Compatibility of the EU measures related to labelling of goods imported from Israeli Settlements with WTO Law.

Master's Thesis

February 2014

Number of words: 24.990 (incl. footnotes, excl. table of contents and bibliography)

LLM International and European Public Law, Tilburg Law School

Supervisor: Prof. P. Delimatsis

Name: Olia Kanevskaia, LL.M

Date of birth: 5.10.1990

Address: Laan van Meerdervoort 25F, 2517 AC Den Haag

Telephone number: +31617658924

E-mail: olga.kanevskaia@gmail.com

Table of contents

Acknowledgements

Within the program of Tilburg University, students attending the bachelor course of International Law are given a great possibility to obtain basic knowledge of legal principles of the WTO during the guest lecture of Prof. Delimatsis. I remember perfectly the day when this lecture took place: I proudly declared that I would be 'depriving myself of this knowledge', assuring my classmates that 'I will never use WTO Law in my life', 'WTO Law is boring' and that 'I have much better things to do'. This was the year 2011. Exactly two years later I realised my terrible mistake, during the regional rounds of the ELSA WTO Moot Court in Porto, when I felt all the joy of being a Senior Legal Advisor. Panos Delimatsis, you are the only person to thank for this 'enlightenment'! I am extremely grateful for all that effort you have done for our team and it has been a great honour to have you as a lecturer and a supervisor.

A famous American novelist once said that 'joy is found not in finishing an activity but in doing it'. I can surely state that there has been no academic activity I enjoyed as much as participation in the WTO Moot Court within the team of awesome people, Sonja van Harten, Desirée Ramada and Arvind Rattan. Guys, we have been through a lot during those months, we all have learned much from it, and it was one of the most fascinating experiences I have ever had. Thank you for those great times we have spent together in Tilburg and in Porto (and, of course, during our wonderful Ryanair flight back home).

I cannot leave these acknowledgements without explicitly thanking Arvind Rattan for all his support and patience. I will miss our studying in the library and cosy coffee breaks. The same goes for Anna Samotycha: thank you for being my friend and support though all the time!

During my Masters at Tilburg University, I was really impressed by the motivation of my fellow students and professionalism and commitment of lecturers. The last particularly concerns Angelos Dimopoulos: many thanks for your time and dedication!

I would like to thank my mother and my grandmother for their incredible support and their care. Honestly, all of this would literally not be possible without you. Also, a special thank goes to Greg, Alina, Michal and Vania, for tolerating and supporting me during all my Moot Courts, exams and theses.

The Hague, 7 February 2014

Abbreviations

AA	Association Agreement
AB	Appellate Body
ARO	Agreement on Rules of Origin
CAP	Common Agricultural Policy
CCC	Community Customs Code
CCP	Common Commercial Policy
CCT	Common Customs Tariff
CHT	Change in Tariff Heading Test
CU	Customs Union
EC	European Community
ECJ	European Court of Justice
EU	European Union
GATT	General Agreement on Tariffs and Trade
ITO	International Trade Organisation
MFN	Most Favoured Nation
MS	Member State of the European Union
NT	National Treatment
OPT	Occupied Palestinian Territories
PLO	Palestine Liberation Organisation
PTA	Preferential Trade Agreement
SC	Security Council of the United Nations
SP	Specific Processing
TBT	Agreement on Technical Barriers to Trade
TFEU	Treaty on Functioning of the European Union
UK	United Kingdom
UN	United Nations
US	United States of America
VA	Value Added Principle
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organisation

1. Introduction

1.1 Short overview

In 1947 the United Nations ('UN') General Assembly adopted the Resolution 181. [1]This resolution contained a so-called partition plan, which provided the division of British – ruled Palestine into a Jewish and an Arab States. Subsequently, in 1949 Israel concluded a number of agreements with its neighbour countries, namely Egypt, Jordan, Lebanon and Syria. Those agreements are also known as Armistice Agreements, [2] and set the border lines of Israeli territory as after the Arab-Israeli War of 1948. The Israel's border with the Occupied Palestinian Territory ('OPT'), namely West Bank, Gaza Strip and Golan Heights, has also been included in those agreements, and therefore internationally recognized.

During 'The Six Days War' in 1967, Israel has occupied some areas in the Palestinian territory. Despite numerous international requests[3] to withdraw the armed forces from the occupied territories beyond the 1949 Green Line, Israel maintained the occupation. Since 1967 an increasing amount of settlements is being built by Israeli civilians in the West Bank and East Jerusalem. The recent investigations show that the percentage of the land of the West Bank controlled by the settlements is nowadays about 43%, while the total number of the Israeli settlements in the OPT is nearly 200. [4] Products made in those settlements, including cultivated fruit and vegetables, are being exported as Israeli products.

1.2 Israeli settlements under International law

The internationally recognized borders of Israel do not include the territories occupied after 1967, and are considered illegal by the UN. [5] Accordingly, the UN considers Israeli settlements, as well as goods coming out of there, illegal. All the attempts of Israel to annex East Jerusalem were declared unlawful. [6] In the light of International Law, the establishing of the settlements in the OPT violates different core principles. An example is an alleged illegal appropriation of Palestinian natural resources. [7] From the economic point of view, Israeli settlements constitute the biggest obstacle for the growth of Palestinian private sector, as argued by the World Bank.[8] The actions of the Israeli armed forces in the occupied territories violate a number of rights of Palestinian civilians, such as rights to freedom of religion, rights to family life and rights to own property. Hence, the presence of Israeli settlements in the OPT

[1] UN Resolution 181 (1947) adopted by the General Assembly on 29 November 1947.
[2] 'Green line'.
[3] E.g.: UN Resolution 242 (1967) adopted unanimously by Security Council ('SC') on 22 November 1967.
[4] Briefing paper *"EU Trade with Israeli Settlements"* August 2012, < http://www.qcea.org/wp-content/uploads/2012/02/EU-Trade-with-Israeli-Settlements1.pdf> accessed 6 February 2014.
[5] "Product of illegal Israeli Settlement" made in Occupied Palestinian Territory, *Open Shuhada Street submission to the department of Trade and Industry on General Notice 379 of 2012,* [2012], 3
[6] UN SC Resolutions 289 (1971) and 478(1980).
[7] Above n5, 23.
[8] Above n5, 23.

significantly violates a number of the provisions of the Fourth Geneva Convention Relative to Protection of the Civilians in the Time of War and the Hague Convention of 1907. [9]

The European Union ('EU') is bound by certain principles of International Law and has an obligation to strengthen the UN and assist in development of International Law.[10] The primacy of the EU's obligations under the UN Charter has been emphasized in the European Court of Justice's ('ECJ') judgment *Kadi.*[11]Despite constant critics and disapproval, the EU maintains trade with Israeli settlements, including the import of the products manufactured or cultivated in the OPT. On the contrary, most UN Members boycott any kind of trade with settlements, considering their illegality under the international law.

This paper does not aim to discuss the European policy towards the Israeli settlements and its compatibility with international obligations of the EU. The problem which will be tackled relates to the import to the EU of goods made in the OPT, including agricultural products cultivated in Israeli settlements.

1.3 The import of Israeli products to the EU

In 2000 the European Communities ('EC') concluded an Association Agreement ('EU-Israel AA') with Israel. [12] The aim of this agreement was mainly to develop close political relationships between the parties through, *inter alia,* the expansion of trade in goods between the Community and Israel by the means of enabling the free movement of goods between the parties.[13]

As only products originating in the territory of the parties are subject to the preferential treatment, there are clear criteria for the concept of origin, set out in the Protocol 4 of the AA. [14] Further in this paper those criteria will be examined and compared to the criteria of origin under the World Trade Organisation ('WTO') Law.

The ECJ stated in its judgment *Brita* that the products coming from Israeli settlements in the OPT are not to be considered as originated from Israel.[15] Hence, those products do not benefit from the free movement of goods between Israel and the EU. Few years before the issuing of this judgment, Israel and the EU agreed that the custom documents for the products which are being imported into the EU

[9] Convention (IV) relative to the Protection of Civilian Persons in Time of War signed in Geneva, 12 August 1949; Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land signed in The Hague, 18 October 1907.
[10] Article 3(5) TFEU.
[11]ECJ, Joined cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR *I-06351.*
[12] 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, (' EU-Israel AA') L 147/3, 21 June 2000.
[13] Article 1(2), Article 7 and Article 8 EU - Israel AA ;
[14] Protocol 4 concerning the definition of the concept of originating products and methods of administrative Cooperation, L 147/50, 21 June 2000.
[15] ECJ, Case C-386/08 *Firma Brita GmbH v Hauptzollamt Hamburg-Hafen* [2010] ECR *I-01289.*

should contain the clear indication of the territory where the production took place, and that the products from Israeli settlements would not enjoy the preferential treatment.[16] Therefore, in order to apply the right customs duty to the imported product, special attention should be paid to the role of labelling of products according to their origin. The regulatory objectives of the rules of labelling will be discussed *infra* in this paper.

There are clear indications that, despite the strict EU policy on labelling, products originating in Israeli settlements are sometimes being mislabelled as of Israeli origin.[17] Due to this unfair practice, the settlements' products unlawfully obtain the benefits of the free trade clause of the AA.

1.4 The importance of the problem of mislabelling products coming out of Israeli settlements

The mislabelling of settlements' products causes a number of problems for the EU commercial practice, especially when it comes to consumers. Being the end users of the products, consumers belong to the vulnerable group which often has a lack of information concerning goods they intent to purchase. Hence, an unfair commercial practice can significantly harm the consumers' economic interests, and therefore the proper functioning of the internal market. The misleading information on the products' label affects the consumers' freedom to choose, as the consumers' regional believes might influence their decision to purchase a particular product.

The fact that mislabelling of products imported from Israeli settlements still takes place ensures that the importers unfairly enjoy the free movement of goods between Israel and the EU, i.e. paying no customs duties. Those custom duties form a lawful income which the EU misses as a consequence of mislabelling. [18]

1.5 Practical relevance of the mislabelling

Palestinian traders often have no other choice than exporting their products through Israeli channels as a result of trade obstacles caused by the settlements activities. [19]This is especially the case for exported agricultural products. [20]Such practice distorts the figures of Palestinian export, and thus it is likely to affect international trade.

---

[16] EU DG for External Policies of the Union (May 2011) Policy Briefing: *Customs issues involving the Occupied Palestinian Territories*, <
http://www.europarl.europa.eu/RegData/etudes/briefing_note/join/2012/491444/EXPO-AFET_SP(2012)491444_EN.pdf> accessed 6 February 2014.

[17] E.g.: above n4

[18] See, *inter alia,* European Commission Financial Programming and Budget, <
http://ec.europa.eu/budget/explained/budg_system/financing/fin_en.cfm> accessed 8 January 2014.

[19]Gijs Berends, 'Fear and Loading in West Bank/Gaza: The State of Palestinian Trade' [2008] 42(1) 154 *JWT* 151, 154.

[20] *Ibid.*

The EU trade with the Israeli settlements is openly criticized by various members of international community, including various Non-Governmental Organisations.[21] The EU recognizes the illegality of the settlements and expresses the willingness to minimize trade with them. Allegedly, the following factors facilitate the import of settlements' products into the EU: the illegal application of the EU-Israel AA by the settlements' manufacturers, the compensations provided by Israel for settlement companies which lose the earning as a result of correct implementation of the AA, the wrong implementation of the relevant EU legislations by the Members States' custom authorities, the potential inability to differentiate between settlement and Israeli goods from their appearance, and, finally, the misleading labelling of settlement products. [22]

The import of mislabelled goods is in particular problematic regarding the free movement of goods within the EU, as the goods imported from Third States to one of the Members States ('MSs') are being put in free circulation.[23] Moreover, consumers' attitude to settlement products could differ a lot in each Member State ('MS'), taking into account such factor as the allocation of Palestinian refugees in the EU.

It is conceivable that the import of mislabelled goods can eventually affect the competition in the European market: retailers can benefit from the fact that they have to pay lower or no custom duties, and therefore can set their prices lower than the retailers of products labelled according to their true origin and not benefiting from preferential treatment.

In sum, the import of mislabelled products to the EU can result in different problems affecting various fields of law. The fact that the issue concerns the products made in the OPT makes those problems even more sensitive from the perspective of international law.

1.6 Measures to be introduced by the EU

In the past year, the High Representative Catherine Ashton has expressed the wish of the EU to draft comprehensive guidelines introducing separate labelling standards for products originating in Israeli settlements. She also pointed out the need for the Commission to ensure effective implementation of those standards. Although most of the EU MSs are willing to cooperate, the guidelines are nonbinding. In this regard, a stronger legal instrument, i.e. a Regulation, is required to ensure compliance with labelling rules.[24] In this paper, the possible labelling guidance/regulation will be referred to as the *'labelling measure'.*

---

[21] E.g.: Reuters, '22 groups call for EU ban on Israeli settler products' (WorldNews, 30 October 2012) < http://www.ynetnews.com/articles/0,7340,L-4299222,00.html> accessed 20 April 2013.

[22] *'Settlement products – the issues and advocacy messages in relation to the European Union',* a paper for use in the European Union developed by Quaker Peace and Social Witness, UK, participants in World Week for Peace in Palestine Israel,< http://www.sadaka.ie/Files/Settlement_Products_EU_issues.PDF > accessed 6 February 2014.

[23] ECJ, Case C-120/78 *Rewe-Zentral AG/Bundesmonopolverwaltung für Branntwein* ('Cassis de Dijon') [1979] ECR *00649* jo. Article 28(2) TFEU.

[24] 'Ashton pushes Europe to label Israel settlement products' (*Middle East Online,* 23 July 2013) <http://www.middle-east-online.com/english/?id=60295> accessed 7 January 2014 ; Ben Lynfield, 'EU to

Another measure which will be discussed in this paper is the Commission Notice on the eligibility of Israeli entities and their activities in the OPT for EU funding.[25] It will be assessed whether these guidelines are of discriminatory character and are compatible with the EU and the WTO principles.

1.7 The topic of the paper and the research methods

This paper aims to map and to compare the legal framework applicable to the rules of origin within the EU and the WTO system. Based on these findings, it will further suggest whether the measures the EU has adopted/is intending to adopt against settlements' products are compatible with the WTO law and principles. Although the legality of trade between the settlements and the EU from the perspective of International Law will not be covered, it still plays a significant role in determining the position of the EU towards the labelling of the products imported from the Israeli settlements. The next two chapters will therefore examine the concept of country of origin and the labelling standards as defined under European and WTO Law, bearing in mind the EU policy in comparable situation with other countries, i.e. Northern Cyprus. Further on, the compatibility of the labelling measures proposed by the EU will be assessed under WTO law. Finally, the last chapter will suggest alternative measures for preventing of import of mislabelled settlements' products.

label products from Israeli settlements'(*The Telegraph,* 23 July 2013) .<http://www.telegraph.co.uk/news/worldnews/middleeast/israel/10198109/EU-to-label-products-from-Israeli-settlements.html > accessed 7 January 2014.

[25] Commission Notice: Guidelines on the eligibility of Israeli entities and their activities in the territories occupied by Israel since June 1967 for grants, prizes and financial instruments funded by the EU from 2014 onwards [2013] OJ C 205/05.

The guiding research question in this paper is:

How compatible are the EU measures related to labelling of the goods stemming out of Israel Settlements with WTO Law?

The research question will be answered by the means of the following sub questions:

I. What are the current standards regarding the rules of origin?
A. What is the current European policy on labelling goods originating in third countries with regard to their origin?
i. How is the concept of rules of origin defined under EU law?
ii. What are the regulatory objectives of labelling according to the EU legislation?
B. How did the EU tackle the import of mislabelled goods stemming from Northern Cyprus?
C. What measures are proposed by the EU legislation with regard to labelling goods stemming from the Israeli Settlements?

II. How is the concept of rules of origin defined under WTO Law?
A. What are the current WTO standards on labelling of products according to their origin?
B. How has the Panel and the AB dealt with the cases related to labelling so far?
C. When can the labelling be considered as a trade restriction within the meaning of the WTO?

III. What are the differences and the similarities between the EU and the WTO rules of origin and how do they influence trade with the Israeli Settlements?

IV. Are the measures introduced / planned to be introduced by the EU with regard to the labelling of the products stemming from the Israeli Settlements compatible with WTO Law?
A. Are the measures at issue in line with the GATT and the core principles of it?
B. Do the measures at issue constitute a trade restriction/barrier and, if so, can that restriction/barrier be justified under WTO Law?

V. What other measures than labelling could be suggested to prevent the abuse of the free trade zone between Israel and the EU by the European importers?

2. What are the current EU standards regarding the rules of origin?

Introduction

The aim of this chapter is to describe the EU legal framework relevant to the problem at stake and to introduce the rationale of the standards of rules of origin and labelling applicable to the EU AAs. Further, the import of mislabelled goods originating in other (Third) States will be discussed, focussing on products originating in Northern Cyprus. Subsequently, the EU measures concerning the Israeli settlements will be elaborated and compared with those relating Northern Cyprus. In this regard, the case law of the ECJ will be discussed.

2.1 What is the current European policy on labelling goods originating in third countries with regard to their origin?

2.1.1 How is the concept of rules of origin defined under EU law?

2.1.1.1 The CCP and the EU AAs.

As it follows from article 28(1) of the Treaty on Functioning of the European Union ('TFEU'), the EU comprises a Customs Union ('CU') and has a Common Customs Tariff ('CCT') in relation to the import from the third countries. The concept of the free movement of goods within the EU is to be distinguished in an internal and an external dimension. [26] Article 28(2) TFEU declares the provisions of the Treaty on CU and Customs cooperation applicable to the products coming from the Third States, once those products have entered the EU and are subject to free circulation within the MSs' markets. Accordingly, the products imported from the Third States enjoy the same rights as the products originating in the EU provided that the import formalities have been complied with and applicable custom duties have been paid by the entering of the product on the market of a MS. [27]

This principle of the 'mutual recognition' has been confirmed by the ECJ in its fundamental ruling *Cassis de Dijon.* [28]The ECJ held that in case a product is lawfully on the market in one MS and is not subject to harmonisation, this product should also be lawfully marketed in the other MSs, even if the product at issue does not fully meet the technical criteria of those MSs. This principle can be limited provided that the necessity and proportionality tests are met, meaning that the limitation measure does not go beyond what is necessary for the achievement of the pursued goal and that there are no other measures which are less trade-restrictive.

