

THE IMPACT OF THE WTO RETALIATION FROM THE PERSPECTIVE OF HUMAN RIGHTS LAW

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Abstract

World Trade Organization (WTO) dispute settlement system through Panel and Appellate Body, allows sanction to be imposed when a member is unwilling to bring a WTO-inconsistent trade measure into conformity. According to the Article 22 of Dispute Settlement Understanding (DSU), if in a certain case WTO Panel finds a party has failed to make new policy in compliance with the WTO rules, the aggrieved party is entitled to obtain retaliation. The WTO retaliation emerges negative impact for some countries in particular developing or small economic countries. This impact denotes the violation of international human rights law, particularly economic rights that stipulate in Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR). This paper explains the impact that arises when WTO retaliation is imposed to a country whether a developed or developing country, from the perspective of international human rights law.

Key words: *WTO Retaliation, Impact, Economic Rights, International Human Rights*

A. Introduction

The World Trade Organization (hereinafter WTO) dispute settlement system through Panels and the Appellate Body, allows sanctions to be imposed when a member is unwilling to bring a WTO-inconsistent trade measure into conformity with WTO law. According to Article 22 of Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter DSU), a party that has failed to bring its rules of policy into conformity with WTO rules will be faced with an aggrieved party that is entitled to obtain compensation or to suspend concessions. This party is entitled to impose the

suspension of concession with respect to the same sector, another sector under the same agreement or other sectors under another agreement. Generally this is called WTO retaliation.

Article 22 of DSU states that if a country member that lost the dispute fails to comply with the decision of Panels and Appellate Body within a period of time, the country that wins the dispute will be able to seek authorization from the Dispute Settlement Body (hereinafter DSB) to suspend certain duties of the WTO system against the losing country in question. The principles and pro-

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cedures are foreseen in the Article 22 (3) of the DSU. The aggrieved party that wins the dispute may suspend its concessions in the same commercial sector, which is involved in the dispute. However, if it turns out to be impossible or ineffective, the country wishing to retaliate may seek from the DSB an authorization to suspend its concession in other industrial sectors covered by the same agreement. If this measure, still, is considered of little or no effect, the country will be able to request the suspension of its obligations covered by another agreement or cross retaliation. In *EC-Bananas Case III*, WTO Panel confirmed that EC had not brought its importation regime into compliance with WTO rules, therefore, Ecuador requested the right to retaliate against EC by suspending another agreement instead of GATT 1994 or in service sectors under GATS. Ecuador requested authorization from DSB to suspend its obligation under TRIPs. In March 2000, WTO arbitrators elaborated on the specific requirements for cross retaliation. In order to impose cross retaliation, the retaliating country must show that it is impractical and ineffective to suspend obligations in the same sector or same agreement. For this reason, Ecuador explained that suspending tariff concessions was not practicable since the portion of EC imports are primary on the investment of goods so that prohibi-

tive tariffs on these goods increase the cost of domestic production. Ecuador therefore argued that tariff raises on EC imports are also unlikely to have significant effect since Ecuador only accounts a small proportion of EC exports. Arbitrators acknowledged that the retaliating country should ensure the impact of suspension has the result of inducing compliance, pursuant to the Article 22 (8) of DSU that retaliation is to pressure the non-compliant party to comply with the Panel and Appellate Body decisions or DSB ruling and recommendation.¹

According to the Article 3(7), 21 (6), and 22 (1) of DSU, retaliation (suspension concession and other obligations) are only temporary measure that fall short of resolving the dispute. The DSU clearly stipulates in Article 19 that preferred remedy is for the non-compliant party to bring its measure into conformity with relevant covered agreement; hence, retaliation should be withdrawn once the non compliant party brings its measure into conformity with WTO rules. From this point of view, the retaliation serves to induce compliance² and should only be in place until such time.³ Nevertheless, the DSU does not provide the precise period of time for aggrieved party to impose retaliation against non-compliant party.

Admittedly, WTO retaliation in general is utilized to prevent continued losses

¹ *European Communities – Regime for the Importation, Sale and Distribution of Bananas (EC-Bananas III), Recourse to Arbitration by the European Communities under Art. 22(6) of the DSU*, (WT/DS27/ARB/ECU), 24/03/2000.

² *European Communities – Regime for the Importation, Sale and Distribution of Bananas (EC-Bananas III), Recourse to Arbitration by the European Communities under Art. 22(6) of the DSU*, (WT/DS27/ARB/ECU), 24/03/2000.

³ The Article 22 (8) of DSU provides “the suspension of concessions or other obligations shall be temporary and shall only be applied until “such time” as the measure found to be inconsistent with a covered agreement has been removed...”

for aggrieved party.⁴ However, this can be costly to the non-compliant party and unfortunately, it can be even more costly or even devastating for the economy of developing or least developed country. The term of developing country (or least developed country) in the legal sense used in WTO Agreement is when a member accepts the principle of self-election, by simply declaring itself a developing country member.⁵ The term of developing country denotes a relatively poor country in the conventional sense. Horn and Mavroidis⁶ mentioned that developing country (or least developed country) is generally has limited domestic legal resources and high average trade barriers. The exports are usually concentrated in term of products and trading partners. Developing countries in general are often economically and politically dependent on industrialized countries.

