

The Obligation to Withhold from Trading in Order Not to Recognize and Assist Settlements and their Economic Activity in Occupied Territories

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Abstract

This article argues that trade embargoes toward illegal settlements in occupied territories are an obligation under general public international law, when such trade primarily benefits the occupant. In this case, the self-executing duty of non-recognition applies. There is no need for an explicit trade embargo imposed by the United Nations Security Council. For, transferring parts of an occupant's civilian population to occupied territories, and gaining economic benefits from occupation, both violate peremptory norms of public international law. Equally, withholding trade is also permitted under the law of the World Trade Organization (WTO). This article shows that according to Article XXVI.5.(a) of the General Agreement on Tariffs and Trade (GATT), the GATT does not apply to illegal settlements. A WTO panel could reach this conclusion, either by denying jurisdiction through finding that the occupying State has no legal standing or by scrutinizing Article XXVI.5.(a) on its merits. However, if a panel would, erroneously, decide the GATT does apply to settlements; trade sanctions could still be allowed in a dispute settlement. This can be done by either accepting the relevant rules of public international law as an independent defense, or by using it in the interpretation of public moral and security exceptions under GATT Article XX and XXI.

Keywords

Trade; embargo; humanitarian law; illegal settlements; WTO; occupation; Israeli-Palestinian conflict; Western Sahara; Morocco; non-recognition; non-assistance; economic relations; sanctions; dispute settlement

Introduction to the Settlement Trade Question

A. Occupation, Settlements and International Trade

Economic factors often lie at the basis, continuation, and resolution of international conflicts. In recent years, the link between trade and conflict has been righteously brought to the forefront, as well being questioned

more explicitly. Legal difficulties with regards to the applicable law in dispute settlement, conflicting legal regimes, and substantive jurisdiction of WTO panels, have been recognized, yet remain unresolved. In most cases, the main legal complications are not so much related to the human rights violation in question as they are to the position of the WTO regime within international public law, and the lack of a fully developed doctrine with regards to the aforementioned legal difficulties.

The following analysis focuses on international conflicts where one State occupies part of the territory of another State or the territory of a people, whose right to self-determination is recognized under international law. This type of conflict is subject to the rights and obligations set out in the international law of occupation, which in itself is largely part of international humanitarian law. Because of its importance in safeguarding the fundamental principle of territoriality, international humanitarian law provides a useful lens to understand how WTO law interacts with other sub-sections of public international law. Because of the importance of the territoriality principle to WTO law, the analysis of how a violation of international humanitarian law would be dealt with in WTO dispute settlement will inevitably touch upon issues of legal standing, jurisdiction, applicable law, and what exactly the differences are in understanding “international responsibility” in a WTO context as opposed to a humanitarian law context. Many of these issues are important in understanding how WTO law can deal with other subsections of public international law.

The trade subject that will be addressed throughout this article is not the WTO-member occupying State as such, but rather the parts of the occupant’s population that have been transferred to the occupied territory, henceforth referred to as “settlements”. This article refers to both civilian and military settlements in occupied territories. The legal questions raised are whether or not other WTO Member States are obliged to cease trade with these settlements and whether trade embargoes are permitted within the context of the WTO. This paper will deal with those questions respectively. First, the study concludes that WTO Member States are obliged under public international law to withhold from trading with settlements. Second, it asserts that WTO Member States are permitted under the WTO regime to impose such trade embargoes.

B. Justification of the Occupation Case Studies

The main conflict analyzed in this article is the Israeli-Palestinian conflict. In the Arab-Israeli Six-Day War of 1967, Israel occupied Eastern-Jerusalem, the

West Bank, and Gaza from the Palestinians. Many of the Israeli practices in the occupied territories have been recognized as illegal under international law. The right of self-determination for the Palestinians has been affirmed for the occupied territories in international law. Despite the applicable international humanitarian law (*infra* section 1), Israel has transferred parts of its own population and encouraged migration to permanent Israeli civilian constructions in the occupied territories. These settlements have also been recognized as illegal under international law. In addition to the International Court of Justice (ICJ) Advisory Opinion on *The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Wall Opinion)¹ and ICRC reports, there have been numerous UN Security Council (UNSC) resolutions, as well as General Assembly resolutions taken under United Nations General Assembly Resolution 377, known as the “Uniting for Peace resolution”.² The wealth of material available on these settlements, which is discussed in detail in section 1 of this paper, are the reason that this particular case will be employed most frequently throughout this paper.

Strong parallels will be drawn to the Moroccan occupation of the Western Sahara. The Moroccan occupation of the Western Sahara involved illegal transfer of the occupant’s population and the exploitation of natural resources in the occupied territory. In 1975, Morocco occupied the Western Sahara in violation of UN Security Council resolutions and against the recognition of Western Sahara’s right to self-determination by the ICJ in its Advisory Opinion.³ Since, there have been numerous attempts to settle the conflict. Central to the conflict is the illegal economic usage of natural resources (mainly phosphate and fish) in the Western Sahara by Morocco.⁴ Notwithstanding the numerous attempts to end the conflict, the Western Saharan government has unilaterally declared in 2009 to be the sovereign power of an offshore Exclusive Economic Zone.

1. International Legal Obligation to Withhold from Trading with Settlements

This section will address what obligations States have with regards to trade with settlements. It will set out the applicable law stipulating that

¹ Advisory Opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ, 9 July 2004.

² GA Res. 337, 30 November 1950.

³ Advisory Opinion, *Western Sahara*, ICJ, 16 October 1975.

⁴ S. Zunes, *Western Sahara: War, Nationalism, and Conflict Irresolution* (2010), at xxi-xxxvii.

annexation and the obstruction of the right to self-determination are illegal (1.A), that settlements and settlement activity are illegal (1.B), that the economic benefits from occupation are illegal (1.C), and that trade with such settlements that primarily benefit the occupant is illegal (1.D). This will be followed by an analysis of the implications that these illegalities have for third States. In particular, the duty of non-recognition (1.D) includes the legal obligation not to trade with settlements if such trade primarily benefits the occupying State. The first heading is of particular relevance to address the permissibility of embargoes under the WTO regime as it includes the law that will be used by a panel to assess and interpret certain GATT articles, or which it is able to apply as an independent defense.

A. Illegal Annexation and Obstruction of the Right to Self-determination

Despite contestation by many occupying forces, international law is often clear on the illegality of particular occupations. For example, Israel is occupying the land of a people for which the right to self-determination has been repeatedly recognized in international law,⁵ or the land of another State.⁶ Similarly, Morocco is occupying the Western Sahara and always claimed it was part of its territory. However, the ICJ Advisory Opinion⁷ and UNSC Resolution 380⁸ offset this claim and called on Morocco to respect Western Sahara's right to self-determination. The legal status or existence of occupation is less clear in other (alleged) occupations such as the one of South Ossetia and Abkhazia by Russia, and Abyei by Sudan. This indicates that international legal declarations and resolutions are important to create legal certainty regarding the illegalities of the occupation.

In spite of authoritative interpretations of international law, occupying States may contest the status of occupied territories. Some authors have voiced such protests with regard to the Israeli settlements.⁹ They assert that the inclusion of the Occupied Palestinian Territories (OPT) under the area of Israel has become customary over the years. Two reasons have been advanced in favor of this argument with regard to Israel's relations with the

⁵ For example: *Wall Opinion*, *supra* note 1, para. 149.

⁶ In case of Syria and the Golan Heights, the occupation of these territories by Israel has been declared null and void by numerous UN Security Council resolutions, for example: SC Res. 497, 17 December 1981.

⁷ *Western Sahara Opinion*, *supra* note 3.

⁸ SC Res. 380, 6 November 1975.

⁹ S. Pardo and L. Zemer, 'The Qualified Zones in Transition: Navigating the Dynamics of the Euro-Israeli Customs Dispute', 8 *European Foreign Affairs Review* 51 (2003).

European Union (EU). First, the EU has never officially protested this position by Israel. Second, the EU-Israel trade agreement applies between the EU and “the territory of the State of Israel”. Subsequently, it is argued that the territory of the State of Israel is the one over which it holds international responsibility, as is mentioned in the GATT (see *infra* section 2).¹⁰ Both of these arguments are, however, severely flawed. Regarding the first argument, not protesting against a position does not necessarily imply the creation of a custom.¹¹ Therefore, explicit legal protest by the EU is not necessary as the UN Security Council and ICJ have clarified that annexation and settlements are illegal, as is the Israeli obstruction to the execution of the Palestinian right to self-determination. This shows again the severe importance authoritative interpretations of international law carry in occupation-related conflicts. Moreover, the EU itself has said in numerous public statements it regards the Israeli settlements as illegal.¹² With regards to the second argument, the EU has now stated that its preferential trade agreements do not apply to settlements in the occupied territories.¹³ Regardless, it should be noted that even if the trade agreements explicitly included trade from settlements, this would not alter their position under international law. The fact that an agreement that is – or is in part – illegal under international law, but is not subsequently challenged, does not transform it into a valid agreement; neither does it affect the illegality of its consequences.

B. Illegal Transfer of Civilians to Permanent Settlements in Occupied Territories

International law is clear on the illegality of settlements. In the case of Israeli settlements, multiple UN Security Council Resolutions,¹⁴ the

¹⁰ *Ibid.*

¹¹ For the strong requirements for the creation of custom, see: A. Cassese, *International Law* (2005), at 153–169.

¹² EU High Representative for Foreign Affairs and Security Policy Ashton noted on several occasions that “The EU position on settlements is clear: they are illegal under international law and an obstacle to peace.” For example: EUBusiness, ‘EU re-affirms opposition to Israel settlements’, *EUBusiness*, 9 December 2010, <http://www.eubusiness.com/news-eu/israel-palestinians.7j1/> (last accessed 31 June 2012).

¹³ Official Journal of the European Union, *Notice to importers - Imports from Israel into the Community*, 2005/C 20/02, 25 January 2005.

¹⁴ Among others: SC Res. 271, 15 September 1969; SC Res. 446, 22 March 1979; SC Res. 465, 01 March 1980; SC Res. 469, 20 May 1980; SC Res. 471, 05 June 1980; SC Res. 476, 30 June 1980; SC Res. 478, 20 August 1980; SC Res. 484, 19 December 1980; SC Res. 592, 08 December 1986;

International Committee of the Red Cross (ICRC),¹⁵ and the Advisory Opinion by the ICJ confirm the applicability of the Fourth Geneva Convention to the occupied territories, including East-Jerusalem.¹⁶ The Fourth Geneva Convention codifies that no occupying power is allowed to transfer parts of its own civilian population into the occupied territories.¹⁷ In cases of clear violations of this prohibition, the fact that settlements exist *de facto* and are under the control of the occupying State is an issue of non-compliance and enforcement. It does not, however, alter the illegality of such settlements.

