THE PSAGOT CASE: AN INNOVATIVE CJEU APPROACH TOWARDS THE ISRAELI-PALESTINIAN CONFLICT

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ABSTRACT

This article analyzes the latest Court of Justice of the European Union (CJEU) case on EU's approach towards imported products from the territories Israel captured in 1967, *Psagot* (C-363/18), illustrating the gradual development of EU's policy towards this issue during the years, in three dimensions: reinforcing the legal status of UN and ICJ non-mandatory decisions as alleged mandatory references (implying new customary law); fine-tuning the labeling requirement, commonly interpreted to include the country and place of origin, to indicate further "Israeli settlements"; and adding a contemporary line of reasoning, relying on consumer preferences and corporate responsibility. In the latter respect, the article suggests that despite their different political agendas, the EU and the BDS movement seem to share some strategies and argumentations.

I. INTRODUCTION

Case C-363/18 Organization juive Europeenne, Vignoble Psagot LTD v. Ministre de l'Economie et des Finances[1] (hereby: *Psagot* case) was decided by the CJEU in November 2019. It was referred to the CJEU as a request for a preliminary ruling by the French Conceil d'Etat (Council of State), in the context of proceedings initiated by the Jewish European Organization–Organization juive Europeenne and Psagot Winery against the French Minister of Economy and Finance. The applicants challenged a notice published by the latter, requiring businesses like Psagot Winery, situated in the territories Israel occupied during regional wars (the territories), to label their products to indicate that they originate in "Israeli Settlements." This requirement expressed the Minister's interpretation of Regulation (EU) no. 1169/2011 of the European Parliament and the Council of October 25, 2011 on the provision of food information to consumers.[2] The opinion of Advocate General (AG) Hogan and the CJEU judgment reinforced the French Minister's interpretation of Regulation 1169/2011, supporting that French labeling demand. Since the CJEU holds the legal authority to interpret EU law,[3] CJEU judgment effectively turned the French practice into a mandatory interpretation for all EU Member States.

This article suggests that *Psagot* judgment forms a new link in a chain of legal measures the EU gradually establishes to impose its political view on the Mediterranean region. The article describes this gradual development, addressing the former links in this chain. It illustrates the developments in the reasoning leading to the CJEU's conclusion in *Psagot*, compared to its former *Brita* (C-386/08) judgment, in three respects: reinforcing the legal status of UN and ICJ non-

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1 .Case C-363/18, Organisation juive européenne and Vignoble Psagot Ltd v Ministre de l'Economie et des Finances Request for a preliminrary ruling from the Conseil d'Etat, ECLI:EU:C:2019:954 (Nov. 12, 2019)

2 Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers, amending Regulations (EC) No 1924/2006 and (EC) No 1925/2006 of the European Parliament and of the Council, and repealing Commission Directive 87/250/EEC, Council Directive 90/496/EEC, Commission Directive 1999/10/EC, Directive 2000/13/EC of the European Parliament and of the Council, Commission Directives 2002/67/EC and 2008/5/EC and Commission Regulation (EC) No 608/2004 Text with EEA relevance, *OJ L 304, 22.11.2011, p. 18–63*, available at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32011R1169 (last visited November 18, 2020).

3 ,Consolidated Version of the Treaty on the Functioning of the European Union Tit. 1, Sec. 5, O.J. (C 326)(December 13, 2007).

mandatory decisions as alleged mandatory references (implying new customary law); fine-tuning the labeling requirement, commonly anticipated to include the country and place of origin, to add an explicit indication regarding "Israeli settlements;" and adding a contemporary line of reasoning, relying on consumer preferences and corporate responsibility. The article suggests that the EU and the BDS movement share some strategies and arguments regarding the latter respect, despite their different political agendas. In light of this analysis, the article assesses the potential future implications of the *Psagot* judgment.

II. EU'S UNDERLYING MOTIVATION

A. The Evolvement of EU's Agenda and Approach Towards the Territories

Israel-EU relations date back to the days before the establishment of the EEC in 1957. Israel wanted to become a member of this alliance, but the six establishing countries decided against it.[4] Nevertheless, relations between Israel and the EEC, which later transformed into the EU, existed since the former's establishment.

EEC-Israel's free trade area agreement of 1975[5] was replaced in 2000 by the Association Agreement[6] currently in force between the parties. Formally, both agreements apply between "Israel"[7] and the EEC. Nevertheless, the 1975 agreement was interpreted as applying to the territories. At that time, that interpretation suited Palestinian exporters in the territories who, lacking a free trade area agreement with the EEC, could enjoy the Israel-EEC agreement's benefits, using Israeli certificates of origin. As long as they did not complain about this arrangement – neither did the EEC.

The EC's approach towards Israel and the territories started to change in 1980 when its nine member-states published the Venice Declaration.[8] In that declaration, they expressed their recognition that "the traditional ties and common interests which link Europe to the Middle East oblige them to play a special role

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4 Sharon Pardo *The Year that Israel Considered Joining the European Economic Community* 51 J. Common MktStud. 901 .(2013)

5 Israeli Ministry of Foreign Affairs. The Agreement between the European Economic Community and Israel (May 11, 1975) (last visited March 10, 2021). https://mfa.gov.il/mfa/foreignpolicy/mfadocuments/yearbook2/pages/82%20agreement%20between%20the%20european%20economic%20communi.aspx (last visited 10 March 2022). For the political process that led to the replacement of this agreement with the Association Agreement see Alfred Tovias. Israel and the Barcelona Process: the First Five Years. Israel and Europe: A complex Relationship (ed. Klaus Boehnke), pp. 37-51, 38 (2003).

6 Council Decision (2012/338/EU) of 23 Apr. 2012 O.J.

7 The term "Israel" was not defined in both agreements, due to political sensitivities.

8 *See generally*Venice Declaration (June 13, 1980). https://eeas.europa.eu/archives/docs/mepp/docs/venice_declaration_1980_en.pdf.

and now require them to work in a more concrete way towards peace."[9] Stressing the need to "promote the recognition and implementation of the two principles universally accepted by the international community: the right to existence and security of all the states in the region, including Israel, and justice for all the peoples, which implies the recognition of the legitimate rights of the Palestinian people,"[10] the declaration provides:

> [t]he nine stress the need for Israel to put an end to the territorial occupation which it has maintained since the conflict of 1967, as it has done for part of Sinai. They are deeply convinced that the Israeli settlements constitute a serious obstacle to the peace process in the Middle East. The nine consider that these settlements, as well as modifications in population and property in the occupied Arab territories, are illegal under international law.[11]

This approach was reinforced by several international political and legal events which affected the Mediterranean region in the mid-1990s:

- The conclusion of the 1993 and 1995 Oslo Agreements, [12] aimed at establishing a long- term plan to obtain peace between Israel and the Palestinians.[13]
- The initiation of the Barcelona Process[14] in 1995, by the EU which, inspired by the Oslo initiative, aimed at applying the EU model in the Mediterranean region.
- The conclusion, in 1997, of a free trade area agreement between the EU and the PLO.[15]

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9 *Id.* ¶ 2.

