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## **EU Differentiation: Past, Present, and Future**

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The Israeli-Palestinian conflict continues to be one of the most longstanding pillars of EU foreign policy. In 1980, the EU's predecessor – the European Economic Community (EEC) – was amongst the first international actors to acknowledge the Palestinian right to self-determination.<sup>1</sup> It was also in Europe that the basis for international diplomatic engagement to solve the conflict was laid – first via the Madrid peace conference in 1991, and then through the series of backchannels that would grow into the Oslo peace process. But since then, Europe has steadily relinquished its leading political role, choosing instead to support US-led Middle East Peace Process (MEPP). This approach has sought to use the EU's strengths as an economic and normative community of now 743 million citizens to support Israeli and Palestinian moves towards a two-state solution. To Palestinians, the EU provided financial support to build up the foundation for statehood pending an end to Israel's occupation of the West Bank (including East Jerusalem) and Gaza Strip (OPT). To Israel, the EU promised increased economic integration in return for progress towards a negotiated peace agreement.

However, the EU's capacity to act effectively in support of Israeli-Palestinian peace has been limited by deep divisions between member states as well as a general reluctance to rock the MEPP boat or otherwise disrupt bilateral ties with Israel. The result has been the blockage of one of the EU's main foreign policy making bodies – the European Foreign Affairs Council (FAC) attended by EU foreign affairs ministers – which rely on member state unanimity to issue decisions. Consequently, EU policy has failed to keep up with negative developments on the ground and in the diplomatic arena that have slowly consolidated “a one-state reality of unequal rights, perpetual occupation and conflict.”<sup>2</sup>

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<sup>1</sup> “Venice Declaration” 13 June 1980, available at:

[http://eeas.europa.eu/archives/docs/mepp/docs/venice\\_declaration\\_1980\\_en.pdf](http://eeas.europa.eu/archives/docs/mepp/docs/venice_declaration_1980_en.pdf)

<sup>2</sup> “Statement by High Representative/Vice-President Federica Mogherini on the “Regularisation Law” adopted by the Israeli Knesset”, EEAS Press Release, 7 February 2017, available at:

[https://eeas.europa.eu/headquarters/headquarters-homepage\\_en/20104/Statement%20by%20High%20Representative/Vice-](https://eeas.europa.eu/headquarters/headquarters-homepage_en/20104/Statement%20by%20High%20Representative/Vice-)

Despite the two-state solution coming under unprecedented threats from the US and Israel, and the deterioration on the ground in the OPT, in particular Gaza, there have been no substantive FAC Conclusions relating to the Middle East Peace Process since January 2016.<sup>3</sup> Even the high-profile French-led peace initiative and the adoption of UN Security Council resolution 2334 in December 2016 – which endorsed EU positions such as its differentiation requirement – failed to boost European unity.

While it is true that EU has proved both reluctant and unable to undertake real action to advance its vision of a two-state solution, its policies based on international law should at least be credited with helping to keep a spotlight on the issue of Palestinian statehood and Israeli violations on the international. The EU's legally-necessitated differentiation measures have to a certain extent also kept alive the notion of the pre-June 1967 Green Line in international minds as the basis for a Palestinian state, and inspired a UN Security Council resolution refusing to acknowledge any changes to the 1967 lines other than those agreed to by the parties. Through its differentiation measures, the EU has at times also successfully pushed back on Israeli efforts to erase the 1967 lines, and compelled Israeli authorities to alter their behaviour by repeatedly accepting to exclude the settlements from their bilateral agreements.

Amidst the current policy backsliding by the Trump administration and its efforts to undermine the saliency of international law and policy positions, the continuation of the EU's differentiation measures, and its potential normative power, have represented one of the few real challenges to Israel's settlement agenda. In its own way, a willingness to uphold international norms also represents a litmus test for states' adherence to the broader rules-based international order.

### **The need to differentiate between Israel and the settlements**

Despite the deepness of their ties, EU-Israel relations cannot be fully ring-fenced from the spill over relating to the latter's conflict with the Palestinians. As the Managing Director for Middle East and North Africa at the EEAS (European External Action Service), Nick Westcott, has pointed out to Israelis, "there is unfortunately a fly in this ointment [of EU-Israel relations], an elephant in this room: the Occupation."<sup>4</sup>

Perhaps the most contentious issue within their bilateral relations has been Israel's ongoing settlement expansion. Not only has this been a source of consternation for the EU, but it also exposed the gap between European discourse and practice when it comes to defending the contours of two-state solution and pursuing relations with Israel: while the EU and its member states often repeat their criticism and concern over Israeli actions

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[President%20Federica%20Mogherini%20on%20the%20%22Regularisation%20Law%22%20a%20dopted%20by%20the%20Israeli%20Knesset](#)

<sup>3</sup> The EU did agree FAC Conclusions on the MEPP in June 2016, but this was largely watered down and did not present any new EU positions.

