The WTO and the Rights of the Individual

The WTO agreements comprise a system of obligations and rights for member governments. None of these apply directly to individual actors. Nevertheless, the WTO does reach into the nation-state to guarantee rights to individuals. The following article explores this little-noted dimension of international economic law and proposes ways that a new WTO trade round could build on developments so far in order to strengthen private rights.

The Marrakesh Agreement Establishing the World Trade Organization (WTO) is silent regarding its relationship to the individual. One might presume that an international organization set up to emancipate trade could have no purpose other than upholding trading rights of private actors. But the WTO was not established to achieve "free trade". That goal is absent from the Marrakesh Agreement. Instead, the goals of the Agreement are "reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade" and the "elimination of discriminatory treatment in international trade relations". The term "reciprocal arrangements" makes clear that the focus of the Marrakesh Agreement is not on the individual trader, but rather on the meshing of governmental trade policies. This is confirmed by the object of the quoted provision, namely, "international trade relations". A visitor from another planet who takes a quick look at the Marrakesh Agreement could draw an erroneous conclusion about the Earth's economy. The visitor could infer that international trade is carried on between governments (or between nations) and that the intended beneficiaries of the Marrakesh Agreement are the government Members of the WTO. Such a hasty inference would be wrong however. Although the subjects of the Marrakesh Agreement are the governments, a closer look at the multilateral trading system shows that individual economic actors are assimilated. Annexed to the Marrakesh Agreement are 17 interwoven trade agreements, most of which accord rights indirectly to the individual. This important feature of WTO law has not received the attention that it deserves.

In recent years, some commentators have called the WTO the "World Trade Constitution". Paralleling constitutions at the national level, the Marrakesh Agreement specifies decision rules and delineates the separation of powers among the WTO organs. In this way, the Marrakesh Agreement also resembles charters of other international agencies, such as the "Constitution" of the World Health Organization. But the constitutional underpinnings of the WTO go deeper than that. The WTO is constitution-like in reaching into the nation-state to guarantee rights to individuals.

The purpose of this article is to explore this little-noted dimension of international economic law. The article first examines the way that WTO agreements mandate certain rights for the individual in national law. It then looks at the limited way in which the WTO agreements provide procedural rights to individuals at the WTO. It discusses how the WTO's emerging jurisprudence expounds this new relationship and interprets WTO rules in light of the needs of economic actors. Finally, it proposes ways that a new WTO trade round could build on these developments in order to strengthen private rights.

By "economic actor", I mean an actor participating in the market and pursuing his, her or its self-interest. Such actors can be natural persons, business corporations, partnerships, cooperatives or labor unions.
They operate as producers, consumers, service providers, exporters or importers. Larger economic actors are probably better able to take advantage of these WTO rights than smaller actors are.

**Individual Rights in National Law**

Before discussing the WTO, one should say a brief word about individual rights in law. The insight that law undergrads and promotes an efficient market can be traced back to the ancients. In modern international law, the idea that governments have a common interest in the substantive rights accorded to individuals in other countries first triumphed in the establishment of the International Labor Organization in 1919. In that year, the ILO Maternity Convention provided that a woman “shall have the right to leave her work if she produces a medical certificate stating that her confinement [for childbirth] will probably take place within six weeks.” International prescription of procedural rights within domestic law came a few years later. In 1927, the ILO Sickness Insurance Convention directed governments to grant a “right to appeal” to an applicant in case of a dispute. In 1933, the ILO Compulsory Old-Age Insurance Convention directed governments to provide individuals and employers a right to appeal to “special tribunals”. Attention to procedural rights is the leitmotif of the “rule of law” in a regulated economy. Whenever an agency or bureaucrat is authorized to make a decision affecting an economic actor, the rule of law provides for an appeal to a higher entity to complain against arbitrary action or self-dealing.

With that as background, this article turns to new developments wrought by the Uruguay Round. The WTO agreements comprise a system of obligations and rights for member governments. None of these obligations applies directly to individual actors. With one exception, no rights exist for economic actors within the WTO. Nevertheless, individuals secure rights indirectly from the WTO.

**Substantive Economic Rights**

The WTO gives economic actors an entitlement to substantive rights in domestic law. The two biggest gains came in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the General Agreement on Trade in Services (GATS). By a substantive right, I mean a property right or a legal guarantee of an opportunity to an economic actor. Such positive rights are a new feature of the multilateral trading system. They were not present in the General Agreement on Tariffs and Trade (GATT) of 1947.

The TRIPS Agreement requires governments to create and grant intellectual “property rights” to the nationals of other WTO member governments. In doing so, the drafters anticipated that these rights would probably also be granted to domestic persons because it would be impolitic for a government to give greater rights to aliens than to citizens. So economic actors may gain these rights not only in foreign countries, but also in their own.

TRIPS is a broad, yet single-minded regime. It accords exclusive property rights for copyrights, trademarks, geographical indications, industrial designs, patents, integrated circuits, and undisclosed information. The “right holders” are permitted to collect rents and to prevent others from infringing on their privilege for specified periods. These periods are lengthy; for example, an inventor is given a patent for 20 years. Although one of the objectives of TRIPS is to promote technological innovation, WTO member governments are not free to experiment with other approaches that avoid the inefficiencies entailed by a government-established monopoly.

The GATS applies the traditional most-favoured-nation (MFN) and national treatment principles, but does so with a twist. In the GATT, the obligations of MFN and national treatment apply to products. But in GATS, these principles are also applied to economic actors, namely “service suppliers.”

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6 Convention Concerning the Employment of Women Before and After Childbirth, No. 3, 1919, Article 3(b).
7 Convention Concerning Sickness Insurance for Workers in Industry and Commerce and Domestic Servants, No. 24, 1927, Article 9.
8 Convention Concerning Compulsory Old-Age Insurance for Persons Employed in Industrial or Commercial Undertakings, in the Liberal Professions, and for Outworkers and Domestic Servants, No. 35, 1933, Article 11. (This Convention has been shelved by the ILO.)
9 WTO Agreement on Trade-Related Aspects of Intellectual Property Rights [hereinafter TRIPS], Articles 1.3, 2.1, 9.1, 9.2, 10.2, 11, 14.2, 16.1, 25.1, 27.1, 35. TRIPS also requires governments to treat foreigners no less favorably than nationals. Ibid., Article 3.1.
10 Developing countries are given extra time to meet these requirements. TRIPS Articles 65.4, 66.1.
11 TRIPS Article 33.
12 TRIPS Article 7 (Objectives). Of course, governments can grant these rights and then buy them back with taxpayer funds. TRIPS Article 27.3(b) does permit experimentation for the legal protection of plant varieties.
13 General Agreement on Tariffs and Trade [hereinafter GATT], Articles I, III.