10 *Id.* ¶ 4.

11 *Id.* ¶ 9.

12 Decl. of Princs. On Interim Self-Gov't Arrangements, Ministry of Foreign Affairs (Sept. 13, 1993), https://mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/declaration%20of%20principles.aspx; The Israeli-Palestinian Interim Agreement on the West bank and the Gaza Strip (Sept. 28, 1995), https://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/the%20israeli-palestinian%20interim%20agreement.aspx.

13 According to Gordon and Pardo, "[a]s the Oslo Process unfolded… the EU became increasingly critical of Israeli policies…" regarding the territories. Neve Gordon and Sharon Pardo. What Can Pro-Democracy Activists in Arab Countries Expect from the European Union? Lessons from the Union's Relations with Israel. Democracy and Security, Vol. 9, No. 1/2, pp. 100-119, 104, (Jan.-June 2013).

14 Union for the Mediterranean, https://ufmsecretariat.org/. *See* more details in Tovias, *supra* note 5 and in Rafaella del Sarto. Plus ca Change…? Israel, the EU and the Union for the Mediterranean. Mediterranean Politics 16 (1), pp. 117-134.

15 See full text of the agreement in https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A21997A0716%2801%29 (last visited March 10, 2022).

The latter agreement, concluded in breach of the Oslo Agreements,[16] created an alternative to the Israel-EU agreement. Through it, Palestinian products could obtain trade benefits when exported to the EU. Consequently, the PLO assumed diplomatic pressure on the EU to declare that the Israel-EU agreement does not apply to the territories. The EU started invoking this argument towards the end of the 1990s.[17]

In 1995 the EU and Israel drafted and initialed the Association Agreement between them (which came into force in 2000).[18] It was a new, extended agreement (compared to the 1975 FTAA), well-rooted in the Barcelona vision. Unlike its predecessor, and like the other Association Agreements concluded in the Barcelona Process framework, it links trade issues with a political context: Article 2 subjects it to shared values such as democracy and the rule of law, and articles 3-5 provide for an ongoing political dialogue between the parties. These provisions establish an official linkage between economic and trade benefits and political considerations.

The diplomatic discourse regarding the status of exports originating in the territories did not yield the expected political fruits, i.e., exerting pressure on Israel to advance towards a comprehensive and lasting peace settlement with the Palestinians. Consequently, the EU Commission published in 2001 a notice (avis) to importers,[19] warning them that goods originating in the territories are not entitled to the benefits of the Israel-EU agreement. The Commission further asked the member states' national customs authorities to require that certificates of origin, issued by the Israeli customs authority for products originating in the territories, indicate that fact. The Israeli customs authority awaited government instructions, realizing that this is not a "technical" request. Meanwhile, the customs authorities of the EU Member States, advised by the EU Commission, detained all Israeli imports. They claimed they could not determine their exact origin based on the common certificate of origin (issued in the same format that the EU fully accepted until that time). This practice caused heavy damages to imports undoubtedly originating in Israel (and probably breached some EU-Israel Association Agreement and GATT provisions).[20] As a result, in 2004, surrendering to the

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16 The Oslo agreements created a customs envelope between the Palestinian Authority and Israel, where only the Israeli Customs Authority was authorized to initiate certificates of origin. Annex V of these agreements included an exhaustive list of countries with which the PLO could conclude independent trade agreements. The list consisted of countries with which Israel had no diplomatic relations. It did not include the EU. The EU signed as a witness on the Oslo Agreements, thus was well aware of these provisions.

17 Tovias, *supra* note 5.

18 The Association Agreement came into force only in 2000, but its spirit affected the diplomatic and legal discourse since 1995.

19 Notice to Importers: Imports from Israel into the Community. OJ (C20/2) (2005).

20 Article 8 of EU-Israel Association Agreement (1995) prohibits the implementation of measures having equivalent effect to customs duties and Article 16 thereof prohibits the implementation of measures having equivalent effect to quantitative restrictions on imports and exports of goods between the parties. Both Israel and the EU are GATT Members. GATT

Israeli exporters' pressure, the Israeli trade Minister decided to label exports from the territories, indicating the specific place where they originated, according to the EU's demand. In response, the EU stopped detaining all Israeli imports to the EU.

Nevertheless, one relic of this period lasted: a dispute between the German customs authority and a German importer regarding import taxation of light beverages from a factory situated in the territories. Eventually, it reached a German court, which turned to the CJEU for a preliminary ruling, resulting in the 2010 CJEU's *Brita* judgment.[21] This judgment provided that, according to public international law rules, the territories are not part of "Israel." Thus, the EU-Israel Association agreement should not apply to goods exported into the EU, originating in the territories. This marked a legal benchmark, turning the diplomatic discourse into a mandatory legal interpretation, which all EU member states and institutions must follow.[22] By and large, since the mid-1990s the EU has succeeded in maintaining an external united front (despite internal nuances)[23] concerning the territories' status. *Legally,* the *Psagot* judgment reinforces this unity by determining a uniformly binding legal interpretation to EU Regulation 1169/2011. However, politically, some EU members expressed their inconvenience with mandatory labeling of territories' originating products.[24]

B. EU's Political Game

prohibits the implementation by a member state of non tariff barriers effectively preventing the access of goods from another member state to its market, infringing the former's GATT commitments (e.g. schedules of concessions, Article I – MFN, Article III – National Treatment). General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

21 CaseC-386/08 Brita GmbH v. Hauptzollamt Hamburg-Hafen, ECLI:EU:C:2009:674 (Oct. 29, 2009).

22 *See, e.g.*, 2015 O.J. (C 375/4).

