



## INSIGHTS

### SPECIAL SECTION – WHAT'S IN A NAME?

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

## CONTEXTUALISATION OF *PSAGOT* IN LIGHT OF OTHER CJEU CASE LAW ON OCCUPIED TERRITORIES

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**ABSTRACT:** This *Insight* is dedicated to a contextualisation of *Psagot* (judgment of 12 November 2019, case C-363/18, *Organisation juive européenne and Vignoble Psagot* [GC]), in light of previous rulings of the CJEU in cases involving occupied territories, namely the cases *Anastasiou I – III*, *Brita*, *Council v. Front Polisario*, and *Western Sahara Campaign UK*. The *Psagot* judgment was certainly influenced by this case law. Regrettably, this finding also concerns the Court's tendency to shy away from applying the EU's and the Member States' obligations under international law head-on.

**KEYWORDS:** *Organisation juive européenne and Vignoble Psagot* – C-363/18 – CJEU – occupied territories – trade – labelling of goods.

### I. INTRODUCTION

In *Psagot*, the CJEU was asked by the French *Conseil d'État* whether, under EU consumer protection law, foodstuffs must bear an indication that they originate in a territory occupied by the State of Israel and, as the case may be, that they come from an Israeli settlement within that territory.<sup>1</sup> Needless to say, the *Psagot* case has not only proven interesting from the perspective of EU consumer protection law, but has shone a spotlight on thorny issues in relation to trade in goods from occupied territories. In the *Psagot* case, the illegality of the occupation of the West Bank and the Golan Heights as well as of the Israeli settlements was the centre of attention. In essence, the case boiled down to the question of whether consumers in the EU have a right to know that food-

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

stuffs imported from Palestinian territory actually originate from occupied territory and, if so, from an Israeli settlement located within such territory. Since the case concerns a highly politicised conflict, it is no surprise that the Court's answer in the affirmative was not well received by all. AG Hogan's disclaimer that nothing in his Opinion to the *Psagot* case nor in the ultimate judgment of the Court of Justice "should be construed as expressing a *political* or moral opinion in respect of any of the questions raised by this reference",<sup>2</sup> did not ward off criticism to the contrary. Yet, the Court was not spared legal critique either. A commentator even went as far as to claim that the Court has acted *ultra vires*, asserting that the labelling requirements established on the basis of EU consumer protection law amounted to foreign policy sanctions, the adoption of which falls within the purview of the Council.<sup>3</sup> While this is a legally interesting – albeit bold – claim,<sup>4</sup> the focus of this *Insight* is to contextualise the *Psagot* judgment in light of the Court's previous rulings in cases involving occupied territories, namely the cases *Anastasiou I – III*,<sup>5</sup> *Brita*,<sup>6</sup> *Council v. Front Polisario*,<sup>7</sup> and *Western Sahara Campaign UK*<sup>8</sup> (section III). Beforehand, it is shortly outlined why trade with occupied territories, and with Israeli settlements in particular, is a delicate matter (section II).

## II. TRADE WITH OCCUPIED TERRITORIES, A DELICATE MATTER

Importing goods from occupied territories is a delicate matter because it may contribute to sustaining occupation by making it lucrative for occupying powers,<sup>9</sup> and raises issues under the principle of self-determination.<sup>10</sup> In particular, importing goods from

<sup>2</sup> Opinion of AG Hogan delivered on 13 June 2019, case C-363/18, *Organisation juive européenne e Vignoble Psagot*, para. 8 (emphasis in the original).

<sup>3</sup> M. POLZIN, *Außenpolitik statt Verbraucherschutz: EuGH-Urteil zur Kennzeichnungspflicht von Lebensmitteln aus israelischen Siedlungen ist ultra vires*, in *Verfassungsblog*, 19 November 2019, [www.verfassungsblog.de](http://www.verfassungsblog.de).

<sup>4</sup> To this effect see O. HARDAN, *Völkerrecht und Verbraucherschutz: Zur Kennzeichnungspflicht von Lebensmitteln aus israelischen Siedlungen*, in *Verfassungsblog*, 21 November 2019, [www.verfassungsblog.de](http://www.verfassungsblog.de).

