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## INTERNATIONAL LAW AND PRACTICE

# The EU's New Approach To the Two-State Solution in the Israeli-Palestinian Conflict: A Paradigm Shift or PR Exercise?

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**Abstract**

The EU's consistent policy towards the Israeli-Palestinian conflict has been that Israel's presence in the West Bank, East Jerusalem, the Gaza Strip (prior to the 2005 disengagement) and the Golan Heights is subject to the laws of belligerent occupation, that any purported Israeli annexation is illegal and null and void, that Israel's settlements in the Territories are in breach of public international law and constitute a serious obstacle to peace, and that Israel and Palestine should settle their conflict on the basis of public international law and through the two-state solution. In recent years the EU attempted to concretize this policy through its trade and trade-related agreements with Israel, withholding the benefits of EU-Israeli co-operation from companies and research institutions based in the Territories or operating therein, as well as from products produced therein (the New Approach). Thus, from the EU perception, the New Approach towards the long-standing conflict and its reliance on international law may be seen as an instrument to reinforce internal and external legitimacy, buttress identity cohesiveness and as a manifestation of its more robust effectiveness. But this article seeks to conduct a more careful and balanced analysis of the New Approach and in doing so to reveal that the EU's (almost) exclusive focus on non-governmental entities, such as corporations situated in the Territories, and on Territories' products, is misplaced in terms of public international law and effectiveness. The New Approach's deficiencies, *in abstracto* and *in concreto*, as evaluated in this article, are likely to prevent it from serving as a paradigm shift in EU-Israel relations.

**Keywords**

EU external relations; EU-Israel relations; laws of belligerent occupation; self-determination; settlements

## 1. Introduction

The EU's consistent policy towards the Israeli-Palestinian conflict has been that Israel's presence in the West Bank, East Jerusalem and the Golan Heights (the Territories) is subject to the laws of belligerent occupation, that any purported Israeli

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annexation is illegal, and null and void, that Israel's settlements in the Territories are in breach of public international law, and that the two parties should settle their conflict on the basis of international law and through the two-state solution.[1] In recent years the EU attempted to concretize this policy through its trade and trade-related agreements with Israel, withholding the benefits of EU-Israeli co-operation from companies and research institutions based in the Territories or operating therein, as well as from products produced therein and researchers who work in these institutions (the New Approach). The New Approach is distinct from, but operates alongside, the civil-society led, private-sector implemented campaign of Boycott, Divestment and Sanctions against Israel's policies (BDS – a campaign that will not be examined in this article).

At face value the New Approach towards the long-standing conflict appears positive from the EU's perspective: It is consistent with the approach of public international law towards the conflict (including the principle of non-recognition of illegal acts and with the Palestinian right of self-determination). Indeed, according to the EU Commission itself, the New Approach is aimed at ensuring '[T]he respect of EU positions and commitments in conformity with international law on the non-recognition by the EU of Israel's sovereignty over the territories occupied by Israel since June 1967'.[2] Moreover, the New Approach appears to represent a more robust EU international actorness, under which the EU is able to form a coherent policy, to speak with one voice and to offer meaningful trade and trade-related benefits which are in conformity with international law, while withholding tangible trade and financial benefits from those entities participating in settlement activities.

The New Approach attracted initial scholarly enthusiasm. Persson, for example, concluded that the *Guidelines on the Eligibility of Israeli Entities and their Activities in the Territories Occupied by Israel since June 1967 for Grants, Prizes and Financial Instruments Funded by the EU* (the Guidelines), which as analyzed below form the core of the New Approach, represent a powerful combination of hard and soft power, amounting to 'the most significant EU action in the Israeli-Palestinian conflict since the 1980 Venice Declaration',[3] exemplifying '[T]he potential for the EU to exercise its normative and legitimising power in the conflict …'. In his opinion, it is likely to prove to be a '… game-changer in the over hundred years conflict in the Middle East'.[4] Similarly, Bouris and Schumacher concluded that the New Approach manifests the EU's increasingly self-assertive, post-Lisbon foreign policy and amounts to a 'paradigm shift', according to which the EU's traditional 'megaphone diplomacy' is

[1] For analysis see E. Aoun, 'European Foreign Policy and the Arab-Israeli Dispute: Much Ado About Nothing?', (2003) 8 *European Foreign Affairs Review* 289; N. Tocci, 'Firm in Rhetoric, Compromising in Reality: The EU in the Israeli–Palestinian Conflict', (2009) 8 *Ethnopolitics* 387.

[2] Guidelines on the eligibility of Israeli entities and their activities in the territories occupied by Israel since June 1967 for grants, prizes and financial instruments funded by the EU from 2014 onwards, OJ C 205, 19.7.2013, at 9, Section A, para. 1.

[3] A. Persson, 'EU's New Settlements Guidelines Are Already Biting', *The Huffington Post*, 10 September 2013, available at www.huffingtonpost.com/anders-persson/eus-new-settlements-guide_b_4061740.html.

[4] Ibid.

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replaced by a more concrete, robust policy.[5] According to them, this paradigm shift will force Israel to come to terms with the fact that it can no longer dismiss the EU's voice as 'unpleasant background noise'[6] and that, should it continue to flout principles of international law, it will have to suffer concrete negative trade and hence economic consequences.[7] This positive perception of the effectiveness of the New Approach was reinforced by statements made by (former) US Secretary of State Kerry[8] and by the *New York Times* journalist Thomas Friedman.[9]

This article critically questions these assumptions, addressing the question of whether the New Approach is a genuine paradigm shift and whether it amounts to an 'earthquake'[10] that will 'shake EU-Israel relations to the very foundations' and will serve as a 'game-changer'.[11] This article evaluates the New Approach and concludes that in its focus on corporations and research institutions situated in the Territories (and hence also on settlers belonging to those corporations and institutions), the New Approach serves to disguise the EU's inability to face the more thorny challenges that Israel's record in the Territories raises.

Thus the New Approach is not 'new' in its actual perception of international law and its application to the Israeli-Palestinian conflict. Instead, it is a continuation of the EU's traditional, non-confrontational Middle East policies, disguised with new, ever-increasing exclusionary practices, directed at the settlers and the means of production situated in the Territories.

It must be emphasized that the article does not argue that the EU should not employ trade instruments in order to advance strategic political objectives. Nor does it argue that the EU's/EU member states' initiatives to withhold privileged treatment from settlement products or otherwise punish non-governmental entities operating in the Territories are contrary to public international law, WTO law or EU law.[12] Likewise, the article does not postulate that settlers or corporations cannot bear criminal or civil responsibility, under international law or under municipal laws, for their assistance in the implementation of the settlement policies,[13] a possibility that was recognized by the Supreme Court of the UK.[14] Similarly, the article does

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5 D. Bouris and T. Schumacher, 'The EU Becomes Assertive in the Middle East Peace Process', *Open Democracy*, 25 July 2013, available at www.opendemocracy.net/can-europe-make-it/dimitris-bouris-tobias-schumacher/eu-becomes-assertive-in-middle-east-peace-proce.

6 Ibid., referring to a phrase used by Israel's Foreign Ministry spokesman Yigal Palmor in 2012.

7 Ibid.

8 Kerry warned that the Israeli-Palestinian *status quo* is unsustainable and that Israel's economic prosperity is illusionary and bound to change if peace negotiations fail: 'People are talking about boycott. That will intensify in the case of failure. We all have a strong interest in this conflict resolution.' E. Beck, 'Kerry: Israel's security is "illusionary", boycott around the corner', *ynet*, 1 February 2014, available at www.ynetnews.com/articles/0,7340,L-4483446,00.html.

9 Friedman referred to the EU-led, Third Intifada (uprising). T. Friedman, 'The Third Intifada', *New York Times*, 4 February 2014.

10 Bouris and Schumacher, *supra* note 5.

11 Persson, *supra* note 3.

12 For analysis, see Opinion of Professor J. Crawford, 'Third Party Obligations with respect to Israeli Settlements in the Occupied Palestinian Territories', 24 January 2012, paras. 125, 133 and 136, available at www.tuc.org.uk/sites/default/files/tucfiles/LegalOpinionIsraeliSettlements.pdf.

13 Ibid., paras. 100–101.

14 See *Richardson and another (Appellants) v. Director of Public Prosecutions (Respondents)* [2014] UKSC 8, 5 February 2014, para. 17: 'If . . . a person, including the shopkeeper company, had aided and abetted the transfer of Israeli

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not contend that the EU is not or should not be attempting to subject corporations to rules on corporate social responsibility.[15] Nor does the article purport to offer an alternative panacea to the EU's challenges with respect to the effectiveness of its policy towards the conflict. All that it attempts to advance is the proposition that the (almost) exclusive focus of the New Approach on non-governmental entities, withholding from them trade and trade-related benefits, while rewarding the State of Israel, the principal promoter of the Israeli policies with respect to the Territories, with trade and trade-related incentives, is misplaced in terms of public international law, morality and effectiveness; misplaced in terms of focus, not in terms of illegality.

## 2. The New Approach

Since the 1980 Venice Declaration (the Venice Declaration)[16] the EU's consistent policy has been that Israel's presence in the Territories is subject to the laws of belligerent occupation and that Israel's settlements therein are in breach of public international law and constitute an obstacle to peace. In 1999 the EU reinforced this position by calling upon Israel and Palestine to conclude a peace agreement on the basis of public international law and of the two-state solution (the Berlin Declaration)[17] and since 2002 it has asserted that this envisaged solution should be premised on the 1949 Green Line (i.e., the borders prior to June 1967 – the Seville Declaration).[18]

Much scholarship, mostly critical, is devoted to the EU's declaration-based, Middle East policy. Scholars designate it, *inter alia*, a 'megaphone policy'[19] and 'much ado about nothing'.[20] In recent years the EU has attempted to alleviate that state of affairs by, *inter alia*, concretizing its declaratory policies and narrowing the gap between its rhetoric and deeds.