23 Michal Wojnarowicz & Szymon Zaręba, C*ourt of Justice of the EU Ruling on Products from Territories Occupied by Israel*, POLSKI INSTYTUT SPRAW MIĘDZYNARODOWYCH (PISM), https://www.ceeol.com/search/gray-literature-detail?id=847106.

24 Raphael Ahren, *On Labeling Settlement Goods, the Euoprean Union is Far From United*, THETIMES OF ISRAEL, (Dec. 2, 2019, 6:43 AM) https://www.timesofisrael.com/on-labeling-settlement-goods-the-european-union-is-far-from-united (Already in 2015 Greece and Germany expressed such opinions: Yair Weinreb (2015). The Greek Minister of Foreign Affairs does not Approve of Labelling Products Originating in Israeli Settlements. Rotter, 16 April [Hebrew]; Barak Ravid (2015). 16 EU Foreign Ministers Call for Labelling Territories' Products. Haaretz, 16.4.15 [Hebrew]. Other EU members which expressed their inconvenience from this EU policy include Czechia, Hungary, Lithuania and the Netherlands: Raphael Ahren (2019). On Labelling Settlement Goods, the European Union is Far From United.).

A central line of criticism against this EU policy and practice stresses the EU's inconsistency in applying it globally. Some assess that the EU has diplomatic, trade, and economic relations with some 150 regions in the world suffering a disputed international law status, some of them even within the EU borders (e.g., North Cyprus, Ceuta, and Melilla).[25] Nonetheless, the EU seems to apply a pragmatic approach[26] in most of these cases,[27] facilitating trade with them, to benefit all populations in these regions. One might therefore wonder what the EU gains from singling out Israel[28] and the territories in this respect. One answer might be that the EU's approach reflects its frustration from the ongoing stagnation in the peace process, significantly exacerbated by the continued expansion of settlements beyond the pre-1967 borders and the Israeli "conflict management" policy associated with it.

The EU seeks to establish its status as a substantial player in the Mediterranean region, using its policy towards the territories as political leverage.

The *Brita* judgment reinforces this position, allowing EU leaders to raise the political "price" for Israel's behavior while maintaining flexibility.[29] However, Israeli governments, tending to perceive the EU as a biased, pro-Palestinian player rather than an "honest broker," do not change their approach towards the territories despite EU measures. For the time being, this equilibrium appears to be politically convenient to both parties. It allows them to maintain their intensive[30] trade,

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25 *See, e.g.,* The JerusalemCenter, *Is the EU Deploying a Double Standard Towards Israel?*, YOUTUBE (May 15, 2014) https://www.youtube.com/watch?v=GBsEm-KJKug.

26 *Seee.g.*, Case C-219/98 Regina v. Minister for Agriculture, Fisheries and Food, ex parte S.P. Anastasiou (Pissouri) Ltd. & Others, 2000 E.C.R. 1–5267; 2000 OJ (L 70) 11. *See* discussion on pragmatic legal solutions in Nellie Munin, *Can Customs Rules Solve Difficulties Created by Public International Law? Thoughts on the ECJ's Judgment in Brita Case (C-386/08)*, 6 GLOBAL TRADE AND CUSTOMS J., 193 (2011).

27 One recent exception to the pragmatic approach, resembling the approach taken re the territories, was decided by the CJEU in case C-104/16 Council v. Front Polisario. *See* interpretation and criticism in Rachel Frid de Vries, *Case Note: EU Judicial Review of Trade Agreements Involving Disputed Territories: Lessons from the Front Polisario Judgments*, 24 COLUM. J. EURO. L. 497 (2018).

28 Scholars criticize the inconsistency of CJEU's approach to the concept of 'territory' in international law: Paul James Cardwell & Ramses Wessel, *EU External Relations and International Law: Divergence on Questions of Territory?* (draft chapter), *in* FRAMING CONVERGENCE WITH THE GLOBAL LEGAL ORDER: THE EU AND THE WORLD 21-23 (E. Fahey (ed., 2020); Olia Kanevskaia Whitaker, *EU Labelling Practices for Products Imported from Disputed Territories* (TILEC Discussion Paper no. 2019-15, 2019); Olia Kanevskaia Whitaker, *Misinterpreting Mislabeling: the Psagot Ruling*, 4 EURO. PAPERS 763 (2020).

29 Alternative, stricter options of interpretation to international law in this context are available: C.M.J. Ryngaert *Indications of Settlements Provenance and the Duty of Non-Recognition Under International Law*, 4 EURO. PAPERS 791 (2019).

30 The EU is Israel's major trade partner. In 2019 trade flows between Israel and the EU exceeded 44 BN $. ISRAELI CENTRAL BUREAU OF STATISTICS, https://old.cbs.gov.il/www/fr_trade/d4t2.pdf (Last visited Nov. 18, 2020).

economic,[31] and strategic collaboration. At the same time, they publicly express their different political agendas.[32] In the global sphere, this helps to establish the EU's status as a leading player and a source of global "normative power."[33] Israeli leaders tend to focus on the domestic opinions of their voters. Nonetheless, they are not indifferent to the potential accumulated damage that such measures may cause to Israel's vulnerable global image and the Israeli economy in the medium and long run.[34] The next sections illustrate three features of this EU strategy, demonstrating its dynamic nature and growing effect.

III. AN EVOLVING NARRATIVE IN THE SERVICE OF EU'S AGENDA: FROM BRITA TO PSAGOT

A. The Different International Statuses of the Territories

During regional wars, Israel occupied some territories from its Arab neighbors. The circumstances of each territory differ, implying their respective different international statuses.[35] Yet, the 2010 *Brita* Case ignored these differences: the factory at stake was situated in the West Bank, the only territory covered by the EU-PLO Association Agreement. Nevertheless, CJEU judgment applied the same legal analysis, leading to the same rule, to *all* the territories, contending:

> '[t]he European Union takes the view that products obtained in *locations which have been placed under Israeli administration since 1967* do not qualify for the preferential treatment provided for under that agreement.' [Emphasis added].[36]

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31 For collaboration in research and development *see, e.g.*, ISERD: ISRAELI-EUROPE RESEARCH AND DEVELOPMENT DIRECTORATE, https://www.innovationisrael.org.il/ISERD/ (Last visited Nov. 18, 2020).

32 Nellie Munin, *EU Measures Towards Israeli Activities in the Occupied Territories and the BDS: A Diplomatic Achievement or a Pyrrhic Victory?*, 7 J. MULTIDISCIPLINARY RSCH. 55 (2013).

