

Economic and Social Actors in the World Trade Organization

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The World Trade Organization (WTO) is an international organization composed of Members that are states or customs territories. Like every international organization, the WTO connects in some ways to the individuals, which inhabit the states. The main impact of the WTO on the individual springs from the substantive disciplines of the trading system. For example, eliminating quotas can change the structure of production and employment within a country. But the WTO also has an important connection to individuals through its procedural disciplines applying to Members, and through other means. This article looks at the broadening rights and opportunities for natural and corporate persons. I will survey the key issues and present some policy recommendations. The connections between the WTO and private actors can be divided into two types: those with economic actors and those with social actors. Economic actors pursue their self-interest. Such actors include exporters, importers, producers, merchants, and workers. They may be individuals, companies, corporations, trade associations, or labor unions. Social actors pursue their vision of the public interest. These actors are multifarious. A typical actor is the non-governmental organization (NGO), but social actors can be religious leaders, academics, and scientists. Business associations and labor unions can also be social actors, whether or not one counts them as an NGO. A social actor need not be a group; an individual can be a social actor. Admittedly, this typology is fuzzy. The pursuit of self interest cannot be disentangled from the pursuit of public interest? Social actors can act with economic motives and economic actors can act with social motives.

Nonetheless, the distinction is a useful one. When a person lodges a complaint about the way an agency deals with him, he is performing a different function than when he offers a prescription for how a law should be changed. In my view, the social actor is distinguished from the economic actor by the nature of the activism rather than the identity of the actor. Thus, a non-profit business association can act in both ways. It can act narrowly as an economic actor and also broadly as a social actor.

My presentation has three parts. Part I looks at the interaction between the WTO and economic actors. A much shorter Part II looks at the interaction between the WTO and social actors. Part III analyzes both relationships briefly and presents a few recommendations for new WTO policies.

I. The WTO and Economic Actors

The WTO agreements are a code of obligations and rights for member governments. None of these obligations apply directly to individual actors. With one exception, no rights exist for economic actors within the WTO. Yet as we will see, the rights and obligations apply to economic actors indirectly.

Many economic actors do very well by the WTO. The biggest gain from the Uruguay

Round of trade negotiations (1986-94) came in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The TRIPS Agreement requires each member government to award private rights to individual right holders from other countries. TRIPS specifies a broad range of such rights embracing copyrights, trademarks, geographical indications, and patents. These are substantive rights that have forced changes in every country's law. Another big gain for economic actors emerged in the General Agreement on Trade in Services (GATS). The GATS requires governments to grant non-discriminatory treatment to service suppliers of other WTO member countries. The innovator and service provider do not acquire these substantive rights directly from the WTO, but rather from governments via the implementation of their WTO obligations. Thus, if the promise is not fulfilled, an economic actor does not have a cause of action at the WTO. Its only recourse would be to petition the government denying the right, or lobby its own government for diplomatic protection.

Some WTO agreements transmit obligations indirectly to economic actors. For example, the Sanitary and Phytosanitary (SPS) Agreement requires governments to take such reasonable measures as may be available to them to ensure that non-governmental entities within their territories comply with the SPS Agreement. The Agreement on Technical Barriers to Trade (TBT) also conveys indirect obligations. It requires governments to take such reasonable measures as may be available to them to ensure that non-governmental bodies comply with certain TBT rules. In addition, the TBT Agreement sets up a Code of Good Practice for the Preparation, Adoption, and Application of Standards. Governments are directed to take such reasonable measures as may be available to them to ensure that local government and non-governmental standardizing bodies . . . accept and comply with this Code of Good Practice.

A. Enhancing Domestic Rights

To assist economic actors in gaining the benefits of the WTO Agreement, governments established numerous procedural and administrative requirements to be met within member countries. These rules are sometimes referred to as transparency, but they are broader than that term suggests. They are due process obligations giving an economic actor the right to submit comments to agencies and to appeal rulings.

The idea of using a trade treaty to mandate procedural economic rights did not originate in the Uruguay Round. It was always part of the General Agreement on Tariffs and Trade (GATT), written in 1947. For example, GATT Article X:3(b) requires each party to maintain judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction of administrative action relating to customs matters, and further requires such tribunals to be independent of the administering agency. Another provision in GATT Article X calls for the prompt publication of trade regulations in order to enable both governments and traders to become acquainted with them.