The Case of Brazil – Export Financing Program for Aircraft between Brazil and Canada was illustrative for the effects of the implementation of the WTO retaliation on a developing country. The retaliation measure was imposed since Brazil had failed to withdraw the export subsidies for regional aircraft under the *Programa de Financiamento às Exportações* (PROEX) policy.

Hence, the Brazilian policy was deemed to be a nullification and impairment of the benefits accruing to Canada's aircraft trade under the Agreement of Subsidies and Countervailing Measures (hereinafter ASCM). In 2000, following the Panel and Appellate Body decisions, Canada was allowed to impose retaliation against Brazil with respect to the suspension of the application of tariff concessions under GATT 1994, the suspension of obligation under the Agreement on Textiles and Clothing, and the Agreement on Import Licensing Procedures. Subsequently, WTO Arbitration determined the level of suspension in maximum amount of C\$ 344.2 million per year.⁷

According to Canada Gazette May 13 2000,⁸ Canada would suspend the obligations under GATT by imposing a 100 percent surtax on selected items imported from Brazil, the surtax would be in addition to any existing rate of duty on these imports. The initial lists included most industrial and agricultural products. Canada also permitted the imposition of restraints on imports of textile and clothing outside the provision of the Agreement on Textiles and Clothing. Additionally, Canada was allowed to suspend its obligations to Brazil under Agreement on

⁴ Hendrick Horn and Petros Mavroidis, "Remedies in the WTO Dispute Settlement System and Developing Country Interests", Research Paper, Institute for Economic Studies, Centre for Economic Policy Research, Stockholm University, London, November 14, 1999. p-1.

⁵ There are no WTO definition of "developed" and "developing" countries. Members are declaring themselves whether they are "developed" or "developing" countries. Available at: http://www.wto.org/english/tratop_e/develop_e/dlwho_e.htm. Last visited 20 May 2008.

⁶ Hendrick Horn and Petros Mavroidis, *Supra* Note 5, P. 3

⁷ *Brazil – export Financing Program for Aircraft*, WT/DS46/ARB, August, 28 2000. In reference to report of the Appellate Body, WTO/DS46/AB/RW, July, 21 2000, and WT/DS46/AB/R, August, 2 1999. Report of the Panel, WT/DS46/R, April, 14 1999.

⁸ Canada Gazette, Department of Foreign Affairs and International Trade (DFAIT), May 13 2000. Available at www.dfaifit.go.ca, last visited may 16, 2008.

Import Licensing.

Once an aggrieved party requests authorization from the DSB to suspend the application of concessions or other obligations under covered agreement, or to impose retaliation, it must set out a specific level of suspension. The level of suspension must be equivalent to the nullification and impairment that caused by the WTO inconsistent measure. In addition, the request must specify the sectors and the agreements under which concession or other obligations would be suspended.⁹ Although the DSU does not explicitly require that members must include a list of potential target products with their request to impose retaliation, in *EC-Hormones case*, the arbitrators stated that, “the US as the party that seek to suspend concession has to identify the products subject to suspension in a way that allowed us to attribute annual tariff proposed, namely a 100 percent tariff.” Arbitrators emphasized that once this is done, the US is free to pick any products from the list (not outside the list) that equals a total trade value but it does not exceed the amount of trade impairment.¹⁰

Palmeter and Mavroidis explained that “the party that seeking to suspend concessions must provide a list identifying the products”, seems not to have a strong legal basis that supporting it.¹¹ None of the provisions in the DSU provides the requirement of a list of products subject to countermea-

asures or retaliation, therefore, the aggrieved party is free to set any products on the list, and pick them freely. Since the aggrieved party uses lists for practical reason, the itemization of potential target products serves to notify elements of the private sector in the territory of non-compliant member.

In the *Brazil – Aircraft Case*, DSB gave Canada authorization to suspend tariff concession up to 100 percent surtax on selected imports from Brazil. The surtax would be imposed on more than 100 items in the initial lists that included most industrial and agricultural products. The Brazil General Preferential Tariff Treatment (GPT) would be suspended up to 100 percent tariff imports ad valorem.¹² According to Canada Custom and Revenue Agency 2001, in the Custom Tariff Schedule, Canada imposed Most Favored Nation (MFN) Tariff to textile products about 10% - 16% per item.¹³

If Canada would impose 100 percent surtax on each textile items that it imported from Brazil, which was practically increasing the price of every piece of clothing imported from Brazil in the Canada’s market, then it would gradually exclude Brazil’s textile and clothing products in the Canada’s market. It was obvious that the retaliation had an adverse effect upon the Brazilian exporters. Finally, the impact of suspension of obligations would be able to decrease trade welfare to both Brazilian exporters and pro-

⁹ The Article 22 (4) of DSU. See also *European Communities – Measures Concerning Meat and Meat Products (Hormones) – Original Complaint by the United States – Recourse to Arbitration by the European Communities under Article 22 (6) of the DSU*, WT/DS26/ARB, 12 July 1999.

