

**Towards a Theory of Democratic Global Economic
Governance:**

**Hybridization of Soft and Hard Law in the Case of Gender
within the World Trade Organization**

by

Judit Fabian

B.Sc., B.A., M.A.

A thesis submitted to the Faculty of Graduate and Postdoctoral Affairs

in partial fulfillment of the requirements for

the degree of Doctor of Philosophy

in

Political Science

Carleton University

Ottawa, Ontario, Canada

January 2015

Copyright © Judit Fabian, 2015

No endeavour that is worthwhile is simple in prospect;
if it is right,
it will be simple in retrospect.¹

¹ Teller, Ede / Edward, Better a Shield Than a Sword: Perspectives on Defense Technology (New York: Free Press, 1987), 241. Another version of the quote reads as follows: “I believe that no endeavor that is worthwhile is simple in prospect; if it is right, it will be simple in retrospect.” Quoted by Judith Shoolery (2004) in Hargittai, István, The Martians of Science: Five Physicists Who Changed the Twentieth Century (Oxford: Oxford University Press, 2006), 251.

The quote signifies Teller’s firm belief that sustainable peace and security rest on people’s willingness to continue to observe treaties that they perceive to be instrumental to sustaining peace and security over a longer period of time and in changing circumstances. In his opinion, by necessity, such treaties would have to be based on agreement, understanding, and legitimacy. What exactly these treaties might be will only become clear in hindsight, when we might also realize that they were simple after all. But before we get there, we tend to make things complicated – a difficult process that might also signify that, after all, if the process arrived at something simple, it was a worthwhile exercise. Teller (1908-2003) was a Hungarian-born American nuclear physicist, who was known, perhaps surprisingly after the foregoing, as “the father of the hydrogen bomb.”

In memoriam
Szondi Béla István Jr.
(Dec 2, 1974 – October 21, 2008)

Abstract

The study is about democracy. It asks whether global economic governance (GEG) can take a democratic turn by testing whether the representation of women and women's interests can be accomplished within the World Trade Organization (WTO). The test answers the question because the representation of women and women's interests is a *sine qua non* of democracy in the 21st century, and because the WTO is the hardest case amongst institutions of GEG for the representation of women and women's interests. This produces two corollaries: if the WTO cannot incorporate a *sine qua non* of democracy, then GEG cannot become democratic without significant institutional restructuring; if the representation of women and women's interests can be accomplished in the 'hardest case,' it should be possible within GEG generally.

So proceeding, the study builds a framework for democratic GEG called Inclusive Global Institutionalism (IGI), comprising the principles inclusion, caution, simplicity, legitimacy and flexibility. IGI, balancing juridification, hybridization and path-dependency, is preferred over three ideas of democratic global governance: a global democratic state, 'multitude,' and 'a new world order of networks.' The study validates its test by showing that the representation of women and women's interests can stand proxy for democratization, while the WTO can stand proxy for GEG. The former is accomplished by critiquing Pitkin's 'substantive representation' and 'potentiality,' advancing a more expansive concept of representation. The latter is accomplished by developing seven 'Moments of Juridification' showing that the WTO represents the post-WWII juridification of GEG, and nine 'Reasons' why the WTO is the 'hardest case.'

The study determines that the representation of women and women's interests is made possible by hybridizing soft and hard law in the Enhanced Integrated Framework and Aid-for-Trade, which require WTO interaction with other IOs, but are brought within the WTO's Committee for Trade and Development in Aid-for-Trade session. This allows the conclusion that democratization of GEG is not impossible, and that representation of women and women's interests is possible within the WTO without fundamental structural reform. The study finally concludes that to balance juridification, hybridization and path-dependency is necessary to any stable democracy or sustained democratization.

Acknowledgements

Although the dissertation is one result of a strong curiosity sustained over a lengthy period of time by a single person, there were many along the way who assisted its completion. Help and assistance came in professional and personal forms and in different stages of the project. Some sustained their support throughout. I would like to thank them here for their support and for the opportunities that I was lucky to have enjoyed.

To begin, I would like to extend particular thanks and gratitude to the members of my dissertation committee, all of whom are from Carleton University: Randall D. Germain, Professor of Political Science (Supervisor); Jill M. Vickers, FRSC, Distinguished Research Professor and Emeritus Chancellor's Professor of Political Science; Laura Macdonald, Professor of Political Science and Director of the Institute of Political Economy; and Paul Davidson, Professor Emeritus of Law and Legal Studies. This group of people, I believe, consists of the very best possible minds this project could have had as advisors. Their intellect, strength, determination, patience, and unmatched ability to focus on what is important in life have influenced me greatly. They were instrumental to the completion of this project and guided my intellectual curiosity and development. They also were instrumental in guiding me through my personal development along the way. Their holistic approach to teaching, research, and mentorship is a great example for all.

My two external examiners, I believe, are also the very best this project could have had. The interest showed by my external examiner, Jacqui True (Professor of Politics and International Relations of the School of Social Sciences, and Associate Dean of Research for the Faculty of Arts, Monash University, Melbourne, Australia), in this project had enormous academic value. Professor True's very informative and knowledgeable report upon the dissertation provided very useful feedback, which will most likely extend into many years to come. Her leading off the defence provided for the opening of a very fruitful discussion and made the defence surprisingly pleasant. Rianne Mahon (Professor and CIGI Chair in Comparative Social Policy, Balsillie School of International Affairs and the Faculty of Social Work, Wilfrid Laurier University, Waterloo, Canada), also provided excellent feedback. Her searching mind and enthusiasm about the nuts and bolts of some of the foundations of the dissertation opened very useful avenues for discussion. Finally, thanks goes to the Chair of the examination board, Michel Gaulin (Professor Emeritus of French, Carleton University), whose calm guidance of the defence process helped to put even the most nervous of us (me) at ease.

A special thanks needs to be extended to Carleton University, and the Department of Political Science for 'housing' the research. Particular thanks goes to the administrative staff current and past. They were very helpful and made me feel at home.

Next, I would like to thank my closest family for their loving support: my parents, Julianna and Laszlo Fabian, and my sister Erika Fabian. They have had to endure my absence from their lives for many years in order to finally see my efforts culminate in this dissertation. Thank you for your loving support and patience.

A very special thanks goes to my partner, Colin Borgal, who has seen me through this project and the PhD program with enormous patience and support. He has accompanied me on some of my research trips, served as a sounding board, and helped me with quiet and gentle determination through the times when I wanted to throw all of

my work into the garbage. He read drafts and edited at different points in the life of the thesis, which helped me express my sometimes too complex thoughts. The dissertation would not have been completed without his continual support.

A thank you should also be extended to Colin's parents, George and Shirley Borgal, who were sufficiently confident in, and perhaps even sufficiently impatient toward, my pursuit of difficult questions and my inclination to try to answer them, that they gifted me a book entitled The Wayfinders.

Further, I would like to thank my numerous good friends who helped 'sustain' me throughout the years. Some were part of my life for only a part of the PhD process, some were with me throughout. They are in different countries and in many different professions. You know who you are: thank you to all! I would, however, like to single out one person, Brad Cook, who has been my very good friend for almost half my lifespan. The importance of his support in life's thick and thin is immeasurable.

No research can be done without financial support. This research was very lucky to be funded entirely from academic sources. The project was supported by a Research Travel Grant by the Centre for European Studies (CES) at Carleton University (the grant was administered by CES, and provided jointly by CES and the European Commission); by a conference bursary from the Centre for the Study of Globalisation and Regionalisation (CSGR) at the University of Warwick; by a travel and conference bursary from the Canada Project Symposium at the International University of Kagoshima; by a conference invitation and bursary from the Russia Trade and Development Project at the Centre for Trade Policy and Law, Ottawa; by an Ontario Graduate Scholarship; by a Kalmen Kaplansky Scholarship in Economic and Social Rights; by a bursary from the Baha'i Community of Canada; and by scholarships and bursaries from the Department of Political Science and Faculty of Graduate Studies at Carleton University. I am thankful to all who facilitated my funding by supplying the funds, administering them, awarding them, or supporting me in my pursuit of them.

I would also like to thank all who agreed to participate in the confidential interviews and those who facilitated arranging the interviews. In identifying some of my first contacts, the Delegation of the European Commission to Canada in Ottawa, Lucie Lamarche (Professor of Law, University of Ottawa, Canada), and Catherine Hoskyns (Professor Emeritus of European Studies, Coventry University, UK) provided me with invaluable help. I also thank the numerous people who so generously shared their time and knowledge with me and so patiently answered my questions during confidential interviews at EU DG-Trade in Brussels, Belgium, the WTO Secretariat in Geneva, Switzerland, and various NGOs working on gender, human rights, environment, and poverty vis-à-vis global trade, mostly based in Geneva, Switzerland.

The project also benefited from invitations to conferences, symposia and workshops, at which the research was shared as it developed. The research was generally communicated at these meetings by delivering an academic paper or a report on more specific questions of policy. These experiences were helpful in the exploration and refinement of the study, including in defining future directions the research might take; therefore, they deserve special thanks and are briefly discussed below.

Academic presentations in Canada, the United Kingdom, and Japan, constituted some of the substantive chapters of the dissertation. More specifically, "Can Global Economic Governance Take a Democratic Turn? Gender and the WTO" was presented as

part of the *International Political Economy Network Seminar Series* at the Centre for International Policy Studies, University of Ottawa, Canada (February 13, 2013). “The Legitimacy of the Mulier Economicus: the Cases of APEC and the WTO” was presented to *Women-Friendly Democracy: Conference in Honour of Jill McCalla Vickers* at Carleton University, Ottawa, Canada (November 9-10, 2007). “The Legitimacy of Mulier Economicus: the Cases of APEC, the WTO and the EU” was presented to *Pathways to Legitimacy? A conference organized by the Centre for the Study of Globalisation and Regionalisation (CSGR) and the Global Governance, Regionalisation and the Regulatory Framework (GARNET)* at the University of Warwick, Coventry, United Kingdom (September 17-19, 2007). “Management of Differences: Conceptualizing the Relationship between the Global Trade Regime and Gender Regimes in the Canadian Context” was presented to the *Canada Project Symposium* at the International University of Kagoshima, Kagoshima, Japan (July 6, 2006). “Mulier Economicus: Gender and the World Trade Organization” was presented to the *Annual Conference of the Canadian Political Science Association* at York University, Toronto, Canada (June 1-3, 2006); and “Gender and Trade: Implications for Global Economic Governance” was presented to the symposium entitled *Cultural Policies, Trade Liberalization, and Identity Politics: Testing the Limits of the State* at the University of Windsor, Windsor, Canada (May 12-14, 2006).

The above experiences resulted in some very constructive discussions with academics in the field. Some were short-lived, others were more sustained: they all left their marks by encouragement or a helping hand. Thanks, in chronological order of meetings, to: Anna Lanoszka (Associate Professor in Political Science, University of Windsor, Canada), Theodore Cohn (Professor Emeritus in Political Science, Simon Fraser University, Canada), Christopher Maule (at time of contact, Professor Emeritus and Distinguished Research Professor in Economics and International Affairs and a research associate of the Centre for Trade Policy and Law, Carleton University, Canada), Donna Lee (Dean of the School of Social and International Studies, University of Bradford, UK; University Senior Tutor, University of Birmingham, UK), Catherine Hoskyns (Professor Emerita of European Studies and Gender Politics, Coventry University, UK), Brigitte Young (Professor Emeritus of International Political Economy at the Institute of Political Science, University of Münster, Germany), Ann Florini (Professor of Public Policy, Singapore Management University), Manfred Elsig (Associate Professor of International Relations and Deputy Managing Director of the World Trade Institute of the University of Bern, Switzerland), Elizabeth Smythe (Professor of Political Science, Concordia University, Canada), Isabella Bakker (Distinguished Research Professor in Political Science and Trudeau Fellow, York University, Canada), Hans-Martin Jaeger (Associate Professor in Political Science, Carleton University, Canada), Elizabeth Friesen (Instructor, Carleton University, Canada), and Patrick Leblond (Associate Professor at the Graduate School of Public and International Affairs, University of Ottawa, Canada).

Policy-oriented presentations took place in Canada and in Russia. “The Legitimacy of Mulier Economicus” was presented to the symposium entitled *The Feminist Economics of Trade*, organized by the Society for International Development and hosted by the North-South Institute in Ottawa, Canada (February 7, 2008). “Gender and Trade: Implications for Global Economic Governance” was presented to the

conference *Socio-Economic Impacts of International Economic Policy*. The conference was part of the *Russia Trade and Development Project: 2004–2007* administered by the Centre for Trade Policy and Law, which facilitated Russia's WTO accession and increased integration into the global economy. The conference took place in Moscow, Russia (November 14–15, 2006).²

These experiences also resulted in helpful discussions in the field, both with practitioners and with academics. I would like to thank a few people whom I felt left their mark on my ideas during the course of our discussions. Again in order of meeting, they include: Heather Gibb (at time of contact, Research Associate, The North-South Institute), Sarah Geddes (at the time of contact, Associate at the Centre for Trade Policy and Law, Carleton University, Canada), Gurushri Swamy (Independent Researcher, ex-Senior Economist, World Bank, USA), and Barbara J. Orser (Deloitte Professor in the Management of Growth Enterprises at the Telfer School of Management, University of Ottawa, Canada).

Being shortlisted for academic prizes of excellence in my field encouraged me to continue with the project. These include the Jill Vickers Prize established by the Canadian Political Science Association, and the Stein Rokkan Award established by the International Political Science Association. Both stand for areas of study that are of crucial importance for this research.

Finally, I thank my students, particularly those in my seminar courses on Transitions to Democracy (PSCI 4505) (2008 – 2011) at the Political Science Department at Carleton University, in which, on multiple occasions and in a very multicultural environment, we explored questions concerning the 4th wave of democratization, including ideas of democratic global governance. The discussions were excellent and paved the way to many new thoughts.

In sum, many thanks to the people who believed in the project and in me, and all who developed or sustained an interest in what I thought was interesting and worthwhile to research.

² A list of both academic and policy contributions associated with the research can be found in the Appendix.

Table of Contents

| | |
|---|-----|
| Abstract | iv |
| Acknowledgements | v |
| Table of Contents | ix |
| List of Figures | xiv |
| List of Tables | xiv |
| List of Appendices | xiv |
| List of Acronyms | xvi |
| Preface | xxi |
| Chapter 1 – Introduction | 1 |
| Contributions to Scholarship | 8 |
| Data Used | 13 |
| Chapter Outline | 16 |
| Chapter 2 – A Framework for Democratic Global Economic Governance: Formulating Inclusive Global Institutionalism (IGI) by Means of Hybridization of Hard and Soft Law <i>within</i> Institutions..... | 27 |
| Thinking It Through: Four Ideas of Democratic Global Governance..... | 28 |
| The Idea of a Global Democratic State | 30 |
| The Idea of ‘Multitude’ and the Role of Global Civil Society | 38 |
| The Idea of ‘A New World Order of Networks’ and the Danger of ‘Empire’ | 47 |
| Democratic Global Governance - Inclusive Global Institutionalism (IGI) | 58 |
| Inclusion | 62 |
| Caution | 65 |
| Simplicity | 67 |
| Legitimacy | 68 |
| Flexibility | 70 |
| Understanding the Movement between Hard Law and Soft Law | 71 |
| Understanding ‘Juridification’ | 79 |
| Hybridization of Hard Law and Soft Law <i>within</i> International Organizations of GEG | 107 |
| Conclusion..... | 110 |

| | |
|---|-----|
| Chapter 3 – A Proxy for Democratization: The Representation of Women and Women’s Interests | 115 |
| A <i>Sine Qua Non</i> of Democracy in the 21st Century: The Representation of Women and Women’s Interests | 116 |
| Understanding Representation at the Global Level: ‘Gender Mainstreaming’ as an Avenue for the Representation of Women and Women’s Interests | 121 |
| Chapter 4 – A Proxy for GEG I: General Trends and Specific ‘Moments of Juridification’ of the WTO | 150 |
| The General Trend of Juridification of Global Economic Governance | 153 |
| The Juridification of the WTO in Seven Moments | 161 |
| Moment 1: From the ITO to the GATT and then to the WTO – Constitutive Juridification | 163 |
| The Ministerial Conference | 172 |
| The TPRB | 173 |
| Moment 2: The Continual Increase of Parties to the GATT and WTO | 176 |
| Moment 3: Dispute Settlement (from Articles XXII and XXIII to the DSB) | 181 |
| Articles XXII and XXIII under the GATT | 181 |
| The DSB | 199 |
| Moment 4: Development: from GATT Part IV through the Doha Development Agenda | 203 |
| The Doha Development Agenda | 211 |
| Moment 5: Extra-GATT Agreements and Subordinate Councils to the WTO (Trade in Goods, GATS, TRIPS and TRIMs) | 218 |
| The Anti-Dumping Codes and Article VI | 218 |
| Extra-GATT Agreements Administered by the WTO | 220 |
| Moment 6: Increasing Consultation and Cooperation with NGOs | 225 |
| Moment 7: The Proliferation of Preferential Trade Agreements (PTAs) | 237 |
| Conclusion | 252 |
| Chapter 5 – A Proxy for GEG II: Why the WTO is the ‘Hardest Case’ amongst the Institutions of GEG | 258 |
| Reason 1: The Traditional Gender Blindness of International Relations and International Political Economy | 260 |
| Reason 2: The Traditional Gender Blindness of Economic Thought and the Need to Construct an Understanding of <i>Mulier Economicus</i> | 266 |
| Towards a Feminist Economics of Trade? | 270 |
| Reason 3: It Was Not Possible for Women to ‘Get In On The Ground Floor’ | 280 |

| | |
|--|-----|
| Reason 4: The Antagonism of Gender and Trade Activism toward Neoliberal Economics and Institutions Perceived as Neoliberal | 285 |
| Reason 5: The WTO was Relatively Closed to Civil Society Involvement for Longer than Most Other Institutions of Regional and Global Economic Governance..... | 300 |
| Reason 6: The Requirement for Consensus and the Single Undertaking | 325 |
| Reason 7: The Locus of Power Rests with the Members – The Importance of Member Proposals | 328 |
| Reason 8: The Limited Ability of the Secretariat to Improve the Representation of Women and Women’s Interests | 334 |
| Reason 9: The Question of Women’s Rights as Human Rights and the WTO Dispute Settlement System as <i>Lex Specialis</i> | 342 |
| Conclusion..... | 364 |
| Chapter 6 – Meeting of the Proxies I: Possibilities in WTO Hard Law via the DSB.... | 366 |
| How Disputes are Settled | 369 |
| Indirect Approaches through Exceptions in WTO Agreements..... | 373 |
| Analogous Disputes? | 374 |
| Article XX of the General Agreement on Tariffs and Trade..... | 379 |
| Agreement on Agriculture (AoA)..... | 392 |
| Agreement on Trade-Related Investment Measures | 394 |
| Agreement on Subsidies and Countervailing Measures | 397 |
| General Agreement on Trade in Services..... | 398 |
| Agreement on Trade-Related Aspects of Intellectual Property Rights | 405 |
| The Indirect Approach – Conclusions | 409 |
| The Direct Approach..... | 412 |
| A ‘Violation Complaint’ Under SCM | 415 |
| A ‘Non-Violation Complaint’ – GATT Article XXIII:1(b) | 420 |
| Conclusion..... | 426 |
| Chapter 7 – Meeting of the Proxies II: The Trojan Horse of Aid for Trade, or the Hybridization of Soft and Hard Law <i>within</i> the WTO | 429 |
| Soft and Hard Law, Legitimacy, and Gender Analysis: What can be Learned from APEC and EU DG-Trade? | 435 |
| Soft Law and Legitimacy - APEC..... | 437 |
| Hard Law and Legitimacy - WTO..... | 443 |

| | |
|---|-----|
| The Legitimacy of ‘Gender Mainstreaming’ within APEC and the WTO..... | 449 |
| The Correlations Revisited and the Suggestion of Hybridization | 456 |
| Objections | 458 |
| A Renewed WTO? The IF, the EIF, and Aid for Trade..... | 460 |
| Conclusion..... | 480 |
| Chapter 8 – Conclusion..... | 485 |
| The Study and Its Literature..... | 497 |
| Juridification and Hybridization..... | 498 |
| Representation, Women and IOs..... | 501 |
| The Five Principles of IGI | 504 |
| Inclusion..... | 504 |
| Caution | 505 |
| Simplicity | 507 |
| Legitimacy..... | 509 |
| Flexibility | 511 |
| Concluding Points | 513 |
| Appendix..... | 515 |
| Bibliography of Cited Works..... | 544 |
| Academic Publications | 545 |
| Official Documents and Judicial Reports..... | 564 |
| Asia-Pacific Economic Cooperation | 564 |
| European Union | 564 |
| General Agreement on Tariffs and Trade / World Trade Organization | 565 |
| Organization for Economic Cooperation and Development | 569 |
| United Nations | 569 |
| Canada | 571 |
| United States of America..... | 571 |
| Other | 572 |
| Coherence | 572 |
| Websites | 572 |
| Asia-Pacific Economic Cooperation | 572 |
| European Union | 573 |
| World Trade Organization..... | 574 |

| | |
|---|-----|
| United Nations | 576 |
| Other | 577 |
| Coherence | 577 |
| Interviews, Emails, Speeches and Transcriptions | 578 |

List of Figures

| | |
|--|-----|
| Figure 1: WTO Members (as of August 2013)..... | 180 |
|--|-----|

List of Tables

| | |
|---|-----|
| Table 1: Modified Blichner-Molender Typology of Juridification – The Ingress of Law – Definitions..... | 103 |
| Table 2: GATT and WTO Trade Rounds | 179 |
| Table 3: Modified Blichner-Molender Typology of Juridification – The Ingress of Law – Select Examples | 253 |
| Table 4: Associations of Concepts in Peterson’s Work Concerning Political and Economic Activity | 269 |
| Table 5: Fundamental International Agreements and Conventions that Prohibit All Forms of Discrimination on the Basis of Gender..... | 357 |
| Table 6: Soft Law and Hard Law in APEC and WTO | 447 |
| Table 7: Legitimacy in APEC and WTO | 448 |
| Table 8: Legitimacy of the Representation of Women and Women’s Interests in APEC and WTO – Some Highlights..... | 455 |

List of Appendices

| | |
|---|-----|
| Appendix 1: Ethics Approval Form | 516 |
| Appendix 2: Letter of Information..... | 517 |
| Appendix 3: Informed Consent..... | 519 |
| Appendix 4: Summary of Research Trip Associated with Dissertation Research..... | 521 |
| Appendix 5: The Global Institutional Environment with Relation to the Gender and Trade Movement | 522 |
| Appendix 6: The Global Gender and Trade Civil Society Movement and Its Goals | 526 |
| Appendix 7: The United Nations System, as of 2007..... | 528 |
| Appendix 8: United Nations System, as of 2011..... | 529 |
| Appendix 9: GATT Contracting Parties | 530 |
| Appendix 10: WTO Membership | 533 |
| Appendix 11: WTO Members that were not Contracting Parties to the GATT | 537 |
| Appendix 12: WTO Observer Governments | 538 |
| Appendix 13: WTO Organizational Chart | 539 |
| Appendix 14: The Panel Process | 541 |
| Appendix 15: APEC Membership | 542 |
| Appendix 16: Academic Presentations and Papers with Relation to Doctoral Research | 543 |

Appendix 17: Policy Engagement by Invitation with Relation to Doctoral Research ... 543

List of Acronyms³

| | |
|------------|---|
| A4T | Aid for Trade |
| AB | Appellate Body |
| ABAC | APEC Business Advisory Council |
| ACWL | Advisory Centre on WTO Law |
| AIDS | Acquired Immunodeficiency Syndrome |
| AM | Assembly Member |
| AMS | Aggregate Measures of Support |
| AoA | Agreement on Agriculture |
| APEC | Asia Pacific Economic Cooperation |
| APEC ISTWG | Industrial Science and Technology Working Group |
| APEC PPFS | APEC Policy Partnership for Food Security |
| APSA | American Political Science Association |
| APWLD | Asia-Pacific Forum for Women, Law & Development |
| ASC | APEC Study Centre |
| ASCC | APEC Study Centre Consortium |
| ASEAN | Association of South-East Asian Nations |
| AWID | Association for Women's Rights in Development |
| BATNA | Best Alternative To Negotiated Agreement |
| BCBS | Basel Committee on Banking Supervision |
| CACSW | Canadian Advisory Council on the Status of Women |
| CAP | Common Agricultural Policy |
| CBD | Convention on Biological Diversity |
| CEDAW | United Nations Convention on the Elimination of All Forms of Discrimination Against Women |
| CES | Centre for European Studies |
| CH | Switzerland |
| CIDA | Canadian International Development Agency |
| CIEL | Centre for International Environmental Law |
| CPSA | Canadian Political Science Association |
| CSGR | Centre for the Study of Globalization and Regionalization |
| CSO | Civil Society Organization |
| CTD | Committee on Trade and Development |
| CTG | Council for Trade in Goods |
| CTPL | Centre for Trade Policy and Law |
| CU | Customs Union |
| CUA | Concerted Unilateral Action |
| CUSFTA | Canada-United States Free Trade Agreement |
| DAW | UN Division for the Advancement of Women |
| DAWN | Development Alternatives with Women for a New Era |
| DC | District of Columbia |
| DDA | Doha Development Agenda |
| DFAIT | Department of Foreign Affairs and International Trade |

³ List of acronyms used in text and not necessarily in the appendix.

| | |
|-------------|---|
| DG | Director General |
| DGEG | Democratic Global Economic Governance |
| DGG | Democratic Global Governance |
| DSB | Dispute Settlement Body |
| DSM | Dispute Settlement Mechanism |
| DSU | Dispute Settlement Understanding |
| DTIS | Diagnostic Trade Integration Study |
| DUP | Democratic Unionist Party |
| EC | European Commission |
| ECJ | European Court of Justice |
| EEC | European Economic Communities |
| EESC | European Economic and Social Committee |
| EIF | Enhanced Integrated Framework |
| EPC | Eminent Persons Council |
| ESAF | Enhanced Structural Adjustment Facility |
| EU | European Union |
| EU DG Trade | European Union Directorate General for Trade |
| FAO | Food and Agriculture Organization |
| FDI | Foreign Direct Investment |
| FIP | Five Interested Parties |
| FSAP | Financial Sector Assessment Program (International Monetary Fund) |
| FSF | Financial Stability Forum |
| FTA | Free Trade Agreement |
| FTAA | Free Trade Area of the Americas |
| G20 | Group of Twenty |
| G7 | Group of Seven |
| G8 | Group of Eight |
| GA | General Assembly |
| GARNET | Global Governance, Regionalisation, and the Regulatory Framework |
| GATS | General Agreement on Trade in Services |
| GATT | General Agreement on Tariffs and Trade |
| GDP | Gross Domestic Product |
| GEG | Global Economic Governance |
| GFPN | Gender Facial Points Network |
| GG | Global Governance |
| GPA | General Procurement Agreement |
| GPE | Global Political Economy |
| GSM | Global Social Movement |
| GSP | Generalized System of Preferences |
| HIPC | Heavily Indebted Poor Countries |
| HIV | Human Immunodeficiency Virus |
| IAEA | International Atomic Energy Agency |
| IAIS | International Association of Insurance Supervisors |
| IAP | Individual Action Plan |
| IASB | International Accounting Standards Boards |
| IBRD | International Bank for Reconstruction and Development |

| | |
|----------|--|
| ICC | International Criminal Court |
| ICFTU | International Confederation of Free-Trade Unions |
| ICJ | International Court of Justice |
| ICSID | International Centre for the Settlement of Investment Disputes |
| ICTR | International Criminal Tribunal for Rwanda |
| ICTY | International Criminal Tribunal for the former Yugoslavia |
| IDA | International Development Association |
| IEO | Independent Evaluation Office |
| IF | Integrated Framework |
| IFC | International Finance Corporation |
| IGI | Inclusive Global Institutionalism |
| IGTN | International Gender and Trade Network |
| ILC | International Law Commission |
| ILO | International Labor Organization |
| IMF | International Monetary Fund |
| IMO | International Maritime Organization |
| INGOs | International Non-Governmental Organizations |
| INSTRAW | International Research and Training Institute for the Advancement of Women |
| INTELSAT | International Telecommunications Satellite Organization |
| IO | International Organization |
| IOSCO | International Organization of Securities Commissions |
| IPE | International Political Economy |
| IR | International Relations |
| ISO | International Standards Organization |
| ISPS | International Ship and Port Facility Security |
| ITAC | Information Technology Agreement Committee |
| ITC | International Trade Centre |
| ITO | International Trade Organization |
| ITTC | Institute for Training and Technical Cooperation (WTO) |
| ITU | International Telegraph Union |
| IWG GT | Informal Working Group on Gender and Trade |
| KEE-KFK | |
| LDCs | Least-Developed Countries |
| LGBT | Lesbian, Gay, Bisexual and Transgender |
| LII | Legal Information Institute (Cornell University Law School) |
| LTA | Long-Term Agreement |
| MAI | Multilateral Agreement on Investment |
| MDG | Millennium Development Goal |
| MDRI | Multilateral Debt Relief Initiative |
| MEI | Multilateral Economic Institution |
| MERCOSUR | <i>Mercado Comun del Sur</i> |
| MFA | Multi-Fibre Agreement |
| MFN | Most Favoured Nation |
| MIGA | Multilateral Investment Guarantee Agency |
| MM | Multiple Member (System) |

| | |
|--------|--|
| MMPA | Maritime Mammal Protection Act (United States) |
| MSF | <i>Medecins Sans Frontieres</i> (Doctors Without Borders) |
| NAC | National Action Committee (on the status of women) |
| NAFTA | North American Free Trade Agreement |
| NBIPs | Non-Binding Investment Principles |
| NGOs | Non-Governmental Organizations |
| NPSIA | Norman Patterson School of International Affairs |
| OECD | Organization for Economic Cooperation and Development |
| OHCHR | Office of the (United Nations) High Commissioner for Human Rights |
| OILPOL | Prevention of the Pollution of the Sea by Oil |
| OPEC | Organization of Petroleum-Exporting Countries |
| OSAGI | UN Office of the Special Advisor on Gender Issues and Advancement of Women |
| PDR | People's Democratic Republic (Lao) |
| PPWE | Policy Partnership on Women and the Economy |
| PR | Proportional Representation |
| PRGF | Poverty Reduction Growth Facility |
| PRSP | Poverty Reduction Strategy Paper |
| PSCI | Political Science |
| PSU | Policy Support Unit |
| PTA | Preferential Trade Agreement |
| RB | Regular Budget from UN and WTO (ITC) |
| RMALC | <i>Red Mexicana de Accion Frente al Libre Comercio</i> |
| RTA | Regional Trade Agreement |
| SCE | Steering Committee on Economic and technical cooperation |
| SCM | Agreement on Subsidies and Countervailing Measures |
| SCR | Supreme Court Reports (Canada) |
| SDR | Special Drawing Rights |
| SDT | Special and Differential Treatment |
| SME | Small and Medium Enterprises |
| SOLAS | Safety Of Life At Sea |
| SOM | Senior Officials Meeting |
| SPS | Sanitary and Phytosanitary Measures Agreement |
| SSHRC | Social Sciences and Humanities Research Council |
| STA | Short-Term Agreement |
| STDF | Standards and Trade Development Facility |
| SWC | Status of Women Canada |
| TBT | Technical Barriers to Trade |
| TM | Transparency Mechanism |
| TPRB | Trade Policy Review Body |
| TPRM | Trade Policy Review Mechanism |
| TRC | Trade Research Coalition |
| TRIMS | Trade-Related Investment Measures |
| TRIPS | Trade-Related aspects of Intellectual Property Rights |
| TWN | Third World Network |
| UFR | Use of Fund Resources (International Monetary Fund) |

| | |
|-----------|--|
| UK | United Kingdom |
| UN | United Nations |
| UN ECOSOC | United Nations Economic and Social Council |
| UNCLOS | United Nations Convention on the Law of the Sea |
| UNCTAD | United Nations Conference for Trade and Development |
| UNDP | UN Development Programme |
| UNECA | United Nations Economic Commission for Africa |
| UNEP | United Nations Environment Programme |
| UN-FfD | United Nations Financing for Development |
| UNHCHR | United Nations High Commission for Human Rights |
| UNIFEM | United Nations Development Fund for Women (Now UN-Women) |
| UNIPO | United Nations Integrated Peacebuilding Office |
| UNOPS | United Nations Office for Project Services |
| UNSNS | United Nations System of Accounts |
| US | United States [of America] |
| USD | United States Dollar |
| USSC | United States Supreme Court |
| USSR | Union of Soviet Socialist Republics |
| WAEN | Women's Alternative Economic Network |
| WB | World Bank |
| WCGJ | Women's Caucus for Gender Justice |
| WCL | World Confederation of Labour |
| WHO | World Health Organization |
| WIDE | Women in Development Europe |
| WIPO | World Intellectual Property Organization |
| WLN | Women's Leadership Network |
| WMO | World Meteorology Organization |
| WSF | World Social Forum |
| WSSE | Workgroup/Website of Solidarity Socio-Economy |
| WTO | World Trade Organization |
| WTPO | World Trade Promotion Organization |
| WWF | World Wildlife Fund |
| WWI | World War One |
| WWII | World War Two |

Preface

In November 2006, early in the research that produced the present study, I travelled to Moscow, Russia, at the invitation of the Canadian International Development Agency (CIDA) to participate in training sessions offered by Carleton University's Centre for Trade Policy and Law (CTPL) concerning the relationship between gender and trade.⁴ What was remarkable about the sessions was that, at first, the Russian participants almost all understood 'gender and trade' as referring to the sexual trafficking of women. By contrast, what the CTPL representatives meant by 'gender and trade' was the gendered nature of the impacts of trade policy, trade liberalization, and global trade governance. This showed the need to address issues of the impact of trade and trade governance on women in a manner commensurate with its importance and beyond the important subject of sexual exploitation in trade.

In November 2007, at the High Level Panel opening the Public Symposium of the World Trade Organization held at Geneva, Finnish President Tarja Halonen called for the

⁴ CTPL is a non-governmental, non-profit organization specializing in trade and support services for public and international organizations and is located in Ottawa, Canada. The Centre brings together trade policy and trade law experts from different countries and sectors to collaborate on multilateral and bilateral trade issues. At the time, when the bulk of this research was done, Sarah Geddes was responsible for gender and trade issues at the Centre. She was also one of those responsible for facilitating the above workshop, at which I was invited to share my research. The workshop was part of a project that facilitated Russia's WTO accession and increased integration into the global economy and was financially supported in part by the Canadian International Development Agency (CIDA). Russian participants included academics, members of NGOs concerned, and members of the Russian trade negotiation team to the WTO.

CIDA required CTPL to include a strong gender component in every project it funded. At the time of finishing this study, the Canadian government decided to amalgamate CIDA into the Department of Foreign Affairs and International Trade (DFAIT). This change will likely affect funding, research requirements and the understanding of the relationship between gender and trade. However, although these implications have yet to be crystallized, the development itself may not be negative for the topic at hand. This is said in light of the developments of the European Union Institutions, where EU DG-Trade and EU DG-Development used not to communicate with each other, but began to be integrated during the time when Pascal Lamy was EU-Trade Commissioner. Interviews conducted with some members of EU DG-Trade saw this as a particularly welcome development with relation to issues that are covered by the social dimensions of the EU, including gender, labour, human rights, etc.

incorporation of gender into the WTO framework in front of several hundred attendees, including bureaucrats, civil servants, NGOs, businesses and academics from all over the world. Turning to Pascal Lamy, Director-General of the WTO, she said: “you’ve got to find a way to bring gender into the WTO.”⁵ Although she admitted not knowing how to do so, it was very clear in her mind that this had to be done. Using examples of her own country’s successful development, she argued that gender equality is a fundamental component to competitiveness in the global market and that it had to be recognized as such by the WTO. Thanking Lamy for the gender parity on the panel – “a welcome improvement over previous years” – she insisted that parity should not be limited to public functions, and that women’s descriptive representation needed to be matched by other types of gender equality.⁶

Another panelist and a WTO-member hopeful,⁷ Liberia’s Minister of Foreign Affairs, Olubunke King-Akerele echoed President Halonen’s views. Grounded in an argument based on her country’s labour relations, she almost shouted: “Gender into the WTO!”⁸ She spoke at length about the need for balance in global governance, including balance between developed and developing countries, to enhance the multilateral trading system’s legitimacy and help human rights, the environment and gender concerns. She

⁵ Verbatim from my transcription of the speech (October 4, 2007).

⁶ Since she was delivering her speech in English, she also expressed her great discomfort, although in a playful manner, with having to say ‘men’ and ‘he’ when referring to the third person in general, which she found a discriminatory form of expression completely foreign to her because the Finnish language does not make such distinctions. There are other languages that are the same in this respect, for example, Estonian, Hungarian, Japanese, Chinese, Malay, Korean, etc.

⁷ Poignantly, Liberia was one of only two states (Australia being the other) officially to ratify the charter of the International Trade Organization (ITO), without making their ratification contingent upon that of the United States (Wilkinson, Rorden, *The WTO: Crisis and the Governance of Global Trade* (London: Routledge, 2006), 35-36). At time of writing, Liberia holds observer status at the WTO; it has not yet acceded.

⁸ Verbatim from my transcription of the speech (4 October 2007).

announced that in 2008 Liberia would host an international symposium on gender and trade and invited Lamy to the event; Lamy agreed to attend.

It was a mere few days prior to the above events that I had conducted formal interviews and informal discussions concerning questions about gender, trade and the WTO at EU DG-Trade in Brussels, with members of the WTO Secretariat in Geneva, and with NGOs in Geneva that have been working on gender and trade and have kept a relationship with the WTO. Amongst the many I talked to, all thought that gender had a place with regards to trade, and there was only one who argued that it had no place vis-à-vis the WTO. In sum, all, including members of EU DG-Trade and the WTO Secretariat, regardless of their own positions on the matter, expressed that it was definitely an important question about which something had to be done. Thus progressive thinkers, some of whom were in high level positions, acted as policy entrepreneurs despite having no decision-making power vis-à-vis the WTO.

It is unclear whether the symposium in Liberia took place and, if so, whether Lamy attended. But what is certain is that the gender component of President Halonen's speech was excluded from the text version of her talk posted on the WTO website after the symposium. Indeed, the words 'gender' and 'women' did not appear once in the posted text despite the fact that a large part of her speech explicitly dealt with gender and hundreds had listened to her words, including myself. Had I not been present, I might never have learned of her passionate speech. Liberia's prospective accession to membership has been delayed and, as of December 2014, it remains an observer at the

WTO.⁹ This sense of frustration, of considerable promise defeated by more considerable obstacles, is a defining feature of the present study.

⁹ It is also clear that Liberia is now working closely with the ITC, which, although recognizes the gender and trade connection, only works with ‘developing’ countries and with assistance from ‘developed’ countries.

Chapter 1 – Introduction

The use of traditional models of national democracy to handle global problems has important limitations [...]. And yet the very credibility of national democracies is at risk if global governance fails to establish its own democratic credentials and if citizens feel that the issues that affect them on a day to day basis, having now become global issues, are beyond the control of their political will as expressed through the ballot box.¹⁰

Pascal Lamy

Director-General (2005 – 2013)
World Trade Organization
15 March, 2010

This study is about democracy; it is foundationally and in all its parts a sustained effort toward developing a theory of democratic global governance. However, it is not an effort to articulate such a theory, but a persistent enquiry concerning whether it is even possible to begin to construct such a theory and to speak about effective global democracy. The fundamental question of the study is whether Global Economic Governance can take a democratic turn. To address this question, the study tests whether the representation of women and women's interests can be accomplished within the World Trade Organization (WTO). The test serves to answer the fundamental question for two reasons: first, because the representation of women and women's interests is a *sine qua non* of democracy in the 21st century; and second, because the WTO is the hardest case amongst institutions of Global Economic Governance for the representation

¹⁰ World Trade Organization, "Lamy Calls for Strengthened System of Global Governance," http://www.wto.org/english/news_e/sppl_e/sppl149_e.htm (accessed 21 April 2014).

of women and women's interests.¹¹ This 'hardest case' methodology allows two important generalizations to be drawn: first, if a *sine qua non* of democracy cannot be achieved at the WTO, then Global Economic Governance cannot be made democratic without significantly restructuring its institutions; and second, if the representation of women and women's interests can be accomplished in a case at least as hard as any other, then it can fairly be said to be possible within the rest of the institutions of Global Economic Governance. By following this methodology, the study can seek an answer to its fundamental question. As will be shown, the study answers the question in the affirmative by means of the hybridization of institutions of Global Economic Governance between hard law and soft law models.

Like the above quotation, the mature framework of the study emerged after much revision at a time of crisis and dislocation, of change, questioning and uncertainty. The research the study rests on began in earnest in 2004, proceeded with interviews in September and October of 2007, and, after interruptions not unrelated to the events of that period, concluded, save minor updates, in 2012. During these years, the world experienced a global financial crisis that began in August 2007, made its definite mark on global economic governance after September 2008, caused the worst economic collapse since the early 1930s and metamorphosed into a European sovereign-debt crisis.¹² It saw also the advent of Basel III and a remarkable coordination of effort by the countries of the G20 to respond to the financial crisis. Further still, the years 2004 to 2012 brought small

¹¹ For this reason, the WTO is referred to throughout as the 'hardest case' for the representation of women and women's interests. It is important to stress, though, that 'hardest case' means that no case exists that is harder than the WTO. It does not mean that the WTO is, on its own, harder than every other case.

¹² Most people have one of the two following dates for the onset of the financial crisis: 1) August 2007 when the first bank rescue occurred and some funds collapsed, and 2) September 2008 when Fannie Mae and Freddie Mac were placed under American government conservatorship and Lehman Brothers declared bankruptcy, etc.

successes and great frustration in the Doha Round of multilateral trade negotiations; the advent of the Enhanced Integrated Framework (EIF) and Aid for Trade at the WTO in December 2005; the advent of a programme that officially recognized a connection between gender and trade in 2010; and the advent of UN-Women in July 2010.

In short, 2004 to 2012 was a period of extraordinary crisis and remarkable coordination in all aspects of economic life throughout the developed world. The eight years in question saw a significant intensification and expansion in many areas of the global governance of economic activity. However, this was only the continuation of a process begun much earlier. Since 1945 there has been an unbroken trend toward the increased scope, complexity and robustness of global economic governance, and of global governance generally – the study calls this trend juridification.

At the most fundamental level, the trend has motivated the study, because it gives rise to the fundamental questions of the science of politics, government and the distribution of power. Whom does the seven-decades trend of juridification of global economic governance benefit and whom does it harm? Who gains by it and who loses? Who does it marginalize, or oppress, and can it ever be called democratic? It is this last question concerning democracy to which all the others resolve themselves and which gives the study its direction, because the question of whether global governance can be democratic contains within it all of the other questions previously asked.

There is a parallel question of equal importance to the question of global democratic governance that runs through the research. It is embedded in the understanding that sex/gender as a category is ontologically prior to all categories other than ‘being’ itself, which places the question of sex/gender in proper relation to the

problem of democratic representation. That is to say, any question of the democratization of global governance must first ask the question of whether it is possible within global governance to accomplish the representation of women and women's interests.

Only when a given polity or organization is capable of representing women both descriptively and substantively can it be considered democratic. 'Descriptive representation' means that women are present in responsible and powerful positions within the institutions of Global Economic Governance at a significant level. It also refers to the percentage of positions occupied by women within institutions of Global Economic Governance.¹³ The 'substantive representation of women's interests' requires initiatives such as 'gender mainstreaming', collection of sex-disaggregated data, discussion of effects of policies and processes (such as trade liberalization) that are specific to women, discussion of how disadvantages and negative effects on women can be overcome or mitigated, and consideration of how advantages and positive effects might best be utilized and amplified to benefit women. It is not necessary for the study to establish specific metrics against which to measure the representation of women and women's interests, because it is primarily concerned with assessing the capacity of Global Economic Governance to represent women and women's interests at all, and so to take a democratic turn. Evidence that women are or can be represented descriptively, and that women's interests are or can be represented substantively, will be indicated by the

¹³ Feminist and democratic scholarship has cited critical mass theory to suggest that particular significance may be attached to the achievement of one-third descriptive representation by women in the composition of a given organization. The study does not pursue this line of reasoning because: (1) there is insufficient evidence that critical mass theory can be successfully transferred from the world of physics to the world of institutions of governance; (2) the logic that would apply critical mass theory in this way is by no means self-evident; (3) the WTO has no influence upon the gender composition of member government delegations; and (4) even in the WTO Secretariat, posts are won by open competition, not granted by appointment and not subject to gender quotas.

presence of women in given institutions, by the presence of policies such as ‘gender mainstreaming’, and by the substantive content of agreements, reports, discussions and other texts produced by a given institution.

The insight that the representation of women and women’s interests must be possible in order to begin to speak of democracy or democratization is fundamental to the study. It has become universally recognized in modern democracies; no country considered democratic now excludes women as representatives or is incapable of representing women and women’s interests substantively. No country would be considered democratic today that did not substantively and descriptively represent women, although the proportions of women’s representation vary widely across democratic governments.

The study places the representation of women in a position of epistemological primacy that matches the ontological primacy of sex/gender. In this way, the two questions that give the study its form are united and frame its basic approach to determining whether Global Economic Governance can take a democratic turn. This approach is to construct a method of evaluating the democratic potential of Global Economic Governance by testing whether the representation of women and women’s interests can be achieved within the World Trade Organization. Hence the dissertation employs a universally accepted democratic principle that, if unmet, renders the democratic development of Global Economic Governance impossible under existing conditions.

To determine where to conduct the test in a way that would produce the most significant results, the study develops and employs a ‘hardest case’ methodology. It

employs two principles, both of which are simple yet significant in their implications. The first is that if a given policy can be implemented where it is most difficult to do so, it follows that it is possible to implement the same policy where it is less difficult to do so. Conversely, the failure to implement a given policy in the hardest case carries its own implications, which may be systemic if the case is sufficiently important. The second principle is the ‘chain of hardest cases,’ whereby the testing of the hardest case at a given level of governance may be used to make determinations about what is possible at a higher and more general level of governance.

Thus, to move from the abstract to the specific, the study takes the ability of a given system, polity, or organization to accomplish the representation of women and women’s interests as determinative of the ability of the same system, polity or organization to become democratic. The study assumes that Global Economic Governance is the hardest case of global governance in which to accomplish the representation of women and women’s interests. This is because of all areas of global governance, arguably Global Economic Governance is bound most continually and explicitly to mediate the tensions between state and market. The study takes the World Trade Organization (WTO) to be the hardest case amongst the institutions of Global Economic Governance for the representation of women and women’s interests, as explained in Chapter 5.¹⁴

In this way, the study constructs and employs a simple but powerful test. It first establishes whether the representation of women and women’s interests, which is a necessary condition for the democratization of any organization or polity at present, can

¹⁴ It is important to clarify here that ‘hardest case’ means a case that is ‘as hard as, or harder than,’ any other case.

be accomplished within the WTO. If not, then democratization of Global Economic Governance would require fundamental reform. Moreover, since the WTO is the hardest case for the representation of women and women's interests, it can serve as a proxy for Global Economic Governance in general. Thus, by testing the potential within the WTO for the descriptive representation of women and the substantive representation of women's interests, the study is able to draw meaningful and important conclusions about whether the democratization of Global Economic Governance is possible at present or whether it would be possible only after significant reform and the creation of a far more robust governing system, such as a global state.

Accordingly, the study builds upon the following logical sequence:

1. Because there is no democracy in the 21st century without some representation of women and women's interests, the representation of women and women's interests is one of the very few universally shared qualities of modern democracies.
2. The representation of women and women's interests qualifies as a fundamental, though insufficient, measure of democracy.
3. If we pose the question of whether a polity can become democratic, we have to ask whether the polity has the capacity to meet this criterion.
4. If it cannot, then it cannot be called democratic.

From the above it is clear that to answer the question of whether Global Economic Governance can take a democratic turn, one must determine whether, within Global Economic Governance, women can represent and be represented. If this criterion cannot be met, it must be allowed that Global Economic Governance is incapable of taking a democratic turn. It follows as well that if Global Economic Governance cannot take a democratic turn, then neither can global governance generally, the former being a large

and profoundly important part of the latter. The above progression will not be problematized in the study, because there is not a single example of a contemporary democracy that does not allow the representation of women and women's interests;¹⁵ indeed, any problems associated with its practical application seriously question the democratic nature of any purported democracy.

The study ultimately locates the democratic potential of Global Economic Governance in the ability of its institutions to organize themselves on a continuum between hard and soft law; it therefore calls for the hybridization of IOs.¹⁶ This would open and develop the democratic potential of Global Economic Governance in its present structure, without necessitating the invention of new governing structures, such as a global government or a global state, in order to achieve a democratic turn.

Contributions to Scholarship

Given that the fourth wave of democratization is a movement to democratize global governance, the study contributes to the growing discussion in this area by considering the question of whether an expansion of democracy into the sphere of Global Economic Governance is possible and, if so, what form it would take. Indeed, the original impetus for the project was to seek a way by which the democratic potential of Global

¹⁵ This is so regardless of women having been excluded from Athenian democracy, and regardless of women having been excluded as representatives in nearly all democracies until the early 20th century (and in some well into the mid-20th century). Moreover, it is no objection to note that no major democratic theorist includes the representation of women and women's interests as a variable any more than it is an objection to heliocentrism to note that no major astronomer or natural philosopher before Copernicus suggested that the Earth rotates around the Sun.

¹⁶ A hard-law institution tends toward specific and binding regulations, as well as a more juridical and adversarial dispute settlement process. A soft-law institution tends toward more general, more flexible and less binding regulations, as well as a more diplomatic or collegial dispute settlement process. A hybridized institution combines elements of both soft-law and hard-law institutions.

Economic Governance could be made a genuine possibility or, stated differently, a way by which such a development would not become an impossibility.

Further, the study examines the kind of democratic potential extant in the global sphere. It does so by seeking an approach to global governance that can accommodate difference (cultural, national, etc.), and that does not create a system of unduly centralized power that cannot accommodate diversity. The crucial element in conceptualizing this balance is to locate the question of democratic global governance on a continuum between soft law and hard law, which would allow for legitimacy and diversity to co-exist in a system of global governance.

The study distinguishes between hard law and soft law as the two end points of a continuum. Hard law is identified by specific and binding regulations, as well as by a juridical dispute settlement process. Soft law regulations are less binding, more general, and more flexible with respect to compliance and specific content. They tend to reduce the risk of agreement and can be tailored to different levels of comfort concerning different questions. Dispute settlement under a soft law regime tends to be less adversarial and more discursive, with greater scope for mediation. The study assumes that it is possible to locate every governing and regulatory body on a continuum between hard law and soft law, and that most institutions at present tend toward one end of the continuum or the other. For its part, although it contains elements of soft law, the WTO is much closer to the hard law model. APEC, conversely, is much closer to the soft law model.

By ‘hybridization,’ the study means the intentional combination within a single institution of elements of hard law and soft law so as to derive benefits from both. That is

to say, if it is allowed that institutions can be placed upon a continuum between hard law and soft law, a hybridized institution will be located at a point between, rather than at, the two extremes. This could take a number of forms in practise. For example, an international organization would be considered hybridized if it combined binding but general commitments from its members with specific but voluntary guidelines. Equally, an institution could be considered hybridized if it combined specific and binding commitments with a relatively informal and discursive mechanism for dispute settlement.¹⁷

In the context of the study, the hybridization of soft law and hard law for these purposes also signals whether a democratic Global Economic Governance system is possible or whether it is necessary to construct a global state to achieve democratic ideals at the global level. It is argued that in order to preserve a governance system, i.e. to work with what we already have as opposed to building a ‘government’ or a ‘state’, the representation of women and women’s interests needs to be addressed within the institutions of Global Economic Governance by finding a balance between hard law and soft law. This approach allows for the maintenance of diversity and possibly even for diversity to emerge in unknown and constructive ways.

As is developed in Chapters 6 and 7, there are many significant benefits of hybridization. Amongst these are the following three. First, hybridization allows an institution to develop more easily by allowing reforms and innovations to be introduced

¹⁷ For other considerations of hybridization as a combination of hard law and soft law see, *inter alia*: Jayasuriya, Kanishka, “Institutional Hybrids and the Rule of Law as a Regulatory Project,” in Brian Z. Tamanaha, Caroline Sage, and Michael Woolcock, eds., Legal Pluralism and Development: Scholars and Practitioners in Dialogue (Cambridge: Cambridge University Press, 2012); Davidson, Paul J., “The Rule of Law in Governing Regionalism in Asia,” in Nicholas Thomas, ed., Governance and Regionalism in Asia (London: Routledge, 2009).

gradually and voluntarily, and then to be made binding by increments. This reduces the risk of change and facilitates the introduction of initiatives such as gender mainstreaming. Second, a hybridized institution is better able to incorporate a wider range of interests, since it is better able to tailor the commitments of its members to their respective preferences. This applies particularly to the binding nature of commitments and to their specificity. Third, hybridization counters path-dependency¹⁸, and particularly the path-dependency of juridification. This is not only necessary to the continued existence of any institution, but to the continued functioning of democratic governance.

Further, the study's analysis shows that tracing the possibilities for the representation of women and women's interests is a significant indicator of the development of global governance generally and that the solution to the problem examined in the dissertation is a potential solution for other issues concerning global governance. Thus, the study is an entry point to further investigations concerning the advantages of hybridized institutions at the global level. In other words, it is reasonable to expect that the findings and insights of this study concerning the possibility for democratization can be 'replicated' in other areas of global governance.

¹⁸ In Institutions, Institutional Change and Economic Performance, North cites W. Brian Arthur's definition of path-dependence in the latter's "Self-Reinforcing Mechanisms in Economics": "the consequence of small events and chance circumstances can determine solutions that, once they prevail, lead one to a particular path." North expands this understanding to include "incremental institutional change involving interplay between the institutional framework and the consequent organizations," which "narrow[s] conceptually the choice set and link[s] decision making through time." As a result, "once a development path is set on a particular course, the network externalities, the learning process of the organization, and the historically derived subjective modeling of the issues reinforce the course." This process of continual reinforcement of the original course selection also holds for the path-dependence of juridification over time.

North, Douglass C., Institutions, Institutional Change and Economic Performance (1990; Cambridge: Cambridge University Press, 2011), 93-94, 97-99; Arthur, W. Brian, "Self-Reinforcing Mechanisms in Economics," in Philip W. Anderson, Kenneth J. Arrow, and David Pines, eds., The Economy as an Evolving Complex System (Reading, MA, USA: Addison-Wesley, 1988).

The contribution is a new theoretical approach to the growing literature on global governance, democratic global governance, and democratic global economic governance.¹⁹ Based on the ‘hardest case’ principle and on the fundamental necessity of the representation of women and women’s interests for democracy, the approach allows the democratic potential of any organization, polity or system to be tested.

With respect to the disciplinary boundaries of global governance scholarship, much of the study is located in political science and political studies, but it is also solidly rooted in related disciplines, including philosophy, law and legal studies, public policy, women’s and gender studies, sociology and economics. The study bases its analysis on the recognition that global developments toward democratization bring together these distinct bodies of literature, and possibly others, by necessity. The study borrows from each, and in turn may contribute to them. Also, since the study locates the democratic potential of global economic governance on the hard-law, soft-law continuum, it can be considered a contribution to the literature of global constitutionalism.²⁰

The gaps in scholarship the study helps to fill are the following. First, it addresses the problem of democratic global governance from a global institutionalist perspective,

¹⁹ The literature significantly shrinks through the categories, but it could be argued that the complexity of the thinking involved is greatest in the case of DGEG because it addresses a fundamental and insoluble problem: the irreconcilable relationship of the state and the market.

²⁰ The literature of global constitutionalism is voluminous, but either does not address the hybridization of hard law and soft law or does not address it nearly in as much detail as this study.

See e.g. Falk, Richard A., Robert C. Johansen, and Samuel S. Kim, eds., Constitutional Foundations of World Peace (Albany, NY: State University of New York Press, 1993).

For a recent survey on global constitutionalism from an IPE perspective, see Gill, Stephen and A. Claire Cutler, eds., New Constitutionalism and World Order (Cambridge, UK: Cambridge University Press, 2014).

Gill and Cutler, in two paragraphs of their introduction (16-17), touch briefly upon the idea of the interaction of soft law as a “safety valve” for hard law. However, they do not develop further the idea or the significance of the interaction of soft law and hard law, and they do not articulate the idea of hybridization (or its implications).

defined and developed as Inclusive Global Institutionalism (IGI) in Chapter 2. Second, there is a very strong tendency amongst scholars of global (democratic) governance to pay insufficient attention, or completely to ignore, questions related to women and gender.²¹ The relegation of gender and feminist scholarship in academic literature to the category of ‘special’ is also reflected in the way in which institutions of global economic governance manage to resist a meaningful discussion of the topic. The study shows that this seriously deprives the literature of insight concerning whether global economic governance can take a democratic turn. Third, there is virtually no interaction between gender and feminist scholars who work on trade, the WTO or global governance, and scholars in the ‘mainstream’, or even scholars conducting critical studies outside of the mainstream.²² The study begins to bridge this gap.

Data Used

The study has five main data components: elite interviews with senior members of WTO Secretariat, EU DG-Trade, and prominent NGOs; analysis of the public records and websites of the WTO, EU DG-Trade, and APEC; participant observation at the WTO Public Forum, academic conferences, and government and NGO conferences; comprehensive reviews of multiple literatures (academic, government, IO and NGO literature including WTO and EU documents and press releases); and use of hypotheticals to develop cases in WTO hard law to determine whether the Dispute Settlement

²¹ See the literature addressed in Chapter 2, most of which fails to address gender; moreover, none of this literature addresses gender in a way that addresses its fundamental necessity to any democratic development.

²² See the literature addressed in Chapter 5, none of which provides a serious or extensive interaction of the kind described.

Mechanism could represent women and women's interests. The initial research questions of the study were formulated in 2004. Data were predominantly gathered between 2004 and 2012, with periodic updates from 2012 through 2014. International conferences, symposia and workshops were attended as speaker, active participant or observer, primarily between 2006 and 2008. A list of presentations delivered with relation to the project may be found in the Appendix.

I attended the WTO Public Symposium in person in 2007 in Geneva, Switzerland, as an observer. It is one of the mechanisms through which the Organization interacts on a yearly basis with outside actors and civil society. The event brought together a large number of experts from civil society, IOs, government and business. It was particularly useful because, at the time, not all presentations were made available, or made available in their original form, on the WTO website. Today, however, all are available on the WTO website, and since 2010 all have been streamed live through various internet feeds. This has greatly reduced the need to attend in person.

I conducted approximately twenty 'formal' open-ended interviews in person with bureaucrats at the Directorate General of Trade (DG-Trade) of the European Union at Brussels, with members of the World Trade Organization (WTO) Secretariat at Geneva, and with select NGOs that were working on gender and trade issues and engaging with the WTO (Switzerland).²³

²³ This was made possible by the project having been given ethics clearance by the Carleton University Ethics Committee in 2007. All interviewees were informed about this process, and as a general requirement of the Committee, interviewees were asked to sign an *Informed Consent* and were provided with a *Letter of Information*. A copy of the original text of the *Informed Consent* and a *Letter of Information* can be found in the Appendix.

The Tri-Council Research Ethics requirements were undergoing changes during the completion of this research towards a model that recognizes the distinctive features of social science research. When this project gained ethics approval, the requirements were, as it was argued, and rightly so, by the Canadian Political Science Association (CPSA), "still dominated by bio-medical conceptions of the ethical issues

The interviews were open-ended, i.e. no specific questions were submitted to the interviewee, but I attempted to steer the conversation to points of particular interest when appropriate and necessary. The objectives of the interviews were made clear for potential interviewees who, prior to the interviews, received writing samples concerning the research and a general summary of the research. This open-ended interview approach resulted in a more positive and relaxed environment, wherein interviewees were able and willing to show greater initiative in educating and sharing information. All were cooperative and helpful. Interviewees were approached by email and only a few declined to participate.

Participation in the interviews was voluntary, most interviews lasted between 1.5 and 2 hours and most were digitally recorded. The audio-records were then transcribed verbatim. During those few interviews where the interviewee requested no recording, extensive notes were taken. The notes were then reviewed and amended immediately following the interview, in order to ensure that they reflected the conversation with the greatest possible accuracy. Interviewees were free to decline to answer any question and there was no financial compensation for participating in the study.

Interviewees were assured that although their names would appear on private notes, they would not appear in the final dissertation. They are referred to throughout the dissertation by general ‘titles’, e.g. ‘a European Commission official’, or ‘a senior WTO official’. Interviewees had the option to choose an even more general title.

The number of ‘non-formal’ interviews, better called ‘informal discussions,’ is also numerous. These include consultations with academics and Canadian bureaucrats

involved in research.” <http://www.cpsa-acsp.ca/researchethics.shtml> Since the project was developed under the earlier regime, the study adheres to its rules throughout.

working, having worked, or interested in working in the area of the research, which informally aided the development of the study. Unlike the above ‘formal’ interviews, though, the substance of these discussions is not explicitly summarized or specifically referred to in the study.

All interviews used in the study were conducted during the fall of 2007, which is an important advantage, because they were conducted just prior to the recent and ongoing global financial and economic crisis, and it was in large part the crisis itself that opened doors for the idea of ‘real world’ change towards democratic global economic governance. Prior to the crisis, discussion of democratic global economic governance existed mainly in academia and in social movements / civil society, but it was not an option openly discussed or mentioned at the level of ‘real world’ global economic governance. Since the interviews were conducted just prior to the unexpected crisis, they provide insight concerning what was underway within the structures of global economic governance, unaware of the impending crisis. Since it seems that the developments underway, or at least under discussion, prior to the crisis with relation to the topic at hand were largely consistent with developments after, and in response to, the crisis, it could be argued that it was not so much a crisis of trade governance.

Chapter Outline

The study poses the problem of whether global economic governance can take a democratic turn. Here, representation is the key concept that makes the project practicable. In short, the representation of women and women’s interests represents, or serves as a proxy for, the possibility of a democratic turn, since it is a *sine qua non* of

democracy in the 21st century. In addition, the WTO represents, or serves as a proxy for, global economic governance generally. First, this is because the WTO constitutes a case as hard as any other for accomplishing the representation of women and women's interests amongst institutions of global economic governance. Second, the GATT/WTO regime of international trade governance underwent the same decades-long post-WWII process of juridification as did global economic governance and global governance generally.

It follows that if the representation of women and women's interests can be introduced within the WTO, then it should be able to be introduced generally within global economic governance and the latter should be able to take a democratic turn. Conversely, it also follows that if the representation of women and women's interests cannot be so accomplished, then significant reforms in the structure of global economic governance will have to be made if it is to take a democratic turn. The study, then, rests upon a test of whether the representation of women and women's interests can be accomplished within the WTO. The course and structure of the study is fundamentally the establishment and conduct of this test.

As such, Chapter 2 builds a framework for democratic global economic governance. It begins by establishing the place of the study within recent and important academic literature, and proceeds to explain the urgency of the study's test of the democratic potential of GEG, which derives from a decades-long trend of juridification of global governance, the reflexivity of juridification, and the path-dependency of juridification. In so doing, Chapter 2 explains the idea of IGI and why it is to be preferred over three other prominent ideas of democratic global governance: a global democratic

state; ‘multitude,’ which includes global civil society; and ‘a new world order of networks,’ which gives rise to the danger of ‘empire.’ In short, Chapter 2 argues that IGI is to be preferred because it insists that the institutions of global governance remain separate from each other, that the present system of global governance be democratized as far as possible before new institutions are created for the purpose, and that the hybridization of soft law and hard law be advanced as far as possible in order to counter path-dependency and to allow for innovation, evolution and deeper democratization. IGI represents the idea that the best means of democratizing the global level is by increasing gradually the ability of the existing system of institutions of global governance to represent diverse groups and interests, rather than by means of either an ideal cosmopolitan democracy or evolution toward a global state and government.

Finally, Chapter 2 defines the terms of the theoretical discourse that provides the groundwork for the study as a whole. It defines the five principles of IGI – inclusion, caution, simplicity, legitimacy, and flexibility – and how they constitute a coherent idea of global governance. It further defines the nature of the movement between hard law and soft law, and how hard law and soft law can be hybridized within International Organizations of global economic governance. Perhaps most importantly, Chapter 2 also defines juridification in a way that is new to social science research, framing the study’s employment of the concept of juridification in terms of the 6 types of what the study calls the ‘Modified Blichner-Molander Typology’: A) constitutive juridification; B) law’s expansion and differentiation; C) increased conflict solving by reference to law; D) increased judicial power; E) legal framing; and F) increased robustness.

Chapter 3 justifies the use of the representation of women and women's interests as a proxy for democratization. In so doing, it analyses Pitkin's typology of representation and critiques the difficulty of operationalizing her concepts of substantive representation and potentiality. Instead, the chapter argues that a more expansive understanding of representation, such as that advanced by Urbinati, is necessary for the study of the possibility of democratic governance at the global level. The chapter also presents sufficient evidence to show that the representation of women and women's interests is a *sine qua non* of democracy in the 21st century, which is necessary if the representation of women and women's interests is to serve as a proxy for democratization. The chapter closes by arguing that gender mainstreaming could improve both descriptive and substantive representation of women, contrary to a significant body of literature concerning women and representation. This in turn establishes that both substantive and descriptive representation of women are possible in the context of IOs.

Chapter 4 establishes that the WTO can be representative of global economic governance and is in fact representative of the post-WWII trend of juridification of global governance generally, and of global economic governance in particular. It does so by employing the modified Blichner-Molander typology of juridification and by showing that the same phenomena of juridification can be observed at the levels of global governance, global economic governance, and the WTO.

The analysis in Chapter 4 first shows the post-WWII trend of juridification in global economic governance with reference to the modified Blichner-Molander typology. It proceeds to analyse a series of seven moments of juridification in the development of global trade governance: first, of the movement from the proposed ITO to the GATT and

the WTO; second, the continual increase of parties to the GATT and the WTO; third, the evolution of dispute settlement from Articles XXII and XXIII under the GATT to the DSB of the WTO; fourth, the evolution of the relationship between development and international trade governance, from GATT Part IV through the Doha Development Agenda; fifth, the increasing complexity and scope of international trade governance, as shown by the development of extra-GATT multilateral trade agreements, as well as the establishment of subordinate councils within the WTO to govern these agreements (GATS, TRIPS and TRIMs being three of the most prominent examples); sixth, increasing consultation of and cooperation with NGOs and other civil-society interests; and seventh, the proliferation of Preferential Trade Agreements (PTAs), particularly since the 1980s. Each of these moments exemplifies at least one, and usually several, types of juridification, and can therefore be mapped to the corresponding types in the juridification of global economic governance generally. Again, this establishes that the WTO can be used as a proxy for global economic governance in the study's test.

Chapter 5 then establishes that the WTO is at least as hard a case as any other institution of global economic governance for accomplishing the representation of women and women's interests. It makes this argument by analyzing nine 'Reasons' that make the WTO the 'hardest case' for the representation of women and women's interests. Again, as long as the WTO is at least as hard a case as any other institution of global economic governance, then if the representation of women and women's interests can be accomplished within the WTO, it should be possible to accomplish the same within the other institutions of global economic governance.

The aforementioned nine ‘Reasons’ are the following: first, the traditional gender blindness of International Relations scholarship and International Political Economy scholarship; second, the traditional gender blindness of economic thought and the consequent need to construct *Mulier Economicus*; third, that it was not possible for women to ‘get in on the ground floor’ at the founding of the WTO in 1994, since GATT 1947 constituted the ‘ground floor’; fourth, the antagonism of gender and trade activism toward neoliberal economics and institutions and networks perceived as neoliberal; fifth, that the WTO was relatively closed to civil society involvement for longer than most other institutions of regional and global economic governance; sixth, the requirement for consensus and the ‘single undertaking,’ which make institutional change at the WTO especially difficult to achieve; seventh, that the locus of power within the WTO rests with the members; eighth, the limited ability of the WTO Secretariat to improve the representation of women and women’s interests at the WTO; and ninth, that the WTO dispute settlement system is a *lex specialis* system, which deprives the identification of women’s rights as human rights of much of its effectiveness as a strategy for advancing the representation of women and women’s interests within the WTO.

Some of these reasons are specific to the WTO, while others are common to global economic governance generally or are products of particular disciplines or sub-disciplines of scholarship that address a wider area than the WTO alone. However, it is the cumulative effect of these reasons that produces a resistance to the representation of women and women’s interests within the WTO not exceeded by any other institution of global economic governance. This is the final qualification necessary to make the WTO an effective proxy for global economic governance in the study’s test. Taken together,

Chapters 3, 4 and 5 establish the validity of the study's test of the potential for global economic governance to take a democratic turn.

The proxies thus established, they meet in the study's test, which is conducted in Chapters 6 and 7. In Chapter 6, the study tests the possibility of the representation of women and women's interests within WTO hard law. Although WTO hard law provides many technical possibilities for the representation of women and women's interests, each is opposed by institutional, procedural and political obstacles likely too great to be overcome, or allowing progress too small to be called the representation of women and women's interests.

Chapter 6 articulates two approaches to achieving the representation of women and women's interests by using the DSB. The first requires that a WTO member institute a trade-distorting policy against an instance of poor representation of women and women's interests in another member's (or members') industry. The purpose would be to induce the targeted member or members to file a complaint with the DSB, thereby to legitimate the representation of women and women's interests as a topic of discussion in international trade governance and trade law, and perhaps even to legitimate the representation of women and women's interests as a justification of trade distortion. This approach is called 'indirect' because it requires the action of a third party to initiate the dispute-settlement process.

The second or 'direct' approach entails a direct complaint made proactively by one WTO member against another on the basis of a failure to represent women and women's interests in a given industry. With respect to the direct approach, Chapter 6 considers each of the major WTO Agreements: GATT; AoA; TRIMS; SCM; GATS; and

TRIPS. Both approaches are shown to provide only opportunities of minimal significance and narrowly circumscribed application, which would rely on WTO members taking the desired action, the DSB making the desired decisions, and somewhat tortured readings of WTO Agreements. Moreover, the chapter also shows how the WTO's requirement for consensus, along with the hard-law nature of most WTO commitments, constitute further obstacles to both approaches.

Chapter 7 applies the study's test to WTO soft law, and particularly to the possibilities afforded by the hybridization of hard law and soft law. In so doing, it finds that the 'Aid-for-Trade' initiative, which resides within the Enhanced Integrated Framework (EIF) and is headed by the WTO, actually serves as a kind of Trojan Horse by which effective representation of women and women's interest might be accomplished within the WTO.

The chapter asks what might be the central question for determining whether global economic governance can take a democratic turn; that is, whether the WTO can achieve the hybridization of hard law and soft law necessary to accomplish the representation of women and women's interests. Hybridization, the chapter argues, balances predictability, formality and flexibility in such a way as to make the desired representation possible within the WTO. The chapter therefore points to the possibility of a WTO renewed by the hybridization begun with the EIF and Aid-for-Trade. It also answers the study's fundamental question with a cautious affirmative, asserting that the gradual democratization of global economic governance is possible, or at least not obviously an impossibility.

The study is problem-driven. Problem-driven research in social sciences that also has contemporary practical relevance is especially difficult to undertake, since its object is a moving target. Over the course of this research, the problem has been slightly reshaped, but the situation of the global political economy, in which the problem was situated, changed dramatically. The ongoing global financial and economic crisis that began in 2007/8 changed the landscape significantly, in particular regarding the possibilities of democratic development at the global level. The crisis resulted in the opportunity to reconceptualise and recontextualize the study's problem in the context of the 'real world' of democratic global governance. Prior to the crisis, discussions of democratic global governance were limited to academia and social movements, with few formal discussions in the institutions the study examines. Post-crisis, discussion of the democratic possibilities of global governance became far more widespread, in academic circles and in the institutions of global governance themselves.²⁴ As a result, the study had to accommodate and, where necessary, incorporate, a broader literature than was available when the research began. For example, nothing like Berik, Dong and Summerfield's Gender, China and the World Trade Organization,²⁵ a key to the analysis in Chapter 6, existed before the crisis.

The study's primary focus is the international level and specifically global economic governance and the WTO, but this does not imply a preference for black-boxing the state. Indeed, the study developed to some extent through monitoring the experience of Canadian activism concerning gender and trade, meaning that there was a

²⁴ See e.g. the following very recent publication: Levi, Lucio, Giovanni Finizio and Nicola Vallinoto, eds., The Democratization of International Institutions: First International Democracy Report, Centre for Studies on Federalism and International Democracy Watch (London: Routledge, 2014).

²⁵ Günseli Berik, Xiao-Yuan Dong and Gale Summerfield, eds., Gender, China and the World Trade Organization: Essays from Feminist Economics (London: Routledge, 2010).

recognition from the outset that domestic and international politics are closely intertwined. Further, the sheer possibility of democratizing global economic governance presupposes bringing the global closer to the individual and therefore opening the ‘inside’ of the state.

Three further methodological points must be made before the introduction closes. First, the study’s usage of ‘women’s interests’ does not imply a monolithic conception of ‘interests’ or that ‘women,’ as a group, share a specific collection of ‘interests.’ Second, recognizing that the representation of women and women’s interests is a *sine qua non* of democracy in the 21st century means disallowing even a possibility or a limited degree of democratization in the 21st century without this condition being achieved. Third, as opposed to the concept of representation, it is not necessary for the study to problematize the concept of democracy as such because the representation of women and women’s interests is fundamental to any democracy in the 21st century, regardless of the definition employed.²⁶

For the purposes of the study, the primary focus is the international level because the study investigates a question best answered by examining what happens in particular international organizations. Choosing to focus on the international level fills a serious gap in the literature and compensates for the tendency of scholars of global governance to ignore or exclude gender. The study recognizes that global developments promoting democratization bring together these distinct bodies of literature, amongst others, by necessity.

²⁶ See Chapter 3.

Although the implications of the test extend clearly from the WTO to global economic governance and to global governance itself, the study addresses only the WTO and global economic governance in significant detail, leaving the application of the test to global governance generally at the level of a clear and logical conclusion. To address global governance in the detail and depth it requires would be beyond the scope of the study.

Chapter 2 – A Framework for Democratic Global Economic Governance: Formulating Inclusive Global Institutionalism (IGI) by Means of Hybridization of Hard and Soft Law *within* Institutions

If the possibility of global democracy is the central concern of the study, then the continual progress of juridification in global governance is the impetus for that concern. This is because juridification is necessary to provide access to the institutions of power, which is itself necessary to democracy; however, left unchecked, juridification can increase the coercive power of an institution so that its legal forms become ideally suited to anti-democratic ends. Bohman calls this dynamic ‘reflexivity.’ The danger is exacerbated by path-dependency, and requires that the democratization of global governance not tend toward unchecked accumulation, centralization and juridification of power. Thus, the chapter begins on the same note as that made by Lamy at the outset of the study: that democratic global governance is necessary.

Yet this requires that a further question be addressed: what idea of global governance is most conducive to the lasting predominance of democratic norms? To answer this question, the chapter defines and explores four ideas of democratic global governance: the global democratic state; ‘multitude’; a new world order of networks; and Inclusive Global Institutionalism (IGI). No account such as this can be truly exhaustive, but these four ideas are sufficiently comprehensive for the purposes of the study.

In so proceeding, the chapter argues for the superiority of IGI over the other three ideas. The reasons for this judgment are given over the course of the discussion, but the most fundamental is that IGI best fosters the hybridization of hard law and soft law. This

instills the flexibility necessary to counter path-dependency and to resist the tendency of juridification to proceed beyond provision of access to abuse of power.

The progress of the chapter is a process of thinking through this argument. The chapter begins by considering the four ideas of global democratic governance. This is followed by a section explaining the concepts of hard law, soft law and the possibility for movement between them. It then explains the typology of juridification to be employed throughout the study, as well as the reflexivity that causes juridification to be both necessary and dangerous to democracy. Finally, the chapter arrives at the conclusion that the hybridization of hard law and soft law within a given institution affords the best possibility for the representation of women and women's interests within an institution, and therefore the best possibility for the realization of democratic global governance. In this way, the chapter serves to think through the form and course of the study, why it is necessary to consider both fact and form of democratic global governance, why IGI is the idea of global governance most conducive to democracy, and why it is necessary to construct a test to determine whether global democratic governance according to the precepts of IGI is a possibility.

Thinking It Through: Four Ideas of Democratic Global Governance

The spread of democracy, the advent of globalization, and the proliferation of International Organizations since the end of WWII have given rise to a significant body of academic literature concerning global governance and the possibility of democratic global governance. However, there are relatively few concerted efforts to review the ideas of democratic global governance to be found within the academic literature. The

present chapter addresses this deficiency by identifying four ideas of possible democratic global governance: a global democratic state, ‘multitude,’ ‘networks’ and IGI. By describing the principles of IGI and their effects, the chapter grounds the fundamental question of the thesis: ‘can Global Economic Governance take a democratic turn?’

In their 2002 work, Globalization / Anti-Globalization, Held and McGrew identified six categories of global politics, which are used in fact as six distinct approaches to globalization and global governance. Briefly, the categories are: (1) ‘neoliberals,’ guided by the principle of ‘individual liberty’ and wanting small, relatively deregulated states and free global markets; (2) ‘liberal internationalists,’ guided by “human rights and shared responsibilities,” and seeking international free trade, “transparent and open international governance arrangements,” and accelerated interdependence through intergovernmentalism;²⁷ (3) ‘institutional reformers,’ guided by a “collaborative ethos built on the principles of transparency, consultation and accountability,” and wanting widened political participation and “regulated global processes alongside democratic global government;”²⁸ (4) ‘global transformers,’ guided by principles of political equality, equal liberty, social justice, and shared responsibilities, and favouring multilevel cosmopolitan democracy and the regulation of “global processes to ensure the equal autonomy of all.”²⁹ There are also two anti-globalization categories: (5) ‘statists/protectionists,’ guided by national interest, shared identity and a common political ethos, and desiring reinforced and strengthened nation-states, strengthened state

²⁷ Held, David and Anthony McGrew, Globalization / Anti-Globalization (Cambridge: Polity Press, 2002), 116-117.