C. *Illegal Economic Activity of Settlements*

Under international occupation law, the exploitation of the economy of the occupied territory is prohibited,¹⁸ as is the exploitation of property to benefit the occupying State's economy.¹⁹ The 1907 Hague Regulations, in Article 55, stipulate:

The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estate situation in the occupied territory. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.²⁰

Thus, according to Article 55 the occupant does not acquire property over the mentioned immovable public properties. It can, however, make use of them on the condition that their capital value is safeguarded. In terms of private property, the Hague Regulations set forward that it cannot be

SC Res. 605, 22 December 1987; SC Res. 607, 08 January 1988; SC Res. 636 of 06 July 1989, SC Res. 641, 30 August 1989; SC Res. 672, 12 October 1990; SC Res. 681, 20 December 1990; SC Res. 694, 24 May 1991; SC Res. 726, 06 January 1992; SC Res. 799, 18 December 1992; SC Res. 904, 18 March 1994; SC Res. 1322, 07 October 2000; SC Res. 1435, 24 September 2002.

¹⁵ Conference of the High Contracting Parties to the Fourth Geneva Convention: statement by the International Committee of the Red Cross, 05 December 2001.

¹⁶ *Wall Opinion*, *supra* note 1, para 101.

¹⁷ 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949), 75 UNTS 287, Art. 49(5): The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.

¹⁸ Y. Arai-Takahashi, *The Law of Occupation* (2009), at 169.

¹⁹ S. Koury, 'The European Community and Member States' duty of non-recognition under the EC-Morocco association agreement: state responsibility and customary international law', in Karin Arts and Pedro Pinto Leite (eds.), *International Law and the Question of Western Sahara*, 165 (2007).

²⁰ 1907 Hague 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 Regulation).

confiscated,²¹ and states that pillage is formally forbidden.²² Further, the Regulations set out that movable property can only be confiscated when used for military operations.²³

The international law of occupation has evolved since 1907. In particular the Fourth Geneva Convention further developed limitations on the use of movable and immovable resources by the occupying force. It first does so by the aforementioned prohibition of transferring parts of its own civilian population to the occupied territory.²⁴ This provision is widely regarded as confirming the prohibition on the occupant to use public or private property of the occupied territory to generate economic benefits for itself.²⁵ A strong prohibition on transferring civilians logically implies an *ipso facto* equally strong prohibition of the economic activity such transferred civilians would undertake for the benefit of the occupying State.

Article 46(2) of the Fourth Geneva Convention is authoritatively considered to confirm the Hague Regulation's principle that movable and immovable goods cannot be used for other purposes than military or security needs.²⁶ The Article provides that "restrictive measures affecting their property shall be cancelled, in accordance with the law of the Detaining Power, as soon as possible after the close of hostilities".²⁷ Thus, established treaty law puts strict limitations on the interference of the occupant in the economy of the occupied territory, and on the use of public and private properties. Either the use must be justified because of military needs, or for the benefit of the local occupied population.

In the case of Israel, the Israeli Supreme Court has also confirmed that occupation cannot be used for the economic, national, or social interests of the occupying State. In the older *Beth El* case, the Israeli Supreme Court ruled that civilian settlements were acceptable if they were temporary in nature (a requirement following Article 43 of the 1907 Hague Convention²⁸)

²¹ *Ibid.*, Art. 46.

²² *Ibid.*, Art. 47.

²³ *Ibid.*, Art. 53.

²⁴ GC (IV), *supra* note 17, Art. 49.

²⁵ Permanent Observer Mission of Palestine to the United Nations, *Israel's belligerent occupation of the Palestinian Territory, including Jerusalem and International Humanitarian Law*, paper presented to the Conference of the High Contracting Parties to the Fourth Geneva Convention on Measures to Enforce the Convention in the Occupied Palestinian Territory, including Jerusalem, 15th July 1999.

²⁶ *Ibid.*

²⁷ GC (IV), *supra* note 17, Art. 46(2).

²⁸ Hague Regulation, *supra* note 20, Art. 43: The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his

and if they served the military and security needs of the Israeli State.²⁹ In the *Elon Moreh and Cooperative Society* case, the Israeli Supreme Court again discussed the meaning of the phrase “needs of the army of occupation” in order to rule on the legality of civilian settlements. The Court held that security needs of the army in occupation could never include national, economic or social interests.³⁰ In principle, settlements should thus not engage in any economic activity that benefits the occupant.

It may be argued that through labor opportunities, settlement economics benefit the occupied population. When talking about settlement economics, it might be true in the short-term that some occupied civilians may benefit; a person employed in the Western Sahara will live wealthier and more securely than when unemployed. However, this argument is irrelevant, as there is no such reality of legal settlement economics for the benefit of the occupying State. If some type of specific economic activity of the occupant (including trade with international members) is specifically targeted to primarily benefit the occupied population, then there is no mention of illegal activity. With regard to non-recognition (*vide infra*), the ICJ in the *Namibia* case confirmed that this principle “should not result in depriving the people of Namibia of any advantages derived from international co-operation”.³¹ It suffices to say that this type of economic activity that primarily benefits the occupied population, rather than the occupant, does not belong in the subject matter of this legal opinion.

One could attempt to construct an alternative argument; namely, that the settlements are “legal” settlements for the purpose of serving the “needs of the occupying army” that actually grant benefits to the Palestinian

power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

²⁹ Judgement, *Ayoub [or Sulayman Tawfiq Ayyub] et al. v Minister of Defense et al.* (“*Beth El Case*”), HC 606/78 and HC 610/78, 33(2), Israeli Supreme Court, 1978. English summary in: Y. Dinstein (ed.), *Israel Yearbook on Human Rights* (1979), at 337. Analysed in: Arai-Takahashi, *supra* note 18, at 105.

³⁰ Judgement, *Mustafe Dweikat et al., v the Government of Israel et al.* (“*the Elon Moreh Case*”), H.C. 390/7934(1), 34(1), Israeli Supreme Court, 22 October 1979. English summary in: Y. Dinstein (ed.), *Israel Yearbook on Human Rights* (1979), at 345. Judgement, *A Cooperative Society Lawfully Registered in the Judea and Samaria Region v. Commander of the IDF Forces in the Judea and Samaria Region et al.* (“*A teachers’ Housing Cooperative Society v. The Military Commander of the Judea and Samaria Region*”), H.C. 393/82, 37(4), Israeli Supreme Court, 1984. English summary in: Y. Dinstein (ed.), *Israel Yearbook on Human Rights* (1984), at 306. Both cases analysed in: Arai-Takahashi, *supra* note 18, at 105, 224.

³¹ Advisory Opinion, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276*, ICJ, 21 June 1971, para. 125.

population by employing them during the occupation. Such an argument would contend that this employment is not to be defined as part of the economy, but rather as part of the military needs of the occupying force. But this line of reasoning cannot be maintained under international law. The Fourth Geneva Convention prohibits the requisition of labor that leads to a mobilization of workers in an organization of a military or semi-military character.³²

D. Implicit Call to Cease Trade with Settlements: UNSC Resolution 465

In the case of the Israeli occupation, UNSC Resolution 465 specifically “calls upon all States not to provide Israel with any assistance to be used specifically in connection [sic] with settlements in the occupied territories”.³³ This resolution does not explicitly call for a trade embargo on settlements. However, considering that the passing of such a resolution seems impossible in light of the use of its veto power by the United States, the question one must ask is whether allowing trade with settlements is a form of assistance to the State of Israel in connection with the settlements.

If an occupying State were to initiate a dispute settlement procedure against a trade ban toward products from the settlements, the link between the occupant and the settlements would be made explicit before a WTO panel. Therefore, this would answer the question whether trade with settlements can be seen as a form of assistance to the occupant. It is uncontested that the objectives of liberalizing trade are to allow States of “raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services.”³⁴ Trade and economic development of settlements that would follow from rights and benefits granted to the occupying State through the WTO agreements would mean *assistance to the occupying State that is being used specifically in connection with the settlements*. Not only can UNSC Resolution 465 be seen as *lex specialis*, it serves as an independent defense if a WTO panel were to accept jurisdiction. Equally, Resolution 465 is applicable law that a panel should consider when making a primary assessment of the applicability of the GATT to settlements in occupied territories (*vide infra*).

³² GC (IV), *supra* note 17. Art. 51(4): “In no case shall requisition of labour lead to a mobilization of workers in an organization of a military or semi-military character.”

³³ SC Res. 465, 1 March 1980.

³⁴ 1994 Marrakesh Agreement Establishing the World Trade Organization, No. 31874, Preamble.

An important qualification to the role of UNSC resolutions is their legal status in international law. Resolutions taken under Chapter VII are by definition legally binding. Generally, UNSC resolutions referring to Article 25 of the UN Charter are also binding.³⁵ A full discussion of Article 25 is beyond the scope of this paper and will therefore not be further discussed here. However, not all resolutions refer to Chapter VII or Article 25, often as a result of political considerations. The absence of such reference does not automatically imply that they are not binding on the UN Member States. To interpret a resolution, it is necessary to know the rules of interpretation first. In the case of UNSC resolutions, such rules have not been codified or authoritatively stated by the Council itself or a judicial authority such as the ICJ.³⁶ In the 1971 *Namibia* Advisory Opinion, the ICJ provided the only suggestion on the correct interpretation of UNSC resolutions:

The language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolutions of the Security Council.³⁷

Until a more authoritative understanding of the rules of interpretation of UNSC resolutions develops, combining the *Namibia* elements with elements of treaty interpretation codified in Articles 31 to 33 of the Vienna Convention on the Law of Treaties is the best available method for interpreting UNSC resolutions.³⁸ Argumentation in favor of finding UNSC Resolution 465 binding would likely focus on different elements of that resolution. Of particular relevance is that the resolution states to accept “the conclusions and recommendations contained in the above-mentioned report of the Commission.” In its recommendations, this report of the Security Council Commission writes about the “magnitude of the

³⁵ 1945 Charter of the United Nations, Article 25: “The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”

³⁶ M. Wood, ‘The Interpretation of Security Council Resolution’, in J. Frowein and R. Wolfrum (eds.) *Max Planck Yearbook of United Nations Law* 73 (1998), at 74.

³⁷ South West Africa, *supra* note 31, para 114.

