

Legal Assessment of the EU Legal Basis for Measures Concerning Trade with Israeli Settlements

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Executive Summary

This memorandum assesses the European Union’s competence to adopt a legislative measure prohibiting trade in goods and services with Israeli settlements in the territories occupied since 1967. Applying the Court of Justice’s “centre-of-gravity” test, it evaluates Article 207 TFEU (potentially with Article 114 TFEU) and Articles 29 TEU/215 TFEU as potential legal bases. The analysis shows that the measure would directly regulate trade flows and pursue values-based objectives—specifically the duty of non-recognition under international law—compatible with the post-Lisbon framework of the common commercial policy. While a CFSP legal basis remains a legal possibility, it would lack the security-oriented framing and broader geopolitical context that have justified that basis in past cases, such as the Russian sanctions. Given the doctrinal flexibility of the post-Lisbon architecture, the Union legislator could signal its intent through the preamble; however, the memorandum concludes that Article 207 TFEU provides the more stable and coherent legal basis for a measure whose primary effect would be the regulation of trade.

Contents

1. Introduction.....	2
2. The choice of legal basis	3
3. Option 1: A regulation based on Articles 207 and 114 TFEU.....	4
3.1. The scope of Article 207 TFEU	4
3.1.1. The “direct and immediate effects” test	4
3.1.2. The role of non-trade objectives.....	4
3.1.3. The emergence of unilateral, values- and interest-based trade instruments	5
3.2. Application to the proposed measure	6
3.3. Adding Article 114 TFEU	7
4. Option 2: A Council decision under Article 29 TEU implemented by a regulation under Article 215 TFEU	7
4.1. The post-Lisbon framework for CFSP restrictive measures	8
4.1.1. The difficulty of identifying CFSP-specific aims or content	8

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4.1.2.	The Court’s contextual approach to CFSP legal bases	9
4.2.	Application to the proposed measure	9
4.3.	Russian sanctions comparison	10
4.4.	The duty of non-recognition.....	11
4.5.	Assessment	12
5.	Conclusion.....	12

1. Introduction

This memorandum examines whether the European Union possesses the competence to adopt a legislative instrument that would prohibit commercial flows of goods and services between the Union and Israeli settlements in the territories occupied by Israel since 1967. The question raises issues that go beyond the legality of any specific instrument. It touches on broader structural developments in EU external relations law, including the post-Lisbon expansion of the common commercial policy (CCP), the abolition of distinct CFSP objectives, and the Court of Justice’s increasingly contextual approach to legal basis review where CFSP legal bases are involved. These developments have blurred the boundaries between competences, making the choice of legal basis for measures with both economic and foreign-policy dimensions increasingly complex.

The analysis proceeds in three steps. Section 2 outlines the legal framework governing the choice of legal basis, focusing on the centre-of-gravity test and the limits on combining Treaty provisions. Section 3 examines whether the proposed measure could be adopted on the basis of Article 207 TFEU, alone or in combination with Article 114 TFEU. This section considers the Court’s post-Lisbon case law on the scope of the CCP, including its acceptance of commitments in free trade agreements (FTAs) that pursue non-commercial objectives. Section 4 turns to Articles 29 TEU and 215 TFEU, assessing whether the measure could instead be framed as a restrictive measure within the Common Foreign and Security Policy (CFSP). Particular attention is paid to the Court’s post-Lisbon case law on CFSP legal bases, which has relied heavily on contextual factors external to the measure itself.

The findings reflect the doctrinal ambiguities inherent in the post-Lisbon framework. Both the CCP and the CFSP offer plausible routes, and neither maps neatly onto the proposed measure. Yet the analysis also reveals an asymmetry. While a CFSP-based approach remains legally plausible, its doctrinal foundations are comparatively unstable, given the absence of CFSP-specific objectives and the lack of CFSP-unique content. By contrast, Article 207 TFEU — particularly when read in light of the Court’s emphasis on the direct and immediate effects of a measure on trade — provides a more coherent account of the measure’s centre of gravity. The memorandum therefore concludes that, among the available options, Article 207 TFEU offers the more convincing legal basis for the proposed measure, with Article 114 TFEU potentially supplementing it where internal market enforcement mechanisms are envisaged.

