



INSIGHTS

SPECIAL SECTION – WHAT'S IN A NAME?

THE *PSAGOT* JUDGMENT AND QUESTIONS OF LABELLING OF SETTLEMENT PRODUCTS

THE CJEU'S JUDGMENT IN *ORGANISATION JUIVE EUROPÉENNE AND VIGNOBLE PSAGOT*: SOME INTRODUCTORY REMARKS

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ABSTRACT: In *Psagot* (judgment of 12 November 2019, case C-363/18, *Organisation juive européenne and Vignoble Psagot* [GC]), the CJEU was asked whether foodstuffs originating in a territory occupied by Israel must, under EU law, bear an indication to the effect that they come from an “Israeli settlement”. The case revolved mainly around the interpretation of Arts 9, para. 1, let. i), and 26, para. 2, let. a), of Regulation 1169/2011 on the provision of food information to consumers, although it entailed a number of questions regarding the relevance of international law for the European Union. The aim of this Special Section is to analyse, from a variety of angles, the reasoning of the Court of justice in the recent *Psagot* case and the implications deriving from it for both the EU and the international legal order. The Special Section is composed of three contributions. The first addresses the interpretation of EU consumer law and labelling regulations and critically analyses the Court's unqualified inclusion of international law considerations in the broader concept of “ethical considerations” that may influence consumers' purchasing choices. The second focuses on the consistency of the Court's decision with its previous case-law on occupied territories and the characterization of the Israeli settlements under international law. The third contribution analyses the relevance of the international law principle of non-recognition for the *Psagot* case and its relationship with the duty of the EU to observe international law.

KEYWORDS: EU consumer law – labelling – ethical considerations – occupied territories – international humanitarian law – duty of non-recognition.

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I. INTRODUCTION

The aim of this Special Section is to analyse, from a variety of angles, the reasoning of the Court of Justice of the European Union in the recent *Psagot* case and the implications deriving from it for both the EU and the international legal order¹.

Over the past few years, the CJEU has heard an increasing number of cases involving questions pertaining to trade with occupied territories. In 2016 in the context of the *Front Polisario* case² and in 2018 in the context of the *Western Sahara Campaign UK* case,³ the Court was called upon to rule on the territorial scope of the EU-Morocco Association⁴ and Liberalization⁵ agreements and on the territorial scope of the EU-Morocco Fisheries Partnership Agreement⁶ as well as of the 2013 Fisheries Protocol⁷ respectively. These judgments have been criticised in the literature mainly because of the Court's selective and artificial reliance on international law.⁸ It has been claimed that, although purportedly relying on international law, upon closer scrutiny, the CJEU applied principles of international law without taking into account how these principles are understood and applied in in-

¹ Court of Justice, judgment of 12 November 2019, case C-363/18, *Organisation juive européenne and Vignoble Psagot* [GC] (hereinafter, *Psagot*).

² Court of Justice, judgment of 21 December 2016, case C-104/16 P, *Council v. Front Polisario* [GC].

³ Court of Justice, judgment of 27 February 2018, case C-266/16, *Western Sahara Campaign UK* [GC].

⁴ Euro-Mediterranean Agreement of 26 February 1996 establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part (EU-Morocco Association Agreement).

⁵ Agreement of 13 December 2010 in the form of an Exchange of Letters between the European Community and the Kingdom of Morocco concerning reciprocal liberalization measures on agricultural products, processed agricultural products, fish and fishery products, the replacement of Protocols 1, 2 and 3 of and their Annexes and amendments to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part (Liberalization Agreement).

⁶ Fisheries Partnership Agreement of 28 February 2007 between the European Community and the Kingdom of Morocco.

⁷ Council Decision 2013/785/EU of 16 December 2013 on the conclusion, on behalf of the European Union, of the Protocol between the European Union and the Kingdom of Morocco setting out the fishing opportunities and financial contribution provided for in the Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco (2013 Fisheries Protocol).