<sup>4</sup> Speech by Nicholas Westcott, MD MENA, EEAS, at the Haaretz Israel Conference on Peace, Tel Aviv, 12 June 2017, available at: [https://eeas.europa.eu/delegations/israel/28095/speech-nicholas-westcott-md-mena-eeas-haaretz-israel-conference-peace-tel-aviv-12-june\\_en](https://eeas.europa.eu/delegations/israel/28095/speech-nicholas-westcott-md-mena-eeas-haaretz-israel-conference-peace-tel-aviv-12-june_en).

that undermine the prospects for a two-state solution, they have done very little to actively dissuade – let alone punish – Israel over its policies that violate international law, including its continued settlement expansion.

Nevertheless, Israeli settlements have continued to pose a headache for growing EU-Israel relations given Israeli efforts to erase the 1967 Green Line and integrate its settlements into Israel’s socio-economic and political fabric. This has unavoidably bumped up against EU legal requirements to ensure that its bilateral relations do not benefit Israeli entities or activities based in the OPT. In response, the EU has increasingly sought to exclude settlement entities and activities from its agreements with Israeli through a process that has become known as “EU Differentiation”.<sup>5</sup> Although progress on this front has been slow and steady, these “differentiation” measures fall far short of the imposition of sanctions demanded by Palestinians given the lack of any political appetite in European capitals for more coercive action, or indeed the sorts of measures imposed against Russia following its annexation of Crimea in 2014.

### **Defining EU Differentiation and its legal basis**

Differentiation refers to a variety of technical measures taken by the EU and its member states to enforce the exclusion of settlement-linked entities and activities from their bilateral relations with Israel based on EU policy positions and international law. Since the EU has never recognised the legality of Israeli settlements in the Occupied Palestinian Territory (OPT) and the Syrian Golan Heights, its legally necessitated measures to differentiate between Israel and settlement-linked entities offer a way of insulating deepening bilateral relations from the settlements.

In this manner, differentiation protects the EU and its member states from the harmful effects of Israel’s internationally unlawful acts of annexation, the structural violations that ensue from Israel’s prolonged occupation, and liabilities that such acts attract under international and domestic laws. As a result, the EU has sought to make the necessary provisions in its agreements with Israel to explicitly and unequivocally exclude Israeli settlement-based entities and activities.

As Dr Valentina Azarova explains, “the EU and its member states must ensure, in line with their own laws and policy, the non-recognition of Israel’s internationally unlawful acts. Ensuring non-recognition is a legal necessity as it enables the full and effective implementation of EU law and guarantees protection for EU nationals and companies. Accordingly, the EU and its member states are required to exclude unlawful Israeli activities outside the 1967 borders... To proceed in their relations and dealings with Israel and Israeli entities, the EU and its member states must ensure that Israel is willing to

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<sup>5</sup> For more on differentiation and its application, see: Hugh Lovatt, “EU differentiation and the push for peace in Israel-Palestine”, ECFR, 31 October 2016, available at [http://www.ecfr.eu/publications/summary/eu\\_differentiation\\_and\\_the\\_push\\_for\\_peace\\_in\\_israel\\_palestine7163](http://www.ecfr.eu/publications/summary/eu_differentiation_and_the_push_for_peace_in_israel_palestine7163).

respect and align its conduct with the positions of the EU and its member states' on the correct application of international law, or to effectively exclude its activities in the occupied territory from the scope of such dealings.”<sup>6</sup>

Differentiation is therefore essentially “reflexive” as it is driven by the internal legal necessity of states and international actors such as the EU and its member states to protect the integrity and effectiveness of their own legal orders. To do so, they are obligated under existing imperatives of their domestic legal order to ensure that they are not giving legal effect to internationally unlawful acts. Given the EU and its member states' positions and commitments on the status and consequences of Israeli actions the Occupied Palestinian Territory (OPT) in international law, they are under an internal obligation to ensure that their actions do not confer recognition of the occupying power's sovereignty over the occupied territory, and that EU citizens and businesses act in accordance with the law.

#### **Differentiation as a foreign policy tool**

Differentiation should not be considered as a politically coercive action such as sanctions — but rather as the correct, full and effective implementation of EU and member state legislation. Beyond ensuring the integrity of the EU's own legal order, such steps do, however, re-affirm EU support for the 1967 Green Line as the future border of a Palestinian state, and in some instances, confront Israelis with the potential incompatibility of deepening relations with the EU, while at the same time pursuing a settlement project that is not recognised by the international community.

International law has been created to disincentive the illegal acquisition of territory and make occupation unsustainable. In doing so, it frames a system of incentives and disincentives that are automatically triggered through the full and effective implementation of a third state's domestic legislation. Such measures also ensure that the EU's own economic, academic and diplomatic ties with Israel do not undermine its foreign policy objective of a two-state solution.

