



# **The 2013 World Trade Organization Agreement on Trade Facilitation: Israel's obligations towards Palestinian Trade**



UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

**The 2013 World Trade Organization Agreement  
on Trade Facilitation: Israel's obligations towards  
Palestinian Trade\***



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## Executive Summary

The Agreement on Trade Facilitation (ATF) was adopted at the Ninth Ministerial Conference of the World Trade Organization (WTO) convened in Bali, Indonesia, in December 2013, following about ten years of negotiations in Geneva. The ATF, which is binding to all member-states of the WTO, will take effect in the middle of 2015 and is expected to result in major trade gains and savings in time and costs of export and import operations, customs clearance, transit passage and related trade measures. The Agreement would also benefit shipments to and from land-locked countries through adjacent countries, as well as countries or non-sovereign territories and those under foreign military occupation.

It is acknowledged that membership in the WTO does not require that candidates be sovereign states, but that they enjoy full autonomy in conducting their external trade relations and policies and in decisions within the competencies of the WTO. Based on these criteria, Hong Kong, Taiwan and Macau are Members of the WTO (WTO, 1994: Article 12, Paragraph 1). The State of Palestine/Occupied Palestinian Territory (OPT) has not been able to meet these membership conditions owing to the constraints imposed by the Paris Protocol (Khalidi, 2015). The Protocol allows the Palestinian Authority (PNA) to manage external trade only within a very limited scope and maintains the domination of the Israeli occupation over the Palestinian economy and its external trade. However, some analysts contend that Palestine has the right to become a full member of the WTO notwithstanding its lack of control over a significant part of its external trade (Cottier, 1997). Meanwhile, others affirm that the signing in 1997 of an Association Agreement between the European Union and the PNA (free trade agreement) covers goods outside the three lists specified in the Paris Protocol, which exempt certain Palestinian imports from the provisions of the Israeli trade regime. This is thought to pave the way for considering the OPT a “separate customs territory” since it has the ability to enter into international trade agreements and hence is entitled to accede to the WTO (Kanafani, 2000).

This study does not address the potential membership of Palestine in the WTO or the degree of its readiness to accede to the Organization. However, it focuses on the potential applicability of the ATF in the OPT, regardless of whether or not Palestine, which has been accorded Observer State Membership in the United Nations, is a party to the WTO Agreement. The study assesses the applicability of the ATF to Palestinian trade in light of international law, positions of international organizations and legal scholars. The question here relates to whether Israel, as the occupying power and a party to the Agreement, is obliged to apply the ATF to Palestinian trade and how the provisions should be applied.

Some estimates suggest that the potential cost savings via trade facilitation will be considerable and concrete. The Organization for Economic Cooperation and Development (OECD) estimates that every percentage point in cost-savings in international trade boosts global income by \$40 billion. The new ATF could reduce trade transaction costs by around 14.5 percent for low-income countries and 10 percent for higher-income countries. Other studies estimate that considerable facilitation of trade as promoted by this Agreement could increase global Gross Domestic Product (GDP) over time by \$1 trillion (ITC, 2013; USTR, 2013).

Undoubtedly, the application of the ATF to Palestinian trade by Israel, in its capacity as a party to the Agreement, as with all international agreements that the international community demands to be applied to the OPT, will result in removing many "security-related" restrictions placed by Israel on Palestinian trade. This in turn would expedite the flow of Palestinian exports and imports, reduce the costs of Palestinian trade operations, contribute to development in the OPT and have a positive impact on the economy as a whole. If the ATF is to be applied to Palestinian trade, it would contribute to reducing the administrative obstacles faced in different markets and establish technical standards for the operation of customs and monitoring agencies in dealing with imports and expedite customs clearance. It would also allow for deployment of electronic clearance and payment systems to collect customs duties as well as all other costs or fees imposed on imports such as those related to the inspection of shipments, handling etc., which in turn reduces customs clearance times.

Improved trade facilitation would also help Palestine, and its developing economy, to gradually build its capacity to meet its trade commitments towards Israel and other Members of the WTO, and eventually fully comply with the ATF once it becomes a member of the WTO. Were the PNA to benefit from the application of the ATF, this would strengthen Palestinian Customs capacity, improve revenue collection and assist small and medium enterprises in accessing new export and import opportunities via measures featuring transparent customs procedures, limited documentation requirements and processing customs transactions in advance of the shipping of goods.

To ensure Israel's application of the ATF to Palestinian external trade, a series of actions are required under each Article of the ATF. One of them is, in cooperation with, and supported by the PNA, the Palestinian Shippers Council (PSC) should act as the national focal point for the Palestinian private sector for advocacy and other initiatives to end the exclusive and unilateral Israeli domination over Palestinian trade at the bilateral and multilateral levels. This requires the PSC to explore all avenues and tools in the context of a clear strategy for making the application of ATF in the OPT mandatory, and to launch a domestic and international campaign to this end, beginning with the establishment of the National Trade Facilitation Committee as ATF stipulates.

## Abbreviations

ATF	Agreement on Trade Facilitation
EC	Europe Commission
ECOSOC	Economic and Social Council
EDISCO	Electronic Digital Information Systems Co
GATT	General Agreement on Tariffs and Trade
GDP	gross domestic product
ICJ	International Court of Justice
IDF	Israel Defense Forces
IHL	International Humanitarian Law
ITC	International Trade Centre
MAS	Palestine Economic Policy Research Institute
OECD	The Organization for Economic Cooperation and Development
OPT	occupied Palestinian territory
PalTrade	Palestine Trade Center
PCBS	Palestinian Central Bureau of Statistics
PLO	Palestine Liberation Organization
PNTFC	Palestinian National Trade Facilitation Committee
PSC	Palestinian Shippers Council
UN	United Nations
UN/CEFACT	United Nations Centre for Trade Facilitation and E-Business
UNCTAD	United Nations Conference on Trade and Development
UNGA	United Nations General Assembly
USTR	United States Trade Representative
WCO	World Customs Organization
WTO	World Trade Organization

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## **Chapter I**

### **Introduction**

#### **A. Background**

This study has been prepared in the context of the project “Capacity Development to Facilitate Palestinian Trade” implemented by the United Nations Conference on Trade and Development (UNCTAD), in partnership with the PSC, and in cooperation with the Palestinian Ministry of National Economy. The study focuses on the applicability of the WTO Agreement on Trade Facilitation (Bali Package, 2013) in the OPT and its impact on the overall Palestinian trade process through the expediting of the flow of goods across borders and reducing the costs of those trade transactions identified in the Agreement.

The field of international trade facilitation contains some of the most important challenges faced by trade operators and governments alike, as it encompasses political, economic, commercial and technical aspects, as well as financial dimensions. The latter are within the purview of customs authorities and need to be taken into consideration when any country devises its trade facilitation strategy. UNCTAD has affirmed that governments and commercial businesses concerned with improving trade transactions across borders need to cooperate on a permanent basis to identify and implement reform measures that improve these transactions through reducing the time and costs of handling goods, thus facilitating the trade logistics as a whole (UNCTAD, 2006).

It is widely acknowledged that trade logistics in the OPT have been subjected since 1967 to the absolute control of Israeli authorities. Through military orders issued by military commanders, Israel imposed import and export fees and other duties, and regulated standards and specifications in line with those applied in Israel. On the other hand, Israel has been working towards de facto annexation of occupied East Jerusalem to Israel since 1967 as the Israeli law was imposed on the city and its Palestinian inhabitants. The Israeli policies enabled the occupation authorities to exercise full domination over Palestinian trade and render the Palestinian market dependent.

The Israeli authorities created these facts on the ground through applying a legal system that combined civil legislations with military orders, thus dominating the Palestinian economy and tying it to the Israeli economy. This also entailed holding sway over all aspects of Palestinians life, including the movement of persons and goods to/from/within the West Bank and Gaza, between them and with Israel, as well as control over all aspects of the international trade process affecting exports and imports from and to the OPT.

The Paris Protocol was designed in line with an Israeli vision and has thus precluded the emergence of an independent Palestinian economy.<sup>1</sup> Some observers consider that the

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<sup>1</sup> According to former Finance Minister Avraham Shochat. Interview 20 Oct 2012. The Center for the Renewal of Israeli Democracy (Molad). Accessed at: <http://www.molad.org/en/articles/articlePrint.php?id=14>

Paris Protocol was imposed on the Palestinian side, which was seeking an independent economy, and that it largely contributed to distorting the Palestinian economy.<sup>2</sup>

According to its provisions, the Paris Protocol was supposed to regulate economic relations between the two sides based on the principle of economic cooperation and strengthening the economic structure of the PNA through delegating the authority to design economic policies and programs and to respond to the needs of the Palestinian people of the OPT. However, this has not been the case on the ground, despite 15 years since the end of the interim period specified by the Oslo Accords, which were to culminate in the end of occupation and the establishment, in September 2000, of the Palestinian State on the territory occupied in 1967. Furthermore, in the wake of the second Palestinian *intifada*, the Israeli authorities tightened their hold over the Palestinian people. Their ability to dominate the Palestinian economy exceeded all expectations, through full control over the flow of goods to/from/within the OPT and a stringent blockade imposed on Gaza, which prevented the entry of many goods needed by the Palestinian people. Thus, the life of each and all Palestinians and their means of sustenance have become fully dependent on Israeli policies more than ever.

The Paris Protocol provisions were also supposed to conform to the rules and principles of various international trade agreements, including exemptions from general rules and agreed principles with a view to assisting the weaker partner, namely the Palestinian side in this case, in achieving economic development and recovery. However, that also has never materialized.

## **B. The goals of the study**

This study aims to shed the light on the obligations of Israel towards Palestinian shippers arising from the ATF of 2013 and its application in the OPT without prejudice towards Palestinian traders, and in particular through:

1. Analyzing the legal status of the OPT, the impact of the Paris Protocol and the validity of the Israeli measures towards Palestinian trade in light of Israel's commitments arising from international trade agreements and especially the 2013 ATF;
2. Examining the Palestinian right to benefit from international trade agreements including the ATF and the applicability of these agreements to the OPT;
3. Identifying the steps and measures that Israel should take as an occupying power to ensure the applicability of the provisions of the ATF to the OPT and in removing all obstacles that hinder the flow of goods to/ from/within it;
4. Review the restrictions the occupation authorities impose on Palestinian shippers and traders and how to address them in light of the ATF, its rules and provisions.

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<sup>2</sup> According to Ephraim Levy, former chief of Israeli intelligence who held important posts related to security coordination with the Palestinian Authority. The Paris Protocol and the Economic Implications for the Palestinians 1994-2000. 27 Nov 2012. The Center for the Renewal of Israeli Democracy (Molad). Accessed at: <http://www.molad.org/en/articles/the-paris-protocol-and-the-economic-implications-for-the-palestinians>

5. Highlight the potential impact of applying the ATF to Palestinian trade resulting from expediting the movement of goods across borders, reducing the cost of trade transactions and ensuring the free flow of goods.

### **C. Methodology**

For the purposes of the study, a review of the WTO trade agreements, in particular the 2013 ATF, was conducted, with special focus on the ATF principles and provisions that Israel, the occupying power and a State Party, is obliged to apply in the OPT because of its control of the territory. In this context, Israeli practices that are contrary to the provisions of the ATF in the OPT are highlighted, as well as the necessary legal and procedural tools to apply the ATF in ways that ensure the facilitation of Palestinian trade on equal terms with Israel and other contracting parties.

