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The Nexus between State Liability Principle and WTO Law

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Abstract: There are two functions of the state liability principle. The first is to secure individual rights (including economic rights) from a wrongful act conducted by a government, and the second is to compensate for damage caused by the infringement of individual right. Economic right is inherently allowing an individual to pursue economic interest both domestically or globally. In order to accommodate this right, a government is obliged to provide trade rules and mechanisms for every individual to conduct their global economic activities by participating in the WTO. The objective of the WTO significantly corresponds to the individual's right in order to obtain trade benefits. Hence, when a government infringes trade rules and mechanisms underlined in WTO Law, it will directly restrict individuals from gaining trade benefits under the WTO or, moreover, it will restrain individuals from enjoying their inviolable economic rights. When the right is violated, and the damage occurs, it thus leads to the obligation for the government to compensate the damage according to the state liability principle. This article discusses the nexus between the state liability principle and WTO Law, in order to encourage national courts to exercise the function of state liability by referring to the infringement of economic rights caused by the violation of WTO Law.

Keywords: economic rights; state liability principle; WTO law.

1 Introduction

There are two principles of liability in general, strict and fault liability. The strict liability principle is a limited liability application. It requires a special or exceptional damage as a result of measures taken in the public interest which

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may recover compensation without the need to prove fault.[1] Another principle is liability based on fault. This principle requires damage resulting from a wrongful act or omission and negligence, which must be proven. The fault may be a wrongful act of administration or omission. The liability based on fault is more often used by the court that requires compensation for damage.

Fuke argued that "in the broadest concept state liability means that the state should make compensation for whatever loss or/and injury which it has to be deemed caused directly or indirectly and mentally or materially to its citizen".[2] It relates to the function of state liability principle that a government is obliged to secure for citizens their individual rights to a life worthy of a human being, including economic rights. Thus, when a citizen suffers damage (loss, injury or property damage) because of the wrongful act of a government in the course of any activities of the state, it is legitimate for the government to rectify and to compensate for the damage.[3]

Rectification and compensation in the framework of economic rights serve to restore to individuals to the extent possible their capacities to achieve their ends for their economic values.[4] Economic right is known as a right granted by a national constitution[5] that inherently allows individuals to pursue economic interests across frontiers. To accommodate this right, a government is obliged to provide trade rules and mechanisms for its citizens to pursue their economic interests across frontiers. It is thus necessary for a government to commit to preserve economic rights in the international sphere by participating in international economic bodies like the WTO. Accordingly, when a government infringes these trade rules and mechanisms underlined in WTO Law, it will directly restrict individuals from gaining trade benefits under the WTO and, moreover, it will restrain individuals from enjoying their inviolable economic rights. When a right is violated and damage occurs, it thus leads to the obligation for the government to rectify

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1 Erdem Buy Uksagis and Willem H. Van Boom, "Strict Liability in Contemporary European Codification: Torn Between Objects, Activities, and Their Risks," *Georgetown Journal of International Law* 44, (2013), 610.

2 Toshiro Fuke, "Historical Phases of State Liability as Law of Remedies – Some Introductory Remarks," in *Comparative Studies on Governmental Liability in East and Southeast Asia*, *in Public Law in East and Southeast Asia*, ed Yong Zhang, (The Hague/London/Boston: Kluwer Law International, 1999), 1–6.

3 *Ibid*, see also Duncan Fairgrieve, *State Liability in Tort: A Comparative Law Study*, (Oxford: Oxford University Press, 2003), 189–90.

4 Dinah Shelton, *Remedies in International Human Rights Law*, (Oxford: Oxford University Press 1999), 40–1.

5 Cass R. Sunstein, "Why Does the American Constitution Lack Social and Economic Guarantees?," 56 *Syracuse Law Review* 1, (2005), 1–17.

and to compensate for the damage according to the state liability principle. This argument is considered as a nexus between the state liability principle and WTO law. However, finding the nexus between state liability principle and WTO Law is problematic since most national courts deny the direct effect of WTO Law on domestic law. This article therefore attempts to find the best argument to tackle this issue.

There are four points of argument discussed in this article, namely:

1. The WTO Law regulates the obligation of a government to provide trade rules and mechanisms for individuals to pursue economic interests across frontiers;
2. This obligation is based on individual economic rights;
3. When a government infringes these trade rules and mechanisms, and damage occurs, it directly infringes the economic rights of individuals that require the government to rectify or to compensate for the damage according to the state liability principle. However, the absence of direct effect of WTO Law becomes an obstacle for national courts to uphold the state liability principle. It is thus required to find the nexus between the state liability principle and WTO Law by implying other concepts.
4. Implying indirect effect of WTO Law in order to uphold the state liability principle.