There is less and less distinction between Israel and the settlements on the ground. For example, there is no Israeli economy distinct from the settler economy. This is, however, what gives EU differentiation its normative power: by conditioning opportunities for maintaining and intensifying Israel's privileged relations with the EU on the appropriate application of differentiation by Israeli authorities and the entities that want to maintain those privileged relations. In order to protect the EU legal order from the harmful effects of unlawful international actions, Israel can consequently only be integrated with and have access to Europe if it complies with European regulations, policies, and values (including respect for the 1967 Green Line). The alternative is to risk losing out on these relations entirely.

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<sup>6</sup> Valentina Azarova, “Israel's unlawfully prolonged occupation: consequences under an integrated legal framework”, ECFR, June 2017, p.14, available at: [http://www.ecfr.eu/publications/summary/israels\\_unlawfully\\_prolonged\\_occupation\\_7294](http://www.ecfr.eu/publications/summary/israels_unlawfully_prolonged_occupation_7294).

### **A short history of differentiation**

The EU has never considered agreements signed with Israel to apply to Israeli settlement-based entities and activities in the OPT (including East Jerusalem) and the Occupied Golan Heights. But for a long time, starting in the 1990s, the EU treated Israel's occupation as temporary in the belief that the imminent success of the Oslo peace process would make added clarifications a moot point. The EU therefore avoided implementing a legal regime of differentiation during this period, and, largely allowed Israel to define the territorial scope of their bilateral agreements. As a result, its 1995 Association Agreement with Israel did not contain an explicit territorial clause limiting it to within the pre-June 1967 lines.

Since then, however, as the prospects for a peace agreement receded, the European Commission and the EEAS have been gradually compelled – by member states, European parliamentarism and EU civil society – to take greater care in ensuring the EU's correct adherence to European law in its bilateral relations with Israel. The constellation of ad-hoc initiatives that ensued – of which the actions listed below are the main examples – steadily crystallised into what is today referred to as “EU differentiation”.

EU members have played an important part in this process by highlighting deficiencies in the EU's bilateral agreements with Israel, and encouraging corrective measures by the relevant EU institutions. While it is true that member states remain somewhat behind the curve when it comes to implementing differentiation measures in their own bilateral relationships with Israel, they have nonetheless taken a number of additional steps at the national level – also outlined below.

Today, the EU and its member states remain at the forefront of international efforts to ensure that that third-state relations with Israel fully and effectively distinguish between Israel and the OPT. In an April 2017, a statement on behalf of the 28 member states (along with EU candidate countries Montenegro and Albania) by the EU's ambassador to the UN, João Vale de Almeida, vowed that the “EU will continue to distinguish, in its relevant dealings, between the territory of the State of Israel and the territories occupied since 1967”<sup>7</sup>. This language built on EU positions since December 2012 committing to ensuring the “continued, full, and effective implementation of existing EU legislation and bilateral arrangements applicable to settlement products”<sup>8</sup>.

This increasing adherence to differentiation requirements has impacted attempts to convene the 12th EU-Israel Association Council to discuss partnership priorities under the revised ENP. A number of states have been concerned about the timing and message

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<sup>7</sup> Statement by the EU's ambassador to the UN João Vale de Almeida on behalf of the European Union (EU) and its 28 member States, 18 April 2016, available at: <https://unispal.un.org/DPA/DPR/unispal.nsf/0/EBB3B64AA27C128F8525810D006B2755>.

<sup>8</sup> Council conclusions on the Middle East Peace Process, Council of the European Union, 10 December 2012, available at: [http://www.consilium.europa.eu/uedocs/cms\\_Data/docs/pressdata/EN/foraff/134140.pdf](http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/134140.pdf).

this would convey to Israel (especially in light of the EU's supposed no-upgrade policy in place since the 2009 Gaza war). They have also insisted that the EU's statement on the meeting make a strong reference to UNSCR 2334 and the EU's position of differentiating between Israel and the settlements. This position has been contested to varying degrees by the EEAS and eastern member states who have attempted to soften this language.

European states have also played an important role in broadening the process of differentiation outside of Europe. EU members of the UN Security Council supported Resolution 2334 in December 2016 which, in paragraph 5, calls on all states "to distinguish, in their relevant dealings, between the territory of the State of Israel and the territories occupied since 1967".<sup>9</sup> This clause builds on the EU's own differentiation practice, echoing language found in its own Foreign Affairs Council (FAC) Conclusions and statements.<sup>10</sup>

#### **Example of EU differentiation measures**

**Full non-recognition:** In January 2018, the parliament of Denmark became the first to pass a binding resolution requiring all Danish agreements with Israel (past, present, and future) to clearly state their inapplicability to occupied territory, and encouraging the government to strengthen its guidance to private and public investors.