[26] Catherine Bernard, *The Substantive Law of the EU: the Four Freedoms* (3rd edn, Oxford University Press 2010) 37.
[27] Article 29 TFEU.
[28] *Cassis de Dijon,* above n 24.

Furthermore, the Common Commercial Policy ('CCP') and the CU fall in the area of the exclusive competence of the EU, as stated in Article 3(a) (e) TFEU. Thus, only the Union has a right to legislate in those matters, unless the MSs are empowered to it by the Union of the implementation of the Union acts, Article 2(1) TFEU. The MSs are obliged to exercise their competence in case the Union has not legislated yet or has decided to cease exercising its competence. [29]

Article 206 TFEU obliges the EU to contribute to the harmonious development of the world trade by virtue of the CCP. Pursuant to article 217 TFEU, the EU has a power to conclude agreements with third countries or international organisations, containing reciprocal rights and obligations, the so-called AAs. It is important to note that those AAs constitute a free-trade area according to WTO law.[30]

2.1.1.2 Current practice in the internal market of the EU

According to Article 26(2) TFEU, the internal market covers free movement of goods, persons, services and capital. Pursuant to article 26(1) TFEU, the Union has an obligation to ensure the ultimate functioning of the internal market. One of the core principles of the internal market is the prohibition of the custom duties and charges having equivalent effect, as those form an obstacle for free movement of goods.[31] The ECJ held in its settled case law[32], that this provision has a direct effect and prevails over the national legal orders of the MSs.

One of the ways to facilitate the free movement of goods is to harmonize the rules affecting interstate trade, e.g. product standards and consumer rights. [33] A large part of internal market harmonisation deals with production process or ensuring equality of competitive opportunities. [34] In turn, consumer protection, codified in Article 4(1) (f) TFEU, is subject to the minimum harmonisation, meaning that the EU legislation lays down a minimum standard but leaves the room for the MSs to adopt stricter standards. [35] Minimum harmonisation is often considered as an obstacle to the free movement of goods or services, as the MSs might apply higher standards in their national legal orders. Moreover, this can lead to the race to the bottom, as the minimum level may in practice become a standard.

2.1.1.3 General view on the rules of origin in the EU legislation

Rules of origin are used to determine for trade purposes whether a product is stemming out from a particular country. [36] The determination of the place of origin of products is tangled by the fact that the real practice is different from the legal assessment. Although a product is in principle considered to

[29] Article 2(2) TFEU.
[30] Article XXIV: 5 GATT.
[31] Article 34 TFEU.
[32] ECJ, Case 26-62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963.
[33] Damian Chalmers, Davies and Monti, *European Union Law (*2nd edn, Cambridge University Press 2010) 678.
[34] Idem ,700.
[35] Idem, 701.
[36] Eckart Naumann, 'Rules of Origin in EU-ACP Economic Partnership Agreements' [2010] ICTSD Issue Paper No. 7 1, 9.

originate in a State where it is exclusively produced, many final products often consist of the materials sourced within and beyond a State's borders. [37]

The EU makes a distinction between the preferential and non-preferential rules of origin within the current legal framework of the CCP. The non-preferential rules of origin are applied to such trade measures as anti-dumping and countervailing duties.[38] The preferential rules of origin ('Generalised Scheme of Preference') are concerned with the Preferential Trade Agreements ('PTAs'), concluded by the EU with Third States, and are therefore subject to political and economic effects. [39]

Although goods originating in an EU MS enjoy the principle of free movement, a number of rules have been adopted with regard to the protection of consumers' interests and the geographical indication of products' origin. An example of the last is a Regulation establishing the rules on the protection of designation of origin and geographical indications of agricultural products. [40]

2.1.1.4 The CCC

The Community Customs Code ('CCC')[41] and its Implementing Regulation [42] were adopted in the light of harmonisation of the rules of origin on the EC level. According to Article 23 (1) of the CCC, goods which are wholly obtained or produced in a country should be considered to have their *non-preferential* origin in that country. Article 23(2) CCC gives a limited list of examples of wholly obtained goods. Article 24 CCC further explains that where there are more countries involved in the production process, the goods are deemed to originate in the country where they underwent their last, substantial economically justified transformation resulting in a manufacture of a new product or representing a new stage of the production. Importantly, Article 25 CCC states that in case the transformation was carried out in a certain country with the purpose of circumventing the application of the provisions of the CCC, the products concerned should not be deemed to originate in that country. This provision is intended to prevent the so- called 'origin shopping'[43], the abuse of the rules of origin introduced in the CCC. With regard to the *preferential* origin, the CCC refers to the provisions on the rules of origin in the PTAs.[44] Importantly, there is often required that the goods have been transported directly from the country of origin to the EU. [45]

---

[37] Ibid, 15.
[38] Christina Moell, *Rules of Origin in the Common Commercial and Development Policies of the European Union* (Lund : Juristförlaget i Lund 2008) 158.
[39] Ibid, 159.
[40] Council Regulation (EC) No 510/2006 of 20 March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs [2006] OJ *L 093.*
[41] Council Regulation (EC) No 2913/92 of 12 October 1992 establishing the Community Customs Code ('CCC') [1992] OJ L 302.
[42] Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code [1993] OJ L 253.
[43] Above n 38, 181.
[44] Article 25 jo Article 20 (3) (d) (e) CCC.
[45] Above n 38, 160.

The rules of origin are thus an integral part of any PTA between the EU and a Third State, and are mostly purposed on avoiding free-riding by the parties of an agreement. [46]

2.1.1.5 The rules of origin in the AAs

2.1.1.5.1 The development of the rules of origin in the AAs

With regard to the determination of origin of the products stemming from Third States, the EU has followed the principle of wholly obtained or substantial transformation. [47]The test for substantial transformation is based on one of the following principles (or a combination thereof), namely the value added principle ('VA'), the tariff classification jump (also referred to as the 'change in tariff heading test' ('CHT')), and the technical processing principle ('specific processing', ('SP')). [48]

In the course of time, various attempts have been made to amend to legislation on the rules of origin. After publishing a Green Paper on the revising of preferential rules of origin in 2003[49], which mostly dealt with the issue of control and compliance, the Commission issued a formal Communication on proposals for the revision of the rules of origin in 2005[50]. This document was purposed on the revision of the methodology of the determination of origin and tended to show the preference to the VA-approach. This view has been confirmed in the shortly published Working Paper.[51]

2.1.1.4.2 Cumulation of the rules of origin

One of the important mechanisms in the EU rules of origin is cumulation. It introduces certain flexibility by allowing the materials which originate in a non-preference-seeking State to be imported in the EU under the preferential status. [52]

In case of the Mashriq countries[53], bilateral cumulation is allowed, meaning that *each* party may use the materials originating from the territory of another party. [54] In turn, full cumulation is common in the AAs

[46] 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' [2002] Fordham International law Journal 26(3) 672, 573.
[47] Above n 36, 5.
[48] Above n 38, 5.
[49] European Commission (EEC) Green Paper on the Future of Rules of Origin in Preferential Trade Arrangements [2003] 787 final.
[50] European Commission (EEC) Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee [2005]100 final.
[51] European Commission (EEC) Working Paper on Justification of the Choice of a Value Added Method for the Determination of the Origin of Processed Products [2005] TAXUD/1121/05 Rev.1 – EN.
[52] Karolien Pieters, The integration of the Mediterranean Neighbours into the EU Internal Market (TMC Asser Press 2010) 127.
[53] i.e. Iraq, Palestine/Israel, Jordan, Kuwait, Lebanon and Syria.
[54] Pieters names an example of an AA with Jordan, which grants preferential treatment to 'goods obtained in the EU or Jordan incorporating materials which have not been wholly obtained there, provided that such materials have undergone sufficient working or processing in the EU or Jordan'.

with the Maghreb[55] countries and the European Economic Area Agreement, [56] meaning that the deciding factor is whether subsequent working or processing activities have taken place. [57]

The diagonal, or the Pan-European (Paneuromed) cumulation of origin, allows the products stemming out of the countries outside the AAs to be treated as domestic. This kind of cumulation is relatively new as it is a consequence of globalization of the world economy. The network of preferential agreements and the origin protocols, consisting of identical rules, constitute a legal framework for this cumulation.

One of the major distinguishing features of the Pan-European cumulation is allowing different kinds of cumulation processes to confer the origin. Pieters defines the application of diagonal cumulation as 'the products which have obtained originating status in one of the 42 countries may be added to products originating in any other of the 42 countries without losing their originating status within the pan-Euro-Mediterranean area.'[58]

The country where the transformation took place is to be considered as the decisive country.[59] However, the Commission stated in its Explanatory Notes that, in case 'the originating materials from one or more countries are not subject to working or processing going beyond minimal operations, the origin of the final product shall be allocated to the country contributing the highest value.'[60]This indicated the tendency of the EU to use the VA approach in determination of the origin.

There are two conditions for applying the Pan-European cumulation, namely the existence of identical rules of origin between the states concerned *and* the existence of a free trade agreement between them. [61] This system of Pan-European cumulation is applicable, *inter alia,* between the EU and Israel and the EU and the West Bank and Gaza Strip. [62]

2.1.1.5.3 Current system of rules of origin in the Euro-Med AAs

The purpose of any Euro-Mediterranean AA ('Euro-Med AA') is mutual liberalization of trade in goods, services and capital between the EU and the States which are party to those agreements. Generally speaking, the AAs should be based on reciprocal scheme and ensure the equality in the obligations. Accordingly, there should be a certain balance between the rights and obligations of the EU, the Member States and the Mediterranean Partners. [63]Therefore, any rules of origin set out in the AAs should not, in any respect, affect that balance.

[55] i.e. Morocco, Algeria, Tunisia and Libya.
[56] i.e. EU MSs + Iceland, Lichtenstein and Norway.
[57] Above n 60, 130.
[58]Above n 60, 131.
[59]Above n 19, 170-171.
[60] Article 3 and Article 4 Commission Explanatory Notes Concerning the Pan-Euro-Mediterranean protocols on Rules of Origin [2007] OJ C 83/01.
[61]Above n 34, 170-171.
[62] Decision No 2/2005 of the EU-Israel Association Council of 22 December 2005 amending Protocol 4 to the Euro-Mediterranean Agreement, concerning the definition of the concept of 'originating products' and methods of administrative cooperation [2006] OJ L 20/1.
[63] Above n 60, 108.

Within the Euro-Med AAs, only goods which got a certificate of compliance with preferential rules of origin can benefit from preferential treatment, guaranteed by the agreements. [64] As we will see in an example of the EU-Israel AA, the determination of the products' origin is mostly set out in the Protocols attached to the AAs, and broadly follows the approach introduced in the CCC[65].

2.1.1.4.4 The AA with Israel and the PTA

Article 8 of the Euro-Med AA with Israel contains a prohibition of customs duties and charges having equivalent effect between the EU and Israel. Pursuant to Article 7 of the Agreement, this provision is applicable to the products originating in Israel, excluding the products listed in Annex I.

Article 2(2) of the Protocol 4 to the Agreement establishes that agricultural products should be considered originating in Israel if they are wholly obtained in Israel (e.g. vegetables which are harvested in Israel) [66] or contain materials not wholly obtained there, provided that those materials have undergone *sufficient working or processing* in Israel. This is the case when a number of conditions are fulfilled, pursuant to article 5(1) of the Protocol 4. These conditions apply only in relation to the non-originating materials which were used to process the imported product.

Finally, Article 11 states that the acquisition of originating status shall be interrupted if the goods undergone working or processing in Israel left the Israeli territory.

2.1.2 What are the regulatory objectives of the labelling according to the EU legislation?

2.1.2.1 The rationale behind labelling

As will be discussed *infra*, labelling is directly connected with consumers' right to choose freely the goods they would like to purchase. Article 12 of the TFEU explicitly states that the policies and activities of the EU should have due regard to the consumer protection requirement. In order to make their choices, consumers need to be informed about various characteristics of the products they intend to buy. [67]Article 169 TFEU imposes an obligation on the Union to ensure a high level of consumer protection by contributing to protecting consumers' economic interests and promoting their right to information. Hence, labelling can be considered as a means to transfer the relevant information to consumers.

The ECJ held in its judgement *Rau* that rules of labelling constitute an effective consumers protection, as it hinders the free movement of goods less than the number of other measures, e.g. the requirement to use only specific type of packaging. [68] The case law also prohibits unnecessary changes to any label.[69]

[64] Above n 60, 126.
[65] See n 38.
[66] Article 4 (1) (b) Protocol 4 EU-Israel AA.
[67] Above n 26, 176.
[68] ECJ, Case C - 261/81 Walter Rau Lebensmittelwerke v De Smedt PVBA [1982] ECR *03961*, paras 12, 17, Case C-448/98 Jean-Pierre Guimont v France [2000] ECR *I-10663*, 33.
[69] ECJ, Case C-366/98 *Yannick Geffroy and Casino France SNC v France* [2000] ECR I-06579.

As suggested by a number of consumers' behaviour studies, the indication of origin can largely influence the eventual choice of the consumer. [70] In case of the products imported from the settlements, the real origin of the products may even be crucial for some consumers' decision to purchase it. For example, it is conceivable that some Islamite groups would refuse to buy a particular fruit or vegetable knowing that it was cultivated in the OPT.

2.1.2.2. Labelling and certification as proof of origin

Generally, the origin of goods can be proved by different documentary evidence, depending on the trade arrangements, the total value of the consignment and the status of the exporter. [71] The producer, exporter and the authorities in the exporting country must provide the information to the importer. In case of the import to the EU from the Third States, the importer must possess the proof of origin and must produce it to the customs authorities in the MS of importation by the entering of the goods. When there is trade between the parties of a free trade agreement, the proof of origin is usually mentioned in a separate protocol to the agreement.

Article 17 (1) of the Protocol 4 of the EU-Israel AA explicitly states that the benefit from the free trade clause of the agreement is conditional upon the submission of a movement certificate or other documents (e.g. declaration from the exporter). Pursuant to Article 25 of the Protocol, the movement certificates and invoice declarations shall be submitted to the customs authorities of the importing country in accordance with the procedures applicable in that country. Certain products have been exempted from the proof of origin, namely small packages send from private persons to private persons and occasional imports consisting of products for personal use, in case the value requirements introduced in Article 27(3) of the Protocol are met. [72] As it follows from the wording of the articles, all these rules apply only to the originating products within the meaning of the Protocol.

2.1.2.3 Secondary EU legislation on labelling

The main legal instrument concerning the European labelling policy is the Food Labelling Directive.[73]Article 2 (1) of the Directive prohibits the labelling methods which could mislead the consumer or attribute to a foodstuff any property of preventing or curing human diseases. Article 3(1) further explains which compulsory information should be stated on the labels. As suggested in this Directive, the particulars of the place of origin or provenance should be stated only in the case where failure to give such information might slightly mislead the consumer as to the true origin of the foodstuff. [74]This provision is logical taking into consideration the principles of the internal market,

[70]E.g. Ivo A. van der Lans, Koert van Ittersum, Antonella de Cicco, Margaret Losseby, ' The Role of the Region of Origin and EU Certificates of Origin in Consumer Evaluation of Food Products' [2001] *28(4) European Review of Agricultural Economics 451.*

[71] Above n 38, 176.

[72]Article 17(2) jo Article 27 (1) (2) Protocol EU-Israel AA.

[73] Directive 2000/13/EC of the European Parliament and of the Council of 20 March 2000 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs ('Food Labelling Directive') [2000] OJ L 109/29..

[74] Article 3(1) (8) Food Labelling Directive.

especially the free movement of goods. Presumably, it should not make difference in which part of the EU the goods are produced, unless the product is associated with a particular province (e.g. Parma ham), or a certain level of quality, and can have an impact on consumers' choice and eventually on competition between the EU producers. However, in case of goods imported from Third States, the matter of origin is more important, especially when it concerns the benefits of the PTAs. Again, this indicates the importance of the harmonised approach for labelling of goods imported to the EU, as once the goods have entered one MS, they are subject to free circulation within the European markets.

In 2008, the Commission proposed to review the Directive at stake with the aim to make essential information available to the consumer in a legible and understandable way. The amendments proposed concerned all food and beverages, *including the imported products,* which are intended for the final consumer. [75]According to that proposal, in case the main ingredients originate from a different place than the finished products, the country of origin of the main ingredients should be stated as well. However, the proposal also suggests that the MSs can make country of origin labelling mandatory or introduce any national legislation on country of origin labelling only under certain conditions and with prior notification to the Commission. Those notifications must include the proof that the choice of a majority of consumers is influenced by the country of origin information provided to them. [76]Remarkably, this test includes the majority of the consumers, and not the specifically identified groups.