³⁸ This method builds on the excellent work of Wood (1998) who first offered a systematic analysis of UNSC Resolution interpretation. For an overview of case law and support for these elements, see: Wood, *supra* note 36.

problem of settlements” as having an impact on “international peace and security”.³⁹

Further, the context of UNSC Resolution 465 shows Israel had been strongly urged on multiple occasions (and in multiple resolutions) to cease settlement activity. In addition, the political context is one in which the United States felt restricted from using more explicit wording. The language of the resolution is also important. It calls upon all States not to provide Israel with *any* assistance to be used with regards to settlements (emphasis added).⁴⁰ The word “any” signifies the exclusion of the type of assistance that could otherwise have been deemed acceptable. The Resolution also uses the term “determines” when it states that settlement practices violate the Fourth Geneva Convention, right before calling upon States to not support settlements. In this regard, the Resolution “affirms once more” the applicability of the Fourth Geneva Convention, which, as mentioned before, affirms that the occupant cannot gain economic benefits from its occupation. It also “takes into account the need to consider measures for the *impartial* protection of private and public land and property, and water resources” (emphasis added). These notions are related to the use of occupied land and resources for economic benefits. Finally, considering the objectives of free trade, interpreting “*any assistance*” as including trade with settlements that benefits the occupying State can be considered as interpreting the resolution in good faith.

In spite of these arguments in favor of interpreting the Resolution as binding and its words as implying the generation of economic benefits, UNSC resolutions and their interpretation remain a legally and politically sensitive matter. Therefore, it may be more opportune to identify the obligations following the breach of the provisions related to the gain of economic benefits in the core international humanitarian treaties. This issue is discussed in the following section.

E. Obligation of Ceasing Trade with Settlements: Duty of Non-recognition

A key question, subsequent to the establishment of a breach of core humanitarian obligations, is what legal consequences this entails for third States. To date, no court has made any judgment on trading with illegal settlements in occupied territories and, even more generally, on the exact

³⁹ Report of the Security Council Commission established under Resolution 446, 4 December 1979, at para. 57.

⁴⁰ UNSC Res. 465, 1 March 1980, para 7.

status of specific humanitarian obligations in international law relevant to the settlements. The status of these obligations may, however, be important in discussing the third party obligations arising out of a breach of core humanitarian norms. The next section will assess whether the humanitarian norms breached can be regarded as *jus cogens*, whether they have *erga omnes* status, and whether (and when) the duty of non-recognition applies and what this duty implies.

1. Core Humanitarian Obligations as *Jus Cogens*

The ICJ has not explicitly confirmed the *jus cogens* status of relevant core humanitarian obligations, such as the prohibition of transferring the civilian population into occupied territories or gaining economic benefits from occupation. In *Legality of the Threat or Use of Nuclear Weapons*, the Court argued that it was unnecessary to decide on the status of the core humanitarian norms at hand.⁴¹ The Court did, however, state that the fundamental rules of humanitarian law were “to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law”,⁴² and that they are “fundamental to the respect of humanity” and “elementary considerations of humanity”.⁴³

This concept of “intransgressible principles of international customary law” had not been used before. Chetail argues that the Court either suggested that fundamental humanitarian principles were *jus cogens in statu nascendi*, or that it implicitly recognized that they were *jus cogens*, but did not explicitly state this, as the ICJ was not required to do so within the questions referred in this instance.⁴⁴ Chetail convincingly refers to the Separate Opinion of President Bedjaoui, stating that the majority of norms have to be considered as *jus cogens*.⁴⁵ He also notes the Dissenting Opinion of Judge Weeramantry, which notes the humanitarian laws of war have acquired *jus cogens* status.⁴⁶ In addition, Chetail recalls the opinion of

⁴¹ Advisory Opinion, *Legality of the Threat or Use of Nuclear Weapons*, ICJ, 8 July 1996, at para. 83.

⁴² *Ibid.*, para. 79.

⁴³ Merits, *United Kingdom of Great Britain and Northern Ireland v. People's Republic of Albania (Corfu Channel Case)*, ICJ, 9 April 1949, at 22.

⁴⁴ V. Chetail, ‘The Contribution of the International Court of Justice to International Humanitarian Law’, in Bernard et al (eds.), *IRRC* 235 (2003), at 251.

⁴⁵ Declaration of President Bedjaoui, *Legality of the Threat or Use of Nuclear Weapons*, ICJ, 8 July 1996, at para. 21.

⁴⁶ Dissenting Opinion of Judge Weeramantry, *Legality of the Threat or Use of Nuclear Weapons*, ICJ, 8 July 1996, at para 10.

Judge Koroma, who points to the International Law Commission's (ILC) 1980 observation that some rules of humanitarian law impose obligations of the *jus cogens* kind.⁴⁷

In its *Wall* Opinion,⁴⁸ the ICJ does not mention *jus cogens* when assessing the right to self-determination. Nevertheless, the ILC has officially recognized the right to self-determination as *jus cogens* ever since the drafting of Article 53 of the Law of Treaties.⁴⁹ This could point toward Chetail's secondary understanding that it has been unnecessary for the Court to determine the exact status of core humanitarian norms in its rulings so far. In the *Wall* Opinion, the ICJ merely repeats its previous statements, adding that the rules included in both conventions "incorporate obligations which are essentially of an *erga omnes* character".⁵⁰ The meaning of attaching *erga omnes* status to core humanitarian rules and principles is described below.

The concepts used by the ICJ when describing the importance of core humanitarian norms tend to correlate with the wording of the provision dealing with *jus cogens* in the 1969 Vienna Convention on the Law of Treaties:

A peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.⁵¹

In particular the collective concept of "intransgressible principles of international customary law that are fundamental to the respect of humanity" can be, in good faith, interpreted as referring to the existence of *jus cogens* norms.

In addition to some of the judges and the ILC, respected legal scholars also view the core humanitarian norms embedded in the aforementioned treaties – the 1907 Hague Convention and the 1949 Fourth Geneva Convention – as belonging to the set of peremptory norms of international law.⁵² It is the view of the author that, despite an explicit ruling by the ICJ, core humanitarian obligations such as the prohibition of transferring

⁴⁷ Dissenting Opinion of Judge Koroma, *Legality of the Threat or Use of Nuclear Weapons*, ICJ, 8 July 1996, at 574.

⁴⁸ *Wall* Opinion, *supra* note 1.

⁴⁹ International Law Commission, *Yearbook of the International Law Commission* 1966 - Volume II (1966), at 248.

⁵⁰ *Wall* Opinion, *supra* note 1, at para. 157.

⁵¹ 1969 Vienna Convention on the Law of Treaties, Art. 53.

⁵² Cassese, *supra* note 11, at 203.

civilians into occupied territories and gaining economic benefits from occupation, are part of that core and, accordingly, have *jus cogens* status.

As a result, all States have the duty of non-recognition of a situation created by a serious breach of such obligation arising under a peremptory norm. This rule is laid down in the ILC Articles on the Responsibility of States for Internationally Wrongful Acts, Article 41(2): “No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.”⁵³ In its *Wall* Opinion, the ICJ recognized the applicability of the duty of non-recognition to the breach of certain fundamental rules related to the right of self-determination. In addition to recognizing the illegal situation resulting from the construction of the wall, States “are also under an obligation not to render aid or assistance in maintaining the situation created by such construction.”⁵⁴

Commentaries at the time of drafting Article 41(2) explicitly state that the duty of non-recognition does not only include abstention from formal acts of recognition, but also “prohibits acts which would imply recognition”. Trading with settlements that primarily benefit the occupant can be considered an act that implies recognition.

The ILC recognizes that in some respects the duty of non-assistance “may be seen as a logical extension of the duty of non-recognition”. It continues, however, that the obligation has a separate scope of application to actions that would not imply recognition. It refers, for example, to Security Council Resolutions to end Apartheid in South Africa.⁵⁵ While it may thus be plausible to argue that an obligation to abstain from trading with settlements that would benefit the Occupying Power could be seen as part of the duty of non-assistance, this paper, however, mainly deals with non-recognition.

2. Core Humanitarian Obligations as Obligations Erga Omnes

The concepts *jus cogens* and *erga omnes* are related, but different. As Judge Nieto-Navia of the Appeals Chamber for the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) sets out: “Although all *jus cogens* norms are enforceable *erga omnes*, not all *erga omnes* obligations are *jus cogens*.”⁵⁶ Apart from that general rule, there is a

⁵³ 2001 Articles on the Responsibility of States for Internationally Wrongful Acts, UN Doc. A/56/10, Art. 41.

⁵⁴ *Wall* Opinion, *supra* note 1, para. 159.

⁵⁵ *Ibid.*, paras. 113–116.

⁵⁶ R. Nieto Navia, *International Peremptory Norms (jus cogens) and International Humanitarian Law* (2003), at 14.

lack of clarity on the exact meaning of *erga omnes* obligations. As mentioned, in its *Wall* Opinion, the ICJ did not explicitly conclude on a violation of *jus cogens*, but rather confirmed that core rules of international humanitarian law “incorporate obligations which are essentially of an *erga omnes* character”.⁵⁷ As to the consequence of a breach of these norms, the ICJ stated:

Given the character and the importance of the rights and obligations involved, the Court is of the view 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, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction.⁵⁸

This is in line with UNSC Resolution 465, and uses the exact wording of the obligations of third States toward a breach of peremptory norms of international law as described in the Articles on State Responsibility. Indicative of the seriousness of the issue, it was only the second time in its history that the ICJ explicitly concluded that States were obliged not to recognize the existing situation.⁵⁹ Indicative of the importance attached to non-recognition and non-assistance in particular, Judge Weeramantry explained in his dissenting opinion in the *Case Concerning East Timor* that:

It is too late in the day, having regard to the entrenched nature of the rights of self-determination and permanent sovereignty over natural resources in modern international law, for the accompanying duties to be kept at a level of non-recognition or semi-recognition.⁶⁰

3. *The Duty of Non-recognition (and Non-assistance)*

Even before assessing the importance of core humanitarian norms and the application of the duty of non-recognition to their breach, sources of authoritative interpretation in international law have long pointed to the application of non-recognition to the acquisition or occupation of territory resulting from aggression. As early as 1970, in the declaration of Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, it was confirmed that State territories shall not be the object of military occupation or acquisition by another State

⁵⁷ *Wall* Opinion, *supra* note 1, para. 157.

⁵⁸ *Ibid.*, para. 159.

⁵⁹ The first was in its advisory opinion on the presence of South Africa in Namibia. South West Africa, *supra* note 31.

⁶⁰ Dissenting Opinion of Judge Weeramantry, *East Timor (Portugal v Australia)*, ICJ, 30 June 1995, at 123.

resulting from the threat or use of force, nor shall territorial acquisition be recognized as legal.⁶¹ This obligation of non-recognition was repeated in, among others, the 1974 Definition of Aggression,⁶² the 1975 Helsinki Final Act of the Conference of Security and Co-operation in Europe,⁶³ and the 1987 Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations.⁶⁴

When discussing core humanitarian norms, there are many similarities between the legal analysis of the humanitarian obligations breached by the construction of a wall and by the installment and expansion of settlements, and the analysis of their consequences, such as the economic activity engaged in on behalf of such settlements for the benefit of the occupying State. Both threaten the right to self-determination and represent *de facto* annexation. In both cases, fundamental norms from The Hague Regulations and Fourth Geneva Convention are breached. Regarding the objective of free trade, permitting trade with settlements is an act that recognizes and assists to maintain the *de facto* illegal annexation of occupied lands to the territory of the occupant's State.

