WTO Treaty System and State Responsibility: Revisiting the Question of Attribution and its Development Perspective in the WTO

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INTRODUCTION

International law has evolved in general and has been codified in different areas including those on treaty interpretations and State responsibility. The evolution of international law has not been without criticisms. Critics have accused international law of being too dependent on State policies and therefore based on speculative utopias. The basis of these criticisms sometimes hinges around the non-existence of an international legislative body or compulsory enforcement mechanisms to effect the will of nations. As a consequence, international law becomes too flexible. Yet, some of the critics admit that in the area of dispute settlement, international law is objective in the way that politics are not. These conflicting views of the nature of international law have been witnessed in different academic writings, especially in the areas of rules enforcement, interpretation and attribution of conducts to that of a State since the adoption by the International Law Commission (ILC) of its Articles on State Responsibility for Internationally Wrongful Acts on the first reading of the Draft Articles in the 1970s to the adoption of the final Articles in 2001.\(^1\) Regarding the issue of attribution, the ILC from the very beginning of its works pointed out that State responsibility would only be invoked if a particular conduct from the outset could be attributed to the State.\(^2\) While the ILC throughout its more than half a century history invested considerable time to the codification of customary rules of international law, the issue of attribution somewhat remained perilous.

As has been the case with other international tribunals,\(^3\) the WTO judicial organs have had the occasion of using the ILC's Articles in some limited respect to highlight

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\(^1\) See the ILC's Articles and commentaries in Official Records of the General Assembly, Fifty-Sixth Session, Supplement No. 10 (A/56/10).

\(^2\) See the view of the Sub-Committee on State Responsibility appointed in 1962 to establish a working project in this area in Yearbook of the International Law Commission (YBILC), 1963, Vol. ii at 227-228.

Members' obligations under the WTO agreements. In the context of the WTO treaty system, one may theoretically conclude that once there is an establishment of a violation of a particular covered agreement, there is little doubt that the relevant acts or omissions are those of the Member concerned. The issue of attribution although not institutionalized per se in the architecture of the WTO system, is a relevant concept that needs greater attention by the WTO dispute settlement system in achieving the security and predictability functions of the system.

Conversely, as may be noticed from the preamble to the WTO Charter and other relevant provisions, trade is potentially a powerful mechanism for development and economic growth. In this regard, attributing a conduct to that of the WTO Member by the DSB will supposedly take into account the development dimension of the WTO treaty system. Consequently, what are the relevant ingredients that will lead to the conclusion that a particular act committed by individuals or entities in the territory of a WTO Member amounts to that of the Member in question? In other words, what is the universe of State responsibility in light of the concept of attribution in the WTO treaty system? This essay tries to throw some light on this difficult question. Taking inspiration from the law of State responsibility, and examining in the context of relevant WTO case law, the paper explores when and how activities of private individuals/entities can be attributed to that of the WTO Member for the purpose of State responsibility. It further examines the development dimension of attributing acts to those WTO Members especially in light of the development objectives of the WTO treaty system.

**Attributes in the WTO Dispute Settlement**

**A. Introduction**

Under international law, acts committed by any organ of a State or private actors linked or, representing that State is usually attributed to the State in question. As regards non-state actors, the international law generally grounds attributions on principle of agency. Whether such persons or entity is doing so as part of a function of the legislative, executive or judicial branch of the government, such conduct will be considered as that of the State. The principle is clearly stated in Article 4 of the International Law Commission's (ILC) Articles on the Responsibility of States for Internationally Wrongful

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4 By referring to an earlier version of the ILC's draft (Article 49 of the 1997 version), the Arbitration in the EC-Bananas case held that "...[c]umulative compensation or cumulative suspension of concessions by different WTO Members for the same amount of nullification or impairment would run counter to the general international law principle of proportionality of countermeasures". See the Arbitration report in WT/DS27/ARB, at 38, para. 6.16 (April 19, 1999). In the Cotton Yarn case, the AB again in justifying its position on the proportionality of countermeasure, referred to Article 51 of the 2001 ILC Articles. See AB report in Appellate Body Report, United States–Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan, WT/DS192/AB/R, 37, para. 120, footnote 90, (adopted November 5, 2001).

5 See for instance, first and second tire of the preamble to the Marrakesh Agreement Establishing the World Trade Organization (hereinafter, WTO Agreement or WTO Charter). And from the perspective of the development dimension of subsidies, see SCM Agreement Article 27.

6 It is important to note that generally a state is not responsible for acts committed by private individuals who were not under the direction of the state. Therefore, such acts cannot be attributed to those of the State.