**Free Trade Agreement:** In February 2005, the EU and Israel reached a technical arrangement in their Free Trade Agreement to exclude Israeli goods produced in Israeli settlements located within the "territories brought under Israeli administration since June 1967" from preferential trade tariffs.

**Funding Guidelines:** In July 2013, the European Commission published funding guidelines explicitly stating that Israeli settlement-based entities and activities are excluded from receiving EU financial grants, such as those available through the EU's research and development programme Horizon 2020 which Israel signed up to in June 2014. In doing so, Israel tacitly agreed to the exclusion of Israeli settlement entities and activities from the scope of the project. The EU's funding guidelines apply to other EU education programmes such as Erasmus and Tempus, as well as the EU's Creative Europe programme which the Israeli Cabinet refused to ratify in January 2017 given its funding restrictions.<sup>11</sup> Conversely though, Israel did sign up the EU's "Cross-Border

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<sup>9</sup> "United Nations Security Council Resolution 2334", UN Security Council, 23 December 2016, available at <http://www.un.org/webcast/pdfs/SRES2334-2016.pdf>.

<sup>10</sup> For a detailed overview of relevant EU FAC language see Hugh Lovatt, "EU differentiation and the push for peace in Israel-Palestine", ECFR, 31 October 2016, p.6., available at: [http://www.ecfr.eu/publications/summary/eu\\_differentiation\\_and\\_the\\_push\\_for\\_peace\\_in\\_israel\\_palestine7163](http://www.ecfr.eu/publications/summary/eu_differentiation_and_the_push_for_peace_in_israel_palestine7163).

<sup>11</sup> Hili Perlson, "Israeli Government Backtracks on 'Creative Europe' Funding Program", ArtNet, 31 January 2017, available at: <https://news.artnet.com/art-world/israeli-government-creative-europe-funding-program-837713>.

Cooperation in the Mediterranean (CBC MED) in December 2017 despite similar funding restrictions.<sup>12</sup>

In January 2014, Germany, followed the EU's example by conditioning the disbursement of its own hi-tech and science grants for Israel on the exclusion of settlement entities.

**Consumer protection:** In November 2015, the European Commission issued guidelines on the correct labelling of Israeli settlement products. The move was designed to allow EU consumers to correctly ascertain the origin of Israeli products and thereby distinguish between those originating from within Israel's internationally recognised borders and those from the OPT. This came after Sixteen EU members wrote to HR/VP Mogherini in April 2015 publicly backing the introduction of EU-wide guidelines on the matter, citing a commitment made by the EU in its May 2012 FAC Conclusions.

In addition to this, three EU member states the UK (2009), Denmark (2012), and Belgium (2014), and France (2016) have issued their own national level labelling guidelines.

The EU has also banned the import of organic, poultry and dairy products from Israeli settlements due to its inability to recognise the on-site inspections carried out by the Israeli certifying agencies. As a result of its non-recognition of Israeli sovereignty over the OPT, the EU is unable to recognise Israeli certification of the organic status of settlement produce, nor the certification of health standards for food products, such as verifying that poultry, eggs, and dairy are not contaminated with salmonella or other bacteria.

**Data protection:** In January 2018, the European Commission released its proposed negotiating positions on a future Europol agreement with Israel, stating that this shall not apply to the territory brought under Israeli administration in June 1967.<sup>13</sup> This includes efforts to establish a technical basis for transferring operational data between the Israeli National Police and Europol in a manner that distinguishes between data originating in Israel and the OPT.

**Charity regulations:** In October 2017, the UK Charity Commission warned British charities that making grants to Israeli settlements could potentially constitute a breach of the UK's Geneva Conventions Act of 1957.<sup>14</sup>

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<sup>12</sup> Noa Landau, "Despite Minister's Opposition, Israel Approves Deal With EU That Excludes Settlements", Haaretz, 31 December 2017, available at: <https://www.haaretz.com/israel-news/premium-israel-approves-deal-with-eu-that-excludes-settlements-1.5630071>.

<sup>13</sup> "Recommendation for a COUNCIL DECISION authorising the opening of negotiations for an agreement between the European Union and the State of Israel on the exchange of personal data between the European Union Agency for Law Enforcement Cooperation (Europol) and the Israeli competent authorities for fighting serious crime and terrorism", European Commission, 20 December 2017, available at: <http://data.consilium.europa.eu/doc/document/ST-5036-2018-ADD-1/en/pdf>.

<sup>14</sup> Ben White, "Grants to Israeli settlements could breach UK law, Charity Commission warns", Middle East Monitor, 21 October 2017, available at:

**Pension limitations:** As of January 2016, The Netherlands has implemented restricted pension payments to Dutch nationals living in Israeli settlements, as mandated by its domestic legislation.

**Business advisories:** To date, at least 18 EU member states have advisories distinguishing between Israel and the settlements. These warn businesses of the legal, financial and reputational consequences of dealing with Israeli settlement entities.