²⁸ *Ibid*, 116-117.

²⁹ *Ibid*, 116-117.

governments and “effective geopolitics;”³⁰ and (6) ‘radicals,’ guided by principles of equality and the common good, and desiring “localization, subnational regionalization and deglobalization.”³¹

These categories form a valuable matrix for conceptualizing different approaches and oppositions to globalization, including possible forms of global and cosmopolitan democracy. However, they are not satisfactory for conceptualizing democratic global governance as such. Two of the categories, ‘statists/protectionists’ and ‘radicals,’ Held and McGrew consider anti-globalization; however, ‘radicals’ could be co-opted to support some forms of democratic global governance, as the work of Scholte *et al* shows (see below). The categories Held and McGrew offer are approaches to globalization; that is to say, they represent primarily the perspectives of specific groups toward globalization. What is needed for this project is an understanding of approaches to the institutions and structures, or potential institutions and structures, of global governance, rather than globalization. Further, to be valuable as an analytical tool, a category of global governance must accept a fundamental globalizing tendency, however valuable a critique of globalization might be in another kind of study. A concept or category of global governance cannot be fundamentally or radically parochial. Thus, the chapter proceeds to explore the four ideas of democratic global governance named above.

The Idea of a Global Democratic State

The first idea of global democratic governance is that of a single, global democratic state. Discussed particularly by IR theorists, this is the end-goal of the

³⁰ *Ibid*, 116-117.

³¹ *Ibid*, 116-117.

Kantian project of perpetual peace, but without Kant's cautions and objections. Of course, Kant is not the earliest to address the question of a world government, and very far from the only significant figure to do so. His '*Zum Ewigen Frieden*'³² forms only one instance in a long early modern and modern tradition of considering the question of a global state, which extends at least from Du Bois in the 14th century through De Vitoria, Grotius, Rousseau, Sully, Bentham, Einstein, Russell and many others. However, the present discussion would not be advanced by describing the history of theories of global government, and the history has been well told elsewhere.³³ Rather, the discussion requires an account of some of the more prominent contributions to the literature of global government at present.

To that end, Craig, in 'The Resurgent Idea of World Government,' argues that in the 18th century, when Kant wrote, there were no truly global crises such as climate change or transnational terrorism. Craig also maintains that the prospect of a global state actually removes a significant impetus toward the tyranny Kant feared, since a global state would not have recourse to the external enemies often used to justify internal repression.³⁴

³² The title is generally translated into English as 'Perpetual Peace.' Kant, Immanuel, Perpetual Peace: a Philosophical Essay, trans. Campbell Smith (1795; London: Swann Sonnenschein, 1903).

³³ See Deudney, Daniel H., Bounding Power: Republican Security Theory from the Polis to the Global Village (Princeton: Princeton University Press, 2007); Aksu, Eşref, "Early Notions of Global Governance: Introduction," and "Eighteenth-Century Perpetual Peace Proposals: an Overview," in Eşref Aksu, ed., Early Notions of Global Governance: Selected Eighteenth-Century Proposals for 'Perpetual Peace' (Cardiff: University of Wales, 2008), 1-24; and Hinsley, F.H., Power and the Pursuit of Peace: Theory and Practice in the History of Relations between States (Cambridge: Cambridge University Press, 1963), 13-32.

³⁴ Craig, Campbell, "The Resurgent Idea of World Government," Ethics and International Affairs, vol. 22, no. 2 (Summer 2008), 133-142.

The article was later published as a chapter in Tinnevelt, Ronald and Helder De Schutter, eds., Global Democracy and Exclusion (Oxford: Wiley-Blackwell, 2010), 27-36.

More stridently, Tännsjö argues that only a democratic world government with a monopoly of global military power can possibly ensure global justice, effectively address global environmental crises, and remove the threat of global war.³⁵ He explicitly denies that either the anarchic ‘Westphalian’ system of nation-states, or a Kantian federation of free states, or a hybridized federal-anarchic system, can provide optimal solutions to global crises of the environment, justice or peace.³⁶ Rather, a radically populist, democratic world government is needed. By this, Tännsjö means a democratically elected world parliament with sovereign power to adopt laws, which then elects a world government, which is responsible for determining the level of government to which a given problem applies.³⁷ The world government is tasked with addressing the problems of environment, justice and war that belong specifically to the global level. For Tännsjö, two processes are required for a democratic world state to come about: “democratization of the UN; and the successive military capitulations from nation-states in relation to the UN.”³⁸ He contends, finally, that a dynamic he calls ‘democratic determinism,’ starting with small instances of democratic reform, will in due course produce the necessary democratization and successive military capitulations, including that of the United States.³⁹

Chase-Dunn and Inoue also call for a global state, but they do so from the perspective of World-Systems theory, which leads them to expect the impetus to come from a semi-peripheral state, and the movement toward a global state to be accelerated by

³⁵ Tännsjö, Torbjörn, Global Democracy: The Case for a World Government (Edinburgh: Edinburgh University Press, 2008), 5.

³⁶ *Ibid*, 2-5.

³⁷ *Ibid*, 74.

³⁸ *Ibid*, 134.

³⁹ *Ibid*, 134.

the acceleration of technological development.⁴⁰ Like Tännsjö, they recognize the difficulty posed by the Weberian requirement for a sovereign state to attain a monopoly over the legitimate use of force. They too call for the democratization of the UN, and particularly of the Security Council.⁴¹ However, unlike Tännsjö, they call for the division of United States military power. They consider that stability would be more effectively maintained in the transition to a global government if one-third of global US military facilities were kept under American control, if another third were sold to the countries in which they are located, and if a final third were sold to the UN, to be managed by a newly established multilateral agency under UN control.⁴² Finally, they argue that the UN ought to be granted taxation powers, and ought to institute a ‘Tobin tax’⁴³ or similar revenue-collecting mechanism.⁴⁴ Chase-Dunn and Inoue neglect to explain how these changes are to come about, or how they are to be reversed or modified if they produce greater instability than expected, or greater concentration of power than desired. However, they do emphasize the standing challenge to the legitimacy of any global institution that is posed by the tendency of interests in the ‘Global South’ to view global institutions as representations of the colonial past, and therefore as creatures of the ‘Global North.’⁴⁵

⁴⁰ Chase-Dunn, Christopher and Hiroko Inoue, “Accelerating Democratic Global State Formation,” Cooperation and Conflict, vol. 47, no. 2 (2012), 158, 166-167.

⁴¹ *Ibid*, 158, 168-169.

⁴² *Ibid*, 158, 169-170.

⁴³ The ‘Tobin Tax’ is named after the Nobel laureate economist James Tobin, who first proposed it in 1972 after the dissolution of the Bretton Woods regime. His idea was to levy a small transaction tax upon currency exchanges in order to dissuade speculation.

⁴⁴ Chase-Dunn, Christopher and Hiroko Inoue, “Accelerating Democratic Global State Formation,” Cooperation and Conflict, vol. 47, no. 2 (2012), 158, 169.

⁴⁵ *Ibid*, 158, 168.

Similarly, in Theory of the Global State, Shaw argues for the desirability of a democratic global state, which he considers the only form of government that can address, effectively and successfully, the global challenges of technology, security and environment human beings face in the 21st century.⁴⁶ Finally, in ‘Why a World State is Inevitable,’ Wendt argues that, contrary to Kant’s fears, it is only by the establishment of a world state that most of the world’s people, the smaller and less powerful actors particularly, can hope to achieve what Wendt calls ‘recognition.’⁴⁷ In short, the arguments of advocates of a democratic global state are as follows: only by means of a democratic global state can all people achieve self-determination; the best way to address global challenges such as climate change is with a democratic global state; and in any case the movement toward a global democratic state is the *telos* of a teleological process.⁴⁸

The literature also contains rebuttals to these assertions. Any assertion of teleology is inherently unverifiable. Even if the expected end in fact comes to pass, one cannot be at all certain that it did so as the result of a specific process. More substantively, Kant’s objections remain powerful. Even if a global democratic state meant ‘recognition’ for some, it equally could be a source of oppression for others; moreover, if it were oppressive, it would be utterly without check or balance. Craig’s claim that a global democratic state would remove the temptation of tyranny caused by

⁴⁶ Shaw, Martin, Theory of the Global State: Globality as an Unfinished Revolution (Cambridge: Cambridge University Press, 2000), 265-270.

⁴⁷ Wendt, Alexander, “Why a World State is Inevitable,” European Journal of International Relations, vol. 9, no. 4 (2003), 507.

⁴⁸ ‘*Telos*,’ in this sense, means the end-state of a process of inevitable development, in which the ultimate result is contained in the beginning of the process and is the only possible culmination. Thus, according to this logic, the origin of self-government would contain within itself, as its inevitable end, a global democratic state.

external enemies may be true. However, many states, for example the USSR, were sufficiently corrupted by the threat of imagined enemies within, and a world state would afford no escape, and maybe no check or balance (particularly if the world state did not take the form of a strongly decentralized federation). For these reasons Held, Archibugi and other advocates of cosmopolitan democracy are wary of the advent of a global state. Indeed, Archibugi argues that “it is undesirable to go beyond a given threshold of centralization on a scale as vast as a global one.”⁴⁹

There also are numerous concerns of practicality. It is by no means certain that an effective democratic state could be established on a global scale. Even if one were to accept Deudney’s argument in Bounding Power that state formation through history involves a continual series of smaller political units overcoming impracticalities to form larger units, it is nevertheless certain that the practical difficulties of forming a new global democratic state would be greater than the difficulties of gradually democratizing the current system of international organizations.⁵⁰ It is also certain that the formation of a global democratic state would produce unintended consequences and difficulties unimagined. Finally, Deudney is factually incorrect, because there have been numerous instances of empires disintegrating into their component parts, of single states subdividing or strengthening their component parts, and of federations decentralizing or strengthening their component parts.⁵¹

⁴⁹ Archibugi, Daniel, “Principles of Cosmopolitan Democracy,” in Daniel Archibugi, David Held, and Martin Köhler, eds., Re-Imagining Political Community: Studies in Cosmopolitan Democracy (Stanford: Stanford University Press, 1998), 216.

⁵⁰ Deudney, Daniel H., Bounding Power: Republican Security Theory from the Polis to the Global Village (Princeton: Princeton University Press, 2007), 1-23.

This is one of the central arguments of the book.

⁵¹ Examples include the dissolution of the Holy Roman Empire and the British Empire, as well as the Ottoman Empire after WWI and the dissolution of the Soviet Union, amongst many others. With respect to

In a sense, it is unfair to critique too closely an ardent advocate of a global state such as Tännsjö. He provides a normative vision of global government as a force for good, and the idea that only a global government can address global problems has a degree of inherent plausibility. However, Tännsjö's argument leaves too much room for concern for one who is not already convinced of the merits of global government, particularly if it takes the form of a global state. Leaving aside the inherent implausibility of Tännsjö's requirement for successive military capitulations, he makes no allowance and provides no remedy for genuine and intractable jurisdictional disputes between the world government and lower levels of government (and hence more localized interests), which could threaten the legitimacy of the world government system. More seriously, Tännsjö provides no remedy for the possibility that the world government will extend its activities beyond justice, war, and environment, raising the spectre of an anti-democratic turn. Finally, he does not consider the possibility that the abrogation of the sovereignty of nation-states could produce instability internationally and domestically – the latter because it could diminish the domestic legitimacy of particular nation-states.

There are, of course, many more objections that can be advanced against the idea of a global state. Tinnevelt identifies no fewer than 10, each of them distinct and serious. They are as follows: (1) the ‘infeasibility objection,’ which holds that the anarchical and self-interested nature of the international order is unlikely to be overcome; (2) the ‘consequentialist objection,’ which holds that the process of creating a global state would cause the proliferation of civil wars; (3) the ‘tyranny objection,’ which holds that a global state poses an unacceptable risk of developing into a global despotism; (4) the

Canadian federalism, the constitutional reforms of 1982, particularly the advent of the ‘notwithstanding clause,’ gave the province of Quebec (and theoretically any other province) significantly greater autonomy.

ungovernable objection,’ which holds that a global state is an “extremely weak and inefficient form of political organization”⁵²; (5) the ‘superfluous objection,’ which holds that global problems can be addressed more effectively at lower levels of government; (6) the ‘no social contract objection,’ which holds that the state of nature between states is not analogous to the state of nature between individuals, and therefore that no social contract is called for between states; (7) the ‘bounded citizenship objection,’ which holds that “a certain degree of homogeneity in culture and language”⁵³ is necessary to democratic politics; (8) the ‘pluralism objection,’ which holds that a global state would nullify cultural difference, at least insofar as their consideration in global state policymaking is concerned; (9) the ‘collective identity objection,’ which holds that a sense of belonging to one group requires a sense of not belonging to at least one other group, and that this precludes the development of the global political community necessary to a stable global state; and (10), the ‘antagonism-agonism objection,’ which holds that politics requires a distinction between ‘we’ and ‘they,’ or between ‘friend and enemy,’ in order to exist, and that the comity required to produce a global state would also require the impossibility of a world without politics.⁵⁴ There is, in the literature, no theorist advocating the creation of a global state who has also answered convincingly all of Tinnevelt’s objections.

Indeed, it may be that Tinnevelt objections cannot be met fully on their own terms. In that case, the most effective argument for the creation of a global state may be

⁵² Tinnevelt, Ronald, “Federal World Government: The Road to Peace and Justice?” Cooperation and Conflict, vol. 47, no. 2 (2012), 223.

⁵³ *Ibid*, 224.

⁵⁴ *Ibid*, 223-225.

Wendt's argument from inevitability, in the sense that, if correct, it would render moot the first, second, fourth, eighth, ninth and tenth of Tinnevelt's objections.

Even here, though, the methodological objection to Wendt's argument stands: should a global state emerge, it would say nothing about whether the development of the global state were inevitable or teleological; conversely, as long as a global state failed to emerge, the claim could always be made that it was just about to do so. In short, Wendt's argument from teleology is meaningless to the present discussion, since it gives no grounds to evaluate either global government or global governance, while giving no reason apart from teleological faith to cease to be concerned with Tinnevelt's objections. Certainly, it gives no grounds to lessen concern over the disastrous possibility that a global state could take an anti-democratic turn. Thus, it remains imperative to explore ideas of democratic global governance that can serve as alternatives to global government by a global state.

The Idea of ‘Multitude’ and the Role of Global Civil Society

The second idea of possible global democratic governance may be called ‘multitude’ after the work of Hardt and Negri. It includes the effects of social movements, civil society, ‘grassroots’ organizing and other aspects of ‘humanity as multitude’ or what might be called ‘networks of difference.’ It is, in short, the most collaborative, cooperative and popular of the possible ways of developing democratic global governance; it is also the most oppositional and potentially insurrectionist.

Hardt and Negri represent the idea of ‘multitude’ at its most philosophical. Helpfully, they oppose ‘multitude’ to ‘the people.’ ‘The people,’ they say, ‘has

traditionally been a unitary conception.”⁵⁵ Although characterized by differences, “the people reduces that diversity to a unity and makes of the population a single identity; ‘the people is one.’”⁵⁶ By contrast, ‘the multitude’ is defined as follows:

[Multitude is] composed of innumerable internal differences that can never be reduced to a unity or a single identity – different cultures, races, ethnicities, genders, sexual orientations, different forms of labour; different ways of living; different views of the world; and different desires. The multitude is a multiplicity of all these singular differences. ... In the multitude, social differences remain different.⁵⁷

The concept of the multitude is equally constituted by the political and the economic (‘the common’). According to Hardt and Negri, ‘the common’ and the collaboration of the ‘multitude’ counter the networks, hierarchies and divisions of ‘empire’ by a dispersal or even elimination of sovereignty.⁵⁸ This they conceive to be the birth of a true global democracy, but concede that the great challenge in the movement from ‘empire’ to ‘multitude’ is allowing the expression of the strength of the ‘multitude’ without erasing the differences that make it powerful.⁵⁹

⁵⁵ Hardt, Michael and Antonio Negri, Multitude: War and Democracy in the Age of Empire (New York: The Penguin Press, 2004), xiv.

⁵⁶ *Ibid*, xiv.

⁵⁷ *Ibid*, xiv.

⁵⁸ That approximates a movement from Hobbes’ Leviathan to his De Cive: the re-dispersal of sovereignty from the God on Earth to the body of the global citizenry. See Hobbes, Thomas, Leviathan (1651; London: Penguin, 1985); Hobbes, Thomas, Philosophicall Rudiments Concerning Government and Society [*i.e.* De Cive] (London: J.C. for Royston, 1651) [*i.e.* Kessinger Legacy Reprints, 2011]; and Hardt, Michael and Antonio Negri, Multitude: War and Democracy in the Age of Empire (New York: The Penguin Press, 2004), xvii.

⁵⁹ Hardt, Michael and Antonio Negri, Multitude: War and Democracy in the Age of Empire (New York: The Penguin Press, 2004), xiv.

Hardt and Negri are explicitly not concerned with the implementation of their ideas. They write, “we will give numerous examples of how people are working today to put an end to war and make the world more democratic, but do not expect our book to answer the question ‘What is to be done?’ or propose a concrete program of action.”⁶⁰ The ‘concrete program of action’ is explicitly left to others, and it follows that the question of whether ‘multitude’ is at all practicable as democratic global governance is also left to others.

The work of Scholte and others concerning the global democratic potential of social movements and civil society is closer to an account of the practical considerations of ‘multitude’ as democratic global governance. Having studied Global Social Movements (GSMs) and Multilateral Economic Institutions (MEIs) over the course of the 1990s, O’Brien, Goetz, Scholte and Williams in 2000 advanced a concept of ‘complex multilateralism’ to describe how global civil society, through GSMs, might interact with MEIs to begin to democratize global governance.⁶¹ They suggested that over the 1990s the practises of multilateral institutions evolved away from what Ruggie defined in 1993 in the following terms:

an institutional form that co-ordinates relations among three or more states on the basis of generalized principles of conduct: that is, principles which specify appropriate conduct for a class of actions, without regard to the particularistic interests of the parties or the strategic exigencies that may exist in any specific occurrence. MFN treatment is a classic

⁶⁰ *Ibid*, xvi.

⁶¹ O’Brien, Robert, Anne Marie Goetz, Jan Aart Scholte and Marc Williams, Contesting Global Governance: Multilateral Economic Institutions and Global Social Movements (Cambridge: Cambridge University Press, 2000), 6-7.

example in the economic realm: it forbids discrimination among countries producing the same product – full stop.⁶²

O'Brien, Goetz, Scholte and Williams determined that multilateralism had become more complex in five important ways. First, multilateral (economic) institutions undertook changes and reforms based on their own institutional structures, their own cultures, and in response to different pressures from social movements, NGOs and business actors.⁶³ Second, GSMS and MEIs are conflicted in their motivations and goals; the former often want to change the policy directions of the latter, while the latter generally seek to achieve already existing goals more efficiently and effectively.⁶⁴ Third, the authors assert that GSMS had by 2000 achieved only middling success in influencing MEIs.⁶⁵ GSMS had found that while they could participate to a degree in debates within the institutions, they were able to achieve very little change to the institutions themselves. MEIs, conversely, had been able to a degree to engage GSMS in dialogue, and had thereby dissipated somewhat the antagonism of some social movements towards them. At the same time, the authors stress that the continued smooth functioning of the MEIs is itself an important accomplishment of complex multilateralism. It should be added that dissipation of antagonism did not take place to any meaningful extent between gender

⁶² Ruggie, John Gerard, 'Multilateralism: The Anatomy of an Institution,' in John Gerard Ruggie, ed. Multilateralism Matters: The Theory and Praxis of an Institutional Form, (New York: Columbia University Press, 1993), 11. Also cited in part in O'Brien, Robert, Anne Marie Goetz, Jan Aart Scholte and Marc Williams, Contesting Global Governance: Multilateral Economic Institutions and Global Social Movements (Cambridge: Cambridge University Press, 2000), 3.

⁶³ O'Brien, Robert, Anne Marie Goetz, Jan Aart Scholte and Marc Williams, Contesting Global Governance: Multilateral Economic Institutions and Global Social Movements (Cambridge: Cambridge University Press, 2000), 6.

⁶⁴ *Ibid*, 7.

⁶⁵ *Ibid*, 7.

and trade activism and the WTO, which will be discussed in Chapter 5, while True argues that activists and NGOs did become less antagonistic toward the World Bank.⁶⁶ This is a contributing factor to why the WTO is the ‘hardest case’ for the representation of women and women’s interests.

Fourth, complex multilateralism affects the role of each state differently depending upon the state’s position in the international system. More specifically, complex multilateralism was found to amplify the importance of the domestic politics of powerful states while making clearer the relative impotence of less powerful states.⁶⁷ Finally, complex multilateralism was found to entail the “broadening of the policy agenda to include more social issues.”⁶⁸ This was essentially a corollary of the increased number of GSMS engaged in dialogue with MEIs, and the authors assert strongly that the IMF, WTO and World Bank all had, by 2000, started to address issues of gender, environmental impact, and ‘social development’ within their policies.

In sum, in 2000, O’Brien, Goetz, Scholte and Williams considered that through these trends, complex multilateralism had begun to incorporate civil society and social

⁶⁶ True, Jacqui, “Mainstreaming Gender in Global Public Policy,” *International Feminist Journal of Politics*, vol. 5, issue 1 (November 2003), 381.

⁶⁷ O’Brien, Robert, Anne Marie Goetz, Jan Aart Scholte and Marc Williams, *Contesting Global Governance: Multilateral Economic Institutions and Global Social Movements* (Cambridge: Cambridge University Press, 2000), 7.

This has positive and negative effects. For example, Debra Liebowitz has shown that women’s movements in the US took relatively little interest in economic issues in general, and trade issues in particular, during the 1990s with relation to organizing around NAFTA. This made it difficult for gender and trade activists in Canada and Mexico to liaise with allies in the US, which arguably rendered gender and trade organizing around NAFTA invisible and ineffective. See Liebowitz, Debra Jacqueline, *Gender and Identity in an Era of Globalization: Transnational Political Organizing in North America*, PhD dissertation (New Brunswick, NJ, USA: Rutgers, 2000). Arguably, in turn, this lack of interest from the US women’s movement in gender and trade issues contributed to make the WTO the hardest case for the representation of women and women’s interest.

⁶⁸ O’Brien, Robert, Anne Marie Goetz, Jan Aart Scholte and Marc Williams, *Contesting Global Governance: Multilateral Economic Institutions and Global Social Movements* (Cambridge: Cambridge University Press, 2000), 7.

movements into a domain previously reserved for states. For this reason, they considered that the larger trend of complex multilateralism constituted a possible way for a more democratic global governance to develop. They stated:

Our study indicates that the structures of MEI governance are becoming more pluralistic in the sense that they are confronting a wider range of actors. Constituencies previously excluded from the operation of these institutions are increasingly coming into contact with MEI officials and state decision-makers involved in their operation. Issues of concern to sectors of civil society are gradually making it into the MEI agenda. MEIs are becoming more responsive to some sections of public opinion, going beyond the interests of various state elites. In this sense, global governance is inching towards a more democratic form. However, the degree of responsiveness on the part of MEIs is limited. In addition the composition of the most influential elements of GSMS reflects a narrow base in developed countries. Our conclusion is that there has been a very slight move to democratise MEIs, but the emphasis must be on its incremental and tentative nature.⁶⁹

One sees in this quotation the essence of the difficulty in Hardt and Negri's concept of 'multitude' if it were to lead to democratic global governance. The difficulty is not in the conceptualization of 'multitude' as global democracy, but in its practical application, which Hardt and Negri deliberately left aside. As discussed above, O'Brien *et al* discerned limited progress toward democratization of the global level by means of GSMS, and took pains to stress the difficulty with which that progress had been achieved.

⁶⁹ *Ibid*, 231-232.

Florini, calling world government “a truly bad idea,”⁷⁰ argued in 2003 that domestic and global civil society would be able to precipitate significant democratization of national governments and IOs, as long as they were empowered by increased transparency.⁷¹ She articulated a persuasive vision in which greater access to information held by national governments, and greater release of information by IOs, would allow greater and better focused pressure to be brought to bear by civil society. This would increase the responsiveness and effectiveness of domestic and international governance. Transparency would also improve civil society organizations in the same way, making them more effective and responsive.⁷²

Nevertheless, despite Florini’s optimism and his own, eleven years after Contesting Global Governance, in 2011, Scholte produced an edited volume entitled Building Global Democracy, which discussed whether and to what extent civil society and social movements can produce movement toward democratic global governance. He phrases his central concern in global democratic terms: “In what ways and to what extents have civil society activities made global regulatory institutions more answerable to the people whose lives and livelihoods are affected?”⁷³ Again, this question must be a fundamental component of any realization in practise of Hardt and Negri’s ‘multitude.’ Scholte finds that social movements and civil society have produced only hesitant and very limited progress toward more democratic global governance.⁷⁴

⁷⁰ Florini, Ann, The Coming Democracy: New Rules for Running a New World (Washington, D.C.: Island Press, 2003), 11.

⁷¹ *Ibid*, 199-200.

⁷² *Ibid*, 198-200.

⁷³ Scholte, Jan Aart, “Conclusion,” in Jan Aart Scholte, ed., Building Global Democracy: Civil Society and Accountable Global Governance (Cambridge: Cambridge University Press, 2011), 341.

⁷⁴ *Ibid*, 341-342.

Germain also expresses skepticism about the capacity for civil society to foster and develop democratic global governance of its own accord, or largely of its own impetus. He asserts that involvement of civil society, being necessary to any global public sphere, is fundamental to any movement toward democratic global governance.⁷⁵ However, Germain also stresses that interaction with the public sphere will inevitably dull any reforming impulse from civil society, since it is a “mediated space ... shot through with configurations of power that originate in the constituent institutional arrangements of the global political economy.”⁷⁶ Moreover, he asserts that power must be delegated from these institutions, or its exercise changed within them, if civil society is to foster any movement at all toward democratic global governance.⁷⁷

Scholte describes four conclusions, all of which bear upon the difficulty of operationalizing Hardt and Negri’s concept of ‘multitude.’ First, accountability is an uncertain quality in global politics.⁷⁸ One must always consider for whom, for what and to whom an individual, group or institution is to be accountable, and that not all accountabilities are democratic. Scholte’s second conclusion is that “thanks in part to interventions from CSOs [Civil Society Organizations], global regulatory institutions today offer more transparency, consultation, evaluation, and correction than was the case before the 1990s.”⁷⁹ But these movements toward transparency, consultation, evaluation and correction have “remained modest, both in absolute terms and relative to needs,” and

⁷⁵ Germain, Randall D., “Global Modalities of Financial Governance: The Public Sphere and Civil Society,” in Randall D. Germain and Michael Kenny, eds., The Idea of Global Civil Society: Politics and Ethics in a Globalizing Era (Abingdon, Oxfordshire, UK: Routledge, 2005), 186-88.

⁷⁶ *Ibid*, 190.

⁷⁷ *Ibid*, 187-88, 190.

⁷⁸ Scholte, Jan Aart, “Conclusion,” in Jan Aart Scholte, ed., Building Global Democracy: Civil Society and Accountable Global Governance (Cambridge: Cambridge University Press, 2011), 341.

⁷⁹ *Ibid*, 341.

they “have not served all constituencies and purposes equally.”⁸⁰ Scholte gives three basic reasons for the limited advancement toward democratic accountability: personal, in that activists and officials have lacked “charisma, passion, acumen, determination and reflexivity”;⁸¹ institutional, in that CSOs and global institutions have lacked “funding, staffing, information, attitudes, procedures, and leadership”;⁸² and structural, in that initiatives by CSOs toward global democratic governance have been limited and marginalized by statism, social hierarchies, capitalism and rationalism. These limitations and impediments all act by definition against the operationalization of Hardt and Negri’s conception of democratic revolution by ‘multitude.’ Scholte also offers a fifth conclusion, that “when properly resourced and practised,” CSOs are one of the “principle feasible ways” to deliver democratic accountability, but even here he allows that a “substantial commitment of resources” will be required.⁸³

This, then, is the great difficulty of ‘multitude’ as an idea of democratic global governance; it is of course the classic difficulty of theory and practice. As an idea of democratic global governance, ‘multitude’ is a comprehensible and laudable contribution to the literature; however, it is badly undefined as a programme of reform and raises difficulties of operationalization. Thus, after 20 years of studying the contributions of global civil society to the development of global democratic accountability, Scholte finds only very limited, narrow and costly progress. Nevertheless, this is an important finding, because, as Scholte asserts, it means that ‘multitude,’ as global civil society, can be

⁸⁰ *Ibid*, 341-342.

⁸¹ *Ibid*, 342.

⁸² *Ibid*, 342.

⁸³ *Ibid*, 342.

expected to make at last a minimal contribution toward democratic global governance.⁸⁴

Also of importance for the present study, Scholte shows that those defined by Held and McGrew as ‘radicals’ can be incorporated within a movement toward globalization as democratic global governance.

The Idea of ‘A New World Order of Networks’ and the Danger of ‘Empire’

The third idea of global democratic governance may be understood as a ‘new world order of networks’ and raises the spectre of ‘empire.’⁸⁵ This follows Hardt and Negri’s concept of ‘network power’ but also encompasses Slaughter’s ‘new world order’ of disaggregated state power, Clarkson’s ‘perilous imbalance’ of exported state-based law and governance, and Cohen’s reflections on ‘globalization and sovereignty.’ The unifying feature of each of these conceptions is that they represent, at bottom and in varied forms, the global expansion and evolution of state power.

Fundamentally, ‘empire’ is the anti-democratic possibility inherent in ‘a new world order of networks,’ and is therefore the reverse of ‘multitude.’ Where ‘multitude’ involves networks of difference, ‘empire’ represents networks of power. As Hardt and Negri explain, ‘empire’ suggests that traditional conceptions of the projection of the sovereignty of the nation-state are insufficient to explain an imperial ‘network power’ that includes nation-states, international and global organizations and corporations,

⁸⁴ *Ibid*, 341.

⁸⁵ It is important to stress that the use of ‘empire’ in this context does not suggest that Hardt and Negri believe ‘empire’ to hold democratic potential. In the same way, neither does it suggest that the study uses ‘empire’ to stand for a kind of democracy. Rather, the study considers ‘empire’ to be a likely result of the kind of ‘new world order’ of networks that Slaughter proposes, because Slaughter’s conception makes no provision against the accumulation of power by the networks she envisions.

among other sites of power.⁸⁶ Unilateralism and multilateralism are impossible in Hardt and Negri's 'empire,' and perpetual war as an instrument of rule is a necessary corollary of its 'network power.' They are clear, however, that 'empire' is not a potential form of global democratic governance but of its disappearance.⁸⁷

Slaughter's understanding of the possibilities of 'network power' as democratic global governance is significantly more hopeful. She frequently cites the G20 finance ministers meetings and the IMF's board of governors as archetypal examples of horizontal networks.⁸⁸ She also cites the training of New Zealand antitrust officials by U.S. officials as an example of the range of horizontal networks.⁸⁹ Vertical networks, conversely, connect similar functions of government between the domestic and the international levels. Here, the system considered archetypal is that by which decisions of the European Court of Justice (ECJ) devolve primarily for enforcement upon the national-level judges of EU members, rather than upon EU members as such.⁹⁰ The primary purpose of horizontal and vertical networks, respectively, is to enforce regulations, harmonize regulations and provide information.⁹¹

Slaughter is clear that her networks do not cover every action in the international and global spheres. She emphasises that there remain powerful International Organizations, such as the World Trade Organization, which are largely outside of the

⁸⁶ Hardt, Michael and Antonio Negri, Multitude: War and Democracy in the Age of Empire (New York: The Penguin Press, 2004), xii.

⁸⁷ *Ibid*, xii-xiii.

⁸⁸ Slaughter, Anne-Marie, A New World Order (Princeton: Princeton University Press, 2004), 19.

⁸⁹ *Ibid*, 19.

⁹⁰ *Ibid*, 21.

⁹¹ *Ibid*, 21-22.

networks she describes (Slaughter emphasizes the WTO's DSB in this context).⁹²

Equally, she emphasizes that nation-states continue at times to perform as unitary actors, particularly with respect to questions of national security,⁹³ and that the power of nation-states constitutes the necessary condition for the horizontal and vertical networks she describes. The key, though, is that she identifies a continued trend of disaggregation of the nation-state in favour of networks, and that she considers this both harbinger of global governance and opportunity for democratic global governance. For the former, who could but agree? It is toward the latter that I express disquietude.

Slaughter grounds her analysis on five premises that derive from the continued predominance of state power, even if disaggregated. First, she stresses that “the state is not the only actor in the international system, but it is still the most important actor.”⁹⁴ Second, the state is disaggregating “into its component institutions,” which mainly interact “increasingly with their foreign counterparts.”⁹⁵ Third, even so, these component institutions continue to represent distinct state interests. Fourth, states continually evolve mechanisms for re-aggregating their interests when necessary. Fifth, “government networks exist alongside and sometimes within more traditional international organizations.”⁹⁶

Slaughter then proposes five norms to balance the power of the networks, states and organizations of her ‘new world order.’ The first is ‘global deliberative equality,’ in which all relevant and affected parties are included to the greatest extent possible in

⁹² *Ibid*, 22.

⁹³ *Ibid*, 12-15, 34-35.

⁹⁴ *Ibid*, 18.

⁹⁵ *Ibid*, 18.

⁹⁶ *Ibid*, 18.

transgovernmental decision-making.⁹⁷ The second is ‘legitimate difference,’ in which the component parts of the transgovernmental order assume they will disagree on ways to organize society and politics.⁹⁸ The third, ‘positive comity,’ assumes a principle of active cooperation between regulatory agencies, courts and legislators.⁹⁹ The fourth is ‘checks and balances,’ which would necessarily follow from the shared power and sometimes dissimilar interests of the component parts of the transgovernmental order.¹⁰⁰ The fifth, ‘subsidiarity,’ is borrowed from the EU and requires that the locus of governance be closest to the level of the individuals and organizations affected.¹⁰¹

Slaughter’s norms require that state power, whether aggregated or disaggregated, be the basis of her ‘new world order.’ Thus, Slaughter is describing in positive terms something very similar in effect and result to what Hardt and Negri understand by ‘empire,’ and although she is more optimistic and correct to identify it as a possible form of global democracy, Slaughter’s ‘new world order’ carries within it all that Hardt and Negri fear about ‘empire.’ Though she mentions checks and balances, Slaughter is ultimately unclear about the forms they would take, how they would be made to come about, and how they would be effective. Moreover, all other protections against abuse of power or too great a concentration of power are left to the goodwill of the powers themselves. This is an important distinction between ‘empire’ and IGI as forms of democratic global governance, as is shown below.

⁹⁷ *Ibid*, 29.

⁹⁸ *Ibid*, 29-30.

⁹⁹ *Ibid*, 30.

¹⁰⁰ *Ibid*, 30.

¹⁰¹ *Ibid*, 30.

Clarkson and Wood, in A Perilous Imbalance, are very aware of this danger. They are particularly concerned that the globalization of the law and governance of nation-states would create laws and networks of power that are blind to the specific needs of particular nation-states, and so are susceptible to distributing benefit and harm unevenly. They state:

Our central thesis is that the globalization of law and governance is characterized by severe, ever-perilous imbalances between economic and social priorities, between the needs of capital and of people, between elites and the general public, between hegemonic expansion and democratic self-determination, between Canada and the United States, and between the global North and South ... We close by arguing that the seeds of a solution lie in the embrace of a pluralist conception of law and governance, which asserts a space for emancipatory governance projects outside the hegemonic instrumentalities of the state, the interstate system, and the market.¹⁰²

In sum, the study is in accordance with Slaughter's identification of the disaggregation of states, and the ascendant trend of networks, but asserts that Slaughter is too optimistic about the ultimate issue of these trends. She leaves the construction of checks and balances too much to the networks themselves, making insufficient allowance for the possibility that the networks will arrogate too much power to themselves, and providing no recourse in the event that they do. She also fails to address Clarkson and Wood's concern that networks of global governance, if too powerful, could produce

¹⁰² Clarkson, Stephen and Stepan Wood, A Perilous Imbalance: The Globalization of Canadian Law and Governance (Vancouver: UBC Press, 2010), 42-43.

policies and regulations that are insufficiently attentive to the specific requirements of individual jurisdictions.

Cohen's work is much closer than Slaughter's to the principles of Inclusive Global Institutionalism. Her Globalization and Sovereignty is a profound and rich work, but its fundamental project is the conservation of state-sovereignty amidst the growing power of Global Governance Institutions, rather than the conception of an approach to facilitate sustainable democratic governance at the international level. The work advances three theses. First, it argues that post-1989 changes in the international system signify the emergence of a 'dualistic world order,' wherein the legal and political regimes of Global Governance Institutions are superimposed over the international law of custom and treaties between sovereign states.¹⁰³ Second, it argues that this dualistic order is producing a 'new sovereignty regime,' wherein states no longer monopolize the production of international law, and wherein the legal prerogatives of sovereign states are being redefined.¹⁰⁴ Third, it argues that 'further constitutionalization' of international law and global governance is desirable and to be pursued, but on the basis of what Cohen calls 'constitutional pluralism.'¹⁰⁵ This entails recognition of both the domestic constitutional order of sovereign states, as well as the increasingly autonomous legal order that accompanies Global Governance Institutions. In short, Cohen's constitutional pluralism would recognize both the sovereign equality of states (non-interference) and international human rights law by instituting as a binding norm that a state would have abdicated sovereignty in cases of mass extermination, expulsion, ethnic cleansing and

¹⁰³ Cohen, Jean L., Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism (Cambridge, UK: Cambridge University Press, 2012), 5.

¹⁰⁴ *Ibid*, 5.

¹⁰⁵ *Ibid*, 6.

enslavement.¹⁰⁶ However, only in such cases would sovereignty be abdicated and intervention permissible.

Cohen certainly posits the emergence of a ‘new world order,’ yet her work belongs in a discussion of networks because they are what remain of global governance once ‘constitutional pluralism’ is applied. She is strongly opposed to a global government, and considers civil society a necessary component of domestic democratic governance, but does not address the capacity for civil society to partake of global governance. Globalization and Sovereignty focuses almost exclusively upon the United Nations system, but with the particular objective of determining how to reconcile increases in its power, constitutionalization, scope and activity with a robust preservation of state-sovereignty and the non-interference principle.¹⁰⁷ The result can only be networks of sovereign states brought together by means of ‘low-intensity constitutionalization’¹⁰⁸ to address a strictly limited subset of issue-areas and scenarios, while otherwise conducting their domestic affairs on the basis of the non-interference principle and their international affairs, of necessity, on the basis of *ad-hoc* networks of interest.

Thus, although the approaches of Cohen and Slaughter to global governance may both be addressed under the rubric of networks, they emphasize very different concerns. Slaughter is concerned to explore the possibilities created by networks for effective global governance: while cognisant of the risks networks pose she focuses upon developing the opportunities they undoubtedly present. Conversely, while cognisant of

¹⁰⁶ *Ibid*, 15.

¹⁰⁷ *Ibid*, 1-20.

¹⁰⁸ *Ibid*, 20.

the same opportunities, Cohen is concerned to a far greater extent about the potential for global governance networks to erode state-sovereignty and self-government, thereby giving rise to a new era of *de facto* imperialism. Clarkson and Wood share a similar concern about the application of bodies of law across polities.

As developed below, IGI partakes of this concern insofar as it insists upon maintaining the separateness of IOs. In this it is directed by disquietude concerning the possibility for Slaughter's networks to arrogate power and the lack of surety in Slaughter's proposals for checks and balances upon the networks. Nevertheless, IGI parts from Cohen's argument in important respects that reduce, fundamentally, to a profound difference in how juridification is understood.

Cohen understands post-1989 changes in international relations to include a significant dynamic of juridification at the international level, particularly with respect to the United Nations Security Council.¹⁰⁹ However, she also understands juridification as only one perspective upon these changes.¹¹⁰ In itself, that would be uncontroversial, except that she advances as a second perspective the ‘deformalization’ of international law, which is coupled with the growing ability of the most powerful states “to create self-serving global rules and principles of legitimacy,” rather than “new ways to limit and orient power by law.”¹¹¹

The problem is that however much it may be couched ‘deformalization,’ the use of law as a medium for the expression of power in the form of ‘self-serving global rules and principles of legitimacy’ is a fundamental component of juridification. It is precisely

¹⁰⁹ *Ibid.* 3.

¹¹⁰ *Ibid.* 3.

¹¹¹ *Ibid.* 4.

this capacity for the “instrumentalization of the legal medium,”¹¹² to use Cohen’s term, in the service of power, that constitutes one-half of what Bohman calls the ‘reflexivity’ of juridification.¹¹³ That is to say, although Cohen advances two perspectives to explain post-1989 changes in international relations, and although she calls one perspective juridification and the other opposed to juridification, in fact both perspectives are part of the same phenomenon of juridification.

Moreover, Cohen’s understanding of the relationship between constitutionalism and juridification differs significantly from that employed in the present study. Cohen is unclear about the precise distinctions between her usage of juridification and constitutionalization; however, she is quite clear that she considers normative ‘constitutionalism’ a more expansive phenomenon than juridification. As she states, “constitutionalism is a discourse that carries a normative and symbolic surplus over mere juridification and we must be careful not to trade in that surplus by applying the term to inappropriate contexts.”¹¹⁴ Certainly, the term ‘constitutionalism’ carries a normative and ideological assertion of its own worth that is absent from a descriptor such as juridification or constitutionalization. To that extent, ‘constitutionalism’ differs in kind from ‘juridification.’ Constitutionalism can only refer to an ideology concerning the creation or value of constitutions or constitutionalization. This places ‘constitutionalism’ clearly within the context of juridification type A in the modified Blichner-Molander

¹¹² *Ibid*, 4.

¹¹³ Bohman, James, “Constitution Making and Democratic Innovation: The European Union and Transnational Governance,” *European Journal of Political Theory* (July 2004), 323.

¹¹⁴ Cohen, Jean L., *Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism* (Cambridge, UK: Cambridge University Press, 2012), 11.

typology, which is developed later in the present chapter.¹¹⁵ Thus, for the purposes of the present study, and in the context of IGI, juridification is far more expansive than constitutionalism and constitutionalization.

Cohen's narrowed understanding of juridification carries important consequences, which point to the need for a theoretical approach to global governance such as IGI. First, the emergence of the legal and political regimes of Global Governance Institutions, and the response and maintenance of the 'international society of sovereign states,'¹¹⁶ are both elements and examples of the larger phenomena of juridification. This includes the increasing use by powerful states of international law as a medium for the expression of power. In short, then, both elements of Cohen's dualistic world order are actually elements of juridification.

Second, Cohen's narrowed understanding of juridification precludes Globalization and Sovereignty from addressing the full scope of the impact that juridification has upon sovereignty. Cohen's 'new sovereignty regime' is essentially concerned with maintaining the sovereign integrity of states following the emergence of Global Governance Institutions, but the impact of juridification upon sovereignty is much wider than the considerations of territorial security, human security, and international human rights law that Cohen identifies. As detailed below, juridification also comprehends the creation of international law concerned with economic transactions, and indeed the tendency of sovereign states increasingly to mirror the discourse of justiciable international law even in their bilateral and plurilateral agreements (particularly trade

¹¹⁵ Blichner, Lars Chr., and Anders Molander, "Mapping Juridification," European Law Journal, vol. 14, no. 1 (January 2008), 37-39.

¹¹⁶ Cohen, Jean L., Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism (Cambridge, UK: Cambridge University Press, 2012), 5.

agreements). Globalization and Sovereignty does not address the WTO, the World Bank, the IMF, APEC, UNCLOS or Basel I and II, yet the impact upon state-sovereignty of the juridification that those organizations and conventions produce and represent is not dissociable from the impact upon state sovereignty of the post-1989 changes that Cohen's 'dualistic world order' represents. The impact of juridification upon state sovereignty is already much wider than Cohen allows.

It follows that because Cohen's narrowed understanding of juridification does not allow Globalization and Sovereignty to address the full scope of the problem concerning sovereignty, her prescription for 'low-intensity constitutionalization'¹¹⁷ of international relations is not able to respond to the challenges posed by juridification to sovereignty and democracy in their fullness. Thus, she bounds her analysis to a consideration of how Global Governance Institutions can be limited and state sovereignty preserved, when what is needed is a comprehensive 'Institutionalism' of the global level that allows its dangers to be understood and managed much more comprehensively, so that its promise can be defined and realized much more effectively. This is why the present study, in its attempt to answer whether Global Economic Governance can take a democratic turn, develops the idea of Inclusive Global Institutionalism, which, as defined below, incorporates both the promise of Slaughter's networks, and the awareness of significant danger to sovereignty and democracy that dominates Cohen's work (and that Slaughter underestimates).

¹¹⁷

Ibid, 20.

Democratic Global Governance - Inclusive Global Institutionalism (IGI)¹¹⁸

The fourth idea is ‘Inclusive Global Institutionalism’ (IGI), which is original to the study. It involves the combined effect of the organizations that regulate particular areas of global concern and, for the most part, already exist. These include the WTO, the IMF, the World Bank, the ILO, the UN General Assembly, the UN Security Council, the G8, the G20 and similar organizations. Such organizations fall within the purview of Slaughter’s work and there are clear similarities between ‘empire’ and ‘global governance.’ There are also, however, fundamental differences. IGI focuses upon the establishment and operation of institutions, rather than on the creation of networks. As

¹¹⁸ IGI is both explanation and prescription. It is both a description of an actual trend in global governance and a conceptual approach to global governance that, the study argues, is more likely to be and remain democratic than the other approaches discussed that also reflect empirical trends in global governance. As such, IGI is both framework and model.

However, the study investigates the question of whether it is possible that global governance could take a democratic turn, rather than the details of how such a turn would or should be implemented in practice. Also, the study is in part an initial attempt to define and depict IGI. It is recognized, however, that as a conceptual approach, IGI would be strengthened by an investigation of the implicit relationship it has with what the study terms ‘the hardest case’ – the representation of women and women’s interests within the WTO. This would involve an investigation of how the representation of women and women’s interests would take place within IGI, and of what each of the five principles of IGI would look like in the context of the representation of women and women’s interests.

The recently formed Feminism and Institutionalism – International Network (FIIN), formed in 2006, which aims to bring together academics studying institutions from a feminist perspective would be a helpful start in this endeavor. Their website states that “[t]o date, although there are common interests, there has been little interplay between ‘mainstream’ institutionalist scholars and feminist scholars working on institutions.” The network aims to fill this void by first seeking to “(1) take stock of the state of gender and institutions research; (2) survey what is being and what could be taken from institutional theory and approaches for work on gender and politics; and (3) explore whether there is a ‘feminist institutionalism’ and, if so, of what it might comprise” (<http://www.femfin.com>). In partnership with the network, a new series was launched in 2014 with Rowman & Littlefield, representing “the ‘next stage’ of development of Feminist Institutionalism” and combining “insights from gendered analysis and institutionalist theory”; its primary interest seems to be the international system

(<http://www.rowmaninternational.com/series/feminist-institutionalist>). These new directions and developments in research and publishing will likely provide plenty material for the fuller development of IGI in the years to come. Thus, developing how exactly IGI, and particularly its five principles, interact with the representation of women and their interests could begin by monitoring and integrating the work of the scholars the FIIN network brings together. Indeed some of their work is already engaged with in this study, predominantly in Chapter 3. But since there is very little theorizing readily available at this point concerning global (economic) governance through the lenses of the ‘ideas’ that the dissertation develops and examines, this will have to be left for a future study.

will be shown, this focus upon institutions prioritizes the principles of inclusion, caution, simplicity, legitimacy and flexibility, and allows for a reconceptualization of the problem of democratization at the global level. Instead of asking what is the most desirable or most practicable set of positive conditions or objectives for institutions of democratic global governance, the study asks what the fundamental conditions are without which one cannot begin to speak of democratic global governance.

In fact, even the ardent realist and self-proclaimed Machiavellian Danilo Zolo corroborates the fundamental trajectory of IGI. He describes a movement from Leviathan to Lilliput, which neatly encapsulates the conceptual movement from the ever-present anti-democratic danger inherent in a global state, to the polycentric, small, binding, common rules that, for Zolo, provide ‘weak pacifism,’ and that the present study expands upon to define IGI.¹¹⁹ Zolo notes that “any political philosophy alert to the perils of the accumulation and centralization of power cannot but regard with suspicion this perspective which would aim to establish at an international level the functional predominance of the political subsystem.”¹²⁰ He adds that such a perspective would reasonably be opposed by a “constellation of ‘international legal regimes’ capable of co-ordinating the subjects of international politics according to a systemic logic of ‘governance without government’: i.e., in simpler terms, the adoption of diffuse and polycentric normative structures and forms of leadership.”¹²¹ Zolo considers that such a system would require only ‘weak interventionism’ and be compatible with ‘bottom-up

¹¹⁹ Zolo, Danilo, Cosmopolis: Prospects for World Government (Cambridge: Polity Press, 1997), 154.

¹²⁰ *Ibid*, 153.

¹²¹ *Ibid*, 153.

development.¹²² The present study concurs and expands upon this and complementary lines of reasoning.

Inclusive Global Institutionalism prioritizes the gradual democratization of existing International Organizations and global institutions. It emphasises continued discussion, negotiation, and evolution toward more democratic institutions. IGI also makes a clear distinction between ‘global governance’, for which it advocates, and ‘global government’, for which it does not. Pascal Lamy, Director-General of the WTO from September 2005 to September 2013, states eloquently some of the distinguishing characteristics of ‘global governance’ in his short essay, “The WTO’s Contribution to Global Governance”:

Governance is a decision-making process based on permanent negotiation, an exchange of agreements and the rule of law. It does not imply the transfer of political sovereignty but organizes the cooperation of existing entities on the basis of agreed and enforceable rules. It takes the form of institutions generating permanent dialogue and debate as a prelude to common actions. In short, governance generates common rules, whereas government commands political will. In philosophical terms, global governance would be an heir to Kant’s cosmopolis, whereas a world government would equate with a giant Leviathan.¹²³

Permanent negotiation, permanent dialogue and debate, exchange of agreements, rule of law, common actions and common rules all parallel Ostrom’s ‘polycentrism,’

¹²² *Ibid*, 154.

¹²³ Lamy, Pascal, “The WTO’s Contribution to Global Governance,” in Gary Sampson, ed., The WTO and Global Governance: Future Directions (Hong Kong: United Nations University Press, 2008), 41.

defined as a system “where citizens are able to organize not just one but multiple governing authorities at differing scales.”¹²⁴ Essentially, Ostrom describes a system of governance wherein multiple governing authorities, each with differing jurisdictions, geographical areas, levels of specialization, and levels of formality and informality, are nested within general-purpose governments of wider jurisdiction and greater area. Governing, as a whole, is accomplished by the shared, cooperative effort of these various, polycentric, decision arenas. In this way, as Knight and Johnson note, the burden of enforcement is more effectively distributed between formal and informal mechanisms.¹²⁵ IGI’s preference for global governance over global government accords with elements of Ostrom’s arguments for polycentrism, since global governance, per IGI, is the combined effect of a series of discrete institutions, all of which operate at different levels of specificity, formality, authority, scope and jurisdiction. Equally, IGI shares with polycentrism the goal of distributing enforcement between formal and informal mechanisms, in the case of IGI by means of hybridization between soft law and hard law mechanisms, which will be developed below.

Inclusive Global Institutionalism does not involve establishing a world government or a global state but seeks the democratization of existing international organizations. To do so, it does not rely only on civil society or the ‘multitude,’ although NGOs and civil society actors must certainly be incorporated into the framework. Further, IGI does not concentrate on creating networks of power to command political will, but upon, as Lamy argues, the development of common rules. These factors make

¹²⁴ Ostrom, Elinor, “Coping With Tragedies of the Commons,” *Annual Review of Political Science*, vol. 2 (1999), 528.

¹²⁵ Knight, Jack and James Johnson, *The Priority of Democracy: Political Consequences of Pragmatism* (Princeton, NJ: Princeton University Press, 2011), 251.

IGI an approach particularly amenable to inclusion, caution, simplicity, legitimacy and flexibility.

Inclusion

‘Inclusion’ means developing the capacity of international organizations, as they democratize, to incorporate more fully the actors of civil society, including what Scholte calls Global Social Movements and Civil Society Organizations, and the groups that Held and McGrew consider ‘radicals.’ Thus, as Ehlermann (as early as 2002) and Williams have described, the WTO has found itself able to accept *amicus curiae* briefs to its DSB from civil society actors.¹²⁶ Similarly, Germain describes the increasing incorporation of elements of civil society within the institutions of global finance, with a view toward developing what he calls a ‘global public sphere.’ As Germain states, a global public sphere “can give voice to stakeholders and enable citizen participation in political life beyond the narrow and often rigid parameters of state institutions.”¹²⁷ Germain further describes a ‘global financial public sphere’ comprised of “an inter-state institutional framework, globally-oriented financial markets, a globally active media, and the globally-oriented activities of what many now call civil society.”¹²⁸

Bohman’s work, “International Regimes and Democratic Governance,” also supports the inclusive capacity of IGI. Bohman concentrates on the potential in providing

¹²⁶ Ehlermann, Claus-Dieter, “Tensions between the Dispute-Settlement Process and the Diplomatic and Treaty-Making Activities of the WTO,” World Trade Review (2002), vol. 1, no. 3, 303-305. Also, Williams, Marc C., “Civil Society and the WTO: contesting accountability,” in Jan Aart Scholte, ed., Building Global Democracy? Civil Society and Accountable Global Governance (Cambridge: Cambridge University Press, 2011), 118-19.

¹²⁷ Germain, Randall, “Financial Governance and Transnational Deliberative Democracy,” Review of International Studies, vol 36 (2010), 499.

¹²⁸ *Ibid*, 504.

“equal access to institutionalization” in global governance, by which he means equal access to the process by which institutions are created, and by which they evolve, in order to serve as the locus of influence and deliberation over areas not yet regulated effectively at the global level.¹²⁹ He is primarily concerned with international organizations and organizing, rather than with horizontal and vertical networks or with the disaggregation of power, like Slaughter. Bohman makes this clear when he argues the following:

[g]iven a vibrant transnational civil society, international organization may not only function as forum and audience for democratization, but also eventually institutionalize such minimal conditions in the form of international law whose domain would be the violation of basic human rights that make minimal conditions of access to global public spheres impossible.¹³⁰

That is to say, if IOs can incorporate a vibrant transnational civil society, they may be able to institutionalize human rights law and thereby make impossible the denial of access to global public spheres. Bohman’s reference to civil society supports the study’s assertion of the inclusive potential of IGI.

Finally, inclusiveness is also raised by Porter and Ronit with reference to ‘global business authority.’ They argue that intergovernmental organizations are well suited “for transmitting democratic impulses into global policy processes,” and for setting the rules

¹²⁹ Bohman, James, “International Regimes and Democratic Governance: Political Equality and Influence in Global Institutions,” *International Affairs*, vol. 75, no. 3 (1999), 506.

It is worth noting in this context that women did not have ‘equal access to institutionalization’ at the creation of the WTO. They could not ‘get in on the ground floor’ because the ‘ground floor’ had already been created by the GATT 1947, a process in which women were largely uninvolved, and certainly unrepresented. See more on this in chapter 5.

¹³⁰ Bohman, James, “International Regimes and Democratic Governance: Political Equality and Influence in Global Institutions,” *International Affairs*, vol. 75, no. 3 (1999), 505.

for inclusion within them for business groups and civil society.¹³¹ However, as Sell has shown with respect to the WTO's 'TRIPS-plus' agreements,¹³² this intergovernmentality contains the possibility for exclusion from or unequal access to global policy processes.¹³³ Conversely, as Kellow and Murphy have shown, the more democratic membership and decision-making structures of the WTO have aided some civil society groups to establish closer relations with some developing countries.¹³⁴

This duality is probably unavoidable and mirrors the reflexivity that is a fundamental aspect of juridification. Any actor or group of actors with the ability to set terms of inclusion also necessarily will set terms of exclusion. However, without requiring further reform, IGI is capable of the inclusion of what Held and McGrew called 'radicals' and what Scholte called Global Social Movements and Civil Society Organizations. Thus it provides the institutional context for the impulse of 'multitude' toward global democratic governance in a way that cannot be replicated by the ideas of 'global state' or 'networks.'

¹³¹ Porter, Tony and Karsten Ronit, "The Complexities of Global Business Authority" in Tony Porter and Karsten Ronit, The Challenges of Global Business Authority: Democratic Renewal, Stalemate, or Decay? (Albany: State University of New York Press, 2010), 294.

¹³² TRIPS plus agreements involve more restrictive provisions concerning intellectual property, patents, and copyright than what is included in the TRIPS agreement.

¹³³ Sell, Susan K., "Business and Democracy? Pharmaceutical Firms, Intellectual Property, and Developing Countries," in Tony Porter and Karsten Ronit, The Challenges of Global Business Authority: Democratic Renewal, Stalemate, or Decay? (Albany: State University of New York Press, 2010), 145-170.

¹³⁴ Kellow, Aynsley and Hannah Murphy, "Democratic Accountability in Global Governance: Business and Civil Society in Multiple Arenas," in Tony Porter and Karsten Ronit, The Challenges of Global Business Authority: Democratic Renewal, Stalemate, or Decay? (Albany: State University of New York Press, 2010), 227-251.

Caution

The second principle of Inclusive Global Institutionalism is caution; i.e. the point of view for which Burke argued in Reflections on the Revolution in France. Burke's point is that it is foolishness to neglect wilfully the accumulated lessons of millennia of human experiments and results in the field of self-government in favour of what one considers a good idea, at the moment. In the Reflections Burke maintains:

The science of constructing a commonwealth, or renovating it, or reforming it, is, like every other experimental science, not to be taught *a priori*. Nor is it a short experience that can instruct us in that practical science: because the real effects of moral causes are not always immediate; but that which in the first instance is prejudiced may be excellent in its remoter operation; and its excellence may arise even from the ill effects it produces in the beginning. The reverse also happens: and very plausible schemes, with very pleasing commencements, have often shameful and lamentable conclusions. In states there are often some obscure and almost latent causes, things which appear at first view of little moment, on which a very great part of its prosperity or adversity may most essentially depend. The science of government being therefore so practical in itself, and intended for such practical purposes, a matter which requires experience, and even more experience than any person can gain in his whole life, however sagacious and observing he may be, it is with infinite caution that any man ought to venture upon pulling down an edifice, which has answered in any tolerable degree for ages the common purposes of society, or on building it up again, without having models and patterns of approved utility before his eyes.¹³⁵¹³⁶

¹³⁵ Burke, Edmund, Reflections on the Revolution in France, (1790; Mineola, New York: Dover, 2006), 59.

It is this principle of caution that might constitute the most profound difference between ‘empire’ and IGI. It is possible that Slaughter’s conception of disaggregated and networked power could augment global democracy. Certainly this is Slaughter’s hope, and her evident belief is that they would tend toward global democracy.¹³⁷ However, nothing guarantees such an outcome. Instead, all that is certain in Slaughter’s conception is the systemic aggregation of networked power, and if, as Hardt and Negri fear, its form were anti-democratic, its systemic nature would mitigate strongly against any democratic corrective or failsafe, check or balance. In short, if Slaughter’s horizontal and vertical networks and disaggregated states did not tend toward global democracy, the result would be disastrous and very difficult to fix. By concentrating upon the democratic potential of institutions, IGI pursues a more cautious route in which any failure would be isolated to a specific institution, but success, if appropriate, could be replicated between institutions. Thus, while IGI contains within it the positive aspects of Slaughter’s ‘new world order’ of networks, its inherent caution ensures that possible negative outcomes need have no systemic or global effect.

¹³⁶ Admittedly, as the lamentably gendered language of this brilliant passage suggests, at the dawn of the 20th century exactly this argument of Burke’s could have used to justify the exclusion of women from all political institutions and processes, including especially the franchise. A century later, though, women have long been central to public political life in most developed democracies, and in such countries all have had the franchise for several decades. Not only is this almost universally accepted to have been a very positive development, it has become universally accepted as a fundamental criterion of any democracy (see chapter 3 of this study). Experience therefore declares a very favourable judgment, and Burke valued experience above all other forms of wisdom, as he makes clear in his speech on American taxation, in the Reflections and elsewhere. There can be no conclusion, therefore, but that Burke at the dawn of the 21st century would have been in favour of the representation of women and women’s interests, and the passage in question, at the dawn of the 21st century, can only rightly be cited in favour of the representation of women and women’s interests.

¹³⁷ Slaughter, Anne-Marie, A New World Order (Princeton: Princeton University Press, 2004), 28-35.

Simplicity

IGI's third principle is simplicity. It is not necessary to IGI to create new institutions, to democratize all institutions at one time, or to democratize all institutions without exception. Instead, it is possible to focus on a given institution that seems more amenable to democratization than others. Patomäki and Teivainen's work in A Possible World shows the value of such simplicity. They argue that most International Organizations will be very difficult to democratize. For example, they are not optimistic that the UN Security Council or General Assembly can be democratized.¹³⁸ Further, while they allow that the IMF and the World Bank have greater possibilities for democratization; nevertheless they consider the possibility remote because of the debt-dependence of developing countries, the conditionalities imposed by the IMF and the World Bank in exchange for funding, and the one dollar/one vote system by which the IMF and World Bank distribute influence internally.¹³⁹ Indeed, Patomäki and Teivainen argue that the interest of global democracy might be more readily achieved by creating institutions of global democratic governance. Nevertheless, they maintain that among existing global institutions, the WTO is the most amenable to democratization and is, indeed, a genuine possibility for democratization. As they write, "the WTO seems to be the existing multilateral economic arrangement that is most susceptible to democratic change,"¹⁴⁰ because of the one country/one vote principle upon which the WTO operates,

¹³⁸ Patomäki, Heikki and Teivo Teivainen, A Possible World: Democratic Transformation of Global Institutions (London: Zed Books, 2004), 24-30, 104-107, 209.

¹³⁹ *Ibid*, 104-107.

¹⁴⁰ *Ibid*, 209.

and its consensus-based model of decision-making which makes it easier to build pressure to democratize upon the WTO than upon the Bretton Woods institutions.¹⁴¹

Since it is amenable to simplicity, the institutional focus of IGI allows the relative openness of the WTO to be pursued to best advantage. Such an approach would allow a specific opening toward democratization in the WTO or any other institution to be pursued to the greatest extent possible at a given time without placing requirements upon any other institution and without risking negative effects to democratic governance beyond the institution in question. The same cannot be said of a ‘global state,’ ‘multitude’ or ‘networks,’ all of which require holistic or at least robustly systemic initiatives. Moreover, simplicity and caution together allow IGI to support the democratization of existing institutions first, to be followed, as necessary and convenient, by the creation of new institutions of democratic global governance. Again, such an approach is much better suited to IGI than to the other three ideas.

Legitimacy

The principles of inclusion, caution and simplicity support a fourth, legitimacy, which takes the form of juridification. Inclusive Global Institutionalism incorporates diverse civil society actors while limiting the effects of unintended consequences of reform; it also focuses reform first upon specific existing global institutions. IGI does this in a manner that cannot be replicated by the other ideas of global democratic governance, and that allows IGI the stability necessary to obtain legitimacy for its reforms through

¹⁴¹ *Ibid*, 104-107, 209.

It is important to stress that this entails no contradiction with the overall framework of the study, since the study argues only that the WTO is the hardest case for the representation of women and women’s interests, rather than for other aspects of democratization. For their part, Patomäki and Teivainen do not explicitly consider the key importance of the representation of women and women’s interests.

juridification. The proposition that juridification is ultimately necessary for legitimacy and effective democratic reform has significant support in the literature of global democratic governance. For example, Bohman maintains that ‘institutionalization of access’ ultimately requires juridification:

In order to be more than a functional equivalent of democracy or merely a feasible means for promoting certain social conditions, more is needed: access to institutionalization must become realized in actual institutions. This requires, above all else, the eventual legal institutionalization of access to global public spheres.¹⁴²

By this Bohman means that in order to consolidate democratic access to influence, it is necessary to have access to the institutionalization of new areas of influence, and for that access to be institutionalized in a form that is guaranteed by recourse to procedures of law. Thus, access must be juridified, and thereby gain the legitimacy of law.

‘Juridification’ means not only that a given right, process or activity can be referred for protection or definition to a duly constituted adjudicative body, but also the creation of the body itself, i.e. the creation of the laws and regulations to which the body refers, the process by which it becomes accepted that such a body is the correct space for dispute resolution, and the process by which it becomes accepted that the body’s decisions are fair and to be followed. Such evolutions, which constitute an important example of juridification, also confer legitimacy, and it is these evolutions to which IGI is better suited than a ‘global state,’ ‘networks’ or ‘multitude.’

¹⁴² Bohman, James, “International Regimes and Democratic Governance: Political Equality and Influence in Global Institutions,” International Affairs, vol. 75, no. 3 (1999), 513.

Of course, it is not only Bohman who recognizes the importance of juridification. The literature is widely supportive of its importance. Germain, for example, recognizes the need for greater accountability of institutions in financial governance.¹⁴³ As this study shows with respect to trade governance, juridification is a fundamentally important way to achieve this accountability. Rommetvedt describes the gradual institutionalization over a number of years of a parliamentary dimension to the WTO. According to Rommetvedt, this dimension has become sufficiently robust to be relied upon as a new forum for domestic relations between executive and legislative bodies, and has been able to support a ‘go-through-the-WTO’ strategy used “to strengthen the influence of parliamentarians on national governments.”¹⁴⁴ This again is a form of juridification. Finally, and more explicitly, Cass claims that international trade law is ‘constitutionalizing,’ by which she means “legal rules, principles, procedures, practices and institutions establishing the community, determining who has public power within it, and defining the scope of that power.”¹⁴⁵ Again, this is a primary component of juridification.

Flexibility

Finally, it is by means of juridification that IGI, as a possible route to democratic global governance, is made flexible. Indeed, it can only be by means of juridification, since this is what allows for the institutionalization of law within international organizations, and only at that point can a balance be achieved between hard law and soft

¹⁴³ Germain, Randall, ‘Financial Governance and Transnational Deliberative Democracy,’ Review of International Studies, vol. 36 (2010), 509.

¹⁴⁴ Rommetvedt, Hilmar, ‘The Institutionalization of a Parliamentary Dimension of an Intergovernmental Organization: the WTO,’ World Trade Review, vol. 10, no. 4 (2011), 444.

¹⁴⁵ Cass, Deborah Z., ‘The ‘Constitutionalization’ of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade,’ European Journal of International Law, vol. 12, no. 1 (2001), 41.

law mechanisms sufficient to introduce to an organization alternative spaces for discussion and for the introduction of new issue-areas, such as the representation of women and women's interests, in the case of the WTO. It is this hybridization of soft law and hard law mechanisms within a given international organization that gives IGI the flexibility it requires to be truly amenable to a democratic turn. This is the real, original and crucial insight of this chapter: that inclusion, caution and simplicity give the stability necessary to foster legitimacy through juridification by ways of hybridization of soft and hard law that in turn creates flexibility and which greatly increases the possibility for genuine, lasting and comprehensive democratization.

Understanding the Movement between Hard Law and Soft Law

Before the study moves on to develop an understanding of juridification, it is necessary to further discuss conceptualizing hard and soft law, and the movement between them. There exists no single accepted definition of hard law or soft law, but the literatures concerning law and trade agree in general that hard law, ideally, constitutes a precise statement of unambiguous obligation whose enforcement mechanism is clear and whose enforcement is a certainty, because it was created as law by a duly constituted and recognized authority. This perspective has long been held by legal positivists, and was dominant for the better part of the 19th and 20th centuries. It is reflected, for example, in the first and second tenets of H.L.A. Hart, which hold that "laws are the commands of human beings," and that "there is no necessary connection between laws and morals."¹⁴⁶

¹⁴⁶ Hart, H.L.A., "Positivism and the Separation of Law and Morals," *Harvard Law Review*, vol. 71, no. 4 (February 1958). Also cited in Alvarez, José E., *International Organizations as Law-makers* (2005; Oxford: Oxford University Press, 2006), 46-47.

Examples of hard law in practice are amongst the most well known kinds of law, including almost all legislation passed by Parliaments. Even in these cases, however, there is a perpetual supply of parties willing to call into question exactly what the law implies (precision) and to whom and when it applies (obligation), and whether the prescribed manner of enforcement was properly carried out. Thus, even the hardest laws have soft edges.

Soft law is more difficult to define. Following Abbott *et al* in “The Concept of Legalization,” Davidson in “The Role of Law in Governing Regionalism in Asia” argues that law, whether hard or soft, consists of rules that regulate behaviour in society, a mechanism for compliance, and a mechanism for the settlement of disputes.¹⁴⁷ According to Davidson, the distinction between soft and hard law lies within these criteria and is a gradation between the binding and non-binding nature of rules, their precision or imprecision, and settlement of disputes by a more judicial or more diplomatic model.¹⁴⁸ Similarly, Abbott, Keohane *et al* define a gradation between soft and hard law in terms of the binding nature of the obligation, the precise nature of the rule, and the diplomatic or judicial nature of the parties to whom the authority to implement, interpret and enforce the rules is delegated.¹⁴⁹

Craik provides a useful summation by defining the essential characteristic of soft law as follows: “unlike traditional hard law sources, soft law does not create formally

¹⁴⁷ Abbott, Kenneth W., Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter, and Duncan Snidal, “The Concept of Legalization,” *International Organization*, vol. 54, no. 3 (2000), 401-404. Also Davidson, Paul J., “The Role of Law in Governing Regionalism in Asia,” in Nicholas Thomas, ed., *Governance and Regionalism in Asia* (London: Routledge, 2009), 224-233.

¹⁴⁸ Davidson, Paul J., “The Role of Law in Governing Regionalism in Asia,” in Nicholas Thomas, ed., *Governance and Regionalism in Asia* (London: Routledge, 2009), 233.

¹⁴⁹ Abbott, Kenneth W., Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter, and Duncan Snidal, “The Concept of Legalization,” *International Organization*, vol. 54, no. 3 (2000), 401.

binding obligations,” it “records only the agreed-upon principles and objectives, and ‘a considerable degree of discretion in interpretation and [concerning] how and when to conform to the requirements is left to the participants.’”¹⁵⁰ Finally, Kirton and Trebilcock define four characteristics of a soft law regime: first, “the formal legal, regulatory authority of governments is not relied upon”¹⁵¹; second, participation, construction, operation and continuation of the soft law regime are voluntary¹⁵²; third, “there is a strong reliance on consensus-based decision making for action”¹⁵³; and fourth, “there is an absence of the authoritative, material sanctioning power of the state.”¹⁵⁴ Kirton and Trebilcock thereby describe a purely soft law regime, which can be said to occupy one extreme of the hard law-soft law continuum. In practice, ‘soft law regimes’ will tend to approach Kirton and Trebilcock’s definition to greater or lesser extents, while hybridized institutions will purposefully incorporate aspects of both hard law and soft law regimes. Examples of soft law include the following: resolutions of the United Nations General Assembly; aspects of the WTO’s TRIPS and SPS Agreements; WTO Ministerial Communications; the ‘Codex Alimentarius’ of the WHO; aspects of the UN’s Convention on the Law of the Sea (UNCLOS); the policies of ‘conditionality’ imposed

¹⁵⁰ Craik, Neil A., “Recalcitrant Reality and Chosen Ideals: The Public Function of Dispute Settlement in International Environmental Law,” Georgetown International Environmental Law Review vol. 10 (1998), 573, following Handl, Gunther, “Environmental Security and Global Change: The Challenge to International Law,” Yearbook of International Environmental Law, vol. 3 (1990), 7, and citing Birnie, Patricia W. and Alan E. Boyle, International Law and the Environment (Oxford: Oxford University Press, 1992), 27.

¹⁵¹ Kirton, John J., and Michael J. Trebilcock, “Introduction: Hard Choices and Soft Law in Sustainable Global Governance,” in John J. Kirton and Michael J. Trebilcock, eds., Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance (Aldershot, UK: Ashgate Publishing Limited, 2004), 9.

¹⁵² *Ibid*, 9.

¹⁵³ *Ibid*, 9.

¹⁵⁴ *Ibid*, 9.

by the International Monetary Fund, ‘gender mainstreaming’ in the EU, and almost all of APEC.

Just as hard law is soft at its edges, soft law is still more resistant to absolute classification. Indeed, there is a marked tendency for soft law to harden in a process of juridification. Ostry interprets the creation of the WTO, including its DSM and Appellate Body, from the soft law framework of the GATT, as a juridification of paradigmatic proportions.¹⁵⁵ Davidson creates a more helpful theoretical construct by placing hard law, soft law and juridification in a wider context. He suggests that the movement from soft law to hard law is only part of a more general juridifying movement between ‘relations-based’ governance and ‘rules-based’ governance.¹⁵⁶ He further suggests a correlation between juridification and increased trade and economic activity, citing Dixit as follows: “as the number of economic partners increases, and as the economic activity becomes more complex, it becomes more difficult to engage in relationship-based governance, as it becomes increasingly difficult to have the requisite knowledge of partners.”¹⁵⁷

Alvarez, in International Organizations as Law Makers, provides several examples of juridification in the form of the hardening of soft law. He notes how the

¹⁵⁵ Ostry, Sylvia, “Trade, Development and the Doha Development Agenda,” in Dona Lee and Rorden Wilkinson, eds. The WTO after Hong Kong: Progress in, and prospects for, the Doha Development Agenda (Abingdon: Routledge, 2007), 30.

¹⁵⁶ Davidson, Paul J., “The Role of Law in Governing Regionalism in Asia,” in Nicholas Thomas, ed., Governance and Regionalism in Asia (London: Routledge, 2009), 227-228.

¹⁵⁷ Dixit, Avinash, “Lawlessness and Economics: Alternative Modes of Economic Governance,” Gorman Lectures, University College, London (December 2002), 11, <http://www.econ.ucl.ac.uk/downloads/Lec1.pdf> (accessed by Paul J. Davidson 29 November 2005). Also cited in Davidson, Paul J., “The Role of Law in Governing Regionalism in Asia,” in Nicholas Thomas, ed., Governance and Regionalism in Asia (London: Routledge, 2009), 227.

That said, it could be argued that the advance of the internet and in particular the increasing widespread use of social media might counter, enhance, or transform this in years to come. For now, however, Davidson’s observation is quite relevant, in particular taking into account the rules of engagement on social media sites, which might simply add a layer for the global rules-based system, as opposed to challenging it.

World Bank, by incorporating the “principles and standards of other IOs within its guidelines, as it has done with the FAO’s ‘Code of Conduct on the Distribution and Use of Pesticides,’” has effectively transformed the FAO’s Code into hard law.¹⁵⁸ As Alvarez states, this has the effect of “turning such agreements into binding rules … and when incorporated into [the World Bank’s] loan agreements with states, perhaps even into binding forms of international or national law.”¹⁵⁹ Other examples noted by Alvarez include the opinions of the International Labour Office, which are widely accepted as standards, the WHO’s Health Regulations, the IAEA’s standards, and the conditionalities imposed by the IMF.¹⁶⁰

The hardening of soft law, and the softening of hard law, as described above, does not mean that the two are indistinguishable, but emphasizes their complementarity. Hard law and soft law, taken separately, possess particular costs and benefits, strengths and weaknesses. Hard law, combined with well-established enforcement mechanisms, is particularly effective at ensuring compliance and at changing or controlling behaviour. At the same time, exactly because of its effectiveness, hard law is particularly limited in the scope of its application to international law, given the requirements for negotiation and agreement between states in order to institute any given international law. The relative certainty of the enforcement of hard law can limit the extent to which states are willing to discuss or subscribe to provisions as hard law. This is one reason why WTO members have found multilateral agreement in the Doha Round so difficult to achieve.

¹⁵⁸ Alvarez, José E., International Organizations as Law-Makers, (Oxford: Oxford University Press, 2006), 220.

¹⁵⁹ *Ibid*, 220.

¹⁶⁰ *Ibid*, 221-244.

The relatively vague and non-binding nature of soft law, on the other hand, confers a number of advantages, even while it cannot be held to have the same capacity as hard law to change or control behaviour. As Peng notes, particularly in an Asian context, a soft law construct can be necessary to achieve consensus or even to begin negotiation.¹⁶¹ Craik further notes that soft law leaves room for the resolution of ambiguities or the filling of gaps in agreements.¹⁶² Davidson adds that the vagueness of soft law can be particularly useful in overcoming cultural differences, in allowing negotiations to progress despite minor differences between participants, in removing sovereignty costs from agreements and reducing the costs and difficulty of reaching agreements, in diminishing the difficulties posed by the frequent need for domestic ratification, in allowing some parties to be bound to a greater degree than others, and in affording an opportunity for participants to learn about the effects of agreements and provisions in practice, without the difficulty and high cost associated with revision to hard law.¹⁶³ Alvarez supports this line of reasoning when he argues that

although they are not ‘supranational’ sources of international law as those are normally described, ostensibly soft instruments such as the Codex [Alimentarius], the WHO’s Code for the Marketing of Breast-Milk Substitutes, or the FAO’s and UNEP’s codes for handling certain pesticides and chemicals have sometimes proven effective *because* they

¹⁶¹ Peng, Shin-yi, “The WTO Legalistic Approach and East Asia: From the Legal Culture Perspective,” Asian-Pacific Law and Policy Journal, vol. 1 (2000), 13.

¹⁶² Craik, Neil A., “Recalcitrant Reality and Chosen Ideals: The Public Function of Dispute Settlement in International Environmental Law,” Georgetown International Environmental Law Review vol. 10 (1998), 573.