To highlight the Israeli policies that contravene the ATF, the study raises several issues via case studies from the field, including the blockade imposed on the Gaza Strip since 2007, which constitutes a serious violation of Israel's international obligations regarding trade facilitation. The study also proposes recommendations for lobbying with WTO Members and parties to the 2013 ATF, requesting them to persuade Israel to remove all constraints that hinder Palestinian trade and to meet its international obligations regarding the facilitation of Palestinian trade.

### **D. Structure**

The study consists of three substantive chapters in addition to a concluding chapter on main conclusions and recommendations. Chapter one reviews the situation of Palestinian trade under occupation since 1967, until and since the signing of the Oslo Accords and its economic Annex, the Paris Protocol. Chapter Two addresses the need for Israel, as the occupying power, to apply all international agreements to the OPT, including the ATF. Chapter Three examines the ATF regulating principles and provisions and their applicability to the OPT. The study draws specific conclusions and makes recommendations addressed to the Israeli authorities, the PNA, States Parties to the ATF, as well as Palestinian traders and shippers. This includes a set of recommendations for action to be taken by the PSC regarding the need to launch a local and international campaign to facilitate Palestinian trade, through requesting the ATF States Parties and the international community in general to act to ensure that Israel meets its international obligations, especially those under the ATF, to facilitate Palestinian trade.

## **Chapter II**

### **Palestinian trade under Israeli occupation**

Palestinian external trade is in fact under the full control of the occupying State, which regulates the Palestinian economy's dependency on the Israeli economy and the movement of people and goods. According to the Paris Protocol, the import and export-related fees, duties, standards and specification applicable in Israel, are also applicable in the OPT through laws and regulations specifically designed to this end.

#### **A. The dependent Palestinian economy**

In light of the full Israeli control of Palestinian trade and the dependency that it has imposed on the Palestinian economy to serve as a captive market for Israeli goods, Israeli exports to the OPT in 1986 surpassed a value of \$730 million, making the OPT the second largest market for Israeli exports after the United States of America (Shehadeh, 1986). During 1985-1986, Israeli goods constituted 90 percent of the OPT imports owing to stringent Israeli restrictions that limited Palestinian imports from Arab and international markets, including the imposition of high import duties (in the range of 200-300 percent) on goods coming from Arab countries. As a result, Israel's share in Palestinian exports rose from 76 per cent in 1992 to 94 percent in 2000, whereas imports from Israel constituted 94 per cent of total Palestinian imports in 1994 and 80 percent by 2000 (Abdel Razek, 2002).

Recent data published by the Palestinian Central Bureau of Statistics (PCBS) indicate an increase in the value of Palestinian exports and imports from 2011 to 2012 and the extent of dependence on the Israeli economy. Total merchandise imports in 2012 were at about \$4.7 billion (a 7.4 percent increase on 2011) while merchandise exports totaled \$782 million in 2012 (a 4.9 percent increase on 2011). Accordingly, the merchandise trade deficit stood at \$3.9 billion in 2012, an increase of 7.9 percent from the preceding year. However, only 16.9 percent of Palestinian exports were destined for the rest of the world, with the bulk (83.1 percent) destined for Israel, largely as a consequence of the constraints placed upon export of Palestinian products to the rest of the world and to Gaza Strip (PCBS, 2014a). Palestinian exports in 2012 were distributed as follows: \$639 million to Israel, \$109 million to Arab countries and \$34 million to the rest of the world. Israel also accounted for the largest share of Palestinian imports in 2012, at about \$3.35 billion, compared to \$496 million from the European Union and \$187 million from Arab countries, with the rest of the world accounting for \$667 million of total Palestinian imports (PCBS, 2014b).<sup>3</sup>

Israel's continued occupation and pursuit of restrictive policy measures which target Palestinian trade, alongside continued violent confrontations, recurrent hostilities and the policy of siege of Gaza and closures in the West Bank, adversely affect the economic prospects of the OPT and prevent its long-term development. Nothing suggests the occupation or its policy of asymmetric containment will end soon, although its forms and

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<sup>3</sup> Data for Palestinian exports and imports do not include East Jerusalem which was annexed to Israel after 1967.

severity may change over time. However, no doubt that sustained economic recovery requires either ending the policy of asymmetric containment or pursuing a Palestinian strategy that addresses this policy in the short-term as an external constraint on development that must ultimately go.

The state of the Palestinian economy has led many Palestinian economists to note the failure of the Israeli policy of “economic peace”. “All attempted forms of economic peace have eventually failed, either because they concealed Israeli colonial motives, because of Palestinian opposition or owing to design flaws, since they were rooted in the principle of subjecting Palestinian development to the prevailing Israeli priorities and to considerations of strengthening Israeli-Palestinian economic cooperation. Such initiatives were accompanied by joint research and studies, most of which relied on questionable economic concepts and expectations. These revolved around the claim that there exists a potential integrative trajectory through dependence on the more advanced Israeli economy and through an economic model that applied neoliberal policies and the “free market economy” as spelt out in the “Palestinian Basic Law” (Khalidi, 2014).

## **B. The Paris Protocol: intentions versus realities**

Two decades have passed since the signing of the Paris “Protocol on Economic Relations”, the Annex to the Oslo Accords that was supposed to regulate the economic relations between Israel and the PNA for a five-year interim period. The Protocol was supposed to regulate economic relations between the two sides based on the principle of economic cooperation and strengthening the economic basis of the PNA by delegating the authority to design economic policies and programs and to respond to the needs of the Palestinian people.

The Protocol provides the PNA with a very narrow space to pursue an economic policy independent of Israel regarding imported goods and permitted quantities (included in Lists A1 and A2), and regarding the possibility of the PNA imposing its own customs duties on certain equipment and tools (in List B), quota free and subject to Israeli standards and specifications. Many economists contend that the limited policy space under the Protocol available to the PNA in making its own trade policies has rendered its relation with Israel more of a “quasi-customs union”, instead of a full customs union (MAS, 2012).

The Paris Protocol provisions were also supposed to be in accordance with the rules and principles of the various international trade agreements, which include exemptions from general rules and agreed principles with a view to assisting the weaker partner, namely the Palestinian side in this case, in achieving economic development and recovery. However, that also did not materialize in reality. With the approach of the entry into force (on 31 July 2015) of the WTO Agreement on Trade Facilitation, which provides for the facilitation of customs procedures in a manner that ensures the flow of goods across borders, enhances the collection of import duties and organizes transit procedures, it is necessary to examine how the Palestinian side can benefit from the provisions of this Agreement. This is especially

important since the Paris Protocol features many weaknesses affecting the movement of goods to and from the OPT and between Palestinian and Israeli markets. The presence of loopholes allowed Israel to place obstacles to the flow of goods to and from the Palestinian market, resorting to phyto-sanitary and environmental justifications in the case of agricultural goods and security-based justifications in all spheres (Abdel Razek, 2002).

Many economists would concur that the Paris Protocol constitutes an incomplete “quasi-customs union” owing to its favoring the interests of Israel, even while including some minor and marginal exemptions. The actual Palestinian economic relation with Israel is more of an “economic union” (also incomplete). Hence the Protocol is akin to “a set of Israeli guidelines on exemptions to the economic union that the Palestinian may adopt if it so wishes” rather than a contractual agreement between two equal parties. According to Khalidi (2012) “there is only one economic system between the Mediterranean Sea and the Jordan River, namely the Israeli trade, fiscal, monetary and macroeconomic system”. Other Israeli economists, such as Ephraim Kleiman who participated in the Paris negotiations and was the main architect of the Protocol, believe that it is outdated and should be replaced by a new framework (Kleiman, 2013).

In this context, repeated problems in Palestinian economic policy-making may be noted, whereby the main question posed has mostly been about which trade relation with Israel is optimal. However, the most crucial (and often ignored) question relates to the shape of the Palestinian economy and trade regime with the rest of the world, according to which the best form of relation with Israel may be identified. One observer has concluded that the PNA is not obliged to maintain the customs unions as the optimal or sole option, but can consider other alternatives (Khalidi, 2012):

- Total trade and monetary separation from Israel through adopting a non-discriminatory trade policy and based on elaborating the legal and institutional concept of a separate customs territory including effective Palestinian control of international commercial borders and a Palestinian developmental tariff;
- Transforming the customs union into a free trade area between the OPT and Israel, covering at least 30 percent of current Palestinian imports from Israel, and a higher proportion of Palestinian merchandise and service exports (especially if these include Palestinian labour services exports). This would allow for the development of trade with other countries outside the Israeli customs system and according to strategic development requirements;
- Improving the dominant (effective if not declared) “economic union”, such that the PNA can opt – for economic if not political reasons - to place upon the occupying power the burden of complying with its legal obligations to consider the interest of the Palestinian people in all its monetary, trade and fiscal policies and decisions.

It may be concluded therefore, that the Paris Protocol, which provides a basis for a customs union and for the free movement of goods and people between the two sides, in reality accommodates the economic and security priorities of the occupying power. It

furthermore restrains the PNA and Palestinian trade largely through the complete Israeli control of border crossings and restrictions on the movement of goods. This has hampered economic growth, and even more so since 2000 because of the establishment of checkpoints and other obstacles, the total separation of Jerusalem and especially the economic siege imposed upon Gaza since 2007.

The rules and practices of the multilateral trading system require that all parties participating in international trade operations should facilitate trade flows by the adoption of the necessary measures to speed the movement of goods to markets, minimize the costs of transactions and handling of goods and increase efficiency in transit. Trade facilitation can minimize those delays and costs arising from moving goods through ports, airports, border crossings and customs stations, and reduce the risks of loss or damage during their transport and at borders.

Israel contends that it is concerned with the welfare and development of the Palestinian people and that it provides the necessary facilities to develop the Palestinian economy and allows the flow of goods to the OPT to meet the needs of its people. However, reality on the ground is different. In practice, the imposition of restrictions on the movement of goods as “security requirements” has entrenched the dependence of the Palestinian economy on the Israeli economy. Moreover, political considerations add pressure on the Palestinian side to refrain from pursuing the legitimate rights to achieve national self-determination and establish the independent State of Palestine.<sup>4</sup>

The continued effective control by Israel of the OPT casts its shadow over all aspects of the operation of Palestinian external trade, through its complete domination of international gateways, which allows it to regulate the flow of Palestinian goods through the ports and international crossings under its full administration. The ties that bind Palestinian external trade to Israel are reinforced through the common customs system and the applicability of all Israeli measures that regulate international trade on the operations of Palestinian exporters and importers. In this situation, Palestinian imports (and exports) are subject to full monitoring by Israeli authorities from the moment they arrive at ports, airports or land crossings and until they reach the areas under the jurisdiction of the PNA. Owing to the delays in issuing the necessary permits and documents to clear Palestinian goods, Palestinian shippers incur additional costs as well as the risk of perishing and damage to their goods and delays in their delivery to consumers during transport from Israel to the PNA areas or from security and customs controls in Israeli warehouses and customs stations (PSC, 2014a).