**UNSCR 2334: A Milestone?**

In December 2016, the UN Security Council passed resolution 2334 which, in its operational paragraph 5, called on all states to “to distinguish, in their relevant dealings, between the territory of the State of Israel and the territories occupied since 1967”.<sup>15</sup> This represented an important sign of international endorsement of the EU’s differentiation practice and mobilising international consensus around such measures. In addition, the quarterly reporting by the UN Secretary-General on the implementation of 2334 carried, including paragraph 5, has drawn attention to differentiation practices outside of Europe. And indeed, even before the passing of UNSCR 2334, there had already been limited efforts to distinguish between Israel and the settlements (or OPT) elsewhere in the world. The United States had on several occasions restricted the territorial scope of its agreements with Israel to within the pre-June 1967 Green Lines, including in areas relating to free trade, loan guarantees, and R&D cooperation. For example, since 1985 the United States limited the territorial scope of its Free Trade Agreement with Israel to within Israeli pre-June 1967 borders. Two agreements reached between the US and Israel – the Binational Science Foundation (BSF) signed in 1972, and the Binational Industrial Research & Development Foundation (BIRD) signed in 1976 – also distinguish between Israel and the OPT by excluding US funding for Israeli entities and activities based in the OPT, in addition to any Israeli activity pertaining to the settlements. In addition, as of 1993, US loan guarantees to Israel may only be issued to support activities undertaken in territory controlled by Israel prior to June 1967.

Elsewhere, Brazil’s Federal Senate approved, in December 2009, a Free Trade Agreement between Israel and the sub-regional trading block Mercosur (of which Brazil is a member together with Argentina, Paraguay, Uruguay, and Venezuela<sup>16</sup>) on the condition that Brazil negotiate the exclusion from preferential trade tariffs of Israeli products originating beyond the pre-June 1967 lines. Brazil also issued a business advisory in its 2010/11 Manual on Exports to Israel explicitly discouraging economic activities with the

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<https://www.middleeastmonitor.com/20171021-grants-to-israeli-settlements-could-breach-uk-law-charity-commission-warns>.

<sup>15</sup> United Nations Security Council Resolution 2334, 23 December 2016, available at: <http://www.un.org/webcast/pdfs/SRES2334-2016.pdf>.

<sup>16</sup> Venezuela’s membership to Mercosur was suspended in December 2016 over its non-compliance with the organisation’s rules, including with regards to respect for human rights.

settlements.<sup>17</sup> (Although this note was not included in the April 2016 edition of the manual).<sup>18</sup>

UNSCR 2334 has provided a catalyst for such efforts, leading to additional instances of non-European differentiation measures. In April 2017, China and Israel signed an agreement on construction labour which distinguished between Israel and the OPT by ensuring that Chinese workers would only be employed in territory controlled by Israel prior to June 1967.<sup>19</sup> And in July 2017, the Japanese Ministry of Foreign Affairs issued a warning that since Israeli settlement activities are regarded as violations of international law related economic dealings with them entail financial, reputational, and legal risks.<sup>20</sup>

### **One-step forward, two-steps back?**

But despite some advances since December 2016, the implementation by states of UNSCR 2334's call to distinguish between Israel and the OPT still remains largely unfulfilled.

The EU and its member states have yet to ensure that the full spectrum of their existing relations with Israel fully and effectively exclude Israeli settlement entities and activities. In addition, a recent change to the Israeli postcode system in 2013 has allowed exports from the settlements to once again benefit from preferential tariffs under the EU-Israel Free Trade Agreement.<sup>21</sup>

Moreover, a cursory search through the UN's Treaties Database (which provides only a partial snapshot) shows that there are at least 350 bilateral agreements between Israel and member states. These deals, 31 of which were concluded in the last ten years, relate to bilateral cooperation on social security, labour, tourism, investment, and research and development.<sup>22</sup> Yet, it would seem that the overwhelming majority of these agreements do not have adequate territorial clauses guaranteeing non-recognition of Israel's settlement entities and activities.

As previously noted, Brazil's April 2016 Manual on Exports to Israel no longer makes any reference to Israeli settlements or related business risks. In addition, the Mercosur

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<sup>17</sup> "Como Exportar Israel" Brazilian Foreign Ministry, 2010, p.1., available at: <http://www.fecomerciomg.org.br/wp-content/uploads/2014/07/Israel1.pdf>.

<sup>18</sup> "Como Exportar Israel", Brazilian Foreign Ministry, April 2016, available at: <https://investexportbrasil.dpr.gov.br/arquivos/Publicacoes/ComoExportar/CEXIsrael.pdf>.

<sup>19</sup> Barak Ravid and Yotam Berger, "Israel Accepts Chinese Demand Not to Employ Chinese Laborers in Settlements", Haaretz, 23 April 2017, available at: <https://www.haaretz.com/israel-news/israel-accepts-chinese-demand-not-to-employ-chinese-laborers-in-settlements-1.5463998>.