¹⁰ *Ibid*

¹¹ David Palmeter and Petros Mavroidis, (2004), *Dispute Settlement in the World Trade Organization: Practice and Procedure*, Cambridge University Press, London, p. 268

¹² Canada Department Foreign and International Trade (DFAIT), Export – Import Control Bureau, 2001 – 2002.

¹³ *Ibid*

ducers.

Yu¹⁴ suggested, “An import tariff on a small country pushes up its domestic import price, which in turn leads to higher domestic production and less consumption on the importable. Without a doubt, such a small country bears a dead weight loss due to both production and consumption distortions.” Therefore, this term will aggravate domestic users, who suffer a loss of choice and probably have to pay higher prices for substitute products; otherwise, if a small country is retaliated, the import tariff will boost the price of exported product, which means domestic users particularly in a large country will acquire substitute product from different exporter country but less price. Furthermore, the competition among exporters from developing countries is fierce, since developing countries are typically exporting similar products.¹⁵

The effect of retaliation in the context of Aircraft dispute between Canada and Brazil can depress or eliminate bilateral trade between them in the goods subject to retaliation. Canada imports goods from Brazil amounting to approximately \$1.5 billion per year, the majority being primary materials, agricultural and low-technology goods. Agricultural products are included among the

imports that would be aggrieved if Canada imposed a 100 percent punitive tariff as retaliation. The impositions of punitive tariffs or non-tariff barriers will detriment the Brazilian market access. It contradicts the *raison d’être* of the WTO system itself. As Steve Charnovitz posited, international institutions do not generally contradict their own *raison d’être* in the name of sanction.¹⁶ Charnovitz observed that “the World Health Organization does not authorize on party to spread viruses to another. The World Intellectual Property Organization does not fight piracy with piracy. So the WTO’s use of trade restrictions to promote free trade is bizarre.”¹⁷

The WTO retaliation seems unfair for industries that affected by this countermeasure. In *Brazil Aircraft* case, some domestic industries such as industries of iron products, agricultural products, textiles and low technology products are affected industries if Canada imposes a 100% punitive tariff. Brazil should be able to clear these products through other international markets, in the light of the relatively limited quantities sold into Canada. As a result, a punitive duty of 100 percent can be expected to shut off trade in the majority of products imported from Brazil.

¹⁴ Miaojie Yu, “Measuring the Impact of Trade Protection on Industrial Production Size”, Research Paper Presented at the 2007 AEA Annual Meeting, Chicago, December 31, 2007, P -11.

¹⁵ *Trade Barriers Faced by Developing Countries’ Exporters of Tropical and Diversification Products*, International Centre for Trade and Sustainable Development (ICTSD) and the Food and Agricultural Organization of the United Nations (FAO), FAO Trade Policy Brief No. 16, March 2008, available at www.fao.org/es/esc/en/378/428/index.html, last visited : 20 May 2008.

¹⁶ Steve Charnovitz, (2002), *Should the Teeth Be Pulled? An Analysis of WTO Trade Sanctions*, The Political Economy of International Trade Law, Cambridge University Press, Cambridge – London, P-12

¹⁷ *Ibid*

1. The Impact of WTO Retaliation

The main purpose of Article 22 DSU is promoting compliance by the non-compliance party. The purpose is also not to punish nor coerce the country at fault, but rather to enable the aggrieved party to recover by re-leveling its trade. However, Charnovitz mentioned that “under the DSU rules, the government using a suspension of concession or other obligation (retaliation) lacks any duty to mitigate the economic or social consequences to private economic actors. Many of these persons will be innocent of any responsibility for the WTO violation that underlies the case.”¹⁸ In the case of *EC – Bananas*¹⁹, Ecuador intent to impose cross retaliation under TRIPS that can generally be expected to have a significant impact on key industries and thereby provide a strong incentive to industrialized countries to comply with WTO rulings. Russe explained, “the industries that affected by Ecuador retaliation are possible to lobby their respective (non-compliance) governments to do everything necessary to avoid such suspensions in the first place and, if already in place, to act as soon as possible to remove them.”²⁰

The economic impact of the WTO retaliation will depend on the size of the economies involved, the degree of bilateral trade between the two nations and the composi-

tion of this trade and its relative importance. The impact will also depend on the ability of the industries targeted to adjust to the punitive tariffs, or to find alternative markets for the goods that subject to retaliation. This situation might be workable for the world trade major player or developed country. Conversely, the economic impact of WTO retaliation would probably different when a small economic country is dependent on the defendant country as the only possible source of its exports. Horn and Mavroidis²¹ also mentioned if the suspension of concession is costly; it will be more costly to the country with the higher trade barriers. If in one country, the suspension reduces imports from \$600 to \$ 500 million, while in another country imports fall from \$100 to nil, and then from an economic point of view the loss to be felt more severely in the latter country. Hence, to the extent that small economic countries (small GNI countries) have higher barriers to trade, there may be an argument to be made for why they should suffer more in welfare terms from a countermeasure or retaliation of a given size.

