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

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On Thursday 13 June 2019, a much-anticipated Opinion was delivered by Gerard Hogan, Advocate General ('AG') at the European Court of Justice ('ECJ'), in a landmark case concerning the discriminatory labelling of Israeli products. In giving his Opinion, Hogan submits that European law requires 'a[n Israeli] product originating in a territory occupied by Israel since 1967' to be labelled as originating from 'an Israeli settlement'. Though an AG's Opinion is not legally binding, it is considered highly authoritative and often followed by the ECJ.

The aim of this blog is to scrutinize Hogan's analysis of international law, which forms an important part of his reasoning. After providing a brief account of the background of the case, the Opinion will be summarized, followed by a critical commentary.

We conclude that significant parts of the AG's Opinion seem more an expression of political belief than a correct legal opinion based on a sound interpretation and fair application of international law. This is extremely problematic, and it is to be hoped that the Court will not follow the AG's Opinion in this respect.

Background of the case

The AG's Opinion was delivered in the context of a request for a preliminary ruling in the *Psagot* case. That case concerns the interpretation of EU Regulation No 1169/2011 on the provision of food information to consumers. The ECJ is asked to clarify the scope of the requirement to label foodstuffs with the country and/or place of origin 'where the absence of such information would mislead the consumer'. After all, the Regulation's lofty aims are to better protect consumer interests, by helping consumers 'to make informed choices … with particular regard to health, economic, environmental, social and ethical considerations.' It is these 'social and ethical considerations' that are hard to define in legal terms and have become the crux of the dispute.

In 2015, the European Commission published an 'interpretative notice' 2015/C 375/05 ('Notice') on indication of origin of goods from the territories occupied by Israel since June 1967 ('Israeli occupied territories'), to clarify that the Commission considers all such territories 'not part of Israel's territory'. And therefore, products originating from Jewish settlements in what the EU considers 'occupied territory' are required to be labelled indicating the accepted geographical location (i.e. 'West Bank' or 'Golan Heights') in addition to 'Israeli settlements' in brackets, reading for example 'product from the Golan heights (Israeli settlement)' or 'product from the West Bank (Israeli settlement)'.

As the Notice is not a separate piece of legislation, it has no direct binding effect in the Member States. According to the European Commission, the Notice was issued to make sure Member States implement legislation to clarify to consumers, market players and national authorities that the Commission considers the indication 'product from Israel' as 'incorrect and misleading' if the product originates from 'Israeli occupied territories'.

With this, the Commission arguably acted *ultra vires*, i.e. beyond its powers, by imposing its opinion that there are agreed-upon borders pre-1967 (which is not the case – as we explain below) and thereby intermingling in a protracted territorial dispute, the final status of which is supposed to be determined through negotiation between Israel and the PLO (not unilateral statements from foreign powers).

In 2016, France issued guidelines, implementing the Notice in French Law. As may be expected, Israel condemned these guidelines as discriminatory, since they ignore other disputed territories around the world and other countries' violations of international law. Eventually, the 2016 guidelines were challenged in a joint lawsuit filed by the European Jewish Organization and by the vineyard company Psagot Ltd ('Psagot') with the French Council of State (France's highest administrative court) against the French Minister of Economic Affairs. The claimants alleged that the Notice, on the basis of which the 2016 French guidelines were issued, is in breach of European law due to its discriminatory character, as it singles out one specific instance of occupied territories and purported violations of international law, while ignoring others.

In May 2018, the French Court decided to stay the proceedings, suspend the 2016 guidelines, and refer the following question to the ECJ for a preliminary ruling:

> Does EU law, and in particular Regulation No 1169/2011 …, where indication of the origins of a product falling within the scope of that regulation is mandatory, require for a product from a territory occupied by Israel since 1967, indication of that territory and an indication that the product comes from an Israeli settlement if that is the case? If not, do the provisions of [Regulation No 1169/2011], in particular those in Chapter VI thereof, allow a Member State to require those indications?

Interestingly, the question to the ECJ diverts attention from the status of the Notice by choosing to focus only on requirements under Regulation No 1169/2011. Specifically, articles 9 and 26 of this Regulation stipulate that indication of the country of origin or place of provenance is required where 'failure to indicate this might mislead the consumer as to the true country of origin or place of provenance of the food'.

At the time of writing, oral hearings have taken place and the AG has submitted his Opinion. The judgment of the ECJ, however, is pending. Once a ruling is issued by the ECJ, which will be binding on all national courts in the EU, the French Court will be obliged to settle the dispute to reflect the ECJ's decision.

