



## INSIGHTS

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

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

## MISINTERPRETING MISLABELLING: THE *PSAGOT* RULING

OLIA KANEVSKAIA \*

**ABSTRACT:** Mandatory origin labelling of products from occupied territories has been a delicate matter in the EU external trade policy. In the recent judgement *Psagot* (judgment of 12 November 2019, case C-363/18, *Organisation juive européenne and Vignoble Psagot* [GC]), the Court of Justice considered consumers' ethical considerations related to violations of international law as a reason for mandatory origin labelling of products originating in the Israeli settlements. This *Insight* argues that, in its decision, the Court missed a number of opportunities to clarify some essential concepts of EU food law, consumer protection and customs law and, as such, provided a ruling that is based on flawed and unconvincing argumentation. The Court's broad interpretation of the notion "ethical considerations" under Regulation 1169/2011 opens a Pandora's box of trade-restrictive practices while at the same time, continues the EU inconsistent policy towards trade with occupied territories.

**KEYWORDS:** EU external relations – origin marking – consumer protection – food information – average consumer – ethics in EU law.

### I. INTRODUCTION

The CJEU has a long history of interpreting compliance of its institutions with public international law. Whereas Art. 3, para. 5, TFEU stipulates that the European Union should contribute to the "strict observance and the development of international law" and respect "the principles of the United Nations Charter," the Court's use of international law provisions in its reasoning has been subjected to fierce critique. It has been argued, for instance, that the Court's recourse to international treaties is artificial, and its application of the treaty provisions selective.<sup>1</sup>

\* PhD Researcher, Tilburg Law and Economics Center, Tilburg University, o.s.kanevskaia@uvt.nl.

<sup>1</sup> 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*, Vol. 2, 2017, No 1,

In the recent *Psagot* judgment, the Court was presented with an opportunity to interpret EU law regarding origin indication for products imported from a territory occupied by the State of Israel since 1967.<sup>2</sup> In particular, the Court was invited to examine whether Regulation 1169/2011 on the provision of food information to consumers<sup>3</sup> requires a mandatory indication “Israeli settlement” for products originating in the Israeli settlements. The Court, following the opinion of AG Hogan delivered earlier this year,<sup>4</sup> held that labels that provide a place of origin that is factually incorrect can deceive consumers and prevent them from making informed purchasing choices.<sup>5</sup> Yet, the Court’s broad interpretation of Art. 3, para. 1, of the Regulation, implying that *under this Regulation*, consumers’ choices are guided by ethical considerations related to violations of international law, has certain flaws. With little to no explanation from the Court on the link between “ethical considerations” and “international law,” as well as its omission to address the notion of the “average consumer” and to examine other relevant instruments of EU law, the Court’s finding that observance of international law should be seen as a separate ground for labelling of goods from occupied territories for the purpose of providing information and enable consumers to make an informed choice, leaves much to be desired.

This *Insight* argues that by shunning politically-sensitive discussions, the Court offered a decision which is reductive and not well-substantiated. Had the Court provided a thorough analysis of the relevant provisions of EU consumer law and made a recourse to customs and trade law, its conclusions would have been more convincing and legitimate. Instead, by mixing observance of international law and technical customs law requirements, the ruling opens a Pandora’s box of EU selective and, arguably, discriminatory trade policy towards other disputed and occupied territories.

## II. THE CJEU RECOURSE TO INTERNATIONAL LAW IN DECISIONS ON DISPUTED TERRITORIES

The earlier case law of the Court of Justice attached considerable weight to the enforcement of international treaties and observance of international law in the EU legal

www.europeanpapers.eu, p. 23 *et seq.*; 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.*; G. BECK, *The Court of Justice of the EU and the Vienna Convention on the Law of Treaties*, in *Yearbook of European Law*, 2016, p. 484 *et seq.*

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

<sup>3</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>4</sup> Opinion of AG Hogan delivered on 13 June 2019, case C-363/18, *Organisation juive européenne e Vignoble Psagot*.

<sup>5</sup> *Psagot* [GC], cit., para 36.

order.<sup>6</sup> In the past decade, however, the Court's interpretation of public international law has arguably become more restrictive: in *Kadi*, for instance, the Court did not allow for the primacy of a United Nations Security Council (UNSC) Resolution over EU law and found that the EU act implementing the UNSC resolution infringed the appellant's fundamental right to respect for property;<sup>7</sup> whereas in *Intertanko*, it refused to assess the validity of EU law in the light of the UN Convention on the Law of the Sea binding the Member States.<sup>8</sup> In its more recent decisions in *Polisario*,<sup>9</sup> the Court was criticized for shedding the EU's image as a committed supporter of international legal order by its arbitrary and selective use of international law.<sup>10</sup>

While dealing with the relationship between the EU and international legal orders, the Court has been invited on a number of occasions to rule on matters related to the importation of agricultural products from territories that have been claimed by States with which the EU had concluded preferential trade agreements (PTAs). Similar to the UNSC, the EU has been known to openly condemn these States' military and civil presence on disputed territories; yet, the EU has never imposed boycotts or adopted trade sanctions to restrict its economic activities with these regimes.<sup>11</sup> In this regard, the questions the Court was asked to consider ranged from the Member States' obligation under EU law to refuse movement certificates and origin marks issued by the customs officials of Turkish Republic of Northern Cyprus, a territory within the island of Cyprus whose sovereignty is recognized by no State other than Turkey (*Anastasiou* line of cases),<sup>12</sup> to the territorial scope of application of the EU Association Agreement with Israel to Israeli settlements in West Bank (*Brita*),<sup>13</sup> and a number of EU Agreements with Morocco to Western Sahara (*Polisario*, *West Sahara Campaign UK*),<sup>14</sup> a non-governing territory that has been occupied by the Kingdom of Morocco.