First, the Commission refused to allow products produced in the Settlements by Israeli corporations and exported by the State of Israel to the EU as Israeli products to be classified as such under the 1995 EU-Israel Association Agreement, thereby denying these products a privileged status.[21] This stance was confirmed by the

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civilians into the [Territories], it might have committed an offence against [sections 51–2 of the International Criminal Court Act 2001]'. For an extended treatment of that verdict, *infra* note 94.

15 See European Parliament, Directorate-General for External Policies of the Union, Directorate B, Policy Department, *The European Parliament's Role in Relation to Human Rights in Trade and Investment Agreements*, Study, EXPO/B/DROI/2012-09, February 2014, at 15: 'Particularly in the context of treaties containing investment obligations, the European Parliament has frequently called for the inclusion of provisions on corporate social responsibility (CSR), based, inter alia, on the UN Guiding Principles on Business and Human Rights'. CSR clauses are also to be found in some of the EU's trade agreements, such as the EU-Korea trade.

16 For the Declaration's text see eeas.europa.eu/archives/docs/mepp/docs/venice_declaration_1980_en.pdf.

17 For the Declaration's text see www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/ACFB2.html.

18 For the Declaration's text see www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/72638.pdf.

19 Bouris and Schumacher, *supra* note 5.

20 Aoun, *supra* note 1.

21 G. Harpaz, 'The Dispute over the Treatment of Products Exported to the European Union from the Golan Heights, East Jerusalem, the West Bank and the Gaza Strip - The Limits of Power and the Limits of the Law', (2004) 38(6) *Journal of World Trade* 1049.

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ECJ in the *Brita* verdict of 2010.[22] Subsequently the Council of the EU decided in December 2012 that the EU is committed:

> … to ensure that … all agreements between the State of Israel and the European Union must unequivocally and explicitly indicate their inapplicability to the territories occupied by Israel in 1967, namely the Golan Heights, the West Bank including East Jerusalem, and the Gaza Strip.[23]

The Commission reinforced the EU's position by publishing Guidelines that set out the conditions under which the Commission will implement key requirements for granting EU support to Israeli entities or to their activities in the Territories (July 2013).[24] According to the Guidelines, only those Israeli entities having their place of establishment within Israel's pre-1967 borders will be considered eligible for EU grants, prizes and financial instruments, and only with respect to their activities pursued west of the Green Line.[25] According to the Guidelines, in the case of grants and prizes, the activities and operations of Israeli entities carried out in the framework of EU-funded grants and prizes will be considered eligible if they do not take place in the Territories, either partially or fully, and in the case of financial instruments, Israeli entities will be considered eligible if they do not operate in the Territories, either in the framework of EU-funded financial instruments, or otherwise.[26]

In November 2013 the EU applied the Guidelines in the context of an agreement allowing Israel's participation in the EU's Framework for Research and Innovation (Horizon 2020),[27] a participation that is of paramount importance to the State of Israel.[28] Two years later, the Commission published the *Interpretative Notice on*

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[22] G. Harpaz and E. Rubinson, 'The Interface between Trade, Law and Politics and the Erosion of Normative Power Europe: Comment on Brita (C-386/08)' (2010) 35 *European L. Rev.* 551.

[23] Council of the EU, Council Conclusion on the Middle East Process, 3209 Foreign Affairs Council Meeting, 10 December 2010, para. 4, available at www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/134140.pdf#sthash.gqXKkWAb.pdf.

[24] Guidelines, *supra* note 2, para. 1.

[25] Ibid., at para. 9. The Guidelines apply to Israeli regional or local authorities and other public bodies, public or private companies or corporations and other private legal persons, including non-governmental not-for-profit organizations, but not to Israeli public authorities at the national level (ministries and government agencies or authorities), nor (at least directly) to natural persons, ibid., para. 11.

[26] Ibid., para. 12.

[27] Horizon 2020 is to be applied during the years 2014–2020 with a budget of close to €80 billion. The terms of the agreement were not yet disclosed, a theme discussed below.

[28] Israel's participation in the EU's Research Framework is long-standing and unique. It joined it in 1996 and since then it has remained the only non-European participant. The fact that a highly disproportionate number of Israeli corporations and researchers have been awarded grants and scholarship indicates the meaningful contribution of the scheme in integrating Israel's advanced research into the European research area. See E. Zimmerman, W. Glänzel and J. Bar-Ilan, 'Scholarly Collaboration between Europe and Israel: a Scientometric Examination of a Changing Landscape', (2009) 78(3) *Scientometrics* 427. Hence, the EU's insistence on the application of the Guidelines to Israel's participation in Horizon 2020 caused an EU-Israel diplomatic crisis. Following strong internal lobbying on the part of the Israeli academia for securing a compromise with the EU, and three emergency sessions of high-ranking Israeli ministers together with Prime Minister Netanyahu, it was reported that a formula had been reached between Israel's former Justice Minister Tzipi Livni and EU former High Representative Catherine Ashton (see B. Ravid, 'Horizon 2020 Crisis // Israel and EU Compromise on Terms of Joint Initiative, Following Rift Over Settlement Funding Ban', *Haaretz*, 26 November 2013, available at www.haaretz.com/news/diplomacy-defense/.premium-1.560292). Under that compromise, the EU attached an appendix to the agreement, in terms of which the agreement would not prevent the EU from applying the Guidelines to Horizon 2020, whereas Israel attached an appendix in which

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*indication of origin of goods from the territories occupied by Israel since June 1967*, in an attempt to clarify the EU's position with respect to the need to label settlement products exported to the EU.[29]

The following section will argue that from the EU perception, the New Approach and its reliance on international law may be seen as an instrument to reinforce internal and external legitimacy, buttressing its identity cohesiveness and external effectiveness and reinforcing the effectiveness of its two-state policy.

## 3. The *raison d'être* of the New Approach: An EU perspective

When the EU faces an interpretative dilemma regarding the extra-territorial applicability of its trade and trade-related agreements to territories that are not under the sovereignty of the relevant trading partner, it may elect one of the following two solutions. The first is the trade-practical approach, under which the issue of *de jure* entitlement to sovereignty over the disputed area under public international law is ignored, the focus being placed instead on the *de facto* control of that territory, seeking to confer benefits on the entity which effectively controls that area and which is responsible for it under international law. The underlying assumption of that approach, which is arguably recognized by the WTO regime (in both 'law in the books' and 'law in action'), is that trade agreements are designed to promote free trade rather than to solve political and legal disputes.[30] The second approach is the legal-sovereign approach, which ignores the *de facto* control of the disputed territory and focuses instead on *de jure* legality, sovereignty and recognition. The underlying assumption of the second approach is that trade agreements are not exclusively about trade, that they should therefore be subject to the *lex generalis* rules of public international law and hence that they should not benefit the entity that possesses a territory that is not under its legal ownership. According to this approach, trade policies should be subjected to public international law and serve as an instrument in its advancement.

The adoption of the trade-practical approach would have led to treating products made in the settlements as Israeli, an outcome tantamount to rewarding the State of Israel for its settlement policy in the West Bank. Such an approach would also have allowed Israel to utilize the EU-Israel Agreement in order to blur the physical and legal dividing lines between Israel and Palestine (which the EU supported),[31] granting priority to the *de facto* occupation on the ground at the expense of inter-

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it declared that it objects to the Guidelines from both a legal and a political perspective. As for indirect funding and loans to Israeli entities based in Israel that also operate in the settlements or have extensions or branches therein, the two sides were reported to have agreed that any such entity may apply for European loans, and both sides would examine ways to make sure that the money would not be allocated to entities or activities in the settlements in any form; *Haaretz*, ibid.

29 OJ C 375, 12.11.2015, at 4, available at eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015XC1112(01)&from=EN.

30 For analysis, see M. Hirsch, 'Rules of Origin as Foreign Policy Instruments?', (2003) 26 *Fordham International Law Journal* 572, at 578–9.

31 *Supra* note 22.

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national law norms developed by international institutions.[32] Such a choice and such an outcome would run counter to the ethos of the EU as a normative (international law-abiding) power and to the letter and spirit of the EU-Israel Association Agreement,[33] thereby prejudicing the EU's internal and external legitimacy. Such a choice and such an outcome would only reinforce the dissonance, analyzed by Tocci, between the EU's firm rhetoric towards Israel with respect to its policies in the Territories and its actual favourable trade and trade-related practices towards Israel.[34]

It is thus not surprising that the EU adopted, through the New Approach, the legal-sovereign approach and attempted to imbue it with concrete content. This choice is influenced by the EU's attempt to underpin its policies towards Israel on international law and in that manner to gain internal and external legitimacy which it needs in order to serve as an effective Normative Power in the Israeli-Palestinian conflict. Put differently, the New Approach is meant to assist the EU in reinforcing its identity, in facilitating its international normative assertiveness and in the changing of its policy from a declaratory policy into a transformative policy.

The EU's aspirations to serve as a Normative Power rest, partially, on external legitimacy, which may be achieved through respect for international law.[35] The EU's normative aspirations, which are heavily based on the ethos of international law, human rights, international institutions and multilateralism, are central to the European Union's internal and external *raison d'être*, as evident in the Lisbon Treaty (the Treaty).[36] Since the early 1990s, the EU has been striving to export its successful model of peace, democracy and democratization through trade to other parts of the world,[37] thereby extending its sphere of economic and normative influence[38] and increasing the geographical scope of its 'peace community'.[39] The EU has attempted in that manner to establish itself as a normative, civilian power, operating on the basis of a cohesive European identity.