2 The WTO Law Regulates the Obligation of Government to Provide Trade Rules and Mechanisms for Individuals to Pursue Economic Interests across Frontiers

In 1994, over 100 governments took part in the Uruguay Round, defending the interests of countries of all sizes, stages of development and economic structures. All WTO members brought their national economic interests and national trade policies into the negotiation in Marrakesh. In every round of WTO negotiations, members focused on bargaining over mutual trade obligations; the WTO therefore remains about multilateral and bilateral trade negotiation. These WTO members are subject to trade obligations among each other. However, the WTO is not only accommodating obligations among members, but also accommodates the obligations of a government to its citizens. Panel in the case of *Section 301–310 of US Trade Act of 1974* mentioned that "it would be entirely wrong to consider that the position of individuals is of no relevance to the GATT/WTO legal matrix. Many

of the benefits to members which are meant to flow as a result of the acceptance of various disciplines under the GATT/WTO depend on the activity of individual economic operators in the national and global market places. The purpose of many of disciplines, indeed one of the primary objects of the GATT/WTO as a whole, is to produce certain market conditions which would allow this individual activity to flourish."[6] Accordingly, in order to provide a market conducive to individual economic activity, a government is obliged to provide trade rules and mechanisms conducive for its citizens to conduct economic activities across frontiers. These trade rules and mechanisms should support individual economic activities to flourish and to gain maximum benefits.

The obligation of a government is to provide trade rules and mechanisms basically based on economic rights that are granted by the national constitution as legal support and protection for individuals to conduct economic activities across frontiers. Without legal support and protection from the government, including national and international legal support, these individuals will suffer from a lack of economic benefits.

3 The Obligation of Government to Provide Trade Rules and Mechanisms for Individuals to Pursue Economic Interests across Frontiers based on Economic Rights

Economic rights in this context relates to the freedom to engage in economic activities. This is similar to the freedom to produce and the freedom to trade what is produced. In the means of production, trade and distribution, this freedom is not restricted by the state preventing individuals from buying, selling and operating the means of production. And the relation of employment is that if the people are allowed to own the means of production, then potential employees are allowed a vastly greater range of potential employment.[7] Today, almost all national constitutions promulgate economic rights

6 WTO, US: *Section 301 – 310 of US Trade Act of 1974 – Panel Report*, (27 January 2000) WT/DS152/R, para. 7.73.

7 Ernst-Urlich Petersmann, "Judicial Protection of Economic Freedom in National and International Law: Time for Bringing Rights Home," in *Judicial Review in International Perspective (Liber Amicorum, in Honour of Lord Slynn of Hadley)*, eds. Mads Andenas and Duncan Fairgrieve, (The Hague/London/Boston: Kluwer Law International, 2000), 475–6.

in different phrases such as economic freedom,[8] the right to work,[9] the right to property,[10] the right to trade or to conduct business,[11] intellectual property rights[12] and other right associated with economic activities.[13] All these rights are the foundation for individuals to engage in any economic activities, such as activity to produce goods, to provide services, to sell and purchase goods, to distribute goods and services and to own property deriving from any economic activities. For example, the EU Charter of Fundamental Rights contains a few rights which can be clearly classified as modern and advanced economic rights. One of the prominent rights is the right to property, which is recognised as the right of possession.[14] Possessions are given a wide interpretation to include various assets acquired through economic activities.[15] All vested rights having an economic value are included. The rights also include the means to earn an income from business.[16] Through the protection of the right to property, the EU Charter has certainly incorporated a wide range of economic activities within the sphere of legal protection.

In order to impose the basic premises on economic rights, the government is obliged to: (1) respect the enjoyment of economic rights, (2) protect the enjoyment of these rights from third parties and (3) fulfil the implementation of these rights through appropriate legislative, administrative, budgetary and judicial

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8 For example: Romanian Constitution Article 45, Bulgarian Constitution Article 19, Swiss Constitution Article 27.

9 For example: Constitution of Norway Article 110, the EU Charter of Fundamental Rights Article 15, Constitution of Peru, Article 24, and Japan Constitution Article 27.

10 For example: Japan Constitution Article 29, EU Charter of Fundamental Rights Article 14, and Argentine Constitution Section 17.

11 For example: Commerce Clause and Contract Clause of the U.S. Constitution, EU Charter of Fundamental Rights Article 16, Argentine Constitution Section 14, and Article 19 para. (g) in The Constitution Of India 1949.

12 For example: Article 1, Section 8, Clause 8 the U.S. Constitution.

13 For example: Article 33 of the Indonesian Constitution.

14 European Charter of Fundamental Rights, Art. 17, "Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest." http://www.europarl.europa.eu/charter/pdf/text_en.pdf (accessed 23 Jul. 2015).

15 Theo R.G. Van Banning, *The Human Right to Property*, (Antwerp: Intersentia, 2001), 85–6.

16 Case *V.D. Mussele v Belgium* App no 8919/80 (ECHR 23 Nov 1983), *Van Marlea.o. v Netherlands* App no 8543/79; 8674/79; 8675/79; 8685/79 (ECHR 26 June 1986), and H v Belgium (30 Nov 1987) 10 E.H.R.R. 339. These cases are pertinent to the rights to an income arising from the exercise of occupation or business.

measures.[17] However, the core of implementation of economic rights is not limited to domestic economic activities. The government is also obliged to provide an appropriate rule and mechanism for individuals to exercise their rights in order to take advantage of economic activities across borders. This leads policy makers to liberalise markets for the individual and collective interest of their countries to take advantage of international economic relations. An example is the regulation of market access in order to simplify access for citizens to conduct their economic activities across borders. The highest level of government provides the necessary discipline and guarantee of market access, such as the economic liberty which is guaranteed as a fundamental right in the Swiss Federal Constitution,[18] then at the regional level, the four fundamental freedoms are guaranteed by EU law,[19] and at the global level, an institution like the WTO enshrines market access for individuals from all WTO member-states.[20]

Historically, global economic relations derive from the common interest of states, which is influenced by individual economic interests within the country. To meet this common economic interest, states therefore construct extraterritorial economic agreements which create international legal rules.[21] This is relevant to the core of intensive international economic relations which began with individual economic interest, and the motivation behind a global economic agreement is the intention of the state to encourage its individuals to gain broader benefit.[22] It seems undeniable that WTO members adopt WTO rules based on the realisation to support their citizens to achieve economic advantage, as it is mandated by their constitutions to guarantee economic rights. The correspondence between individual economic rights and the intention of states to join the WTO therefore exists indirectly.