In *Anastasiou II and III*, the Court came to its decision through technical customs rules of EU law and by way of considering the purpose of the certificates mandatory

<sup>6</sup> See J. ODERMATT, *The Court of Justice of the European Union: International or Domestic Court?*, in *Cambridge International and Comparative Law*, 2014, p. 69 *et seq.*, and M. MENDEZ, *The legal Effect of Community Agreements: Maximalist Treaty Enforcement and Judicial Avoidance Techniques*, in *European Journal of International Law*, 2010, p. 83 *et seq.*

<sup>7</sup> Court of Justice, judgment of 3 September 2008, joined cases C-402/05 P and C-415/05 P, *Kadi* [GC].

<sup>8</sup> Court of Justice, judgment of 3 June 2008, case C-308/06, *Intertanko* [GC].

<sup>9</sup> Court of Justice, judgment of 21 December 2016, case C-104/16 P, *Council v. Front Polisario* [GC] (hereinafter, *Polisario*); General Court, judgment of 10 December 2015, case T-512/12, *Council v. Front Polisario*.

<sup>10</sup> E. KASSOTI, *The Council v. Front Polisario Case*, *cit.*, p. 23 *et seq.*

<sup>11</sup> An exception would be the EU Sanctions Programme adopted in response to Russia's actions against Ukrainian territorial integrity.

<sup>12</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>13</sup> Court of Justice, judgment of 25 February 2010, case C-386/08, *Brita*.

<sup>14</sup> *Polisario* [GC], *cit.*; Court of Justice, judgment of 27 February 2018, case C-266/16, *Western Sahara Campaign UK* [GC] (hereinafter, *Western Sahara Campaign*).

under the applicable EU Directive, without referring to the rules of public international law.<sup>15</sup> In *Brita*, however, the Court invoked the principle of the relative effect of the treaties of Art. 34 of the 1969 Vienna Convention on the Law of the Treaties (VCLT), consolidating the international law principle of *pacta tertiis nec nocent nec prosunt* (which implies that treaties do not impose any obligations or confer any rights on third States).<sup>16</sup> The Court reasoned that allowing products from West Bank to be handled under the EU-Israel Association Agreement would require Palestinian customs authorities to refrain from their duties under the EU Association Agreement with the Palestine Liberation Organization (PLO), thus creating obligations for a third party without its consent.<sup>17</sup> Remarkably, and unlike the decision in *Psagot*, the Court did not have any recourse to the status and legality of the Israeli settlements under international humanitarian law.<sup>18</sup>

The Court increased its reliance on public international law in the *Polisario* and *Western Sahara Campaign UK* judgments. In the latter, the Court concluded that the Fisheries Partnership Agreement between the EU and Morocco<sup>19</sup> and the 2013 Fisheries Protocol<sup>20</sup> did not apply to Western Sahara and the waters adjacent to its territory since the opposite would breach the right to self-determination for the people of Western Sahara, as well as other EU commitments under international law.<sup>21</sup> In *Polisario*, the CJEU again resorted to the Vienna Convention and held that since following its Art. 31, para. 3, let. c, treaties should be interpreted in the context of the relevant rules of international law, including the right to self-determination of the Sahrawi people, the EU-Morocco Liberalisation

<sup>15</sup> *Anastasiou II*, cit., para. 36; *Anastasiou III*, cit., paras 46–49. Frid de Vries finds that such “pragmatic” solution does not deprive the citizens of the territories from the benefits of the agreement. R. FRID DE VRIES, *EU Judicial Review of Trade Agreements Involving Disputed Territories: Lessons from the Front Polisario Judgment*, in *Columbia Journal of European Law*, 2018, p. 519. Cf. N. MUNIN, *Can Customs Rules Solve Difficulties Created by Public International Law?: Thoughts on the ECJ’s Judgment, in the Brita Case (C-386/08)*, in *Global Trade and Customs Journal*, 2011, p. 204.

<sup>16</sup> *Brita*, cit., paras 44 and 52.

<sup>17</sup> *Ibid.*, paras 52–53.

<sup>18</sup> By the same token, the Court of Justice did not take into consideration the meaning of the “territory” in the Association Agreement between the EU and Israel. E. KONTOROVICH, *Economic Dealings With Occupied Territories*, in *Columbia Journal of Transnational Law*, 2015, p. 597 *et seq.*

<sup>19</sup> Council Regulation No 764/2006 of 22 May 2006 on the conclusion of the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco, concluding the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco.