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32 Ibid., at 461.

33 Ibid.

34 See Tocci, *supra* note 1. In Tocci's opinion, EU schemes such as the Research Framework and the EU-Israel Association Agreement have benefitted settlement activities. The EU's willingness to turn a blind eye to Israel's illegal practices, or rely on politically non-confrontational deals couched in technical terms, signals that EU law and EU rhetoric should not be taken too seriously. According to her analysis (ibid., at 388–95), in the service of other political goals and interests, the EU 'has been uncharacteristically compromising' in practice, granting Israel little incentive to modify its behaviour in line with European norms and with its declared commitment to a two-state solution and the respect for human rights and international law. Ibid., at 396: 'Under the EU's 5th and 6th Framework Programmes of research, several settlement companies benefited from EU funding .... Under the 7th Framework Programme, no legal measures were taken to ensure that this would not reoccur. Moreover, the [European Neighbourhood Policy], which is specifically tailored to border regions, does not include adequate safeguard mechanisms to ensure that funds will not be directed to support actors or actions that contravene international law.'

35 G. de Burca, 'The European Court of Justice and the international Legal Order after Kadi', (2009) 51 *Harv. Intl. L. J.* 1.

36 2007 Consolidated Version of the Treaty on the European Union, 2008/C 115/01 (2008), Arts. 3 and 21.

37 K. Nicolaïdis and R. Howse, '"This is my EUtopia ...": Narrative as Power', (2002) 40 *Journal of Common Market Studies* 767, at 768.

38 I. Manners, 'Normative Power Europe: A Contradiction in Terms?', (2002) 40 *Journal of Common Market Studies* 235; R. Whitman, *From Civilian Power to Superpower? The International Identity of the European Union* (1998).

39 L. Gardner-Feldman, 'Reconciliation and Legitimacy: Foreign Relations and Enlargement of the European Union', in T. Banchoff and M.P. Smith (eds.), *Legitimacy and the European Union: The Contested Polity* (1999), 77.

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However, measures that were once effectively used to attain such identity, such as the constitutional doctrines of supremacy and direct effect, as well as the internal market freedoms, are largely exhausted for such purposes, while the Euro, once perceived as a social-cementing instrument, presently engenders trenchant criticism and social discontent. In a similar vein, the enlargement policy suffers from 'enlargement fatigue', while the Common Foreign and Security Policy is still hindered, even after the adoption of the Treaty, by intergovernmental pressures. The economic and monetary crises, the refugee crisis and Brexit, all reinforce Euro-scepticism. These developments further distance European masses from Europe's economic, political and bureaucratic elite, rendering that search even more challenging. The EU's reliance on international law, including international human rights norms, in its external activities may prove to be useful in alleviating this state of affairs.[40] Respect for international law, the peaceful settlement of international disputes and protection of human rights are fine examples of EU values which serve identity-defining and constitutive roles. Such respect serves both as a founding value and a strategic objective of the EU's external relations, assisting it in developing, defending and promoting its values and contributing to the development of a more cohesive identity. Thus, the search for cohesive identity, common values and a normative, civilian force may be promoted by formulating advanced, common European human rights standards and by disseminating these standards to the rest of the world through respect for international law.[41]

Thus the EU is adamant in portraying its Middle East policies as consistent with international law, including the laws of belligerent occupation and international human rights laws. In the words of (former) EU High Representative Ashton: 'The region needs peace. Peace based on international law.'[42]

This framing of EU policies may be viewed in the wider context, namely the EU's commitment to addressing international conflicts through international institutions and multilateralism, and to advancing the resolution of such conflicts on the basis of international law. Such a commitment, which is part of the EU's *raison d'être* and contemporary persona, is reflected in the Treaty, according to which the EU is founded on respect for human rights.[43] The Treaty underscores that in its relations with the wider world, the EU undertakes to '... uphold and promote' these values:

> It shall contribute to peace, security ... and mutual respect among peoples ... the protection of human rights ... as well as to the *strict observance* and the development of international law, including respect for the principles of the United Nations Charter (emphasis added).[44]

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40 G. Harpaz, 'The Dispute over the Sovereignty of Jerusalem: EU Policies and the Search for Internal Legal Coherence and Consistency with International Law', (2012) 17(3) *European Foreign Affairs Review* 451, at 468–70.

41 Ibid.

42 Speech by Catherine Ashton, at the League of Arab States, 'A Commitment to Peace, the European Union and the Middle East', Cairo, 15 March 2010, European Union A36/10,available at www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/113352.pdf.

43 *Supra* note 36, Art. 2.

44 Ibid., Art. 3(2).

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The EU's actions in the international arena are guided, according to the Treaty, by these principles,[45] which are employed to develop its relations with countries and international organizations,[46] including, in particular, its neighbours,[47] allowing it to consolidate and support 'human rights and international law, preserve peace and prevent conflicts'.[48] Thus according to Bartels, the obligation to act consistently with international law applies to EU external policies, to the external aspects of the EU's internal policies, as well as to trade policies which may carry negative implications for individuals in non-EU countries.[49] Hence, the EU and its member states (when acting within the scope of EU law) are bound to refrain from any acts that adversely affect the human rights of persons in third countries and are also under an obligation to promote the protection of human rights.[50] Indeed, according to the European Court of Justice (ECJ):

> ... the European Union is to contribute to the strict observance and the development of international law. Consequently, when it adopts an act, it is bound to observe international law in its entirety, including customary international law, which is binding upon the institutions of the European Union.[51]

This EU ethos is also relevant to its external, commercial persona. Article 207(1) of the Treaty on the Functioning of the European Union attempts to consolidate that long-standing practice by stating that '[t]he Common Commercial Policy shall be conducted in the context of the principles and objectives of the Union's external action', which include, as stated above, the promotion of compliance with human rights. Indeed, in the last 20 years the EU concluded more than 120 trade agreements that included human rights clauses, requiring the parties to these agreements to respect human rights and democratic principles.[52] These commitments, which are enshrined in the Association Agreements with the State of Israel and with the Palestinian Liberation Organization,[53] govern the extraterritorial effects of the EU's international policies, including the Common Commercial Policy (the CCP).[54]

The New Approach and its reliance on the legal-sovereign alternative is also consistent in some respects with the spirit of the EU-Israel Agreement itself, which states that its purposes are not only trade-promotion but also political and legal objectives. The Agreement actually subordinates all trade aspects provided in it to

45 Ibid., Art. 21(1).
46 Ibid., Art. 21(1).
47 Ibid., Art. 8.
48 Ibid., Art. 21(2)–(3).
49 L. Bartels, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects', (2014) 25 *EJIL* 1071, at 1074, 1090.
50 L. Bartels, 'A Model Human Rights Clause for the EU's International Trade Agreements', Study, *German Institute for Human Rights*, February 2014, available at www.institut-fuer-menschenrechte.de/uploads/tx_commerce/Studie_A_Model_Human_Rights_Clause.pdf, analyzing Arts. 3(5) and 21(2)–(3) of the Treaty on European Union.
51 Case C-366/10, *Air Transport Association of America* [2011] ECR I-nyr (21 December 2011), paras. 101, 123.
52 *Supra* note 15, at 5.
53 Art. 2 of the two respective Association Agreements. For analysis, see Harpaz and Rubinson, *supra* note 22.
54 Bartels, *supra* note 49, at 10.

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an overriding commitment to human rights and democratic principles, which are defined as an 'essential element' of the Agreement.[55]

Thus, the New Approach's interpretation of trade and trade-related agreements as not applying to the Territories is consistent with the EU's declared commitment to abide by international law and with its attempt to rely on the CCP to advance the fulfillment of that commitment.

This interpretation is also consistent with the perception under international law of Israel's recognized borders. According to the EU, the New Approach may assist it in advancing its two-state solution, based on the almost universal consensus according to which Israel is an occupying power in the Territories and its borders should be delineated by the 1949 Armistice lines (the Green Line), subject to any adjustment that may be agreed upon by the relevant parties. In 2004 this approach was embraced by the International Court of Justice (ICJ) Advisory Opinion regarding the *Wall* (the *Wall* Opinion):

> The territories situated between the Green Line ... and the former eastern boundary of Palestine under the Mandate were occupied by Israel in 1967. Under customary international law, these were therefore occupied territories in which Israel had the status of occupying Power. Subsequent events in these territories ... have done nothing to alter this situation. All these territories ... remain occupied territories ...[56]

The ICJ also concluded that the Fourth Geneva Convention is applicable 'in the Palestinian territories which, before the conflict, lay to the east of the Green Line and which, during the conflict, were occupied by Israel'.[57] The *Wall* Opinion, which has been in line with the official EU position since the Venice Declaration and which was adopted by all EU member states, appears to validate the Green Line as the internationally recognized border between the two political entities. Hence the New Approach's insistence on conferring trade and trade-related benefits only upon those entities situated within the Green Line is moulded to match the almost universal consensus regarding Israel's borders under international law, reinforcing the legal and hence the normative position of the EU towards the Israeli-Palestinian conflict.

The New Approach can also be contextualized within the ever-growing importance ascribed by international law to human rights, in general, and to the collective right to self-determination, in particular.[58] The principle of self-determination, which acquired the status of *erga omnes*, and which may arguably be classified under international law as *jus cogens*,[59] requires states to pursue concrete action in order to advance its realization. This requirement appears in the 1966 International Covenant on Civil and Political Rights[60] and is enshrined in the 1970 General Assembly

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55 Ibid.