In his dissent in *East Timor*, Judge Weeramantry offers similar reasoning. He concludes that the “right to permanent sovereignty over natural resources is a basic constituent of the right to self-determination”,⁶⁵ and both these rights are recognized as rights *erga omnes*.⁶⁶ As to the consequences of a violation of an *erga omnes* obligation, he regrets that the Court has never addressed this matter. He finds that such a disregard on behalf of the ICJ of *erga omnes* obligations “makes a serious tear in the web of international obligations, and the current state of international law requires that violations of the concept be followed through to their logical and legal conclusions”.⁶⁷

Most importantly, the obligation of non-recognition has two characteristics that implicitly mandate a trade ban. First, it is a customary obligation, and second, it is a self-executing obligation, which does not need collective

⁶¹ GA Res. 2625 (XXV), 24 October 1970 (Friendly Relations Declaration).

⁶² GA Res. 3314 (XXIX), 14 December 1974, at Art. 5.

⁶³ 1975 Conference on Security and Co-operation in Europe (CSCE) (Helsinki Final Act), 14 ILM 130, at IV.

⁶⁴ GA Res. 42/22, 18 November 1987.

⁶⁵ Dissenting Opinion of Judge Weeramantry, *East Timor (Portugal v. Australia)*, ICJ, 30 June 1995, p. 197.

⁶⁶ *Ibid.*, at 135.

⁶⁷ *Ibid.*, at 129.

action to be triggered. When a State observes a breach of peremptory norms of international law, it does not need action by the United Nations (i.e., in this case a trade embargo under Chapter VII) to not recognize, by any measure or action, the illegality of the situation.⁶⁸ Because of the *erga omnes* character of the right to self-determination, Judge Weeramantry found “[t]he duty to recognize and respect those rights is an overarching general duty, binding upon all States, and is not restricted to particular or specific direction or prohibitions issued by the United Nations”.⁶⁹

While it is contested whether the duty of non-recognition creates positive obligations, it needs to be mentioned that withholding trade in this case should not be seen as a sanction (which is a tool of foreign policy), but rather as correcting an error in international trade relations; namely, trading with internationally recognized illegal settlements. The duty of non-recognition thus includes a negative obligation to refrain from trading with an illegal actor. States trading with settlements benefitting mainly the Occupying Power is thus an issue of non-observance of the duty of non-recognition.

4. *Non-compliance with the Duty of Non-recognition (and Non-assistance)*

The self-executing nature of a customary obligation is to prevent permanent members of the Security Council, or other States protected by them, from being able to breach such norms or to prevent the exercise of the duty of non-recognition by other UN members.⁷⁰ This is often claimed to be the case for the United States with regards to Israel, and for the United States and France with regards to Morocco.⁷¹ It is possible that trade partners such as the EU in the case of Western Sahara and Israeli settlements do not observe their international obligation. This, however, is an issue of non-compliance. Without judging or demanding the cessation of non-compliance, a WTO panel would be expected to know the law and recognize their Member States’ international customary obligations.

It is not inconceivable that trade agreements of some sort would violate the duty of non-recognition and non-assistance. However, when

⁶⁸ I. Brownlie, *Principles of Public International Law* (2003), at 491.

⁶⁹ Weeramantry, *supra* note 65, p. 135.

⁷⁰ Koury, *supra* note 19, at 186.

⁷¹ For Israel, see: J. Mearsheimer and S. Walt, *The Israel Lobby and U.S. Foreign Policy* (2007). For Western Sahara, see: Zunes, *supra* note 4.

fundamental humanitarian principles are *jus cogens in statu nascendi*, the Vienna Convention on the Law of Treaties provides in Article 64 that emerging peremptory norms void any previously existing treaties that conflict with the new norm.

An example of non-compliance is the EU's trade policy with Morocco and Israel. The agreed-upon compromise with Israel allows settlement products in the EU by specifying in the certificate of origin the geographic location of the production. This is contrary to the duty of non-recognition, which is binding upon the EU and its Member States. The EU accepts certificates such as "Ariel (*name of a settlement*) – Israel" for the import of settlement products, thereby accepting a link between a settlement and the State of Israel for customs or trade purposes.⁷² Similarly, the *de jure* ambiguity yet *de facto* inclusion of Moroccan fishing in Western Saharan waters in the EU-Morocco Fisheries Partnership Agreement of 2007 raises serious legal concerns. In this regard, it should be noted that, for example, the United States did make it explicit that Western Sahara is not included in the US-Morocco Free Trade Agreement of 2004.⁷³ More importantly, the fact that the EU allows trade with Moroccan and Israeli produce from occupied territories *at all* is a breach of its obligation of non-recognition.

Finally, doubts may exist whether trade with settlements could be used to encourage negotiations between the occupied and the occupant. In this regard, Judge Al-Khasawneh in his separate opinion in the *Wall* Opinion has emphasized that *erga omnes* obligations cannot be made conditional upon negotiations.⁷⁴

While legally there is a strong case for the application of the duty of non-recognition and non-assistance to trade with settlements, in reality, most States do not observe their obligations for short-term economic or political reasons. This is indicative of the development of *erga omnes* obligations under international law, or as Judge Weeramantry puts it in the *East Timor* case, "[v]iewed realistically, the world of obligations *erga omnes* is still the world of the 'ought' rather than the 'is'".⁷⁵

⁷² G. Harpaz, "The Dispute Over the Treatment of Products Exported to the European Union from the Golan Heights, East Jerusalem, the West Bank and the Gaza Strip - The Limits of Power and the Limits of the Law" 36 *Journal of World Trade* 1049 (2004).

⁷³ Koury, *supra* note 19, at 69.

⁷⁴ Separate Opinion of Judge Al-Khasawneh, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, at 13, p. 107.

⁷⁵ Weeramantry, *supra* note 65, at p. 130.

2. No Violation of WTO Law: Interpretation of GATT Article XXVI.5.(a)

A. No Conflict Between WTO Law and the Duty of Non-recognition

Even though there is an international legal obligation to refrain from trade with settlements, there is a fear that such restraint is still not permitted under WTO rules. Although often (implicitly) claimed, the present author holds that there is no hierarchy between the different formal sources of international law and that the WTO is not a self-contained regime within the system of public international law. In *US-Reformulated Gasoline*, the Appellate Body solidly confirmed, “the General Agreement is not to be read in clinical isolation from public international law”.⁷⁶ International law has to be seen from a unitary point of view. This effectively means that WTO law is only one part of a wider unified yet decentralized system in which States cannot use their trade law rights and obligations as an excuse to break other rules of international law. WTO law accepts general norms of international law such as *pacta sunt servanda*, *lex posterior*, *lex specialis*, the hierarchy with *jus cogens* and UNSC resolutions taken under Chapter VII as legally binding upon UN members. Under these general principles, WTO law is able to interact with other “sub-systems” of public international law.

Fundamental humanitarian norms are, in general, considered to be of an *erga omnes* character.⁷⁷ Therefore, rules of occupation law and international humanitarian law undisputedly will have an effect within WTO dispute settlements. Similarly, customary, self-executing obligations following peremptory norms would not only be applicable, but would often even be overriding WTO rules. From one perspective, this would be useful as, to date, panels have been rather cautious to accept a role for international law outside of the covered agreements in WTO dispute settlements.⁷⁸ WTO panels are less reluctant to do so when the rules have a stronger status in public international law, such as customary rules or UNSC resolutions under Chapter VII. Indicative is the panel’s use of customary rules

⁷⁶ Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, Appellate Body, 20 May 1996, at 17.

⁷⁷ For a firm analysis of the role of the International Court of Justice in the development of this vision, see: G. Zyberi, *The Humanitarian Face of the International Court of Justice: Its Contribution to Interpreting and Developing International Human Rights and Humanitarian Law Rules and Principles* (2008).

⁷⁸ A. Mitchell and D. Heaton, *The Inherent Jurisdiction of WTO Tribunals: The Select Application of Public International Law Required by the Judicial Function* (2009).

of international law embedded in the Vienna Convention on the Law of Treaties.⁷⁹

In case of settlement trade, however, it will not be necessary for a panel to decide whether other public international law rules prevail over WTO law (see section 4). It will also not be necessary to deal with the duty of non-recognition and non-assistance. Rather, a correct interpretation of GATT Article XXVI.5.(a) suffices to find that the WTO rights and obligations do not apply to settlements in occupied territories. Therefore, there is no ground for a panel to find that a banning State has obligations under the WTO vis-à-vis the occupying State in respect of the civilian settlements of this occupying State in occupied territories. GATT Article XXVI.5.(a) decides on the applicability of GATT:

Each government accepting this Agreement does so in respect of its metropolitan territory and of the other territories for which it has international responsibility, except such separate customs territories, as it shall notify to the Executive Secretary to the CONTRACTING PARTIES at the time of its own acceptance.⁸⁰

There are three important elements in this provision that could be used to justify the application of GATT rules to the trade with settlements: (1) settlements belong to the territory of the occupying State; (2) settlements are the international responsibility of the occupying State as understood under GATT; and (3) settlements and the occupying State form a customs territory. In what follows, these three potential grounds to apply GATT to settlements will be dismissed, using references to international law, as described under section 2.

B. Settlements Do Not Belong to the Metropolitan Territory of the Occupant

Recall that the Fourth Geneva Convention explicitly recognizes that illegal settlements do not belong to the metropolitan territory of the occupant, and expressly prohibits the transfer of parts of the civilian population to occupied territories (*vide supra*).⁸¹ For example, the illegality of the

⁷⁹ The panel declared in *Korea-Measures Affecting Government Procurement*, at 7.96: “[...] to the extent there is no conflict or inconsistency, or an expression in a covered WTO agreement that implies differently, we are of the view that the customary rules of international law apply to the WTO treaties and to the process of treaty formation under the WTO.”

⁸⁰ 1994 General Agreement on Tariffs and Trade, 55 UNTS. 194 (GATT).

⁸¹ GC (IV), *supra* note 17, Art. 49(5).