### **C. Additional constraints on Palestinian trade: dual use materials**

In addition to the general constraints on Palestinian trade, there are specific restrictions on lists of goods that may not be imported to the OPT for “security” reasons since they are classified by the occupation authorities as dual use materials and equipment. Internationally, dual use goods are defined as those goods that can be used for civilian or military purposes

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<sup>4</sup> See the reports of the Israeli non-governmental organization GISHA- Legal Centre for Freedom of Movement.

and whose sale, transport and use is regulated according to the Wassenaar Arrangements of 1995 (Wassenaar Arrangements, 2000). Lists of these goods cover nine categories of goods and complex and highly technical and accurate equipment such as electronic and electrical equipment used in aviation, computing and programming of different types, detection, communications and laser and related equipment, and organic chemicals including fertilizers (Wassenaar Arrangement Control Lists). However, Israel adopts, and imposes, a much more strict definition of dual goods items than the Wassenaar Arrangements.

The issue of entry of dual use goods to the West Bank and Gaza Strip is regulated by an Israeli military order on monitoring security exports entitled “Movement of dual use equipment to the areas under the jurisdiction of the Palestinian Authority”. The order requires that Palestinian traders obtain a special permit from the Israeli authorities that allows the purchase and transport of any of these materials to the West Bank and Gaza. Even though the Israeli authorities have permitted the entry of some dual use goods to the West Bank, the procedures for import licensing and acquiring security clearance entail significant disadvantages to Palestinian shippers and an extended period of time. The procedures are further complicated upon the arrival of the shipment in Israel, whereby they can be retained by Israeli Customs for more than a month, incurring additional expenses for the Palestinian importer. A separate permit is required for each individual shipment, contrary to usual practice whereby Israeli shippers can receive import permission for dual use materials that are valid for as long as three years (PSC, 2014b).

The Israeli authorities have applied the dual-use import system to prevent the entry of hundreds of items to Palestinian markets, thus weakening the Palestinian productive sectors especially in such areas as metal, engineering, agriculture, food and pharmaceutical industries, which face numerous restrictions (Nazzal, 2014). A number of precision tools are not permitted entry since they are considered to have a potential for being used to manufacture tubes that could be used to make rockets or missile launchers. Similar restrictions affect quarry operators who need dynamite to mine for stone and marble and who incur additional costs because of the limited ability to import such standard mining materials in the quantities required. The dual use restrictions on textile industries also add to production costs and the efforts required for dyeing textiles, a process that calls for liquid Oxygen (concentrated at 48 percent) which is on the dual use lists. Instead, Palestinians are allowed to import Oxygen concentrated only up to 16 percent, just a one-third of the concentration required.

Therefore, it may be concluded that the policy of placing restrictions on Palestinian trade by Israel contradicts the obligations of the occupying State regarding the facilitation of trade. These restrictions, in practice achieve the following:

- Ensuring the dependency of the Palestinian economy upon the Israeli economy and keeping the Palestinian market open to unfettered and unconditional entry of Israeli products;

- Excessive resort to unilateral security considerations as a tool to control all aspects of Palestinian external trade and keep the Palestinian economy attached to that of Israel;
- By restricting dual use imports from third countries to the OPT, in some cases this allows for the export of Israeli goods with similar specifications to the Palestinian market;
- Israeli restrictions furthermore discourage investment in certain Palestinian productive sectors, especially information and communications technologies.

#### **D. Case study 1: the siege of Gaza in the light of international law and the Agreement on Trade Facilitation**

In the aftermath of the Palestinian second intifada in 2000, Israel tightened its restrictions on the Gaza Strip and economic conditions deteriorated. Even after its disengagement from Gaza in September 2005, Israel retained control over the life of the 1.8 million Palestinian people of Gaza by the on-going control of Gaza's airspace, maritime space and the land crossings. Even though Gaza has been under various forms of closure since the 1990s, the blockade, starting in 2007, was a sharp turning point as the Israeli restrictions were escalated into a near total blockade that isolated Gaza's exporters, importers, producers and consumers from the rest of the world. Gaza has been almost completely severed from the rest of the world since 2007. Gaza also remained isolated from its traditional markets in the West Bank and Israel, which absorbed some 85 per cent of its exports before the blockade. Since then, with the precipitous deterioration of the overall political conditions, the problems of Gaza have been steadily moving from bleak to worse.

The Israeli authorities have pursued a policy of restriction on the movement of goods between the Gaza Strip and the West Bank beginning in 1995, leading to a complete siege on the Strip since September 2007 and entailing its complete disconnection from the outside world and from the West Bank. Strict controls were enforced on the passage of goods to and from Gaza, as well as a total ban on the entry of dual use materials, leading to a complete deterioration of economic activity throughout Gaza and its trade relations with the outside world (IDF, 2007 a, and b; 2008).

The siege came as part of exercising pressure against the Hamas government in Gaza, following the decision of the Israeli Ministerial Committee on Security Affairs to restrict the entry of goods to Gaza to those goods that provide for humanitarian needs. For this purpose the Israeli government adopted a document entitled "Red lines: food consumption in Gaza", which included lists of hundreds of items that may not be imported into Gaza even if they are necessary to daily lives of Palestinians in Gaza and constitute no security threat (Gisha, 2010). These lists included basic inputs used in food production such as industrial salt, foodstuffs, including tea, sugar, rice, wheat, sesame, oils, construction materials such as wood and steel reinforced cement, pharmaceuticals, vital medical equipment, cleaning materials and disinfectants, shoes and paper products and school stationary. Such measures support the argument that Israeli authorities pursued policies of collective punishment through trade sanctions against civilians in Gaza (Gisha, 2010).

The Israeli Government justified its tight siege on Gaza on grounds of pressuring Hamas to cease its rocket attacks from Gaza towards Israel. In his testimony to the Terkel Commission, the Israeli Coordinator of Government of Activities in the Territories (COGAT) testified that entry of goods to Gaza was limited because of the firing of rockets towards Israel and against the border crossings (Terkel, 2010).<sup>5</sup> This near total economic blockade, however, is a form of collective punishment. In June 2011, some restrictions on the entry of goods necessary for the life of the people of Gaza were eased, except building materials and dual use classified materials. However, restrictions on the movement of persons and goods between Gaza and Israel or the West Bank remained in place. These practices resulted in a severe shortage of food products throughout Gaza. According to the World Food Program (WFP), local traders reported shortages in basic foodstuffs such as wheat, sugar, milk products and cooking oil, while the economic crisis arising from the siege and the ban on imports of raw materials and on export goods also increased unemployment to around 40 percent, and in turn reliance on food aid from relief agencies peaked (Gisha, 2012). The siege also led to the establishment of a network of clandestine tunnels at the border with Egypt used to import all sorts of goods required and needed to keep the deteriorating economic cycle turning (Abuhatab and Mdallaleh, 2014).

The siege also brought an end to the system of an integrated economy and single market between the West Bank and Gaza Strip whereby until then goods coming from Gaza accounted for around 25 percent of the West Bank market and 20 percent vice-versa (Paltrade, 2009). Prior to the siege, it was normal for Palestinian traders from Gaza to travel to the West Bank to purchase goods for transport to Gaza, while afterwards it was no longer possible for traders to go to the West Bank to select and inspect goods. Those goods that are permitted entry to Gaza require warehousing before transport at a cost of NIS 4000 (around \$1000) per shipment and special arrangements with Israeli and Palestinian truck drivers to transport goods to Gaza via the Israeli crossing point at Karm Abu Salem (Kerem Shalom) for a charge of around \$2250 per shipment. Added to these costs are the expenditures arising from delays by Israeli authorities in allowing entry of the goods into Gaza and in warehousing until entry is granted (Gisha, 2012).

The movement of trade to and from Gaza has not seen a significant improvement since 2007, engendering further distortion of the Palestinian economy and preventing any development in Gaza in particular. In all of 2013, only 185 trucks departed Gaza laden with goods, equivalent to 2 percent of the number that used to operate before 2007 (Gisha, 2013). As for the entry of good to Gaza, the average number of trucks entering annually had reached 10,757 before 2007 while their number had fallen to 4,107 trucks by 2014 (Levy, 2014). On the face of it, the measures that Israel pursued until 2010 were reformulated since then as “separation measures” that have effectively maintained the division between Gaza and the West Bank and kept them as distinct entities thereby prolonging occupation and maintaining Israel’s control over the fate and all aspects of economic life of Gaza.

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<sup>5</sup> The *Public inquiry to establish the facts regarding the commandeering of the international ship convoy to Gaza Strip of 31/5/2010*, chaired by the retired Supreme Court Judge Yakov Terkel, was established by an Israeli Cabinet decision on 14 June 2010.

### **Chapter III**

## **The obligations of Israel as an occupying power with regard to facilitating Palestinian trade**

In the light of the continuing occupation by Israel of the OPT, the legitimate question arises as to the necessity and importance of the applicability of international agreements and conventions upon the territory. These include the agreements that regulate international trade such as the 1995 Agreement Establishing the WTO and the 2013 WTO Agreement on Trade Facilitation (ATF). There is a case that Israel, as the occupying State, may be obliged to apply these and other agreements to the OPT and its Palestinian population.

There is a wide consensus among legal scholars regarding the necessity of the applicability of international law upon the OPT. This viewpoint is advocated mainly by reference to international Human Rights Conventions and International Humanitarian Law (IHL). Since the entry into force in 2002 of the Rome Statutes of the International Criminal Court of 1998, a legal debate between scholars has ensued regarding the legitimacy of its applicability to the OPT, especially since the UN General Assembly granted Palestine the status of a non-member State in September 2012<sup>6</sup> and subsequent to the State of Palestine joining the ICC as its 123<sup>rd</sup> member in April 2015.

This Chapter addresses the question as to whether Israel, as an occupying State, is obliged to facilitate the trade process in the OPT through commitment to implementing the ATF with respect to Palestinian and Israeli trade operations alike.

#### **A. The principle of applicability of international law and agreements upon occupied territories**

The Israeli authorities have failed to comply with their international obligations towards the Palestinian people and have rationalized violations of the rights of the Palestinian people in line with the statement by the Legal Counsel of the Israeli Foreign Ministry of 1984, which dismissed the applicability of the International Declaration and the two Covenants of Human Rights upon the OPT arguing that the exceptional status of the relation between the occupying power and the occupied territory is outside the scope of human rights law (Bevis, 1994).

However, international law does not seem to support such an argument and the UN Charter affirms the applicability of international law on territories that have not yet achieved their independence and have remained subject to the control of foreign States. It is the obligation of such States above all to protect the interests of the citizens of the territories subject to their control, not to mention the obligation to develop the welfare of the subject populations to the greatest degree possible in accordance with international peace and security. According to Article 73 of the UN Charter, for this purpose States should:

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<sup>6</sup> By a vote of 138 in favor, 9 opposed and 41 abstentions.

1. Ensure the advancement of the subject peoples in political, economic, social and educational fields, as well as their fair treatment and protection from adversity, alongside the need to protect the culture of these peoples;
2. Develop local government and allow for the political aspirations of these people, while cooperating in the development of their free political systems, according to the specific conditions of each territory and people and their degree of development;
3. Strengthen international peace and security;
4. Strengthen humanitarian measures needed for growth and prosperity in support of research and cooperation (amongst the occupied population) to achieve concrete social, economic and scientific goals, and their cooperation with international specialized agencies as deemed necessary.

In Article 74, the Charter stipulates that Member States agree to base their policies towards territories subject to their control on the principle of good neighborliness and to consider the interests of the other parts of the world and their prosperity in social economic and trade affairs. Since it is incumbent on these States to respect the provisions of the UN Charter and assure their application, legal scholars consider this the foundational principle that ensures the applicability of the standards of international agreements and conventions upon occupied territories. The United Nations and all its specialized agencies and institutions have affirmed that these standards are applicable at all times and places (in peacetime as well as during armed conflicts and military occupation), without exception for any reason (UNGA, 1968; UNGA, 1969; UNGA, 1970; Roberts, 1992).