2. The choice of legal basis

The determination of whether the European Union may adopt a particular measure, and on what legal basis, is governed by the foundational principle of conferral.² The Union possesses only those competences that the Treaties attribute to it, and every EU measure must therefore be anchored in a specific Treaty provision. This requirement gives the choice of legal basis a constitutional character: it defines not only the validity of the measure but also the institutional balance and procedural framework through which it must be adopted.³

The Court of Justice has long held that the selection of a legal basis must rest on objective factors amenable to judicial review, notably the aim and the content of the measure.⁴ This “centre-of-gravity” test presupposes that the measure’s predominant component can be identified and mapped onto a corresponding Treaty provision. Where a measure pursues multiple objectives or contains multiple components, the Court distinguishes between those that are essential and those that are merely incidental.⁵ Only in the exceptional case where the components are inseparably linked, and where the relevant procedures are compatible, may multiple legal bases be combined.⁶

This framework is conceptually straightforward but increasingly difficult to apply in practice. The post-Lisbon Treaty architecture has blurred the boundaries between external-relations competences. The CCP now explicitly operates within the broader objectives of the Union’s external action, while the CFSP no longer possesses its own distinct set of aims. As a result, measures with both economic and foreign-policy dimensions may plausibly fall within the scope of more than one Treaty provision, and the traditional aim/content dichotomy may not yield a determinate answer.⁷ As will be discussed in greater detail below, the Court’s case law reflects this complexity: while it continues to apply the centre-of-gravity test, it has increasingly relied on contextual factors external to the measure itself, particularly in cases involving the CFSP.

The proposed measure must be assessed against this backdrop. Its components — restrictions on trade in goods and services flows — have clear economic effects, yet they are also motivated by concerns relating to international law and the Union’s external action. The question is therefore not simply whether the measure affects trade or foreign policy, but how its predominant character should be understood within a legal framework in which the boundaries between these domains have become porous.

² Arts. 4(1) and 5(1) TFEU.

³ Case C-687/15 *Commission v Council (World Radiocommunication Conference 2015)* ECLI:EU:C:2017:803, para 49: ‘The choice of the appropriate legal basis has constitutional significance, since, having only conferred powers, the European Union must link the acts which it adopts to provisions of the FEU Treaty which actually empower it to adopt such acts...’

⁴ See e.g. Case C-263/14 *Parliament v Council (Tanzania)* ECLI:EU:C:2016:435, para. 43.

⁵ *Ibid*, para. 44.

⁶ *Ibid*. Conversely, where decision-making procedures are deemed incompatible, legal bases may not be combined. Relevant in the present context is that the CJEU has held that a measure cannot combine CFSP and TFEU legal bases. See Case C-130/10 *Parliament v Council (Restrictive Measures)* ECLI:EU:C:2012:472, paras 46-49.

⁷ Writing shortly after the entry into force of the Lisbon Treaty, Peter Van Elsuwege spoke of a “legal imbroglio”. See Peter Van Elsuwege, ‘EU External Action after the Collapse of the Pillar Structure: In Search of a New Balance between Delimitation and Consistency’ (2010) 47 *Common Market Law Review* 987, 1003. Or also: Piet Eeckhout, *EU External Relations Law* (Oxford University Press 2011) 35, referring to the “awkwardness” of the EU’s dichotomy between trade and foreign policies’. For a discussion highlighting the difficulties, see also Marise Cremona, ‘The Position of CFSP/CSDP in the EU’s Constitutional Architecture’ in Steven Blockmans and Panos Koutrakos (eds), *Research Handbook on the EU’s Common Foreign and Security Policy* (Edward Elgar Publishing 2018).

The following sections apply this analytical framework to the two principal candidates for the legal basis: Article 207 TFEU, alone or in combination with Article 114 TFEU, and Articles 29 TEU and 215 TFEU. The aim is not to eliminate the inherent indeterminacy of the post-Lisbon system, but to assess which legal basis offers the most coherent account of the measure’s centre of gravity.

3. Option 1: A regulation based on Articles 207 and 114 TFEU

There are plausible arguments that the proposed measure could be framed as a regulation based on Article 207 TFEU, either on its own or, where internal market enforcement mechanisms are envisaged, in combination with Article 114 TFEU. The analysis below examines the scope of Article 207 TFEU as interpreted by the CJEU, the role of non-trade objectives within the common commercial policy, the post-Lisbon evolution of unilateral trade instruments, and the application of these developments to the proposed measure.

3.1. The scope of Article 207 TFEU

3.1.1. The “direct and immediate effects” test

The Court of Justice has consistently held that an EU act falls within the common commercial policy where it “relates specifically to such trade in that it is essentially intended to promote, facilitate or govern such trade and has direct and immediate effects on it.”⁸ This formulation links the *aim* of the measure to its intention to regulate trade and its *content* to its direct and immediate effects on trade flows. It has become the central analytical tool for determining whether a measure falls within Article 207 TFEU.

At the same time, the Court has emphasized that the CCP does not extend to every measure that is merely liable to affect trade. A measure whose effects on trade are incidental or indirect must be based on another Treaty provision, even if it has cross-border implications. The Court’s (pre-Lisbon) advisory opinion on the Cartagena Protocol illustrates this point: although the protocol regulated the transboundary movement of living modified organisms, the Court held that its primary objective was environmental protection rather than the governance of trade.⁹

3.1.2. The role of non-trade objectives

The post-Lisbon Treaty framework has broadened the scope of the CCP, not only by including trade in services, the commercial aspects of intellectual property, and foreign direct investment in Article 207(1) TFEU, but also by requiring that the CCP be conducted “in the context of the principles and objectives of the Union’s external action,” which include the promotion of human rights, sustainable development, and respect for international law.¹⁰ This textual shift has further

⁸ Opinion 2/15 *EU-Singapore FTA* ECLI:EU:C:2017:376, para. 36, and also Case C-414/11 *Daiichi Sankyo and Sanofi-Aventis Deutschland* ECLI:EU:C:2013:520, para. 51.

