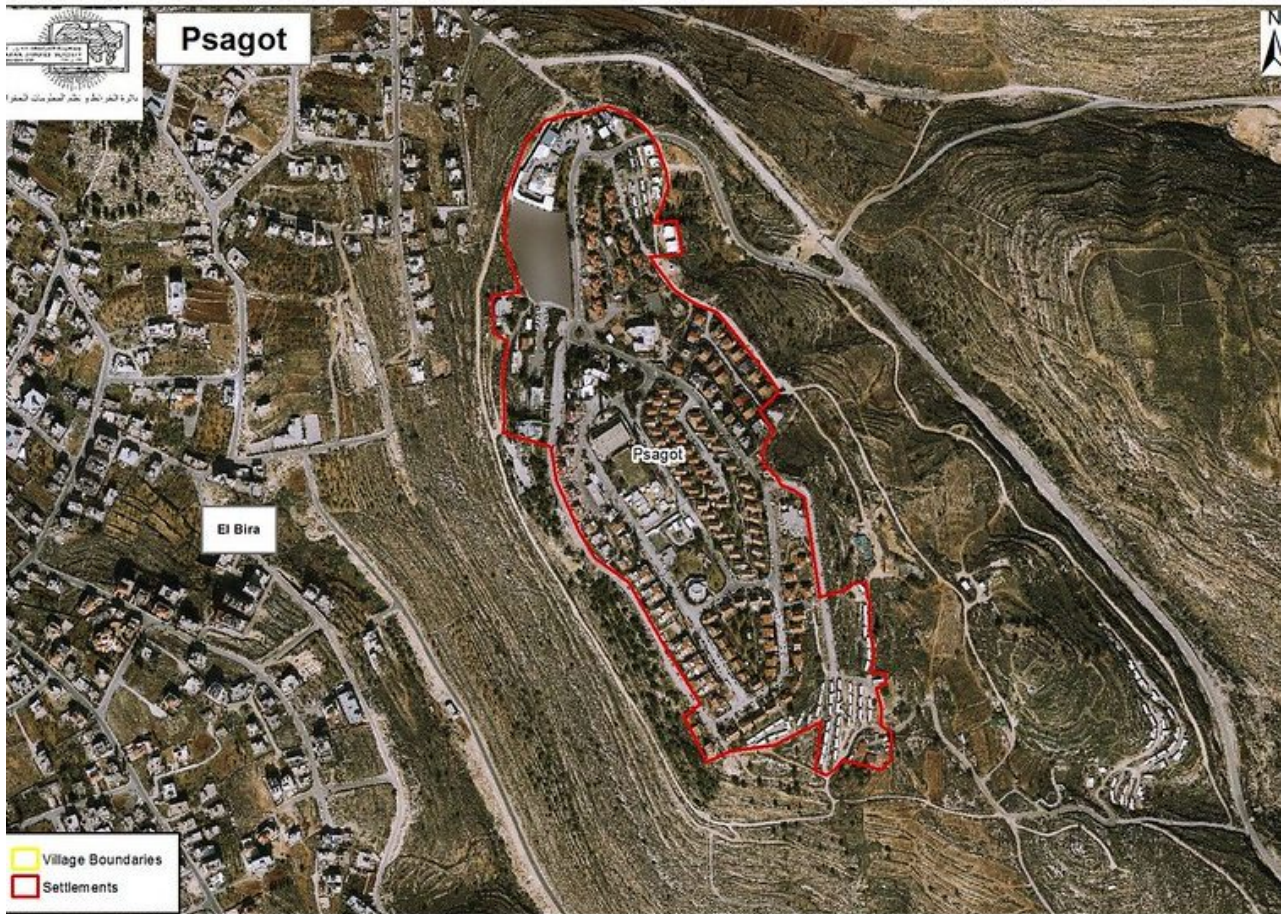


European Court's interpretation of international law in Psagot labeling case seriously flawed

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By Andrew Tucker, Director, *thinc*.

The European Court of Justice issued on Tuesday 12th November its much-anticipated judgment in the *Psagot Winery Case*, concerning the question how products imported into Europe from the “occupied Palestinian territories” should be labeled.

The Court ruled that, in order to ensure that European consumers are not misled about the provenance of imported products, “foodstuffs originating in a territory occupied by the State of Israel must bear not only the indication of that territory but also, where those foodstuffs come from a locality or a group of localities constituting an Israeli settlement within that territory, the indication of that provenance.”

There are many reasons why this judgment is problematic, including the fact that it picks out one specific case of “occupation” in the world and subjects it to condemnation. That is not only unfair, it is a breach of Israel’s right to be treated equally.

But there are two other aspects of the Court's judgment that are, in our view, of concern, and which we address in this article:

First, the court endorses official EU policy that all territories outside the "1967 lines" are "occupied" and therefore by definition cannot belong to territory of Israel.

Second, the Court re-states the oft-heard assertion that all "Israeli settlements" in those territories infringe international law.

These legal conclusions reflect an incomplete, imbalanced and distorted view of the history of these territories, as well as a fundamental misinterpretation of the law of occupation.

The "occupied" territories are not part of the territory of Israel

The Court reasons that "under the rules of international humanitarian law, these territories are subject to a limited jurisdiction of the State of Israel, as an occupying power, while each has its own international status distinct from that of that State." Further, citing the International Court of Justice Advisory Opinion in the Wall Case (2004), the Court states that "the West Bank is a territory whose people, namely the Palestinian people, enjoy the right to self-determination." All of this means, according to the Court, that these territories are not "in Israel", and therefore products originating from these territories may not bear the label "made in Israel".

