

Following the ICJ advisory opinion on the Occupied Palestinian Territory, comprehensive trade measures against Israel are required from third States

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In its advisory opinion released in July 2024, the International Court of Justice (ICJ) determined that “[t]he sustained abuse by Israel of its position as an occupying Power... violates fundamental principles of international law and *renders Israel’s presence in the Occupied Palestinian Territory unlawful*” (emphasis added).¹ The Court observed that Israel has violated obligations of an *erga omnes* nature, including the obligation to respect the Palestinian people’s right to self-determination, the obligation arising from the prohibition of the use of force to acquire territory, as well as certain of its obligations under international humanitarian law and international human rights law.² These obligations by their very nature are “the concern of all States” and “all States can be held to have a legal interest in their protection”.³ The Court also affirmed that “in cases of foreign occupation such as the present case, the right to self-determination constitutes a peremptory norm of international law”.⁴

The Court stressed that all States should ensure that any impediment to the exercise by the Palestinian people of their right to self-determination, resulting from Israel’s illegal presence in the Occupied Palestinian Territory (OPT), is brought to an end.⁵ Furthermore, the Court underlined the obligation of third States not to render aid or assistance in maintaining the illegal situation created by Israel.⁶ The Court underscored as well that “every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the [UN] Charter...”

¹ International Court of Justice (ICJ), advisory opinion (AO) of 19 July 2024 on the *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, para. 261, available at: <https://www.icj-cij.org/sites/default/files/case-related/186/186-20240719-adv-01-00-en.pdf>

² Ibid., ICJ AO, para. 274. The ICJ pointed to the “systemic discrimination based on, inter alia, race, religion or ethnic origin, in violation of Articles 2, paragraph 1, and 26 of the ICCPR [International Covenant on Civil and Political Rights], Article 2, paragraph 2, of the ICESCR [International Covenant on Economic, Social and Cultural Rights], and Article 2 of CERD [International Convention on the Elimination of All Forms of Racial Discrimination]” (para. 223) and “breach of Article 3 of CERD” on racial segregation and apartheid (para. 229).

³ Ibid., ICJ AO, para. 274.

⁴ Supra n. 1, ICJ AO, para. 233.

⁵ Supra n. 1, ICJ AO, para. 279.

⁶ Ibid.

Third World Network (TWN) is an independent non-profit international research and advocacy organisation involved in bringing about a greater articulation of the needs, aspirations and rights of the peoples in the South and in promoting just, equitable and ecological development.

Published by Third World Network Berhad (198701004592 (163262-P))

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(emphasis added).⁷ The court was of the view that States are under the obligation to, inter alia, “take steps to prevent trade or investment relations that assist in the maintenance of the illegal situation created by Israel in the Occupied Palestinian Territory”.⁸

The advisory opinion is an authoritative judicial pronouncement on the legal obligations that arise for Israel and for third States under multiple instruments of international law including the UN Charter, the law of State responsibility, and international human rights and humanitarian law. This briefing focuses on the obligations of third States, particularly in regard to their trade relations with Israel. The briefing provides an overview of the bases for third States’ legal obligations, reviews what the law of the World Trade Organization (WTO) provides for, and discusses the scope of trade measures that third States ought to be undertaking.

The briefing argues that comprehensive trade measures against Israel are not only permitted, but are required, in order for third States to fulfil their obligations under international law. Furthermore, WTO law provides for the legal basis to undertake such trade measures while remaining compliant with general trade-related obligations. States are compelled to act individually as well as collectively, such as under the umbrella of the WTO and under other relevant regional and international organizations where they participate as Members.