33 Nave Gordon & Sharon Pardo, Research Note, *Normative Power Europe and the Power of the Local*, 5 J. COMMON MKT. STUD., 416 (2014).

34 Eyal Kofman, *Analysis of Potential Implication of an Economic Boycott on Israel*, THE KNESSET'S CTR. INFO. & RSCH (2014). https://fs.knesset.gov.il/globaldocs/MMM/ff4e6b58-e9f7-e411-80c8-00155d010977/2_ff4e6b58-e9f7-e411-80c8-00155d010977_11_10368.pdf (last visited Nov. 18, 2020).

35 *See, e.g.* Munin, *supra* note 26.

36 Case C-386/08, *supra* note 21, ¶¶ 64, 66.

Such a broad interpretation implies that all other EU regulation applies to all the territories occupied by Israel.[37] This approach was somewhat fine-tuned in the *Psagot* case. AG Hogan specifically addresses the different circumstances applying to the various territories in section II of his opinion, titled "short historic background."[38] The CJEU also refers shortly to these differences, contending:

> [t]he West Bank is a territory whose people, namely the Palestinian people, enjoy the right to self-determination… while the Golan Heights form part of the territory of a State other than the State of Israel, namely the Syrian Arab Republic.[39]

However, this acknowledgment does not seem to affect the sweeping CJEU's decision,[40] binding all territories (even those irrelevant to the case) together by determining: "Israel is present in those territories as an occupying power and not as a sovereign entity…"[41] The CJEU further contends in *Psagot:* "[t]he term 'settlement,' because of its generic nature, is likely to refer not to a single place, but a number of localities, stressing the need for an indication that a foodstuff comes from an 'Israeli settlement' located in *one of the territories* [Emphasis added]."

In this sense, *Psagot's* judgment reinforces *Brita* judgment's approach. It uses the opportunity of a case referring to one of the territories: the West Bank, to

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37 *E.g.* Commission Decision of 31 January 2011 Pursuant to Directive 95/46/EC of the European Parliament and of the Council on the Adequate Protection of Personal Data by the State of Israel with Regard to Automated Processing of Personal Data, 2011 O.J. (L 27); 2013 O.J. (C205/9); European Commission. (2013). Commission Regulation 594/2013, 2013 O.J. (L 170/43).

38 Case C-363/18, *supra* note 1, ¶¶ 4-7.

39 Case C-363/18, *supra* note 1, ¶ 35.

40 In public international law, the right for self-determination does not necessarily imply a different sovereign state with a separated customs authority (*see, e.g., Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217, 161 D.L.R. (4th) 385, 228 N.R. 203, 37 I.L.M 1342). Annex V of the Oslo Agreements of 1993 and 1995 provided for a customs envelope led by the Israeli customs authority. One may argue that these agreements have expired and that the reality underlying them changed considerably since their signature. However, the CJEU does not explicitly address these considerations. Even if the CJEU judgment should be interpreted to imply the broader version of self-determination, linked with a territory, the borders of such a territory can be only defined by the parties' agreement. Without such definition, the CJEU is not in a position to decide which part of the disputed territory will be eventually considered as materializing the Palestinian right for self-determination. For the complexity of this perception and its link to territory *see, e.g.*, Protracted Conflicts in the GUAM Area and Their Implications for International Peace, Security and Development: The situation in the Occupied Territories of Azerbaijan, Security Council, Sixty-third year/ General Assembly, Sixty-third session, Agenda items 13 and 18, A/63/664 – S/2008/823, 29 December 2008.
Unlike the other territories at stake, East Jerusalem was unilaterally annexed to Jordan by law in 1950, an act formally recognized only by two countries. These circumstances invoke some doubt of whether its status is of an 'occupied' territory.

41 Case C-363/18, *supra* note 1, ¶ 37.

provide for a rule that applies to all of them, overlooking the potential implications of their different historical circumstances in terms of public international law.

B. Implying New Customary Law?

CJEU's *Brita* judgment states: "[t]he European Union takes the view that products obtained in locations which have been placed under Israeli administration since 1967 do not qualify for the preferential treatment provided for under that agreement."[42] This CJEU judgment does not specify the rules of international law allegedly breached, establishing its judgment on the necessity to determine a different scope of application for EU-Israel and EU-PLO association agreements. However, AG Bot's legal opinion mentions a list of international decisions, declarations, and opinions to support this position.[43]

In *Psagot,* the CJEU explicitly justifies this position contending that Israel's status in the territories is a status of an occupying power, Israeli settlements breach the rules of international humanitarian law and undermine the Palestinian people's right to self-determination.[44] There is no *mandatory* decision by any international law forum that defines Israel's international borders with its relevant neighboring countries. The general, global approach is that the parties to this dispute should agree on their borders. Nevertheless, to establish their position in the *Psagot* case, the AG[45] and CJEU enlarge the list mentioned in the *Brita* case by referring to the following international law resources: Article 49 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (the fourth Geneva Convention), which Israel did not sign,[46] a sequence of *non-mandatory* UN

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42 *Id.* ¶ 64.

43 Case C-368/08 Brita GmbH v Hauptzollamt Hamburg-Hafen ¶¶ 108-113, (Oct. 29, 2019); the Plan for the Partition of Palestine, drawn up by UNSCOP and approved by United Nations General Assembly Resolution 181 (November 29th 1947); United Nations Security Council Resolutions 242 (November 22nd 1967) and Resolution 338 (October 22nd 1973); a European Council's statement following a written question that was addressed to the European Parliament, relating to the territorial scope of EU-Israel Association Agreement (OJ 2001 C 113 E, p. 163).

44 Case C-363/18, *supra* note 1, ¶¶ 34-35, 48 (CJEU); Case C-368/08, *supra* note 43, ¶¶ 53-55.

45 *See* G. Kuchenbecker & Andrew Tucker, *The Israeli Products Labelling Controversy – Imposing Politically-motivated Opinions in the Name of Law: An Analysis of the AG's Opinion in the Psagot Winery Case*, THINC (2019) https://www.thinc.info/wp-content/uploads/2019/08/Psagot-winery-final_20190726ocx.pdf (last visited Nov. 18, 2020) (for detailed analysis of the AG opinion and an assessment of its political motivation).

