



# BULLETIN

No. 41 (117) • March 11, 2010 • © PISM

Editors: Sławomir Dębski (Editor-in-Chief), Łukasz Adamski, Mateusz Gniazdowski,  
Beata Górka-Winter, Leszek Jesień, Agnieszka Kondek (Executive Editor),  
Łukasz Kulesa, Marek Madej, Ernest Wyciszekiewicz

---

## Court of Justice Ruling in Brita Case: Implications for EU-Israeli Relations

by Rafał Kownacki

*Under the Court of Justice of the European Union's 25 February 2010 ruling in the Brita case, products originating in the West Bank do not fall within the territorial scope of the EU's association agreement with Israel and, as such, do not qualify for preferential treatment under that agreement. Coming as a manifestation of judicial control of EU-concluded agreements' conformity with international law, the verdict also provides for member states an indication of how to conduct trade policy towards Israel and Palestinian territories.*

The court's ruling, which de facto questions the Israeli approach to the legal status of Jewish settlements on Palestinian Autonomy territories (as contravening international law) dovetails with the EU practice of regarding the Palestinian territories as occupied, with all its legal and political implications.

**Occupied Palestinian Territories.** Following the capture of Palestinian lands by Israeli troops in 1967, the Western Bank (including eastern Jerusalem) and the Gaza Strip became occupied territories within the meaning of international law (Article 42 of the Hague Convention of 1907, known as the "Hague Regulations"). And given Israel's ratification in 1951 of the Fourth 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, the legal status of the Palestinian areas was confirmed by the International Red Cross. Similarly, the UN Security Council, in its Resolution 242 of 1967, emphasised the inadmissibility of territorial acquisition by war and it recognised as occupied territories the area taken by Israel after the Six Days War. In its advisory opinion of 9 July 2004, the International Court of Justice said the Palestinian territories east of the so-called Green Line should be regarded as occupied (para. 101); it found these territories to be external to integral Israeli territory and confirmed the fact of Israel's having effective control for them (para. 111).

In the light of international law, the Israeli land forces' pullout from the Gaza Strip in 2005 does not yet mean an end to occupation. The 17 January 2006 report from the UN Commission on Human Rights emphasises that in order to establish the end to an occupation, the effective control of a given area must be lost (ICJ ruling in the List case). And Israel, despite the withdrawal of its land forces, still exercises control of the Gaza Strip. Today, permanent military presence is no longer a necessary condition for ascertaining the effectiveness of control over another's territory. The sonic booms generated by Israeli jets and missile attacks provide evidence of a continued Israeli occupation, in the same way as the holding of several hundred Palestinian prisoners from the Gaza Strip, who would have to be released by Israel if the occupation indeed ended (Article 77 of the Fourth Geneva convention). Control of the buffer zone and electricity supplies provide more evidence of the occupation.

The motive behind Israel's reluctance to recognise the Palestinian territories as occupied is to prevent the Palestinians from taking advantage of the guarantees provided under international humanitarian law, and especially the prohibition of displacement, whether mass-scale or individual, and deportation. The ban derives not only from the Geneva Convention, but also from Article 8.2 of the ICC Charter. An Israeli recognition of the occupation would only confirm the illegal nature of transfer of part of its own civilian population into the occupied territories (Article 49 of the Geneva Convention). According to the ICJ advisory opinion of 9 July 2004, that would also necessitate putting down the so-called "security barrier" and getting rid of a special legal regime for the Jewish settlements, which benefit from tax exemptions and enjoy priority access to water and energy supplies. And according to an advisory opinion of the International Criminal Tribunal for the Former Yugoslavia

(Krajišnik case), where people in occupied territories abandon their houses as a result of severe living conditions having been created by the occupying power, this constitutes a forcible transfer, i.e. a war crime.

**Brita Ruling.** The proceedings at the Court of Justice of the European Union in the Brita case (C-386/08) were initiated in response to a prejudicial question. The German sparkling-water company Brita ordered its Israeli supplier to provide accessories and syrup, which were produced at Mishor Adumin in the West Bank, east of Jerusalem. Brita informed the German customs authorities that the goods originated in Israel and, on that basis, it asked for their preferential customs treatment under the 20 November 1995 association agreement between the European Communities and their member states on the one hand and Israel on the other. Suspecting that the products originated in the occupied territories, the German customs authorities asked their Israeli counterparts to produce evidence to the contrary. The latter, though, only confirmed that the goods in question originated in the area under Israeli responsibility. In these circumstances, the German authorities refused to grant the preferential treatment, because the origin of the goods could not be established conclusively. Brita appealed against the decision of the authorities to the tax and customs court (Finanzgericht) in Hamburg, which in turn asked a prejudicial question to the Court of Justice whether the preferential treatment provided for under the EC–Israel Agreement may be granted in respect of goods which have been manufactured in the occupied Palestinian territories and which the Israel authorities have confirmed as being of Israeli origin. The Luxembourg court noted that in addition to the agreement with Israel, there is also a binding provisional association agreement of 24 February 1997 between the European Community and the Palestine Liberation Organisation, applicable to the Palestinian Autonomy. Each of the two association agreements has its own territorial scope: the EC–Israel Agreement applies to the territory of the State of Israel, as recognised under international law, whereas the EC–PLO Agreement applies to the territory of the West Bank and the Gaza Strip. Under international law, an obligation cannot be imposed upon a third party without its consent. The EC–Israel Agreement may not be interpreted in such a way as to compel the Palestinian Authorities to waive their right to exercise the competence conferred upon them by virtue of the EC–PLO Agreement. Consequently, only the Palestinian Authorities can issue customs documents providing proof of origin for goods manufactured in the West Bank and the Gaza Strip, even where such goods are made in Jewish settlements regulated by a special regime under Israeli law. In the light of international law, all occupied territories must be treated as a single whole. Only in this way can the Palestinian Autonomy's territorial integrity and the Palestinians' right to self-determination within a uniform state system be respected.

The Brita ruling, just as the UK government's 2009 guidelines on marking goods manufactured in Jewish settlements in the occupied territories, are wrongly regarded in Israel as hostile political decisions. Israel will likely seek reversing the CJ of EU ruling at the national level, just as it did in response to the ICJ's advisory opinion on the illegality of the security wall (in its 15 September 2005 ruling, the Israeli Supreme Court contested that opinion and found it non-binding).

**Conclusions.** The ruling in the Brita case offers an example of the control of EU-concluded agreements' conformity with general international law. Member states governments must see to it that products originated in Jewish settlements in the West Bank do not enter the EU's single market on preferential terms. The ruling points out that Jewish settlements in the occupied territories do not conform with international law. Consequently the EU member states should impose the requirement of legible graphical markings on products imported from Israel and the Palestinian territories, to enable consumers to determine the place of origin. While supporting the peace process, the European Union should remind the Israeli government about the need to observe international humanitarian law and human-rights commitments in respect to the Palestinian population of the occupied territories.