The misleading indication of origin is furthermore condemned in Regulation on the protection of geographical indications and designations of origin for agricultural products. **[77]**

2.1.2.4 Mandatory v voluntary labelling of agricultural products

The dispute concerning mandatory information on the labels has already been initiated a couple of years ago. The Commission's proposal to harmonise and to strengthen the labelling requirements[78] was supported by the alleged consumer's difficulties to read labels. *[79]* The report issued in 2009 explicitly stated that the origin of the products should fall under compulsory information stated on the label. *[80]*

Currently, the country of origin labelling is mandatory for limited products, namely: beef, veal, fruit, vegetables, eggs, poultry meat, wine, honey, olive oil, aquaculture products and organic products. For other products, the indication of the place of origin is mandatory only if the omission of such

[75] USDA Foreign Agricultural Service, *FAIRS Subject Report Proposal for a new EU Food Labeling Regulation* (Global Agriculture Information Network 2008)2.
[76] *Ibid.*
[77]Article 1(c) (d) Council Regulation (EEC) No 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs [1992] OJ *L 208.*
[78] Proposal for a Regulations of European Parliament of the Council on the provision of food information to consumers [2008] 40 final.
[79] European Commission DG Health and Consumer Protection, *Labelling: competitiveness, consumer information and better regulation for the EU* (A DG SANCO Consultative Document, February 2006) < http://ec.europa.eu/food/food/labellingnutrition/betterregulation/competitiveness_consumer_info.pdf > accessed 3 November 2013.
[80] Above n 75, 5.

information might mislead the consumer[81]and thus might lead to the unfair commercial practice. This term will be explained *infra.*

2.1.2.5 The Unfair Commercial Practice Directive

As indicated earlier, the protection of consumers' interests has an important role within the EU legislation. Next to the prohibition of misleading labels pursuant to the secondary legislation discussed *supra,* unfair commercial practice is explicitly prohibited by the related Directive[82]. A commercial practice is considered to be unfair, *inter alia*, if it 'materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers'. [83]

Therefore, in order to determine whether mislabelling of goods stemming out the settlements as of Israeli origin falls under unfair commercial practice, it is necessary to establish if the label affects the choice of the average consumer. The term 'average consumer' is defined in the Directive as the consumer 'who is reasonably well informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors'. [84] This average consumer test is not statistical. [85]

Presumably, the labels of the settlements' products would mostly affect the choice of the groups which actively do not support the existence of settlements. It is however questionable if those groups can be considered as an 'average consumer' within the meaning of this Directive.

The Directive further suggests that 'the commercial practices which are likely to distort economic behaviour of a clearly identifiable group of consumers who are particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, shall be assessed from the perspective of the average member of that group.'[86]In this regard, it is very unlikely that the consumers whose choice might be affected by the labels would fall under this definition, as there is no 'clearly identifiable group'.

Further, the Unfair Commercial Practice Directive to certain extend repeats article 2 (1) of the labelling Directive, by stating that the commercial practice is considered to be unfair if it is misleading, meaning that it contains false information, *inter alia*, regarding the geographical or commercial origin of the product, and that information can have an impact of the choice of the average consumer. [87]Commercial

[81] Article 3 Food Labelling Directive
[82]Article 5(1) Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') [2005] OJ L 149/22.
[83] Article 5(2) (b) Unfair Commercial Practice Directive.
[84] Preamble 18 Unfair Commercial Practice Directive.
[85] *Ibid.*
[86]Article 5(3) Unfair Commercial Practice Directive.
[87] Article 5(4)(a) jo Article 6 (1)(b) Unfair Commercial Practice Directive.

practice is also misleading if the trader omits to provide the material information which the average consumer needs in order to take the decision by purchasing a certain product. [88] Under the Unfair Commercial Practice Directive, the geographical address and the identity of the trader, not the exporter, are considered to be material.

Accordingly, the incorrect indication of the origin of the imported settlements' goods can be considered as misleading if the choice of an average consumer would be different in case he possessed the right information.

Hence, it can be stated that in order to establish unfair commercial practice, there should be a clear indication that the practice at stake affects the choices of the average consumer. It is questionable whether the groups interested in the correct labelling of the settlements' products are to be considered as such. Another question is if the choice of consumers who are indifferent to the Middle - East conflict would be affected by the labels of origin. Although there is some evidence that the consumers do not support the import of settlements' products in some EU states (e.g. the United Kingdom ('UK') and the Netherlands), in an ideal situation, a specific research should be conducted on this matter. However, it is rather doubtful if the results of this research would be worth the costs made for conducting it.

Finally, it is worth to mention that it is left to the MSs to adopt measures in order to prevent unfair commercial practice. [89]This indicates that no harmonised EU sanctioning mechanism concerning this matter has yet been adopted.

2.2 How did the EU tackle the import of mislabelled goods stemming from Northern Cyprus?

2.2.1 Background

Northern Cyprus is the north-eastern part of the Cyprus Island occupied by Turkey since 1974. The self-proclaimed state is not recognized by the UN as such, and is considered to be a territory of Republic of Cyprus, which is an EU MS since 2004. The Turkish control over this part of the island is therefore illegal under international law. [90]

The origin of products exported from that part to the EU was one of the central aspects of trade and politics relations between the EU and Cyprus. Especially the agricultural products have a large share in the export of Turkish Cypriot goods. [91]In the following paragraphs, the AA between EC and Cyprus, which was in force before its accession to the EU ('EC- Cyprus AA'), will be examined, focusing on the determination of origin according to that agreement, with the purpose of comparing the rules of origin pursuant to the EC-Cyprus AA with those of the EU-Israel AA.

2.2.2 The EC – Cyprus Association Agreement before the accession of Cyprus

[88] Article 7(1) Unfair Commercial Practice Directive.
[89] Article art 11(1) Unfair Commercial Practice Directive.
[90] UN Resolution 550 adopted by the Security Council on 11 May 1984.
[91]Stefan Talmon, 'The Cyprus Question before the European Court of Justice' [2001]*12(4) EJIL* 727, 729.

2.2.2.1 The purpose and the main provisions of the Association Agreement

The AA signed by the EC and Cyprus in the 1972 was initially purposed at progressive elimination of the trade obstacles through a process of reciprocal trade, namely by the means of the reduction of customs duties, abolishment of discriminatory measures and imposition of the export duties not higher than those to the products of most favoured third countries. [92] Article 16 of the EC-Cyprus AA defines the territorial scope of its application, namely the EC ('the territories to which the treaty establishing the European Economic Community applies') and the Republic of Cyprus, *excluding* Northern Cyprus.

The products originating in Cyprus benefit from the 70% reduction of the CCT' and should not be subject to any charges having an equivalent effect. [93]Furthermore, Article 5 of the EC-Cyprus AA prohibits any discrimination between the nationals or companies of the MSs and of Cyprus. With regard to the determination of rules of origin applicable to trade between the EC and Cyprus, Article 7 refers to the 4th Protocol of the EC-Cyprus AA ,further to be referred to as the 1977 Protocol.

Finally, Article 11 of the AA allows for the prohibitions or restrictions on imports, exports or goods in transit provided that those are justified on ground certain grounds. Those exhaustive grounds are mentioned further in that provision and are identical to the justification grounds mentioned in article 36 TFEU.

2.2.2.2 1977 Protocol regarding products originating in Cyprus

As mentioned supra, the rules of origin applicable to the AA at stake are being determined by the 1977 Protocol. Article 1(2) of the Protocol establishes that the product should be considered as originating in Cyprus if they are wholly obtained in Cyprus or have undergone sufficient working or processing there. The establishment of the origin of the power and the equipment tools used to obtain those goods is not required. [94]However, the determination of the origin pursuant to this Article is conditional upon the direct transportation of the products from Cyprus to the importing MS within the meaning of this agreement. This is the case when goods are being transported without passing through territory other than Cyprus or the EC, and when a single transport document has been issued by a MS or Cyprus if goods have been transported through the territories of third countries.[95]

Article 3(a) of the Protocol further states that the sufficient working or processing should be a 'result of which the goods obtained receive a classification under a tariff heading other than that covering each of the products worked or processed.'

Furthermore, article 6 of the 1977 Protocol suggests that the products subject to the benefits of the agreement shall be issued a certain movement certificate ('A.CY n. 1'). It is explicitly stated that the

[92]Article 2,4,5, and 6 Agreement establishing an Association between the European Economic Community and the Republic of Cyprus (EC-Cyprus AA) [1973] OJ L 133.
[93] Article 3(1) EC-Cyprus AA jo. Article 1, 3 Annex I Implementation of Article 3(1) of the Agreement.
[94] Note on Article 1 of the Protocol concerning the definition of the concept of 'originating' products and methods of administrative cooperation ('1977 Protocol').
[95] Article 5 1977 Protocol.

certificates at stake can only be issued by customs authorities of a MS or *the Republic of Cyprus.* Those movement certificates may only be issued in case they can serve as a documentary evidence for preferential treatment under the AA. [96]Pursuant to Article 14 of the Protocol, the custom authorities of an importing party may ask the custom authorities of an exporting party for verification in case of doubt. The word 'may' indicates that this article does not impose any obligation on the contracting parties to do so.

2.2.2.3 Comparison between the rules related to origin pursuant to the AA with Israel

As it follows from settled case law with regard to AAs, a provision of such agreement has direct effect if it contains clear and precise obligation which is not subject to adoption of any subsequent measure, with regard to its wording and the purpose and the nature of the agreement. [97]

The main difference between the agreements at issue is their purpose: while the aim of the EC-Cyprus AA is to increase trade between the parties, the EU-Israel AA also aspires to improve political relations between Israel and the EU. This might explain the fact that the ECJ remained silent with regard to the political side of the conflict in its case law on the import of products originating in Northern Cyprus, which will be discussed in the next paragraph.

The other significant difference is that the EU-Israel AA establishes a so-called free trade area, meaning that goods originating in Israel are not subject to customs duties by the importation in a MS. In turn, the goods originating in Cyprus were benefiting from the 70% reduction of the CCT.[98]

With regard to the determination of the products' origin, both protocols mention that the country of origin is being determined according to where goods are wholly obtained or undergone sufficient working processing. The rules relating to the proof of origin are as well similar. However, the EU-Israel AA imposes an obligation on the customs authorities of the party issuing the movement certificates to verify the origin of the products. [99] The EC-Cyprus AA does not contain this obligation, and only allows the authorities of the importing state to ask for verification for a purpose of random checks or in case of once they have doubts regarding the origin of the products.

In short, it can be observed that the EU-Israel AA has a much more detailed explanation for the rules of origin than the EC-Cyprus AA. The reason for that might be the general development of the rules of origin in the years between the conclusion of those agreements, as well as the differences in geographical and political aspects.

2.2.3 The case law of ECJ

[96] Article 8 1977 Protocol.
[97] ECJ, Case 12/86 *Demirel* [1987] ECR 3719, 14.
[98] Article 3 jo. EC-Cyprus AA jo Article 1 Annex I Implementation of Article 3(1) of the Agreement.
[99] Article 18(6) Protocol 4 EU-Israel AA.

The ECJ discussed the question of origin of goods produced in Northern Cyprus in the case *Anastasiou I*.[100] The action was brought against the English authorities accepting the certificates of origin pursuant to the 1977 Protocol issued by the 'Turkish Republic of Northern Cyprus'. The ECJ was asked whether the importation of products accompanied by origin and phytosanitary documents issued by the northern part of Cyprus rather than by officials authorized by the Republic of Cyprus could be legally permitted. The UK suggested that the Court should take into account the difficulties of the producers with obtaining movement certificates from the Cyprus government. In addition to that, the Commission alleged that that non-recognition of the movement certificates issued by the authorities of Northern Cyprus would deprive the people of Cyprus of the advantages of the AA. It has also been argued that such practice should be considered discriminatory, as the producers from the different parts of Cyprus would be treated differently, and thus would be in breach of article 5 of the AA. [101]

The Court held that, as the 1977 Protocol has a direct effect, the rules set out there must be followed strictly. In this regard, the complicated political situation in the territory of Cyprus 'does not warrant a departure from the clear, precise and unconditional provisions of the 1977 Protocol of the origin of products and administrative cooperation.' [102]Furthermore, the Court acknowledged the link between the proper function of an origin certificate to the principle of mutual reliance and cooperation between the competent authorities of the parties, meaning that by accepting the certificates issued by the exporting State, the importing State shows its confidence as to the accuracy of the content of those certificates. [103]In addition, the Court stated that the fact that neither the Community nor the MSs have recognized the self-proclaimed State of Northern Cyprus indicates that the mutual reliance at the level envisaged under the 1977 Protocol between the authorities of the Northern Cyprus and the MSs is excluded. [104] According to the Court, the proper administrative cooperation between the authorities of the MSs and the Republic of Cyprus is crucial for the correct application of the AA.

With regard to the non-discrimination argument, the Court held that Article 5 of the AA must be assessed in the light of the other aims of the agreement. Therefore, the prohibition of discrimination pursuant to this article cannot lead to disregarding the fundamental rules of the agreement, such as the provisions of the 1977 Protocol. The Court explicitly stated that those provisions do not merely constitute administrative norms, but are necessary for the proper functioning of the AA. [105]

Finally, the Court held that the Community may not unilaterally adopt any other means of proof of the origin than those mentioned in the 1977 Protocol, as it may jeopardise the achievement of the aims of the AA and thus violate its Article 3. In case the authorities of a MS consider other means as valid, they should take into account of the other contracting party, namely the Republic of Cyprus, and of the

[100] ECJ, Case C-432/92 The Queen v Minister of Agriculture, Fisheries and Food, ex parte S. P. Anastasiou (Pissouri) Ltd and others (Anastasiou I) [1994] ECR *I-03087.*
[101] *Anastasiou* I, *paras* 31-32.
[102] *Anastasiou* I, 37.
[103] *Anastasiou* I, 38.
[104] *Anastasiou* I*,* 39.
[105] *Anastasiou* I, 44.

institutions established under the AA. [106] Lastly, the Court stated that difference in the MSs' approach towards the origin of the products and the legality of certificates is likely to undermine the existence of the CCP and the compliance with the Community's obligations under the AA. [107]

2.2.4 Practical relevance

Although the question at stake is rather political, the Court unambiguously discusses solely the provisions of Community law and Protocol 1977 and their potential breach by the actions of the importers. It does not make recourse to the political situation around *de facto* partition of the island. In this regard, it must be recalled that the Community has no right to intervene in the internal affairs of Cyprus. [108]Surprisingly, the argument that the acceptance of certificates from the occupied Northern Cyprus would violate a number of UN Resolutions, urging the members of international community not to recognize Turkish Cyprus, was not addressed at all.

Hence, the Court tries to ensure uniformity and effectiveness of Community law by interpreting Protocol 1977 and minimizing its intervention in a clear political issue.[109] Accordingly, in can be concluded that the approach taken by the Court is rather trade oriented than political oriented.

With regard to the certificates issued by the authorities of non–recognized states, the Court held unequivocally that such certificates cannot be accepted by the MS's. This statement of the Court has been criticized in the literature. As there is not International or European rule which prohibits states to cooperate with the non - recognized states, the international non-recognition does not necessary imply non–cooperation. The exclusion of cooperation can only be applicable when that cooperation implies recognition. [110]Interestingly, the Court does not touch upon this matter in its decision.

2.2.5 Other cases of products imported to the EU from non-recognised counties: Taiwan, Western Sahara

The Commission adopted specific rules regarding the certificates of origin for products imported from the non-recognised republic of Taiwan.[111] Hence, the certificates issued by the competent authorities of Taiwan could be recognised by the MSs, provided that they comply with certain requirements. Remarkably, those rules were adopted after the decision of the Court in *Anastasiou I* and are controversial to the approach taken by the Court. However, this case is not dealing with the import of products which have been labelled in a wrong way, but rather with the acceptance of the certificates issued by the authorities of a non-recognised state.

[106] *Anastasiou* I*, paras* 45 – 46.
[107] *Anastasiou* I, 47.
[108] Panos Koutrakos, "Legal Issues of EC-Cyprus trade relations" [2003] *International and Comparative Law Quarterly (UK)*489, 501.
[109] *Ibid.*
[110]Above n 91, 743.
[111]Article 2(1)(1) Commission Regulation (EC) No 1084/95 of 15 May 1995 abolishing the protective measure applicable to imports of garlic originating in Taiwan and replacing it with a certificate of origin [1995] OJ No L 109/1.

A situation comparable to the one of the import of Israeli settlements' products has occurred by import of goods originating in the territory of Western Sahara and labelled as of Moroccan origin. Although Western Sahara is not a part of the Kingdom of Morocco, the UN considers it as a 'non-self-governing territory' and acknowledges that Morocco has *de facto* administering power over it.[112] According to the European Commission, the products imported from Western Sahara are *de facto* benefiting from the trade preferences granted to products of Moroccan origin. Furthermore, the Commission recalls that neither the AA with Morocco, nor the Agreement on the liberalisation of trade on agriculture and fisheries products provide for specific rules regarding the labelling requirements. In this regard, the EU *de facto* grants the products originating in Western Sahara the same preferential tariffs as the *like* products originating in Morocco enjoy under the EU-Morocco AA. [113]

This opinion is not supported by a number of MSs, including the Netherlands, which suggests that the products originating in West Sahara cannot be labelled as Moroccan. In the absence of the ECJ's opinion this matter, it can be assumed that the EU approach on the import of product originating in Western Sahara should be derived from current practice.

2.3 What measures are proposed by the EU legislation with regard to labelling goods stemming from the Israeli Settlements?

2.3.1 The determination of origin of the settlements' products

2.3.1.1 The EU approach

The origin of products imported from the OPT happens according to the political – sovereignty approach, as suggested in literature. [114] Pursuant to this approach, the issue of origin depends on an earlier determination of sovereignty or recognition of a state. [115]The political-sovereignty approach was also used by the ECJ in the case *Anastasiou I.* [116]

According to the European Commission, the granting of preferential access to the European markets for exports originating in the settlements would contravene the established rules of origin. [117] In the view of

[112] E.g. UN SC, *Report of the Secretary-General on the situation concerning Western Sahara* (19 February 2002) S2002/178.
[113]E.g. European Parliament, Parliamentary questions (14 July 2011) <
<http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=P-2011-001023&language=SL> accessed 6 February 2014.
[114] Above n 46, 574.
[115] Above n 46, 577.
[116] *See supra*
[117] Above n 46, 587,with reference to point 8 of The Commission's Communication cites Article 38 of the EC-Israel Interim Agreement that is reproduced in Article 83 of the 1995 EU-Israel Agreement. Implementation of the Interim Agreement on Trade and Trade-vely.

the European Parliament, the products originating in Israeli settlements should be distinguished from those originating in Israel and in Palestine.[118]

Hence, it can be assumed that according to the EU institutions, the products imported from the settlements are not entitled to any preferential treatment under the PTA with Israel.