2. The Most Affected Party by the WTO Retaliation

One question may arise relating to the implementation of WTO retaliation is who

¹⁸ Steve Charnovitz, “The WTO’s Problematic “Last Resort” Against Noncompliance”, *Aussenwirtschaft, The Swiss Review of International Economic Relations – Press*. Geneva, December 2002. p. 12

¹⁹ WT/DS27/ARB/ECU, *Supra* note 2.

²⁰ Hemming Grosse Ruse – Khan, (April 2008), *Suspending IP Obligations under TRIPS, A Viable Alternative to Enforce prevailing WTO Rulings*, Center for International Environmental Law – Press, Geneva. See also *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities Under Article 22 (6) of the DSU, Report of the Arbitrators (hereinafter Ecuador Arbitration)*, 24 March 2000, WT/DS27/ARB/ECU, par. 173 (d). Arbitrators pointed out that this could abridge the private rights of individuals in Europe.

²¹ Hendrick Horn and Petros Mavroidis, *Supra* Note 5, p. 21.

are affected by the adoption of retaliation measure? Alemmano mentioned that private economic actors are the most affected party. They are actors participating in the global market. The actors can be natural persons, business corporations, partnerships or labor union. They operate as producers, consumers, exporters or importers. Alemmano distinguished between two categories of private economic actors. Firstly, private companies in the winning countries whose exports continue to not receive the benefits that are normally entitled to, and secondly, companies in the losing countries that are affected by the retaliation or cross retaliation.²² Unfortunately, although these private economic actors are the most affected parties by WTO countermeasure, WTO rules do not provide rights directly to them nor a direct access to the dispute settlement mechanism, except as *amicus curiae*.²³

WTO rules do not provide direct rights and obligations to the private economic actors. The rights and obligations of private

economic actors are substantive that given by the government of the WTO members. When a WTO member is dealing with WTO rules for instance TRIPs, the government should give rights to individual that holding exclusive property rights such as copyrights, patents, trademarks, geographical indications, industrial designs and undisclosed information.²⁴ GATS applies the Most – Favoured-Nations (MFN) and National Treatment principles to economic actors, namely “services suppliers”.²⁵ These principles also apply to products that exported and imported among WTO members pursuant to GATT rules.²⁶ The substantive rights apply directly from national law of WTO members to the private economic actors in the context of implementation of TRIPs, GATS and GATT.

Charnovitz explained “since the substantive rights are extended only indirectly to individuals, the WTO can easily disoblige a government to respect these rights.”²⁷ This occurred to the *Brazil Aircraft Case*, when

²² Alberto Alemmano, (2008), *Private Parties and WTO Dispute Settlement System, Who Bears the Costs of Non – Compliance and Why Private Parties Should Not Bear Them*, in *Essays on the Future of the World Trade Organization*; Vol. II *The WTO Judicial System: Contributions and Challenges*, Julien Chaisse and Tiziano Balmelli (ed.), Editions Interuniversitaires Suisses – Edis, Geneva, p. 37.

²³ David Palmer and Petros C. Mavroidis, (2004), *Dispute Settlement in the World Trade Organization: Practice and Procedure*, Cambridge University Press, Cambridge – London, p. 113. The issue of *Amicus curiae* briefs has been contentious in the WTO. In some cases, the panel declined to accept the documents submit by the non government (private party), but stated that any party to the dispute could put forward all or part of these briefs as part of its own submission. It means that non government (private economic actors or NGO) has right to submit its information regarding the case through the submission of the disputant party. See also *Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products* (US-Shrimp Case), WT/DS58/AB/R, adopted 6 November 1998, DSR 1998: VII, 2755. *Panel Report, US-Shrimps Case*, WT/DS58/R and Corr.1. Adopted in 6 November 1998.

²⁴ Agreement on Trade – related aspects of Intellectual Property Rights (hereinafter GATS), Article 41, in *The Results of the Uruguay Round of Multilateral Trade Negotiations*, Cambridge, Cambridge University Press, 1995,

²⁵ Werner Zdouc, “WTO Settlement Practice Relating to the GATS”, *Journal of International Economic Law*, Vol. 2, February 1999, p. 295. See also Charnovitz, “The WTO and The Rights of Individual”, *Journal of Intereconomics*, Geneva, Vol March/April 2001.

²⁶ General Agreement on Tariffs and Trade, Articles I and III, in *The Results of the Uruguay Round of Multilateral Trade Negotiations*, Cambridge, Cambridge University Press, 1995

²⁷ Steve Charnovitz, *Supra Note 19*

the Canada government got DSB approval to levy high tariffs on more than 100 items of products from Brazil. The economic impact of these punitive duties will be dispersed across a number of products imported from Brazil.²⁸ This situation also happened to the Banana case in 2000, when for the first time, the DSB permitted Ecuador to withdrawal of intellectual property rights to be used as a cross retaliation.²⁹ When a non compliance party ignores the DSB recommendations and rulings, then the aggrieved party intent to impose countermeasure, private economic actors may run the risk of not being protected by a system that on the one hand make them bear all the costs of the countermeasures or retaliation.