The AG's Opinion

AG Hogan begins by stressing that EU labelling requirements take into account, amongst others, 'ethical considerations' (Article 3(1) Regulation No 1169/2011) that may influence a consumer's purchasing choices. In his opinion, such ethical preferences may include not purchasing goods originating from settlements on occupied territory. Playing the intersectionality card, he links the objection to purchasing goods from Israeli settlements to the pre-1994 apartheid era when consumers across the world united in a boycott movement against South African products. With this, Hogan essentially engages in a comparison of apples and oranges, equating the struggle against apartheid in South Africa with the Israel-Palestine conflict. The main idea here is that consumers should be allowed to object to purchasing goods from a certain country because it is not a democracy or because certain

political or social policies of that country are considered objectionable. Hogan, however, goes a step further suggesting that Israel is the type of country that deserves to be singled out, labelled as anti-democratic, and boycotted in light of policies that some consider 'objectionable'. No mention is made of any other country with objectionable policies; just think of Iran, North Korea, Saudi Arabia, Turkey etc. Hogan sympathizes with consumers that may object to purchasing products from the Israeli-occupied territories 'precisely because of the fact that the occupation and the settlements [in his eyes] *clearly* amount to a violation of international law.' According to Article 4(2) of Regulation No 1169/2011, 'to enable consumers to make informed choices, account shall be taken of widespread need… for certain information to which [the majority of consumers] attach significant value.' To Hogan, stipulating whether a product originates from the 'Israeli occupied territories' would be of 'significant value' for the majority of consumers (apparently). While he acknowledges that it is not up to the ECJ to approve or disapprove the consumers' choice in this regard or to influence consumers' opinions, he stresses that it is the ECJ's duty to highlight that Israel's violations under international law impact ethical considerations, which has explicitly been acknowledged as legitimate by the Union legislature in the context of labelling requirements concerning the place of origin. He doesn't explain why Israel is the only country singled out in this way and deserves such singular treatment more than any other country does.

Hogan reinforces this claim with reference to the controversial 2004 *Wall* Advisory Opinion, in which the International Court of Justice (ICJ) referred to the territories beyond the green line as 'Arab territory' and determined that Israel's settlement policy since 1977 had breached article 49 of the Fourth Geneva Convention (GCIV), affecting the demographic composition of the territories. Hogan notes that the *Wall* Advisory Opinion referred to numerous UN Security Council (SC) resolutions (see resolutions 446 (1979), 452 (1979), and 465 (1980)).

While Hogan makes sure to stress that his advice should be construed as 'purely legal not expressing a political or moral opinion', the AG fails to note that both the *Wall* Advisory Opinion and the UN SC resolutions adopted under Chapter VI are advisory and political, so not legally binding and therefore open to conjecture. By referring to these sources as if they were binding legal sources, the AG blurs the lines between what is legal and what is political despite characterizing his advice as 'purely legal'.

In addition, the AG points out that in the ECJ's *Brita* ruling regarding the scope of the Association Agreements between the EU and Israel, and the EU and the Palestine Liberation Organization, the ECJ already pointed to the need for making a clear distinction between products originating from territory of Israel and those originating from Israeli-occupied territory. Hogan notes that the Court's analysis in *Brita* is also in line with article 3(5) TEU, in which the EU commits itself to 'the strict observance … of international law.' And it is in line with UN SC resolution No 2334 (2016) which 'calls upon all States … to distinguish, in their respective dealings, between the territory of the State of Israel and the territories occupied since 1967.' The problem with the AG's analysis here is that no consideration is given to the Oslo Accords that were negotiated between Israel and the PLO in 1993-1997, the second of which was witnessed by the EU, and which are still in force. According to the Oslo Accords, the final status of the territories is to be determined through negotiation. Until then, no 'clear distinction' can be made between what is (or will be) Israeli or Palestinian territory. In fact, premature statements made by foreign powers may only hinder Israel and the PLO coming to any agreement at all.

Furthermore, Hogan criticizes the judgment delivered in a 2014 UK Supreme Court case, *Richardson v Director of Public Prosecutions*, upon which the representatives of Psagot relied in their claims. In this 2014 case, the main finding was the following:

> [T]he number of people whose decision whether or not to buy a supposedly Israeli product would be influenced by knowledge of its true provenance would fall far below the number required for them to be considered as the 'average consumer'. If a potential purchaser is someone who is willing to buy Israeli goods at all, he or she would be in a very small category if that decision was different because the goods came from illegally occupied territory.