17 Zeshan Khan, International Economic Rights, 4 *Gonzaga Journal of International Law* 1 (2000–2001), 1–2.

18 Switzerland Constitution, Article 27, Economic Freedom, para. (1) Economic freedom is guaranteed, (2) In particular, it entails the free choice of profession as well as free access to and free exercise of private economic activity. http://www.servat.unibe.ch/icl/sz00000_.html (accessed 13 Feb. 2015).

19 Market Access right for goods is promulgated in Free Movement of Goods, Treaty Functioning of European Union (Treaty Rome) Articles 28–37, http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047:0199:en:PDF.

20 Market Access right is also recognised in GATS Article XVI.

21 Sergei A. Voitovich, *International Economic Organizations in the International Legal Process*, (Leiden: Martinus Nijhoff, 1995), 4.

22 Patrick Love and Ralph Lattimore, *International Trade: Free, Fair and Open?*, (Denver: OECD INSIGHTS, 2009), 170. These authors explore the advantage of conducting international trade both from the state’s focal point and individual interests.

Although the WTO and the GATT do not contain economic rights, WTO Law regulates rules of non-discrimination in the sense of most favoured nation treatment and national treatment, which is very significant to guarantee functions with regard to the safeguarding of unimpeded trade. The key objective of WTO Law is the progressive removal of barriers that prevent or make more difficult beneficial exchange between producers and consumers located in different countries. The removal of barriers is intended to enhance the WTO's support for promoting growth and economic stability, and in turn to supporting the protection of economic rights for individuals. In the light of this, when the WTO creators negotiated a multilateral trading system, they created an objective of WTO in accordance with economic rights of individuals. The government of WTO members therefore relies on this objective in regard to providing trade rules and mechanisms for individuals to trade across border.

4 The Correlation between Economic Rights and WTO Objective

The Preamble of the WTO Agreements defines the objectives of the WTO in terms of "raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment".[23] Many other WTO rules recognise that the WTO objectives extend far beyond economics.

In terms of "raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand," this elaborates the relationship between the individual right to higher standards of living and full employment and the economic activity of the individual as an engine for such economic growth. The success of the WTO in increasing the world's economic welfare depends to a considerable extent on individual initiatives.[24]

23 The interpretation of objective of WTO Agreement refers to WTO Panel Report, Section 301–310 of US Trade Act of 1974, *Supra Note 6*, Section (c), para. 7.74, "[T]he ordinary meaning … in the light of [the treaty's] object and purpose, which is similar language in the second preambles to GATT 1947 and GATS. The TRIPS Agreement addresses even more explicitly the interests of individual operators, obligating WTO Members to protect the intellectual property rights of nationals of all other WTO Members. Creating market conditions so that the activity of economic operators can flourish are also reflected in the object of many WTO agreements."
24 *Ibid.*

The WTO objective of increasing human welfare with an open trading system that fosters employment and development at the same time requires and promotes individual freedom and economic rights.[25]

The WTO trade rules and mechanisms are created based on the intention of all WTO members to conduct trade and economic activities with a view to raising standards of living for all individuals by expanding trade in goods and services and reducing barriers to trade.[26] Tariff concession and non-trade barriers are considered as rules that are provided for individuals to simplify their economic activities across borders. With these rules, they are supposed to pursue economic interests while their governments support this through constitutional commitment to protect economic rights to obtain profit from economic activities. One significant economic right is the right to property.[27] This right becomes a major intention for every nation to get involved in the WTO. The establishment of secure and stable rights to property has become a key element in the rise of modern economic growth. It stands to reason that individuals would not have the incentive to accumulate and innovate unless they have adequate control over the return on the assets that are thereby produced or improved, and at the end individuals have rights to enjoy the benefit from it.[28] In terms of the objective of the WTO, the protection of property rights will promote the comprehensive raising of standards of living when individuals have the right to obtain and to enjoy benefit from their economic activities, without any restriction or deprivation by national policy.[29] The objective of the WTO also accommodates the promotion of rights that lie

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25 Ernst-Urlich Petersmann, *The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement*, (The Hague/London/Boston: Kluwer Law International, 1997), 4–6.

26 See the interpretation of preamble of GATT in WTO, *Ecuador: Bananas III – Recourse to Appellate Body UnderArticle 21.5*, (26 November 2008) WT/DS27/AB/RW2/ECU, *US: EC – Bananas III Recourse to Appellate Body under Article 21.5*, (19 May 2008) WT/DS27/RW/USA, para. 433.