From this point of view, it is clear that WTO retaliation is likely to influence the private economic actors. The effect of WTO retaliation to the private economic actors also had become a polemic in the EC³⁰. In the case of *EC- Hormones*,³¹ EC failed to comply with the DSB rulings and recommendations, the complaining parties such as the US and Canada were authorized to

impose retaliatory measures in the form of punitive tariffs on certain products exported into their respective territories by the EC. However, EC keep maintaining its ban of beef hormones until facing heavy retaliatory actions. European exporters of luxury products such as French cheese and Italian handbag manufactures are those most affected private economic actors by the trade sanction.³² Thus, in June 2000, French traders of meat, *Biret International*, were seeking compensation for damage that it claimed to have suffered as a result of the adoption and maintenance in force of the European ban on the import of meat and meat products into the Community, through the Court of First Instance.³³ However, the court emphasized that the action for damage that it claimed by the private economic actors by referring to WTO rules was unacceptable since “the purpose of the WTO Agreements is to govern relations between States or Regional Organizations for economic integration and not to protect individuals”. The court added that “decision of DSB of 13 February 1998 cannot be altered”, therefore the rights of

²⁸ Joseph D Cruz and Charles M. Gastle, (February 2002), *Canada – Brazil Trade Relations: An Expected Arbitral Mechanism may be required to resolve the WTO Aircraft from Brazil/Canada Dispute*, Estey Centre for Law and Economics in International Trade - Press, Washington, p. 56. Cruz and Gastle explained that “instead of building pressures for change within Brazil, it would more likely have the effect of vilifying Canada once again. Canadian products could once again to be the subject of boycotts. Canadian potash and sulphur would be convenient targets, to the extent that agricultural organizations would feel the effects of the punitive tariffs.”

²⁹ Hemming Grosse Ruse – Khan, *Supra Note 21*.

³⁰ Alberto Alemanno *Supra Note 23*, this polemic refers to the unresolved problem of the possibility for a private economic actor in a WTO member to base a claim in domestic courts against another private party, or another WTO member, relying on an alleged violation of a WTO rule.

³¹ Panel Report, *European Communities – Measures concerning meat and meat products (hormones)*, WT/DS26/R/USA (August, 18, 1997); Appellate Body Report, WT/DS26/AB/R.

³² Alberto Alemanno *Supra Note 23*. However, in June 2000, the US Senator, Max Baucus introduced a bill to establish a Beef Industry Compensation Trust Fund to recover the US beef industries from severely damaged by the EC ban, it has been proposed to allocate the income obtained from the application of the retaliatory measures to these companies. See *Trade Industry Compensation Act of 2000, S 2709, 106th Cong. 2 (7) 2000*.

³³ *Ibid*

individual to rely on WTO rules before the European Court were discharged.³⁴

The *Biret International* further filled appeal against the judgment of the Court of First Instance. The Advocate General Alber mentioned “why Biret should face this situation without any possibility of recovery or should it rather be entitled to invoke the hormones decision establishing the WTO illegality of the ban.”³⁵ Alber posited that “it would be not only being unfair to refuse to compensate the damage by an individual as a result of the non compliance, but it would also amount to a fundamental right’s violation.”³⁶ This argument seems reasonable since the effect of WTO retaliation is not only damaging those companies who do not receive the benefits that are normally entitled to under the WTO Agreement (companies in the applicant state), but also those companies that have nothing to do with the original complaint (companies in the respondent state). In addition, the WTO retaliation is also disfavoring individual in the applicant country who will pay higher prices for the targeted products.

3. The Impact of WTO Retaliation to a Developing or Small Economic Country

One question may arise, what will happen if the WTO retaliation is applied to a developing country or a small economic country? where in the most developing country, private economic actors are including non major trade player (non multinational company). For example, most of Indonesian agricultural and textile producers are middle low entrepreneurs. Therefore, they are categorized as vulnerable economic groups; once they lose their benefits, they will face a dead end.³⁷ Vulnerable economic groups are sensitive private economic actors in a developing country. They are sensitive because of the number of workers they employ, their small impact on the domestic economy, the lack of power to lobby their politicians, their vulnerability to international competition and their symbolic status.³⁸ Is the opinion of General Advocate Alber that the WTO retaliation would also amount to a fundamental right’s violation acceptable?

³⁴ *Ibid*, See also Case C-93/02. *Biret International SA v. Council of the European Union*, 30 September 2003

³⁵ Opinion of Advocate General Sigber Alber in case C-93/02, *Biret International v. Council*. Delivered on 15 May 2003.

³⁶ *Ibid*, see also Geert Zonnekeyn, “EC Liability for the Non – Implementation of WTO Dispute Settlement Decisions – Advocate General Alber Proposes a “Copernican Innovation” in the case law of the ECJ”, *Journal International Economic Law*, Vol. 6 Number 3, 2003, p. 761-769.