Israeli occupation of the West Bank and settlement activity has been recognized on numerous occasions. However, the territorial application of a treaty is not always easy to determine. Nevertheless, the territorial definition of a Member State is the first question a panel should address. The European Court of Justice (ECJ) has failed to take up this point in the case of Israel. In *Firma Brita GmbH v. Hauptzollamt Hamburg-Hafen*, the Hauptzollamt Hamburg-Hafen, the customs office at the harbor in Hamburg, Germany, denied preferential access to products from a company that was manufacturing them in an Israeli settlement in the occupied West Bank.⁸²

Bartels rightly points out that when the ECJ was asked to rule on the case, they avoided determining whether settlements or the West Bank belonged to the “territory of the State of Israel”, to which the EC-Israel Association Agreement applies. Rather, the Court decided that the Association Agreement does not apply to Israeli produce from the West Bank, as this would infringe upon the competence of the Palestinian customs authorities over West Bank produce granted to them in the EC-PLO Protocol.⁸³ This approach was largely unnecessary, and arguably wrong. Article 207 of the Treaty on the Functioning of the European Union (TFEU) – better known as the former Article 133 TEC on the common commercial policy – establishes that “the common commercial policy shall be conducted in the context of the principles and objectives of the Union’s external action”. These principles and objectives are laid out in TFEU Article 205, which in itself stipulates that the external action will be “conducted in accordance with the general provisions laid down in Chapter 1 of Title V of the Treaty on European Union (TEU)”. This chapter names the rule of law and respect for the principles of the United Nations Charter and international law as part of the set of principles that the Union *shall respect* in the conduct of its external action.⁸⁴ It would have sufficed for the ECJ to refer to these articles and rule that settlements were not part of the “territory of the State of Israel” as is well established in international law (see section 2).

⁸² *Firma Brita GmbH v Hauptzollamt Hamburg-Hafen*, Judgment of the Court (Fourth Chamber) of 25 February 2010, Case C-386/08.

⁸³ L. Bartels, ‘EU Denies Preferences to Products from Israeli settlements’, *EJIL*, 2 March 2010, <http://www.ejiltalk.org/eu-denies-preferences-to-products-from-israeli-settlements/> (last accessed 7 April 2013).

⁸⁴ 2008 Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, Official Journal of the European Union 2008/C 115/01.

C. *The Occupant Does Not Incur International Responsibility Over Settlements as Understood Under GATT*

Whereas territorial application of trade agreements is often defined in terms of statehood, GATT explicitly mentions in Article XXVI:5.(a) that it is applicable to “other territories for which is has international responsibility” as well. This is often used as the main argument in favor of GATT applicability to settlements. Under international law, it is clear that occupants carry certain international responsibilities over the occupied territories. These obligations follow from international humanitarian and human rights law, and are either toward the occupied population or toward the international community (*erga omnes* obligations). The key question is whether or not all rights and obligations that flow from the WTO agreements can also be relied upon by the occupant’s civilian settlements in occupied territory. Are territories for which parties to the WTO incur international responsibility equal to territories for which an occupying force needs to observe certain international responsibilities?

The answer to this question must be no. The interpretation of “international responsibility” does not include occupied territories in clear cases such as the Occupied Palestinian Territories, the Golan Heights and Western Sahara. First, interpretative notes to GATT and their negotiation history hint that the original intention was not to include occupied territories within the territories for which State parties have international responsibility. Second, public international law can be used in the interpretation of “international responsibility” and put limits on the concept, and subsequently on the applicability, of GATT. A WTO panel could use either argumentation.

1. *The Negotiation History of Interpretative Notes to Article XXVI*

What do “territories for which [a WTO Member State] has international responsibility” mean under the GATT? Is “international responsibility” under the GATT to be understood in the same way as it is under international humanitarian law? The negotiation history of Article XXVI:5.(a) provides insight into the envisioned meaning. The analytical index of the GATT recalls that until 1955, an interpretative note to Article XXVI clarified that “territories for which the contracting parties have international responsibility do not include areas under military occupation”.⁸⁵ At first

⁸⁵ Analytical Index of the GATT, *Article XXVI: Acceptance, entry into force and registration*, at 920.

glance, this makes clear the intention not to include occupied territories to those territories to which GATT obligations apply.

However, a final note, although issued with the aim to provide more clarity, leads to some uncertainty:

The applicability of the General Agreement on Tariffs and Trade to the trade of contracting parties with the areas under military occupation has not been dealt with and is reserved for further study at an early date. Meanwhile, nothing in this Agreement shall be taken to prejudge the issues involved. This, of course, does not affect the applicability of the provisions of Articles XXII and XXIII to matters arising from such trade.

These provisions were again deleted on 7 October 1957.⁸⁶

The negotiation history behind both notes shows the original intention behind them. At first a note was submitted by the United States on 17 September 1947,⁸⁷ having in mind the occupation of Germany and Japan after World War II. Generally speaking, the negotiating parties agreed that military occupied territories were not intended to belong to those territories that fall under the international responsibility of contracting parties as understood under GATT. The main discussion point was how this would be translated into an interpretative note. The delegate of Australia, Dr. Coombs, submitted that:

So far as we can see, there is nothing in the Agreement to indicate that the provisions of the Agreement would apply to the occupied territories, and therefore it is no more necessary to say that it shall not apply to them than it is to say that it will not apply to some country which is not a Member of this Committee.⁸⁸

France's delegate, Mr. Royer, summarized the entire discussion on the wording of the note and the consensus on its substance by stating the following:

Mr. Chairman, I think we all agree on the substance of this question: that is to say, that the provisions of the General Agreement should not be extended to

⁸⁶ *Ibid.*

⁸⁷ Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, *Note to Article XXIV*, E/PC/T/W/340, 17 September 1947.

The United States delivered a revised version of this note on the same day: Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, *Final Note*, E/PC/T/W/340. Rev.1, 17 September 1947.

⁸⁸ Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, *Twenty-second Meeting of the Tariff Agreement Committee Held on Wednesday, 17 September 1947 at 2.30 P.M. in the Palais des Nations, Geneva*, E/PC/T/TAC/PV/22, 17 September 1947, at 52–65.

Occupied Territories, but the question is how to translate our words into a text [...] it was always our understanding that the provisions of Paragraph 4 of Article XXVI did not apply to the Occupied Territories and that the territories for which a government has international responsibility did not cover the Occupied Territories.⁸⁹

Representatives of Great Britain, China and the Netherlands were included in a technical discussion about the choice of wording, but did not oppose the intended substance of the note.⁹⁰

Two days later, on 19 September 1947, the discussion continued and the note suggested by the United States was removed to make room for a suggestion that the issue should be subject to study at a later time. This was due to a fear held by some Member States that rigid rules would allow the United States to trade beneficially with its occupied territories for too long. Therefore, they wanted to make sure that consultation (Article XXII) and impairment (Article XXIII) applied.⁹¹ The goal of the discussion was thus to not give the United States a free pass in trading with its occupied territories, to ensure the United States was still aware of its obligations, and provide others with free access to the occupied territories. It was not intended to apply rights arising from the GATT to the United States within its occupied territories.

The final discussion, set for 24 September 1947, was intended to reach a compromise for the text. By that time, the main discord was between the United States and Australia, with the latter wanting a guarantee of free trade with the occupied areas. The United States closed the discussion and opened the way for a compromise by stating:

Nothing in the document commits the Occupying Authorities with respect to their trade with the occupied areas, nor does it commit any other signatory with regard to its trade with those areas. [...] neither has Australia, nor any other country undertaken a commitment here to extend Most-Favoured-Nation treatment to the Occupied Areas. In other words, the answer to Mr. McCarthy's question, so far as we are concerned, is "Yes".⁹²

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, *Twenty-fourth Meeting of the Tariff Agreement Committee Held on Friday, 19 September 1947 at 3 P.M. in the Palais des Nations, Geneva*, E/PC/T/TAC/PV/24, 19 September 1947, at 1-26.

⁹² Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, *Twenty-eighth Meeting of the Tariff Agreement Committee Held on Wednesday, 24 September 1947 at 2.30 P.M. in the Palais des Nations, Geneva*, E/PC/T/TAC/PV/28, 24 September 1947, at 21-41.

With that statement both parties were able to reach a compromise. From one side, the United States was able to continue its “relief efforts” to occupied areas, which were often inconsistent with proper State Trading (this had been the main concern for the United States and the reason it submitted the note⁹³). On the other hand, Australia had secured guarantees that trade with the Occupied Territories remain free. In April 1954 the Secretariat suggested that the final note in which the “applicability of GATT to trade with areas under military occupation was reserved for further study” was unnecessary and could be removed.⁹⁴ The review working party confirmed this suggestion later that year.⁹⁵

2. *Analysis of the Interpretative Notes and Their Applicability to Civilian Settlements in Illegally Occupied Territories*

The political dispute underlying the discussion on the interpretative notes is very different from the one on Israeli Settlements in the OPT, for two main reasons. First, the political and legal status of Germany and Japan after World War II were very different from the status of the OPT now. In the latter case, numerous UNSC resolutions and the ICJ have recognized the Palestinian people’s right to self determination.⁹⁶ Similarly, the right of self-determination of the Western Saharan people has been recognized before the UN and confirmed on several occasions by international bodies.⁹⁷ As such, elements within and consequences of these occupations have been consistently recognized as illegal. Second, the question at hand is that of trade with civilian settlements. These entities have a different position in international law than military occupied territories. Occupied territories do have a position within international law, and the occupant has certain rights and obligations related to the occupation, but

⁹³ *Ibid.*, at 52–65.

⁹⁴ GATT Secretariat, *The Review of the Agreement: Some Advance Notes by the Secretariat*, L/189, 12 April 1954.

⁹⁵ Review Working Party IV on Organizational and Functional Questions, *Legal questions*, W.9/62, 02 December 1954.

⁹⁶ Most notably implicitly recognized in SC Res. 242, 22 November 1967. Repeated in subsequent resolutions and explicitly by the ICJ *Wall* Opinion and repeatedly by United Nations General Assembly resolutions, among others: A/RES/3236 (XXIX), 22 November 1974; A/RES/36/9, 28 October 1981; A/RES/59/179, 03 May 2005; A/RES/65/202, 11 March 2011. It has confirmed the right to self-determination and an independent Palestinian State acting under the Uniting for Peace Resolution to assume its secondary responsibility for international peace and security. Among others, it has confirmed so in GA Res. ES-10-15, 20 July 2004.

⁹⁷ Zunes, *supra* note 4, at 169–190.

settlement activity has no legal validity. The UN Security Council stated as much in Resolution 465, where it declared measures taken by Israel to change the demographic composition or status of the Palestinian territories occupied since 1967 had no legal validity.⁹⁸ Consequently, economic activity by such illegal settlements has no legal validity under public international law either.

3. *Interpretation of “International Responsibility” Using Public International Law*

The negotiating history of GATT Article XXVI should suffice for a panel not to consider illegal civilian settlements of a WTO member as falling under its “international responsibility” as understood under GATT. However, the interpretation of Article XXVI will be stronger if a panel includes the analysis of public international law as set out in sections 2.4 and 2.5. Especially when reference is made to the duty of non-recognition and to UNSC resolutions to limit the applicability of the GATT through the interpretation of the “international responsibility” provision. While it would also be possible to use this law as *lex specialis* in an independent defense (*vide infra*), it should not have to come to this, as a panel should use it in the interpretation of the Article. Because of the *iura novit curia* principle (“The court knows the law”) and because peremptory norms of international law are at stake, it can reasonably be expected the panel will do so automatically.