27 For argument regarding the protection of right to obtain profit from economic activity, see *Case 4/73 Nold v Commission (1974) ECR 491* when the court declared that the Commission deprived Nold of the fundamental rights of free development of its business activity, which as a result jeopardised the profit from conducting business.

28 Dani Rodrik, "Trade Policy Reform as Institutional Reform," in *Development, Trade, and the WTO: A Handbook Issue 1*, eds. Bernard M Hoekman, Aaditya Matto and Phillip English, (Washington: the World Bank, 2002) 4–5.

29 This refers to the opinion of General Advocate Alber regarding a violation of a fundamental right perpetrated by EU institutions when they refused to comply with DSB Decision in Hormone Case. See Opinion of Advocate General Siegbert Alber in *Cases C-93/02 P and C-94/02 P, Biret International SA and Etablissements Biret et Cie. SA v Council of the European Union*, in EU Press Release, CJE/03/39, (15 May 2003) 120.

exclusively in the international economic sphere, such as the rights of exporters and importers to enjoy property, freedom of contract and non-discrimination in relation to other similar industries, and the freedom of movement of goods and services across borders.[30]

WTO negotiators also created rules and mechanisms which relate to employment. For example, the GATT has several provisions relating to employment, such as GATT Article XII: (3) para. (a), which mentions that "contracting parties undertake, in carrying out their domestic policies, to pay due regard to the need for maintaining or restoring equilibrium in their balance of payment on a sound and lasting basis and to the desirability an uneconomic employment of productive resources." This article relates to domestic policies directed towards the achievement and maintenance of "full and productive employment."[31]

The employment dimension also plays a role in other WTO Agreements, for example the Agreement on Subsidies and Countervailing Measures (SCM Agreement), Article 15 (4). According to this article, the examination of the impact of subsidised imports on domestic industry shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including employment.[32] The Agreement on Textiles and Clothing, Article 6 (3), also regulates a standard examination of the effect that imports can have on employment.[33] The most in-depth agreement regarding employment is GATS Article V bis: Labour Markets Integration Agreement. It states that WTO agreements shall not prevent any of its members from being a party to an agreement establishing full integration of the labour markets between or among the parties. Another rule regarding employment is GATS Annex on Movement of Natural Persons Supplying Services. This annex applies to measures affecting natural persons who are services suppliers of a member, and natural persons of a member who are employed by a service supplier of a member.[34]

The context of full employment is pertinent to economic rights, which constitute the foundation for all individuals to earn personal income that derives from their economic activities. National trade policy should not deprive anyone of this

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30 Michael Hart, *From Pride to Influence: Towards a New Canadian Foreign Policy*, (Vancouver: UCB Press, 2008) 42.
31 General Agreement on Tariffs and Trade 1947, (15 April 1994), LT/UR/A-1A/1/GATT/2, (https://docs.wto.org/).
32 Agreement on Subsidies and Countervailing Measures, (15 April 1994), LT/UR/A-1A/9, (https://docs.wto.org/).
33 Agreement on Textiles and Clothing, (15 April 1994), LT/UR/A-1A/11, (https://docs.wto.org/).
34 General Agreement on Trade in Services, (15 April 1994), LT/UR/A-1B/S/1, (https://docs.wto.org/).

right since it is essential for all individuals in order to derive the benefit from trade across frontiers according to WTO Law.

5 Finding the Nexus between State Liability Principle and WTO Law

Economic rights will be violated if a state adopts legislation which is incompatible with pre-existing legal obligations to these rights.[35] In terms of WTO Law, there are two different consequences if a government regulates national trade policies that infringe trade rules and mechanisms provided in the array of WTO Agreements. Firstly, the infringement of WTO Law directly violates individual's economic rights. Secondly, the national trade policy violates WTO Law, which results in retaliation from other WTO members. This retaliation itself ultimately inflicts trade damage on citizens. When a government infringes WTO Law and damage occurs, it directly infringes the economic rights of individuals, which requires the government to rectify and to compensate for the damage according to the state liability principle. However, two cases below illustrate the adverse outcome of WTO Law violation, since national courts declined to uphold the state liability principle in order to grant compensation owing to the violation of WTO Law.

5.1 Infringement of Economic Rights in Biret Case

The EU has had several experiences regarding the consequences of violating WTO Agreements where the violation is deemed to be an infringement of an individual's economic rights. One of these is the Biret case. In this settled case, the Biret Company claimed to have suffered damage as a consequence of EU legislation prohibiting the importation of hormone treated meat.[36] Biret referred to the Dispute Settlement Body (DSB) Decision in Hormone Case[37] that a EU ban on imports of meat and meat products from cattle treated with any of

35 Khan, *Supra Note 17*, 4.
36 Council Directive 96/22/EC of 29 April 1996, OJ 1996 L 125/3; Council Directive 88/146/EEC of 7 March 1988, OJ 1988 L. 70/16; Council Directive 81/602/EEC of 31 July 1981, OJ 1981 L 222/32.
37 WTO, *EC: Hormone case*, (19 February 1997) WT/DS26/13.