¹⁶³ Davidson, Paul J., “The Role of Law in Governing Regionalism in Asia,” in Nicholas Thomas, ed., Governance and Regionalism in Asia (London: Routledge, 2009), 223-226.

do not require implementing legislation by states to affect the actions of industry that are the principal target.¹⁶⁴

As will be discussed in detail later, the WTO adheres more closely to a hard law paradigm, and APEC to a soft law paradigm, which produces interesting correlations with respect to legitimacy and the incorporation of gender mainstreaming. Nevertheless, the WTO incorporates examples of soft law, APEC affects matters of hard law, and both incorporate instances of the hybridization of hard and soft law. For example, the Trade Policy Review Mechanism (TPRM) of the WTO may be considered soft law, insofar as its purpose is to improve the adherence of WTO members to the “rules, disciplines and commitments made under the Multilateral Trade Agreements.”¹⁶⁵ Another example is the Doha Round Declaration that TRIPS should not interfere with government measures to protect public health. The Declaration’s binding nature is therefore suspect, allowing it more easily to be understood as soft law.¹⁶⁶ Similarly, while APEC incorporates soft law far more extensively than hard law, APEC’s soft law can harden in practice. This is particularly evident with respect to the relationship between APEC’s ‘Best Practices for RTAs and FTAs,’ APEC’s Non-Binding Investment Principles (NBIPs), and Asian Regional Trading Agreements. As Davidson states:

¹⁶⁴ Alvarez, José E., International Organizations as Law-Makers (Oxford: Oxford University Press, 2006), 245.

¹⁶⁵ Davidson, Paul J., “The Role of Law in Governing Regionalism in Asia,” paper presented at the *Workshop on Governance and Regionalism in Asia*, University of Hong Kong (8-9 December 2005), 14.

¹⁶⁶ Alvarez, José E., International Organizations as Law-Makers, (Oxford: Oxford University Press, 2006), 233.

Although these ‘Best Practices’ and ‘Principles’ are non-binding in nature, they are evidence of ‘soft law’ policy and may be a useful ‘tool’ in the role of creating rules to be included in an RTA. The ‘soft law’ may become part of the ‘hard law’ of the RTA, or the parties to the RTA may incorporate existing ‘soft law’ rules, or they may develop their own ‘soft law’ rules as part of a rules-based governance system to govern their relations in the RTA.¹⁶⁷

Finally, as the above examples suggest, there are particular advantages to be gained by the hybridization of International Organizations to incorporate aspects of both hard law and soft law models. For example, hybridization can allow for the establishment of precise, obligatory and enforced high-level goals, thereby following the hard law model, while at the same time allowing wide scope for different methods of achieving the goals, positing only ‘soft’ principles or suggestions, and incorporating the soft law model. The WTO’s SPS Agreement also represents a successful hybridization. As Alvarez notes, the SPS Agreement addresses measures intended to protect health that “arbitrarily or unjustifiably discriminate” between products from WTO members; at the same time, SPS allows WTO members to base their measures of non-discrimination upon soft law sources such as the WHO’s ‘Codex Alimentarius.’¹⁶⁸ The effect is, again, that ends are well-defined and obligatory, while means can be adapted to suit the particular requirements and capabilities of individual signatories.

Hybridization is thus commonsensical: hard law is particularly well able to change or control behaviour, but for that reason limited in applicability and not always

¹⁶⁷ Davidson, Paul J., “The Role of Law in Governing Regionalism in Asia,” paper presented at the *Workshop on Governance and Regionalism in Asia*, University of Hong Kong (8-9 December 2005).

¹⁶⁸ Alvarez, José E., International Organizations as Law-Makers, (Oxford: Oxford University Press, 2006), 220-221.

conducive to negotiation; soft law is effective at setting the parameters of discourse, initiating juridification, opening negotiations to numerous parties, and taking full advantage of different capabilities and preferences of different parties, but is generally without effective recourse if its principles or standards are ignored; there is no reason why these two models cannot be combined in numerous ways, and there is every reason to believe that the normal course of events will cause hard law to soften and soft law to harden. Given the above, it makes sense proactively to take full advantage of the benefits of hybridization in the context of the legal structures of International Organizations.

Understanding ‘Juridification’

Throughout the study, the term ‘juridification’ is used to signify what might be called the ‘ingress of law’ upon the global sphere. More specifically, the study describes the increasing scope, complexity and robustness of global economic governance as a movement of juridification. Unusually, though, the study is particularly alive to the beneficial aspects of juridification. Indeed, it holds that the democratization of global economic governance is only possible by means of a measure of juridification, even while it recognizes that, taken too far, juridification can also threaten democracy. As such, the study adopts an understanding of juridification that is more expansive and more benevolent than what is predominant in much of the literature of International Political Economy, International Relations and Law. It is therefore necessary to explain how the study contributes a new understanding of juridification in the global sphere, where it echoes the literature, where it diverges from the literature, and why it does so.

The scholarly use of ‘juridification’ is marked at present by an exceptional variety of interpretations. As Blichner and Molander state:

In descriptive terms some see juridification as ‘the proliferation of law’ or as ‘the tendency towards an increase in formal (or positive, written) law,’ others as ‘the monopolization of the legal field by legal professionals,’ the ‘construction of judicial power,’ ‘the expansion of judicial power’ and some quite generally link juridification to the spread of rule-guided action or the expectation of lawful conduct in any setting, private or public. These are but a few of the shorthand definitions presented in the ‘juridification literature.’ In normative terms juridification is sometimes seen as the hallmark of constitutional democracy, the triumph of the rule of law over despotism; at other times as undermining not only efficiency, but also democracy and civil society, for example in the form of ‘legal domination,’ and eventually the rule of law itself.¹⁶⁹

The predominant approach to juridification since the 1970s has been more negative than positive, particularly in the IR and IPE literatures. Amongst the earliest extended treatments of juridification after WWII, though not properly in IR or IPE, was that by Habermas in his Theory of Communicative Action.¹⁷⁰ Taking his point of departure from the inter-war German theorist Kirchheimer, Habermas employed the German term *verrechtlichung*, which has been translated by Killion and by Blichner and

¹⁶⁹ Blichner, Lars and Anders Molander, “What is Juridification?” Working Paper, No. 14, Centre for European Studies, University of Oslo (March 2005), 2-3.

¹⁷⁰ Habermas has often been borrowed by IR and IPE scholars. He describes *verrechtlichung* in The Theory of Communicative Action, vol. 2, trans. Thomas McCarthy (Boston: Beacon Press, 1992), 356-373. Here Habermas directly addresses juridification. He also uses precisely the ‘juridification of the legitimization process’ formulation that is the foundation of Bohman’s concept of reflexivity.

Molander as ‘juridification.’¹⁷¹ By this, Habermas meant the expansion and increasing diversity of law. He described four waves of juridification: the bourgeois state; the bourgeois constitutional state; the democratic constitutional state; and the democratic welfare state.¹⁷² What precisely Habermas meant by each of these four waves is not of great import to the present study; however, it is important to note that he considered the first three to be ‘freedom-guaranteeing,’ but the fourth to be as likely to detract from freedom as to guarantee it.¹⁷³ This is because Habermas thought that the welfare state created too great a juridification of social relations, in the process displacing communicative action.¹⁷⁴ This recasting of social relations as specified legal commitments, proffering individual entitlements and requiring bureaucratic monitoring and enforcement, has the effect, for Habermas, of eroding solidarity.¹⁷⁵ As Killion states, “[a] consequence of an increasing utilization of law (i.e. increasing juridification) for regulating social relations is a corresponding and increasing proclivity among people not to labor to understand each other.”¹⁷⁶

There are several perspectives from which to critique Habermas concerning juridification. His historical account is over-generalized. He does not attend sufficiently to distinctions in the extent of juridification between and within social programmes. He does not address sufficiently distinctions between social programmes in common-law and

¹⁷¹ Blichner, Lars, and Anders Molander, “Mapping Juridification,” *European Law Journal*, vol. 14, no. 1 (January 2008), 50-51. Also Killion, M. Ulric, “The Function of Law in Habermas’ Modern Society,” *Global Jurist*, vol. 10, issue 2, article 1 (2010), 2.

¹⁷² Blichner, Lars, and Anders Molander, “Mapping Juridification,” *European Law Journal*, vol. 14, no. 1 (January 2008), 50.

¹⁷³ *Ibid*, 50.

¹⁷⁴ *Ibid*, 50-51.

¹⁷⁵ Killion, M. Ulric, “The Function of Law in Habermas’ Modern Society,” *Global Jurist*, vol. 10, issue 2, article 1 (2010), 10-11.

¹⁷⁶ *Ibid*, 10.

civil-law jurisdictions. However, his fundamental insight that juridification can disincentivize communicative action and diminish solidarity is echoed in a significant body of subsequent literature.

For example, in Private Power and Global Authority, Cutler describes the juridification of international commerce in terms of the creation of new kinds of commercial activity, new kinds of legal regulation, new subjects of law, new sources of law, new legal processes for dispute settlement, and a general ‘ubiquity of law.’ As she states, in the juridification of commerce, “legal and juridical concepts, institutions and ideologies are used with increasing intensity, in terms of both their expanded scope and their deep penetration into local political/legal/social orders, to substantiate and legitimate claims to political authority.”¹⁷⁷ In short, she posits an understanding of juridification marked by ‘ubiquity of law’ and the extension of the movement ‘from status to contract’ ever more deeply in social and commercial relations.¹⁷⁸

Cutler expands upon this theme in ‘Gramsci, Law, and the Culture of Global Capitalism.’ She argues that the use of juridical concepts, institutions and ideologies with “increasing extensity and intensity” amounts to the juridification of the economy and society, and that this constitutes the globalization of law.¹⁷⁹ More than this, she argues that any such ‘global solution’ is only global in scope, but Anglo-American in substance; she particularly emphasises the globalization of American corporate values and

¹⁷⁷ Cutler, A. Claire, Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy (Cambridge: Cambridge University Press, 2003), 18.

¹⁷⁸ *Ibid*, 18.

¹⁷⁹ Cutler, A. Claire, “Gramsci, Law, and the Culture of Global Capitalism,” Critical Review of International Social and Political Philosophy, vol. 8, no. 4 (December 2005), 532.

interests.¹⁸⁰ In addition, Cutler recognizes that juridification can take place as soft law or hard law, but she suggests that the import of each is very different.¹⁸¹ Indeed, she argues that law is operating dialectically to juridify aspects of hard legal disciplines, such as WTO dispute settlement, while de-juridifying soft-law regimes, such as corporate social responsibility.¹⁸² In this sense, for Cutler, juridification and de-juridification are part of the same dialectical process whose purpose is not juridification or commodification as such, but the advancement of private corporate capitalist interest under the mask of public communal interest.¹⁸³ Thus, she writes that the law presents a formally rational economic and political system “that is at root coercive, oppressive and inherently inequitable.”¹⁸⁴ Moreover, the juridified and commodified legal order of economic and social relations at once creates “illusory forms of equality” and precludes “genuine equality.”¹⁸⁵

Certainly, there are elements of Cutler’s position with which the study is in agreement. For example, it is relatively uncontroversial to state that formal equality under the law does not equate to substantive equality or equal access to the law. This mirrors the study’s reflections on the difference between formal and substantive representation developed in Chapter 3. Further, Cutler’s recognition that a process of juridification is occurring, and that this involves a significant expansion of law and legal forms, is in fundamental accord with one of the central tenets of the study. Nevertheless, Cutler discounts too easily the formal equality that is possible, for example, under a juridified

¹⁸⁰ *Ibid*, 537.

¹⁸¹ *Ibid*, 537.

¹⁸² *Ibid*, 537.

¹⁸³ *Ibid*, 538.

¹⁸⁴ *Ibid*, 532.

¹⁸⁵ *Ibid*, 532.

system of dispute settlement. This equality is not illusory, and it is difficult to believe that delegates to the WTO labour under any meaningful illusions about the substantive power structures amongst states that always inform juridified dispute settlement. Yet the juridification of dispute settlement at the WTO has consistently been pursued and approved by developing countries especially because the formal equality of the WTO DSM was a significant improvement in reliability, relative impartiality, and relative fairness over the less formalized and less juridified systems of dispute settlement practised under the GATT.¹⁸⁶ As Davis shows, Peru benefited from choosing juridified, formalized dispute settlement at the WTO, a process that in 2002 resulted in the EU having to amend its labeling policies for sardine imports in Peru's favour. Conversely, Vietnam, which was not a member of the WTO, was unable during the 2000s to have the US remove import restrictions on Vietnamese catfish, despite having a bilateral trade agreement with the US. As a result, Vietnam urgently sought accession to the WTO, which was achieved in 2007. In 2010, Vietnam filed a dispute at the WTO concerning US antidumping duties on shrimp.¹⁸⁷ Therefore, representatives of Peru and Vietnam, and certainly of other developing countries, did not need to labour under illusions in order to understand that the imperfection of partial or relative improvements in formal equality does not make them illusory.

Further, the study does not share Cutler's dialectical hypothesis. For the study, juridification and de-juridification are the effects of movement along a series of continuums, whether between hard law and soft law, greater and lesser scope, or greater

¹⁸⁶ Trebilcock, Michael, Robert Howse and Antonia Eliason, The Regulation of International Trade, Fourth Edition (London: Routledge, 2013), 612-613.

¹⁸⁷ Davis, Christina, Why Adjudicate? Enforcing Trade Rules in the WTO (Princeton: Princeton University Press, 2012), 261, 278-279.

and lesser prevalence of ‘legal framing,’ to use Blichner and Molander’s term.¹⁸⁸ It is therefore entirely possible in theory for a movement from hard law to soft law to constitute an instance of juridification, as long as it is accompanied by an increase of scope. Soft law can also be used as a vehicle intended gradually to become a hard law regime. It is also possible for institutions to be hybrids of soft law and hard law models; indeed, many IOs, including the WTO, already are to varying extents. Of course, a hybridized institution could in theory carry out a dialectic within itself, but the more intertwined soft law and hard law are in a given institution, the more involved, tortured and unlikely the explanation of a dialectical movement must become. Equally, Cutler’s dialectical hypothesis is open to the same objection of non-falsifiability that Popper made against Marxian theories generally.¹⁸⁹

The study also places greater emphasis than Cutler upon the capacity for soft law and hard law to operate in cooperation to bring about juridification. That is to say, soft law can be used as a vehicle intended gradually to become a hard law regime. In this way, soft law acts to mitigate the risks and ease the introduction of new measures intended to become hard law over time. It can also be used to tailor the extent of the commitments made by different signatories to a given agreement. Cutler does not address these possibilities, yet they must have the effect of complicating greatly her dialectical hypothesis concerning juridification.

Finally, the study is not in accordance with Cutler when she makes the following argument that juridification defines the current ‘historical bloc’:

¹⁸⁸ Blichner, Lars, and Anders Molander, “Mapping Juridification,” *European Law Journal*, vol. 14, no. 1 (January 2008), 47.

¹⁸⁹ Popper, Karl, *Conjectures and Refutations: The Growth of Scientific Knowledge* (1963; New York: Routledge, 2002), 48-49.

Juridification (and de-juridification) is proposed as the analytical link between local and global politico-legal orders and as the process that is instantiating a commodified legal form as the template of economic and social regulation. Juridification is the process by which law becomes hegemonic and defines the current historical bloc.¹⁹⁰

The problem with this argumentation is that Cutler conflates historical judgment with present observation. Juridification might well serve as the link between local and global orders at present, and as the process instantiating at present commodified legal forms, but this makes no logical connection to their historical significance. To make such a connection, Cutler would need to compare present circumstances with past, and attempt to distinguish from these comparisons the outlines of past historical blocs. Even then, her argument might prove impossible, since the determination of the existence of an historical bloc at present would require a perspective outside the present. This is the point Hegel made in The Philosophy of Right: that philosophy can only ‘paint its grey in grey’ – can only know an historical era as such – after the historical era has come to an end.¹⁹¹

Others, such as Silverstein and Hartmann, share Cutler’s view that juridification tends on balance to be freedom-limiting, disempowering, contrary to communicative action, and potentially threatening to democratic norms. Hartmann shares with Cutler the argument that juridification creates a moment of fictive equality between parties to an

¹⁹⁰ Cutler, A. Claire, “Gramsci, Law, and the Culture of Global Capitalism,” Critical Review of International Social and Political Philosophy, vol. 8, no. 4 (December 2005), 538.

¹⁹¹ Hegel, George Wilhelm Friedrich, The Philosophy of Right, trans. S.W. Dyde (London: George Bell and Sons, 1896), xxx.

exchange, which serves to mask the power and property relations between them.¹⁹² For Hartmann, law is used as the means to institutionalize this moment of equality, but this has the effect of institutionalizing what she calls a ‘contract society,’ in which “law abstracts from the existing ties of mutual dependence and exploitation.”¹⁹³ As she states,

[A]s legal subjects, the individuals encounter one another under conditions of the necessary fiction of equality and independence abstracting from concrete social relations. Law transforms people into something they are not – equals, regardless of whether they enter into a relation as exchangers of goods or as employers and employees.¹⁹⁴

In Hartmann’s view, this dynamic extends to and is reshaping international politics and international law; both are being juridified.¹⁹⁵ Her overriding concern is that in the process the communicative dimension of international law and politics is being lost, and extra-economic dynamics between parties to exchange are being made invisible.¹⁹⁶

Silverstein shares a similar concern, although he is conscious that judicial venues might be a positive preference or the only realistic option to achieve a desired outcome.¹⁹⁷ Nevertheless, in Law’s Allure, he defines juridification as the substitution or replacement of “ordinary politics with judicial decisions and formality,”¹⁹⁸ and as “the

¹⁹² Hartmann, Eva, “The Difficult Relation between International Law and Politics: The Legal Turn from a Critical IPE Perspective,” New Political Economy, vol. 16, no. 5 (November 2011), 566.

¹⁹³ *Ibid*, 566.

¹⁹⁴ *Ibid*, 566.

¹⁹⁵ *Ibid*, 561, 563.

¹⁹⁶ *Ibid*, 561-566.

¹⁹⁷ Silverstein, Gordon, Law’s Allure: How Law Shapes, Constrains, Saves, and Kills Politics (Cambridge: Cambridge University Press, 2009), 17.

¹⁹⁸ *Ibid*, 5.

reliance on judicial rules and rulings; the desire to formalize, proceduralize, rigidify, and legalize, the substituting of legal rules and rulings for the political arts of negotiation, bargaining, elections, and persuasion.”¹⁹⁹ In short, third-party judgment replaces compromise. Silverstein comes to this position by analysing prominent US Supreme Court cases, such as *Brown v. The Board of Education*, 1955, and *Roe v. Wade*, 1973. He shares the concern voiced by Habermas, Cutler and Hartmann that juridification is deleterious to communication and compromise, but it is important that he does so neither from a Habermasian nor a Marxian position.

Taking his departure from Kojéve’s Phenomenology of Right, Swan is more open to the possibility that juridification of international law could strengthen a just order of global governance. Nevertheless, he is very conscious of the possibility described above that the moments of equality juridification makes possible can also serve to mask inequalities of power, and that Kojéve’s system of empires, which Swan considers a possible vehicle for bringing about the juridification of international politics, could easily be a freedom-limiting result.²⁰⁰ Purvis describes three ‘thrusts’ of international juridification: the “deepening and intensification of market relations”; the “processes of

¹⁹⁹ *Ibid*, 270.

²⁰⁰ Swan, Peter, “American Empire or Empires? Alternative Juridifications of the New World Order,” in Amy Bartholomew, ed., Empire’s Law: The American Imperial Project and the ‘War to Remake the World’ (London: Pluto Press, 2006), 150-157.

In his letter of 1945 to De Gaulle on “French Policy,” Kojéve articulates his understanding that the end of WWII signaled the end of the epoch of the nation-state, and that an epoch of empires had succeeded it. This will in turn be succeeded by the epoch of humanity, but such a change will be very long in coming. In the meantime, Kojéve argued that France should protect its nationhood by fostering a Latin/Mediterranean empire to balance the Anglo-American empire and the Slavo-Soviet Empire. The Latin Empire would provide a new space and a new challenge for democratic political thought. It is in this newly opened space that the possibility arises for the realization of both equivalence and equality as functions of *Droit*, and it is this possibility that actuates Swan’s essay in Law’s Empire. See Kojéve, Alexandre, “Outline of a Doctrine of French Policy,” trans. Erik de Vries, Policy Review, no. 126 (1 August 2004). See also, Kojéve, Alexandre, Outline of a Phenomenology of Right, ed. Bryan-Paul Frost, trans. Bryan-Paul Frost and Robert Howse (Lanham, Maryland: Rowman and Littlefield, 2000), 80, 222-231.

decolonization”; and the emergence of the UN system, IOs, and the capacity of individuals to be legal subjects internationally.²⁰¹ He considers that emergence of the UN system and related developments constitute a genuine possibility for juridification to lead to the international rule of law. Nevertheless, Purvis also considers that the predominant result of the “deepening and intensification of market relations,” and of the “processes of decolonization” has been to deepen the institutionalization of Western-style capitalism and free-market ideology as international law.²⁰² As he states with respect to decolonization, “here the rule of law has translated into law and order backed by strong states, while the ‘goodness’ of good-government is to be measured in terms of market friendliness.”²⁰³

What is clear, then, is that from a number of different theoretical perspectives, and across a number of different areas of research, there exists a strong and general concern that juridification mitigates against communication, masks power relations, and substitutes moments of equality before the law, in some senses illusory, for the flexibility of negotiated agreement. Surely this dynamic can threaten democracy if taken too far, as the critics of juridification maintain and as even those with a more sanguine view accept. Yet what most critics of juridification do not account for sufficiently is that it is absolutely necessary to democracy. Juridification is also a much wider ranging phenomenon than its most ardent critics realize or allow.

²⁰¹ Purvis, Trevor, “Looking for Life Signs in an International Rule of Law,” in Amy Bartholomew, ed., Empire’s Law: The American Imperial Project and the ‘War to Remake the World’ (London: Pluto Press, 2006), 116.

²⁰² *Ibid*, 116-117.

²⁰³ *Ibid*, 118.

Blichner and Molander have constructed the most comprehensive typology of juridification to date. They identify five types of juridification, which they label A through E. Type A, ‘Constitutive Juridification,’ takes place when “norms constitutive of a political order are established or changed to the effect of adding to the competencies of the legal system.”²⁰⁴ Within this type, A1 denotes the bare establishment of a legal order, while A2 denotes constitutionalization, particularly by the establishment or augmentation of a formal constitutional order.²⁰⁵

Type B, ‘Law’s Expansion and Differentiation,’ is the process by which “an activity becomes subjected to legal regulation or more detailed legal regulation.”²⁰⁶ Within this type, B1 denotes the horizontal and vertical expansion of law, as when an issue area (horizontal) or a new stratum of the economy or society (vertical) is brought under law’s purview.²⁰⁷ B2 denotes the horizontal or vertical differentiation of law, which occurs when “one law is divided into two or more laws” so as to “differentiate between an increasing number of cases.”²⁰⁸ Type C, ‘Increased Conflict Solving by Reference to Law,’ is the process or trend by which “conflicts in a society increasingly are solved by reference to law.”²⁰⁹ Within this type, Blichner and Molander make three further distinctions. C1, which is judicial conflict solving, entails “a highly specialised and standardised form of legal reasoning involving the judiciary.”²¹⁰ C2, which is legal

²⁰⁴ Blichner, Lars, and Anders Molander, “Mapping Juridification,” *European Law Journal*, vol. 14, no. 1 (January 2008), 39.

²⁰⁵ *Ibid*, 39.

²⁰⁶ *Ibid*, 42.

²⁰⁷ *Ibid*, 42.

²⁰⁸ *Ibid*, 42.

²⁰⁹ *Ibid*, 44.

²¹⁰ *Ibid*, 44.

conflict solving, entails the use of legal reasoning outside the judiciary.²¹¹ Finally, C3, which is “lay conflict solving with reference to law,” entails the use of legal reasoning in a manner that is less expert, somewhat imitative, outside the confines of the judiciary or professional legal practise, possibly even mistaken or misunderstood to a degree, but always striving to invoke legal nomenclature and modes of reasoning – in a word, lay.²¹²

Type D, ‘Increased Judicial Power,’ results from an increase of indeterminacy or a decrease of transparency.²¹³ By the former, Blichner and Molander mean the difficulty of determining the state of the law and jurisprudence with respect to a particular case.²¹⁴ By the latter, they mean the degree of openness and intelligibility of the law from the point of view of the citizen.²¹⁵ From these definitions it follows that juridification types A, B and C produce judicialization, or the increase of judicial power, insofar as they increase indeterminacy or decrease transparency.²¹⁶

Finally, juridification type E is called ‘Legal Framing,’ which is defined as “the increased tendency to understand self and others, and the relationship between self and others, in light of a common legal order.”²¹⁷ This entails a normative understanding in which individuals “increasingly tend to see themselves as belonging to a community of legal subjects with equal legal rights and duties.”²¹⁸ Legal framing can be further distinguished between E1, when people are considered predominantly as the addressees

²¹¹ *Ibid*, 44.

²¹² *Ibid*, 44.

²¹³ *Ibid*, 45.

²¹⁴ *Ibid*, 45.

²¹⁵ *Ibid*, 45.

²¹⁶ *Ibid*, 45.

²¹⁷ *Ibid*, 47.

²¹⁸ *Ibid*, 47.

of law, and E2, when people are considered predominantly as authors of law.²¹⁹

According to Blichner and Molander, addressees of law have passive, negative and positive capacities in that juridification takes place when legal duties are accepted in place of other kinds of allegiance (passive), when individuals understand themselves to be entitled to do what is not forbidden (negative), and when “social well-being is thought of in terms of legally based provisions,” rather than in terms of charity or private obligations (positive).²²⁰

The purpose of recounting Blichner and Molander’s typology in this manner is not to advance their conception as more correct than that of Habermas, Cutler or Harmann. Rather, it is to present a more accurate reflection of the range and complexity of phenomena that can be comprised under the rubric of juridification. Indeed, Blichner and Molander conceive of juridification with still greater complexity, since they expect types A through E to interact in numerous combinations.²²¹

Complexity is also possible in the underlying motives and incentives that move individuals, groups, organizations and institutions to pursue the juridifying option in a given situation, as Silverstein makes clear in Law’s Allure. As mentioned earlier, Silverstein is aware of the dangers of juridification, but also understands that it can be the preferred option, or indeed the only realistic option, to achieve a given objective. In fact, Silverstein’s conception of motives and interests for juridification extends to a further level of nuance.

²¹⁹ *Ibid*, 47.

²²⁰ *Ibid*, 47.

²²¹ *Ibid*, 49.

He describes four reasons why juridification might be preferred. First, juridification might be considered effective or necessary.²²² For example, the cost in time and resources to achieve a goal through legislation (or negotiated agreement in the international sphere) could in a given case be significantly higher than the achievement of the same goal through a judicial decision.²²³ The result could also achieve more fully a given objective, since a given judicial decision requires compromise between a much smaller number of stakeholders than a given piece of legislation.²²⁴ Aboriginal groups in Canada found post-Charter jurisprudence an effective means to achieve specific objectives.²²⁵ The Court Challenges Programme in Canada during the 1980s and 1990s was also motivated to a degree by the perceived relative effectiveness and efficiency of judicial processes over legislative.²²⁶ For his part, Silverstein supports his assertion by reference to the famous strategy of the civil-rights and anti-poverty movements in the United States during the 1950s and 1960s.²²⁷

Second, juridification can be preferred because it has a mobilizing and consolidating effect upon individuals and groups.²²⁸ Silverstein cites *Roe v. Wade*,

²²² Silverstein, Gordon, *Law's Allure: How Law Shapes, Constrains, Saves, and Kills Politics* (Cambridge: Cambridge University Press, 2009), 21-23.

²²³ *Ibid*, 21-23.

²²⁴ *Ibid*, 21-23.

²²⁵ *R. v. Delgamuukw*, 1997, 3 S.C.R. 1010.

In *Delgamuukw*, the Gitksan and Wet'suwet'en chiefs successfully asserted aboriginal title to a total of 58,000 square kilometres of land in British Columbia.

²²⁶ Goreham, Richard, *Language Rights and the Court Challenges Program: A Review of its Accomplishments and Impact of its Abolition*, submitted to The Commissioner of Official Languages, (Ottawa, 1992).

²²⁷ Silverstein, Gordon, *Law's Allure: How Law Shapes, Constrains, Saves, and Kills Politics* (Cambridge: Cambridge University Press, 2009), 21-22.

²²⁸ *Ibid*, 23-25.

1973,²²⁹ and *Brown v. The Board of Education*, 1954-55,²³⁰ as prominent examples. As Silverstein writes, “[c]ourt rulings can goad social movements affirmatively (by providing an inspiring, organizing or rallying set of arguments) or negatively, as groups organize in resistance to, or rejection of, a court ruling.”²³¹ By effectively mandating the desegregation of American schools, *Brown* affirmed for the civil rights movement the effectiveness of the judicial option. *Roe v. Wade*, conversely, convinced the anti-abortion movement of the same thing, and made the judicial option central to the movement’s strategy from the moment of its inception. Thus, in these cases, juridification was advanced essentially by choice.

Third, Silverstein argues that many believe there to be a normative or moral superiority to the judicial process and to legal decision-making. As Silverstein states, “politics is about compromise, deals and tradeoffs,”²³² while law can be idealized in a way that is more difficult for contemporary democratic politics: “law is about justice, and courts and judicial decisions seem to offer a morally superior path.”²³³ Although the perception cannot withstand critical inspection, nevertheless legal processes appear to many to embody principles of neutrality and clarity, and this makes them appealing in

²²⁹ In *Roe v. Wade*, the USSC found that the US Constitution included a right to privacy. It therefore found unconstitutional all total bans on abortion, and limited such bans to the final trimester of pregnancy, when the state was deemed to have an interest in the life of the prospective child that overrode a woman’s right to privacy. *Roe v. Wade*, 410 U.S. 113 (1973).

²³⁰ The USSC in *Brown* found that the policy of ‘separate but equal’ treatment of black students and white students did not in practise allow for equal treatment. The Court therefore ordered the desegregation of public schools in Alabama. The decision in *Brown* was issued by the USSC in two parts, the first in 1954 and the second in 1955. *Brown v. Board of Education*, 347 U.S. 483 (1954); *Brown v. Board of Education*, 349 U.S. 294 (1955).

²³¹ Silverstein, Gordon, Law’s Allure: How Law Shapes, Constrains, Saves, and Kills Politics (Cambridge: Cambridge University Press, 2009), 24.

²³² *Ibid*, 25.

²³³ *Ibid*, 25.

themselves.²³⁴ Silverstein's emphasis here is particularly American: his subject, after all, is the juridification of American politics. Even so, his point that some consider legal and judicial processes morally superior to electoral and representative political processes, must be conceded at least to a degree. The opposite, that no one holds such an opinion, is not credible. Silverstein employs the powerful example of the profoundly juridifying response to Watergate²³⁵ in order to illustrate his point:

The Watergate-era reforms took the form of statutory, procedural attempts to solve political problems – legalizing, constitutionalizing, and even criminalizing the political process. Politics was to be cleansed, formalized and contained. The budget process would be automated, war powers allocated, assigned, formalized and proceduralized; campaign finance regularized and regulated; and political corruption controlled by prosecutors independent of all political influence. These were efforts by Congress to adopt the approach, the precision, and what some thought and hoped was the black-and-white of law.²³⁶

The fourth reason Silverstein calls 'blame avoidance.' By this he means the capacity and the tendency for elected representatives to avoid the enactment of

²³⁴ This is why, for example, a 2010 UNCTAD study on the gender dimension of trade policy reform in countries acceding to the WTO declared, surprisingly, that WTO law is entirely gender neutral. (United Nations Conference on Trade and Development, *Assessment of the Impact of Trade Policy Reform on Countries Acceding to the World Trade Organization: The Gender Dimension*, (New York and Geneva: United Nations, 2010)).

²³⁵ 'Watergate' refers to the scandal surrounding the break-in at the headquarters of the Democratic National Committee at the Watergate Complex in 1972. The resulting investigation found that the break-in had been ordered by the office of US President Nixon, and that it was only one example of a series of similar tactics. In the resulting scandal, Nixon made the decision to resign the Presidency rather than be impeached and convicted.

²³⁶ Silverstein, Gordon, Law's Allure: How Law Shapes, Constrains, Saves, and Kills Politics (Cambridge: Cambridge University Press, 2009), 27-28.

controversial or unpopular policies by deferring to legal and judicial processes.²³⁷

Silverstein gives the example of the 99th Congress in the United States, which was unable to agree to reductions in spending necessary to meet its budgetary targets, and instead passed a law requiring that US President Reagan, then in his second term, implement reductions to the specified amount.²³⁸ Tushnet has also written extensively concerning the tendency for elected representatives to leave controversial topics to decisions by the judiciary.²³⁹ Knopff and Morton have addressed the same topic at length in the Canadian context, particularly with respect to the Canadian Charter of Rights and Freedoms.²⁴⁰ To these must be added Davis' observation that the administrations of US Presidents George W. Bush and Barack Obama have used WTO DSM adjudication as a means to escape pressure brought by the US Congress to 'get tough' with China.²⁴¹

Finally, quite aside from reasons why juridification might be preferred, Silverstein also addresses two important reasons why it can be considered necessary. First, institutional barriers can make the achievement of a given objective appear impossible except by recourse to the judiciary.²⁴² For example, Silverstein argues that the federal structure of the United States constitution, combined with the use of the filibuster in the

²³⁷ *Ibid.* 28.

²³⁸ *Ibid.* 28.

²³⁹ Tushnet, Mark, Taking the Constitution Away From the Courts (Princeton: Princeton University Press, 1999).

²⁴⁰ Knopff, Rainer and Ted Morton, The Charter Revolution and the Court Party (Peterborough: Broadview Press, 2000). This is the central argument of the work.

It is interesting to note in this connection that the perspectives of Knopff and Morton, tending toward libertarianism, and of Cutler, Hartmann, *et al.*, grounded in Marxism, arrive at the shared conclusion, and the shared fear, that there is too much juridification in the form of formalization and adjudication.

²⁴¹ Davis, Christina, Why Adjudicate? Enforcing Trade Rules in the WTO (Princeton: Princeton University Press, 2012), 159.

²⁴² Silverstein, Gordon, Law's Allure: How Law Shapes, Constrains, Saves, and Kills Politics (Cambridge: Cambridge University Press, 2009), 17-18.

US Senate, made the juridifying option the only practicable course to address segregation in the southern states during the 1950s and ‘60s.²⁴³ Equally, Silverstein argues that profound political barriers can make recourse to the judiciary seem necessary.²⁴⁴ He uses the example of prison reform in the US during the 1960s, when wide agreement amongst enforcement officials, law officers, scholars, legal professionals, and elected politicians could not produce the reform that all considered necessary, because of the perception that an exceptionally great political cost would attend those who pursued and implemented the reforms.²⁴⁵

A similar dynamic operates with respect to the representation of women and women’s interests at the WTO. Very few disagree with the need to resolve this question, but none has developed a strategy for doing so.²⁴⁶ This is due to the perception of a high political and economic cost, and to uncertainty about whether the WTO is the correct venue to address the question of the representation of women and women’s interests. This ambivalence has in turn convinced some that the DSM is the best means for addressing the representation of women and women’s interests. As a result, in Chapter 6 the study examines in detail the various ways in which the ‘introduction of gender’ into the WTO has been considered through the Dispute Settlement Mechanism. The relatively high compliance rate with Panel and Appellate Body reports and the capacity for authorized retaliation under WTO dispute settlement have made the DSM attractive to those, including feminists, who are inclined to seek their goals by judicial means.

²⁴³ *Ibid*, 17-18.

²⁴⁴ *Ibid*, 18-20.

²⁴⁵ *Ibid*, 18-20.

²⁴⁶ As was demonstrated by interview undertaken for the present study in Brussels and Geneva, at EU DG-Trade, at the WTO, and with representatives of NGOs.

Thus Silverstein gives four reasons why juridification might be preferred and two why it might be deemed necessary. As with Blichner and Molander, the purpose of dwelling at some length upon Silverstein's work is to demonstrate the complexity of juridification. Certainly, Silverstein's analysis is open to critique for its reliance upon the American context and upon US Supreme Court cases, as well as for the imbalance toward juridification in courts – part of type C in Blichner and Molander's typology.

Nevertheless, what Silverstein shows is that, quite apart from different kinds of juridification, very great complexity exists even in reasons for and motivations toward juridification. When Silverstein's complexity of motivation is considered in light of Blichner and Molander's complexity of type, when the two are taken together, it becomes clear that juridification comprises a series or collection of phenomena that is exceptionally complex, though always tending toward the ingress of law. This complexity is much greater than what is addressed by Cutler, Hartmann or even Habermas as 'juridification.' It is also what allows juridification at once to be necessary to democracy and a threat to democratic norms.

This problem, that juridification is both constitutive of and dangerous to democracy, is what becomes apparent when the complexity of juridification is delineated even in part. Brunkhorst understands well the positive, constitutive, welfare-enhancing and democratizing potential of juridification in its historical and contemporary context. He describes the medieval Catholic Church as a “‘juridified’ constitutional system enabling the reconciliation of lasting opposites.”²⁴⁷ That is to say, the juridification of the Catholic Church during the 11th and 12th centuries, the growing scope, complexity and

²⁴⁷ Brunkhorst, Hauke, “The Co-evolution of Cosmopolitan and National Statehood – Preliminary Theoretical Considerations on the Historical Evolution of Constitutionalism,” Cooperation and Conflict, vol. 47, no. 2 (2012), 182.

robustness of its legal order, allowed it to conceptualize itself as a universal legal order, a universal confederation of *civitas dei* and *civitas terrana*.²⁴⁸

This juridified order resulted in a system of canon law and clerical power that on one hand made lawful torture and the exploitation of rural populations, but on the other hand made Roman Law for the first time an instrument available at least in some degree to all classes for the assertion of legal rights. Law became, in theory at least, “the main instrument to change the world in light of biblical egalitarian universalism.”²⁴⁹ In this context, Brunkhorst enunciates the conundrum of juridification in the following passage: “it was just the same law that contained all the progress in the consciousness of freedom that could be used to transform, improve and increase oppressive power, exploitation and class rule, and make it more effective than ever before.”²⁵⁰

However, to be cognisant of a conundrum is to be cognisant of both sides: that juridification is both necessary and dangerous to democracy, because only juridification gives access to the law. It is in this dual light, but with particular emphasis upon the freedom-enhancing and democratizing aspects of juridification, that Brunkhorst describes the period between the Atlantic Charter of 1941 and the advent of the European Community in 1951 as one of global juridification, global constitutionalization and “massive revolutionary change.”²⁵¹ It is also in this light that Brunkhorst identifies the democratizing reforms of 1989 in the former Soviet bloc as a profound moment of global juridification, even if he believes the reforms to have brought universal capitalism more

²⁴⁸ *Ibid.* 182.

²⁴⁹ *Ibid.* 184.

This ‘universalism’ was of course never more than ideal and in theory. However, this was enough for the idea of universalism to shape the idea of law.

²⁵⁰ *Ibid.* 184-185.

²⁵¹ *Ibid.* 187.

than universal democratic self-determination.²⁵² The central point for the present study is that the conundrum Brunkhorst identifies persists in every instance of juridification, from the 11th century and before to the present, and must be addressed in the course of the juridification of international trade governance and global economic governance. This highlights the importance placed within IGI upon hybridization and upon soft law as means to limit hard-law juridification within an institution, and upon the need to maintain separation between institutions of global governance.

Both the conundrum of juridification and its capacity to empower are developed by Bohman in “Constitution Making and Democratic Innovation: The European Union and Transnational Governance.” Bohman defines juridification as “the tendency toward the increasing expansion of law and law-like methods of formal rules and adjudication to new domains of social life.”²⁵³ This is a concise but wide-ranging definition that could fairly be said to comprise Blichner and Molander’s juridification types A, C, D and E. However, it cannot be said to account for the ‘differentiation’ aspect of juridification type B. This omission carries the important consequence of neglecting the differentiation between hard law and soft law, and the opportunities this provides for the ingress of law.

Nevertheless, Bohman’s understanding of juridification is of particular significance because of two concepts it allows him to articulate. First, following Habermas verbatim, ‘reflexivity’ is understood by Bohman to entail the juridification of the legitimization process itself.²⁵⁴ That is to say, suffrage itself, equal suffrage, legal rights, formal representation and substantive representation are all examples of

²⁵² *Ibid*, 193.

²⁵³ Bohman, James, “Constitution Making and Democratic Innovation: The European Union and Transnational Governance,” *European Journal of Political Theory* (July 2004), 321.

²⁵⁴ *Ibid*, 323.

juridification, brought about by juridification and implemented by juridification. They are, of course, laws themselves, but they also convey the ability to change laws. They are constitutive of the social and political order, but are also constitutive of the ability to change the social and political order. This is the essence of their reflexivity, and reflexivity is the product of juridification.²⁵⁵ Of course, the present study focuses upon the representation of women and women's interests within the WTO; it does not dwell upon suffrage or direct elected representation as such, because they are not comprised within the institutional structure of the WTO at present. The point, however, is that any representation of women and women's interests will of necessity be a moment of juridification within a long process of juridification, that juridification can bring about democratization in many different forms, and that a process of juridification is in fact necessary to democratization.

The second of Bohman's concepts is that juridification is best understood as a problem of governance.²⁵⁶ It is a problem because it is the means to both domination and non-domination, and one cannot be attained without entertaining the possibility of the other. The solution, then, cannot be juridification as such, but the balance between juridification and over-juridification. This is another example of how Cutler, Hartmann, and other ardent critics are strictly correct in their critiques, but insufficient in their conceptualization of what juridification entails, and inattentive to the necessary constitutive function of juridification for democratic governance. The same point is echoed in Davis' fundamental argument that formalized and juridified dispute settlement at the WTO can generally be considered a good thing from the perspective of nearly all

²⁵⁵ *Ibid*, 323.

²⁵⁶ *Ibid*, 334.

WTO Members and according to the objectives they have themselves articulated.²⁵⁷ The key is to juridify sufficiently to provide reflexivity, and to provide access to the institutions of power, but not to juridify so much as to make the institutions of power the easy tools of domination. Thus it is essential for the present study to attend closely to the juridification of international trade governance and global economic governance – to their increasing scope, complexity and robustness – if it is to attain its purpose of determining whether the WTO can represent women and women's interests, and therefore whether global economic governance can take a democratic turn.

It remains, then, to clarify precisely the understanding of juridification employed in the study. As stated at the outset of this section, juridification in the present study may be understood as 'the ingress of law' in all its forms. This understanding is wide-ranging and comprises types A through E of the Blichner-Molander typology, but modifies the typology to add a type 'F'. The modified Blichner-Molander typology of juridification is therefore as follows: (A) 'constitutive juridification'; (B) 'law's expansion and differentiation'; (C) 'increased conflict solving by reference to law'; (D) 'increased judicial power'; (E) 'legal framing'; and (F) 'increased robustness.'²⁵⁸

²⁵⁷ Davis, Christina, Why Adjudicate? Enforcing Trade Rules in the WTO (Princeton: Princeton University Press, 2012).

²⁵⁸ The typology is henceforth referred to as the modified Blichner-Molander typology.

Table 1: Modified Blichner-Molender Typology of Juridification – The Ingress of Law – Definitions

| Type of Juridification | Definition |
|---|--|
| A - Constitutive Juridification | “When norms constitutive of a political order are established or changed to the effect of adding competencies to the legal order.” |
| B - Law’s Expansion and Differentiation | The process by which “an activity becomes subjected to legal regulation or more detailed legal regulation.” |
| C - Increased Conflict Solving by Reference to Law | The process by which “conflicts in a society increasingly are solved by reference to law.” |
| D - Increased Judicial Power | An increase of indeterminacy (the difficulty of determining the state of the law and jurisprudence) or a decrease of transparency (the degree of openness and intelligibility of the law from the point of view of the citizen). |
| E - Legal Framing | “The increased tendency to understand self and others, and the relationship between self and others, in light of a common legal order,” in which individuals “increasingly tend to see themselves as belonging to a community of legal subjects with equal legal rights and duties.” |
| F - Increased Robustness | Increased voluntary compliance, including a culture of accountability, compliance with soft law, and unforced compliance with judicial decisions. Also increased coerced compliance, including compliance under threat or fact of penalty, the use of force, and the abuse of power. |

Source: The Blichner-Molander typology of juridification was updated by the author by having added type F – Increased Robustness. The other categories of juridification are extracted from the text of the following article: Blichner, Lars Chr., and Anders Molander, “Mapping Juridification,” *European Law Journal*, vol. 14, no. 1 (January 2008)

Each of these types is readily apparent with respect to the WTO, which is the focus of Chapter 4 in more detail. ‘Constitutive juridification’ may be observed in the Marrakesh Agreement, the Dispute Settlement Understanding and other examples of fundamental WTO law. ‘Law’s expansion and differentiation’ may be found, for example, in such agreements as TRIPS and GATS, which expand the scope of trade governance, but which also differentiate in that some WTO Members are allowed to agree to different exceptions or delays in implementation. Free-trade agreements and regional trade agreements may also be said to expand and differentiate trade-law. The increased robustness, scope, complexity and utilization of formal dispute settlement under the WTO, as opposed to dispute settlement under the GATT, constitutes ‘increased conflict solving by reference to law.’ The WTO DSM also represents ‘increased judicial power’ in the sense that, systemically, international trade governance has come to rely increasingly upon formal dispute settlement mechanisms, such as that employed by the WTO. ‘Legal framing’ is readily evident in the use of formal, adjudicative dispute settlement in FTAs and RTAs, in the legal language employed in new trade agreements, and in public and political discourse concerning trade disputes and trade agreements. Finally, ‘increased robustness’ is provided for by the explicit endorsement of the possibility of retaliatory sanctions in the WTO DSU. Conversely, the understanding of juridification employed by Cutler, Hartmann and other ardent critics of juridification is dominated by the expansion and differentiation of law, increased power of the judiciary, and increased legal framing, but addresses only cursorily both constitutive juridification and the positive, constructive aspects of juridified conflict solving. Clearly, such an understanding is correct but insufficient; an understanding that incorporates all of

Blichner and Molander's types must be employed in order to address sufficiently the complexity of the juridification of international trade governance and global economic governance.

More than this, the study expands upon Blichner and Molander in four significant ways. First, it places particular emphasis upon the role of soft law. This itself has two interconnected aspects: (a) soft law can facilitate the constitutive possibilities of juridification by varying the nature and extent of commitments between signatories to a new agreement, thereby reducing the risk of creating and acceding to new agreements; (b) therefore, it is also the case that by facilitating law's differentiation, soft law can facilitate law's expansion in such a way as to be constitutive of new agreements. This capacity for juridification by soft law is particularly important with respect to the representation of women and women's interests at the WTO through initiatives such as Aid-for-Trade, discussed in detail in Chapter 7.

Second, the study adds a type F, 'increased robustness,' to Blichner and Molander's typology. This is necessary because Blichner and Molander do not account sufficiently for compliance and accountability. It could be argued that their distinctions between passive, negative and positive under 'legal framing' (type E) capture elements of compliance and accountability; however, they remain insufficient. Even under 'legal framing,' Blichner and Molander cannot adequately express systemic compliance, or the extent to which legal decisions are complied with system-wide. Further they do not sufficiently account for the distinctions between accountability, compliance and coercion. Thus, they miss for the most part three important factors of juridification: (a) the rise of a systemic culture of accountability to commitments in legal agreements, including soft-

law and hard-law agreements; (b) rising rates of compliance with legal agreements, both hard law and soft law, and with judicial decisions, regardless of the favorability of the decision; and (c) the rising capacity to coerce compliance, extending from a framework to authorize retaliatory measures, as in the WTO, to the abuse of power, dwelt upon by Brunkhorst and Bohman. For these reasons, the study divides type F, ‘increased robustness,’ into two parts: F1, or ‘voluntary compliance,’ which includes accountability, compliance with soft law, and unforced compliance with judicial decisions; and F2, or ‘coerced compliance,’ which includes compliance under threat or fact of penalty, as well as the use of force and abuse of power.

Third, by focusing upon the juridification of international trade governance and global economic governance, the study has the effect of combining Blichner and Molander’s expansive understanding of juridification with Cutler’s focus upon the juridification of economic activity, and with the global scope at which Bohman, Hartmann, Swan, Purvis and others pitch their analyses. In so doing, the study is able to partake of the strengths of the analyses of the critics of juridification and of those who grasp its constitutive and democratizing potential.

Fourth, the study understands juridification within the context of IGI, which was developed earlier in this chapter. That is to say, it places juridification within a system of discrete, hybridized and interconnected IOs that nevertheless do not constitute an integrated network in the sense that Slaughter employs the term. They provide for global governance, but they do not constitute a global government. To be consistent with IGI, then, the understanding of juridification employed in the study must take fully into account Bohman’s ‘problem of governance’ concerning juridification. It must be equally

cognisant of the capacity for juridification to provide access to the institutions of power and to provide tools for the abuse of power. Particularly in terms of the ingress of hard law, juridification within the WTO must be limited and the WTO must be capable of institutional evolution. From this it follows finally that the understanding of juridification employed in the study must incorporate fully the hybridization of soft law and hard law. Hybridization counters path-dependency of institutions because soft law can be used to mitigate the risks of change. This makes juridification less likely to proceed beyond the provision of institutional access to the provision of tools for the abuse of power. Nevertheless, hybridization also allows juridification to proceed with sufficient scope, complexity and robustness that it can be constitutive of institutions sufficiently powerful to provide for the effective democratization of global economic governance.

Hybridization of Hard Law and Soft Law *within* International Organizations of GEG

Being an original contribution of the study, there is no literature concerning the hybridization of hard and soft law in the context of global democratic governance *per se*. There are, however, two very important discussions of hybridization in the context of international organizations. In the context of 'The Rule of Law in Governing Regionalism in Asia,' Davidson defines soft law and hard law on a continuum between non-binding commitment (soft law) and binding obligation (hard law), between vague principle (soft law) and precise, highly elaborated rule (hard law) and, in terms of dispute

settlement, between diplomacy (soft law) and a formal court (hard law).²⁵⁹ He notes that APEC has made particularly effective use of soft law mechanisms and that the WTO has made particularly effective use of hard law mechanisms.²⁶⁰ Davidson specifically addresses the virtues of a hybridized system of governance in Asian countries. He states, “if one continues to look at the evolving legal framework … from the dichotomous viewpoint of ‘binding’ vs. ‘non-binding,’ ‘law’ vs. ‘non-law’ then it will be difficult, if not impossible, to achieve development of the framework for governing relations.”²⁶¹ Davidson concludes that a governance system incorporating both hard law and soft law would be more effective.

Finally, Davidson identifies six characteristics of soft law that constitute particular advantages of a hybridized form of governance. First, soft law can provide “flexibility in the implementation of an agreed course of conduct that is otherwise established as ‘hard law.’”²⁶² That is, soft law can soften the impact of the introduction of new hard law. Second, soft law can be used to reach agreement on general principles of cooperation where such agreement was not possible to achieve in the context of hard law.²⁶³ Third, “the utilization of soft law allows for the possibility of differentiation in institutions involving a wide set of actors.”²⁶⁴ That is, it allows different actors to be legally bound by specific principles to different degrees at different times. Fourth, soft

²⁵⁹ Davidson, Paul J., “The Rule of Law in Governing Regionalism in Asia,” in Nicholas Thomas, ed., Governance and Regionalism in Asia (London: Routledge, 2009), 233.

²⁶⁰ *Ibid*, 232-238.

²⁶¹ *Ibid*, 240.

²⁶² *Ibid*, 241.

²⁶³ *Ibid*, 241.

²⁶⁴ *Ibid*, 242.

law allows for “flexibility and diversity.”²⁶⁵ That is to say, it allows “states to adapt their commitments to their particular situations rather than trying to devise a ‘one-size-fits-all’ agreement.”²⁶⁶ Fifth, soft law reduces the sovereignty costs of entering multilateral agreements. This makes it easier both to construct new agreements and to revise existing agreements.²⁶⁷ Sixth and finally, soft law allows even “agreements to be made with parties that other parties to the agreement are not willing to formally recognize.”²⁶⁸ Davidson’s example applies to relations akin to those between China, Hong Kong and Taiwan. It also reinforces the principle of inclusion described above.

The second discussion of hybridization is Jayasuriya’s 2012 article, ‘Institutional Hybrids and the Rule of Law as a Regulatory Project.’ Jayasuriya describes institutional hybrids as a means for transnational actors and agencies to pursue ‘rule of law’ objectives.²⁶⁹ What is important in this, according to Jayasuriya, is “not the shift from law to nonlegal forms of regulation, but the relationship between ‘hard law’ and soft social norms of private or civil society actors and the resultant proliferation of institutional ‘hybrids.’”²⁷⁰ These hybrids allow inclusion of a significant range of new forms of what Jayasuriya calls ‘rule of law’ regulation. Moreover, given that “competing legal discourses are often located at different scales of governance,” legal hybrids between hard law and soft law can serve as a means by which these discourses can be managed

²⁶⁵ *Ibid*, 242.

²⁶⁶ *Ibid*, 242.

²⁶⁷ *Ibid*, 242.

²⁶⁸ *Ibid*, 242.

²⁶⁹ Jayasuriya, Kanishka, “Institutional Hybrids and the Rule of Law as a Regulatory Project,” in Brian Z. Tamanaha, Caroline Sage, and Michael Woolcock, eds., Legal Pluralism and Development: Scholars and Practitioners in Dialogue (Cambridge: Cambridge University Press, 2012), 148.

²⁷⁰ *Ibid*, 148.

and their tensions mollified.²⁷¹ Finally, Jayasuriya argues that hybridization allows for “new governance settings that challenge the ‘public’ and ‘private,’ ‘national’ and ‘global’ binaries of the Weberian and Westphalian notions of statehood.”²⁷² It is exactly this opening of new legal and new discursive space, not least between public and private, that makes hybridization a profound opportunity for the representation of women and women’s interests within global economic governance. This in turn would let one begin to speak of the democratization of global economic governance.

Conclusion

In the most general sense, the chapter served two purposes. First, it gave a comprehensive account of recent and important academic literature concerning ideas of democratic global governance. Second, it constructed the argument supporting the urgency of the study’s test of the democratic potential of global economic governance.

This second purpose involved three stages that provided the chapter’s structure. First, the chapter discussed four ideas of democratic global governance that together, for all intents and purposes, covered the possible ways in which one might conceive of democratic global governance: the idea of a global democratic state; ‘multitude,’ or the role of global civil society; a new world order of networks; and Inclusive Global Institutionalism (IGI).

The arguments in favour of a global state were its potential to represent the entire population of the world, its supposed capacity to address global problems, and its inevitability. Against these virtues were posited the following concerns: that assertions of

²⁷¹ *Ibid*, 149.

²⁷² *Ibid*, 149.

inevitability are unverifiable; that the establishment of a global democratic state is probably impracticable; and that a global state of any kind is likely to be deficient, or to become deficient, in domestic checks and balances, while not being subject at all to checks by international relations.

The idea of ‘multitude,’ or of democratic global governance based predominantly on global civil society, had the virtue of incorporating the interests of a wide public (or publics). Nevertheless, this idea was found to suffer difficulties of its own: that civil society relied upon state and international institutions to grant access; that it was difficult to be certain that civil society institutions actually represented those they claimed to represent; and, as Scholte *et al* found over the decade of the 2000s, that civil society organizations had not shown themselves to be very effective in creating fundamental change in institutions of global governance. It was found, in short, that civil society organizations might be necessary to any democratic global governance, but that they were insufficient in themselves.

The idea of a new world order of networks, had the advantage of recognizing and incorporating a long-term trend toward global governance by means of cooperation and institutional relationships between states, between IOs, and between states and IOs. The great difficulty, however, with the idea of a new world order of networks was found to be that it carried no check or balance, nor a very strong mechanism of accountability within its component parts. Thus, however democratic its origins, and however democratic the impetus toward interconnectedness, as long as it continued to grow, such a new world order of networks carried the significant and unmanaged danger that it would bend toward anti-democratic empire.

This left one of the most important of the study's original contributions: a fourth idea of democratic global governance that the study defined as Inclusive Global Institutionalism (IGI). This formulation took a very different approach to democratic global governance than the three other ideas mentioned above. It emphasized the institutions of global governance but insisted that they remain separate from each other. As such, IGI militated against the threat of 'empire' that could arise from networks of states and IOs. IGI also insisted upon working first to democratize the IOs that constitute the system of global governance at present. In this way, IGI incorporated a Burkean caution in its preference for democratizing the system of global governance as it stands at present, rather than attempting the invention of a new system. Thus, the study follows the precepts of IGI when it asks whether the representation of women and women's interests, a *sine qua non* of democracy in the 21st century, can be accomplished within the WTO. Further, insistence upon the democratization of discrete IOs militated against the anti-democratic danger of undue concentration of power to which a global state or a new world order of networks lay open. Finally, the 'Institutionalism' of IGI entailed a persistent focus throughout the study on the hybridization of hard law and soft law as a means to ensure institutional flexibility, the capacity for evolution, and the mitigation of path-dependency.

This last point is of particular import because it allows for the management of the dangers and possibilities of juridification in a way that would not be possible if the institutional hybridization of hard law and soft law were not emphasized. As such, the chapter explained three further points that are central to the study. First, using a modified version of Blichner and Molander's typology, it was explained what is meant by

juridification and how it can be conceptualized in terms of seven different types. This allows the study in Chapter 4 to establish the existence of a decades-long trend of juridification in global governance generally, and in global economic governance and the WTO in particular. Second, the chapter established that the urgency of democratizing global governance derives from the reflexivity of juridification, combined with path-dependency. ‘Reflexivity’ meant, in short, that juridification carries with it both the institutionalization of access to law and power that is necessary to democracy, and the capacity for the creation of institutions of law and power that are coercive, abusive and anti-democratic. ‘Path-dependency’ meant, in this case, that unless it is checked, a juridifying body will continue to juridify well past the point where democratic access to power becomes anti-democratic abuse of power. Third, the chapter explained how the hybridization of soft law and hard law within a given institution provides the flexibility necessary to counter the path-dependency of juridification, and thereby to guard, maintain and evolve the democratic character of the institution. Indeed, as the study’s final chapter shows in the case of the WTO and Aid-for-Trade, it is exactly this hybridization that allows for the innovation in the structure of an institution that is necessary to a democratic turn.

In sum, then, the present chapter explained the context and the urgency of the question of whether a democratic turn is possible in global economic governance as it is currently structured. It is the task of the rest of the study to answer this question. To that end, Chapter 3 develops the understanding of representation employed over the course of the study and shows that IOs can in fact achieve democratic representation, including the representation of women and women’s interests. Chapter 4 then uses the modified

Blichner-Molander typology to establish that the WTO can serve as a proxy for the general trend of the juridification of global governance and global economic governance since WWII. Chapter 5 then establishes that the WTO is the ‘hardest case’ for the representation of women and women’s interests, which is, again, a *sine qua non* of democracy in the 21st century. These two chapters allow the WTO to serve as a test-case for the possibility of a democratic turn in global economic governance generally. If the representation of women and women’s interests is necessary to democracy in the 21st century, and if it can be accomplished in the ‘hardest case,’ then it stands to reason that a democratic turn can at least begin in all other institutions of global economic governance. If it cannot be accomplished, then the conclusion may be formed that democratization as such is impossible in global economic governance as it is currently structured. Chapter 6 conducts the first part of this test, which concerns the possibility of the representation of women and women’s interests within WTO hard law. Chapter 7 then completes the test by investigating the possibility of the representation of women and women’s interests within WTO soft law and by means of hybridization.

Chapter 3 – A Proxy for Democratization: The Representation of Women and Women’s Interests

[T]here is more to be achieved in terms of improving diversity, including on gender mainstreaming.²⁷³

Pascal Lamy

Director-General (2005 – 2013)
World Trade Organization
15 March, 2010

In order to address whether the representation of women and women’s interests can be accomplished within global economic governance, it must first be established whether IOs are in fact capable of representation in a democratic sense. To this end, it is necessary to problematize the concept of democracy sufficiently to support the assertion that the representation of women and women’s interests is a *sine qua non* of democracy in the 21st century, regardless of the understanding of democracy employed. The concept of representation must then be problematized to a much greater extent. The chapter therefore shows that the representation of women and women’s interests is a *sine qua non* of democracy in the 21st century, that IOs are capable of representation, and that gender mainstreaming can serve as an effective means to achieve substantive and descriptive representation within an IO. All of these points serve either as new contributions to the

²⁷³ World Trade Organization, “Strengthening the WTO as *the* Global Trade Body,” Speech of Pascal Lamy to WTO General Council, 29 April 2009, http://www.wto.org/english/news_e/news09_e/tnc_chair_report_29apr09_e.htm (accessed 11 October 2010).

literatures of representation and gender, or as sustained critiques of widely-held positions and prominent texts within the literatures of representation and gender.

A *Sine Qua Non* of Democracy in the 21st Century: The Representation of Women and Women's Interests

It is helpful to begin the analysis with the following counterfactual question: is it conceivable that in the 21st century a polity that refused the vote to women or that refused women the right to stand for election would be considered democratic? Certainly, it would not be so considered by any of the established democracies in Europe, North America, Asia, or Australia. Nor indeed would such a country be considered democratic by China, India, Venezuela, South Africa or a host of other developing countries, if one judges by the standards those countries have set for themselves. Neither would any such country continue to be considered democratic were it to revoke women's suffrage or the ability of women to stand for election. Of course, this does not constitute a reasoned or empirical argument of a kind that would convince a skeptic; however, it helps to clarify the nature and significance of what would be implied were the representation of women and women's interests not considered a *sine qua non* of democracy in the 21st century. It would, in short, run counter to all practical experience of democracy at the present time.

It is also helpful briefly to consider how democracy itself is defined and understood. Etymologically, democracy derives from '*demos*' and '*kratia*, ' the latter essentially meaning 'power' or 'rule,' and the former 'the people.' As Coppedge, Gerring, *et al* note, in 'Conceptualizing and Measuring Democracy: A New Approach' from the time of Plato to the present day 'democracy' has been taken to mean 'rule by the

people.²⁷⁴ To state the obvious, it would follow that the rejection of the representation of women and women's interests as a *sine qua non* of present-day democracy carries with it the implication that women are not 'people.'²⁷⁵ More specifically, though, Coppedge, Gerring *et al* discern six different kinds of 'rule by the people': 'electoral,' which for them constitutes a minimalist conception defined solely by free and fair multiparty election of an effective government; 'liberal,' which prioritizes constitutionally guaranteed individual rights, civil liberties, limited government, transparency and decentralization; 'majoritarian,' the overriding priority of which is the consolidation of power in the majority, particularly as represented by disciplined political parties; 'participatory,' which prioritizes the direct participation of citizens in political processes, and can in theory approximate direct democracy; 'deliberative,' whose overriding requirement is that political decisions be the direct product of public deliberation, ideally involving all those who would be affected by a given decision; and 'egalitarian,' which requires that all citizens be equally empowered.²⁷⁶

Of course, there are other levels of nuance and other definitions that could be employed, but the above distinctions capture a significant range and are sufficient for the present study. Each of the six kinds of democracy outlined above clearly requires the representation of women and women's interests if its fundamental principles are to be

²⁷⁴ Coppedge, Michael, John Gerring *et al*, "Conceptualizing and Measuring Democracy: A New Approach," *Perspectives on Politics: A Political Science Public Sphere*, vol. 9, no. 2 (June 2011), 248.

²⁷⁵ Indeed, the argument of the Supreme Court of Canada when it denied women the right to be appointed to the Senate was that they were not 'persons' under the British North America Act, Canada's constitution at the time.

²⁷⁶ Coppedge, Michael, John Gerring *et al*, "Conceptualizing and Measuring Democracy: A New Approach," *Perspectives on Politics: A Political Science Public Sphere*, vol. 9, no. 2 (June 2011), 254.

It is well understood that these categories are not mutually exclusive and that there is significant overlap between them. Nevertheless, they demonstrate significant distinctions and cover a very wide range of possibilities.

met. A polity in the 21st century would not qualify as an electoral democracy if women could not vote or hold office, nor as a liberal democracy if women were not granted individual rights, nor as a majoritarian democracy if women, always near or actually forming a majority, had no share in government. Neither could a polity qualify as a participatory democracy in the 21st century if women were barred from participation, as a deliberative democracy if women were barred from public deliberation, or as an egalitarian democracy if, for example, a woman's vote was of lesser value than that of a man. In each of these cases, *mutatis mutandis*, the rejection of the representation of women and women's interests would nullify the polity's claim to the status of democracy. The same is true of the WTO and, by extension, of the institutions global economic governance generally. They cannot be called democratic until they are able to represent women and women's interests.

Even so, a skeptic might respond that each of the above scenarios has been the case in a past democracy, and even if this were not so, the above is confined entirely to theory, saying nothing about contemporary practise. To this, a wealth of empirical evidence may be adduced in response, especially concerning the rights of women to vote worldwide. Moreover, the absence of parity in women's representation has resulted in quotas being employed in an increasing number of countries worldwide, promoting the representation of women in parties, assemblies and legislative bodies.

With respect to the former, the extension of women's suffrage to all countries that pretend even to a modicum of democracy amply supports the assertion that the representation of women and women's interests is in the 21st century a *sine qua non* of democracy. It is the scope and breadth of this extension between 1893 and the present

that is particularly impressive. It was in 1893 that New Zealand became the first self-governing country²⁷⁷ to grant unqualified suffrage to women in national elections.²⁷⁸ Until that time only scattered regional states, provinces and territories had allowed women to vote, and in the large majority of these cases the right was limited to municipal elections, limited by property requirements, or in some other way abrogated. By 1902, only Australia and Finland could be counted with New Zealand.²⁷⁹ By 1930, though, women had been granted the unrestricted right to vote in 34 countries, and by 1960 this had increased to 75 countries.²⁸⁰ The number continued to increase through the rest of the 20th century and has done so through the opening years of the 21st. In 2013, in fully 223 countries worldwide women held the unqualified right to vote in national elections.²⁸¹ Even countries whose democratic character is very dubious or generally not credited, such as Iran and Saudi Arabia, have nonetheless introduced measures to allow women to vote. Indeed, in Iran, women have been allowed to vote since 1963 under the Shah, and continue to vote in the Islamic Republic. In Saudi Arabia, national elections are not held, and to date only men have been allowed to vote in municipal elections, but King Abdullah bin Abdulaziz al-Saud has promised that women would be allowed to vote in

²⁷⁷ It seems best to use the term ‘country’ here, since New Zealand had been self-governing in all domestic matters including native populations since the 1860s. Having said that, ‘country’ is not meant here to imply full sovereignty, since New Zealand remained a colony of the British Empire in 1893, did not gain Dominion status until 1907 and did not adopt the Statute of Westminster until 1947. ‘Country’ simply works better here than ‘polity,’ which is not accurate (other polities granted women’s suffrage before New Zealand) and ‘colony,’ which would limit the discussion unnecessarily to imperial colonies.

²⁷⁸ Inter-Parliamentary Union, “Women’s Suffrage: A World Chronology of the Recognition of Women’s Right to Vote and to Stand for Election,” <http://www.ipu.org/wmn-e/suffrage.htm> (accessed 27 June 2013).

²⁷⁹ *Ibid.*

²⁸⁰ *Ibid.*

²⁸¹ *Ibid.* Also United States, Central Intelligence Agency, “The World Factbook,” <https://www.cia.gov/library/publications/the-world-factbook/fields/2123.html> (accessed 27 June 2013).

2015 and to run for office.²⁸² The point here is not that Saudi Arabia and Iran are democratic, but that the representation of women and women's interests is viewed so widely as a *sine qua non* of democracy at present that any country that pretends to a semblance of democracy also considers it necessary at least to seem to represent women and women's interests.

A similar development may be observed with respect to the descriptive representation of women in democracies worldwide. By 2013 no country that claims to be a democracy can bar women from standing for election. Still more tellingly, by 2006 quotas were employed in more than 100 countries to ensure and positively require women's representation.²⁸³ This has taken three forms. First, at time of writing, 14 countries in Africa, Asia and the Middle East employ quotas that reserve seats in single or lower houses of Parliament.²⁸⁴ In 76 countries, one or more parties employ quotas that ensure that a fixed percentage of the party's candidates are women.²⁸⁵ Finally 40 countries employ legislated or constitutional quotas that ensure that a fixed percentage of representatives in single or lower houses of parliament will be women.²⁸⁶ In short, the world evolved to the point where in 2009 quotas were employed in more than 100 countries promoting women's descriptive representation.

²⁸² The Atlantic, "In Saudi Arabia, A Quiet Step Forward for Women," 26 October 2011, <http://www.theatlantic.com/international/archive/2011/10/in-saudi-arabia-a-quiet-step-forward-for-women/247351/> (accessed 27 June 2013); BBC News Middle East, "Women in Saudi Arabia to Vote and Run in Elections," 25 September 2011, <http://www.bbc.co.uk/news/world-us-canada-15052030> (accessed 27 June 2013).

²⁸³ Krook, Mona Lena, "Reforming Representation: The Diffusion of Candidate Gender Quotas Worldwide," *Politics & Gender*, vol. 2 (2006), 303.

²⁸⁴ Krook, Mona Lena, *Quotas for Women in Politics: Gender and Candidate Selection Reform Worldwide* (Oxford: Oxford University Press, 2009), 227.

²⁸⁵ *Ibid*, 229-235.

²⁸⁶ *Ibid*, 236-237.

In sum, then, the representation of women and women's interests is essential to the range of understandings of democracy identified by Coppedge, Gerring *et al*, which comprises nearly the full range of understandings employed at present. Moreover, as expressed in the right to vote in national elections, the representation of women and women's interests is fundamental to democracy in 223 countries worldwide. Indeed, there is no country that calls itself a democracy in which women do not hold the right to vote on an equal basis with men. Finally, there are quotas in more than 100 democracies worldwide, requiring the descriptive representation of women either as elected representatives or as candidates. If these factors do not comprise a *sine qua non* of democracy in the 21st century, then it is very difficult to understand what such a *sine qua non* could possibly be.

Understanding Representation at the Global Level: 'Gender Mainstreaming' as an Avenue for the Representation of Women and Women's Interests

A second methodological concern is the need to clarify more fully what is meant in the study by 'representation' in the context of 'the representation of women and women's interests.' This concern comprises two parts: first, what is meant by 'representation' in the study; and second, how an IO can be said to 'represent' women, particularly when delegates to IOs are sent as official representatives of members.

Like a significant portion of the literature of democracy, representation and gender, the study employs Pitkin's taxonomy of representation,²⁸⁷ which distinguishes between descriptive representation and substantive representation. Descriptive

²⁸⁷ Pitkin, Hanna Fenichel, The Concept of Representation (Berkeley: University of California Press, 1967).

representation is generally used to refer to the physical traits of the person or group being represented, in this case sex. As Celis and Mazur state, “descriptive representation refers to what the representatives ‘look like’; who they are is what makes them representative.”²⁸⁸ In the study, ‘the representation of women’ is essentially synonymous with descriptive representation. ‘Substantive representation’ concerns the matter represented and reflects the quality of the representation. As Celis and Mazur state, it is “established by what the representatives do, their acts for the issues and interests of concern for the represented.”²⁸⁹ In the context of the study, ‘the representation of women’s interests’ is essentially synonymous with substantive representation.

This distinction immediately gives rise to a number of concerns that must be addressed before proceeding further. First, it will be noted that the formulation above spoke of ‘women’; i.e., ‘sex’ rather than ‘gender.’ In this, the study mirrors the substance, if not always the precise language, of most recommendations that arise from WTO, UN and national government documents. That is to say, recommendations generally are made in such documents toward the material or socio-economic betterment of the situation of women. For example, the International Trade Center’s *Strategic Plan for 2012-15* names “a better understanding of women and trade” as one of its priorities.²⁹⁰ Equally, the WTO’s 2012-13 *Aid for Trade Work Programme* addresses the creation of employment for women, export strategies for women in trade, and the creation of new opportunities

²⁸⁸ Celis, Karen, and Amy G. Mazur, “Hanna Pitkin’s ‘Concept of Representation’ Revisited: Introduction,” *Politics & Gender*, vol. 8 (2012), 508.

²⁸⁹ *Ibid*, 508.

²⁹⁰ International Trade Center, *Strategic Plan 2012-2015* (March 2012), 13.

for female entrepreneurs.²⁹¹ Even where ‘gender’ is used, it is not generally in the context of an enquiry concerning the nuances of the term, but as a signifier to acknowledge that a difference exists between men and women. Thus, the ITC considers the ‘gender dimension’ in its projects, intends to make its strategic framework ‘gender responsive,’ and desires to achieve ‘gender-sensitive reporting’ and ‘gender parity in staffing’.²⁹² The use of ‘gender parity’ here is key; it clearly implies the existence of two sexes, male and female, that should be equally represented in staffing; i.e., ‘sex’ and ‘gender’ are being used synonymously. Zalewski recognizes this usage of ‘gender’ in a negative sense when she argues that “in its pursuance of social justice, gender mainstreaming has not adequately moved beyond the male-female dichotomy and consequently regularly ignores interfaces between race, sex, gender, nationality, ethnicity, sexuality and power.”²⁹³ Finally, in all interviews at EU DG-Trade and at the WTO, it was clear that ‘gender’ was equated with ‘women.’ The interviews conducted for the present study did not provide even one exception to this statement.

In other cases, where usage is so widely accepted as to render a different usage merely confusing, the study adheres to the common usage. Thus, the study considers ‘gender mainstreaming’ rather than ‘women mainstreaming,’ but ‘women’s interests’ rather than ‘gender interests.’ In general, this is not a study of the nuances in the usage of ‘gender’ and ‘women.’ Too much can easily be made of the infinite nuance possible in

²⁹¹ World Trade Organization, Committee on Trade and Development: Aid for Trade, *Aid-for-Trade Work Programme 2012-2013: Deepening Coherence*, 9.

²⁹² International Trade Center, *ITC Gender-Mainstreaming Policy* (28 April 2011), 7-11.

²⁹³ Zalewski, Marysia, “‘I Don’t Even Know What Gender Is’: A Discussion of the Connections between Gender, Gender-mainstreaming and Feminist Theory,” *Review of International Studies*, vol. 36 (2010), 25.

This also reflects how, although ‘gender’ comprises differences of sexuality, there is no evidence that gender mainstreaming is used to address LGBT difference. Rather, LGBT appears not to be operationalizable in a practical and institutional context with relation to economic activity.

language, which can cause significant distraction without meaningful benefit to such questions as are at issue in the present study. The overarching goal of the present study in its usage of ‘gender’ and ‘women’ is to use ‘women’ where ‘women’ is clearly meant, and otherwise to adhere to common usage and avoid confusion.

More importantly, it is crucial to consider the possibility of both the representation of women and the representation of women’s interests because both would be necessary to any democratic turn in global economic governance. Again, a few points here require emphasis. First, the plural is stressed – women’s interests rather than women’s interest. In no sense does the study suggest that all women have an identifiable interest or group of interests, or that ‘women’s interests’ cannot change or contradict each other. Women may share interests in common, but manifesting such interests in politics requires the formation of a common constituency; women also have conflicting interests. It is not necessary for the study to detail the content of women’s interests in order to argue that the representation of women’s interests is necessary to any democratic turn, although in many cases the argument is aided by the illustration of the content of women’s interests. Second, this follows Vickers’ argument in ‘The Trouble With Interests’ that the pursuit of ‘women’s interests’ carries with it the tactical requirement at least for a significant number of women to agree to concentrate upon a relatively narrow and well-defined interest or set of interests.²⁹⁴ Third, in no logical or necessary way does this constitute the essentialization of any interest or set of interests – it is, again, a tactical requirement only. Fourth and finally, throughout the study the substantive representation of women’s interests is often equated with gender mainstreaming. This is because there

²⁹⁴ Vickers, Jill, “The Problem with Interests: Making Political Claims for ‘Women,’” in Louis Chappell and Lisa Hill, eds., The Politics of Women’s Interests: New Comparative Perspectives (London: Routledge, 2006), 5-38.

exists no electoral means to advance the substantive representation of women's interests in IOs. Equally, it is because to date gender mainstreaming has been the most effective (although not at all perfect) means to advance the representation of women's interests in governing bodies and especially in IOs. APEC and the EU are advanced as examples over the course of the study.

Having said this, the need for both descriptive and substantive representation – the representation of women and the representation of women's interests – gives rise to the following four serious objections to the study's basic purpose. The first objection is that gender mainstreaming is limited to the substantive representation of women's interests and cannot advance the descriptive representation of women through electoral processes. If this were so, the study's frequent equation of the representation of women's interests with gender mainstreaming would render less likely the descriptive representation of women, which the study holds to be necessary to any democratic turn in global economic governance. The second objection holds that as a response the study should separate the representation of women from the representation of women's interests and concentrate upon the latter. This would carry profound implications for the capacity of global economic governance to take a democratic turn, and arguably would preclude the full realisation of such a turn. The third objection is that the hybridization of soft law and hard law, understood by the study as a primary means to advance the representation of women and women's interests, would not provide a solution. This would be because hybridization could help to advance the substantive representation of women's interests, but could not bring about the descriptive representation of women. The fourth objection holds that IOs have an inherent democratic deficit that precludes

them from descriptively representing women or any other marginalized group excluded from nation-states' centres of decision-making power. This is because women in an IO's Secretariat, or female delegates to IOs from members, do not in fact represent women; rather, they represent the IO, or the members as a group, or an individual member-state. This, again, would have a profound effect upon the ability of global economic governance to take a democratic turn.

All four of the above objections can be qualified sufficiently or met fully. First, it may be admitted that gender mainstreaming can only exercise persuasion toward the descriptive representation of women in delegations to IOs from members. However, in a Secretariat that has control over its own hiring, as the WTO Secretariat has, gender mainstreaming can have a significant and direct effect upon the descriptive representation of women within the WTO. Moreover, if the Secretariat has control of its own research, which the WTO Secretariat has had to a degree since 2010, gender mainstreaming can lead to work that exercises a degree of persuasion toward the descriptive representation of women in member-state delegations. This possibility is discussed in detail in Chapter 7. Finally, if gender mainstreaming is able to advance the substantive representation of women's interests, it could serve to persuade at least some elements or delegations in a given IO that the descriptive representation of women is a good to be pursued.

