



INSIGHTS

SPECIAL SECTION – WHAT'S IN A NAME?

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

INDICATIONS OF SETTLEMENT PROVENANCE AND THE DUTY OF NON-RECOGNITION UNDER INTERNATIONAL LAW

CEDRIC RYNGAERT*

ABSTRACT: In its 2015 “Interpretative Notice on indication of origin of goods from the territories occupied by Israel since June 1967”, the European Commission linked the indication of origin of products from Israeli settlements in the occupied Palestinian territories to the duty of non-recognition under international law, *i.e.*, a duty not to recognize illegal situations. In its *Psagot* judgment (judgment of 12 November 2019, case C-363/18 [GC]), however, the CJEU did not engage with this duty, but limits itself to interpreting EU consumer law. It is argued that disputes over the application and interpretation of consumer law indeed do not lend themselves well to the application of the duty of non-recognition. The question remains, however, whether conducting trade relations as regards settlement products amounts to an implicit recognition of Israeli settlement policy in the occupied territories.

KEYWORDS: duty of non-recognition – peremptory norms – public international law – consumer law – settlements – occupation.

I. INTRODUCTION

In 2015, in its “Interpretative Notice on indication of origin of goods from the territories occupied by Israel since June 1967” (hereinafter, Interpretative Notice),¹ the European Commission linked the indication of origin of products from Israeli settlements in the occupied Palestinian territories (OPT) to the duty of non-recognition under international law, *i.e.*, the duty not to recognize illegal situations. In its *Psagot* judgment, however, the CJEU,

* Professor of Public International Law, Utrecht University (RENFORCE research programme), c.m.j.ryngaert@uu.nl.

¹ Commission Interpretative Notice 2015/C 375/05 on indication of origin of goods from the territories occupied by the Israel since June 1967.

while noting the Commission's reference to the duty of non-recognition, did *not* ground its decision on this duty.² Instead, its decision that foodstuffs originating in a territory occupied by Israel should bear an indication of settlement provenance, is solely based on EU consumer and customs legislation, albeit interpreted in light of international law.

In this *Insight*, I argue that disputes over the application and interpretation of consumer law do not lend themselves well to the application of the duty of non-recognition, as consumer law is concerned with protecting individual consumer rights and preferences rather than with implementing public international law obligations resting on States and the EU. The question remains, however, whether the mere importation of settlement products into the EU – a question that was not before the Court – amounts to an implicit recognition of Israeli settlement policy in the OPT, in violation of the duty of non-recognition.

II. THE DUTY OF NON-RECOGNITION: THE COMMISSION'S INTERPRETATIVE NOTICE VERSUS THE COURT'S JUDGMENT

According to the Interpretative Notice of the Commission, the aim of indications of origin of goods from the OPT is "to ensure the respect of Union positions and commitments in conformity with international law on the non-recognition by the Union of Israel's sovereignty over the territories occupied by Israel since June 1967".³ Arguably, in so stating, the Commission gave effect to the EU's international duty not to "recognize as lawful a situation created by a serious breach [of a peremptory norm of international law], nor render aid or assistance in maintaining that situation", *i.e.*, the formulation used in Art. 42, para. 2, of the International Law Commission's Draft Articles on the Responsibility of International Organizations (DARIO 2011).⁴

In contrast, in its *Psagot* judgment,⁵ the CJEU remains silent on the duty of recognition, and limits itself to interpreting EU law only, in particular Regulation 1169/2011 on the provision of food information to consumers and Art. 60 of the Union Customs Code.⁶ This limitation follows from the very framing of the reference for a preliminary

² Court of Justice, judgment of 12 November 2019, case C-363/18, *Organisation juive européenne and Vignoble Psagot* [GC] (hereinafter, *Psagot*).