46 *Supra,* note 1, ¶ 53. The Israeli High Court of Justice expresses Israel's commitment to the fourth Geneva Convention's *humanitarian* provisions, on humanitarian grounds. *See, e.g.* HCJ 7957/04 *Mara'abe et al. v. The Prime Minister of Israel et al.* (Sep. 15, 2005), English version available et

decisions,[47] decided in highly controversial political contexts, and an *advisory* opinion by the International Court of Justice situated in Hague (ICJ).[48]

The persistent reliance on *non-mandatory* international fora decisions is peculiar unless implying that these decisions form a new customary law rule.[49] The CJEU and AGs do not say so explicitly.[50] However, if this is the case, it should concern Israel. Suppose this argumentation will be broadly followed in the future by the CJEU as well as by other national and international tribunals. In that case, a new customary law rule may be established, turning all these non-mandatory decisions into a mandatory rule that could effectively determine Israel's international borders without negotiations.

C. Different Context, Similar Interpretation

Since the beginning of this effort, the EU chose to pursue its political agenda by interpreting the economic regulation of technical nature instead of opting for the "highway:" an international political campaign. The *Brita* case referred to the interpretation of the rules of origin in Israel-EU and PLO-EU Association Agreements. The EU later applied CJEU's interpretation in the *Brita* case to other

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https://mfa.gov.il/MFA_Graphics/MFA%20Gallery/Documents/Alfei%20Menashe%20ruling%2015.9.05.doc (last visited Nov. 18, 2020).

47 In footnote 26 of his Opinion (*supra* note 37), AG Hogan refers to the following decisions: UN Security Council, UNSCR No 242 (1967) of 22 November 1967 (Middle East); UNSCR No 446 (1979) of 22 March 1979 (Territories occupied by Israel); UNSCR No 465 (1980) of 1 March 1980 (Territories occupied by Israel); UNSCR No 476 (1980) of 30 June 1980 (Territories occupied by Israel); UNSCR No 2334 (2016) of 23 December 2016 (The situation in the Middle East, including the Palestinian question), and for the UN General Assembly, Resolutions No 72/14 (2017) of 30 November 2017 (Peaceful settlement of the question of Palestine); No 72/15 (2017) of 30 November 2017 (Jerusalem); No 72/16 (2017) of 30 November 2017 (The Syrian Golan), and No 72/86 (2017) of 7 December 2017 (Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and the occupied Syrian Golan).

48 Hogan *supra,* note 1, ¶ 54 (addressing *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, I.C.J. Reports 2004, p. 136. AG).

49 Contending that the cumulative weight of many international forums' persistent decisions forms a 'general practice' (e.g. **South West Africa, Second Phase**, I.C.J. Reports 1966, p.6), which is 'accepted as law' (e.g. **Nicaragua v. USA (Merits)** ICJ 1986)https://www.icj-cij.org/en/case/70/judgments (Last visited Mar. 10, 2022), the two elements provided for by article 38 (1) (b) of the Statute of the International Court of Justice, available at https://www.icj-cij.org/en/statute (Last visited Mar. 10, 2022).

50 In *Brita,* Case C- 386/08, *supra* note 21, the CJEU mentions customary law only when referring to the rules of United Nations, Vienna Convention on the Law of Treaties, United Nations, Treaty Series, vol. 1155, paras. 41-42 (23 May 1969).

contexts, including agricultural regulations, regulations addressing education, sports, research, etc.[51]

The *Psagot* case extends the scope of application of this interpretation to another domain: consumer protection. This field is subject to particular regulation, substantially different from the one governing other disciplines mentioned. The CJEU uses it to support its agenda by broadly interpreting the interest of modern, well-informed customers to make an informed choice based upon 'social and ethical' considerations.[52] Those two categories, explicitly mentioned by Regulation 1169/2011, could cover political considerations. However, to be on the safe side, the CJEU stresses the non-exhaustive nature of this list, suggesting that other types of considerations, 'such as those relating to the observance of international law, may also be relevant in that context.'[53]

D. 'Fine Tuning' the Subject's Definition

1. The subject population

The *Brita* judgment (2010) was heavily criticized,[54] *inter alia,* for failing to distinguish the original Palestinian population of the territories from the Israeli settlers and failing to distinguish initiatives advancing peace and normalization from ones that could escalate the situation. These biases harmed many Palestinian workers who lost their jobs as Israeli industries and businesses left the territories to avoid this judgment's consequences. These consequences are particularly misfortunate in light of a 2018 ILO report indicating that the occupied territories' unemployment rate has risen to the world's highest level.[55] Consequently, later EU initiatives that followed the same logic attempted to "fine-tune" the *Brita* decision, to avoid these counter-productive elements. Thus, the 2013 regulations,[56] depriving EU funding of education, sports, and research activities in the territories,

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51 *See supra* note 37.

52 Case C-363/18, *supra* note 1, ¶¶ 53, 56.

53 *Id.* ¶ 54.

54 *E.g.* Guy Harpaz & Eyal Rubinson, *The Interface Between Trade, Law and Politics and the Erosion of Normative Power Europe: Comment on Brita*, 35 EURO. L. REV. 551 (2010); Sharon Pardo & Lior Zemer, *Bilateralism and the Politics of European Judicial Desire*, 17 COLUM. J. EURO. L. 263 (2011); Munin, *supra* note 26.

55 ILO (2018). The Situation of Workers of the Occupied Arab Territories. https://www.ilo.org/ilc/ILCSessions/previous-sessions/107/reports/reports-to-the-conference/WCMS_629263/lang--en/index.htm

56 European Commission, 2013/C205/05 *Guidelines on the Eligibility of Israeli Entities in the territories Occupied by Israel since June 1967 for grants, prizes, and financial instruments funded by the EU from 2014 onwards.* (OJC 205/5) (19.7.2013), Brussels, Belgium.

stressed that this deprivation would not apply to original citizens' activities or activities promoting peace and normalization in the territories.

Psagot judgment follows the same logic, singling out settlements where only Israeli citizens – addressed by the CJEU as *"a population of foreign origin*"[57] – live in the territories.

The CJEU contends that these settlements "give concrete expression to a policy of population transfer conducted by the State outside its territory, in violation of the rules of general international humanitarian law…"[58] It stresses the importance of using this term to correctly inform potential consumers, prevent their misleading to believe that such products come "in the case of the West Bank, from a Palestinian producer or, in the case of the Golan Heights, from a Syrian producer."