<sup>20</sup> "State of Israel", Japanese Ministry of Foreign Affairs, available at: <http://www.mofa.go.jp/mofaj/area/israel/data.html>.

<sup>21</sup> "Goods from Israel settlements granted preferential EU trade deals", Middle East Monitor, 28 September 2017, available at: <https://www.middleeastmonitor.com/20170928-goods-from-israel-settlements-granted-preferential-eu-trade-deals>.

<sup>22</sup> Data analysis provided courtesy of the European Middle East Project (Eumep.org).

Free Trade Agreement still grants preferential trade tariffs to Israeli settlement products. This despite Brazil's 2009 commitment to negotiate their exclusion.

Israel has also been making inroads in Asia. In January 2018, Prime Minister Netanyahu visited India, during which he signed a number of agreements, including on energy, aviation, and investment.<sup>23</sup> These were in addition to existing agreements dating to 2003 relating to cultural and educational cooperation.<sup>24</sup> Israel has also entered free trade talks with South Korea, China, Vietnam and India. It has also continued to expand its trade relations with South and Latin America – efforts which received a considerable boost during Prime Minister Netanyahu's visit to region in September 2017.<sup>25</sup> Yet again, however, there is no evidence that any of these agreements with Asia or South/Latin America distinguish between Israel and the settlements, in line with UNSCR 2334, and state obligations under international law.

### **The Israeli fight-back**

Israel has led a concerted effort to pushback against EU differentiation measures. This has sought to delegitimise such measures, and deter European decision-makers from supporting efforts to differentiate between Israel and its settlement. This is occurring within the context of Israeli attempts at home and abroad to normalise the occupation and fulfil the vision of a "Greater Israel" through a creeping annexation and management of the conflict.

Although Israel had been relatively quiet in response to more consequential measures by the EU – such as those relating to organic, poultry or dairy products – it chose to react fiercely to the November 2015 labelling guidelines. Unlike other more technical measures, labelling offered Israel the prospect of halting or at least delaying the differentiation processes by accusing the EU of anti-Semitic behaviour through comparisons to historical imagery of Jewish suffering.

Israel's anti-EU campaign was top down, with Prime Minister Netanyahu warning that "we remember history and we remember what happened when the products of Jews were labelled in Europe. The labelling of products of the Jewish state by the European Union brings back dark memories. Europe should be ashamed of itself, it took an immoral

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<sup>23</sup> "List of MoUs/Agreements signed during the visit of Prime Minister of Israel to India", Press Information Bureau for the Government of India's Prime Minister's Office, January 15, 2018, available at: <http://pib.nic.in/newsite/PrintRelease.aspx?relid=175631>.

<sup>24</sup> "Delhi Statement on Friendship and Cooperation between India and Israel", Indian Ministry of External Affairs, 10 September 2003, available at : <http://mea.gov.in/bilateral-documents.htm?dtl/7730/Delhi+Statement+on+Friendship+and+Cooperation+between+India+and+Israel>.

<sup>25</sup> David Shamah, "Latin America rolls out red carpet for Israeli trade", Times of Israel, 27 March 2005, available at <https://www.timesofisrael.com/latin-america-rolls-out-red-carpet-for-israeli-trade>.

decision.”<sup>26</sup> Israeli Justice Minister Ayelet Shaked similarly alleged, “European hypocrisy and hatred of Israel has crossed every line”.<sup>27</sup>

The highest decibels came not just from right-wing politicians and the settlement movement. The same talking points were picked up by the centre-left Labour and centrist Yesh Atid leaders, Isaac Herzog and Yair Lapid respectively. Isaac Herzog, for example, equated EU labelling with “an act of violence by extremists”.<sup>28</sup> Conversely though, EU differentiation measures – and the potential of Israel having to choose between the outside world and the settlements – could be seen as a belated manifestation of long-standing warnings about the costs of continued occupation to Israel’s international standing, including from former prime ministers Ehud Barak and Ehud Olmert, and former Labour party’s leader Shelly Yachimovich.<sup>29</sup>

Israel has also been fighting EU differentiation via Washington DC, in particular through the US Congress which criticised EU labelling guidelines for settlement products, used TTIP negotiations to discourage EU action on settlements, and passed legislation to combat economic pressure targeting settlements and laying the groundwork for imposing sanctions against those who engage in such actions.<sup>30</sup>

These effort, have to a certain extent paid off for Israel. The publication of the labelling guidelines was felt to be a painful experience for the EU, and HR/VP Mogherini reportedly let it be known she did not want to see any future high-profile measures similar to the labelling guidelines.<sup>31</sup> In doing so, the European leaders attempted to hold legally-necessitated measures hostage to political considerations. While this cannot for ever hold

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<sup>26</sup> “PM Netanyahu’s response to the EU decision regarding product labelling”, the Israel Ministry of Foreign Affairs, 11 November 2015, available at <http://mfa.gov.il/MFA/PressRoom/2015/Pages/PM-Netanyahu-responds-to-EU-decision-regarding-product-labeling-11-November-2015.aspx>.