Recently, GATT Article X was the subject of a landmark WTO panel decision in the Argentina Bovine Hides case. The panel found that Argentina was violating GATT Article X:3(a), which requires governments to administer trade regulations in a uniform, impartial, and reasonable manner At issue was a regulation that permitted two domestic leather and tanning trade associations to observe Customs agency inspections wherein products are classified for an export tax assessment. The plaintiff European Communities (EC) called this regulation a violation of GATT Article X because the

presence of the trade associations inhibited the export of raw hides. One problem was that the export procedures gave downstream slaughterhouses access to confidential business information. The WTO panel was called upon to interpret GATT Article X provisions which, surprisingly, had not received much attention during the previous five decades. Noting that Article X uses the terms traders and importer, the panel held that the Article X discipline requires more than treating all governments the same. After considering what information the trade associations were gaining access to, the panel held that Argentina's regulation was not being administered in an impartial and reasonable manner. The implication of the holding is that Argentina is being unreasonable to its exporters, who may suffer injury from the presence (during inspections) of private actors with adverse economic interests. Although the panel does not vindicate the due process right of the exporter directly, its holding for the EC is centered on a finding that Argentina is disadvantaging *its domestic* economic actors.

The advance in jurisprudence in this case is subtle, and so let me clarify it. Every WTO dispute has private actors lurking behind it. Nevertheless, the typical dispute is couched in state-centric terms - that is, the claim is that one government is failing to fulfill the WTO obligations it owes to another. Argentina Bovine Hides can be viewed in that normal way too. Yet the panel could only reach its legal conclusion by finding that the Government of Argentina was being unreasonable to *someone*, and in this case, it was to its exporters. In most WTO disputes in which a victim appears in the story, that victim resides in the plaintiff country. This case is different because the EC exercises its GATT cause of action against Argentina for, in effect, victimizing a domestic economic actor in Argentina.

In requiring parties to accord limited procedural rights to economic actors, the original GATT laid the foundation for the broader rights now championed in WTO agreements. Like the GATT, the WTO does not accord rights directly to individuals, but rather mandates that member governments do so. Although a few commentators have pointed to this important legal development - most notably the perspicacious Ernst-Ulrich Petersmann - this dimension of WTO law has often been left to the specialists for each trade agreement.

In at least three WTO agreements, the guarantee of individual economic rights is central. Consider the agreements on antidumping, subsidies, and intellectual property. The Antidumping Agreement requires governments: (1) to initiate antidumping investigations upon an application by (and on behalf of) a domestic industry; (2) to give all interested parties notice and an ample opportunity to present evidence and to defend their interests; (3) to give public notice upon initiating an investigation; (4) to provide judicial review of antidumping decisions; and (5) to give interested parties the right to seek review of the continued need for an antidumping duty, and to terminate the duty if no longer needed. The Agreement on Subsidies and Countervailing Measures (SCM) contains analogous provisions regarding countervailing duties. Part III of the TRIPS Agreement assigns to governments numerous procedural obligations toward the holder of private rights. For example, governments must enable an individual right holder to institute administrative or judicial proceedings to block the importation of a good lacking an authentic trademark or copyright. In effect, TRIPS defines illicit trade and commits governments to ban it at the behest of an economic actor.

The attention to economic actors is less central in other WTO agreements, but still very

important. Consider the agreements on services (GATS), safeguards, customs valuation, rules of origin, and TBT. The GATS requires governments to maintain judicial, arbitral or administrative tribunals or procedures which provide, at the request of an affected service supplier, for the prompt review of, and where justified, appropriate remedies for, administrative decisions affecting trade in services. The GATS also requires governments to work in cooperation with relevant intergovernmental and non-governmental organizations towards the adoption of common international standards for qualifications of service providers. The Safeguards Agreement requires governments, when commencing a safeguard investigation, to give public notice and to hold hearings in which importers, exporters and other interested parties can provide evidence and respond to the presentations of other parties. The Customs Valuation Agreement requires governments to establish in law the right of the importer to appeal a determination of customs value. An appeal must lie to a judicial authority and be without penalty. The Agreement on Rules of Origin provides that an exporter or importer may ask a government for a determination of the origin of a good. This is to be provided as soon as possible but no later than 150 days. The TBT Code of Good Practice calls for a sixty-day comment period on new standards by interested parties. The standardizing body is directed to take into account the comments, and to reply if requested.