³⁷ Tempointeraktif, *Indonesia Rugi Rp. 40 Miliar Akibat Embargo Tekstil AS*, November 6, 2001, available at http://www.tempointeraktif.com/hg/ekbis/2001/11/06/brk.20011106-02_id.html, last visited : 12 April 2008. An estimated 60% of Indonesia’s total exports of textile and apparel to the US market were subject to specific quotas. The result of US textile embargoed against Indonesia in 2001 was trade impairment in approximately 40 billion Rupiahs. Some of the producers were decreasing the number of employment to cover the expenses of textile production. Besides the monetary and economic crisis that overwhelmed Indonesia, the situation was aggravated by the existence of the US embargoed on Indonesia’s export of textile and apparel. Almost 3000 workers of textile industries in West Java and 1200 workers in Central Java were laid off after the US embargo in 2001.

³⁸ For example, several Indonesian textile producers that export their products and import their fabricant contents are home made industries.

4. The Impact of WTO Retaliation from the Perspective of Human Rights Law

A fundamental right is a right that has its origin in a state's constitution that is implied from the terms of that constitution. Fundamental rights usually include the rights that considered basic human rights. These rights are based on the entire human rights corpus such as the Universal Declaration of Human Rights (hereinafter UDHR)³⁹, the International Covenant on Civil and Political Rights (hereinafter ICCPR)⁴⁰, and the International Covenant on Economic, Social and Cultural Rights (hereinafter ICESCR), these documents referred to as the International Bill of Human Rights.

McGee⁴¹ had pointed out that one of the basic human rights is freedom to engage in commercial intercourse voluntarily. It is clearly state in the Article 1 (2) of ICESCR that, "*all peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obliga-*

tions arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In no case may a people deprived of its own means of subsistence." Conversely, this right will be eliminated if a country is imposing trade sanction to another country that reduces the opportunity of its people to obtain their economic values. The opinion of General Advocate Alber seems acceptable since the decision of the council violated the fundamental right to achieve free trade and economic values.

WTO retaliation will prevent the individual in the retaliated country to trade and to obtain their economic values freely.⁴² It violates the property, contract and association rights of the individuals who wish to trade and to gain the benefits of trade. Trade sanctions⁴³, embargoes and economic blockade violate economic rights of individual in the respective country. When the US embargoed against Indonesian textile⁴⁴, several textile industries were reducing their produc-

³⁹ Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948). Article 8 : "*Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.*"

⁴⁰ International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March, 23, 1976. Article 1 (1): "*All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*"

⁴¹ Robert W. McGee, "Trade Embargoes, Sanctions and Blockades – Some Overlooked Human Rights Issues", 32 *J. World Trade* 1 Number 39, August 1998, p. 143.

⁴² Pierre Lemieux, "Ottawa Wins a Jet Battle, But Canadians Lose", *Wall Street Journal*, Vol. A17, December 15, 2000.

⁴³ Steve Charnovitz, "Rethinking WTO Trade Sanction", *American Journal of International Law*, October 2001, Reprinted in *The WTO and International Trade Law/Dispute Settlement* (Edward Elgar Publishing, 2005). Charnovitz argued that WTO retaliation (suspension of concession and other obligation) is "trade sanction". The term "sanction" was occasionally used by GATT in a Secretariat Note in 1965 characterized withdrawing concessions under Article XXIII as "the final sanction". See also *Guide to GATT Law and Practice* 693 (World Trade Organization ed., 1995).

⁴⁴ Akhmad Rizal Shidiq, "Review of NTM Facing Indonesian Exporters", *Institute for Economic and Social Research*, Faculty of Economics, University of Indonesia, 2005. In the year 2001, Indonesia exporters of textile and apparel were threatened by special safeguard. Approximately 60% from Indonesian's total exports of textile and apparel were subject to export quotas. The American Textile Manufacturer Institute (ATMI) has asked for

tion since their lost their benefits. Amount of workers were laid off since the annual benefits of companies were sharply decreasing.⁴⁵ To this end, in a small economic country, the effect of trade sanction is not only reducing the private economic actors' rights to gain their benefits, but also deprivation of right to work of their workers.⁴⁶

The core of right to work identified in the Article 23 (1) of the Universal Declaration of Human Rights 1948. It states that *"Everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment."* This right can be traced back to the ancient multilateral treaties. In the establishment of the International Labor Organization (hereinafter ILO), the contracting parties agreed that right to work was coherently relating to labor rights.⁴⁷ At the end of World War II, the International Labor Conference adopted Philadelphia Declaration in May 1944. This Declaration defined again the objective and purpose of the ILO, in particular that all human beings have the right to pursue both their material well-being

and their spiritual development in conditions of freedom and dignity of economy security and equal opportunity. It also referred to the social aspect of economic and financial measures.

From the background of ILO development, it turns to new development of international trade. The Havana Charter of 1947 laid down a link between international trade and right to work. It considers that *"the members recognize that the avoidance of unemployment and underemployment, through the achievement and maintenance in each country of useful employment opportunities for those able and willing to work and of a large and steadily growing volume of production and effective demand for goods and services, is not of domestic concern alone, but is also a necessary condition for the achievement of the general purpose and the objectives set forth in Article 1, including the expansion of international trade, and thus for the well-being of all others countries."*⁴⁸

According to the Havana Charter, the contracting parties at that time agreed to facilitate the promotion of mutual understand-

this action as it declared that the textile domestic industry is risked for loss from the large number of imported textiles, especially from Asia. ATMI suggested the US government to: 1) not to give commitment for tariff reduction in the WTO forum; 2) investigation for dumping and subsidies, and use other trade remedies to prevent the entry of Asia textile; 3) use section 201 to protect US textile industry.

