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WTO Rules for Trade with Disputed Territories

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ABSTRACT

The legality of trade with territories over which sovereignty is disputed has recently come to the forefront of policy and academic discussions due to emerging case law and escalating territorial conflicts. While considerations shaping the debate on economic activities with disputed territories are typically informed by concerns of international law, little is known about international trade and customs rules applicable to these regimes. This article aims to fill this literature gap by inquiring into the rules that apply to trade with disputed territories under the relevant World Trade Organization (WTO) Agreements, in particular the General Agreement on Tariffs and Trade, the Agreement on Rules of Origin, and the Agreement on Technical Barriers to Trade. In a broader sense, it contributes to the understanding of interactions between the WTO and other self-containing regimes of international law, illustrating the challenges that arise from their different approaches to territories.

I. INTRODUCTION

Disputed territories[1] are territories over which sovereignty is contested due to the control of an outside entity and which the international community does not recognize either as parts of these entities or as separate sovereigns. The examples of such territories include regions occupied and annexed by Israel, the Turkish Republic of Northern Cyprus (TRNC), Western Sahara, Taiwan, Hong Kong, the Nagorno-Karabakh region, Transnistria, and, more recently, Crimea and regions in Eastern Ukraine.

Trade with such territories has been a source of many controversies. To name a few, Taiwan's intentions to join the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), announced directly after China's bid to join the treaty, created political tensions among the CPTPP members,[2] and measures that prohibit marking imports from

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[1] This paper uses the terms disputed territories, regions, and regimes interchangeably, as an overarching concept for territories that are occupied or annexed or where self-determination is sought by the local population.

[2] Tsuyoshi Kawase, 'China and Taiwan's Applications to Join the CPTPP and Japan's Response', Discuss Japan (8 February 2022), https://www.rieti.go.jp/en/papers/contribution/kawase/09.html (visited 13 April 2023).

Israeli-occupied regions as 'originating in Israel' were subject to litigation in the European Union (EU) and Canada.[3]

States that trade or are involved in economic relations with these disputed regions typically use a practical trade approach, focusing on *de facto control* over the territory rather than its political sovereignty.[4] Their practice towards imports from these territories is remarkably different. For instance, the EU policy towards trade with Israeli settlements is argued to be selective or even discriminatory,[5] while the USA and the EU maintain different approaches towards Morocco's sovereignty over Western Sahara.[6] Given the recent escalation of territorial conflicts in the Russian neighbourhood, the question of which rules apply to trade with these territories is bound to become increasingly salient.

Quite strikingly, the debate on economic dealings with disputed territories has been largely neglected in the scholarship on international trade. To this day, it remains unclear whether, and on which terms, such regimes can be included in international trade and why the multilateral trading system allows the existence of different and conflicting approaches towards trade with disputed territories.

This article attempts to fill this gap by inquiring into the multilateral trading rules that are most relevant for trade with disputed territories and exploring which avenues, if any, are available to address trade with these territories under the law of the World Trade Organization (WTO). The scope of this research is focused on trade in goods and, in particular, on imports from disputed regions to which international sanctions do not apply. As explained further, one of the main problems lies within characterizing these territories under the relevant WTO Agreements since the WTO defines jurisdictional boundaries as separate customs territories rather than 'sovereign States' and does differentiate between various instances of international territorial conflicts. Accordingly, 'statehood' in the sense of *political* autonomy is decoupled from the territorial application of international trade rules focused on *customs* autonomy.[7]

In a broader sense, this article contributes to the understanding of interactions between different regimes of international law that function as autonomous systems with their own rules, principles, and institutions. In this regard, it highlights the different policy objectives pursued by the WTO and the regimes of occupation and human rights law when dealing with the questions of territory and control, warning that, sooner or later, a WTO panel will have to decide which principles should prevail and which should be set aside.

To concretize the analysis, this article offers three case studies: Israeli settlements in Syria and Palestinian territories, the TRNC, and Western Sahara. These regions were selected because of the extensive coverage of their long-standing territorial conflicts in the literature on international law, which conveys the much-needed historical and legal background necessary to inform the analysis under international trade law. That said, the purpose of this article is not to compare these, or other, disputed territories; rather, it will demonstrate that their classification under

[3] ECJ, Case C-363/18 *Organisation juive européenne and Vignoble Psagot Ltd v Ministre de l'Économie et des Finances* (2019); *Kattenburg v Canada* (29 July 2019) 2019 FC 1003 and *Kattenburg v Canada* 2021 FCA 86.

[4] See Moshe Hirsch, 'Rules of Origin as Trade or Foreign Policy Instruments? The European Union Policy on Products Manufactured in the Settlements in the West Bank and the Gaza Strip', 26 Fordham International Law Journal 572 (2002), 576–584.

[5] Olia Kanevskaia, 'EU Labelling Practices for Products Imported from Disputed Territories', in Antoin Duval and Eva Kassoti (eds), *The Legality of Economic Activities in Occupied Territories* (London: Routledge, 2020), 112–136; Eva Kassoti, 'Trading with Settlements: The International Obligations of the European Union with regard to Economic Dealings with Occupied Territories', T.M.C. Asser Institute for International & European Law, Policy Brief 2017–02 (July 2017), https://ssrn.com/abstract=3001962 (visited 13 April 2023).

[6] See Kristen E. Eichensehr (ed.), 'United States Recognizes Morocco's Sovereignty Over Western Sahara', 115 American Journal of International Law 318 (2021).

[7] Marios Iacovides, 'Topoi of Ambiguity I: WTO Membership without Statehood', in Jure Vidmar and Ruth Kok (eds), *32 Hague Yearbook of International Law* (Leiden: Brill, 2019), 103–133.

international law has little relevance to the application of the WTO Agreements and, in particular, the General Agreement on Tariffs and Trade (GATT)[8] due to the WTO's functional approach to territory.

In the remainder of this article, Section II sketches the relevant rules of public international law and provides a historical background to the three disputed regimes, focusing on their trade administration. Section III proceeds with examining the relevant WTO Agreements and other rules of international trade and attempts to address the three disputed territories under the applicable provisions. Section IV then hypothesizes about the feasibility to implement a rule-based multilateral approach to trade with disputed territories. Section V concludes.

II. BACKGROUND TO TERRITORIAL CONFLICTS

Territories claimed by an occupying power or an ethnic group are intrinsically linked to the questions of sovereignty and statehood. Many leading scholars have analysed and interpreted various instances of territorial conflicts under public international law and international humanitarian law.[9] It is not the aim of this section to summarize this wide-ranging research; instead, it introduces the historical and legal backgrounds against which the three selected case studies unfold.

A. The rules of public international law

In law, 'territory' is typically determined through the jurisdiction of entities that are recognized by the international community as sovereigns over their geographical borders that have been established according to the rules and norms agreed upon in international law.[10] Legal questions pertaining to 'territory' arise against the background of different international conflicts and often revolve around the sovereignty over land and the ethnicity of its inhabitants. There are many avenues through which territories can be acquired, including secession, devolution, or State succession[11]; some territories, however, are acquired by force, for instance through military occupation or annexation, and are claimed by two sovereign States or between a State and a non-State entity.

Occupation occurs when a territory is 'placed under the authority of the hostile army', meaning that a State or an international organization exercises *effective control* over a territory to which it has no sovereign title and to which the sovereign of that territory has not consented.[12] Not all States acknowledge their military and civil presence on a foreign territory as 'occupation'[13] or even lean towards annexation or establishing of proxy regimes.

[8] The GATT 15 April 1994, 1994, Marrakesh Agreement Establishing the WTO, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994).

[9] See, among many others, John Dugard and John Reynolds, 'Apartheid, International Law, and the Occupied Palestinian Territory', 24 European Journal of International Law 867 (2013); Eyal Benvenisti, *The International Law of Occupation* (Oxford: Oxford University Press, 2012); Eliav Lieblich, 'Intervention and Consent: Consensual Forcible Interventions in Internal Armed Conflicts as International Agreements', 29 Boston University International Law Journal 337 (2011); Shane Darcy and John Reynolds, 'An Enduring Occupation: The Status of the Gaza Strip from the Perspective of International Humanitarian Law', 15 Journal of Conflict and Security Law 211 (2010); Yoram Dinstein, *The International Law of Belligerent Occupation* (Cambridge: Cambridge University Press, 2009). Yutaka Arai, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law* (Leiden: Brill, 2009).

[10] Territorial sovereignty is the 'right to exercise therein [its territory], to the exclusion of any other state, the functions of a state' Permanent Court of Arbitration, The Island of Law Palmas, Hague Court Reports 2d 83 (1932), (Perm. Ct. Arb. 1928), 2 U.N. Rep. Intl. Arb. Awards 829. See also Cedric Ryngaert, 'Territory in the Law of Jurisdiction: Imagining Alternatives', in Martin Kuijer and Wouter Werner (eds), 47 *Netherlands Yearbook of International Law* (The Hague: Springer, 2017), 47–82, at 51, on how lawyers take territory as a pre-given political knowledge.