In a lecture to the American Society of International Law in 2000, Anne Marie Slaughter presented a liberal theory of international law in which she contended that the primary function of international law is not to create international institutions to perform functions that individual states cannot perform by themselves, but rather *to influence and improve the functioning of domestic institutions*. Professor Slaughter does not point to the WTO as an example of such a function, but it would seem to fit her liberal theory. By installing new due process requirements, the WTO enhances the domestic rule of law.

Governments become more accountable to domestic and foreign economic actors.

B. Enforcing WTO Rules Domestically

The WTO sets rules for governments, but does not require governments to allow private actors to enforce WTO obligations in domestic courts. To my knowledge, no government does so. Professor Petersmann has been a tireless advocate of strengthening trade rules by allowing adversely affected citizens to invoke and enforce GATT/WTO guarantees in domestic courts. Meinhard Hilf is another scholar who promotes such a reform. He points out that domestic courts would offer the best guarantee of protection of interests and rights of individual operators, thus making the entire GATT system more effective. In July 2000, the International Law Association recommended that WTO Members: strengthen the legal and judicial remedies of their citizens and residents (natural and legal) if the latter are adversely affected by violations of precise and unconditional WTO guarantees of freedom and non discrimination, especially where such violation of WTO rules has been ascertained in a legally binding manner by rulings of the [WTO Dispute Settlement Body] DSB.

C. Enforcing WTO Rules at the WTO

Another way to strengthen the rule of WTO law would be to allow economic actors to invoke WTO dispute settlement on their own. Several commentators have advocated this approach. At present few, if any, WTO Members would feel confident enough about their record of implementation to subject themselves to this new source of criticism.

The closest the WTO gets to private invocation is the Agreement on Preshipment

Inspection (PSI), which is the exception referred to at the beginning of Part I. Preshipment inspection verifies the quality, quantity, price, and customs classification of goods. Some governments mandate that goods be inspected before shipment. The Agreement on Preshipment Inspection obligates those governments to require the inspection entity to make available a grievance procedure for exporters. Then, two working days after such a grievance is lodged, either the exporter or the inspector may refer the dispute for review by an Independent Entity. The WTO established the Independent Entity in 1995, in conjunction with the International Federation of Inspection Agencies and the International Chamber of Commerce. If such referrals occur, the Independent Entity will set up an arbitral panel whose decisions are binding on the exporter and inspector. The role of the panel is to decide whether the parties have complied with the PSI Agreement.

This review procedure gives an economic actor - the exporter - a procedural right of action under WTO rules. The exporters claim would be that the agent of the importing government (i.e., the preshipment inspector) is violating the PSI Agreement. The WTO member government in the country of intended importation is one step removed from being a party to the dispute.

The arbitrations under the Independent Entity are separate from the arbitrations (or adjudications) carried out through the WTO Dispute Settlement Body (DSB). The DSB considers only disputes between WTO member governments. Nevertheless, some WTO panels have looked through the governmental veil to see the economic actors who are the real stakeholders in the dispute.

The leading case is United States Section 301. The panel held that a controversial United States trade law did not violate WTO rules. In reaching that decision in 1999, the panel explained that:

[T]he GATT/WTO did *not* create a new legal order the subjects of which comprise both contracting parties or Members and their nationals. However, 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 these 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 The multilateral trading system is, per force, composed not only of States but also, indeed mostly, of individual economic operators.

In line with the panels reasoning, one can view economic actors as the beneficiary of the WTO contract. The trading system will build on this insight in the future, as economic operators push governments to comply with their WTO obligations.

The lack of formal procedures for economic actors to participate in WTO dispute settlement has led to pressures to permit *amicus curiae* briefs. At the compliance stage of the Australia Salmon dispute, the Article 21.5 panel accepted a brief from the Concerned Fishermen and Processors in South Australia, but did not discuss the brief in finding continuing violations by Australia. (The decision went against the interests of the Concerned Fishermen.) In the United States Hot Rolled Lead dispute, the Appellate Body accepted briefs from two trade associations, but then declared that it did not find it necessary to take their briefs into account. As of December 2000, the state of WTO law is

that non-governmental persons do not have the right to submit an *amicus curiae* brief to a panel, although they may try to do so.