56 See *Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2014 [2014] ICJ Rep. 136, para.78. For analysis, see A. Gross, 'The Construction of a Wall between the Hague and Jerusalem: The Enforcement and Limits of Humanitarian Law and the Structure of Occupation', (2006) 26 *Leiden Journal of International Law* 393.

57 Ibid., para. 101.

58 Ibid., paras. 118–22.

59 For analysis see A. Cassese, *International Law* (2005), 65.

60 Article 1 of the Covenant.

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Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States.[61] The New Approach may thus be seen as fulfilling that principle.

The recent verdict of the ECJ in the *Front Polisario* proceedings (December 2016) is relevant to our discussion, arguably lending support to the New Approach. In this verdict, the ECJ, which relied heavily on the *Brita* verdict delivered in 2010 with respect to the West Bank and settlement products, drew on the principle of self-determination as interpretive means to support the conclusion that EU-Morocco trade agreements do not apply to West Sahara, as such application would not respect the right of self-determination of the Saharawi people.[62]

The growing importance attached to the right of self-determination may be understood in its wider context, namely the evolution of public international law from 'the law of nations', which is focused on the protection of sovereign states, especially the European former colonial powers, their rights and privileges, to 'the laws of humanity', a body of law more concerned with the protection of human beings and their individual and collective rights.[63]

Reverting to our context, it may be argued that the New Approach reflects the growing international recognition of the collective rights of the Palestinian people.[64] The EU's non-recognition of the territorial applicability of EU-Israel agreements to the Territories is intertwined with its 'unshakable commitment' to the 'individual and collective rights of the Palestinians'.[65] In fact the EU may justifiably be considered the Western entity that contributed most to the transformation of the concept of a two-state solution from heresy in Israel and the West (1970s) to the accepted goal of the international community by 2000.[66]

As can be learned from the *Wall* Opinion, the erection of the wall in the Territories adversely affects the ability of the Palestinian people to exercise its right of self-determination throughout the Territories.[67] The EU's insistence that its agreements with Israel will not apply extra-territorially is designed to prevent, or at least to avoid supporting the same consequences, namely conduct by Israel that would prejudice the ability of the Palestinians to exercise their right of self-determination. As such, it is in line with the customary, *erga omnes* principle of self-determination. Such

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61 Resolution adopted by the General Assembly 2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UN Doc. A/RES/25/2625 (1970). The Declaration requires that when peoples are faced with actions denying their right to self-determination, they are entitled 'to seek and to receive support in accordance with the purposes and principles of the Charter', while every state 'has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter'.

62 Case C-104/16 P *Council of the European Union v. Front Polisario* (21 December 2016), available at curia.europa.eu/juris/document/document.jsf?text=&docid=186489&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=397652, particularly para. 92.

63 R.G. Teitel, *Humanity's Law* (2011).

64 See, for example, the Venice Declaration, *supra* note 16.

65 N. Tocci, 'The EU as a Global Conflict Manager', in S. Wolff and C. Yakinthou (eds.), *Conflict Management in Divided Societies: Theories and Practice* (2011), 135.

66 See Aoun, *supra* note 1, at 293; Tocci, *supra* note 1, at 395.

67 *Supra* note 56, para. 122.

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consistence may, from an EU perspective, reinforce, once again, the EU's policies, granting them an aura of internal and external legitimacy.

It is also argued that the New Approach can be considered as an implementation of the international law principle under which treaty obligations must be performed in good faith. The findings of the ECJ in the abovementioned verdict in *Front Polisario*, according to which the application of the EU-Morocco trade agreements to West Sahara would manifest the EU's intention to act contrary to the right of self-determination and to the principle of relative effect of treaties, and hence it would amount a violation of the principle that Treaty obligations must be performed in good faith, is applicable, *mutatis mutandis*, to our case study.[68]

It is further argued that the adoption of the New Approach is also motivated by the intention of the EU to rely on the combined effect of enhanced legitimacy and concrete trade 'sticks' in order to reinforce the effectiveness of its two-state policy. As early as 1982, the UN General Assembly called upon states to implement economic sanctions against Israel for its unlawful settlement policy.[69] Yet, for reasons that go beyond the ambit of this article, for many years the international community, particularly the EU, contented itself with condemnations when dealing with the State of Israel.

In order to contribute to the Middle East, the EU must pursue decisive, effective and coherent policies. Yet, the Common Foreign and Security Policy in general, and the policies of the EU towards the Middle East in particular, are far from matching this description, leading many Israelis to dismiss them as merely declaratory. The EU's reliance on declarations and its incapacity to form a coherent policy towards the Middle East contribute to the widespread Israeli perception that the EU's policies reflect the lowest common denominator and that the EU itself excels in words and preaching and not in deeds.

In the last decade, an attempt has been made by the international community to ameliorate this state of affairs by supporting condemnations directed at Israel with concrete actions. Thus, for example, the *Wall* Opinion, adopted by the vast majority of the members of the General Assembly, concluded that:

> … the parties to the Fourth Geneva Convention … have … the obligation … to ensure compliance by Israel with international humanitarian law … The United Nations … should consider *what further action* is required to bring to an end the illegal situation resulting from the construction of the Wall and the associated regime (emphasis added).[70]

Other examples of attempts to concretize the principled approach include the 2012 recognition by the General Assembly of Palestine as a (non-member) observer state and the two most recent reports of the UN Human Rights Council on Israel's conduct in the Territories (2013).[71] More recently in December 2016, the UN Security Council

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68 *Polisario*, *supra* note 62, paras. 123–4.

69 UN Doc. A/RES/ES-9/1 (1982). See also UN Doc. A/RES/38/180A(1983).

70 *Supra* note 56, para. 163(d) and (e).

71 Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Richard Falk, UN Doc. A/HRC/23/21 (2013); Report of the independent international fact-finding

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adopted Resolution 2334 which stipulates that Israel's settlement activity constitutes a 'flagrant violation' of international law and has 'no legal validity', and which demands that Israel stop such activity and fulfill its obligations as an occupying power under the Fourth Geneva Convention. In Resolution 2334 the UN Security Council also: 'Reaffirms its determination to examine practical ways and means to secure the full implementation of its relevant resolutions.'[72] In its attempt to imbue the EU overall policy with concrete content, the New Approach fits neatly with this international trend.

Yet the remainder of the article develops the argument that the attempt on the part of the EU to advance a more legitimate and effective policy towards the conflict should not blur the fact that the New Approach's (almost) exclusive focus on non-governmental entities is misplaced in terms of public international law and morality and effectiveness.

## 4. A CRITIQUE

### 4.1. Legal and normative critique

The relationship between the State of Israel and the settlement movements or settlers, which is long-standing and multi-faceted, is beyond the scope of this article.[73] Suffice to note that the State of Israel can be considered as the principal facilitator, if not the principal promoter, of the settlement policies in the Territories. Admittedly, over the course of the years, and with the settlers' enhanced political representation and prominence, they have often appeared to be the tail that wags the dog. But for the purposes of international law, the EU may and should legitimately regard the Israeli governments, which have facilitated and underwritten the settlement movement and pulled the financial strings, as the principal promoters of settlement in the Territories. The settlers and corporations that are involved in settlement activities provide 'the boots on the ground', thereby serving as secondary, albeit important actors.

Thus it is the State of Israel which bears international responsibility for the settlement policies and their execution, as well as for the settlers' settlement activities,[74] certainly when such activities are supported by it. As acknowledged by both the ICJ and the Israeli Supreme Court,[75] in the vast majority of cases, the settlers settled in the Territories with the active support, encouragement and facilitation of the Israeli political establishment and the security forces. As the Special Rapporteur of the Human Rights Council established: Israel pursues '[C]onsistent and

mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem, A/HRC/22/63 (2013).

72 UN Doc. S/RES/2334 (2016), para. 11.

73 For analysis, see G. Gorenberg, *The Accidental Empire: Israel and the Birth of the Settlements, 1967-1977* (2007); I. Zertal and A. Eldar, *Lords of the Land: The Settlers and the State of Israel, 1967–2004* (2004) (in Hebrew).

74 ILC Articles on Responsibility of States for Internationally Wrongful Acts, 2001 YILC, Vol. II (Part Two), Art. 8: 'The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of that State in carrying out the conduct.'

75 *Supra* note 56, para.120; HCJ 2056/04 *Beit Sourik Village Council v. The Government of Israel* 2004 PD 58(5) 807, para. 21.

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systematic expansion of settlements through subsidies, expropriations, house demolitions and granting permits for homes in settlements and intensifying the exploitation of Palestinian natural resources.'[76] As Yehouda Shenhav underscores in his book devoted to the Green Line:

> Who supplies the settlers the economic and physical infrastructure? Who supplies them with the infrastructure for telephone lines, plumbing, electricity and water? Who supplies them with health and education services? What about the role of organisations like the *Histradrut* [Labour Union], the Jewish National Fund, the Jewish Agency and the United Jewish Appeal as sub-contractors for the administration of the Occupation? How do we have an independent Council for Higher Education for institutions of higher education in the Territories? Who supplies the legal infrastructure for the expropriation of land? Who supplies the engineering and paving works for the roads that cross the West Bank? … The settlements are not a spontaneous and casual project of eccentric people, but a national project conducted by the State.[77]

It is submitted that the New Approach fails to recognize that (i) Israel is the principal facilitator/promoter of settlements, and that (ii) Israel bears prime international responsibility for the settlement policies and the settlers' settlement activities. Instead, it advances an oversimplified story in which the Green Line delineates the boundary between morality and immorality, between legality and illegality. All those East of it are to be treated as baddies, immoral and illegal and hence not entitled to preferential treatment. As the EU itself states, the purpose of the Guidelines 'is to make a distinction between the State of Israel and the occupied territories when it comes to EU support'.[78] Yet such distinction fails to reflect the fact that activities in the Territories are sponsored and at times executed by the state.