In this respect, it is helpful to emphasise that descriptive representation in the international sphere must be achieved by appointment rather than election, since at present there exists no IO to which election is a possibility. This is helpful because the gender and representation literature suggests that some success has been achieved toward the representation of women by means of descriptive representation through appointment.

For example, Vickers notes the ‘femocrat’ appointment by Australian Labour Prime Ministers of women to high bureaucratic positions in order to court the ‘women’s vote.’²⁹⁵ She further notes that the percentage of women senators appointed to represent regions in Canada and Malaysia exceeds in both cases the percentage of women elected.²⁹⁶ Finally, it was pressure from organized women during negotiations toward the Canadian Charter of Rights and Freedoms that caused the adoption of the standard that 3 of 9 Canadian Supreme Court Justices would be women.²⁹⁷ These examples show at least that organized pressure from women’s groups can improve the descriptive representation of women by means of appointments. To the extent that ‘gender mainstreaming’ is possible within the WTO, it could act as a source of pressure analogous to that which led to the examples above. That is to say, ‘gender mainstreaming’ at the WTO, whether hard law or soft law, and even if limited to the Secretariat, could be expected to exert pressure upon the Secretariat and the delegations to improve the descriptive representation of women by means of appointment. This is so even if the gender and representation literature addresses descriptive representation by appointment much less than by election.

Second, it follows that if the Secretariat of a given IO has control over hiring or its own research, then there is no need to discard the descriptive representation of women in favour of the substantive representation of women’s interests. Indeed, to do so would be damaging, since it would unnecessarily predetermine the conclusions of the study against the possibility of a democratic turn in global economic governance. The

²⁹⁵ Vickers, Jill, “Women’s Representation, Fragmented Citizenship and Territorial Pluralism: Family Law Reform in Federations, North and South,” paper presented at the *American Political Science Association Annual Meeting*, 2012 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2107509 (accessed 7 July 2013), 15.

²⁹⁶ *Ibid*, 15.

²⁹⁷ *Ibid*, 15.

representation of women and women's interests is comprised of descriptive and substantive components, both of which are necessary to any democratic turn.

Again, the key here is to understand that the study does not purport to show how the WTO can 'achieve democracy' or what a democratic WTO would look like, but only to ask whether the WTO can take a turn toward democracy by achieving the representation of women and women's interests. Therefore, there is no need to articulate here how the WTO might develop an electoral process to overcome any democratic deficit. However, there is a need to articulate how the descriptive representation of women at the WTO counts as representation. The understanding of representation employed in the study accords with the concept of representation articulated by Urbinati, particularly in Representative Democracy: Principles & Genealogy. For Urbinati, representation is a necessarily and continually indirect, fragmented and changing expression of a continually changing and fragmentary sovereign will. As she states concerning a hypothetical representative of a hypothetical nation, "she is a representative of the nation because and insofar as she expresses a part of the nation when she makes claims before the whole nation and in the name of the principles it stands for as if they were consistent with the hypothetical sovereign will."²⁹⁸ Under this construction, representative democracy is not a poor substitute for direct democracy but an improvement upon it. Moreover, once directness is replaced conceptually by indirectness as an ideal of democratic government, descriptive representation becomes easier because appointed representatives can also fit within Urbinati's framework of representative democracy.

²⁹⁸ Urbinati, Nadia, Representative Democracy: Principles & Genealogy (Chicago: University of Chicago Press, 2006), 227.

This is because the concept of indirectness allows for derivative democratic representation.²⁹⁹ That is to say, once direct democracy is removed as an ideal, what becomes important is whether a representative is a responsive expression of the sovereign will. There is no reason under this construct to suggest that an appointed member of the judiciary, or an appointed delegate to an IO, is not fully democratic, as long as the appointment is at bottom the expression of the sovereign will through elections, and as long as the appointee is responsive to the sovereign will in a manner appropriate to her or his position. Indeed, Urbinati and Warren are quite clear that although elections are excellent tools for creating representatives, they are not in themselves particularly good at achieving responsive representation.³⁰⁰ This is because votes are information poor. The actual work of representation must be done outside of elections. As Urbinati and Warren state,

[a]lthough the campaigns leading up to elections are, ideally, energetic periods of issue-focused deliberation, votes in themselves are information-poor. Elected representatives are left to rely on other means (polls, advice, focus groups, letters, petitions, and the like) to guess what voters intend them to represent – over what spectrum of issues, in what proportion, and with what intensity.³⁰¹

This conception of representation stands in contrast to much of the literature of gender and representation. For example, Tremblay uses the term “wasted votes” to

²⁹⁹ ‘Derivative’ is used here in the sense that a derivative financial instrument created from a given bond carries with it, but does not abrogate, the promise inherent in the original bond.

³⁰⁰ Urbinati, Nadia and Mark E. Warren, “The Concept of Representation in Contemporary Democratic Theory,” *The Annual Review of Political Science*, vol. 11 (2008), 402.

³⁰¹ *Ibid*, 402.

express an important sense in which votes in a proportional representation (PR) system for parties that fall below a given threshold of support do not translate directly into elected representatives.³⁰² This is of course true, but to call these votes ‘wasted’ is to admit a preference for a direct relationship between vote and representative that contrasts with the importance Urbinati places upon indirectness.³⁰³ Such a preference is not surprising; much of the gender and representation literature, including Tremblay, supports PR systems in the belief that they provide better descriptive representation for women.³⁰⁴ Indeed, in support of this belief, Tremblay cites a 2011 survey of 86 countries that showed the percentage of women parliamentarians was 11.1 percent in plurality/majority systems, 22.1 percent in multiple-member (MM) systems, and 24.2 percent in PR systems.³⁰⁵ Castiglione has noted the longstanding criticisms in the gender and representation literature that territorial representation and principal-agent models of representation tend to result in deficits in the descriptive representation of women.³⁰⁶

Criticisms and data such as these show that a deficit exists in women’s descriptive representation at present, that it has long existed, and that past theoretical understandings of representation have not considered the representation of women and women’s interests with sufficient specificity. However, they do not provide convincing arguments that only PR can improve women’s descriptive representation, that the link between descriptive

³⁰² Tremblay, Manon, ed., Women and Legislative Representation: Electoral Systems, Political Parties, and Sex Quotas (New York: Palgrave MacMillan, 2012), 7.

³⁰³ Urbinati, Nadia, Representative Democracy: Principles & Genealogy (Chicago: University of Chicago Press, 2006), 1-3.

³⁰⁴ Tremblay, Manon, ed., Women and Legislative Representation: Electoral Systems, Political Parties, and Sex Quotas (New York: Palgrave MacMillan, 2012), 7.

³⁰⁵ *Ibid*, 7.

³⁰⁶ Castiglione, Dario, “A New Agenda for Democratic Representation?” Politics & Gender, vol. 8, no. 4 (December 2012), 520-521.

and substantive representation is stronger in PR than in other systems, that indirect representation cannot be sufficiently responsive to constitute substantive democratic representation, or that multiple other channels, sites and agencies, like appointed and derivative representatives, cannot achieve descriptive and substantive representation more effectively in some contexts than directly elected representatives. This returns to Urbinati's point that elections do not in themselves create representation or good representatives. The study employs Urbinati's understanding of representation because a more expansive, inclusive, flexible and nuanced understanding of representation is necessary to address effectively the question of the possibility of democratization at the international level.

Third, to argue that hybridization cannot bring about the descriptive representation of women is to mistake somewhat the nature of hybridization. The study uses the term 'hybridization' to refer to the combined use of hard law and soft law within a given IO; hybridization is therefore a signifier of the IO's ability to obtain the advantages of hard law and soft law, rather than a specific measure or initiative in itself. In this technical sense, then, there is nothing that cannot be accomplished by means of hybridization. Hybridization encompasses hard law, and a hard law measure could accomplish the descriptive representation of women. Indeed, hybridization opens the possibility for either hard law or soft law 'sex' quotas for representatives, as the situation permits. The essential conceptual step here is again to employ Urbinati's expansive understanding of indirect democratic representation through multiple sites, channels and agencies, not only elections. Having said that, the adoption of a hard law initiative of this sort within the WTO or any other institution of global economic governance is widely

understood to be extremely unlikely. Even so, it is entirely plausible that soft law measures adopted by a hybridized institution could meaningfully advance the descriptive representation of women. Such measures could include guidelines, non-binding agreements, binding agreements of a non-specific nature, or agreements whose signatories comprise only part of an IO's membership. Again, the purpose of the study is to test whether global economic governance can take a democratic turn, rather than to chart the turn's precise course or to show exactly how the representation of women and women's interests is to be mandated or attained. The possibility is the key, and as long as the possibility exists for a given IO to incorporate soft law and hard law initiatives in a hybridized manner, then it is incorrect to state that hybridization cannot bring about the descriptive representation of women.

Fourth, to argue that IOs suffer an inherent democratic deficit because they cannot achieve the descriptive representation of women is to place greater weight of meaning upon 'descriptive' than is warranted, and to employ too restrictive an understanding of representation. That many IOs suffer in fact from a democratic deficit is indisputable, particularly with respect to the descriptive representation of women. However, this says nothing about whether the deficit is inherent to IOs. For such a deficit to be inherent, the descriptive representation of women by IOs would have to be impossible. This could happen in one of two ways: either the descriptive mode of representation would have to be impossible, or representation itself would have to be impossible.

For the first, again following Pitkin's taxonomy, it is crucial to understand that 'descriptive' refers only to physical traits. For women to be descriptively represented, it is necessary only for representatives to be women. Thus, as long as one allows that

member-state delegates qualify as representatives, then the descriptive representation of women at IOs requires only that delegations to IOs be comprised of women.

For the second, it is of course true that delegates to an IO generally are not sent to represent women as such, but to represent their countries. However, as has been addressed above with reference to Urbinati's understanding of representation, this is not sufficient to disqualify them as representatives of women. When one speaks of the descriptive representation of women in corporations, parliaments or professions, for example, one does not mean that women have been sent, elected or otherwise, specifically to represent women in a given corporation, parliament or profession; it is assumed that these women are able to represent women at the same time that they represent their corporation, constituency, country or profession. In the same way, a woman who is a delegate to an IO at once represents her country and women. To suggest otherwise, one would have also to maintain that female Members of Parliament in Canada or the United Kingdom do not descriptively represent women simply because they were elected to represent a geographically defined constituency. For all of these reasons, discussed in response to the above fourfold objection, the study persists in its focus upon both the descriptive representation of women and the substantive representation of women's interests.

Yet in making this argument the study must deviate from the position held by much of the gender and representation literature concerning territorial representation. This position is succinctly expressed by Manon Tremblay in Quebec Women and Legislative Representation in the context of 'sex' quotas:

... the reading of representation within which the National Assembly and the House of Commons fall uses a basic referent, territory, in which citizens are stripped of socio-demographic, identity, or ideological markers. This compartmentalized territory is distilled and reconstructed in the legislature, where bodies and ideas are not meaningful to representation. In this perspective, opponents argue, quotas would reshuffle the deck of territorial representation by substituting representation of specificities. Those who support quotas base their reasoning on the microcosmic conception of representation. This conception implies that the representativeness of legislative assemblies flows from their composition – that is, not from the presence of individuals from a given piece of the national territory, the entirety of which covers the full area of a geopolitical entity, but from the proportional presence of the various socio-demographic, ideological and identity groups that form the political community.³⁰⁷

The position as stated conflates referent with mandate. It assumes that the use of territory as referent, to the exclusion of identity, socio-demography and ideology, also precludes substantive representation in terms of identity, socio-demography and ideology. The assumption is not required by logic and conflicts with Urbinati's more nuanced and expansive understanding of representation. Indeed, Tremblay's conflation of referent and mandate seems to imply a latent assumption of the principal-agent model of representation, which again is too restrictive to be optimal for the study of the possibility of democratization at the international level.

The final reason to focus upon both the descriptive representation of women and the substantive representation of women's interests concerns 'responsiveness,' which is a

³⁰⁷ Tremblay, Manon, Quebec Women and Legislative Representation (Vancouver: UBC Press, 2010), 158.

key concept for Pitkin, Urbinati, and most of the gender and representation literature.³⁰⁸ Specifically, responsiveness is key because it is essential to democratic representation but very difficult to define, know or capture empirically. For Pitkin, responsiveness is central to her understanding of substantive representation. As she states, substantive representation is “acting in the interest of the represented, in a manner responsive to them.”³⁰⁹ In this sense, as Celis writes, “responsiveness turns what representatives do into substantive representation of the *demos*. ”³¹⁰

There are three problems with responsiveness, all of which support the study’s focus on both the descriptive representation of women and the substantive representation of women’s interests. The three problems are as follows: first, the ephemeral nature of responsiveness – its resistance to definition and to empirical observation; second, the need for responsiveness to align with the intersectionality of representation; and third, the importance of potentiality and the difficulty of transferring between descriptive representation and responsive, substantive representation. For the purposes of the ensuing discussion, it is easiest to refer to these problems by shorthand: resistance to definition; intersectionality; and potentiality.

Concerning the first, Eulau & Karps’ early critique of Pitkin articulated the difficulty of defining responsiveness in the following terms:

[Pitkin] provides no clues as to how ‘responsiveness’ as a systemic property of the political collectivity can be ascertained and how, indeed, it can be measured in ways

³⁰⁸ Pitkin, Hanna Fenichel, The Concept of Representation (Berkeley: University of California Press, 1967), 209, 232-233.

³⁰⁹ *Ibid*, 209.

³¹⁰ Celis, Karen, “On Substantive Representation, Diversity and Responsiveness,” Politics & Gender, vol. 8, no. 4 (December 2012), 524.

enabling the scientific observer to conclude that representation has in fact emerged at the level of the political system. Pitkin's treatment seems to stress the condition in which the representative stands ready to be responsive when the constituents do have something to say. A legislature may, therefore, be responsive whether or not there are specific instances of response. In other words, Pitkin emphasised a potential for response rather than an act of response.³¹¹

The first problem, then, is the significant difficulty of defining responsiveness. As Eulau and Karps note, responsiveness has no necessary empirical referent. It can be present in any given situation whether a representative acts or does not act, as long as in acting or not acting the representative has taken due account of the constituency, without ever being merely the constituency's agent. As such, in any given situation, responsiveness can be ascertained only by the relative and unverifiable measure of whether the representative has taken into account the wishes of his or her constituency before acting either in accordance with or against the same wishes. Moreover, the 'wishes' of a 'constituency' are notoriously hard to define. Focus groups, polls and other such measures can only provide an incomplete and temporally limited picture. This is particularly so because the nature of the constituency must always be determined beforehand, this determination must always be somewhat arbitrary, and it must always involve decisions concerning sensitivity to race, class, sex, gender, ideology, and other such categories. Above all this, the 'wishes' of the 'constituency' and its composition are continually changing. Yet descriptive representation is supposed to become substantive by means of 'responsiveness.' Faced with this necessary and insoluble uncertainty in the

³¹¹ Eulau, Heinz and Paul D. Karps, "The Puzzle of Representation: Specifying Components of Responsiveness," Legislative Studies Quarterly, vol. 2, no. 3 (August 1977), 237.

definition of ‘responsiveness,’ the most sensible and pragmatic course for the present study is to insist upon a focus on both the descriptive representation of women and the substantive representation of women’s interests.

It is this uncertainty of definition and the fragmentary nature of ‘constituency’ that produces the problem of intersectionality. ‘Intersectionality,’ in this sense, means the need for ‘responsiveness’ to account for the way in which the ‘wishes’ of any constituency, even under PR, are composed of multiple sexes, genders, identities, classes and ideologies. Celis captures this requirement for intersectionality when she asks the following question: “When can we say that women or ethnic minorities are substantively represented, especially when, fully appreciating the existence of intersectional identities, we recognize that ‘women’ and ‘ethnic minorities’ are highly diversified groups?”³¹² Celis recognizes that the question poses a “major challenge” for representation studies, and tries to meet the challenge by constructing the following definition of responsiveness:

... plural and possibly conflictual or contradictory interests and perspectives are the basic ingredients of democratic substantive representation. Since women are not a homogenous group and are expected to have diverging views (e.g., the opinions of leftists versus conservatives/neoliberals, whites versus people of colour, high versus lower classes, for instance, on the burqa, quotas or maternity leave), responsiveness increases when divergent and even contradictory views are included in the representation process. Political deliberation in the course of which different views are argued for and are

³¹² Celis, Karen, “On Substantive Representation, Diversity and Responsiveness,” *Politics & Gender*, vol. 8, no. 4 (December 2012), 525.

substantiated contributes to a greater extent to responsive representation in diverse societies than pretending that the conflicting interests do not exist.³¹³

The problem with this definition is its logic. If responsiveness increases as ‘divergent and even contradictory views are included in the representation process,’ it follows that when views are at their most divergent and most contradictory, then the representation process is at its most responsive. In short, if contradiction is the sign of responsiveness, and if the two are directly related, then one has no choice but to return to the original problem of the definition of responsiveness, since contradictory actions by the representative could equally well be taken to be responsive. This is not to suggest that responsiveness or intersectionality can be abandoned in any concept of representation; the result would be the abandonment of democracy.³¹⁴ Rather, the point is again that if responsiveness cannot be defined sufficiently to support an understanding of how descriptive representation becomes substantive, then the only pragmatic and sensible approach for any study of democratization at the international level is to focus upon both the descriptive representation of women and the substantive representation of women’s interests.

This highlights the problem with critical mass theory, which holds that the attainment of a particular level of descriptive representation of women will produce substantive representation.³¹⁵ Again, the problem of the definition of responsiveness

³¹³ *Ibid*, 525.

³¹⁴ That said, given their indeterminacy, it might be wise to circumscribe more narrowly the employment of these terms in studies of representation.

³¹⁵ Vickers, Jill, “Women’s Representation, Fragmented Citizenship and Territorial Pluralism: Family Law Reform in Federations, North and South,” paper presented at the *American Political Science*

makes it very difficult, if not impossible, to isolate specific instances of transition between descriptive and substantive representation. This in turn makes it very difficult to show that any specific ‘critical’ point of descriptive representation causes or supports a transition to substantive representation. The study therefore shares the concerns articulated by Diaz about the lack of clarity concerning women, the precise nature of the effect specific numbers of women have on legislative outcomes, the precise mechanisms allowing women legislators to represent women in the electorate, and the precise mechanisms linking descriptive and substantive representation.³¹⁶ The study further shares Vickers’ concerns about claims by critical mass theory that women share common interests because of their sex, or that a ‘women-friendly outcome’ can be easily defined.³¹⁷ Of course, it is easy to believe that significant descriptive representation of women makes the substantive representation of women’s interests easier to accomplish. However, beyond this vague assurance there is too much uncertainty to make definitive statements or causal claims. Faced with this uncertainty, the present study, like any study concerning the democratization of the international level, must focus upon both the descriptive representation of women and the substantive representation of women’s interests.

This leaves the problem of potentiality, which was announced by Eulau and Karps when they wrote that “Pitkin emphasised a potential for response rather than an act of

Association Annual Meeting, 2012 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2107509 (accessed 7 July 2013), 12-13.

³¹⁶ Diaz, Mateo, M., Representing Women? Female Legislators in West European Parliaments (Oxford, ECPR Press, 2005).

³¹⁷ Vickers, Jill, “Women’s Representation, Fragmented Citizenship and Territorial Pluralism: Family Law Reform in Federations, North and South,” paper presented at the *American Political Science Association Annual Meeting*, 2012 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2107509 (accessed 7 July 2013), 13.

response.”³¹⁸ Pitkin herself states that “there need not be a constant activity of responding, but there must be a constant condition of responsiveness, of potential readiness to respond.”³¹⁹ Finally, Uhlaner defines potentiality in greater detail as “the individual’s well-grounded, reasonable, subjective sense that his or her interests would be defended were they expressed or were they at risk even without expression.”³²⁰ So constructed, responsiveness is always *in potentia* and therefore always undefined. Its referent is the subjective sense of a constituent’s interests at an undefined future point. Again, this is undoubtedly an important aspect of what makes democratic representation work in practice, but it is nothing upon which to base an understanding of how responsiveness links descriptive and substantive representation. Indeed, if responsiveness is always *in potentia*, it may be that its substance can only be known by empirical historical research into each legislative event, and even this would provide no grounds from which to generalize about the nature of responsiveness as such. Again, therefore, the present study, and any study concerning democratization at the international level, must focus upon both the descriptive representation of women and the substantive representation of women’s interests. To do otherwise is to rely too much upon a concept, in this case ‘responsiveness,’ that leaves too much unknown, and to predetermine the results of the study against the possibility of the democratization of global economic governance.

³¹⁸ Eulau, Heinz and Paul D. Karps, “The Puzzle of Representation: Specifying Components of Responsiveness,” Legislative Studies Quarterly, vol. 2, no. 3 (August 1977), 237.

³¹⁹ Pitkin, Hanna Fenichel, The Concept of Representation (Berkeley: University of California Press, 1967), 232.

³²⁰ Uhlaner, Carole J., “Potentiality and Representation: The Link between Descriptive Representation and Participation in the United States,” Politics & Gender, vol. 8, no. 4 (December 2012), 536.

In essence, this assertion only recognizes that no verifiable or quantifiable link has been established between descriptive and substantive representation, and that, owing to the nature of substantive representation, it may be impossible to establish such a link. In any case, the literature varies too greatly in its definitions and understandings of substantive representation for the present study to assume that a link exists. As such, it is incumbent upon the study to hedge between descriptive and substantive representation, and to insist that, given the current state of knowledge, any study of democratization at the international level must address both descriptive and substantive representation.

The straightest path to this end would be to acknowledge that ‘gender mainstreaming’ could advance both descriptive and substantive representation. Concerning the latter, it is fairly well established in the gender and representation literature that one of the basic purposes of ‘gender mainstreaming’ is to advance the substantive representation of women. This is clear from the definition employed by the United Nations in 1997, which reads as follows:

Mainstreaming . . . is the process of assessing the implications for women and men of any planned action, including legislation, policies or programs, in all areas and at all levels. It is a strategy for making women’s as well as men’s concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programs in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated. The ultimate goal is to achieve gender equality.³²¹

³²¹ United Nations. *Report of the Economic and Social Council for 1997*, A/52/3.18 September, Chapter IV. Para4.A, (1997) <http://www.un.org/documents/ga/docs/52/plenary/a52-3.htm> (accessed 2 August 2013).

This was the definition cited as a starting point in Rittenhofer and Gatrell's survey of ambiguities in the definition and implementation of 'gender mainstreaming' across the European Union.³²² The definition's focus upon making 'concerns and experiences' an integral dimension of policies, and the focus upon 'political, economic and societal spheres, strongly support the association of 'gender mainstreaming' with substantive representation. It is of course the case that others such as True and Mintrom³²³ and Squires³²⁴ have advanced different definitions, but they agree upon the association of 'gender mainstreaming' with substantive representation. Certainly, the above UN definition corresponds with Pitkin's understanding of 'substantive representation' as 'acting for.' In short, it is sufficiently well accepted in the gender and representation literature that 'gender mainstreaming' can serve as a tool for the advancement of the substantive representation of women.

By contrast, it is more difficult to establish that 'gender mainstreaming' can advance descriptive representation and the gender and representation literature is divided on the question. Nevertheless, inarguably the UN definition of 'gender mainstreaming' comprises descriptive representation. Moreover, there is a meaningful body of literature providing evidence that 'gender mainstreaming' can in fact advance descriptive representation. For example, Chaney shows how devolution presents a

³²² Rittenhofer, Iris and Caroline Gatrell, "Gender Mainstreaming and Employment in the European Union: A Review and Analysis of Theoretical and Policy Literatures," International Journal of Management Reviews, vol. 14 (2012), 206.

³²³ True, Jacqui and Michael Mintrom, "Transnational Networks and Policy Diffusion: The Case of Gender Mainstreaming," International Studies Quarterly, vol. 45 (2001), 27–57.

³²⁴ Squires, Judith, "Is Mainstreaming Transformative? Theorizing Mainstreaming in the Context of Diversity and Deliberation," Social Politics: International Studies in Gender, State and Society, vol. 12 (2005), 366–388.

‘window of opportunity’ for ‘gender mainstreaming’ in Wales. As he explains, Welsh gender equality activists used the equality provisions in the *Government of Wales Act* to employ “a ‘technical approach’ to ‘constitution building’ – or the framing of legal and procedural matters – in order to achieve an equal role for women politicians and to compel the devolved Assembly to promote equality of opportunity.”³²⁵ In effect, they ensured that the new Welsh constitution was framed in such a way as to make ‘gender mainstreaming’ essentially inevitable. As Helen Mary Jones AM states, “We have been able to make a difference in this new space [the National Assembly], but an awful lot of people did an awful lot of work to ensure that this new space could operate in that way, so it was set up in such a way that it was very difficult for anybody to do anything else.”³²⁶ Cheney further cites a Welsh female cabinet minister’s statement that concerns of gender equality had been consciously mainstreamed from the beginning of the process of drafting the new constitution:

I think that we’ve been very fortunate from the very outset with these issues at the forefront, they weren’t afterthoughts, they were really mainstreamed in the way that the place was set up, in terms of the legislative framework. But I also think that it was because in terms of representation there were individuals in the right place at the right

³²⁵ Chaney, Paul, “Women and Constitutional Change in Wales,” *Regional and Federal Studies*, vol. 14, no. 2 (Summer 2004), 288.

³²⁶ *Ibid*, 288.

‘AM’ stands for ‘Assembly Member’ in the National Assembly for Wales. Helen Mary Jones was an AM from 1997 to 2011, including two terms as AM for Linelli in Wales (1997 to 2001) and (2007 to 2011). She was an AM for the Mid and West Wales ‘top-up’ region from 2003 to 2007. She is a member of the Welsh political party Plaid Cymru.

time who were able to make sure that those issues were mainstreamed from the very beginning.³²⁷

The result of these efforts has been the effective inclusion of ‘gender mainstreaming’ at the constitutional level in Wales. Significantly for the present study, this has directly improved women’s descriptive representation in the Welsh Assembly. Again, Chaney cites a ‘woman minister in the Welsh Assembly government’ in support of the assertion that women’s descriptive representation has been advanced by ‘gender mainstreaming’:

One of the key issues is we’ve gone from three male [Welsh Office] ministers to having women as 42% of elected Members. Inevitably that will allow a greater opportunity to scrutinize policy and develop policy and [to oversee] how that policy is implemented to help women. I think fundamentally [we have] greater opportunities for democracy and investigation into the way things are done in Wales. I think that’s the starting point and, of course, we’ve got the provision in the [Government of Wales] Act on Equal Opportunities which then puts a legal requirement on us to do things in a different way. So I think the expectations really come around those two key points.³²⁸

Kenney describes how a process that, by her account, amounts to ‘gender mainstreaming’ has since 1995 increased the descriptive representation of women in the European Court of Justice. She argues that active EU participation in the 1995 Fourth World Conference on Women at Beijing, the resulting Fourth Action Programme for

³²⁷ *Ibid*, 288.

³²⁸ *Ibid*, 299.

Equal Opportunities, the Council Recommendation to Member States, and the admission of Austria, Finland and Sweden all combined to produce a significant institutional demand for greater gender equality within the EU.³²⁹ She further suggests that an early manifestation of this trend was Anasagasti and Wuiame's 1999 report entitled "Women and decision-making in the Judiciary in the European Union."³³⁰ In Kenney's view, the report was analogous to the gender bias taskforces that addressed and began to repair gender inequality in the United States judiciary during the 1970s. She considers both the gender bias taskforces and the 1999 report as forms of 'gender mainstreaming' in essence and in practise. As she states:

The recommendations of the report are familiar: to identify the discretionary criteria (politics) that enables some judges (men) to rise to higher levels of appointment, to make the procedures more open and transparent, to generate policy support at top levels and monitor the percentage of women, and lastly, the report challenged member states and the EU to examine working patterns that favour male norms, and that make family life difficult and create hostile working environments and conditions.³³¹

These recommendations from the 1999 report are typical of 'gender mainstreaming' initiatives; they are also perfectly commensurate with the advancement of descriptive representation. Indeed, Kenney criticizes Pitkin for undervaluing

³²⁹ Kenney, Sally J., "Breaking the Silence: Gender Mainstreaming and the Composition of the European Court of Justice," Feminist Legal Studies, vol. 10 (2002), 263.

³³⁰ *Ibid*, 263-264. Also Anasagasti, Miriam and Nathalie Wuiame, European Commission, Directorate-General for Employment, Industrial Relations and Social Affairs, Unit V/D.5, *Women and Decision-making in the Judiciary in the European Union* (Luxembourg: Office for Official Publications of the European Communities, 1999).

³³¹ Kenney, Sally J., "Breaking the Silence: Gender Mainstreaming and the Composition of the European Court of Justice," Feminist Legal Studies, vol. 10 (2002), 264.

descriptive representation and argues that descriptive representation is both the appropriate form of democratic representation for the judiciary, and the form most likely to result from ‘gender mainstreaming’ within the judiciary.³³² Indeed, she argues strongly that it was the lack of women’s descriptive representation that constituted the most significant threat to the legitimacy of the ECJ during the 1990s.³³³ Significantly, no member of the ECJ between 1952 and 1999 was a woman, but 11 women have since become members.³³⁴

A number of further examples can be drawn from the literature to support the assertion that ‘gender mainstreaming’ can advance descriptive representation. For example, Ward shows that the introduction of ‘gender mainstreaming’ within the Democratic Unionist Party (DUP) and Sinn Fein in Northern Ireland has increased women’s descriptive representation amongst the candidates of both parties.³³⁵ She further shows that the equality of opportunity provisions in the Northern Ireland Act of 1998, which in effect constitutionalized ‘gender mainstreaming’ in Northern Ireland, helped to improve women’s descriptive representation in the Northern Irish Assembly.³³⁶ Chaney has expanded his earlier work concerning the advancement of women’s descriptive representation by means of ‘gender mainstreaming’ from Wales to the entire UK. He has found that women’s descriptive representation increased significantly in Scotland following devolution. He explicitly associates this increase with equality of opportunity

³³² *Ibid*, 267-268.

³³³ *Ibid*, 264-265.

³³⁴ CURIA, http://curia.europa.eu/jcms/jcms/Jo2_7014/ (accessed 2 August 2013); and CURIA, http://curia.europa.eu/jcms/jcms/Jo2_7026/ (accessed 2 August 2013).

³³⁵ Ward, Rachel, “Gender Issues and the Representation of Women in Northern Ireland,” *Irish Political Studies*, vol. 19, no. 2 (Winter 2004), 10.

³³⁶ *Ibid*, 13.

provisions in the devolved Scottish constitution, which effectively constitutionalized ‘gender mainstreaming’. In this, Chaney has found that the Scottish case mirrors that of Wales.³³⁷ In the context of South Korea, Park argues that the descriptive representation of women is in itself important.³³⁸ She further argues that the results of her study, which concern the effects of gender representation in public bureaucracy upon government performance, are encouraging for the advancement through ‘gender mainstreaming’ of the descriptive representation of women in the South Korean bureaucracy.³³⁹³⁴⁰

Finally, Lombardo and Meier have argued forcefully that “the implementation of the strategy of ‘gender mainstreaming’ is understood also to raise the number of women involved in processes of political decision-making and of policy-making.”³⁴¹ In other words, they argue that ‘gender mainstreaming’ directly improves women’s descriptive representation. They further argue that a shift toward a broader approach to gender equality requires that ‘gender mainstreaming’ be transformative “by continuously

³³⁷ Chaney, Paul, “Gender, Electoral Competition and Political Behaviour: Preliminary Analysis from the UK’s Devolution Programme,” Contemporary Politics, vol. 13, no. 1 (March 2007), 93-117.

³³⁸ Park, Sanghee, “Does Gender Matter? The Effect of Gender Representation of Public Bureaucracy on Governmental Performance,” American Review of Public Administration, vol. 43, no. 2 (2012), 221-242.

³³⁹ *Ibid*, 235-236.

³⁴⁰ In discussing these findings, it is important to note the role of political parties in representation. Whether parties in a given country are disciplined or not, whether they are well-developed or inchoate, whether their organizational structures are centralized or fragmented, and where political parties rest in the constitutional order of the country, greatly affects the manner and extent of the substantive and descriptive representation made possible by gender mainstreaming. That said, the matter of political parties is a lesser concern relative the purposes of the study for two reasons. The first is that the present discussion is concerned to show that substantive and descriptive representation are possible in IOs by means of gender mainstreaming. Having shown that the possibility exists, it follows that the representation of women and women’s interests at the WTO remains theoretically possible, as does a democratic turn in global economic governance. That the nature of political parties in some countries makes this representation either easier or more difficult is very interesting, but of secondary importance in the context of the study. The second reason is that there are no political parties in IOs.

³⁴¹ Lombardo, Emanuela and Petra Meier, “Gender Quotas and Mainstreaming: Sparring Partners in Gender Equality Policies?” Presented at the 21st International Political Science Association World Congress (12-16 July 2009), Santiago, Chile, 2.

displacing existing hierarchies and promoting diversity and empowering subjects through the creation of spaces where gender concepts and strategies can be continuously contested.”³⁴² In other words, ‘gender mainstreaming’ advances women’s descriptive representation in part because it causes a continual displacement within hierarchies and power structures. This in turn creates opportunities to promote diversity and to increase the number of women holding positions in hierarchies and power structures. This echoes the arguments of Squires in her work of 2005 and 2007.³⁴³

In sum, by no means does the gender and representation literature exhibit unanimity concerning the capacity for ‘gender mainstreaming’ to advance the descriptive representation of women. However, there exists a significant volume of literature that argues strongly for the connection. The ‘straightest path’ mentioned above is therefore plausible in itself and supported by literature, and this is enough to fulfill the need of the present study to address both descriptive and substantive representation of women without assuming or requiring a connection between them. That is to say, it is enough to show that a measure of ‘gender mainstreaming’ can be introduced within the WTO in order to show that there exists a possibility for the global governance of trade to take a democratic turn. Like the test the study conducts, the assertion requires no connection between the descriptive and substantive representation of women, only that it be possible to accomplish both. Further, this entails no limitation upon the modes of descriptive and substantive representation by which the conditions of the test could be met. If other means than ‘gender mainstreaming’ can be shown to advance the descriptive or

³⁴² *Ibid.* 8.

³⁴³ Squires, Judith, “Is Mainstreaming Transformative? Theorising Mainstreaming in the Context of Diversity and Deliberation,” *Social Politics*, vol. 12, no.3 (2005), 366-388; Squires, Judith, *The New Politics of Gender Equality* (Hounds Mills: Palgrave, 2007).

substantive representation of women within the WTO, then they should inform the results of the study.

To return to Urbinati, representation must be understood expansively if it is to be a useful analytical construct for the study of democratization at the international level. Understood in such a manner, but understood separately from one another, the descriptive and substantive representation of women are perfectly commensurate with the kind of representation given by representatives in elected bodies, by those who comprise the judiciary or by those who serve in International Organizations. Moreover, as discussed above, both can plausibly be advanced by ‘gender mainstreaming’ as long as the concept of ‘representation’ is held to accord with Urbaniti’s expansive understanding. Finally, it follows that if ‘gender mainstreaming’ can be introduced by means of hybridization, as is shown in the final two chapters, then hybridization can plausibly be said to advance both the descriptive and substantive representation of women within the WTO, and therefore to allow the WTO to take a democratic turn.

Chapter 4 – A Proxy for GEG I: General Trends and Specific ‘Moments of Juridification’ of the WTO

Since the end of the Second World War, the global political economy has trended increasingly toward a more rules-based system. That is to say, the institutions of global economic governance, which establish rules by which sectors of global economic activity are regulated, have increased steadily in number, influence, complexity and scope. In short, the institutions of global economic governance have juridified, and they have done so according to all 6 of the modified Blichner-Molander types developed in Chapter 2: (A) constitutive; (B) law’s expansion and differentiation; (C) increased conflict solving by reference to law; (D) increased judicial power; (E) legal framing; and (F) increased robustness.

Of course, there is nothing inherent in the juridification of global governance; no law of necessity requires global governance to become more or less juridified over time, though path-dependence compels it to continue to do so, once it has begun.³⁴⁴ Even so, the postwar era has seen a continual growth of international and now global organizations, both in terms of numbers and the width and depth of issue-areas covered, along with the continual growth and accumulation of treaties and law – in short, a continual juridification.³⁴⁵ During this time, there are no examples of reversals; that is to say, there is no example of an issue area that used to be subject to international

³⁴⁴ Blichner, Lars, and Anders Molander, “Mapping Juridification,” *European Law Journal*, vol. 14, no. 1 (January 2008), 39-49.

³⁴⁵ The distinction between ‘international’ and ‘global’ employed in the present study is one of degree and gradation rather than absolute division. ‘International’ refers to a circumstance or institution involving two or more countries. ‘Global’ refers to a circumstance or institution involving most or nearly all of the world’s countries.

governance and has now ceased to be governed internationally and there is no example of an international organization or a body of law that has ceased to exist without being merged into a new and more expansive body. This continual increase in reliance upon international institutions for global economic governance is fully in concert with the principles of Inclusive Global Institutionalism (IGI), as long as the institutions remain separated from one another.

As the present chapter shows, the WTO represents a significant part of this trend. This is particularly the case with respect to its origins in the post-WWII General Agreement on Tariffs and Trade (GATT). Indeed, the WTO can be considered a laboratory for ideas of global governance and global democracy. In this sense, it can serve not only as harbinger of the continuation of the trend toward global governance, but as a test of the nature of that trend. At the same time, the WTO is the ‘hardest case’ amongst the institutions of global governance for the representation of women and women’s interests, as will be shown in Chapter 5.³⁴⁶ Thus, the purpose of the present chapter is to show that global economic governance has been subject to juridification since at least the end of WWII, and arguably much before then; to show that international trade governance has been subject to the same trend, under both the GATT and the WTO since 1947; and therefore to show that the WTO can be taken as representative of global economic governance for the purpose of testing whether it can take a democratic turn.

This dual nature, as representative and ‘hardest case,’ is what allows the WTO to serve as a proxy for global economic governance for the purposes of testing whether it can take a democratic turn. Indeed the test itself, since it is based on the assertion that the

³⁴⁶ Again, the term ‘hardest case’ is used throughout the study to mean at least a case as hard as any other. That is, there can be other cases equally hard, but the logical requirement of the test is only that there be no case harder.

representation of women and women's interests is a *sine qua non* of democracy in the 21st century, can only be constructed by means of its two assertions: that the WTO represents the growing robustness, scope and complexity of the juridifying trend of global economic governance; and that the WTO represents the 'hardest case' for the representation of women and women's interests.³⁴⁷ It is the task of the present chapter and the next chapter to define and establish the nature and validity of these two assertions.

To this end, the present chapter establishes the place of the WTO as representative of the larger trend toward the juridification of global economic governance. It does so by recounting and analysing the development of global economic governance from the immediate aftermath of WWII to the present, giving particular attention to the history of trade governance, the place of the WTO within the larger context of global economic governance, and the structure, governance and political practices of the WTO. The chapter explores seven 'Moments of Juridification' that, cumulatively, show the depth of juridification undergone by international trade governance since 1947, and that show the WTO to be strongly representative of the juridification of global economic governance during the post-WWII era.

It is important to remember here that juridification includes the process of making an area of human activity subject to law, of expanding law's purview, of increasingly looking to law as the primary means of resolving uncertainties, of expanding the power of those who practise law or make authoritative decisions upon questions of law, and of increasingly defining human experience by means of the terminology, customs, rules and

³⁴⁷ It is sufficient for the WTO to be as hard a case as any other institution; it need not be the 'hardest case' on its own.

expectations of legal practice.³⁴⁸ In this sense, all of the increasing scope, complexity and robustness of global economic governance since 1945 can be, and ought to be, understood as juridification. After having established that the WTO is representative of global economic governance, Chapter 5, following the present chapter, then addresses the second assertion necessary to the test: that the WTO is the hardest case for the representation of women and women's interests.

The General Trend of Juridification of Global Economic Governance

Of course, to establish that the WTO may represent a trend, it must first be established that the trend exists. This may be done, in the present case, promptly. A short review of some of the developments since 1945 in other international organizations of global economic governance will suffice to establish the general trend. Indeed, examples of such developments are plentiful; one finds the same trends of juridification of global economic governance across several organizations and many bodies of law.

Craig Murphy's work, International Organization and Industrial Change, brings together a significant volume of evidence that has the effect of supporting the above assertions, even if his general argument differs from that of the present study. Murphy delineates two distinct World Orders, which overlap three distinct eras of IO activity, each of which is an example of long-term juridification. The cumulative effect of Murphy's study is to trace the development of IOs from 1860 to 1990. More specifically, Murphy dates the rise of the 'Interimperial Order' to about 1865, the year of the Austro-

³⁴⁸ Blichner, Lars, and Anders Molander, "Mapping Juridification," European Law Journal, vol. 14, no. 1 (January 2008), 39-49.

Prussian War, and of the founding of the International Telegraph Union (ITU).³⁴⁹ Both of these events, military and industrial, are of equal importance to Murphy for dating the beginning of the World Order. In the same way, its decline may be traced by the advent of the Radio Telegraph Union in 1906, the Peace Conference at the Hague in 1907, the end of the First World War in 1918, and the advent of the League of Nations in 1920.³⁵⁰

The Interimperial Order was marked by the rise of Public International Unions, such as the ITU, the European Rail Union, and the Brussels Tariff Union, which served to regulate, i.e. juridify, a wide range of areas of industry and human activity. Further, as Murphy states, the Interimperial Order “united the Austro-Hungarian, Belgian, British, Danish, Dutch, French, German, Italian, Russian, Spanish, Swedish empires (and extended beyond them) throughout the generation before the First World War.”³⁵¹

The ‘Free World Order’ succeeded the Interimperial Order and bore its first fruits during the interwar decades with the League of Nations, The International Labour Organization (ILO), Interpol, the Permanent Court of International Justice, the International Bank of Settlement, the Telegraph and Telephone Consultative Committee, and numerous of the IOs, all of which juridified areas of human activity.³⁵² For Murphy, the Free World Order reached its apogee between 1945 and 1950 with the advent of the UN, the GATT, the IMF, the WHO, the ICJ, the World Bank, and numerous other organizations.³⁵³

³⁴⁹ Murphy, Craig N., International Organization and Industrial Change: Global Governance since 1850 (Cambridge: Polity Press, 1994), 6-7.

³⁵⁰ *Ibid*, 6-7.

³⁵¹ *Ibid*, 293.

³⁵² *Ibid*, 6-7, 154-157.

³⁵³ *Ibid*, 6-7, 154-157.

Again for Murphy, this ‘second-generation’ World Order continued in strength through the end of the 1960s. However, from about 1972 through the end of the 1980s it faced an existential crisis. This had been foreshadowed in 1965 by the founding of INTELSAT (International Telecommunications Satellite Organization), which Murphy understands to be a ‘third-generation’ IO, signalling the beginning of a new World Order. Moreover, for Murphy, far more powerful signals were given by the economic crises of the 1970s, the rise of neoliberalism, the growth of new communications technologies, and the declining interest from the Reagan and G.H.W. Bush administrations in funding IOs.³⁵⁴

More than 20 years after the composition of International Organizations and Industrial Change, it seems that Murphy’s diagnosis of the decline in the post-1945 ‘Free World Order’ was premature and present-minded. All of the above-mentioned IOs continue in existence and may be said to thrive. Equally, Murphy’s identification of the beginning of a ‘New World Order’ is based on far less data than his identification of the ‘Interimperial’ or ‘Free World’ orders. It is also much nearer his time of writing than the divisions marking the earlier orders, and this always carries a great risk that nearer events will be given much greater import than what they would be allowed within the view of another 50 or 100 years’ historiography. One wonders, for example, whether a British Imperialist in the 1890s might have thought that the Irish Home Rule Bill of 1893, the Mahdist War (1881–1899), the Boer Wars (1880–1881 and 1899–1902), the end of the Long Depression (1873–96), the First Peace Convention at The Hague (1899), and the advent of the modern battleship (1906), did not signal the beginning of a new world

³⁵⁴ *Ibid*, 6-7, 224–257.

order. Yet all of them occurred during the middle of what Murphy calls the Interimperial Order, and all of them pale in comparison to the First World War and the advent of the League of Nations, which actually ended the Interimperial Order roughly 20 years later.³⁵⁵ This is what is meant by ‘present-mindedness’ and it reinforces the study’s earlier discussion concerning Cutler’s effort to identify the ‘historical bloc’ of the present day.

Leaving aside, therefore, Murphy’s assertion of a New World Order, his data actually show significant juridification of the international sphere between 1865 and 1914, during the interwar years, and after 1945. It is this latter period that is of greatest import to the present study, and Murphy’s findings during this period deserve closer attention.

In fact, what Murphy’s data show is a significant and unbroken trend toward juridification of the international sphere between 1919 and 1990, intensifying after 1944. According to Murphy, 27 IOs across 16 sectors were created between 1919 and 1939.³⁵⁶ However, fully 76 IOs across the same 16 sectors were created between 1944 and 1970.³⁵⁷ Equally, Murphy’s data show that IOs meaningfully increased their activities between 1970 and 1985. Using Murphy’s categories, between 1970 and 1985 IOs increased their activities to foster industry from 623 to 707 annually, and their activities to manage potential social conflicts from 1323 to 1707 annually.³⁵⁸ During the same period, IOs increased their activities to strengthen states and the state system from 520 to 565 annually, to strengthen society from 382 to 435 annually, and concerning

³⁵⁵ *Ibid*, 6-7.

³⁵⁶ *Ibid*, 154-157.

³⁵⁷ *Ibid*, 154-157.

³⁵⁸ *Ibid*, 254.

environmental issues from 4 to 40 annually.³⁵⁹ Finally, during the same period, more UN Conferences were conducted than had been conducted during the previous 75 years. Fully 98 such conferences across 11 sectors took place between 1970 and 1985.³⁶⁰

The establishment of IOs, discussed above, accords with Blichner and Molander's Type A, or 'constitutive' juridification. The increased activities of IOs between 1970 and 1985 accords with Blichner and Molander's Type B, 'law's expansion and differentiation,' and Type E, 'legal framing.' The same may be said of the marked increase in UN Conferences between 1970 and 1985, particularly with respect to 'legal framing.'³⁶¹ Thus, Murphy's data constitute important evidence of intensifying juridification of the international sphere after 1944. Given that Murphy's sectors of IO activities include 'infrastructure,' 'industrial standards and intellectual property,' 'trade,' 'labour,' 'agriculture,' 'LDCs,' and 'public finance,' it is clear that his data show the intensifying juridification not only of global governance generally, but more particularly of global economic governance.

At a more detailed level, further examples support the contention that global governance and global economic governance have been subject to meaningful juridification since 1945, increasing in scope, complexity and robustness. The United Nations Convention on the Law of the Sea (UNCLOS), for example, unified in a single treaty in 1982 four different treaties that had been ratified in 1958. UNCLOS came into effect in 1994, the same year in which the WTO was established. It affects the management of marine natural resources, amongst many other subjects, and by 2013 it

³⁵⁹ *Ibid*, 254.

³⁶⁰ *Ibid*, 255-257.

³⁶¹ Blichner, Lars, and Anders Molander, "Mapping Juridification," *European Law Journal*, vol. 14, no. 1 (January 2008), 39-49.

counted 166 signatories including the European Union.³⁶² Similarly, between 1948 and the present, the Inter-Governmental Maritime Consultative Organization became the International Maritime Organization (IMO). During this time, it has brought within its traditional purview concerning, for example, the Safety of Life at Sea (SOLAS), such areas as the Prevention of Pollution of the Sea by Oil (OILPOL), International Ship and Port Facility Security (ISPS), greenhouse gas emissions from international shipping, and the Facilitation of International Maritime Traffic. Moreover, UNCLOS, upon coming into effect in 1994 effectively transformed “a number of the IMO’s, codes, guidelines, regulations and recommendations ... into binding norms, even for states that may not have approved of these standards within the context of the IMO but have become parties to the Law of the Sea Convention.”³⁶³ These developments, which intimately affect global shipping, fall clearly under the rubric of global economic governance and exemplify the trend toward increasing robustness, scope and complexity. They are also profound examples of juridification types A, B, C and E.

Other organizations have displayed a similar evolution. The ILO, for example, has by means of its *Recommendations* both updated and expanded the scope of its Conventions (juridification Type B – law’s expansion and differentiation). The G7 created in 1999 both the G20 and the Financial Stability Forum (FSF), an important example of constitutive juridification (Type A). The twofold mandate of the latter was to coordinate international responses to financial crises with global implications and to

³⁶² United Nations, Office of Legal Affairs, Division for Ocean Affairs and the Law of the Sea, “Chronological Lists of Ratifications of Accessions and Successions to the Convention and the Related Agreements as of 29 October 2013.”

www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm (accessed 23 June 2014).

³⁶³ Alvarez, José E., *International Organizations as Law-makers* (Oxford: Oxford University Press, 2005), 220.

create a set of financial standards and codes that would combine the various efforts of such bodies as the BCBS, the IAIS, IOSCO, the OECD and the International Accounting Standards Boards.³⁶⁴ Thus, it was also an example of juridification type B.

The World Bank's *Guidelines* are another example of the juridification of global economic governance. As Alvarez argues in International Organizations as Lawmakers, the *Guidelines* are "not the product of any explicit provision in the Bank's charter" and "are yet another form of particularly potent international law."³⁶⁵ These *Guidelines* have come to exert the force of law, since they dictate, amongst other matters, both the groups that must be consulted and the policies a country must adopt before funding will be granted. In effect, then, the World Bank's *Guidelines* extend the scope of global economic governance in certain cases to the domestic policy of certain states. To cite Alvarez again, "the Guidelines are internal administrative law that, incidentally, binds some states directly (through loan commitments) and other states indirectly, by casting normative ripples far afield."³⁶⁶

Thus, the *Guidelines* represent law's expansion and differentiation (type B), as well as legal framing (type E) and increased robustness (type F). One may note further the World Bank's 'disclosure policy,' which has made its policies more transparent to the global public, and the creation in 1993 of its Inspection Panel, which provides the functions of an ombudsperson. The latter in particular is an example of juridification Type C – 'increased conflict solving with reference to law.'³⁶⁷ The same may be said of

³⁶⁴ Porter, Tony, Globalization and Finance (Cambridge: Polity Press, 2005), 39-40.

³⁶⁵ Alvarez, José E., International Organizations as Law-makers (Oxford: Oxford University Press, 2005), 235.

³⁶⁶ *Ibid*, 238.

³⁶⁷ *Ibid*, 236-237.

the tendency that Alvarez notes of the Bank's *Guidelines* to 'harden' the Bank's "dense network of otherwise 'soft law' norms and treaties,"³⁶⁸ which accords with Type A, or 'constitutive' juridification. This process of juridification of the World Bank further evinces the general post-1944 trend of juridification of global economic governance.

As is often noted, the conditionalities imposed by the IMF have effects and implications very similar to those created by the *Guidelines* of the World Bank. In short, conditionality refers to the practise that began in the 1950s as the requirements upon a given country to undertake specific structural adjustments in order to obtain IMF funding beyond its designated 'reserve tranche' amount.³⁶⁹ This was justified by reference to the term 'adequate safeguards,' which appeared in the Fund's articles. By 1979, the IMF had published the macro-economic indicators it considered necessary conditions for funding. By 1997 these requirements had been extended to good governance generally.³⁷⁰ In this way, the conditionalities imposed by the IMF increased in robustness, scope and complexity over the course of the second half of the 20th century. That is to say, the IMF juridified in accordance with Blichner and Molander's Types A and B, as well as by type F (increased robustness) of the modified Blichner-Molander typology. By the turn of the millennium it had become possible to state, as Alvarez does in 2006, that "IMF

³⁶⁸ *Ibid.* 237.

³⁶⁹ As Fritz-Krockow and Ramlogan define it, "a member's reserve tranche position in the IMF is equal to the difference between the member's quota and the IMF's holdings of the currency stemming from the use of IMF credit. The reserve tranche position is initially 25 percent of quota, the amount of the capital subscription paid in reserve assets, but fluctuates with members' borrowing from or lending to the IMF." An IMF member can draw against its reserve tranche without incurring interest or conditionalities, since the reserve tranche forms part of the member's foreign exchange reserves. Indeed, the IMF pays interest upon a member's reserve tranche position, save for the small portion known as the 'gold tranche,' which constitutes "25 percent of the member's quota on April 1, 1978 - that part of the quota that was paid in gold prior to the Second Amendment of the Articles of Agreement." Fritz-Krockow, Bernhard, and Permehswar Ramoglan, eds., International Monetary Fund Handbook: Its Functions, Policies and Operations (Washington: International Monetary Fund, 2007), 24.

³⁷⁰ Alvarez, José E., International Organizations as Law-makers (Oxford: Oxford University Press, 2005), 241-242.

conditionality forces governments to adapt local laws, reform governmental institutions, or refrain from taking certain actions that would otherwise be within their sovereign discretion.”³⁷¹ This is, then, a powerful example of ‘legal framing,’ or type E in the modified Blichner-Molander typology. It is also a further example of the general trend toward the juridification of global economic governance between 1944 and the present. As is shown below, the WTO is an important and representative part of this trend.

The Juridification of the WTO in Seven Moments

From the above account, there is a clear and identifiable trend of juridification in global economic governance since 1945. That the history of the WTO shows it to be representative of the same trend is now to be established. In the course of doing so, the argument alludes to the political context in which the WTO developed. Nevertheless, the nature of the account requires that it dwell less upon the political than other sections of the study. This is because it has a single objective, which is to show that the WTO is representative of a general trend toward juridification in global economic governance. This requires an account with which most reasonable observers and experts can agree. Too great an emphasis upon overtly political factors would necessarily be more controversial and therefore render more difficult the achievement of the section’s objective.

The history of the WTO is indissociable from the post-WWII history of the development of the global governance of international trade by means of the abortive International Trade Organization (ITO) and the General Agreement on Tariffs and Trade

³⁷¹ *Ibid*, 242.

(GATT). It begins, of course, with the United Nations Monetary and Financial Conference, held at Bretton Woods, New Hampshire, in July of 1944. As is well known, the purpose of the Conference was to establish a system of international economic governance sufficient to preclude, or at least reduce, the protectionism, lack of cooperation, and competitive currency devaluations that were understood to have worsened the Great Depression of the 1930s and to have contributed meaningfully to the advent of WWII.³⁷² The system was to have consisted of the International Monetary Fund (IMF), the International Bank for Reconstruction and Development (IBRD – later the World Bank), and an International Trade Organization (ITO). In the end, only the IMF and the IBRD were established, the ITO having failed to be ratified. The effect of the IMF and the IBRD was to cause each signatory to the Bretton Woods agreement to maintain its currency at a particular exchange rate by tying its currency to the US dollar. The IMF would provide financial assistance during the adjustment processes necessary to allow balances of payments to return to a sustainable pattern.³⁷³

The history of the development of international trade governance from the final years of WWII to the present is rather more circuitous. It is marked by two trends that are fundamental to the study: the increasing purview of international trade governance; and the increasing juridification of international trade governance. Neither trend has met with a reversal during the 70 years since the beginning of discussions in 1943, and both trends are essential to the prospects for democratic global economic governance. As Odell and Eichengreen state:

³⁷² Porter, Tony, Globalization and Finance (Cambridge: Polity Press, 2005), 39-40. Also Steil, Ben, The Battle of Bretton Woods: John Maynard Keynes, Harry Dexter White, and the Making of a New World Order (Princeton, N.J., USA: Princeton University Press, 2013), 1-3.

³⁷³ Porter, Tony, Globalization and Finance (Cambridge: Polity Press, 2005), 39-40.

The proposal for a postwar trade organization was developed by a set of interdepartmental and interagency committees that met in Washington, DC, from the spring of 1943 to the summer of 1945. Its four foundations were (1) generalized most-favoured nation treatment, with exceptions only for long-standing preferences, (2) no increases in existing preferences, (3) a commitment to negotiate reductions in existing barriers, and (4) a ban on using quantitative restrictions except under exceptional conditions.³⁷⁴

These four foundations have remained fundamental to international and global trade governance throughout the intervening seven decades; indeed, the first and the third were incorporated essentially without alteration in the 1994 Marrakesh Agreement that established the WTO. That said, the scope and the manner of their application have undergone important changes since 1943. These changes have taken the form of juridification, and the study now highlights seven ‘Moments of Juridification’ that crystallize the nature of the changes.

Moment 1: From the ITO to the GATT and then to the WTO – Constitutive Juridification

Between the end of WWII and 1948, two sets of negotiations were conducted concurrently, both of which supported the furtherance of trade liberalization and the

³⁷⁴ Odell, John and Barry Eichengreen, “The United States, the ITO and the WTO: Exit Option, Agent Slack, and Presidential Leadership,” in Anne Krueger, ed., The WTO as an International Organization (Chicago: University of Chicago Press, 1998), 184.

international governance of trade.³⁷⁵ The first and smaller set of negotiations initially comprised 15 countries and included 23 by the conclusion of negotiations. These negotiations had begun in December of 1945, continued at London in 1946, and concluded at what became known as the Geneva Preparatory Meeting in 1947 with the finalization of the GATT as a separate agreement standing entirely alone.³⁷⁶ At the conclusion of the Geneva meeting, the 23 ‘contracting parties’ had conducted 123 bilateral negotiations and agreed to 45,000 tariff concessions. These concessions cut the average tariff by 35 percent and affected USD 10 billion in trade, or one-fifth of the global total.³⁷⁷ This was a significant increase in the scope, complexity and robustness of

³⁷⁵ There is a certain lack of clarity and specificity in much of the international trade literature concerning the precise nature of the relationship between the original GATT negotiations and the ITO negotiations.

Jackson describes the GATT negotiations as distinct from those to form the ITO. Winham follows Jackson, and states that “the GATT … was created mainly as a set of trading rules pending the completion of the ill-fated ITO, and it was put in place to accompany multilateral tariff-reduction negotiations that were held in 1948.” (Winham, Gilbert, The Evolution of International Trade Agreements, (Toronto: University of Toronto Press, 1992), 43 (also citing Jackson).) The account given by Trebilcock, Howse and Eliason agrees with those of Winham and Jackson. They describe the GATT as “a provisional agreement, negotiated in 1947 among some 23 major trading countries in the world as a prelude to the ITO and the adoption of the Havana Charter …” (Trebilcock, Michael, Robert Howse and Antonia Eliason, The Regulation of International Trade, Fourth Edition (London: Routledge, 2013), 24.) These comments suggest that the GATT and ITO negotiations were separate and distinct, rather than the GATT being part of the ITO negotiations. The WTO website, as referenced in the present chapter, also agrees with this account.

Hudec’s 1975 work, The GATT Legal System and World Trade Diplomacy, largely settles the question. As Hudec describes it, the two negotiations were distinct but related. The initial American invitation to 15 key countries for GATT negotiation predated the first Preparatory Committee meeting for the ITO. However, the actual GATT negotiations began during the second ITO Preparatory Committee meeting, in April of 1947. They were concluded on 30 October, 1947, well before the conclusion of negotiations for the components of the ITO. The GATT negotiations were conducted by the same representatives who conducted the ITO negotiations, but great care was taken to erase all mention of GATT as an institution (save the term CONTRACTING PARTIES in capitals), while the ITO was openly constructed as a robust institution. Finally, although the GATT text began as the tariff-reduction portion of the ITO text, it ended with important differences concerning institutional structure, compliance practices, legal obligation, and exceptions to tariff reductions. (Hudec, Robert, The GATT Legal System and World Trade Diplomacy, (New York: Praeger Publishers, 1975), 44-51.)

In short, the GATT and ITO negotiations were clearly distinct, though concurrent and related.

³⁷⁶ http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm (accessed 3 February 2013).

³⁷⁷ http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm (accessed 3 February 2013).

international trade governance. It was also the archetypal moment of constitutive juridification of international trade governance.

Concurrently, negotiations had proceeded between 50 countries under the auspices of the United Nations and with the purpose of establishing an International Trade Organization (ITO). The idea of an ITO had been advanced at Bretton Woods in 1944; it had been conceived as a partner to the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development, which would become the World Bank. The Charter of the ITO was agreed upon by the 50 negotiating countries at Havana in March of 1948. Famously, though, the ITO failed to win ratification by the United States Senate, largely owing to protectionist sentiment and concerns for United States sovereignty.³⁷⁸ The ITO effectively ceased to exist in 1950 when the Truman Administration declared that it would no longer seek Congressional ratification of the Havana Charter; it was considered that the Organization could not be effective without the full participation of the United States, and many countries had conditioned their accession to the ITO upon its ratification by the United States.³⁷⁹ In light of this failure, it became crucial that the GATT had been concluded separately from the ITO. The contracting parties had defined the means by which the GATT could be incorporated within the ITO, but had been explicit that the GATT was an independent agreement that would continue in force should the ITO fail to be ratified. Thus, in the absence of the

³⁷⁸ Wilkinson, Rorden, The WTO: Crisis and the Governance of Global Trade (London: Routledge, 2006) 35-36. Also Winham, Gilbert R., International Trade and the Tokyo Round Negotiation (Princeton: Princeton University Press, 1986), 13, 27, 33, 396.

³⁷⁹ Wilkinson, Rorden, The WTO: Crisis and the Governance of Global Trade (London: Routledge, 2006) 35-36. Also Winham, Gilbert R., International Trade and the Tokyo Round Negotiation (Princeton: Princeton University Press, 1986), 13, 27, 33, 396.

ITO, the GATT became “the only multilateral instrument governing international trade.”³⁸⁰

As Wilkinson notes, as an end result this was precisely in accordance with the trade policy and foreign-policy interests of the United States.³⁸¹ The contrast between the failed ITO and the smaller and relatively less formal GATT was reassuring to those concerned about the abrogation of US sovereignty, particularly in the US Congress. At the same time, the immediate effect of the GATT was to open industrial markets for exports from the US and other industrialized countries, while leaving closed markets such as agriculture and textiles that were subject to far greater domestic sensitivity. This was to have important consequences in subsequent decades, as was the relatively informal operation of the GATT in practise, which was to allow its subsequent evolution to be strongly guided by American and allied interests. As Wilkinson states, “[t]he GATT, then, was neither an insufficient nor a haphazard tool; rather, it was a precise instrument facilitating the realisation of US trade interests in a way that the ITO proved not to be.”³⁸² In a similar vein, Hudec has stated with respect to the ITO that “[the GATT] would provide a place where the leading countries could go off to do business by themselves, unencumbered by the complexities of the larger organization.”³⁸³ Finally, Wilkinson convincingly argues that precisely this asymmetry of interests between developed and

³⁸⁰ http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm (accessed 3 February 2013).

³⁸¹ Wilkinson, Rorden, The WTO: Crisis and the Governance of International Trade (London: Routledge, 2006), 43-45.

³⁸² *Ibid*, 43-45.

This is also the fundamental argument of Wilkinson’s monograph, and therefore is developed in every chapter.

³⁸³ Hudec, Robert E., The GATT Legal System and World Trade Diplomacy (New York: Praeger Publishers, 1975), 51. Also cited in Wilkinson, Rorden, The WTO: Crisis and the Governance of International Trade (London: Routledge, 2006), 45 (citing 1990 edition of Hudec).

developing countries was incorporated within the structure of the GATT. It became a fundamental and defining component of the structure and challenges of international trade governance during the subsequent decades, all but necessitating the periodic breakdowns in Ministerial Conferences since the advent of the Tokyo Round in 1973.³⁸⁴

Not only, then, did the GATT of 1947 make official the four fundamental principles described by Odell and Eichengreen above, not only did it govern international trade in a general sense between 1948 and 1994, and not only did its *ad hoc* nature profoundly condition trade governance to the present time, but it was also included within the GATT of 1994, which created the World Trade Organization. As such, the GATT 1947 constitutes the institutional and juridical foundation of the WTO. It is the most important moment of constitutive juridification as founding (Type A1). It also made possible all further moments of constitutive juridification Type A2, which Blichner and Molander call constitutionalization.³⁸⁵ This includes the advent of Part IV of the GATT, the Kennedy Round anti-dumping code, the Tokyo Round Codes, and, amongst other examples, the several understandings about dispute settlement that preceded 1994 (all of which are further discussed later in the present chapter).

Of course, in the context of international trade governance, the founding of the WTO in 1994 was of greater import than any other moment of juridification as constitutionalization (Type A2). It constitutionalized the entirety of the juridifying trend under the GATT that dated to 1947. The immediate foundation of the WTO was the Uruguay Round of multilateral trade negotiations, the impetus for which, as Odell and

³⁸⁴ Wilkinson, Rorden, *The WTO: Crisis and the Governance of International Trade* (London: Routledge, 2006), 45.

³⁸⁵ Blichner, Lars, and Anders Molander, "Mapping Juridification," *European Law Journal*, vol. 14, no. 1 (January 2008), 37-9.

Eichengreen state, was “the protectionism associated with the oil shocks and international economic imbalances of the 1970s.”³⁸⁶ The Reagan Administration in particular desired a new round of trade negotiations, since it sought greater access to foreign markets for US suppliers, as well as the extension of the GATT to cover, or better cover, agriculture, services, intellectual property and foreign investment.³⁸⁷ Yet the difficulty any new round would experience soon became apparent. At the 1982 GATT Ministerial meeting, no agreement could be reached to open a new round, since European countries were particularly concerned about liberalization of agriculture, and developing countries were concerned generally that expansion of the GATT would remove attention from the need for improved access for their exports to developed economies.³⁸⁸

It took four years more to achieve agreement to open the Uruguay Round, and a further eight years for the round to be completed. By 1988, agreement had been reached upon reforms to dispute settlement and the establishment of a Trade Policy Review Mechanism. Even so, European countries and the so-called ‘Cairns Group’ continued to oppose liberalization of trade in agricultural goods and services respectively.³⁸⁹ Only in 1992 and 1993 was agreement reached in these areas, allowing for a complete agreement and the close of the Uruguay Round in 1994. It is not the purpose of this study, nor is it valuable to this study, to recount in detail the negotiations by which agreement was reached between 1990 and 1994 upon the most difficult subjects. The result, however, is of the greatest interest and import.

³⁸⁶ Odell, John and Barry Eichengreen, “The United States, The ITO and the WTO: Exit Option, Agent Slack, and Presidential Leadership,” in Anne Krueger, ed., The WTO as an International Organization (Chicago: University of Chicago Press, 1998), 187.

³⁸⁷ *Ibid*, 187.

³⁸⁸ *Ibid*, 187.

³⁸⁹ *Ibid*, 187.

As is well known, the end of the Uruguay Round produced the most significant changes in the GATT and in international trade governance since 1947. These included the General Agreement on Trade in Services (GATS), the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), the Agreement on Trade-Related Investment Measures (TRIMS), the Agreement on Agriculture (AoA), the Trade Policy Review Mechanism (TPRM), the Dispute Settlement Understanding (DSU), and, of course, the establishment of the World Trade Organization (WTO) itself (the Marrakesh Agreement). Each of these is an important example of Type A2 constitutive juridification of international trade governance (i.e. constitutionalization). Fundamentally, the seven components, together with the GATT, constitute the system of international trade governance as it currently stands.

The Marrakesh Agreement of 1994 founds the WTO and, like the GATT 1947, includes a preamble that defines the purpose and goals of the WTO. These include a clear statement that

... trade and economic endeavour should be conducted 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 ...³⁹⁰

The preamble further recognizes that a positive effort must be made to ensure that developing and least-developed countries have access to trade and the benefits thereof

³⁹⁰ World Trade Organization, *Marrakesh Agreement Establishing the World Trade Organization*, http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm (accessed 24 October 2013).

commensurate with their needs. Finally, this is followed by the assertion that the parties to the *Agreement* will reduce tariffs in order to contribute to the above goals, in the process developing a more integrated, durable and mutually-beneficial trading system. In itself, the preamble is an important exemplar of the increasing scope of global trade governance; i.e. juridification Type B – law’s expansion and differentiation. While the original 1947 preamble included raising standards of living and full employment amongst its goals, there was no pretension in 1947 to including raising income and sustainability within the purview of trade governance.

Indeed, the very manner in which the GATT and the WTO refer to themselves respectively is an important example of juridification – in this case Type A, or constitutive. Official documentation under the GATT regime took pains not to refer to GATT as an institution, despite the existence of elements such as a Secretariat, standardized procedures for dispute settlement, quasi-constitutional standards and requirements for reaching agreement in multilateral trade negotiations, and a universally accepted founding document (GATT 1947), all of which scholars of political science would generally consider amongst the trappings of an ‘institution.’ Winham, for example, states in 1992 that “the fact that the modern-day GATT looks and functions like an international organization is the result of a largely unplanned and incremental accretion of political and legal powers. It has been institution-building by accident.”³⁹¹ Conversely, the WTO regime has been very forward in referring to itself as an ‘institution,’ with official organizational charts,³⁹² committees and sub-committees, a much more

³⁹¹ Winham, Gilbert, *The Evolution of International Trade Agreements* (Toronto: University of Toronto Press, 1992), 44.

³⁹² For the WTO organizational chart, please refer to the Appendices.

independent and robust Secretariat (relatively speaking), formal liaisons with other IOs, a formalized and independent Dispute Settlement Mechanism based on a *Dispute Settlement Understanding*, a formal Trade Policy Review Board, and a defined place relative the UN System as a ‘Related Organization.’³⁹³ In short, there is nothing coy about the WTO’s status as an ‘institution,’ and this in itself is an example of juridification Type A.

The clearest means of exploring the system that became operative on the 1st of January, 1995, is to begin with the organization and practises of the WTO. What becomes clear in doing so is that the system itself is expansive in the sense that its continued operation provides an impetus for further juridification; it is path-dependent. For example, the WTO’s biannual Ministerial Conference has for its fundamental purpose the negotiation of multilateral agreements to bring further areas of economic activity within the purview of international trade governance.³⁹⁴ The purpose of the Trade Policy Review Body (TPRB) is to ensure that the policies of member states remain compliant with their obligations under WTO Agreements.³⁹⁵ The purpose of the Dispute Settlement Body (DSB) is to use legal methods and nomenclature to resolve trade disputes.³⁹⁶ Finally, the purpose of the various Subordinate Councils is essentially to manage the areas of

³⁹³ For the WTO’s relative place vis-a-vis the UN system, please refer to the chart of the UN system in the Appendices.

³⁹⁴ World Trade Organization, *Marrakesh Agreement Establishing the World Trade Organization*, Art. III, para. 2; Art. IV, http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm (accessed 24 October 2013).

³⁹⁵ World Trade Organization, *Marrakesh Agreement Establishing the World Trade Organization*, Annex 3, http://www.wto.org/english/docs_e/legal_e/29-tprm_e.htm (accessed 17 September 2014).

³⁹⁶ World Trade Organization, *Marrakesh Agreement Establishing the World Trade Organization*, Annex 2 – *Understanding or rules and procedures governing the settlement of disputes (DSU)*, http://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm (accessed 17 September 2014).

economic activity already under the purview of international trade law.³⁹⁷ In short, then, every fundamental component of the WTO has for its basic function the continued juridification of economic activity in accordance with at least one of the modified Blichner-Molander types of juridification.

The Ministerial Conference

Allowing for a few qualifications, the WTO is a consensus-based organization.³⁹⁸ Its purpose is to provide a negotiating forum, and rules for negotiation toward further liberalization of international trade. Its authority derives entirely from its members. It follows that the highest level of authority within the structure of the WTO should be the Ministerial Conference. This is comprised of a representative, or minister, from each

³⁹⁷ World Trade Organization, *Marrakesh Agreement Establishing the World Trade Organization*, Art. IV, paras. 5-8, http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm (accessed 24 October 2013).

³⁹⁸ The first principle of the WTO is that it is a forum for discussion and negotiation run by its member governments. With only four exceptions, decisions are made, agreements reached and the Organization governed on the basis of consensus (http://www.wto.org/english/thewto_e/whatis_e/tif_e/org1_e.htm (accessed 3 February 2013)).

The four exceptions are the following: three-quarters of WTO members are sufficient to adopt an interpretation of any multilateral trade agreement; three-quarters of the Ministerial Conference is sufficient to waive a particular obligation imposed upon a member under a multilateral agreement; particular amendments to particular multilateral agreements can be approved by two-thirds of all members, with the proviso that such amendments are binding only for the members that voted to accept them; and the admission of a new member is approved by a two-thirds majority of the Ministerial Conference or the General Council (http://www.wto.org/english/thewto_e/whatis_e/tif_e/org1_e.htm (accessed 3 February 2013)). Aside from these exceptions, the WTO is governed by consensus. Having said that, it must be stressed that consensus-based decision-making does not equate to a requirement in all cases for a universal expression of unanimity. Instead, consensus in WTO proceedings entails the absence of a dissenting vote, rather than a universal positive consensus.

Politically, this alters somewhat the calculus of costs and benefits, principles and preferences that informs the vote of each WTO Member. A Member's decision to absent itself from a vote can be accomplished with a significantly lower profile than a vote upon a given question, regardless of whether the vote is visible to the public or not. This could conceivably make easier the process of legitimizing and advancing the representation of women and women's interests within the WTO. Nevertheless, it must also be remembered that absence from a vote is a decision not to vote against a given initiative and thereby tacitly to maintain consensus. It is certainly likely to be interpreted in this way by parties desirous of the failure of an initiative. As such, it is entirely correct to state that the adoption of a given initiative by the WTO requires the consensus of all WTO Members not to vote against the initiative. This must in turn reduce the potential benefit to a WTO Member of abstention or absence.

member government, and is mandated to meet at least once every two years by the Marrakesh Agreement establishing the WTO. The authority of the Ministerial Conference is plenary; it may take any decision it pleases upon any subject governed by the GATT and related agreements, though it must do so in nearly all cases by consensus.³⁹⁹ Again, therefore, the highest level of authority and the highest function within the WTO is a forum for continual constitutive juridification (Type A2). In this sense, the WTO is path-dependent by design.

Yet clearly a body that meets every two years is not sufficient to run an organization meant to govern international trade at all times. For this reason, the Marrakesh Agreement provides for a General Council, composed of representatives from each member economy, whose purpose is threefold. First, it performs the functions of the Ministerial Conference between the biannual meetings. Second, it convenes as the Trade Policy Review Body (TPRB), which is addressed next in this first moment of juridification. Third, it convenes as the Dispute Settlement Body (DSB), as provided for by the *Dispute Settlement Understanding* annexed to the *Marrakesh Agreement*.⁴⁰⁰ The DSB is addressed separately in this chapter, as part of the third moment of juridification.

The TPRB

The Trade Policy Review Body (TPRB) is the mechanism by which the WTO conducts periodic reviews of the trade policies of each member in order to ensure compliance with all WTO agreements. Again, the TPRB is simply the General Council in

³⁹⁹ http://www.wto.org/english/thewto_e/whatis_e/tif_e/org1_e.htm (accessed 3 February 2013) and http://www.wto.org/english/thewto_e/minist_e/minist_e.htm (accessed 3 February 2013).

⁴⁰⁰ http://www.wto.org/english/thewto_e/whatis_e/tif_e/org1_e.htm (accessed 3 February 2013) and http://www.wto.org/english/thewto_e/gcounc_e/gcounc_e.htm (accessed 3 February 2013).

a different guise; thus, in effect, the TPRB is the name given to the process of WTO members reviewing each other's policies. Though it is a soft-law mechanism, the TPRB is nevertheless an important example of juridification. It has three primary objectives: first, to improve transparency and increase understanding of members' trade policies and practices; second, to improve the quality of debate concerning trade policy; and third, "to enable a multilateral assessment of the effects of policies on the world trading system."⁴⁰¹ Of note, TPRB reviews not only address specific policies and practices, but also consider economic and developmental needs and objectives of member economies. The size of an economy determines the frequency with which it is reviewed. The four largest economies are examined once every two years. The next 16 largest are examined every four years. The remainder are examined every six years. Each review produces a policy statement by the member under review, and a detailed analysis prepared by the WTO Secretariat.⁴⁰² The existence of the TPRB is itself an increase in the scope of international trade governance. The practise of regular reviews of the trade policies of contracting parties is new to the WTO. There was no comparable level of review under the GATT.

The establishment of the TPRB is therefore an example of juridification type A2; that is, the augmentation of a formal constitutional order. Moreover, the extension to the WTO of the authority to review its members' trade policies is an example of the vertical expansion of law within type B2 in the modified Blichner-Molander typology.⁴⁰³ The TPRB is also an example of increased robustness (type F) and legal framing (type E), in which WTO Members, participating in international trade governance through their

⁴⁰¹ http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm11_e.htm (accessed 3 February 2013).

⁴⁰² http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm11_e.htm (accessed 3 February 2013).

⁴⁰³ Blichner, Lars, and Anders Molander, "Mapping Juridification," *European Law Journal*, vol. 14, no. 1 (January 2008), 42.

representatives, understand themselves, other Members, and their relationship to other Members, in light of a common legal order.

In sum, then, Moment 1 shows how international trade governance has been subject to the same intensive juridification since 1945 to which global economic governance generally has been subjected. This is particularly the case with respect to types A and B, in which the legal order is formed, constitutionalized, expanded and differentiated. This is the process that gives the question of democratization its urgency, since juridification is equally necessary to ensure access to the institutions of power (and thus necessary to democracy itself), and capable of turning those institutions into the loci of the abuse of power. The process of juridification has no bias toward one possibility or the other. However, in subjecting an ever-greater sphere of activity to the rule of law and legal reasoning, juridification is reinforced by the path-dependence already markedly present in the WTO. Every new instance of juridification makes further juridification more likely, even as it reinforces prior juridification and makes de-juridification, or any other fundamental change of course, more difficult. This is why IGI insists upon hybridization of hard-law and soft-law regimes as a means to introduce variance, innovation and flexibility, thus to counter path-dependence. Therein lies the importance of pursuing these different moments of juridification: to establish the nature of the general trend; to establish the urgency of the question of democratization; and to learn the different ways in which international trade governance has been juridified since 1945. In particular, by showing the different ways in which the WTO represents the juridifying trend of global economic governance, the study is also able to explore the context in

which the tenets of IGI are applicable, especially as they concern the need for hybridization.