Hogan disagrees, arguing that there may well be many potential consumers who would not object to purchasing products from 'within the pre-1967 internationally recognized boundaries of Israel' but who would object to purchasing goods from Israeli settlements in the so-called 'Israeli occupied territories'. In fact, Hogan believes that failing to label products from Israeli settlements accordingly, would fall under 'misleading actions' within the meaning of the Unfair Commercial Practices Directive ('UCPD'). Article 6 UCPD states that a commercial practice is misleading 'even if the information is factually correct [but] is likely to cause [the average consumer] to take a transactional decision that he would not have taken otherwise'. Yet again, this appears to reflects Hogan's personal opinion and not necessarily the legal facts as they stand.

In light of his above considerations, Hogan concludes that the addition of the terms 'Israeli settlements' to the geographical identification of the place of origin of the product(s) is paramount to provide 'accurate, clear and easy to understand' information to the consumer (as required under Article 7(2) of Regulation No 1169/2011).

Critique

There are many problematic aspects of the AG's Opinion and it is to be hoped the Court will not follow his advice.

Firstly, as pointed out earlier, the AG repeatedly states that his aim was to issue an opinion that is 'purely legal not expressing a political or moral opinion'. In light of the fact that the Notice contains 'an interpretation' concerning a highly politicized situation, it is impossible not to be political. It should further be noted that Hogan's advice deviates from the terms of the Notice. For example, Hogan does not say it is necessary to state 'occupied territory'; the geographical location together with the reference to the fact it is an Israeli settlement is sufficient (in his opinion).

Secondly, it should be noted that the AG repeatedly refers to the needs of consumers and consumer preferences interchangeably, as if these two things were the same, which they are not. And the AG's conclusion is based on the idea that ethical preference concerning the place of origin may therefore be relevant for labelling laws.

Thirdly, the AG doesn't comment on the status of the Notice, so we still don't know whether such an 'interpretative' statement by the Commission should be considered binding or not. After all, the European Commission does not function as a Union legislator on its own; therefore, the Notice cannot be construed as 'Union legislation' in itself, as Hogan appears to suggest.

Fourthly, and most importantly, the AG's interpretation and application of international law is seriously flawed. The most concerning aspect of the Opinion is that AG Hogan confirms the opinion of the EU Council and Commission that no part of East Jerusalem and the West Bank fall within the territory of the State of Israel. In doing so, the AG completely ignores the historical context of the dispute, the rights and interests of the Jewish people and the State of Israel derived from the Mandate for Palestine, and the Oslo Accords. He rejects any claims that Israel has to sovereignty over East Jerusalem, Judea and Samaria. Just as the Commission has never provided a sound analysis for its position, so too the AG simply assumes the correctness of the EU position, without subjecting it to sound legal scrutiny.

It is indicative that the AG begins his 'Short Historical Background' in June 1967. In so doing, the impression is created that in 1967 Israel took control of territory (through use of force) to which it had no prior claim. This is a flawed interpretation of history, which is adopted in virtually all UN resolutions and even the ICJ's Opinion in the *Wall* case. It is flawed, in our respectful opinion, because it completely overlooks the status of the territories prior to 1967.

The fact which is commonly ignored is that the State of Israel emerged in May 1948 out of the prior Mandate for Palestine, the core purpose of which was the creation of a 'Jewish homeland'. The Mandate conferred on the Jewish people the right to settle in the territory of Palestine – which included all territory west of the Jordan River. This was, clearly, not a right to exclusive ownership, but 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 principle that determined the borders of all other States emerging out of Mandates – such as Iraq, Syria and Lebanon).

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.

The so-called '1967 lines' are not borders. It is in fact astounding that Hogan refers to "the pre-1967 internationally recognized boundaries of Israel". He is presumably referring to what is commonly known as the 'Green Line': the Armistice Demarcation Line agreed in April 1949 between Israel and Jordan in their Armistice Agreement. These were cease-fire lines only, agreed to end the fighting. The Israel-Jordan Armistice Agreement expressly states (Article VI(9)) that these lines are 'without prejudice to future territorial settlements or boundary lines or to claims of either Party relating thereto'. The AG is simply repeating here a commonly-held assumption that has no legal basis in law.

While the perpetual condemnation and contestation of Israel's policy vis-à-vis the territories Israel acquired in 1967 in a defensive war, and Israel's conduct itself since 1967, may have

resulted in some kind of customary norm that Israel's occupation of these areas is illegal (and that would be in our view an unsustainable conclusion), this does not mean that all instances of occupation are illegal (as Hogan suggests). This is certainly not envisaged by the law of belligerent occupation (1907 Hague Conventions, the Geneva Conventions and customary law). Assuming Judea and Samaria are 'occupied' in the sense that Israel is an Occupying Power within the meaning of the Hague Conventions, that does not make the occupation itself illegal. Not even the ICJ makes the assertion that the occupation itself is illegal.