These statements are astounding in their incompleteness and inaccuracy.

First, it is highly questionable whether all of these territories are "occupied" within the meaning of the law of occupation. The arguments that are consistently made by Israel and others that the territories captured by Israel in June 1967 are not necessarily "occupied" are not even addressed by the Court.

But, secondly, and perhaps more importantly, even if they are "occupied" within the meaning of the law of belligerent occupation, this does not necessarily mean they cannot be part of the State of Israel. The law of occupation does not determine the territorial sovereign status of the territory. The law of occupation simply imposes certain obligations and prohibitions on the occupying power, which are to be respected pending the finalization of a peace treaty to resolve the dispute. In other words, it is quite possible under international law for territory to be both "occupied" and "disputed". Both Israel and the Palestinians make claims to these territories. It is not up the European Court of Justice to make a determination on this.

The fact is that there are very strong arguments that some, if not all, the territories captured in 1967 already belonged to the territory of Israel, based on the Mandate for Palestine (1922), and the Oslo Accords (1993-1995). In brief: the State of Israel emerged in May 1948 as a result of the Mandate for Palestine (1922), the core purpose of which was the creation of a 'Jewish homeland in Palestine'. The Mandate conferred on the Jewish people the right to settle in the territory of Palestine – which included all territory

west and some of the territory east of the Jordan River. It was undoubtedly intended that Jews should have a right to live in what is now known as East Jerusalem and the West Bank. After termination of the Mandate, and pending the establishment of a Trusteeship (which, in the case of Palestine, never happened), Article 80 of the UN Charter expressly preserved the pre-existing rights of the Jewish people under the Mandate.

When Israel was created on 14th May 1948, upon the termination of the Mandate, its borders were arguably – on the basis of the principle of *uti possidetis juris*– the pre-existing administrative boundaries under the Mandate – in accordance with the same principle that has determined the borders of all other States emerging out of Mandates – such as Iraq, Syria and Lebanon – as well as many other states in the world.

Jordan (with other Arab states) attacked the infant State of Israel on 15th May 1948, resulting in Jordan's control of East Jerusalem and the West Bank until 1967. This attack was clearly illegal and could not have resulted in Jordan acquiring any territorial sovereignty over these territories. So when, in effect, Jordan 'abandoned' its claims to East Jerusalem and the West Bank in the late 1980's in favor of the Palestinians, it could not confer on the Palestinians more rights than it itself possessed.

Further, it is simply not true that the Palestinian people have a "right" to self-determination in all of the territories captured by Israel in 1967. On the contrary, international law requires that the right to self-determination cannot infringe the territorial integrity or security of neighboring states. The territorial scope of their right to self-determination is precisely one of the topics of negotiation under the Oslo agreements. In the Oslo Accords, the PLO itself agreed to a process for achieving self-determination, in which it agreed (Article V, Oslo I) that issues like borders, settlements and Jerusalem would be the subject of permanent status negotiations. In other words, the parties themselves agreed that the status of these territories is under negotiation, and at least some of these territories could in fact be part of the territory of the State of Israel.

To conclude on this point: not only is the Court's reasoning deficient, it simply has no jurisdiction to make a determination that these territories do not belong to Israel. The most it should have done is conclude that the status of the territories is disputed. The judgment interferes with difficult and complex matters of negotiation between two parties (Israel and the PLO).

Israeli settlements are illegal

According to the court, any product that "comes from an Israeli settlement located in one of those territories" must indicate that fact. This is because "the settlements established in some of the territories occupied by the State of Israel are characterized by the fact that they give concrete expression to a policy of population transfer conducted by that State outside its territory, in violation of the rules of general international humanitarian law."

Here again, the Court's reasoning is open to criticism.

First, there are good arguments that these territories are not "occupied" within the meaning of the law of belligerent occupation. One of these is that the law of occupation only applies when there is another state claiming sovereignty over these territories. In the case of the "occupied Palestinian territories", there is simply no other state that has a legitimate claim to the territories.

But even if the territories were "occupied" (as most people seem to think), the Court makes a further error by suggesting that all Israeli settlements in these territories are illegal. This cannot be correct, first because under the law of belligerent occupation, it is only an Israeli policy to 'transfer or deport' Israeli civilians into those territories that could be said to be illegal (article 49(6) Fourth Geneva Convention). But second, because a particular settlement can only be regarded as the product of such a policy if it can be shown that the Israeli person or company concerned is living/working/residing in the occupied territory as a result of an Israeli policy to transfer or deport that person into the occupied territories. The fact is that many Israeli's living in these territories are doing so voluntarily. Israel did not compel anybody to establish wineries in Judea or Samaria. At best, the government allowed the wineries to be established. The mere granting of government approval can hardly be regarded as 'deportation' or 'transfer' and thus is not sufficient to bring the government's actions within the purview of Article 49(6).

We would argue that, notwithstanding this judgment, EU law cannot require an importer of products originating in Israeli settlements in the West Bank to label that product as such, unless it can be shown that the producer has been forced by the Israeli government to establish the production company in those territories.

Conclusion

This reasoning in this judgment is seriously flawed. However, the Court's judgment is final and binding; it is not possible to appeal the judgment. Thus this flawed line of reasoning is likely to become accepted as definitive. In this way, the case is yet another example of how law has become politicized.