The International Court of Justice (ICJ), in turn supported this approach when it examined the request by the UN General Assembly for an opinion on “the legal consequences arising from the wall that Israel, the occupying power, is building in the OPT, including in and around East Jerusalem”. The Court concluded “that the protection afforded by the Human Rights Conventions is not lifted in case of armed conflict, except through restrictive provisions of the type specified in Article 4 of the Convention on Civil and Political Rights of 1966” (ICJ, 2004). In the light of the above it can be concluded that it is incumbent upon the Israeli occupying State to honor its obligations towards the OPT that it has taken upon itself by virtue of its adherence to international agreements.

## **B. Application of International Humanitarian Law in the OPT**

International Humanitarian Law, IHL, is a branch of international public law whose customary bases and agreements aim to protect people affected adversely by armed conflicts and the ensuing pain as well as financial resources that are not linked to military operations. International law affirms the necessity of applying the provisions of IHL in its customary and contractual aspects in time of armed conflict, occupation and war, which in turn implies their applicability to the Palestinian territory occupied since 1967.

The Fourth Geneva Convention Regarding the Protection of Civilians in Time of War is one of the most prominent IHL agreements and its applicability to protect Palestinian

civilians in the OPT is not in doubt. The provisions of the Convention are clear regarding their applicability in cases of war and of military occupation. Its second Article states: “*in addition to provisions that apply during peacetime, this Agreement is applicable in the case of declared war or any other armed clash between two or more of the High Contracting Parties, even if one of them does not recognize a state of war*” (Pictet, 1958). The provisions and principles of the Fourth Convention apply to the OPT also owing to its status as it is subject to Israeli military occupation. The Convention stipulates that it is also “applicable in all cases of partial or complete military occupation” and that from the moment hostilities actually commence, regardless of whether they are declared or not (Pictet, 1958).

The Fourth Geneva Convention acquires a binding legal value upon all contracting States, as it obliges all parties to it to apply it with good intention (Vienna Convention, 1969: Articles 26 and 34). The ICJ affirmed in its advisory opinion regarding the Namibia question in 1970 that the Convention is applicable in conditions of military occupation and it requested the State of South Africa, as the State occupying Namibia, to commit to the application upon the occupied territory of international multilateral agreements of a humanitarian nature (ICJ, 1970; ICJ Reports, 1971; Roberts, 1992).

Israel does not apply the provisions of the Fourth Geneva Convention upon the OPT, even though it is a State party to the agreement, and Israeli officials resort to a number of justifications with questionable legal basis. Despite the international consensus that the Convention should be applied in the OPT because Israeli control is a military occupation, Israel’s official policy violates this principle, supported by the opinions of some Israeli scholars. Their position affirms that since the end of the British Mandate in 1947 sovereignty in the West Bank and Gaza Strip has been suspended and not subject to that of any of the High Contracting Parties. Furthermore, when Israel occupied the territory in 1967 neither Jordan, nor Egypt had the right to sovereignty over it and that this is sufficient reason to excuse Israel from applying the Convention (Shehadeh, 1986).

The Israeli authorities acts somewhat selectively with regard to the application of international law and agreements upon the OPT, for example declaring its recognition of the application of the “humanitarian rules” of the Fourth Convention upon the occupied territory – even though all its provisions are of a humanitarian nature. On the other hand, Israel regularly declares its adherence to the application of the Fourth Hague Convention on the Rules and Customs of Land War of 1907 and its annexed provisions, as part of international customary law, which is in turn part of Israeli domestic law. This Convention, however, contains no references to civilian populations and the need to protect them.

The official Israeli position rejecting the applicability of the Fourth Geneva Convention on the OPT is widely criticized by the United Nations and the States parties to those Conventions and the International Committee of the Red Cross and most scholars of modern international law (ICRC, 2001). These States have affirmed in repeated resolutions the necessity of application of IHL and the Fourth Convention in the occupied territory. The ICJ considers that IHL, including the Fourth Geneva Convention, has a binding nature with

respect to Israel as the occupying power and a Contracting Party. The Judges of the Court agreed in their Advisory Opinion of 9 June 2004 on the principle of applicability of the Convention and its rules and provisions upon the Palestinian territory so that it may provide protection to the civilian population (ICJ, 2004).

International law, supported by the international community, resolutions and scholars, stipulates that States should recognize the principle of the universal and comprehensive nature of human rights and implement them in a manner that ensures respect for international human rights law in times of peace, war and situations of military occupation (UNGA, 1968; UNGA, 1969; UNGA, 1970; Roberts, 1992). The ICJ has also affirmed that the “humanitarian nature of international agreements” is of close relevance to human rights and that the failure of the occupying (Israeli) State to apply the human rights agreements in this situation gives rise to grave violations of the rights of the population of this territory.

The Israeli occupation authorities fail to meet their obligation to respect and apply international human rights standards on the OPT (resorting to arguments referred to above). However, these Israeli justifications are contrary to the spirit and essence of the international human rights agreements and the principles of international law, which prevent States from registering any reservations to international agreement of a nature that may contravene their essential aims (Vienna Convention, 1969). The ICJ has already provided its conclusions on this in its Advisory Opinion of 28 May 1951 regarding the legitimacy of reservations by States parties to the Convention on Combating the Crime of Genocide of 1948 (Rousseau, 1982). The Court accepted the right of States to express reservations to international agreements on the condition that they do not undermine the aims and principles of those agreements.

### **C. The obligations of the occupying Authorities and applicability of the 2013 ATF upon the OPT**

The obligation of Israel as an occupying power is not limited to the respect and application of the international standards of human rights and of IHL in the OPT. Israel should also comply with all its commitments arising from the UN Charter and all international conventions that require the occupying power to ensure and promote the appropriate conditions for development. This entails providing the appropriate environment for local and foreign investments, facilitating trade and the free movement of goods, which would enhance the efficiency of the Palestinian economy and ensure all the basic needs of the inhabitants, contribute to their development, improve their living conditions and create job opportunities (ICJ, 2004). The need to comply with these obligations is not restricted to the West Bank part of the OPT but also covers Gaza. The Israeli authorities’ claim regarding the “ending of occupation” of Gaza in 2005, when it undertook a redeployment of its forces in and around the Gaza Strip and dismantled its settlements there has not meant honoring Israel’s legal, and humanitarian obligations towards the Palestinian people of Gaza since Gaza remains under a tight sea, land and air blockade and subject to repeated and frequent Israeli military operations.

Furthermore, the Israeli authorities' justification for the strict constraints that they place upon the movement of goods and basic commodities to the West Bank and Gaza on the grounds of "security requirements" or their classification as dual use materials lack legal or humanitarian rationale. In most cases these restrictions constitute a form of collective punishment of the Palestinian people for political reasons, because of their opposition to continued occupation or to retaliate for military acts undertaken by Palestinian armed groups.<sup>7</sup>

As occupying state, Israel is responsible for limiting unemployment of the Palestinian people and providing them with job opportunities, as well as supplying the civilian population with food and medical supplies, improving public health and ensuring the free flow of goods needed by the population (Gisha, 2012).<sup>8</sup> The occupying state is also forbidden from attacking, removing or damaging basic utilities needed by the inhabitants or agricultural areas. Such acts constitute grave violations of Palestinian rights as they inflict severe damage on the Palestinian economy and restrict growth and development by constraining, rather than facilitating trade. Subsequent paragraphs discuss the obligation of the Israeli occupation authorities to apply the ATF of 2013 in light of the general applicability of international law upon the OPT, as has been reviewed above.

International treaties constitute an essential source of international law, and serve as tools for the development of peaceful cooperation among nations based on the universal recognition of the principles of free will, good faith, and *pacta sunt servanda* (Latin for "agreements must be kept"). The preamble of the Vienna Convention on the Law of Treaties of 1969 affirms that the peoples of the United Nations were determined to establish the necessary conditions to maintain justice and respect for the obligations arising from treaties. This entails respect for the principles of international law enshrined in the UN Charter such as: equal rights; the right of the peoples to self-determination; equality in the sovereignty and independence of all States; non-interference in internal affairs; preventing the threat or use of force; universal respect for human rights and fundamental freedoms for all; preservation of international peace and security; and, developing friendly relations and cooperation between nations.

The Vienna Convention on the Law of Treaties confirms the principle of *pacta sunt servanda*, which entails that every treaty in force is binding upon the parties who must implement it in good faith, and that a party may not invoke the provisions of its domestic law as justification for its failure to implement the Convention. With respect to the geographic (regional) scope of the implementation of treaties, unless it appears from the treaty or it is proven otherwise, the treaty is binding upon each party in respect of its entire territory. States are also obliged to interpret the treaty in good faith and in accordance with the meaning given to its terms within its specific context and purpose (Vienna Convention, 1969: Articles 26, 27, 29, 31).

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<sup>7</sup> Article 33 of the Fourth Geneva Convention forbids collective punishment and all measures of threat or terror, as well as theft or acts of revenge against civilians and their property.

<sup>8</sup> As stipulated in the Fourth Geneva Convention, Articles 52, 53, 55, 56, 59.

This implies that it is the responsibility of Israel as a State party to the Vienna Convention to interpret the international agreements to which it is a party in good faith and to ensure the application of their provisions on its entire territory and the territories subject to its effective control, such as the OPT. Furthermore, Article 1 of the Covenant on the Economic, Social and Cultural Rights of 1966 stipulates that States should ensure that peoples are able to determine their own political, economic, social and cultural fates, enjoy and benefit from the management of their wealth and resources and that they not be deprived of their means of subsistence.

Accordingly, it can be argued that what is specified in numerous international covenants regarding the geographic (regional) scope of their applicability applies to all international covenants, including the ATF of 2013 with regard to the OPT. Since Israel is a party to international trade agreements, the Paris Protocol entails the applicability of the provisions of the WTO upon the OPT as well as of the trade flows between Palestine and all WTO members.

The provisions of international law and justice, the opinions of scholars and international treaties affirmation of the necessity of their application to States own territories and to territories under their effective control (occupied territories), lead to the conclusion that international trade agreements, including the ATF, should be applied to the OPT. The ATF imposes binding commitments upon all 160 Members of the WTO, including Israel the occupying power.

It is therefore the responsibility of Israel to apply the provisions of the Agreement upon the OPT in order to facilitate the Palestinian business process. This would ensure accelerating the transport, release and clearance of goods, improving cooperation between Israel and the PNA on customs issues, and helping to empower the latter, whose economy is still developing, in the full facilitation of trade relations with Israel and other members of the WTO. Were Palestinian trade to benefit from the application of the ATF, that would improve the capacity of the Palestinian customs authorities and contribute to the effective collection of revenue. Such an outcome would also help small businesses access new export opportunities through measures such as transparency in customs operations, reducing the documentation requirements and completing the processing of documents before the arrival of goods.

## **Chapter IV**

### **Application of the ATF to the OPT**

Facilitating trade between countries contributes above all to reducing costs of trade transactions; this was the main purpose of the ATF adopted at the WTO Bali Ministerial conference in December 2013, which regulates the clearance procedures of imported and exported goods and aims to reduce their cost. Though countries have paid increasing attention to the costs of monitoring the movement of goods at borders in recent years, these have remained subject to delays at borders that impede the free flow of commerce and impose additional costs, which are generally borne by shippers and consumers.

