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The Israel-Palestine Protocol on Economic Relations and the Law of the World Trade Organization

Submitted to the
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by
Prof. Thomas Cottier
Professor of European & International
Economic Law

Legal Opinion
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Programme Coordination Office
Room Z324, Department of International Relations
London School of Economics
Houghton Street, London WC2A 2AE

Programme Coordinator: Valerie Yorke
Tel: 44 171 955 6781/955 6175 Fax: 44 171 955 6176
Email: V.Yorke@lse.ac.uk

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I. Introduction

The purpose of this brief and preliminary paper consists of evaluating the relationship of the Protocol on Economic Relations between the Government of the State of Israel and the PLO, representing the Palestinian People, *done* and entered into force 29 April 1994 (hereinafter the Protocol) and the law of the World Trade Organization (WTO). The analysis is undertaken with a view to identifying areas which under the Protocol are governed by more specific rules of World Trade Law. Moreover, it seeks to identify relevant issues with a view to shaping future relations between the Parties in accordance with the legal requirements of World Trade Law and to provide a suitable basis for regional economic integration in the Middle East.

The interim Protocol is a unique instrument and a particular answer to a very particular and unique problem. The legal structure is without any precedent, and issues that have arisen therefore remain without clear-cut answers. The instrument was negotiated outside the realm of traditional trade relations and patterns of bilateral trade agreements. The Protocol addresses economic relations in a manner transgressing the scope of World Trade Law enshrined in the agreements annexed to the Agreement Establishing the World Trade Organization.¹ It goes beyond the contents of traditional trade agreements. The Protocol predominantly regulates economic relations between Israel and the Areas: Article IV (Monetary and Financial Issues), Article V (Direct Taxation), Article VI (Indirect Taxes on Local Production), Article VII (Labor), Article X (Tourism) and Article XI (Insurance) almost exclusively deal with such relations. Article VIII (Agriculture) and Article IX (Industry) predominantly deal with bilateral relations. Relations affecting directly third countries prevail only in Article III (Import Taxes and Import Policy).

The State of Israel has been a Contracting Party to the GATT since 1962 and is a founding member of the World Trade Organization. Trade with other Member States of the WTO is therefore governed by the rules and disciplines of WTO law in terms of market access and market conditions on the Israeli market. The question arises to what extent these obligations need to be taken into account and influence the application and interpretation of the Protocol. We first address this question in general, and then proceed to look at the specific language of the Protocol.

II. The Legal Nature of the Protocol

A. In General

It is unclear whether and to what extent obligations of Israel under WTO law generally extend to territories under authority of the Palestinian Authority (PA) in the West Bank and the Gaza Strip. On the one hand, membership of Israel in the WTO does not include these territories, and no mention of them was made in the ratification of WTO Agreements by the State of Israel.² Tariff Concessions by Israel were made subject to changes in a final agreement.³ It is

¹ See The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts (Geneva 1995).

² Information provided by the WTO Secretariat.

³ See Annex to the Schedules on Goods for Israel (Schedule XLII-Israel) footnote 3, which reads: „Israel reserves its rights to adapt these schedules in the lights of any autonomy arrangements made, pursuant to the declaration of principles on interim self government arrangements signed in Washington D.C. on 13/9/93.“

recalled that formerly, the West Bank and Gaza Strip were not annexed, and annexation of the city of Jerusalem was never recognized by the international community.⁴ It is generally agreed that they were under prolonged occupation, and did not form part of the state of Israel.

From this perspective, it could be concluded on the one hand that the territorial scope of WTO law does not extend to the formerly occupied territories and therefore does not currently apply to the Areas under jurisdiction of the Palestine Authority under the interim agreements. Moreover, these agreements do not apply between Israel and the Palestine Authority for the simple reasons that the Palestine is not yet a Member of WTO either as a state or as a separate customs territory with full autonomy under Art. XII of the Agreement establishing the World Trade Organization (Marrakesh Agreement).

On the other hand, the Protocol does not fundamentally alter the fact that Israel and the Areas under control of the PA continue to form de facto a single customs territory for most goods. The interim regime provides for an enumerated category of products, contained in Lists A1, A2 and B for which import policies from Arabic countries are autonomously governed by the PA up to consumption levels within the Areas. The Protocol thus establishes partial and limited autonomy. However, this constitutes an exception to the prevailing concept of a single customs territory comprising Israel and the Areas for all other products, both goods and services. According to Art. III(5)(a) of the Protocol, Israeli rates of customs, purchase tax, levies, excises, prevailing at the date of signing of the Agreement, and as changed from time to time by Israel, shall equally serve as a minimum basis for the Areas. While the PA may increase such emoluments, the basic rates are uniformly set for both the territories of Israel and the Areas. Similarly, Art. III(10) of the Protocol provides that import policies are governed „all as applied by Israel with respect to its importation“ and subject to unilateral changes by Israel within the bounds of specific international agreements. Article VIII(12) of the Protocol establishes an obligation to refrain from agricultural imports which may adversely affect the interests of each party's farmers. This obligation is subject to international agreements, and there can be no doubt that the WTO Agreement on Agriculture and other relevant provisions in GATT 1994 are meant to apply as much to the territories under the authority of the PA as they apply to Israel.