six specific hormones for growth promotion purposes was inconsistent with the provisions of the SPS Agreement, and requiring the EU to lift the hormone ban in the absence of any scientific risk assessment of harm.[38] Biret sought damage for the EU's failure to comply with WTO Law because EU institutions refused to implement the DSB decision in the hormone case. Nevertheless, the General Court (GC) rejected the claim for damages because the GC did not identify the unlawful conduct of the EU. The court also denied the possibility for individuals to rely on provisions of the WTO Agreements in order to establish unlawful conduct by EU institutions.[39]

Advocate-General (AG) Alber in the Biret case opined that the GC's reasoning in refusing to comply with the DSB decision infringed a fundamental right or an economic right. A fundamental right was affected at its core when the Biret Company could not continue their normal commercial activities because the EU had decided not to comply with WTO Law which was affecting their businesses.[40] The EU imposed restrictions on trade through the adoption of SPS measures, which constituted discrimination between domestic and imported goods and those who engaged in trade in such goods. Restriction on trade therefore affects the freedom of individual to conduct an economic activity. Meanwhile, the SPS Agreement is of considerable importance to citizens who engage in trade as it states in Article 2 (3) that the agreement intends to prevent disguised restrictions on international trade.[41]

AG Alber argued that EU courts must not disregard the freedom of trade and freedom to conduct economic activity that had been expressed in more recent judgements.[42] Moreover, AG Alber also referred to the *Kampffmeyer* case when EU courts held that the Regulation of the Council on the progressive establishment

38 *WTO: EC-Hormones case – complaint by the US*, WT/DS26/R/USA and *EC-Hormones (complaint by Canada)*, WT/DS48/R/CAN, (18 August 1997). *EC: Hormone Case – Appellate Body Report* (16 January 1998) WT/DS/26/AB/R and WT/DS48/AB/R.

39 Cases C-93/02 P and C-94/02 P, Biret International SA and Etablissements Biret et Cie. SA v Council of the European Union, in EU Press Release, CJE/03/39, (15 May 2003) 120. the GC refused to review EU Legislative on hormones based on the 'nature and structure of the WTO Agreements', the reciprocal character of WTO obligations and the need to maintain the discretion enjoyed by the EU institutions, similar to that enjoyed by bodies of the EU trading partners.

40 Marco Bronckers and Sophie Goelen, "Financial Liability of the EU for Violations of WTO Law: A Legislative Proposal Benefiting 'innocent bystanders,'" 39 *Legal Issues of Economic Integration* 4, (2012), 399–418.

41 Opinion AG Alber, *Supra Note 29*, para 117.

42 *Ibid*, See Case 240/83, *Procureur de la République v Association de défense des brûleurs d'huiles usagées* (ADBHU), (1985), ECR 00531.

of a common organisation of the markets in grain was directed to ensuring appropriate support for the agricultural markets of EU member states during the transitional period, and to allow the progressive establishment of a single market by making possible development of the free movement of goods within the EU. The interest that the regulation is intended to protect is of a general nature, not to prevent the interest of individuals who are engaged in EU trade.[43] It is similar to the rules on liberalisation according to the WTO Agreements and, more specifically, regulated in Article 2 (3) SPS Agreement that is, in fact, intended to protect individual interest.

To that end, the opinion of AG Alber is relevant to the Panel Report in Section 301-310 of the US Trade Act of 1974 that "trade is conducted most often and increasingly by the private operators. It is through improved conditions for these private operators that members benefit from WTO disciplines. *The denial of benefits to a member which flows from a breach is often indirect and results from the impact of the breach on the market place and the activities of individuals within it* (emphasis added)."[44]

The hormone ban that restricted the Biret Company from conducting their economic activities under the SPS Agreement infringed the right to conduct economic activities which is granted by the EU Charter, Article 16 (freedom to conduct a business) and Article 17 (right to property), while basically the Biret Company has an inviolable right to trade protection under the EU Charter. Hence, since this case concerns the infringement of a fundamental right, the Biret Company is entitled to obtain compensation in order to rectify the damage caused by the hormone ban. Pursuant to EU non-contractual liability underlines in Article 340 (2) of the Treaty on the Functioning of the European Union (hereinafter TFEU) (ex Article 288 TEC), the EU can be held liable if there is a serious breach of rules conferring rights on individuals. They have acknowledged that breaches of rules conferring individual rights can constitute the basis for compensation.[45]

43 Joined Case 5, 7 and 13 to 24-66, *Firma E. Kampffmeyer and others v Commission of the EEC*, (1967), ECR 245, 933 and 262.

44 WTO, US: Sections 301-310 of US Trade Act of 1974 – Panel Report, *Supra Note 6*, Para. 7.77.

45 EC Treaty (Treaty of Rome, as amended) Article 340 (2) of TFEU (ex-Article 288 TEC) underlines the basis of EU non-contractual liability and states that "In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties." http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN.