<sup>5</sup> 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*.

<sup>6</sup> Court of Justice, judgment of 25 February 2010, case C-386/08, *Brita*.

<sup>7</sup> Court of Justice, judgment of 21 December 2016, case C-104/16 P, *Council v. Front Polisario* [GC].

<sup>8</sup> Court of Justice, judgment of 27 February 2018, case C-266/16, *Western Sahara Campaign UK* [GC].

<sup>9</sup> Note, however, that under the laws of occupation the exploitation of natural resources of occupied territories is only legal if it benefits the inhabitants of the territory (Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907, Art. 55). See B. SAUL, *The Status of Western Sahara as Occupied Territory under International Humanitarian Law and the Exploitation of Natural Resources*, in *Global Change, Peace & Security*, 2015, pp. 316–317.

<sup>10</sup> On the legal issues raised by trading goods from occupied territories see S. HUMMELBRUNNER, A.C. PRICKARTZ, *It's not the Fish that Stinks! EU Trade Relations with Morocco under the Scrutiny of the General Court of the European Union*, in *Utrecht Journal of International and European Law*, 2016, p. 28 *et seq.*; E. KASSOTI,

occupied territories may undermine a people's right to freely determine their future political status, including the possible formation of an independent State,<sup>11</sup> and the right of peoples and nations to freely dispose of the natural resources occurring in their territories.<sup>12</sup> What is more, it may even be in breach of the "obligations of all States not to recognise the illegal situation resulting from [a breach of a people's right to self-determination] and, additionally, an obligation not to render aid or assistance in maintaining this situation".<sup>13</sup> This "obligation not to recognise as legal" was formulated by the International Court of Justice (ICJ) as an emanation of the right to self-determination of a people, which is an obligation *erga omnes*,<sup>14</sup> the observance of which is in the legal interest of all States, and can thus be enforced by all of them.<sup>15</sup> The "duty not to recognise as legal" is of particular relevance, where occupying powers claim territorial sovereignty over the territory they occupy, the consequence being that States have to abstain from behaviour that would imply recognition of such claims.<sup>16</sup> Besides raising this issue of non-recognition, the *Psagot* case also concerns legal problems raised by the Israeli settlements in the West Bank, including East Jerusalem, and the Golan Heights. According to the ICJ, these settlements – together with the wall established by Israel – violate the right to self-determination, in that they amount to a *fait accompli* that prejudices the future frontier between Israel and Palestine and, therefore, impedes the exercise by the

*The Legality under International Law of the EU's Trade Agreements covering Occupied Territories: A Comparative Study of Palestine and Western Sahara*, in *CLEER Papers*, no. 3, 2017, p. 1 *et seq.*

<sup>11</sup> International Court of Justice, *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, para. 53.

<sup>12</sup> General Assembly, Resolution 1803 (XVII) of 14 December 1961, *Permanent sovereignty over natural resources*, UN Doc. A/RES/1803 (XVII), in which the permanent sovereignty over natural resources is denoted "as a basic constituent of the right to self-determination".

<sup>13</sup> International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, advisory opinion of 9 July 2004 (hereinafter, *Wall Opinion*), para. 159. On the significance of the duty of non-recognition in the context of the *Psagot* case, see Cedric Ryngaert's contribution to this special issue: see C. RYNGAERT, *Indications of Settlement Provenance and the Duty of Non-recognition under International Law*, in *European Papers*, Vol. 4, 2019, No 3, www.europeanpapers.eu, p. 791 *et seq.* For an assessment of the role of the duty not to recognise as legal in the context of trade relations 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. 1 *et seq.*

<sup>14</sup> *Wall Opinion*, *cit.*, para. 155.

<sup>15</sup> To this effect, see International Law Commission, Articles on State Responsibility for Internationally Wrongful Acts (hereafter, ARSIWA), UN Doc. A/RES/56/83, Art. 42; and International Law Commission, Draft Articles on the Responsibility of International Organizations (hereafter, DARIO), UN Doc. A/66/10, Art. 43. Note that the enforcement of *erga omnes* obligations through "third parties" is highly disputed.