<sup>20</sup> 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.

<sup>21</sup> *Western Sahara Campaign [GC]*, cit., para. 63. For further analysis, see J. ODERMATT, *Fishing in Troubled Waters: ECJ 27 February 2018, Case C-266/16, R (on the application of Western Sahara Campaign UK) v Commissioners for Her Majesty’s Revenue and Customs, Secretary of State for Environment, Food and Rural Affairs*, in *European Constitutional Law Review*, 2018, p. 751 *et seq.*

Agreement did not apply to Western Sahara.<sup>22</sup> The Court held that, since Morocco does not exercise its full sovereign power over Western Sahara, and due to the absence of an explicit treaty provision intending to bind the Kingdom of Morocco with respect to the territories under its international responsibility, the application of the EU-Morocco Agreements to Western Sahara is *a priori* precluded by Art. 29 VCLT (which provides that “the treaty is binding upon each party in respect of its entire territory”).<sup>23</sup> In this regard, the Association Agreement also cannot be binding to the people of Western Sahara as a “third party” under Art. 34 VCLT in the absence of their consent.<sup>24</sup> This decision has received fierce critique for, among others, Court’s erroneous and selective use of Arts 31 and 34 VCLT,<sup>25</sup> its disregard of *de facto* application of the Liberalization Agreement to Western Sahara<sup>26</sup> and the missed opportunity to have a recourse to trade law which, arguably, would have resulted in a stronger and more effective judgement.<sup>27</sup>

None of the discussed cases, however, has dealt with the question of whether rules of public international law should be taken into account by the EU technical rules on labelling and certification for products from disputed territories. The only instrument clarifying the Commission’s position on this matter is the Interpretative Notice on indication of origin of goods from the territories occupied by Israel since June 1967,<sup>28</sup> stating that products from the West Bank and Golan Heights that originate from Israeli settlements should be accompanied by origin marking with additional geographical information that the product comes from settlements, *to the extent that the indication of origin is mandatory*.<sup>29</sup> The *Psagot* case concerned indication of origin for Israeli wine produced by the Israeli

<sup>22</sup> *Polisario*, cit., para. 92; for further analysis, see, among others, 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. 1 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.; 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. 907 et seq.; E. KASSOTI, *The Council v. Front Polisario Case*, cit., p. 23 et seq.; 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. 19 et seq.

<sup>23</sup> *Polisario* [GC], cit., paras 94-97.

<sup>24</sup> *Ibid.*, para. 106.

<sup>25</sup> P. HILPOLD, *Self-Determination at the European Courts*, cit., p. 917 et seq.; E. KASSOTI, *The Council v. Front Polisario Case*, cit., p. 37 et seq.

<sup>26</sup> J. ODERMATT, *Council of the European Union v. Front populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario). Case C-104/16P*, in *American Journal of International Law*, 2017, p. 737 et seq.; R. FRID DE VRIES, *EU Judicial Review of Trade Agreements Involving Disputed Territories*, cit., p. 522; E. KASSOTI, *The Council v. Front Polisario Case*, cit., p. 40.

<sup>27</sup> R. FRID DE VRIES, *EU Judicial Review of Trade Agreements Involving Disputed Territories*, cit., p. 500.

<sup>28</sup> European Commission, Interpretative Notice on indication of origin of goods from the territories occupied by Israel since June 1967, C(2015) 7834 final (hereinafter, Interpretative notice).

<sup>29</sup> Interpretative Notice, cit., paras 8 and 10.

*Vignoble Psagot Ltd* in the West Bank. The contested Ministerial Notice<sup>30</sup>, which stipulated the mandatory origin indication of “Israeli settlement” on Israeli products imported from the West Bank or the Golan Heights, was claimed not to take into account Regulation 1169/2011 on the provision of food information to consumers. The case was referred for the preliminary ruling by the French Council of State, asking the CJEU to decide whether EU law, and in particular Regulation 1169/2011, requires mandatory indication of “Israeli settlement” for products originating in territories occupied by Israeli since 1967 (first question). If this question was answered negatively, the Court was asked to clarify whether the provisions of Regulation 1169/2011 allow Member States to require those indications (second question). *Psagot* is thus remarkable for the fact that the Court was invited to interpret the EU consumer protection rules in relation to imports from disputed territories, rather than reviewing EU acts in the light of international law.

### III. COURT’S ANALYSIS IN *PSAGOT*: MANDATORY INDICATION OF THE COUNTRY OF ORIGIN OR THE PLACE OF PROVENANCE OF FOODSTUFFS

To answer the first question, the Court considered Arts 9, para. 1, let. i), and 26, para. 2, let. a), of Regulation 1169/2011, which provide that the indication of the country of origin or the place of provenance is mandatory where its omission may mislead the consumer as to the true origin of the good, and where the information provided otherwise may imply different country of origin or place of provenance.<sup>31</sup> After providing a brief legal analysis, the Court held that indication of “Israeli settlement” as a place of provenance for products originating in the settlements is indeed mandatory under the provisions of the Regulation since the absence of this information would preclude consumers from making informed choices. This section discusses the Court’s findings and identifies the flaws in its reasoning.