⁹ Opinion 2/00 *Cartagena Protocol on Biosafety* ECLI:EU:C:2001:664. An important consideration was that the protocol regulated all cross-border movements of living modified organisms, including movements without a commercial objective. See *ibid*, para. 38.

¹⁰ Arts. 3(5) and 21(2) TEU.

enabled the Court to accept that trade instruments may legitimately pursue non-commercial objectives, provided they nonetheless govern trade flows.

Opinion 2/15 is central in this respect.¹¹ The Court upheld the inclusion of sustainable development chapters in the EU–Singapore FTA, even though these chapters pursued labour and environmental objectives. What mattered was that they regulated the conditions under which trade takes place.¹² The opinion thus confirmed that the CCP can accommodate values-based trade regulation.¹³

3.1.3. The emergence of unilateral, values- and interest-based trade instruments

Following Opinion 2/15, the Union legislator has increasingly relied on Article 207 TFEU to adopt unilateral instruments that pursue non-trade objectives but nonetheless govern trade flows. Examples include the Anti-Coercion Instrument¹⁴, the Forced Labour Regulation¹⁵, the Conflict Minerals Regulation¹⁶, the Anti-torture Regulation¹⁷, and most recently the ban on Russian gas imports.¹⁸ Although the Court has not yet reviewed the legal basis of these instruments, their adoption reflects a broader post-Lisbon trajectory: Article 207 TFEU has become the principal vehicle for regulating trade in ways that integrate sustainability, human rights, and even security considerations.¹⁹

These instruments share two features relevant to the present analysis. First, they regulate trade directly — by imposing import bans, export controls, or due diligence obligations — and have

¹¹ Opinion 2/15 *EU-Singapore FTA* ECLI:EU:C:2017:376.

¹² The CJEU held that through these commitments, “the European Union and the Republic of Singapore undertake, essentially, to ensure that trade between them takes place in compliance with the obligations that stem from the international agreements concerning social protection of workers and environmental protection to which they are party.” See Opinion 2/15 *EU-Singapore FTA* ECLI:EU:C:2017:376, para. 152.

¹³ In pre-Maastricht case law, the CJEU had already confirmed that CCP measures could pursue “foreign policy and security objectives.” See e.g., with regard to dual-use export controls, Case C-70/94 *Fritz Werner Industrie-Ausrüstungen GmbH v Germany* [1995] ECR I-3189, para. 7. However, these judgments were issued before the adoption of the Maastricht Treaty, and thus before the establishment of the CFSP, which makes the legal landscape difficult to compare with today’s post-Lisbon framework.

¹⁴ Regulation (EU) 2023/2675 of the European Parliament and of the Council of 22 November 2023 on the protection of the Union and its Member States from economic coercion by third countries [2023] OJ L 2023/2675.

¹⁵ Regulation (EU) 2024/3015 of the European Parliament and of the Council of 27 November 2024 on prohibiting products made with forced labour on the Union market and amending Directive (EU) 2019/1937 [2024] OJ L 2024/3015.

¹⁶ Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas [2017] OJ L 130/1.

¹⁷ Regulation (EU) 2019/125 of the European Parliament and of the Council of 16 January 2019 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment [2019] OJ L 30/1.

¹⁸ Regulation (EU) 2026/261 of the European Parliament and of the Council of 26 January 2026 on phasing out Russian natural gas imports and preparing the phase-out of Russian oil imports, improving monitoring of potential energy dependencies and amending Regulation (EU) 2017/1938 [2026] OJ L 261/1.

¹⁹ At the time of writing (March 2026), an annulment action against regulation 2026/261 was pending before the CJEU. See Case C-46/26, *Action brought on 2 February 2026 – Hungary v European Parliament, Council of the European Union* [2026] OJ C, C/2026/1343, 16.3.2026. One of the pleas pertains to CCP-CFSP nexus, with Hungary arguing that ‘the centre of gravity of Regulation 2026/261, having regard in particular to its purpose and content, does not fall within the scope of trade regulation, but within that of restrictive measures under Article 215 TFEU, since the main purpose of that regulation is not to regulate trade in natural gas, but to require the interruption of trade relations with a third State in the area of natural gas, which is why it should have been adopted on the basis of Article 215 TFEU and not on the basis of Article 207 TFEU.’ Following the recent elections in Hungary, it remains to be seen whether Hungary will continue the case or opt for discontinuance.

immediate effects on trade flows. Second, they pursue objectives that are not intrinsically commercial, yet are treated as compatible with the CCP because they shape the conditions under which trade may occur.