<sup>16</sup> To this effect see *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *cit.*, para 121; M. DAWIDOWICZ, *Trading Fish or Human Rights in Western Sahara*, in D. FRENCH (ed.), *Statehood and Self-Determination*, Cambridge: Cambridge University Press, 2013, pp. 267–274.

Palestinian people of its right to self-determination.<sup>17</sup> Moreover, the ICJ found that the Israeli settlements are in breach of Art. 49, para. 6, of the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV), according to which an occupying power “shall not deport or transfer parts of its own civilian population into the territory it occupies”. In view of the fact that this convention applies *erga omnes partes*, the ICJ established that all States parties to the Geneva Convention IV are bound “to ensure compliance by Israel with international humanitarian law as embodied in that Convention”.<sup>18</sup> Since all of the EU’s Member States are party to that convention, they are all bound by this third-party obligation.

### III. ANALYSIS OF THE *PSAGOT* JUDGMENT IN LIGHT OF *BRITA & CO.*

The cases *Anastasiou I – III*, *Brita*, *Council v. Front Polisario*, *Western Sahara Campaign UK*, and the *Psagot* case have in common that they concern trade issues that have occurred because the territories involved, namely “Northern Cyprus”, the West Bank, including East Jerusalem, the Golan Heights, and the Western Sahara, are (largely) occupied. While, naturally, their status as occupied territories has influenced the findings of the Court of Justice, the impact of that status has been quite different, depending on the specific constellations of the case at hand. Yet, what unites them is that the Court, in all of them, exhibits a tendency that could be described as “*semi-völkerrechtsfreundlich*” (“semi-international law friendly”), in that it takes into account the status of occupied territories under international law,<sup>19</sup> but abstains from identifying third party obligations that have to be observed by the EU or the Member States in this respect.

In *Psagot*, the West Bank’s and Golan Heights’ status as occupied territories was of relevance because Arts 9, para. 1, let. i), and 26, para. 2, let. a), of Regulation 1169/2011 on the provision of food information to consumers require an indication of the country of origin or place of provenance of a foodstuff,<sup>20</sup> if otherwise consumers would be misled or deceived about the true origin or provenance of the foodstuff concerned.<sup>21</sup> According to the Court, in case a foodstuff comes from an Israeli settlement located within a territory occupied by Israel, said articles require both the indication of the territory concerned as well as the indication that it comes from an Israeli settlement.<sup>22</sup> To this effect, the Court

<sup>17</sup> *Wall opinion*, cit., paras 120-122.

<sup>18</sup> *Ibid.*, para. 159.

<sup>19</sup> Note that the Court of Justice has not used the term “occupied territory”, when dealing with the Western Sahara or the northern parts of Cyprus.

<sup>20</sup> Regulation (EU) 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers.

<sup>21</sup> For a short summary of the judgment see also Eva Kassoti’s introduction to this special issue: E. KASSOTI, S. SALUZZO, *The CJEU’s Judgment in Organisation juive européenne and Vignoble Psagot: Some Introductory Remarks*, in *European Papers*, Vol. 4, 2019, No 3, [www.europeanpapers.eu](http://www.europeanpapers.eu), p. 753 *et seq.*

<sup>22</sup> *Psagot* [GC], cit., para. 58.