Moment 2: The Continual Increase of Parties to the GATT and WTO

Although the number of countries participating in multilateral trade negotiations varied during the 1940s and 1950s, the number of contracting parties to the GATT did not decline. At Geneva in 1947, 23 countries took part. At Annecy in 1949 only 13 countries participated in discussions. At Torquay in 1951, fully 38 countries took part, but at Geneva in 1956 only 26 countries did so. The same number, 26, took part in the Dillon Round of negotiations at Geneva in 1960-61. These fluctuations reflect the number of countries that participated in a given round of negotiations; conversely, the number of contracting parties to the GATT, and consequently under the purview of international trade governance, did not decline at any point between 1948 and 1994. After the Dillon Round, the number of countries who had become contracting parties to the GATT increased steadily, numbering 62 at the Kennedy Round of 1964-67, 102 at the Tokyo Round of 1973-79, and 123 at the Uruguay Round of 1986-94.⁴⁰⁴

By March of 2013 the WTO had accepted 159 Members, of which 31 non-GATT 1947 Members had acceded since 1 January 1995, and of which 21 had acceded since 1 January 2000. Further, of these 21 countries, 16 have acceded since the inception of the Doha Round in 2001, suggesting that the Round's many difficulties have actually been contemporaneous with a steady increase in the scope and strength of the WTO. In addition, 25 countries have been granted observer status, of which all save the Vatican

⁴⁰⁴ http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm (accessed 3 February 2013).

must begin accession negotiations within 5 years of becoming observers. Finally, more than 30 different IOs hold observer status for one or more of the WTO's Councils or Committees.⁴⁰⁵

At the same time, the number and variety of the subjects governed by the GATT increased steadily from 1947 to 1994. The first five rounds, from Geneva in 1947 to Dillon in 1961, addressed officially only the further reduction of tariffs. The Kennedy Round added anti-dumping measures to official negotiations, and the Tokyo Round added non-tariff measures and 'framework agreements.' Finally, the Uruguay Round, in addition to tariff reductions, addressed non-tariff measures, rules, services, intellectual property, textiles, agriculture, the creation of the WTO, and dispute settlement under the WTO, amongst other subjects.⁴⁰⁶ These latter agreements, known collectively as the 'Final Act' of the Uruguay Round, have governed international trade since 1 January 1995, and are frequently referred to as the 'WTO Agreements.' Of course, the Doha Round has had less success in extending the scope of the WTO Agreements, but this has not materially affected the stability or robustness of the WTO regime.

Indeed, no matter how stalled the Doha Round may be, by 1 February 2013 fully 159 countries had accepted that international trade was governed by the terms of the WTO Agreements, that trade disputes would be defined and settled by reference to the WTO Agreements, and that changes to the international trade regime could only be made legitimate by means of the WTO. The proliferation of Preferential Trade Agreements (PTAs) during the same period changes none of this. As a result of these increases in

⁴⁰⁵ World Trade Organization, *International Intergovernmental Organizations Granted Observer Status to WTO Bodies*, www.wto.org/english/thewto_e/igo_obs_e.htm (accessed 24 June 2014).

⁴⁰⁶ http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm (accessed 3 February 2013).

membership and scope, the 66 years between 1947 and 2013 constitute an unbroken period of juridification as law's expansion (type B1). This includes horizontal expansion by a continual growth of membership to include nearly all of the world's countries. This is shown in Table 1 and Figure 1 below. It also includes vertical expansion by the advent of new agreements covering new areas of economic activity.

Table 2: GATT and WTO Trade Rounds

| Year | Place/name | Subjects covered | Countries Attending | Contracting Parties | Number of Parties Actually Granting Concessions* |
|---|----------------------|--|----------------------------|--|---|
| 1947 | Geneva | Tariffs | 23 | 23 | 23 |
| 1949 | Annecy | Tariffs | 13 | 33 | 33 |
| 1951 | Torquay | Tariffs | 38 | 34 | 29 |
| 1956 | Geneva | Tariffs | 26 | 39 | 22 |
| 1960-1961 | Dillon Round | Tariffs | 26 | 42 | 22 |
| 1964-1967 | Geneva Kennedy Round | Tariffs and anti-dumping measures | 62 | 76 | 37 |
| 1973-1979 | Geneva Tokyo Round | Tariffs, non-tariff measures, “framework” agreements | 102 | 85 | 44 |
| 1986-1994 | Geneva Uruguay Round | Tariffs, non-tariff measures, rules, services, intellectual property, dispute settlement, textiles, agriculture, creation of WTO, etc. | 123 | The Uruguay Round required every member to have a schedule of concessions – hence all participated. (Wilkinson, p.56) | |
| 2001 on (details as of March 2013) | Geneva Doha Round | Tariffs, non-tariff measures, development, agriculture, etc. | 159 | 159 (open only to WTO Members) | N/A (the round is not yet completed) |

* “GATT negotiations also involved countries that were not signatories to the General Agreement but which had requested accession or were in the process of acceding.” (Wilkinson, p.56)

Source: http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm (August 27, 2013); Wilkinson, Rorden, The WTO: Crisis and the Governance of International Trade (London: Routledge, 2006), 56. Wilkinson’s table was updated from the WTO website.

Figure 1: WTO Members (as of August 2013)



Source: http://www.wto.org/english/thewto_e/countries_e/org6_map_e.htm (September 5, 2013); Green – Member; Yellow - Observer

Moment 3: Dispute Settlement (from Articles XXII and XXIII to the DSB)

Articles XXII and XXIII under the GATT

As Jackson has described, dispute settlement under the GATT evolved significantly between 1948 and 1994; indeed, “the GATT developed through practice a relatively sophisticated set of procedures for dispute settlement.”⁴⁰⁷ Moreover, this process constituted a sustained movement toward the juridification of dispute settlement under the GATT.

Dispute settlement under the GATT and the WTO takes its origin ultimately from Articles XXII and XXIII of the GATT 1947. Article XXII institutes a requirement for consultation between contracting parties, and allows for consultation between all contracting parties in the event of a dispute. Article XXIII defines the acceptable response when a contracting party considers that a benefit it ought to receive from the GATT, or any objective of the Agreement, is being nullified or impaired. It first requires that the complaining party conduct discussions with the contracting party accused of nullification or impairment. Should these discussions not result in agreement, the complainant can be referred to the Contracting Parties as a whole. The Contracting Parties, considered as a body, have plenary authority to determine whether a violation has occurred and to define appropriate countermeasures.

The evolution of dispute settlement under these two articles is itself an important and evocative example of the juridification of international trade governance between 1947 and 1994. The text of Article XXII specifically mandates that each contracting party

⁴⁰⁷ Jackson, John H., “Designing and Implementing Effective Dispute Settlement Procedures: WTO Dispute Settlement, Appraisal and Prospects,” in Anne Krueger, ed., The WTO as an International Organization (Chicago: University of Chicago Press, 1998), 166.

accord ‘sympathetic consideration to’ and ‘adequate opportunity for consultation regarding,’ any matter affecting the operation of the GATT. It also permits the Contracting Parties, as a body, to consult with any specific contracting party or parties when a solution cannot be agreed upon to the original complaint concerning the operation of the GATT. In other words, Article XXII allows a dispute between contracting parties to be referred to the Contracting Parties as such. The text of Article XXIII specifically permits written representation to be made between contracting parties in cases of perceived nullification and impairment. Where no solution can be reached, it then allows the dispute to be referred to the Contracting Parties as a body, which is required to investigate and issue a recommendation or a ruling as appropriate.

The first recorded disputes under GATT occurred during the Second Session in 1948.⁴⁰⁸ In the first, the Netherlands argued that a consular tax levied by Cuba contravened GATT Article I. In the second, Pakistan objected to India’s discriminatory application of export tax rebates, and asked whether Article I applied to the rebates. In both cases, the dispute was referred to the GATT ‘Chairman,’ who was asked to produce a ruling. The Chairman ruled that GATT Article I (the Most Favoured Nation (MFN) obligation) applied to both consular taxes and export tax rebates.⁴⁰⁹ This was sufficient to produce a resolution in the Netherlands-Cuba dispute, since Cuba agreed to remove its consular taxes.⁴¹⁰ However, the India-Pakistan dispute was not settled during the Second Session since, when the Chairman gave his ruling against India on the application of

⁴⁰⁸ Hudec, Robert, The GATT Legal System and World Trade Diplomacy, (New York: Praeger Publishers, 1975), 66-68. See also Trebilcock, Michael, Robert Howse and Antonia Eliason, The Regulation of International Trade, Fourth Edition (London: Routledge, 2013), 173.

⁴⁰⁹ Hudec, Robert, The GATT Legal System and World Trade Diplomacy, (New York: Praeger Publishers, 1975), 66.

⁴¹⁰ *Ibid*, 66.

Article I, the Indian delegate stated only that he was required to ‘reserve’ his position on the ruling pending instructions from his government. In subsequent communications between India and Pakistan, India stated that it was unable to accept the Chairman’s ruling. The dispute was not resolved until late in the GATT Third Session, in 1949, when India and Pakistan concluded a separate agreement that both countries would award each other MFN treatment on export tax rebates (India thereby effectively conceding Pakistan’s position).⁴¹¹

The ‘chairman’s ruling’ as a method of dispute resolution was an important innovation but it was not long lasting. As Hudec states,

the choice of the ‘chairman’s ruling’ as the procedure for resolving the legal issue was typical of the Preparatory Committee format of the first GATT meetings. In this very tenuous period, the organization needed the Chairman’s personal prestige as a source of collective authority. Reliance on this procedure proved short-lived, however. After the Second Session, legal complaints were invariably referred to subsidiary working groups.⁴¹²

Nevertheless, these first two disputes under the GATT signify a recognition that legal disputes would arise and that a mechanism to help resolve the disputes would be needed. The ‘chairman’s ruling’ format also hinted at later third-party methods of dispute resolution under the GATT. All of these were movements of juridification.

⁴¹¹ *Ibid*, 67-68, 100-102.

⁴¹² *Ibid*, 66-67.

That said, one of the most important ways in which the ‘chairman’s ruling’ method differed from later practice under the WTO was that it was entirely a method to facilitate further negotiation between the disputants and was not binding in any way upon the disputants or other contracting parties. As the India-Pakistan dispute showed, this was true even with relation to findings of fact and interpretations of legal texts in a given dispute. Conversely, under the Dispute Settlement Mechanism of the WTO, the judgment of the Panel (pending appeal) or Appellate Body would be binding upon the disputants unless opposed by a consensus of WTO members, including the disputants themselves.

As Hudec noted, the ‘chairman’s ruling’ method did not last long. It was superseded by the introduction during the Second Session of the Working Party as an aid to dispute settlement. The first Working Party was established as the result of a nonviolation nullification and impairment complaint by the United States against Cuba concerning regulations that nullified benefits expected from tariff concessions on textiles.⁴¹³ The Contracting Parties refused to accept automatically the American complaint, and the Working Party was ordered “to recommend … a practical solution consistent with the principles and provisions of the General Agreement.”⁴¹⁴ In this first of several Working Parties that would be established between 1948 and 1952, a settlement was achieved. Cuba agreed to withdraw the regulation and the United States agreed to renegotiate particular textile tariffs.⁴¹⁵

⁴¹³ *Ibid*, 67-68.

⁴¹⁴ GATT/CP. 2/SR. 23 (Sept 10, 1948), 8-9. Cited in Hudec, Robert, The GATT Legal System and World Trade Diplomacy, (New York: Praeger Publishers, 1975), 67.

⁴¹⁵ Hudec, Robert, The GATT Legal System and World Trade Diplomacy, (New York: Praeger Publishers, 1975), 67.

A Working Party was essentially a locus of specially focused negotiation involving the disputants and select neutral countries, the purpose of which was to produce agreement between the disputants. It was not empowered to give rulings or make decisions. As Hudec states, “although neutrals [were] sometimes added for their ability to offer objective suggestions, the essential target [was] always agreement among the principals. If the principals [could] not agree, the working party [had] no answer.”⁴¹⁶ Trebilcock Howse and Eliason add that “this was not a third-party investigation for the purpose of coming to objective conclusions on the merits: such a function was precluded by the participation of the disputants, and the fact that the other representatives were acting on the instructions of their respective countries.”⁴¹⁷

The advent of Working Parties in the context of the GATT is itself an example of juridification, since they were dedicated, if *ad hoc*, bodies created specifically to consider the legalities of disputes and to facilitate their resolution. Even so, they were very far from the highly juridified dispute settlement that would develop under the WTO. Most importantly, they required consensus of contracting parties for their establishment and adoption, and they always included the disputants amongst their members.⁴¹⁸ As a result, they were primarily fora for negotiation and the disputants could abandon the Working Party at any time. By contrast, under the WTO DSM, Panels are established as of right, they can only be blocked by consensus, their decisions can only be rejected by consensus, and their proceedings can only be abandoned at specific points and only by consensus.

⁴¹⁶ Hudec, Robert, The GATT Legal System and World Trade Diplomacy, (New York: Praeger Publishers, 1975), 69.

⁴¹⁷ Trebilcock, Michael, Robert Howse and Antonia Eliason, The Regulation of International Trade, Fourth Edition (London: Routledge, 2013), 173.

⁴¹⁸ *Ibid*, 172-174.

Working Parties themselves underwent a degree of juridification between 1948 and 1952. In at least three cases the Working Party adopted a *de facto* third-party dispute resolution model, although the formal structure of the Working Party did not change. The first and most important was the Australian Subsidy case of 1950, where Chile filed a nonviolation nullification and impairment claim against Australia.⁴¹⁹ Despite Australian objections, the Working Party report supported the Chilean claim and the Contracting Parties accepted the report. Australia chose to stand upon a separate memorandum stating its opposition, without formally objecting to the report. Thus, “the final product had the appearance of what it was in fact – a decision of the legal issue by the three neutrals, with Australia filing an appeal.”⁴²⁰ In the second case, a dispute between Czechoslovakia and the United States in 1950, the neutral worked as a single voting bloc and, while siding ultimately with the United States, produced “the most detailed and legal of all GATT decisions of this kind.”⁴²¹ In the third case, also in the Fifth Session in 1950, the Netherlands was able to use the GATT to force the United Kingdom to amend domestic tax law after bilateral negotiations had failed to produce the desired result.⁴²²

Each of these cases was an example of juridification because they were indicative of a sustained movement toward more formalized third-party dispute settlement during the early years of the GATT. Nevertheless, they remained formally within the construct of a Working Party based negotiation between the disputants, as described above. They were, therefore, entirely eclipsed as moments of juridification by the establishment of the

⁴¹⁹ Hudec, Robert, The GATT Legal System and World Trade Diplomacy, (New York: Praeger Publishers, 1975), 70, 144-153.

⁴²⁰ *Ibid*, 70.

⁴²¹ *Ibid*, 71.

⁴²² *Ibid*, 71-72.

first GATT dispute settlement Panel in 1952.⁴²³ Hudec describes the advent of the first Panel somewhat wryly.⁴²⁴ It began with the GATT Chairman suggesting that a special ‘working party’ be established to address all dispute cases during the upcoming Seventh Session in 1952. This agreed, five days later the same Chairman ‘recalled’ that “it had been agreed to establish a *panel* to hear the various complaints ...”⁴²⁵ The chair of the Panel was agreed to be the representative from Canada, while the five other members were from Australia, Ceylon, Cuba, Finland, and the Netherlands. The major powers were not represented upon the Panel; neither were the disputants.⁴²⁶ The change in working procedures was radical.⁴²⁷ The disputants would present their cases to the Panel; other interested parties could do so as well. The Panel would then consider the dispute by itself, draft a report by itself, discuss the report with the disputants, and prepare by itself its final report to the Contracting Parties. Hudec observes that “the procedure left no doubt that the decision-making body would be the Panel itself.”⁴²⁸

As Jackson remarks, this shift signalled “a more juridical, rather than negotiating procedure. The experts on a dispute panel were acting in their own right, and not as representatives of other governments. They had an obligation to be impartial and to apply

⁴²³ See Trebilcock, Michael, Robert Howse and Antonia Eliason, The Regulation of International Trade, Fourth Edition (London: Routledge, 2013), 173. See also Hudec, Robert, The GATT Legal System and World Trade Diplomacy, (New York: Praeger Publishers, 1975), 74-83.

⁴²⁴ Hudec, Robert, The GATT Legal System and World Trade Diplomacy, (New York: Praeger Publishers, 1975), 74-76.

⁴²⁵ *Ibid*, 74 (emphasis added).

⁴²⁶ Trebilcock, Michael, Robert Howse and Antonia Eliason, The Regulation of International Trade, Fourth Edition (London: Routledge, 2013), 173. See also Hudec, Robert, The GATT Legal System and World Trade Diplomacy, (New York: Praeger Publishers, 1975), 75.

⁴²⁷ Hudec, Robert, The GATT Legal System and World Trade Diplomacy, (New York: Praeger Publishers, 1975), 75.

⁴²⁸ *Ibid*, 76.

careful reasoning to the cases brought before them.”⁴²⁹ A GATT Secretariat report to the Contracting Parties defined the adoption of panels as a move toward greater objectivity in dispute settlement.⁴³⁰ Even so, it is important to recall that dispute settlement under the GATT was always a continuation of negotiation and that the disputes themselves would only be settled when the contracting parties agreed that they were settled. Moreover, in its final report, the Panel would still only make recommendations to the Contracting Parties, which would have to be adopted by consensus. Again, dispute settlement under the WTO was to be very different and much more juridified. Under the *Dispute Settlement Understanding* of 1994, the formal filing of a complaint would all but automatically produce a binding decision.

There was, therefore, still much room for juridification under the GATT before reaching the standard of 1994. In 1962, a panel introduced the concept of ‘*prima facie* nullification or impairment’ in a case initiated by Uruguay.⁴³¹ As mentioned above, the concept of ‘nullification and impairment’ was defined in Article XXIII of the GATT, but in terms that left a reasonably wide scope for interpretation and implementation. The 1962 panel, however, determined that any breach of the GATT was *prima facie* nullification and impairment. This placed the burden of proof upon the country

⁴²⁹ Jackson, John H., “Designing and Implementing Effective Dispute Settlement Procedures: WTO Dispute Settlement, Appraisal and Prospects,” in Anne Kreuger, ed., The WTO as an International Organization (Chicago: University of Chicago Press, 1998), 166.

⁴³⁰ *Ibid.*, 173.

⁴³¹ Jackson, John H., “Designing and Implementing Effective Dispute Settlement Procedures: WTO Dispute Settlement, Appraisal and Prospects,” in Anne Kreuger, ed., The WTO as an International Organization (Chicago: University of Chicago Press, 1998), 166.

The case in question is “Report of the Panel on Uruguayan Recourse to Article XXIII,” adopted 16 November 1962 (L/1923 – 115/95).

responding, in defense, to the complaint.⁴³² Moreover, subsequent GATT panels consistently cited the 1962 case throughout the 1960s and ‘70s, creating a sense of precedent, and respect for precedent, even in a system entirely without a formal doctrine of binding or advisory precedent. Indeed, the principle was embodied in the GATT itself at the conclusion of the Tokyo Round of 1979.⁴³³ This is almost an archetypal case of juridification type C, wherein conflicts are solved with increasing frequency with reference to law. In particular, the construction of a *de facto* precedent from the 1962 case shows that juridification type C1 took place even from the early years of the GATT regime, producing a “highly specialised and standardised form of legal reasoning involving the judiciary.”⁴³⁴

Again, therefore, the development of dispute settlement under the GATT and the WTO is one of the most important examples of the juridification of international trade governance since 1947. However, as the above example indicates, there was much distance to travel between the GATT 1947 and the *Dispute Settlement Understanding* of 1994. In the interval, there were four agreements of particular importance reached concerning dispute settlement, each of which served the further juridification of international trade governance. Each of these constitutes an example of the development of more precise rules of dispute settlement, which is itself an example of juridification types A (constitutive), C (increased conflict solving by reference to law), and D (increased judicial power).

⁴³² Jackson, John H., “Designing and Implementing Effective Dispute Settlement Procedures: WTO Dispute Settlement, Appraisal and Prospects,” in Anne Krueger, ed., The WTO as an International Organization (Chicago: University of Chicago Press, 1998), 166.

⁴³³ *Ibid*, 166.

⁴³⁴ Blichner, Lars, and Anders Molander, “Mapping Juridification,” European Law Journal, vol. 14, no. 1 (January 2008), 44.

First is the *Decision of 5 April 1966 on procedures under Article XXIII*. It is remarkable in that it concerns exclusively disputes between developed and developing countries.⁴³⁵ It also mandates that when consultation fails the GATT Director-General shall submit a report to the Contracting Parties as a body concerning the dispute's background and any actions taken. The *Decision* then binds the Contracting Parties to establish a Panel to examine the dispute and recommend a solution. It further requires the submission of the Panel's report within 60 days, it requires the Contracting Parties to make a decision upon the report, and it requires the offending party to report to the Contracting Parties within 90 days of their decision. Finally, the *Decision* permits the Contracting Parties to authorize the affected party to suspend concessions to the offending party in the absence of compliance.⁴³⁶

Several aspects of the *Decision* are noteworthy as examples of juridification, even if it applies only to disputes between developed and developing countries. Its use of panels, its adoption of the language of mandate and requirement, and its explicit contemplation of the suspension of concessions, all constitute examples of increasing specialization in legal reasoning. Its specific application to developing countries is in fact reflective of the increasing scope of international trade governance, not only because in itself it signals greater inclusivity, but also because it follows in the wake of the 1961 *Declaration on the Promotion of the Trade of Less-Developed Countries* and the adoption in February 1965 of Part IV of the GATT, concerning trade and development. Finally, the

⁴³⁵ *Decision of 5 April 1966 on Procedures Under Article XXIII*, Preamble and Paragraph 1, http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/a2s1p1_e.htm (accessed 23 August 2013).

⁴³⁶ *Decision of 5 April 1966 on Procedures Under Article XXIII*, http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/a2s1p1_e.htm (accessed 23 August 2013).

Decision and Part IV of the GATT are good examples of the argument made by Wilkinson that the outcome of the Kennedy Round (64-67) was not as directly favourable to US interests as had been the outcomes of previous rounds.⁴³⁷ For Wilkinson, as for Howse, Trebilcock and Eliason, this was in part because the rising prominence of the EEC and Japan had begun to move the balance of power in trade governance away from the United States for the first time since 1947.⁴³⁸

The 1979 *Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance* was in many respects the earliest formal codification of Dispute Settlement Practise under the GATT as a whole. As such, it is in itself an example of juridification. This is particularly the case because although in the 1960s the legal and textual basis of GATT dispute settlement had moved somewhat toward a juridical model, the practise of GATT dispute settlement had emphasized consultation and moved away from the juridical. As Howse, Trebilcock and Eliason note, there were only 6 Panel complaints from 1960 to 1962, and none at all from 1963 through 1970.⁴³⁹ Although the number of panel disputes rose again during the 1970s, the 1979 *Understanding* was nevertheless an important reaffirmation of the process of juridification. In this sense, the 1979 *Understanding* also juridified international trade governance both in the constitutive sense of type A, and by increasing reference to law in conflict solving (type C).

⁴³⁷ Wilkinson, Rorden, *The WTO: Crisis and the Governance of International Trade* (London: Routledge, 2006), 69-74.

⁴³⁸ *Ibid*, 69-74.

⁴³⁹ Trebilcock, Michael, Robert Howse and Antonia Eliason, *The Regulation of International Trade*, Fourth Edition (London: Routledge, 2013), 173.

Hudec notes the following reforms in the text itself: it rejects the practise of linking the resolution of a given dispute to that of another dispute; it authorizes a standing roster of panel members; it exhorts contracting parties to respond to panel nominations within seven days; it exhorts contracting parties not to oppose nominations except on compelling grounds; and it sets a standard of 30 days for establishment of a panel after a Council decision.⁴⁴⁰ These, though not profound, are important minor steps toward greater robustness, increasing complexity and fuller juridification. That is to say, they are further examples of the increased specialization of legal reasoning under the GATT (type C1).

The third important agreement was the *Ministerial Declaration* of 29 November 1982, which included a specific section on Dispute Settlement Procedures. It states plainly that the 1979 Tokyo Round *Understanding* “provides the essential framework of procedures for the settlement of disputes among contracting parties and that no major change is required in this framework.”⁴⁴¹ In so doing, the *Declaration* affirms the place of the 1979 *Understanding* as the codification of dispute settlement under the GATT.

The statement is then followed by 10 points comprising procedural reforms that the contracting parties have agreed will improve dispute settlement. Amongst these, five are of particular note for the present study. Point 3 provides for experts to be made available to serve on Panels and mandates that their expenses be paid. Point 4 makes the GATT Secretariat responsible for assisting the Panel, particularly on legal, historical and

⁴⁴⁰ Hudec, Robert E., “GATT Dispute Settlement after the Tokyo Round: An Unfinished Business,” *Cornell International Law Journal*, vol. 13 (1980), 145.

⁴⁴¹ *Dispute Settlement Procedures: Ministerial Declaration adopted 29 November 1982* (BISD 29S/9) (BISD 29S/13), preamble.

procedural matters.⁴⁴² The need for expert testimony and research assistance in these two points suggests awareness in the contracting parties that dispute settlement under the GATT is increasing in complexity (type B1), to the point where their delegations require assistance (type D).

Point 5 makes clear that a Panel's terms of reference should allow for a clear finding of contravention or of nullification and impairment. Point 8 requires the GATT General Council to make periodic reviews of compliance with Panel recommendations. It also requires any contracting party to which a recommendation is addressed to report within a specified period on the reasons for their action or inaction.⁴⁴³ In all of these points, as in the 1979 *Understanding* and the 1966 *Decision*, may be seen the increasing specialization of dispute settlement under Articles XXII and XXIII of the GATT (type B). Moreover, in each case the contracting parties become progressively more accountable in practise for their adherence to their obligations under the GATT. Thus, the above agreements concerning dispute settlement also show international trade governance under the GATT to be undergoing a process of juridification type F1, or increasing robustness comprised of growing accountability and voluntary compliance. That said, Point 10 in the 1982 *Declaration* preserves the requirement for positive consensus, including the disputing parties, before a Panel's decision can be adopted as binding.⁴⁴⁴ In effect, this reaffirms the veto traditionally held by each contracting party concerning the adoption of a Panel Report. This requirement for positive consensus militated strongly against juridification throughout the history of the GATT. Even here,

⁴⁴² *Dispute Settlement Procedures: Ministerial Declaration adopted 29 November 1982* (BISD 29S/9) (BISD 29S/13).

⁴⁴³ *Ibid.*

⁴⁴⁴ *Ibid.*

though, the Contracting Parties register unease with positive consensus when they stipulate in Point 10 that “obstruction in the process of dispute settlement shall be avoided.”⁴⁴⁵ In 1994, as will shortly be discussed, the requirement for ‘positive consensus’ in order to adopt a panel report was replaced by a requirement for ‘negative consensus’ in order for a Panel report not to be adopted. This proved to be one of the most profound reforms of the Uruguay Round (86-94) and one of the most consequential moments in the long movement of juridification.

The fourth of the important pre-Uruguay Round agreements concerning dispute settlement was an *Action* taken on procedures on the 30th of November 1984. The language of the *Action* clearly indicates increased dissatisfaction amongst contracting parties with dispute settlement under the GATT. Indeed, it is the frank statement of need for improvement that is most notable about the *Action*, since its substantive provisions constitute relatively little innovation. The statement, though, is a call for juridification made in the following terms:

However, if improvement in the whole system is to be achieved, it is necessary not only to make specific procedural improvements, but also to obtain a clear cut understanding by and commitment from the Contracting Parties (or Signatories to the Codes) with respect to the nature and time-frame of (a) the panel process; (b) the decision on the dispute matter to be taken by the Contracting Parties (or the Code Committee) on the basis of the panel’s report; and (c) the follow-up to be given to that decision by the parties to the dispute.

⁴⁴⁵ *Ibid.*

A number of the procedural problems related to the panel process have been encountered which can be addressed within the existing framework. Such problems include the formation of panels in a timely manner, and the timely completion of panel work. Although the [1979] *Understanding* provides guidelines for these procedures (thirty days for the formation of a panel and nine months to complete the panel's work), experience has shown these time targets are seldom met.⁴⁴⁶

Of the specific proposals, the most significant are the directive to create a roster of non-governmental panelists to be drawn from as needed, and the granting of authority to the Chair of the General Council to construct a panel from the roster if the parties to the dispute cannot agree upon panelists within 30 days.⁴⁴⁷

As Trebilcock, Howse, and Eliason have described, the discontent displayed in the 1984 *Action* was caused by, and symptomatic of, a decline in the effectiveness and perceived legitimacy of dispute settlement under the GATT during the 1980s.⁴⁴⁸ As Hudec, Kennedy and Sgarbossa have noted, this was evident in the decline in compliance with adopted panel reports from 88% to 81% between 1979 and 1989, and in the disproportionately lower compliance rate of the United States.⁴⁴⁹ In addition, Trebilcock, Howse and Eliason note four particular reasons for this growing discontent with dispute settlement during the 1980s: first, delay and uncertainty caused by the absence of a right to a panel and the absence of mandatory time limits on "consultations, responses to

⁴⁴⁶ *Dispute Settlement Procedures: Fortieth Session of the Contracting Parties, Action taken on 30 November 1984*, (BISD 31S/9) I.

⁴⁴⁷ *Ibid*, 'Formation of panels,' paragraph 3.

⁴⁴⁸ Trebilcock, Michael, Robert Howse and Antonia Eliason, *The Regulation of International Trade*, Fourth Edition (London: Routledge, 2013), 176-178.

⁴⁴⁹ Hudec, Robert E., Daniel Kennedy and Mark Sgarbossa, "A Statistical Profile of GATT Dispute Settlement Cases: 1948-1989," *Minnesota Journal of Global Trade*, vol. 1 (1993), 18.

requests for panels, and panel proceedings and rulings”,⁴⁵⁰; second, the absence of “legal rigor and clarity” in panel rulings⁴⁵¹; third, the tendency for panel rulings not to be adopted because the consensus rule required the consent of the losing party; and fourth, delays and incomplete compliance with panel rulings.⁴⁵²

Moreover, as Sevilla has shown, increasing discontent in the 1980s was paralleled by an extraordinary increase in the number of dispute settlement cases. Under GATT dispute settlement between 1947 and 1994 there were a total of 295 complaints filed.⁴⁵³ Of these, only 59 were filed in the 1950s, 22 in the 1960s and 32 in the 1970s.⁴⁵⁴ However, fully 132 complaints were filed during the 1980s and 50 between 1990 and 1994.⁴⁵⁵ It would be difficult to contrive a clearer instance of juridification type C1; that is, a rising predisposition toward specialized judicial conflict solving.⁴⁵⁶

On a different tack, Trebilcock, Howse and Eliason have argued that dispute settlement under the GATT suffered a crisis of legitimacy during the 1980s and early

⁴⁵⁰ Trebilcock, Michael, Robert Howse and Antonia Eliason, The Regulation of International Trade, Fourth Edition (London: Routledge, 2013), 176.

⁴⁵¹ *Ibid.* 176.

⁴⁵² *Ibid.* 176.

⁴⁵³ Sevilla, Christina R., “Explaining Patterns of GATT/WTO Trade Complaints,” Weatherhead Center for International Affairs, Working Paper Series 98-01 (January 1998), Table 1(a).

Sevilla makes extensive use of the following works: Hudec, Robert, Enforcing International Trade Law: the Evolution of the Modern GATT Legal System (Salem, NH: Butterworth Legal Publishers, 1993); Reinhardt, Eric R., Posturing Parliaments: Ratification, Uncertainty, and International Bargaining. (Ph.D. diss., Columbia University, 1996)

⁴⁵⁴ *Ibid.*

⁴⁵⁵ *Ibid.*

⁴⁵⁶ As a further instance of juridification, Trebilcock, Howse and Eliason argue that the 1980s and 1990s represent a period during which DSM decisions came to refer increasingly to previous decisions as precedents, signifying an approach to the DSM more closely in accordance with the Anglo-American common-law tradition. They note that in *Alcoholic Beverages* the Appellate Body within the DSM took the position that “past adopted panels create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute.” (Trebilcock, Michael, Robert Howse and Antonia Eliason, The Regulation of International Trade, Fourth Edition (London: Routledge, 2013), 201-203).

1990s caused by a growing need to adjudicate between value systems.⁴⁵⁷ According to this argument, dispute settlement under the GATT expanded in scope from identifying ‘cheating,’ what Trebilcock, Howse and Eliason call explicit or hidden protectionism, to being forced to choose whether to prioritize neoliberal economic values or to protect environmental, cultural, nationalistic, human rights, or labour rights-based value systems.⁴⁵⁸ The most famous examples are the US-Tuna cases, and particularly *US-Tuna I*. In the latter case, a GATT panel determined that the *US Marine Mammal Protection Act* (MMPA) was in violation of Articles II and XI:1 of the GATT.⁴⁵⁹ Therefore, under the terms of the GATT, the United States could not prohibit the import of tuna from Mexico solely because the methods used by Mexican tuna fishers also resulted in the killing of dolphins. In substance, the panel decided that to allow the prohibition would in effect allow a given country to use trade action in order to impose its domestic regulations upon other countries.⁴⁶⁰

The conflict in this famous case between neoliberal economic values and environmental values is obvious. Indeed, it should probably be allowed that the argument advanced by Trebilcock, Howse and Eliason overstates the case somewhat, since the project of trade liberalization was always fundamentally a choice between competing value systems. Regardless, it is certain that during the 1980s and ‘90s these conflicts became more evident and the subject of much greater controversy. This in itself is a key indication of type B juridification of international trade governance.

⁴⁵⁷ Trebilcock, Michael, Robert Howse and Antonia Eliason, *The Regulation of International Trade*, Fourth Edition (London: Routledge, 2013), 178-179.

⁴⁵⁸ *Ibid.* 178-179.

⁴⁵⁹ World Trade Organization, *Environment: Disputes 4*, “Mexico etc. versus US: ‘Tuna-dolphin’,” http://www.wto.org/english/tratop_e/envir_e/edis04_e.htm (accessed 23 August 2013).

⁴⁶⁰ *Ibid.*

Lastly, the significant increase in complaints filed and adjudicated during the 1980s and early ‘90s indicates more than just discontent with international trade governance under the GATT. Indeed, it shows that there existed significant appetite amongst the contracting parties for more certain, better defined, more rules-based, more widely applicable, and more adjudicative dispute settlement – in short, for a juridified dispute settlement mechanism that was more robust, more complex and of wider scope. To this end, one of the earliest important achievements of the Uruguay Round was the 12 April 1989 *Decision on Improvements to the GATT Dispute Settlement Rules and Procedures*. This has been called an ‘early harvest’ of the Uruguay Round, and it was superseded in relatively short order by the 1994 *Dispute Settlement Understanding*. Nevertheless, the 1989 *Decision* was the first articulation of dispute settlement under articles XXII and XXIII of the GATT to mandate a timeline for the dispute settlement process as a whole. Thus, paragraph G.4 of the 1989 *Decision* requires that the period from filing to the Council’s decision not take more than 15 months.⁴⁶¹ In addition, the 1989 *Decision* requires that technical legal assistance be made available on demand to developing countries; it also provides for closer surveillance of Council recommendations and rulings.⁴⁶² Importantly, the 1989 *Decision* preserves the consensus rule for adoption of panel rulings; this, again, was not to be replaced until the advent of the WTO. Nevertheless, by means of the above reforms, the 1989 *Decision* constitutes another incremental movement in the four-decades-long trend toward the juridification of dispute settlement under Articles XXII and XXIII of the GATT.

⁴⁶¹ *Improvements to the GATT Dispute Settlement Rules and Procedures: Decision of 12 April 1989*, (L/6489), para. G.4.

⁴⁶² *Ibid*, para. I.

The DSB

The establishment of the Dispute Settlement Body (DSB) of the WTO was another archetypal episode in the long process of the juridification of international trade governance. As will be shown, it exemplifies all 6 types in the modified Blichner-Molander typology of juridification that the study employs.

The DSB is addressed in detail in the context of Chapter 6. Nevertheless, it is necessary at this point to describe briefly the procedure for dispute settlement as established by and pursuant to the 1994 *Dispute Settlement Understanding*. To begin, any member may bring a complaint to the DSB against any other member concerning any agreement to which both members are signatories. The first step is for the complainant and the respondent to engage in consultation and mediation for 60 days. Should this fail to produce agreement, the complainant can then request that a panel be established, which must be done within 45 days, absent a ‘reverse consensus’ to the contrary. Since such a consensus would have to include the party requesting the panel, it establishes for the complainant a *de facto* right to be heard.⁴⁶³

The panel must issue its report to the parties within 6 months, making a determination upon the complaint. Three weeks after the report is received by the parties, it is circulated to the entire WTO membership. The parties then have 60 days to appeal. Should neither do so, the report is adopted by the DSB as a ruling unless, again, opposed by ‘reverse consensus.’ Appeals are made to a panel of three members from the permanent seven-member Appellate Body “set up by the Dispute Settlement Body and

⁴⁶³ http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm (accessed 3 February 2013).

broadly representing the range of WTO membership”⁴⁶⁴, the advent of the Appellate Body is a particularly important example of constitutive juridification (type A). The Appellate Body panel hearing the appeal has a maximum of 90 days to issue its report, which must then be accepted or rejected by the Dispute Settlement Body (i.e. the General Council convened as the DSB). However, as with panel reports, the appeals report can only be rejected by a consensus of the DSB, which must include the votes of both parties to the dispute. In practise, this rule of reverse consensus means that reports of the Appellate Body are nearly always adopted.

Once a case has been decided, and if a violation has been found, the member who has committed the violation must follow the recommendations of the panel or appeals report. Should the member ultimately fail to do so, after a reasonable period of time has elapsed, the complainant will be allowed by the DSB to impose appropriate compensatory trade sanctions. This process of dispute settlement, and the assurance that trade sanctions will follow an uncorrected violation, is one of the most significant contributory factors to the institutional effectiveness and legitimacy of the WTO.⁴⁶⁵ It is also a prime example of how the WTO is representative of type C and type F juridification of global economic governance.

Further, the rule of ‘reverse consensus,’ mentioned above, is arguably the most significant change to dispute settlement between the GATT and WTO eras. Prior to 1994, under the GATT regime, a panel’s report could only be adopted by positive consensus of the contracting parties, which had to include the complaining party and the party complained of. In practise, this meant that panel reports often were not adopted, as in the

⁴⁶⁴ *Ibid.*

⁴⁶⁵ *Ibid.*

US-Tuna cases.⁴⁶⁶ It also meant that the substance of the panel's report was sometimes affected by the difficulty of its adoption, and it must have meant that some complaints were not filed because of the relative improbability of a given report being adopted. The combined effect was to produce a system of dispute settlement that tended more toward negotiation by other means than to decision or adjudication as such.

After 1994, under the WTO regime, the requirement for positive consensus was changed to a rule of 'reverse consensus.' Under this rule, a panel would be established automatically at the request of a contracting party.⁴⁶⁷ Further, an Appellate Body report would automatically be adopted unless it was opposed by the consensus of contracting parties.⁴⁶⁸ Again, this consensus would have to include both the complaining party and the party complained of, and the dispute would certainly have been decided in favour of one and against the other. In practise, therefore, under the WTO regime, an Appellate Body report would be adopted and considered binding almost automatically.

This is one of the pivotal moments of juridification under the GATT and the WTO. It produced three highly important results. First, it established the right of each contracting party to the formation of a panel upon the filing of a dispute. Second, it made the ultimate adoption of a binding report all but automatic, whether from the original panel or from the Appellate Body. Third, it transformed the process of dispute settlement under the WTO into an inexorable march toward a binding decision, whereas under the GATT dispute settlement had in essence been a means to facilitate negotiation between

⁴⁶⁶ See e.g. *United States – Restriction on Imports of Tuna*, Report of the Panel (DS21/R-39S/15S), 3 Sept. 1991.

⁴⁶⁷ World Trade Organization, *Marrakesh Agreement Establishing the World Trade Organization*, Annex 2 – *Understanding of Rules and Procedures Governing the Settlement of Disputes (DSU)*, Art. VI, para. 1.

⁴⁶⁸ *Ibid.*, Art. XVII, para. 14.

contracting parties. For the first time in its history, this gave the regime of international trade governance the capacity to require a contracting party to amend its trade policy against its will (including applicable domestic policies), or to require it to face countermeasures. This was a signal example of juridification types C, E and F in the history of trade governance, and in global economic governance generally.

Moreover, the evolution of dispute settlement under the GATT, and the advent of the DSB, involved all 6 types of juridification in the modified Blichner-Molander typology, reinforcing the study's earlier assertions about the complexity of juridification. The DSB is an augmentation of the constitutional order of international trade governance (type A). It is an expansion of the purview of trade law, in some cases over the domestic policy of WTO Members (type B). The advent of the DSB follows and is followed by a marked statistical increase in conflict solving by reference to the GATT and to WTO Agreements (type C). Its extensive use has coincided with increased difficulty of determining the state of international trade law on a given point, as WTO Agreements, PTAs and RTAs have proliferated. Certainly, the power of the judicial component of international trade governance has increased since 1994 (type D). Equally certain is that the increased use of formal, juridical dispute settlement under the DSB, as compared to the use of informal dispute settlement prior to 1994, testifies to an increased tendency amongst WTO Members to identify themselves as part of a common legal order (legal framing – type E). Finally, the advent of the DSB, and the 20 years since its inception, have increased markedly the robustness of international trade governance. Quite aside from rates of voluntary compliance with DSB decisions, the formalization and authorization of retaliatory measures introduced an ability to compel compliance with

DSB decisions that was far more robust than the more informal methods possible under the GATT (type F). Thus, in comprising all 6 types of juridification, the DSB itself serves as a microcosm of the complexity of juridification and of the large and long-term trend of juridification of global economic governance described earlier in this chapter.

Moment 4: Development: from GATT Part IV through the Doha Development Agenda

Articles XXXVI to XXXVIII constitute Part IV of the GATT, which was adopted during the Kennedy Round (64-67). Part IV regulates the trading relationship between developed and developing countries. It was amongst the most important reforms to the GATT during its first two decades of existence, even if its import may be said to be more profound symbolically than in substance. It is an important example of constitutive juridification (type A2) in that Articles XXXVI to XXXVIII augment the formal constitutional order of the GATT.

The text of Article XXXVI gives the reasons for the adoption of Part IV, both in terms of the fundamental principles already articulated in the GATT, and in terms of what is needed for developing countries to pursue further development. Amongst these important general principles, which nevertheless committed developed countries to no definite action, one finds a single provision of immediate and highly important effect. This is paragraph 8 of Article XXXVI, which provides that “[t]he developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less developed contracting

parties.”⁴⁶⁹ This removed from developing countries the obligation to provide a concession in return for a concession received. As Trebilcock, Howse and Eliason state, “[g]iven that reciprocity was, and still remains, a key factor of the world trading regime, the principle of non-reciprocity is not one that developed countries accepted lightly.”⁴⁷⁰ That said, even non-reciprocity did not require a positive action from or impose a positive obligation upon developed countries. Indeed, nowhere in Part IV is there a positive commitment to action from developed countries.

This is true of Article XXXVII, the text of which commits the contracting parties to further reductions in tariffs, and to enter into consultations whenever it is considered that a contracting party is not pursuing sufficiently the principles and objectives of the GATT. This is also true of Article XXXVIII, which defines the joint action that may be taken by the contracting parties in order to further the objectives of Article XXXVI. Wilkinson summarizes the nature of the commitments made by developed countries in GATT Part IV in the following terms:

(i) [to] give high priority to the reduction and elimination of barriers to trade for goods of export interest to their developing counterparts; (ii) [to] refrain from introducing or increasing customs duties or non-tariff barriers on those goods; and (iii) [to] refrain from imposing or making any adjustments in existing fiscal measures that would hamper demand for products from developing countries.⁴⁷¹

⁴⁶⁹ General Agreement on Tariffs and Trade, Part IV (1966), Article XXXVI, Paragraph 8.

⁴⁷⁰ Trebilcock, Michael, Robert Howse and Antonia Eliason, *The Regulation of International Trade*, Fourth Edition (London: Routledge, 2013), 608.

⁴⁷¹ Wilkinson, Rorden, *The WTO: Crisis and the Governance of International Trade* (London: Routledge, 2006), 64.

Even if these provisions did not require positive action, they nevertheless constituted an important statement of principles that were more inclusive of developing countries, and more openly expressive of the principle of Special and Differential Treatment (SDT), than anything that had previously been formalized as GATT law. As such, Part IV of the GATT is a meaningful augmentation of the constitutional order of international trade governance under the GATT (juridification type A2).

More than this, as an expression of SDT, Part IV of the GATT is part of a more general trend of types A and B juridification concerning trade and development under the GATT. The earliest formalized instance of SDT was the 1955 revision of Article XVIII of the GATT, which, amongst other measures, allowed developing countries to “derogate from scheduled tariff commitments in order to promote the establishment of a particular industry,” and to use quantitative restrictions to address balances-of-payments.⁴⁷² The Contracting Parties also amended Article XVI to allow the use of export subsidies for manufactured goods, and they amended Article XXVIII to allow tariff commitments to be modified more easily.⁴⁷³

Along with GATT Part IV, the Kennedy Round (64-67) coincided with the birth of the United Nations Conference on Trade And Development (UNCTAD) in 1964. Frustrated with the GATT regime, developing countries began to pursue their interests through UNCTAD, which in turn led to the advent of the Generalized System of Preferences (GSP). As Trebilcock, Howse, and Eliason explain, “[t]his regime created a framework for developed countries to offer preferential and non-reciprocal market

⁴⁷² Trebilcock, Michael, Robert Howse and Antonia Eliason, *The Regulation of International Trade*, Fourth Edition (London: Routledge, 2013), 608.

⁴⁷³ *Ibid*, 608.

access. Since such preferences would require deviation from MFN treatment, GSP relied upon a temporary GATT waiver [...].”⁴⁷⁴ Broader and deeper preferences were also granted by European countries to their former colonies under the 1975 Lome Convention; these too required a GATT waiver.⁴⁷⁵

During the Tokyo Round (73-79), the Contracting Parties agreed to the *Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries* framework, which has come to be known as the ‘Enabling Clause.’⁴⁷⁶ This provided a legal basis for preferential tariffs established under GSP, and established a distinction between developing and Least Developed Countries (LDC), allowing special treatment for the latter.⁴⁷⁷

Finally, the Tokyo Round coincided with the advent of the Multi-Fibre Agreement (MFA) in 1974, which was a successor to the Long-Term Agreement (LTA) of 1962 and the Short-Term Agreement (STA) of 1961. Like them, it concerned the export of textiles from developing to developed countries.

Specifically, MFA extended to textiles of wool, synthetic fibres and blends the same rights of discrimination that had previously been extended under STA and LTA to cotton. Although framed as a means to ensure the orderly opening of developed markets to textile products from developing countries, the most pronounced effect of MFA was to widen further the scope of trade governance, and to increase developed country protection against developing country imports.⁴⁷⁸ It did, however, produce a positive

⁴⁷⁴ *Ibid*, 609.

⁴⁷⁵ *Ibid*, 609.

⁴⁷⁶ *Ibid*, 609-610.

⁴⁷⁷ *Ibid*, 610.

⁴⁷⁸ *Ibid*, 610.

effect for some smaller developing countries in that it provided them with export quotas sufficient to allow the development of their textile industries.⁴⁷⁹

By the time of the Uruguay Round (86-94), many developing countries had become dissatisfied with the outcomes of SDT, and were prepared to take a fuller and reciprocal part in negotiations. As Pangestu has noted, developing countries were prepared to accept the dilution of SDT in exchange for greater market access and “strengthened rules.”⁴⁸⁰ This made possible a number of innovations and agreements in the Uruguay Round that had not been possible in previous rounds. Agriculture, being an area of prime concern to developing countries, was for the first time made subject to regulation under the GATT, although only minimal liberalization was achieved.⁴⁸¹ Several other new agreements were reached in areas of significant concern to developing countries. These included Trade-Related Investment Measures (TRIMS), Sanitary and Phytosanitary Measures (SPS), Technical Barriers to Trade (TBT), and Trade-Related Aspects of Intellectual Property Rights (TRIPS). As is well known, the latter caused developing countries to incur significant new costs for the use of intellectual property, which created a particularly onerous burden for manufacturing, pharmaceuticals, public health, and several other sectors in developing countries.⁴⁸² At the same time, developing countries also agreed to the termination of MFA over the course of 10 years, and to the

⁴⁷⁹ *Ibid*, 610. Also Wilkinson, Rorden, The WTO: Crisis and the Governance of International Trade (London: Routledge, 2006), 66-67, 78.

⁴⁸⁰ Pangestu, Mari, “Special and Differential Treatment in the Millennium: Special for Whom and How Different?” The World Economy, vol. 23, no. 9 (September 2000), 1291.

⁴⁸¹ Wilkinson, Rorden, The WTO: Crisis and the Governance of International Trade (London: Routledge, 2006), 115-116, 133-134.

⁴⁸² Trebilcock, Michael, Robert Howse and Antonia Eliason, The Regulation of International Trade, Fourth Edition (London: Routledge, 2013), 611-613.

elimination of Voluntary Export Restraints by means of the Agreement on Safeguards.⁴⁸³

All of these were important instances of law's expansion (juridification type B1) in the context of trade and development. Finally, developing countries gained of necessity from the juridification of dispute settlement, which has been described above. They could not have done otherwise. Although by no means perfectly equitable, the system formalized by the DSU accomplished a significant movement toward rules-based from power-based dispute settlement, and this could only redound to the benefit of the relatively less powerful developing countries. Surely, a system where both parties are bound by rules is more equitable than where one party is bound by the power of the other.

Davis has written extensively concerning the advantages and disadvantages of adjudication as a form of dispute settlement in the WTO. With respect to developing countries, she states that

adjudication offers several advantages important for developing countries, especially when they are engaged in asymmetric bargaining. The adjudication process forces both sides to make a consistent argument based on existing law. This prevents the kind of moving target that occurs when there is no agreed upon standard for evaluating different arguments. Since developing countries lack the power to issue threats and side payments or to unilaterally determine the standard of evaluation, in practice this constraint binds the developed country more than the developing country.⁴⁸⁴

⁴⁸³ *Ibid*, 611-613.

⁴⁸⁴ Davis, Christina L., Why Adjudicate? Enforcing Trade Rules In The WTO (Princeton: Princeton University Press, 2012), 259.

Davis also notes that legal framing formalizes obligation and thereby raises the reputational cost of breaking an agreement: “even small states are able to use rules to shame bigger states.”⁴⁸⁵ Moreover, juridification of international trade governance and of dispute settlement provides developing countries with “cover for making difficult policy reversals.”⁴⁸⁶

These benefits are countered to an extent by the difficulties developing countries have experienced in accessing and utilizing WTO dispute settlement, owing to scarcity of funds and expertise relative to developed countries. These difficulties have been widely noted and are not to be minimized; however, they are different in kind from the power-based difficulties experienced by developing countries in the less-juridified dispute settlement practices under GATT. Scarcity of funds and expertise can be overcome by organizing provision of funds and expertise, as the Advisory Centre on WTO Law (ACWL) has begun to do. Discrepancy of power in dispute settlement can only be overcome by redefining power or by organizing a new distribution of power. This is exactly what the juridification of dispute settlement accomplishes.

Thus, Davis notes that 96 complaints have been filed at the WTO by a developing country against a high-income country, and that India and Brazil have been amongst the most frequent users of WTO dispute settlement.⁴⁸⁷ Davis also cites Busch and Reinhardt’s study of WTO dispute outcomes between 1980 and 2000. This shows that while developing countries were able to gain concessions in 63 percent of their complaints, versus 72 percent for developed countries, this discrepancy is largely

⁴⁸⁵ *Ibid*, 259.

⁴⁸⁶ *Ibid*, 259.

⁴⁸⁷ *Ibid*, 259-260.

attributable to poorer performance by developing countries during the consultation period.⁴⁸⁸ Once a panel has been established, a country's income "does not have a significant effect on outcomes."⁴⁸⁹ None of this is meant to suggest that juridified WTO dispute settlement is ideal or even particularly great for developing countries, but it does seem to be better for developing countries than the more nakedly power-based arrangements for dispute settlement that operated under the GATT regime.

In sum, the relationship between trade and development prompted meaningful expansion of the purview of international trade governance under the GATT regime between 1947 and 1994 (juridification type B1). It also augmented the constitutional order of international trade governance under the GATT (juridification type A2). The revision of Articles XVI, XVIII and XXVIII, signalling the advent of SDT, certainly made the GATT system more complex (type C), but they also made it more robust by addressing, however incrementally, the specific concerns of developing countries (types C and F). The same is true of Part IV of the GATT, particularly in that it formalized non-reciprocity. In adding three new Articles to the text of GATT 1947, Part IV also augmented the scope of international trade governance (types A and B).

The advent, development and formalization of GSP during the Kennedy (64-67) and Tokyo (73-79) Rounds made international trade governance more complex by allowing for deviation from the MFN principle. However, it also made the system somewhat more amenable to concerns and needs of developing countries, allowing them greater flexibility and delays in the long process of economic liberalization. This in turn

⁴⁸⁸ Busch, Marc and Eric Reinhardt, "Developing Countries and GATT/WTO Dispute Settlement," *Journal of World Trade*, vol. 37 (2003), 725. Also cited in Davis, Christina L., *Why Adjudicate? Enforcing Trade Rules In The WTO* (Princeton: Princeton University Press, 2012), 260.

⁴⁸⁹ Davis, Christina L., *Why Adjudicate? Enforcing Trade Rules In The WTO* (Princeton: Princeton University Press, 2012), 260-261.

helped to make the system more robust. Finally, the numerous extra-GATT agreements negotiated under the GATT regime, including STA, LTA, MFA, SPS, TRIPS, TRIMS, TBT, and the DSU, constituted a significant increase in the purview of international trade governance (juridification type B1), even if considered solely in terms of their effects upon trade and development. In short, there is a clear and significant trend of juridification, which is in accordance with several types in the modified Blichner-Molander typology, and which is represented by the numerous augmentations and reforms of the GATT regime that regulated the trading relationship between developed and developing countries from 1947 through 1994.

Importantly, this conclusion does not counter Wilkinson's argument that asymmetries in the GATT and WTO systems, particularly between developed and developing countries, might be the fundamental cause of the periodic breakdowns in GATT/WTO negotiations.⁴⁹⁰ Rather, the above account shows that the system of international trade governance juridified despite the presence of these asymmetries. In this, the above account actually supports Wilkinson's argument.

The Doha Development Agenda

Indeed, despite juridification, it was these asymmetries that gave rise to a sense of a deficit of legitimacy amongst developing country members. This was expressed with particular frequency and intensity during the years following the close of the Uruguay Round (86-94). For example, at the 1999 Seattle Ministerial, African trade ministers made the following joint complaint: "There is no transparency in the proceedings, and

⁴⁹⁰ Wilkinson, Rorden, *The WTO: Crisis and the Governance of International Trade* (London: Routledge, 2006), 141.

African countries are being marginalized and generally excluded on issues of vital importance for our people and their future.”⁴⁹¹ Celso Lafer, then Foreign Minister of Brazil, stated at the Doha Ministerial in 2001 that “developing countries have always attached great weight to the principle of special and differential treatment. Yet, after more than five decades, there is not much to show for it.”⁴⁹² Further, Murasoli Maran, then Indian Commerce Minister, criticized the draft declaration of the 2001 Doha Ministerial in the following terms: “The draft Ministerial Declaration is neither fair nor just to the viewpoints of many developing countries including my own in certain key issues. It is a negation of all that was said by a significant number of developing countries and least-developed countries.”⁴⁹³

The response of WTO member governments to these significant and widely shared complaints was the launch of the Doha Development Agenda in 2001. Like the Uruguay Round, Doha has proven very difficult and negotiations have been suspended at several points. Indeed, the Round continues at time of writing, 12 years after it began. Even the timeline on the website of the WTO cites no meaningful progress from the beginning of 2009 until the Bali Agreement in December of 2013.⁴⁹⁴

Jones gives a definitive summary of 10 reasons for the difficulty of the Doha Round. It is instructive to review them, particularly in light of juridification, path-dependency, and their possible amelioration by the hybridization of hard law and soft law. His first reason is that multilateral trade negotiations have become too unwieldy to

⁴⁹¹ Narlikar, Amrita, “All’s Fair in Love and Trade? Emerging Powers in the Doha Development Agenda Negotiations,” in Donna Lee and Rorden Wilkinson, eds. The WTO after Hong Kong: Progress in, and Prospects for, the Doha Development Agenda (London: Routledge, 2007), 197.

⁴⁹² *Ibid.*, 198.

⁴⁹³ *Ibid.*, 198.

⁴⁹⁴ http://www.wto.org/english/tratop_e/dda_e/dda_e.htm (accessed 22 February 2014).

be effective. 153 members constrained by consensus-based decision-making, and faced with a growing range of issue-areas, do not come easily to agreement about anything.⁴⁹⁵ Increase of membership and increase of scope are archetypal examples of juridification types A and B and, as the rest of the study shows, their tendency to become unwieldy can be mitigated to a degree by hybridization. The second reason is that the ‘single undertaking’ was a good idea in principle and in the context of the Uruguay Round, but that it is unworkable as a perpetual requirement in practice.⁴⁹⁶ Here Jones addresses exclusively the political aspect of the single undertaking, which requires that nothing be agreed in WTO negotiations until everything is agreed. This is complemented by the legal aspect of the ‘single undertaking,’ which requires that all WTO Agreements be understood as a single treaty. The ‘single undertaking’ was essential to bring about the end of the Uruguay Round, but to require that nothing ever be agreed until all is agreed is to constrain future negotiations to the point where agreement becomes all but impossible. Here, then, is a prime example of juridification type B leading to path-dependency and ossification. Again, the soft-law aspects of hybridization introduce the possibility for flexibility in commitments where necessary, and thereby the circumvention of the constraints of the ‘single undertaking.’

The third reason, according to Jones, is that “the balance of power in trade negotiations has shifted in favour of large developing countries.”⁴⁹⁷ That is to say, the predominance of the United States, the EU and Japan has begun to recede, in relative terms, in favour of advanced developing countries such as China, Brazil and India. This

⁴⁹⁵ Jones, Kent, The Doha Blues: Institutional Crisis and Reform in the WTO (Oxford: Oxford University Press, 2010), 3.

⁴⁹⁶ *Ibid*, 3.

⁴⁹⁷ *Ibid*, 3.

upsets the balance between members that allowed for agreement in the Uruguay Round, and makes agreement more difficult until a new balance is found. Here again, hybridization could facilitate negotiations by tailoring the scope or irrevocability of commitments by different members, at least in the initial stages of negotiation or the opening years of an agreement.

The fourth and fifth reasons are the overselling of the development aspects of the Doha Round, and the unhappiness of developing countries with both the WTO and the Doha Round.⁴⁹⁸ According to Jones, this is because the WTO is not a development agency, and therefore is not well placed to define or deliver upon development goals. It is also because the expected gains from concessions and liberalization, especially in textiles and clothing, did not materialize for most developing countries. In addition, developing countries suffered increased costs of compliance with new WTO commitments, especially concerning intellectual property. These two reasons show the effect of path-dependency upon types A and B juridification over time, as first the GATT regime and then the WTO prioritized the more purely trade-oriented aspects of their agreements and operations, while leaving aside aspects concerning development, equality and quality-of-life (such as those stated in the preambles of GATT 1947 and of the Marrakesh Agreement). Soft-law initiatives could be used at relatively little risk to experiment with measures to re-emphasize development-oriented aspects of the WTO's mandate, thus using hybridization of soft law and hard law to counter path-dependency.

Jones' sixth and seventh reasons provoke a similar insight. His sixth is that "multilateral trade negotiations have run out of easy 'fuel' and political support for

⁴⁹⁸ *Ibid*, 3-4.

reciprocal bargaining.”⁴⁹⁹ His seventh states that “many countries are politically or economically unprepared to benefit from trade liberalization.”⁵⁰⁰ That is to say, the easiest or most urgent reforms toward liberalization have already been accomplished, the most powerful stakeholders in trade liberalization have already realized the majority of the goals they could have hoped for, and many countries that could in theory benefit from further trade liberalization lack the political and economic infrastructure necessary to do so. This too is a product of long-term juridification and path-dependency, as the original flexibility of the GATT 1947 has been lost almost entirely over the subsequent seven decades, making reforms far more difficult than they were in 1947, limiting the range of goals for which to hope, and limiting the range of measures that could in theory be introduced to broaden the stakeholders and increase the ease by which a greater number of countries could benefit from trade-liberalization. If so, then soft-law initiatives, and therefore a more hybridized Organization, could begin to broaden the scope of trade liberalization with less risk and greater attention to benefits in developing countries by means of measures that can be tailored in scope, application and enforcement, and that can be amended or revoked if they prove ineffective or damaging.

Jones’ eighth and ninth reasons are straightforward and unavoidable. The eighth is that other crises, such as global terrorism and global warming, have distracted governments from the pursuit of trade liberalization and made the pursuit more complicated.⁵⁰¹ His ninth reason is the diminishment of US leadership toward global

⁴⁹⁹ *Ibid*, 4.

⁵⁰⁰ *Ibid*, 4.

⁵⁰¹ *Ibid*, 4.

trade liberalization.⁵⁰² Jones argues that this has resulted from the end of the Cold War confrontation with the Soviet Union, the decline of the US manufacturing base, the relative decline in US economic growth vis-a-vis countries such as China, India and Brazil, the increase of the US trade deficit, and the damage caused to US global leadership by the foreign policies pursued during the George W. Bush administration.

Finally, Jones' tenth reason is that "business interests in global trade have shifted to regional supply chains."⁵⁰³ According to Jones, this has led to greater interest in PTAs and RTAs, rather than multilateral liberalization on the order of GATT. However, as Moment 7 in the present chapter shows, the proliferation of PTAs and RTAs can be understood to constitute a movement of juridification that serves, on balance, to strengthen the regime of international trade governance under the WTO.

The Doha Round, however, has not been without important accomplishments. In 2004, a framework agreement was reached whose purpose was to focus negotiations and narrow the agenda for the remainder of the Round. Fundamentally, the framework agreement defined the work programme that determined the content of post-2004 Doha Round negotiations. To this end, it stated that the relationship between trade and investment, the interaction between trade and competition policy, and transparency in government procurement, which together had comprised paragraphs 20 through 26 of the Doha Ministerial Declaration, would no longer be negotiated during the Doha Round. Conversely, frameworks, modalities and parameters were established for ongoing negotiations concerning agriculture, cotton, non-agricultural market access, development principles, special and differential treatment, trade-related technical assistance,

⁵⁰² *Ibid*, 4-5.

⁵⁰³ *Ibid*, 5.

implementations, commitments to LDCs, services, rules, trade and environment, TRIPS, dispute settlement and trade facilitation. A 2008 agreement settled the range of questions whose answers would constitute the final agreement of the Doha Development Agenda. It established the modalities, or formulae, to be used to determine the cuts in tariffs and subsidies necessary to achieve further trade liberalization in the areas that defined the 2004 framework agreement. Also in 2008 revised draft modalities were agreed upon concerning agriculture and non-agricultural products.⁵⁰⁴ Moreover, the December 2013 ‘Bali Package’ was genuinely an important and difficult accomplishment toward the reduction of customs barriers to trade. It is certainly the most significant accomplishment of the Doha Round to the end of 2013.

With the exception of the ‘Bali Package,’ however, the agreements reached during the Doha Round have at bottom been in negotiations whose purpose was to establish the content of future negotiations. They are certainly essential, but they pale in comparison to the achievements of the Uruguay Round. Aside from the ‘Bali Package,’ perhaps the most significant reform of the Doha Round has been in process, rather than result. A significant and conscious effort has been insisted upon, and successfully made, to include developing countries at all levels and points of negotiations. Thus, in 2004, the framework agreement mentioned above was achieved not between the traditional ‘Quad’ of the US, the EU, Japan and Canada, but by the Five Interested Parties (FIP) group comprised of Brazil, India, Australia, the US and the EU.⁵⁰⁵

⁵⁰⁴ http://www.wto.org/english/tratop_e/dda_e/dda_e.htm (accessed 3 February 2013).

⁵⁰⁵ Lee, Donna and Rorden Wilkinson, “The WTO after Hong Kong: Setting the Scene for Understanding the Round,” in Donna Lee and Rorden Wilkinson, eds., The WTO after Hong Kong: Progress in, and Prospects for, the Doha Development Agenda (London: Routledge, 2007), 5.

Moment 5: Extra-GATT Agreements and Subordinate Councils to the WTO (Trade in Goods, GATS, TRIPS and TRIMs)

During the Kennedy (64-67), Tokyo (73-79) and Uruguay Rounds (86-94) of GATT negotiations, constitutive juridification (type A) and law's expansion (type B1) have also taken the form of extra-GATT agreements addressing specific areas of economic activity. These include the anti-dumping code of the Kennedy Round, the 5 Tokyo Round Codes, and the GATS, TRIPS, TRIMs, and Agriculture Agreements of the Uruguay Round. Contrary to the use of ancillary agreements under the GATT regime, which were binding only upon signatories to the specific agreements, WTO Members agree to be bound by all agreements administered by the WTO. This is in itself an important example of juridification types A and B1.

The Anti-Dumping Codes and Article VI

Article VI of the GATT was further defined by the anti-dumping codes negotiated during the Kennedy (64-67) and Tokyo Rounds (73-79), in such a way that its scope was expanded and its application subjected to a more fully defined rules-based approach. Thus, in 1967, it was agreed *inter alia* that dumping duties were justified only when material injury could be shown, and that 'dumping' took place when the price of an exported good was less than its normal sale price in the exporting country. It was also agreed that all interested parties and authorities in an anti-dumping dispute have the right to present evidence, defend their interests, and have the evidence weighed and a

determination made expeditiously by experts.⁵⁰⁶ Amongst other results, these provisions led Canada to adopt an injury requirement in its anti-dumping legislation. Moreover, the United States agreed to expedite its anti-dumping procedure and not to withhold appraisement during anti-dumping investigations.⁵⁰⁷ In this way, even though the US Congress declined to ratify the Kennedy Round anti-dumping code,⁵⁰⁸ the code's expansion of the scope of Article VI constitutes an example of juridification type B1.

In 1979, a revised anti-dumping code was adopted at the close of the Tokyo Round. The substance of the code was close to that negotiated during the Kennedy Round, with US acceptance of a material-injury test and further revisions to make the anti-dumping code consistent with the code on subsidies and countervailing duties (also negotiated during the Tokyo Round).⁵⁰⁹ This time, the 1974 US Trade Act had kept the US Congress and other domestic interests far more closely involved with the negotiations, and US ratification of the anti-dumping code and the other 5 Tokyo Round codes took place with relative ease.⁵¹⁰

However, difficulties arose with developing countries. Their approval could only be gained by allowing that dumping in the case of a developing country would be

⁵⁰⁶ Winham, Gilbert R., International Trade and the Tokyo Round Negotiation (Princeton: Princeton University Press, 1986), 68-69. Also Trebilcock, Michael, Robert Howse and Antonia Eliason, The Regulation of International Trade, Fourth Edition (London: Routledge, 2013), 334-335.

⁵⁰⁷ Winham, Gilbert R., International Trade and the Tokyo Round Negotiation (Princeton: Princeton University Press, 1986), 69.

⁵⁰⁸ *Ibid*, 69.

⁵⁰⁹ *Ibid*, 69, 311-312. Also Trebilcock, Michael, Robert Howse and Antonia Eliason, The Regulation of International Trade, Fourth Edition (London: Routledge, 2013), 334-335.

⁵¹⁰ Winham, Gilbert R., International Trade and the Tokyo Round Negotiation (Princeton: Princeton University Press, 1986), 312-314.

The five other Tokyo Round codes are the 'Agreement on Government Procurement,' the 'Agreement on the Implementation of Article VII' (Customs Valuation), the 'Agreement on Technical Barriers to Trade' (Standards), the 'Agreement on Licensing Procedures,' and the 'Agreement on Interpretation and Application of Articles 6, 16, and 23' (Subsidies and Countervailing Duties).

determined on the basis of the export price to a third country, and that developing countries could receive exceptions to administrative requirements in anti-dumping investigations on a case-by-case basis.⁵¹¹ That all of this was accomplished under the rubric of the articulation of Article VI of the GATT makes the Tokyo Round anti-dumping code, like the Kennedy Round code, an instance of the expansion of the purview of an extant GATT Article, and thus an instance of juridification type B1.⁵¹²

Extra-GATT Agreements Administered by the WTO

When the WTO came officially into existence on the 1st of January 1995, it marked as well the moment when a number of agreements outside the scope of GATT 1947 and GATT 1994 (thus extra-GATT agreements) came into force that had been negotiated during the Uruguay Round. These established third and fourth levels of governance within the WTO, subordinate to the General Council. The third level concerns the present section more than the fourth; it consists of the Council for Trade in Goods, the Council for Trade in Services, and the Council for Trade-Related Aspects of Intellectual Property Rights. The first concerns the GATT, the second the GATS, and the third the TRIPS agreement; these last two are the direct result of the Uruguay Round side agreements. The GATS agreement divides all internationally traded services into four modes: mode 1 concerns cross-border supply; mode 2 concerns consumption from abroad; mode 3 concerns commercial presence (i.e. of a foreign company providing

⁵¹¹ *Ibid.* 353-354.

⁵¹² It is important to clarify the distinction here between types A and B juridification. Type A, or constitutive juridification, would require that a new Article be added to the GATT, as with the addition of GATT Part IV. Alternatively, a new agreement outside the scope of GATT, such as TRIPS or TRIMs, would also constitute juridification type A. Conversely, the Kennedy and Tokyo Round antidumping codes only articulate Article VI of the GATT. They do so in a way that has the effect of expanding the scope of Article VI, but they do not augment the constitutional order by adding a new Article or a new Agreement.

services in a given country); and mode 4 concerns “presence of natural persons” (i.e. consultants or domestic workers who travel to provide services in a given country).⁵¹³

These four modes are governed by the Services Council’s subsidiary committees, which cover financial services, domestic regulations, GATS rules and specific commitments.

The advent of GATS in 1994 signaled another significant increase in the scope and complexity of international trade governance. Services had traditionally been considered not easily tradable, and the GATT regime applied only to trade in goods. The regulation of trade in services under GATS therefore had no meaningful parallel under the GATT. Moreover, provisions within GATS allowed the WTO to strengthen links with the International Telecommunications Union (ITU) and the International Standards Organization (ISO), further increasing the scope of global economic governance. Finally, GATS has increased the complexity of international trade governance by bringing within the purview of the WTO the comparative advantages in service industries held by developing countries.⁵¹⁴ In short, GATS augmented the constitutional order of international trade governance beyond the GATT, and is therefore an instance of juridification type A2.

The TRIPS Agreement also augmented the constitutional order of international trade governance by applying to Intellectual Property the basic principles of the GATT: national treatment; most-favoured nation treatment; and balanced protection. More specifically, TRIPS applies these principles to such diverse areas of intellectual property as copyright, trademarks, geographical indications, industrial designs, patents, circuit

⁵¹³ http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm6_e.htm (accessed 3 February 2013).

⁵¹⁴ Trebilcock, Michael, Robert Howse and Antonia Eliason, The Regulation of International Trade, Fourth Edition (London: Routledge, 2013), 477-80; also Wilkinson, Rorden, The WTO: Crisis and the Governance of International Trade (London: Routledge, 2006), 99.

layouts and trade secrets.⁵¹⁵ TRIPS also requires that intellectual property rights be enforceable under members' domestic laws, imposes penalties for infringement, and imposes provisions by which technology transfer from developed to developing countries is encouraged.⁵¹⁶ The TRIPS Council is without official subordinate Councils.⁵¹⁷

Like GATS, TRIPS came into effect in 1994 and inaugurated an entirely new area of international trade governance. Like services, the regulation of trade in intellectual property had no meaningful parallel under the GATT. It was therefore a significant augmentation of the constitutional order of international trade governance (juridification type A2).

Under the Council for Trade in Goods (i.e. the GATT Council) are committees on market access, agriculture, sanitary and phytosanitary measures, technical barriers to trade, subsidies and countervailing measures, anti-dumping practices, customs valuation, rules of origin, import licensing, trade-related investment measures (TRIMS), and safeguards, as well as a working party on state-trading enterprises and the plurilateral Information Technology Agreement Committee.⁵¹⁸ TRIMS is another of the significant additions to the scope of international trade governance that came into effect with the advent of the WTO in 1994.

Agriculture too has occasioned significant additions to the constitutional order of international trade governance since 1994. From the advent of the GATT in 1947, the regulation of trade in agricultural products has been amongst the most controversial of topics in trade negotiations. Although technically regulated under GATT 1947,

⁵¹⁵ http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm (accessed 3 February 2013).

⁵¹⁶ *Ibid.*

⁵¹⁷ http://www.wto.org/english/thewto_e/whatis_e/tif_e/org2_e.htm (accessed 3 February 2013).

⁵¹⁸ *Ibid.*

agriculture has long been given a great deal of protection by developed countries, and GATT regulations as they applied to agriculture were not the subject of rigorous adherence. Indeed, as Trebilcock, Howse and Eliason state, “a number of the major exporting states had come close to ignoring, when it came to agriculture, GATT requirements altogether, even to the point of refusing to implement GATT panel decisions.”⁵¹⁹

In fact, the origin of the special treatment of agriculture under the GATT is essentially a direct result of American insistence during the years immediately following WWII.⁵²⁰ No treaty that affected the import quotas and export subsidies that supported the US Farm Programme had a hope of approval within the US Senate.⁵²¹ While the resulting special treatment of agriculture caused a number of trade disputes during the 1950s and 1960s, it was also in fundamental accord with the preferences of other developed countries.⁵²² Thus, it was buttressed by the advent of the *Common Agricultural Policy* (CAP) of EEC in 1962, and by significant subsidies to the agricultural sectors of Canada and Japan. These policies were sufficient to create a strong precedent and path-dependence, which was strengthened by considerations of price instability, protection of culture, and food security. This is why the decision to bring agriculture explicitly within the purview of the GATT at the close of the Uruguay Round was such a significant expansion of the scope and complexity of international trade governance.

⁵¹⁹ Trebilcock, Michael, Robert Howse and Antonia Eliason, *The Regulation of International Trade*, Fourth Edition (London: Routledge, 2013), 434.

⁵²⁰ *Ibid*, 435.

⁵²¹ *Ibid*, 435.

⁵²² *Ibid*, 435, 444-445.

Essentially, the genesis of the *Agreement on Agriculture* (AoA) was a mutual determination by the US and the EU during the 1980s that competition between them to protect their agricultural sectors to ever greater degrees was becoming too costly to sustain, while depressing agricultural sectors in developing countries. Indeed, developing countries agreed to negotiate the AoA because the resultant liberalization by developed countries was supposed to compensate developing countries for the liberalization of their clothing and textiles sectors. Of course, in the event, the AoA produced only minimal liberalization from developed countries.⁵²³

Reached in December of 1993 and effective as of 1 January 1994, the AoA was conceived in significant part as a means to induce future liberalization, so it is not surprising that, as many have noted, it has to date resulted in relatively little actual liberalization.⁵²⁴ Nevertheless, the AoA included commitments to replace non-tariff border measures by explicit tariffs, and to reduce average tariffs on agricultural products by 36 percent for developed countries over six years, and 24 percent for developing countries over 10 years, with *de minimis* per product reductions of 15 percent and 10 percent respectively. It also committed developed countries to reduce Total Aggregate Measures of Support (Total AMS) by 20 percent, while committing developing countries to a 13 percent reduction in Total AMS. Export subsidies and subsidized exports were also to be reduced meaningfully.⁵²⁵

⁵²³ Clapp, Jennifer, "WTO Agriculture Negotiations and the Global South," in Donna Lee and Rorden Wilkinson, eds., The WTO After Hong Kong: Progress in, and Prospects for, the Doha Development Agenda (London: Routledge, 2007), 38-41.

⁵²⁴ Trebilcock, Michael, Robert Howse and Antonia Eliason, The Regulation of International Trade, Fourth Edition (London: Routledge, 2013), 468-471.

⁵²⁵ World Trade Organization, "Agriculture Negotiations: Background Fact Sheet: Tariff Negotiations in Agriculture: Reduction Methods," www.wto.org/english/tratop_e/agric_e/agnegs_swissformula_e.htm (accessed 22 February 2014).

To balance these commitments, ‘green-box exceptions’ were introduced.⁵²⁶ These were to include government services such as disease control, but also direct income support to producers and structural adjustment assistance. Even with the green-box exceptions, and regardless of the extent of actual liberalization achieved, the mere inclusion of agriculture under the GATT/WTO regime augmented the constitutional order of international trade governance, and therefore of global economic governance. As such, like the other extra-GATT Agreements, it constituted an example of juridification type A2.

Clearly, the structure that emerged in 1994, and that has governed international trade since that time, represents a system more extensively governed by rules and more fully juridified than at any prior moment. It is also a system whose scope is far more extensive than ever before, especially because of its extension to services and intellectual property.

Moment 6: Increasing Consultation and Cooperation with NGOs

The burgeoning incorporation of NGOs and civil society within the framework of international trade governance constitutes a sixth moment of juridification. This process has been ongoing since the advent of the WTO, but particularly since the Seattle demonstrations in 1999, even if it remains imbued with tokenism and less effective than civil society advocates would prefer.

Under the GATT regime, little official contact, and no formal linkages, were established with NGOs. Conversely, the agreement establishing the WTO gives the

⁵²⁶ Trebilcock, Michael, Robert Howse and Antonia Eliason, *The Regulation of International Trade*, Fourth Edition (London: Routledge, 2013), 451.