At the same time, it should be acknowledged that the post-Lisbon trend towards greater use of Article 207 TFEU as a legal basis is not uniform. Other instruments that also regulate trade flows in pursuit of non-commercial objectives — such as the Carbon Border Adjustment Mechanism (CBAM)²⁰ and the Anti-Deforestation Regulation²¹ — were adopted on the basis of Article 192(1) TFEU. Their legal basis reflects their primary environmental objective and their integration into a wider body of EU environmental legislation. Similarly, the ban on Russian gas imports has a dual basis, combining Article 194(2) TFEU on energy policy with Article 207 TFEU, which is meant to reflect the regulation's embedding within a wider EU energy policy that aims to increase the energy security and resilience of the Union.²²

These examples illustrate that the mere fact that a measure restricts or conditions trade does not, in itself, determine the legal basis.²³ What matters is whether the measure's predominant aim and regulatory technique concern the governance of trade flows (pointing towards Article 207 TFEU) or the pursuit of other policies, such as environmental policy (pointing towards Article 192(1) TFEU) or energy policy (pointing towards Article 194(2) TFEU).

3.2. Application to the proposed measure

When assessed against this case law and legislative practice, the proposed measure is likely to exhibit the characteristics that the Court has identified as bringing an instrument within the scope of Article 207 TFEU.

In terms of *content*, the measure would likely prohibit the import and export of goods – possibly also of services – between the Union and Israeli settlements in the occupied territories. Such prohibitions would have direct and immediate effects on trade flows: they would bring the relevant exchanges to a halt, either at the border or, where internal market mechanisms are added, within the Union's territory. Measures with comparable effects have been treated by the Union legislator as falling within the CCP.

In terms of *aim*, the measure would seek to ensure that trade with a third territory takes place in a manner consistent with the Union's obligations under international law, including the obligations identified by the International Court of Justice in its 2024 advisory opinion.²⁴ The CJEU

²⁰ Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 establishing a carbon border adjustment mechanism [2023] OJ L 130/52.

²¹ Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation [2023] OJ L 150/151.

²² It should be noted that the Commission offered no justification for its choice of legal bases in the explanatory memorandum accompanying the legislative proposal. See European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on phasing out Russian natural gas imports, improving monitoring of potential energy dependencies and amending Regulation (EU) 2017/1938' COM(2025) 828 final. The preamble to the regulation however embeds the regulation within the EU's energy strategy – the REPowerEU Roadmap – that aims to strengthen energy security and resilience, citing recurrent and deliberate interruptions in supply in the past twenty years.

²³ It should also be recalled that the CJEU has held on several occasions that a mere institutional practice cannot derogate from the rules laid down in the Treaty and therefore cannot create a precedent binding on the EU institutions with regard to the correct legal basis. See the references to case law in Case C-411/06 Commission v Parliament and Council ECLI:EU:C:2009:189, Opinion of AG Poiares Maduro, paras 44 and 45.

²⁴ International Court of Justice, *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem (Advisory Opinion)* [2024] ICJ Rep 1.

has accepted that the CCP may legitimately pursue such values-based objectives, provided the measure governs trade. The sustainable development chapters upheld in Opinion 2/15 illustrate that the CCP can accommodate measures intended to ensure that trade does not contribute to violations of international obligations.²⁵

Moreover, the measure would operate within the framework of Article 207(1) TFEU, which requires that the CCP be conducted in the context of the principles and objectives of the Union's external action. These objectives include respect for international law and the promotion of human rights. The measure's purpose — to prevent trade and investment relations that contribute to the maintenance of an unlawful situation — is therefore not external to the CCP but embedded within the normative framework that Article 207 itself invokes.

Taken together, these considerations suggest that the proposed measure would fit within the doctrinal contours of Article 207 TFEU as interpreted by the CJEU. While its objectives are not commercial in the narrow sense, its regulatory technique and its effects on trade are of the kind that the Court has treated as falling within the CCP. This does not eliminate the broader structural ambiguities of the post-Lisbon system, but it does indicate that Article 207 TFEU can provide a coherent legal basis for the measure.

3.3. Adding Article 114 TFEU

Where the measure is designed not only to prevent the entry of settlement goods and services into the Union but also to regulate their circulation *after* entry — for example, by prohibiting their sale, marketing, or further distribution within the internal market — Article 114 TFEU may potentially serve as a complementary legal basis. The Court has accepted that Article 114 may be used to harmonize rules governing the placing of goods on the market, including where such rules pursue non-economic objectives, provided they contribute to the establishment or functioning of the internal market.²⁶

A dual legal basis of Articles 207 and 114 TFEU is therefore conceivable where, following the example of the Forced Labour Regulation, the measure combines border-focused trade restrictions with internal-market enforcement mechanisms.²⁷ Because both provisions require the ordinary legislative procedure, their procedural compatibility allows for both legal bases to be combined in a single measure.²⁸

4. Option 2: A Council decision under Article 29 TEU implemented by a regulation under Article 215 TFEU

A different route would be to characterize the measure as a restrictive measure within the Common Foreign and Security Policy (CFSP), adopted through a Council decision under Article 29 TEU and implemented by a regulation under Article 215 TFEU. The former would require unanimity in the Council, while the latter would be adopted by qualified majority and would

²⁵ Note moreover that a measure of the type discussed in this memo would not be in conflict with the EU's commitments under the WTO agreements, as the Israeli settlements are located outside of Israel's customs territory.