Namely, CJEU's interpretation aims to help customers distinguish the two populations living in the territories and their respective products, to facilitate customers' informed choice.

2. Origin's description

Yet another aspect where the demand for specification gradually grows is the information about the product's origin. Usually, certificates of origin specify the country of origin to ensure that only goods originating in parties to a trade agreement at stake will enjoy its benefits. As mentioned before, in 2004, Israel politically agreed, due to EU pressure, to specify also, in certificates of origin destined to the EU, the exact place where the product originated. This indication facilitates implementing the *Brita* case's customs instructions and EU regulations applying the same rule to other fields.

Extending *Brita*'s approach to consumer protection,[59] the *Psagot* judgment adds to the country and place of origin requirements an indication potentially bearing a political connotation: the "place of provenance." The CJEU interprets it "as referring to any specific geographical area within the country or

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57 Case C-363/18, *supra* note 1, ¶ 43.

58 *Id.* ¶ 48.

59 In November 2015 the European Commission has approved, also due to consumer protection considerations, directives that call on member countries to enforce the labeling of settlements products sold in marketing chains: Barak Ravid, *EU Adopts Guidelines for Labelling Products Manufactured in Settlements and Golan Heights*, **Haaretz** (11.11.2015) www.haaretz.co.il/news/politics/1.2773817. In January 2017, on the other hand, Israeli Minister of Culture Miri Regev torpedoed Israel's participation in the Creative Europe agreement due to the existence of a similar exclusionary clause – Tal Shalev, *Regev Voices Objections - EU Cultural Agreement Off the Table*, **Walla** (29.1.2017) news.walla.co.il/item/3035678. France adopted this directive in November 2016. Barak Ravid, *French Government Publishes Guidelines Requiring Marketing Chains to Label Settlements Products*, **Haaretz** (24.11.2016) www.haaretz.co.il/news/politics/1.3132821. Prior to that, the United Kingdom (2009), Denmark (2012) and Belgium (2014) have independently adopted voluntary guidelines for labelling.

territory of origin of a foodstuff, with the exception of a producer's address."[60] The CJEU stresses that in the circumstances of the case, reference to this indication, in addition to the country of origin indication, is mandatory since it is inevitable to prevent consumers' misleading.[61]

E. The Inspiring Source for EU's New Approach – the Rise of the Ethical Consumer

The new EU focus on ethics and consumer choice relies on a broader context. It seems to be inspired by the gradually changing social expectations from corporations and the increasing consumers' demand that corporate decisions will take into account extra-economic considerations, including human rights issues.

The question of the relationships between business and society is not new. However, a new variant emerged in the late 1990s, with the exposure of large multinational corporations' abuses of economic globalization for harmful practices. Publication of such negative social externalities re-invoked the need for corporations' commitment to adopt "do good" practices, compelling them to consider broader public concerns of their activities, beyond mere shareholders' profits. This expectation from corporations is growing in light of the following:

- Corporations' economic, social and political power grows, increasing countries' challenge of regulating and monitoring their activities;
- Potential countervailing powers, such as organized labor, which opposed corporate governance for several decades, weaken.
- In the current age of privatization and deregulation of public services, corporations exercise a growing portion of state-like functions.[62]

The profound crisis of Western democracy, characterized by politicians' distrust, populist political leaders and parties' rise, and comprehensive outsourcing of governmental functions to the private sector, reinforces suspicion and resentment against leading corporations. "When the public sphere becomes privatized, the private becomes a matter of public concern."[63]

Shamir distinguishes between two types of "social rage" towards corporations, developing Bottom-Up:

- The rage of those whose **standards of living** were materially impaired by a specific corporate activity such as the establishment of sweatshop

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60 Case C-363/18, *supra* note 1, ¶ 41.

61 *Id.* at ¶ 57 (interpreting Articles 9 (1)(i) and 26 of Regulation 1169/2011).

62 *See* DAVID VOGEL, THE MARKET FOR VIRTUE: THE POTENTIAL AND LIMITS OF CORPORATE SOCIAL RESPONSIBILITY (2005) (for further details).

63 Ronen Shamir, *Private Market and Public Pressure: On the Formulation of The Corporate Social Responsibility Concept*, *in* GENERATIONS, SPACES, IDENTITIES: CURRENT PERSPECTIVES OF ISRAELI SOCIETY AND CULTURE 237, 239 (Eds. Hanna Herzog, Tal Kohavi, & Shimshon Zelniker, 2007).

workshops, expulsion of villagers off their lands, closure of factories, etc.; and

- The rage of those whose cultural identity values, referring to their **quality of life**, were compromised due to corporate activities, e.g., workforce exploitation, human rights violations, environmental damages, and animal welfare transgressions (this position also dubs "Post materialism").

Shamir indicates a recent extension of ethical concerns. They are expressed through a growing awareness of the latter group to the former group's existence and position and the last group's consumerist insistence that the goods sold to them by corporations meet particular ethical demands corresponding to the subjective identity they seek to establish.[64]

To a large extent, this indicates a change in political action patterns, which nowadays relies often on consumer identity as much as on civic identity. As culture critic Naomi Klein demonstrated in her classical book *No Logo*,[65] leading companies' branding process is leveraged by civil society organizations to imprint in the public mind links between certain brands and violation of human rights. They do so by exposing the double concealment underlining brand-building:

- concealment of production conditions from quality-of-life sufferers, and
- concealment of the product's economic value from standard-of-living sufferers.

The interest in **Standard-of-living sufferers** and the activism that it invokes among **Quality-of-life sufferers** are realized in three dimensions, constituting together the "normative pressure" to which the corporations are nowadays subject:[66]

- Various topics became ethical concern subjects: factory conditions, human rights, animal welfare, environmental damage, etc.
- Economic practices express ethical concern, e.g., economic boycotts, divestment demands, socially responsible investing (SRI), shareholder activism, the establishment of cooperatives, and Ethical Consumerism.
- Various social initiatives resist corporate activity: shaming, fair trade campaigns, lawsuits, lobbying for further regulation, activities resisting consumer culture, local food markets, and so forth.

The globality of this pressure, which often results from cooperation between activists associated with "Global North" and "Global South" victims, provides ample room for NGOs and social movements operating trans-nationally (known as "Global Civil society"). They enjoy social trust and standing, which enables them to lay down expected corporations' ethical standards. For this purpose, these organizations use the internet and social networks, which produce an

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64 *Id* at 244-45.