Law includes both rights and obligations. In the case of responsibility of an occupying force, these two are to be distinguished. While the occupying force has certain obligations, such as guaranteeing safety to civilians in occupied territories, it does not have the right to claim rights for parts of its own civil population that have been illegally transferred to the occupied territories. This would be a fundamental undermining of the unitary character of international law. A panel could refer to the Preamble of the Marrakesh Agreement that states the economic benefits of liberalized trade, and can subsequently find the duty of non-recognition sets limits on the applicability of GATT. It follows that GATT is not in conflict with the duty of non-recognition, and States can respect their duty of non-recognition by withholding trade with settlements.

D. *The Occupant and its Settlements Do Not Form a Customs Territory*

This argument mainly applies to the Israeli occupation of the West Bank in which Israel and the areas under control of the Palestinian Authority form

⁹⁸ UNSC, *supra* note 36. (not sure which footnote this is referring to)

a *de facto* customs territory. The signing of the Paris Protocol on Economic Relations between Israel and the Palestine Liberation Organization (the PLO)⁹⁹ triggered several unprecedented questions regarding international economic and trade law in the case of prolonged occupation. The main legal questions address the relationship between Israel, the areas under control of the Palestinian Authority, and third countries, the latter being either WTO members or members to bilateral trade agreements with either the State of Israel or the Palestinian Authority.¹⁰⁰

While all these matters were legally complex and without precedent, the question related to settlement produce remained untouched, despite it being of high relevance to reveal the invalidity of the customs territory argument to defend settlement trade. The *de facto* existence of a customs territory can indeed raise questions on the roles of State and non-State actors. However, questions concerning trade coming from settlements were not addressed by either the Protocol or the existence of a *de facto* customs union. The fact that settlements are not addressed is made explicit in the Paris protocol itself. It states that the term “areas” refers only to those areas that are under the jurisdiction of the Palestinian Authority, as decided upon in the Oslo Interim Agreement.¹⁰¹

These areas under Palestinian jurisdiction are only a limited proportion of the territory to which the right to Palestinian self-determination is recognized. The territory would have eventually included area A (Palestinian control), area B (joint control), and area C (Israeli control), as decided under the Oslo Agreements. The status of East-Jerusalem was to be agreed upon in the final status negotiations, to be held within 18 months after the inauguration of the Palestinian Council. This never happened; consequently, the whole applicability of the Interim Agreement and Paris Protocol is under question. In conclusion, regarding the question whether the Paris Protocol or the *de facto* existence of a customs territory allows for including settlement trade as a possible object of defense by the State of Israel before the WTO, the answer is clearly in the negative. Settlements are specifically not addressed in the Paris Protocol or the Interim Oslo Agreement, and remain illegal under international law.

⁹⁹ 1994 Gaza-Jericho Agreement ANNEX IV Protocol on Economic Relations between the Government of the State of Israel and the P.L.O., representing the Palestinian people (The Paris Protocol).

¹⁰⁰ T. Cottier, *The Israel-Palestine Protocol on Economic Relations and the Law of the World Trade Organization* (27 February 1997), http://www.mne.gov.ps/epp/EPP1/EPP_WYO_Work/1.pdf (last accessed 14 November 2011).

¹⁰¹ Paris Protocol, *supra* note 99, Art. 1(4); 1995 Israeli-Palestinian interim agreement on the West Bank and the Gaza Strip (The Oslo Interim Agreement).

E. Non-application of the GATT: An Issue of Jurisdiction or Merits?

It is clear from the interpretation of Article XXVI.5.(a) that WTO Member States do not hold any obligations towards an occupying WTO-member, with respect to their illegal settlements in occupied territories. The question then arises whether a panel should come to this conclusion on the merits, or on an assessment of its own jurisdiction over the case. While the result is the same – withholding trade from and to illegal settlements is permissible before the WTO – the question nonetheless remains relevant for WTO Dispute Settlement. Three different legal opinions can be brought forward. The first is the “classic understanding” that the complainant does not need a “legal interest” to have legal standing in a dispute. The second is the argument that the WTO does not recognize *actio popularis*; therefore, public international law elements become more important in assessing an occupant’s legal standing, and the question arises whether WTO rights and obligations belong to a WTO Member State’s settlements in occupied territories. The third is that the dispute is not primarily trade-related. The following section will first explain the dispute settlement process and the importance of legal standing, after which the three different legal opinions are briefly analyzed.

1. Dispute Settlement Process

Any member of the WTO can initiate consultations when it considers itself disadvantaged by a measure or set of measures enacted by another WTO member. After consultations, Member States have the right to request the establishment of a panel. The defending party cannot stop such dispute settlement processes, as only a negative consensus of the WTO dispute settlement body is required.¹⁰² This means the Dispute Settlement Body (DSB) automatically establishes a panel unless there is consensus amongst the DSB to the contrary.¹⁰³ This, however, does not preclude the panel – which has limited jurisdiction¹⁰⁴ – from asking, at its own initiative, whether it has jurisdiction over the case in front of it.¹⁰⁵

¹⁰² 1995 Understanding on Rules and Procedures governing the Settlement of Disputes, 1869 UNTS 401, Arts. 6.1, 16.4, 17.14 and 22.6.

¹⁰³ As the Dispute Settlement Body is constituted of all WTO Member States, this has never happened to date. Therefore, there is evidence of “quasi-automaticity” of such DSB decisions.

¹⁰⁴ For an assessment of limited jurisdiction related to human rights in the WTO see: G. Marceau, ‘WTO Dispute Settlement and Human Rights’, 13 *European Journal of International Law* 753 (2002).

¹⁰⁵ The Appellate Body confirmed a panel’s *competence de la competence* in: Appellate Body Report, *United States – Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R,

When assessing their own jurisdiction, panels have to take account of WTO law, as well as all other relevant international law, such as burden of proof, legal standing, or other customary provisions related to State responsibility, and dispute settlement for which WTO law is not *lex specialis*.¹⁰⁶ Parties to the dispute are allowed to put forward certain arguments that may undermine the panel's jurisdiction. Though it is expected the judge knows the law (*iura novit curia*), it is possible that panels in practice do not have access to sufficient information or accurate understanding of complicated legal matters.¹⁰⁷ If a disputing party raises an argument that successfully challenges a panel's jurisdiction, the presumption of competence is rebutted and a panel should refrain from exercising jurisdiction.

Only when a member to a treaty has legal standing can there be a legally valid dispute under that treaty. Thus, if there is no legally valid dispute under a certain treaty, there can be no exercise of subject-matter jurisdiction related to that treaty.¹⁰⁸ Only parties who have legal standing can invoke a panel's jurisdiction.

2. WTO Members Do Not Need a "Legal Interest" to Have Legal Standing

The first interpretation of legal standing is founded upon the Appellate Body's ruling in *EC-Bananas*,¹⁰⁹ which assessed the right of the United States to bring claims in the case. The Appellate Body confirmed the earlier ruling of the panel:

Neither Article 3.3 nor 3.7 of the DSU nor any other provision of the [Dispute Settlement Understanding (DSU)] contain any explicit requirement that a Member must have a "legal interest" as a prerequisite for requesting a panel. We do not accept that the need for a "legal interest" is implied in the DSU or in any other provision of the WTO Agreement.¹¹⁰

The Appellate Body continued that it does recognize a requirement of "substantial trade interest" under Article 4.11 if a Member wishes to join in multiple consultations, and "a substantial interest" requirement under

26 September 2000, at para. 54; Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States*, WT/DS132/AB/RW, 21 November 2001, at para. 36.

¹⁰⁶ J. Pauwelyn, *Conflict of Norms in Public International Law* (2003), at 448.

¹⁰⁷ To reduce the possibility of such a situation occurring, judges with experience in public international law are increasingly being appointed to WTO panels.

¹⁰⁸ T. Gazzini, 'The Legal Nature of WTO Obligations and the Consequences of their Violation', 17 *European Journal of International Law* 723 (2006).

¹⁰⁹ Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, 25 September 1997.

¹¹⁰ *Ibid.*, para. 132.

Article 10.2 of the DSU if a Member wishes to be a third party. These standards, however, do not apply to parties to the dispute.¹¹¹

Trade law scholars are divided when it comes to the exact meaning of these words and their consequence on WTO litigation. For Matsushita, Mavroidis and Schoenbaum, this implies that all WTO members have an interest in a breach of a provision of the WTO agreements. This would simply mean that the WTO recognises *actio popularis*.¹¹² This is closely related to their vision that WTO obligations are integral in nature. If the words of the Appellate Body are taken literally, and there is no need for a “legal interest” to have standing, an occupying State has the right to ask for interpretation of the WTO agreements on a ban towards its settlements in occupied territories by another WTO Member State. Because of quasi-automaticity and the interest the occupant has in the economic performance of its settlements in occupied territories, the occupying State would have legal standing in the WTO, and the panel would accept jurisdiction over the case. Subsequently, the panel would assess whether or not WTO obligations are owed to settlements. The legal analysis as given above is then an issue for the merits. A WTO panel would accept jurisdiction and then interpret the “international responsibility” provisions first. They would recognize that WTO obligations do not belong to settlements and permit the cessation or withholding of trade therewith.

3. *WTO Members Do Need a “Legal Interest” and WTO Rights and Obligations Need To Be Owed to That Member’s Settlements in Occupied Territories*

At first sight, the Appellate Body’s ruling in *EC-Bananas III* seems to clearly refer to the recognition of *actio popularis*. Some scholars, however, argue this is a misunderstanding. Analyzing the meaning of “legal interest” in international case law and the ILC Final Draft Articles, Pauwelyn comes to the conclusion that more than a legal interest is needed for standing; namely a State must prove it has a “legal right”. He later argues that the Appellate Body must have not implied the ordinary meaning of “legal interest” (interest to see the law abided by), but rather something more consequential, like “a requirement of proof of actual damage or trade diversion”.¹¹³

¹¹¹ *Ibid.*, para. 132.

¹¹² M. Matsushita, P. Mavroidis and T. Schoenbaum, *The World Trade Organization. Law, Practice, and Policy* (2004), at 26–27.

¹¹³ J. Pauwelyn, *The Nature of WTO Obligations*, Jean Monnet Working Paper 1/02, 2002, at 14–18.