5.2 Infringement of Fundamental Rights in FIAMM and Fedon Case

FIAMM and Fedon along with seven other companies suffered trade damage due to high punitive tariffs imposed by the US. The retaliation was imposed by the US in order to induce the EU to comply with the DSB Decision in the Banana case.[46] According to FIAMM, the EU institutions infringed their rights because they had to pay prohibitive custom duties on their imports of batteries into the US and to relocate their production facilities.[47] They argued that the provisions of the Banana market regulation interfered with their export operations in a manner that impaired the very substance of their rights, because the duty tariff hit the core of their trade activities.[48] In the case of FIAMM and Fedon,[49] the applicants acknowledged that the enforcement of punitive tariffs infringed the right to property including the freedom to conduct a business embodied in Article 16 of the EU Charter, which represents a particular form of freedom of profession. Advocate-General Maduro was strengthening the applicants' argument that "the damage on which they rely is unusual which it constitutes sufficiently serious harm to the attributes of the right to property, and to rule on whether that damage is special."[50] The EU Courts should consider that the decision of EU institutions not to comply with the DSB decision within a period of time was causing trade retaliation. The US trade retaliation was absolutely depriving FIAMM and other companies the right to gain trade benefits under the WTO agreements. It was not only inconsistent with the objective of WTO Agreements, but also infringed their rights to conduct business and their rights to enjoy the benefits from business activity pursuant to Article 16 of the EU Charter. Accordingly, when a right is violated and damage occurs, the EU is obliged to imply non-contractual liability according to Article 340 TFEU.

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46 European Community – *Regime for the Importation, Sale and Distribution of Bananas; Recourse by the United States to Article 22 (2) of DSU*, WT/DS27/43 (WTO Appellate Body January 14, 1999).

47 Joined Case, *Fabbrica Italiana Accumulatori Motocarri Montecchio SpA (FIAMM) and Others v. Council and Commission and Giorgio Fedon & Figli SpA and Others v. Council and Commission*, C-120/06P and 121/06P (The European Court of Justice, September 9, 2008).

48 Anne Thies, *International Trade Dispute and EU Liability*, (Cambridge: Cambridge University Press, 2013), (Kindle Cloud Reader), Location 4913.

49 Joined Case C-120/06P and 121/06P.

50 Opinion of Advocate-General Poiares Maduro (AG Maduro) in Joined Cases C--120/06 P and 121/06 P, *Fabbrica Italiana Accumulatori Motocarri Montecchio SpA (FIAMM) and Others v. Council* and *Commission and Giorgio Fedon & Figli SpA and Others v. Council and Commission* [2008] ECR I--6513 delivered on 20 February 2008.

6 The Absence of Direct Effect of WTO Law

Both the Biret and FIAMM cases were fruitless. The EU courts unequivocally decided in all settled case law that "No liability regime exists under which the Community (EU) can incur liability for conduct falling within the sphere of its legislative competence in a situation where any failure of such conduct to comply with the WTO Agreements cannot be relied upon before the Community (EU) Courts."[51] The absence of direct effect of the WTO Law in the EU legal system[52] is one of the reasons why the EU Courts did not imply state liability principle to award compensation, although Article 340 TFEU opens the possibility for individual to seek compensation owing to the damage caused by EU institutions in the performances of their WTO obligations.

The classic definition of direct effect doctrine is a legal provision granting rights to an individual which must be upheld to national court.[53] The EU courts have authority to establish whether WTO Law has direct effect or not in their cases, such as the Biret case, the Chiquita case, the case of Van Parys and the FIAMM case, but nothing from the judgements of those cases entail justification of direct effect of WTO Law.[54]

Before the establishment of the WTO, the ECJ had experience of denying the direct effect of GATT 1947. The ECJ argued that the GATT had to be conceived as a trade/diplomatic tool, rather than a judicial one, and the flexible and imprecise agreement was incapable of conferring rights that citizens can invoke in domestic courts to challenge the lawfulness of EU actions, and also precluded the Court from taking the provisions of the GATT into consideration to assess the lawfulness of a regulation in an action brought by a member state.[55]

51 Joined Case FIAMM and Fedon, *Supra Note 47*, para. 176.
52 Armin Von Bogdandy, "Legal Effect of World Trade Organization Decision within European Union Law: A Contribution to the Theory of the Legal Acts of International Organizations and the Action for Damages under Article 288 (2) EC," 39 *Journal of World Trade*, 1, (January 2005), 45–66.
53 Eileen Denza, *The Intergovernmental Pillars of the European Union*, (Oxford: Oxford University Press, 2002) 14.
54 Intan Soeparna, The Polemic of Giving Direct Effect of WTO Law and DSB Decision to Domestic Law for Individual's Judicial Protection, *27 Mimbar Hukum Journal 5*, (Yogyakarta: Gadjah Mada University Press, 2015), 521.
55 Case C-280/93, *Federal Republic of Germany v. Council of the European Union*, [1994] ECR I-4973, para. 5073. See also Case C-21/72, *International Fruit Co. v. ProduktschapvoorGroenten en Fruit*, (1972) ECR 1219.