²⁶ See seminally Case C-376/98 *Germany v Parliament and Council (Tobacco Advertising I)* ECLI:EU:C:2000:544.

²⁷ Chapter V of the Forced Labour Regulation imposes enforcement obligations on customs authorities as well as "competent authorities", which will have to be designated by the Member States.

²⁸ See note 6.

require European Parliament consent. This option reflects the post-Lisbon architecture for CFSP-based restrictive measures, but its applicability to the proposed measure raises a number of conceptual and doctrinal questions.

4.1. The post-Lisbon framework for CFSP restrictive measures

Article 29 TEU empowers the Council to adopt decisions defining the Union's approach to a particular geographical or thematic issue within the CFSP. Where such decisions entail the interruption or reduction of economic or financial relations with third countries, Article 215 TFEU provides the mechanism for implementing them through binding Union regulations. This two-step structure — a CFSP decision followed by a TFEU regulation — has become the standard model for EU restrictive measures.

The language of Article 215 TFEU is broad. It authorizes measures that interrupt or reduce economic and financial relations “in part or completely,” and it does not distinguish between targeted and sectoral measures.²⁹ The Treaty therefore leaves open the possibility of using CFSP restrictive measures to limit trade flows, even though the Union has, in practice, shifted towards more targeted sanctions since the early 2000s. The Lisbon Treaty did not remove this possibility; if anything, it codified it.

4.1.1. The difficulty of identifying CFSP-specific aims or content

Despite this formal openness, the application of the centre-of-gravity test to CFSP measures is complicated by the post-Lisbon Treaty structure. As mentioned earlier, as part of the Treaty framers' efforts to incorporate the CFSP within the Union legal order, the CFSP no longer possesses its own distinct set of objectives.³⁰ The aims of the CFSP are now embedded within the general objectives of the Union's external action, which, as mentioned, also inform Article 207 TFEU. As a result, the traditional aim-based analysis provides limited guidance: both CFSP and CCP measures may pursue the promotion of human rights, respect for international law, or the preservation of international peace and security.³¹

²⁹ Targeted sanctions (or “smart” sanctions) are measures directed at specific individuals, groups, or entities—such as high-ranking officials or terrorist organizations—to freeze assets or restrict travel without broadly affecting the general population. In contrast, sectoral sanctions are broader measures aimed at entire key industries of a target country (e.g., energy, banking, or defense) to exert significant economic pressure by restricting access to capital markets, technology, or trade. See Case C-130/10 *Parliament v Council* ECLI:EU:C:2012:472, paras 63–65 (discussing measures against individuals) and Case C-72/15 *Rosneft* ECLI:EU:C:2017:236, paras 88–90 (discussing sectoral restrictions on the oil industry). A shift towards targeted or ‘smart’ sanctions took place in EU policy-making as a reaction to the humanitarian catastrophe caused by the comprehensive sectoral embargoes on Iraq in the 1990s. Discussing the rise of smart sanctions, see e.g. Daniel W Drezner, ‘Sanctions Sometimes Smart: Targeted Sanctions in Theory and Practice’ (2011) 13 *International Studies Review* 96; Christina Eckes, *EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions* (Oxford University Press 2009) 15.

³⁰ On the (incomplete) incorporation of the CFSP within the wider Union legal order, see e.g. Van Elsuwege (n 7); Cremona (n 7); Ramses Wessel, ‘Lex Imperfecta: Law and Integration in European Foreign and Security Policy’ (2016) 1 *European Papers* 439.

³¹ Pointing to this difficulty in the related context of the development-CFSP nexus, see Geert De Baere and Tina Van den Sanden, ‘Interinstitutional Gravity and Pirates of the Parliament on Stranger Tides: The Continued Constitutional Significance of the Choice of Legal Basis in Post-Lisbon External Action’ (2016) 12 *European Constitutional Law Review* (EuConst) 85, 105 (“Given that the CFSP has lost its specific objectives, applying that objectives based approach post Lisbon is not at all straightforward”) <<https://doi.org/10.1017/S1574019616000055>>. Going as far as to speculate that the abolition of CFSP-specific objectives will over time lead to the demise of the CFSP as a standalone field, see Graham Butler, *Constitutional Law of the EU's Common Foreign and Security Policy: Competence and Institutions in External Relations* (Hart 2019) 289 (“[S]pecific objectives for CFSP matters have been abolished. Inevitably, this act in

The content-based analysis is similarly inconclusive. CFSP restrictive measures may include trade bans, asset freezes, and financial restrictions — instruments that overlap with those envisaged for example by the Anti-Coercion Instrument, which has been adopted under Article 207 TFEU.³² The overlap between the two competences is therefore structural rather than incidental. This blurring of boundaries makes it difficult to identify a CFSP-specific content that would clearly distinguish a CFSP measure from a CCP measure.