The only thing that could *possibly* be illegal, under the law of belligerent occupation, is an Israeli policy to 'transfer or deport' Israeli civilians into those territories (article 49(6) Fourth Geneva Convention). To prove this, however, it would be necessary to show in each specific case 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. We would assume that Israel did not compel the winery-owners to establish wineries in Judea (Hebron wineries) or Samaria (Psagot). But even if the words 'transfer or deport' are interpreted widely (as many do), in the case of the Psagot winery, for example, it would need to be established, at the very least, that the Israeli government enabled, facilitated or encouraged its establishment, and that without such enabling, it would not have been established. In our view, the mere granting of government approval can hardly be regarded as 'deportation' or 'transfer' and thus would not be sufficient to bring the government's actions within the purview of Article 49(6).

Hogan further argues that Israel's settlement policy can be seen as a manifest breach of international law based on 'the right of peoples to self-determination' – again, citing the *Wall* Advisory Opinion – a position which incidentally also reflects the position generally taken by the United Nations. Here also, it should be noted that this is a political, not legal, statement. (See for example the comments of Judge Higgins in her Separate Opinion in the *Wall* case). We would submit that the principle of self-determination of peoples under international law does not confer on the Palestinian people an absolute right to statehood. Nor does it confer on them a right to territorial sovereignty over all of the territories controlled by Israel since 1967 (for the main reason that, as explained, Israel itself has a potential claim to some or all of those territories). Further, 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.

The fact of the matter is that Israel and the PLO have competing sovereign claims with respect to East Jerusalem and the West Bank, and they are in the midst of an (albeit stagnated) process of negotiations. It may even be that Israel's policies concerning settlements are impeding negotiations. But that does not make them "illegal". The EU's position that East Jerusalem, Judea and Samaria are not a part of Israel, and moreover that Israel does not have any claims to these territories, is simply an opinion based more on political considerations than sound legal analysis. It has never been the subject of a binding judicial determination. The EU has maintained this controversial position since 1973 when pressured by Arab states who considered the EU at the time to be too pro-Israel. One could in fact argue that the EU's unmovable position is in conflict with international law, including the principle of sovereign equality of states, and the duty to negotiate.

The EU position also conflicts with the EU's duties under the Oslo Accords that were negotiated between Israel and the PLO in 1993-1997, the second of which was witnessed by the EU, and which are still in force. As said before, according to the Oslo Accords, the final

status of the territories is to be determined through negotiation. Premature statements made by foreign powers may only hinder Israel and the PLO coming to any agreement at all.

To conclude this critique of the AG's interpretation of international law, the AG fails to establish that – as a matter of international law – the Commission is correct in its allegation that East Jerusalem and the West Bank are not part of Israel's territories. His reasoning does not back up his claim that Israeli settlements are in 'breach' of international law, let alone a '*clear* breach' as Hogan suggests.

Fifthly, the AG does not address the arguments of Psagot that the EU labelling requirements are discriminatory and restrict trade. For good reason, it appears. As the lawfare project noted, '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.' In other words, it's much easier to be discriminatory and single out Israel.

Finally, as the lawyers for Psagot note, it should be pointed out that the AG's reasoning is dangerously open-ended and may result in a 'Pandora's box of unintended consequences':

> "If adopted, the Advocate General's reasoning opens the floodgates to harmful litigation against EU companies, for it allows consumers to argue that any ethical consideration regarding any country of origin is relevant to product labeling laws. A CJEU ruling that politicized labeling must be applied to goods coming from territories involved in legal disputes will be a commercial disaster."

Conclusion

The AG's treatment of international law is flawed and inadequate**.** His defense of the view that East Jerusalem and the West Bank do not constitute part of Israel, and that Israeli settlements are illegal, seems more an expression of political belief than a correct legal opinion based on a sound interpretation and fair application of international law. This is extremely problematic, and it is to be hoped that the Court will not follow the AG's Opinion in this respect.

To end on a lighter note, reference should be made to a recent example of a call to boycott Israeli wine sold by Hema in the Netherlands, which backfired spectacularly, with the result that the product was sold out within a day. If the ECJ ultimately decides to follow Hogan's advice and require Israeli wine produced in the disputed territories to be marked with the label 'Israeli settlement', the unintended consequences may involve a run to buy such products by consumers who disagree with the unjust and unfair treatment Israel is subjected to within the international community and by the EU.