The law of international responsibility

The legal framework supporting third States’ actions rests on two primary pillars under the law of States’ international responsibility.⁹ First, States have a positive obligation to cooperate to end serious breaches of peremptory norms. This obligation applies to States whether or not they are individually affected by the serious breach.¹⁰ It entails some form of collective response through the organized international community, although the law of international State responsibility provides no specification of the form this cooperation should take.¹¹ Cooperation can occur through UN mechanisms or through other arrangements, including ad hoc arrangements by a group of States. Legal experts point out that this obligation “ensure[s] that States support measures that fall short of being obligatory by a decision of the [UN] Security Council”.¹² In relation to trade relations, States are compelled to take action in the relevant trade organizations, including the WTO and its concerned bodies.¹³

Second, States must not recognize as lawful a situation created by a serious breach nor aid or assist in maintaining the illegal situation. According to an International Law Commission (ILC) commentary, the prohibition of aiding and assisting has a separate scope in comparison to the prohibition of recognition of the situation created by serious breaches.¹⁴ Also, what is addressed under this obligation extends beyond aid and assistance in the commission of the serious breach itself to aid and assistance in the maintenance of the situation created by that breach.¹⁵ In previous practice in relation to apartheid, the UN General Assembly (UNGA) had affirmed that continued trade

⁷ Supra n. 1, ICJ AO, para. 275, quoting the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

⁸ Supra n. 1, ICJ AO, para. 278.

⁹ See: Articles 40 and 41 of the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA).

¹⁰ International Law Commission (ILC)’s commentary on Article 41 of ARSIWA, available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf

¹¹ Ibid.

¹² Nina Jorgensen, “The Obligation of Cooperation”, in *The Law of International Responsibility*, Chapter 48, page 697.

¹³ The UN General Assembly resolution (September 2024) adopted in light of the ICJ’s AO “[c]alls upon international organizations, including the United Nations, and regional organizations not to recognize as legal the situation arising from the unlawful presence of Israel in the Occupied Palestinian Territory and to distinguish, in their relevant dealings, between Israel and the Occupied Palestinian Territory and not to recognize, or cooperate with or assist in any manner in, any measures undertaken by Israel to exploit the natural resources of the Occupied Palestinian Territory or to effect any changes in the demographic composition or geographic character or institutional structure of the Territory”. See also supra n. 1, ICJ AO, para. 280.

¹⁴ The ILC commentary on Article 41 of ARSIWA, para. 12, available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf. According to the ILC, this separate existence is confirmed, for example, in the resolutions of the UN Security Council prohibiting any aid or assistance in maintaining the illegal apartheid regime in South Africa or Portuguese colonial rule. Referenced source: Security Council resolutions 218 (1965) of 23 November 1965 on the Portuguese colonies, and 418 (1977) of 4 November 1977 and 569 (1985) of 26 July 1985 on South Africa.

¹⁵ Ibid., ILC commentary on Article 41 of ARSIWA, para. 11.

relations with a State committing grave violations of international law (1) assist that State to “defy world opinion”,¹⁶ (2) “aggravate the danger of violent conflict”,¹⁷ and (3) nullify “the efforts of the UN to solve the problem”.¹⁸ Thus, this obligation provides basis for a State to legitimately avoid all types of normalized international cooperation with the State responsible for the breach.

Trade measures against Israel are required from third States

Trade measures against Israel are clearly considered part of the measures that third States ought to undertake in order to fulfil their legal obligations. The UNGA resolution of September 2024¹⁹ which basically translated the ICJ’s opinion into practical actions, or what the ICJ referred to as “precise modalities” required to put an end to Israel’s illegal presence in the OPT,²⁰ clearly addressed the trade-related measures that States should be undertaking. UN human rights experts²¹ and the UN Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel²² similarly clearly spoke of the trade-related measures that ought to be undertaken.

It is important to underline that the way these different sources address this issue clearly indicates that the economic relations concerned here include relations that could pose a risk of contributing to the unlawful presence of Israel in the OPT and to the maintenance of the unlawful situation, and that they definitely extend beyond dealings with products of Israel’s unlawful settlements in the OPT.