4.1.2. The Court's contextual approach to CFSP legal bases

The Court of Justice has had limited opportunities to clarify the scope of Articles 29 TEU and 215 TFEU. In the few cases where it has reviewed CFSP-based measures, the Court has relied heavily on contextual factors external to the measure itself.

In *Restrictive Measures*, the Court upheld the use of Article 215 TFEU to implement a UN Security Council resolution aimed at maintaining international peace and security.³³ The Court emphasized the broader policy context — including the link to the UN system — rather than the intrinsic aim or content of the measure.

Similarly, in *Tanzania*, the Court accepted a CFSP legal basis for an agreement on the transfer of suspected pirates because it formed part of a wider CSDP military operation authorized by the UN Security Council, despite the content of the agreement aligning more closely with measures pertaining to the Area of Freedom, Security and Justice (AFSJ).³⁴

While it is difficult to derive general conclusions from such a limited judicial record, these cases do seem to suggest that the Court is willing to accept a CFSP legal basis where the measure forms part of a broader EU engagement with threats to international peace and security.³⁵ However, they also illustrate the difficulty of applying the traditional aim/content test to CFSP measures: the Court's reasoning turns on contextual cues that may not be present in other situations.³⁶

4.2. Application to the proposed measure

Applying this framework to the proposed measure reveals both possibilities and limitations. On the one hand, the measure concerns a situation that the International Court of Justice has characterized as involving serious violations of peremptory norms of international law. One might argue that a CFSP-based response would reflect the Union's commitment to upholding international law and contributing to the maintenance of international peace and security.

time will likely be seen as one of a series of nails in the coffin of CFSP matters as a standalone field, as Union decision-making as a whole becomes even more communitarised and constitutionalised").

³² Discussing the legal basis of the Anti-Coercion Instrument, see Lukas Schaupp, 'Decoding the Intersection of Trade and Security in the EU's Anti-Coercion Instrument' (2024) 29 *European Foreign Affairs Review* 133, 152, concluding that "the ACI de facto operates at the intersection of trade and security, while de jure being a trade instrument" <<https://doi.org/10.54648/EERR2024006>>.

³³ Case C-130/10 *Parliament v Council (Restrictive Measures)* ECLI:EU:C:2012:472.

³⁴ Case C-263/14 *European Parliament v Council of the European Union* [2016] ECLI:EU:C:2016:435, in particular para. 47.

³⁵ On the significance of context in choice of legal basis analyses involving the CFSP, see also Cremona (n 7) 15–18. Suggesting that the specificity of the CFSP is concentrated in security and defence matters, see already Eeckhout (n 7) 189.

³⁶ Criticizing the CJEU's judgment in *Tanzania* on this basis, see Thomas Verellen, 'Pirates of the Gulf of Aden: The Sequel, or How the CJEU Further Embeds the CFSP into the EU Legal Order' (*European Law Blog*, 23 August 2016) <<http://europeanlawblog.eu/?p=3304>> accessed 20 September 2016.

On the other hand, the proposed measure does not form part of a broader EU security operation, nor is it linked to a UN Security Council mandate. It is not embedded within a CSDP mission, nor does it respond to an immediate threat to the Union’s own security. In this respect, the contextual factors that supported the use of CFSP legal bases in *Restrictive Measures* and *Tanzania* are absent. The measure’s operative provisions — prohibitions on trade — would resemble instruments that the Union has adopted under Article 207 TFEU. The foreign-policy dimension is therefore present, but not uniquely or decisively so.

4.3. Russian sanctions comparison

The EU’s restrictive measures against Russia — including wide-ranging import and export bans on Russian-occupied territories of Ukraine³⁷ — might appear to support the use of Articles 29 TEU and 215 TFEU for the proposed measure. However, the analogy has limitations. The Russian sanctions were adopted in response to a situation that the European Council explicitly characterized as a threat to “European and global security and stability” – terminology reminiscent of “international peace and security”, and they formed part of a coordinated package of diplomatic, military, and economic measures.³⁸ In other words, they were embedded in the kind of broader geopolitical and security context that the CJEU emphasized in *Restrictive Measures* and *Tanzania*.