<sup>27</sup> “Shaked says European ‘hatred’ of Israel ‘crossed every line’”, the Times of Israel, 11 November 2015, available at [http://www.timesofisrael.com/liveblog\\_entry/shaked-says-european-hatred-of-israel-crossed-every-line](http://www.timesofisrael.com/liveblog_entry/shaked-says-european-hatred-of-israel-crossed-every-line).

<sup>28</sup> “Herzog: Settlement product labeling is ‘European prize for terror’”, the Jerusalem Post, 3 November 2015, available at <http://www.jpost.com/Breaking-News/Herzog-Settlement-product-labeling-is-European-prize-for-terror-431900>.

<sup>29</sup> See for example: “Olmert warns of Israel’s isolation”, Sunday Morning Herald, 23 March 2009, available at: <https://www.smh.com.au/world/olmert-warns-of-israels-isolation-20090323-97ec.html>; Adrian Blomfield, “Israel must repair rift with US, defence minister warns”, Telegraph, 19 April 2010, available at: <https://www.telegraph.co.uk/news/worldnews/middleeast/israel/7607970/Israel-must-repair-rift-with-US-defence-minister-warns.html>; “Israel risks isolation with EU settlement guidelines”, AFP, 18 July 2013, available at: <http://www.maannews.com/Content.aspx?id=614812>.

<sup>30</sup> See Lara Friedman, “The Stealth Campaign in Congress to Support Israeli Settlements”, LobeLog, 1 December 2015, available at <https://lobelog.com/the-stealth-campaign-in-congress-to-support-israeli-settlements>.

<sup>31</sup> Interviews with EU and member state officials, Brussels, 2015.

back the legal necessity that compels the EU to undertake remedial action to align its agreements with Israel with its own rules and positions, such political resistance has certainly slowed down the implementation of differentiation measures.

### **The quest for EU unity**

There is no doubt that there has been a step forward in broadening EU member states' consensus on differentiation and their understanding of the legal necessity driving such measures. Yet Israel and its supporters have been able to impede the implementation of EU differentiation measures, not only by brow-beating European officials, but also by leveraging internal EU divisions.

These divisions have led to coalescing of two groups of "like-minded" states on MEPP issues. The first centred around mostly western states relatively sensitive to EU positions and obligations based on international law, and the need to advance measures to preserve the space for a two-state solution, in particular those focussing on Israeli settlement actions. The second group of "like-minded" is made up predominantly of eastern members which out of a mixture of ideology and geopolitics, have been more supportive of Israeli actions, including those that violate international law. Added to this latter group is usually Greece, and on occasion the UK.

For a number of states the prospect of enhanced bilateral ties with Israel is incredibly attractive. Greece, for instance, is in the midst of securing an energy cooperation agreement with Israel (and Cyprus) and is therefore susceptible to political trade-offs on the Palestinian issue to keep Israel onside.

Meanwhile, the UK's June 2016 decision to leave the EU widened the member state split, as the country pulled back from EU initiatives and consensus making on the issue, aligning itself with US policy under Trump on several occasions. It was this desire to please the incoming Trump administration that prompted the UK to snub the Paris peace conference held in January 2017, and then on two occasions to block the adoption of an EU statement in favour of the initiative. The same motivation likely also played a role in the UK's decision to avoid joining France, The Netherlands, and Sweden, expressing concern over the lack implementation of UNSCR 2334 in a letter to the UN Secretary General and the President of the UN Security Council.

These calculations differ from those of eastern European states that have significantly more pro-Israeli elites and publics. While trade interests have been a factor in shaping these relations, the sense of historical injustice perpetrated against Jewish populations in these countries during the Second World War continues to loom large. In addition, figures such as Hungary's Viktor Orban have espoused the same rhetoric as Netanyahu, attacking left-wing civil society and liberal philanthropist George Soros, bashing the EU, and calling for curbs on the independence of the judiciary.

Israel closeness to eastern members was his on full display during a meeting in July 2017, when Netanyahu joined the leaders of Hungary, Slovakia, Poland, and the Czech Republic (known as the Visegrád Four) in berating EU policy on Israel, before urging them to help move forward the next meeting of the EU-Israel Association Council.