In Pauwelyn's interpretation, for a "member to have standing, the inconsistent measure must, at least in theory, apply to the trade of that member". Therefore, Pauwelyn finds that the WTO does not recognize *actio popularis*. As the finding of *actio popularis* is closely linked to an understanding of WTO obligations as integral obligation, Pauwelyn's understanding is closely linked to his view of WTO obligations as bilateral in nature.¹¹⁴

Under Pauwelyn's reading, public international law acquires more importance in the interpretation of the requirements for legal standing of WTO members. The Articles on State Responsibility¹¹⁵ become an elementary source for the interpretation of certain issues, such as legal standing, and can be used when WTO law does not set out specific rules.¹¹⁶ This is where Pauwelyn diverges from Mavroidis, et al. For the latter, the Appellate Body has confirmed the existence of WTO rules on legal standing ("no legal interest" is required), and therefore Article 3 of the DSU precludes the applicability of the customary rules embedded in the Articles on State Responsibility. However, Pauwelyn supports the idea that other international law is used to *assess jurisdiction* exactly to assure that a panel abides by its limited jurisdiction in *exercising its jurisdiction*. In the first instance, the 2001 Articles on State Responsibility would provide guidance.

(a) Legal Standing of the Complainant as Understood under the 2001 Articles on State Responsibility

The 2001 articles on State Responsibility declared that in case of bilateral obligations, a "State is only entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to that State individually".¹¹⁷ Thereby, the International Law Commission puts emphasis on the ownership of the obligation as a criterion for an injured State to have legal standing. An important criterion for legal standing, then, is whether the obligation is actually owed to the injured State, which is fundamentally different from the question of whether an injured State is member to a treaty and capable of bringing a claim before a (quasi-automatically established) panel. The ultimate question is whether the obligations within a treaty are *owed to* an injured State, not just whether a State is injured. This is highly relevant to an occupant's economic activity in occupied territories.

¹¹⁴ *Ibid.*

¹¹⁵ Articles on State Responsibility, *supra* note 53.

¹¹⁶ DSU, Art. 3.

¹¹⁷ Articles on State Responsibility, *supra* note 53, Art. 42.

(b) The Link Between Non-application of GATT and Legal Standing

From this perspective, the question of whether obligations are owed to the subject entity of a violation complaint is thus central to determining legal standing and the (non-) existence of a dispute. Consequently, there is no reason why a panel should not be able to interpret WTO provisions such as GATT Article XXVI.5.(a) at the jurisdiction stage. If a panel would find that there is no legal standing and hence no legal dispute, declining jurisdiction would be a logical consequence. For those who argue in favor of no jurisdiction, an opposite reasoning makes the core problem even clearer. If a panel would accept jurisdiction, it implies that a violation of a WTO provision is a legal possibility. This, however, is in itself impossible because WTO obligations are not owed to settlements. Therefore, determining whether obligations belong to the subject of the dispute has to be done at the jurisdiction stage. In regular dispute settlements this step is often uncontested as the subject of the dispute is simply the party member to the WTO. In sum, this camp claims that it should be concluded that if occupied territories do not belong to territories for which a WTO member holds international responsibility within a GATT understanding – and it does not – then that member would have no legal standing, which means no legal dispute and no exercise of panel jurisdiction.

4. *It is Not a Trade Dispute*

Finally, it could be argued that even if a WTO panel would not recognize the legal arguments made above, or it would decide not to include UN resolutions, rulings by the ICJ, international humanitarian law, or even peremptory norms of international law to interpret the applicability of GATT, it would still have to refrain from exercising jurisdiction. The question at hand is not primarily trade-related, but instead comes down to the territorial status of settlements and the occupant's economic activity in the OPT and Western Sahara. Accepting substantial jurisdiction over such a question by a WTO panel could be considered legal overstretch.

5. *Conclusion on Legal Standing, Jurisdiction and Applicability of GATT*

While it is important for the future of WTO dispute settlement that a more clear doctrine on jurisdiction and legal standing is developed, it must be concluded that for the case at hand the question whether or not a panel accepts jurisdiction over a “settlement case” is only of secondary importance. Rather, priority should be given to the consistent interpretation of Article XXVI.5.(a), which contains the possibility to have a coherent reading of public international law and WTO law. As important as Articles XX

and XXI are, delineating the applicability of GATT based on peremptory norms of public international law is not only a possibility but also a necessity. Any other ruling from a WTO panel would not be justified, and would harm the position of the WTO within public international law severely.

3. No Violation of WTO Law (2): International Public Law as an Independent Defense

Section 2 provided a full answer to the question of WTO permissibility of trade embargoes against illegal settlements in occupied territories. However, for the sake of completion, sections 3 (independent defense) and 4 (Articles XX and XXI) will deal with the permissibility of trade bans once a panel errs and considers that illegal settlements are included under GATT Article XXVI.5.(a). It cannot be emphasized enough that such a ruling would infringe on public international law.

The first possibility is to apply public international law as *lex specialis* constituting an independent defense in WTO dispute settlement. It is undisputed that *jus cogens* norms are higher in hierarchy than WTO rules and therefore have direct effect within WTO law.¹¹⁸ More specifically, the duty of non-recognition serves as an independent defense when it applies. In occupation cases where case law and UN resolutions are clearer on its application, this argument will be stronger. If in one given case, it would be clear that the duty of non-recognition applies, such an independent defense must lead a panel to the conclusion that trade bans vis-à-vis settlements do not violate GATT Article XI.

The question whether international law outside of WTO law can be applicable in dispute settlements has been systematically discussed among academics. Pauwelyn holds that unlike the ICJ Statute, the DSU does not include an exhaustive list of applicable law in a WTO dispute settlement.¹¹⁹ The only reference to other international law in the DSU is found in

¹¹⁸ Marceau, *supra* note 104.

¹¹⁹ 1946 Statute of the International Court of Justice, 33 UNTS 993, Art. 38(1). The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. 2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

Article 3.2.¹²⁰ The subject matter of this article is the interpretation of provisions of the covered agreements; it does *not* deal with the applicable law outside of interpretation in dispute settlement.¹²¹ However, WTO panels and the Appellate Body have been very cautious of accepting a role for international law outside of the WTO inside WTO dispute settlement. In the ruling in *EC - Measures Affecting Trade in Large Civil Aircraft*, the Appellate Body touched again upon the relationship between treaty interpretation and other public international law. Specifically, it reiterated that “a delicate balance must be struck” between considering a WTO member’s international obligations and ensuring a consistent approach to WTO law amongst all WTO members.¹²²

Clearly, in case of fundamental norms in international humanitarian law and the duty of non-recognition, the balance is not so delicate as international obligations are not owed to *individual* WTO members; rather, as they are *erga omnes*, they are owed to the entire WTO community. However, it would remain unsettling that a trade-related case in which *erga omnes* humanitarian obligations related to occupation clearly apply, such norms would be assessed as applicable law in a dispute, rather than as a basis for the interpretation of Article XXVI.5.(a). The provision in the *EC-Large Civil Aircraft* ruling, after all, pointed to the consistent and harmonious approach to the interpretation of WTO law among all WTO members.

4. Excusing an Otherwise Violation of WTO law: Article XX and XXI Exceptions

If a panel were to err and rule that obligations within the WTO agreements were owed to an occupant’s settlements, an embargo would violate GATT Article XI.(1). If other public international law were not accepted as an independent defense in the dispute, the defendant would likely seek recourse from exceptions within GATT; it could refer both to general exceptions and security exceptions. This analysis is merely theoretical, as if a panel were to arrive at this step, it would have long disregarded peremptory norms of international law and found itself in a difficult position.

¹²⁰ DSU, Art. 3.2.

¹²¹ J. Pauwelyn, ‘The Application of Non-WTO Rules of International Law in WTO Dispute Settlement’, in P. Macrory and M. Plummer (eds.), *The World Trade Organization: Legal, Economic and Political Analysis* (2005), at 1410–1417.

¹²² Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, 18 May 2011, at 363.

Article XX and XXI are only applied after a violation has been found. However, as trade with settlements is illegal, finding a violation of GATT Article XI is paradoxical.

A. Article XX: General Exceptions

The banning State could successfully call upon general exceptions to search for permission for import measures that would otherwise violate Article XI. Article XX allows the adoption of measures that are necessary to protect public morals, or necessary to secure compliance with laws not inconsistent with GATT.¹²³ To qualify for an exception, the banning State must be able to prove that trade measures satisfy the requirements in both the introductory clause (often called “chapeau”) and the specific exception. As the approach decided upon by the panel in *US-Gasoline*, the latter is dealt with first.¹²⁴

1. Public Morals

Is a trade ban necessary to safeguard public morals? This question implies two sub-questions a panel would need to answer. First, are public morals at stake (the content)? And second, is an import ban necessary to protect them (the necessity test)?

Regarding the public morals question, in *US-Gambling*, the panel clarified that public morals “denote standards of right and wrong conduct maintained by or on behalf of a community or nation”.¹²⁵ Indeed, international humanitarian law applies to the entire international community and denotes standards of right and wrong conduct through the rights and obligations laid out in the treaties.¹²⁶ In terms of banning services, both the panel¹²⁷ and the Appellate Body¹²⁸ recognized that due to similarities in wording, previous decisions under GATT Article XX are relevant for analysis of General Agreement on Trade in Services (GATS) Article XVI. It is only

¹²³ GATT, *supra* note 80, at Art. XX.

¹²⁴ Panel Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/R, 20 May 1996, as modified by Appellate Body Report, WT/DS2/AB/R, at 39.

¹²⁵ Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, 20 April 2005, as modified by Appellate Body Report WT/DS285/AB/R, at 236–240.

¹²⁶ For an analysis of ICJ confirmation of this principle in its rulings, see: Chetail, *supra* note 44.

¹²⁷ Panel Report as modified by Appellate Body, *supra* note 125, at 235.

¹²⁸ Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, 20 April 2005, at 97–98.

logical that this finding works in two ways and that the interpretation of public morals under GATS Article XVI is relevant for the similar provision in GATT Article XX.

The necessity test means weighing three factors: (1) the contribution made by the measure to the enforcement of the law or regulation at issue; (2) the importance of the common interests or values protected; and (3) the accompanying impact of the law or regulation on imports or exports.¹²⁹ While a trade ban is obviously the most restrictive measure that can be taken, the Appellate Body found that it could be necessary to protect public morals.¹³⁰ In this case a ban has to satisfy the first two factors; it should contribute to the cessation of Israeli settlement activity *and* the common interests and values are of the highest customary norms related to humanity (see above). A preliminary conclusion that the measure is necessary is present.

The next step is to verify whether there are less trade-restrictive alternatives. Again, considering settlements are illegal under international law, it is hard to imagine that litigation would ever arrive at this question. The answer, therefore, could potentially be a breach of international law in itself. It is not the defending party's obligation to set out every alternative and why each has not worked; the complaining party holds this burden of proof.¹³¹ When assessing whether alternatives are possible, a panel will look at the political attempts made to encourage occupants to comply with international law related to settlements. For example, in Israel, the result would include a longer-term analysis of trends in settlement construction, relying on the most reliable quantitative sources. These analyses would result in the observation of non-compliance and non-cooperation in political initiatives together with a constant growth in settler population since 1967.¹³² The analysis would be similar in the case of Morocco in Western Sahara. Rather than settlement expansion, the trend in increase of Moroccan economic activity in Western Sahara and the consistent opposition and cancellation of diplomatic initiatives

¹²⁹ Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, 10 January 2001, at 50.