³ Commission Interpretative Notice, cit., para. 2. I have discussed this interpretative notice in an earlier publication in Dutch: C. RYNGAERT, *Product uit de Westelijke Jordaanoever (Israëlische nederzetting) – Europese consumentenlabels voor Israëlische producten uit de bezette gebieden in het licht van het internationaal recht*, in *SEW, Tijdschrift voor Europees en economisch recht*, 2016, p. 162 *et seq.*

⁴ International Law Commission, 2011 Draft Articles on the Responsibility of International Organizations (hereinafter, DARIO), UN Doc. A/66/10, Art. 42. See on peremptory norms Art. 41 DARIO.

⁵ *Psagot* [GC], cit.

⁶ Regulation (EU) 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers; Regulation (EU) 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code.

ruling. The main question put to the Court by the French *Conseil d'État* was whether "EU law and in particular Regulation No 1169/2011, where indication of the origin of a product falling within the scope of that regulation is mandatory, require, for a product from a territory occupied by the State of Israel since 1967, an indication of that territory and an indication that the product comes from an Israeli settlement if that is the case".⁷

While the Court does not as such engage with the duty of non-recognition under international law, the Court does interpret the aforementioned EU instruments in light of relevant international law. In particular, the Court cites the Palestinian people's right to self-determination and the rules of international humanitarian law, which prohibit policies of population transfer conducted by the State outside its territory.⁸ It does so in the context of interpreting Art. 3, para. 1, of Regulation 1169/2011, which provides that the provision of information to consumers enables them to "make informed choices [...] with particular regard to health, economic, environmental, social and ethical considerations". According to the Court, this list of considerations is not exhaustive, but may include "other types of considerations, such as those relating to the observance of international law".⁹ Thus, the Court relies on international law as a *body of rules that can influence consumer perceptions*.

As it happens, this body of rules may also include the duty of non-recognition of situations created by serious breaches of peremptory norms of international law. In fact, the Court itself points out that "the fact that a foodstuff comes from a settlement established in breach of the rules of international humanitarian law may be the subject of ethical assessments capable of influencing consumers' purchasing decisions, particularly since some of those rules constitute *fundamental rules of international law*".¹⁰ These "fundamental rules of international law" echo the "peremptory norms of international law", which trigger the duty of non-recognition under Art. 42 DARIO. This reading may be confirmed by the Court's citation of para. 159 of the International Court of Justice's Advisory Opinion in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, where the Court held that "all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory" – which, in the Court's opinion, violated peremptory norms.¹¹

While the CJEU's judgment in *Psagot* contains this implicit nod to the duty of non-recognition, eventually, in the specific context of EU consumer law, the interpretative recourse to peremptory norms does *not* serve the purpose of grounding a genuine duty of non-recognition. The "fundamental" nature of an international norm is just one rele-

⁷ *Psagot* [GC], cit., para. 20.

⁸ *Ibid.*, paras 34, 35 and 48. The Israeli settlements in the OPT can be considered as a manifestation of such policies.

⁹ *Ibid.*, para. 54.

¹⁰ *Ibid.*, para. 56 (emphasis added).

¹¹ International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, advisory opinion of 9 July 2004, p. 136, para. 159.

vant consideration that enables a consumer to take an informed decision regarding the purchase of a particular product. It does not give rise to any *legal* obligations, as the consumer continues to have the *free choice* to purchase a product of Israeli settlement provenance. This is obviously a far cry from a perceived *duty* of non-recognition, which should normally ground a parallel *prohibition*, in this case a prohibition from purchasing the relevant product. Such a duty also does not follow from current international law, which only creates duties of non-recognition for *States and international organizations*, not for individual consumers.¹²

III. CONSUMER LAW AND THE DUTY OF NON-RECOGNITION: A POOR FIT

It is no surprise that the duty of non-recognition only played a background role in *Psa-got*. After all, the judgment only concerned the interpretation of EU consumer law. The aim of consumer law is inherently limited to achieving a high level of protection for consumers and guaranteeing their right to information, by ensuring that they are appropriately informed as regards the products which they consume.¹³ Consumer law can only *indirectly* pursue the goals of the international community not to recognize illegal situations: it limits itself to empowering individual consumers to “vote with their trolley”,¹⁴ i.e., to take more informed transactional decisions regarding products made in conditions related to breaches of fundamental rules of the international legal order.¹⁵ As consumer law ultimately protects consumers (only), States or the EU cannot *instrumentalize* consumer law as a political tool to promote international legal interests if these interests are unrelated to consumer perceptions. As in consumer law, the unit of concern is the consumer, the duty of non-recognition cannot as such ground the attachment of labels containing mandatory information of origin.