Finally, it remains a fact that at present the importation and exportation of goods and services from and to third countries generally (and with the exception of trade of listed items) must pass through the territory of Israel. Rights and obligations of third Members of WTO will therefore be affected in most transactions from and to the Areas by the very facts of geography and lack of independent sea and air ports under exclusive control of the PA. In sum, from a point of view of World Trade law, the Protocol legally establishes a single customs territory comprising the State of Israel and the Areas under control of the PA.

It will, however, be necessary to further study in depth the impact of trade agreements negotiated by the PA directly with Members of the WTO, in particular the United States, the European Community and EFTA countries. It is presently unclear to what extent they affect the status of the Areas in international law. To the extent that they merely expand treatment

⁴ For a general assessment see, e.g., Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967*, 84 *American Journal of Int'l Law* 44-103 (1990); Eyal Benvenisti and Eyal Zamir, *Private Claims to Property Rights in the Future Israeli-Palestinian Settlement*, 89 *American Journal of Int'l Law* 295-340 (1995).

granted to the State of Israel, they are not in a position to fundamentally alter the present situation of a customs territory subject to limited exceptions in trade with Arab neighbors.

Trade between Israel and the Areas continues to be considered a different matter. While the Protocol applies the terms of exports and imports with regard to third countries, different terminology is used in bilateral relations. It mainly employs the term of free movement (see Art. VIII(1) on agriculture, Art. IX(1) for industrial goods) or unrestricted market access (Art. VIII(10)). No tariffs and import taxes exist for such trade. It is telling that in Article IV(16)(a) and (b) on Monetary and Financial Issues the terms of exports and imports between Israel and the Areas are merely used in quotation marks. In the field of industrial goods, free movement is subject to each side's legislation (Art. IX(1)), and disciplines to curb trade-distorting subsidies and deceptive practices are merely subject to best endeavor or duties to cooperate (Art. IX(2-4)). This indicates that we are here dealing legally with an internal rather than an international relationship.

B. Relationship with Member of WTO other than the State of Israel

From a point of view of Member States of the WTO (and other trade agreements to which Israel is a party) it may therefore be argued that the obligations of Israel under these agreements equally extends to goods and services originating in, or destined for, the Areas under jurisdiction of the PA. This is clearly the case with respect to goods in transit. Even if the Areas are considered not to be part of the Israeli customs territory, Members of the WTO are entitled that their rights under Article V GATT 1994 (Freedom of Transit) are respected by Israel customs authorities. Yet, beyond this, it is submitted that all activities regarding foreign products imported from, or exported to, a Member of WTO in the Israeli-PA customs territory fall under the rules of WTO law due to the membership of Israel and her obligations to other Members of the WTO. As a corollary, similar obligations can be invoked not only vis-à-vis Israel, but indirectly and as a result of the Protocol also vis-à-vis the PA. Any Member of the WTO could complain and bring suit under the WTO Dispute Settlement System against Israel for alleged violations of their rights within the uniform customs territory. It may be therefore concluded that WTO rules in effect apply de facto to and in the Areas already.

It should be cautiously noted that there exists no authority regarding these questions. No depth legal analysis of trade relations under the state of prolonged occupation could be consulted, and the matter needs further research under the interim Protocol. But the very fact that the Protocol does not transgress the basic concept of a single customs territory allows to put forward the argument that WTO rules already apply generally in relations of both Israel (de jure) and the PA (de facto) with Members of the World Trade Organization. In conclusion, the PA is in position to invoke WTO rules vis-à-vis the State of Israel with respect to products originated from, or destined to, Member States of the WTO. Equally, such states can invoke such rules and if necessary bring complaints against Israel under the Dispute Settlement System of the WTO.

C. Relationship between the State of Israel and the Palestinian Authority

The situation, however, is different with regard to products originating in the Area or Israel and moved between the Parties of the Protocol. Whether or not this is deemed to be internal trade, rules of WTO law do not apply to relations where products of other WTO Members are

not involved. WTO rules may at best be invoked in analogy in order to construe the provisions of the Protocol in light of predominant standards of international trade.