pointed out that, under international law, the West Bank, including East Jerusalem, and the Golan Heights are territories that are only subject to a limited jurisdiction of Israel as the occupying power, highlighting their distinct international status from that State: while the West Bank is subject of the Palestinian people's right to self-determination, the Golan Heights are part of the Syrian Arab Republic.<sup>23</sup> That being the case, the Court concluded that an indication identifying Israel as the "country of origin" of foodstuffs that actually originate in one of these territories would be liable to deceive consumers, and could mislead them by implying that Israel is not only acting as an occupying power but as a sovereign with respect to these territories.<sup>24</sup> Apart from that, the Court abstained from making any pronouncements on possible obligations of the EU arising from the right to self-determination, in particular the duty not to recognise as legal, in that respect.<sup>25</sup> Instead, it chose to adjudicate the case at hand within the confines of Regulation 1169/2011. Basically the same applies to the Court's findings as to the mandatory indication of the Israeli settlements as place of provenance, with regard to which the Court noted that, in some of the territories occupied by Israel, these settlements were the result of a policy of population transfer conducted by Israel outside its territory, in violation of international humanitarian law, which has been condemned by the UN Security Council as well as the EU itself.<sup>26</sup> In this respect, the Court of Justice referred to Art. 3, para. 5, TEU, which provides that the Union is to contribute to the strict observance of international law, including the principles of the UN Charter.<sup>27</sup> Rather than pointing out that all Member States were under an obligation to ensure compliance by Israel with international humanitarian law as embodied in the Geneva Convention IV,<sup>28</sup> the Court justified this recourse to considerations of international law via a teleological interpretation of the labelling requirements under Regulation 1169/2011. According to the Court, the aim of the regulation is to ensure a high level of consumer protection in relation to food information (Art. 1, para. 1), and to enable consumers to make informed choices, with particular regard to health, economic, environmental, social and ethical considerations (Art. 3, para. 1). To this effect, the Court established that the observance of international law and, in particular, of "fundamental rules of international law" can be a relevant factor for enabling consumers to make informed choices, since it considered the list of relevant considerations as non-exhaustive. *In casu*, the Court recognised that a consumers' purchasing decision may be informed by the fact that foodstuffs originate from settlements established in breach of international humanitarian law.<sup>29</sup> The Court concluded that if a foodstuff from an Israeli

<sup>23</sup> *Psagot* [GC], cit., paras 34-35.

<sup>24</sup> *Ibid.*, paras 36-37.

<sup>25</sup> On the duty not to recognise as legal see section II above.

<sup>26</sup> *Psagot* [GC], cit., para. 48.

<sup>27</sup> *Ibid.*, para. 48.

<sup>28</sup> On this obligation see section II above.

<sup>29</sup> *Psagot* [GC], cit., paras 54-55.

settlement only bore the indication “West Bank” or “Golan Heights”, as the case may be, without mentioning the place of provenance, i.e. the Israeli settlement it originates in, consumers could be led to believe that it comes from an Palestinian or Syrian producer respectively.<sup>30</sup>

The “semi-völkerrechtsfreundliche” approach of the Court can also be felt in the *Anastasiou* cases, which concerned the occupation of the northern parts of Cyprus by the “Turkish Republic of Northern Cyprus” (TRNC). The constellation in Cyprus is, however, different from that of the West Bank, or Western Sahara for that matter, in that in contrast to the latter, the northern part of Cyprus is – in line with international law and practice – not recognised as a separate and distinct “entity”, but is considered to be part of the Republic of Cyprus. This aspect has informed the Court’s ruling in *Anastasiou I*, in which it found that movement certificates, which establish evidence as to the origin of products, issued by the TRNC was deemed insufficient for obtaining preferential treatment under the ECC-Cyprus Association Agreement, which governed the relationship between Cyprus and the EU before Cyprus’ accession to the EU.<sup>31</sup> Yet, while the Court pointed out that neither the European Union nor the Member States have recognised the TRNC, it did not refer to the “duty not to recognise as legal” in order to substantiate its findings, but merely expressed a lack of trust in terms of cooperating with authorities of such a non-recognised entity.<sup>32</sup>

The Court upheld this approach in *Brita*, in which the goods in question, which undisputedly originated from the West Bank, were accompanied by a formal certificate of Israeli origin: the Court reiterated its findings made in *Anastasiou I*, namely that the validity of certificates issued by authorities other than those designated in the relevant association agreement cannot be accepted.<sup>33</sup> Similarly, it denied that the proof of origin produced by authorities of the exporting State in the context of a subsequent verification procedure bind the authorities of the importing State, unless the customs authorities of the exporting State, upon request, supply sufficient information to enable the real origin of the products to be determined. In this respect, the Court pointed out that the purpose of such procedure is to determine whether the products in question fall within the territorial scope of the EC-Israel Association Agreement, highlighting that the Union takes the view that products obtained in locations “placed under Israeli administration since 1967” do not qualify for preferential treatment under the EC-Israel Association Agreement.<sup>34</sup> In line with the fact that the Court stopped short of qualifying the situation of the territories referred to as occupation, it did not justify this pronounce-

<sup>30</sup> *Psagot* [GC], cit., paras 49 and 51.