The lack of a right to intervene as an interested third party or to submit an amicus brief was most glaringly absent in the Australia Leather case. In that WTO dispute, the United States government was successful in characterizing an Australian government grant to the leather producer Howe and Company as a prohibited export subsidy, in violation of the SCM Agreement. The panel did not give Howe any opportunity to argue that the grant was not an export subsidy. That incapacity is not unusual. The WTO has adjudicated several export subsidy cases all of whom have stakeholders who are not heard from in the proceedings. What was unusual, and troubling, in the Leather case was Howes absence during the compliance review proceedings. The Article 21.5 panel ruled that Australia had failed to comply because it had not required Howe to repay the subsidy to the government. This was the first time any GATT or WTO panel issued a judgment that would require a private actor to pay money to a government. Given the important precedent being set in this case, which might be characterized as a WTO-required expropriation, it was unfortunate that the panel did not offer Howe a right to reply. The DSU gives every panel the authority to seek information from any individual or body that the panel deems appropriate.

In summary, notwithstanding its state-centric nature, the WTO interacts with private economic actors in significant ways. In TRIPS and GATS, governments are mandated to treat economic actors according to substantive rules. In several WTO agreements, governments are mandated to accord private actors various procedural rights. In the PSI Agreement, the exporter can avail itself of arbitration at the WTO. All of these advances are important. Yet in many other areas, economic actors are still excluded from WTO law and implementation.

II. The WTO and Social Actors

The status of social actors at the WTO is better in some ways than the status economic actors enjoy, but worse in most others. It is better because the WTO Agreement permits direct involvement by NGOs in WTO affairs. It is worse in that social actors did not achieve the gains that economic actors did in the Uruguay Round.

Constitutionally, the WTO can be open to social actors. The WTO Agreement (Article V: 2) says that The General Council may make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO. This provision was implemented in 1996 by the General Council, but its Guidelines provide for only very shallow participation by NGOs. The main consultation so far has been a series of symposia organized by the WTO Secretariat at which selected NGOs were invited to speak. NGOs are also able to seek accreditation to attend WTO Ministerial Conferences as observers. About 915 NGOs did so and attended the Seattle Ministerial in 1999.

The WTO has several councils, committees, and bodies, but social actors are not allowed to participate in them. Thus, the TRIPS Council does not consult medical NGOs concerned about drug patenting; the Committee on Agriculture does not consult farm NGOs concerned about food security; and the Textiles Monitoring Body does not consult development NGOs concerned about continued protectionism in textiles. In the DSB, the opportunities for social actors as a friend of the court are about the same as for private actors - that is, very limited to nil. Even the WTO Trade Policy Review Mechanism,

which appraises government trade policies, does not solicit input from social actors. Social actors do have one advantage over private actors however. Most private actors cannot apply for accreditation to attend WTO Ministerial Conferences. Thus, exporters, importers, and service suppliers cannot apply, although associations of these private actors can apply (and do).

Although most of the WTO provisions that mandate procedural rights at the national level pertain only to economic actors, there are two instances where such rights pertain to social actors. These are in the Antidumping and SCM agreements. The Antidumping Agreement directs governments to give interested parties the right to participate in domestic antidumping proceedings, and states that when the target product is commonly sold at the retail level, representative consumer organizations shall have an opportunity to provide information relevant to the ascertainment of dumping, injury, and causality. SCM has a similar provision with respect to subsidization, injury, and causality. While it is possible to characterize consumer NGOs as economic actors, they are better conceived as social actors because the interest of the consumer is a general interest, not a special interest.

III. Analysis and Recommendations

Even with its fuzziness, the distinction between economic and social actors is helpful in showing how WTO law weaves in non-state actors. The economic actors got new rights as market participants. The social actors got a special door to the WTO, but the door is almost always closed. So one might say that the WTO is more solicitous of *homo economicus* than *homo politicus*.

But that is too simplistic an explanation. The economic actors obtained more from the Uruguay Round because they were better organized and asked for more. In asking for more responsive administrative procedures at the national level, the economic actors aligned themselves with an existing norm of the GATT system (i.e., Article X). Social actors could follow this same track in the next trade round. Strengthening due process for social actors could be justified as a WTO goal because regulatory procedures that provide for public participation may be more stable and less susceptible to special interest influence. Consider the following example: The SPS Agreement calls for the harmonization of standards and the acceptance of foreign standards as equivalent in certain circumstances. These goals are more likely to be achieved when each government has a fair, inclusive standard-setting procedure that allows economic and social actors to participate. Presently, the transparency provisions in the SPS Agreement apply only to state actors.

When one looks at the international level, economic actors are no better positioned for influencing WTO results than are social actors. Both lack formal opportunities to participate. With respect to the WTO's legislative and executive functions, the case for participation by social actors seems stronger than for economic actors. That's because as an international agency, the WTO should be more open to hearing assertions of public interest than individual interest. With respect to the WTO's judicial functions, the prospect of giving private groups a right of action seems remote. If that were to occur, economic and social actors should have an equal right to participate after qualifying for standing. As *amici*, economic and social actors should have similar access.