#### III.1. “COUNTRY OF ORIGIN” V. “PLACE OF PROVENANCE”

As a first step of its analysis, the Court examined the differences between the concepts of “country of origin” and “place of provenance” under EU law. As for the former, the Court referred to the determination of origin of Art. 60 Union Customs Code (UCC).<sup>32</sup> At the outset, the CJEU established that the term “country” is a synonym for “State, a sovereign entity exercising, within its geographical boundaries, the full range of powers recognized by international law”; whereas the term “territory” refers to entities other

<sup>30</sup> French Ministry of the Economy and Finance, *Avis aux opérateurs économiques relatifs à l’indication de l’origine des marchandises issues des territoires occupés par l’État d’Israël depuis juin 1967*, 24 November 2016.

<sup>31</sup> *Psagot* [GC], cit., para. 21.

<sup>32</sup> As per Art. 2, para. 3, of the Regulation. *Psagot* [GC], cit., para. 27.

than States.<sup>33</sup> With that in mind, the Court referred to its earlier considerations in *Polisario* and *Western Sahara* on a separate status of such “territories” under international law.<sup>34</sup> Hence, it was concluded that Art. 26, para. 2, of Regulation 1169/2011 applies to the products originating both in “countries” as well as in “territories.”<sup>35</sup>

The Court continued with stating that under international humanitarian law, Israeli settlements are *territories* subject to a limited jurisdiction of the State of Israel and either enjoy the right to self-determination (West Bank), or are part of a different State (the Golan Heights).<sup>36</sup> Yet, it noted that “territory” within the meaning of the UCC does not equal to “place of provenance”, within the meaning of Regulation 1169/2011, which defines “place of provenance” as “any specific geographical area *within the country or territory of origin of a foodstuff*, with the exception of a producer’s address”.<sup>37</sup> Since the term “settlement” refers to specific geographical area and also has a “demographic dimension,” implying a population of foreign origin, settlements can be deemed as the place of provenance within the meaning of the Regulation.<sup>38</sup> Hence, following the Court’s reasoning, the West Bank and the Golan Heights are territories under international humanitarian law,<sup>39</sup> while the Israeli settlements in these territories are the “place of provenance” under Regulation 1169/2011.<sup>40</sup>

Quite surprisingly, the Court did not proceed with any further clarification regarding the actual acquisition of origin for the product at issue, mainly noting that the product originated in the country or territory where they have been either wholly obtained or have undergone a substantial transformation.<sup>41</sup> For instance, it is unclear whether the Court’s decision would have been different if the wine in question was bottled, packaged, or processes in the territory *within* Israel’s internationally recognized borders.<sup>42</sup> Likewise, the striking absence of any reference to the EU-Israel and EU-PLO Association Agreements, as well as to its earlier case law on the territorial scope of these treaties, suggests that the Court considers the technical customs rules of the UCC in isolation from their context and is engaging in fragmentary application of the EU customs law. Arguably, a more thorough analysis that takes into consideration processes and pro-

<sup>33</sup> *Psagot* [GC], cit., paras 29-30.

<sup>34</sup> *Ibid.*, para. 31.

<sup>35</sup> *Ibid.*, para. 32.

<sup>36</sup> *Ibid.*, paras 3-35.

<sup>37</sup> *Ibid.*, para. 40-41.

<sup>38</sup> *Ibid.*, para. 43.

<sup>39</sup> *Ibid.*, para. 34.

<sup>40</sup> *Ibid.*, para. 45.

<sup>41</sup> *Ibid.*, para. 27.

<sup>42</sup> Cf. N. GORDON, S. PARDO, *The European Union and Israel's Occupation: Using Technical Customs Rules as Instrument of Foreign Policy*, in *Middle East Journal*, 2015, p. 76 *et seq.*; M. HIRSCH, *Rules of Origin as Trade or Foreign Policy Instruments? The European Union Policy on Products Manufactured in the Settlements in the West Bank and the Gaza Strip*, in *Fordham International Law Journal*, 2002, p. 575 *et seq.*

duction methods in the context of rules of origin in EU PTAs, would have strengthened this part of the Court's reasoning and render it more appropriate in the light of European trade and customs policy.

The Court also seems reluctant to explain, or even to mention, the applicable principles of international law on which its arguments are built: only when proceeding with the notion of misleading consumers, the Court decides to refer to the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV) and the UN Security Council's resolutions regarding the situation in Palestine and recalls, in the very same paragraph, the EU's commitment under Art. 3, para. 5, TFEU to contribute to the strict observance of international law.<sup>43</sup> Given the importance that the Court attaches to the observance of international law in the findings of this judgement, its scarce reference to the applicable international principles, treaty provisions and EU case law, as well as their analysis in the context of the judgment, is rather astonishing.