2.3.1.2 The EU-PLO Interim Association Agreement

The Interim AA between the EU and the Palestine Liberation Organisation ('PLO') ('EU-PLO AA') declares the provisions of that Agreement to be applicable to the products originating in West Bank and Gaza Strip.[119] As it follows from Article 6 of the EU-PLO Agreement, products originated in those territories and imported into the EC shall not be subject to any customs duties or measures having equivalent effect. The rules of origin, as well as the certification requirements applicable to this agreement are compatible with those of the above mentioned AAs. [120]

However, it is questionable whether products originating in the *settlements* also fall under the scope of the EC-PLO Interim AA, taking into account their illegal status under international law. In any event, such practice would be in contradiction to the approach taken by the Commission and the Parliament.

2.3.2 The Brita case

The issue of labelling of the settlements' goods has been discussed by the ECJ in the judgment *Brita.* [121] This dispute concerned the import of goods labelled as of Israeli origin by German company Brita. Although the preferential treatment, requested by Brita, has been initially granted by the German customs authorities, the verification procedure pursuant to Article 32 of the Protocol to the EU-Israel AA has been conducted. It has been stated by Israeli authorities that the products subject to verification originate in the area which is under Israeli Customs *responsibility,* and thus should benefit from the preferential treatment of the EU-Israel AA. However, the Israeli authorities failed to indicate, upon request made by customs authorities, if the products have been manufactured in Israeli-occupied settlements. [122] The Court was asked whether goods originating in the West Bank may be granted the preferential treatment under EU-Israel or EU-PLO AAs by the submission of a formal certificate of origin from Israel. [123]

The Court held that expanding the Israeli customs authorities' competences to the territory of the West Bank would be equivalent to imposing a duty on the Palestinian customs authorities to refrain from their obligations under the EU-PLO AA. As such interpretation in fact creates an obligation for a third party

[118] European Parliament Written Declaration on labelling goods from the Occupied Palestinian Territories, [2010] 0064.
[119] Article 3, 4 Euro-Mediterranean Interim Association Agreement on trade and cooperation between the European Community, of the one part, and the Palestine Liberation Organisation (PLO) for the benefit of the Palestinian Authority of the West Bank and the Gaza Strip ('EU-PLO AA') [1997]L 187/3.
[120] Title II and Title V Protocol 3 EU-PLO Agreement.
[121] *Brita,* above n 16.
[122] *Brita,* paras 30-34.
[123] *Brita,* 36.

without its consent, it is incompatible with Article 34 of the Vienna Convention on the Law of Treaties ('VCT'). [124]Accordingly, products originating in the West Bank do not fall in the territorial scope of the EU-Israel AA and thus are not entitled to preferential treatment under this agreement. [125]

With regard to the question whether the customs authorities can make an elective determination, meaning that they are free to choose which of the two substantively equivalent agreements to apply in a certain situation, the Court stated that such practice would be tantamount to denying the obligation to provide a valid proof of origin in order to benefit of the preferential treatment. [126]

In short, the Court held that 'the customs authorities of the importing MSs *may* refuse to grant the preferential treatment provided for under the EC-Israel Association Agreement where the goods concerned originate in the West Bank.'[127] It is worth to note that this statement of the Court does not oblige the customs authorities to refuse the preferential treatment. Rather, it follows that the MSs have a choice to grant or to refuse the preferential treatment to the imported products. As such approach might result in different practices in the MSs, it is likely to cause difficulties with regard to the principle of mutual recognition and free circulation of goods within the EU.

Furthermore, the Court was asked to rule to which extent the customs authorities of importing States are bound by the proof of origin submitted by the customs authorities of the exporting State pursuant to the procedure of Article 32 of the 4th Protocol of the EU-Israel Agreement. [128]Firstly, the Court recalled that the verification is carried out by the customs authorities of the exporting State in case the customs authorities of the importing State have reasonable doubts about the origin of the imported goods. Bearing in mind the principle of mutual recognition, the proper functioning of this system is conditional upon the acceptance of the determinations legally made by the competent authorities.[129] The verification was carried out with the purpose of establishing the exact place of manufacture of imported products in order to determine if those products fall under the scope of the EC-Israel AA. In this regard, the Court stated that the reply provided by the Israeli custom authorities did not give sufficient information for establishing the real origin of the goods, and therefore the assertion of the Israeli customs authorities is not binding upon the customs authorities of importing MS. [130]

In turn, the AG Bot argued in his opinion that the dispute between the customs authorities of the parties to the AA is not related to the facts determining the origin of the products. Rather, it should be assessed in the light of interpretation of the scope of the Agreement. [131] In his view, products originating in the settlements fall neither under the scope of the EU-Israel AA, nor the EU-PLO AA.

---

[124] *Brita,* 52.
[125] *Brita,* 53.
[126] *Brita*, 56.
[127] *Brita,* 58.
[128] *Brita,* 59.
[129] *Brita,* paras 60-63.
[130] *Brita,* paras 64-67.
[131] Opinion AG *Bot* delivered on 29 October 2009 *Case C-386/08 on* Case C-386/08 *Brita GmbH v Hauptzollamt Hamburg-Hafen* [2010] ECR I-01289, *96.*

However, the Court took a different position with regard to the entitlement to the benefits of the AAs. As it appears from the judgement, the preferential treatment for products originating in settlements may only be requested following the rules of the EU-PLO AA. [132]In practice, this means that the certificates of origin of the products manufactured in Israeli settlements, and thus by Israeli producers on the illegally occupied territory, should be issued by the competent authorities of Palestine. As providing of these certificates facilitates trade with settlements, it is unlikely that they would be issued by Palestinian authorities.

It follows from this judgement that goods originating in the OPT do not fall within the scope of the EU – Israel AA, but can fall within the EU-PLO AA, provided that a certificate of origin is granted by the competent authorities designated in that AA, which are the Palestine custom authorities.

2.3.3 The measures proposed

2.3.3.1 Labelling legislation

In the past years, the EU institutions and the MSs supported the adoption of clear labelling rules applicable to the products imported from Israeli settlements. According to the latest news reports, new labelling guidelines have already been introduced in certain MSs (e.g. the UK, Denmark and the Netherlands).[133] In fact, such practice ensures that the products imported to the EU from a Third State are treated differently in various MSs, and thus might jeopardise the functioning of the CCP and subsequently the internal market. This can be prevented by harmonisation of the labelling requirements for settlements' products with regard to their origin.

In its notice for grants, prizes and financial instruments, the Commission explicitly stated that the EU does not recognise the Israel's sovereignty over the OPT and that the agreements concluded with Israel apply only to the territories recognised by the EU. [134] However, those guidelines do not constitute a binding legal instrument. Therefore, the fact that most EU MSs are expected to adopt them does imply that the policy on settlements would be subject to harmonisation at the EU level.

Although the adoption of the labelling rules has been suspended, the EU still shows its intention to introduce a harmonised legislation on this matter.

2.3.3.2 Sanctions

The possibility to impose sanctions in case of the import of the mislabelled products could be considered as an important instrument of the EU trade policy. An example of the sanctioning measures introduced

[132] Laura Puccio 'Understanding EU Practice in Bilateral Free Trade Agreements : Brita and Preferential Rules of Origin in International Law ' [2011] *36(1) European Law Review* 124.

[133]Barak Ravid 'Catherine Ashton: Israeli settlement products to be labeled in EU by end of 2013' (*Haaretz, 23 July 2013)* <http://www.haaretz.com/news/diplomacy-defense/.premium-1.537315 > accessed 10 October 2013.

[134] Points 2 and 3 Commission Notice.

in the new guidelines is the prohibition to distribute the grants to companies and projects operating in the settlements. [135] However, this might deprive the population of the settlements from the benefits granted by the EU.

[135] Section D Commission Notice.

3. How is the concept of rules of origin defined under WTO Law?

Introduction

This chapter aims to define the standards rules of origin and marks of origin from a WTO perspective, based on applicable legislation, case law and relevant literature. Those rules will be applied to products made in Israeli settlements. Thereafter, the specific reports of the Panel and the Appellate Body ('AB') with regard to the labelling measure will be discussed. Finally, this chapter will attempt to establish when labelling measures are likely to constitute trade restrictions and/or distort international trade.

3.1 What are the current WTO standards on labelling of products according to their origin?

3.1.1 The determination of origin in WTO law

3.1.1.1 The Agreement on Rules of Origin

Within the WTO system, the rules related to determination of the products' origin are codified in the Agreement on Rules of Origin ('ARO'). Herein, the rules of origin are being defined as laws, regulations and administrative determination purposed on determining the goods' country of origin without granting those products treatment more favourable than the one applied to the Most Favoured Nations ('MFN'), pursuant to Article I: 1 GATT. [136] Furthermore, the rules of origin must satisfy certain criteria: they may not be unduly burdensome, must be transparent, objective and coherent and must apply equally for all purposes.[137] Importantly, the rules of origin may not serve as instruments for trade policy or distort international trade, and may not be more stringent than those that apply to domestic products. [138]Rather, they are used to address different trade policy instruments and to achieve specific goals of national or international policies.[139]

Although Article 2 ARO introduces certain limitations, it does not impose any obligations, meaning that WTO Members have a wide discretion when designing their rules of origin. [140]Accordingly, Members are not prevented from determining or amending their origin criteria, or applying different criteria to different products. [141]

[136] Article 1.1 ARO.
[137] Article 1.2 ARO.
[138] Article 2 b, c, d ARO; Panel Report *United States — Rules of Origin for Textiles and Apparel Product*, [2003], paras 6.23-24.
[139] *Handbook rules of origin* < http://www.wcoomd.org/en/topics/origin/overview/~/media/D6C8E98EE67B472FA02B06BD2209DC99.ashx> accessed 6 February 2014, 6.
[140] Petros Mavroidis, *Trade in Goods*, (Oxford University Press 2012) 139.
[141] Panel Report *United States — Rules of Origin for Textiles and Apparel Product [*2003], paras 6.23-24.

The rules of origin can be used by WTO Members to implement discriminatory trade policies and to establish country – of origin making requirements,[142] what may result in barriers to trade. Hence, in order to ensure that WTO Members do not use the origin of goods for the circumvention of their WTO obligations, there is a need for harmonised international standards for the rules- of origin.

3.1.1.2 Preferential and non-preferential rules of origin

The ARO makes a distinction between preferential and non- preferential rules of origin. Preferential rules of origin are used to determine if certain goods originate in a country which enjoys the right of preferential treatment (i.e. member of a free trade agreement).[143] Non – preferential rules of origin are used for all other purposes in order to establish the country of origin in marking the origin of certain goods. [144]Only that second kind of rules is subject to harmonisation under the current WTO system. For determination of the non-preferential rules of origin, Parts I to IV of the ARO apply accordingly. [145]

The non-preferential rules of origin must provide an exhaustive method for determining the origin of a certain product. In case the primary origin criteria are not met, the origin of a particular good shall be determined by an alternative method.[146] In turn, if the criteria of preferential origin are not met, there is no need to fall back on alternative methods, as the preferential tariff simply will not be applied. [147]

Therefore, both preferential and non-preferential rules of origin are relevant for the purpose of this paper. With regard to the question whether the goods imported from OPT enjoy the preferential treatment of the EU-Israel AA, due account should be taken of the preferential rules of origin. In turn, for the purpose of labelling and certification policies, the non-preferential rules apply.

3.1.2 Methods of determination of rules of origin

3.1.2.1 Determination of non-preferential origin according to the ARO

In case of non-preferential rules of origin, the country of origin of a particular good should be considered the country where the good has been wholly obtained or, in case the production takes place in more than one country, where the last substantial transformation has been carried out. [148]In this regard, the determination of the origin of imported goods shall not be more stringent or discriminative than the

[142] M. Matsushita, T. Schoenbaum & P. Mavroidis: *The World Trade Organisation: Law, Practice, and Policy* (Oxford University Press 2006) 265.

[143] Hiroshi Imagawa and Edwin Vermulst, 'The Agreement on Rules of Origin' in Patrick Macrory, Arthur Appleton, and Michael Plummer (eds.) *The World Trade Organisation: Legal, Economic and Political Analysis* (Springen New York 2005) 604; Annex II, Article 2 ARO.

[144] *Ibid*

[145] Article 1.1 ARO

[146] Stefano Inama,' Nonpreferential Rules of origin and the WTO Harmonisation Program' in by Bernard Hoekman, Aaditya Mattoo and Philip English *(eds), Development, Trade and the WTO* (Washington, DC : The World Bank 2002) 122.

[147] *Ibid.*

[148] Article 3(b) ARO.

determination of domestic origin. [149]Moreover, the rules of origin should be applied equally[150] towards all WTO Members and should be administered in a 'consistent, uniform, impartial and reasonable manner.'[151] Particularly the requirement of impartiality can play an important role in the determination of origin of the OPT products. For instance, it can be argued the position of States with regard to the origin of settlements' goods implies the (non-) recognition of the OPT as an Israeli territory. Another important aspect is the difficulty to distinguish between the country of origin and the country of export. [152]

An attempted to clarify the definition of a country of origin has been made by the WCO Secretariat. It was suggested to adopt Article 9(2) (c) (i)[153], which would have sounded as following:

For the purposes of the Agreement on Rules of Origin the term 'country' shall be taken to mean the land, including the airspace above and the soil and subsoil beneath the land, and the territorial sea appurtenant to the land, including the airspace above and the seabed and subsoil beneath the territorial sea, over which a country exercises sovereignty. The term 'country' shall also be taken to include free ports, free zones and in bond operations. The term 'territorial sea' shall be interpreted in accordance with international law as defined in the 1982 Convention on the Law of the Sea.[154]

Although this proposal would facilitate the determination of the country of origin, it was not accepted.

3.1.2.2 Wholly obtained goods

The ARO does not provide as such for the definition of 'goods wholly obtained'. Pursuant to Article 9 (2) (i) ARO, it is the Technical Committee[155] which is empowered to develop detailed harmonised definitions of the products which are considered to be wholly obtained in one country.

In short, goods which can be considered as wholly obtained are the goods naturally occurring/plants harvested/minerals extracted or taken/live animals born and raised in a single country. [156] Goods produced from wholly obtained goods or scrap and waste derived from various manufacturing or processing operations also fall under the definition of wholly obtained goods. [157]

3.1.2.3 Last substantial transformation

The problems around the determination of origin according to last substantial transformation arise from the fact that the very meaning of this term remains unclear. Moreover, the requirement of the last

[149] Article art 3 (c) ARO.
[150] Article art 3(a) ARO.
[151] Article 3(d) ARO.
[152]Above n 143, 621.
[153] Above n 143, 648.
[154] WCO Doc. 39.166, pp. 2 and 6.
[155] Article 4(2) ARO.
[156] Point 3.3 of Explanation rules of origin, available at www.wto.org .
[157] *Ibid.*

substantial transformation to be sufficiently proved makes it a very time-consuming and cost-intensive manner to determine goods' origin. [158] Literature reveals three tests to determine the country where the last substantial transformation has taken place.

The first test is the determination of origin based on *Ad Valorem* Percentage, also called the Percentage Criterion Test, mostly used for tele - and radio receivers. It focuses on a specific add-value, which is calculated on the basis of different factors, i.e. the production and labour costs, manufacturing overhead and general overhead expenses.[159]

Subsequently, the Change of Tariff Classification test confers the origin if the manufacture results in a product which falls under the Harmonised System. This test has been used by the EC in determination of preferential rules of origin. [160]

Lastly, the Manufacturing or Processing Operations, i.e. the Technical Test, prescribes certain production or sourcing process that may or may not confer originating status. [161] This test has been used by the European Community/Union in the most of non-preferential products origin regulations.

It is worth noting that all the three tests are not ideal and have their own disadvantages, which makes it rather complex to determine the country where the last substantial transformation took place. [162]

3.1.2.4 The two different approaches

Next to the determination of products' origin pursuant to the ARO, the relevant literature reveals two approaches to determine a country of origin, namely the practical-trade approach and the political-sovereignty approach.[163] Following the practical - trade approach, the issue of origin should be considered from a commercial perspective. The rules of origin are being determined in accordance with the rules of international trade law, focusing on such factors as *de facto* control, jurisdiction and ensuing *responsibility.* [164] Within this approach, the role of political factors in the determination of origin is minimized. The basis of this approach is Article 31 of the Vienna Convention on the Law of Treaties, which states that the treaty provisions should be interpreted in the light of their ordinary meaning, taking into account their particular context and object.[165] In this regard, it can be alleged that 'trade treaties, such as the free- trade- areas agreements, are ordinarily aimed at liberalizing trade relations between the contracting parties and not at determining the legal status of a certain territory'. [166] This approach is supported by the Article XXVI (5) (a) GATT, which states that 'each government accepting

[158] Jord Hollenberg, *Rules of Origin in the WTO and in Other Free Trade Agreements - An Overview* (Seminar Paper of Suffolk University Law School 2003) 7.
[159] Above n 143, 605.
[160] Above n 143, 607.
[161] Above n 143, 604 and 605.
[162] Above n 143, 605.
[163] Above n 46, 577.
[164] *Ibid.*
[165] Article 31 (3c) VCLT.
[166] Above n 46.

this Agreement does so in respect of its metropolitan territory and of the other territories for which it has international responsibility(…).'[167]It follows that the interpretation of rules of origin in the free-trade-areas agreements should not consider the sovereignty, acquisition of territory, or international recognition of a State, but should rather be based on the factors like jurisdiction, *de facto* control and ensuing international responsibility. [168]

In turn, the political – sovereignty approach is oriented towards the international politics. Under this approach, the prior determination concerning sovereignty or recognition with regard to a particular territory is of the highest importance by the determination of origin. Accordingly, only a sovereign State can be determined as a State of origin, and the issuing of certificates of origin can only be done by a recognized government. [169]

In general, it can be assumed that the rules and practise of the GATT tend to be in line with the practical – trade approach rather than with the political – sovereignty approach. [170]

3.1.2.5 Agricultural Products

For the determination of the origin of agricultural goods, it is mostly a definition of 'wholly-obtained goods' that applies. [171] Some authors believe that the origin of agricultural products should always be carried forward from the original product, which was wholly obtained in that country, and be changed by subsequent processing. [172] Accordingly, there is no such phenomenon as substantial transformation for agricultural goods. In case of blending or mixing agricultural materials originating in more than one country, the products must be determined as originating in the place they were originally harvested or plucked. [173] Following this approach, agricultural goods originating in the OPT and being mixed with goods originating in the territory of Israel, or being subject to substantial transformation taking place in Israel, should still be considered as originating in the OPT. This allegation might be illustrated by the following example: grapes harvested in the settlements' territory were subsequently transported to the territory of Israel, recognized by the International Community, where they were used for a production of grape juice. In this case, the grape juice should still be considered originating in the settlements' territories, disregarding the fact that the main process of production factually took place in Israel.