⁴⁵ Tempointeraktif, *Supra* Note 38.

⁴⁶ Indonesian government was powerless to prevent this situation. In 2001, the monetary crisis impact was spreading to all domestic economic sectors included unemployment.

⁴⁷ The core of labor rights identified in the establishment of the International Labor Organization which has become Part XIII of the Treaty of Versailles in 1919, Article 387 – 399. Available at <http://www.ilo.org/public/english/about/history.htm>, last visit, 20/07/2008: 8.31 p.m. In that year, the ILO established the Convention Concerning the Employment of Women Before and After Childbirth, No.3, 1919, Article 3 (b). Convention Concerning Sickness Insurance for Workers in Industry and Commerce and Domestic Servants, No.24, 1927, Article 9. These conventions directed governments to improve the condition of labor and employers by providing a right to appeal to special tribunal in case of a dispute.

⁴⁸ Havana Charter 1948, Chapter II, Employment and Economic Activity, Article 2: Importance of Employment, Production and Demand in relation to the Purpose of this Charter.

ing, consultation and co-operation to resolve the problem relating to international trade in the fields of employment in the economic development. The parties were responsive on the prevention of unemployment as result of the expansion of international trade. Unfortunately, the Havana Charter shelved by the contracting parties. The International Trade Organization had not been created and the original purpose of Havana Charter was substituted by General Agreement on Tariffs and Trade 1947.⁴⁹ The objectives of GATT that stipulated to the Preamble of GATT 1947 were raising standard of living, ensuring full employment, steady growing real income and effective demand. While the GATT 1947 functioned well enough, the leading members wished to replace it with a permanent institution.

In 1994, the GATT 1947 was replaced by the WTO through the adoption of Agreement Establishing of the WTO. The Preamble of the WTO Agreement states that members should conduct their trade and economic relations with a view to “*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 (...)”.

The WTO objectives enshrined the achievement of full employment among its member.

It means that one of the WTO goals is ensuring the right to work of individual within the territory of its member.⁵⁰ WTO objective is concomitant with the right to work that laid down in the Article 6 of the ICESCR. It draws attention to the obligation of all state parties to take steps individually and through international assistance and cooperation, especially economic and technical, towards the full realization of the rights recognized in the ICESCR.⁵¹ Moreover, the CESCR explained, “in conformity with the Articles 22 of the ICESCR, the ILO and other special agencies of the United Nations, the World Bank, regional development banks, the International Monetary Fund, the WTO and other relevant bodies within the United Nations system, should cooperate effectively with state parties to implement the right to work at the national level.” For that reason

⁴⁹ GATT 1947 was annexed to the Final Act Adopted at the Conclusion of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment. In the UN Conference on Trade and Employment, the Economic and Social Council considered the essential of the co-operative economic measures that taken by further international measures dealing directly with trade barriers and discriminations which stand in the way of an expansion of multilateral trade and by an undertaking on the part of nations to seek full employment. On of the basic suggestion by the committee was that “*the international agreement relating to the achievement and maintenance of high and stable levels of employment and economic activity.*” Available at <http://www.unbisnet.un.org>. Last visited July 1, 2008.

⁵⁰ Steve Charnovitz, “The Globalization of Economic Human Rights”, *Brooklyn Journal of International Law*, Vol 12, November 1999, P – 13. Since the rights to work is part of human rights law, charnovitz elaborated that “whereas international human rights law aims to transmit norms from international law to domestic law (e.g. ILO treaties), international trade law takes as a given that the responsibilities of a government towards citizen property owners are a matter to be determined by each government, not by the international community.”

⁵¹ Committee on Economic, Social and Cultural Rights, *General Comment No.18, the Right to Work, Article 6 of the International Covenant on Economic, Social and Cultural Rights, Adopted on 24 November 2005*, E/C.12/GC/18, 6 February 2006: Geneva, p.8.

states parties and international bodies, includes the WTO, should prevent any actions that hinder the enjoyment of people "right to work".⁵²

Nevertheless, the trade – full employment (in the context of "right to work") linkage is neglected in the WTO dispute settlement system. None in the system provides a possibility to prevent the effect of the implementation of WTO retaliation (trade sanction⁵³), in particular to individual's right to work. It contradicts the objective of the WTO itself. In addition, the neglectful of right to work will contribute an unemployment condition within countries that powerless to prevent the effect of trade sanction (in example a small economic country).