### III.2. MISLEADING CONSUMERS REGARDING THE PRODUCTS' TERRITORY OF ORIGIN AND PLACE OF PROVENANCE

The Court continues with the reasoning that the omission to indicate "Israeli settlement" as a place of provenance would deceive consumers. Firstly, it submits that the indication of the country of origin "made in Israel" is misleading since the products originate in the *territories* that are not considered as part of the State of Israel under international law.<sup>44</sup> Yet, a sole indication of the *territory* of origin is also deceiving, since consumers cannot, in all reasonableness, distinguish Palestinian and Israeli goods from these territories: accordingly, even though Regulation 1169/2011 requires indication of the country of origin or the place of provenance, in case of products originating in settlements, the indication of *both* territory of origin and the place of provenance is thus mandatory.<sup>45</sup>

While the Court was correct in suggesting that without indicating the place of provenance, consumers cannot distinguish between Palestinian or Israeli origin of foodstuffs, its earlier argument that consumers should be informed that products do not originate in Israel to prevent them from being "misled as to the fact that the State of Israel is present in those territories as an occupying power, and not as a sovereign entity"<sup>46</sup> is rather striking. Firstly, origin marks are not supposed to inform consumers about the legality of a State's presence in other territories, and neither should they intend to educate consumers on international law. Secondly, this reasoning is in stark contrast with the Court's further findings that consumers may make their purchasing choices based on the product's origin (see section III.3), which undeniably implies that

<sup>43</sup> *Psagot* [GC], cit., para. 48.

<sup>44</sup> *Ibid.*, paras 34-36.

<sup>45</sup> *Ibid.*, para. 46.

<sup>46</sup> *Ibid.*, para. 37.



consumers are *already* informed about the status of these territories under international law and have taken a negative stance towards settlements' products.

### III.3. CONSUMER PROTECTION AND MANDATORY NATURE OF ORIGIN MARKS

The most remarkable finding of the Court relates to its interpretation of Art. 3, para. 1, of the Regulation 1169/2011 as a provision that introduces international law considerations into consumer protection. While stating that mandatory indication of "Israeli settlement" on products originating in settlements is supported by the objectives of the Regulation to "ensure a high level of consumer protection in relation to food information, taking into account the difference in perception of consumers,"<sup>47</sup> the Court refers to Art. 3, para. 1, providing that to protect their health and interests, "consumers should make informed choices and use safe foods, with particular regard to health, economic, environmental, social and ethical considerations". The Court notes that this list is non-exhaustive and that other types of considerations may also be relevant for consumers' purchasing decisions, such as consideration related to the observance of international law,<sup>48</sup> meaning that consumers may base their choices whether to buy certain products depending on whether these products are imported from regimes that violate international humanitarian law.<sup>49</sup> Bypassing the discussion on the EU and its Member States obligations under international law towards trade with such regimes (which, given the nature of the case, were reasonably expected to be addressed), the Court continued with stating that the breach of the rules in international humanitarian law may also be subject of ethical assessment by consumers and hence, influence their choice.<sup>50</sup>

The Court concluded that considerations of international law constitute a separate ground for mandatory indication of products' origin and are encapsulated in the term "ethical considerations" of Art. 3, para. 1, of the Regulation. As it will argued in section IV, such reasoning of the Court misses a number of crucial points, which in theory could have provided convincing arguments in favour of the Court's approach, and is moreover based on a wrong interpretation of the Regulation.

## IV. OBSERVANCE OF INTERNATIONAL LAW AS A GROUND FOR MANDATORY ORIGIN MARKING

As such, the Court's reasoning in *Psagot* poses new questions regarding the Court's use of international law in technical trade rules. The Court's broad interpretation of the term "ethical considerations" of Art. 3, para. 1, of Regulation 1169/2011, as well as its

<sup>47</sup> *Ibid.*, para. 52.

<sup>48</sup> *Ibid.*, para. 54.

<sup>49</sup> *Ibid.*, para. 55.

<sup>50</sup> *Ibid.*, para. 56.

use of international humanitarian law as a reason behind consumers' commercial choices, is not only poorly substantiated but arguably also misinterprets the objectives of the Regulation, which predominantly relate to consumer health and safety, and ignores other relevant provisions of EU law that deal with unfair commercial practices.

Firstly, the Court takes the premise that consumers are well-informed and that observance of international humanitarian law forms a part of their ethical assessment when deciding whether to purchase a product. It is unclear how the Court arrived at this conclusion: while consumers may be acquainted with information regarding the UN and the EU position towards the Israeli settlement policy through different media channels, it is questionable whether such type of information equips them to make any assessments with regard to the observance of the applicable provisions of, among others, the Geneva Convention and UN Resolutions (unless, of course, they have expressed a considerable interest in this question).<sup>51</sup> Seemingly, a reference to "political or moral beliefs" rather than "considerations of international law" would have been more appropriate.<sup>52</sup>