WTO law supports measures to pursue UN Charter obligations

The security exceptions under WTO law reflect in the architecture of this legal regime a hierarchy between States’ obligations under the UN Charter and those under WTO law. In particular, Article XXI(c) under the General Agreement on Tariffs and Trade (GATT) (also replicated under the WTO agreements related to services and intellectual property) provides an exception allowing States to undertake measures in pursuance of their obligations under the UN Charter for the maintenance of international peace and security. The law of State responsibility has been applied when enforcing WTO rules,²³ including as means of interpreting the WTO Agreements in accordance with the Vienna Convention on the Law of Treaties (VCLT).²⁴ In accordance with the customary rule of

¹⁶ See for example: UN Doc. A/RES/2054(XX), “The policies of apartheid of the Government of the Republic of South Africa” (1965-12-15), para. 1: “Urgently appeals to the major trading partners of the Republic of South Africa to cease their increasing economic collaboration with the Government of South Africa, which encourages that Government to defy world opinion and to accelerate the implementation of the policies of apartheid.”

¹⁷ See for example: UN Doc. A/RES/2202(XXI)[A], “The policies of apartheid of the Government of the Republic of South Africa” (1966-12-16). The UNGA “Draws the attention of the main trading partners of South Africa to the fact that their increasing collaboration with the government of South Africa despite repeated appeals by the General Assembly has aggravated the danger of a violent conflict, and requests them to take urgent steps towards disengagement from South Africa and to facilitate effective action to secure the elimination of apartheid”.

¹⁸ UN Doc. A/RES/2506(XXIV)[B], “The policies of apartheid of the Government of South Africa” (1969-11-21). See preamble.

¹⁹ UNGA resolution entitled “Advisory opinion of the International Court of Justice on the legal consequences arising from Israel’s policies and practices in the Occupied Palestinian Territory, including East Jerusalem, and from the illegality of Israel’s continued presence in the Occupied Palestinian Territory”, A/ES-10/L.31/Rev.1, 13 September 2024, available at: <https://documents.un.org/doc/undoc/ltid/n24/266/48/pdf/n2426648.pdf>

²⁰ Supra n. 1, ICJ AO, para. 281.

²¹ “UN experts warn international order on a knife’s edge, urge States to comply with ICJ advisory opinion”, available at: <https://www.ohchr.org/en/statements/2024/09/un-experts-warn-international-order-knives-edge-urge-states-comply-icj-advisory>

²² UN Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel, “Legal analysis and recommendations on implementation of the International Court of Justice, Advisory Opinion, Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem” (18 October 2024), para. 29. Available at: <http://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/coiapt/2024-10-18-COI-position-paper-co-israel.pdf>

²³ The view that the WTO Agreements are a so-called “self-contained system” has been largely discredited, and practice has confirmed that general international law is applicable to WTO disputes. See: “United States—Standards for Reformulated and Conventional Gasoline”, Report of the Appellate Body, World Trade Organization, WT/DS52/AB/R, 29 April 1996, and Anna Ventouratou, “The Law on State Responsibility and the World Trade Organization”, *Journal of International Investment and Trade* (2021), referencing Pieter Jan Kuijper, “The Law of GATT as a Special Field of International Law: Ignorance, Further Refinement or Self-Contained System of International Law?”, 25 *NYIL* 227 (1994).

²⁴ Ibid., Ventouratou (2021), concluding section. Ventouratou points out that “WTO case law confirms that WTO adjudicative bodies have taken into consideration the rules on state responsibility – as codified in ARSIWA – in interpreting the terms of the WTO Agreements, as relevant rules of international law applicable between the parties under Article 31(3)(c) VCLT”.

interpretation enshrined in Article 31(3)(c) of the VCLT, the application and interpretation of WTO rules will have to take into account other relevant applicable rules of international law, including the general international law on State responsibility.²⁵ As such, and under the current circumstances and the persistence of Israel's illegality, WTO Members have the legal basis to justify suspension of Israel's most-favoured nation (MFN) treatment, despite such a measure being unlawful in normal circumstances.

Most third States' trade relations with Israel are governed by WTO rules. Where States have other trade agreements (such as bilateral, regional or other free trade agreements (FTAs)) and investment protection agreements with Israel,²⁶ obligations under the latter are additional to those under the WTO. Many FTAs usually replicate the WTO exceptions, including Article XXI(c) of GATT.