The ECJ still implies the concept of non-direct effect even after the establishment of the WTO in 1994, although in the Biret case, the court introduced an innovative conceptual distinction between the direct effect of WTO rules and reliance on the DSB decision. Thus, individuals potentially could be permitted to invoke a DSB decision condemning the EU as a basis for claiming damage before the ECJ pursuant to Article 340 TFEU (ex Article 288 EC Treaty).[56] But the ECJ rejected giving compensation because Biret did not suffer any damages after the expiration of the reasonable period of time to comply with the DSB decision. The reason was that Biret went out of business in 1995, while the 15-month implementation period ended in May 1999. The ECJ therefore considered that there was no causal link between the damage and the act of EU institutions.[57] And the most prominent argument from the ECJ is that the court mostly relied on concern over the lack of reciprocity principle as a powerful reason to reject the direct effect of the WTO Law.[58] The ECJ added in their judgements that evaluating the invocability of a DSB decision is a conceptually separate problem from the implementation of direct effect of a DSB decision. The ECJ also argued that giving a private party the possibility to claim compensation for damage does not amount to the recognition of direct effect,[59] since the legal effects of DSB decisions are autonomous from those which pertain to the direct effect of WTO Law. However, it confirmed that the previous judgement did not tackle the issue of direct effect of the DSB decision.[60]

56 Thies, *Supra Note 48*, (Kindle) Location 317. See also Bronckers, *Supra Note 40*, 885–98.
57 Case T-174/00, Biret International SA v. Council para.57 (January 11, 2002), http://europa.eu.int. Case T-210/00, ÉtablissementsBiret et Cie SA v. Council para. 64 (January 11, 2002), http://europa.eu.int, accessed December 2012. The ECJ rejected the appeal of Biret Company because according to the court a right to recover damages suffered before the end of the deadline would render ineffective the grant of a reasonable time period for compliance with the DSB ruling.
58 See Case C-149/96, Portuguese Republic v. Council, 1999 E.C.R. I-8395.
59 Mohamad F.A. Nsour, *Rethinking the World Trade Order towards A Better Legal Understanding of the Role of Regionalism in the Multilateral Trade Regime*, (Leiden: Sideston Press, 2010), 194. Nsour opined that “the Biret case can be considered a modest but promising start for creating a better legal nexus between a key RTA like the EU and the Multilateral system.”
60 Fabrizio Di Gianni and Renato Antonini, “DSB Decisions and Direct Effect of WTO Law: Should the EC Courts be more Flexible when the Flexibility of the WTO System has Come to an End?,” 40 *Journal of World Trade* 4, 2006, 777–93.

7 Implying Indirect Effect of WTO Law to Exercise the Function of State Liability Principle

The main friction between WTO Law and state liability principle is the absence of direct effect; however, the Panel in Section 301-310 of US Trade Act of 1974 case advocated indirect effect of WTO. The Panel stated that "it may be convenient in the GATT/WTO legal order to speak not of the principle of direct effect but of the principle of indirect effect."[61] Hence, by using the concept of indirect effect, the national court can effectively exercise the function of the state liability principle in order to grant the right to individual for judicial protection, which instigates a safeguard for individuals who have suffered damage from WTO violations or even retaliation. To that end, in order to protect an individual's substantive rights, a domestic court should have the discretion to interpret substantive rights derived from WTO agreements. For example, when the EU courts held in the Hermes case that the court has jurisdiction to interpret Article 50 of TRIPs in order to meet the needs of the courts of the EU member states, they are called upon to apply national rules with a view to ordering provisional measures for the protection of rights arising under EU legislation falling within the scope of TRIPs.[62]

The question about direct application of the TRIPs agreement also exists in the Dior case.[63] Although the ECJ decided in this case that TRIPs is not directly effective as a matter of EU law, the question of direct effect must be resolved as a matter of EU member states' law as to those areas in which the member state retains exclusive competence, because the matter is complex, so it does not enjoy exclusive competence vis-à-vis the member states in the field of IPRs. The ECJ then held in the Dior case that the Netherlands Court would have discretion to decide whether Article 50 (6) of the TRIPs agreement, regarding provisional measures, would be directly implied in Dutch law.[64] The ECJ has in effect acknowledged that the question of whether TRIPS is directly effective is to be determined by each WTO member. The Court in the Dior case also decided

61 WTO Panel Report, *Section 301–310 of US Trade Act of 1974*, *Supra Note 6*, para. 7.78.
62 Judgement of *Hermès v. FHT* Case C-53/96, [1998] ECR I-3603, para. 28-29. See also Case C-431/05 *Merck Genericos-ProdutosFarmaceuticos v. Merck Co. Inc. and Merck Sharp Dohme Lda* (2007) ECR 1-7001. See also Piet Eeckhout, *EU External Relations Law (2nd Edition)*, (Oxford: Oxford University Press, 2011), 279.
63 See Joined Cases C-300/98 and C-392/98 *Parfums Christian Dior SA and Tuk Consultancy BV*, (2000) ECR I-11307.
64 *Ibid*, para. 49.

regarding the interpretation of intellectual property rights as substantive rights of the individual, because TRIPs does not provide an express definition about 'intellectual property rights'; instead it refers in Article 1 (2) to all categories of IPRs that are the subject of Part II Section 1 to 7.[65] The ECJ has observed that TRIPs leaves WTO members the freedom to give such an interpretation. The Court held that "the interest which will be protected under TRIPs as intellectual property rights and the method of protection, provided always, first, that the protection is effective, particularly in preventing trade counterfeit goods and, second, that it does not lead to distortions of or impediments to International trade."[66]

8 Conclusion

International trade under the WTO Agreements is created based on the intention of all WTO members to conduct trade across border with a view to raising standards of living and full employment for all individuals, as is embodied in the objectives of the WTO. This objective principally corresponds to the purpose of economic rights that is granted in their constitutions, and economic rights allow individual to enjoy the benefit of trade across frontier pursuant to WTO Agreements. The government therefore is obliged to provide trade rules and mechanisms for all individuals to conduct trade across frontiers in accordance with the objectives of WTO Agreements.