<sup>31</sup> *Anastasiou I*, cit., paras 37-41.

<sup>32</sup> *Ibid.*, paras 38-41. This has been harshly criticised by S. TALMON, *The Cyprus Question before the European Court of Justice*, in *European Journal of International Law*, 2001, p. 727 *et seq.*

<sup>33</sup> *Brita*, cit., paras 55-57.

<sup>34</sup> *Ibid.*, paras 59-67.

ment by the “duty not to recognise as legal”. Instead, the Court denied preferential treatment under the EC-Israel Association Agreement with respect to goods originating in the West Bank, by pointing out that interpreting the territorial scope of that agreement so as to confer on Israeli customs authorities competence in respect of products originating in the West Bank would be contrary to the international law principle *pacta tertiis nec nocent nec prosunt*: according to the Court, this would be tantamount to imposing on the Palestinian customs authorities an obligation to refrain from exercising the competence conferred upon them by virtue of the EC-Palestine Liberation Organization (PLO) Association Agreement in conjunction with the EC-PLO Protocol.<sup>35</sup> The application of the *pacta-tertiis* principle in this context is noteworthy, seeing that pursuant to Art. 34 of the 1969 Vienna Convention on the Law of Treaties (VCLT), to which the Court explicitly referred to, this principle applies to *States*, and, despite the fact that there is an association agreement with the PLO, neither the EU nor all of its Member States recognise Palestine’s statehood. This might explain why the Court, in its reasoning, relied heavily on the EC-PLO Association Agreement, instead of conceding the Palestine territories some form of distinct status under international law. This omission as well as the Court’s indecision to qualify Israel’s presence in the West Bank as occupation have been clearly remedied in the *Psagot* judgment.<sup>36</sup>

With respect to granting the West Bank and the Golan Heights a “separate and distinct status under international law”, the Court was influenced by its reasoning in the cases *Council v. Front Polisario* and *Western Sahara Campaign UK*,<sup>37</sup> in which it took a relatively decisive stance when it came to the application of trade agreements concluded between the EU and Morocco to the parts of Western Sahara occupied by Morocco. Although the Court did not label Morocco’s presence in Western Sahara as occupation, it emphasised that the territory of Western Sahara, by virtue of the principle of self-determination, has a separate and distinct status in relation to that of any State, including Morocco.<sup>38</sup> Consequently, the territorial scope of an agreement concluded with Morocco could not be interpreted so as to include the Western Sahara.<sup>39</sup> This finding was supported by the *pacta tertiis*-principle, which the Court of Justice, taking into account the Sahrawi people’s right to self-determination, quite progressively applied to the Western Sahara, which it considered to be a “third party” in relation to the agreement concluded between the Union and Morocco.<sup>40</sup> In *Western Sahara Campaign UK*, the Court even went as far as to state that the EU and Morocco could not have intended to give a special meaning, in the sense of Art. 31, para. 4, VCLT, to the territorial scope provisions in question, since doing so “would be

<sup>35</sup> *Brita*, cit., paras 47-52.

<sup>36</sup> *Psagot* [GC], cit., paras 31-37.

<sup>37</sup> *Ibid.*, para. 29.