65 NAOMI KLEIN, NO LOGO: TAKING AIM AT THE BRAND BULLIES (1999).

66 *See* SARAH SOULE, CONTENTION AND CORPORATE SOCIAL RESPONSIBILITY 7-9 (2009) (for a discussion of differences between direct and indirect pressures on corporations).

unprecedented level of monitoring, enabling quick, inexpensive, and effective exposure of problematic corporate practices.[67]

One example of this mounting "normative pressure" is the BDS campaign against Israel and its settlements in the territories, relevant to understanding the evolving EU position reflected by *Psagot* Judgment.

1. BDS agenda and approach towards Israel.

In certain respects, the BDS campaign may be regarded as the natural continuation of the historical Arab League boycott of Israel–using the instrument of economic pressure to achieve a far-reaching political goal. However, they differ on two grounds:

1. Their different initiators: governmental decisions led to the Arab boycott, while direct "Bottom-Up" action against business corporations reinforces the BDS campaign, initiated by "civil society" players.
2. The above-described change in social expectations of corporations underlines the BDS initiative.

The World Conference against Racism, held in 2001 in Durban, South Africa, symbolized the beginning of the intensified public opinion struggle against Israel, which later led to the BDS campaign's initiation. The conference, held by the UN, served as a platform for presenting strong anti-Israeli positions, especially by a global forum of NGOs, calling for sanctioning and boycotting Israel and severing all ties with it. As of 2002, against the backdrop of the second Intifada, Palestinian intellectuals and Western academics began a growing outcry for imposing an academic boycott of Israel.[68] In April 2004, these calls gained wider recognition. A group of Palestinian intellectuals and civil society organizations launched the PACBI campaign (Palestinian Campaign for the Academic and Cultural Boycott of Israel), calling for a systematic boycott of Israeli cultural and academic institutions to increase political pressure on Israel. On July 9th, 2005,[69] 170 Palestinian organizations founded the Boycott, Divestment, Sanctions (BDS) campaign.

That campaign has three goals:

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67 *See* MARGARET E. KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS (1998) (for a textbook discussion of the subject); *see also*, Tim Bartley & Curtis Child, *Shaming the Corporation: The Social Production of Targets and the Anti-Sweatshop Movement*, 79 AMER. SOCIO. REV. 653 (2014).

68 *See Academic Boycott of Israel*, WIKIPEDIA, en.wikipedia.org/wiki/Academic_boycotts_of_Israel (last visited November 18, 2020) (for a detailed description); *see also Successes in the Academic Boycott*, PALESTINIAN CAMPAIGN ACAD. & CULTURAL BOYCOTT ISRAEL, pacbi.org/etemplate.php?id=2441 (last visited Nov. 18, 2020) (for a detailed description).

69 The anniversary of the International Court of Justice (ICJ) advisory opinion deeming the construction of the Israeli West Bank wall illegal: *Supra* note 48.

- End the Israeli occupation of the territories and tear down the West Bank wall;
- Grant full equal rights to Israeli Arab citizens; and
- Protect Palestinian refugees' right to return to their homes, following UN's General Assembly resolution 194.

In light of the ongoing Israeli occupation of the territories and the international community's inability to compel Israel to end it, that campaign urges civil society organizations worldwide[70] and "principled individuals" to impose various boycotting forms on Israel until it fulfills the above-specified goals.

Unlike the EU (and though vastly different, also unlike the Arab League boycott) operating in a "Top-Down" manner, the BDS campaign is a "Bottom-Up" initiative[71] of the Palestinian civil society, with Palestinian Authority playing a limited role in this context. As suggested by its initials, the movement's activities focus on three significant venues of action:

Boycotts – in different sectors: economic, academic, cultural, and sporting. Thus, for example, the SodaStream company's products manufactured in Mishor Adumim Industrial Park, beyond the pre-1967 borders, were pulled off the shelves of the British department store chain John Lewis in July 2014, following pressure and boycott threats from Palestinian NGOs.[72]

Divestment entails appealing to institutional investors (such as universities and pension funds) to divest from Israeli and foreign companies involved in violating Palestinians' rights. Initiators hope that such acts might impose economic pressure on Israel, leading it to alter its conduct in the territories. Thus, in June 2014, for example, the general assembly of the Presbyterian Church, one of US's most prominent church organizations, voted in favor of divesting $21 million from three multinational corporations which allegedly profited from Israel's occupation of the West Bank, namely: Caterpillar, whose bulldozers were used for tearing down Palestinian houses, Motorola Solutions, whose security equipment was utilized for settlements' protection, and Hewlett-Packard, whose technologies were implemented for continuing the siege on Gaza.[73]

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70 *See, e.g.*, Claudia Baumgart-Ochse, *Claiming Justice for Israel/Palestine: The Boycott, Divestment, Sanctions (BDS) Campaign and Christian Organizations*, 14 GLOBALIZATIONS 1172 (2017) (a description of ties between the BDS campaign and Christian organizations).

71 *See, e.g.,* Joost Berkhout et. al., *Making Inference Across Mobilisation and Influence Research: Comparing Top-Down and Bottom-Up Mapping of Interest Systems*, 66 POL. STUD. 43 (2018) (for the theoretical implications of this distinction).

72 Haaretz, *BDS Bursts SodaStream UK Bubble*, HAARETZ (Jul. 3, 2014) www.haaretz.com/news/diplomacy-defense/.premium-1.603011. In October 2014 SodaStream announced it shuts down its Mishor Adumim Industrial Park factory to move it to the Negev – Nir Zelik, *SodaStream to Shut Down Mishor Adumim Factory*, YNET (Oct. 29, 2014) www.ynet.co.il/articles/0,7340,L-4585757,00.html.

73 Rebecca Shimoni Stoil, *Presbyterian Church Votes in Favor of Divestment*, TIMES ISRAEL (June 21, 2014) www.timesofisrael.com/presbyterian-church-votes-in-favor-of-divesting-from-israel.

Sanctions – this aspect of the movement's activity pertains to international relations ("Top-Down") rather than civil society activities. It involves constant and continuous pressure for imposing international sanctions on Israel in light of its alleged international law violations by jeopardizing its membership in various economic and diplomatic forums. Nevertheless, the likelihood of such sanctions to be implemented in the foreseeable future is very slim, in light of the geopolitical situation and, in particular, the ongoing United States support of Israel.