There is, however, another view, suggesting that 'the processing of agricultural raw materials is basically a substantial transformation, and origin should be conferred on the processed goods in the country where these processes are carried out'. [174]The disadvantage within this approach is the unclear distinction between 'simple transformation' and 'substantial transformation'. For instance, it is not

[167] Article XXVI :5 (a) GATT.
[168]Above n 46, 577.
[169] Above n 46, 580.
[170] Above n 46, 589.
[171]Above n 143, 654.
[172] *Ibid.*
[173] Above n 143, 655.
[174] *Ibid.*

always easy to determine whether the process is meant to keep the product in good condition or to change the original condition of the product,[175] what is crucial for defining the country of origin. Following this approach, agricultural products originating in the OPT and subject to substantial transformation in Israel, with a result that their original condition is changed, should be considered as products originating in Israel. Turning back to our example, juice produced in Israel from the grapes harvested in the settlements territories should be considered as of Israeli origin.

It is not clear from the relevant legislation or literature which of the two mentioned approaches prevails.

3.1.2.6 Products from OPT according to the WTO standards

In principle, the determination of origin does not constitute a problem when, i.e. the plants at issue are harvested in the settlements' territory. In case the determination taken place on the basis of last substantial transformation, it is in principle the Change of Tariff Classification Test that applies, as the disputed origin of the products is decisive for their qualification under the preferential trade agreement with Israel. However, with regard to the labelling of origin requirements, the Technical Test would be applicable, as those requirements deal with non-preferential rules of origin.

As explained *supra*, the determination of origin of agricultural products is dependent whether the last substantial transformation is taken into account.[176] The fact that the meaning of the term 'substantial transformation' remains rather unclear makes it even more difficult to determine the origin of agricultural products imported from the settlements' territories.

The problems around the origin of the goods relate to the question whether those can be exported as of the Israeli origin, rather than where the goods are *factually* produced. Therefore, it is more interesting to elaborate on this issue from the perspective of the two approaches, introduced *supra*. *Prima facie*, it appears that the settlements' products should be considered as of Israeli origin according to the practical-trade approach, by way of Israel having *de facto* control over those territories. However, it is rather uncertain whether Israel can be considered internationally responsible for the OPT. Although the 1995 Israeli-Palestinian Interim Agreement states that Israel will continue to exercise powers and responsibilities in several areas, including the settlements,[177] the very existence of those settlements is still considered illegal by the UN. Yet, as suggested in the literature, the practical-trade approach was used by the EU the cases with Taiwan and Western Sahara. [178] It follows that in case Israel bears international responsibility over the territories of the OPT, products obtained in that territory are to be considered as originating in Israel. The issues of sovereignty and non-recognition under the International Law are therefore irrelevant.

---

[175] *Ibid.*

[176] See paragraph 3.1.1.5 of this paper.

[177] Israel-Palestinian Interim Agreement on the West Bank and Gaza Strip ('Oslo Interim Agreement')[1995], < http://israelipalestinian.procon.org/view.background-resource.php?resourceID=000921 > accessed 5 December 2013.

[178] Above n 46, 580.

As discussed *supra*, the political- sovereignty approach is more focused on the political positions of the relevant government with regard to the disputed territory. This approach may be used as an instrument for exerting pressure upon States that illegally take the control over a territory, and has been used by the EU in case of Northern Cyprus and Israel.[179] Accordingly, the products obtained in the settlements' territories cannot be considered of Israeli origin. The disadvantage of this approach is that it consequently blurs the valuable distinction between international trade rules and foreign policy. [180]

3.1.3 Marks of origin

3.1.3.1 The rationale behind labelling/marks of origin in the WTO system

The marks of origin are strongly linked with the rules of origin in the sense that the former mentioned are intended to inform the consumers about the origin of the products they are about to purchase. [181]Accordingly, in case the country of origin has been changed, the related mark of origin will be changed as well, what might have consequences for the consumers' choice. [182] In this regard, it can be stated that the purpose of marks of origin is to guarantee a certain level of transparency and ensure fair trade by informing consumer about the geographical origin of the purchased goods.

3.1.3.2 Legislation on marks of origin

The non-preferential rules of origin might be used by States in order to establish country – of – origin marking requirements.[183] In this regard, WTO Members are entitled under Article IX GATT to maintain laws relating to marks of origin on imported products, in order to protect consumers from misleading information. [184] Those marks of origin may not be discriminatory and neither may they constitute unreasonably burdensome.[185] Furthermore, 'marks of origin may not be misleading or allowed to work to the detriment of products with distinctive regional or geographic names'.[186]Most importantly, the marking requirements should comply with the MFN principle. [187] Finally, Article IX: 6 GATT, which was elaborated by the Panel in *Japan - Alcoholic Beverages*, imposes on Members an obligation to cooperate in preventing the use of trade names in a manner which misrepresents the true origin of a product. [188]

The Drafters of the New York Charter of the International Trade Organisation ('ITO') were of the opinion that each country had a right to prohibit the import, export and transit of foreign goods falsely marked

[179] Above n 46, 580.
[180] Above n 46, Section IV .
[181] Above n 146, 125.
[182] *Ibid.*
[183] See paragraph 3.1.1.2 of this paper.
[184] Above n 142, 265 jo Article IX: 2 GATT.
[185] Article IX:4 GATT.
[186] Above n 142, 265 jo Article IX: 6 GATT.
[187] Article IX:1 GATT.
[188] Panel Report *Japan Taxes on Alcoholic Beverages* [1996]; although this report was not adopted, it can be utilised as supplementary means of interpretation pursuant to Article 32 of the VCLT.

as being produced in the country in question, describing this as 'deceptive practices'. [189]Hence, the import of mismarked or mislabelled goods has been considered as a misleading practice prior to the establishing of the WTO.

Furthermore, the 1958 Recommendation noted that 'The Contracting Parties (...) understand that no country shall be obliged to alter: (a) any provision protecting the 'truth' of marks, including trademarks and trade descriptions, aiming to ensure that the content of such marks is in conformity with the real situation'.[190]

Consequently, it can be stated that the false marking of products which leads to misrepresentation of the true origin of the product constitutes an unfair commercial practice and is thus incompatible with WTO Law. However, in the absence of a harmonised system of marking according to true geographical origin, the regulation of marks of origin of imported products is left to the discretion of WTO Members. Notably, there are no specific sanctions in case the Contracting Parties fail to comply with the marking requirements prior to importation, except in cases when corrective marking is unreasonably delayed, deceptive marks have been affixed or the required marking has been intentionally omitted.[191]

Besides, WTO Law does not contain voluntary or mandatory labelling requirements with relation to *origin* of the products.

3.2 How has the Panel and the AB dealt with the cases related to labelling so far?

3.2.1 United States – Certain Country of Origin Labelling Requirements

US COOL[192] was concerned with the mandatory certain country of origin labelling provisions (further abbreviated as 'COOL') in the amended United States' ('US') Agricultural Marketing Act 1946[193]. The measure at issue is an internal measure, obliging retailers to inform consumers of the country of origin in respect of covered commodities, i.e. beef and pork, by the means of labelling. [194] It also established the rules for determining the county of origin of products when some or all steps of the meat products process have taken place outside the US, imposing the additional requirements on producers. [195]

According to legislation, products could only be considered of US origin if the animal was exclusively born, raised and slaughtered in the US, thus excluding the animals which have been exported to the US for feed or immediate slaughter. The measure was challenged by Canada and Mexico, which alleged that the mandatory COOL provisions violate various US obligations under the GATT, the Agreement on Technical Barriers to Trade ('TBT') and the ARO, namely Article 2 thereof.

---

[189] Article VIII The Draft of International Trade Organisation Charter [1947], Press Release No. 291.
[190] Recommendation on Marks of Origin, 7S/30; Working Party Report on "Marks of Origin", L/912/Rev.1, adopted 21 November 1958, 7S/117.
[191]Article IX:5 GATT.
[192] Appellate Body Report *United States — Certain Country of Origin Labelling (COOL) Requirements* [2012].
[193] 60 Stat. 1087, *United States Code*, Title 7, section 1621 *et seq.*, as amended.
[194] Appellate Body Report *US-COOL*, paras 7.78, 7.81, and 7.89.
[195] Appellate Body Report *US-COOL*, paras7.81 and 7.89 and 7.116-7.120.

The Panel found that COOL constitutes a technical regulation in the meaning of the TBT, which subsequently breaches Article 2.1 TBT by according the imported products treatment less favourable than the domestic products.[196] Therefore, 'the measure at issue modifies the conditions of competition in the US markets by creating an incentive in favour of processing exclusively domestic livestock and a disincentive against handling imported livestock.'[197]Moreover, the Panel stated that the measure breaches Article 2.2 TBT as it does not fulfil the legitimate objective of providing consumers with information on origin.[198] More precisely, it was the violation of the necessity requirement of this Article, as the COOL measure did not inform the consumers in the clear way and could rather lead to the consumers' confusion regarding which step of production was undertaken in which country.

In its report, the AB held that the COOL's recordkeeping and verification requirements impose a disproportionate burden on upstream producers of meat in comparison to the amount of information communicated to consumers through the mandatory labelling requirements.[199] Thus, the finding of the Panel that COOL violated Article 2.1 TBT was upheld by the AB, although through the different reasoning. With regard to the alleged breach of Article 2.2 TBT, the AB noted that measure contributes to the certain extent to achieving the objective of providing consumer with the information on origin. [200]It reversed the Panel's finding that the measure was inconsistent with Article 2.2 TBT, but was not able to determine whether COOL is more trade restrictive than necessary for the fulfilment of this objective. [201]

3.2.2 United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products

The other significant WTO labelling dispute is the case *US -Tuna II.*[202] In this dispute, Mexico alleged that the requirement of the US to use a 'dolphin-safe labelling standards' label on tuna products is inconsistent with the US obligations under the GATT and the TBT Agreement. The conditions of this measure varied depending on the area where the tuna is caught and the type of fishing method by which it is harvested. [203]In this regard, tuna products made from tuna caught by 'setting on' dolphins were not eligible for a dolphin-safe label in the US. Mexico claimed that the measure and the conditions were discriminative and unnecessary.

The Panel held that the mandatory US dolphin-safe labelling provisions constitute a technical regulation within the meaning of the TBT and Annex 1.1 thereof. However, the Panel found that the labelling provisions do not discriminate against Mexican tuna products, as those products were not accorded

[196] Panel Report *US-COOL*, paras. 7.275-7.420.
[197] Appellate Body Report *US-COOL*, paras 274 – 292.
[198] Panel Report *US-COOL*, paras 7.565-7.720.
[199] Appellate Body Report *US-COOL*, 349.
[200] Appellate Body Report *US-COOL*, 373.
[201] Appellate Body Report *US-COOL*.
[202]Appellate Body Report *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* [2012].
[203] Appellate Body Report *US-Tuna II,* 172.

treatment less favourable than like products of the US origin. Hence, the measure was found consistent with Article 2.1 TBT.[204] With regard to the alleged breach of Article 2.2 TBT, the Panel stated that the dolphin safe-labelling provisions address only party the legitimate objectives pursued by the US, which are preventing the misleading of consumers and contributing to the protection of dolphins.[205] In addition to that, the Panel affirmed that there is a less trade restrictive alternative available, which is capable to achieve the same level of protection as the measure at stake.[206] In short, the Panel found that the US dolphin-safe labelling provisions are more trade-restrictive than necessary in order to fulfil the legitimate objectives pursued by the US.

The AB noted that the measure at issue prescribes in a broad and exhaustive manner the conditions for issuing the 'dolphin-safety' label, as it introduces a single definition of a 'dolphin-safe' tuna and does not allow for the use of other labels.[207] The AB found the measure inconsistent with Article 2.1 TBT, as it modified the conditions of competition in the US market to the detriment of Mexican tuna products.[208] It was not convinced by the investigation provided by the Panel with regard to the safety of the other fishing techniques, and held that the measure at stake was not even-handed in the manner in which it addresses the risks to dolphins arising from different fishing methods. The finding of the Panel that the measure was inconsistent with Article 2.2 TBT was reversed as well, as the analysis of the Panel with regard to the alternative less trade-restrictive measure was insufficient. [209]

3.2.3 Common approach of the WTO adjudicating bodies

Considering the two discussed cases, it can be assumed that the WTO adjudicating bodies have developed a common approach regarding the labelling rules introduced in WTO Members' import policies. This approached can be derived from the similarities in the AB's assessment of the measures at issue and its main reasoning.

Firstly, it is important to note that in both cases the importers were obliged to comply with the provisions by the national law of the WTO Members concerned, and both COOL and the 'dolphin-safety' label requirement were found to constitute technical regulations within the meaning of the TBT Agreement. [210]

Pursuant to the discussed WTO case law, there is a breach of the TBT Agreement when the competitive conditions on the market of the imported State are modified by the challenged measure. This would usually imply that the measure discriminates against the foreign imported products which are *like* the domestic product. In both cases the AB recalls that WTO Members are obliged to accord to imports treatment no less favourable than to like domestic products and to ensure that compliance with law on

[204] Panel Report *US-Tuna II,* 7.305.
[205] Panel Report *US-Tuna II,* 7.599.
[206] Panel Report *US-Tuna II,* 7.619.
[207] Appellate Body Report *US-Tuna II,* 193.
[208] Appellate Body Report *US-Tuna II,* paras 239, 240 and 298.
[209] Appellate Body Report *US-Tuna II,* paras 330 and 331.
[210] Article 1 Annex 1 TBT.

marks of origin does not lead to damaging imports, reducing their value or unreasonably increasing their costs.

The objective of both challenged measures was to inform the consumers about the origin of the certain products/ the way of harvesting the certain product by the means of labelling. In this regard, it is apparent that, in order to be compatible with WTO Law, rules of origin measures should sufficiently contribute to the achievement of that objective. However, it must not constitute a disproportional burden for the importers. This is for example the case when the costs of verification or additional research exceed the importance/amount of information conveyed or the costs stemming from the related deceptive practices (e.g. loss of customs duties as a consequence of importing mislabelled products). In any case, the measures may not lead to the consumers' confusion, as it will undermine its objective. Additionally, the measure cannot be more restrictive than necessary. In the situation where a less trade-restrictive measure is available, it should be opted to use that alternative measure, provided that it ensures the achievement of objectives pursued in the same way as the challenged measure.

3.3. When can the labelling be considered a trade restriction within the meaning of the WTO?

3.3.1 Rules of origin as a restriction

The relevant literature suggests that rules of origin would be superfluous in a completely open world economy, as it would be immaterial where goods and services originally come from.[211] Accordingly, the very existence of rules of origin already implies discriminatory restrictions on international trade. [212]

Yet, it is exactly the international trade which constitutes the main reason for the existence of the rules of origin[213], for the origin of the product can be decisive by granting that product the MFN treatment. As the sets of rules of origin vary per different jurisdiction, one of the goals behind the ARO was to achieve the harmonisation of the different rules of origins of the WTO Members. [214]

3.3.2 The effects on international trade

As mentioned *supra,* one of the requirements of Article 2(c) ARO is that the rules of origin may not have a distortive effect on international trade. However, it is rather unclear whether this prohibition concerns the effect on trade in intermediate stages of production or effect on trade in finished goods. [215]The AB has not had a chance so far to interpret the term 'effect on international trade'. However, this issue has been elaborately discussed by the Panel in its report *US-Textiles Rules of Origin.* [216] The Panel did not adequately address the question whether 'effects on international trade' applies to intermediate stages of production or finished goods, but suggested that, in order to have an effect on international trade, a

[211] Above n 8, 603.
[212] *Ibid.*
[213] Above n 8, 604.
[214] *Ibid.*
[215] Above n 8, 613.
[216] Panel Report *US — Rules of Origin for Textiles and Apparel Product* [2003.]

measure must affect trade of more than just the complaining Member.[217] In the absence of a clear view on this matter, it is hardly possible to establish when labelling according to origin can be considered as a trade restriction within the meaning of the ARO.

3.3.3 Trade restriction according to Article 2.2 of the TBT Agreement

Within the TBT Agreement, the obligation not to adopt technical regulations which might affect international trade is codified in Article 2.2. This Article explicitly prohibits technical regulations to be more trade-restrictive than necessary to fulfil a legitimate object. [218]In this regard, it is important to note than the Appellate Body considered consumer protection as a legitimate object within the scope of Article 2.2 TBT.[219]Accordingly, only trade – restrictions which go beyond than what is necessary to achieve the pursued aim are prohibited under the TBT. This implies that the trade-restrictive measures are in general prohibited under the TBT agreement, unless they are necessary for achieving a legitimate objective.

In *US – Tuna II,* the AB suggested a number of factors which should be taken into consideration for the assessment if a measure is more trade-restrictive than necessary. According to this report, a special attention should be paid to the degree of contribution made by the measure to the legitimate objective at issue, the trade-restrictiveness of the measure and the nature of the risks at issue and the gravity of consequences that would arise from non-fulfilment of the objective(s) pursued by the WTO Member through the measure. [220]In addition to that, the measure at issue should be compared with a proposed alternative, what would result in weighing and balancing with regard to whether the measure at issue is 'necessary' and whether the proposed alternative is less trade-restrictive. [221] This comparison is not required if a measure is not considered as trade-restrictive or when it makes no contribution to the achievement of the objectives pursued. [222]

It follows that a labelling measure can breach the TBT Agreement when it is trade-restrictive and goes beyond what is necessary to achieve the objectives pursued by it. In this regard, the labelling should be assessed under the test proposed by the AB, including a comparison with an alternative measure.