The article does not argue that the settlers bear no moral responsibility for the socio-political condition of the Palestinians. All that it does is to advance the argument that this oversimplified, dichotomous European narrative fails to take cognizance of the simple and known fact: it is the Israeli legislator, executive and judiciary (all situated west of the Green Line) which have purposefully, systematically and successfully acted to blur the Green Line and that, as the ICJ acknowledged in its *Wall* Opinion, such action has been pursued for decades.

Yet under the aegis of the New Approach, the EU confers upon the State of Israel significant trade and trade-related benefits. This conferral may be perceived as treating Israel as an innocent bystander in the situation that it has brought about.[79]

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[76] See Falk Report, *supra* note 71, para. 37. See also the Report of the fact-finding mission, *supra* note 71, which established that the State of Israel has had 'full control of the settlements in the Occupied Palestinian Territory since 1967 and continues to promote and sustain them through infrastructure and security measures'.

[77] Y. Shenhav, *The Time of the Green Line: A Jewish Political Essay* (2010), at 44–5 (own translation from Hebrew).

[78] See the Statement by the Delegation of the European Union to the State of Israel on the European Commission Notice, 16 July 2013: 'These guidelines were prepared as a follow up to the political decision taken by the foreign ministers of the EU Member States at the EU Foreign Affairs Council of 10 December 2012', available at eeas.europa.eu/delegations/israel/press_corner/all_news/news/2013/20131607_02_en.htm.

[79] See the statement of the former President of the European Parliament Martin Schulz, in his address delivered on 12 February 2014 to the Israeli Parliament: 'Let me seize this opportunity and make a clarification: the EU has no intention to boycott Israel. I am of the conviction that what we need is more cooperation, not division', available at www.europarl.europa.eu/the-president/en/press/press_release_speeches/speeches/sp-2014/sp-2014-february/html/speech-to-the-knesset-12-february-2014-by-martin-schulz-president-of-the-european-parliament.

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Thus if the New Approach is designed to exert normative-moral pressures on Israel, then it might produce the opposite results. After all, a policy that withholds trade and trade-related benefits from the secondary entity while, as outlined below, rewarding Israel, the principal promoter or at least facilitator of these policies, with the same benefits, isolates and decontextualizes the settlers and corporations that assist the implementation of the settlement policies. This conveys the message that it is they who are morally at fault, while the state itself acts legitimately.

Moreover, the New Approach is not consistent with this focus by international law on the responsible state and on those operating on its behalf. From a legal perspective, the employment of trade and trade-related instruments that focus on the secondary entities of the Territories' policies rather than on their principal promoter, the state, does not fit with the letter and spirit of public international law, including, in particular, the laws of belligerent occupation. There is a lively academic debate regarding the illegality under public international law (including international criminal law) of the settlers' settlement activities in occupied territories and of corporations assisting or implementing settlement policy.[80] This is also true with respect to civil responsibility for breaches of international law: The US recognizes the existence of civil, tortious responsibility of corporations for serious breaches of international law, and such responsibility may in fact lead to the imposition of civil liability on corporations that assist the establishment of settlements in the Territories.[81] Yet the fact remains that public international law, including the laws of belligerent occupation, is focused, first and foremost, on public authorities (in this case on the occupying power itself), whereas its willingness and ability to impose its norms on corporations and individuals, is still undeveloped.[82]

This verity is particularly applicable to the laws of belligerent occupation. Thus, Article 49 of the Fourth Geneva Convention lays down that: '*The Occupying Power* shall not deport or transfer parts of its own civilian population into the territory it occupies' (emphasis added).[83] The conventional interpretation of this provision is that it is the state which is responsible, under the laws of belligerent occupation, for the establishment of settlements in occupied territories, not the settlers or corporations that operate in the Territories.[84] Thus it is the State of Israel which is the entity primarily responsible under public international law for any of Israel's illegal activ-

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80 See, for example, A. Zemach, 'Fairness and Moral Judgments in International Criminal Law: The Settlement Provision in the Rome Statute', (2003) 41 *Columbia Journal of Transnational Law* 123.

81 Crawford, *supra* note 12, para. 106: 'a US court could conceivably find that a corporation operating in the West Bank from the jurisdiction of a third State was aiding and abetting Israel in its ongoing denial of the Palestinian people's right to self-determination; and that such a right constitutes a "specific, universal, and obligatory" norm of international law, actionable under the Alien Tort Statute'.

82 See, for example, C.M. Vazquez, 'Direct vs. Indirect Obligations of Corporations under International Law', (2005) 43(3) *Columbia Journal of Transnaional Law* 927; D. Kinley and J. Tadaki, 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law', (2004) 44(4) *Virginia Journal of International Law* 931. See also D. Augenstein and D. Kinley, 'When Human Rights "Responsibilities" become "Duties": The Extra-Territorial Obligations of States that Bind Corporations', in S. Deva and D. Bilchitz (eds.), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (2014).

83 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 75 UNTS 287.

84 For analysis see D. Kretzmer, 'The Laws of Belligerent Occupation in the Supreme Court of Israel', (2012) 94 *International Review of the Red Cross* 207.

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ities in the Territories. This proposition underlines the entire *Wall* Opinion, where the ICJ placed emphasis on Israeli practices that 'organize or encourage' settlement activities,[85] and focused exclusively on the activities of the state, not on those of the settlers.

Similarly, it is the official Israeli settlement policy that has been traditionally treated by the UN, the US and the EU as a serious obstacle to the ability of the Palestinians to exercise their right of self-determination and the ability of both parties to resolve the conflict. Thus, in the above-mentioned Security Council Resolution of December, 2016, the Council reaffirmed that:

> … the establishment *by Israel* of settlements in the Palestinian territory occupied since 1967, including East Jerusalem, has no legal validity and constitutes a flagrant violation under international law and a major obstacle to the achievement of the two-State solution and a just, lasting and comprehensive peace (emphasis added).[86]

This approach under public international law, which places the primary responsibility for breaches of the laws of belligerent occupation on the occupying power, which is assumed to be a state, may find support in the Rome Statute of the International Criminal Court (ICC). Large-scale settlements may amount to a war crime under the Rome Statute, which criminalizes the following activity:

> The transfer, directly or indirectly, *by the Occupying Power* of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory (emphasis added).[87]

Thus even a treaty that focuses on individual responsibility appears to underscore that it is the individuals working on behalf of the occupying power who are to be subject to ICC jurisdiction. Again, a conventional interpretation of the Rome Statute will bring us to the conclusion that it governs, in this particular context, first and foremost, individuals working on behalf of the state and not independent of it, even if non-official individuals may bear secondary responsibility under the Rome Statute (as well as under certain national legislations)[88] due to their aiding and abetting the illegal actions. The jurisdiction of the Court will not apply in any event to corporations.[89]

Moreover, in its sweeping coverage of entities situated in the Territories or operating therein, the New Approach is not in line with the spirit of Canadian and American verdicts that established that not every corporate presence in an unlawful regime or any commercial activity that engages with such a regime amounts to an infringement of international law.[90]

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85 *Supra* note 56, para. 120.
86 *Supra* note 72, para. 1.
87 1998 Rome Statute of the International Criminal Court 2187 UNTS 3.
88 Under Section 52 of the UK International Criminal Court Act 2001, it is an offence for a person to engage in conduct ancillary to a war crime, even where that ancillary act is committed outside the United Kingdom. See Crawford, *supra* note 12, para. 68; *Richardson* case, *supra* note 14.
89 According to Art. 25 of the Rome Statute, *supra* note 87, non-governmental individuals may also be responsible.
90 See, for example, *re South African Apartheid Litigation*, 346 F. Supp. 2d 538 (S.D.N.Y. 2004); In *Sosa v. Alvarez-Machain*, 542 U.S. at 728, 124 S. Ct. at 2764 (2004), the US Supreme Court directed federal courts to exercise

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Even the two recent reports of the UN Human Rights Council, which referred critically to the assistance granted by corporations to settlement activities,[91] focused on Israel's responsibility and on the need to address Israel, referring to these corporations only collaterally.[92] The Human Rights Council Fact-Finding Mission with respect to the settlements placed emphasis on the fact that 'Israel is committing serious breaches' of international law, that it should 'in compliance with Article 49 of the Fourth Geneva Convention, cease all settlement activities without preconditions' and hence it called upon 'the government of Israel to ensure full accountability for all violations' and upon all 'Member States to comply with their obligations under international law and to assume their responsibilities in their relationship to a *State* breaching peremptory norms of international law' (emphasis added).[93]

*Per contra*, the New Approach focuses almost exclusively on corporations and institutions situated in the Territories or operating therein and on the settlers who belong to them. When, for example, Ahava, an Israeli cosmetic company, decided to establish its factory in the Territories and to extract minerals from the Territories, its decision was supported and facilitated by the state. Any decision, for example withholding from Ahava, a beneficiary of EU research grants, the possibility of enjoying research grants under Horizon 2020, is tantamount to penalizing the secondary entities of the settlement policies, in other words, to addressing the symptoms of the Israeli settlement policy rather than its roots. The verdict of the Supreme Court in London regarding protesters who trespassed a retail shop in London that sold Ahava products adds force to the proposition that it is doubtful whether corporations operating in the Territories may be considered, *in concreto*, to be aiding and abetting any illegal settlement activities by the responsible state.[94]

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'great caution' in adapting the law of nations to private rights. See also *Cynthia Corrie and Craig Corrie, et al. v. Caterpillar, Inc.*, Case No. CV-05192-FDB and paragraph 317 of 500-17-044030-081 *Bil'in et al. v. Green Park international Inc. et al.* 2009 QCCS 4151 (Justice Louis-Paul Cullen).