By contrast, the proposed measure is not situated within a wider EU security strategy, nor has the Union framed the situation in the occupied Palestinian territory as a threat to its own security. While the conflict is long-standing and serious, the Union has consistently approached it through the lens of international law, humanitarian considerations, and the political parameters of the peace process, rather than through the security-oriented framing that characterized its response to Russia’s aggression against Ukraine.³⁹

The content of the measure – restrictions on trade with Israeli settlements – would resemble those of CCP-based instruments, and the contextual factors that justified recourse to the CFSP in the Russian case — including the Union’s explicit characterization of the situation as a threat to international peace and security and the embedding of sanctions within a broader security strategy — are not as prominently present here. The Russian example therefore demonstrates

³⁷ See with regards to Crimea and Sevastopol: Council Decision 2014/386/CFSP of 23 June 2014 concerning restrictions on goods originating in Crimea or Sevastopol, in response to the illegal annexation of Crimea and Sevastopol, OJ L 183, 24.6.2014, p. 70; Council Regulation (EU) No 692/2014 of 23 June 2014 concerning restrictions on the import into the Union of goods originating in Crimea or Sevastopol, in response to the illegal annexation of Crimea and Sevastopol, OJ L 183, 24.6.2014, p. 9. See with regards to other Russian-occupied territories of Ukraine: Council Regulation (EU) 2022/263 of 23 February 2022 concerning restrictive measures in response to the illegal recognition, occupation or annexation by the Russian Federation of certain non-government controlled areas of Ukraine, OJ L 42I, 23.2.2022, p. 77, as amended by Council Regulation (EU) 2022/1903, OJ L 259I, 6.10.2022, p. 1; Council Decision (CFSP) 2022/266 of 23 February 2022, OJ L 42I, 23.2.2022, p. 109.

³⁸ See European Council, *Special meeting of the European Council (24 February 2022) – Conclusions* (EUCO 18/22, 2022) (emphasis added): “The European Council condemns in the strongest possible terms the Russian Federation’s unprovoked and unjustified military aggression against Ukraine. By its illegal military actions, Russia is grossly violating international law and the principles of the UN Charter and undermining European and global security and stability.”

³⁹ European Council conclusions adopted shortly after the ICJ advisory opinion do not refer to the Israel-Palestinian conflict as a threat to “European and global security and stability” in terms similar to those used in the European Council conclusions concerning the Ukraine conflict, even if the European Council did invite the Council to “to take work forward on further restrictive measures against extremist settlers and against entities and organisations which support them”. See European Council, *European Council meeting (17 October 2024) – Conclusions* (EUCO 13/24, 2024). At the time of writing (March 2026), no such measures have been adopted. Other initiatives, such as the suspension of the EU-Israel Association Agreement, have been proposed but not decided.

that CFSP-based trade bans are possible, but in circumstances that differ materially from those at issue.

4.4. The duty of non-recognition

A further point of comparison between the proposed measure and the Russian sectoral sanctions concerns their shared objective of giving effect to the duty of non-recognition under international law. In both contexts, the Union has sought to ensure that its trade and economic relations do not contribute to the maintenance of an unlawful situation.⁴⁰ This duty, reflected in Article 3(5) TEU and Article 21 TEU, has been reaffirmed by the UN General Assembly: in the case of Russia, through resolutions condemning the attempted annexation of Ukrainian territory⁴¹, and in the present context, through resolutions calling on States not to recognize the legality of Israeli settlement activity in the occupied territories.⁴² These resolutions strengthen the international-law basis for EU action in both situations. With regards to the proposed measure, this basis is further strengthened by the 2024 ICJ advisory opinion, which confirmed the existence of a positive duty incumbent on all third states to prevent trade and investment relations that consolidate Israel's occupation.

However, the existence of a duty of non-recognition — even when supported by UN General Assembly resolutions and ICJ jurisprudence — does not, in itself, determine the appropriate legal basis.⁴³ The Union has relied on both the CFSP and the CCP to give effect to that duty in different circumstances. In the case of Russia, the CFSP route may have been chosen because the duty of non-recognition formed part of a broader EU response to a situation characterized as a threat to international peace and security, and because the measures were embedded within a coordinated package of diplomatic, military, and economic actions and related measures to support Ukraine in its war effort. In the present case, by contrast, the duty of non-recognition is not situated within a wider EU security strategy, nor is it linked to a UN Security Council mandate or a CSDP operation.⁴⁴ It therefore does not seem to operate as a CFSP-specific objective capable of shifting the centre of gravity towards Articles 29 TEU and 215 TFEU.

Instead, the duty of non-recognition functions as a general external-action objective that can be pursued through different Treaty bases, including Article 207 TFEU, provided the measure directly and immediately affects trade. It therefore reinforces the need to identify the predominant aim

⁴⁰ The 2014 sectoral sanctions explicitly referred to the duty of non-recognition, while the 2022 sanctions did not. See the references in note 37.

⁴¹ UNGA Res 68/262 (27 March 2014) UN Doc A/RES/68/262, mentioned in the preamble to Council Decision 2014/386/CFSP (see note 37).