<sup>38</sup> *Council v. Front Polisario* [GC], cit., para. 92.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*, paras 100-103.

contrary to certain rules of general international law that are applicable in relations between the European Union and Kingdom of Morocco, namely the principle of self-determination, [...] and the principle of the relative effect of treaties".<sup>41</sup> Hence, according to the Court, the Union "could not properly support any intention of the Kingdom of Morocco to include" Western Saharan territory within the scope of an agreement concluded with Morocco.<sup>42</sup> In other words, the Court stopped "short of reprimanding the EU for potentially recognising Moroccan sovereignty over Western Sahara".<sup>43</sup> Yet, it appeared to indirectly remind the Union of its duty not to recognise as lawful the situation resulting from a breach of the right to self-determination.<sup>44</sup>

Since the *Psagot* case was about the interpretation of labelling requirements under EU consumer protection law,<sup>45</sup> and not about treaty relations under international law, the *pacta-tertiis* principle was of no relevance. Yet, the Court, in line with its previous case law discussed above, also abstained from applying the "duty not to recognise as legal" in order to further substantiate its findings, despite the fact that it is possible to argue that allowing for a label which indicates Israel as the country of origin of products originating in the West Bank or the Golan Heights is tantamount to recognising Israel's claims to sovereignty over those territories. Similarly, it did not refer to the obligation of all States parties to the Geneva Convention IV to ensure Israel's compliance with that convention, which prohibits the transfer or to encourage transfers of parts of its own population into occupied territory.<sup>46</sup> Instead, the Court confined itself to analyse the case from the perspective of EU consumer protection law as much as possible, only "entering the international law sphere" where deemed necessary in order to establish whether or not a certain indication could mislead or deceive consumers as to the "true" country of origin or place of provenance. Also in this respect the *Psagot* judgment is comparable to other judgments, in particular *Anastasiou I*, in which the Court merely referred to the non-recognition of the TRNC in order to make an argument about a lack of trust in cooperating with the TRNC's authorities.<sup>47</sup> In *Anastasiou II and III*, which concerned phytosanitary certificates relating to fruit from the northern part of Cyprus issued by Turkish authorities, the Court even went as far as to abstain from any pronouncements of the status of the northern part of Cyprus altogether, confining itself to

<sup>41</sup> *Western Sahara Campaign UK* [GC], cit., para. 63.

<sup>42</sup> *Ibid.*, para. 71.

<sup>43</sup> A.C. PRICKARTZ, S. HUMMELBRUNNER, *EU-Morocco Trade Relations, Western Sahara and International Law: The Saga Continues in C-266/16 Western Sahara Campaign UK*, in *European Law Blog*, 28 March 2018, [www.europeanlawblog.eu](http://www.europeanlawblog.eu).

<sup>44</sup> *Ibid.*

<sup>45</sup> For an analysis of the labelling requirements established in the *Psagot* case, see Olia Kanevskaia's contribution to this special issue: O. KANEVSKAIA, *Misinterpreting mislabelling: the Psagot ruling*, in *European Papers*, Vol. 4, 2019, No 1, [www.europeanpapers.eu](http://www.europeanpapers.eu), p. 763 et seq.

<sup>46</sup> *Wall Opinion*, cit., paras 120 and 159.

<sup>47</sup> *Anastasiou I*, cit., paras 38-41.



a “self-contained” interpretation of the EU directive in question – one time accepting that phytosanitary certificates can be issued by a country other than the country of origin,<sup>48</sup> and one time rejecting that (albeit for particular, yet fragile reasons).<sup>49</sup>