91 See Falk Report, *supra* note 71, para. 54: 'The case for action against businesses profiting from the Israeli occupation has been strengthened'; para. 55(h): 'The international community should investigate the activities of businesses that profit from Israel's settlements, and take appropriate action to end any activities in occupied Palestine and ensure appropriate reparation for affected Palestinians.' See also the Report of the fact-finding mission, *supra* note 71, paras. 96–7: 'Information gathered by the Mission shows that business enterprises have enabled, facilitated and profited, directly and indirectly, from the construction and growth of the settlements … [thereby] contributing to their maintenance, development and consolidation.'

92 See Report of the fact-finding mission, *supra* note 71, para. 117: 'Private companies must assess the human rights impact of their activities and take all necessary steps – including by terminating their business interests in the settlements – to ensure they are not have an adverse impact on the human rights of the Palestinian People, in conformity with international law as well as the Guiding Principles on Business and Human Rights. The Mission calls upon all Member States to take appropriate measures to ensure that business enterprises domiciled in their territory and/or under their jurisdiction, including those owned or controlled by them, that conduct activities in or related to the settlements respect human rights throughout their operations. The Mission recommends that the [Human Rights Council] Working Group on Business and Human Rights be seized of this matter.'

93 Ibid., paras. 104, 112, 114, 116.

94 *Richardson* case, *supra* note 14: In that case the Defendants trespassed in a shop and immobilized themselves in it. The shop, situated in Covent Garden, London, sold beauty products extracted from Dead Sea mineral material by the Israeli corporation *Ahava*. They were convicted of the offence of aggravated trespass contrary to Section 68 of the *Criminal Justice and Public Order Act 1994*. The offence refers to a situation in which a person trespasses on land and, in relation to any lawful activity which persons are engaging in or are about to engage in on that land, does anything on it which is intended to have the effect of intimidating, obstructing or disrupting the said activity. In an appeal to the Supreme Court the Defendants argued that the shop and

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Another example is that of Israeli companies that excavate minerals in quarries in the Territories, under a concession granted to them by the Israeli Civil Administration in the Territories in consideration for leasing fees and royalties. The state has allowed the exploitation of exhaustible natural resources in the Territories not withstanding that (i) the mining is conducted for the corporation's profits, and despite (ii) the fact that the mining gradually exhausts the capital of resources, (iii) causing irreversible environmental damage to the occupied territory, while (iv) the vast majority of mining products are transferred to the Israeli territory, in circumstances in which (v) the remaining mining materials are marketed within the occupied territory to the occupying army and the Israeli settlers living in the occupied territory – for the purpose of expanding the settlements despite the harm caused to the interests of the local population. The granting by the state of licenses to these corporations under these circumstances amounts to a breach of the laws of belligerent occupation, yet that decision was taken by the competent Israeli authorities and its legality was unanimously confirmed by the Israeli Supreme Court.[95] Any legal mechanism that would withhold from these corporations benefits relating to their activities in the Territories, as the Guidelines purport to do, would amount to targeting the secondary entities rather than the principal entity of such illegality. The penalization of these corporations under the New Approach does not match the focus of the laws of belligerent occupation on the occupying power itself.

Similar arguments can be made with respect to Israeli research entities situated in the Territories. When, for example, the state decided to establish an Israeli university (Ariel) in the Territories, aimed at teaching Israeli citizens courses in Hebrew, this decision amounted, in our opinion, to a breach of the laws of belligerent occupation.[96] Yet the Israeli government justified that decision as being in pursuance of Israel's

its sellers were engaged in criminal activity and hence they themselves should not bear legal responsibility for the obstruction of that activity. First, they alleged that the labelling of the products as 'Made by Dead Sea Laboratories Ltd, Dead Sea, Israel' was false or misleading and hence a criminal offence under UK consumer laws. Second, the products sold were produced by an Israeli corporation situated in an Israeli settlement in the Territories and staffed by Israelis who had been encouraged by the Government of Israel to settle there. Thus, the corporation running the shop was guilty of aiding and abetting the transfer by the Israeli authorities of Israeli citizens to the Territories, contrary to Art. 49 of the Fourth Geneva Convention. Such aiding and abetting constitutes an act ancillary to a war crime, criminal offence in England and Wales under Sections 51–2 of the International Criminal Court Act 2001. The Supreme Court dismissed the appeal on the following grounds: For an act of the occupant of the premises to be considered unlawful for the purpose of exemption from criminal responsibility, the offence must be integral to the core activity carried on by the occupant and not collateral to or remote from it. As to the first contention, the alleged misleading acts were antecedent to, and remote from, the retail selling. As to the second, the Court underscored that it is doubtful whether the employment of Israelis by the corporation 'could amount to counselling or procuring or aiding or abetting the Government of Israel in any unlawful transfer of population' (Section 17). The corporation might be blamed for 'taking advantage of such a transfer, but that is not the same as encouraging or assisting it' (Section 17). The Court further found that even if that corporation could have been aiding and abetting such transfer, 'that cannot amount to an offence by the separate retailing company, whatever the corporate links between the two companies' (Section 17). Consequently, the offences postulated 'were either not demonstrated to have been committed by the occupants of the shop at the time of the defendants' trespass or were at most collateral to the core activity of selling rather than integral to that activity. The occupants of the shop were, accordingly, engaged in the lawful activity of retail selling at the time and Section 68(2) provided 'no defence to the defendants' (Section 24).

95 See www.btselem.org/settlements/20120116_hcj_ruling_on_quarries_in_wb.

96 The occupying power uses the occupied resources in order to advance its own national strategic interests. For analysis of Israel's record under the laws of belligerent occupation see G. Harpaz and Y. Shany, 'The Israel

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strategic national interests, it was implemented by the Military Commander in the Territories, and its legality was unanimously confirmed in December 2013 by the Israeli Supreme Court.[97] Thus a researcher who decides to work at that university with the blessing of the state, the Israeli Military Commander and the Supreme Court might see himself as a law-abiding, loyal citizen, serving Israel's national interests. The New Approach attempts to exact from his institution and its researchers the price of the illegal decisions and actions of their state.

The argument advanced in this sub-section is supported by the EU's own consistent practice. If the correct focus of the New Approach had been in place, then one could have expected the EU to employ similar Guidelines and apply them to comparable economic activities in occupied territories. Yet this is not the case. There is no additional documented case of occupation in which the EU attempted to apply a systematic approach akin to the New Approach. In fact, and as demonstrated by Kontorovich, the EU's practice in comparable cases of occupation is in conflict with the New Approach.[98]

### 4.2. Policy critique

The legally/morality-based critique advanced in the previous sub-section is intertwined with an effectiveness-based critique, advanced in this sub-section. We refer in this context to the concept of external effectiveness (denoting the degree of influence of the EU's measures on Israel's policies) and not to internal effectiveness (*viz.* the success of the measures in appeasing European public opinion, or the demands of EU's institutions or certain member states).

The EU's traditional policy instruments towards Israel in the context of the Territories (diplomacy, persuasion, declarations and the conclusion of trade agreements) have not proven to be effective in terms of implementing the two-state solution. The New Approach is meant to ameliorate this state of affairs. It is postulated, however, that its failure to address the roots of the settlement policy problem and instead to exact from the settlers and from corporations acting in the Territories the price of such settlement policies might prove to be a symbolic act, largely devoid of any transformative impact. This argument finds strong support in qualitative and quantitative research.

This predicted lack of effectiveness is to be attributed to the political strength and determination of the settlement movement and the entrenched, vested economic interests of corporations operating in the Territories. Drawing on the work of Lavenex and Schimmelfennig in the realm of (accession) Europeanization, one may assume that the effectiveness of EU external governance may be prejudiced when that governance is faced with a large number of cohesive and effective domestic veto

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Supreme Court and the Incremental Expansion of the Scope of Discretion under Belligerent Occupation Law', (2010) 43(3) *Israel Law Review* 514.

97 HCJ 6168/12 *The Hebrew University of Jerusalem and others v. The Higher Education Council for Judea and Samaria and others* (24 December 2013), for the Hebrew Text see elyon1.court.gov.il/files/12/680/061/s20/12061680.s20.htm.

98 E. Kontorovich, 'State Practice on Economic Dealings with Occupied Territories', a Paper delivered at the meeting of the International Law Forum, Law Faculty, Hebrew University of Jerusalem, 13 May 2014.

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players,[99] particularly when such players perceive the EU's agenda to be encroaching upon their particular socio-political interests. Domestic veto players who benefit from the *status quo* and who perceive proposed EU reforms as illegitimate and contrary to their entrenched belief, or economically prejudicial to their vested interests, may use their internal political force to prevent the adoption and implementation of such reforms. The settlers may be considered as such veto players in the context of the EU's attempts to promote socio-political reforms in Israel. They form a cohesive, well-organized and highly influential group. The hard core of the settlement movement is highly ideological and committed, willing to pay a heavy price for the realization of their religious-nationalistic beliefs. In this context, the price that the EU attempts to exact from them in the form of withdrawal of preferential trade and trade-related benefits amounts in their eyes to a *de minimis* price, one worth paying, especially when the settlers are justifiably confident that the state will indemnify them for such a price.[100]

That financial price is also on a *de minimis* scale from a national perspective, amounting, in the words of Pardo and Touval to 'economic irrelevance'.[101] This is so because the exportable economic activities in the Territories, in industry, agriculture and research, are small.