Secondly, and related to the first point, the Court's and AG's failure to explain in their reasoning the notion of "average consumer" is rather striking, especially given the existence of guidelines and case law that favour the broad interpretation of the "average consumer".<sup>53</sup> AG Hogan notes in this regard that the *average* consumer is well-informed due to his or her behaviour,<sup>54</sup> and thus that "some reasonably well informed, and reasonably observant and circumspect consumers may regard [the fact that the product originates in settlements] as an ethical consideration that influences their consumer preferences and in respect of which they may require further information".<sup>55</sup> The

<sup>51</sup> Indeed, as noted by the AG, an "average consumer" is "reasonably well informed" (Opinion of AG Hogan, *Psagot*, cit., paras 47-48), which some scholars have suggested to imply that the consumer has "a rough idea, but not necessarily a detailed knowledge, about the product or service in question," see R. INCARDONA, C. PONCIBO, *The Average Consumer, the Unfair Commercial Practices Directive, and the Cognitive Revolution*, in *Journal of Commercial Policy*, 2007, p. 24.

<sup>52</sup> For instance, in *Kattenburg v. Canada*, briefly discussed further in this section, the Federal Court of Canada came to a similar conclusion by referring to consumers' freedom of speech to express their political view in a "peaceful" way through their purchasing decisions, invoking the Canadian Charter of Rights and Freedoms, Federal Court of Canada, decision of 27 July 2019, *Kattenburg v. Canada (Attorney General)*, para 117. In this regard, it should also be recalled that while the EU indeed may promote the respect for international law under its Common Foreign and Security Policy (CFSP) through, for instance, sanctions and embargoes, the case in question dealt with the EU consumer policy, which arguably provides narrower space for incorporation of international law.

<sup>53</sup> I.e. European Commission Staff Working Document, Guidance on the Implementation/Application of the Directive 2005/29/EC on Unfair Commercial Practices, SEC(2009) 1666 final, which for instance emphasize that the notion of average consumer should also be interpreted in line with Art. 114 TFEU requiring high level of consumer protection. Furthermore, CJEU case law confirms that the "average consumer" is somebody who is not "weak" and is always in a position to acquire information and act on it. B.D. DUIVENVOORDE, *The Consumer Benchmarks in the Unfair Commercial Practice Directive*, Heidelberg: Springer, 2015, p. 23.

<sup>54</sup> Opinion of AG Hogan, *Psagot*, cit., para. 48.

<sup>55</sup> *Ibid.*, para. 56.

AG referred to the Unfair Commercial Practice Directive (UCPD)<sup>56</sup> when discussing provision of misleading information to consumers:<sup>57</sup> yet, clarifications regarding the “average consumer test” that, according to the Directive, “national courts and authorities will have to exercise their own faculty of judgement, having regard to the case-law of the Court of Justice, to determine the typical reaction of the average consumer in a given case”,<sup>58</sup> seems to be omitted from his reasoning.

Instead of building on the AG’s analysis of misleading practices under the UCPD and remedying his omission to introduce the “average consumer” test, which arguably could have strengthened the Court’s conclusion, the Court chose to stick to its arguments under Regulation 1169/2011. Yet, neither Art. 3 or 26 of Regulation 1169/2011 refer to the “average consumer”: Art. 3 requires a high level of protection for the “final consumer” –“the ultimate consumer of a foodstuff who will not use the food as part of any food business operation or activity.”<sup>59</sup> Moreover, Art. 4, para. 2, of the same Regulation stipulates that where food information is mandatory to enable consumers to make informed choices, “account shall be taken of *a widespread need on the part of the majority of consumers* for certain information to which they attach significant value or *of any generally accepted benefits* to the consumer”.<sup>60</sup> As such, Regulation 1169/2011 only refers to the “average consumer” when discussing the forms of expression or presentation of information on the labels.<sup>61</sup> Consequently, it is unclear how the Court’s reasoning that consumers will take into account international law considerations in making a decision to purchase a product is reconcilable with the notion of “consumer” under the food information Regulation.<sup>62</sup>

Curiously, the average consumer test was also neglected by the Federal Court of Canada in *Kattenburg v. Canada*, issued earlier this year.<sup>63</sup> The case likewise concerned mandatory designation of “Israeli settlement” on the label of settlements’ wines. The Federal

<sup>56</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market. Note that pursuant Art. 6, para. 1, of the UCPD, its definition of a “misleading practice” under this Directive relies on the notion of the average “consumer.”

<sup>57</sup> Opinion of AG Hogan, *Psagot*, cit., para. 73.

<sup>58</sup> Directive 2005/29/EC, cit., recital 18.

<sup>59</sup> This definition is provided in Art. 3, para. 18, (18) of Regulation (EU) 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the principles and requirements of food law, and is referred to by Art. 2, para. 1, let. a), of Regulation 1169/2011.

<sup>60</sup> Emphasis added.

<sup>61</sup> Recital 43 and Art. 25(1) of Regulation 1169/2011, cit.