#### IV. CONCLUSIONS

All in all, it can be held that while the *Psagot* judgment was certainly informed by the Court of Justice’s previous case law on occupied territories, the reasoning therein is characterised by a rather strict focus on EU consumer protection law. This does not mean that the Court did not take into account international law. In fact, the Court relied heavily on primary and subsidiary sources of public international law,<sup>50</sup> which makes it possible to draw a parallel to the Western Sahara cases, in which the Court of Justice applied principles of international law, including the principle of self-determination and certain principles of treaty interpretation, straightforwardly – albeit in a “creative” and sometimes selective manner.<sup>51</sup> On the other hand, by calling out the illegality of Israel’s occupation of the West Bank and the Golan Heights as well as of the Israeli settlements, the Court has formulated its stance more unequivocally than in its rulings in *Brita*, the Western Sahara cases and in *Anastasiou I-III*.<sup>52</sup> In this sense, the *Psagot* judgment can be held to be quite *völkerrechtsfreundlich*. However, the Court’s readiness to apply international law ends, where third-party obligations of the EU or the Member States that exist in respect of occupied territories come into play. The Court, in neither of the cases discussed above, directly applied the “duty not to recognise as legal” or the obligation to ensure that occupying powers observe the prohibition of a transfer of civilians to occupied territory. This is understandable, since framing the issue at stake as a matter of complying with the EU’s and the Member States’ obligations *vis-à-vis* occupied territories would mean to recognise these obligations: this would have a *de facto* precedent-setting effect in relation to all occupied territories, and, what is more, could trigger questions as to the EU’s and the Member States’ international responsibility.<sup>53</sup> However, invoking

<sup>48</sup> *Anastasiou II*, cit., paras 20-38.

<sup>49</sup> *Anastasiou III*, cit., paras 49-52 and paras 57-60.

<sup>50</sup> To this effect see also J. WEINZIERL, *An unlikely couple: Informed consumer choice in EU law and the Middle East conflict*, in *Völkerrechtsblog: International law & international legal thought*, 14 November 2019, [www.voelkerrechtsblog.org](http://www.voelkerrechtsblog.org).

<sup>51</sup> To this effect see: S. HUMMELBRUNNER, A.C. PRICKARTZ, *EU-Morocco Trade Relations Do Not Legally Affect Western Sahara – Case C-104/16 P Council v Front Polisario*, in *European Law Blog*, 5 January 2017, [www.europeanlawblog.eu](http://www.europeanlawblog.eu); A.C. PRICKARTZ, S. HUMMELBRUNNER, *EU-Morocco Trade Relations*, cit.; E. KASSOTI, *The Council v Front Polisario: The Court of Justice’s Selective Reliance on International Rules on Treaty Interpretation*, in *European Papers*, Vol. 2, 2017, No. 1, [www.europeanpapers.eu](http://www.europeanpapers.eu), p. 23 *et seq.*; E. KASSOTI, *The ECJ and the Art of Treaty Interpretation: Case C-266/16 Western Sahara Campaign UK*, in *Common Market Law Review*, 2019, p. 209 *et seq.*

<sup>52</sup> On the significance of this finding see E. KASSOTI, *The CJEU’s Judgment in Case C-363/18*, cit.

<sup>53</sup> To this effect, see also S. HUMMELBRUNNER, A.C. PRICKARTZ, *It’s not the Fish that Stinks!*, cit., p. 35.

these third-party obligations could have supported the Court's findings in the *Psagot* case in some places, and even remedied some of its weaknesses. These particularly concern the Court's reasoning with regard to the mandatory requirement to indicate that foodstuffs originating in the West Bank or the Golan Heights come from an Israeli settlement. While it is true that Arts 9, para. 1, let. i) and 26, para. 2, let. a), of Regulation 1169/2011 allow for an interpretation according to which the observance of international law is a valid point of reference when it comes to enabling consumers to make informed choices, this possibility of "private enforcement" of international law raises issues of legitimacy: under international law, a State or international organisation that is not individually affected by a breach of international law by another State or international organisation may only invoke the responsibility of the latter in case the breach concerns an obligation *erga omnes*.<sup>54</sup> The Court's reference to Art. 3, para. 5, TEU, according to which the Union is to contribute to the strict observance of international law, does not remedy the problem that the EU cannot be considered to be individually affected by any breach of international law. Art. 3, para. 5, TEU may only provide legitimacy internally at EU level, but cannot be used as a justification *vis-à-vis* a third State, because it is not bound by the EU Treaties.<sup>55</sup> In order to justify the enforcement of international law via EU consumer protection law, the Court could have simply invoked the Palestinian's right to self-determination, which, as pointed out in section II, is an obligation *erga omnes* that can be enforced by all States, and, arguably, also by international organisations such as the EU.