¹² International Law Commission, Draft Articles on State Responsibility for Internationally Wrongful Acts of 3 August 2001, UN Doc. A/56/1, Art. 41; Art. 42 DARIO.

¹³ Regulation 1169/2011, cit., recital 3. See on the goals of consumer law also M. DUROVIC, *International Consumer Law: What Is It All About?*, in *Journal of Consumer Policy*, 2019, p. 3, available at www.link.springer.com (describing the main function of international consumer law as “the protection of consumers, i.e., the development of rules which are going to protect the consumers from potential abuse by traders due to the presence of an inequality of bargaining powers – irrespective of where consumer or trader are based”).

¹⁴ The Economist, *Voting with your trolley. Can you really change the world just by buying certain foods?*, Special report of 7 December 2006, in *The Economist*, www.economist.com.

¹⁵ This could be considered as a “nudging” strategy, which aims to nudge consumers in a direction that contributes to the realization of socially or politically desirable goals. There is currently a large amount of behavioural sciences-inspired research going on in consumer law that relates to nudging consumers to behave in a more sustainable fashion. See A. Mathios, H. Micklitz, L. Reisch et al. *Journal of Consumer Policy's 40th Anniversary Conference: A Forward Looking Consumer Policy Research Agenda*, in *J Consum Policy*, 2020, pp. 7-8, <https://doi.org/10.1007/s10603-019-09446-9>.

Since the CJEU's judgment in *Psagot* only pertains to consumer law and individual consumer decisions, Israel's reaction that the Court is a "tool in the political campaign against Israel" appears to be misguided.¹⁶ There may well be consumers whose "purchasing decisions may be informed by considerations relating to the fact that the foodstuffs in question [...] come from settlements established in breach of the rules of international humanitarian law", including peremptory norms;¹⁷ these consumers need to be informed of the exact provenance of these foodstuffs to take a proper transactional decision. However, as AG Hogan pointed out in his opinion, it is not the task of the Court "to approve or to disapprove of such a choice on the part of the consumer: it is rather sufficient to say that a violation of international law constitutes the kind of ethical consideration which the Union legislature acknowledged as legitimate in the context of requiring country of origin information".¹⁸ In other words, even if the Court requires mandatory labelling of settlement produce, it remains *agnostic* as to whether particular consumer choices are good or bad. The Court only acknowledges that some consumers' decisions may be informed by the consideration that fundamental rules of international law are breached, and by political ideology, while refraining from necessarily *supporting* such decisions.¹⁹

In contrast, there may be some more merit in Israel's Foreign Ministry statement that the EU uses double standards and singles out Israeli settlement products, whereas there are "200 ongoing territorial disputes across the world".²⁰ Admittedly, the CJEU itself does not discriminate between territorial situations; in fact, the judgment supports the mandatory indication of provenance of *all* foodstuffs insofar as consumers' transactional decisions may be guided by international law considerations.²¹ It remains, however, that the Commission has produced an Interpretative Notice only in relation to the OPT, and not in relation to comparable territories, such as the Western Sahara (occupied by Morocco), where breaches of peremptory norms may give rise to duties of non-recognition. At the same time, it is not unlikely that consumers care more about the sit-

¹⁶ N. LANDAU, DPA, *EU States Must Label Products From Israeli Settlements, Top Court Says*, in *Haaretz*, 12 November 2019, www.haaretz.com.

¹⁷ *Psagot* [GC], cit., para. 55.