<sup>62</sup> In this regard, Schebesta and Purnhagen note that Regulation 1169/2011 is “preliminary dedicated to the formulation of positive objective information, such as the size of the front on packaging [...]” while “[t]he UCPD, by contrast, relies on the average consumer in order to determine whether information already used in the market is misleading”, H. SCHEBESTA, K.P. PURNHAGEN, *An Average Consumer Concept of Bits and Pieces: Empirical Evidence on the Court of Justice of the European Union’s Concept of the Average Consumer in the UCPD*, in *Wageningen Working Paper Law and Governance*, 2019/02, p. 8.

<sup>63</sup> Federal Court of Canada, *Kattenburg v. Canada*, cit.

Court of Canada held that labelling of settlement products as “products of Israel” misleads the “average reasonable consumer” and prevents him or her from expressing their political views through purchasing choices, thereby limiting their freedom of expression.<sup>64</sup> Another remarkable observation is that similarly to AG Hogan,<sup>65</sup> the Canadian Court considered inapplicable the UK Supreme Court findings in *Richardson v. Director of Public Prosecution*, which held that the number of consumers whose purchasing decisions may be affected by the knowledge of the true provenance of the goods is insufficient for the number required to reach the benchmark of the “average consumer”.<sup>66</sup>

Thirdly, even assuming that the CJEU had no obligation to address the benchmarks for – the average or majority (of) – consumer(s), it has still erred in judgment when considering the objectives of Regulation 1169/2011. As such, despite the broad definition of “food information”,<sup>67</sup> nothing in the Regulation implies that its objective to protect consumer health and interests pertain to the grounds other than food safety and quality.<sup>68</sup> This also appears from its Art. 39, para. 2, on national measures on mandatory origin, which Member States are permitted to introduce if there is a link between a products’ certain *qualities* and its origin. In fact, when dealing with the second question presented to the Court,<sup>69</sup> the AG determined that the reason that a country of origin or a place of provenance has certain importance to the consumers’ decision is insufficient to allow national mandatory origin marking under Art. 39, para. 2.<sup>70</sup> This reasoning of the AG does not sit well with his and the Court’s conclusion that the EU-wide origin labelling should be mandatory for the reasons other than those related to food quality or consumption.

In concluding that violations of international law fall within consumers’ ethical assessment, the Court seemed to have followed the AG’s assumption that within the meaning of Regulation 1169/2011, “ethical considerations” refers to the broader context than the ingredients or quality of foodstuffs, which consumers may take into account due to, for instance, their religions or social beliefs.<sup>71</sup> Indeed, one can suppose that there is an overlap between ethical considerations and the rules of international law,

<sup>64</sup> *Ibid.*, paras 85-86. Thus, the Court came to this conclusion through invoking consumers’ fundamental rights, rather than their ethical considerations.

<sup>65</sup> Opinion of AG Hogan, *Psagot*, cit., paras 61-68.

<sup>66</sup> Supreme Court of the UK, judgement of 5 February 2014, 2012/0198, *Richardson and another v. Director of Public Prosecutions*.

<sup>67</sup> Generally meaning “information concerning a food and made available to the final consumer by means of a label”, Art. 2, para. 2, let. a), of Regulation 1169/2011; see also Art. 9, para. 1, of the Regulation.

<sup>68</sup> Earlier case law discussing misleading practices under the food information Regulation related, for instance, to the presence of certain ingredients in products, i.e. Court of Justice, judgment of 4 June 2015, case C-195/14, *Teekanne*.

<sup>69</sup> Note that the second question was not addressed by the Court since the first question was answered affirmatively.

<sup>70</sup> Opinion of AG Hogan, *Psagot*, cit., para. 85.

<sup>71</sup> *Ibid.*, paras 50-51.

for instance, where business or State practices violate the internationally acceptable labour rules.<sup>72</sup> But in the absence of earlier case law clarifying the concept of “ethics” in EU consumer law, the AG’s and the Court’s reasoning is insufficient and lacks any justification. In fact, very few examples of the ethical dimension in food law and EU consumer protection relate to animal slaughter, animal welfare or environmental impact of certain foods’ consumption.<sup>73</sup> All this considered, “ethical considerations” under Regulation 1169/2011 are thus likely to have a connection to the quality, ingredients or presentation of foodstuffs, or to its production and processing methods.

Arguably, instead of stretching the scope of the term “ethical considerations” to consumers’ perception of the matters related to international law, the Court should have reviewed the legislative history of Regulation 1169/2011: as a matter of fact, such approach was taken by the Federal Court of Canada, and resulted in a more thorough decision.<sup>74</sup> This exercise would have provided the Court of Justice’s decision with increased legitimacy, as well clarified the objectives of the Regulation.