¹³⁰ Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, 17 December 2007, at 52–63.

¹³¹ *Ibid.*, at 63–70.

¹³² The settlement population has grown from about 10,000 in 1972, to over 100,000 in 1983, then to 227,000 in 1993, to 387,000 in 2000, and to 507,000 in 2008. For example, see statistics of: Foundation for Middle East Peace, 'Statistics and tables', 2011, http://www.fmep.org/settlement_info/overview.html (last accessed 17 June 2013).

(such as a proposed and planned referendum) would indicate a lack of potential alternatives.¹³³

2. *Secure Compliance with Laws or Regulations*

The banning State would be less likely to resort to Article XX(d). So far, the panel interpreted that this provision does not apply to obligations of WTO Member States under other international agreements. In *Mexico-Taxes on Soft Drinks*, the Appellate Body found that the terms “laws or regulations” usually refers to domestic laws or regulations and does not include WTO Member obligations under an international agreement.¹³⁴ However, one could argue that peremptory norms of international law have direct effect in any legal order and therefore this article could apply to such rules. Because resorting to security exceptions and public morals seems simpler, this defense will not be treated further.

3. *Chapeau*

The trade ban seems to be necessary to protect public morals. To be accepted as a general exception, the ban still needs to satisfy the introductory clause of Article XX. The chapeau prohibits a measure that satisfies the specific exception but constitutes: (1) an arbitrary discrimination between countries where the same conditions prevail; (2) an unjustifiable discrimination between such countries; or (3) a disguised restriction on international trade. It is for the defendant (the banning party) to prove the measure respects these three standards.¹³⁵

In *Brazil-Retreaded Tyres*, the Appellate Body stipulated that an arbitrary or unjustifiable discrimination exists when the discrimination resulting from application of a measure bears no relationship to the accomplishment of the objective.¹³⁶ In the case of Israel, Security Council resolutions, ICRC decisions, and the ICJ *Wall* Opinion determine that settlements are illegal under international law (*vide supra*). At the same time, the international community has been conducting diplomatic efforts for decades

¹³³ See: Zunes, *supra* note 4.

¹³⁴ Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, 24 March 2006, at 28.

¹³⁵ Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, at 55-76; Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW, 21 November 2001, at 35-50.

¹³⁶ Appellate Body, *supra* note 130, at 1527.

with regards to ending settlement construction and the occupation.¹³⁷ However, in reality, these efforts have failed. The Appellate Body's finding in *US-Gasoline* that the United States failed to "explore adequate means" in cooperation with the complainant to settle the dispute without having to resort to trade measures¹³⁸ proves these diplomatic measures are important.

These elements allow the conclusion that a trade ban is not unjustifiable discrimination. Considering the illegality of settlements, it also does not constitute arbitrary discrimination, despite being the most rigid and inflexible measure. A similar analysis can be found for the Moroccan activity in Western Sahara; first, it is not disguised – it is an open restriction on trade. Second, the Appellate Body considered the design, architecture and revealing structure as three elements that could determine whether a measure has protectionist objectives.¹³⁹ A trade ban includes no complicated structures and is straightforward. A trade ban should also include an export prohibition to indicate that there is no intention to gain protectionist, economic benefits from the measures.

B. Article XXI: Security Exceptions

The banning State can possibly be successful by calling upon security exceptions. Article XXI provides that GATT shall not be construed as preventing Member States from pursuing their obligations under the UN Charter "for the maintenance of international peace and security".¹⁴⁰ At first glance, it might seem that this provision is only related to trade-sanctions imposed by the United Nations Security Council under Chapter VII. This view, however, is too limited and incorrect. The issue at stake is one that threatens international peace and security. It is well established that if the Security Council fails to assume its primary responsibility for the maintenance of international peace and security, then the General Assembly can call for an emergency session pursuant to UNGA Resolution 377.¹⁴¹ It is evidential that in its *Wall* Opinion, the ICJ recognized that the

¹³⁷ Both Appellate Body reports in the *US-Shrimp* case confirm that diplomatic efforts by means of negotiations must be conducted in good faith, but that there is no obligation to conclude an agreement.

¹³⁸ Appellate Body, *supra* note 76, at 28.

¹³⁹ Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 1 November 1996, at 29.

¹⁴⁰ GATT, *supra* note 80, Art. XXI.

¹⁴¹ UNGA, *supra* note 5. (not sure which footnote this is referencing).

General Assembly had not acted *ultra vires* by holding an emergency session, and the Resolution was legal under international law.¹⁴² The ICJ's reasoning was simply that certain permanent members of the UN Security Council can veto resolutions under Chapter VII. The fact that GATT Article XXI does not explicitly mention UN Security Council decisions under Chapter VII means there is room to implement obligations under international law, such as the duty of non-recognition. In this case, it would be absurd if a panel reached the point where it must scrutinize Article XXI.

There are, however, other potential cases in which peremptory norms could be at stake, and in which the territorial element is less prevalent. For example, when a WTO Member State uses slavery for the manufacturing of certain products, other WTO members should, under the duty of non-recognition, ban the import of these products. If the UN Security Council does not take action, it still does not grant States the right to violate their obligations under public international law. In such instances it would be useful for the General Assembly to rule under the Uniting for Peace Resolution that the State's action threatens international peace and security. This resolution does not create obligations; rather, it assists in confirming and clarifying the obligations other States have with regards to the violation of peremptory norms of international law.

In the case of the Israeli occupation, due to the veto of a permanent member, the General Assembly called for an emergency session on 24 April 1997. One day later, the General Assembly voted for a resolution that stated:

The repeated violation by Israel, the occupying Power, of international law and its failure to comply with relevant Security Council and General Assembly resolutions and the agreements reached between the parties undermine the Middle East peace process and constitute a threat to *international peace and security*. [Emphasis added]¹⁴³

In the same resolution, it condemned the construction of settlements in the occupied Palestinian Territory. In addition, as mentioned above, the UN Security Council in Resolution 465 has also *accepted* the conclusions and recommendations of a report of the Commission. This report did explicitly state that settlements have an impact on international peace and security. These elements, in combination with the obligations following from the self-executing duty of non-recognition in response to breaches of

¹⁴² *Wall Opinion*, *supra* note 1, para. 14–35.

¹⁴³ GA Res. A/RES/ES-10/2, 25 April 1997 (Illegal Israeli actions in occupied East-Jerusalem and the rest of the Occupied Palestinian Territory).

peremptory norms of international law (see above), would allow the banning State to successfully resort to Article XX.

5. Need for an Interpretative Declaration to GATT Article XXVI.5.(a)

It has been stated multiple times throughout this article that WTO members do not hold any trade obligations toward illegal settlements apart from withholding from trading with them under the duty of non-recognition. Nevertheless, it is unclear how a panel would rule if it were to be confronted with a settlement-related case. It could be valuable for the WTO community to confirm the illegality of trading with settlements outside of a dispute settlement. It can do so by deciding upon an interpretative declaration to GATT Article XXVI.5.(a), which can be enacted by a three-fourths majority decision of the Ministerial Conference.¹⁴⁴ This would clarify any provision in the WTO agreement and will have legal effect from the moment of enactment. Therefore, it is possible to vote that the WTO agreement is not applicable to trade with civilian or military settlements of WTO Member States in internationally recognized occupied territories. Such a provision would effectively and clearly establish that WTO rules do not apply to bans on settlement produce and would strengthen the position of the WTO within, as well as the unitary character of, public international law.

Conclusion

This Article argues that all UN Member States must recognize it is legal obliged to cease trade with illegal settlements in occupied territories. The duty of non-recognition applies to occupation by the threat of force. It is the status of core humanitarian norms in international law, either as *jus cogens* obligations or as *erga omnes* obligations, that gives way to the application of the duty of non-recognition and non-assistance. This paper has found that core humanitarian norms certainly include *erga omnes* obligations and many of them are deemed to be of *jus cogens* status. It also has established that economic activity by an occupant and its settlements in occupied territories, which primarily benefits the occupying State, is a flagrant violation of the core principle of humanitarian law that the occupant

¹⁴⁴ Marrakesh Agreement, *supra* note 34, at Arts. IX.3 and IX.3.2.

cannot transfer parts of the own population to occupied territories and cannot gain economic benefits from its occupation. Trading with such settlements would be an implicit recognition of the legality of settlements and their economic activity. As such, States are under an obligation to refrain from trading with permanent or temporary settlements if such trade primarily benefits the occupant.

To date, most Western States do not observe the obligation of non-recognition through the abstention of trade with settlements in occupation-related conflicts. This is particularly the case for the Israeli occupation of the Palestinian Territory and Golan Heights, as well as for the Moroccan occupation of Western Sahara. The analysis set out in this article may also be significantly relevant to the occupation of Sudan (which currently only holds observer status to the WTO) of the region of Abyei, a contested border region with South Sudan.

Trade measures toward settlements are permissible before the WTO. This article sets out three lines of defense that would amount to allowing trade measures to be taken toward settlements. Because of the “quasi-automaticity” of the establishment of a panel by the DSB, the occupied WTO member would be able to request the composition of a panel. This panel would have to interpret GATT Article XXVI.5.(a) and must consequently find, as is set out above, that it does not apply to settlements in occupied territories. This interpretation is the only one that is consistent with the WTO Member States community’s legal obligations under public international law in general, and those under the duty of non-recognition and non-assistance in particular. Whether this interpretation of GATT Article XXVI.5.(a) can preclude legal standing and WTO jurisdiction, or whether it is an issue for the merits, is of secondary importance.

If a panel were to decide that WTO obligations are owed to the occupant’s settlements and, therefore, the occupant has legal standing, a ban on settlement trade would still be possible on two grounds. First, a panel could accept other public international law as applicable in the conflict. Specifically, it would be able to decide that self-executing obligations under public international law in response to the breach of peremptory norms of international law would excuse the otherwise violation of GATT. Such a conclusion seems paradoxical: how would it be possible for WTO law to apply to entities that are illegal under international law and even breach peremptory norms? Finally, if necessary, trade bans would be permissible under the WTO regime because of public moral and security exceptions.

With regards to WTO dispute settlement, it is possible to clarify the relationship between international humanitarian law and WTO law by giving an interpretative decision. Such a decision would clarify GATT Article

XXVI.5.(a) by, for example, confirming that in line with core principles of international humanitarian law, the WTO Agreements are not applicable to trade with illegal civilian or military settlements of WTO Member States in internationally recognized occupied territories that illegally preclude the exercise of the right to self-determination by the occupied people. The passing of such a decision needs a three-fourths majority of the Ministerial Conference. A positive outcome would strengthen the unitary character of public international law, and the position of the WTO within.