[11] See further James Crawford, *The Creation of States in International Law,* 2nd ed. (Oxford: Oxford University Press, 2007).

[12] Article 2(2) of the Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, 12 August 1949 ('IVth Geneva Convention'); Article 47 of the Hague Regulations Respecting the Laws and Customs of War on Land, 18 October 1907 ('The Hague Regulations'). See also Benvenisti, above n 9, at 4 and 55–56; Tristan Ferraro, 'Determining the Beginning and end of an Occupation under International Humanitarian Law', 94 International Review of the Red Cross 133 (2012), at 134.

[13] That is, in 2008, Russia denied being an occupying power in Georgia, arguing that it did not create any administrative authorities and hence had no sufficient effective control. Territorial conflicts may also take the form of a 'creeping occupation', where the

Occupation is usually accompanied by violence and use of force in breach of various *jus cogens* norms of international law, the IV[th] Geneva Convention, and the Hague Regulations.[14] Both occupying powers and third States have certain obligations towards occupied regimes. Under international humanitarian law, the occupying State has the responsibility to maintain order and public life in the occupied land and administer public properties to the benefit of the local population.[15] In turn, third States have a collective duty of non-recognition and non-assistance to the occupied regimes.[16] The scope of this duty was limited by the International Court of Justice in the 'Namibia exception', pursuant to which the population of an occupied territory cannot be deprived of advantages derived from international cooperation.[17]

Another type of territorial conflict arises between a liberation movement and the State from which this movement seeks to be separated.[18] The right to self-determination of people, i.e. to determine people's own destiny in the international legal order,[19] allows indigenous populations to pursue their economic development and dispose of their resources.[20] In this regard, it is also assumed that exploitation of natural resources in the non-self-governing territories should occur according to the wishes and interests of the people of those territories,[21] which served as a rationale for the recent decision of the European Court of Justice (ECJ), confirming that the Sahrawi population should consent to the application of the EU trade agreement with Morocco to Western Sahara.[22] As in the case of occupation, third States have an obligation *erga omnes* not to recognize the illegal situation created by the denial of self-determination.[23] That said, States are usually reluctant in accepting the self-determination of subnational ethnic groups or linguistic minorities.[24] Furthermore, not all ethnic groups make self-determination claims since some may seek to be united with other sovereign States.[25]

Seeking independence from the sovereigns is linked to the issue of recognition. To be recognized as a sovereign state, an entity needs to comply with the four cumulative criteria identified by the Montevideo Convention on Rights and Duties of States: to have a permanent population, defined territory, government, and capacity to enter into agreements and relationships

territory is controlled by the enemy army, but the extent of occupation is unclear, see Cedric Ryngaert, 'De internationale rechtmatigheid van EU-handselsbetrekkingen met bezette gebieden', 7/8 SEW, Tijdschrift voor Europees en Economisch Recht 351 (2022).

[14] See above n 12.

[15] See the description of the duties of the occupying powers in Section III of the Geneva IV Convention and Articles 63 and 69 of the Protocol I Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3 (Additional Protocol I 1977), Article 55 of the Hague Regulations; and the Internationl Court of Justice (ICJ), Advisory Opinion, Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory (2004) ICJ Rep 136, para 95. See further Adam Roberts, 'What Is a Military Occupation?', 55 British Yearbook of International Law 243 (1984), at 300; Cedric Ryngaert and Rutger Fransen, 'EU Extraterritorial Obligations with respect to Trade with Occupied Territories: Reflections after the Case of Front Polisario before EU courts', 1 Europe and the World: A Law Review (2008), at 10–11.

[16] Article 41(2) Draft Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of Its Fifty-Third Session, the United Nations (UN) the General Assembly Official Record, 56th Sess., Supp. No. 10, at 43 (2001) UN Doc. A/56/10.

[17] ICJ Advisory Opinion, Legal Consequences for States of the Continued Presence of South Africa in Namibia (Southwest Africa) notwithstanding Security Council Resolution 276, ICJ, 21 June 1971, para 125. Note, however, that this case revolved around the recognition of marriage, birth, and death certificates and not the rights that arose from trade agreements.

[18] Article 1(4) Additional Protocol I 1977.

[19] Article 1(2) Charter of the United Nations (26 June 1945).

[20] Article 1(2) of the International Covenant on Civil and Political Rights (16 December 1966). See also Thomas Franck, 'The Stealing of the Sahara', 70 American Journal of International Law 694 (1976).

[21] Article 73 UN Charter, as interpreted by Hans Corell in 2002; however, whether this consent is required under international law is debatable; see Ryngaert, above n 13.

[22] See ECJ, Joined Cases T-344/19 and T-356/19 *Front populaire pour la libération de la Saguia el-Hamra et du Rio de oro (Front Polisario) v Council of the European Union* (2021) (hereinafter: Polisario II).

[23] See Israel Wall Advisory Opinion, above n 15, paras 154–159 and 163.

[24] Rather, States treat self-determination as a legal right to political independence *of States* or *colonial territories* (emphasis added) and not subnational ethnolinguistic groups; David Wippman, 'International Law and Ethnic Conflict on Cyprus', 31 Texas International Law Journal 141 (1996), at 170.

[25] Suzanne Palmer, 'The Turkish Republic of Northern Cyprus: Should the United States Recognize It as an Independent State?', 4 Boston University International Law Journal 423 (1996), at 425, describing the situation at the beginning of the conflict between Greek and Turkish Cypriots.

with other states.[26] However, some territories that (seem to) fulfil these conditions are still not widely recognized as sovereigns, examples being Kosovo and the TRNC. Furthermore, territorial conflicts may run in parallel. States involved in these conflicts often do not agree on factual interpretations,[27] and violations of fundamental norms of international law are often entangled in the politically provocative conduct.[28]

B. Examples of disputed territories: Israeli settlements, Western Sahara, and the TRNC

The differences in the historical settings and application of international law make selecting case studies for this analysis a difficult task. Admittedly, discussing only three territories does little justice to the complexity of the topic and elucidates only a small fraction of disputed regimes; yet, these territories are by far the most studied examples of the long-term territorial, ethnic, and military conflicts, which makes them suitable for this initial analysis under WTO law.

Israel's military and civil presence in its neighbouring regions has garnered much attention among scholars and policymakers. In the past decades, Israel has been expanding its civil settlements beyond its internationally recognized external border, 'the green line',[29] to East Jerusalem and the West Bank, initially belonging to Jordan and, subsequently, Palestine. Since 2005, Israel also held control over the Gaza Strip, a former territory of Egypt (Israel claims to no longer maintain control over this region).[30] Even without its military presence in Gaza, Israel is believed by some to continue subordinating Palestinian territories to its legal requirements.[31] Furthermore, Israel maintains its presence in the Golan Heights, which is accepted by many governments around the world as a Syrian territory but which the USA in 2019 recognized as a part of Israel.[32]

Administration of the disputed territories around Israel is fragmented: in Gaza, for instance, civil and administrative functions are exercised by Hamas,[33] while Israel administers Gaza's main trade channels, i.e. transportation networks, including its territorial waters and airspace.[34] The economic activity in these regions is further governed by the agreements with Israel. The Paris Protocol signed between the Palestinian National Authority (PNA) and Israel in 1994 as a part of the Gaza–Jericho Agreement creating the Palestinian Authority, and the Oslo II Accords, stipulated harmonization of most Palestinian import tariff rates with those of Israel, while allowing Palestine to retain the right to raise the tariff rates or to apply lower rates for goods listed in the annexes,[35] in a way reinforcing its commercial authority over the Gaza Strip and the West Bank. In practice, however, Palestinian trade policy and tariff levels appeared to have been largely determined by Israel,[36] while Israel also controlled entry points for many Palestinian imports

[26] Article 1 of the Montevideo Convention on Rights and Duties of States, 26 December 1933; see further Cedric Ryngaert and Sven Sobrie, 'Recognition of States: International Law or Realpolitik? The Practice of Recognition in the Wake of Kosovo, South Ossetia, and Abkhazia', 24 Leiden Journal of International Law 467 (2011), at 469–472.

[27] Brad R. Roth, 'The Neglected Virtues of Bright Lines: International Law in the 2014 Ukraine Crises', 21 ELSA Journal of International and Comparative Law 317 (2015), at 318.

[28] Ibid, at 323.

[29] US Security Council, Resolution 242: The Situation in the Middle East (22 November 1967) S/RES/242.