⁸ For an overview see E. KASSOTI, *The EU and Western Sahara: An Assessment*, in *European Law Review*, 2018, p. 751 *et seq.* See *contra* E. CANNIZZARO, *In Defence of Front Polisario: The ECJ as a global jus cogens maker*, in *Common Market Law Review*, 2018, p. 569 *et seq.* See also P. HILPOLD, "Self-determination at the European Courts: The Front Polisario Case" or "The Unintended Awakening of a Giant", in *European Papers*, Vol. 2, 2017, No. 3, www.europeanpapers.eu, p. 907 *et seq.*; A. EL QUALI, *L'Union Européenne et la question du Sahara: entre la reconnaissance de la souveraineté du Maroc et les errements de la justice européenne*, in *European Papers*, Vol. 2, 2017, No. 3, www.europeanpapers.eu, p. 923 *et seq.*; E. MILANO, *Front Polisario and the Exploitation of Natural Resources by the Administrative Power*, in *European Papers*, Vol. 2, 2017, No. 3, www.europeanpapers.eu, p. 953 *et seq.*; A. RASI, *Front Polisario: A Step Forward in Judicial Review of International Agreements by the Court of Justice?*, in *European Papers*, Vol. 2, 2017, No. 3, www.europeanpapers.eu, p. 967 *et seq.*

ternational practice.⁹ According to this line of argumentation, the Court simply “instrumentalised” international law in order to avoid pronouncing on the politically sensitive question of Moroccan sovereignty over Western Sahara and, thus, by extension, on the repercussions of the EU’s policy and practice towards Western Sahara.¹⁰

Apart from the relevant jurisprudence of the CJEU, there have been some noteworthy developments regarding trade with occupied territories at the national level too. The Irish Control of Economic Activity Bill is a case in point. The Control of Economic Activity Bill¹¹ was introduced to the Seanad (Ireland’s upper house) in early 2018. The Bill essentially seeks to make the importation or sale of goods produced in settlements established in occupied territories, the provision of certain services, as well as the extraction of resources from an occupied territory a criminal offence.¹² Should the Bill become law, Ireland will be the first EU Member State to criminalise trade with settlements. The objective of the Bill, as it is expressly stated therein, is to comply with Ireland’s obligations under the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War and under customary international humanitarian law.¹³ At the same time, the main criticism levelled against the Bill is that it constitutes a measure that restricts trade unilaterally – thereby allegedly violating Ireland’s obligations under EU law.¹⁴ More particularly, the Irish government opposes the adoption of the Bill on the grounds of its alleged incompatibility with EU law which will – as the argument goes – expose Ireland to legal action not only by the European Commission, but also by any private parties claiming to have been adversely affected thereby.¹⁵ As a result, it is unlikely that the Bill will be enacted as law. The example of the Irish Bill illustrates the difficulties of reconciling a unilateral domestic measure purporting to secure compliance with a Member State’s obligations under inter-

⁹ E. KASSOTI, *The ECJ and the Art of Treaty Interpretation: Western Sahara Campaign UK*, in *Common Market Law Review*, 2019, p. 235. J. ODERMATT, *Council of the European Union v. Front populaire pour la libération de la saquia-el-hamra et du rio de oro (Front Polisario) – Case C-104/16 P*, in *American Journal of International Law*, 2017, p. 737.

¹⁰ E. KASSOTI, *The Council v. Front Polisario Case: The Court of Justice’s Selective Reliance on International Rules on Treaty Interpretation*, in *European Papers*, Vol. 2, 2017, No 1, www.europeanpapers.eu, pp. 30-40. J. ODERMATT, *Council of the European Union v. Front populaire*, cit., pp. 736-738.

¹¹ Control of Economic Activity (Occupied Territories) Bill 2018, introduced by Senators Frances Black, Alice-Mary Higgins, Lynn Ruace, Colette Keheller, John G. Dolan, Grace O’Sullivan, and David Norris, 24 January 2018, available at data.oireachtas.ie.

¹² *Ibid.*, p. 5.

¹³ *Ibid.*, p. 3.