Business costs in developing countries in particular are relatively high, despite those countries' limited capacity to bear additional costs. A number of geographic factors related to weak communications and transport adversely affect least developed countries, many of which are remote, non-coastal, landlocked or small island states. Those countries feature very weak transport infrastructure, which increases average trade costs: the average costs of shipping a container from LDCs is 43 percent higher than for other developing countries (ITC, 2013). The situation of the OPT is distinct owing to continued occupation and the restrictive trade policy applied by the occupying power under the justification of "security requirements", which add to the costs of Palestinian trade. These restrictions impose additional challenges upon Palestinian shippers different to those common in other developing countries.

As reviewed in Chapter 1, Israeli domination of Palestinian trade through control of international borders compounds the usual problems faced by landlocked, least developed countries and means that the realities of Palestinian trade are worse than any other developing country (PSC, 2014a). This Chapter explains how the application of the ATF upon the OPT would positively affect Palestinian trade processes and would benefit Palestinian shippers just as it is intended to benefit Israeli and other traders. In this respect, the flexibility afforded by the ATF should be utilized, especially as regards the necessary technical assistance that could be provided to allow for the application of the provisions of the Agreement on the Palestinian territory fairly and in line with the law.

#### **A. Trade facilitation: significance and benefits**

A nonprofessional understanding of international trade generally focuses on the physical movement of goods and containers and the different land, sea and air transport modes involved. However, this view omits pivotal aspects of these processes related to the control and regulation of the movement of goods across international borders, through massive, complex and interlinked infrastructures. Much of this is unseen, involving documents, dealing with data related to the movement and handling of shipments and other formalities and procedures. This in turn calls for enhancing trade efficiency, which entails the removal of all formalities, procedures, and documentation that do not contribute to increasing the value added of the external trade sector (Al-Khalidi 2011).

According to UNCTAD, trade facilitation measures aim to prepare the environment for trade transactions across border through harmonizing and simplifying measures and practices in the areas of “customs, documentation requirements, shipping and transit and trade transport and procedures” (UNCTAD, 2006). The special needs of each of the different areas of trade facilitation calls for close coordination “between shippers, forwarders, service providers, customs and all concerned Ministries and regulatory agencies involved in international trade”.

While there is no single definition of “trade facilitation”, the concept adopted by the WTO and on which the ATF was based refers to “facilitation and coordination of international trade procedures”. These are specified as formal or official activities, practices and conduct undertaken in the collection, presentation, declaration and treatment of the data required for the movement of goods in international commerce (WTO, 2013). Similarly, under the European Union’s customs union trade facilitation is defined as simplification and harmonizing the international trade processes including import and export procedures, particularly those activities which entail the collection, presentation, communication, and processing of the data required for the movement of goods in international commerce (European Commission, 2015).

The facilitation of international trade is not an end in itself, but rather a mechanism that targets accelerating economic growth through participation of countries in international trade and attracting local and foreign investment that creates new jobs and boosts and diversifies production (Al-Khalidi, 2011). Facilitating trade calls for improving procedures and controls that manage the movement of goods over national borders and that reduce the associated cost burden and increase trade efficiency. The longer the duration of customs clearance procedures for goods at borders and the slower the supply chain, the more do international trade-related costs rise and add to the burden to final consumers.

More efficient trade facilitation helps to strengthen the capacity of customs and to increase trade revenue collection at borders. This is why the ATF is so important and needed, since its implementation can have direct impact on the speed of clearance of goods over borders and improve transparency and the capacity to measure actual trade flows and monitor trade transactions. With the growth and expansion of regional and global supply chains, predictable trade facilitation is one of the main components of establishing supply chains from which developing countries may benefit (ITC, 2013).

UNCTAD (2006) also affirms that successful trade facilitation calls for the following steps:

1. Establishing formalities, measures and documents and electronic templates to process international trade;
2. Accelerating the movement of goods through enhanced operations of customs agencies (“predictable transparency”) and in the regulatory infrastructure of

transport and communications, as well as the use of information technology and customs automation;

3. Publishing data related to trade so that it is readily available to all concerned parties especially shippers, businesses, service providers, and public agencies, and achieving that through establishment of a consultative mechanism (trade facilitation bodies).

There are strong indicators regarding the advantages and benefits of trade facilitation as a winning proposition for developing and advanced countries alike. Some developing countries were not enthusiastic about the ATF deal at the WTO essentially owing to their concerns about the costs of implementing their commitments under the Agreement. However, supporters of the ATF (especially advanced industrial countries) cited the estimates of the OECD of the reduced costs of trade transactions that would ensue for developing countries, of 13 – 15.5 percent, or contended that the costs of non-implementation would outweigh those associated with its application because of the acknowledged contribution of trade facilitation to development (ITC, 2013).

The ATF is composed of thirteen Articles divided into two main sections, the first focuses on procedures and obligations related to trade facilitation and the second addresses flexibility (special and preferential treatment) for the developing and least developed countries. The following Chapter reviews the provisions and texts of the Agreement in comparison to current practice to shed light on the potential benefits of its application on the movement of goods and in reducing the costs of Palestinian trade.

## **B. The applications of the ATF related to information and transparency: Articles 1-6**

### ***1. Article One: Publication and availability of information***

Article 1 of the ATF affirms the principle of transparency in obtaining the latest information on procedures and requirements related to exportation and importation, as well as enabling shippers and all professional parties to obtain trade-related forms and documents through publication online and making them widely available. This Article stresses the importance of online publication of all information related to trade, such as enquiry points and notification procedures for information that States are obliged to publish regarding customs clearance requirements and procedures for exports and imports. These include requisite forms and supporting documentation, customs duty rates and taxes, customs classification and valuation guidelines, rules of origin, transit restrictions, procedures and fines and appeal procedures, trade agreements and procedures for administering customs tariff quotas.

These provisions are of special importance to the facilitation of Palestinian trade, as Israel is required (in its capacity as a Member State of the WTO) to publish all documents related to imports and exports as expeditiously as possible in Hebrew, Arabic and English to make them equally available to Palestinian and foreign traders as to Israelis. Ensuring that

Israeli Customs authorities and all specialized departments implement this Article will help Palestinian traders become better aware of trade procedures and requirements, and allow them to access documents and forms in their language. This in turn would assist them in better management of their trade, decision-making, accessing information and speeding and reducing the cost of customs clearance in particular.

**2. *Article Two: Opportunity to Comment, Information Before Entry Into Force and Consultation***

By the provisions of this Article, States should consult with shippers and all other concerned parties in the drafting of any new laws related to the movement of goods and their release through customs clearance. This is in addition to the systematic consultation expected between border agencies, traders and other interested parties within the territory under the control of States party to the Agreement.

Palestinian shippers, business institutions and other official parties are marginalized from participation in decision-making and designing laws and regulations needed to facilitate trade, all of which is dominated by Israeli authorities, manifested as follows:

- a. Subjecting Palestinian shipments to security inspections that cause delays well beyond those experienced by Israeli shipments;
- b. Application of Israeli laws and procedures in all domains of Palestinian external trade without any participation by any Palestinian traders or concerned institutions, all of whom are on the receiving end of the process regarding content of these regulations and laws;
- c. Inability of Palestinian shippers to directly communicate with Israeli institutions and reach customs zones to facilitate the procedures for the movement of their goods, which prevents them from checking goods or rectifying errors on the spot;
- d. The absence of Palestinian customs clearance agents who could be able to represent the shippers' interests at borders and inside customs zones; and,
- e. Collection of Palestinian customs revenues by a foreign power (the Israeli Customs Authority).

In order to facilitate Palestinian trade according to Article 2, Israeli official authorities should consult with official counterparts in the PNA and with Palestinian shippers, businesses and other institutions. This should aim to involve them in modifying laws and procedures to make them compatible with the Article and ready for application in the OPT upon the entry into force of the Agreement. Implementation of this Article would resolve a major impediment faced by Palestinian shippers and institutions arising from Israeli constraints, which prevent them from reaching Israeli customs offices or from entering customs bonded zones to ascertain that the authorities treat their shipments according to laws and regulations intended to facilitate trade. By assuring the integrity and transparency of these processes, Palestinian shippers will allay much of their concern and suspicion regarding their treatment,

while expediting the clearance of their shipments and exempting them from arbitrary, lengthy and costly delays and storage at border crossings.

### **3. *Article Three: Advance Rulings***

The ATF will facilitate trade through the requirement in States Members to issue and publish clear and transparent advance rulings regarding information and procedures so that shippers may be able to access the widest possible information. Advance rulings help shippers to avoid doubts and uncertainty regarding trade transactions and to calculate in advance the costs of customs duties, fees and services, all of which permit rational pricing of final goods. Such enhanced certainty and predictability can have a positive impact on the trade and development of countries, especially in the Palestinian case.

The application of this Article could address the arbitrary decisions of Israeli authorities that constrain Palestinian trade for no transparent, legitimate reason, such as the lack of clarity regarding the scope of goods that may be imported to the PNA areas subject to limitations, including dual-use items that may be withheld for lengthy periods at border crossings. In addition, decisions regarding customs valuation, goods classification and rules of origin can open the door to customs duty evasion and corruption, as shippers are obliged to limit their costs by resorting to bribery to obtain better treatment of their shipments and faster customs clearance (PSC, 2014a). An end to arbitrary decisions by the authorities and ensuring the publication and application of advance rulings regarding Palestinian goods can help to increase predictability of trade transactions across borders. It would also reduce disputes with Customs authorities regarding duties, valuation and origin, as well as increase the possibility of receiving preferential treatment upon release of goods. All of this would contribute to resolving claims regarding the integrity and safety of customs procedures upon clearing containers, not to mention discourage corruption.

### **4. *Article Four: Appeal or Review Procedures***

It is especially important that traders who have been adversely affected by decisions and practices of authorities involved in the trade process, such as Customs, have an opportunity to address these authorities to enquire about the reasons for their decisions, as well as to be able to access courts to contest the adequacy and legitimacy of decisions. This is the main purpose of Article 4 of the ATF, whose provisions entitle adversely affected parties to appeal or review any administrative or judicial measure or mistake by the Customs authorities or other related border agencies. Undoubtedly, the right of review and appeal affords protection to all traders and parties who have been affected adversely by decisions or mistakes by Customs that violate the laws and regulations in force. Furthermore, review of decisions by concerned authorities allows for greater harmonization between countries in the application of laws and regulations as advocated by the World Customs Organization (ITC, 2013).

In order for the Israeli authorities to apply this Article upon the OPT, they must remove all restrictions on access to customs zones at land, sea and air borders by Palestinian shippers.

The latter also should be able to request review of any arbitrary decisions by Israeli Customs authorities personally or through their agent and to access the competent courts in case they need to appeal decisions.