[30] As confirmed by the Israel's Supreme Court in *Al-Bassiouni vs Prime Minister* HCJ 9132-07. See however Marco Longobardo, 'The Legality of Closure on Land and Safe Passage between the Gaza Strip and the West Bank', 11 Asian Journal of International law 50 (2021), at 54, stating that since 2009, Israel imposed restrictions for the movement of goods between Gaza and the West Bank based on security reasons.

[31] Marco Guasti, 'Israeli Territory, Settlements and European Union Trade: How Does the Legal and Territorial Jurisdictional Regime That Israeli Imposes throughout Israel-Palestine affect the EU-Israel Association Agreement and EU-Palestinian Authority Association Agreement', 21 The Palestine Yearbook of International Law 3 (2021), at 11–12.

[32] U.S. Mission Israel, 'Proclamation on Recognizing the Golan Heights as Part of the State of Israel', (25 March 2019), https://il.usembassy.gov/proclamation-on-recognizing-the-golan-heights-as-part-of-the-state-of-israel/ (visited 13 April 2023).

[33] Longobardo, above n 30, at 65.

[34] Ibid, at 56.

[35] Article III of Annex IV to Gaza–Jericho Agreement, Protocol on Economic Relations between the Government of the State of Israel and the PLO, Representing the Palestinian People (29 April 1994) A/49/180|S/1994/727.

[36] Claus Astrup and Sébastien Dessus, 'Trade Options for the Palestinian Economy: Some Orders of Magnitude', World Bank Group, Middle East and North Africa Working Paper Series No. 21 (2001), http://documents.worldbank.org/curated/en/232511468771323315/Trade-options-for-the-Palestinian-economy-some-orders-of-magnitude (visited 13 April 2023).

and provided customs clearance and audits for them[37]: for instance, EU exports to the West Bank under the preferential terms of EU–Palestine Interim Association Agreement were routinely rejected by Israeli customs, allegedly requiring exporters to change their paperwork so that the preferential treatment could be sought under the EU–Israel Association Agreement instead.[38] The West Bank and Gaza Strip exports to Israel were also subject to inspections by Israeli authorities, despite the 'de facto customs union' created by the Paris Protocol.[39] Hence, by controlling infrastructure and applying their laws to these territories, Israel appears to seek to integrate the Palestinian economy[40] ('economic annexation').[41]

Less information on trade and civil administration is available for the TRNC and Western Sahara than for territories claimed by Israel, perhaps since the latter gained more attention in scholarly and policy debates. The actual administration of these territories also seems less fragmented since the control over them is claimed 'only' by two parties.

The partition of Cyprus started off in the colonial setting of Britain's administrative control over the island and has evolved into a conflict between two different ethnic communities, Turks and Greeks, either seeking unification with Turkey or Greece or fighting for independence.[42] In 1983, the Turkish Cypriot community declared the TRNC a sovereign State, which was recognized only by Turkey: the international community considers the region a part of the Republic of Cyprus. Because of Turkey's political and economic backing, and due to its strong military presence in the region, the TRNC is often referred to as a proxy regime of Turkey. While Turkey has been previously recognized to exercise 'effective control' over the TRNC and held responsible for its acts,[43] it also plays a significant role in the region's infrastructure, presumably also controlling some trade channels: for instance, because the TRNC is not a Member of the Universal Postal Union, post addressed to its residents is transferred through Turkey.[44] Turkey and the TRNC form a joint economic area for trade and financial matters[45] although no customs union has been officially established between the two parties. Formally, however, the TRNC's external trade may be expected to be governed by Cyprus' (meaning also the EU since Cyprus is an EU Member State) trade agreements and commitments.[46] Among others, the connection with the island's government in trade-related matters appears from the fact that the local administration required authorization from the government of the Republic of Cyprus to issue customs documents and certificates.[47]

Western Sahara is designated as a non-self-governing territory by the United Nations as of 1963. Upon the termination of the Spanish colonial control in 1975, the territory fell under the facto control of Morocco, while some parts of Western Sahara are administered by the

[37] Ibid; see also Oren Gross, 'Mending Walls: The Economic Aspects of Israeli-Palestinian Peace', 15 American University of International Law Review 1539 (2000), at 1599.

[38] Kim Van der Borght and Hisham Awwad, 'Palestine and the World Trade Organization: A Legal Roadmap for Accession', 18 The Palestine Yearbook of International Law 144 (2015), at 174.

[39] Ibid; see also Talia Einhorn, 'Developments in Regional Trade Law: A View from Israel', 15 European Journal of Law Reform 71 (2013), at 77–78.

[40] Guasti, above n 31, at 4.

[41] See Benvenisti, above n 9, at 242.

[42] For historical overview and legal analysis, see Palmer, above n 25.

[43] European Court of Human Rights, *Loizidou v Turkey* (Merits) (1996) 15,318/89 (note, however, that this case was not about trade).

[44] Universal Postal union, 'Member countries', https://www.upu.int/en/Universal-Postal-Union/About-UPU/Member-Countries (visited 13 April 2023).

[45] TRNC Ministry of Foreign Affairs, 'Relations with Turkey', https://mfa.gov.ct.tr/foreign-policy/relations-with-turkey/ (visited 13 April 2023).

[46] At least, the European Economic Community –Cyprus Association Agreement, which was in force before the island become a EU member, was applied to 'the territory of Cyprus'; Agreement establishing an Association between the European Economic Community and the Republic of Cyprus (1973) OJ L 133/2.

[47] See, for instance, ECJ Case C-219/98 *Regina v Minister of Agriculture, Fisheries and Food,* ex parte S.P. Anastasiou (Pissouri) Ltd and Others (2000) ECR I-5267 (Anastasiou II).

Sahrawi Arab Democratic Republic (SADR), represented by the Front Polisario.[48] Most of the world's States generally do not recognize Morocco's sovereignty over Western Sahara and support Sahrawi's right to self-determination[49] although the international community is still far from reaching a consensus on this matter: for instance, the disagreement among the Maghreb countries on Western Sahara allegedly was one of the reasons for the poor performance of the Arab Maghreb Union.[50] Nevertheless, the SADR is a member of some prominent international and regional organizations, such as the African Union. De facto, however, the SADR does not seem to retain extensive control over Western Sahara's economic relationships, which are still largely governed by Morocco.[51]

III. THE APPLICABLE WTO RULES

The three case studies illustrate different instances where the sovereignty over a region is disputed. This article inquires where these territories fit in the multilateral trading regime, if at all. Apart from the obligations of non-recognition and non-assistance, the application of which to economic relations remains contested,[52] occupation and international humanitarian law are silent on matters of cross-border trade: the answer thus should be sought in international trade law.

Trade with disputed regimes covers many aspects, making different WTO Agreements applicable to imports to and exports from disputed territories. Consequently, the questions arise whether to be covered by WTO commitments, disputed territories should accede to the WTO independently or rather be viewed as parts of WTO Members' customs territories (and, if latter, which ones).

Without any pretense of exhaustiveness, this section examines the three most relevant WTO Agreements: the GATT, revealing the possibilities of these regions to be covered by the WTO commitments; the Agreement on Rules of Origin (ARO),[53] explaining which 'nationality' goods imported from these territories should acquire; and the Agreement on Technical Barriers to Trade (TBT),[54] governing technical trade measures that may be applied to these goods at the border by importing WTO Members.

A. The Marrakesh Agreement and the GATT

Pursuant to Article XII (1)(2) of the Marrakesh Agreement,[55] the WTO membership is open to '[a]ny State or *separate customs territory possessing full autonomy in the conduct of its external commercial relations* and of the other matters provided for in this Agreement and the Multilateral Trade Agreements […]' (emphasis added), with the approval by a two-thirds majority of

[48] For historical overview and legal analysis, see George Joffé, 'Sovereignty and the Western Sahara', 15 The Journal of North African Studies 375 (2010), and Sidi M Omar, 'The Right to Self-determination and the Indigenous People of Western Sahara', 21 Cambridge Review of International Affairs 41 (2008).

[49] United Nations General Assembly, Resolution 34/37: Question of Western Sahara (21 November 1979) A/RES/34/37.

[50] WTO, Trade Policy Review: The Kingdom of Morocco. Report by the Government (19 May 2003) WT/TPR/G/116.

[51] See the EU disputes over the national resources expropriation, European Parliament, 'Answer given by Mr Gentiloni on behalf of the European Commission', (26 March 2020), https://www.europarl.europa.eu/doceo/document/E-9-2019-004342-ASW_EN.html (visited 13 April 2023).