NGO participation is being debated at the WTO, but most governments resist opening the doors. Such exclusivity is justified on the grounds that government actors are the only

legitimate participants in the WTO. Governments are elected by The People, while NGOs are merely selected by their members. The fact that the WTO does not require its Member Governments to be democratic (and many are not) is considered too undiplomatic to mention in WTO debate.

The claim that an individual may lack legitimacy to speak is an authoritarian idea. The right of an individual to speak for oneself, to form associations, and to petition government is a natural right that undergirds democracy. To suggest that when governments meet together to bargain, social actors consequently lose their voice is both illogical and anti democratic. The creation of an international organization cannot deprive individuals of their voice to the governments that run the organization. Indeed, the personality of an international organization includes being open to some extent to public input.

In 1945, the drafters of the United Nations Charter recognized this truism when they wrote Article 71 which provides that the Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence. Some commentators view Article 71 as enshrining a new principle of law. But in my view, Article 71 was merely reflective of customary international law - namely, that in establishing international organizations with legislative or executive functions, governments have an obligation to provide a channel for NGOs.

The continued influence of state-centrism among the delegates to the WTO is understandable. These delegates work for governments. Furthermore, they may prefer not having to compete intellectually with non-government actors.

What is surprising though is how state-centrism continues to distort the thinking of academics and even social actors. Let me give two recent examples. In September 2000, a group of academics sent a letter to 535 college presidents criticizing the Anti Sweatshop campaigns on college campuses. The letter states: Little attention has been given to whether the views of the Anti-Sweatshop campaign are representative of the views of governments, non government organizations and workers in the poor countries. But why should it matter whether the anti sweatshop campaigners are representing the views of developing country governments who are tolerating, if not promoting, the sweatshops? (The professors point about foreign NGOs and workers has merit.) In December 2000, the United States labor federation (the AFL-CIO) wrote the Office of the United States Trade Representative to offer views on the ongoing United States negotiations with Singapore for a free trade agreement. The AFL-CIO opposed inclusion of an investor-to-state dispute resolution system, explaining that Investors ought not to be able to bypass their own governments to determine when a dispute merits international arbitration To hear such a constipated view from the AFL-CIO is particularly startling given the longtime role of the American labor movement in championing opportunities for NGOs to bypass their governments in international organizations.

Change will come to the WTO. If I may offer a prediction, I think that social and economic actors will gain significant participatory rights at the WTO within the next decade. Both NGOs and the private sector are far better positioned to influence the trading system in 2000 than they were in 1990. Furthermore, the trends inducing that change will continue. The most important trends are the increase in international transactions and the widening of WTO law. Each new WTO agreement brings new

private actors into the trading system, all asking the same initial questions as to how they can participate. Eventually, the resistance of the WTO to greater cooperation and consultation with NGOs will melt away.

In closing, let me offer three suggestions for what can be done to improve the interface between the WTO and the private and non-profit sectors. First, we ought to begin thinking about an Optional Protocol for the WTO wherein parties would agree to WTO jurisdiction for disputes lodged by private actors. A minimum number of governments would be required to ratify the accord. One might wonder why any government would ratify. The answer is the same as for analogous protocols in human rights treaties.

Governments do so to demonstrate and lock in their commitment to international rules. A second suggestion is that the WTO negotiate an Agreement on Public Participation in National Trade Policymaking. This idea follows from the statement in the WTO's NGO Guidelines: Closer consultation and cooperation with NGOs can also be met constructively through appropriate processes at the national level where lies primary responsibility for taking into account the different elements of public interest which are brought to bear on trade policy-making.

In drafting such a Protocol, inspiration could be drawn from the 1976 Tripartite Consultation Convention (No. 144) of the International Labor Organization and the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. One might also recall the recommendation by the GATT's Leuwiler Group (in 1985) that governments consider setting up advisory groups made up of influential and active representatives of the main stakeholders in international trade - business, finance, labour, and consumers.

My final suggestion is that the WTO set out a place on its website to solicit comments from the public on pending decisions, declarations, and agreements. Eventually, there should be one website posting such notices for all international organizations - in other words, a global Federal Register. So far, however, only a few international organizations regularly seek public comment, such as the World Bank and the North American Commission on Environmental Cooperation. That will surely change early in the 21st century.