Indeed, a research produced by the Research and Information Centre of the Israeli Parliament (the Knesset) established that the EU's withdrawal of trade privileges from Territories' products is of a '*de minimis*' importance: Territories' products represent only 0.5 per cent of Israel's industrial export to the EU and merely 2.5 per cent of Israeli agriculture exports to the EU.[102] This empirical economic analysis concludes that the EU's withdrawal of trade privileges from the Territories' products (coupled with the private-led BDS European campaign), did not harm Israel's macro-economic performance in any significant manner, when one examines Israel's exports to the EU or the scale of FDI in Israel.[103]

Thus even those members of the Israeli government who take cognizance of the potentially prejudicial impact of EU sanctions, focus not on sanctions that are directed at commercial activities in the Territories, but on the risk of the imposition by the EU of sanctions on the state itself. For example, former Finance Minister Yair

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99 F. Schimmelfennig and U. Sedelmeier, 'Governance by Conditionality: EU Rule Transfer to the Candidate Countries of Central and Eastern Europe', (2004) 11(4) *Journal of European Public Policy* 661, at 664–5. For further analysis of the concept, see P. Hille and C. Knil, '"It's the Bureaucracy, Stupid" The Implementation of the *Acquis Communautaire* in EU Candidate Countries, 1999–2003', (2006) 7(4) *European Union Politics* 531, at 536–7, who rely on the seminal work of G. Tsebelis, *Veto Players: How Political Institutions Work* (2002).

100 Indeed it was reported that when the EU applied its policy of non-recognition of settlement products as Israeli products, the state actually devised a scheme of indemnification. Similarly, when the EU insisted that Horizon 2020 would not benefit researchers in the Territories, the former Minister of Economy, responsible for trade and industry, N. Bennett, was quoted as reassuring them that they would be indemnified; see Y. Verter, 'Horizon 2020 // Israel-EU Settlement Compromise: When Funding at Stake, Heaven and Earth Can Be Moved', *Haaretz*, 29 November 2013, available at www.haaretz.com/weekend/week-s-end/.premium-1.560881. The settlers, of course, will be compensated by the state.

101 S. Pardo and Y. Touval, 'The EU and Israel: Much Ado About Love', *The Jerusalem Post*, 19 December 2013, available at www.jpost.com/Opinion/Op-Ed-Contributors/The-EU-and-Israel-Much-ado-about-love-335610.

102 E. Kupman, The Research and Information Centre, the Knesset, *Analysis of the Potential Implications of an Economic Embargo against Israel*, 31 December 2014, at 12, available at www.knesset.gov.il/mmm/data/pdf/m03501.pdf (in Hebrew).

103 Ibid.

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Lapid warned that, should the peace negotiations that were taking place at that time fail and should that failure be blamed on Israel, the EU might terminate its Association Agreement with the State of Israel.[104]

Our tentative conclusion is that the New Approach's focus on the settlers is misplaced in terms of legality and that directing negative conditionality instruments almost exclusively towards private entities would not enable the EU to serve as a game-changer or as a transformative entity.

Our conclusion regarding the inability of the New Approach to cause a transformative impact is supported by the analysis of Oded Eran, former Israeli Ambassador to Brussels and Lauren Klein who establish that sanctions that were applied against Israel since its creation have only proven to be effective when they addressed a certain state of affairs or a particular problem, but sanctions that were meant to address Israel's policies in the Territories have so far failed to produce a long-term and systematic policy change.[105] According to their analysis, the application by the EU of customs duties on Territories' products is of a *de minimis* economic nature, the EU's policies amount to no more than a 'nuisance' and hence it is doubtful whether they can change Israel's policies towards the Territories.[106]

Our conclusion of the likely ineffectiveness of the New Approach is also supported by Israel's practice since its adoption: High-ranking members of the Israeli government have reacted vocally against the New Approach, reiterating that it would not change Israel's perceptions or policies.[107] Indeed, such statements were supported by concrete policies, when Israel refused to adopt, during the last round negotiations with the Palestinians, a decision to freeze settlement activities. Subsequently, when the Israeli-Palestinian peace negotiations failed, Prime Minister Netanyahu declared his intention to abandon, for the time being, his commitment to the two-state solution and this declaration did not prevent his re-election (some would argue that it actually assisted in his recent electorate triumph). In fact, in the aftermath of the change of leadership in the US (January, 2017), the State of Israel announced its intention to pursue large-scale construction of settlement houses in the Territories.[108]

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[104] N. Elis and T. Lazaroff, 'Lapid: EU Considering Striking Central Treaty with Israel if Peace Talks Fail', *The Jerusalem Post*, 29 January 2014, available at www.jpost.com/Diplomacy-and-Politics/WATCH-LIVE-Lapid-addresses-the-INSS-conference-339760: 'Just canceling the Association Agreement with the EU, which we know is already on the table now as far as they're concerned, would reduce exports by NIS 3.5 billion, harming the GDP by NIS 1.5billion and causing 1,400 layoffs.'

[105] O. Eran and L. Klein, 'The Effectiveness of Sanctions against Israel: Past, Present and Future', (2014) 16(4) *Strategic Newsletter*, 57, at 57–67 (in Hebrew).

[106] Ibid., at 67.

[107] Thus, for example, the former Minister of Economy reacted to the Guidelines by treating them as nothing less than 'economic terrorism', see E. Benari, 'Bennett: EU Boycott is "Economic Terrorism"', *Arutz Sheva*, 17 July 2013, available at www.israelnationalnews.com/News/News.aspx/169988#.UsPNGptDGM8. The former Minister of Defence Moshe Ya'alon asserted that EU boycott is preferable to rockets on Ben-Gurion Airport (Israel's main international airport situated near the Territories), concluding 'that we have to explain to Europe why they are wrong', Y.J. Bob, 'Ya'alon: EU Boycott Preferable to Rockets on Ben-Gurion Airport', *The Jerusalem Post*, 30 December 2013, available at www.jpost.com/Defense/Yaalon-EU-boycott-preferable-over-rockets-on-Ben-Gurion-Airport-336553.

[108] R. Sanchez, 'Israel approves 2,500 West Bank settler homes in post-Trump building surge', *The Telegraph*, 24 January 2017, available at www.telegraph.co.uk/news/2017/01/24/israel-approves-2500-west-bank-settler-homes-post-trump-building/.

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Our conclusion regarding the ineffectiveness of the New Approach is furthermore supported by the lack of its spillovers. Persson rightly argued that the effectiveness of the New Approach will be manifested by its ability to serve as an example 'that others will follow'.[109] Yet no other Israeli trading partners have adopted a position similar to that of the New Approach. They all refrain from interpreting their trade and trade-related agreements with Israel as not applying to the Territories and none of them insist on the inclusion of a clause that would prevent extra-territorial applicability of these agreements.[110] It will thus be difficult to argue that the New Approach manifests the EU's ever-growing normative power and ever-growing concrete effectiveness, when no other state follows suit. Exercising power over opinion is a manifestation of robust soft power and when no other entity follows the path of the New Approach, it will be difficult to maintain that the EU possesses such a power and such effectiveness in our context.

A *caveat* is, however, in order. The above-mentioned Security Council Resolution 2334 of December 2016 adopts the same ethos of the New Approach (without explicitly mentioning the EU), namely calling for the distinction between the State of Israel and the Territories: 'Calls upon all States ... to distinguish, in their relevant dealings, between the territory of the State of Israel and the territories occupied since 1967'.[111] In that respect, and contrary to the conclusions of this article, the New Approach did permeate an important resolution of the UN Security Council, which was adopted with the support of fourteen Members of the Security Council (with only the US abstaining).

The conclusion regarding the ineffectiveness of the New Approach raises, in turn, the question as to why the EU does not employ trade-related instruments of negative conditionality towards the State of Israel itself. The article does not argue that such a course of action would necessarily render the EU's two-state policy effective. It only argues that without pursuing such a course of action the EU's policy is most likely to remain ineffective.

Indeed, the corporations and research institutions situated in the Territories are small in numbers. Similarly, the settlers form a small minority in Israel. They are nevertheless politically powerful, able to mobilize their political force, and assisted by a grass-root, passive-permissive consensus. The majority of Israelis may not necessarily support the settlement movement and might be willing to support a territorial withdrawal that would entail dismantling some of the settlements. But such a position is not translated into widespread political pressures or activity. Most ordinary Israelis who live west of the Green Line do not visit the West Bank and have no commercial or other ties with it. The establishment of the wall allows them to continue to live a peaceful, relatively secure, prosperous, Western-style life, not having to face the same hardship faced by the Palestinians, nor having to directly pay the economic price of the settlement policies, or even to be cognizant

[109] Persson, *supra* note 3.

[110] See, for example, the recent Israel-Colombia Free Trade Agreement that is applicable to Israel's 'territory' without excluding the Territories, available at http://economy.gov.il/English/InternationalAffairs/ForeignTradeAdministration/TradePolicyAgreements/BilateralAgreements/Pages/Colombia.aspx

[111] *Supra* note 72, Art. 5.

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of it. This state of affairs renders most of them relatively indifferent towards such pro-settlement policies and such indifference allows the settlers and their political supporters to dominate the political sphere. Redirecting the EU focus from the (politically-entrenched) settlers to the State of Israel would exact an economic price from these ordinary Israelis and from most of Israeli corporations that do not operate in the Territories. That price might cause them to replace to a certain extent their passive stance with a more critical, active political stance, which could exert, in turn, pressure on the Israeli government to adopt more compromising policies.

The wide-scale, long-standing practice of establishing settlements has been supported, in varying degrees, by all Israeli governments since 1967. It is the EU position that 'ending the conflict was a European interest'[112] and that the settlements constitute a serious obstacle to the resolution of the conflict. Similarly, according to the EU, the realization of Palestinians' right of self-determination is a strategic EU interest and the settlement policies prejudice that interest. As former High Representative Ashton postulates: 'The position of the EU is very clear: settlements are illegal under international law, constitute an obstacle to peace and threaten to make a two-State solution impossible.'[113] Thus, from an EU perspective, Israel knowingly and systematically harms EU's interests. If that is the case, why does the EU not exact a price from Israel rather than the settlers, Israeli companies and researchers residing in the Territories?