**5. *Article Five: Other Measures to Enhance Impartiality, Non-Discrimination and Transparency***

By the provisions of this Article, States parties have the responsibility to monitor borders and inspection operations of food, beverages, animal feed and livestock. On this basis, authorities subject numerous goods to health inspection in order to protect consumers from foodstuffs that may be spoiled once they are marketed for consumption. In case the monitoring authorities suspect that some of the goods in a specific shipment may be unsafe, they tend to assume that the whole shipment is spoiled and would need to be inspected to prevent any unsafe products from reaching markets. The provisions of the Article furthermore stipulate that analyses of health risks should be conducted independently, objectively and that these tests should produce scientific results. In light of the expenses borne by shippers and the losses that might be incurred by suspect shipments, those who wish may obtain a second opinion. When States Parties to the ATF issue any instructions to reinforce monitoring and inspecting of such goods they must do so on the basis of managing risks in a harmonized manner at all entry points, and they should lift such measures and publish that decision as soon as its cause has been alleviated. The provisions of the Article also require that shippers or their agents should be informed if their goods are detained. If a first test reveals the goods to be spoiled, the shipper may request analysis of a second sample.

***Case Study 2: Palestinian agricultural exports***

Israeli practices severely damage Palestinian agricultural products during transport from Gaza to the West Bank or to export markets. Every year, the Palestinian Ministry of Agriculture receives a formal notification from its Israeli counterpart that there is no objection to entry to the West Bank of strawberries grown in Gaza. However, the Coordinator of the Israeli Civil Administration (ICA) in the West Bank rarely permits the entry of strawberries from Gaza to the West Bank while allowing the marketing of Israeli-grown strawberries to the West Bank (within the rules of the existing “customs union”). Even though Gaza products depart from Ben Gurion airport as exports to European markets, they may not enter the West Bank. Palestinian Ministry of Agriculture officials consider that this restriction has no security considerations. Rather it reflects political and economic considerations, such as the fact that 80 percent of strawberries consumed in the West Bank are of Israeli origin and are below the standards and specifications of exports to Europe, whereby the West Bank functions as a reserve market for low-quality Israeli products (Abu-Laban, 2014).

Palestinian traders also incur additional costs when moving livestock such as sheep and goats from the West Bank to Gaza. Usually the trader must rent a space at the Tulkarem or Tarqumia crossing (with Israel) to assemble the livestock intended for transport to Gaza, prior to the two hour transit journey through Israel. According to established procedures, ATF receiving the transit permit, the trader must coordinate with the ICA officer in the Bet El settlement near Ramallah, to allow the transport of the livestock across Israel. In the best of circumstances, the transport permit may be issued within two weeks, while arbitrary decisions by officers at the actual crossing points can add weeks to the process. Meanwhile, the livestock awaiting transport must be fed and cared for, adding further costs and losses to the shipper (Abu-Laban, 2014; PSC, 2014a).

**6. *Article Six: Disciplines on Fees and Charges Imposed on or in Connection With Importation and Exportation***

This Article seeks to limit the costs of customs fees and trade transactions in line with the value of the service provided by the competent agencies, including the Customs Authority and all related parties, and as specified in the 1994 GATT Agreement. Accordingly, States parties are required to publish all information and updates regarding fees and costs and to revise them regularly (as specified in Article One), to not demand modified cost-charges on imports and exports before all relevant information has been published and to regularly revise fee-rates to reduce their diversity and number.

In addition, a number of disciplinary measures specify that fines should be imposed only on those persons actually responsible for any infractions of laws or regulations, and that the fines be commensurate with the violations and take into account overriding circumstances. Such fines should be communicated in writing and should be imposed within a specified and limited period after the infraction takes place. Palestinian Businesses will certainly benefit from ending the imposition of arbitrary fees and fines and from the new opportunities afforded by the ATF to register objections to arbitrary impositions that are not commensurate with the infraction.

**C. *The applications of the ATF related to the release and clearance of goods:***

**Article 7**

Article 7 of the Agreement has special importance to Palestinian trade because it regulates the measures that States Members must take and follow to release goods and clear them through customs in export or import operations, including goods in transit. This Article specifies best practices in customs operation and other measures at borders in line with World Customs Organization (WCO) recommendations, especially those contained in the International Agreement to Simplify and Harmonize Customs Measures, or the amended “Kyoto Agreement”. In 1999, the Council of World Customs Organizations adopted the Agreement, which should be applied by States Parties without reservation, with the aim of

facilitating trade and ensuring effective monitoring through adopting simplified and efficient measures.

Some of the most significant principles in this respect are:

- Making maximum use of information technologies;
- The minimal monitoring of customs duties needed to ensure adherence to regulations and laws;
- Transparency and predictability of customs measures;
- Harmonization and simplification of data on goods and supporting documentation;
- Organizing the process of interaction between various border agencies;
- Adoption of simplified procedures for registered agents; and,
- Adoption of risk management and post-audit techniques in monitoring goods.

Article Seven is especially important with respect to Palestinian trade because of its impact on smoothing the flow of goods to and from the OPT, expediting customs clearance and lowering costs in general. The provisions of this Article are examined here in detail to highlight its pivotal nature and potential impact of its application to Palestinian trade.

#### ***1. Pre-arrival Processing***

Before the arrival of imported shipments, States Parties should take steps to activate treatment of documents, electronic coordination and other formalities to be able to release them upon arrival. Undoubtedly, application of this principle by Israel upon Palestinian trade would help to speed the clearance of Palestinian imports in general and dual-use items in particular, especially materials such as chemicals and pesticides, IT and communication equipment and electrical motors and equipment. This would necessarily require changing current Israeli practices towards Palestinian shippers, which entail the beginning of clearance procedures only after the arrival of dual-use goods to Israeli ports and crossings. Application of this principle would speed the clearance of such goods and their arrival to markets and reduce the costs associated with their storage at border warehouses (which takes up to four weeks in some cases).

#### ***2. Electronic payment duties and fees***

The ATF obliges Member States to offer the option to shippers to pay electronically for duties, fees and other customs costs to the extent that such an option is feasible. If Palestinian traders could benefit from this opportunity to directly access electronic means of payment (as Israeli shippers do), this would save them effort and time and allow the payment of all duties and costs to the intended beneficiaries without intermediaries, hence rendering trade more effective and efficient.

### ***3. Separation of Release from Final Determination of Customs Duties, Taxes, Fees and Charges***

States parties to the ATF should put in place regulations and measures that allow the quickest possible release of goods intended for export or import before establishing the final customs duties and other fees. For this purpose, authorities can request an advance payment or bank guarantee to ensure payment of dues, as long as the amount does not exceed the final payment required. Deposits or any remaining part of them should be returned in case they are not required to cover any fees or costs not specified at the outset.

Palestinian shippers are currently permitted to store their goods in the bonded warehouses of the Customs Authority located in Israel, after unloading them from shipping containers while awaiting clearance. One of the advantages of the current system for Palestinian traders of licensed warehouses is the option of either clearing all goods at once or only bringing to market those quantities needed and thus staging payment of clearance duties for each part of the shipment when it is released. In case goods remain in bonded warehouses for more than a year without payment of duties owed, the Customs Authority may offer them for public sale as unclaimed imported goods.

Were this ATF principle regarding release of goods applied to Palestinian trade, this would in turn require the establishment of licensed Palestinian warehouses inside the OPT to store goods closer by and more easily accessible for those importing them, and at lower storage costs than in Israel.

### ***4. Risk management***

All States parties to the Agreement should to the greatest extent possible use a suitable and effective system to manage risks and avoid arbitrary or discriminatory measures. It is possible to design risk management systems that at once take account of the need to ensure customs control of highly risky shipments while also allowing for speedy release of low-risk shipments.

Application of this principle with regard to Palestinian trade would limit arbitrary or discriminatory inspection practices affecting Palestinian traders such as the constraints on imports of “dual-use” items for use in the areas under PNA jurisdiction. This has become especially problematic since Israel expanded the dual-use list to include many items not included in the Wassenaar Arrangement Control List.

### ***5. Post clearance audit***

States Members should adopt an accounting audit system for post-clearance operations, whereby shippers should be ready to make their shipping records available to Customs authorities in order to be able to demonstrate their adherence to customs monitoring procedures and other legislative requirements.

## **6. *Establishment and Publication of Average Release Times***

States Parties are encouraged to publish the average times for customs clearance to demonstrate to shippers that their goods are not retained inappropriately. States Parties are expected to share expertise in measuring average customs clearance times, methodologies adopted, and the tools that help expedite customs clearance and goods release. The application of these provisions to Palestinian trade flows would put the onus upon Israel to lift all restrictions upon Palestinian trade in a manner that would speed the movement of goods across borders and bring customs clearance times for Palestinian goods into line with the averages experienced by Israeli shippers.

## **7. *Authorized operators***

State Members should make additional arrangements to facilitate trade for agents who satisfy certain criteria, so-called “authorized operators”. In recent years, the trend among customs authorities has been to develop programs that allow the trade logistic chain to benefit from additional steps to facilitate trade such as expedited customs clearance, documentation reduction and data requirements, as well as reduced physical inspections. Such shippers are considered as “trusted” operators who boast a record of full compliance with border requirements and represent a reduced risk. In the European Union, such traders are considered as “certified economic operators” who are recognized when they satisfy certain criteria, such as a track record of compliance, good record keeping, the ability to meet financial obligations (solvency), as well as ensuring the security of the logistics chain.

Among its commitments under the ATF, Israel as a Member State should afford Palestinian shippers the opportunity to benefit from this principle of Article 7 by certifying those Palestinian traders who satisfy the criteria mentioned to be considered as “trusted operators”. In order that Palestinian shippers may benefit from the application of this principle along with Israeli shippers, Israeli authorities must show their willingness to authorize Palestinian operators in words and actions. Meanwhile, Palestinian shippers must abide by all laws and regulations that would allow them to become “trusted operators”, thus facilitating and enhancing Palestinian trade in general.

## **8. *Expedited shipments***

States Members are expected to adopt or maintain measures that allow for expedited release of goods, at least for freight that enters through airports. In this respect, concerns exist regarding courier mail operators, many of which depend on airfreight services and provide their services on the basis of their ability to deliver goods rapidly and on time. In supply chains and value adding logistics chains in the modern global economy, on-time delivery helps in bringing down business costs such as inventory list maintenance, and in avoiding additional costs arising from airport storage, hence enhancing their competitiveness.

### ***Case Study 3: Information and communications technology imports***

The Israeli measures applied to Palestinian shippers importing most information and communications technology equipment from abroad (mainly through air-freight) or purchasing them from Israel for entry to the PNA areas fall within the application of the controls on “dual-use” materials and equipment. For Palestinian shippers, these measures entail additional burden and losses that can reach as much as 12 percent of the value of each shipment in the form of airport storage and handling, thus eliminating any competitive edge they might have against Israeli importers (EDISCO, 2014). For example, the average annual losses arising from arbitrary practices for one major digital electronics company involved in this trade amount to around NIS 100,000 (around \$25 thousand). This is not to mention the losses arising from delays in delivering goods to clients or losing clients to Israeli importers as their prices for the same goods can be cheaper than the Palestinian market and can avoid unjustified delays. Palestinian importers of such goods must present the invoice and Airway or Shipping Bill to the ICA before inspection procedures may begin at the port of entry, a process that might take between two to four weeks in normal circumstances and requires costly airport storage. In addition, delays may be incurred if the competent ICA official is absent on sick-leave, vacation, official holidays or training, all of which add to damage, and material losses and in turn adversely affects investment in this important sector.<sup>9</sup>

### **9. *Perishable Goods***

By the terms of the Agreement, Member States commit to release perishable goods, in normal circumstances, within the shortest possible period by giving them priority when establishing inspection schedules, all the while providing appropriate storage prior to release. Such release should be possible in the warehouses where the goods are stored when that is possible if the importer so requests.