It is perceived that the protection of economic rights will fully promote raising standards of living and full employment when individuals are able to obtain and enjoy benefit from their economic activities, without any restriction or deprivation by national policy. However, when a government imposes a trade policy which violates WTO Law and it consequently infringes the rights of individuals to obtain trade benefits under the WTO Law, or moreover, it causes trade damage to individuals, the court is supposed to exercise the function of the state liability principle. The function of the state liability principle is that the government is obliged to compensate and to rectify the right through judicial decision.

Nevertheless, some national courts, such as the EU courts, were reluctant to imply the state liability principle owing to the absence of direct effect of WTO

65 See TRIPS Agreement, Part II – Standard concerning the availability, scope and use of Intellectual Property Rights, Section 1: Copyright and Related Rights. http://www.wto.org/english/tratop_e/trips_e/t_agm3_e.htm.

66 See Joined Cases Parfums Christian Dior, *Supra Note* 63, para. 60.

Law. Non-direct effect doctrine constitutes a friction between the state liability principle and WTO Law, because the courts deny relying on WTO Law in order to imply the state liability principle for the violation of WTO agreements. To tackle this friction, the Panel principally advocated the concept of indirect effect. This concept is likely to urge national courts to be more concerned about the right of citizen to enjoy the benefit of international trade under the WTO Agreements. By using the concept of indirect effect, the national court can effectively exercise the function of the state liability principle in order to grant the right to individual for judicial protection, which instigates a safeguard for individuals who have suffered damage from WTO violations or even retaliation. In the light of this, EU courts in the Biret, FIAMM and Fedon cases should consider that the violation of WTO Law by EU Institutions resulted in trade damage accruing to those companies. This damage is considered an infringement of economic rights, since those companies were hardly enjoying their inviolable rights to obtain the benefit of trade under the WTO Agreements. The EU courts hence are obliged to imply state liability principle (non-contractual liability) by granting compensation to rectify the right. In sum, this article provides a solution to find the nexus between the state liability principle and WTO Law. The nexus is that a national court should indirectly refer to the real impact of violation of WTO Law in order to exercise the function of state liability principle.

Appendix A: Case Reference Number and Name

WTO Case

Case Name	Year
WTO, EC: Hormone case, WT/DS26/13	1997
WTO: EC-Hormones case – complaint by the US, WT/DS26/R/USA and EC-Hormones (complaint by Canada), WT/DS48/R/CAN	1997
WTO, EC: Hormone Case – Appellate Body Report WT/DS/26/AB/R and WT/DS48/AB/R.	1998
WTO, EC – Regime for the Importation, Sale and Distribution of Bananas; Recourse by the United States to Article 22 (2) of DSU, WT/DS27/43 WTO Appellate Body.	1999
WTO, US: Section 301 – 310 of US Trade Act of 1974 – Panel Report, WT/DS152/R,	2000
WTO, Ecuador: Bananas III – Recourse to Appellate Body Under Article 21.5, WT/DS27/AB/RW2/ECU.	2008
WTO, US: EC — Bananas III Recourse to Appellate Body under Article 21.5, WT/DS27/RW/USA	2008

EU Case

Case Name	Year
Joined Case 5, 7 and 13 to 24–66, Firma E. Kampffmeyer and others v Commission of the EEC, ECR 245, 933 and 262.	1967
Case C-21/72, International Fruit Co. v. ProduktschapvoorGroenten en Fruit, ECR 1219.	1972
Case 4/73 Nold v Commission, ECR 491	1974
Case App no 8919/80. V.D. Mussele v Belgium, ECHR.	1983
Case 240/83, Procureur de la République v Association de défense des brûleurs d'huiles usagées (ADBHU), ECR 00531.	1985
Case App no 8543/79; 8674/79; 8675/79; 8685/79, Van Marlea.o. v Netherlands ECHR	1986
Case H v Belgium 10 E.H.R.R. 339.	1987
Case C-280/93, Federal Republic of Germany v. Council of the European Union, ECR I-4973.	1994
Case C-53/96, Hermès v. FHT. ECR I-3603.	1998
Case C-149/96, Portuguese Republic v. Council, E.C.R. I-8395.	1999
Joined Cases C-300/98 and C-392/98 Parfums Christian Dior SA and Tuk Consultancy BV, ECR I 11307.	2000
Case T-174/00, Biret International SA v. Council.	2002
Case T-210/00, Établissements Biret et Cie SA v. Council.	
Cases C-93/02 P and C-94/02 P, Biret International SA and Etablissements Biret et Cie. SA v Council of the European Union,	2003
Case C-431/05 Merck Genericos-ProdutosFarmaceuticos v. Merck Co. Inc. and Merck Sharp Dohme Lda. ECR 1-7001.	2007
Joined Case, C-120/06P and 121/06P, Fabbrica Italiana Accumulatori Motocarri Montecchio SpA (FIAMM) and Others v. Council and Commission and Giorgio Fedon & Figli SpA and Others v. Council and Commission, ECJ	2008

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