[52] For instance, Kyriacou suggests that non-recognition prohibits economic relationship only when there is a clear UN resolution, citing ICJ Namibia as an example, see Nikolas Kyriacou, 'The EU's Trade Relations with Northern Cyprus Obligations and Limits under Public International and EU Law', in Duval and Kassoti, above n 5, 88–111. See, however, Tom Moerenhout, 'The Obligation to Withhold from Trading in Order Not to Recognize and Assist Settlements and Their Economic Activity in Occupied Territories' 3 International Humanitarian Legal Studies 344 (2012).

[53] Uruguay Round Agreement on TBT.

[54] Uruguay Round ARO.

[55] Uruguay Round Agreement establishing the WTO (15 April 1994) (The Marrakesh Agreement).

the WTO Members.[56] Article XXIV:2 GATT[57] further defines customs territory as 'any territory with respect to which separate tariffs or other regulations of commerce are maintained for a substantial part of the trade of such territory with other territories'. Such a definition underscores the substantial separateness from other customs territories, but also the absence of internal tariffs and regulatory barriers,[58] arguably mixing physical, political, and administrative dimensions; at the same time, there is no mention of who should be in control of this territory,[59] meaning, at least in theory, that a separate customs territory can fall under the sovereignty of another State. 'Territory' in the WTO thus has a functional meaning and materializes through the autonomy to conduct external commercial relations and through the authority over customs administration, viewed independently from political power as an authority to exercise trade liberalization goals.[60]

From this perspective, the lawfulness of sovereign claims over a territory should not affect the application of international trade rules. What's more, the WTO allows the existence of multiple and crossing territorial units, illustrated by the parallel membership of the EU and its Member States, and, at least in theory, enables multiple jurisdictional claims.[61] Indeed, territorial units that are not States have been included in the GATT/WTO disputes,[62] most recently in the Panel consultations requested by Hong Kong[63]; these disputes, however, did not trigger the question of territorial sovereignty over these units.

Next to acceding the WTO as separate Members through Article XXIV GATT,[64] customs territories can also join as parts of other sovereign governments by virtue of Article XXVI:5 GATT. This provision was initially intended for colonial powers holding international responsibilities over their overseas territories, and hence, its relevance and application to the current territorial conflicts that involve a great deal of political controversy and ethical dilemmas may seem problematic.[65] At the same time, Article XXVI:5 has the potential to offer a gateway to the multilateral trading system for a number of disputed regions where customs authorities are fragmented or even absent and which would otherwise be left outside the scope of international trade.

1. Article XXVI:5(a) GATT

Article XXVI:5(a) GATT states that territories can become WTO Members through governments that hold international responsibility over them but does not explain when such international responsibility arises nor whether such responsibility is linked to the notion of jurisdiction or, in the case of occupation, the notion of effective control.[66] One may suggest, for instance,

[56] Note that the explanatory note of the Marrakesh Agreement defines 'country' as customs territories, while the GATT refers to 'governments', apparently aiming to enable governments with less than complete sovereignty to become GATT contracting parties. See Kathleen Claussen, 'Sovereignty's Accommodations: Quasi-States as International Lawmakers', in Karen N. Scott, Kathleen Claussen, Charles-Emmanuel Côté and Atsuko Kanehara (eds), *Changing Actor in International Law* (Leiden: Brill| Nijhoff, 2020) vol. 74, retrieved from: https://ssrn.com/abstract=3642982, at 9–10.

[57] Like the ARO and TBT, GATT is an integral part of the Marrakesh Agreement and is binding upon all WTO Member States, see Article II Marrakesh Agreement.

[58] Iacovides, above n 7, at 119.

[59] Ibid, at 120.

[60] Alessandra Arcuri and Federica Violi, 'Reconfigurating Territoriality in International Economic Law', in Martin Kuijer and Wouter Werner (eds), *Netherlands Yearbook of International Law* (The Hague: Springer, 2017) 175–215, at 177.

[61] Ibid, at 185. This, however, should *not* be compared to multiple claims on a single territorial unit since the authority over customs remains limited to a particular 'separate' territory.

[62] Although sometimes as part of other governments, see Rutsel Silvestre J. Martha, 'Capacity to Sue and Be Sued under WTO Law' 3 World Trade Review 27 (2004), at 37, providing the examples *EEC-Quantitative Restrictions against Hong Kong* (12 July 1983), where the UK was formally a complainant, but the investigation was effectively conducted by Hong Kong officials; and in *US-Tuna*, where the Netherlands was formally a complainant, but investigation was conducted by the Netherlands Antilles.

[63] WTO Panel Report, *United States—Origin Marking Requirement,* WT/DS597/R, adopted 21 December 2022.

[64] See Lorand Bartels, 'The UK's Status in the WTO after Brexit' (2016), https://dx.doi.org/10.2139/ssrn.2841747 (visited 13 April 2023), at 17, discussing the example of Cambodia.

[65] Tatsuro Kunigi, 'State Succession in the Framework of GATT', 59 American Journal of International Law 268 (1965), at 272 and 275; see further Bartels, above n 64, at 16.

[66] To compare, the Lisbon Treaty applies to the extended overseas territories of Member States since those are the 'European territories for whose external relations a Member State is responsible'. See Paul James Cardwell and Ramses A. Wessel, 'EU External

that given the WTO's functional approach to the notion of territory, it is the control *over the trade and customs administration* that matters for the purpose of this provision—again, Article XXVI:5(a) is silent in this regard. Furthermore, as illustrated by the following examples, the application of this provision to the territories at issue is problematic from the perspective of public international law.

Suppose Article XXVI:5(a) GATT allows Israel to accept WTO commitments on behalf of the regions under its continuing military and civil occupation since Israel holds international responsibility over them. While Israel's administrative authority over these territories, including their trade and customs relations, does not contradict the understanding of territory under WTO law,[67] it is not acceptable from the perspective of international law, which allocates these territories under the Palestinian or, in the case of the Golan Heights, Syrian authority. In this regard, it has been argued that Article XXVI:5(a) does not apply to territories where the population is transferred to the occupied land, especially since such transfer breaches the norms of international law.[68] It has also been argued that this provision was not intended to cover situations of military occupation although this remains unclear from the GATT's *travaux preparatoires*.[69]

A similar reasoning applies to the TRNC, over which Turkey is assumed to claim international responsibility and where it applies its customs regime. However, since the TRNC is generally considered a part of the Republic of Cyprus by the international community, it can also be reasonably expected to be treated as its customs territory under the WTO. Applying Article XXVI:5(a) to the TRNC hence requires the Republic of Cyprus to cease applying its WTO commitments to the TRNC, which raises issues under Article 29 of the Vienna Convention on the Law of Treaties (VCLT).[70]

Unlike the TRNC, Front Polisario participates in some regional organizations as a separate entity, independent from Morocco,[71] and some States recognize Front Polisario as a sovereign ruler of the region. That said, following the logic of the WTO, Western Sahara is most likely to be covered by Morocco's GATT commitments since trade with the largest part of the region is controlled by the Moroccan customs authorities.[72]

2. *Article XXVI:5(b) GATT*

A government may also accept the GATT on behalf of territories that are 'separate customs territories' or 'territories so expected' by virtue of Article XXVI:5(b) GATT. The question that arises in this regard is to what extent the examined regions are, or are expected to be, truly 'separate customs territories' since the customs rules and practices of the occupying power are de facto applied to their trade relations.

During the British Mandate, the UK accepted the GATT on behalf of Palestinian territories through Article XXVI:5(b) GATT.[73] Upon the Mandate's termination, a succession of GATT obligations by Israel was considered as an option, but this idea never materialized, firstly due

Relations and International Law: Divergence on Questions of Territory', in E. Fahey (ed.), *Framing Convergence with the Global Legal order: The EU and the World* (Oxford: Hart Publishing, 2020) 143–161, at 148. In human rights law, a State's responsibility arises as a consequence of lawful or unlawful military occupation (*Loizidou v Turkey*), but a State's jurisdiction over a sovereign territory may be reduced when this State is prevented from exercising its authority over that territory due to the presence of the foreign government, which is not necessarily limited to a military occupation, European Court of Human Rights, *Ilascu and Others v Moldova and Russia* (2004) 48,787/99.

[67] See, by analogy, Eugene Kontorovich, 'Some State Practice Regarding Trade with Occupied Territories: from the GATT to Today' in Duval and Kassoti, above n 5, 62–87.

[68] Moerenhout, above n 52, at 347–8.

[69] WTO, *WTO Analytical Index:* GATT Article XXVI, at 919; Kontorovich, above n 67, at 70.

[70] Vienna Convention on the Law of Treaties (23 March 1969) vol. 1155–18, 232.

[71] See African Union, 'Member States', https://au.int/en/member_states/countryprofiles2 (visited 13 April 2023), mentioning the membership of SADR.

[72] See above Section II.B.