After all, such measures will hardly be revolutionary. When, for example, in the early 1990s Israel was facing a huge wave of immigrants and a resultant dire need for loans to be able to absorb them, the administration of President George H.W. Bush withheld guarantees that Israel was seeking in order to obtain the loans, because of Israel's refusal to freeze her settlement policy. That decision addressed the roots of the settlement policies rather than their symptoms, exacting a price from the principal of the settlement policies and refraining from targeting the settlers themselves. This US example underscores the fact that it is only natural that public, political entities should address other public, political entities that commit wrongs under international law (just as it is natural that private bodies that pursue BDS strategies will do so *vis-à-vis* other private entities). Yet, contrary to this US example, the EU has proven itself to be unwilling or incapable of employing a mechanism of negative conditionality towards its neighbours, including, in particular, the State of Israel.[114]

### 4.3. Inability to employ instruments of negative conditionality

The growing frustration of the EU with Israel's activities in the Territories, its continued support of the settlements and its refusal to adopt a more compromising

[112] Bouris and Schumacher, *supra* note 5.

[113] Statement by Catherine Ashton, High Representative for Foreign Affairs and Security, Policy of the European Union, on the Middle East peace talks, A190/10, Brussels, 27 September 2010.

[114] For analysis see A. Magen, 'The Shadow of Enlargement: Can the European Neighbourhood Policy Achieve Compliance?', (2006) 12 *Columbia Journal of European Law* 383; R. Balfour, 'Changes and Continuities in EU-Mediterranean Relations after the Arab Spring', in S. Biscop, R. Balfour and M. Emerson (eds.), *An Arab Springboard for the EU Foreign Policy* (2012), 27.

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position towards the Palestinians has led the EU in recent years to attempt to reinforce its trade-based conditionality mechanism. Thus the Commission declared that:

> The process of developing closer EU–Israel partnership needs to be, and to be seen, in the context of the broad range of our common interests and objectives, which notably include the resolution of the Israeli–Palestinian conflict through the implementation of the two-State solution.[115]

The Commission also underscored that 'Any review of bilateral EU–Israel relations, including in the context of the ENP Action Plan, must take into account the persisting Arab-Israeli conflict'.[116] In a subsequent joint document of the Commission and High Representative, the EU explicitly spoke of freezing negotiations for upgrading reciprocal trade relations and of refraining from the adoption of a new EU-Israeli Action Plan.[117]

Nevertheless, a gap still prevails between the EU's rhetoric and its deeds, and the EU finds it difficult to employ instruments of negative conditionality towards Israel. This is due to its overall weakness in employing negative conditionality, and for reasons particularly relevant to Israel (e.g., the Holocaust, Israeli-Germany special relations, US support of Israel and Israel's ever-growing diversification of international trade).[118] Consequently, the EU has failed to fulfil its commitment with respect to Israel: '[T]he Union has never seriously contemplated the use of *ex post* conditionality, i.e., that of suspending the association agreement by referring to the breach of the human rights article'.[119]

In fact, the EU may be seen as acting in precisely the opposite direction, exempting Israeli public authorities at the national level (ministries and government agencies or authorities) from the applicability of the Guidelines, and concluding with Israel some beneficial trade and trade-related agreements, namely the Open Skies Agreement, the Agreement on Conformity Assessment and Acceptance of Industrial Products[120] and the Horizon 2020 Agreement.

Thus, despite the fact that according to the EU itself Israel prejudices the EU's strategic interests, the EU refrains from employing trade mechanisms of negative conditionality towards it and continues its practice of conferring beneficial trade-related agreements upon it. Thus the above-cited prediction that Israel will no longer be able to dismiss the EU's voice as 'unpleasant background noise' may prove to be premature. Due to the New Approach's focus on the symptoms of Israel's settlement

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[115] Eighth Meeting of the EU–Israel Association Council, Statement of the EU, Luxembourg, 16 June 2008, available at www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/association_counc/association_council.pdf; Communication to the European Parliament and the Council, Implementation of the ENP 2008, COM (2009) 188/3, at 4, available at ec.europa.eu/world/enp/pdf/progress2009/com09_188_en.pdf.

[116] Communication to the European Parliament, ibid.

[117] S. Pardo and J. Peters, *Uneasy Neighbors: Israel and the EU* (2010); European Commission and High Representative of the EU for Foreign Affairs and Security Policy, Joint Staff Working Document, Implementation of the European Neighbourhood Policy in Israel: Progress in 2012 and recommendations for action, Brussels, 20.3.2013, SWD (2013) 91 final, 2.

[118] Tocci, *supra* note 1, at 390–1.

[119] Ibid., at 395.

[120] mfa.gov.il/MFA/PressRoom/2012/Pages/ACAA-agreement-ratified-23-Oct-2012.aspx

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policy and the EU's inability to employ concrete measures of negative conditionality *vis-à-vis* the state, it is unlikely that the New Approach, in itself, will prove to be an effective EU Middle East initiative.

## 5. Summary and conclusions

As early as 1971 the ICJ acknowledged in its *Namibia* judgment that 'the qualification of a situation as illegal does not by itself put an end to it. It can only be the first, necessary step in an endeavour to bring the illegal situation to an end'.[121] In the spirit of that assertion, former senior EU officials warned in a letter addressed to the (former) High Representative Ashton that 'the Occupation is actually being entrenched by the present western policy' and that:

> later generations will see it as unforgivable that we Europeans not only allowed the situation to develop to this point of acute tension, but took no action now to remedy the continuing destruction of the Palestinian people's right to self-determination.[122]

The EU's New Approach attempts to alleviate that state of affairs, relying on trade and trade-related agreements in an attempt to back the EU's principled, long-standing policy with a concrete, territorial manifestation, withholding the benefits of EU-Israeli co-operation from companies and research institutions based in the Territories or operating therein, as well as from products produced therein and researchers who work in these institutions. In that respect the New Approach can be seen as part of a conceptual shift in the EU's self-perceived role, from 'what it is' to 'what it does', from passively representing 'power of attraction' to adopting a proactive role of an 'ethical power'.[123] In such a role, international legal norms upon which the EU strives to premise its external policies, including the CCP, serve it in both a constitutive and an instrumentalist manner,[124] enabling it to take a more proactive role as a human rights norms-maker and as an exporter of these norms to third countries.[125] In that process, EU values take the form of legal norms, including, in particular, the norms of public international law, thereby becoming constitutive of the EU's identity and its self-perception and self-projection as an international actor. The EU perceives these values as identity-defining and constitutive, and it sees its own role as forming, developing and promoting them.[126] Thus from the EU perceptive, the New Approach and its reliance on international law may be seen

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[121] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971 [1970] ICJ Rep. 16, para. 111.

[122] Bouris and Schumacher, *supra* note 5.

[123] G. Harpaz and A. Shamis, 'Normative Europe and the State of Israel: An Illegitimate Eurotopia?', (2010) 48(3) *Journal of Common Market Studies* 579; L. Aggestam, 'Introduction: Ethical Power Europe?', (2008) 84 *International Affairs* 1.

[124] See M. Cremona, 'Values in the EU Foreign Policy', in M. Evans and P. Koutrakos (eds.), *Beyond the Established Orders: Policy Interconnections between the EU and the Rest of the World* (2011) 275, at 275–6, 313.

[125] B. de Witte, 'The EU and the International Legal Order: The Case of Human Rights', in M. Evans and P. Koutrakos (eds.), *Beyond the Established Orders: Policy Interconnections between the EU and the Rest of the World* (2011) 127, at 128.

[126] Cremona, *supra* note 124, at 307.

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as an instrument to reinforce internal and external legitimacy, buttress identity cohesiveness and as a manifestation of its more robust effectiveness.

But does the EU's New Approach amount to a 'paradigm shift' (as characterized by Bouris and Schumacher) or to a 'game-changer', reflecting the EU's post-Lisbon reinforced international actorness (as termed by Persson)?

This article analyzed the New Approach and concluded that its (almost) exclusive focus on non-governmental entities such as corporations and research institutions situated in the Territories and on products produced in them is misplaced in terms of public international law and effectiveness. Misplaced but not illegal. Despite the fact that according to the EU itself, in the implementation of its settlement policy, Israel prejudices the EU's strategic interests, the EU refrains from employing trade mechanisms of negative conditionality towards Israel and instead it continues its practice of conferring beneficial trade-related agreements upon it.

Thus the EU's New Approach cannot be considered as reinforced EU actorness, nor can it be considered a 'paradigmatic shift'. Instead, it is a continuation of the EU's traditional, non-confrontational Middle East policies, disguised with new, exclusionary practices directed at the settlers and the means of production situated in the Territories. It represents a traditional, nuanced policy that walks the thin line between the historical support of Israel, regional geopolitics in which Israel is perceived as an island of stability, and a web of economic relations, on one hand, and opposition to Israel's policies in the Territories, on the other.

The New Approach's deficiencies, *in abstracto* and *in concreto*, legally and in terms of effectiveness, as analyzed in this article, are likely to prevent the New Approach (certainly when examined in isolation from private sector BDS practices), from serving as a paradigm shift, a 'game-changer' or a large Richter-scale 'earthquake' that will 'shake EU-Israel relations to the very foundations', as predicted by some scholars, analyzed above. Those who would want to see the international community, international institutions and international law exerting effective pressure on Israel will most probably have to look elsewhere.