[217]Panel Report *United States — Rules of Origin for Textiles and Apparel Product* [2003], 6.148
[218] Article 2.2 second sentence TBT
[219] Appellate Body Report *US-COOL,* 440
[220] Appellate Body Report *US-Tuna II,* 322
[221] Appellate Body Report *US-Tuna II,* 321
[222] Appellate Body Report *US-Tuna II,* 321, footnote 647,

4. What are the differences and similarities between the EU and the WTO rules of origin and how do they influence trade with the Israeli settlements?

Introduction

The prior chapters elaborately discussed rules of origin and their application under EU Law and WTO Law. The aim of this chapter is to compare the rules of origin of the two legal systems and to sketch the differences and similarities in their application with regard to the products originating in the OPT. Based on that comparison, it will be discussed whether the measures the EU is planning to adopt with a purpose of preventing import of mislabelled goods are compatible with the WTO principles of trade liberalisation and non-discrimination. It will be also assessed whether the measures at stake constitute a trade barrier within the meaning of the TBT Agreement.

4.1 Legislation applicable to rules of origin

A first remarkable distinction is the absence of a separate legislation on rules of origin in the EU Law system. Where there is a special Agreement which contains (most of) the related rules under the WTO system, the rules of origin applicable within the EU law are derived from the secondary legislation, for example the CCC, the Regulation on the protection of geographical indications and the PTAs with Third States, the so-called EU AAs discussed *supra*.

This significant difference might be attributed to the existence of the EU internal market and the CU, including the CCT and the free movement of goods from third countries once they have entered the EU, pursuant to the inherent characteristic of a customs union. [223] This concept is not applicable under the WTO system, which is based on such principles as the MFN and the National treatment ('NT'),[224] and where the import tariffs are being determined by the schedule of concessions.

4.2 Purpose of the rules of origin in WTO law and EU law

In general, the rules of origin are being used by WTO Members in order to distinguish products which should be granted the MFN treatment and preferential treatment by virtue of regionalism, i.e. free trade zones and customs unions. The purpose of the rules of origin under the EU law is mostly to avoid free – riding. In this regard, it is apparent that in both WTO and EU systems the rules of origin aim at distinguishing products which can benefit from preferential treatment. Whilst rules of origin may in principle not be used as trade instruments pursuant to Article 2 of the ARO, such practice is common in the EU. This indicates a certain divergence in the application of rules of origin in both legal systems.

[223] See chapter 1 for the explanation.
[224] Article I and Article III GATT.

As this issue has not yet been assessed by a WTO adjudicating body, it would be too inaccurate to state that the application of the rules of origin by the EU is not in line with WTO Law. It should also be recalled that WTO Members have a wide discretion in adopt their rules of origin, provided that they do not violate the relevant provisions of the WTO *acquis.*[225] Therefore, further discussion on compatibility matters would only tackle the application of rules of origin by the EU with regard to the products imported from the OPT.

4.3 Preferential and non-preferential rules of origin in the EU and the WTO systems

Both WTO and EU systems are familiar with the distinction between preferential and non-preferential rules of origin. In WTO Law, preferential rules of origin are used to determine whether the products at question enjoy a preferential status, whilst non-preferential rules of origin are applicable in for all the other cases. The EU practice in this matter is slightly similar: the preferential rules of origin are codified in PTAs, and thus deal with the trade between the EU and Third States, whereas non-preferential rules of origin are applicable in the other matters.. As PTAs often contain a free trade clause, the preferential rules of origin within the EU are rather politically and economically sensitive. Hence, the significance of strict application of rules of origin in PTAs increases the gap between those PTAs and the general MFN regime.[226]

Non- preferential rules of origin are subject to harmonisation within the WTO system. In the absence of common legislation on rules of origin within the EU, there is still a certain degree of harmonisation at some level, i.e. when it comes to designated goods or GMO labelling.[227]

4.4 Methods of determination of origin

4.4.1 Wholly obtained goods

Although the ARO does not provide for a definition of 'wholly obtained goods', it presumably covers products which are naturally occurring or being harvested in a single country. Besides, the scope of wholly obtained goods is extended to the goods or scrap and waste derived from various production operations.

Within EU Law, the concept of 'wholly obtained goods' corresponds to the one in WTO Law. The CCC introduces which goods are considered to be wholly obtained in a country,[228] explicitly mentioning the products obtained on ships or taken by the ships under a country's flag and products originating in a

[225] Above n 140, 139.
[226] Above n 46, 574.
[227] Above n 37.
[228] Article 23(2) CCC.

country's territorial sea. In the absence of the definition of a country of origin in the ARO, [229]it can be assumed that the concept of 'wholly obtained goods' is broader within the WTO system.

4.4.2 Last substantial transformation

The concept of last substantial transformation is also rather unclear in WTO law. Depending on the products, three types of tests are being used in order to determine the country of origin, namely the *Ad Valorem* test, the Tariff Classification and the Technical Test.

The determination of origin by the means of last substantial transformation is also present in EU Law.[230]In this matter, the same tests as discussed *supra* are applicable, with a distinction for preferential rules of origin, which are usually subject to Tariff Classification Jump test, and the non-preferential rules of origin, where the EU applies the Technical Test.

4.4.3 Cumulation of rules of origin

One of the main differences within the preferential rules of origin in both systems is the existence of cumulation of rules of origin in EU Law. As a consequence of introducing cumulation, materials originating in a non-preference country are allowed to be imported in the EU under the preferential status and thus benefiting from the provisions of the AAs with other Third States. Hence, although the preferential rules of origin in EU law seem to be stricter than those in WTO law due to the existence of the PTAs, they are at the same time more flexible as a result of the rules allowing for cumulation of rules of origin.

4.5 Approaches with regard to the determination of the origin in the WTO law and the EU law

As suggested supra, there are two approaches to the rules of origin, namely the practical – trade approach, which minimises the role of the various political factors in the determination of origin, and the political-sovereignty approach, which takes into account the recognition of a country under International Law. Whilst the practical –trade approach is considered to be more in line with the principles of the GATT, the political-sovereignty approach is mostly used by the EU in case of the determination of goods produced in disputable territories, i.e. Israeli Settlements and the Northern Cyprus. Yet, in the situation when the goods were imported from Western Sahara, the EU applies the practical-trade approach. This issue will be elaborated in Chapter 5.

4.6 Labelling of products according to their origin

[229] See chapter 3.
[230] Article 24 CCC.

The rationale behind labelling under EU law is to inform consumers and to prevent unfair commercial practice.[231] Comparable objectives are found in the ARO, as issuing marks of origin is purposed at informing consumer about the geographical origin of the purchased goods. The term 'unfair commercial practice' is not explicitly mentioned in the WTO Agreements. However, the GATT prohibits marks of origin which are misleading.[232]Besides, the intention of the GATT to prohibit unfair commercial practice becomes apparent from the negotiation on the ITO Charter. It was clearly stated in the preparatory works of the ITO Charters that the export of goods falsely marked of wrong origin was considered as 'deceptive practices'. Yet, while the test of unfair commercial practice is introduced in the relevant EU Directive, no equivalent test can be found under WTO Law.

Another significant difference is the end-purpose of labelling. Whereas consumer protection within WTO Law is needed to ensure a certain level of transparency and to facilitate fair trade, the eventual aim of labelling under EU law is to avoid free-riding and abuse of rights.

Finally, unlike EU Law, WTO Law does not contain any obligations on mandatory or voluntary labelling or certification, leaving this to WTO Members' national policies.

4.8 Determination of goods produced in the OPT

As the practical trade approach appears to be more compatible with WTO Law, goods originating in the OPT are expected to be assessed by means of this approach. Accordingly, if Israel exercises *de facto* control and bears responsibility over the disputed territories, the products made in those territories should be treated as of Israeli origin, regardless the illegal character of the settlements. So far no explicit statement was made with regard to the origin of the settlements' products under WTO Law. Moreover, a lot depends on the fact whether the last substantial transformation is allowed in determining the origin of agricultural products. If this is the case, goods which originate in the settlements but are subject to manufacturing or production process in Israel are to be considered as of Israeli origin.

In turn, the EU, while using the political-sovereignty approach, has stated in various occasions that the products originating in the OPT are not treated as Israeli products. Although it can be argued that this approach is not in line with the core principles of trade development, it is not prohibited under WTO law. There is no sufficient case law in which the AB or panels have stated if either the political or the practical trade approach prevails for the labelling of goods originating in disputed territories.

Furthermore, due account should be taken of the requirement of impartiality under the ARO [233] by conferring origin to one specific country. It is, however, questionable whether the position of the EU regarding the goods originating in the OPT can be considered as impartial, as it can be alleged that the

[231] See chapter 2.
[232] Article art IX:6 GATT.
[233] Article 2 ARO.

EU takes the side of Palestine in this conflict by stating that the products originating in the OPT fall under the scope of the EU-PLO AA.[234]

On one hand, WTO Members are obliged to comply with their WTO obligations, which presupposes that the products originating in the OPT should be considered under the practical–trade approach and should be allowed to circulate in the concerned AA as products originating in Israel. The rules which somehow hinder the import of those products might have an effect on the international trade and therefore should be set aside. On other hand, WTO Members have a clear obligation to act in accordance with the principles of international law. As Israeli settlements are considered to be illegal, the goods originating from there may not be categorized as Israeli goods. It is rather difficult to find the balance between those two obligations.

[234]Above n 132, 124.

5. Are the measures and policies introduced/planning to be introduced by the EU with regard to the labelling of the products stemming from the Israeli Settlements compatible with WTO Law?

Introduction

The chapter is discusses the compatibility of the (proposed) EU measures with the core principles of the GATT and the TBT Agreement, focusing on the treatment of mislabelled goods imported from Northern Cyprus and Western Sahara into the EU. It aims to suggest if the measures at issue are of discriminative character and can be possibly justified under the WTO system.

5.1 Are the measures at issue in line with the GATT and the core principles of it?

5.1.1The objectives of the measures at issue

5.1.1.1 Commission Notice

The Commission Notice on eligibility of Israeli firms in the OPT for grants, prices and financial instruments funded by the EU has been introduced in Chapter 2. In short, this Notice confirms the EU's view that the settlements do not belong to Israeli territory, independent on the status of settlements under the Israeli domestic law. [235]

The Notice states further that only *Israeli* entities (and not *Palestinian*) operating on the territories of the Gaza Strip, West Bank and Golan Heights, are not eligible for financial grants or prizes issued by the EU within the meaning of Titles VI, VII and VIII of the EU Financial Regulation. [236] [237]In fact, the scope of the EU financial support is limited to solely to the Israeli entities which are established at the territory recognised as Israel by the EU.[238] It follows that the Notice has the following objectives: to confirm the view of the EU regarding the Israeli settlements and to stop the financial support of the economic activities conducted by Israeli entities in the OPT.

Yet, the Notice in question provides for a mechanism which indirectly substitutes the loss of the customs duties which are not being paid in case of importing mislabelled settlements' products. As financial support is being paid from the EU budget, and the collected customs duties constitute an income for the EU, it is arguable that by not providing any financial support to Israel's economic activities in the OPT, the measure at issue compensates for the losses which occur due to the omission of paying import duties.

[235] Point 3 Commission Notice.

[236] Regulation (EU, EURATOM) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, EURATOM) No 1605/2002 [2012] OJ L 298/1.

[237] Points 2, 5, and 12 Commission Notice.

[238] Point 9 Commission Notice.

5.1.1.2 The labelling regulation/guidance

As suggested earlier, European decision makers are calling for adoption of a harmonised measure with regard to the labelling requirements applicable to the products imported from the settlements. This measure would facilitate the determination of origin of products and thereby would prevent the loss of customs duties resulting from the import of mislabelled goods. Furthermore, the measure would ensure that goods imported from the OPT are treated in the same way within the EU and that final consumers would get correct information regarding the origin of the purchased goods. Finally, the measure should be seen as a support to the peace negotiations between Israel and Palestine. [239]

As there no legal draft available, the future labelling regulation would further be assessed in the light of the mentioned objectives.

5.1.2 The Core Principle of the GATT: trade liberalisation

The preamble of the WTO Agreement refers to 'expanding the production of and trade in goods and services while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development' as an objective of the agreement. The GATT preamble complements to this by stating that the objectives of the WTO Agreement should be pursued by the means of substantial reduction of trade barriers and the abolition of discriminatory treatment in international commerce. Accordingly, the principle of trade liberalisation can be considered as one of the key principles of the WTO *acquis.* In order to be WTO compatible, the measures at issue should comply with this principle.

Although the measures at issue are not purposed on restricting the trade with settlements (despite the fact that this would be preferred by a number of MSs), the labelling measure would indirectly affect trade, putting additional burden on the customs to ensure the compliance with new rules. Moreover, there is a chance that the retailers would try to circumvent labelling rules to prevent the expenses on verification of origin, what indicates a need for a stricter compliance mechanism. This might result in a vicious circle with high compliance costs. It is questionable whether those costs are proportional to the objectives pursued, namely the loss of customs duties and informing of consumers. The measures is thus most likely to lead to diminishing of trade with the OPT. Considering that some countries are already boycotting OPT products, it can be assumed that the labelling measure would not be beneficial to international trade as a whole.

5.1.3 The Principle of National treatment

5.1.3.1 The concept of National Treatment under the GATT

Article III: 4 GATT, which is concerned with non-fiscal measures, i.e. labelling requirements, prohibits WTO Members to treat products imported from another WTO Member less favourable than like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, purchase, transportation or use. Thus, this Article implies that WTO Members cannot impose a

[239] See n 24.

higher burden on foreign goods than they impose on *competing like* domestic goods, which in fact refers to a non-discriminatory application of national law. In this regard, the concept of *likeness* plays the key role in establishing a violation of Article III: 4 GATT. The AB adopted a wide scope of *likeness* under Article III: 4 GATT and held that like products are products that are considered to be in competitive relationship with each other. [240]The test of *likeness* consists of four criteria, namely (1) properties, nature and quality of the comparable products (2) the end-uses of the products, (3) consumers' tastes and habits and (4) tariff classification.[241] In this regard, the third condition should be assessed using the notion of a 'reasonable consumers'. In addition to that, the AB considered a treatment to be less favourable in case the differential treatment modifies the conditions of competition. [242]

5.1.3.2 Mislabelling of goods from Northern Cyprus

In this paragraph, the current EU practice with regard to the mislabelled goods imported from the Northern Cyprus will be compared to the practice of the EU with regard to the mislabelled goods imported from the OPT in case the labelling legislation would have been adopted.

As it appears from Chapter 2, the situations in Northern Cyprus and the OPT are similar in a certain way, especially with regard to mislabelling of imported products and benefiting from preferential treatment. Although Cyprus is a MS of the EU, the Turkish control over the Northern Cyprus remains illegal under International Law, and the self-proclaimed republic is not recognised by the EU. Therefore, products originating in those territories are not considered as Cypriote and thus are not subject to the free movement of goods principle after the accession of Republic of Cyprus to the EU.

Accordingly, it can be expected that the EU policy towards the products imported from Northern Cyprus would be comparable with its policy toward the settlements' products, implying the adoption of similar rules with regard to labelling. Instead, trade with Northern Cyprus has been encouraged by the EU during the last years.[243] Moreover, goods wholly obtained or subject to substantial transformation in Northern Cyprus can be imported to the Republic of Cyprus without customs duties or charges having equivalent effect.[244] This development illustrates the EU's support to the unification of the Northern Cyprus with Republic of Cyprus. As Cyprus is a MS of the EU, it can be argued that the products mislabelled as of Cypriote origin are treated different than the products mislabelled as of Israeli origin.

[240]Appellate Body Report *European Communities — Measures Affecting Asbestos and Products Containing Asbestos* [2001], paras 94 and 98.

[241] See, i.e. Appellate Body Report *Japan Taxes on Alcoholic Beverages* [1996] and Appellate Body Report *EC-Asbestos.*

[242] Appellate Body Report *EC- Asbestos* [2001], 123.

[243] E.g. Martin Banks, 'EU urged to end the "blockade" of Northern Cyprus' (*The Parliament,* 15 January 2013) <http://www.theparliament.com/latest-news/article/newsarticle/eu-urged-to-end-blockade-of-northern-cyprus/#.UrychNLuLzw > accessed 21 December 2013.

[244] Article 4(2) Council Regulation (EC) No 866/2004 of 29.4.2004 on a regime under Article 2 of Protocol No 10 of the Act of Accession as amended by Council Resolution (EC) No 293/2005 of 17 February 2005 (The Green Line Regulation) [2004] OJ L 85.

By applying the test of national treatment, ex Article III: 4 GATT, it should be assessed whether the products in question are *like* and if the treatment of those products is indeed different. It can be argued that the imposing of stricter labelling rules on the goods imported from the OPT to the EU place those goods in less advantageous competitive position than goods imported from the Northern Cyprus which are not subject to the same strict labelling requirement. In this regard, the competitive position is worsened mostly because of the increase of compliance costs, and partly as a result of factual obligation to pay customs duties. Furthermore, the imported products should be *like* within the meaning of Article III: 4 GATT. In order to establish *likeness*, the whole list of products imported from the territories at issue should be assessed under the likeness test introduced *supra*.

5.1.3.3 EU funding of projects in Northern Cyprus

As mentioned *supra,* the Commission Notice prohibits issuing any grants, prizes or financial instruments to Israeli entities in the OPT. In turn, the Turkish Cypriote Community is being subject to financial support of the EU. [245] Whilst the Commission Notice clearly makes a distinction between Palestinian entities (which are eligible for the EU financial support) and Israeli entities, the Regulation concerned with the financial support to Northern Cyprus does not provide for such distinction. In other words, the EU treats Palestinian and Israeli entities in the OPT differently, unlike the Hellenic and Turkish entities in occupied Northern Cyprus.