[73] See *WTO Analytical Index:* GATT Article XXVI, at 1014.

to the objections of contracting parties[74] and, secondly, because it was assumed that Israel was not bound by the previous government's concessions under the law of treaty succession as those concessions were too far-reaching to carry over to a new political entity in the same territory.[75]

While the island of Cyprus was under UK administration until its independence in 1960, there are no records of the UK accepting any trade commitments on behalf of Cyprus. Cyprus, however, has been a Contracting Party of the GATT since 1963, meaning that the territory that is currently designated as the TRNC initially fell under Cyprus' GATT commitments. To the author's knowledge, no changes were communicated with Cyprus' WTO membership in 1995, and the international community still views the TRNC as a part of the Republic of Cyprus. Likewise, the status of Western Sahara as a 'separate customs authority' remains questionable.

It is also worth noting that the 'separate customs territories' may prefer to accede to the WTO on their own terms, rather than under the commitments of other States. In the past decades, the PNA has claimed to have 'functioning autonomous customs, trade and monetary institutions'[76] and has concluded multiple trade agreements with third parties.[77] Despite having these components of a separate customs territory, the PNA is currently not a WTO Member but participates as an observer on an ad hoc basis[78] (and not as an 'observer government' as it initially requested).[79] However, this arrangement only pertains to the territory where Palestinian customs laws apply and thus excludes Palestinian territories that are under de facto Israeli customs rules, dividing single territorial units into separate customs units belonging to different entities. Similarly, it is not improbable that Front Polisario may consider seeking observer status in the WTO as the next logical step to support its independence. Hypothetically, this request to become an observer would have more chances to succeed than the similar request from the TRNC, given most States' favourable view on Sahrawi's self-determination.

3. Article XXVI:5(c) GATT

While the avenues of Article XXVI:5(a) and (b) in theory allow the application of the GATT in non-sovereign regions, they still preclude these regions from becoming independent players in the global trade. In this regard, Article XXVI:5(c) allows a succession of WTO membership if the territory in question acquires full autonomy in the conduct of its external commercial relations. The drafting history of this provision suggests that it was invoked to accommodate the important role of Burma, Ceylon, and Southern Rhodesia, which joined the WTO under the UK's mandate but have since then acquired the autonomy over customs regimes and were able to conduct trade autonomously, albeit lacking political independence. The criteria to establish these territories' autonomy over their customs and external trade regimes were the ability to (i) determine and modify tariffs without the consent of the UK, (ii) apply the GATT without reference to the UK, and (iii) enter contractual relations on commercial matters with foreign governments.[80] This three-prong test later made it into the definition of a 'separate customs territory'. Most importantly, it was sufficient to satisfy these criteria de facto and not de jure.[81] Article XXVI:5(c) thus represents a sort of a compromise by allowing territories whose sovereignty is disputed to have a seat at the multilateral trade table as independent actors without circumventing the will of the government holding the political authority over these regions.

[74] Van der Borght and Awwad, above n 38, at 149.
[75] See Kontorovich, above n 67.
[76] WTO, 'Remarks of the Minister of National Economy of Palestine' (30 November 2009) on file with the author.
[77] See examples in Section III.B.
[78] WTO, The Rules of Procedure for Session of the Ministerial Conference and Meetings (31 January 1995) WT/L/28, Annex 2, stipulates that ad hoc observers can only observe specific ministerial conferences for which the request has been made.
[79] WTO, Palestine—Request for Observer Status (13 April 2010) WT/L/792, which however failed to gain the 2/3 of majority.
[80] See WTO, *WTO Analytical Index:* GATT Article XXVI, at 919–920.
[81] See Iacovides, above n 7, at 115.

However, it is not up to the international community, but the Member that has initially accepted the WTO commitments on behalf of a territory to establish that the 'full autonomy in the conduct of [this territory's] external commercial relation' has been acquired.[82] This adds additional political tensions at the WTO membership-wide level[83] to the, ideally, apolitical GATT,[84] not least because States will unlikely compromise their territorial integrity. But even if no longer operable, Article XXVI:5(c) may still provide some guidance on enabling the participation of newly established, but also occupied, non-sovereign, or disputed territories at the WTO.[85]

Suppose it can be argued that the Israeli settlements in Syria and Palestine, the TRNC and Western Sahara can become independent WTO Members by virtue of Article XXVI:5(c), succeeding the hypothetical GATT obligations of, respectively, Israel, Turkey, and Morocco. Accordingly, the three-prong test of the 'separate customs territory' should be applied, namely whether these territories (i) can determine and modify tariffs without consent of the occupying powers, (ii) can apply GATT independently, i.e. without reference to the State has accepted GATT commitments on their behalf, and (iii) can enter contractual relations on commercial matters with other States.

Regarding the first criterion, and as discussed earlier, Palestinian territories occupied by Israel are presumed to apply Israel's tariffs and customs rules. While it is unclear whether Front Polisario and the Northern Cypriot authorities have 'full autonomy' over the claimed territories, there is strong evidence suggesting that their authorities apply the tariffs of Morocco and Turkey, respectively. Therefore, the first prong of the 'separate customs authority' test already presents challenges for these territories.

According to the second criterion, the territories should be able to apply the GATT on a de facto basis, meaning that they observe its substantial provisions but do not apply the procedural ones.[86] The application of this criterion presupposes that GATT was already applied to these territories in the first place; however, for the territories at issue, it is unclear which Members, if any, have accepted the GATT commitments on their behalf. Furthermore, and as explained earlier, the existence of their own trade rules and (functional) customs authorities in these territories is questionable, let alone the ability to apply these rules independently from the controlling power.

Conversely, the third criterion—entering contractual relationships—seems less problematic to satisfy. Many disputed regimes that lack sovereignty have signed international agreements, even without having been involved in their negotiation process.[87] In our case studies, the occupied Palestinian territories maintain trade agreements with several States,[88] and the Front Polisario has membership in regional organizations. Apart from Turkey, the TRNC does not have trade agreements with other countries: to illustrate, trade between the EU and TRNC typically occurs when the products from Northern Cyprus are transited through the Republic of Cyprus' customs authorities or, otherwise, imported through Turkey.

[82] Unless the State is newly independent, see WTO, *WTO Analytical Index:* GATT Article XXVI, at 920.

[83] See, however, Kim Borght and Awwad, above n 38, at 155, suggesting that Israel is likely not to object Palestine's WTO membership based on its previous experience with Egypt and the interest of all Members to keep WTO non-political. But see also Kim Van der Borght, 'Accession of the Russian Federation to the World Trade Organization: A New Player Joins the Trade Game' 40 Review of Central and East European Law 321 (2015), at 364, on Georgia threatening to veto Russian's accession to WTO over the territorial dispute in Abkhazia and South Ossetia.

[84] Iacovides, above n 7, at 130 suggesting that '[…] GATT and the WTO are perceived as synallagmatic contracts whose system would suffer by dealing with politically sensitive and divisive matters'.

[85] See also Bartels, above n 64, at 17, by analogy for Brexit.

[86] WTO, *WTO Analytical Index:* GATT Article XXVI, at 923.

[87] Claussen, above n 56, at 3034 and 37. By the same token, the GATS applies to territories of WTO Members that are not subject to a schedule, see Matthew Kennedy, 'Overseas Territories in the WTO', 65 International and Comparative Law Quarterly 741 (2016), at 745. However, this also opens avenues for disputed regimes to be coerced under economic pressure into agreements due to unequal bargaining power, see Articles 51–53 of the Vienna Convention, and Palmer, above n 25, arguing that Article 52 of the Vienna Convention leaves open the question of whether force or threat of force also include political and economic pressure.

[88] See Section III.B.

The hypothetical analysis of Article XXVI:5 GATT suggests the theoretical possibility to integrate into the multilateral trading system the regions whose status under international law is ambiguous due to competing claims of territorial rights. But the devil is in the details, and in particular, in the fragmented and changing customs authorities in these territories.[89] The application of Article XXVI:5 GATT thus inevitably supports the further territorial division of disputed sovereigns, even if only for customs purposes. Such practice contributes to the juridification of practices in these regions, creating a potentially dangerous precedent.

The application of Article XXVI:5 GATT is also problematic from the perspective of international law. Even if establishing commercial relationships with disputed regions does not imply their recognition as independent States or the acceptance of the claimant's sovereignty over these regions, it may still create a strong State practice or convey a message of 'tolerance' by turning such territories into legally relevant entities within the international trade regime. It should also be noted in relation to XXVI:5(a) and XXVI:5(b) that the WTO cannot create any rights or obligations for the territories that are not parties to the WTO Agreements,[90] which adds complexity to the application of this provision to the territories at issue.