### ***Case study 4: delays in the release of raw materials used in the Palestinian pharmaceutical industry***

Palestinian pharmaceutical industries face certain specific restrictions by the Israeli authorities, as producers must obtain permits from the Israeli Ministry of Health that allow them to import raw materials regardless of the materials’ origin. Importers must obtain a separate permit for each shipment whereas Israeli importers obtain annual permits. In addition, raw materials obtained from abroad are liable to delays of days or up to two months owing to security inspections when goods are detained at ports, adding further

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<sup>9</sup> Early in 2014, the ICA undertook some administrative restructuring that brought its work in processing Palestinian shippers’ requests to an almost total standstill for 50 days.

costs to shippers and in some cases depriving them of the opportunity to take part in international procurement bids. In many cases, such goods are subject to spoilage while being held in refrigerated containers that can suffer electricity cuts in warehouses and temperature variations (PSC, 2014a). The pharmaceutical industry also has to deal with the inclusion in the dual-use list of some raw materials used in production of medicines that require a special permit from the ICA for import and entry to the West Bank and Gaza, such as Glycerin, which is used as a base material for many medicines and in cosmetics. Because of these restrictions imposed since 2000, Palestinian pharmaceutical and cosmetic industries have suffered major losses and lost market shares, locally and internationally (Who Profits, 2012).

#### **D. The applications of the related to institutional issues and transit: Articles 8-13**

##### ***1. Article Eight: Border agency cooperation***

The provisions of this Article oblige Member States to ensure cooperation and coordination for trade facilitation purposes between authorities and agencies responsible for border monitoring and measures affecting imports, exports and goods in transit. The Article stipulates that such cooperation between States Members and especially those with common borders should entail:

- a. *Alignment of working days/hours*: Problems can arise when customs authorities on each side of the border operate according to different opening hours. The problem in the Palestinian case is the full control by Israeli authorities of all international and internal crossings, ports and the airport. This situation requires the occupying power (Israel) to consult with Palestinian official agencies and shippers regarding the desirable opening days and times at internal crossings and international passages for goods and persons, and to refrain from its current practice of unilateral decision-making and imposition on the Palestinian side;
- b. *Alignment of procedures and formalities*: In some cases, delays can ensue because of customs agencies working autonomously, instead of these agencies cooperating in a manner that allows shippers to meet their obligations regarding the related issues, especially in areas such as data and document coordination formalities. In order to facilitate Palestinian trade according to this principle of the Agreement, Israeli authorities should commit to complete and permanent coordination with Palestinian Customs and traders, as partners and not dependents, and to involving them in decision-making, policy formulation and implementation of procedures;
- c. *Development and sharing of common facilities*: Since Israel continues to refuse to permit the PNA to construct its own airport and seaport, realizing such an option appears distant. Until then, it is possible to facilitate Palestinian trade and render it more efficient by bringing together public border agencies dealing with Palestinian shippers in common premises and goods control/testing sites to avoid repetitive inspections. This would require Israeli authorities to be more open and transparent and

undertake their function in a spirit of commercial partnership, including by allowing Palestinian official agencies and shippers direct access to common facilities and concerned agencies;

- d. *Joint controls*: Under current circumstances, the inspection of the contents of shipments more than once by more than one agency, with Palestinian and Israeli agencies requesting separate inspections, necessarily results in delays. The harmonization of operations, data sharing and coordination of inspection procedures can lead to inspection procedures that are less costly and consume less effort and would help reduce the long queues of trucks at border crossing. In this regard, the WCO best practices can serve to guide better border management and coordination procedures (ITC, 2013).

## **2. *Article Nine: Movement of goods under customs control intended for import***

In order to expedite the flow of goods at borders, all States parties to the Agreement are obliged to allow the movement of goods intended for import under the supervision of Customs from the point of entry to the next customs station and to permit customs clearance at the borders. Application of this Article to Palestinian trade would help to accelerate the flow of goods into the OPT. This should include those goods classified as dual-use items, import of which should also benefit from the other provisions of the Agreement that if applied, would prevent their detention at ports or the airport for long periods.

## **3. *Article Ten: Formalities connected with importation and exportation and transit***

This is a core article of the ATF that aims at limiting complicated formalities and obstacles to trade flows - a costly burden on Palestinian shippers. It also stipulates the importance and necessity of harmonizing documentation requirements and reducing them to the minimum possible.

- a. *Formalities and documentation requirements*: Upon the entry into force of the Agreement, States Members should have reviewed formalities and necessary documents for importation, exportation and goods in transit and ensure that they are in line with the need for fast customs clearance and release of goods. They should ensure that formalities limit the costs borne by shippers and the time taken to complete them, while minimizing any trade restricting measures and discarding them once they are no longer needed;
- b. *Acceptance of copies*: States Members should accept electronic documents in support of import, export or transit when feasible, and oblige government agencies, when possible, to accept electronic or paper copies of original documents when the latter are retained by other agencies. Furthermore, Members shall not require an original or copy of export declarations submitted to the customs authorities of an exporting Member as a requirement for importation;

- c. *Use of international standards*: The Agreement encourages Members to follow international best practices in the area of trade facilitation by regularly reviewing and enhancing their implementation. In this respect, UN/CEFACT recommendations can provide guidance (UN/CEFACT, 2015).
- d. *Single-window*: The single-window system is considered an effective solution for the complex regulatory and operational requirements of international trade imposed by governments of different countries. It provides a means to limit regulatory inefficiency in the work of customs and other border authorities by allowing companies and institutions to provide commonly required data at one entry point and be able to complete all import, export and transit formalities together. A single-window system that allows shippers to provide all data at once is considered a model in this respect, but its correct application requires that all equally concerned border agencies commit to using it and accessing their required data through this single channel. The ATF calls for Members to exert maximum efforts possible to establish single-window systems, to simplify measures so that each border agency participating in this system does not again request data already provided, and to do what is possible to use electronic data systems to strengthen the process;
- e. *Pre-shipment inspection*: The Agreement prohibits Members from conducting pre-shipment physical inspections of goods for purposes of customs classification or valuation. This should not detract from the rights of Members to undertake other types of pre-shipment inspection operations but it is preferable that their scope not be extended. Pre-shipment inspection is considered important as it allows for controls on quality and quantities of goods, limits tax-evasion efforts by shippers and prevents importation of prohibited or sub-standard goods. This view is supported by pre-shipment inspection companies, which claim that it helps to reduce costs. However, some States consider that such inspections are not necessary and create a non-technical obstacle that adds to trading costs. UNCTAD has found that pre-shipment inspections affect on average around 20 percent of trade in goods and services and add costs to trade that can limit competition and distort trade flows (UNCTAD, 2006);
- f. *Use of customs brokers and clearance agents*: The ATF stipulates that Members should not adopt measures that make use of customs brokers obligatory and should publish national rules regarding the use of customs agents, while ensuring that the requirements for the registration of the latter are transparent and objective. Obligatory use of customs agents may be an unnecessary cost added to those already borne by shippers and to trade in general. This provision is especially important to Palestinian traders. Israeli authorities prevent their movement into Israel to access ports, crossings and the airport freely; hence, those who wish cannot undertake customs clearance procedures themselves. Since the authorities prevent Palestinian shippers from entering areas where security inspections are conducted, they are effectively obliged to resort to the services of Israeli customs brokers to secure the release of their goods;
- g. *Common border procedures and uniform documentation requirements*: In the context of new far-reaching obligations under the ATF, States Members are to apply common customs procedures and uniform documentation requirements for release and clearance of goods throughout their territory. This aims to enhance shippers' ability to predict

how established measures will be applied and to adhere to requirements of border authorities;

- h. *Rejected goods*: By this provision, Members are obliged to allow the importer to re-consign or to return the rejected goods to the exporter if they are rejected because of failure to meet health, phyto-sanitary or technical specifications;
- i. *Temporary admission of goods/inward and outward processing*: This provision requires that each Member shall allow goods to be brought into a customs territory conditionally relieved, totally or partially, from payment of import duties and taxes if such goods are brought into a customs territory for re-exportation within a specific period.

#### **4. *Article Eleven: Freedom of transit***

The provisions of this Article impose a general obligation on Member States to cooperate among themselves in order to promote freedom of transit. The provisions of this Article regulate every aspect of freedom of transit, and are a repetition of Article V of GATT, which obliges each State to treat transit products no less favorably than if these products had been transported to the destination concerned directly without entering the territory of that State. Members should not apply regulations or formalities that impose unnecessary or additional restrictions on the movement of transit cargo. Members should also refrain from imposing any additional administrative expenses from those stipulated in Article V of the GATT agreement regarding transit across the territory of their States and ensure that transit service costs are limited.

The most significant provisions of the ATF with regard to facilitating trade in transit are identified below. Clearly, the application of these obligations will assist in simplifying the principles of transit trade as they entail monitoring of transport channels and informing national authorities about any infractions of these commitments, which if detected can be discussed at the recently established WTO Trade Facilitation Committee. Following are the main provisions of the Agreement on Trade Facilitation on freedom of transit:

- a. Effective separation of the flow of transit and other imported goods, including sites and facilities for each;
- b. Simplification of formalities, documentation requirements and customs monitoring of transit flows to avoid complexity and in a manner that responds only to the need to identify goods and to ensure their conformity with transit requirements;
- c. Refrain from subjecting goods to additional customs inspection, or additional technical requirements of compliance testing, once they have satisfied transit requirements and throughout their transport across Members' territory;
- d. All Members should permit for advance submission of applications and processing of documents for transit;
- e. Members should complete transit procedures as soon as the goods in transit have left their territories and reached their destination;

- f. States are requested to release without delay any financial guarantees paid for goods in transit.

The application of this Article to the OPT could allow the PNA to provide transit-related services for import and export goods destined to neighbouring countries via the OPT. The unique geographic position of the territory means that it can play a role in international and regional transit trade, create many new job opportunities, and strengthen prospects for Palestinian economic development through the value added of transit transport services. In order to facilitate the establishment of a Palestinian transit trade market and make it efficient, it needs to be diversified through the establishment of a Palestinian seaport and airports in Gaza and the West Bank, as well as the designation of sites for storing and receiving goods in transit.

This brings into focus again the need for the occupying state to remove all obstacles imposed on the establishment of these essential port and other facilities so that the PNA can fully benefit from transit services. Until such time as that is possible, it is necessary for Israel to review current procedures for goods imported through Israel but labeled as destined for the OPT (around 30 percent of Palestinian imports), as well as Palestinian exports to the rest of the world, to be handled as transit trade according to the explicit provisions of this Article.

#### **5. *Article Twelve: Customs cooperation***

Under the terms of this article about the necessary requirements to improve customs cooperation Members are required to share information in the framework of cooperation in the field of customs control, provided that they respect the confidentiality of information that are exchanged. In the case of any doubts by any customs authority, and in order to verify the accuracy of import or export permits or health certificate, such information should be requested in writing to the relevant authority in any other country. The authorities of the State receiving such a request should share the required information to the maximum possible. However, the Article also contains provisions that allow for not responding immediately to a request or even rejection on the basis of reciprocal treatment. The provisions of this Article also allow Members to conclude bilateral, multilateral or regional customs information sharing and data exchange agreements.

This Article also encourages Members to develop and introduce voluntary systems that allow for the possibility of importers' self-correction without imposing fines on them, and in return take strict action against traders who violate trade rules. This text arises from the demand by traders that customs authorities estimate their records as clean due to their respect of the law and only imposing simple fines for minor technical irregularities they might commit, while at the same time highlighting risk management processes for traders with dubious records.