5.1.4 Non – Discrimination and MFN principles

5.1.4.1 The case with Western Sahara

Goods imported from Western Sahara and deliberately mislabelled as of Moroccan origin are *de facto* benefiting from the preferential treatment under the EU-Morocco AA. Unlike with Northern Cyprus and Israeli settlements, the EU uses the practical –trade approach in order to determine the origin of the goods produced/harvested in Western Sahara. Hence, it can be stated that the EU applies different policies in similar mislabelling cases, what leads to a discriminative and inconsistent approach. Moreover, concerning Western Sahara and Israeli settlements, the different practices might constitute a breach of the Most-Favoured- Nation Principle derived from Article I: 1 GATT.

However, it has to be recalled that the *de facto* administering control exercised by Morocco over the Western Sahara is recognised, at least not disputed, by the UN. Yet, the EU does not to take into consideration the alleged exercise of *de facto* control over the OPT by Israel. Moreover, *de facto* control of Israel over the OPT has not been recognised by the UN as such.

5.1.4.2 Possible Justifications under the WTO law

This paragraph will cover whether the labelling measure which is planning to be introduced by the EU could be justified under the GATT in case it constitutes a breach of WTO principles discussed *supra*.

[245] Council Regulation (EC) No 389/2006 of 27 February 2006 establishing an instrument of financial support for encouraging the economic development of the Turkish Cypriot community and amending Council Regulation (EC) No 2667/2000 on the European Agency for Reconstruction [2006] L 65/5.

Generally, WTO Members can justify the deviations from their WTO obligations under Article XX GATT. In this regard, Article XX(d) GATT states that the measures can be justified if they are necessary to secure compliance with laws or regulations which are inconsistent with the provisions of the GATT, *inter alia,* customs enforcement and the prevention of the deceptive practices. Accordingly, it should be determined at first, whether the obligatory labelling rules are purposed at ensuring compliance with customs laws of the EU or at the prevention of the deceptive practices. As the mandatory labelling would result in the prevention of products originating in Israeli settlements abusing the provisions of the EU – Israel PTA, it can be assumed that the legislation regarding the mandatory labelling is purposed at customs enforcement. In addition to that, the requirement of mandatory labelling is aimed at informing consumers about the true origin of the goods purchased. Despite the lack of clarity with regard to the term 'deceptive practice', it can be assumed that deliberately marking a wrong origin constitutes deceptive practice within the meaning of the WTO Specific provision.[246]

The second condition of Article XX (d) GATT is that the measures should be *necessary* in order to achieve the objectives pursued. In this regard, the term 'necessity' should be interpreted similar to Article XX (b) GATT, meaning that the contributions of the measure to fulfilment of the objectives must be balances with their impact on international trade. [247]As a matter of course, WTO Members should employ the least trade restricting measure, and use the alternatives which are reasonably available, meaning that they do not impose an undue burden on the regulating state. [248]

It is important to note that justification on basis of this provision would most likely not apply to the suggested breach of the principle of National Treatment.

Lastly, in order to be justified under Article XX, the labelling measure should not be applied in a manner which would constitute arbitrary or unjustifiable discrimination or a disguised restriction on international trade (the conditions introduced by the so-called *Chapeau* of Article XX GATT)[249]. As suggested *supra,* the treatment of mislabelled goods imported from Israeli settlements differs from the treatment of mislabelled goods imported from Western Sahara. This indicates that the practice of the EU should be considered as discriminatory and therefore not *Chapeau* consistent. Moreover, the labelling measure would indirectly restrict international trade. Hence, the conditions of Article XX GATT are not met. The overall conclusion therefore is presumably, that the EU cannot justify its labelling practice for goods originating from the OPT, on the condition that a breach of Article III: 4 GATT has been successfully established.

5.2 Do the measures at issue constitute a trade restriction/barrier and, if so, can it be justified under WTO law?

[246] See chapter 3 .
[247] Appellate Body Report *Korea — Measures Affecting Imports of Fresh, Chilled and Frozen* Beef [2000].
[248] Appellate Body Report *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* [2009], 318.
[249] Appellate Body Report *United States — Import Prohibition of Certain Shrimp and Shrimp Products* [1998], 150.

5.2.1 The TBT Agreement

The aim of this paragraph is to establish whether the purposed labelling measure breaches Article 2.1 of TBT Agreement.

Firstly, in order to establish a violation of this provision, the measure at issue should constitute a technical regulation within the meaning of the TBT. This is the case when a measure can be categorised as a document, which lays down product characteristics or related process and production methods, with which compliance is mandatory. [250] Labelling requirements applicable to a product, process or production method are considered to fall under the definition of a technical regulation. [251] In case the labelling regulation for goods produced in the OPT will indeed be introduced, it would fall under the definition of the technical regulation, as compliance with this document would be mandatory for the EU customs. Furthermore, a technical regulation within the meaning of the TBT Agreement may not be applied with a view to or with the effect of creating unnecessary obstacles to international trade[252]. This implies that a technical regulation should be non-discriminatory, pursuing a legitimate objective and necessary to achieve that objective.[253]As suggested supra, the labelling measure may be considered discriminatory if it treats the mislabelled products imported from the Israeli settlements differently than the mislabelled products imported from Northern Cyprus and the Western Sahara. With regard to the objective pursued, the Appellate Body found a consumer protection as a legitimate objective within the meaning of TBT. [254]Moreover, the prevention of deceptive practices is also listed as a legitimate objective of a technical trade-restrictive regulation. Turning to the necessity criteria, it should be established to what extend does the measure contributes to achievement of the stated objectives, as well as how grave the consequences of the non-fulfilment of the objectives pursued would be. [255]As the measure would introduce a mandatory labelling requirement, it would certainly contribute to consumer protection/information and to the prevention of deceptive practice of mislabelling imported goods. It is, however, disputable whether the consequences of non-fulfilment can be considered as grave, as it mostly likely will lead to the same situation as nowadays, bearing in mind the origin requirements of the EU-Israel AA. Accordingly, it can be argued that the future labelling regulation is unnecessary obstacle to trade within the meaning of Article 2.2 as it is applied in a discriminatory way. With regard to necessity, it should be established whether there is an alternative, less trade-restrictive measure available to achieve the objectives pursued. The existence of those alternatives will explicitly be tackled in Chapter 6.

The second condition for a breach of Article 2.1 TBT is the *likeness* of the products in question. In this regard, the term 'likeness' should be understood as relating to the nature and extend of a competitive

[250] Article 1 Annex 1 TBT.
[251]Article 1 second sentence Annex 1 TBT.
[252] Article 2.2 Annex 1 TBT.
[253] Above n 140, 686.
[254] Appellate Body Report *US-COOL,* 440.
[255] Appellate Body Report *US-Tuna II,* 322.

relationship between the products at stake. [256] Accordingly, this condition can be fulfilled if agricultural products imported from the OPT are *like* to the agricultural products harvested in the EU/Northern Cyprus or imported from Western Sahara. Finally, the settlements' products should be afforded treatment less favourable than the like domestic/ other country's products. As the mislabelled products imported from Northern Cyprus and Western Sahara are not subject to the same strict rules, it can be suggested that the EU treats goods imported from Israeli Settlements in a manner less favourable than the other *like* products. Hence, the proposed secondary legislation by the EU will most likely constitute a breach of the TBT.

5.2.2 Unnecessary/disproportionate burden

Following the findings of the Appellate Body in *US-COOL*, the verifications requirements must not impose a disproportionate burden on producers in comparison to the amount of information communicated to the consumers through the mandatory labelling requirements. [257]As compliance with the new labelling measure would imply stricter verification and control requirements, it should be established at first whether those requirements are proportional with the information given to the consumers. It should be recalled that pursuant to Article 17(1) of the Protocol 4 of the EU-Israel AA, preferential treatment of imported products is conditional upon submitting a movement certificate or a similar document. This implies that EU customs authorities should pay additional attention to the compliance with the rules of origin of this AA. Regarding the fact that the aim of the measure is to inform consumers about the exact place of origin of products, the requirements of verifications do not seem disproportional.

5.2.3 Justifications for possible breach of the TBT

It remains questionable whether the breach of the TBT Agreement can be justified by Article XX GATT. [258]In any event, the measure at stake most likely would not pass the test of Article XX GATT, as it would probably breach the *Chapeau* of this Article, meaning that is applied in a manner which would constitute an unjustifiable discrimination.

There is another possible view on the issue of discrimination. It can be argued that the products of Israeli Settlements are not *like* to those of Western Sahara and Northern Cyprus, as the backgrounds of the conflicts in those countries are different. As Israel has been explicitly condemned for its settlements practices by international law, it may be stated that the stricter treatment of mislabelled products imported from the OPT is justifiable on this ground. Moreover, the relevance and the circumstances of the political conflict in the Middle-East play an important role in the assessment of the current EU trade measures.

[256] Above n 140,687.
[257] Appellate Body Report *US-COOL,* 347.
[258] Above n 140, 687.

However, this argument can be refuted by stating that the *likeness* requirement is applicable with regard to the features of the products in questions and the final consumers/markets, and not to the political situation causing the illegal practice.

On the other hand, such view would indicate the highly political character of the measure at issue, which is absolutely not compatible with the rationale of WTO. The justification of the trade-restrictive measure on this ground would imply the probable *political* purpose of it, namely explicitly informing the international community that the EU does not support the building with the EU settlements. The use of trade regulations with a purpose of distributing a political message might not only circumvent the obligations of WTO Members, but also nullify the purpose behind the WTO.

The following chapter will introduce alternative measures and will assess if they could achieve the objectives pursued in a less trade-restrictive manner.

6. Which other measures than mandatory labelling could be suggested to prevent the abuse of the free trade zone between Israel and the EU by the European importers?

6.1 Objectives of the labelling regulation

6.1.1 Prevention of deceptive/misleading practices

As mentioned supra, one of the conditions for trade restrictive measure to be WTO compatible is its necessity for the achievement of the legitimate objective pursued. As false labelling is considered an illegal practice under EU and WTO law, the prevention of such practices can be considered as a legitimate objective.[259]Although the mandatory labelling requirement would indeed contribute to the achievement of this objective, it can be argued that this measure is superfluous, as various AAs between the EU and third countries already introduce a similar clause with regard to the origin of those products. [260] The mislabelling of goods with regard to their origin violates in the first instance the provisions of those agreements.

6.1.2 Consumer protection/informing

Another objective which can be derived from the labelling measure is safeguarding consumers' right to be informed about the properties of purchased goods, including the true origin of products. Within the EU context, this objective is linked with the prevention of misleading practices. [261]However, it is questionable whether the origin indication is indeed likely to distort the economic behaviour of the *average consumer*. [262] In this regard, it is important to note that mislabelling is not directed to a particular group of consumers, i.e. those who explicitly do not support the settlements. However, there is no other easier alternative to provide consumers with the information then stating the origin of goods on the products labels. Consumers get the relevant information directly during the purchase without making any additional research, and are able to take their decision before the purchase is made. This is supported by the case law of the ECJ, which considered rules of labelling a less restrictive measure to ensure effective consumers protections. [263] As mandatory labelling implies that consumers can make a responsible choice, such measure will be beneficial for competition. This matter will be discussed further in paragraph 6.2.1.

6.1.3 Prevention of customs duty losses

The primary purpose of mislabelling of settlements' goods is allowing them to benefit from PTAs rules, as the imported goods escape the customs duties at the EU borders. In this regard, the contribution of

[259] See Chapter 4 for further explanation .
[260] See the relevant protocols in the AAs with Israel, Cyprus and Morocco.
[261] Food Labelling Directive.
[262] Article 5(2) (b) Unfair Commercial Practice Directive.
[263] *Rau,* above n 71, paras 12, 17; *Jean-Pierre Guimont v France*, above n 72, 33.

the labelling measure should be assessed by the level of compliance with it. Presumably, compliance will increase in case of introduction of sanctions for the breach of the rules of labelling.

Furthermore, it is crucial to which parties the sanctions will be addressed. The parties involved in the importing process are the Israeli exporters, who provide wrong information about the origin of goods, and the EU importers and retailers, who omit to verify the origin of imported products/deliberately issue a wrong certificate of origin. Presumably, sanctioning the EU retailers would be more efficient than sanctioning Israeli exporters.

Next to that, it is worth to recall that one of the aims of the CCC is the so-called prevention of origin shopping purposed at circumventing the customs rules.

6.1.4 Political message

Finally, the last possible objective of labelling measure is the expression of the EU's disapproval of the settlements building. Allegedly, the proposed EU measure creates a dilemma for Israel whether to continue the occupation of West Bank, as the maintenance of settlements would put under the question mark Israel's trade prospective with the international community. [264]However, this objective cannot be considered valid for the following reasons. Firstly, the EU has already expressed its position with regard to the settlements in various occasions, i.e. the *Brita* case. Secondly, the measure does not contribute to achievement of the objective pursued, but rather contradicts the EU's view, as it allows trade with settlements. Yet, the measure at stake is indeed less trade restrictive than the bans on the settlements' products. Finally, the measure is discriminatory, as the EU does not provide for comparable labelling rules with regard to (future) mislabelled products imported from other States.

It is also questionable to which extent political considerations may influence international trade. Although both the WTO and the EU legal orders have obligations to comply with international law, they are also required to contribute to development of international trade. In my opinion, it would not be reasonable if political considerations are allowed to overrule the core international trade objective, such as ensuring of fair competition. [265] In this regard, a trade restrictive measure can only then be justified if it is meant to achieve the objectives which imply safeguarding or increase of competitive conditions in a fair way.

6.2 Alternative measures

6.2.1 The wording of the label

[264] Ben Lynfield, 'EU to label products from Israeli settlements'(*The Telegraph, 23 July 2013)* <http://www.telegraph.co.uk/news/worldnews/middleeast/israel/10198109/EU-to-label-products-from-Israeli-settlements.html > accessed 7 January 2014.

[265] In this regard, see also *US - COOL* which paid lots of importance of modifying conditions of competition for the measure to be WTO compatible.

By issuing a mandatory labelling measure, it is important to establish how the place of origin will be referred to. The indication 'made in Occupied Palestinian Territory' seems to be compatible with the international designation of the territories at stake. However, such reference might indirectly have a negative influence on the consumers' choice, especially when consumers are not well-informed about the Middle- East conflict. The word 'occupied' is thus likely to be confusing, and therefore it might affect the competitive position of the products. On the other hand, the indication 'made in West Bank/Eastern Jerusalem/Gaza Strip' may result in the situation that the products at stake will be confused with the products made in the same territories by *Palestinian* producers. The designation 'made in Israeli settlements' might appear as a neutral solution. Yet again, such indication may not be sufficient for uninformed consumers. Moreover, such label does not provide an origin indication, meaning that it does not make clear on which *territory* are the goods produced. It may be suggested that the most convenient indication of the territories would sound like 'made by Israeli producers in the territories of West Bank/Eastern Jerusalem/Gaza Strip'. Such wording is politically neutral and at the same time contains sufficient information with regard to the place of origin.

6.2.2 Separate PTA with Israeli settlements

Goods produced in the OPT can neither be considered of Israeli origin, nor can they reasonably be granted Palestinian origin. In this regard, a separate agreement between the EU and the Israeli settlements in the OPT might be an alternative to a mandatory labelling measure.

It can be assumed that the existence of separate agreement would imply that the producers would no longer be interested in mislabelling their goods as of Israeli origin, unless the new agreement would introduce conditions less favourable than the EU-Israel AA. Moreover, the issue regarding the indication of the disputed territories on the labels will be solved. Accordingly, the objectives of the measures at issue would be achieved in a less trade restrictive way than by the separate labelling measure.

Yet, the disadvantage of this alternative is that the adoption of such agreement is likely to be seen as implicit recognition of the Israel's authority over the disputed territories by the EU. This contradicts with the EU's position in the Middle East Conflict. Therefore, this measure would indirectly be a strong political instrument, which might result in breach of the EU's and or Member States obligations under the International law.

6.2.3 Labelling regulation for products imported from Northern Cyprus and Western Sahara

Another possible alternative is expanding the scope of mandatory labelling requirement to products imported from other States, such as Northern Cyprus and Western Sahara. This would solve the alleged discriminatory character of the labelling measure, and would reach the objective pursued with regard to the mislabelled products other than those from Israeli settlements.

However, such alternative might not be compatible with the policies in the EU with regard to the reunification of Cyprus. Moreover, the labelling requirement should still be compatible with WTO Law,

meaning that the questions with regard to WTO compatibility of mandatory labelling requirement in general are still remaining open.

6.2.4 Import of the goods via Israel/ pan cumulation

As suggested in first two chapters, determination of the origin of goods imported from Israel which contain/are made of products originating in the OPT is highly problematic due to the practical situations and ambiguities of the applicable rules. Therefore, it might be suggested that separate rules will be adopted with regard to the use of pan cumulation by determination of origin of products in question. This opinion is supported by the Commission's proposal referred to in Chapter 2, to state the country of origin of main ingredients in case those originate in different place(s) than the finished products.

6.2.5 Sanctions

Another way of achieving the objectives at stake is the enforcement of a strong sanctioning mechanism against the import of mislabelled goods. The European Commission describes sanctions as 'an instrument of a diplomatic or economic nature which seeks to bring about a change in activities or policies such as violations of international law or human rights or policies that do not respect the rule of law or democratic principles'.[266]The sanctioning measures may target the governments of third countries, non-state entities or certain individuals, and include, *inter alia,* specific or general trade restrictions and boycotts. [267]

However, it should be taken into consideration that sanctioning is the ultimate measure, and therefore it is more trade restrictive than the mandatory labelling requirement. Accordingly, even though sanctioning might achieve the objectives pursued more effectively, it cannot be considered as a valid alternative within the meaning of WTO Law as it is per definition more trade restrictive than the measures at issue.