B. The ARO and rules of origin in the applicable Preferential Trade Agreements

Inherently linked to the concept of territory are origin requirements—rules that convey the goods their economic nationality. As expected from its functional definition of territory, the WTO leans towards a practical trade approach towards rules of origin, focusing on *de facto control* over the territory rather than its political sovereignty.[91] In this regard, rules of origin may be preferential, i.e. according to benefits to certain States or regions as defined in Preferential Trade Agreements (PTAs), and non-preferential, defined in the ARO.

1. The ARO

The ARO provides little insights into the concept of territory: a provision clarifying that the term 'country' shall mean 'the land […] over which a country exercises sovereignty' was proposed during the ARO negotiation rounds, as it was also suggested to include the concept of 'products or activities in territories not subject to the jurisdiction of a single country', but neither of these proposals made it to the final text.[92]

The rule of thumb is that goods get the origin of a State where they are 'wholly obtained'[93]; however, such determination is challenging in today's economic reality where goods are composed or manufactured in multiple countries. In this regard, different methods can be applied to determine a product's origin such as change in tariff classification, change in ad valorem percentages, specific production process rules, or the place of the last substantial transformation.[94] Especially, the latter may be a challenging exercise since disputed regions are usually the geographical neighbours of countries claiming sovereignty over them. To illustrate, wine may be produced within Israel's legal borders from grapes harvested in the occupied region.

[89] Murat Metin Hakki, 'Property Wars in Cyprus: the Turkish Position According to International Law', 15 The International Journal of Human Rights 847 (2011), at 848.

[90] Article 34 Vienna Convention; see also ECJ, Case C-104/16 P *Council of the European Union v Front populaire pour la libération de la saguia-elhamra et du rio de oro* (2016) (Polisario I).

[91] Some parallels may be drawn with constitutive and declaratory theory of recognition; Robert Vance, 'Recognition as an Affirmative Step in the Decolonization Process: The Case of the Western Sahara' 7 Yale Journal of International Law 45 (1980), 63–73.

[92] WTO, Technical Committee on Rules of Origin, WCO Doc. 39.166 (on file with the author).

[93] Article 3(b) ARO.

[94] Moshe Hirsch, 'International Trade Law, Political Economy and Rules of Origin. A Plea for a Reform of the WTO Regime on Rules of Origin', 36 Journal of World Trade 171 (2002), at 575.

2. PTAs

Preferential rules of origin are used to establish whether goods fall within the scope of a PTA and can enjoy its benefits.[95] These rules are codified in trade agreements with countries claiming sovereignty over disputed territories and are linked to the PTAs' territorial scope. The proper analysis of these PTAs would require consideration of any subsequent practices for interpreting these agreements[96] and falls outside the scope of this article; nevertheless, a preliminary assessment of their territorial scope can already provide some interesting observations.

The US–Israel Free Trade Agreement (FTA) has no extensive provisions defining territorial scope and merely refers to 'parties'. While the USA has no trade agreement with the PNA, the Qualifying Industrial Zone (QIZ) established by the USA in 1996 in the Middle East region allowed combining the content of goods produced in Israel with those produced in the West Bank and Gaza Strip, or certain parts of Jordan and Egypt, for the purpose of gaining preferential treatment under the US–Israel FTA; thus, products from occupied territories could enter the USA on the similar conditions as products from Israel as long as they contained input from Israel.[97] In turn, the territorial scope of the EU–Israel Association Agreement refers to Israel's 'internationally recognized borders'[98] and does not apply to products of the West Bank and Gaza Strip, which was also confirmed by the ECJ in *Brita*.[99] The opposite, according to the Court, would result in Palestinian customs authorities neglecting their obligations under the EU–PNA Interim Association Agreement[100] that enables duty-free access for Palestinian goods originating in the West Bank and Gaza Strip into the EU.[101] However, the EU–PNA Agreement, while covering 'the territory of the West Bank and Gaza Strip',[102] only applies to goods produced by *Palestinian* communities in these regions. It follows, then, that products originating in Israeli settlements do not qualify for preferential treatment under either of the two agreements.

The territorial scope of other trade agreements concluded by Israel is rather diverse: the Israel–Turkey FTA applies to 'the customs territories and free trade zones of the Parties'[103]; the Israel–Mexico FTA refers to the 'territories of the parties'[104]; Israel's agreements with Ukraine[105] and Canada[106] apply where 'Israel's customs laws are applied'; and the Jordan–Israel Agreement of 1994 covers '[a]n area under Israeli customs control within the boundaries of the land crossing border at "Sheikh Hussein-Nahar" Hayarden Bridge, shown on the map attached as

[95] The WTO Dispute Settlement Bodies have taken into account PTAs and other trade agreements for the purpose of establishing parties' intent or ordinary meaning of the treaties, see, for instance, WTO, Appellate Body Report, *European Communities—Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, adopted 23 July 1998, DSR 1998:V, p. 2031; and WTO, Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, DSR 2001:I, p. 5.

[96] See also WTO, Appellate Body Report *Japan—Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, p. 97 and Article 29 of the Vienna Convention regarding whether these intentions bind the States.

[97] Pierce Lee, 'Rules of Origin and the Kaesong Industrial Complex: South Korea's Uphill Battle against the Principle of Territoriality', 39 North Carolina Journal of International Law and Commercial Regulation 1 (2013), 25–26, referring to QIZ as an example of unilateral arrangement of how outwards processing for preferential rules of origin can still be possible.

[98] Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the State of Israel, of the other part (2000), L 147, Article 83.

[99] ECJ, Case C-386/08 *Firma Brita GmbH v Hauptzollamt Hamburg-Hafen* (2010) ECR I-01289.

[100] Euro-Mediterranean Interim Association Agreement on trade and cooperation between the European Community, of the one part, and the PLO for the benefit of the Palestinian Authority of the West Bank and the Gaza Strip (1997) L 187/3 (EU–PNA Interim Association Agreement).

[101] Articles 3 and 6 EU–PNA Interim Association Agreement.

[102] Article 73 EU–PNA Interim Association Agreement.

[103] Article 1 Protocol B Turkey–Israel FTA (1996).

[104] Article 2–01 Mexico–Israel FTA (1999).

[105] Article 1.2 (w) (ii) of the Free Trade Agreement Between the Government of the State of Israel and the Cabinet of Ministers of Ukraine (2019).

[106] Chapter 1, Section B Article 1.7 (b) Canada–Israel Free Trade Agreement (1997).

Exhibit A'.[107] Remarkably, while almost all the mentioned trade partners seem to favour the functional definition of the concept of territory and to follow 'practical' trade approach, they also maintain agreements with Palestine[108]: the Palestine Liberation Organisation (PLO) Interim Agreement on Trade with Turkey, for instance, applies to 'the territory of the West Bank and the Gaza Strip'[109] and does not specify whether the territories should be under Palestinian or Israeli jurisdiction.

The territorial question of Western Sahara is absent from the US–Morocco FTA.[110] To the contrary, the EU approach towards trade with Western Sahara has often been criticized.[111] The EU–Morocco Association Agreement applies to the 'the territory of the Kingdom of Morocco',[112] while Protocol 4 of the agreement refers to 'the territory of the community of Morocco'[113] for the purpose of origin acquisition. Nevertheless, the scope of the agreement has been interpreted as covering Western Sahara.[114] In a similar vein, the EU–Morocco Fisheries Partnership Agreement and the EU–Morocco Aviation Agreement, while applicable to the territory under the sovereignty or jurisdiction of Morocco,[115] were also believed to stretch their territorial scope of Western Sahara. Curiously, in the aftermath of the *Polisario* cases, in which the ECJ ruled that the agreements between EU and Morocco do not apply to Western Sahara,[116] the EU amended the Protocols of the Association Agreement so that the Protocols include products originating in Western Sahara but controlled by the customs authorities of Morocco[117]; this was recently overturned by the ECJ in *Polisario II*.

The situation with the TRNC seems rather peculiar since the only trade agreement that the self-proclaimed republic has concluded is the one with Turkey. Before Cyprus' accession to the EU, products of the TRNC were considered as originating in Cyprus under EU–Cyprus Association Agreement and required customs documents to be issued by Cypriot customs authorities: in practice, the TRNC authorities for a long time used the Cypriot documents.[118] The issue of the TRNC also came to the forefront during negotiations for Cyprus' accession.[119] While Protocol 10 to the Accession Act suspended the application of the EU acquis to 'those areas of the Republic of Cyprus in which the Government of the Republic of Cyprus does not exercise effective control', rules governing trade between those territories and the Member States were

[107] Article 1, Treaty of Peace Between the State of Israel and the Hashemite Kingdom of Jordan (1994), UN IL Volume 2042, I-35,325.

[108] For example, Joint Canadian–Palestinian Framework for Economic Cooperation and Trade Between Canada and the Palestine Liberation Organization on Behalf of the Palestinian Authority (1999).