**6. *Article Thirteen: Institutional arrangements***

The ATF provides for a clear mechanism to monitor its implementation. It is planned that the Negotiation Group on Trade Facilitation at the WTO be replaced with a standing body – the Trade Facilitation Committee – to oversee the application of the Agreement and its purposes. As is customary with such international covenants, Members have highlighted the importance of a comprehensive review of its application four years after its entry into force.

The Agreement finally obliges WTO Members to establish national trade facilitation committees to permit traders and companies to play a role in its effective implementation and development, through permanent consultation with their Governments and through mechanisms that allow shippers and businesses to communicate and coordinate with the authorities concerned with the implementation of the Agreement on the obstacles they face.

## **Chapter V**

### **Conclusions and Recommendations**

The ATF constitutes an historic achievement of the States Members of the WTO owing to its expected positive impact on facilitating merchandise trade between them. Its implementation, as the first multilateral trade agreement adopted by consensus since the establishment of the Organization in 1995, will result in the acceleration of goods trade between States in the context of modern customs measures relying heavily on information technologies. This in turn will enable businesses and shippers to transport their goods to and from markets in shorter times and at less cost, as well as enhancing their competitiveness in destination markets. The commitment by Members to implement the provisions of this Agreement will certainly contribute to facilitating international merchandise trade, especially since it stipulates the completion of customs procedures at land, sea and air entry points as quickly as possible through the application of modern technologies to customs operations.

An important aspect of the Agreement is that it did not ignore the concerns of developing and least developed countries, but rather directly granted them special and differential treatment through specific provisions (in Section Two of the Agreement). This includes financial and technical assistance to build capacities to enable them to improve the infrastructure of their border entry points and to modernize customs procedures so that these countries may meet all their obligations under the Agreement by deploying the latest technologies.

The continued Israeli occupation of the Palestinian West Bank and Gaza Strip for 48 years places an obligation upon the occupying State to implement all the provisions and principles of international trade facilitation, including the ATF of 2013 throughout all areas under its control, including the OPT. There can be no doubt that the application of the ATF to the OPT would result in facilitating Palestinian trade in all its aspects and render it faster, more efficient and less costly as a result of accelerating transport, clearance and release of goods and institutionalizing customs cooperation between Israel and the PNA on equal basis. This would also help Palestine, and its developing economy, to gradually build its capacity to meet its trade commitments towards Israel and other Members of the WTO, and eventually comply with the ATF once it becomes a member of the WTO. Were the PNA to benefit from application of the ATF, this would strengthen Palestinian Customs capacity, improve revenue collection and assist small and medium enterprises in accessing new export and import opportunities, through measures featuring transparent customs procedures, limitation of documentation requirements and treatment of customs data in advance of the expedition or arrival of goods.

#### **A. General conclusions**

1. The Paris “Protocol on Economic Relations between Israel and the PLO” was designed in a manner that safeguards the economic and security priorities of Israel, the occupying State, since it shackles the policy space of the PNA, restricts the

development of Palestinian external and internal trade and hence impedes the prospects for growth and development of the Palestinian economy;

2. The Israeli authorities exercise total control over all Palestinian land, sea and air gateways and thus maintains domination of Palestinian trade processes, which results in deepening the dependency of the Palestinian economy on the Israeli economy and renders the OPT a reserve, captive market for Israeli products and services;
3. Israeli authorities are obliged under international law to meet their international obligations regarding the application of international Conventions to the OPT, which is under their jurisdiction having been subject to prolonged occupation;
4. The provisions of the ATF should be applied to the OPT so as to ensure facilitation of Palestinian trade, making it speedier and less costly;
5. This will also call for assistance by Member States to the development of the Palestinian economy and the PNA in building capacities in this area alongside the commitment by Israel to apply it to Palestinian trade;
6. It is incumbent upon Israel, as a party to the Agreement, to consult with concerned PNA official departments and Palestinian businesses and shippers. These parties should be involved in the process of modifying laws and procedures according to the provisions of the Agreement so that it is ready for application to Israel and the OPT upon entry into force;
7. In this context, Israel should remove all restrictions that prevent access by Palestinian traders to customs stations at the border crossings, so that they may contest, as may be needed, customs decisions personally or through their agents, as well as access competent judicial bodies in case of dispute;
8. It is also necessary for Israel to eliminate all forms of discrimination towards Palestinian shippers and to follow best practices in customs and other border procedures in dealing with Palestinian trade, in a manner that ensures speedy release of goods at least cost possible;
9. Formalities and complex measures affecting Palestinian exports, imports and goods in transit should be reduced to the minimum and simplified as much as possible; and
10. Coordination and cooperation between Customs and all other Israeli and Palestinian border authorities should be conducted and institutionalized on the basis of equality, autonomy and in a manner that serves trade facilitation.

## **B. Article-specific findings and recommendations**

While the preceding Chapters and above section have identified major areas of application of the ATF with respect to the occupied territory, specific actions are required under all of the Articles, especially as follows:

1. *Publication and availability of information:* The commitment of Israeli Customs Authority and other concerned agencies to publish information on imports and exports so that Palestinian traders may access them in Hebrew, Arabic or English will enhance their awareness about trade procedures. They will be able to obtain documents, forms and information in their language, which will assist them in better managing their trade businesses and decision-making that contributes to containing costs;

2. *Consultation and information before entry into force:* Consultation with Palestinian shippers and allowing them to take part in the process of modifying laws and regulations in line with the Agreement will help to reduce restrictions and problems that prevent them from reaching customs stations to assess the commitment of Israeli agencies in facilitating their trade. This in turn will allow for speedier release of goods, which will reduce transaction costs of extended detention of shipments at ports and crossings;
3. *Advance rulings:* Israel's implementation of the ATF with regard to the issuance of advance rulings that are clear, transparent and published will limit the scope for arbitrary measures against Palestinian shippers. This, in turn, will lead to greater predictability regarding trade transactions at borders since Palestinian shippers will have access to the information needed to calculate the cost of customs duties and fees and all related services and hence be able to determine the final cost of goods. This will furthermore reduce the room for corruption and disputes with the Customs Authority over valuation;
4. *Appeal or review procedures:* Enabling Palestinian shippers to contest the administrative decisions of the Customs Authority or any other parties including different judiciary bodies as stipulated in the Agreement will protect shippers from adverse or arbitrary decisions that violate established laws or regulations. Israeli authorities must therefore remove any obstacles to Palestinian shippers reaching Customs stations to contest decisions or to competent judicial bodies to appeal them;
5. *Disciplines on fees and charges imposed on importation and exportation:* In order to reduce trade fees and costs borne by Palestinian shippers, it is necessary for the Customs Authority to ensure correspondence between the prices charged and the value of the services provided, and to refrain from imposing arbitrary charges and fines. They should also enable shippers to register their complaints towards such practices when they are not commensurate with the infraction;
6. *Best practices for release and clearance of goods:* Palestinian trade transaction costs will also be reduced by implementation by Israel of the provisions of the Agreement regarding document processing before arrival of goods, release of goods before final determination of customs dues, allowing Palestinian shippers to use electronic means of payment, publishing expected customs release times and registering Palestinian shippers as trusted "authorized operators";
7. *Perishable goods:* Palestinian trade will be facilitated and costs of trade and losses will be reduced by release of perishable goods within the shortest time possible, by giving them priority treatment in clearance or provision of appropriate storage facilities prior to release at the request of the shipper;
8. *Movement of goods under customs control intended for import:* Israeli application of the provisions of the Agreement that allow for movement of goods intended for import from point of entry to customs stations under the supervision of the Customs Authority will expedite the flow of goods and allow for customs clearance at borders. This should include dual-use materials and equipment that should not be detained for lengthy periods at ports, crossings and the airport;

9. *Formalities connected with importation, exportation, and transit:* By meeting its commitments under the Agreement regarding transit trade, Israel would enable the PNA to benefit from the strategic geographic position of Palestine by providing transit transport services for goods intended for import or export to or from the OPT. This calls for establishment of maritime, air and overland gateways and zones for receiving and storing goods in transit in the Gaza Strip and the West Bank. That would allow those neighbouring countries and other areas of the world to benefit from transit through the OPT and from services provided by Palestinian transit transport operators. In the meantime, Israel should treat the passage of goods to and from the OPT through its territory as goods in transit and apply the relevant provisions of the Agreement accordingly; and

10. *Customs cooperation:* Cooperation between Palestinian and Israeli authorities and the authorities responsible for border control and monitoring exports, imports and goods in transit will facilitate Palestinian trade through: coordinating opening days and working hours, procedures and formalities; development of public facilities; participation by Palestinian official bodies and shippers in joint monitoring of unified procedures; and, data-sharing to reduce costs, effort and delays waiting at borders.

### **C. Recommendations for action by the PSC, supported by the PNA**

As a pioneering representative of Palestinian shippers, the PSC should act as the Palestinian private sector national focal point for future advocacy and other initiatives to raise the profile of Palestinian trade facilitation issues, from the exclusive unilateral domain of the Israeli authorities, to both the bilateral and multilateral dimensions that it entails. This requires that the PSC explore all avenues and available tools within the context of a clear strategy to oblige the application of the ATF upon the OPT, and to launch a local and international campaign to support this aim, including the following components:

1. Spearhead the establishment of the Palestinian National Trade Facilitation Committee (PNTFC), to act as the national forum for consultation between government, shippers and concerned private sector institutions on trade facilitation issues and policy, as provided for under the ATF;
2. Establish a monitoring mechanism and database to assess Israeli authorities' compliance with its obligations under the ATF towards Palestinian trade and to document violations on a case-by-case basis;
3. Investigate breaches of the ATF by Israeli authorities in this regard and their impact on Palestinian trade and sponsoring appeals regarding them to the competent authorities as provided for under the ATF;
4. The PNA and the PNTFC should formally demand from all the competent Israeli authorities that they include public and private sector Palestinian representatives in the process of modifying Israeli laws and procedures related to trade facilitation and maintain permanent consultation in this respect. These consultations should aim to ensure the application of the ATF upon the OPT upon its entry into force;

5. The PNA and the PNTFC should address formal requests to the concerned Israeli authorities, including the Customs Department, the Border and Ports Authority and other pertinent border agencies identifying the specific actions that Israel should take to apply its commitments under the ATF to the occupied territory in order to facilitate Palestinian trade;
6. All available international avenues should be explored to encourage Israel to apply the ATF to the OPT, including formal presentation to Members of the WTO who have trade relations with Palestine. These States can inform the newly established WTO Trade Facilitation Committee of obstacles placed by Israel to the application of the ATF to Palestinian trade and ask it to hold Israel accountable for violations of the ATF in this regard;
7. Cooperate closely with UNCTAD regarding resort to competent UN forums to encourage Israel to respect its obligations under the ATF in a manner that facilitates Palestinian trade;
8. The PSC should seek observer status with UNCTAD, ECOSOC and the WTO so that it may have access to all relevant international forums to report on the obstacles placed by the occupying State on Palestinian trade and to encourage Israel to apply the ATF to the occupied territory; and
9. In addition to the above efforts, the PSC and PNTFC should seek to disseminate and advocate for the adoption of best practices in international trade facilitation in Palestinian trade operations so that institutional development can proceed in tandem with, but not instead of, adherence by Israel to application of the ATF upon OPT.

## References

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