The legal situation reflects the bifurcated nature of the Protocol and the political realities within which it was created and within which it has to operate. WTO rules can be applied and invoked directly whenever trade with third Members of WTO is affected. However Israel-Palestine relations are termed, either bilateral or internal, these rules can be only formally invoked when and if they are positively referred to in the Protocol. But they can also be used in analogy, in support of an argument, yet without the force to overrule specific treaty provisions.

III. Explicit References to WTO Law in the Protocol

The following brief survey of the Protocol shows that most references to WTO obligations relate to trade with third countries.

The Protocol occasionally refers to existing international agreements, incorporating them by reference (e.g., Art. IV(8) relating to the Basle Concordat in Financial Services. Other examples include standards of US or EEC law (Art.III(12)(a), or the International Plant Protection Convention (IPPC) in Art. VIII(9)(c)). The same is true with respect to WTO law. The Protocol does not address its relationship to WTO law in any comprehensive or systematic manner. No general provision to that effect can be found either in the preamble, nor in the operative text. However, the following two specific references can be found. Both deal with third country relations and do not address trade between the Areas and Israel:

- Art. III(2)(b): The valuation of goods contained in lists A1 and A2 for the purposes of customs valuation are governed by the GATT 1994. More specifically, this relates to the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994.
- Art. III(10): For products other than List A1 and A2, the Protocol affirms existing import regulations by Israel being applicable to imports to the territories. Changes eventually introduced by Israel are subject to the conditions and criteria of Article 2.2. of the Agreement on Technical Barriers to Trade. (No explicit reference, however, is found to the Agreement on the Application of Sanitary and Phytosanitary Measures, either here or in the context of Chapter VIII on Agriculture.)

IV. Implicit References to WTO Law

More frequently, indirect references *ratio materiae* can be found in the following provisions:

- Art. III(8): There is no explicit reference to WTO rules of origin. Yet, the principles partly correspond to main approaches contained in the Agreement on Rules of Origin, and the instrument can be used to construe the provisions of the Protocol. This is particularly true with respect to the notion of substantial transformation, (Para 8(a)(i)): The Agreement should provide guidance in the elaboration of detailed rules of origin under Article 15(4) of the Agreement.

- Art III(9): No reference to the WTO Agreement on Import Licensing Procedures. The agreement, however, should be consulted in elaboration of detailed rules under Article III: 16(5) of the Protocol.
- Art. III(12)(a): The Protocol refers to US or European standards for Petroleum Products. These standards, again, need to comply with the requirements of the TBT Agreement and Article III of GATT; indirectly, therefore, the reference establishes a link to WTO law and prevents that standards are being applied which are excessive and have a protectionist effect by excluding sourcing from other countries (e.g., from Egypt, see Art. 12(b)(c)).
- Art. III(13): The right to use all points of exit and entry in Israel for the purposes of importation and exportation of goods and a right to non-discriminatory national treatment is backed by third countries' transit rights under Article V GATT 1994 to the extent that Israel or the PA do not follow the concept of a single customs territory under the Protocol.
- Art. III(14)(a) and (b): Inspection of goods by Israeli customs authorities destined both for Israel and for the Areas are implicitly subject to rights of third Members of WTO. General provisions relating to fees and formalities connected with importation and exportation exist in Article VIII GATT 1994 and assist in avoiding excessive fees and formalities. These provisions also apply with regard to products originating in, or destined for, the Areas. Specific provisions to that effect can be found in the provisions on enforcement of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs). Suspension and release of goods and rights of traders are regulated in detail in Articles 51-60 of the TRIPs Agreement. They, however, only apply to goods containing intellectual property and do not generally apply to all goods.
- Art. VI(2): The obligation to apply identical purchase tax rates (VAT) for domestically produced and imported products corresponds to the obligation of national treatment of Article III(2) GATT 1994. It can be construed in the light of GATT/WTO jurisprudence.
- Art. VIII(3) and (4): Restrictions imposed on agricultural trade on the basis of phytosanitary and sanitary standards are to be agreed upon and to be in accordance with the National Health Code, as updated from time to time. International standards, in particular the Agreement on the Application of Sanitary and Phytosanitary Measures and the standards of the FAO/WHO Codex Alimentarius incorporated therein could be applied in analogy in order to avoid unnecessary and distortive barriers to trade.
- Art. VIII(10): It should be noted that the market access rights in agriculture between the Areas and Israel, subject to restrictions to be phased out by 1998, go beyond existing rights and obligations under WTO law. The following rules of WTO may nevertheless remain important *in analogy* to the extent that free movement of agricultural goods is impeded by administrative actions:
- Art. VIII(11): The right of Palestinians to export agricultural goods without restriction to external markets can be effectively assisted by WTO disciplines in trade relations with Members of WTO, including Israel's activities in export controls. In particular, Article VIII GATT 1994 on fees and formalities, Article XIII on non-discriminatory administration of quantitative restrictions (export licensing), and the provisions on production and export subsidies of the Agreement on Agriculture to the effect that

excessive subsidies on the part of Israel may unlawfully impede the right to export of Palestinian producers.