Apart from that, even if one were to argue that this form of private enforcement was not problematic as it does not amount to actual enforcement action on the part of the EU,<sup>56</sup> there is still the more general issue of how to apply the Court's approach in *Psagot* to other occupied territories. Is it, for instance, mandatory to indicate that a product originates in Western Sahara or the northern part of Cyprus?<sup>57</sup> The Court's rul-

<sup>54</sup> See Art. 42 ARSIWA, cit., and Art. 43 DARIO, cit.

<sup>55</sup> See Art. 34 VCLT, cit., in which the *pacta-tertiis* principle is codified. To this effect see also K.P. PURNHAGEN, J. VAN ZEBEN, C. AHLBORN, P. OOSTERVEER, *Beyond Food Safety – EU Food Information Standards as a Facilitator of Political Consumerism and International Law Enforcement Mechanism*, in *Wageningen Working Paper Law*, no. 1, 2020, p. 26.

<sup>56</sup> After all, the Court's interpretation of Arts 9, para. 1, let. i), and 26, para. 2, let. a), of Regulation 1169/2011 only enables consumers to make informed purchasing decisions. It does not immediately or necessarily lead to a boycott of products from Israeli settlements.

<sup>57</sup> Note that, following the judgments in *Front Polisario v. Council* and *Western Sahara UK Campaign*, it was not possible to import products originating in the part of Western Sahara on the then applicable terms of the EU-Morocco trade agreements in place. However, in July 2019, the Council adopted a decision to revise the EU-Morocco Association Agreement so as to expressly extend its territorial scope to the Western Sahara: Decision (EU) 2018/1893/EU of the Council of 16 July 2018 regarding the signature, on behalf of the European Union, of the Agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco on the amendment of Protocols 1 and 4 to the Euro-Mediterranean Agreement establishing an association between the European Communities and their

ing implies so. Yet, what about the additional indication of a place of provenance? After all, the illegal transfer of civilian population from occupying States to occupied territories has also occurred, e.g., in the Western Sahara,<sup>58</sup> or the northern part of Cyprus.<sup>59</sup> That said, it will be hard or even impossible to establish geographically defined places of provenance similar to the Israeli settlements. While this is mostly a practical and not a legal problem, it cannot be denied that Israeli settlements are thereby worse off than, for instance, Turkish entrepreneurs in the northern part of Cyprus, or, Moroccan entrepreneurs in the Western Sahara. On the other hand, only indicating the country or territory of origin could also have a negative economic impact on other entrepreneurs, such as Greek Cypriot entrepreneurs living in the northern part of Cyprus. In such a case, only indicating the country or territory of origin could be equally misleading as a failure to indicate that foodstuff originating in the West Bank comes from an Israeli settlement. While a reference, in the *Psagot* judgment, to the above-mentioned third-party obligations formulated by the ICJ with respect to the territories occupied by Israel could not have solved these issues, it would have, at least in part, helped to neutralise the negative connotations of a political bias against Israeli settlements.

Member States, of the one part, and the Kingdom of Morocco, of the other part. In light of the Court's findings in *Brita* and the Western Sahara cases, it is doubtful that such amendments would stand a chance before the Court of Justice. For a detailed analysis of this issue see E. KASSOTI, *The Empire Strikes Back: The Council Decision Amending Protocols 1 and 4 to the EU-Morocco Association Agreement*, in *European Papers*, Vol. 4, 2019, No 1, [www.europeanpapers.eu](http://www.europeanpapers.eu), p. 307 *et seq.*

<sup>58</sup> See P. VAN ELSUWEGE, *The principle of self-determination in relations between the EU and its neighbours: Between Realpolitik and respect for international law*, in *Zeitschrift für öffentliches Recht*, 2018, p. 761.

<sup>59</sup> To this effect, see General Assembly, Resolution 3395 (XXX) of 20 November 1975, Question of Cyprus, UN Doc. A/RES/3395(XXX); Security Council, Resolution 550 (1984) of 11 May 1984, UN Doc. S/RES/550.