2. EU and BDS Position Towards Israel and Its Settlements – Differences and Similarities

The BDS campaign calls for a boycott of all Israeli produce – originating either in the West Bank or in Israeli territory. This approach relies on the allegation that Israeli settlement goods, often labeled "Made in Israel," are hard to be traced given this ambiguous labeling. Also, boycott advocates who often compare the Israeli regime in the territories with the South African Apartheid regime argue that the blanket boycott of South Africa, which did not differentiate dissidents from regime supporters, substantially contributed to the collapse of Apartheid. They believe that the same approach should apply to Israel. In other words, BDS supporters claim that the distinction between the Settlements and Israel, in terms of constructing, funding, and expanding them, is essentially artificial.

Unlike this BDS campaign's "Blanket Boycott" approach, the EU adopts a "differentiating" politics, distinguishing "legitimate" Israel from its "illegitimate" settlements. In addition to the EU's "Top-Down" measures specified above, over half of EU member states issued warnings regarding legal and financial risks involved in maintaining business relations with entities working to establish Israel's control of the disputed territories. Thus, the Dutch government's warning led the PGGM pension fund to divest from five Israeli banks. In Denmark, the KLP Kapitalforvaltning insurance company decided to divest from two international building materials companies that owned Israeli subsidiary companies operating quarries in area C.

Psagot judgment reinforces these national initiatives.

EU leadership considers being Israel's largest trading partner, and the potential of deepening Israel's integration with it, significantly leverages to strengthen and enhance the differentiation policy.[74] Virtually, Israel has mostly accepted it: Israel joined the "Horizon 2020" science, research, and development agreement in 2014, although its underlying regulation deprives Israeli institutions, operating beyond the pre-1967 borders, [75] of the potential entitlement to research

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[74] Other possible steps include restricted European cooperation with Israeli banks operating in the settlements; Reducing tax benefits for European organizations which support the settlements; Revocation of the validity of official Israeli documents issued in the occupied territories (e.g., on behalf of Ariel University), etc.

[75] Barak Ravid, *The European Union: All Agreements with Israel no Longer Apply to the Settlements*, HAARETZ (Jul. 16, 2017) www.haaretz.co.il/news/politics/.premium-

grants.[76] The Financing Agreement of EU's economic development program, ENI CBC Med, ratified by the Israeli government in 2017, includes an identical clause.[77]

The EU's continuous focus on the Israeli-Palestinian Conflict is contrary to its more pragmatic approach towards many other territorial disputes worldwide.[78] Nevertheless, Israeli politicians' common attempts to bind together the EU policy of differentiation between Israel and the settlements and the BDS campaign should be dismissed. EU's policy constitutes a legal and political result of Israel's desire to deepen its economic integration with the EU, and of the EU's refusal to apply this integration to the settlements, on grounds specified above. The European position does not call for a boycott on Israel – nor on the settlements – and does not question Israel's legitimacy, unlike some aspects of the BDS campaign. Moreover, the EU insists that its policy towards the territories is compatible with public international law and that EU law aims at its application. These elements differentiate the EU's approach from the BDS campaign, underlined by an anti-Israeli policy. However, both these campaigns seem to rely on a new political and economic climate within which business corporations are evolving today and which is essential to understand.

Psagot case seems to bring to the front this additional substantial similarity: by interpreting EU Regulation no. 1169/2011 as meant to protect consumers against what they may perceive as undesired political decisions, actions or policies of the State from which a product originates. In this way, the CJEU effectively gives such unsatisfied potential customers, defined by Shamir as "ethical consumers" or "quality-of-life sufferers," the power to act Bottom-Up, to express their position by refraining buying products originating in contested sovereignty areas. Thus, by endorsing ethical consumerism considerations, the EU seems to deviate from its complete Top-Down approach towards the Israeli-Palestinian issue. The EU appears to view this civic "normative pressure" – which resembles the BDS campaign - as complementary to its Top-Down power, hoping it might help reinforce its desired position.

1.2072599. President Trump administration's decisions of moving the US Embassy to Jerusalem (May 2018), acknowledging Israeli sovereignty over the Golan Heights (March 2019), reject the view holding settlements illegal (Nov. 2019), and especially its "Deal Of The Century" Peace Plan (Jan. 2020) constitute obviously a dramatic change in the United States' position. Nevertheless, global objection to these decisions, admittedly, was nearly unanimous.

[76] Israel has attached a letter of protest to the agreement, clarifying that it maintains its position on the matter. In addition, it was decided that the Ministry of Economics would formulate a mechanism for compensating settlements' companies and organizations hurt by the European prohibition on transferring funding – Barak Ravid, *A Compromise Enabling Israel to Sign EU Scientific Agreement Achieved*, HAARETZ (Nov. 26, 2013) www.haaretz.co.il/news/politics/1.2175745.

[77] Noa Landau, *Regev Blunders, Other Ministers Keep Silent – and the Government Approves an EU Agreement Exclusive of Settlements*, HAARETZ (Dec. 31, 2017) www.haaretz.co.il/news/politics/.premium-1.5535278.

[78] *See* Munin, *supra* note 26.

The current EU approach singles Israel out. It will be interesting to see whether the EU will apply *Psagot's* broad interpretation of EU Regulation no. 1169/2011 to all territories under contested sovereignty globally, to demonstrate a comprehensive and consistent approach. We should not hold our breath, though. Kuchenbecker and Tucker[79] (2019) suggest: "if EU law would be interpreted as requiring that all perceived violations of international law must be addressed by product labeling, it would be a vastly complex commercial disaster."

IV. CONCLUSION

The *Psagot* judgment seems to form another EU step towards imposing its political opinion on Israel, using economic instruments, extending its approach towards the territories to consumer protection regulation. It is part of a changing political landscape in which business decisions increasingly face normative pressure.

This judgment plants seeds that imply a further extension of this policy in the future – by the EU and the global community. First, the reference to a sequence of non-mandatory decisions by the UN and the ICJ as alleged mandatory decisions or as decisions expressing a broad international agreement, thus implying that they may establish customary law. Second, the transfer of power to consumers aimed to assume bottom-up economic pressure on Israel, echoing and, simultaneously, strengthening the BDS campaign. These two elements may fold a substantial future danger to products originating in the territories and the entire Israeli economy.

79 Kuchenbecker & Tucker*supra* note 45.