¹⁸ Opinion of AG Hogan delivered on 13 June 2019, case C-363/18, *Organisation juive européenne e Vinoble Psagot*, para. 51.

¹⁹ See on the interaction of political ideology and consumption, for instance, J.C. KIM, B. PARK, D. DUBOIS, *How Consumers' Political Ideology and Status-Maintenance Goals Interact to Shape Their Desire for Luxury Goods*, in *Journal of Marketing*, 2018, p.132-149.

²⁰ N. LANDAU, DPA, *EU States Must Label*, cit.: "The ruling's entire objective is to single out and apply a double standard against Israel. There are over 200 ongoing territorial disputes across the world, yet the ECJ has not rendered a single ruling related to the labeling of products originating from these territories. Today's ruling is both political and discriminating against Israel".

²¹ After all, the CJEU, while deciding specifically on the case before it, which indeed concerned Israeli settlement produce, ruled in general terms that considerations relating to the observance of international law may be relevant in the context of Art. 3, para. 1, of Regulation 1169/2011, cit. Cf. *Psagot* [GC], cit., para. 54.

uation in the OPT than they care about – say – the situation of the Western Sahara, because there is simply more media attention for Israeli settlements in the OPT. At the end of the day, consumer law does not require States or the EU to create or change consumers' perceptions but only to give them sufficient information so that they can give effect to their existing convictions by means of purchasing decisions.²² "Objective" duties of non-recognition, even if considered as self-executory, may have little practical bearing on such subjective perceptions.²³

IV. IMPORTATION OF SETTLEMENT PRODUCTS AS IMPLICIT RECOGNITION

The narrow framing of the *Psagot* case, and its limitation to the interpretation of EU consumer law (albeit in light of international law), do not put to rest the important question of whether the mere fact of allowing the importation of settlement products into the EU is compatible with the duty of non-recognition. In other words: is the EU under an international legal obligation to ban such products from its markets, regardless of consumer perceptions?

Such an obligation can at first sight be derived from the *Namibia* advisory opinion of the International Court of Justice, in which the Court held that the duty of non-recognition imposes "upon [UN] Member States the obligation to abstain from entering into economic and other forms of relationship or dealings with [the occupying power] on behalf of or concerning [the occupied territory] which may entrench its authority over the Territory".²⁴ It is not clear, however, whether, as a matter of positive international law, this duty of non-recognition requires that States and the EU ban settlement products from their markets.²⁵ In the context of this brief *Insight*, I limit myself to noting that there is a fierce academic debate on this issue. Authors such as Dubuisson and Moerenhout have forcefully argued that allowing the importation of products from Israeli settlements amounts to the implicit recognition of a situation of illegality,²⁶ whereas the likes of Kontorovich have argued precisely the opposite.²⁷

²² See on ethical labelling also O. KANEVSKAIA, *Misinterpreting Mislabelling: The Psagot Ruling*, in *European Papers*, Vol. 4, 2019, No 3, www.europeanpapers.eu, p. 763 et seq..

²³ M. DAWIDOWICZ, *The Obligation of Non-Recognition of an Unlawful Situation*, in J. CRAWFORD, A. PELLET, S. OLLESON (eds), *The Law of International Responsibility*, Oxford: Oxford University Press, 2010, p. 683.

²⁴ International Court of Justice, *Legal Consequences for States of the Continued Presence of South Africa in Namibia notwithstanding Security Council Resolution 276(1970)*, advisory opinion of 21 June 1971, para. 121.

²⁵ C. RYNGAERT, R. FRANSEN, *EU Extraterritorial Obligations with Respect to Trade with Occupied Territories: Reflections after the Case of Front Polisario before EU Courts*, in *Europe and the World: A Law Review*, 2018, p. 17, available at www.scienceopen.com.