¹⁴ Statement by the Minister of State at the Department of Foreign Affairs and Trade (Deputy Helen McEntee), Debate on the Control of Economic Activity Bill: Report and Final Stages, Seanad Éireann Debate, 5 December 2018, available at www.oireachtas.ie.

¹⁵ *Ibid.*; see also Statement by the Minister of State at the Department of Foreign Affairs and Trade (Deputy Simon Coveney), Debate on the Control of Economic Activity Bill, Dail Éireann Debate, 23 January 2019, available at www.oireachtas.ie.

national law with EU law, a legal regime under which the exclusive competence to regulate external commercial policy has been conferred on the Union.

From an international law vantage point, trading with occupied territories poses a number of complex questions. The cases that have come before the Court showcase the typology of problems that economic dealings with such territories may entail. First, such dealings raise questions regarding the legality of international agreements concluded with the occupying power that extend to the occupied territories. The Western Sahara litigation saga dealt exactly with that question; in that line of case-law the Court found that the EU-Morocco agreements could not be considered as covering Western Sahara as this would be contrary to the EU's obligations under international law.¹⁶ A second set of problems relates to questions of importation and labelling of settlement products. The *Psagot* case concerned the latter issue; in the case at bar, the CJEU was essentially asked whether foodstuffs originating in a territory occupied by Israel must, under EU law, bear an indication to the effect that they come from an "Israeli settlement".

By way of contrast to the Western Sahara litigation saga, where recourse to international law rules on treaty interpretation was necessary in order to delimit the territorial scope of the relevant EU-Morocco agreements, the *Psagot* case revolved mainly around the interpretation of Arts 9, para. 1, let. i), and 26, para. 2, let. a), of Regulation 1169/2011 on the provision of food information to consumers.¹⁷ At the same time, international law still played a significant role in the Court's findings. The Court held that the establishment of settlements in some of the territories occupied by Israel gave expression to a policy of population transfer by Israel outside its territory contrary to international humanitarian law – a policy which has been condemned both by the UN and the EU.¹⁸ Citing the EU's commitment to contribute to the strict observance of international law under Art. 3, para. 5, TEU, the Court held that the omission of the indication that a foodstuff comes from an "Israeli settlement" located in a territory occupied by Israel is likely to mislead consumers as to its true place of provenance. The Court buttressed this conclusion with reference to the objectives of Regulation 1169/2011, which include the provision of information to consumers in order to enable them to make informed choices with particular regard to health, economic, environmental, social and ethical considerations. According to the Court, since the list of such considerations is non-exhaustive, considerations pertaining to the observance of international law may be relevant in that context.¹⁹ Additionally, compliance with international law may also be considered "as part of ethical assessments capable of influencing customers' purchasing decisions, particularly since some of those rules

¹⁶ *Council of the European Union v. Front Polisario* [GC], cit., para. 123; *Western Sahara Campaign UK* [GC], cit., paras 72-73.

¹⁷ Regulation (EU) 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers.

¹⁸ *Psagot* [GC], cit., para. 48.

¹⁹ *Ibid.*, paras 53-54.

constitute fundamental rules of international law.”²⁰ In this light, the CJEU concluded that in the case of foodstuffs originating in territories occupied by Israel, Regulation 1169/2011 prescribes that the foodstuffs in question must bear both the indication of that territory and the indication that they come from an “Israeli settlement”.

Unsurprisingly, the judgment has caused a political stir – despite the Advocate General’s statement that nothing in the judgment “should be construed as expressing a *political* or moral opinion in respect of any of the questions” raised by the case.²¹ The US has stated that the labelling requirement identified by the Court “serves only to encourage, facilitate, and promote boycotts, divestments and sanctions (BDS) against Israel.”²² In the same vein, Israel’s Minister of Foreign Affairs has stressed that “the court’s decision is wrong, promotes boycotts against Israel and gives a tailwind to the haters of Israel”.²³ On the other hand, while Palestinian officials have welcomed the ruling, they have implied that it does not go far enough. According to the Secretary General of the Palestine Liberation Organization (PLO): “our demand is not only for the correct labelling reflecting the certificate of origin of products coming from illegal colonial-settlements, but for the banning of those products from international markets”.²⁴

In the light of the significant – albeit perhaps indirect – role that international law played in this case, we have invited three colleagues, namely Olia Kavenskaia, Sandra Hummelbrunner and Cedric Ryngaert, to reflect on what, we at least, consider the most important international and EU law issues that the *Psagot* ruling gives rise to. The rest of this *Introduction* will briefly map out the relevant *problematique* and outline the content and the structure of this Special Section.