General Council the authority to consult and cooperate with NGOs. In addition, in 1996 the WTO Secretariat was empowered to engage with NGOs directly, including liaison, briefings, symposia and the distribution of documents, amongst other means.⁵²⁷ Progress was made in this respect from a failed and antagonistic symposium with NGOs in 1994, to a successful 1996 symposium with 36 representative NGOs, to high-level symposia in 1999 concerning the relationship of trade with the environment and with development. In addition, beginning in 1996, the General Council has progressively liberalized its policies for de-restriction of documents, making an increasing number of documents available earlier to NGOs and the public.⁵²⁸ The advent of the WTO website in 1999, and its subsequent development, has been of crucial importance in this respect; at present, it provides an exhaustive repository of official WTO documents, communiqués, and news for NGOs and the public. Further, the advent in 2001 of the WTO Public Forum (or ‘Public Symposium’ in its early years), and the determination in 1998 that *amicus curiae* briefs can be accepted, broadened the capacity for NGOs to inform WTO proceedings. The Public Forum was instituted specifically to address the protests at the Seattle Ministerial. Moreover, WTO accreditation to attend Ministerial Meetings has become easier for NGOs to obtain since the Geneva Ministerial in 1998. In part as a result, NGO attendance at Ministerials has increased 800 percent, from 108 in 1996 to 812 in 2005. This is a particularly evocative example of legal framing (juridification type E). Finally,

⁵²⁷ O’Brien, Robert, Anne Marie Goetz, Jan Aart Scholte and Marc Williams, Contesting Global Governance: Multilateral Economic Institutions and Global Social Movements (Cambridge: Cambridge University Press, 2000), 138-139.

⁵²⁸ *Ibid*, 138-139.

for some individual WTO officials, the connection between gender and trade was first made known by means of the NGO community.⁵²⁹

It is instructive to continue with this moment by considering two critical perspectives concerning increased civil society involvement in the WTO as it pertains to women's activism. First, liberal economist Jagdish Bhagwati is in principle well disposed toward civil-society organizations, NGOs, and their participation to a certain degree in global economic governance. However, concerning women and feminist NGOs, such as the International Gender and Trade Network (IGTN), he fears that their insistence upon gender-specific analysis of trade agreements mistakes the purpose of the WTO and its Appellate Body, and requires a micro-level view of the effects of multilateral trade policy that cannot possibly be accurate.⁵³⁰ His argument is in essence that gender mainstreaming in the WTO or in the WTO Members' trade policies amounts to placing a roadblock against progress at every policy-making decision-point.⁵³¹ It must be allowed that Bhagwati's argument is strong with relation to the Appellate Body, the purpose of which is to settle specific questions of trade law as it is, not as one would wish it were. However, with respect to his larger points concerning the WTO and its Members' trade policies, Bhagwati has failed to give sufficient weight to the need for democratization imposed by incessant juridification, and to the representation of women and women's interests as a *sine qua non* of democratization in the 21st century.

Interestingly, though, Mariama Williams describes how IGTN arrived from a very different angle to a clear disapproval of gender mainstreaming within the WTO. From

⁵²⁹ Senior member of WTO Secretariat. Confidential interview, October 2007.

⁵³⁰ Bhagwati, Jagdish, In Defense of Globalization (Oxford: Oxford University Press, 2004), 86-88.

⁵³¹ *Ibid*, 87.

IGTN's perspective, gender mainstreaming within the WTO would only tie gender advocacy in trade to the WTO's internal processes, legitimate the WTO and the liberalization of trade, and facilitate the expansion of the WTO to new issue-areas, one of which would be gender.⁵³² As Williams explains, "given its advocacy against the expansion of the WTO into broader areas, IGTN was quite wary of pushing a gender mainstreaming agenda inside the institutional orbit of the WTO."⁵³³ Thus far, IGTN and Bhagwati are in agreement. However, IGTN's alternative is to advocate for gender mainstreaming within specific trade agreements and within WTO Member States' trade policies. As Williams explains, "for IGTN, mainstreaming gender into trade policy means explicitly to make links between trade policy and women's empowerment and gender equality and advocating for provisions in trade agreement and trade negotiations that work toward these objectives and, thus, are supportive to women in their multiple roles in

⁵³² Williams, Mariama, "A Perspective on Feminist International Organizing from the Bottom Up: The Case of IGTN and the WTO," in Gülay Caglar, Elisabeth Prügl and Susanne Zwingel, Feminist Strategies in International Governance (London: Routledge, 2013), 99.

⁵³³ *Ibid*, 99.

Mariama Williams was instrumental in first bringing to the attention of the WTO the possibility of a connection between gender and trade. She was also amongst the first to explore and explain the nature of gender mainstreaming and its application to the WTO. Indeed, she has strongly advocated for the inclusion of gender mainstreaming within the WTO. Amongst other positions, Williams is an Adjunct Associate at the Center of Concern in Washington, D.C., the Research Associate of the International Gender and Trade Network (IGTN), and a consultant advisor on gender and trade to the Commonwealth Secretariat at London. It is worth noting, therefore, that when Williams speaks of the opinions of IGTN, she is in part relating the results of her own research. Her publications include the following: Gender Mainstreaming in the Multilateral Trading System: A Handbook for Policy-makers and other Stakeholders (London: Commonwealth Secretariat, 2003); Gender and Trade Action Guide: A Training Resource, with Thakur Athil and Carr, eds., (London: Commonwealth Secretariat, 2007); and Trading Stories: Experiences with Gender and Trade, with Carr eds., (London: Commonwealth Secretariat, 2010).

As the above citations for Williams suggest, she has since about 2010 been increasingly reticent to advocate the formal inclusion of gender mainstreaming within the WTO. She is particularly concerned that measures to address gender equality partake of the mechanisms for compliance (especially the TPRB) possible within the WTO. However, Williams continues to assert the need to address gender equality within all aspects of WTO policy and activity.

trade.”⁵³⁴ This is, in substance, precisely the tactic that Bhagwati argued would create a roadblock at every decision-point, and ultimately delay or preclude the formation of trade policies that materially improve the lives of women.

Both views are correct in some respects but ultimately insufficient. As discussed above, Bhagwati is unmindful of juridification, its implications and its effects; he also underestimates the flexibility possible in gender mainstreaming. IGTN does not recognize the centrality to 21st century international trade of intellectual property, services and agriculture, amongst other issue-areas. Their desire to bind the WTO within the traditional sphere of the GATT is anachronistic; such a perspective would be practicable only in an era when a significant portion of the world’s trade did not include intellectual property, services and agriculture. Moreover, IGTN neglects the continuing impetus toward expansion provided by the foundation of the WTO upon Ministerial Conferences, its juridification and path-dependency. Most seriously, their rejection of gender mainstreaming within the WTO makes far more difficult the representation of women and women’s interests within the WTO, if not precluding it altogether, and therefore does the same to the democratization of the WTO. Yet juridification, path-dependence and expansion continue apace, and create a need to address democratization within the WTO, and therefore the representation of women and women’s interests. The alternative is that the anti-democratic potential of juridification, always latent in its constitutive and democratizing function, comes to the fore in ways that render much more difficult the representation of women and women’s interests.

⁵³⁴ Williams, Mariama, “A Perspective on Feminist International Organizing from the Bottom Up: The case of IGTN and the WTO,” in Gülay Caglar, Elisabeth Prügl and Susanne Zwingel, *Feminist Strategies in International Governance* (London: Routledge, 2013), 99.

Further, as IGI holds, if juridification and path-dependency in global economic governance will increase the urgency of its democratization, then it is preferable to pursue measures concordant with democratization within the institutions of global economic governance, thus to maintain the distinctions between them. This implies pursuit of the representation of women and women's interests, perhaps through gender mainstreaming, within the individual institutions of global economic governance. If this cannot be done, the alternative must involve more robust institutions of global government, which will be less amenable to the checks and balances imposed by the relatively limited scope of contemporary institutions of global governance. Thus, by advocating against gender mainstreaming within the WTO, IGTN not only militates against the representation of women and women's interests, but militates against the democratization of individual IOs, and makes it more likely that they will either develop without democratizing, or be superseded by institutions of global government.

What both Bhagwati and IGTN have missed is the significance of juridification, which Marc Williams has neatly characterized as a movement from intergovernmentalist to supranationalist with respect to the relationship between civil society and the WTO. By 'intergovernmentalist,' Williams means an organization whose legitimacy is derived in full from its formal members, whose accountability is entirely to its formal members, and whose purpose is to serve the interests of its members.⁵³⁵ In the case of the WTO, its legitimacy and accountability in this conception are entirely a function of its member-states. The purpose of the WTO is to serve the interests of its member-states, which are

⁵³⁵ Williams, Marc, "Civil Society and the WTO: Contesting Accountability," in Jan Aart Scholte, ed., Building Global Democracy? Civil Society and Accountable Global Governance (Cambridge: Cambridge University Press, 2011), 110.

themselves accountable to their respective domestic populations. Under this conception, civil society has no role at the WTO.⁵³⁶

Conversely, by ‘supranationalist’ Williams means an organization whose accountability is to a wider group than its formal members.⁵³⁷ By this reasoning, the WTO must be accountable to, and must derive its legitimacy from, more than just its member-states. Advocates of the supranational perspective give three fundamental reasons for their position: first, that trade liberalization restricts the scope of nation-state government action; second, that WTO surveillance of trade policy limits the autonomy of nation-state governments; and third, that the normative power of the WTO subverts nation-state policymaking.⁵³⁸ For these reasons, argue the supranationalists, the WTO’s member-states cannot fully check or counter WTO policies. This in turn creates an accountability deficit between the WTO and the populations affected by its policies, and calls for civil society organizations to fill the deficit that cannot be filled by WTO member-states.⁵³⁹ For the present study, the period between 1994 and 2013 comprised the movement of the WTO away from a strictly intergovernmentalist model and toward a more supranational model. This was a process of juridification of the WTO, wherein the structure and activities were modified to incorporate civil-society organizations.

A number of different institutions over the past two decades constitute this sixth moment of juridification. In 1996, for example, the WTO General Council adopted the *Procedures for the Circulation and De-Restriction of WTO Documents*, which created a

⁵³⁶ *Ibid*, 110-111.

⁵³⁷ *Ibid*, 111.

⁵³⁸ *Ibid*, 111-112.

⁵³⁹ *Ibid*, 112.

rules-based system for assuring transparency with respect to WTO documents.⁵⁴⁰ In 2002, pressure from NGOs helped increase the speed of document release to the point where most documents would be released within six to eight weeks. Also in 1996, the WTO General Council adopted *Guidelines for Arrangements on Relations with Non-Governmental Organizations*.⁵⁴¹ Although stressing that the WTO was fundamentally an intergovernmental organization, the *Guidelines* gave primary responsibility to the WTO Secretariat for engaging with NGOs, and articulated four ways of doing so: symposia; the circulation of information and WTO papers; the provision of briefings and responses to requests for information about the WTO; and discussions between NGOs and chairpersons of WTO councils and committees.⁵⁴² During the same period, from the late 1990s through the early 2000s, civil society organizations attended WTO Ministerial Conferences in greatly increased numbers. The Singapore Conference in 1996 had been attended by only 108 civil society organizations, and only 128 were at Geneva in 1998; however, 737 such organizations attended the Seattle Ministerial in 1999, 902 attended Cancun, and 812 attended Hong Kong in 2005.⁵⁴³

Such a significant increase in NGO attendance at WTO Ministerial Conferences is itself evidence of legal framing, or juridification type E, displaying an “increased tendency to understand the self and others, and the relationship between self and others,

⁵⁴⁰ World Trade Organization, *Procedures for the Circulation and Derestriction of WTO Documents*, Decision adopted by the General Council on 18 July 1996, WT/L/160/Rev.1.

⁵⁴¹ World Trade Organization, *Guidelines for Arrangements on Relations with Non-Governmental Organizations*, Decision adopted by the General Council on 18 July 1996, WT/L/162.

⁵⁴² *Ibid.*

⁵⁴³ Williams, Marc, “Civil Society and the WTO: Contesting Accountability,” in Jan Aart Scholte, ed., Building Global Democracy? Civil Society and Accountable Global Governance (Cambridge: Cambridge University Press, 2011), 116.

in light of a common legal order,”⁵⁴⁴ in this case the WTO Agreements. NGO attendance also becomes a question of juridification when it is the result of changes within the WTO that accord with the modified Blichner-Molander typology, such as a change in the Organization’s fundamental mandate (type A), or an increase in the scope of the Organization’s activities (type B). This could certainly entail an increase in the transparency to NGOs or participation of NGOs, including at Ministerial Conferences.

It may be objected that briefings, meetings, symposia, public fora, and the provision of documents do not necessarily constitute juridification. Yet this view would be insufficient on two counts. First, the provision of documents and the engagement with NGOs are both done in accordance with promulgated guidelines; in other words, in accordance with a soft-law, rules-based system that extends the purview of international trade governance. Thus, it falls under Blichner and Molander’s juridification type B1. Second, at the same time, the above-mentioned efforts to engage with NGOs have the effect of normalizing the WTO Agreements as the shared basis upon which discussions of international trade governance are grounded. Thus, as argued immediately above, these efforts cumulatively form an important example of legal framing. The WTO Public Forum, held annually at Geneva, is of particular importance in this respect.

The decision of the DSB to accept *amicus curiae* briefs from NGOs, even if unsolicited, is amongst the most significant initiatives in this sixth moment of juridification. Specifically, the determination of the Appellate Body report in *US-Shrimp 1998* had the effect essentially of deciding that any given WTO dispute settlement panel

⁵⁴⁴ Blichner, Lars, and Anders Molander, “Mapping Juridification,” *European Law Journal*, vol. 14, no. 1 (January 2008), 47.

had absolute discretion whether to accept or reject any *amicus curiae* submission.⁵⁴⁵ Of course, the decision could not strictly be binding upon any other dispute settlement panel, but its clear statement that the inclusion of *amicus curiae* briefs *prima facie* could constitute part of a member-state's submission created a clear rationale for their acceptance by future panels.

The Appellate Body's conclusion in *US-Shrimp 1998* also stated clearly that “[t]he Appellate Body reverses the Panel's finding that accepting non-requested information from non-governmental sources is incompatible with the provisions of the DSU”⁵⁴⁶ – an authoritative statement of constitutional interpretation that served to bind the interpretations of future panels in practice, if not in fact, concerning a panel's right to accept a submission. This is so even though it did not require future panels to accept submissions, did not create a right amongst NGOs to participate in panel decisions, and did not end controversy concerning the propriety of unsolicited *amicus curiae* briefs amongst WTO Members. In the event, the decisions of panels have been mixed between acceptance and rejection of submissions.⁵⁴⁷

Regardless, the NGO campaign to submit *amicus curiae* briefs, its successful conclusion, the actual submission of the briefs, and the acceptance by some panels of some briefs, are powerful examples of legal framing (juridification type E). In these actions, as well as by participating in WTO Symposia and meetings, NGOs came to adopt the legal discourse of the WTO as the means to express their concerns about trade policy.

⁵⁴⁵ World Trade Organization, Report of the Appellate Body, *United States – Import Prohibitions of Certain Shrimp and Shrimp Products*, AB-1998-4, WT/DS58/AB/R, 12 October 1998, paras. 83, 89, 187a.

⁵⁴⁶ *Ibid*, para. 187a.

⁵⁴⁷ Williams, Marc, “Civil Society and the WTO: Contesting Accountability,” in Jan Aart Scholte, ed., Building Global Democracy? Civil Society and Accountable Global Governance (Cambridge: Cambridge University Press, 2011), 118.

They began to understand themselves, and their relationships with other NGOs, with states and with the WTO, “in light of a common legal order.”⁵⁴⁸ Indeed, the arguments by which NGOs asserted their rights to submit *amicus curiae* briefs implies a sense of “belonging to a community of legal subjects with equal [or at least defined] legal rights and duties.”⁵⁴⁹

Equally, NGO submissions of *amicus curiae* briefs are inconceivable without acceptance in civil society and amongst NGOs of being both addressees and authors of international trade law. This might be said to call into question the extent to which the WTO remains a state-to-state organization. To do so, however, would be to overstate the significance of the unsolicited third-party *amicus curiae* briefs in dispute settlement proceedings. The right to produce such a brief and to offer it for consideration, and a panel’s right to consider any such brief at its absolute discretion, does not equate to a right held by NGOs to have their briefs considered. NGOs hold no right to be heard in WTO proceedings, and the WTO remains, in this sense, more intergovernmentalist than supranationalist, even if it has moved along the continuum toward the latter since 1994. Of course, in no sense do NGOs consider themselves solely as addressees or authors of international trade law; however, the extent to which they do consider themselves as addressees and authors is far greater than it was on the 1st of January 1995.

Numerous other instances express in practical terms the relative movement toward supranationalism. For example, the General Council’s 2003 *Decision concerning the Implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement*

⁵⁴⁸ Blichner, Lars Chr., and Anders Molander, “Mapping Juridification,” *European Law Journal*, vol. 14, no. 1 (January 2008), 47.

⁵⁴⁹ *Ibid*, 47.

and public health was achieved after significant pressure from and consultation with developed and developing country NGOs such as MSF, Oxfam, Third World Network, and Affordable Treatment and Action in India.⁵⁵⁰ This *Decision* exempted LDCs from the requirement to produce patented pharmaceuticals under compulsory license. It also exempted all countries without the capacity to produce patented pharmaceuticals from the licensing provisions of TRIPS that had previously barred them from importing less expensive generic pharmaceuticals even for limited humanitarian purposes.⁵⁵¹ In addition, pressure from environmental NGOs, such as CIEL and WWF, was reflected in the ‘Trade and Environment’ section of the 2001 Doha Declaration.⁵⁵² Finally, NGO pressure has been an important factor in the failure of successive WTO Ministerial Conferences to agree to further measures concerning international investment.⁵⁵³

In sum, where NGO engagement has resulted in concrete promulgated agreement, as in the 2003 *Decision*, it has been a cause of juridification type B1. Even where no such agreement has resulted, NGO engagement has been a cause of juridification type E, since it has entailed agreement from all parties to an increasing degree to discuss trade-related concerns in accordance with the discourse of the WTO Agreements. It follows that the movement away from a strictly intergovernmentalist understanding of the WTO and

⁵⁵⁰ Williams, Marc, “Civil Society and the WTO: Contesting Accountability,” in Jan Aart Scholte, ed., *Building Global Democracy? Civil Society and Accountable Global Governance* (Cambridge: Cambridge University Press, 2011), 123.

⁵⁵¹ World Trade Organization, *Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health*, Decision of the General Council of 30 August 2003, WT/L/540 and Corr 1, 1 September 2003, http://www.wto.org/english/tratop_e/trips_e/implem_para6_e.htm (accessed 20 October 2013).

⁵⁵² Williams, Marc, “Civil Society and the WTO: Contesting Accountability,” in Jan Aart Scholte, ed., *Building Global Democracy? Civil Society and Accountable Global Governance* (Cambridge: Cambridge University Press, 2011), 121-122.

⁵⁵³ *Ibid*, 122.

toward a more supranational understanding, even if relative and very much incomplete, is not insignificant and is a movement of juridification.

To use Germain's general explanation concerning civil society itself, movement toward greater engagement between civil society and the WTO has produced four important results: first, it has made possible a wider and deeper debate, particularly concerning the nature of the WTO's accountability and legitimacy; second, it has better defined the terrain over which the WTO's power is extended and where it is contested; third, it has broadened the WTO's decision-making structure; and fourth, it has expanded conceptions of the WTO's accountability.⁵⁵⁴ Taken cumulatively, the above comprises the movement of juridification between intergovernmentalism and supranationalism that is the essence of this sixth moment of juridification. It is the failure to account for this moment that explains the positions taken by Bhagwati and IGTN. Equally, this sixth moment shows particularly well the capacity for juridification to increase access to the institutions of power, and therefore to have a constitutive and democratizing effect.

Moment 7: The Proliferation of Preferential Trade Agreements (PTAs)

The seventh moment is perhaps the most surprising in that it has been strongly argued by many, particularly during the past decade, that PTAs are detrimental to the WTO regime of global trade governance. In fact, however, the proliferation of PTAs since the advent of the WTO is a moment of juridification of profound import. The degree of this proliferation is striking. As Florentino *et al* show, the cumulative total PTAs reported to the GATT/WTO between 1959 and 2005 did not reach 50 until 1994.

⁵⁵⁴ Germain, Randall D., "Global Modalities of Financial Governance: The Public Sphere and Civil Society," in Randall D Germain and Michael Kenny, The Idea of Global Civil Society: Politics and Ethics in a Globalizing Era (2003; London: Routledge, 2005), 187-188.

Between 1994 and 2005, the number rose to exceed 200.⁵⁵⁵ Indeed, between 2000 and 2008, the United States alone implemented 6 PTAs, reached agreement upon 5 further PTAs, and was in negotiations to reach 5 further PTAs.⁵⁵⁶ This total of 16 exceeds the cumulative total reported to GATT as late as 1972.⁵⁵⁷ During the same period of 2000 to 2008, the EU implemented 12 PTAs, reached agreement on 1 (implemented 1 April 2009⁵⁵⁸), and opened negotiations on 11 more PTAs.⁵⁵⁹ During this period, Japan implemented 6 PTAs, reached agreement on 3, and opened negotiations on 6.⁵⁶⁰ Singapore implemented 13, concluded negotiations for 2, and opened negotiations for 11.⁵⁶¹ Singapore's total of 26 exceeds the total cumulative PTAs reported to GATT as late as 1987, while the EU's total of 24 exceeds the GATT total as late as 1985.⁵⁶² It is this level of proliferation that has caused such concern amongst economists such as Bhagwati,

⁵⁵⁵ Fiorentino, Roberto V., Luis Verdeja, and Christelle Toqueboeuf. *The Changing Landscape of Regional Trade Agreements: 2006 Update*. Discussion Paper No. 12. World Trade Organization, Regional Trade Agreements Section, Trade Policies Review Division, Geneva, 2007. Also cited in Bhagwati, Jagdish, Termites in the Trading System: How Preferential Agreements Undermine Free Trade (Oxford: Oxford University Press, 2008), 13.

⁵⁵⁶ Heydon, Kenneth and Stephen Woolcock, The Rise of Bilateralism: Comparing American, European and Asian Approaches to Preferential Trade Agreements (New York: United Nations University Press, 2009), 269-272.

⁵⁵⁷ Fiorentino, Roberto V., Luis Verdeja, and Christelle Toqueboeuf. *The Changing Landscape of Regional Trade Agreements: 2006 Update*. Discussion Paper No. 12. World Trade Organization, Regional Trade Agreements Section, Trade Policies Review Division, Geneva, 2007. Also cited in Bhagwati, Jagdish, Termites in the Trading System: How Preferential Agreements Undermine Free Trade (Oxford: Oxford University Press, 2008), 13.

⁵⁵⁸ This was the Stabilisation and Association Agreement with Albania. European Commission, Trade, Policy, Countries and Regions, Agreements. <http://ec.europa.eu/trade/policy/countries-and-regions/agreements/> (accessed 12 January 2015)

⁵⁵⁹ Heydon, Kenneth and Stephen Woolcock, The Rise of Bilateralism: Comparing American, European and Asian Approaches to Preferential Trade Agreements (New York: United Nations University Press, 2009), 273-277.

⁵⁶⁰ *Ibid*, 284-286.

⁵⁶¹ *Ibid*, 287-291.

⁵⁶² Fiorentino, Roberto V., Luis Verdeja, and Christelle Toqueboeuf. *The Changing Landscape of Regional Trade Agreements: 2006 Update*. Discussion Paper No. 12. World Trade Organization, Regional Trade Agreements Section, Trade Policies Review Division, Geneva, 2007. Also cited in Bhagwati, Jagdish, Termites in the Trading System: How Preferential Agreements Undermine Free Trade (Oxford: Oxford University Press, 2008), 13.

who favour a multilateral approach to trade liberalization. However, as the ensuing discussion shows, while critiques of PTAs have significant merit, PTAs have nevertheless been the cause of the expansion of international trade law (juridification type B1), of increased conflict resolution by judicial means (juridification type C), and of more intensive legal framing (juridification type E). On balance, therefore, they have strengthened the regime of international trade governance under the WTO.

The primary authorization for PTAs is found in GATT Article XXIV, which creates an exception in the GATT for Customs Unions (CU), Free Trade Areas (FTA), and ‘interim agreements’ meant to lead to a CU or FTA. The exception is necessary because CUs and FTAs are Preferential Trade Agreements (PTAs); they create a system of preferences that would seem to undermine the fundamental principles of non-discrimination and MFN upon which the GATT/WTO system is based. The underlying logic of the Article XXIV exception is therefore to treat PTAs as a single political entity for trade purposes, rescuing the principles of non-discrimination and MFN status. In keeping with this logic, Article XXIV makes three basic requirements of PTAs. The first is the ‘internal requirement,’ by which ‘duties and other restrictive regulations of commerce’ must be eliminated on ‘substantially all the trade’ between parties to the PTA. The second is the ‘external requirement,’ by which ‘duties and other regulation of commerce’ upon countries outside the PTA cannot be made higher than what they were before the PTA came into effect. Third, interim agreements are required to lead to PTAs within a ‘reasonable amount of time.’⁵⁶³ PTAs are also permissible under GATS Article V, when the PTA involves trade in services, and under the Enabling Clause negotiated

⁵⁶³ ‘Internal Requirement’ and ‘External Requirement’ are the terms used by Trebilcock, Michael, Robert Howse and Antonia Eliason, The Regulation of International Trade, Fourth Edition (London: Routledge, 2013), 102-113.

during the Tokyo Round (73-79). The first important point, then, is that each PTA is an affirmation of the WTO Agreements and an extension of international trade governance under the WTO to new areas, even if only to two or three countries at a time. This is certainly juridification type B1, even if not multilateral.

The consequences of this acceptance of PTAs must be addressed in greater detail because they have been held by some to threaten the GATT/WTO system, and therefore any narrative of the juridification of that system. There are two basic debates concerning these consequences. The first is whether PTAs are ‘trade-creating’ or ‘trade-diverting.’ The second is whether PTAs support or impede multilateral trade liberalization. These two debates are the crux of the question concerning PTAs.

Concerning the first, the terms ‘trade-creating’ and ‘trade-diverting’ are taken from Viner’s classic study⁵⁶⁴ and used by Trebilcock, Howse and Eliason, amongst others, to consider the effects of PTAs upon economic welfare. Essentially, a trade-diverting outcome is held to occur when trade increases within the PTA are at the cost of a reduction in trade with more efficient producers outside the PTA.⁵⁶⁵ That is, when the decrease in trade restrictions within the PTA has made it more cost-effective to obtain a given product within the PTA, even if the same product can be produced at lesser cost (more ‘efficiently’) outside the PTA. This is held to be counter to global welfare. Conversely, a ‘trade-creating’ outcome occurs when trade in a given product is shifted to a lower-cost producer in one of the PTA countries, whether from a higher-cost producer

⁵⁶⁴ Viner, Jacob, The Customs Union Issue (New York, Carnegie Endowment for International Peace), 1950. The book was reissued in 2014 by Oxford University Press, edited and with an introduction by Paul Olslington.

⁵⁶⁵ Trebilcock, Michael, Robert Howse and Antonia Eliason, The Regulation of International Trade, Fourth Edition (London: Routledge, 2013), 90-1. Also Bhagwati, Jagdish, Termites in the Trading System: How Preferential Agreements Undermine Free Trade (Oxford: Oxford University Press, 2008), 17, 49-57.

in one of the PTA countries, or from a higher-cost producer in a country outside the PTA.⁵⁶⁶

In an idealized sense, the point of a PTA is therefore to reduce extraneous transaction costs to trade and to allow the costs of production and delivery (given equal quality) to determine trade flows. The extent to which PTAs promote this ideal is the substance of the question concerning trade-creation and trade-diversion. It remains a question of considerable controversy and uncertainty. For example, it could be argued that the trade-diverting effects of PTAs must be relatively marginal, since about 50% of international trade is MFN duty free, while a further 19.9% is subject to an MFN duty of less than 5%, and only 4% of international trade is subject to MFN duties of 10% or more.⁵⁶⁷ Conversely, Bhagwati argues that comparative advantage can depend on such narrow margins that even a small trade-diverting tendency can have a significant effect upon trade flows, particularly with respect to developing economies.⁵⁶⁸ He further argues that even if a preference does not have an immediate trade-diverting effect, the narrowness of comparative advantage can lead to such an effect at a later time.⁵⁶⁹ Thus, a trade-creating PTA today can become trade-diverting tomorrow.

Empirical data mirror the theoretical uncertainty. The *World Trade Report 2011* states that some PTAs in some sectors have caused trade-diversion, but that “it does not

⁵⁶⁶ Trebilcock, Michael, Robert Howse and Antonia Eliason, The Regulation of International Trade, Fourth Edition (London: Routledge, 2013), 90-1. Also Bhagwati, Jagdish, Termites in the Trading System: How Preferential Agreements Undermine Free Trade (Oxford: Oxford University Press, 2008), 17, 49-57.

⁵⁶⁷ Trebilcock, Michael, Robert Howse and Antonia Eliason, The Regulation of International Trade, Fourth Edition (London: Routledge, 2013), 87-88.

⁵⁶⁸ Bhagwati, Jagdish, Termites in the Trading System: How Preferential Agreements Undermine Free Trade (Oxford: Oxford University Press, 2008), 51-2.

⁵⁶⁹ *Ibid*, 52.

emerge as a key effect of preferential agreements.⁵⁷⁰ Do and Watson note a World Bank meta-analysis of 19 studies⁵⁷¹ that shows the average effect of PTAs to be trade-diverting; however, it also shows such a diversity of results that 44% of cases studied found PTAs to have a statistically significant trade-creating effect.⁵⁷² This renders impossible any conclusion about the effects of PTAs as such. Given evidence such as the above, Trebilcock, Howse and Eliason conclude that “taking the results of empirical studies of the effects of trade flows at face value, it is unclear whether their predominant effect is one of trade creation or trade diversion.”⁵⁷³ This is an important conclusion because a marked tendency for PTAs individually to be trade-diverting could indeed, if PTAs continued to proliferate, render likely the gradual diminution, or de-juridification, of multilateral trade governance under the WTO. However, no such tendency can be discerned with confidence in a generic individual PTA; that is to say, it cannot be said to be an expected result of any given PTA.

The second controversy concerning PTAs is whether, taken collectively, they support or undermine the GATT/WTO regime and the multilateral liberalization of trade. Essentially, there are two questions underlying this debate. The first asks whether the proliferation of PTAs effectively systematizes trade-diversion in accordance with Bhagwati’s ‘spaghetti bowl’ metaphor. The second asks whether the proliferation of

⁵⁷⁰ World Trade Organization, *World Trade Report 2011: The WTO and Preferential Trade Agreements: From Co-existence to Coherence* (Geneva: World Trade Organization, 2011), 105.

⁵⁷¹ World Bank Group, *Global Economic Prospects 2005: Trade, Regionalism, and Development*, World Bank Publications (1 November 2004).

⁵⁷² Do, Viet D., and William Watson, “Economic Analysis of Regional Trade Agreements,” in Lorand Bartels and Federico Ortino, eds., *Regional Trade Agreements and the WTO Legal System* (Oxford: Oxford University Press, 2006), 16.

⁵⁷³ Trebilcock, Michael, Robert Howse and Antonia Eliason, *The Regulation of International Trade*, Fourth Edition (London: Routledge, 2013), 91.

PTAs creates momentum toward multilateral liberalization or creates incentives against it.

Bhagwati's 'spaghetti bowl' metaphor argues that the proliferation of PTAs causes profound discontinuity in tariff regimes between countries and between regions.⁵⁷⁴ According to Bhagwati, the difficulty of learning the various regimes and of adjusting business practices to the differences between them can only increase transaction costs, be trade-diverting, and be detrimental to global welfare.⁵⁷⁵ The problem is compounded by equally disparate rules of origin between the various PTAs.⁵⁷⁶ These, he argues, greatly increase the cost of creating a global supply chain, and cause absurd judgments about the national or regional identity of particular products. Bhagwati gives the evocative example of the refusal of the US Customs Service to allow that Hondas produced in Ontario were in fact North American because they did not meet the requirement for 50% local content.⁵⁷⁷ Bhagwati also quotes Hong Kong businessman Victor Fung's negative assessment of PTAs in the following terms:

Bilateralism distorts the flow of goods, throws up barriers, creates friction, reduces flexibility and raises prices. In structuring the supply chain, every country of origin rule and every bilateral deal has to be tacked on as an additional consideration, thus constraining companies in optimizing production globally.⁵⁷⁸

⁵⁷⁴ Bhagwati, Jagdish, Termites in the Trading System: How Preferential Agreements Undermine Free Trade (Oxford, Oxford University Press, 2008), 61-71.

⁵⁷⁵ *Ibid*, 61-71.

⁵⁷⁶ *Ibid*, 66-69, 120.

⁵⁷⁷ *Ibid*, 68.

⁵⁷⁸ *Ibid*, 70.

Born in 1945, Victor Fung is Group Chairman of the Li & Fung Group of Companies. He was chair of the International Chamber of Commerce from 2008 to 2010, was a member of the WTO Informal Business

Finally, Bhagwati notes that the ambiguities and inconsistencies in the numerous rules of origin create a wide range of opportunity for corruption.⁵⁷⁹ All of this is unavoidably trade-diverting.

In response, Do and Watson argue that the increased transaction costs caused by PTAs may not be sufficient to cause a significant diversion of trade. They suggest that in the process of assessing competitiveness in a given market, determining the correct tariff rate is likely to be “the easiest part of the calculation.”⁵⁸⁰ They argue further that the aggregate negative effect of Bhagwati’s ‘spaghetti bowl’ must be capped by the MFN tariff rate, since producers can always revert to the MFN rate when rules of origin are too complex.⁵⁸¹

In making this argument, they do not seem to account sufficiently for the likelihood that an aggregate negative effect would mask asymmetrical distribution. That is to say, even if a given product could always in theory be imported at the MFN tariff rate, the importer might decide to import from a different country under a different PTA where the rules of origin are clearer and the tariff lower than MFN, thus rendering meaningless the theoretical possibility of the producer exporting under the MFN tariff. Equally, the same kind of trade-diversion could lead a multinational corporation to alter its supply chain rather than trading under the MFN tariff. In short, at the level of the

Advisory Body, has been chair of the Hong Kong Airport Authority and the Hong Kong Trade Development Council, and was Hong Kong’s representative in 1996 and 2001 to the APEC Business Advisory Council.

⁵⁷⁹ *Ibid*, 66-68.

⁵⁸⁰ Do, Viet D., and William Watson, “Economic Analysis of Regional Trade Agreements,” in Lorand Bartels and Federico Ortino, eds., *Regional Trade Agreements and the WTO Legal System* (Oxford: Oxford University Press, 2006), 19.

⁵⁸¹ *Ibid*, 20.

business doing the trading, and once a given product has been subdivided to its component parts, trade-diversion is a zero-sum game. Bhagwati would add that the asymmetrical effects of trade diversion disproportionately affect developing countries. For instance, he notes that the EU extends MFN tariffs to only six countries, including Canada, the US, and Japan.⁵⁸² All other countries receive tariff rules better than MFN, and would therefore stand to lose relatively more by trade diversion caused by the ‘spaghetti-bowl’ of PTAs.

Thus it seems reasonable to conclude that the proliferation of PTAs causes at least some negative effects upon global welfare, even if Trebilcock, Howse and Eliason note that there is insufficient empirical evidence to quantify or describe the negative effects in detail. The larger question, though, is whether these effects, and other aspects of the proliferation of PTAs, are likely to undermine the multilateral liberalization of trade and the system of international trade governance under the WTO. Bhagwati calls this the ‘dynamic time-path question,’ asking whether PTAs are ‘building blocks’ that accelerate multilateral liberalization, or ‘stumbling blocks’ that delay it.⁵⁸³ If the former, present trade-diversion could be accepted as a momentary cost. If the latter, the implications of trade-diversion grow more severe, the discontinuity between PTAs could begin to resemble the discontinuity of the preferential system of the 1930s, and the continued multilateral liberalization of international trade could be called into question, along with prospects for international trade governance under the WTO and the narrative of the present chapter. In short, even while a generic individual PTA cannot confidently be

⁵⁸² Bhagwati, Jagdish, Termites in the Trading System: How Preferential Agreements Undermine Free Trade (Oxford, Oxford University Press, 2008), 14.

⁵⁸³ *Ibid*, 39, 105-108, 120.

expected to be trade-diverting or trade-enhancing, if PTAs are collectively and systematically trade-diverting, then they can be expected gradually to undermine the WTO-led regime of international trade governance and lead to a period of de-juridification.

On this question, the theoretical literature is divided. During the Uruguay Round, Robert Zoellick of the US State Department commented wryly that it was possible to ‘walk on two legs’ and argued that PTA liberalization could reinforce and provide impetus for multilateral liberalization.⁵⁸⁴ Along similar lines, Baldwin theorized that trade-diversion caused by PTAs would actually create ever-increasing incentives for new countries to join new PTAs, causing a domino effect that would end only with *de facto* multilateral liberalization and global free trade.⁵⁸⁵ Conversely, Cournot-oligopoly models have suggested that PTA member welfare will peak at a point prior to universal membership, thereby suggesting that Baldwin’s dominoes would cease to fall before PTA liberalization could become global liberalization.⁵⁸⁶

Another argument against PTAs is that they provide countries with a powerful BATNA, or Best Alternative To Negotiated Agreement, a concept that Odell has used extensively in his work.⁵⁸⁷ A strong BATNA strengthens a given country’s negotiating position by reducing its incentive to attain a given objective. Thus, the knowledge that recourse may be had to PTAs weakens the need to achieve a multilateral agreement to

⁵⁸⁴ *Ibid*, 39.

⁵⁸⁵ Baldwin, Richard E, “The Causes of Regionalism,” The World Economy, vol. 20, no. 7 (1997), 878-884.

⁵⁸⁶ Trebilcock, Michael, Robert Howse and Antonia Eliason, The Regulation of International Trade, Fourth Edition (London: Routledge, 2013), 93.

⁵⁸⁷ Odell, John, Negotiating the World Economy (Ithaca, New York: Cornell University Press, 2000), 27-28, 52-55, 202.

liberalize trade. To this, the *World Trade Report 2011* added ‘fear of preference erosion’⁵⁸⁸ and Bhagwati adds ‘trade anxiety’ and ‘trade fatigue’ as factors caused by PTA proliferation that mitigate against multilateral trade liberalization.⁵⁸⁹

Against these reasons, Hoekman and Kostecki note that the entire purpose of the Dillon Round (60-61) was to renegotiate a balance of concessions subsequent to the advent of an unusually large PTA known as the EEC.⁵⁹⁰ Schott argues that the most important factor is the maintenance of momentum toward trade liberalization, whether through PTAs or multilateral negotiations.⁵⁹¹ In Schott’s argument, this momentum will cause domestic producers to understand that their relative benefits under any given PTA will be short-lived. They will therefore use the period of preference more to restructure in order to ensure competitiveness against foreign producers, than to lobby for preservation of protection.⁵⁹² Schott’s argument thus suggests that domestic protectionist lobbies caused by PTAs might not be quite as serious a problem as Bhagwati thinks.

It is also possible, according to the *World Trade Report 2011*, that the proliferation of PTAs could produce competitive liberalization, since in practise every PTA must exclude more countries than it includes.⁵⁹³ It would be reasonable for excluded countries to seek to neutralize the disadvantages they suffer by this exclusion. This could

⁵⁸⁸ World Trade Organization, *World Trade Report 2011: The WTO and Preferential Trade Agreements: From Co-existence to Coherence* (Geneva: World Trade Organization, 2011), 166.

⁵⁸⁹ Bhagwati, Jagdish, Termites in the Trading System: How Preferential Agreements Undermine Free Trade (Oxford, Oxford University Press, 2008), 87.

⁵⁹⁰ Hoekman, Bernard M., and Michel M. Kostecki, The Political Economy of the World Trading System (New York: Oxford University Press, 2001), 363.

⁵⁹¹ Schott, Jeffrey J., Free Trade Agreements: US Strategies and Priorities (Washington, DC: Institute for International Economics, 2004), 12.

⁵⁹² *Ibid*, 12.

⁵⁹³ World Trade Organization, *World Trade Report 2011: The WTO and Preferential Trade Agreements: From Co-existence to Coherence* (Geneva: World Trade Organization, 2011), 52.

lead them either to seek new PTAs in new markets, thus increasing liberalization generally, or to seek a reduction in the MFN tariff, thus rendering PTA advantages less meaningful.

Indeed, as even Bhagwati is compelled to accept, if PTAs are in fact a serious systemic concern, the reduction of the MFN tariff is a very effective and conceptually very simple solution.⁵⁹⁴ A sufficient MFN reduction would at once deprive PTAs of their major tariff benefits. It is certainly true that the multilateral agreement necessary for MFN reduction has not been forthcoming since the opening of the Doha Round in 2003, though agreements have been reached on the questions to be negotiated and some other important points.⁵⁹⁵ Nevertheless, the systemic strength of the multilateral trade system is as much located in the ever-present possibility of enacting MFN tariff reductions as it is in their actual enactment. The proliferation of PTAs does not threaten the ability of the system as such to reduce the MFN tariff. Seen from this vantage, it becomes more important that even if a PTA BATNA reduces a given country's incentive to achieve multilateral liberalization, it increases the likelihood that the same country will liberalize its trade and that international trade systemically will be further liberalized. Thus, it seems more correct to suggest that the proliferation of PTAs is a periodic response to the difficulty of achieving liberalization by multilateral agreement, rather than a threat to the multilateral system as such, to international trade governance, to further multilateral MFN tariff reductions, or to further multilateral agreement governing trade in sectors such as intellectual property or agriculture.

⁵⁹⁴ Bhagwati, Jagdish, Termites in the Trading System: How Preferential Agreements Undermine Free Trade (Oxford, Oxford University Press, 2008), 100.

⁵⁹⁵ Such as the production of generic pharmaceuticals and their distribution to LDCs, as well as the reduction of customs barriers to trade.

Indeed, the entire purpose of the WTO and of the system of multilateral negotiations is the liberalization of international trade. It would be strange therefore if the WTO were to be undermined by the proliferation of PTAs, the cumulative effect of which is greatly to increase international trade governance, and greatly to liberalize international trade. The problem with Bhagwati's 'termites in the trading system' argument is that he does not account sufficiently for the differences between the preferential system of the 1930s and the preferential agreements that have proliferated since the 1980s.⁵⁹⁶ The former constituted the dominant system of international trade for its time, and its ultimate effects were damaging. Irwin has shown the extraordinary decline in world trade between 1929 and 1933 from USD 5.35 billion to USD 1.75 billion.⁵⁹⁷ The latter do not constitute a system; they are an adjunct to the system of international trade governance under the WTO, and they are an adjunct to multilateral trade negotiations. Moreover, far from the disastrous decline shown by Irwin, international trade has significantly increased since the advent of the WTO, and despite the proliferation of PTAs. Between 1994 and 2010 the volume of world merchandise exports has more than doubled.⁵⁹⁸ Bhagwati too easily assumes that the two periods and their consequences are directly comparable.

There are two further reasons why the proliferation of PTAs may not be the systemic threat that some consider it to be. Every WTO contracting party that enters into a PTA does so under the auspices of Article XXIV of the GATT, Article V of GATS, or

⁵⁹⁶ *Ibid*, 7-11.

⁵⁹⁷ Irwin, Douglas A., Trade Policy Disaster: Lessons from the 1930s (Cambridge, Massachusetts: MIT Press, 2012), 101.

⁵⁹⁸ WTO Secretariat, "Chart 1: Growth in Volume of World Merchandise Trade and GDP, 2005-13," in "Press/658," 12 April 2012, www.wto.org/english/news_e/pres12_e/pr658_e.htm (accessed 20 February 2014).

the Enabling Clause, and in accordance with all of the other articles and agreements incident to membership in the WTO. Should the PTA breach any of these commitments or concessions, it can be challenged through the WTO's DSM. In short, PTAs are institutionally subordinate to the system of international trade governance under the WTO; because of this, when considered institutionally, they actually reinforce and strengthen multilateral international trade governance under the WTO. Properly considered, then, PTAs produce juridification type C, because each PTA increases, at least potentially, recourse to the DSM for conflict resolution under the WTO Agreements. Moreover, each PTA produces juridification type E, or legal framing, in which two or more countries agree to define their mutual trading relationship by the terms and discourse of the WTO Agreements. Thus, PTAs strengthen juridification of multilateral international trade governance, and in doing so cannot be said to undermine the GATT/WTO system, but must be allowed to have strengthened it.⁵⁹⁹

Second, there is little or no empirical evidence that the proliferation of PTAs is a systemic threat to multilateral trade liberalization or international trade governance. As Wilkinson has shown, every multilateral negotiation since the 1963-67 Kennedy Round has been a difficult and lengthy process.⁶⁰⁰ Every Round since the 1973-79 Tokyo Round has involved significant and unforeseen breakdowns and delays.⁶⁰¹ Moreover, as Wilkinson has shown, the kind of asymmetry produced by the proliferation of PTAs, and

⁵⁹⁹ In this connection, it is especially notable that nowhere in Termites in the Trading System does Bhagwati mention dispute settlement or the DSM; indeed, the terms do not appear in the book's index.

⁶⁰⁰ Wilkinson, Rorden, The WTO: Crisis and the Governance of International Trade (London: Routledge, 2006), 69-74.

This is the citation for Wilkinson's consideration of the Kennedy Round, though the argument is pursued throughout this work.

⁶⁰¹ *Ibid.*, 77-93. This is the citation for Wilkinson's consideration of the Tokyo and Uruguay Rounds, though the argument is pursued throughout this work.

which Bhagwati considers so dangerous, has in fact been a feature of international trade governance since the advent of the GATT in 1947.⁶⁰² In that it gives the system impetus to pause and reset itself periodically, allowing a systemic response to changes in circumstance, this asymmetry can even be said to be a systemic institutional strength. Finally, international trade governance under the WTO has continued to function effectively during the ongoing, difficult and relatively unproductive Doha Round, and it rebounded with singular alacrity from the financial crisis of 2008.⁶⁰³ It cannot be maintained, therefore, that the proliferation of PTAs has constituted a systemic threat to the multilateral liberalization of trade or to international trade governance under the WTO. Indeed, rather than a systemic threat, it is much more closely in accordance with events to describe the proliferation of PTAs since 1994 as the progressive juridification of multilateral international trade governance under the WTO.

In sum, then, it is likely that the proliferation of PTAs causes a measure of trade-diversion, but the extent to which this has taken place, and the extent of any damage to global welfare that it may have caused, remains largely unknown. Further, while it seems theoretically likely that the proliferation of PTAs might reduce somewhat and for a time the motivation of some countries toward further multilateral liberalization, it seems very unlikely that it constitutes a systemic threat to multilateral liberalization or to international trade governance under the WTO. Instead, the proliferation of PTAs is better understood as part of the progressive juridification of the system of international trade governance under the WTO, specifically producing juridification types B1, C and

⁶⁰² *Ibid.* This is the central argument of Wilkinson's monograph.

⁶⁰³ WTO Secretariat, "Chart 1: Growth in Volume of World Merchandise Trade and GDP, 2005-13," in "Press/658," 12 April 2012, www.wto.org/english/news_e/pres12_e/pr658_e.htm (accessed 20 February 2014).

E, and, on balance, strengthening the regime of international trade governance under the WTO.

Conclusion

In conclusion, the chapter has proceeded toward a single overarching objective: to show that the WTO is representative of the post-WWII trend of juridification of global economic governance. To do so, the chapter built upon the modified Blichner-Molander typology of juridification introduced earlier in Chapter 2 of the present study. This allowed a robust method of direct comparison between the widely-accepted general trend of the juridification of global economic governance since WWII, and the specific trend of the juridification of the GATT/WTO regime of international trade governance during the same period. It showed that the juridification of the GATT/WTO regime could be taken as representative of the juridification of the generality of global economic governance for the purposes of the study.

Table 3: Modified Blichner-Molender Typology of Juridification – The Ingress of Law – Select Examples

| Type | Global Governance and Global Economic Governance | GATT and the WTO |
|---|--|---|
| A – Constitutive Juridification | - Creation of 76 IOs across 16 sectors, 1944-70. | - Marrakesh Agreement - DSU - GATT 1947 & Part IV - The ‘single undertaking’ |
| B – Law’s Expansion and Differentiation | - Increase of IO activities 1970-85 - ILO Recommendations - WB Guidelines | - Tokyo Codes - Increase of GATT/WTO Contracting Parties from 23 in 1947 to 159 in 2013. - Conflicts between value systems - TRIPS - GATS - TRIMs - PTAs |
| C – Increased Conflict Solving by Reference to Law | - WB Inspection Panel - ICC - ICJ | - Increased use, scope, and complexity of dispute settlement - 113 cases from 1947-79, versus 182 cases from 1980-94 |
| D – Increased Judicial Power | - War Crimes Tribunal - ICC - ICJ - WB Inspection Panel | - Increased formalization of dispute settlement - Increased need for expertise and dedicated professional experts - Increased approximation of doctrine of precedent in WTO DSB - Change from positive to negative consensus for adoption of panel and AB reports - Delegations’ requirement for legal assistance recognized under GATT Ministerial Declaration of 24 November 1982 |
| E – Legal Framing | - More UN Conferences conducted between 1970-85 (48 total) than during the previous 75 years - UNCLOS | - Increased use of formal, adjudicative, adversarial dispute settlement in PTAs - Legal language of new PTAs - Public and political discourse concerning trade disputes and trade agreements - NGO submissions of <i>amicus curiae</i> briefs - NGO participation rose from 108 in 1996 to 812 in 2005 |
| F – Increased Robustness | - IMF Conditionalities | - Explicit endorsement of the possibility of retaliatory sanctions |

in WTO DSU

- Voluntary compliance with DSB decisions
 - TPRB
 - 1981 GATT Ministerial Declaration requiring the GATT General Council to make periodic reviews of compliance with Panel recommendations
-

Sources: The Blichner-Molander typology of juridification was updated by the author by having added type F – Increased Robustness. The other categories of juridification are extracted from the text of the following article: Blichner, Lars Chr., and Anders Molander, “Mapping Juridification,” *European Law Journal*, vol. 14, no. 1 (January 2008). The examples given are extracted from the academic literature used throughout the present study, especially the present chapter.

More specifically, all 6 types in the modified Blichner-Molander typology could be shown to be present in the microcosm of the GATT/WTO regime and in the macrocosm of global economic governance generally. Thus, constitutive juridification (type A) is evident in the establishment of the Bretton Woods organizations and the UN, but also in the establishment of the GATT, of the WTO, and of the extra-GATT WTO agreements. Law's expansion and differentiation (type B) is evident in the *Recommendations* of the ILO and the *Guidelines* of the World Bank, but also in the Tokyo Round Codes of the GATT and of course the accession of new members to the GATT and the WTO. Increased conflict solving by judicial means (type C) is evident in the advent of the World Bank's Inspection Panel, but also in the evolution of dispute settlement under the GATT and in the advent of the DSB of the WTO, as well as in numerous PTAs and RTAs established since the 1980s. The increase of judicial power (type D), being fundamentally the product of types A, B and C, is evident in the WTO's DSB, as shown in Moment 3 above, as well as in the World Bank's Inspection Panel. Legal framing (type E) is evident throughout the larger trend and the smaller, in the IMO's *Law of the Sea Convention* (UNCLOS), in World Bank *Guidelines*, in the relationship between IOs and NGOs generally, in the WTO's DSB, in its extra-GATT agreements, in the proliferation of PTAs, and in many other occurrences. Finally, increased robustness (type F) is evident in the IMF's Conditionalities, but also in the high level of voluntary compliance with DSB decisions, and the legal authorization of WTO Members to pursue retaliatory measures in the absence of compliance. All of these examples and more have been adduced to show that the juridification of international trade governance under the GATT and the WTO since 1947 can be understood as

representative of the general post-1944 trend of juridification in global economic governance. It must be stressed that this is not to suggest that the modified Blichner-Molander typology is without conceptual flaws; however, it more than suffices to make the desired comparison.

The ability of the juridification of international trade governance under the GATT/WTO to represent that of global economic governance generally allows the WTO to serve as a proxy for global economic governance in the study's investigation of whether global economic governance can take a democratic turn. Thus, the study has constructed the first half of its test, which is premised upon the reasoning that if the WTO can represent global economic governance, and if the WTO is the hardest case for the representation of women and women's interests within global economic governance, and if the representation of women and women's interests is a *sine qua non* of democracy in the 21st century, then the capacity for the WTO to represent women and women's interests is also determinative of the capacity for global economic governance to take a democratic turn. Following this reasoning, the next step is to determine whether sufficient grounds exist to construct a convincing argument that the WTO is the hardest case amongst the institutions of global economic governance for the representation of women and women's interests. This, then, is the task of Chapter 5, which follows the present chapter. Afterward, Chapters 6 and 7 conduct the test.

Finally, by using the modified Blichner-Molander typology to describe the differences between six fundamental types of juridification, and by showing the constancy, variation and extent of the juridification of global economic governance and international trade governance since WWII, the chapter reinforces two important tenets of

IGI. First, the progress of juridification shows the need for democratization of global governance, since, as explained in Chapter 2, juridification is a reflexive phenomenon, equally capable of providing access to institutions of power and of providing means for the abuse of power. Second, this reflexivity of juridification also reinforces IGI's opposition to global government; that is, its insistence upon the maintenance of separation between institutions of global governance. In effect, this acts as a systemic check upon the undemocratic effects that are always possible with the progress of juridification, limiting them to the purview of a given institution, instead of allowing them to take root in a structure of global government to which no check could be provided.

Chapter 5 – A Proxy for GEG II: Why the WTO is the ‘Hardest Case’ amongst the Institutions of GEG

To recapitulate, the purpose of Chapters 4 and 5 is to establish the validity of the test to be conducted in Chapters 6 and 7. This test establishes whether global economic governance, as it is presently constituted, can take a democratic turn. To do so, the WTO is employed as a proxy for global economic governance, and the test is reduced to whether the representation of women and women’s interests is possible within the WTO. This may be done for three reasons: first, because it is universally accepted that, in the global political economy of the early 21st century, no entity can be considered democratic in which the representation of women and women’s interests is not possible; second, because the WTO is representative of a general trend of juridification of global economic governance since 1945; and third, because the WTO is the ‘hardest case’ amongst the institutions of global economic governance for accomplishing the representation of women and women’s interests. These last two reasons establish the WTO as an effective proxy for global economic governance for the purposes of the test in Chapters 6 and 7.

Chapter 4 established that the WTO is in fact representative of a general trend of juridification of global economic governance since 1945. Alone, however, this would still leave the test ineffective, since it would not be clear how the results of the test would be valuable in a generalized sense for making conclusions about the democratic potential of global economic governance.

As such, the present chapter must establish that it is at least as difficult to achieve the representation of women and women’s interests within the WTO as it is within all

other international organizations regulating economic activity. This is what is meant by ‘hardest case’ and this is what allows the results of the test to be generalized to the democratic potential of global economic governance. If it is found that the representation of women and women’s interests can be accomplished within the WTO as it stands, the same thing can certainly be accomplished within the other organizations regulating global economic activity. Conversely, given that the WTO occupies one of the most important positions in global economic governance, if the representation of women and women’s interests cannot be accomplished within the WTO, then it becomes certain that global economic governance cannot be effectively and meaningfully democratized without significant reform. Thus, the test that comprises Chapters 6 and 7 allows for powerful conclusions to be drawn, as long as the WTO can serve as an effective proxy for global economic governance.

What remains, then, is to establish that the WTO is in fact the ‘hardest case.’ To do so, the present chapter gives nine reasons why the WTO is the ‘hardest case,’ which are the following: the traditional gender blindness of International Relations and International Political Economy scholarship (reason 1); the traditional gender blindness of economic thought and the need to construct an understanding of *mulier economicus* (reason 2); that it was not possible for women to ‘get in on the ground floor’ at the founding of the WTO in 1994 (reason 3); the antagonism of gender and trade activism toward neoliberal economics and toward networks and institutions perceived as neoliberal (reason 4); that the WTO was relatively closed to civil society involvement for longer than most other institutions of regional and global economic governance (reason 5); the requirement for consensus in WTO decision-making and the ‘single undertaking’

(reason 6); that the locus of power within the WTO rests with its members (reason 7); the limited ability of the WTO Secretariat to improve the representation of women and women's interests (reason 8); and that the WTO, or at least the WTO DSU, constitutes a system of *lex specialis*, negating much of the effectiveness of the strategy of identifying women's rights with human rights (reason 9). It must be stressed that it is the cumulative nature of these reasons, all of which apply to the WTO, that makes the WTO the hardest case. It is certainly true that other institutions of global economic governance share some or several of these reasons, but no other such institution shares all of them.

Reason 1: The Traditional Gender Blindness of International Relations and International Political Economy

The fields of International Relations (IR) and International Political Economy (IPE) have for most of their histories been blind to gender difference, and in many respects continue to be so. As Sjoberg and Tickner write in 2011,

‘making feminist sense’ of global politics is a big task, which requires endless, careful research and thinking (and rethinking) about people, parts of the world, and processes that are difficult to investigate because they fall outside the purview of what is traditionally understood as the proper research concerns of the discipline of IR.⁶⁰⁴

Most early feminists in IR “attended graduate programs in political science where there were few women, read syllabi full of scholarly articles by mainly or only men, and

⁶⁰⁴ Tickner, J. Ann and Laura Sjoberg, “Introduction: International Relations through Feminist Lenses,” in J. Ann Tickner and Laura Sjoberg, eds., Feminism and International Relations: Conversations about the Past, Present and Future (London: Routledge, 2011), 2.

experienced IR as a scholarly place often hostile to women and femininity.”⁶⁰⁵ IR scholarship began to incorporate feminist contributions between 1988 and 1992,⁶⁰⁶ which means that ideas of gender difference were only beginning to be incorporated within IR scholarship during the middle years of the Uruguay Round (1986-1994) negotiations that led to the founding of the WTO.

It may be argued that IPE is still less receptive to gender scholarship than IR, since it can claim a direct lineage to the thinking of imperialist political economy, predominantly British, of the late 19th and early 20th century, as opposed to IR, which became popularized post-WWII. As Clift and Rosamond write, the fundamental tenets of political economy that Strange ‘rediscovered’ in the 1970’s, particularly the refusal to countenance the theoretical separation of politics and economics, were preponderant in the era of globalization immediately prior to the First World War and during the interwar period,⁶⁰⁷ prior to women having entered public life in mass proportions globally. This is important because it was this line of thinking, this tradition of knowledge production that arguably informed the negotiators at Bretton Woods and in the negotiations that led to the GATT in 1947. Moreover, because the gender blindness of imperialist political economy was communicated to the GATT 1947, it had been reinforced by path-dependence for nearly 50 years by the time the gender blindness of IPE (and IR) was communicated to the WTO in 1994. Thus, because GATT 1947 was incorporated within the WTO, the gender blindness of the political economy tradition of the late 19th and early 20th century

⁶⁰⁵ *Ibid*, 3.

⁶⁰⁶ *Ibid*, 2-3, 9-11.

⁶⁰⁷ Clift, Ben, and Ben Rosamond, “Lineages of a British International Political Economy,” in Mark Blyth, ed., Routledge Handbook of International Political Economy (IPE): IPE as a Global Conversation (London: Routledge, 2009), 102.

was matched with the gender blindness of IPE, to which it was antecedent, and IR, which developed as a discipline after WWII partly as a replacement to the political economy tradition but in a gender-blind tradition, were arguably all incorporated within the knowledge base of the WTO in 1994 and were buttressed by path-dependence.

IPE scholarship has been inadequately attentive to gender difference even including the discipline's most critical and dissenting incarnations. As Peterson wrote in 1997 concerning critical and post-modern IPE theorists, "whatever the innovative contributions of these theorists, however dissident, disruptive or deconstructive their inquiries, it is remarkable how they fail to disturb – much less dismantle – androcentric premises."⁶⁰⁸ Waylen, in 2006, found that both mainstream and critical IPE had continued to prove very resistant to considerations of gender and to feminist theorizing. Concerning mainstream IPE, she cited Tickner's statement that the state-centric, positivistic and rationalistic methodologies of neo-realist and neoliberal frameworks did not easily "lend themselves to investigating gendered structures of inequality."⁶⁰⁹ Concerning critical IPE, Waylen observed that,

[even] most critical IPE does not mention gender except in passing or engage with any of the gendered political economy debates and research, despite the feminists' attempts to engage in dialogue. At the moment only an occasional token article or a few references to

⁶⁰⁸ Peterson, Spike V., "Whose Crisis? Early and Post-modern Masculinism," in Stephen Gill and James Mittelman, eds., Innovation and Transformation in International Studies (Cambridge: Cambridge University Press, 1997), 156.

⁶⁰⁹ Tickner, J. Ann, Gendering World Politics: Issues and Approaches in the Post-Cold War Era (New York: Columbia University Press, 2001), 66; also cited in Waylen, Georgina, "You Still Don't Understand: Why Troubled Engagements Continue between Feminists and (Critical) IPE," Review of International Studies, vol. 32 (2006), 145.

women are included within critical IPE. Most analyses therefore remain gender-blind and over-simplistic, oblivious to the complexity of the situations they analyse.⁶¹⁰

Finally, despite the work of countless scholars, and despite the critiques of Peterson and Waylen, the Routledge Handbook of International Political Economy, published in 2009, contains no contribution by a feminist IPE scholar. Moreover, its index contains no entry for ‘women,’ no entry for ‘gender,’ only six incidental mentions of ‘feminism,’ but 15 entries for various aspects of world systems theory, and 97 entries concerning war.⁶¹¹

Nevertheless, it is important not to overstate the significance of the traditional gender-blindness of IR and IPE scholarship for the present study. It would be very difficult to establish a causal relationship between this gender-blindness and policy at the WTO and other international organizations. It also would be very difficult to establish that this gender-blindness affected policy at the WTO differently than it affected policy at other International Organizations. For these reasons, it is unnecessary and would be unfruitful to establish in greater detail the traditional gender-blindness of IR and IPE, particularly since it is already well established.

⁶¹⁰ Waylen, Georgina, “You Still Don’t Understand: Why Troubled Engagements Continue between Feminists and (Critical) IPE,” Review of International Studies, vol. 32 (2006), 145.

Amongst others, Waylen critiques the following works: Cox, Robert, “Critical Political Economy,” in Björn Hettne, ed., International Political Economy: Understanding Global Disorder (London: Zed Press, 1995); Cox, Robert, “The Way Ahead: Toward a New Ontology of World Order,” in Robert Wyn Jones, ed., Critical Theory and World Politics (Boulder, CO, USA: Westview, 2001); O’Brien, Robert, “The Agency of Labour in a Changing Global Order,” in Richard Stubbs and Geoffrey Underhill, eds., Political Economy and the Changing Global Order, 2nd ed. (Oxford: Oxford University Press, 2000); Gills, Barry, “Re-orienting the New (International Political Economy),” New Political Economy, vol. 6, no. 2 (2001); Woods, Ngaire, ed., The Political Economy of Globalization (Basingstoke: Macmillan, 2000); Germain, Randall, ed., Globalization and Its Critics: Perspectives from Political Economy (Basingstoke: Macmillan, 2000); Held, David, Anthony McGrew, David Goldblatt and Jonathan Perraton, Global Transformations: Politics, Economics and Culture (Cambridge: Polity Press, 1999); and Held, David, and Anthony McGrew, eds., Global Transformations: An Introduction to the Globalization Debate (Cambridge: Polity, 2000).

⁶¹¹ Blyth, Mark, ed., Routledge Handbook of International Political Economy (IPE): IPE as a Global Conversation (London: Routledge, 2009), 355-377.

Nevertheless, there are two important ways in which the traditional gender blindness of IR and IPE acts as an impediment to the representation of women and women's interests within the WTO. First, it removes a possible institutional impetus toward the representation of women and women's interests. As with economic thought, neither at the establishment of the GATT nor at the foundation of the WTO was it understood that there existed a need to address gender difference and the representation of women and women's interests simply because an agreement or organization was being established that would contribute significantly toward the governance of international relations and the international political economy. It is uncertain if this would still be the case in 2014. This, of course, does not distinguish the WTO from other organizations of global (economic) governance; it reflects another impediment to the representation of women and women's interests.

Many of those who participated in the Uruguay Round (1986-1994) negotiations received at least some education in IR or a form of IPE, which would have lacked a gender component and been without attention to the representation of women and women's interests. The importance of this is reflected in Strange's analysis in States and Markets:

What the student of international political economy is more immediately concerned with is the nature of power exercised through a knowledge structure, whether past, present or future; and whether the centres of such power are presently undergoing significant change; and with what the '*cui bono*' consequences are for states, classes, corporations and other groups. My conclusions (for what they are worth) are that, of the four basic

structures of the world economy, the knowledge structure is undergoing the most rapid change.⁶¹²

For Strange, this has three results. First, competition between states has begun to take the form of “competition for leadership in the knowledge structure.”⁶¹³ Second, changes in the knowledge structure have begun to produce disparities between states with respect to their acquisition of and access to knowledge. Third, changes in the knowledge structure have begun to cause new distributions of power, social status and influence both within and between states.⁶¹⁴ However, States and Markets was published in 1988, in the midst of the ferment in the knowledge structure Strange describes, and when the Uruguay Round (1986-1994) negotiations were taking place. Thus, between 1986 and 1994, it was those who were educated in IR and IPE *without* attention to the representation of women and women’s interests who were especially well placed to establish the terms of discussion in a knowledge structure unusually open to new terms but was closed to gender analysis. Moreover, they were especially well placed to institutionalize those terms in the structure of the WTO. This can only have had the effect, even if because of institutional path-dependency, of making the WTO, along with other institutions of global (economic) governance, less amenable to the representation of women and women’s interests.

⁶¹² Strange, Susan, States and Markets: An Introduction to International Political Economy (London: Pinter Publishers, 1988), 132.

⁶¹³ *Ibid*, 132.

⁶¹⁴ *Ibid*, 132-133.

Reason 2: The Traditional Gender Blindness of Economic Thought and the Need to Construct an Understanding of *Mulier Economicus*⁶¹⁵

As much as any other cause, it is the traditional silence of economic thought concerning matters of gender and women that gives rise to the need to discuss the possibility of representing women and women's interests within global economic governance. To establish that this is the tradition in economic thought, one need only note that nowhere in the writings of Smith, Ricardo, Malthus, Marx, Keynes, Hayek or Friedman is there evidence of meaningful attention to gender difference.⁶¹⁶

The assumptions that economics is gender neutral and that economic relationships are immune to gender considerations have come to be contested by the recognition that the economic activities of women were often located in informal sectors or in the private sphere, which were not accounted for by gender-neutral economics. Awareness that these assumptions of traditional economic thought are in fact deficiencies dates back to only a few decades ago.

⁶¹⁵ Thus far, all feedback suggests that the term and concept '*Mulier Economicus*' was coined and first publicly presented by me early on during research into this project: "*Mulier Economicus: Gender and the World Trade Organization*," presented to the *Annual Conference of the Canadian Political Science Association*, York University, Toronto, Canada (June 1-3 2006). I have been using the concept periodically.

That said, I have yet to fully develop what I mean by it, and it is one of the future tasks I intend to do. For the purposes of this particular project, it is sufficient to say that in general, '*Mulier Economicus*' is an all encompassing concept that concerns itself with women as economic beings.

⁶¹⁶ One of the major drawbacks of developing the concept of '*Mulier Economicus*' is that we simply lack studies by women on economic activity from a time period, including Adam Smith, David Ricardo, Robert Malthus and Karl Marx, that had profound influence on how we think about ourselves and others as economic beings. I suspect that this will begin to be rectified by the following forthcoming three volume set of 2024 pages of facsimile of original publication placed in context: Kuiper, Edith, Women's Economic Thought in the Eighteenth Century (Forthcoming, London: Routledge, 2014). The following is provided by the publisher: "In the history of economics, women writers were all but invisible until a few decades ago. Although much work has now been recuperated, the writings on economics of eighteenth-century women authors have yet to be brought fully to light. This new three-volume collection from Routledge remedies that omission and makes key archival source material readily available to scholars, researchers, and students. This comprehensive compilation of eighteenth-century works by women writers includes several texts translated into English for the first time, such as an important critique on Adam Smith's Theory of Moral Sentiments (1759) by Sophie de Grouchy Condorcet."

Amongst development theorists, Boserup's groundbreaking 1965 work, The Conditions of Agricultural Growth: The Economics of Agrarian Change under Population Pressure, identified women's participation in agricultural economic production. She highlighted the notion that 'neutral' economic policies very frequently failed to identify women's economic activities and that, as a consequence, women's contributions to wealth were generally unrecognized in economic and development policies.⁶¹⁷

In a similar fashion, Harding argued that the underlying dualisms of Western scientific thought, such as subject/object, public/private and formal/informal, normalize androcentric concepts of gender in the structure and policies of social science.⁶¹⁸ Economics, by this reasoning, privileges formal – public – economic activity and is often blind to the myriad roles that women play in informal economies and as producers in domestic spheres.

At the level of national accounting, specifically at the level of the United Nations System of Accounts (UNSNS), Waring's classic 1989 study, If Women Counted: A New Feminist Economics, showed that the lives and work of women were not valued, were not actually given a value, in Western economic theory and in the system of accounting that underlies all economic policy. For example, she notes that military hardware is everywhere valued in detail, but no value is calculated for the individual lives the hardware is meant to take, or for the reproduction and raising of those lives.⁶¹⁹

⁶¹⁷ Boserup, Ester, The Conditions of Agricultural Growth; the Economics of Agrarian Change under Population Pressure, (Chicago: Aldine, 1965), 124.

⁶¹⁸ Harding, Sandra G., The Science Question in Feminism, (Ithaca: Cornell University Press, 1986), p.136.

⁶¹⁹ Waring, Marilyn, If Women Counted: A New Feminist Economics (San Francisco: Harper & Row, 1988), 9. A second edition of this work was issued in 1999 as Waring, Marilyn, Counting for Nothing: What Men Value and What Women are Worth, 2nd ed., (1988; Toronto: University of Toronto Press, 1999).

Peterson argues that the basic dichotomy of public/private fundamentally privileges masculinity (public and market) over femininity (private familial relations), reinforces existing gender roles, and enables the exclusion of all references associated with the familial/domestic. This results in the denial of the economic significance of the primary site of reproductive labour, including “subject formation and cultural learning that naturalizes ideologies and encourages group identifications (religious, racial/ethnic, national),”⁶²⁰ while also denying the subjective identities involved in sustaining labour markets, notions of productivity, and job performance.⁶²¹ Her thesis is displayed in Table 1, which shows her association of concepts concerning political and economic activity. Peterson associates domestic, familial, femininity, household, informal (economic activity), private, reproductive, subject, and unpaid. Against these she opposes, respectively, the associated terms ‘outside of the home/international,’ androcentric, masculinity, market, formal/productive (economic activity), public, productive, object and paid.⁶²²

⁶²⁰ Peterson, V. Spike, “Rereading Public and Private: The Dichotomy That Is Not One,” SAIS Review, vol. 20, no. 2 (2000), 19.

⁶²¹ *Ibid*, 19.

⁶²² *Ibid*, 11-21; and Peterson, V. Spike, A Critical Rewriting of Global Political Economy: Integrating Reproductive, Productive and Virtual Economies, (London: Routledge, 2003), 2-13, 44-48, 78-89, 147-173.

Table 4: Associations of Concepts in Peterson's Work Concerning Political and Economic Activity

| | |
|--------------------|-------------------------------------|
| Domestic | Outside of the home / International |
| Familial | Androcentric |
| Femininity | Masculinity |
| Household | Market |
| Informal (economy) | Formal / productive (economy) |
| Private | Public |
| Reproductive | Productive |
| Subject | Object |
| Unpaid | Paid |

Source: Peterson, V. Spike, "Rereading Public and Private: The Dichotomy That Is Not One [in International Relations]," SAIS Review, vol. 20, no. 2 (2000).

As the above table reinforces, the lack of recognition of women's specific roles and conditions obscures relations between women and economic activity. This includes, on one hand, the impact upon women of 'neutral' economic policies, which assume the masculine subject as the norm, and, on the other, women's fundamental role in sustaining the economy through social re/production that is unquantified. In turn, this obscures the prominent role played in the failure of many economic and development policies by the unknown, unassessed and unharnessed nature of women's contributions. It is this line of argumentation from Boserup to Peterson that shows the gendered nature of economic activity to which traditional economic thought has been blind.

Towards a Feminist Economics of Trade?

Rooted in the traditional gender blindness of economics described above, to date, much of the literature has focused on identifying the relationship between gender and trade and justifying why the connection and its resulting impacts, primarily in terms of employment income and welfare effects, should be addressed by all levels of government, including domestic, regional, and global. Fundamental to the argument is that trade relations are gendered; they impact men and women differently depending upon their access to resources, education and market opportunities.⁶²³

Peebles provides five major reasons for linking gender and trade: first, issues of equity including the fair recognition of women's roles in economic activity; second, issues of economic efficiency such as ensuring that international trade policies have the desired positive impacts; third, recognition of trade policies' differential impacts on

⁶²³ Macdonald, Laura, "Trade with a Female Face: Women and the New International Trade Agenda," in Anne Taylor and Caroline Thomas, eds., Global Trade and Global Social Issues (London: Routledge, 1999), 53-71.

women and men; fourth, the link between poverty and gender and the importance within international trade policies of reducing poverty; and fifth, different gendered consumption patterns that impact upon trade.⁶²⁴ Moreover, as Peebles noted in 2005, women contribute more to the productive economy than is usually recognized and women's unpaid labour is generally overlooked. Women's labour in the domestic sphere, family farms, family businesses, and the informal economy constitutes over 28 percent of the United Nations Development Program's estimated total global market transactions.⁶²⁵

It is clear from the brief discussion above, and widely accepted in the literature, that mainstream economic thought has generally been blind to gender difference and much of women's economic activity. It is therefore unnecessary to elaborate further upon a subject so widely understood and upon implications so widely accepted. What is necessary, though, is to articulate briefly how the impact of the gender blindness of economic thought contributes to making the WTO the 'hardest case' for the representation of women and women's interests.

Essentially, the gender blindness of economic thought serves to differentiate the WTO from other international organizations not so directly related to economic activity. Further, it increases the difficulty of representing women and women's interests within an organization whose primary mission is to regulate matters economic, like the WTO, compared to organizations whose primary mission concerns matters not so immediately economic and perhaps less blind to gender difference.

⁶²⁴ Peebles, Dana, Status of Women Canada Policy Research, *Increasing Gender Inputs into Canadian International Trade Policy Positions at the WTO*, (Ottawa: Status of Women Canada, 2005), 9-10.

⁶²⁵ *Ibid*, 6.

This manifests itself in three important ways. First, neither at the establishment of the GATT in 1947, nor at the founding of the WTO in 1994, was there any impetus to address gender difference from within the process of founding an organization of economic governance. Unsurprisingly, neither the GATT 1947, nor the Marrakesh Agreement, nor TRIPS, nor the DSU, nor any of the subsequent Ministerial-level WTO agreements, addresses gender difference. Second, the gender blindness of economic thought was strengthened by its resistance to human rights discourses. Thus, initiatives to address gender difference or women's interests within the WTO by way of human rights discourses were unsuccessful (see Reason 9 on this as well). Third, the gender blindness of economic thought has contributed to the failure, thus far, to incorporate 'gender mainstreaming' within the WTO. It has also contributed to making 'gender mainstreaming' relatively less successful at the IMF than at the World Bank, and less successful at the World Bank than, for example, in development projects operating under the aegis of German or European agricultural policy.⁶²⁶ Thus, as True notes, "feminist development researchers agree that the adoption of mainstreaming norms in organizations like the World Bank is a successful outcome at the level of policy but has been less so at the level of practices."⁶²⁷

In order to ameliorate the persistent gender blindness of economic thought with relation to trade, a group of feminist economists have taken it upon themselves to try to change the field. In 2007 they published The Feminist Economics of Trade.⁶²⁸ They

⁶²⁶ True, Jacqui, "Feminist Problems with International Norms: Gender Mainstreaming in Global Governance," in J. Ann Tickner and Laura Sjoberg, eds., Feminism and International Relations: Conversations about the Past, Present and Future (London: Routledge, 2011), 81-83.

⁶²⁷ *Ibid*, 81.

⁶²⁸ Van Staveren, Irene, Diane Elson, Caren Grown and Nilüfer Çağatay, eds., The Feminist Economics of Trade (London: Routledge, 2007).

identify the shortcomings of orthodox economic thought and make recommendations for the field of study to better reflect gendered social realities. In particular, they identify the principle of comparative advantage as a root cause of the problem, and recommend instead that absolute advantage be used as a guiding principle of international trade. The following few paragraphs address some of the fundamental points of their work.

In orthodox economic thought trade liberalization is guided by the principle of comparative advantage whereby each country produces what is of least relative cost. This maximizes effective resource allocation and production efficiency, resulting in economic growth and increased economic output. This specialization in turn creates differentials in costs of production, such as labour and capital, which allow countries with the lowest relative production costs for a given product to accrue benefits through trade. Thus it is recognized that the benefits of trade are not necessarily distributed evenly among countries, but overall the theory argues there is a net benefit as countries export goods in which they have a comparative advantage and import those produced more cheaply from abroad. Trade, however, benefits all countries, even if one country consistently has a comparative cost advantage. This supports one of the key arguments of comparative advantage theory, which is that it is better for a country to produce only what is of the least relative cost, even if it can produce other goods at a lower absolute cost than other countries. Krugman supports the same conclusion from a slightly different perspective when he argues that the real exchange rate must decrease when a county has a trade deficit, which in turn will diminish the deficit.⁶²⁹

⁶²⁹ Krugman, Paul, "What Do Undergrads Need to Know about Trade?" American Economic Review, Papers and Proceedings of the Hundred and Fifth Annual Meeting, vol. 83, no. 2 (1993), 23-26.