Israel had previously leveraged the same constellation of states to impede and politicise the implementation of the EU's labelling guidelines by pushing national governments, parliaments, and MPs to vocally oppose the move. Politico reported this backlash at the time: "Hungarian Foreign Minister Péter Szijjártó called the move 'irrational,' while the Czech Republic's Culture Minister Daniel Herman urged countries to 'reject the efforts to discriminate against the only democracy in the Middle East.' The Czech parliament passed a resolution urging the government not to implement the decision."<sup>32</sup> Meanwhile, Greek Foreign Minister Nikos Kotzias was alleged to have informed Prime Minister Binyamin Netanyahu of his country's opposition to the labelling of settlement products.<sup>33</sup> The net result has been a near total EU paralysis on the Israeli-Palestinian conflict, and the emergence of consensus making process between members based on an ever lower common denominator. This comes despite the unprecedented threat to the two-state solution from the US and Israeli governments, and the deterioration of conditions on the ground in the OPT (particularly the humanitarian crisis in Gaza).

#### **Looking beyond Israel/Palestine**

The legal necessity that has driven EU differentiation measures towards Israel's settlements in the OPT, has also applied – to varying degrees – to other situations of de-facto annexation, including northern Cyprus (occupied by Turkey in 1974), Western Sahara (annexed by Morocco in 1975), and Crimea (annexed by Russia in 2014). As with Israel's occupation, the EU and its member states are under a similar obligation to not give legal effect to internationally unlawful acts and facts, particularly where businesses operate in high-risk situations of structural human rights violations.

In Northern Cyprus, EU action is primarily designed to uphold its non-recognition of the self-declared Turkish Republic of Northern Cyprus (TRNC) supported by Turkey. Brussels views the whole of Cyprus as EU territory while acknowledging that the Republic of Cyprus does not exercise effective control over the northern part of the island.

The main practical effect of the EU's non-recognition of the TRNC is that the northern areas are outside the EU's customs and fiscal territory and not subject to EU legislation. Goods from any area of Cyprus not under effective control of the government of the Republic of Cyprus are therefore treated as non-EU imports. The EU has also refrained from entering into bilateral agreements with TRNC. However, this does not affect the personal rights of Turkish Cypriots who are still considered full EU citizens (this excludes Turkish settlers).

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<sup>32</sup> Vince Chadwick and Maïa De La Baume, "How one phrase divided the EU and Israel", Politico, 4 January 2016, available at <http://www.politico.eu/article/best-before-1967-how-the-eu-labeled-israels-occupied-territories-food-labels-european-commission>.

<sup>33</sup> Raphael Ahren, "Greece set to oppose EU settlement labelling", the Times of Israel, 30 November 2016, available at [http://www.timesofisrael.com/liveblog\\_entry/greece-set-to-oppose-eu-settlement-labeling/](http://www.timesofisrael.com/liveblog_entry/greece-set-to-oppose-eu-settlement-labeling/).

In the case of Crimea, the EU has actually been much more forceful in upholding its duty of non-recognition of Russian sovereignty over the territory than in the case of Israel and the OPT, in large part out of a desire to send a clear political message to Moscow. The measures deployed by the EU and its member states in this instance significantly raised the bar when it comes to disincentivising annexation and occupation. For instance, the EU imposed sanctions on Russian entities, including “restrictive measures” that prohibit EU-based companies from buying real estate and financing Crimean companies, and offering tourism services there. The EU also prohibited its nationals and companies from selling or buying financial products linked to certain Russian financial institutions.<sup>34</sup>

The case of Western Sahara is often also raised when discussing EU measures towards Israeli settlements. Given that the EU has never clarified whether or not it deems the law of occupation (international humanitarian law) to be applicable to Western Sahara, the bar that it has to meet in order to comply with its own laws is arguably lower than in the case of the occupied Palestinian territories. The EU is however still fully beholden to its duty of non-recognition of Moroccan sovereignty over the territory and its obligations to uphold the rights of the Sahrawi people.

This legal obligation has been steadily born out in the EU’s relation with Morocco. In a 21 December 2016 judgment, the European Court of Justice found that the EU-Morocco agriculture agreement, and the EU-Morocco Association Agreement upon which it is premised, could not be applied to the territory of Western Sahara without the consent of the people of that territory.<sup>35</sup> And in February 2018, the CJEU ruled that the EU-Morocco Fisheries Agreement cannot be applied to Western Sahara or its adjacent waters.<sup>36</sup> The fact that these rulings come in the face of concerted opposition from the European Commission, illustrates the inescapability of EU rules and regulations.

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<sup>34</sup> For more details on EU sanctions against Russia over Ukraine, see “EU sanctions against Russia over Ukraine crisis”, the European Union, 21 December 2015, available at [http://europa.eu/newsroom/highlights/special-coverage/eu\\_sanctions\\_en](http://europa.eu/newsroom/highlights/special-coverage/eu_sanctions_en).

<sup>35</sup> “EU Court protects Western Sahara from EU-Morocco trade deal”, Western Sahara Resource Watch, 21 December 2016, available at: <http://www.wsrw.org/a105x3695>

<sup>36</sup> “EU Court stops EU-Morocco fish deal in Western Sahara”, Western Sahara Resource Watch, 27 February 2018, available at <http://wsrw.org/a105x4108>.