II. INTERNATIONAL LAW AND THE INTERPRETATION OF EU CONSUMER LAW

First of all, international law played an important role in the Court’s interpretation of Regulation 1169/2011. The issue of the Court’s recourse to international law in interpreting EU consumer law in this case is dealt with by Olia Kavenskaia in her *Insight*. Kavenskaia critically analyses the Court’s unqualified inclusion of international law considerations in the broader concept of “ethical considerations” that may influence consumers’ purchasing

²⁰ *Ibid.*, para. 56.

²¹ Opinion of AG Hogan delivered on 13 June 2019, case C-363/18, *Organisation juive européenne, Vignoble Psagot Ltd v Ministre de l’Économie et des Finances*, para. 8 (emphasis in the original).

²² US Department of State, Press Statement, Decision by EU Court of Justice on Psagot Case, 12 November 2019, available at www.state.gov.

²³ R. AHREN, *US condemns ‘anti-Israel bias’ in EU court verdict on settlement labelling*, in *The Times of Israel*, 13 November 2019, available at www.timesofisrael.com.

²⁴ State of Palestine, Palestine Liberation Organization, Statement by Dr Saeb Erekat on the ruling of the European Court of Justice on the labelling of Israeli settlement products, 12 November 2019, available at www.nad.ps.

choices pursuant to Art. 3 of Regulation 1169/2011 – without any justification or clarification of what that concept may entail in the context of EU consumer law.

More fundamentally, the very fact that the Court argues that violations of international law rules may be part of the considerations influencing consumer behaviour, “particularly since some of those rules constitute *fundamental rules of international law*”,²⁵ does not sit well with its reluctance to pronounce on the EU’s own obligations as a third party towards occupied territories. The examination of the issue at bar strictly through the lens of EU consumer law coupled with the broadened definition of “ethical considerations” to incorporate international law considerations – even in the absence of any evidence that the concept may include such considerations – shows a certain degree of willingness on behalf of the Court to pass the buck to final consumers. This approach is particularly problematic in the light of the fact that the EU is bound by international law not to recognise illegal situations or be complicit in the commission of internationally wrongful acts, whereas individuals have no such obligations/responsibility since they are not subjects of international law.

III. CONTEXTUALISING *PSAGOT* IN RELATION TO OTHER CASE-LAW INVOLVING OCCUPIED TERRITORIES

The judgment also raises questions in relation to how it fits with the line of case-law dealing with occupied territories, namely *Anastasiou*,²⁶ *Brita*,²⁷ *Front Polisario* and *Western Sahara Campaign UK*. This question has been tackled by Sandra Hummelbrunner in her *Insight*. Hummelbrunner argues that *Psagot* is consistent with the CJEU’s previous case-law on occupied territories and that it confirms the Court’s tendency, in this specific context, to avoid addressing the EU’s and Member States’ international law duties vis-à-vis these territories.

While this argument undoubtedly carries much persuasive force, it remains that case that, in *Psagot*, the Court – in no uncertain terms – characterised Israel’s presence in the Palestinian territories as occupation and condemned its settlement policy as being inconsistent with international law.²⁸ This constitutes a welcome departure from previous case-law where the Court has carefully avoided any reference to the status of a territory as “occupied”, a judicial strategy which was undoubtedly deployed *inter alia* in order to avoid being drawn into political storms.

This was, for instance, the case in *Anastasiou*, where the Court did not address at all the argument put forward by the Greek Government to the effect that acceptance of the

²⁵ *Psagot* [GC], cit., para. 56 (emphasis added).