The unemployment situation may result in social costs to people as individual, to their families and to the society as a whole. Sen identifies the costs associated with unemployment, specifically, "loss of current output and fiscal burden, loss of freedom and social exclusion, skill loss and long run damage, psychological harm, ill health and mortality, motivational loss and future work, loss of human relations and family life, racial and gender inequality, loss of social values and responsibility, and organizational inflexibility and technical conservatism."⁵⁴ In most developing countries or small eco-

nomic countries, unemployment is adjacent to ability of individual in obtaining an adequate standard of living. Low income per capita creates inability to save some wages; moreover, the high price of basic needs accumulate a living burdensome to each person in a small country. Furthermore, being without an income also severely restricts the ability to participate in the market economy. It curtails personal development and ability to access to basic needs and goods.⁵⁵ It negates to the basic norm of human right that stipulates in Article 25 of UDHR. The Article 25 of UDHR states that "*Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.*" Therefore, the violation of rights to work may result in the violation of right to achieve standard of living. In conclusion, the effect of trade sanction in specific scope like WTO retaliation may deprive the fundamental rights in economic, social and cultural substance. It is understandable if Hubbard and Guiraud mentioned that "any WTO sanctions or countermeasures taken will have a real im-

⁵² *Ibid*, Article 22 states that "the Economic and Social Council may bring to the attention of other organs of the United Nations, their subsidiary organs and specialized agencies concerned with furnishing technical assistance any matters arising out of the reports referred to in this part of the present Covenant which may assist such bodies in deciding, each within its field of competence, on the advisability of international measures likely to contribute to the effective progressive implementation of the present Covenant."

⁵³ See Charnovitz, *Supra* Note 51.

⁵⁴ Amartya Sen, "Inequality, Unemployment and Contemporary Europe", *International Labour Review*, Vol. 2 Number 13, 1997, p. 155-171.

⁵⁵ Siegel R.L., (1994), *Employment and Human Rights: the International Dimension*, University of Pennsylvania Press, Philadelphia, p. 12

pact on the fundamental rights of the citizens of the countries involved in the dispute. But in the absence of any binding mechanism for the protection of economic, social and cultural rights, the principal victims are unable to seek redress for any damage endured.”⁵⁶

The economic, social and cultural rights are fundamental rights that stipulate in the normative international code of human rights.⁵⁷ At the universal level, the UDHR and the ICESCR are singled out as the most important sources of economic, social and cultural rights. The UDHR provides for the rights to social security, the right to work, the right to rest and leisure, the right to an adequate standard of living, the right to education, and the right to the benefits of science and culture. In this regard, economic, social and cultural rights recognized as the principal legal source that stipulate in the ICESCR. The ICESCR provides and protects the right to work and favorable working conditions (Articles 6 and 7), and the right to an adequate standard of living, including the right to food, clothing and housing (Article 11). In this context, UN Charter also provides prominent protection for human rights in economic, social and culture

rights. This is clearly expressed in Article 55 of the UN Charter: “*with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations, the United Nations shall promote: (a) higher standards of living, full employment, and conditions of economic and social progress and development; (b) solution of international economic, social, health and related problems; (c) universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion*”.⁵⁸

B. Conclusion

From this point of view, I would like to remark that the objective of WTO Agreements share much in common with the goal of international human rights covenants. The legitimacy of the WTO hinges on its fully integrating the goal of human rights and sustainable development for all. Nevertheless, the WTO has concentrated on an extremely narrow mandate of liberalizing trade, with no attention given to the broader social, economic and cultural rights context. For instance in the WTO Dispute Settlement

⁵⁶ Anne-Christine Hubbard and Marie Guiraud, (November 1999), *The World Trade Organization and Human Rights: Position Paper*. Available at : <http://www.fidh.org/spip.php?rubrique182>. Last visited July 10, 2008. See also Edwin Kessie, “Enhancing Security and Predictability for Private Business Operators under the Dispute Settlement System of the WTO”, 34(6) *Journal World Trade* 1, Vol. 17, January 2000. He stated that “Although private business operators do not have access to WTO dispute settlement system, they are the ones who are most likely to be affected by the inefficiencies of the system.”

⁵⁷ Scheinin, (2001), *Economic and Social Rights as Human Rights*, Dordrecht: Martinus Nijhoff, p. 29

⁵⁸ Leckie, (2006), S & A Gallagher (Eds.), *Economic, Social and Cultural Rights: A legal resources Guide*, University of Pennsylvania Press, Philadelphia, p. xv. There are various other international human rights instruments contain provisions which are directly related to economic, social and cultural rights. The Convention on the Eliminations of all Forms of Racial Discrimination, for example, prohibits discrimination on the basis of racial or ethnic origin with respect to economic, social and cultural rights. The Convention on the Elimination of Discrimination against Women affirms the applicability of the full range of economic, social and cultural rights for women. Similarly, a broad range of worker – related rights has been developed under the auspices of the ILO that enshrined in the ILO Convention and other legal instruments.

System, nothing can be found in the details of DSU that calls to mind the primacy of international human rights law. The characteristic recommendation and ruling from the DSB is that the illegal measures conducted by a WTO member must be aligned on WTO rules. In case this does not succeed, the aggrieved country can even resort to retaliation. It is possibly even involving industries that have little to do with those involved in the

initial dispute. Moreover, the various consequences on the implementation of the WTO retaliation will associate with the violation on human rights law in particular economic, social and cultural rights. These rights are fundamental rights that belong to all human being include individual who live within the country that powerless to bear the impact of WTO retaliation.

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