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Corporate Accountability and WTO Dispute Settlement: Assessing the Interpretive Space for the UN Business and Human Rights Framework

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ABSTRACT

Global supply chains have worsened the problem of labour exploitation and human rights violations that are happening in parts of world, and the consumers are the farthest people from these places. As a response to this situation, countries have since used trade measures that are based on business and human rights standards such as mainly the UN Guiding Principles on Business and Rights (UNGPs). Nevertheless, the WTO system remains structurally state-centric and was not designed to control corporate behaviour. This work investigates the condition under which WTO judges may consider the UNGPs while assessing human rights-related trade measures. According to the paper, the UNGPs can in no case be considered as binding law in terms of WTO interpretation but rather may have a limited role as a contextual aid to shed some light on the objective, the organization, and the logical flow of such measures. This interpretive route accords the WTO with the latest regulations without it having to change its fundamental legal framework.

I. INTRODUCTION

Worldwide trade is no longer a single story but is largely dependent on the complex supply chains that involve different territories with various labour standards and regulatory capacities of different degrees. In separating production from consumption, these chains tend to detach, thus, leaving the issue of rights abuses such as forced labour and extreme exploitation without anyone to be held accountable for. Countries have responded to this situation by implementing trade measures that are based on the new international standards for business and human rights, mainly the UN Guiding Principles on Business and Human Rights (UNGPs).

The WTO system, however, is not designed for corporate accountability. The WTO rules only apply to states and changes by the state are the only things taken into account. This, thus, raises the vital question: Can WTO adjudicators take into account the UNGPs while interpreting the

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measure if a member adopts a trade measure aimed at protecting human rights and based on supply-chain issues? This work discusses that interpretive possibility.

II. WTO STRUCTURE

WTO adjudication is essentially organized around a state-centric model. Obligations under GATT, TBT, and other agreements are only for members, and no panels are formed to look into the conduct of private actors. Nevertheless, the system acknowledges that various non trade policy objectives could be the reasons for trade restrictions.

The general exceptions in GATT Article XX represent the ways in which Members may justify measures having legitimate objectives. The one most related to human rights-driven regulations is the "public morals" clause. The Appellate Body provided in *US – Gambling* a broad definition of public morals so that each Member was allowed to decide what moral protection in its society meant. The significant doctrinal flexibility here is very important as it can reconcile concerns that come from outside the trade sphere.

Likewise, in *EC – Seal Products*, the Appellate Body regarded the ban on the use of animal-welfare as the reflection of public morals even though, the ethical side was the ultimate goal, not the economic one. These decisions communicate that WTO law is not in conflict with value-driven regulations provided that the measures are non-discriminatory and proportionate.

III. PUBLIC MORALS AND NECESSITY

Trade actions related to human rights often hinge on the public morals clause. Given the enormity of the issues, operations aimed at removing forced labour, child labour, or extreme exploitation may be considered as those being within this category.

Although the intention is good, courts still have to determine whether the measure is "necessary". The Appellate Body in *Korea – Beef* case argued that necessity means that one has to look at the importance of the objective, the measure's contribution, and the availability of less trade-restrictive alternatives. In the case of human rights violations in supply chains, it might be tough to prove contribution since the cause may be dissipated. Nevertheless, the necessity test is not a complete ban on such measures. Hence, WTO law has doctrinal provisions that make room for human rights-based regulation. The question that is left to be answered is how the UNGPs correspond to this framework.

IV. THE LEGAL STATUS OF THE UNGPS

The UNGPs define a framework with three pillars: state duties, corporate responsibilities, and access to remedies. They are mainly used as a guide for administration and have been very

influential in the development of laws in different areas. However, their legal character is quite clear: they are a non-binding instrument. Since they are not "rules of international law applicable between the parties", WTO adjudicators cannot refer to the UNGPs per VCLT Article 31(3)(c). Therefore, they are not in a position to amend WTO treaty obligations or increase the extent of exceptions that are allowed.

However, non-binding instruments are not totally removed from consideration for interpretation. Panels often review contextual material in order to understand the motive and the design of a measure. Likewise, the UNGPs might be able to perform such a function.

V. CONTEXTUAL RELEVANCE

Though the UNGPs should not be enforced as binding law, they may still help the panels in comprehending:

- the reason why a state chose to use a certain regulatory approach
- how the state identified human rights risks in supply chains, and
- why it is that due diligence obligations "serve" the given ethical purpose

According to VCLT Article 31(1), context is an inseparable part of interpretation. The WTO case law also supports this view by stating that advisory reports, guidelines, and explanatory documents can be considered as parts of the regulatory environment of the measure. When a Member explicitly invokes the UNGPs, they may be used precisely for this interpretive function.

Such application would be very limited and of a non-normative character. Panels should be careful that they do not convert the UNGPs into binding obligations. The only manner they can make use of them is as background corroboration to facilitate understanding of the objective and the consistency of a measure.

VI. HUMAN-RIGHTS-MOTIVATED TRADE MEASURES

Three categories of emerging state practice illustrate how this interpretive space functions:

Forced-labour import bans: These bans are a Member's moral rejection of products that have been manufactured by using forced labour. According to the current case law, forced labour should be regarded as a matter of public morals. Import bans that aim at supply-chain risks can be justified by paradigms based on UNGPs.

Mandatory due-diligence requirements: Due diligence regulations are gradually linking market access with corporate procedures for the identification and mitigation of human rights

violations. Panels may consider these legislations as being in conflict with GATT or TBT obligations. UNGPs can be used as a reference to understanding why due diligence is considered a reasonable regulatory response.

Sustainability-based trade conditions: If labour or environmental issues are invoked as grounds for trade conditions, panels should determine whether the differences are fair. The UNGP principles might help in unveiling the reasoning of differentiating between those supply chains that are compliant and those that are not. In each of these cases, the UNGPs function as a background and do not imply additional obligations.

VII. CONCLUSION

The WTO system was not designed to regulate the conduct of corporations; nevertheless, globally interconnected supply chains have compelled states to react to human rights violations in remote areas. Amidst transitions, the UNGPs have turned out to be a major normative reference.

WTO judges cannot treat the UNGPs as binding law. They are not permitted to mention them under VCLT Article 31(3)(c), and they refrain from using them to alter treaty obligations. However, this is not a bar to their limited interpretive role. Panels might consider the UNGPs as background if a Member explicitly refers to BHR principles in connection with the measure. Such use helps to illuminate the measure's objective and supports the necessity and design argument, thus, without altering the normative framework of WTO law.

At the same time, this very cautious recognition of the WTO's state-centric nature, which is still very much alive, and the regulatory reality that is changing and in which trade and human rights are getting more and more interconnected reflects.

Footnotes

1. Appellate Body Report, United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WTO Doc. WT/DS285/AB/R (Apr. 7, 2005).
2. Appellate Body Report, European Communities – Measures Prohibiting the Importation and Marketing of Seal Products, WTO Docs. WT/DS400/AB/R, WT/DS401/AB/R (May 22, 2014).
3. Appellate Body Report, Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef, WTO Docs. WT/DS161/AB/R, WT/DS169/AB/R (Dec. 11, 2000).

4. U.N. Human Rights Council, Guiding Principles on Business and Human Rights, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011).