[109] Article 48 Interim Free Trade Agreement between the Republic of Turkey and Palestine Liberation Organization for the Benefit of the Palestinian Authority (2004).

[110] Article 1.2 US–Morocco Free Trade Agreement (2004).

[111] For example, Eva Kassoti, 'The Legality under International Law of the EU's Trade Agreements Covering Occupied Territories: A Comparative Study of Palestine and Western Sahara', CLEER Papers 2017/3 (2017), https://www.asser.nl/media/3934/cleer17-3_web.pdf (visited 13 April 2023); Eugene Kontorovich, 'Economic Dealings with Occupied Territories', 53 Columbia Journal of Transnational Law 584 (2015).

[112] Article 94 Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part (2000) L 70.

[113] Article 13 of Protocol 4 to the EU–Morocco Association Agreement.

[114] See Council Decision 2013/784/EU, 2013 O.J. (L 349) 1. EU customs authorities applied preferences on a de facto basis to products from Western Sahara certified to be of Moroccan origin (Council proposal 11 June 2018). See also European Parliament, 'Parliamentary Questions' (14 July 2011), http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=P-2011-001023&language=SL (visited 13 April 2023).

[115] Articles 2(a) and 11 Council Regulation EC No 764/2006 of 22 May 2006, OJ L141. See also Council Decision 2013/720/EU, 2013 OJ L 328; and Article 1(15) EU–Morocco Association Agreement. Note that for Israel, a similar agreement states 'territory of the State of Israel'.

[116] Making recourse to Article 31(3)(c) Vienna Convention.

[117] See Eva Kassoti, 'The Empire Strikes Back: The Council Decision Amending Protocols 1 and 4 to the EU-Morocco Association Agreement' 4 European Papers 307 (2019).

[118] See the analysis in Stefan Talmon, 'The Cyprus Question before the European Court of Justice', 12 European Journal of International Law 727 (2001).

[119] Reportedly, Turkey was engaged in a ban of some Cypriot products because Turkish Cypriot cannot trade directly with the EU; Toby Vogel, 'MEPs Consider Allowing EU Trade with Northern Cyprus', Politico, 19 May 2010, https://www.politico.eu/article/meps-consider-allowing-eu-trade-with-northern-cyprus/ (visited 13 April 2023).

later clarified by the 'Green Line Regulation',[120] which enabled goods originating in the areas that are not effectively controlled by the Government of the Republic of Cyprus to be imported into the EU on a free trade basis, allowing Turkish Cypriot authorities to issue the necessary customs documents as long as they held an explicit mandate from the authorities of the Republic of Cyprus.[121] Furthermore, the European Commission offered a draft proposal for a Council Regulation on special conditions for trade with the areas where the Republic of Cyprus does not exercise effective control.[122] The draft suggested a preferential regime for Turkish Cypriot products entering the EU Customs Territory and acknowledged that the necessary customs documentation could be issued by Turkish Cypriot authorities[123] but was opposed by the Republic of Cyprus.

It appears that States apply a different standard across PTAs and even use rules of origin as political instruments rather than technical customs norms. The difference in the territorial scope of trade agreements may thus bear far-reaching consequences that do not only affect the application of preferential origin rules but also shape wider policies that go beyond the trade and customs issues.[124] This is especially apparent in the EU, whose policy towards Western Sahara is clearly different in its functional approach from the policy towards territories claimed by Israel, which is centred around the issues of sovereignty and international recognition.[125] An argument can be made, however, that in the absence of any trade agreement between the EU and the SADR, stretching the application of EU commitments towards Morocco to Western Sahara may be the only way to accord those products preferential access to the EU market, contributing to the Sahrawian economy.

C. The TBT Agreement

Once a product's origin is established, it should also be communicated to customs authorities and consumers. Here, imports from disputed territories may face another challenge when an importing State requires specific customs documents or origin labels for their products: to illustrate, the ECJ ruling in *Psagot* prohibits goods imported from the West Bank to be labelled as 'made in Israel'.[126] This, in turn, may give rise to claims of discriminatory treatment under Article IX:1 GATT (origin marking) and Article 2.1 TBT[127] (origin marking and a wider scope of technical measures).[128] Another possible claim may be the breach of Article 2.2 TBT (creating unnecessary obstacles to trade by being more restrictive than necessary to fulfil a legitimate objective).

Articles IX:1 GATT and 2.1 TBT encapsulate the most-favoured-nations (MFN) principle that requires Members to accord products imported from any other Member treatment no less

[120] Council Regulation No. 866/2004 of 29 April 2004 OJ L 161 ('Green Line Regulation').
[121] Ibid, Article 4.
[122] European Commission, Proposal for a Council Regulation on Special Conditions for Trade with those Areas of the Republic of Cyprus in which the Government of the Republic of Cyprus does not Exercise Effective Control, COM (2004) 466 final, 2004/0148.
[123] Ibid, Article 5.
[124] Different and even contrasting definitions of territory are also observed in some Bilateral Investment Treaties, see Markus Beham, 'The Concept of "Territory" in BITS of Disputing Sovereigns', in Tobias Ackermann and Sebastian Wuschka (eds), *Investments in Conflict Zones* (Leiden: Brill, 2020) 139–175, referencing United Nations Conference on Trade and Development (UNCTAD), Scope and Definition. UNCTAD Series on Issues in International Investment Agreements II (2011).
[125] By the same token, not all EU Member States recognize Kosovo as an independent State, yet the EU has a trade agreement with Kosovo.
[126] For further analysis, see the author's previous comments, Olia Kanevskaia, 'Misinterpreting Mislabeling: the Psagot Ruling', 4 European Papers 763 (2020).
[127] See also Avi Bell and Eugene Kontorovich, 'Challenging the EU's Illegal Restrictions on Israeli Products in the World Trade Organization', Kohelet Policy Paper No. 18 (2015), https://en.kohelet.org.il/publication/challenging-the-eus-illegal-restrictions-on-israeli-products-in-the-world-trade-organization (visited 13 April 2023). Curiously, while being an active player when it comes to filing Specific Trade Concerns in the TBT Committee and the Committee on Sanitary and Phytosanitary (SPS Measures), Israel has never issued a formal WTO complaint against the EU of its treatment of settlements' products.
[128] Annex 1.1 TBT Agreement.

favourable than that accorded to *like* products of any other Member.[129] In this regard, the question arises whether the MFN obligation is breached by the requirements that are applied only to some territories: for instance, no labelling rules similar to the ones applicable to West Bank imports were adopted by the EU in relation to Western Sahara or the TRNC. Another avenue would be to claim that the labelling measures are more trade restrictive than necessary to achieve the (non-exhausting list of) the legitimate objectives, as pursuant to 2.2 TBT.

Discussing hypothetical claims under the TBT Agreement requires a more extensive analysis, but even the initial observations make the success of these claims doubtful. Firstly, both IX:1 GATT and 2.1 TBT refer to the territory of a Member, which already requires a broad examination of 'territory' under the WTO. Secondly, the 'likeness' test may present a problem due to its competition-oriented approach[130] since imports from disputed territories are usually not in direct competition. Finally, many labelling measures that could potentially be discriminatory constitute voluntary guidelines or clarifications, rather than mandatory technical requirements.[131] While this, in principle, does not prevent challenging these measures as technical regulations under the TBT Agreement,[132] it may affect the assessment whether less restrictive alternatives that are available.

Intuitively, the issue of origin labelling overlaps with the determination of products' origin in the ARO. However, in the recent decision *US—Origin Marking Requirement*, the Panel ruled that the requirement to use a mark of origin as a trade policy instrument is distinct from the determination of a country of origin for marking purposes.[133] Hong Kong sought consultations against the US measures requiring its imports to be labelled as 'Made in Hong Kong, China', claiming, among others, the breach of IX:1 GATT and 2.1 TBT—discriminatory treatment of Hong Kong imports that is motivated by political rather than technical reasons.[134] The USA was indeed found violating Article IX:1 GATT.[135] Following the Panel's reasoning, the provisions at issue are breached when the label indicates that the product originates in a different WTO Member than where it actually is harvested or manufactured. The Panel, however, emphasized that Hong Kong is an independent WTO Member. As demonstrated in this contribution, this is not the case for many disputed territories. While neither the WTO membership of Hong Kong nor its territorial boundaries were disputed by the parties, this is unlikely to be the case if the dispute related to the TRNC, Western Sahara, or territories occupied by Israel—precisely because none of these territories are Members 'in their own right'.

IV. NEED FOR A HARMONIZED WTO APPROACH TO TRADE WITH DISPUTED TERRITORIES

The WTO lacks clarity and certainty when it comes to the question whether and how should we trade with disputed territories. A harmonized approach is first and foremost prevented by the definition of territory that focuses on the independence over customs' authorities, while establishing this independence remains under the discretion of the State claiming sovereignty over the contested region—a situation charged with opacity and plenty of geopolitical considerations. Equally, customs authorities of these regions are often fragmented due to various historical,

[129] Note that the 2.1 TBT obligation also applies to like products of national origin ('national treatment').