⁴² UNGA Res 79/2 (18 September 2024) UN Doc A/RES/79/2.

⁴³ In *Kadi*, the CJEU held e.g. that “an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the Community legal system.” See Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakat International Foundation v Council and Commission* ECLI:EU:C:2008:461, para. 282. The same holds true for other norms of international law, including peremptory norms. See by analogy also with regards to the EURATOM Treaty: Ruling 1/78 ECLI:EU:C:1978:202, para. 35: “[I]t is not necessary to set out and determine, as regards other parties to the convention, the division of powers in this respect between the Community and the Member States, particularly as it may change in the course of time. It is sufficient to state to the other contracting parties that the matter gives rise to a division of powers within the Community, it being understood that the exact nature of that division is a domestic question in which third parties have no need to intervene.”

⁴⁴ The Union does operate a civilian Common Security and Defence Policy (CSDP) mission in the West Bank to support Palestinian police and justice reforms. This mission however predate the proposed measure. Its mission moreover appears disconnected from the aims pursued by the proposed measure.

and content of the measure, rather than supplying an autonomous criterion for selecting the CFSP as the legal basis.

4.5. Assessment

The preceding analysis does not render a CFSP legal basis impossible. The Treaties allow for CFSP restrictive measures with economic effects, and the Court has not excluded the possibility of using Articles 29 TEU and 215 TFEU in situations involving serious breaches of international law. However, the doctrinal foundations for doing so are comparatively unstable. Under the centre-of-gravity test, the Union legislator must identify a single predominant aim and content. In the present case, the measure's operative provisions would regulate trade directly and immediately, and its foreign-policy dimension, while significant, does not appear to be the kind that the Court has treated as determinative for CFSP measures. *Prima facie*, the CFSP route therefore appears less plausible as the correct legal basis.

That said, the doctrinal ambiguities of the post-Lisbon framework described earlier grant the Union legislator flexibility: by framing the measure as part of a broader foreign policy and security strategy in the preamble, the Union legislator could signal a CFSP "centre of gravity" (Article 29 TEU and 215 TFEU). Conversely, a preamble presenting the measure as a technical intervention to ensure trade policy complies with international law would signal a CCP legal basis (Article 207 TFEU). The drafting of the preamble is therefore important, as it provides the Court with evidence of the legislator's intent.

5. Conclusion

The analysis above illustrates that the proposed measure sits at the intersection of several post-Lisbon developments that complicate the traditional legal-basis inquiry. The expansion of Article 207 TFEU into areas once associated with foreign policy, the erosion of CFSP-specific objectives, and the Court's increasingly contextual approach to legal-basis review together create a landscape in which neither the aim nor the content of a measure offers a straightforward answer. This indeterminacy is particularly visible in the overlap between unilateral trade instruments adopted under Article 207 TFEU and restrictive measures adopted under Articles 29 TEU and 215 TFEU, both of which can restrict trade and both of which may pursue values- and interest- based objectives.

Against this background, a CFSP-based approach cannot be dismissed as entirely without merit. The case law does not exclude the adoption of restrictive measures with economic effects under Articles 29 TEU and 215 TFEU, and the Court has accepted that the broader policy context may justify recourse to a CFSP legal basis. Yet the doctrinal foundations of such an approach are comparatively fragile. The absence of CFSP-specific objectives, the lack of CFSP-unique content, and the Court's reliance on contextual cues external to the measure itself make it difficult to articulate a stable centre of gravity pointing decisively towards the CFSP. Moreover, the proposed measure does not seem to form part of a wider EU effort to address threats to international peace and security, which has been a salient contextual factor in the Court's previous acceptance of CFSP legal bases.

By contrast, while Article 207 TFEU is not without its own conceptual tensions, it offers a more coherent fit with both the content and the structure of the proposed measure. The measure would have direct and immediate effects on trade in goods and services, and the Court has accepted

that the CCP may encompass instruments that pursue non-commercial objectives, provided they govern trade flows. The post-Lisbon trajectory of the Court's jurisprudence — including its acceptance of values-based trade instruments and its emphasis on the regulation of trade as the decisive criterion — supports the view that Article 207 TFEU can accommodate a measure designed to ensure that trade with a third territory complies with international law obligations. Where internal-market enforcement mechanisms are added, Article 114 TFEU may be combined with Article 207 TFEU, provided the procedural requirements are compatible.

In sum, the choice of legal basis is shaped by a set of structural ambiguities that the post-Lisbon framework has not fully resolved. Nevertheless, when assessed through the lens of the Court's recent jurisprudence, and when the measure's direct and immediate effects on trade are taken as the decisive criterion, Article 207 TFEU emerges as the more convincing legal basis for the proposed measure. The CFSP route remains available in principle, but it rests on a less stable doctrinal foundation and offers a less coherent account of the measure's centre of gravity.