Criticisms of mainstream accounts of comparative advantage point to its theoretical assumptions. First, it assumes full employment and balanced trade, so that the value of imports and exports are expected to balance over time and any resulting employment disruptions (losses) due to import competition are expected to be transitional. Only given this understanding will full employment be maintained over time. Second, mainstream theories of comparative advantage assume perfect competition.⁶³⁰ Neither of these assumptions reflects the body of empirical evidence suggesting that long-term trade imbalance and chronic under/unemployment are endemic and that asymmetric power struggles distort market shares in capitalist countries. The latter is indicated by examples of countries that secure their respective technological advantages by means of restrictive patent laws.⁶³¹

Moreover, mainstream theories of comparative advantage imply that trade liberalization should increase the return of unskilled labour in ‘developing’ countries since their comparative advantage resides in low labour costs. This could be viewed as particularly beneficial to women who are concentrated in unskilled jobs; thus, theoretically, trade liberalization could lead to the reduction of gender inequalities.⁶³² However, Elson, Grown, and Çağatay note that such predictions are tenuous and that empirical evidence indicates unskilled labour does not always increase, and that often there is a substantial increase in the demand for skilled labour, which is predominantly

⁶³⁰ Elson, Diane, Caren Grown, and Nilüfer Çağatay “Mainstream, Heterodox, and Feminist Trade Theory,” in Irene Van Staveren, Diane Elson, Caren Grown and Nilüfer Çağatay, eds., The Feminist Economics of Trade (London: Routledge, 2007), 33-52.

⁶³¹ *Ibid*, 33-52.

⁶³² *Ibid*, 33-52.

male.⁶³³ Fontana, for example, uses orthodox economic modeling to show that women facing job losses in import-substitution industries are not necessarily able to find employment opportunities elsewhere in the economy after the implementation of trade liberalization policies.⁶³⁴ This indicates that mainstream economic policies sometimes create outcomes that lead to unequal accrual of benefits in ways not accounted for in mainstream theory.

To mitigate varied outcomes, mainstream theory assumes that the redistribution of benefits at the state level is required if positive outcomes are to accrue more evenly. These distribution efforts, however, tend to be circumscribed by financial constraints caused by liberalization in part through decreased revenues for trade taxes.⁶³⁵ Even the development of New Trade Theory, as exemplified by Krugman,⁶³⁶ which incorporates assumptions such as imperfect competition, technology transfers and product cycles, remains fundamentally orthodox with its adherence to assumptions of comparative advantage.

Some mainstream theorists, however, have begun to address gender in a limited manner. Winters, for example, researched household prices of goods and services consumed or sold to analyze the impact of trade and trade policy on poverty in

⁶³³ *Ibid*, 33-52.

⁶³⁴ Fontana, Marzia, “Modeling the Effects of Trade on Women, at Work and at Home: Comparative Perspectives,” in Irene Van Staveren, Diane Elson, Caren Grown and Nilüfer Çağatay, eds., The Feminist Economics of Trade (London: Routledge, 2007), 117-140.

⁶³⁵ Elson, Diane, Caren Grown, and Nilüfer Çağatay, “Mainstream, Heterodox, and Feminist Trade Theory,” in Irene Van Staveren, Diane Elson, Caren Grown and Nilüfer Çağatay, eds., The Feminist Economics of Trade (London: Routledge, 2007), 33-52.

⁶³⁶ *Ibid*, 40. See also, Krugman, Paul, Rethinking International Trade (Cambridge, MA: MIT Press, 1990); and Krugman, Paul, “Myths and Realities of US Competitiveness,” Science, vol. 5 (1991), 254.

developing countries.⁶³⁷ In this study he considers some gender-based inequalities and raises questions for policy-makers to consider, including whether trade reform will affect household members differently. Elson, Grown, and Çağatay identify a number of deficiencies related to Winter's research and its failure to account for the varied impacts related to gender. For example, when intra-household gender inequality is recognized, the research fails to address the fact that women's work burden may increase either through increased paid labour, or through increases in unpaid labour associated with decreased public services. Likewise, in cases where the success of reforms depends on individuals to take risks, Winter's work fails to address the insufficiency of research on the different abilities of women and men to assume risk and risk-taking behaviour. Winter's work does not address sufficiently the gendered impact of other policies associated with trade liberalization, such as labour market liberalization and workplace rights in changing production relations. Finally, Winter does not generally account sufficiently for discriminatory practices that are embedded in competitive strategies of some labour-intensive manufacturers.⁶³⁸

This final point is addressed by Bhagwati, who argues that women gain relatively more economic benefits from trade liberalization than men due to the comparative costs associated with men's higher relative wages.⁶³⁹ This leads to a comparative advantage for

⁶³⁷ Elson, Diane, Caren Grown, and Nilüfer Çağatay, "Mainstream, Heterodox, and Feminist Trade Theory," in Irene Van Staveren, Diane Elson, Caren Grown and Nilüfer Çağatay, eds., *The Feminist Economics of Trade* (London: Routledge, 2007), 37-38. See also Winters, A.L., *Trade and Poverty, Is There a Connection?* World Trade Organization Special Studies No. 5: Trade, Income Disparity and Poverty (Geneva: World Trade Organization, 2000), 43-69.

⁶³⁸ Elson, Diane, Caren Grown, and Nilüfer Çağatay "Mainstream, Heterodox, and Feminist Trade Theory," in Irene Van Staveren, Diane Elson, Caren Grown and Nilüfer Çağatay, eds., *The Feminist Economics of Trade* (London: Routledge, 2007), 33-52

⁶³⁹ *Ibid*, 38-39. See also Bhagwati, Jagdish, *In Defense of Globalization* (New York and Oxford: Oxford University Press, 2004) 74-76.

women's labour leading to more relative gains in wages compared to men. Further, as economies are opened to trade, non-discriminating firms will put market pressure on discriminating firms to reduce the wage advantages of men.⁶⁴⁰ Bhagwati's work remains orthodox in its use of comparative advantage even as it seeks to incorporate some of the insights of unorthodox and heterodox economic thought.

In contrast to mainstream comparative advantage theories, Elson, Grown, and Çağatay draw on heterodox trade theory, in this case focusing on Marxist and post-Keynesian approaches to comparative advantage, wherein they specifically reject the assumptions of full employment and perfect competition.⁶⁴¹ In both of these traditions it is assumed that the economy is essentially a monetary process and that employment and trade imbalances are intrinsic to capitalism. Heterodox theories also emphasize that there is no mechanism for balanced trade.⁶⁴² Shaikh, for example, argues for an understanding of competitive (absolute) advantage in which trade is driven by absolute costs, with firms having the lowest per-unit cost being able to outcompete those with higher costs.⁶⁴³ Since there is no mechanism to equalize power between firms of different countries, and given the importance of technological difference, this means that trade between unequal

⁶⁴⁰ Bhagwati, Jagdish, In Defense of Globalization (New York and Oxford: Oxford University Press, 2004) 74-76.

⁶⁴¹ Elson, Diane, Caren Grown, and Nilüfer Çağatay "Mainstream, Heterodox, and Feminist Trade Theory," in Irene Van Staveren, Diane Elson, Caren Grown and Nilüfer Çağatay, eds., The Feminist Economics of Trade (London: Routledge, 2007), 33-52.

⁶⁴² Elson, Diane, Caren Grown, and Irene van Staveren "Introduction: Why a Feminist Economics of Trade?" in Irene Van Staveren, Diane Elson, Caren Grown and Nilüfer Çağatay, eds., The Feminist Economics of Trade (London: Routledge, 2007), 1-10.

⁶⁴³ Shaikh, Anwar, "Globalization and the Myth of Free Trade," in Anwar Shaikh, ed., Globalization and the Myths of Free Trade (London: Routledge, 2007), 50-68.

partners will result in persistent trade imbalances that will need to be covered by foreign capital flows.⁶⁴⁴

In relation to trade, countries achieve competitiveness - as contrasted to comparative advantage - in a variety of ways, including increased public spending, its resulting higher wages, innovation and growth in productivity. That is, the focus is no longer related to the production costs, and its associated comparative advantages: “costs are not determined by ‘given’ endowments of factors of production and knowledge, but by active, socially and historically shaped processes of technology and knowledge creation.”⁶⁴⁵ This opens up a variety of heterodox feminist accounts, such as the production of unpaid labour related to the private sphere, the social and historical shaping of gender differences related to the acquisition of resources and knowledge production, and the feminization of labour in certain economic sectors.⁶⁴⁶

It is in these openings that Elson, Grown, and Çağatay argue for a specifically feminist economic theory that takes absolute, rather than comparative, advantage as its starting point and highlights how the process of competitive advantage is a gendered process. This is partially an attempt to move from simply identifying the specific impacts of trade liberalization on women towards a more nuanced economic theory that examines the locations in which women become disadvantaged or benefit through trade

⁶⁴⁴ *Ibid*; also Elson, Diane, Caren Grown, and Nilüfer Çağatay “Mainstream, Heterodox, and Feminist Trade Theory,” in Irene Van Staveren, Diane Elson, Caren Grown and Nilüfer Çağatay, eds., The Feminist Economics of Trade (London: Routledge, 2007), 33-52.

⁶⁴⁵ Elson, Diane, Caren Grown, and Nilüfer Çağatay “Mainstream, Heterodox, and Feminist Trade Theory,” in Irene Van Staveren, Diane Elson, Caren Grown and Nilüfer Çağatay, eds., The Feminist Economics of Trade (London: Routledge, 2007), 43-44.

⁶⁴⁶ *Ibid*, 33-52; also Rai, Shirin M., “Gendering Global Governance,” International Feminist Journal of Politics, vol. 6, no. 4 (2004), 587.

liberalization.⁶⁴⁷ It can help identify the myriad social relations that shape production and distribution systems, such as understanding the processes that can lead small business owners and own-account producers to be disadvantaged by liberalized trade, while some women hired as cheap labour can nevertheless find themselves with higher incomes and more relative prosperity. Berik addresses many of the complexities regarding trade and wages in her analysis of technological restructuring in Taiwan, concluding that it did not improve the relative economic status of women. Although in some areas the improvement of women's wages was marginally better than that of men, women wage earners experienced disproportionate employment losses, and women were negatively affected in both absolute and relative terms in relation to salaried jobs in the manufacturing sector.⁶⁴⁸

In feminist approaches there is an attempt to understand the systemic imbalances extant in the economy and to identify the social relations that "take place and are transformed as firms seek competitive advantage in the world market."⁶⁴⁹ At its core, feminist economics is believed necessary to prioritize economic issues that are otherwise neglected and to make visible the interactions that otherwise are left invisible: it raises questions and addresses multiple inequalities simultaneously.⁶⁵⁰

⁶⁴⁷ Elson, Diane, Caren Grown, and Nilüfer Çağatay "Mainstream, Heterodox, and Feminist Trade Theory," in Irene Van Staveren, Diane Elson, Caren Grown and Nilüfer Çağatay, eds., The Feminist Economics of Trade (London: Routledge, 2007), 33-52.

⁶⁴⁸ Berik, Günseli "Mature Export-Led Growth and Gender Wage Inequality in Taiwan," in Irene Van Staveren, Diane Elson, Caren Grown and Nilüfer Çağatay, eds., The Feminist Economics of Trade (London: Routledge, 2007), 141-163.

⁶⁴⁹ Elson, Diane, Caren Grown, and Nilüfer Çağatay , "Mainstream, Heterodox, and Feminist Trade Theory," in Irene Van Staveren, Diane Elson, Caren Grown and Nilüfer Çağatay, eds., The Feminist Economics of Trade (London: Routledge, 2007), 47.

⁶⁵⁰ Elson, Diane, Caren Grown, and Irene van Staveren "Introduction: Why a Feminist Economics of Trade?" in Irene Van Staveren, Diane Elson, Caren Grown and Nilüfer Çağatay, eds., The Feminist Economics of Trade (London: Routledge, 2007), 1-10.

In sum, it is the failure to incorporate ideas of heterodox and feminist economics that has perpetuated the gender blindness of mainstream economic thought, and contributed significantly to the gender blindness of institutions of global economic governance. Primary amongst these are the Bretton Woods Institutions and the WTO. This has distinguished institutions of global economic governance from other IOs, which have not had to overcome a fundamental theoretical and philosophical indifference in order to incorporate analysis based on sex/gender difference. This indifference has also helped to foster significant antagonism in the women's movement and in feminist literatures toward institutions of global economic governance, and toward institutions and policies perceived to be neoliberal.

Reason 3: It Was Not Possible for Women to 'Get In On The Ground

Floor'⁶⁵¹

Reason three is that for women there was no possibility of 'getting in on the ground floor' at the Founding of the WTO in 1994 because the WTO was, so to speak, built on the 'mezzanine', the GATT having occupied the 'ground floor'. The 'ground floor' was created at the establishment of the GATT in 1947, and the GATT 1947 was adopted in full as part of the founding agreements of the WTO in 1994. This means that the WTO was not a 'new' organization in the sense of having been created from whole cloth. Rather, its creation incorporated the GATT regime, which had become *de facto* a path-dependent institution in its own right.

⁶⁵¹ The phrase 'getting in on the ground floor' is borrowed from Vickers. See Vickers, Jill, "Is Nationalism Always 'Bad for Women'? In Search of 'Women-friendly' Democracy: Gender/Nation Relations in Modern Nation-States," 2005/2006 Davidson Dunton Research Lecture, Carleton University (27 March 2006), 15.

As Vickers describes, following North⁶⁵², ‘getting in on the ground floor’ is important because institutions are path-dependent; they are self-reinforcing feedback loops in which each loop makes the next loop more predictable and makes changing the nature of the loop more difficult. More specifically, the cost of establishing and restructuring institutions is high and most institutions are complex; this creates disincentives against restructuring and changes of direction, and reinforces over time any policy direction initially taken by the institution. This means that opportunities for inclusion within institutions usually arise only at the time of establishment and at a time of restructuring. For example, as Underhill writes, “those market constituencies which successfully exert influence on the process of institutionalization, particularly at its early stages, are likely to find their interests better represented than others.”⁶⁵³ Walby adds that restructuring occurs almost exclusively at critical junctures, building upon the ideas of ‘rounds of struggle,’ as developed by Edwards, and ‘rounds of accumulation,’ as developed by Massey.⁶⁵⁴

Vickers argues the seriousness of the implications of path-dependency and the importance of ‘getting in on the ground floor’ in the context of states for women’s inclusion:

⁶⁵² North, Douglass C., Institutions, Institutional Change and Economic Performance (1990; Cambridge: Cambridge University Press, 2011).

⁶⁵³ Underhill, Geoffrey, “Markets, Institutions, and Transaction Costs: the Endogeneity of Governance,” World Economy & Finance Research Programme Working Paper Series, Universiteit van Amsterdam (June 2007), 34.

⁶⁵⁴ Walby, Sylvia, Gender Transformations (London: Routledge, 1997), 76-78, 99. See also Edwards, Richard, Contested Terrain: the Transformation of the Workplace in the Twentieth Century (New York: Basic Books, 1979); and Massey, Doreen, Spatial Divisions of Labour: Social Structures and the Geography of Production (London: Macmillan, 1984).

Because gender regimes are part of institutional design, ‘getting in on the ground floor’ of political institutions is especially important for women. Given the long association between the state form and patriarchy, it requires positive acts to legitimize women’s inclusion to change that association. But if women are explicitly included by the rules of institutional design, their presence is unlikely to be reversed as institutions proceed down their established path. If they were excluded from the original design, however, path dependence will make it difficult to include them later because ideas legitimizing their exclusion will form part of the feedback loop maintaining a stable equilibrium.⁶⁵⁵

Vickers also shows that the benefits of ‘getting in on the ground floor’ are replicated to a significant extent at times of restructuring, such as “federalization, unification, constitutional activism, competing nationalisms, devolution and discursive shifts.”⁶⁵⁶

The difficulty posed by the WTO is that, as stated above, the ‘ground floor’ was the establishment of the GATT in 1947, because it was incorporated in full as part of the founding agreements of the WTO in 1994. The GATT 1947 was entirely blind to gender and made no provision for representation of women and women’s interests as such. Thus, when the WTO was established in 1994, it incorporated all the negative effects resulting from this path-dependency which made the representation of women and women’s interests especially difficult. Hence, the foundation of the WTO in 1994 was not an opportunity to ‘get in on the ground floor.’ Nor was it an opportunity created by restructuring, since the restructuring was partial and conditioned by the GATT, by

⁶⁵⁵ Vickers, Jill, “Is Nationalism Always ‘Bad for Women’? In Search of ‘Women-friendly’ Democracy: Gender/Nation Relations in Modern Nation-States,” 2005/2006 Davidson Dunton Research Lecture, Carleton University (27 March 2006), 15.

⁶⁵⁶ Vickers, Jill, “Gendering Federalism: Institutions of Decentralization and Power-Sharing,” in Mona Lena Krook and Fiona Mackay, eds., Gender, Politics and Institutions: Towards a Feminist Institutionalism (New York: Palgrave Macmillan, 2011), 144.

subsequent rounds of multilateral trade negotiations, and by almost five decades of global trade governance under the GATT. All of these excluded gender analysis and the representation of women and women's interests.

This failure to address the representation of women and women's interests when the WTO was founded in 1994, a failure embedded in the practices and ideas of a half-century old path-dependent institution, kept the GATT/WTO regime on a path that did not address the representation of women and women's interests. With no opportunity to 'get in on the ground floor' in 1947 or 1994, there was no likelihood that it would be considered necessary to address the lack of representation of women and women's interests during subsequent rounds of negotiations or potential restructurings.

Indeed there has been little success in raising the subject within the WTO since 1994. For example, the 2004 Sutherland Report⁶⁵⁷ simply does not mention gender or women amongst any of its discussions concerning the recommended reforms necessary to ensure the WTO's continued viability. The 2007 Report of the First Warwick Commission, in its turn, makes only fleeting mention of women and gender, and does not address either substantively in any way.⁶⁵⁸ This is despite widespread understanding in

⁶⁵⁷ World Trade Organization, *The Future of the WTO: Addressing Institutional Challenges in the New Millennium*, Report by the Consultative Board to the Director-General Supachai Penitcpakdi (i.e. 'The Sutherland Report') (Geneva, 2004).

The consultative board had no woman member.

⁶⁵⁸ The Warwick Commission, *The Multilateral Trade Regime: Which Way Forward?*, The Report of the First Warwick Commission, The University of Warwick, (December 2007).

The Report examined "how the multilateral trade regime [could] better serve the global community" (*Ibid*, 1), and asked whether "the sustained and uneven transformation of the global economy, with the associated rise of new powers, heightened aspirations, and considerable pockets of societal discontent, require a reconsideration of the principles and practices that currently guide the multilateral trade regime, the core of which is the World Trade Organization" (*Ibid*, 1).

The Report identified 5 basic challenges in this regard: "growing opposition to further multilateral trade liberalisation in industrialised countries" (*Ibid*, 2); the rise of a multipolar, rather than bipolar, global trade regime; the need to "forge a broad-based agreement among the membership about the WTO's objectives and functions" (*Ibid*, 2); the need to ensure that the WTO Agreements benefit the weakest WTO members;

2007 of the gendered effects of trade, even within the WTO Secretariat (as shown by the interviews conducted and quoted elsewhere in the present study).⁶⁵⁹ Silence such as this supports Hawkesworth's contention that feminist knowledge is erased by evidence blindness, which in turn has the effect of insulating vested interests that are themselves gendered and racialized.⁶⁶⁰ In this way, the traditional silence of the GATT/WTO regime concerning women and gender is preserved and extended. Young, who was a member of the Warwick Commission, expresses this dynamic when she states that "structural power derives its power from the control over ideas and knowledge, and from the ability to deny access to others who hold different views."⁶⁶¹ In this context, the placement of the WTO

and the proliferation of PTAs. (*Ibid*, 2) To meet these challenges, the Report makes 10 recommendations: consideration of the adoption of a 'critical mass' approach to decision-making, as a modification to the requirement for consensus; the establishment of a Dispute Settlement Ombudsman; increasing transparency and accessibility of dispute settlement; consideration of cash compensation to aggrieved parties in disputes where compliance or trade-related compensation is not forthcoming; the design of clear and concise provisions for Special and Differential Treatment of developing country WTO members; the clear delineation of responsibility for all parties concerning trade-related development aid; clarification and improvement of disciplines and procedures related to WTO provisions concerning Regional Trade Agreements (RTAs); that major industrialized countries refrain from establishing new PTAs; that the Transparency Mechanism (TM) for reviewing RTAs be made permanent and strengthened; and that a general process of reflection be established in the WTO, led by the Chair of the General Council or the Director General, to address the challenges and opportunities of the multilateral trading system.

The First Warwick Commission was chaired by Pierre Pettigrew, who held a number of cabinet positions in Canada, including Minister for International Trade, under Jean Chretien and then Paul Martin between 1996 and 2005. The Commission included 19 members, of whom 14 were men and 5 women.

⁶⁵⁹ Confidential interviews conducted at the WTO Secretariat (Geneva, Switzerland) and EU DG-Trade (Brussels, Belgium), September-October 2007.

⁶⁶⁰ Hawkesworth, Mary, "Policy Discourse as Sanctioned Ignorance: Theorizing the Erasure of Feminist Knowledge," *Critical Policy Studies*, vol. 3, nos. 3-4 (October-December, 2009), 283-285.

⁶⁶¹ Young, Brigitte, "Structural Power and the Gender Biases of Technocratic Network Governance in Finance," in Gülay Caglar, Elisabeth Prügl and Susanne Zwingel, *Feminist Strategies in International Governance* (London: Routledge, 2013), 270.

Remarkably, Young was a member of the Warwick Commission, along with four other women. Young's bio is included on page 74 of the Report of the First Warwick Commission. It reads as follows: "Brigitte Young has been Professor of International/Comparative Political Economy at the Institute of Political Science, University of Muenster, Germany since 1999. Between 2000 and 2002, she was Expert Advisor to the high-level Enquete-Commission of the German Parliament on 'Globalization of the World Economy – Challenges and Responses'. She is a senior scientist in the Network of Excellence, funded by the EU-6. Framework Program, 'Global Governance, Regionalisation, and Regulation: The Role of the EU' (GARNET), and is the project leader of the 'Virtual Network' and 'Gender in Political Economy'. Her research areas include globalisation and global governance; transformation of the world economy, trade

outside the UN system becomes even more important, since the WTO falls outside the mandate of UN Women to promote and advance gender mainstreaming throughout the UN System.⁶⁶²

Reason 4: The Antagonism of Gender and Trade Activism toward Neoliberal Economics and Institutions Perceived as Neoliberal

Beginning in the 1980s and extending to the present, a significant proportion of gender scholars, perhaps even a majority, have taken an antagonistic and even hostile approach to neoliberal economics, and to institutions and networks perceived as neoliberal. This antagonism has extended to globalization, and to those international organizations involved in trade issues, such as the WTO. For the present study, the most important result of this antagonism has been the resistance of a significant proportion of gender scholars and many NGOs to engaging positively with the WTO in order to build an organization of global economic governance more amenable to the representation of women and women's interests.

As a political and economic ideology, neoliberalism came to prominence and was first implemented in reaction against the perceived over-regulation and theorized failure of Keynesian economics in the 1970s amidst the OPEC crisis, the abandonment of the

and financial markets; trade in services (GATS and EU); international political economy, feminist macroeconomics. She has written widely on these topics in English and German. Her book, The Political Economy of Trade in Services (GATS): Gender in EU and China (2007), has just been published (in German) – an English translation will appear in the spring of 2008.”

It is extraordinary that even with a member with such experience and expertise, the First Warwick Commission did not address gender substantively in any way.

⁶⁶² United Nations, Office of the Special Adviser on Gender Issues and Advancement of Women, “Supporting Gender Mainstreaming: The Work of the Office of the Special Adviser on Gender Issue and Advancement of Women,” (March 2001) <http://www.un.org/womenwatch/osagi/pdf/report.pdf> (accessed 17 September 2014). Also UN Women, “Gender Mainstreaming,” <http://www.un.org/womenwatch/osagi/gendermainstreaming.htm> (accessed 10 April 2014).

gold standard, stagflation and severe labour unrest. ‘Neoliberalism,’ as Harvey defines it using examples that range from Chile in 1973 through Iraq in 2003, advocates limited regulation of economic activity, the sanctity of private contracts, the primacy of property rights, the strong protection of individual freedoms of expression, choice and action, and the support for ‘private enterprise’ and the ‘entrepreneurial spirit.’⁶⁶³ While there is little in this definition with which an advocate of democracy could quarrel, it is how these principles are implemented that has made neoliberalism so controversial. In this context, neoliberalism meant the absence of regulation and active deregulation of areas of economic activity, including environmental and cultural protections. It meant also the privatization of publicly-owned assets, the dismantling of welfare policies, elimination of or restrictions upon hard-won rights to unionize and strike, and determination to govern by free-market ideology and by principles of business management.⁶⁶⁴

As Steinkopf Rice argues, a neoliberal economic philosophy requires that states, not organizations of global economic governance, should ensure equal access to market opportunities for men and women, since for such organizations to do so would distort markets.⁶⁶⁵ In practice, this leaves uncertain which elements of state-based governance would ensure non-discriminatory gender regimes and how this is to be done without market distortion. It also fails to address the gender inequalities caused by liberalization, globalization and organizations of global economic governance themselves. Thus, as Bakker has argued, the extension of market rationality to all institutions and all aspects of

⁶⁶³ Harvey, David, A Brief History of Neoliberalism (Oxford: Oxford University Press, 2005), 5-9.

⁶⁶⁴ *Ibid*, 3-4.

⁶⁶⁵ Steinkopf Rice, Julie, “Viewing Trade Liberalization through a Feminist Lens: A Content Analysis of the Counterhegemonic Discourse of Gender and Trade Advocacy Groups,” Sociological Spectrum, vol. 30 (2010), 292-293.

human activity “means that responsibility for systemic problems is being downloaded onto the individual, especially women,”⁶⁶⁶ and “gender as a basis for claims-making vis-a-vis states is being delegitimized, thus rendering much of women’s labour an ‘externality’ or an activity that is not problematized as important to public policy either in terms of costs or benefits.”⁶⁶⁷ Justifiably, then, the relationship between gender scholarship, feminist activism, and global economic governance has usually been antagonistic.

In particular, for many excellent reasons, feminist scholarship has assumed a critical and even an adversarial perspective toward global (economic) governance in relation to trade. These reasons were given what may have been their earliest comprehensive explanation by Cohen, representing the National Action Committee on the Status of Women (NAC), during the debate preceding the 1988 Free-Trade Agreement between the United States and Canada. Cohen, through NAC, argued that the prospective Free-Trade Agreement would impose the greatest costs upon those “most disadvantaged in the labour force,”⁶⁶⁸ who, given the structure of the Canadian economy in the mid 1980s, would predominantly have been women.

Cohen further argued that women were most likely to lose manufacturing jobs as a result of the proposed FTA, since women’s manufacturing jobs tended to be in the “most vulnerable secondary sectors.”⁶⁶⁹ Finally, Cohen argued that many of the women

⁶⁶⁶ Bakker, Isabella, “Social Reproduction and the Constitution of a Gendered Political Economy,” *New Political Economy*, vol. 12, no. 4 (2007), 553.

⁶⁶⁷ *Ibid*, 553.

⁶⁶⁸ Cohen, Marjorie, “The Macdonald Report and Its Implications for Women,” *Feminist Action* (December, 1985); cited in Bashevkin, Sylvia B., *True Patriot Love: The Politics of Canadian Nationalism* (Toronto: Oxford University Press, 1991), 140.

⁶⁶⁹ *Ibid*, 140.

who held these jobs were immigrants who would not likely be able to find new employment, and that the expansion of multinational companies as a result of the FTA would displace Canadian labour, causing particular harm to women in the services industry.⁶⁷⁰

NAC continued its opposition to the proposed FTA through the 1988 Canadian federal election. In 1985, NAC participated in the founding meetings of the anti-free-trade Council of Canadians, as well as the Coalition Against Free Trade. In 1986, it co-sponsored an ‘Against Free-Trade Revue’ and in 1987 its annual general meeting unanimously endorsed a resolution in opposition to the proposed FTA. Also in 1987, NAC became a founding member of the anti-free-trade Pro-Canada Network.⁶⁷¹ During 1987 and 1988 NAC argued more generally that the proposed FTA would weaken Canadian labour standards and social programmes by harmonizing them with less progressive American standards.⁶⁷² As Vickers, Rankin and Appelle state,

the anti-free-trade position developed by Cohen and the Employment and Economy Committee, therefore, came to be the position associated with NAC. It assumed that the liberation of women required state programs and that these were threatened by the proposed Canada-US Free Trade Agreement.⁶⁷³

⁶⁷⁰ *Ibid.* 141.

⁶⁷¹ Bashevkin, Sylvia B., True Patriot Love: The Politics of Canadian Nationalism (Toronto: Oxford University Press, 1991), 141.

⁶⁷² Cohen, Marjorie, “The Macdonald Report and Its Implications for Women,” Feminist Action (December, 1985); cited in Bashevkin, Sylvia B., True Patriot Love: The Politics of Canadian Nationalism (Toronto: Oxford University Press, 1991), 142.

⁶⁷³ Vickers, Jill, Pauline Rankin and Christine Appelle, Politics as if Women Mattered: A Political Analysis of the National Action Committee on the Status of Women (Toronto, University of Toronto Press, 1993), 273.

Finally, during the 1988 Canadian federal election, NAC campaigned openly and ardently against the FTA, effectively aligning themselves with those opposed to the Progressive Conservative Mulroney government by seeking “to mobilize women to oppose politicians who favour the deal.”⁶⁷⁴

NAC had, therefore, taken a strong and public position against the Canada-US FTA. Moreover, it had done so effectively, as testified the smaller support for FTA amongst women than men. It had also done so justifiably on the basis of sound economic and feminist analysis. As Vickers, Rankin and Appelle state, NAC had had the temerity to construct its position on the FTA “as if women mattered.”⁶⁷⁵ Nevertheless, NAC had taken a strong and highly politicized position against the FTA, and the position had been against that of the government from which NAC received most of its funding. As is well known, it was a losing position; the Progressive Conservatives won a majority government in the 1988 election, and the FTA was agreed and ratified by Canada and the United States. As a result of this, and of NAC’s opposition to the Meech Lake and Charlottetown Accords, NAC suffered severe costs; its direct funding from government was cut from \$680,000 to about \$300,000 between 1989 and 1992.⁶⁷⁶ This required NAC to cut staff, reduce its offices and presence, and rely to a far greater extent upon donor-based fundraising.⁶⁷⁷

⁶⁷⁴ Bashevkin, Sylvia B., True Patriot Love: The Politics of Canadian Nationalism (Toronto: Oxford University Press, 1991), 142.

⁶⁷⁵ Vickers, Jill, Pauline Rankin and Christine Appelle, Politics as if Women Mattered: A Political Analysis of the National Action Committee on the Status of Women (Toronto, University of Toronto Press, 1993), 274.

⁶⁷⁶ Bashevkin, Sylvia B., True Patriot Love: The Politics of Canadian Nationalism (Toronto: Oxford University Press, 1991), 143.

⁶⁷⁷ *Ibid*, 142-144. Also Vickers, Jill, Pauline Rankin and Christine Appelle, Politics as if Women Mattered: A Political Analysis of the National Action Committee on the Status of Women (Toronto, University of Toronto Press, 1993), 293-295.

Even so, the position NAC took, and the research it undertook, in the context of the 1988 Canada-US FTA, was of very great import to subsequent research concerning gender and trade, and to subsequent positions taken by Canadian women's organizations and feminists concerning trade liberalization. As Bashevkin states, NAC "identified linkages between free trade as a major government policy initiative and the lives of Canadian women, a connection that might have been ignored without NAC's intervention."⁶⁷⁸ That is to say, by articulating the critiques of the FTA described above, "NAC worked to articulate a feminist perspective on free trade."⁶⁷⁹ This perspective was critical and generally antagonistic.

NAC led feminist anti-NAFTA organizing and lobbying in the years leading to the Agreement's signing and ratification in 1993. Its arguments were essentially similar to the arguments advanced against the Canada-US FTA.⁶⁸⁰ However, the important innovation NAC brought to its anti-NAFTA campaign was to seek to connect with Mexican and American women's organizations to develop a common anti-NAFTA position.⁶⁸¹ In this effort, NAC had particular success establishing a relationship with the Mexican women's group *Mujer a Mujer*. As Elaine Burns, a founder of *Mujer a Mujer* stated, "with NAFTA it became obvious to us that we had to get to know each other

⁶⁷⁸ Bashevkin, Sylvia B., True Patriot Love: The Politics of Canadian Nationalism (Toronto: Oxford University Press, 1991), 147.

⁶⁷⁹ *Ibid*, 145.

⁶⁸⁰ Liebowitz, Debra Jacqueline, Gender and Identity in an Era of Globalization: Transnational Political Organizing in North America, PhD dissertation (New Brunswick, NJ, USA: Rutgers, 2000), 74-88. See also Gabriel, Christina and Laura Macdonald, "Managing Trade Engagements? Mapping the Contours of State Feminism and Women's Political Activism," Canadian Foreign Policy, vol. 12, no. 1 (Spring 2005), 76-77.

⁶⁸¹ Liebowitz, Debra Jacqueline, Gender and Identity in an Era of Globalization: Transnational Political Organizing in North America, PhD dissertation (New Brunswick, NJ, USA: Rutgers, 2000), 74-82.

across borders to try and influence the process of regional integration rather than just accepting the negative effects that it was going to have on women.”⁶⁸²

Burns makes clear that *Mujer a Mujer* came to share NAC’s antagonistic relationship to trade liberalization.⁶⁸³ Moreover, Liebowitz makes clear that NAC’s experience with FTA in Canada was a very important influence in persuading both NAC and *mujer a mujer* to oppose NAFTA.⁶⁸⁴ Thus, major women’s organizations in Canada and Mexico aligned themselves together against NAFTA. Although women’s organizations in the United States did not generally consider it an effective use of resources and political capital to oppose NAFTA in concert with their Canadian and Mexican counterparts, from 1990 to 1994 the Women’s Alternative Economic Network (WAEN) opposed NAFTA and the nascent WTO, and by 1997 Women’s EDGE had arisen in opposition to the WTO and policies of trade liberalization.⁶⁸⁵ Their opposition was framed in terms that recollected those used by NAC in opposition to the Canada-US FTA: services and social programmes would be eroded by trade liberalization; environmental and labour standards would decline as a result of ‘harmonization’; and women, who tended to be disproportionately represented in lower-skilled manufacturing sectors, would tend to suffer most from trade liberalization as lower-skilled manufacturing jobs were moved overseas.⁶⁸⁶

⁶⁸² Burns, Elaine, *Mujer a Mujer – Mexico*, Interview with Debra Jacqueline Liebowitz, Mexico City, January 10, 1996, cited in Liebowitz, Debra Jacqueline, Gender and Identity in an Era of Globalization: Transnational Political Organizing in North America, PhD dissertation (New Brunswick, NJ, USA: Rutgers, 2000), 81.

⁶⁸³ *Ibid*, 80-83.

⁶⁸⁴ Liebowitz, Debra Jacqueline, Gender and Identity in an Era of Globalization: Transnational Political Organizing in North America, PhD dissertation (New Brunswick, NJ, USA: Rutgers, 2000), 74-75.

⁶⁸⁵ *Ibid*, 97-99.

⁶⁸⁶ *Ibid*, 93-97, 229-230.

Liebowitz has also described how, along with advancing a gendered critique of NAFTA, “those concerned with gender and trade also worked to educate the broader women’s and feminist communities. Advocates concerned with the gender/NAFTA nexus wanted to spark the attention of women’s rights advocates toward international economic policy.”⁶⁸⁷ Gender and trade advocates participated in the RMALC coalition against NAFTA.⁶⁸⁸ Women’s NGOs were also involved in the successful broad-based civil society efforts against the Multilateral Agreement on Investment (MAI) in 1998,⁶⁸⁹ against ‘fast-track’ authorization in 1997 for the Clinton Administration to extend NAFTA membership,⁶⁹⁰ for a ‘social-labour declaration’ at the December 1998 MERCOSUR summit,⁶⁹¹ and against the proposed Free Trade Area of the Americans (FTAA).⁶⁹² In the context of opposition to the FTAA, 200 women’s rights activists from 35 countries met in April 1998 in Santiago, Chile, for the Alternative Women’s Forum at the People’s Summit of the Americas, in one of the earliest broadly international meetings of gender and trade activists.⁶⁹³ At the close of the decade, gender and trade advocates were involved in opposition to the 1999 WTO Ministerial in Seattle. The ‘People’s Assembly,’ held 29 November 1999, included a session titled “Women Say No

⁶⁸⁷ *Ibid*, 228.

⁶⁸⁸ *Ibid*, 228.

⁶⁸⁹ *Ibid*, 225-226.

⁶⁹⁰ *Ibid*, 225.

⁶⁹¹ *Ibid*, 225.

⁶⁹² *Ibid*, 229.

⁶⁹³ *Ibid*, 229.

to WTO!”⁶⁹⁴ The above instances are representative of the consistency with which gender and trade advocacy was largely antagonistic toward trade liberalization during the 1990s.

What seems to have begun in Canada with gender-based opposition to the Canada-US FTA, and what continued with opposition to NAFTA and expanded internationally through the 1990s, can reasonably be called the building of a counterpublic. Fraser, writing in 1990, developed more fully the logic of counterpublics, arguing that women’s historic and present marginalization from governance and from a ‘universal public sphere’ required formation of ‘subaltern counterpublics.’ By this Fraser meant an historical shift from repressive, power-based domination to hegemonic, ideology-based domination. For her, this shift called for the advent of counterpublics, which she defined as “parallel discursive arenas where members of subordinated social groups invent and circulate counter discourses to formulate oppositional interpretations of their identities, interests and needs.”⁶⁹⁵ Counterpublics are therefore by definition counterhegemonic. Benhabib called in 1992 specifically for the creation of counterpublics to counter the gendered structure of the public sphere, in which that which is not public, and cannot be publicly discussed, predominantly affects women.⁶⁹⁶ It was as part of a nascent counterpublic, generally antagonistic to the liberalization of trade and the hegemony of neoliberalism, that Canadian gender and trade activism first sought to introduce gender to trade policy discussion at APEC and the WTO during the late 1990s and early 2000s.

⁶⁹⁴ Costa, LeeRay, for Asia Pacific Forum for Women Law and Development (APWLD), Chiangmai, “Women Say No to WTO,” Conference Reports, Gender, Technology and Development, vol. 4, no. 2 (2000), 315.

⁶⁹⁵ Fraser, Nancy, “Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy,” Social Text, nos. 25-26 (1990), 67.

⁶⁹⁶ Benhabib, Seyla, Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics (Cambridge: Polity Press, 1992), 89-90.

Mayer and Prügl's three approaches to the study of gender and international organizations bear out the antagonistic nature of this counterhegemonic discourse. The first seeks niches established for women and women's interests in international organizations.⁶⁹⁷ The second investigates the manner in which the international women's movement seeks to affect "the purposive, goal-oriented activities and strategies of influential actors" in international organizations.⁶⁹⁸ The third investigates "contestations of rules and discursive practises in different issue areas."⁶⁹⁹ Mayer and Prügl emphasize that these rules include both the codified rules of international organizations and the informal rules of economics and other knowledge areas. They further emphasize that these rules are gendered in ways that "construct and reproduce notions of masculinity and femininity and associated power differentials."⁷⁰⁰ They argue that the creation or opening of political spaces for women is often considered to signal feminist politics.⁷⁰¹ Moreover, "a focus on norms and rules is more likely to highlight structural impediments to women's advancement and to view international organizations as implicated in the reproduction of gendered hierarchies."⁷⁰² Thus all three of Mayer and Prügl's categories of investigation, and the second and third in particular, morph into an antagonistic relationship between gender scholars or feminist activists and global economic governance. As a member of the WTO Secretariat noted: "[During the late nineties] ... the

⁶⁹⁷ Meyer, Mary K. and Elisabeth Prügl, "Gender Politics in Global Governance," in Mary K. Meyer and Elisabeth Prügl, eds., Gender Politics in Global Governance (Lanham, Maryland: Rowman and Littlefield Publishers, Inc., 1999), 4.

⁶⁹⁸ *Ibid*, 5.

⁶⁹⁹ *Ibid*, 5.

⁷⁰⁰ *Ibid*, 5.

⁷⁰¹ *Ibid*, 5.

⁷⁰² *Ibid*, 6.

debate ... was ... very sharp. It was basically anything done in trade or WTO is bad for gender.”⁷⁰³

Steinkopf Rice, in ‘Viewing Trade Liberalization Through a Feminist Lens,’ argues even that “all women experience economic disadvantage under trade liberalization,”⁷⁰⁴ though of course such a universalistic assertion badly overstates the case. She also defines the advocacy of gender and trade NGOs, such as the International Gender and Trade Network, as “global counter-hegemonic efforts,” implying again that gender scholarship and gender advocacy are necessarily alienated from the WTO and other institutions of global economic governance.⁷⁰⁵

Central to the analyses and struggles of the global gender and trade movement that Steinkopf Rice studies are the impacts that neoliberal trade policies have on women. Steinkopf Rice identifies the intersectionality of the network of advocacy groups and a range of other coalition approaches in which feminist gender analyses are linked with multiple global power relations. She attempts to understand the contradictory nature of trade liberalization and traverse “boundaries such as the global/local, economic/cultural and solidarity/difference.”⁷⁰⁶ She makes clear that resisting neoliberalism and trade liberalization is a substantial subject of feminist organizing, even as it is clearly understood that the specific localities of struggle will be different.⁷⁰⁷ Although Steinkopf Rice again arrogates greater universality to her conclusions than is warranted – there are

⁷⁰³ Senior member of WTO Secretariat. Confidential interview transcribed verbatim from digital recording, October 2007.

⁷⁰⁴ Rice, Julie Steinkopf, “Viewing Trade Liberalization Through a Feminist Lens: A Content Analysis of the Counterhegemonic Discourse of Gender and Trade Advocacy Groups,” Sociological Spectrum, vol. 30 (2010), 308.

⁷⁰⁵ *Ibid*, 289.

⁷⁰⁶ *Ibid*, 291.

⁷⁰⁷ *Ibid*, 307.

feminist scholars, advocacy groups and NGOs that are not antagonistic toward neoliberalism or global trade liberalization – her fundamental argument is correct. Indeed, what is most important in her work, for the purposes of the present study, is her marshalling of a significant body of empirical evidence to show convincingly the existence and growth of a counterhegemonic force amongst gender and trade advocacy groups.

Based on her analysis of a wide range of advocacy groups globally, Steinkopf Rice's research identifies key themes that gender and trade organizations advocate: gender equality in market structures, alternatives to free-market capitalism, bottom-up trade policies, networks, accountability through gender-specific measures, greater global/local cohesion in policies, and the democratization of decision-making processes.⁷⁰⁸ Each of these themes is critical of neoliberalism or assertive of the need to engender trade and economic analysis. As such, Steinkopf Rice finds that a significant proportion of the gender and trade ‘movement’ of advocacy groups is constructed as a counterhegemonic force to the hegemonic power relations which include institutions such as the WTO.

More than this, Steinkopf Rice shows that the nascent counterhegemonic counterpublic of the late 1980s and 1990s had developed to become a global counterpublic by the mid 2000s. Her research records 21 distinct ‘gender and trade

⁷⁰⁸ *Ibid*, (see appendix of the present study).

The notion of democratization promoted by these organizations, extends to being able to increase gender parity, bolster inclusive civil society and NGOs in their endeavours to incorporate a variety of views of problems impacting women, and actively to engage with local and global policy-makers. This engagement is primarily advocated through increased transparency and information sharing by policy-makers to ensure that gender equity commitments are incorporated into decisions (Rice, 301-302).

advocacy groups,⁷⁰⁹ worldwide, of which 13 are in the global north, but seven are in the global south, and one is entirely internet-based.⁷¹⁰ More specifically, two of these organizations have offices in both the global south and north: AWID, the Association for Women's Rights in Development has offices in Canada, Mexico and South Africa; and TWN, the Third World Network, has offices in Malaysia and Switzerland. One, Women in Development Europe (now WIDE+, rather than WIDE), is an umbrella group for WIDE organizations in several European countries. Another, the World Prout Assembly, is based in India and is effectively the umbrella organization for institutes and groups of Progressive Utilisation Theory worldwide. Finally, WSSE, or the Workgroup/Website of Solidarity Socio-Economy, is entirely an internet-based alliance, though largely financed by the Swiss-based Charles Leopold Mayer Foundation.

Together, the 21 'gender and trade advocacy groups' listed by Steinkopf Rice have offices, or have affiliates with offices, in the following 17 countries: Canada, Mexico, South Africa, Belgium, UK, Barbados, USA, Philippines, France, Brazil, Malaysia, Switzerland, Austria, Spain, Denmark, and India. Each of these organizations is critical of neoliberalism and advocates for the inclusion of gender in trade discussions. Therefore, even these 'advocacy groups,' which do not constitute a comprehensive and updated list, are sufficient to show the building of a critical, counterhegemonic global

⁷⁰⁹ 'Gender and trade advocacy group' is Steinkopf Rice's term, and the discussion is bound to use her terminology. However, had Steinkopf Rice not used 'advocacy group,' the discussion would certainly have used 'activist,' and the groups should be understood as activist for the purposes of the discussion.

⁷¹⁰ Steinkopf Rice, Julie, "Viewing Trade Liberalization through a Feminist Lens: A Content Analysis of the Counterhegemonic Discourse of Gender and Trade Advocacy Groups," Sociological Spectrum, vol. 30 (2010), 314.

These figures are from a review of the contact details on the websites of the groups Steinkopf Rice lists. Her own figures give only four groups in the global south and 17 in the global north; however, her figures are contradicted in this regard by the information on the websites she has given (or, in a few cases, updated versions of the websites).

counterpublic essentially advocating against trade liberalization and for the inclusion of gender in discussions of trade policy and negotiations.

The challenge, however, and what constitutes another reason why the WTO is the ‘hardest case’ for the representation of women and women’s interests, is that this counterpublic, which had been developing for over 20 years, had taken the form Steinkopf Rice describes during the same years in which the WTO had first sought to broaden its engagement with civil society. Thus, effectively, two contrary institutions, path-dependent not only in their institutional composition but in their knowledge production, met in the late 1990s and 2000s. One was largely committed to the neoliberal programme by means of trade liberalization, the other deeply antagonistic toward neoliberalism. Regardless of the merits of the arguments of either side, the development and meeting of these two oppositional forces made progress toward the representation of women and women’s interests particularly difficult to achieve within the WTO. Paradoxically, because the WTO was the single multilateral governing institution for world trade, the same antagonism toward neoliberalism that had produced the insights of gender and trade activism also produced an environment for interaction with the WTO that militated against the adoption of the insights within global trade governance.

As one interviewee at the WTO Secretariat argued, by the mid-2000s, both policy entrepreneurs and particularly civil society organizations had been mistaken in three ways that proved fatal for practical implementation of insights about the gender and trade connection. One, they fell silent; two, they insisted on working within a women-versus-men paradigm; and three, they failed to link gender concerns to the mechanics of trade negotiations:

It's these kinds of debates, new issues, is that, a lot of people are sympathetic, but then you go to the next phase and people say, like, 'well, what are you actually talking about, or what do you want to research, or what do you want to bring to the agenda? That's where in the beginning the gender and trade debate went wrong, because then it fell silent. It was also driven, in the beginning, by, [...], by certain fairly well-known feminists, who really made it into this man-versus-women argument [...]. That's not the way to approach it as far as I can see, because you have to sort of bring it down to the technical level first, and come up with the facts and arguments, because that's how you can get the politicians and the negotiators interested, because they need to have some juice to sell, they need to have some bone to hold on to. 'Okay, we have article whatever in this agreement – there's a link with [...]’ Not just say, like, ‘No, no, you see, it's man dominating over women’ – because that's how the debate started. [...] You've pushed away 95 percent of your audience by doing that.⁷¹¹

Although the antagonism that contributed to this disjuncture was legitimate, essential and valuable, it came with costs. This was articulated in the warning that Nager *et al* offered in 2002: “constructing women as universally exploited by global capital and neoliberal policies obscures the ways in which gendered subjects, in particular historically and geographically specific places, engage in complex and contradictory experiences of, and in response to, global processes.”⁷¹² As much as neoliberal policies consist of fundamentally gendered constructs and create fundamentally gendered impacts, consequences nevertheless have attached to a certain lack of attention to the complex and

⁷¹¹ Senior member of WTO Secretariat. Confidential interview transcribed verbatim from digital recording, October 2007.

⁷¹² Nagar, Richa, Victoria Lawson, Linda McDowell and Susan Hanson, “Locating Globalization: Feminist (Re)readings of the Subjects and Spaces of Globalization,” *Economic Geography*, vol. 78, no. 3 (July 2002), 269.

contradictory moments and locations in which women could benefit from and engage in neoliberal policy. Furthermore, the path-dependence of knowledge-production suggests that an antagonistic relationship is likely to have dissuaded scholars from fully considering the discursive production of globalization, which is constructed primarily in a manner that has legitimized neoliberal policies.

This suggests that lost insights and lost opportunities for engagement with the WTO will be an ongoing cost of continued antagonism, however justified, of gender and trade activists toward neoliberalism and trade liberalization. It may well be that this is a cost gender and trade activists are able and willing to bear. Regardless, it remains the case that, by means of the construction of an effective counterpublic, the antagonism of gender and trade activists toward neoliberalism makes the WTO a harder case for the representation of women and women's interests than perhaps it would have been otherwise. Certainly, it makes the WTO as hard a case as any other institution of global economic governance, none of which face an activist counterpublic concerning gender that is both more developed and more antagonistic.

Reason 5: The WTO was Relatively Closed to Civil Society Involvement for Longer than Most Other Institutions of Regional and Global Economic Governance

The fifth reason is that the WTO took significantly longer to include civil society contributions in a meaningful way than did the World Bank, APEC, and other institutions that contribute to global economic governance. This is precisely the result that one would expect to follow from the path-dependency of the WTO as an institution, particularly

when combined with the path-dependency of knowledge production that informs the construction of the institution. It had the effect of secluding the WTO to a significant degree from what True and Mintrom have called ‘transnational networks of policy diffusion, which helped to promote gender-mainstreaming policies in many states and IOs.’

This refers to True and Mintrom’s argument that transnational networks amongst non-state actors, particularly INGOs, offer the “most compelling explanation” for the diffusion of ‘gender mainstreaming’ across 110 countries and numerous international organizations by 2001.⁷¹³ True and Mintrom maintain:

... networking among women’s organizations – and among women’s organizations, governments, and international organizations such as the UN – has provided the political momentum and societal pressure for meaningful institutional change at the domestic level. Thus, transnational networks at the frontier of world politics appear to have been decisive in the adoption of gender mainstreaming institutions by a myriad of states. They are the primary mechanism transmitting emerging global gender norms to states and translating them into very different national lexicons.⁷¹⁴

True and Mintrom’s evidence is persuasive. It shows by event-history analysis a strong correlation between openness to policy networks, comprised primarily of INGOs that support ‘gender mainstreaming’, and adoption of ‘gender mainstreaming’ policies by national governments. It further shows a strong correlation between openness to policy

⁷¹³ True, Jacqui and Michael Mintrom, “Transnational Networks and Policy Diffusion: The Case of Gender Mainstreaming,” *International Studies Quarterly* vol. 45 (2001), 37.

⁷¹⁴ *Ibid*, 38.

networks supportive of ‘gender mainstreaming’ and the adoption of high-level mechanisms to implement ‘gender mainstreaming,’ such as independent central government ministerial portfolios or agencies, as opposed to lower-level mechanisms, such as divisions within ministries.⁷¹⁵ True and Mintrom produce sufficient evidence to convince independent observers that openness to sympathetic transnational networks of policy diffusion is a significant contributing factor in the adoption of ‘gender mainstreaming’ policies. Even though their analysis focuses upon states, it nonetheless constitutes a strong argument that openness to such networks is an important contributory factor to the adoption of ‘gender mainstreaming’ policies by institutions in general, including by institutions of global economic governance.

Given the WTO’s position outside the gender mainstreaming mandate of UN Women, it is especially crucial for the representation of women and women’s interests that the WTO be open to existing transnational networks of policy diffusion, perhaps even more so than other IOs such as the IMF or World Bank.⁷¹⁶ That the WTO is more open in 2014 than it was in 1994 is well established. As Moment 6 of Chapter 4 demonstrated, the WTO has increased significantly its consultation and cooperation with NGOs during the two decades of its existence. To cite only the most evocative example, NGO attendance at WTO Ministerial increased from 108 in 1996 to 812 in 2005. However, despite clear and meaningful progress toward openness, many experts have argued that WTO engagement with NGOs and other CSOs has been more superficial than

⁷¹⁵ *Ibid.* 48.

⁷¹⁶ The WTO is a related organization, technically outside of the UN system, while the World Bank and IMF are specialized organizations within the UN system. The WTO is therefore outside, for example, the mandate of UN Women to promote gender mainstreaming throughout the UN system.

what has been achieved in other IOs, and has been slower or later than other IOs in its development. A significant body of evidence can be adduced to support this argument.

For example, with respect to the World Bank, Clark describes an evolution from the late 1980s through the late 1990s that greatly altered how the Bank interacts with civil society. During the early to mid 1980s, Bank officials tended to view NGOs as potential “low-cost subcontractors,”⁷¹⁷ while NGOs and other CSOs became increasingly and then highly critical of the social and environmental impact of the Bank’s policies.⁷¹⁸ By the mid-1990s, it had become clear that the Bank needed to reform its relationship with CSOs generally.

This led to the development of five initiatives. First, the Bank expanded its operational collaborations with CSOs, particularly “early civil society involvement in project design.”⁷¹⁹ Second, the Bank engaged CSOs in “country-level strategy and policy formation.”⁷²⁰ Third, the Bank implemented a new disclosure policy, making public a far greater volume of information.⁷²¹ Fourth, the Bank was “proactive in establishing international, structured dialogue on major topics and policy initiatives, including ongoing consultative forums concerning gender, the environment, forest protection, debt relief, and population activities.”⁷²² Fifth and finally, the Bank sought to convince

⁷¹⁷ Clark, John D., “The World Bank and Civil Society: An Evolving Experience,” in Jan Aart Scholte and Albrecht Schnabel, *Civil Society and Global Finance* (London: Routledge, 2002), 112.

⁷¹⁸ *Ibid*, 112-114.

⁷¹⁹ *Ibid*, 113.

⁷²⁰ *Ibid*, 113.

⁷²¹ *Ibid*, 113.

⁷²² *Ibid*, 113.

member governments to move toward greater engagement with CSOs and their inclusion in significant policy forums.⁷²³

For all that the WTO has made genuine and significant improvement in its relations with CSOs during its 20 years, it has not engaged with CSOs at a level that would approximate involvement in early project design. Neither has the WTO produced an ongoing consultative forum concerning gender, and the WTO Secretariat would not consider urging member governments to alter their respective approaches to civil society in any way. Finally, only with the advent of the EIF has the WTO begun to engage in country-level initiatives. The evolution of the World Bank's relationship with civil society is encapsulated by Clark in a single statement of a Bank official: "when I joined the World Bank you could be sacked for talking with an NGO; now you can be sacked if you don't."⁷²⁴ The WTO cannot be said to have undergone a transformation of similar depth even more than a decade later.

Bonzon too has shown how the WTO's engagement with civil society has lagged behind other initiatives that contribute to global economic governance. He notes in 2010 three of the mechanisms through which the WTO engages with civil society: the *Decision of the General Council on the Procedures for the Circulation and De-Restriction of WTO Documents* (1996; revised 2002); the *Guidelines for Arrangements in Relations with Non-Governmental Organizations* (1996); and the submission by civil society interests of *amicus curiae* briefs.⁷²⁵ These measures have been addressed in Chapter 4, Moment 6 of

⁷²³ *Ibid.*, 113.

⁷²⁴ *Ibid.*, 114.

⁷²⁵ Bonzon, Yves, "Options for Public Participation in the WTO: Experience from Regional Trade Agreements," in Debra P. Steger, ed., WTO: Redesigning the World Trade Organization for the Twenty-first Century (Waterloo: CIGI & Wilfrid Laurier University Press, 2010), 288.

the present study. Bonzon calls them rudimentary,⁷²⁶ though it must be noted that he does not mention the Public Forum, the EIF, Aid-for-Trade, the WTO website, or subsequent expansion of the public availability of WTO documents. His presentation of the WTO's engagement with civil society is therefore insufficient.

Nevertheless, Bonzon emphasizes two caveats that appear in the WTO's 1996 'Guidelines' and that restrict the nature of WTO involvement with civil society. The first states that "there is currently a broadly held view that it would not be possible for NGOs to be directly involved in the work of the WTO or its meetings."⁷²⁷ The second asserts that closer cooperation with NGOs can be achieved "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."⁷²⁸ This shows the absence of will within the member-governments for the WTO itself to engage closely or very actively with civil society. Such statements are reminiscent of the position of the World Bank toward civil society during the early 1980s, as recounted by Clark. Moreover, the path-dependence of the WTO as an institution suggests that this initial reluctance to involve civil society conditioned WTO interactions with civil society for a significant period, helped to make the WTO for a long period less open to civil society than the World Bank and other institutions of global economic governance, and probably curtailed the range of policy responses considered acceptable to the Seattle protests of 1999.

⁷²⁶ *Ibid.* 288.

⁷²⁷ World Trade Organization, *Guidelines for Arrangements on Relations with Non-Governmental Organizations* (23 July 1996), WT/L/162, para VI.
http://www.wto.org/english/forums_e/ngo_e/guide_e.htm (accessed 6 August 2014).

⁷²⁸ *Ibid.*

By comparison, as Van Den Bossche notes, UN ECOSOC provides for three levels of NGO engagement, granting NGOs ‘general consultative status,’ ‘special consultative status’ or ‘roster’ status.⁷²⁹ The first of these allows the most extensive engagement, giving select NGOs the following rights: to be informed of the provisional agenda of the ECOSOC; to propose to the ECOSOC NGO Committee⁷³⁰ that it request the UN Secretary General to place specific items on the ECOSOC provisional agenda; to make oral presentations to ECOSOC concerning items on the agenda as the result of an NGO proposal; to be an official observer at public meetings of ECOSOC and its subordinate bodies; to submit written statements for circulation to ECOSOC members; and, with the approval of the NGO Committee and the Council, to make oral statements to the ECOSOC Council.⁷³¹ These rights extend well beyond the level of access or engagement granted by the WTO to any NGO or CSO.

Other institutions of global economic governance also engage with civil society more extensively and in greater depth than the WTO. The World Intellectual Property Organization, for example, had granted permanent observer status to 233 national and international NGOs by 2010.⁷³² These NGOs enjoyed the right to attend, without invitation, all WIPO assemblies, all WIPO diplomatic conferences, all intersessional intergovernmental meetings, and all WIPO committees and working groups.⁷³³ NGOs

⁷²⁹ Van Den Bossche, Peter, “Non-Governmental Organizations and the WTO: Limits to Involvement?” in Debra P. Steger, ed., WTO: Redesigning the World Trade Organization for the Twenty-first Century (Waterloo: CIGI & Wilfrid Laurier University Press, 2010), 315-316.

⁷³⁰ *I.e.* ECOSOC Committee responsible for dealing with NGOs.

⁷³¹ Van Den Bossche, Peter, “Non-Governmental Organizations and the WTO: Limits to Involvement?” in Debra P. Steger, ed., WTO: Redesigning the World Trade Organization for the Twenty-first Century (Waterloo: CIGI & Wilfrid Laurier University Press, 2010), 315-316.

⁷³² *Ibid*, 317.

⁷³³ *Ibid*, 317.

were excluded only from meetings of the WIPO Coordination Committee, and from Executive Committee meetings for WIPO conventions at Paris and Berne.⁷³⁴ Finally, the Convention establishing WIPO explicitly gives it authorization to engage with NGOs.⁷³⁵ The *Marrakesh Agreement* establishing the WTO gives no such explicit authorization, and the access of the 232 ‘permanent observer’ NGOs to WIPO proceedings is nowhere matched by NGO or CSO access to the WTO.

Even the IMF, for all that it has been criticized for lack of openness, and for all that the WTO has improved its relations with civil society, may be said to have engaged civil society at least as extensively, as the WTO, if not more so. As Dawson and Bhatt relate, CSO criticism of the IMF increased significantly during the late 1980s and early 1990s, leading at its apogee to a campaign to withhold US Congressional funding from the IMF, and to the passage of legislation by the US Congress seeking IMF reform.⁷³⁶ The criticism led to a sustained effort from the IMF to improve its relations with civil society.

A number of initiatives contributed to this objective. IMF management began to seek closer relationships with prominent humanitarian and debt-relief organizations, such

⁷³⁴ *Ibid*, 317.

⁷³⁵ World Intellectual Property Organization, *Convention Establishing the World Intellectual Property Organization*, Stockholm (14 July 1967, amended 28 September 1979), http://www.wipo.int/treaties/en/text.jsp?file_id=283854 (accessed 6 August 2014). Cited in Van Den Bossche, Peter, “Non-Governmental Organizations and the WTO: Limits to Involvement?” in Debra P. Steger, ed., WTO: Redesigning the World Trade Organization for the Twenty-first Century (Waterloo: CIGI & Wilfrid Laurier University Press, 2010), 316.

⁷³⁶ Dawson, Thomas C., and Gita Bhatt, “The IMF and Civil Society: Striking a Balance,” in Jan Aart Scholte and Albrecht Schnabel, eds., Civil Society and Global Finance (London: Routledge, 2002), 146–147.

What was remarkable about the episode of anti-IMF feeling in the US Congress during the early 1990s was its derivation in large part from civil society protest. It is well known that the Congressional-District-based structure of the US House of Representatives tends to give particular prominence to issues of local interest and that this has often produced antipathy in the House toward foreign aid, including IMF contributions. The most famous example may have occurred in 1983, when renewal of US IMF funding nearly suffered a Congressional defeat.

as Jubilee 2000 and Caritas International, while also inviting presentations from Oxfam UK and US.⁷³⁷ The IMF also held conferences in 1993 and 1995 with representatives of many areas of civil society concerning the relationship between macroeconomic policy and the environment.⁷³⁸ Further conferences were held in 1995 concerning income distribution and in 1998 concerning economic equality.⁷³⁹

In addition, the IMF engaged much more closely with both national-level trades unions and institutions representing international labour, including the ICFTU, the WCL and the ILO.⁷⁴⁰ Moreover, the External Relations Department of the IMF, in undertaking missions to member countries, began much more regularly to meet for seminars with local NGOs, which often extended to multiple days. These included Cameroon and Nigeria in 1999, Zambia, the United States, France, the United Kingdom, Switzerland and the Nordic countries in 2000, regional seminars for Central and Eastern European members in 2000, and regional seminars for East Asian and African members in 2001.⁷⁴¹

Four significant policy innovations, implemented during the late 1990s and early 2000s, also brought the IMF into closer and more productive engagement with civil society. First, Poverty Reduction Strategy Papers (PRSPs) were required from members applying for loans or debt relief; the process of developing PRSPs was mandated to include significant consultation with civil society.⁷⁴² Second, the Enhanced Structural Adjustment Facility (ESAF) became the Poverty Reduction and Growth Facility (PRGF),

⁷³⁷ *Ibid*, 149.

⁷³⁸ *Ibid*, 149.

⁷³⁹ *Ibid*, 149.

⁷⁴⁰ *Ibid*, 150.

⁷⁴¹ *Ibid*, 150.

⁷⁴² *Ibid*, 152, 154.

with the express purpose of providing financial support for the pursuit of Poverty Reduction Strategies.⁷⁴³ Third, in conjunction with the World Bank, the IMF commenced the Heavily Indebted Poor Countries (HIPC) initiative in 1996, with the objective of providing debt relief that would “reduce to sustainable levels the external debt burdens of the most heavily indebted poor countries.”⁷⁴⁴ The initiative was enhanced in 1999 by greater access to funds and a broader mandate to strengthen “the links between debt relief, poverty reduction, and social policies.”⁷⁴⁵ It was further enhanced in 2005 by the Multilateral Debt Relief Initiative (MDRI), which provided for “100 percent relief on eligible debts” held by the IMF, the World Bank, and the African Development Fund, for countries that had completed the HIPC process.⁷⁴⁶ As Dawson and Bhatt write, “from the start, the HIPC process has benefited from consultations with civil society in all parts of the world.”⁷⁴⁷ They also state that “there is no doubt that pressure from civil society”⁷⁴⁸ led to the enhancement of HIPC in 1999. They further state that “there is no doubt that dialogue with CSOs has affected Fund policies,”⁷⁴⁹ and that the IMF and the World Bank made more than 150 separate engagements with CSOs between 1995 and 2002.⁷⁵⁰ Fourth and finally, the IMF Executive Board determined in September 2000 to establish an

⁷⁴³ *Ibid.*, 151-152.

⁷⁴⁴ International Monetary Fund, *Factsheet – Debt Relief Under the Heavily Indebted Poor Countries (HIPC) Initiative* (24 March 2014), <https://www.imf.org/external/np/exr/facts/hipc.htm> (accessed 6 August 2014).

⁷⁴⁵ *Ibid.*

⁷⁴⁶ *Ibid.*

⁷⁴⁷ Dawson, Thomas C., and Gita Bhatt, “The IMF and Civil Society: Striking a Balance,” in Jan Aart Scholte and Albrecht Schnabel, eds., *Civil Society and Global Finance* (London: Routledge, 2002), 152.

⁷⁴⁸ *Ibid.*, 153.

⁷⁴⁹ *Ibid.*, 159.

⁷⁵⁰ *Ibid.*, 152.

Independent Evaluation Office (IEO), which would be active from April of 2001.⁷⁵¹ The IEO's establishment was in part the result of NGO criticism and suggestions.⁷⁵² It is independent of IMF management, its work programme is made public, and most of its findings are made public.⁷⁵³ The IEO continues to produce frequent evaluations of IMF policy and its effects in 2014.⁷⁵⁴

Writing in 2010, Van den Bossche describes four regular occasions for IMF consultations with CSOs: first, the annual and spring meetings of the IMF and World Bank; second, during IMF missions, including Article IV, UFR, External Relations and FSAP missions; third, IMF invitations to contribute to policy review, including at seminars and by commenting upon papers posted on its website; and fourth, during other *ad hoc* meetings, conferences and workshops.⁷⁵⁵ In addition, IMF and CSO meetings ranged from between 45 and 75 per year from 2001 through 2005, comprising interaction with 330 different CSOs annually.⁷⁵⁶ This last number rose to 380 during the 2008 IMF-World Bank annual meeting, held at the height of the global financial crisis.⁷⁵⁷

It is of course the case that many of the IMF initiatives described above can be criticized for not producing more substantive or fundamental change. Equally, the IMF is

⁷⁵¹ *Ibid*, 155.

⁷⁵² *Ibid*, 155.

⁷⁵³ Independent Evaluation Office, International Monetary Fund, *Standard Rules for Review and Publication of Evaluation Reports and other IEO Documents* (19 August 2002), <http://www.ieo-imf.org/ieo/files/origins/081902.pdf> (accessed 6 August 2014). Also Dawson, Thomas C., and Gita Bhatt, "The IMF and Civil Society: Striking a Balance," in Jan Aart Scholte and Albrecht Schnabel, eds., *Civil Society and Global Finance* (London: Routledge, 2002), 155.

⁷⁵⁴ See, e.g., Independent Evaluation Office, International Monetary Fund, *Completed Evaluations*, <http://www.ieo-imf.org/ieo/pages/Completed.aspx> (accessed 6 August 2014).

⁷⁵⁵ Van Den Bossche, Peter, "Non-Governmental Organizations and the WTO: Limits to Involvement?" in Debra P. Steger, ed., *WTO: Redesigning the World Trade Organization for the Twenty-first Century* (Waterloo: CIGI & Wilfrid Laurier University Press, 2010), 320.

⁷⁵⁶ *Ibid*, 320.

⁷⁵⁷ *Ibid*, 320.

clearly less extensively and deeply engaged with CSOs than is, for example, WIPO or the UN ECOSOC. Nevertheless, the point of the above account is that even the IMF engages with civil society more broadly and extensively than the WTO, and that it began to engage extensively with civil society during the same years in the mid 1990s that saw the advent of the WTO – well before the WTO began to expand significantly its own engagement.⁷⁵⁸

Lastly, APEC has also been more extensively engaged with civil society than has the WTO, and APEC too began its involvement earlier. The concept of ‘stakeholder participation’ has long been a central tenet of APEC governance. To that end, in 1995 APEC founded the APEC Business Advisory Council, with its own Secretariat based in Manila, and comprised of up to three senior private sector business people from each member economy. ABAC meets four times annually and serves to provide advice and information to APEC concerning “specific business sector priorities.”⁷⁵⁹ In 2013, ABAC contributed significantly to the “completion of a detailed roadmap towards regional food security,”⁷⁶⁰ drafted by the APEC Policy Partnership for Food Security (PPFS). This latter is a newly founded initiative that further develops APEC’s connection with civil society. In addition, ABAC was instrumental in the development of the APEC Business Travel Card programme, which has since 2011 significantly reduced business travellers’

⁷⁵⁸ It is evocative in this context to note that one member of the WTO Secretariat first learned from CSOs about gender and trade having to do anything with each other. (Member of WTO Secretariat. Confidential interview transcribed from manuscript notes, October 2007.)

⁷⁵⁹ Asia-Pacific Economic Cooperation, *APEC Business Advisory Council*, <http://www.apec.org/Groups/Other-Groups/APEC-Business-Advisory-Council.aspx> (accessed 6 August 2014).

⁷⁶⁰ Asia-Pacific Economic Cooperation, *APEC Business Advisory Council - Achievements*, <http://www.apec.org/Groups/Other-Groups/APEC-Business-Advisory-Council.aspx> (accessed 6 August 2014).

application-time costs, immigration-processing-time costs, and application fees.⁷⁶¹ ABAC was inaugurated the year after the WTO was founded, and therefore significantly enhanced APEC's involvement with civil society well before the WTO began to intensify its own engagement with civil society. Moreover, WTO involvement with civil society has not directly produced an outcome as tangible and immediately impactful as the APEC Business Travel Card programme.⁷⁶²

In addition to ABAC, the APEC Study Centers Consortium (ASCC) has since 1993 met annually to discuss and evaluate APEC progress and policy. The ASCC comprises 50 APEC Study Centers located in 20 APEC member economies.⁷⁶³ The ASCC was envisioned from its beginning as a means to improve civil society relations. Specifically, the ASCC would "foster regional cooperation among tertiary and research institutes to promote greater academic collaboration on key regional and economic challenges."⁷⁶⁴ Although the WTO's Public Forum, its Institute for Training and Technical Cooperation (ITTC), and its Advisory Centre on WTO Law are significant educational initiatives, only the first entails a comparable intensity of engagement with civil society, and none integrates itself within member countries in the way that ASCC integrates itself in APEC member economies through ASCs.

⁷⁶¹ Asia-Pacific Economic Cooperation, *APEC Business Travel Card*, <http://www.apec.org/about-us/about-apec/business-resources/apec-business-travel-card.aspx> (accessed 6 August 2014).

⁷⁶² This is not to argue that the WTO should have such a programme. It is merely to demonstrate the difference between the two 'trade' organizations with respect to their differing levels of involvement with civil society.

⁷⁶³ Asia-Pacific Economic Cooperation, *APEC Study Centers Consortium*, <http://www.apec.org/Groups/Other-Groups/APEC-Study-Centres-Consortium.aspx> (accessed 6 August 2014).

⁷⁶⁴ *Ibid.*

Finally, APEC has accorded official observer status to ASEAN, the Pacific Economic Cooperation Council, and the Pacific Islands Forum Secretariat.⁷⁶⁵ These observers are able to participate in APEC meetings and have full access to APEC documents and information.⁷⁶⁶ The extent of the access of APEC observers was achieved earlier than official observers at WTO Ministerial Conferences, and is not exceeded by the latter.

What one finds as a result of the WTO's much later engagement of civil society is exactly what one would expect to find if True and Mintrom's argument concerning trans-national networks of policy diffusion were to hold with IOs, and if the effects of True and Mintrom's argument were to be amplified by path-dependency. It appears that IOs that had engaged more extensively and earlier with civil society, had also done a great deal more than the WTO to advance the representation of women and women's interests.

For example, APEC was not only more engaged with civil society, and therefore to transnational networks of policy diffusion, it was committed to gender mainstreaming much earlier and more extensively than the WTO. This was made easier and amplified by the soft law nature of commitments made by APEC members, which allowed 'gender mainstreaming' to be introduced more gradually and in a less binding manner than would be possible in a straightforward manner within the WTO. In 1996 the Women Leaders Network (WLN) began to lobby APEC to include gender issues in its economic forum. This was promoted in 1997 by Canada, APEC chair at the time, which established a federal government interdepartmental sub-committee on Gender and APEC co-chaired by

⁷⁶⁵ Asia-Pacific Economic Cooperation, *APEC Observers*, <http://www.apec.org/About-Us/How-APEC-Operates/APEC-Observers.aspx> (accessed 6 August 2014).

⁷⁶⁶ *Ibid.*

Status of Women Canada (SWC) and the Canadian Department of Foreign Affairs and International Trade (DFAIT).⁷⁶⁷ One of the purposes of the sub-committee was to identify and target key entry points for gender within the structure of APEC.⁷⁶⁸ The Canadian International Development Agency (CIDA), under the Liberal government of Jean Chretien, also supported the WLN through a Gender and APEC project. The resulting document, *Framework for the Integration of Women in APEC*⁷⁶⁹, “defines the elements necessary for mainstreaming women into APEC processes and activities.”⁷⁷⁰ In the ‘gender mainstreaming’ initiatives, all proposals related to general or sectoral policies and programs were to be analyzed from a gender-equality perspective to ensure positive, equitable impacts. The goal of ‘gender mainstreaming’ in APEC is “the full participation of women in all aspects of life and [to address] access issues to increase women’s participation in sectors where they are weakly represented.”⁷⁷¹ APEC became the only multilateral economic organization to incorporate ‘gender mainstreaming’ throughout its policy initiatives, fundamentally because APEC’s soft-law structure made it possible to do so.

The language of the recommendations made in the Joint Ministerial Statement from the October 1998 APEC Ministerial Meeting on Women is illustrative of the soft-law nature of APEC gender mainstreaming commitments. For example, APEC is

⁷⁶⁷ Gabriel, Christina and Laura Macdonald, “Managing Trade Engagements? Mapping the Contours of State Feminism and Women’s Political Activism,” *Canadian Foreign Policy* vol. 12, no. 1 (2005), 82.

The APEC chair was held by Canada at the time (1997), and was shared by Lloyd Axworthy, then Minister of Foreign Affairs, and Sergio Marchi, then Minister of International Trade.

⁷⁶⁸ *Ibid*, 82.

⁷⁶⁹ Asia-Pacific Economic Cooperation, *Framework for Integration of Women in APEC*, 1999, http://www.apec.org/~media/Files/Groups/GFPN/02_aggi_framewk.pdf (accessed 6 August 2014).

⁷⁷⁰ Gibb, Heather, *Gender Mainstreaming: Good Practices from the Asia Pacific Region*, North-South Institute, Asia Pacific Economic Cooperation Secretariat (Ottawa: Renouf Publishing, 2001), 7.

⁷⁷¹ *Ibid*, 9.

‘strongly urged,’ and ‘recommendations are submitted to Leaders,’ toward ‘integrating women into the mainstream of APEC processes and activities.’ The recommendations were the following: to ‘recognize’ gender as a cross-cutting theme in APEC; to ‘place a high priority’ on the collection of sex-disaggregated data; to “implement gender impact analysis of policy, program and project proposals as an integral component of APEC decisions, processes and activities”;⁷⁷² to ‘place a high priority’ on the development of further studies concerning the impact of financial and economic crises upon women; to ‘accelerate the process’ of integrating women in the mainstream of gender processes and activities; to ‘promote and encourage’ the involvement of women in all APEC fora; and to ‘ensure’ that the recommendations be implemented and that APEC members be accountable for results.⁷⁷³

These were, at the time, important initiatives that had the potential to lead to significant advances for the representation of women and women’s interests within APEC. Nevertheless, what is also important in the context of the present study is their nature as soft law. That is to say, while they are undoubtedly framed in the language of commitments, they actually commit APEC Members to very little. Of all the recommendations, only the recommendation to implement gender impact analysis mandates an action, and the action in that case is the further study of the gendered impact of APEC ‘decisions, processes and activities.’ In all other cases, the requirement is actually a particular attitude toward gender analysis and the fuller representation of women within APEC, whether this entails ‘recognition,’ ‘high prioritization,’

⁷⁷² Asia-Pacific Economic Cooperation, *Joint Ministerial Statement*, APEC Ministerial Meeting on Women (15-16 October, 1998), para. 27 c.

⁷⁷³ *Ibid*, para. 27.

‘acceleration of progress,’ ‘promotion’ or ‘encouragement.’ Moreover, each of the recommendations is a relative measure that requires each APEC member only to adjust their respective policies in the required direction to their own satisfaction. Having said that, this reasoning should not be taken to disparage the soft-law measures instituted by APEC. Exactly where they do not require a policy result, even when it is within the power of APEC members to do so, is where they make it easier for all APEC members to agree to the recommendations. In this way, the representation of women and women’s interests is made legitimate as a topic of discussion and negotiation amongst all APEC members.