[266] European Commission – Restrictive measures [2008] <
http://eeas.europa.eu/cfsp/sanctions/docs/index_en.pdf> accessed 6 February 2014, 1
[267] *Ibid.*

7. Conclusion

Despite the illegal status of Israeli settlements under International Law, the EU maintains trade with Israeli entities in the OPT. Goods imported from the OPT to the EU are being mislabelled as of Israeli origin, illegally benefiting from the EU – Israel AA. Such practice violates consumers' right to be informed about the origin of the products they are about to purchase, and results in the loss of customs duties in the EU. The EU intends to adopt a labelling measure, which would impose the requirement concerning labelling according to origin of goods imported from the OPT to the EU. The other measure discussed in this paper, namely the Commission Notice, prohibits any funding of the Israeli entities in the OPT territories.

For the purpose of labelling it is crucial whether goods produced in the OPT can be considered as of Israeli origin. The EU legal framework with regard to rules of origin consists of secondary legislation, i.e. the regulation establishing the Community Customs Code and the PTAs with Third States. For the purpose of determining whether goods at issue can be considered as of Israeli origin, the Protocol 4 of EU-Israel AA applies. As it appears from the Articles of that Protocol, the EU-Israel AA covers only goods produced on the territory recognized as Israel, and thus not the OPT.

According to Unfair Commercial Practice Directive, wrong indication of the origin of goods imported from the OPT to the EU can be considered as misleading if the choice of an *average consumer* would be different if the correct information was made available. On the other hand, this can be stated only if this information has such an impact on an average consumer. It is, however, questionable if consumers influenced by the indication of origin in this particular case fall under the scope of an average consumer pursuant to the Directive at stake.

Comparable situations of mislabelling took place with goods imported from Northern Cyprus and Western Sahara. The approach taken by the EU towards products imported from the OPT and Northern Cyprus is quite similar and follows the ECJ case law *Anastasiou I* and *Brita*: goods originating in those territories do not fall under the preferential treatment conferred by the AAs with Cyprus and Israel. Yet, the EU does not require a mandatory labelling of the origin by importation of goods from Northern Cyprus. Furthermore, the EU even stimulates trade with Northern Cyprus in the light of the reunification of Cyprus, i.e. by funding Turkish entities. In turn, goods imported to the EU from Western Sahara and mislabelled as of Moroccan origin are granted preferential treatment by the EU.

Within the WTO system, the rules of origin are codified in the ARO, and are similar to a large extent to those of the EU system. Relevant literature introduces two approaches for determination of products' origin, namely the practical – trade approach, which is more compatible with the WTO principle of trade liberalisation, and political –sovereignty approach, used by the EU, *inter alia,* in determination of the origin of settlements' goods. The purpose of labelling under the WTO Law corresponds to that of EU Law, and is mainly purposed at providing consumers with correct information. However, whilst the rationale behind labelling under WTO Law is to facilitate international trade, label of origin is used by the EU to avoid free-riding and abuse of rights.

As it appears from the WTO case law, a labelling requirement is in breach of the TBT agreement when it constitutes a technical regulation, which modifies competitive conditions on the market by according to the imported products treatment less favourable than the domestic products. However, such practice is not prohibited if it pursues a legitimate objective. In principle, consumer protection/information can be considered as such, provided that the measure at issue contributes to the achievement of that objective and does not constitute a disproportional burden for the importers.

The measures introduced/to be introduced by the EU are purposed at various objectives. Whereas the Commission Notice aims to confirm the view of the EU regarding the Israeli settlements, and to stop the financial support of the economic activities conducted by Israeli entities in the OPT, the proposed labelling regulation/guidance primarily prevents the loss of customs duties resulting from the import of mislabelled goods, and informs consumers about the origin of certain products. As the previously mentioned measure requires an additional compliance check, it presumably affects international trade.

With regard to the possible breach of NT principle, it can be argued that the imposing of stricter labelling rules on the goods imported from the OPT to the EU puts those goods in less advantageous competitive position than goods imported from the Northern Cyprus, as the last mentioned are not subject to any strict labelling requirement. Moreover, the Commission Notice ensures that Palestinian and Israeli entities in the OPT are treated differently, unlike the Hellenic and Turkish entities in Northern Cyprus. Presumably, the breach of the NT and the MFN principles also follows out the practice of the EU towards mislabelled goods imported from the Western Sahara. Furthermore, the alleged breach of those principles, OPT cannot be justified with Article XX GATT.

Turning to the breach of the TBT Agreement, it appears that mislabelled products imported from Northern Cyprus and Western Sahara are not subject to the same strict rules than mislabelled products imported from the OPT. Therefore, the EU treats goods imported from Israeli Settlements less favourable than the other *like* products. Hence, the proposed EU measures would most likely violate the TBT Agreement. As the measures at stake constitute unjustifiable discrimination, they would not pass the test of the *Chapeau* of Article XX GATT and thus would not be justified by this Article.

With regard to the alternative, less trade-restrictive measure, it can be suggested that, bearing in mind different objectives pursued by the measures at issue, an introduction of similar labelling measures with regard to products imported from Northern Cyprus and Western Sahara would be the most beneficial solution.

8. Bibliography

Legislation: United Nations

- Vienna Convention on the Law of Treaties
- Convention (IV) relative to the Protection of Civilian Persons in Time of War
- Convention (IV) respecting the Laws and Customs of War on Land ; Annex: Regulations concerning the Laws and Customs of War on Land
- United Nations Resolution 181 (1947)
- United Nations Resolution 242 (1967)
- United Nations Security Council Resolution 289 (1971)
- United Nations Security Council Resolution 478(1980)
- United Nations Security Council Resolution 550 (1984)

Legislation: World Trade Organisation

- Agreement on Rules of Origin
- Agreement on Technical Barriers to Trade
- General Agreement on Tariffs and Trade

Legislation: European Union

- Treaty on the Functioning of the European Union
- Directive 2000/13/EC of the European Parliament and of the Council of 20 March 2000 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs ('Food Labelling Directive') [2000] OJ L 109/29
- Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') [2005] OJ L 149/22
- Regulation (EU, EURATOM) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, EURATOM) No 1605/2002 [2012] OJ L 298/1
- Council Regulation (EC) No 510/2006 of 20 March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs [2006] OJ *L 093*
- Council Regulation (EC) No 2913/92 of 12 October 1992 establishing the Community Customs Code ('CCC') [1992] OJ L 302
- Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code [1993] OJ L 253

- Council Regulation (EC) No 866/2004 of 29.4.2004 on a regime under Article 2 of Protocol No 10 of the Act of Accession as amended by Council Resolution (EC) No 293/2005 of 17 February 2005 (The Green Line Regulation) [2004] OJ L 85
- Council Regulation (EC) No 389/2006 of 27 February 2006 establishing an instrument of financial support for encouraging the economic development of the Turkish Cypriot community and amending Council Regulation (EC) No 2667/2000 on the European Agency for Reconstruction [2006] L 65/5
- Commission Notice: Guidelines on the eligibility of Israeli entities and their activities in the territories occupied by Israel since June 1967 for grants, prizes and financial instruments funded by the EU from 2014 onwards [2013] OJ C 205/05

EU Association Agreements

- 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, (' EU-Israel AA') L 147/3, 21 June 2000
- Protocol 4 concerning the definition of the concept of originating products and methods of administrative Cooperation, L 147/50, 21 June 2000
- Decision No 2/2005 of the EU-Israel Association Council of 22 December 2005 amending Protocol 4 to the Euro-Mediterranean Agreement, concerning the definition of the concept of 'originating products' and methods of administrative cooperation [2006] OJ L 20/1
- Agreement establishing an Association between the European Economic Community and the Republic of Cyprus (EC-Cyprus AA) [1973] OJ L 133; Annex I on Implementation of Article 3(1)
- Protocol concerning the definition of the concept of 'originating' products and methods of administrative cooperation, available at http://wits.worldbank.org/GPTAD/PDF/archive/EC-Cyprus.pdf
- Note on Article 1 of the Protocol concerning the definition of the concept of 'originating' products and methods of administrative cooperation.
- Euro-Mediterranean Interim Association Agreement on trade and cooperation between the European Community, of the one part, and the Palestine Liberation Organisation (PLO) for the benefit of the Palestinian Authority of the West Bank and the Gaza Strip ('EU-PLO AA') [1997]L 187/3; Protocol 3
- Commission Explanatory Notes Concerning the Pan-Euro-Mediterranean protocols on Rules of Origin [2007] OJ C 83/01.

Case Law: World Trade Organisation

- WTO Appellate Body Report *United States — Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/AB/R, WT/DS386/AB/R, adopted 29 June 2012
- WTO, Appellate Body Report *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, adopted 16 May 2012

- WTO Appellate Body Report *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, 21 December 2009
- WTO Appellate Body Report, European Communities — Measures Affecting Asbestos and Asbestos Containing Products, WT/DS135/AB/R adopted 5 April 2001
- WTO Appellate Body Report *Korea — Measures Affecting Imports of Fresh, Chilled and Frozen* Beef, WT/DS161/AB/R, WT/DS169/AB/R, adopted 11 December 2000
- WTO Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, adopted 6 November 1998
- WTO Appellate Body Report, Japan – Taxes on Alcoholic Beverages, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996

- WTO Panel Report, Appellate Body Report *United States — Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/R, WT/DS386/R, adopted 18 November 2011
- WTO, Panel Report *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products,* WT/DS381/R, adopted 11 September 2011
- WTO Panel Report, *United States — Rules of Origin for Textiles and Apparel Product,* WT/DS243/R, adopted 20 June 2003
- WTO Panel Report, *Japan Taxes on Alcoholic Beverages*, WT DS8/R,WT/DS10/R,WT/DS11/R, adopted 11 July 1996

Case Law: European Union

- ECJ, Case C-386/08 *Firma Brita GmbH v Hauptzollamt Hamburg-Hafen* [2010] ECR I-01289 ; Opinion AG *Bot* delivered on 29 October 2009
- ECJ, Joined cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-06351
- Case C-448/98 *Jean-Pierre Guimont v France* [2000] ECR *I-10663*
- ECJ, Case C-366/98 *Yannick Geffroy and Casino France SNC v France* [2000] ECR I-06579
- ECJ, Case 12/86 *Demirel* [1987] ECR 3719
- ECJ, Case C-432/92 *The Queen v Minister of Agriculture, Fisheries and Food, ex parte S. P. Anastasiou (Pissouri) Ltd and others (Anastasiou I)* [1994] ECR *I-03087*
- ECJ, Case C - 261/81 *Walter Rau Lebensmittelwerke v De Smedt PVBA [1982] ECR 03961*
- ECJ, Case C-120/78 *Rewe-Zentral AG/Bundesmonopolverwaltung für Branntwein* ('Cassis de Dijon') [1979] ECR *00649*
- ECJ, Case 26-62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963]

Textbooks

- Bernard, C. *The Substantive Law of the EU: the Four Freedoms* (3rd edn, Oxford University Press 2010)
- Chalmers, Davies and Monti, *European Union Law (*2nd edn, Cambridge University Press 2010)

- Imagawa, H.,Vermulst, E. 'The Agreement on Rules of Origin' in Patrick Macrory, Arthur Appleton, and Michael Plummer (eds.) *The World Trade Organisation: Legal, Economic and Political Analysis* (Springen New York 2005)
- Inama, S., ' Nonpreferential Rules of origin and the WTO Harmonisation Program' in by Bernard Hoekman, Aaditya Mattoo and Philip English *(eds), Development, Trade and the WTO* (Washington, DC : The World Bank 2002)
- Matsushita, M., Schoenbaum, T., and Mavroidis, P.: *The World Trade Organisation: Law, Practice, and Policy* (Oxford University Press 2006)
- Mavroidis, P. *Trade in Goods*, (Oxford University Press 2012)
- Moell, C. *Rules of Origin in the Common Commercial and Development Policies of the European Union* (Lund : Juristförlaget i Lund 2008)
- Pieters, K. *The integration of the Mediterranean Neighbours into the EU Internal Market* (TMC Asser Press 2010)

Journal Articles

- Berends, G. 'Fear and Loading in West Bank/Gaza: The State of Palestinian Trade' [2008] 42(1) 154 *JWT*
- Hirsch, M. 'Rules of Origin as Trade or Foreign Policy Instruments? The European Union Policy on
- Koutrakos,P. 'Legal Issues of EC-Cyprus trade relations' [2003] *International and Comparative Law Quarterly (UK)*489
- Lans, I., Ittersum, K., Cicco, A., Losseby, M. ' The Role of the Region of Origin and EU Certificates of Origin in Consumer Evaluation of Food Products' [2001] *28(4) European Review of Agricultural Economics*
- Products Manufactured in the Settlements in the West Bank and the Gaza Strip' [2002] Fordham International law Journal 26(3)
- Puccio, L. 'Understanding EU Practice in Bilateral Free Trade Agreements : Brita and Preferential Rules of Origin in International Law ' [2011] 36(1) European Law Review
- Talmon, S. 'The Cyprus Question before the European Court of Justice' [2001]*12(4) EJIL* 727

Papers and Related Documents

- United Nations Security Council, *Report of the Secretary-General on the situation concerning Western Sahara* (19 February 2002) S2002/178
- The Draft of International Trade Organisation Charter [1947], Press Release No. 291
- WTO Secretariat report [2012]WT/TPR/S/272
- WTO document G/ADP/Q1/ISR/15.
- WCO Secretariat report Doc. 39.166
- Explanation rules of origin, available at www.wto.org

- Recommendation on Marks of Origin, 7S/30; Working Party Report on 'Marks of Origin', L/912/Rev.1, adopted 21 November 1958, 7S/117
- European Commission (EEC) Green Paper on the Future of Rules of Origin in Preferential Trade Arrangements [2003] 787 final
- European Commission (EEC) Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee [2005]100 final.
- Israel-Palestinian Interim Agreement on the West Bank and Gaza Strip ('Oslo Interim Agreement')[1995], <
- http://israelipalestinian.procon.org/view.background-resource.php?resourceID=000921 > accessed 5 December 2013.
- EU DG for External Policies of the Union (May 2011) Policy Briefing: *Customs issues involving the Occupied Palestinian Territories*, < http://www.europarl.europa.eu/RegData/etudes/briefing_note/join/2012/491444/EXPO-AFET_SP(2012)491444_EN.pdf> accessed 6 February 2014.
- European Parliament Written Declaration on labelling goods from the Occupied Palestinian Territories, [2010] 0064
- European Commission (EEC) Working Paper on Justification of the Choice of a Value Added Method for the Determination of the Origin of Processed Products [2005] TAXUD/1121/05 Rev.1 – EN
- Proposal for a Regulations of European Parliament of the Council on the provision of food information to consumers [2008] 40 final
- European Commission DG Health and Consumer Protection, *Labelling: competitiveness,*
- *consumer information and better regulation for the EU* (A DG SANCO Consultative Document, February 2006) <
- http://ec.europa.eu/food/food/labellingnutrition/betterregulation/competitiveness_consumer_info.pdf> accessed 3 November 2013
- European Parliament, Parliamentary questions (14 July 2011) < <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=P-2011-001023&language=SL> accessed 6 February 2014
- Jord Hollenberg, *Rules of Origin in the WTO and in Other Free Trade Agreements - An Overview* (Seminar Paper of Suffolk University Law School 2003)

Miscellaneous

- Briefing paper *'EU Trade with Israeli Settlements'* August 2012, < http://www.qcea.org/wp-content/uploads/2012/02/EU-Trade-with-Israeli-Settlements1.pdf> accessed 6 February 2014
- 'Product of illegal Israeli Settlement' made in Occupied Palestinian Territory, *Open Shuhada Street submission to the department of Trade and Industry on General Notice 379 of 2012,* [2012]
- European Commission Financial Programming and Budget, < http://ec.europa.eu/budget/explained/budg_system/financing/fin_en.cfm> accessed 8 January 2014

- Reuters, '22 groups call for EU ban on Israeli settler products' (WorldNews, 30 October 2012) < http://www.ynetnews.com/articles/0,7340,L-4299222,00.html> accessed 20 April 2013
- *Settlement products – the issues and advocacy messages in relation to the European Union',* a paper for use in the European Union developed by Quaker Peace and Social Witness, UK, participants in World Week for Peace in Palestine Israel,< http://www.sadaka.ie/Files/Settlement_Products_EU_issues.PDF > accessed 6 February 2014
- Ashton pushes Europe to label Israel settlement products' (*Middle East Online*, 23 July 2013) <http://www.middle-east-online.com/english/?id=60295> accessed 7 January 2014
- Ben Lynfield, 'EU to label products from Israeli settlements'(*The Telegraph*, 23 July 2013) .<http://www.telegraph.co.uk/news/worldnews/middleeast/israel/10198109/EU-to-label-products-from-Israeli-settlements.html > accessed 7 January 2014
- Eckart Naumann, 'Rules of Origin in EU-ACP Economic Partnership Agreements' [2010] ICTSD Issue Paper No. 7 1
- USDA Foreign Agricultural Service, *FAIRS Subject Report Proposal for a new EU Food Labeling Regulation* (Global Agriculture Information Network 2008)
- USDA Foreign Agricultural Service, Food and Agricultural Import Regulations and Standards – Narrative FAIRS Country Report (Global Agriculture Information Network 2009)
- Barak Ravid 'Catherine Ashton: Israeli settlement products to be labeled in EU by end of 2013' (*Haaretz, 23 July 2013)* <http://www.haaretz.com/news/diplomacy-defense/.premium-1.537315 > accessed 10 October 2013
- *Handbook rules of origin* < http://www.wcoomd.org/en/topics/origin/overview/~/media/D6C8E98EE67B472FA02B06BD2209DC99.ashx> accessed 6 February 2014
- Martin Banks, 'EU urged to end the 'blockade' of Northern Cyprus' (*The Parliament*, 15 January 2013) <http://www.theparliament.com/latest-news/article/newsarticle/eu-urged-to-end-blockade-of-northern-cyprus/#.UrychNLuLzw > accessed 21 December 2013