- Art. VIII(12): The restrictions on imports of agricultural products imposed by this provision clearly are subject to market access obligations under the WTO Agreement on Agriculture. Up to commitments undertaken by Israel, trade may be restricted and equally bind the PA under the terms of the Protocol. Such restrictions, however, are subject to the rules and disciplines of Article XIII GATT 1994 and the Agreement on Import Licensing Procedures to the extent that restrictions affect Members of the WTO. Restrictions imposed by Israel exceeding such obligations can be directly challenged by WTO Members and indirectly by the PA based on the Protocol.
- Art. IX(2-5): These provisions on bilateral trade in industrial goods between Israel and the Areas may be construed in the light of existing WTO provisions relating to subsidies, dumping and deceptive practices. The WTO rules, however, are more stringent than the provisions of the Protocol, and room to apply them in full analogy seems limited.
- Art. IX(6): The right of Palestinians to export their industrial products to external markets without restrictions may be supported by obligations under WTO and rights of recipient WTO Members. We refer to what was said above under Article VIII(11) and instead of the Agreement on Agriculture refer to the Agreement on Subsidies and Countervailing Measures which in particular contains a prohibition of export subsidies in industrial goods.

V. Other Provisions of the Protocol

The above-mentioned provisions show apparent direct or indirect relations to obligations and rights of the WTO. The listing is not exhaustive, and more detailed examination may provide further connections in particular in service related sections of the Protocol (monetary and financial issues, labor, tourism and insurance issues). Links to the Agreement on Trade in Services (GATS) however, are not apparent and may only be found in problem oriented case studies with a given set of facts.

VI. Conclusions

The legal nature and relation of the Protocol to the rules and obligations of the WTO are difficult to assess. The unique character of the arrangement does not allow for conclusions on secure legal ground. The matter is likely to be disputed, but this first assessment may be used as a basis for argumentation and to demonstrate already existing implications of WTO law despite the fact that the PA is neither a member of the WTO nor complies presently with the requirements to join as a independent state or a customs territory with full autonomy in trade regulations. The Protocol does not establish a clear legal regime, but reflects the complexities of the political and economic situation in the region. Implicitly, it establishes an Israel-Palestine customs territory subject to exceptions of limited autonomy in trade regulations with third countries. In such a constellation, we argue that the obligations of Israel as Member of WTO fully apply to the Protocol with respect to trade not governed by listed exceptions. Its

obligations can be invoked by third Member States when trade with the Areas is impaired by Israel. Dispute settlement machinery in WTO may be used in order to settle such problems. It can also be invoked by the PA in such constellations vis-à-vis the State of Israel, however short of using WTO dispute settlement. The law of WTO thus directly and indirectly assists the development of trade relations with Members of the WTO. Further studies will be needed to assess the impact of independent trade agreements currently concluded by the PA with Members of the WTO.

The existing implications of WTO law in relations with third countries clearly supports the aspiration to achieve observer status in the Organization as soon as possible.⁵ However, the current legal regime of the Protocol is not in a position to create the necessary conditions for membership in the WTO.

Bilateral relations between Israel and the Areas are not regulated by WTO rules to the extent that no products originating in or destined for other WTO Members are concerned. The Protocol, without saying so, defines in effect bilateral relations in terms of „internal“ relations within a single de facto customs territory. Rules and obligations of WTO can only be invoked and applied as an argument in interpretation and by analogy. The current regime therefore does not allow invoking the body of WTO law where it would be most needed, i.e. in bilateral Israel-Palestine relations and its many impediments. The instruments of WTO dispute settlement cannot be invoked, either directly or indirectly in matters exclusively dealing with products with Israeli or Palestinian origin. The same holds true in services and intellectual property protection. In order to make these rules directly guiding trade relations with Israel, a final agreement would need to look conceptually different and rely either on statehood of Palestine or on a separate customs territory having full autonomy.⁶

Possible options compatible with the framework of the WTO need to be studied in depth and need to be available with a view to a final peace settlement.

⁵ See Thomas Cottier and Remo Arpagaus, The Possibility of Participation by Means of Observer Status for the Palestinian National Authority in the World Trade Organization (WTO), legal opinion submitted to the Economic Policy Programme, LSE, February 25, 1997.

⁶ See Thomas Cottier And Krista Nadakavukaren Schefer, The Accession of Customs Territories to the World Trade Organization (WTO): An Analysis of „Full Autonomy“, Legal opinion submitted to the Swiss Trade Initiative Middle East/North Africa (STIMENA), March 14, 1996 (on file with authors).