²⁶ F. DUBUISSON, *Les obligations internationales de l'Union européenne et de ses Etats membres concernant les relations économiques avec les colonies israéliennes*, in *Revue Belge de Droit International*, 2013, pp. 408-489; T. MOERENHOUT, *The Consequence of the UN Resolution on Israeli Settlements for the EU: Stop*

It is noted that in the *Western Sahara* cases (2015-2018),²⁸ the CJEU had the opportunity to address the scope and content of the duty of non-recognition in the context of economic relations – in those cases bilateral trade and fisheries agreements concluded between the EU and Morocco in respect of goods produced or harvested in the Western Sahara. However, it managed to skirt this controversial issue by relying instead on alternative legal regimes, such as the Charter on Fundamental Rights of the EU, the 1969 Vienna Convention on the Law of Treaties, and peoples' right to self-determination. In an earlier publication, I have criticized the Court for failing to review the said agreements in light of the duty of non-recognition.²⁹

V. CONCLUDING OBSERVATIONS

In *Psagot*, the CJEU did not directly engage with the duty of non-recognition, even if it engaged with international law in the context of gauging consumer perceptions. I have argued in this *Insight* that this lack of engagement with the duty of non-recognition is not surprising, as the case was entirely framed in terms of consumer law. Consumer law protects free and informed consumption choices of individuals, whereas the duty of non-recognition imposes obligations on States and international organizations. Accordingly, the duty of non-recognition and consumer law are a poor fit. After *Psagot*, the fundamental question remains, however, as to whether the very conduct of economic

Trade with Settlements, in *EJIL: Talk!*, 4 April 2017, www.ejiltalk.org. See also the NGO campaign *Made in Illegality*, www.madeinillegality.org.

²⁷ E. KONTOROVICH, *Economic Dealings with Occupied Territories*, in *Columbia Journal of Transnational Law*, 2015, p. 584 et seq.

²⁸ Court of Justice: judgment of 21 December 2016, case C-104/16 P, *Front populaire pour la libération de la sahraïelhamra et du rio de oro (Front Polisario) v. Council of the European Union* [GC]; judgment of 27 February 2018, case C-266/16, *Western Sahara Campaign UK* [GC]. Especially the first judgment has been discussed at length in this journal: E. KASSOTI, *The Front Polisario v. Council Case: The General Court, Völkerrechtsfreundlichkeit and the External Aspect of European Integration (First Part)*, in *European Papers*, 2017, www.europeanpapers.eu, pp. 339-356; E. KASSOTI, *The Council v. Front Polisario Case: The Court of Justice's Selective Reliance on International Rules on Treaty Interpretation (Second Part)*, in *European Papers*, 2017, www.europeanpapers.eu, pp. 23-42; P. HILPOLD, *Self-determination at the European Courts: The Front Polisario Case" or "The Unintended Awakening of a Giant"*, in *European Papers*, 2017, www.europeanpapers.eu, pp. 907-922; A. EL OUALI, *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*, 2017, www.europeanpapers.eu, pp. 923-952; E. MILANO, *Front Polisario and the Exploitation of Natural Resources by the Administrative Power*, in *European Papers*, 2017, www.europeanpapers.eu, pp. 953-966; A. RASI, *Front Polisario: A Step Forward in Judicial Review of International Agreements by the Court of Justice?*, in *European Papers*, 2017, www.europeanpapers.eu, pp. 967-975; E. KASSOTI, *The Empire Strikes Back: The Council Decision Amending Protocols 1 and 4 to the EU-Morocco Association Agreement*, in *European Papers*, 2019, www.europeanpapers.eu, pp. 307-317. See on the relationship with other CJEU judgments also S. HUMMELBRUNNER, *Contextualisation of Psagot in Light of Other CJEU Case Law on Occupied Territories*, in *European Papers*, Vol. 4, 2019, No 3, www.europeanpapers.eu, p. 779 et seq.

²⁹ C. RYNGAERT. R. FRANSEN, *EU Extraterritorial Obligations with Respect to Trade with Occupied Territories*, cit.

relations regarding settlement products violates the duty of non-recognition. In the recent *Western Sahara* cases, the CJEU unfortunately failed to address this question precisely where the circumstances called for it.