Finally, the Court’s decision questions the EU selective foreign policy towards products imported from disputed territories: if European consumers consider observance of international law when purchasing products originating in Israeli settlements, why would they not take these considerations into account, for instance, when buying products from Western Sahara that are labelled as “made in Morocco?”<sup>75</sup> In fact, while some Member States understand the mandatory provision of the place of provenance as applicable to products from *all* occupied territories, and not only those from the Israeli

<sup>72</sup> Ethical considerations have also been discussed outside the food safety domain: for instance, in the 2016 Canada-EU Comprehensive Economic and Trade Agreement (CETA), ethical rules implied independence and impartiality of individuals serving on the CETA Tribunal, Art. 8.30 of CETA; cf. M. FRISCHHUT, *The Ethical Spirit of EU Law*, Heidelberg: Springer, 2019, p. 31 *et seq.*

<sup>73</sup> E.g. European Commission, *White Paper on Food Safety*, COM (1999) 719 final; K. MYLONA, P.A. MARAGKOUKAKIS, A.K. BOCK, J. WOLLGAST, S. LOURO CALDEIRA, F. ULBERTH, *Delivering on EU Food Safety and Nutrition in 2050 – Future Challenges and Policy Preparedness*, JRC Science for Policy Report, 2016, available at <https://publications.jrc.ec.europa.eu/repository/handle/JRC101971> (discussing such issues as child labour, environmental sustainability and animal welfare as ethical factors); see also the 2019 Eurobarometer “Food Safety in the EU” (Special Eurobarometer Wave EB91.3), commissioned by the European Food Safety Authority (EFSA), available at [www.efsa.europa.eu](http://www.efsa.europa.eu).

<sup>74</sup> Federal Court of Canada, *Kattenburg v. Canada*, *cit.*, para. 97.

<sup>75</sup> In this regard, the EU policy towards occupied territories is particularly questionable given that the recent Council’s Decision to include Western Sahara into the scope of the EU-Morocco Association Agreement (Council Decision (EU) 2018/1893 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 Member States, of the one part, and the Kingdom of Morocco, of the other part), which would not only allow Saharan products to be labelled as “made in Morocco” but, arguably, also violates EU’s obligations under international law. 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.*

settlements,<sup>76</sup> others consider a country-wide boycott targeting specifically products of Israeli settlements.<sup>77</sup> Such practices, while currently taking place only at the level of parliamentary discussions, eventually risk undermining the EU Common Commercial Policy. In this regard, the Court's decision in *Psagot* is unlikely to satisfy any of the two camps by still "allowing" the EU trade with Israeli settlements and limiting the requirement to provide indication of place of provenance to the Israeli settlements' products.

The idea that the EU is shaping its foreign policy through the arguably, discriminatory customs rules is not novel.<sup>78</sup> In an optimistic scenario, the *Psagot* judgement will induce the EU to reassess its trade policies and technical measures towards disputed territories other than those occupied by Israel. On this occasion, alas, the Court missed an opportunity to reflect on international law considerations in relation to the territories other than Israeli settlements.

## V. CONCLUSION

Origin indications that are misleading are bad from the perspective of consumer protection, and hence need to be addressed under EU consumer law. And while *Psagot* may as well carry some positive consequences, the Court's erroneous reasoning and lack of argumentation render this decision ambiguous and unconvincing.

Among other things, the Court overlooked the relevant provisions of the UCC and the UCPD Directive, demonstrating incorrect application and interpretation of the term "average consumer". Furthermore, the Court's broad understanding of the notion of "ethical considerations" of Regulation 1169/2011 does not appear to be based on the proper reading of this regulation. This selective use of EU law adds to the Court's – already traditional – selective use of international law: for instance, the *Psagot* decision does not address EU obligations under international law, such as the duty of non-recognition (discussed further in this Special Section), or the obligation to ensure respect for international humanitarian law. This upholds the CJEU's contemporary cautious and conditional approach to international law,<sup>79</sup> its reluctance to give formal valid-

<sup>76</sup> Motion from the Member of the Parliament Voordewind, 14 November 2019.

<sup>77</sup> Control of Economic Activity (Occupied Territories) Bill 2018, introduced by Irish 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](http://data.oireachtas.ie); see also the Introduction to to this Special Section, namely 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>78</sup> N. GORDON, S. PARDO, *The European Union and Israel's Occupation*, cit., p. 74 et seq.

<sup>79</sup> G. DE BURCA, *Internalization of International Law by the CJEU and the US Supreme Court*, in *International Journal of Constitutional Law*, 2015, p. 1001 et seq.

ity to the principles of international law in the EU and its perseverance to maintain the autonomy of the EU legal order from international law.<sup>80</sup>

Given the absence of previous case law, clarification of “ethical considerations” in the EU consumer law is indeed highly desirable. With the evolution of trade practices and food production methods, the issue of ethics may become central also in technical trade and customs rules. Yet, even if the EU consumer protection goes as far as including broader considerations of international law, with which the author disagrees, the Court’s failure to provide a clear and concise analysis of EU consumer law, food law and customs law undermines the potentially broader objectives of its judgement.

To end on an optimistic note, the aftermath of the *Psagot* ruling may inspire other cases on mandatory provision of the place of provenance for products originating in occupied territories, such as Western Sahara and Nagorno-Karabakh. This, in turn, may shed more light onto misleading practices and eventually, provide the EU with a chance to rectify its inconsistent and discriminatory external trade policies.

<sup>80</sup> B. DE WITTE, *European Union Law: How Autonomous is its Legal Order?*, in *Zeitschrift für öffentliches Recht*, 2010, p. 141 *et seq.*