In its wording (i.e., "in pursuance of" obligations under the UN Charter), Article XXI(c) of GATT sets a broad rather than strict correlation between the measure taken and the set objective. Article XXI(c) does not include the "necessity" requirement as in other parts of the WTO security exceptions, such as Article XXI(b) of GATT on the "essential security" exception. This difference has an effect on the nature of the measures that could be taken under each article. A measure taken in pursuance of the obligations under the UN Charter could be understood as a measure that contributes to fulfilling these obligations pertaining to the maintenance of international peace and security.²⁷ Practice pertaining to Article XXI(c) under the GATT system,²⁸ which preceded the establishment of the WTO, shows that States referred to this exception as a basis to suspend MFN treatment in relation to other States for the purposes of implementing UN resolutions.²⁹

Trade measures against Israel should be comprehensive

While the duty to halt all trade and investment with and in the settlements and any other Israeli establishments in the OPT clearly falls under the economic measures required from third States, this does not exhaust the economic measures required in light of the obligations facing third States in this case. Comprehensive trade measures in the form of an overall embargo on export and import relations with Israel, including suspension of the MFN

²⁵ Under Article 3.2 of the WTO Dispute Settlement Understanding, WTO adjudicative bodies are instructed to "clarify the existing provisions of [the WTO] agreements in accordance with customary rules of interpretation of public international law". This is in line with the approach adopted by the International Law Commission Study Group on Fragmentation, which explained that "[a]ll treaty provisions receive their force and validity from general law, and set up rights and obligations that exist alongside rights and obligations established by other treaty provisions and rules of customary international law". See: ILC Fragmentation Report (n. 27), para. 414.

²⁶ Israel has 44 investment protection agreements, eight of which are either not in force or terminated. Source: <https://investmentpolicy.unctad.org/international-investment-agreements/countries/102/israel>. The list of Israel's FTAs can be found at: <https://www.trade.gov/country-commercial-guides/israel-trade-agreements>. This briefing does not address the specifics of these agreements.

²⁷ The ICJ notes that "In the view of most of these participants, the subject-matter of the General Assembly's request, although it involves Israel and Palestine, concerns the responsibilities of the United Nations and wider questions of international peace and security, as well as certain obligations *erga omnes* of States" (para. 33 of the AO on the OPT). In relation to peace and security, the UN Charter reflects Members' determination "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained..." and "to unite our strength to maintain international peace and security". Article 1 of the Charter addresses the obligation "1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace; and 2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace...". Article 2 of the Charter provides that "5. All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter...".

²⁸ The present text of Article XXI dates back to the 30 October 1948 Geneva Final Act. It has never been amended. The provisions of what is now GATT Article XXI were included and discussed in the context of the US Draft Charter, and London and New York Draft Charter texts on the article on exceptions to the commercial policy chapter (see Article 32, US draft; Article 37, London and New York drafts).

²⁹ The import licensing notification of Cyprus noted that imports from certain countries were prohibited in accordance with United Nations resolutions (L/5640, 24 January 1994). Brazil's 1994 notification on import licensing noted that the import licensing system of Brazil applied for goods entering from or exported to any country except for those covered by UN embargoes (L/5640/Add.54). India's 1994 background document for simplified balance-of-payments consultations noted that while almost all of India's trading partners received MFN treatment in the issue of import licences, licences were not issued for imports from countries facing UN mandated sanctions, which at the time included Iraq, Fiji, and Serbia and Montenegro (L/5640/Add.7/Rev.6, 18 August 1994; see also BOP/321 of 24 October 1994).

treatment at the WTO and any other preferential treatment under other trade agreements, are part of the economic measures required to effectively implement the obligation not to assist in maintaining the prolonged illegal situation perpetrated by Israel against the Palestinian people.