[130] WTO Appellate Body Report, *United States—Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, adopted 24 April 2012, DSR 2012:XI, p. 5751.

[131] See the example of the proposed Irish Bill, Simon Carswell, 'State in Firing Line if Ban on Israeli Settlement Imports Passes', The Irish Times (15 September 2018), https://www.irishtimes.com/news/politics/state-in-firing-line-if-ban-on-israeli-settlement-imports-passes-1.3629726 (visited 13 April).

[132] WTO Appellate Body Reports, *United States—Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/AB/R / WT/DS386/AB/R, adopted 23 July 2012, DSR 2012:V, p. 2449.

[133] Panel Report, *US—Origin Marking Requirement*, para 7.213 and 7.219.

[134] See Report on Hong Kong's Written Submission to WTO Panel on US' Requirement on Origin Marking (1 June 2021), US Department of Agriculture, Foreign Agricultural Services (on file with the author).

[135] Panel Report, *US—Origin Marking Requirement*, para 7.234.

economic, and legal factors. This fragmentation is furthermore reinforced by States' selective application of their regional customs rules to imports from disputed territories. Above all, the three case studies reveal the gap between the theoretical application of the WTO Agreements and the functional reality of customs rules applicable to these regions.

An argument in favour of trade with disputed regions despite their occupation or annexation may be the ultimate benefit that trade liberalization will bring to the local population. Bringing disputed territories as *separate actors* under the WTO would reinforce their economic independence and allow them to benefit from technical trade assistance in a depoliticized manner[136]; including these regimes in processes and structures that govern global trade is also likely to boost their economies,[137] realizing the long-standing idea of using economic policy as a tool for preventing further economic inconsistencies and violations of human rights. If sovereignty is truly 'situated in the eye of the beholder',[138] these regimes should be allowed to raise their own economic voice.

While Article XXVI:5 GATT may indeed present an attractive—and the only—opportunity for including disputed territories into multilateral trade, its relevance and application to the regions under occupation, annexation, or claiming self-determination are rather ambiguous. In turn, applying the ARO and TBT to imports from disputed territories is also problematic since those territories are not independent WTO Members, and it is unclear to which Members' customs territories they 'belong'. All this adds to legal uncertainties surrounding economic relationships with disputed territories, rather than resolves them.

Even if Article XXVI:5 were to apply to disputed territories, this application is problematic from the perspective of international law. Inherently, the WTO' s classification of such regions as parts of other Members' customs regimes may run afoul of third States' obligations towards these territories under occupation and human rights laws. The example of the recent Russian aggression in Ukraine illustrates this point: since the main Ukrainian harbours are in the regions currently occupied by Russia and where Russia will apply its administrative and customs laws,[139] they will most probably be considered as Russia's customs territories under the WTO. This also implies that exports from these territories should be considered as originating in Russia for customs and labelling purposes. This puts third States in a difficult position since exports through these harbours are necessary to supply grain to the Global South,[140] while trading with occupied territories as if they fall under Russia's customs authority does not sit well with States' duty of non-recognition and non-assistance.

An even deeper problem lies with the interaction of the WTO regime with other branches of international law—the problem that a WTO panel will ultimately have to address if a case on trade with disputed territories were to arise. The Appellate Body on multiple occasions has made recourse to Article 31(3) (c) VCLT, interpreting the WTO provisions in accordance with the general principles of international law.[141] In fact, while the Dispute Settlement Body

[136] See by analogy Rosemary Yogiaveetil, 'Fighting the Phantom Menace: Applying the Model of Taiwanese WTO Integration to the Problem of South Ossetian Autonomy', 46 George Washington International Law Review 437 (2014).

[137] Some commentators suggested that the situation in the occupied territories worsened due to disintegration between Israeli and Palestinian economic relationships, i.e. Gross, above n 37, at 1559.

[138] Kathleen Claussen, 'Functional State Recognition and International Economic Law', in Chiara Giorgetti and Natalie Klein (eds), *Liber Amicorum for Lea Brilmayer* (Leiden: Brill, 2019), 152–180, at 153.

[139] As it does with Crimea, see Kanevskaia, EU Labelling Practices, above n 5, at 131.

[140] The Economist, 'The Coming Food Catastrophe' (19 May 2022), https://www-economist-com.proxy.library.uu.nl/leaders/2022/05/19/the-coming-food-catastrophe (visited 13 April 2023).

[141] See WTO Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, p. 2755, para 158; James Cameron and Kevin R. Gray, 'Principles of international law in the WTO Dispute Settlement Body' 50 International and Comparative Law Quarterly 2 (2001), 248.

has jurisdiction only over the covered Agreements,[142] its discretion to refer to international law when interpreting WTO treaties appears from Article 3.2 of the WTO Dispute Settlement Understanding, as well as from the established jurisprudence that the WTO Agreements should not be interpreted in isolation from public international law.[143]

Put simply, a panel will have to decide whether to engage in a complex discussion on the issue of sovereignty, with a political undertone, or to apply WTO law in isolation from international law. The fact that the two regimes differ fundamentally when it comes to States and customs sovereignty makes this choice even harder.[144] In the current absence of a functioning Appellate Body, panels may even strategically decide to bypass any issues involving the application of other regimes of international law, leaving the matter unaddressed under the WTO system.

While dealing with power inequalities that arise from the disconnect between de jure and de facto customs authority was not meant to fall under the GATT and WTO sphere, the question of trade with disputed territories challenges not only this non-political setting but also the WTO's technical approach to international law.[145] Political relations may not be constant, and new regimes outside the traditional jurisdictional borders continuously emerge in the international arena. The future WTO accession of Azerbaijan is likely to raise the issue of Nagorno-Karabakh belonging to its customs territory; potential territorial debates may arise at the UK and Irish border in the aftermath of the recent Brexit deal; and the recent Russian aggression in Ukraine adds yet another strain to the economic relationship with the Eastern European and Asian regions. All these require a reaction from the multilateral trading system. But choosing economic benefits over political stance will necessarily open a Pandora's box of issues, such as the economic viability and independence of these regions and the acceptance of their autonomy by the occupying powers.

V. CONCLUSION

In what preceded, I analysed whether and how WTO law applies to disputed territories, taking the example of three disputed regimes and three WTO Agreements that are relevant for trade with disputed regions. This analysis concluded that the main challenge lies in the classification of disputed regimes as 'separate customs territories' and, consequently, their coverage by the WTO commitments of the WTO Members claiming sovereignty over these territories. Hence, when trying to curb modern conflicts under the established rules for international trade, the WTO leaves more questions than answers. Historical and legal differences in how these territories have been acquired, conflicting interpretations of their legality in the pluralistic legal system, and the existence of parallel trade agreements, together with the diverging State practice, have no place for consideration under the WTO Agreements and the WTO acquis.

In a broader sense, discussing disputed territories under the international trade framework uncovers deeper challenges that the WTO is facing when addressing current trade issues and

[142] Article 1.1 Uruguay Round Agreement on Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In this regard, see Joel Trachtman, 'The Domain of WTO Dispute Resolution', 40 Harvard International Law Journal 333 (1999), at 347–8, arguing that the DSB cannot apply substantive international law. However, it has been argued that limited jurisdiction does not mean limited applicable law, see The Report of the Study Group of the ILC, finalized by Martti Koskenniemi, 'Fragmentation of International Law; Difficulties Arising from the Diversification and Expansion of International Law' Document A/CN.4/L.682 and Add.1 (13 April 2006), at 39. For further reading, see Joost Pauwelyn, *Conflict of Norms in Public International Law. How WTO Law Related to Other Rules of International Law* (Cambridge: Cambridge University Press, 2009).

[143] Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, p. 3, see also Gabrielle Marceau, 'WTO Dispute Settlement and Human Rights', 13 European Journal of International Law 753 (2002).

[144] See WTO Panel Report, *Korea—Measures Affecting Government Procurement*, WT/DS163/R, adopted 19 June 2000, DSR 2000:VIII, p. 3541, 7.96 (on regimes inconsistencies).

[145] See also Ferraro, above n 12, at 136.

raises fundamental questions of the interactions between WTO law and (other self-contained regimes) of international law. As non-economic concerns, such as those pertaining to national security, are gradually entering commercial disputes, it also becomes clear that despite the spirit of the GATT, it would never be possible to separate trade from politics.[146]

[146] See also Arie Reich, 'The Threat of Politicization of the WTO', 26 University of Pennsylvania Journal of International Economic Law 779 (2005), at 781.