²⁶ Court of Justice: judgment of 30 September 2003, case C-140/02, *Anastasiou III*; judgment of 4 July 2000, case C-219/98, *Anastasiou II*; judgment of 5 July 1994, case C-434/92, *Anastasiou I*.

²⁷ Court of Justice, judgment of 25 February 2010, case C-386/08, *Brita*.

²⁸ *Psagot* [GC], cit., paras 34, 48, 56.

certificates issued by the Turkish authorities in Northern Cyprus would be tantamount to violating a number of UN Security Council Resolutions condemning the Turkish occupation and calling upon all member of the international community not to recognise the self-proclaimed Turkish Republic of Northern Cyprus.²⁹ Although the Court did acknowledge the *de facto* partition of the island, the problems stemming from this situation were merely regarded as pertaining to the “internal affairs of Cyprus” which should be resolved “exclusively by the Republic of Cyprus, which alone is internationally recognized.”³⁰ Similarly, in *Brita*, despite an express invitation by the Advocate General to analyse the legal status of Israel’s presence in the West Bank for the purpose of establishing the territorial scope of the EU-Israel Association Agreement,³¹ the Court decided the matter solely with reference to the “politically detached” principle of *pacta tertiis*.³² On this basis, the Court concluded that the territorial scope of the EU-PLO Association Agreement implicitly restricted the territorial scope of the EU-Israel Association Agreement.³³ In the same vein, the Court omitted any reference to the status of Western Sahara as a territory occupied by Morocco in determining the territorial scope of the relevant EU-Morocco agreements in the context of the Western Sahara litigation saga.³⁴ In this light, the Court’s unequivocal endorsement of the legal status of the Palestinian territories as territories occupied by Israel and its pronouncement to the effect that the Israel’s settlement policy contravenes rules of international humanitarian law shows not only a considerable degree of openness towards international law, but also a certain amount of boldness in handling politically charged questions that was patently absent in previous cases.

IV. THE DUTY OF NON-RECOGNITION: THE ELEPHANT IN THE ROOM?

As seen above, the CJEU in *Psagot* was essentially confronted with the question of mandatory labelling of settlement products. From an international law point of view, this question is closely intertwined with that of the legality of importation of such products at the first place. In turn, assessing the legality of importation of settlement products necessitates the examination of the scope of the duty of non-recognition.³⁵ The propo-

²⁹ P. KOUTRAKOS, *Legal Issues of EC-Cyprus Trade Relations*, in *International and Comparative Law Quarterly*, 2003, p. 492.

³⁰ *Anastasiou I*, cit., para. 47.

³¹ Opinion of AG Bot delivered on 29 October 2009, case C-386/08, *Brita*, paras 109-112.

³² G. HARPAZ, E. RUBINSON, *The Interface between Trade, Law and Politics and the Erosion of Normative Power Europe: Comment on Brita*, in *European Law Review*, 2010, p. 566.

³³ *Brita*, cit., paras 50-53.

³⁴ See *Western Sahara Campaign UK* [GC], cit.

³⁵ For the duty of non-recognition see International Court of Justice: *Legal Consequences for States of the Continued Presence of South Africa in Namibia notwithstanding Security Council Resolution 276*, advisory opinion of 21 June 1971, para. 121; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, advisory opinion of 9 July 2004, para. 159. For the debate regarding the scope of the duty

sition that these two issues (namely importation and labelling of settlement products) are not easily decoupled when it comes to adjudicating questions of trade with occupied territories is evidenced by the 2015 Commission "Interpretative Notice on indication of origin of goods from the territories occupied by Israel since 1967" – a notice which was also cited in the judgment.³⁶ Therein, the Commission grounded the requirement of labelling settlement products as such on the EU's duty not to recognise an illegal situation.³⁷ Thus, the question arises as to whether the *Psagot* judgment sheds any light on the underlying issue of the legality of importation of settlement products – in light of the EU's duty of non-recognition.