The illegality maintained by Israel is reliant on a regime of policies and practices by the State that is systemic and spans decades, including but not limited to the settlements and their associated regime, annexation, and legislative and other measures that discriminate against the Palestinians in the OPT.³⁰ In this context, the scope of the obligation not to assist in maintaining the situation created by Israel's illegal presence in the OPT covers more than mere assistance in maintaining the settlements.

There is an entrenched intertwined relation between the Israeli economy and the OPT.³¹ In this relation, the role of Israel as an occupying power cannot be understood as an act isolated from the overall operations of the Israeli State and Israeli economy.³² Israel's practices, policies and laws create the conditions for facilitating the exploitation of the Palestinian economy, and in turn the Israeli economy benefits from this exploitation.³³ The UN Trade and Development agency (UNCTAD) had studied how the Israeli economy benefits from Israel's role as an occupying power and, as such, from the resources it extracts from the OPT and Palestinian people.³⁴ Third States seeking to fulfil the obligation to distinguish between Israel and the occupied Palestinian territory,³⁵ and wanting to dissociate from trading or financial relations with Israel or Israeli entities that are linked to the illegal occupation, will face the challenge of delineating between what is Israel proper and what is linked to or benefitting, directly or indirectly, from Israel's unlawful presence in the OPT.

When it comes to the illegal settlements, they are in a permanent state of expansion and their boundaries are not static. This undermines attempts to respect the obligation of preventing relations with the illegal settlements. Generally, limiting measures to settlement-related embargoes would be insufficient to fulfil third States' obligations under international law. Taking measures only in relation to the settlements, while maintaining normal trade relations with Israel beyond the settlements, will help maintain normalized conditions for Israel, and will in effect contribute to legitimizing the regime underpinning the prolonged illegalities and the exploitative relations that it perpetuates. As such, this will assist Israel in maintaining the illegality in defiance of international law.

It is clear that any comprehensive measures taken by third States against Israel are distinct from controversial unilateral coercive measures because they are taken in response to the ICJ's authoritative determination of international law violations, including serious breaches of peremptory norms, they are supported by collective UN General Assembly action, and they pursue clear obligations under the UN Charter and international law.

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³⁰ See UNGA resolution of September 2024. For example, it is documented how Israeli land law has been designed as a tool of forceful exclusion. Hadeel Abu Hussein, *The Struggle for Land Under Israeli Law: An Architecture of Exclusion* (2021). Referenced by Shahd Hammouri, "The Palestinian Right of Self-determination as Decolonisation: A talk presented to the Committee on the Inalienable Rights of Palestinian People".

³¹ See: Ralph Wilde, "Illegality of Israel's presence in the Palestinian Gaza Strip and West Bank, including East Jerusalem, in the light of the 2024 Occupied Palestinian Territory Advisory Opinion of the International Court of Justice, and consequences for third States and the European Union" (December 2024), available at: https://www.ucl.ac.uk/laws/sites/laws/files/ralph_wilde_icj_opt_ao_thirdstateseu_legal_opinion.pdf

³² Rabea Eghbariah, "Toward Nakba as a Legal Concept", 124 *Columbia Law Review* 887 (2024).

³³ Supra n. 30, Hammouri. See also: Shahd Hammouri, "Systemic Economic Harm in Occupied Palestine and the Social Connections Model", 22 *The Palestinian Yearbook of International Law Online* 112 (2021); George T. Abed, *The Palestinian Economy: Studies in Development under Prolonged Occupation* (1988); Leila Farsakh, "Palestinian Labor Flows to the Israeli Economy: A Finished Story?", 32 *Journal of Palestine Studies* 13 (2002).

³⁴ UNCTAD, "Report prepared by the secretariat of the United Nations Conference on Trade and Development on the economic costs of the Israeli occupation for the Palestinian people: the toll of the additional restrictions in Area C, 2000–2020" (August 2022).

³⁵ See: ICJ AO, supra n. 1, para. 278, which also refers to this obligation as stated in Security Council resolution 2334 (2016) and UNGA resolution 77/126. This obligation was reiterated in the UNGA resolution A/ES-10/L.31/Rev.1 of September 2024, para. 4(d) and para. 6.