This question was tackled by Cedric Ryngaert in his contribution to this Special Section. As Ryngaert argues, the Court's main task in this case was to interpret EU consumer law – a body of rules that does not lend itself easily to the application of the duty of non-recognition. In this sense, the peculiarities of the case were such that did not allow the Court to delve into a detailed examination of the issue of the importation of settlement products.

Although it is true that the interpretation of EU consumer law and the duty of non-recognition make strange bedfellows, the fact that the Court avoided any reference to the duty of non-recognition is not as unproblematic as it initially appears. Instead of narrowly focusing on EU consumer law, the Court could have simply argued that allowing labels to indicate that Israel is the country of origin of foodstuffs originating from an Israeli occupied territory would amount to recognizing Israeli sovereignty over the territory. This proposition is further buttressed by the text of the 2015 Commission Interpretative Notice which, as mentioned above, links mandatory origin labelling for settlement products with the EU's duty of non-recognition. However, had the Court pronounced on the duty of non-recognition, it could have been faced with the difficulty of defining its exact scope – thereby potentially having to address the underlying issue of the legality of importation of settlement products.

Interestingly, the Court came close to making an argument on the basis of the duty of non-recognition in para. 48 of its judgment. In particular, the Court argued that Israel's settlement activity violates international humanitarian law and concluded by stressing that the EU is duty-bound to observe international law under Art. 3, para. 5, TEU. Now, in the absence of any further explanation, no logical connection exists between these two statements. Indeed, Israel violates international humanitarian law by pursuing its settlement policy and, indeed, the EU is bound to observe international law on the basis of Art. 3, para. 5, TEU. But clearly something is missing – how are Israel's viola-

of non-recognition, see E. KASSOTI, *The EU's Duty of Non-Recognition and the Territorial Scope of Trade Agreements covering Unlawfully Acquired Territories*, in *Europe and the World: A Law Review*, 2019, p. 6.

³⁶ *Psagot*, cit., paras 12-16.

³⁷ European Commission, Interpretative Notice on indication of origin of goods from the territories occupied by the Israel since June 1967, 2015, points 1-2.

tions of international humanitarian law related to the EU's duty to observe international law? In order to make sense of this paragraph, the only logical conclusion that can be deduced is that there is a missing link between Israel's violations of international law and the EU's duty to observe international law. Thus, the Court seems to imply here that the EU has certain international law duties arising from Israel's violations of international law, namely the duty of non-recognition. Otherwise, the reference to the EU's duty to contribute to the strict observance of international law would not only be a *non sequitur* but also redundant. The same argument, namely that Israel violates international humanitarian law by maintaining its settlement policy and that consumers could be misled as to the true place of provenance of settlement products unless they are clearly labelled as such, could be made without any reference to the EU's duty under Art. 3, para. 5, TEU. In this light, by omitting any reference to the duty of non-recognition and by framing the question of labelling of settlement products purely in terms of consumer protection, the Court eschewed engagement with the EU's own duties in relation to the importation and labelling of these products.

V. CONCLUDING REMARKS

Overall, the *Psagot* judgment offers a fresh counterbalance to a string of case-law pertaining to trade with occupied territories marked by a characteristic reluctance to pronounce on the international legal status of the territories in question. In *Psagot*, the CJEU departed from its previous overcautious approach and made abundantly clear that the Palestinian territories in question are occupied by Israel and that Israel's settlement policy violates international humanitarian law. At the same time, the Court shied away from pronouncing on the EU's own international law duties and responsibility vis-à-vis these territories – something that somewhat detracts from the judgment's persuasive force. Furthermore, it remains to be seen how the judgment will influence the labelling of products coming from other occupied territories such as Western Sahara. In principle, the Court's findings seem to apply to all products originating from occupied territories. Therefore, on balance, the judgment constitutes an important stepping-stone in closing the gap between the EU's internationalist rhetoric and its practice on the ground in relation to occupied territories.

We are deeply grateful to the three authors for having accepted our invitation and for having contributed with their ideas to the debate and to *European Papers* for hosting this Special Section.