This constitutes a meaningful advance for women within APEC and it was achieved precisely because the soft law nature of the recommendations allowed each APEC member flexibility concerning the extent and scope of its commitment. In the case of ‘gender mainstreaming’ within APEC, the framework and guidelines that followed the ministerial recommendations were also soft law instruments. Again, they were therefore relatively flexible, and more easily adopted, but nevertheless constituted an advance toward the representation of women and women’s interests within APEC. In the case of the WTO, with its requirement for consensus and its tradition of agreements that correspond more closely to a hard law model, similar progress toward ‘gender mainstreaming’ would be more difficult to attain. This is so simply because any agreement is harder to attain at the WTO and carries a greater risk for the members/contracting parties.⁷⁷⁴

⁷⁷⁴ That said, despite the apparent success evinced by key documents such as *Gender Mainstreaming: Good Practices from the Asia Pacific Region* (Gibb, Heather, North-South Institute, Asia Pacific Economic Cooperation Secretariat (Ottawa: Renouf Publishing, 2001)), there is a notable tension between APEC’s desire to replicate policy tools across political jurisdictions and recognition of the particularities of different

Aside from APEC, other IOs that have engaged more closely and extensively than the WTO with civil society have also made greater progress toward the representation of women and women's interests. Although some complain that gender mainstreaming within the UN system lacks sufficient focus, nevertheless it has been introduced and developed to a significant extent, and the UN System comprised 1300 gender focal points by the beginning of the new Millennium.⁷⁷⁵ The WTO, by contrast, began partially (and somewhat incidentally) to introduce gender mainstreaming in the late 2000s in the context of Aid-for-Trade. Moreover, *UN Security Council Resolution 1325*, passed in October of 2000, "calls for the integration of gender across UN security policy and operations,"⁷⁷⁶ by improving the representation and participation of women, by introducing gender analysis and collecting sex-disaggregated data, and by conducting gendered research concerning peacekeeping and peacebuilding operations.⁷⁷⁷ Even if, as True notes, it took four years before the *Resolution* began to be implemented in practise,⁷⁷⁸ and even if its effectiveness remains questionable, nevertheless there remains in 2014 no parallel within the WTO to *Resolution 1325*.

Equally, the advances toward the representation of women and women's interests achieved at the 1999 UN Conference on Financing for Development (UN-FfD) have no

contexts. The document examines case studies that identify 'best-practices' of 'gender mainstreaming' in the APEC region, and one of the criteria of success was the project's replicability. However, the report notes that cultural constraints, including legal barriers to women's land ownership and expectations that women will "defer to husbands or other family members in key business decisions" (*Ibid*, 15), can negatively affect, for example, women's ability to grow their businesses. Such factors can seriously hinder the replicability of projects and policy tools.

⁷⁷⁵ True, Jacqui, "Gender Specialists and Global Governance: New Forms of Women's Movement Mobilisation" in Sandra Grey and Marian Sawer, *Women's Movements: Flourishing or in Abeyance?* (London: Routledge, 2008), 97.

⁷⁷⁶ *Ibid*, 97.

⁷⁷⁷ *Ibid*, 97-98.

⁷⁷⁸ *Ibid*, 98.

parallel at any WTO Ministerial Conference, Public Forum or other meeting.

Specifically, the process of ‘multi-stakeholder consultations’ allowed feminist activists to integrate ‘gender budgeting’ into the conference’s final document; this became known as the Monterrey Consensus.⁷⁷⁹ Gender budgeting is a tactic of gender mainstreaming that, amongst other things, ensures that all commitments to gender equality are adequately resourced. Further, as Caglar states, “gender budgeting itself is a mainstreaming strategy in the field of macroeconomic policy-making as it aims at systematically integrating gender into budgets – local and national budgets as well as those of international organizations – and fiscal policies.”⁷⁸⁰ Thus, again, where an institution has engaged more extensively than the WTO with civil society, there also one finds an institution that has been able to represent women and women’s interests at a level unmatched by the WTO. This is true even if ‘gender budgeting’ in UN-FfD has failed seriously to question prevailing norms and categories of economic governance.

In the same way, just as they have engaged more closely than the WTO with civil society, the World Bank and UNDP, in introducing gender budgeting, have exceeded the ability of the WTO, as demonstrated to date, to represent women and women’s interests. As Caglar notes, UNDP defines gender issues as social issues, and thereby “emphasises women’s reproductive role in the care economy.”⁷⁸¹ Even if UNDP gender budgeting therefore assumes what Caglar calls “a traditional gender division of labour,”⁷⁸² still it represents a fuller integration of gender within UNDP governance than anything achieved

⁷⁷⁹ Caglar, Gülay, “Feminist Strategies and Social Learning in International Economic Governance,” in Gülay Caglar, Elisabeth Prügl and Susanne Zwingel, Feminist Strategies in International Governance (London: Routledge, 2013), 252.

⁷⁸⁰ *Ibid*, 253.

⁷⁸¹ *Ibid*, 261.

⁷⁸² *Ibid*, 259, 260.

by the WTO. Conversely, gender budgeting at the World Bank is intended to improve the economic efficiency of women in the care economy, in order to improve the ability of women to contribute efficiently to work outside the care economy. *Integrating Gender Into the World Bank's Work*, which serves to define gender budgeting for the World Bank, makes this perspective clear when it states that “improvements in infrastructure ... directly affect the efficiency of home production, reducing time spent in household work and releasing time for other activities.”⁷⁸³ Again, though, even if this reduces to an “investment strategy in mothers for growth,”⁷⁸⁴ as Caglar defines it, gender budgeting at the World Bank still represents a fuller integration of gender into World Bank governance than anything achieved thus far within the WTO. If True and Mintrom’s argument holds concerning the importance of exposure to transnational networks of policy diffusion, then this is what one would expect from two IOs that began their engagement with civil society earlier than the WTO, and have developed their engagement more fully and extensively than the WTO.

Finally, as True relates, although not part of global economic governance, the ICC’s Rome Statute, essentially its constitutional document, “was influenced to a significant degree by the lobbying efforts of the Women’s Caucus for Gender Justice (WCGJ), an expansive transnational network of women’s organizations and

⁷⁸³ World Bank, *Integrating Gender into the World Bank's Work: A Strategy for Action* (Washington, DC, USA: World Bank, 2002), 186. Cited in Caglar, Gülay, “Feminist Strategies and Social Learning in International Economic Governance,” in Gülay Caglar, Elisabeth Prügl and Susanne Zwingel, Feminist Strategies in International Governance (London: Routledge, 2013), 261.

⁷⁸⁴ Caglar, Gülay, “Feminist Strategies and Social Learning in International Economic Governance,” in Gülay Caglar, Elisabeth Prügl and Susanne Zwingel, Feminist Strategies in International Governance (London: Routledge, 2013), 261.

individuals.”⁷⁸⁵ Indeed, the ICC’s openness to transnational networks made it possible for the WCGJ to play “a pivotal role in bringing to the attention of official delegates the importance of considering gender issues in their discussion.”⁷⁸⁶ In this way, gender was mainstreamed throughout the ICC’s Rome Statute, mandating the appointment of gender experts, requiring gender balance or gender sensitivity in the recruitment of judges and staff and in court procedures, and defining war crimes, crimes against humanity, and genocide to include sexual violence.⁷⁸⁷ Each of these initiatives extends further toward the representation of women and women’s interests than anything accomplished within the WTO, including Aid-for-Trade. Indeed, in contrast, the WTO imposes no official mandate for gender balance even with relation to the selection of its own Secretariat staff. As a member of the WTO Secretariat explained:

... This is a multicultural organization ... I’ve never seen it as a burden, whereas at the UN you sometimes do see that. We don’t have ... a politicized quota system ... it’s not like people are being nominated because country A is pushing that person. No, we recruit; up to the highest level, we recruit. Even the Director-General is elected – I mean, it’s [the

⁷⁸⁵ True, Jacqui, “Gender Specialists and Global Governance: New Forms of Women’s Movement Mobilisation,” in Sandra Grey and Marian Sawer, Women’s Movements: Flourishing or in Abeyance? (London: Routledge, 2008), 100.

⁷⁸⁶ Chappell, Louise, “Gender Mainstreaming in International Institutions: Developments at the UN *Ad Hoc* Tribunals and the International Criminal Court,” in Shirin M. Rai and Georgina Waylen, eds., Global Governance: Feminist Perspectives (New York: Palgrave, 2008), 163. Also cited in True, Jacqui, “Gender Specialists and Global Governance: New Forms of Women’s Movement Mobilisation,” in Sandra Grey and Marian Sawer, Women’s Movements: Flourishing or in Abeyance? (London: Routledge, 2008), 100.

⁷⁸⁷ True, Jacqui, “Gender Specialists and Global Governance: New Forms of Women’s Movement Mobilisation,” in Sandra Grey and Marian Sawer, Women’s Movements: Flourishing or in Abeyance? (London: Routledge, 2008), 100.

process of selecting the Director-General] candidates that compete and they get elected at the end ... but I've never seen that ... as a burden.⁷⁸⁸

However, the research conducted for this study, including interviews with the WTO Secretariat, show that most of the impetus toward addressing gender *within* the WTO came from member delegations and not from the transnational networks True and Mintrom write about, which were not very influential within the WTO, particularly with relation to gender and trade. A senior member of the WTO Secretariat made this point in a confidential interview conducted in October of 2007:

... there's nobody [in the WTO Secretariat] who has gender and trade in his portfolio... External Relations division used to follow the gender and trade debate as ... it was taking place, not necessarily being experts, but ... just trying to follow what's going on. Right now, the last two years, we don't have anybody specifically following it, [but] it was hot for a few years. [But] for a long, long time ... there was a lot of scepticism about ... why [we] are actually looking at it.⁷⁸⁹

The importance of member delegations and official representatives to the WTO, as opposed to INGO networks, was evinced by the brief increase in activity concerning gender and trade that followed the appointment of Adair Heuchan as Counsellor to the WTO for the Government of Canada in Geneva,⁷⁹⁰ and as the Canadian International

⁷⁸⁸ Senior member of WTO Secretariat. Confidential interview transcribed verbatim from digital recording, October 2007.

⁷⁸⁹ Senior member of WTO Secretariat. Confidential interview transcribed verbatim from digital recording, October 2007.

⁷⁹⁰ Organization of Women in International Trade (OWIT), *News Archives 2004* (November 2004), OWIT award citation, http://www.owit-toronto.ca/news/news_archive04.html (accessed 23 August 2014).

Development Agency's (CIDA's) senior trade and development officer based in Geneva.⁷⁹¹ Heuchan was amongst the earliest to advocate at the WTO for consideration of the gender dimension of trade policy. She was also instrumental to the creation and organization of a 2003 WTO-NGO symposium, "Women as Economic Actors in Sustainable Development," which was co-hosted by CIDA and sponsored by CIDA, SWC, and DFAIT. The Symposium was the first session concerning gender and trade to be held within a WTO forum.⁷⁹² Peebles called it a "critical first move in getting the WTO to take a serious looks at adopting an effective gender integration policy."⁷⁹³ In the same year a session sponsored by CIDA and DFAIT, "Gender Equality, Trade and Development," was held in conjunction with the Cancun WTO Ministerial Conference. Also in 2003, Industry Canada officials briefed the Canadian trade minister concerning gender issues before entering negotiation.⁷⁹⁴

This proved to be a relatively brief period of engagement, however, followed by a decline in the work of policy entrepreneurs within the WTO and civil society organizations. This was noted by an interviewee at the end of 2007:

They [gender and trade advocates] are less active now, but they were very active a few years ago. ... particular individuals who were very active on gender and trade ... and ... sort of got together, and ... dragged ... the Canadian delegation into it. ... Definitely the

⁷⁹¹ Foundation of Canadian Women Entrepreneurs, *Best Practices For Women Entrepreneurs in Canada* (Toronto: May 2004), 34.

⁷⁹² *Ibid*, 34.

⁷⁹³ Peebles, Dana for Status of Women Canada Policy Research, *Increasing Gender Inputs into Canadian International Trade Policy Positions at the WTO*, (Ottawa: Status of Women Canada, 2005), 66.

⁷⁹⁴ *Ibid*, 65.

Canadian delegation played an important role. They were a focal point for activities. They organized lunches at the Canadian delegation to talk about gender and trade.⁷⁹⁵

The same interviewee continued:

... there were quite a lot of women ambassadors here, who were very keen to get involved in a debate, partly from a, you know – look, I mean we have women at a certain level, at a higher level, influential [level] ... we have a female American ambassador [to the WTO], we have a Rwandan ambassador who is now ... Deputy Director General, who ... is a woman ... so, there was a mix of factors and at that point in time that actually brought [the gender and trade advocacy network] together.⁷⁹⁶

Later, the same interviewee continues as follows:

[I think] the interest mainly came ... simply because ... there happened to be a big concentration of women ambassadors at that particular time. And they had a burst of solid interest, so they made it to a higher level ... and they dealt with trade, so they were invited to come to speak ... and [people] were very sympathetic to the issue. The question then comes back to ... ‘But would they actually be able to make the next step? Make it into the next phase?’ But translating that into a negotiating position has not happened. I mean there’s no delegation in this organization, no country, no government, that has

⁷⁹⁵ Senior member of WTO Secretariat. Confidential interview transcribed verbatim from digital recording, October 2007.

⁷⁹⁶ Senior member of WTO Secretariat. Confidential interview transcribed verbatim from digital recording, October 2007.

made a specific point ... about gender. ... So it's still very much ... a personally driven exercise – sympathetic people to the idea, to the issue.⁷⁹⁷

While these statements do not suggest hostility to ‘gender mainstreaming’ or the importance of the connection between gender and trade, they also do not display enthusiasm or structural openness within the WTO, or suggest that INGOs had meaningful influence on WTO staff or delegations regarding ‘gender mainstreaming’ or the representation of women’s interests. There were only brief initiatives from within the Secretariat and from members to expose themselves to INGO initiatives concerning gender and trade. Also, the process was largely personally-driven, i.e. the comments describe a short, cautious process initiated internally, not driven by the external influence of transnational civil society networks of the sort described by True and Mintrom.

In addition to being outside the UN system, the WTO is notably less receptive to and less influenced by the transnational networks of policy diffusion identified by True and Mintrom. Thus, while the first three reasons show that the intellectual and theoretical underpinnings of the WTO are every bit as difficult as those in any other IO regarding the representation of women and women’s interests, the fourth and fifth reasons suggest that it is more in practise difficult to represent women and their interests within the WTO than within other organizations of global (economic) governance.

⁷⁹⁷ Senior member of WTO Secretariat. Confidential interview transcribed verbatim from digital recording, October 2007.

Reason 6: The Requirement for Consensus and the Single Undertaking

The sixth reason is that decisions at the WTO are made by consensus, save the exceptions noted in Chapter 4. This means that formal changes to accomplish the representation of women and women's interests can be blocked by any single WTO member for any reason. This includes, of course, a significant number of members that have shown themselves unsympathetic to initiatives to promote gender equality.

Conversely, the IMF decides policy by majority vote of its Board of Governors, with votes allocated amongst its 187 members according to the size of their respective quotas, which are themselves based roughly upon the relative size of each member's economy, and which determines the member's financial commitment to the IMF and its voting power. Specifically, quotas are currently allocated as a weighted average: GDP receives 50 percent, openness 30 percent, economic viability 15 percent, and international reserves 5 percent. A member's voting share is comprised of 'basic votes' plus one vote per SDR 100,000 of quota (SDR, or Special Drawing Rights, being the currency in which quotas are denominated).⁷⁹⁸ The votes of the IMF Executive Board are similarly allocated, with the exception that the Executive Board consists of only 24 members, several 'members' consisting of states with small economies grouped together. Again, a member's voting share is essentially determined by its quota. Thus, for example, the US receives a voting share of 16.75 percent, Japan receives 6.23 percent, and a group of countries comprising Albania, Greece, Italy, Malta, Portugal and San Marino receives 4.22 percent.⁷⁹⁹ While it cannot be said to be easy, it is nevertheless less difficult to

⁷⁹⁸ International Monetary Fund, *Factsheet – IMF Quotas* (25 March 2014), <http://www.imf.org/external/np/exr/facts/quotas.htm> (accessed 19 August 2014).

⁷⁹⁹ International Monetary Fund, *IMF Executive Directors and Voting Power* (19 August 2014), <http://www.imf.org/external/np/sec/memdir/eds.aspx> (accessed 19 August 2014).

implement the changes needed to represent women and women's interests within the IMF than in the WTO.

Amongst institutions of global economic governance, only in the WTO does the vote of a single member block a change in rules. Voting power at the World Bank and its component parts (IBRD, IDA, IFC, MIGA & ICSID) is distributed according to each member's contribution to the capital stock of the Bank, which is roughly in accordance with the size of a given member's economy. Thus, for example, the United States and Japan hold IBRD voting shares of 16.45 and 7.89 percent respectively, while a group of 26 sub-Saharan countries with relatively small economies holds a voting share of 2.0 percent.⁸⁰⁰ Neither the voting system of the IMF nor that of the World Bank is democratic, but both are structurally more open to the possibility of reforms that would advance the representation of women and women's interests than the consensus-based voting system of the WTO, which gives any individual member the power to block any initiative. The same is also true of the UN General Assembly and any other organization in which decisions are taken by a majority vote of all members. Indeed, it follows that any organization with a voting system that is not consensus-based will be more open to movement toward the representation of women and women's interests, and to the introduction of 'new issues' in general, than the WTO.

Yet the hindrance to the representation of women and women's interests posed by the requirement for consensus is still greater. This is illustrated by Elsig and Cottier in their 'incompatible triangle,' in which consensus combined with the member-driven nature of the WTO and the single undertaking to render still more difficult the decision-

⁸⁰⁰ World Bank, "International Bank of Reconstruction and Development: Voting Power of Executive Directors," <http://siteresources.worldbank.org/BODINT/Resources/278027-1215524804501/IBRDEDsVotingTable.pdf> (accessed 31 March 2013).

making process.⁸⁰¹ Mentioned previously as one of the reasons for the difficulties of the Doha Round, the single undertaking has a legal aspect and a political aspect. The former requires that all WTO Agreements be interpreted as a single treaty, but the latter is of greater concern here: it requires that nothing be agreed in WTO negotiations until everything is agreed by all members.

As such, the political aspect of the single undertaking is an extension of the consensus principle, but one that strengthens the hand of a member objecting to a given initiative. It does so by giving such a member leverage over a wide scope of negotiations, rather than a single issue-area or subset. In effect, this increases the power of the *de facto* veto that the consensus principle by implication grants to every member. By extension, this increases the power held by a hypothetical member or group of members opposed to advancing the representation of women and women's interests within the WTO.

Indeed, even if there were no active opposition, the single undertaking would still reduce the likelihood of advancing the representation of women and women's interests in WTO negotiations. This is because of what Elsig and Cottier call "a type of inherent negotiation logic among contracting parties that being a first mover in terms of making a meaningful concession is seen as a disadvantage as subsequent pressures on the other parties to follow cannot be maintained."⁸⁰² In short, then, the single undertaking, as a particular extension of the consensus principle and as conditioned by the member-driven nature of the WTO, both increases the relative power of the veto of any member opposing the representation of women and women's interests, and makes a negotiated advance less

⁸⁰¹ Elsig, Manfred, and Thomas Cottier, "Reforming the WTO: the Decision-making Triangle Revisited," in Thomas Cottier and Manfred Elsig, eds., Governing the World Trade Organization: Past, Present and Beyond Doha, World Trade Forum (Cambridge: Cambridge University Press, 2011), 291.

⁸⁰² *Ibid*, 300.

likely even absent active opposition. In the single undertaking, as in the prevalence and extent of the consensus principle generally, the WTO is without parallel amongst other institutions of global economic governance, showing again why it is the hardest case for the representation of women and women's interests.

Reason 7: The Locus of Power Rests with the Members – The Importance of Member Proposals

The Americans and the Canadians have come and I said, 'Ask your members to propose it.' [They] never proposed [anything concerning gender or women]... And the DG will not do it if members are not willing. How come, you know, Norway, EC, US, how come they don't? Just a proposal.⁸⁰³

It might well be thought that the location of power within the WTO Membership constitutes an opportunity. However, closer examination of the different ways a member could propose to represent women and women's interests suggests that the locus of WTO power within its membership remains on balance a significant hindrance.

WTO members are exclusively states⁸⁰⁴ and it is fundamental both to the structure and the identity of the WTO that it is primarily a forum for negotiation concerning the governance of international trade among members. In practise, this identity primarily

⁸⁰³ Senior member of WTO Secretariat. Confidential interview transcribed verbatim from digital recording, October 2007.

⁸⁰⁴ With a few exceptions: Chinese Taipei, the sovereignty of which is disputed; Hong Kong, which acceded as a British colony in 1995 and has been a Special Administrative Region within China since 1997; Macao, which acceded as a Portuguese colony in 1995 and has been a Special Administrative Region within China since 1999; and the European Union, which is comprised of several states.

takes the form of ongoing negotiations concerning how to administer current trade agreements, and periodic negotiations about how best to liberalize further global trade. This places the burden of initiating change upon the members themselves, and is a significant disincentive to discussions of matters not traditionally considered part of trade governance or trade liberalization. In turn, this creates a *de facto* requirement that issue-areas be discussed predominantly in terms of their quantified effects on trade or economic well-being, not their ethical merits or whether they accord with the norms and requirements of international administrative or human rights law.

Conversely, the WTO's primary function as a forum for negotiation can create a confused and disordered atmosphere for discussion in which any member delegation can place any issue area on the agenda, essentially without reference to the priorities of other members or to any external prioritization. This confusion is demonstrated in the following extract from an interview with a member of the WTO Secretariat:

Animal rights [has] ... been an issue for years ... brought to the table by Europeans, animal rights and animal welfare groups. We haven't done anything on ... [gender and trade] ... which is actually quite sick, to be very frank. I mean, we talk about gender and trade and you can't get it to the agenda, whereas animal rights have been brought to the agenda. Why? Because of ... pressure groups. And because of the negative images that people actually put on the table; so some politicians thought we should bring this to the table here. You know, you protect animal rights – you want to have the right, and you want to have the flexibility to protect, you know, the rights of animals, the welfare of

animals. They have an argument, they have an issue brought to the agenda by NGOs mainly, and it was brought to the table here by certain members.⁸⁰⁵

In short, the structure that makes it easy in theory to introduce a topic is the same structure that allows any member to block any initiative for any reason, and the same structure that resists orderly construction of agendas for negotiation and the introduction of new issue areas. It is striking, disconcerting and important that the representation of women and women's interests has not had greater success in being placed on the agenda for trade negotiations.

There are four basic ways a proposal by a member could advance the representation of women and women's interests. First, a member could propose that the issue be brought within the purview of the WTO in a manner that all members could accept. Given the difficulties of reaching agreement during the Doha Round of negotiations, given the difficulties of arriving at consensus in general, given that it would require a significant expansion of the WTO's scope, and given the differences in gender regimes across members, it is very unlikely that this approach is possible. As stressed in Chapter 3, in a consensus-based organization, a positive dissenting vote by only one member is required to block almost any initiative.

Second, a proposal could take the approach of treating the representation of women and women's interests as part of 'non-trade' initiatives already within the purview of the WTO, or already being considered. Development and environment can already be said to be part of the organization's purview. Former Director-General Lamy

⁸⁰⁵ Senior member of WTO Secretariat. Confidential interview transcribed verbatim from digital recording, October 2007.

stressed in his speeches the importance of human rights, and research was done in collaboration with the ILO as early as 2007.⁸⁰⁶ Although the latter study did not concern gender, the ILO is explicitly concerned with it, as far as it concerns redistribution. It is also possible in theory that sustainable development could provide an opening for the representation of women and women's interests, as occurred in the EU's Directorate-General of Trade (EU DG-Trade).⁸⁰⁷

Third, many scholars and advocates have argued that the WTO requires a 'social clause' in its trade agreements, which could be proposed and adopted by members, and would allow for potentially trade distorting policies to be justified as a social good.⁸⁰⁸ Such a clause was included in the 1947 Havana Charter and was discussed during the

⁸⁰⁶ World Trade Organization, International Labour Office, *Trade and Employment: Challenges for Policy Research* (Geneva: WTO & ILO, 2007).

⁸⁰⁷ Member of EU DG-Trade, confidential interview, October 2007.

As the interviewees explained in the following terms, taken from interview notes: The social dimensions of trade came back as sustainable development became part of EU DG-Trade. In the past, sustainable development was only part of DG-Development; now there is a horizontal sustainable development unit that informs the different operational units of EU DG-Trade. Gender equality is a strong component of the sustainable development agenda and it is through this vehicle that we make the connection between gender and trade and that we work within EU DG-Trade. The main tool in this regard is the construction of Sustainability Impact Assessments of trade agreements. That said, negotiations do not happen with reference to gender at all. When it comes to this issue, there are really two dominant positions: those who would want to include social aspects directly in the negotiations and those who would not. Negotiators are usually against including the social dimension, mostly because they are afraid that it would simply complicate things. So there is a bit of an internal struggle at the DG in this regard. But assessing trade agreements with regards to their gendered impacts concerning sustainable development is happening. The time may come when trade negotiations address gender equality openly. But what the EU wants to ensure at present is that trade liberalization improves gender equality as much as possible – gender equality is very important, even if it is not yet a very strong component of trade.

It might be worth noting that almost all of the discussion concerning gender and trade and gender equality within the context of the interviews conducted at EU DG-Trade was focused on developing countries, and omitted any mention of the relationship between gender and trade in developed countries. It would be worthwhile to find out whether the discussion shifted at all in this regard after the onset of the recent economic crisis that began after the interviews were conducted.

⁸⁰⁸ Burda, Julien, "Chinese Women After the Accession to the World Trade Organization: A Legal Perspective on Women's Labor Rights," in Günseli Berik, Xiao-Yuan Dong and Gale Summerfield, eds., *Gender, China and the World Trade Organization: Essays From Feminist Economics* (London: Routledge, 2010), 263-265.

negotiations that led to the founding of the WTO.⁸⁰⁹ Certainly, the representation of women and women's interests could constitute a social good, although the ultimate decision would rest with a DSB panel or the Appellate Body.⁸¹⁰ However, a social clause also could be used to justify trade restrictions based on labour practices that exploit women.

Regardless, a social clause is unlikely to be adopted to be within the WTO. The idea was rejected at the December 1996 WTO Ministerial because it was considered to threaten the comparative advantage of low-wage developing countries.⁸¹¹ This is important for the present study because it impedes the ability of WTO members to cite labour practices that are exploitative of women to justify trade-distorting policies.

Fourth, a Generalized System of Preferences (GSP) could be used to incentivize policies in developing countries⁸¹² that promote the representation of women and women's interests; it would do so by granting extra market access to developing countries that adopted the preferred policies.⁸¹³ This approach concerning labour standards has been implemented with success by European countries toward developing

⁸⁰⁹ It is worth noting that it is said that former WTO Director-General Lamy, at the time in charge of the rescue of Credit Lyonnais, and later EU Commissioner for Trade, was disappointed by the exclusion of a social dimension from the WTO. Multiple members of EU DG-Trade whom I interviewed mentioned this during the confidential interviews conducted in October 2007 and thus it appeared that this was a well-known 'fact'.

⁸¹⁰ Because ultimately, if it were subject to dispute, a panel or the Appellate Body would in each case decide upon the definition of 'social good' and its application to the case at hand.

⁸¹¹ Burda, Julien, "Chinese Women After the Accession to the World Trade Organization: A Legal Perspective on Women's Labor Rights," in Günseli Berik, Xiao-Yuan Dong and Gale Summerfield, eds., Gender, China and the World Trade Organization: Essays From Feminist Economics (London: Routledge, 2010), 264.

⁸¹² GSP is limited to developing countries pursuant to the WTO Agreements. It is specifically designed to allow developed countries to tie trade preferences to policy preferences vis-a-vis developing countries.

⁸¹³ Burda, Julien, "Chinese Women After the Accession to the World Trade Organization: A Legal Perspective on Women's Labor Rights," in Günseli Berik, Xiao-Yuan Dong and Gale Summerfield, eds., Gender, China and the World Trade Organization: Essays From Feminist Economics (London: Routledge, 2010), 268-271.

countries since 1971.⁸¹⁴ Moreover, the GSP was upheld by the WTO Appellate Body in 2004 as long as GSP standards were tied to ‘objective’ data and as long as the WTO member implementing GSP standards did not discriminate between countries meeting the standards.⁸¹⁵

While this approach might create minor advances, it is unlikely that the employment of GSP would be sufficient to achieve significant representation of women and women’s interests, because it is not properly a WTO initiative, but a member-initiated set of preferences, which are unique to each member, although their principle has been approved by the Appellate Body.⁸¹⁶ Further, GSP can be applied only to developing countries, which reduces considerably its potential to accomplish the representation of women and women’s interests throughout the WTO and WTO proceedings. Finally, the connection of GSP with developing countries would make it very difficult for GSP to be dissociated from discourses of colonialism, and would likely create resentment. Such resentment would then be associated with the representation of women and women’s interests and become a meaningful disincentive against its accomplishment amongst developing countries. That is to say, the danger would be that measures advancing the representation of women and women’s interests become associated with ‘the West’ or ‘the North,’ and come to be understood as new attempts to undermine developing country sovereignty, culture, and traditions.

⁸¹⁴ *Ibid*, 269.

⁸¹⁵ *Ibid*, 269-270.

⁸¹⁶ *EC-Tariff Preferences 2004*, DS 246, Report of the Appellate Body of the WTO.

Although both the panel report and the AB report in this case determined that India’s complaint was justified, the AB report also found that GSP could be made to accord with the MFN principle as long as the selection of developing countries was based on objective criteria, and as long as all developing countries that met the criteria received the same preferences.

In sum, the structure of the WTO as a forum for negotiation between members creates a number of hindrances and disincentives that militate against the representation of women and women's interests. These are functions both of the ease with which a single member can block any initiative, and of the ease with which a single member can introduce any topic for discussion. From these two factors follow all of the considerations described above, and of these two factors and their effects there is no meaningful parallel within the IMF, the World Bank, or any other institution of global economic governance. Moreover, such proposals as may be made by individual members to advance the representation of women and women's interests show themselves upon inspection to be technical possibilities but practical impossibilities. Thus, that the locus of power within the WTO rests with the membership shows itself to be another and an important reason why the WTO is the 'hardest case' with respect to the representation of women and women's interests.

Reason 8: The Limited Ability of the Secretariat to Improve the Representation of Women and Women's Interests

Just say, if we can expand our research, if we can be – and this is what Pascal Lamy very much wants – to create a little more of an independent Secretariat. The membership will have to at a certain point either give him the mandate, or he will just, you know, take the liberty for doing things differently, and see how far he can go. And he's already trying to push the limits. That's, I think, the only way to change the organization. Because the membership I don't expect that they will ever formally say, 'Sure, Secretariat you've

become independent. You do your own research, you can make proposals, you have the right of initiative like the European Commission.⁸¹⁷

The eighth reason why the WTO is the ‘hardest case’ follows directly from the WTO’s primary function as a forum for negotiation among members. This makes it very difficult for the Secretariat, the largest bureaucratic body within the WTO and the one with the most equitable gender composition, to introduce items to the agenda for trade negotiation. It also severely restricts the Secretariat as an access point for introducing representation of women and women’s interests into the WTO. As Elsig writes, “the role of the Secretariat in multilateral trade negotiations has to be read in conjunction with the ‘member-driven’ nature of the WTO.”⁸¹⁸ The Sutherland Report also expresses regret concerning the inability of the Secretariat to take a more active, agenda-setting role.⁸¹⁹

⁸¹⁷ Senior member of WTO Secretariat. Confidential interview transcribed verbatim from digital recording, October 2007.

⁸¹⁸ Elsig, Manfred, “WTO Decision-Making: Can We Get a Little Help from the Secretariat and the Critical Mass?” in Debra P. Steger, ed., WTO: Redesigning the World Trade Organization for the Twenty-first Century (Waterloo: CIGI & Wilfrid Laurier University Press, 2010), 71.

⁸¹⁹ World Trade Organization, *The Future of the WTO: Addressing Institutional Challenges in the New Millennium*, Report by the Consultative Board to the Director-General Supachai Penitcpakdi (i.e. ‘The Sutherland Report’) (Geneva, 2004).

Chaired by Peter Sutherland, the other members of the Consultative Board were Jagdish Bhagwati, Kwesi Botchwey, Niall FitzGerald, Koichi Hamada, John H. Jackson, Celso Lafer, and Thierry de Montbrial. The objective of the Consultative Board was “to look at the state of the World Trade Organization as an institution, to study and clarify the institutional challenges that the system faced and to consider how the WTO could be reinforced and equipped to meet them” (*The Future of the WTO: Addressing Institutional Challenges in the New Millennium*, 2). The Report made 37 recommendations that its authors consider practical and realizeable (*Ibid*, 4). It also made a significant effort to “make the case for liberalizing trade” (*Ibid*, 6), countering what its authors believed were misrepresentations of and misunderstandings about the WTO.

The 37 recommendations were clearly influenced by Bhagwati. They expressed deep concern about the spread of PTAs and recommended that the “‘spaghetti bowl’ of discriminatory preferences” be countered by reduction of MFN tariffs and non-tariff measures (Recommendations 1 through 4 (R1-4)). The Report also recommended commitment to a date at which all tariffs would “move to zero,” (R3) and that PTAs be subject to “meaningful review and effective disciplines in the WTO” (R4).

Other recommendations were the following: that observer status should be limited to parties willing and able to contribute to the WTO’s role as a forum for trade negotiations (R7); that international development

Structurally, therefore, it is not the business of the Secretariat to address the representation of women and women's interests unless required to do so by a member. That the Secretariat is one of the most important elements within the WTO bureaucracy is entirely immaterial upon this point.

What one finds, then, is that while the Secretariat has been fairly successful in achieving equal representation of women and men within itself,⁸²⁰ the real loci of power within the WTO continue to be dominated by men and it is by no means certain that there are measures the Secretariat could use to address this. Indeed, while the WTO does not publish the gendered composition of the delegations of its members, the gendered composition of the Appellate Body of the DSB, and of the various Councils of Chairpersons under the General Council, is very telling. Among current Appellate Body

agencies, in close cooperation with the WTO, should fund trade-policy-related adjustment assistance (R8 – this unmistakably foreshadows EIF and Aid-for-Trade); that pursuit of coherence between IOs should be expanded and intensified (R9); that WTO membership should develop a set of clear objectives for relations with civil society (R12); that DSB findings should occasionally be reviewed by a relatively impartial group of DSB 'special experts' (R17); that criteria should be developed for acceptance of *amicus curiae* submissions (R20); *that the WTO Secretariat should facilitate technical assistance* (R23); that the General Council should adopt a declaration requiring a member blocking a measure that otherwise enjoys very broad consensus support must "declare in writing, with reasons included, that the matter is one of vital national interest to it" (R25); that WTO Ministerial Conferences should normally take place on an annual basis (R28); *that the management culture in the Secretariat should be strengthened, potentially by the advent of a Secretariat CEO* (R35); and *that the intellectual and analytical output of the Secretariat should be greater* (R36).

⁸²⁰ World Trade Organization, "Overview of the WTO Secretariat," http://www.wto.org/english/thewto_e/secre_e/intro_e.htm (accessed 31 March 2013).

As of 31 December 2012, the WTO Secretariat employed 349 women and 290 men. In terms of seniority, on a scale of grades where 2 is the lowest and 12 the highest, the breakdown is as follows: grade 2 – 0 women and 3 men; grade 3 – 14 women and 19 men; grade 4 – 33 women and 22 men; grade 5 – 70 women and 20 men; grade 6 – 61 women and 31 men; grade 7 – 44 women and 24 men; grade 8 – 28 women and 34 men; grade 9 – 53 women and 49 men; grade 10 – 38 women and 68 men; grade 11 – 6 women and 11 men; grade 12 – 0 women and 5 men; Deputy Director General level – 2 women and 3 men; Director General – 0 women and 1 man.

Clearly, there remains an imbalance in the most senior grades and executive levels in favour of descriptive representation of men; however, in fairness, the numbers cited above might be the snapshot of an evolving institution, since they show women to outnumber men in grades seven and nine. As such, with normal turnover of staff, it might be reasonable to expect descriptive representation at the most senior grades and executive levels to become more equal.

members, six are men and only one is a woman.⁸²¹ Since 1994, former members include 14 men and only three women.⁸²² Among chairpersons of the General Council, 13 are men and only one is a woman.⁸²³ Among chairpersons of the Trade Negotiations Committee Council, 9 are men and only one is a woman.⁸²⁴ Of chairpersons of the Council for Trade in Goods, the division is ten men and three women.⁸²⁵ The same division for Trade in Services is, remarkably enough, 2 men and 2 women.⁸²⁶ For chairpersons of the Committees of Plurilateral Agreements, the division is two men and no women.⁸²⁷

This is a significant disparity and suggests strongly that owing to the structure of the WTO, even when the Secretariat ensures that its own composition is divided evenly between men and women in terms of both numbers and roles,⁸²⁸ this has little effect upon the gender composition of those bodies and councils whose gender composition is dictated by the members. Indeed, the member-centric structure of the WTO inhibits any initiative to balance the gender composition of delegations to the WTO, and of course the balanced representation of women (descriptive representation) is no guarantee of the substantive representation of women's interests.

⁸²¹ World Trade Organization, "Appellate Body Members," http://www.wto.org/english/tratop_e/dispu_e/ab_members_descrip_e.htm (accessed 31 March 2013).

⁸²² *Ibid.*

⁸²³ World Trade Organization, "Current WTO Chairpersons," http://www.wto.org/english/thewto_e/secre_e/current_chairs_e.htm (accessed 31 March 2013).

⁸²⁴ *Ibid.*

⁸²⁵ *Ibid.*

⁸²⁶ *Ibid.*

⁸²⁷ *Ibid.*

⁸²⁸ World Trade Organization, "Overview of the WTO Secretariat," http://www.wto.org/english/thewto_e/secre_e/intro_e.htm (accessed 31 March 2013).

Gender mainstreaming would in many respects be a corrective, but it can bear on trade policy only if it is adopted by the members. At time of writing (2013-14), the WTO does not make official use of any form of gender analysis, much less gender mainstreaming; however, as early as 2007, certain members of the Secretariat acknowledged that there were sufficient reasons, economic and political, for the WTO to consider developing this way. As one member of the WTO Secretariat put it:

By now I think it's an accepted fact that in certain areas, I think more in developing countries than in developed countries, trade liberalization, or sometimes ... protectionism, has a specific effect upon a sector where there [are] a lot of women working, so there is a gender aspect to it. ... I think by now, there has been enough done by different people, academics, NGOs, [that] have proven that you can establish a link between [gender] and trade, and I would say particularly trade policies and gender, and particularly the effects on the gender balance within a sector, whether it's agriculture, whether it's industrial, whether it's services, particularly in developing countries. ... By now, as I said before, I think there is enough research or evidence on the table.⁸²⁹

How might the representation of women and women's interests have been introduced into the structures of the WTO? A senior member of the Secretariat described succinctly both the technical possibility of success and the most significant impediment:

⁸²⁹ Senior member of WTO Secretariat. Confidential interview transcribed verbatim from digital recording, October 2007.

A priori, I would not say that the structure of the Organization would prevent gender and trade or any other new issue ... [from being] looked at, at least from the Secretariat's perspective. The membership, then you may have problems.⁸³⁰

One opportunity for the representation of women and women's interests would involve the WTO Secretariat becoming more independent and beginning to investigate the representation of women and women's interests on its own initiative. The role of the Secretariat in implementing the 'Aid for Trade' programme suggests this might be possible as a necessary consequence of initiatives with which the WTO is involved. However, as part of the Enhanced Integrated Framework (EIF), 'Aid For Trade' is a soft-law initiative and is outside the WTO, or at least at arm's length. It is therefore addressed in detail in Chapter 7. The present Reason addresses the WTO only as a stand-alone institution.

The taking of greater initiative by the Secretariat is initially appealing, whether by its own proactive arrogation of authority or by official delegation from the WTO membership. It is the only part of the WTO with a quasi-executive capacity, to which greater independence could be delegated by WTO members to undertake research proactively and even propose new initiatives. However, officially and constitutionally, so to speak, such a reform would require the consensus of WTO members; consensus would also be required in order to place an obligation upon members to address or follow the findings of the Secretariat. This would entail a redefinition of the role of the Secretariat, perhaps expanding the scope of the WTO and certainly expanding the mandate and the

⁸³⁰ Senior member of WTO Secretariat. Confidential interview transcribed verbatim from digital recording, October 2007.

number of staff employed by the Secretariat. Hence, it is highly unlikely to come to pass – “never, never, never,” as one interviewee put it.⁸³¹ Elsig echoes this sentiment when he notes that “the reluctance of Members to delegate powers to the Secretariat has not changed [since 1994].”⁸³²

The possibility that the Secretariat could develop openly, proactively, and independently its research activity to where it could investigate of its own accord the representation of women and women’s interests may be dismissed quickly. To initiate research and make suggestions without the formal approval of the members it would be necessary for the Secretariat to assume powers it currently lacks. There is simply no reason to believe that the members would allow the Secretariat to arrogate to itself any such power.

Further, interviews with senior members of the WTO Secretariat show that the political culture within the Secretariat is not amenable to taking the initiative or the risk required to undertake reform proactively:

There is still a lot of conservative thinking in this house. That may actually lead, to, you know, opposition to trying out new things, and I’ve seen this in practice. Once again, this is very much, I don’t want to, sort of, talk about in-house stuff, but that’s one thing I’ve experienced very much – you have a conservative school and a progressive school.⁸³³

⁸³¹ Senior member of WTO Secretariat. Confidential interview transcribed verbatim from digital recording, October 2007.

⁸³² Elsig, Manfred, “WTO Decision-Making: Can We Get a Little Help from the Secretariat and the Critical Mass?” in Debra P. Steger, ed., WTO: Redesigning the World Trade Organization for the Twenty-first Century (Waterloo: CIGI & Wilfrid Laurier University Press, 2010), 71.

⁸³³ Senior member of WTO Secretariat. Confidential interview transcribed verbatim from digital recording, October 2007.

Another interviewee shared the following:

Three or four years ago, I gave a talk to a group of NGO business people from the South of Asia, on human rights and trade, but more what arguments it could raise against the US, who is imposing a ban on Myanmar, this is what we discussed. The Secretariat was investigated by the members of the General Council, the DG, all mee[tings] – all meetings were cancelled in-house – [a] special meeting of the General Council [was convened] where they all said, ‘Here the staff works on trade.’ And we tried to say, this is just to inform NGOs, this is to inform them of how to fight human rights protectionism, and they said ‘no.’ The Secretariat in the WTO has zero initiative power. It can never propose something.⁸³⁴

In sum, leaving aside the consequences of WTO initiatives with other IOs, the structure of the WTO constrains the Secretariat to only the barest technical possibility that it could act to promote the representation of women and women’s interests in the WTO organizationally, and it almost certainly will not ever produce a meaningful result. To do so would require either that the members had determined beforehand to accomplish the representation of women and women’s interests in the WTO, or that the Secretariat had overcome its own political culture and the constitutional limitations of its role. For all practical purposes, therefore, when considering the WTO as a stand-alone institution, it is necessary to look beyond the Secretariat, to the members themselves and to the Dispute Settlement Body (DSB), for progress on representing women and women’s interests within WTO hard law.

⁸³⁴ Senior member of WTO Secretariat. Confidential interview transcribed verbatim from digital recording, October 2007.

Reason 9: The Question of Women's Rights as Human Rights and the WTO

Dispute Settlement System as *Lex Specialis*

The final reason, and one of the most powerful, is that WTO dispute settlement operates as *lex specialis*, a specialized sub-system of law that has a distinct place in the interrelationships of international law. This is not an uncontroversial appellation. In fact, an extended controversy in international law literature, known as the Marceau-Pauwelyn debate, has since 2001 addressed at length the place of the WTO in international law. An account of the fundamental points of the debate must therefore be given. In short, though, the stronger arguments seem to lie on the side of Marceau, and therefore with an understanding of WTO dispute settlement as *lex specialis*. This is of great significance to the representation of women and women's interests within the WTO and to the argument that the WTO constitutes the hardest case for the representation of women and women's interests within global economic governance. The former, because it negates within the context of the WTO much of the effectiveness of the strategy of identifying women's rights with human rights, which has been prominent since the advent of CEDAW in 1980. Thus, an understanding of WTO dispute settlement as *lex specialis* requires the terminology, 'the representation of women and women's interests,' which is used throughout the study. The latter, the argument that the WTO constitutes the hardest case, is strengthened because as both *lex specialis* and a highly juridified mechanism for dispute settlement, the WTO DSM is without parallel in global economic governance.

Marceau is not the only proponent of the idea that the WTO DSM, and arguably even the WTO itself, may be understood as *lex specialis*. Trachtman, Kuijper, and

Crawford, the latter the Special Rapporteur to the ILC on State Responsibility, have constructed detailed arguments that at least the DSM of the WTO is *lex specialis*.⁸³⁵ However, Marceau's work provides the most comprehensive and forceful argument for this side of the debate, while taking account of the arguments of Trachtman, Kuijper, Crawford and others. As such, Marceau is taken here to represent the *lex specialis* side of the debate. Pauwelyn is taken to represent the opposite side, which argues that the WTO and its DSM constitute treaty law that operates normally under the rules of general international law, and that they are not to be understood as *lex specialis*. Along with Pauwelyn, Garcia Rubio, Palmeter and Mavroidis, and others take this position.⁸³⁶

The question of *lex specialis* is of crucial importance because, in international law, '*lex specialis derogat generalis*' – 'specialized law derogates from general law.'⁸³⁷ This means that in cases of conflict the provisions of the specialized system take precedence over provisions of general treaties under international law. Moreover, '*lex posterior generalis non derogat priori specialis*' – 'later general law does not derogate

⁸³⁵ Marceau, Gabriel, "WTO Dispute Settlement and Human Rights," *European Journal of International Law*, vol. 13, no. 4 (2002); Trachtman, "The Domain of WTO Dispute Resolution," *Harvard International Law Journal*, vol. 40 (1999); Kuijper, Pieter Jan, "The Law of GATT as a Special Field of International Law – Ignorance, Further Refinement or Self-Contained System of International Law," *Netherlands Yearbook of International Law*, vol. 25 (1994). Crawford is cited as the author of the ILC Third Report, A/CN.4/507.

⁸³⁶ Pauwelyn, Joost, "The Role of Public International Law in the WTO: How Far Can We Go?," *American Journal of International Law*, vol. 95, no. 3 (July, 2001); Garcia Rubio, Mariano, "Unilateral Measures as a Means of Forceful Execution of WTO Recommendations and Decisions," in Laura Picchio Forlati and Linos-Alexandre Siciliano, eds., *Les sanctions économiques en droit international / Economic Sanctions in International Law*, Hague Academy of International Law (Leiden, Netherlands: Martinus Nijhoff Publishers, 2004); Mavroidis, Petros C., "Remedies in the WTO Legal System: Between a Rock and a Hard Place," *European Journal of International Law*, vol. 11 (2000); Palmeter, David, and Petros C. Mavroidis, "The WTO Legal System: Sources of Law," *American Journal of International Law*, vol. 92 (1998).

⁸³⁷ Marceau, Gabriel, "WTO Dispute Settlement and Human Rights," *European Journal of International Law*, vol. 13, no. 4 (2002), 794.

from prior special law.⁸³⁸ This is an exception from the norm under general international law that, in cases of conflict, law created later takes precedence over law created earlier.

Marceau states her reasons clearly and convincingly why the WTO, and particularly the DSU, can be considered a system of *lex specialis*. First, the WTO treaty defines both the applicable law and the jurisdiction and competence of panels, with reference to the WTO Agreements. Moreover, as Marceau states:

The provisions on the limited jurisdiction of panels mirror those on the applicable law between WTO Members. Articles 1, 3, 4, 7, 11 and 19 of the DSU identify the WTO as a subsystem of international law which contains its specific rights and obligations (the covered agreements), specific causes of action, specific remedies and specific countermeasures. Specific rights and obligations, specific remedies and a specific dispute settlement mechanism are mandatory and countermeasures have been regulated, [hence the] WTO can be seen as having set up a system that contains a specific applicable law, a *lex specialis* system.⁸³⁹

Marceau then extends her reasoning to the following highly important conclusion, citing the ILC's 'Riphagen II Report' while doing so:

this is not to say that WTO law should not evolve and be interpreted consistently with general international law. But if WTO law is a specific subsystem of international law,

⁸³⁸ *Ibid*, 794.

⁸³⁹ *Ibid*, 764.

WTO provisions ‘cannot be overruled by situations and considerations belonging to another subsystem,’ such as those of human rights law.⁸⁴⁰

Without becoming too detailed, it would be well here to outline briefly a few of the specific attributes that for Marceau constitute the WTO a *lex specialis* system. First, the specific rights and obligations of WTO members are comprised of the ‘covered agreements’ and any ‘relevant secondary legislation.’ This includes GATT, GATS, TRIPS, TRIMs, SPS, the DSU, and the Marrakesh Agreement Establishing the WTO. Moreover, while these rights and obligations must be interpreted consistently with international law, Marceau notes that Article XVI (5) of the Marrakesh Agreement restricts reservations to WTO obligations to those made pursuant to multilateral trade agreements, and that no such agreement contains procedure for making a reservation.⁸⁴¹ This, in short, makes it very difficult for WTO Members to derogate from their WTO commitments formally, and strengthens the argument that the WTO is a specialized subsystem of international law.

Second, dispute settlement actions of the WTO can have only one of three specific causes: (a) a ‘violation complaint’ against the violation of a provision in a covered agreement, which nullifies or impairs a reasonably expected benefit;⁸⁴² (b) a

⁸⁴⁰ *Ibid*, 767.

⁸⁴¹ *Ibid*, 767.

⁸⁴² “The first, and by far, the most common complaint is the so-called “**violation complaint**” pursuant to Article XXIII:1(a) of GATT 1994. This complaint requires “nullification or impairment of a benefit” as a result of the “the failure of another [Member] to carry out its obligations” under GATT 1994. This “failure to carry out obligations” is just a different way of referring to a legal inconsistency with, or violation of, the GATT 1994. There also needs to be “nullification or impairment” as a result of the alleged legal inconsistency.”

‘non-violation complaint’ against the nullification or impairment of a reasonably expected benefit provided by a covered agreement, caused by a measure taken by another WTO member that is not in technical violation of a covered agreement;⁸⁴³ and (c) a ‘situation complaint’ in which a reasonably expected benefit is nullified or impaired as the result of any unexpected situation not provided for in the WTO Agreements, and possibly not under the control of WTO members.⁸⁴⁴ Causes (a) and (b) comprise almost all complaints under the WTO DSM; cause (c) is only with the utmost rarity the basis of a complaint. The specific nature of these causes means that WTO and AB Panels can

http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c4s2p1_e.htm (accessed 12 January 2015).

⁸⁴³ “The second type of complaint is the so-called “**non-violation complaint**” pursuant to Article XXIII:1(b) of GATT 1994. A non-violation complaint may be used to challenge any measure applied by another Member, even if it does not conflict with GATT 1994, provided that it results in “nullification or impairment of a benefit”. There have been a few such complaints both under GATT 1947 and in the WTO.”

World Trade Organization, Dispute Settlement System Training Module: Chapter 4 - Legal basis for a dispute: Types of complaints and required allegations in GATT 1994,
http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c4s2p1_e.htm (accessed 12 January 2015).

⁸⁴⁴ “The third type of complaint is the so-called “**situation complaint**” pursuant to Article XXIII:1(c) of GATT 1994. Literally understood, it could cover any situation whatsoever, as long as it results in “nullification or impairment”. However, although a few such situation complaints have been raised under the old GATT, none of them has ever resulted in a panel report. In the WTO, Article XXIII:1(c) of GATT 1994 has not so far been invoked by any complainant.”

World Trade Organization, Dispute Settlement System Training Module: Chapter 4 - Legal basis for a dispute: Types of complaints and required allegations in GATT 1994,
http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c4s2p1_e.htm (accessed 12 January 2015).

“The negotiating history indicates that Article XXIII:1(c) of GATT 1947, the so-called “situation complaint”, was intended to play a role in situations of macroeconomic emergency (e.g. general depressions, high unemployment, collapse of the price of a commodity, balance-of-payment difficulties). Under GATT 1947 practice, contracting parties relied on Article XXIII:1(c) in a few cases in order to complain about withdrawn concessions, failed re-negotiations of tariff concessions and non-realized expectations on trade flows. However, none of these complaints ever resulted in a panel ruling based on Article XXIII:1(c). Therefore neither GATT nor WTO jurisprudence provides guidance as to the criteria for a legitimate situation complaint.”

World Trade Organization, Dispute Settlement System Training Module: Chapter 4 - Legal basis for a dispute: Types of complaints and required allegations in GATT 1994,
http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c4s2p2_e.htm (accessed 12 January 2015).

decide only upon the questions of whether a WTO obligation was met and whether a reasonably expected benefit was nullified or impaired.⁸⁴⁵ This specificity argues for the WTO to be understood as *lex specialis*.

Third, the DSU created a specific system of enforcement, which prohibited non-authorized retaliatory action, and prescribed specific procedures and bodies for the settlement of disputes. As Marceau states, this reinforces “the idea that the DSU provides a *lex specialis* system pursuant to Article 55 of the Rules on State Responsibility.”⁸⁴⁶ Marceau takes pains to note that states, who happen to be WTO Members, remain perfectly free to use non-WTO legal bodies to assess the compatibility and priority of their trade obligations with their other obligations (such as human rights obligations).⁸⁴⁷

Fourth, the DSU defines a very specific and self-contained regime for remedies in cases of failure to meet WTO obligations. These remedies are, fundamentally, cessation of the illegal activity, non-repetition of the activity, and ‘satisfaction,’ or closely regulated retaliation, in cases of persistence in the illegal activity. Thus, the WTO system limits the DSB to judging whether WTO obligations have been infringed or benefits impaired, requires that disputes be settled according to the specific procedure established by the DSU, and mandates that remedies and sanctions be administered and closely regulated in accordance with the DSU. For Marceau, Kuijpers, Crawford and others, this specification makes at least the DSM a system of *lex specialis*, and possibly the entire WTO.

⁸⁴⁵ Marceau, Gabriel, “WTO Dispute Settlement and Human Rights,” European Journal of International Law, vol. 13, no. 4 (2002), 767-768.

⁸⁴⁶ *Ibid*, 768.

⁸⁴⁷ *Ibid*, 768.

Marceau advances two further reasons to call the WTO a system of *lex specialis*. First, she notes that the WTO Agreements cannot be changed or amended, whether by addition or subtraction, by any means other than the procedures defined in the WTO Agreements.⁸⁴⁸ This entails a need for consensus of WTO Members and, importantly, reinforces the impermissibility of a WTO or AB panel amending WTO obligations and rights by means of its decisions or interpretations (whether by addition or subtraction). As Marceau states,

it is difficult to conceive of situations where a panel would set aside a WTO provision in favour of another treaty or a customary provision claimed to have superseded the relevant WTO provision, without changing the relevant covered agreement (WTO rights and obligations) at least between the two disputing states.⁸⁴⁹

Second, Marceau emphasizes the significance of the WTO being a ‘single undertaking,’ both in the political sense of nothing being agreed in negotiation until all is agreed, and in the legal sense that the WTO Agreements are to be implemented and understood as a single coherent treaty with all WTO Members agreeing to be bound by all WTO Agreements.⁸⁵⁰ For Marceau, “this obligation to read the WTO as a whole and in a consistent manner reinforces the idea that members wanted to set up an international system of rules and obligations specific to their trade relations.”⁸⁵¹ This would make the WTO, or at the very least the DSU, a system of *lex specialis* under Article 55 of the Rules

⁸⁴⁸ *Ibid*, 771-772.

⁸⁴⁹ *Ibid*, 771.

⁸⁵⁰ *Ibid*, 772-773.

⁸⁵¹ *Ibid*, 773.

on State Responsibility. In this connection, it is instructive to cite Kuijper, the EC legal advisor to the DSU negotiations in 1994: “It is perhaps too early to say if the GATT, which was a self-contained system of international law only in aspiration but not in reality, has moved decisively in the direction of such a self-contained system in the form of the WTO. It is obvious, however, that the intention was there.”⁸⁵² Further, concerning the DSU, Crawford states that “there are, no doubt, to a greater or lesser degree, elements of *lex specialis* in the work of the Dispute Settlement Mechanism of the World Trade Organization, the focus of which is firmly on cessation rather than reparation.”⁸⁵³

Against this understanding of the WTO, or at least the DSU, as *lex specialis*, Pauwelyn argues that the WTO system is but one more component of international law, subject to the normal rules of interpretation, and not exempted in any way as *lex specialis*.⁸⁵⁴ For Pauwelyn, the WTO Agreements, like any other treaty of general international law, are superseded in conflicts by later agreements and by earlier (or later) *lex specialis*. As he states, “depending on the relevant conflict rules, pre-1994 non-WTO rules may prevail over the WTO treaty.”⁸⁵⁵ Pauwelyn further asserts that WTO panels can apply international law without limit in resolving claims, and that WTO members should be able to justify breaches of WTO obligations by invoking non-WTO rules. As he states, “non-WTO rules may actually apply before a WTO panel and overrule WTO rules.”⁸⁵⁶

⁸⁵² Kuijper, Pieter Jan, “The Law of GATT as a Special Field of International Law – Ignorance, Further Refinement or Self-Contained System of International Law,” Netherlands Yearbook of International Law, vol. 25 (1994), 252.

⁸⁵³ Crawford, James, *ILC Third Report*, A/CN.4/507/Add.1, para. 157.

⁸⁵⁴ Pauwelyn, Joost, “The Role of Public International Law in the WTO: How Far Can We Go?,” American Journal of International Law, vol. 95, no. 3 (July, 2001), 537.

⁸⁵⁵ *Ibid*, 537.

⁸⁵⁶ *Ibid*, 577.

Pauwelyn would hold this to be true for all cases of conflicting obligations under general international law, whether the non-WTO rules were a human rights treaty, an environmental treaty, or any other treaty; his fundamental requirements would be that both parties to the dispute were signatories to the non-WTO treaty, and that the conflict between the treaties had been resolved by reference to the standard rules of conflict resolution under international law.⁸⁵⁷ Finally, Pauwelyn argues that for the WTO Agreements, or even the DSU alone, not to be a normal component part of international law, and not to be subject to the standard rules of conflict resolution, it would have had to ‘contract out’ explicitly from specific elements of international law within the text of the WTO Agreements (as was in fact done to a very limited extent in the TRIPS Agreement).⁸⁵⁸ In sum, Pauwelyn’s fundamental position is that “if the WTO neglected other rules of international law, it would not only impoverish the WTO legal system and risk reducing it to a one-rule-fits-all framework implemented as a trade-only ‘safe haven.’ In addition, it would threaten the unity of international law.”⁸⁵⁹

The side of the argument represented here by Marceau is more convincing. The first problem with Pauwelyn’s argument is that there is no unity of international law outside the minds of international lawyers. That is to say, ‘unity’ is a convenient and powerful rubric under which to comprehend and give order to the disparate realms and components of international law, but it cannot be more than this. Sovereignty internationally is vested in states, and though they may delegate or share sovereignty by means of International Organizations, and though many have argued that the rise of IOs

⁸⁵⁷ *Ibid.*, 559-60.

⁸⁵⁸ *Ibid.*, 537, 540, 578.

⁸⁵⁹ *Ibid.*, 578.

and Multi-National Corporations derogates from the system of state-sovereignty to a certain degree,⁸⁶⁰ still these are not reasons for an individual lawyer or panelist to substitute himself or herself into the position of the states making the treaties that constitute international law, even if the excuse is the ‘unity’ of international law. There is little question where, in the end, sovereignty resides in the international system, or whence it derives.

Yet this sort of substitution is precisely what Pauwelyn requires when he argues, for example, that a WTO panel can employ non-WTO rules to justify a breach of WTO obligations. This assertion requires slightly more detailed analysis. Indeed, Pauwelyn asserts that WTO members themselves, in their capacity as sovereign states, have revised the WTO Treaty whenever they have agreed to a later treaty that conflicts at any point.⁸⁶¹ Thus, for Pauwelyn, a failure by a WTO or AB panel to find that a later treaty supersedes the WTO treaty would amount to a failure to apply the stated position of the given state concerning its international obligations, and the substitution of the panelist’s own sense of the state’s obligations.

Here Pauwelyn’s argument fails on two counts. First, the text of the WTO Agreements will not have changed, whether by the procedure prescribed in the WTO Agreements or by any other means; the text itself, defining WTO obligations and exceptions, will have remained the same. Second, Articles 3.2 and 19.2 of the DSU state, respectively: (3.2) “Recommendations and rulings of the DSB cannot add to or diminish

⁸⁶⁰ Strange, Susan, The Retreat of the State: The Diffusion of Power in the World Economy (Cambridge, UK: Cambridge University Press, 1996).

⁸⁶¹ Pauwelyn, Joost, “The Role of Public International Law in the WTO: How Far Can We Go?,” American Journal of International Law, vol. 95, no. 3 (July, 2001), 567, text and note 210.

the rights and obligations provided in the covered agreements”,⁸⁶² and (19.2) “In accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and the Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.”⁸⁶³

Pauwelyn’s analysis of these provisions is remarkable and seems discordant with their plain meaning. He asks, “Do these provisions mean that no other law, be it pre- or post-1994, can ever influence WTO covered agreements and that, in the event of conflict between these agreements and another rule of international law, the WTO rule must always prevail? In my view, the answer is no.”⁸⁶⁴ He argues that Articles 3.2 and 19.2 do not address the jurisdiction of panels, the applicable law before panels, or the relationship between the WTO Agreements and other international law, all of which might reasonably be thought to be alluded to by articles stipulating that the ‘findings and recommendations’ of a WTO panel cannot ‘add to or diminish’ the ‘rights and obligations’ defined in the WTO Agreements.⁸⁶⁵

Instead, for Pauwelyn, Articles 3.2 and 19.2 “deal with the inherent limits a WTO Panel must observe in interpreting WTO covered agreements.”⁸⁶⁶ This is a tortured reading. Certainly, a WTO or AB panel may not amend the WTO Agreements by means of interpretation, but it cannot be that articles whose primary objects are the

⁸⁶² World Trade Organization, *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Art. 3, Para. 2, http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm (accessed 19 March 2014).

⁸⁶³ World Trade Organization, *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Art. 19, Para. 2, http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm (accessed 19 March 2014).

⁸⁶⁴ Pauwelyn, Joost, “The Role of Public International Law in the WTO: How Far Can We Go?,” *American Journal of International Law*, vol. 95, no. 3 (July, 2001), 564.

⁸⁶⁵ *Ibid*, 564-67.

⁸⁶⁶ *Ibid*, 564.

recommendations and rulings of WTO and AB panels, in other words the final results of their deliberations and interpretations, deal only with the interpretations of WTO and AB panels.⁸⁶⁷ To suggest, as Pauwelyn does, that everything beyond interpretation in Articles 3.2 and 19.2 was simply included out of an abundance of caution (*ex abundante cautela*),⁸⁶⁸ is to render the entirety of the Articles ‘*ex abundante cautela*,’ to interpret them into redundancy, and to deprive them of all practical effect. This in itself would violate the Vienna Convention on the Law of Treaties.⁸⁶⁹

In fact, as Marceau and others argue, with the exception of *jus cogens*,⁸⁷⁰ it would essentially be impossible for a WTO or AB panel to rule that a non-WTO treaty overrides

⁸⁶⁷ The assertion that a WTO or AB panel may not amend the WTO Agreements by means of interpretation can be construed as an example of over-juridification, since the panel is ill-equipped to address burgeoning issue-areas such as human rights, women’s rights and environmental concerns. It might well be that the DSM needs greater flexibility in this respect, but at the moment it does not have this flexibility, because panels cannot add to or diminish from the WTO Agreements by means of their interpretations.

⁸⁶⁸ Pauwelyn, Joost, “The Role of Public International Law in the WTO: How Far Can We Go?,” *American Journal of International Law*, vol. 95, no. 3 (July, 2001), 564.

⁸⁶⁹ *Vienna Convention on the Law of Treaties* (1969), http://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf (accessed 17 August 2014).

Specifically the preamble, which states, “Noting that the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized,” and Article 31 (1), which states, “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

⁸⁷⁰ ‘*Jus cogens*’ is Latin for ‘compelling law’ and is generally translated into English as ‘peremptory norm.’ According to Cornell University Law School’s Legal Information Institute (LII), *jus cogens* “refers to certain fundamental, overriding principles of international law, from which no derogation is ever permitted.” http://www.law.cornell.edu/wex/jus_cogens (accessed 17 August 2014). See also Brownlie, Ian, *Principles of Public International Law*, 5th Ed. (Oxford, 1998) and Crawford, James, ed., *Brownlie’s Principles of Public International Law*, 8th Ed. (Oxford: Oxford University Press, 2012), 594-597. For an excellent overview, see also Nieto-Navia, Rafael, “International Peremptory Norms (*Jus Cogens*) and International Humanitarian Law,” (The Hague, 2001) <http://www.iccn.org/documents/WritingColombiaEng.pdf> (accessed 17 August 2014). Nieto-Navia was Judge of the Appeals Chamber for the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR). He traces the origins of *jus cogens* to the *jus natural necessarium* (necessary natural law) of the medieval natural law tradition, which also informed medieval civil and canon law in Europe.

The notion of *jus cogens* was first properly codified as Article 53 of the *Vienna Convention of the Law of Treaties* (1969), where it is defined as “a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”

http://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf (accessed 17 August 2014).

a WTO Agreement without at the same time adding to or diminishing the rights and obligations of WTO members. Thus, while WTO and AB panels are permitted to report a genuine conflict to the DSB, they are not permitted to rule that a non-WTO treaty overrides a WTO right or obligation, and are limited to ruling whether a WTO obligation has been violated, and whether a violation can be justified by *jus cogens* or by an exception provided for in the WTO Agreements. This is the limit of the charge given to WTO panels and AB panels by the DSU, the *lex specialis* system that gave the panels their existence.

For a WTO panelist to rule as Pauwelyn urges, and to declare a violation of a WTO right or obligation justified because it conflicts with another international treaty, would be for that jurist to overstep his or her mandate and to decide for a WTO member whether that member's WTO commitments or other international commitments will take precedence. To do so, given the text of Articles 3.2 and 19.2 of the DSU, given the *lex specialis* nature of at least the WTO DSU, and given that the panelist is charged only to

In practise, as Brownlie states, “more authority exists for the category of *jus cogens* than exists for its particular content ...” (Brownlie, 516-517). International lawyers have met with significant difficulty in trying to identify and assert specific rules, rights and duties as *jus cogens*, and particularly in trying to elevate specific norms to the status of *jus cogens*. Accepted *jus cogens* norms are very limited in number. They have generally been limited to prohibitions upon the use of force, slavery, human trafficking, piracy, genocide and crimes against humanity (LII, http://www.law.cornell.edu/wex/jus_cogens (accessed 17 August 2014); also Nieto-Navia, 15-16, 26-27).

At the Vienna Conference, Uruguay cited racial discrimination as a violation of *jus cogens* norms, but it was not mentioned in the final document (Nieto-Navia, 16). The ICJ cited racial non-discrimination in the *Barcelona Traction* case in 1970 (*Case concerning the Barcelona Traction, Light and Power Company, Limited, Second Phase*, Judgment of 5 February 1970, ICJ Reports (1970), 3, at 32 – cited in Nieto-Navia, 14), and the 2001 Genocide Convention specifically mentions ‘racial groups’ in Article II (Convention on the Prevention and Punishment of the Crime of Genocide, adopted 9 December 1948 and entering into force on 12 January 1951 – cited in Nieto-Navia, 27). The principle of racial non-discrimination in international law is possibly the most latterly emerging of the *jus cogens* norms.

The panoply of human rights and freedoms (such as the freedoms of expression and assembly), women’s rights and democratic principles are not (or not yet) recognized as *jus cogens* norms within any treaty of international law or by any prominent institution of international law. This is because, however much it should be different, human rights, women’s rights, and democratic principles simply do not enjoy anything like the universal acceptance, or the universal agreement upon their definitions, necessary to qualify as *jus cogens* norms.

determine whether a WTO right or obligation has been violated, and whether a violation can be justified under the exceptions in the WTO Agreements, would be for the jurist to arrogate to himself or herself the sovereignty of the WTO member. Finally, it should be stressed that there is no meaningful disagreement between Pauwelyn and Marceau concerning the ability of WTO and AB panels to refer to international law where necessary to interpret WTO law.⁸⁷¹ Equally, both Pauwelyn and Marceau agree that norms of *jus cogens* take precedence over all other international law, including the WTO Agreements.⁸⁷² Their disagreement, described above, concerns the mandate of, and restrictions upon, WTO panelists.

This disagreement underlies a reason of the first order why the WTO is the hardest case for the representation of women and women's interests. First, since the WTO DSU is a system of *lex specialis*, international human rights treaties cannot be invoked in a WTO or AB panel to justify the violation of a WTO obligation. The same would of course hold for environmental treaties, and other such treaties that do not qualify as *jus cogens*. This means that the strategy of identifying women's rights with human rights cannot be an effective strategy for achieving the representation of women and women's interests at the WTO. Whether or not women's rights constitute human rights, and whether or not women's rights as human rights conflict with a WTO obligation, it matters not because the WTO and AB panels are not empowered to find that a human rights violation, as such, justifies the violation of a WTO obligation.

⁸⁷¹ Pauwelyn, Joost, "The Role of Public International Law in the WTO: How Far Can We Go?," *American Journal of International Law*, vol. 95, no. 3 (July, 2001), 577-578; Marceau, Gabriel, "WTO Dispute Settlement and Human Rights," *European Journal of International Law*, vol. 13, no. 4 (2002), 813-814.

⁸⁷² Pauwelyn, Joost, "The Role of Public International Law in the WTO: How Far Can We Go?," *American Journal of International Law*, vol. 95, no. 3 (July, 2001), 537; Marceau, Gabriel, "WTO Dispute Settlement and Human Rights," *European Journal of International Law*, vol. 13, no. 4 (2002), 756, 795.

This is very significant because in an enquiry concerning the democratization of global economic governance, one would expect human rights agreements to be of importance; the proposition is true in general, but in the context of the present study human rights are of much less import. Certainly, most of the constituent members of the WTO are bound, as sovereign states, by having signed a number of international agreements of a fundamental or constitutional nature. To give only a few examples, 'sex' and/or 'gender' are prohibited as grounds for discrimination in the preamble to the Charter of the United Nations, the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the American Convention on Human Rights, the African Charter on Human and People's Rights, and the Protocol on the Rights of Women in Africa.

Table 5: Fundamental International Agreements and Conventions that Prohibit All Forms of Discrimination on the Basis of Gender

| |
|---|
| The Charter of the UN |
| The Universal Declaration of Human Rights |
| The International Covenant on Economic, Social and Cultural Rights |
| The International Covenant on Civil and Political Rights |
| The Convention for the Elimination of all forms of Discrimination Against Women |
| The European Convention for the Protection of Human Rights & Fundamental Freedoms |
| The American Convention on Human Rights |
| The African Charter on Human & People's Rights |
| The Protocol on the Rights of Women in Africa |

Moreover, the definition of women's rights as human rights has long been practiced as strategy by women's organizations, and accepted as fact by many. As Dorsey notes, the identification of women's rights with human rights can be traced at least to the advent of CEDAW in 1980. It has been a developed, coherent and successful strategy for the advancement of women's rights since the 1993 World Conference on Human Rights at Vienna, the 1994 International Conference on Population and Development at Cairo, the 1995 World Summit on Social Development at Copenhagen, and the 1995 Fourth World Conference on Women at Beijing.⁸⁷³

Of equal importance, the Marrakesh Agreement establishing the WTO states unequivocally that trade relations should be structured with the intention to 'raise standards' of living and achieve sustainable development. This places the Marrakesh Agreement within the discourse of development, which in turn, according to Zampetti, places it within a human rights discourse, since he understands development to be essential to the "freedom to choose," or the "capability to lead the kind of life one values."⁸⁷⁴ While this argument does not have the force of logical necessity, and while Zampetti knowingly conflates 'sex' and 'gender,' the argument does suggest that the intention, if not the letter, of the Marrakesh Agreement might be contravened when

⁸⁷³ These four conferences together constituted a crucial milestone in the development and implementation of the strategy of identifying women's rights as human rights.

For a fuller discussion of this development, the detailed history of which not being necessary to this study, see Dorsey, Ellen, "The Global Women's Movement: Articulating a New Vision of Global Governance," in Paul F. Diehl, ed., The Politics of Global Governance: International Organizations in an Interdependent World (London: Reinner, 2005), 418-430.

⁸⁷⁴ Zampetti, Americo Beviglia, "The Impact of WTO Rules on the Pursuit of Gender Equality," in Anh-Nga Tran-Nguyen and Americo Beviglia Zampetti, eds., *Trade and Gender: Opportunities and Challenges for Developing Countries* (New York: United Nations: UNCTAD, 2004), 299. See also Sen, Amartya, Development As Freedom (1999; New York: Anchor Books, 2000).

global trade is structured so as not to benefit women and men equally.⁸⁷⁵ In any case, the preamble of the Marrakesh Agreement *prima facie* constitutes a plausible argument that the WTO members intended WTO law to be interpreted in light of human rights law, and so as to avoid conflict with human rights law wherever possible.

Finally, the Vienna Convention of 1969 on the Law of Treaties, to which all WTO members are signatories, states plainly that treaties are to be “interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context” and in light of their objects and purposes.⁸⁷⁶ The Vienna Convention can therefore reasonably be said to have the effect of removing the possibility for doubt concerning the legal obligation of WTO member states, as states, to adhere to provisions of international treaties requiring non-discrimination upon the basis of ‘sex’ and/or ‘gender.’ In sum, as Zampetti states,

the compound effect of all these international instruments, where the principle of gender equality is generally expressed in unequivocal terms, renders it a broadly shared and

⁸⁷⁵ The full paragraph referenced above is the following:

“The Parties to this Agreement,

Recognizing that their relations in the field of trade and economic endeavour should be conducted 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, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development. ...”

Marrakesh Agreement Establishing the World Trade Organization,
http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm (accessed 11 October 2010).

⁸⁷⁶ Zampetti, Americo Beviglia, “The Impact of WTO Rules on the Pursuit of Gender Equality,” in Anh-Nga Tran-Nguyen and Americo Beviglia Zampetti, eds., *Trade and Gender: Opportunities and Challenges for Developing Countries* (New York: United Nations: UNCTAD, 2004), 303 note 19.

accepted principle in the international community and one that partakes of the normative strength and primacy that human rights possess in international law.⁸⁷⁷

At a basic level, then, the structures exist to facilitate and motivate the incorporation of gender concerns within the WTO. As former DG Lamy noted, “There is a clear consensus: all WTO member governments are committed to a narrower set of internationally recognized “core” standards – freedom of association, no forced labour, no child labour, and no discrimination at work (including gender discrimination).”⁸⁷⁸ The problem is that the Agreements emphasized do no more than prohibit discrimination based on sex/gender. They instill no positive requirement for action, and they do not sway the argument concerning *lex specialis* from Marceau’s position to that of Pauwelyn. WTO panelists and AB members remain barred from altering WTO Agreements and from determining anything more than that an irresolvable conflict exists between the obligations of a given state as a WTO member under WTO law, and the same state’s obligations under the international law that is not *jus cogens*. This would not permit the panelist or AB member to absolve the WTO member of its obligations under WTO law, it would not excuse a violation of WTO law, it would not negate the legitimacy of retaliation against a continued violation, and it would not alter in any way the requirement upon a WTO member to remain in accordance with WTO law in all of its actions.

⁸⁷⁷ *Ibid*, 297-8. Though it must be added that this does not suffice to constitute *jus cogens*.

⁸⁷⁸ “Understanding the WTO: Cross-Cutting and New Issues – Labour Standards: Consensus, Coherence and Controversy; Consensus on Core Standards, Work Deferred to the ILO,” http://www.wto.org/english/thewto_e/whatis_e/tif_e/bey5_e.htm (accessed 11 October 2010).

Moreover, what is required for the test conducted by the present study is a positive engagement with the representation of women and women's interests, or at least an indication that the WTO can incorporate the representation of women and their interests. The prohibition of discrimination, which all the above-mentioned agreements address, carries no implication and has no significance for that test.

Second, there is no parallel amongst other institutions of global governance to the *lex specialis* DSU of the WTO. One can argue that other bodies of international law that contribute to global economic governance can also qualify as *lex specialis*. Elements of the International Law of the Sea certainly can be considered *lex specialis*.⁸⁷⁹ However, UNCLOS does not comprehend a mechanism for dispute settlement that is as robust, as strong in compliance, and as wide in its reach as the WTO DSM. For their parts, neither the IMF nor the World Bank incorporates a robust, legalistic mechanism for dispute settlement. Neither can they be considered *lex specialis*, since, to employ Marceau's criteria, they do not comprise systems of specific rights and obligations, specific causes of action, specific remedies and specific countermeasures. Indeed, there is no other institution of global economic governance that can be considered *lex specialis* and that combines a mechanism for dispute settlement as robust and extensive as the DSM of the WTO. This makes the WTO institutionally resistant to human rights discourse, and therefore to the representation of women and women's interests (particularly as women's rights), in a way that is stronger and more severe than any other institution of global economic governance.

⁸⁷⁹ Pauwelyn, Joost, "The Role of Public International Law in the WTO: How Far Can We Go?," American Journal of International Law, vol. 95, no. 3 (July, 2001), 538 at note 29, 544 at note 69.

Third, many countries, including Canada, ardently oppose the formal incorporation of human rights within WTO agreements, bodies and procedures. As one senior member of the WTO Secretariat stated:

[T]he problem is that ninety percent of our members don't want human rights, because they say, 'Here we deal with trade, there they deal with human rights. ... what people will say is that they would prefer if trade is discussed in another forum, rather than having human rights here. ... Countries like Canada, for instance, are very aggressively opposed to having any human rights here. ... [T]he Canadian delegation is against the introduction of human rights discourse within the WTO. ... I went to some sort of conference and the Canadian, sort of trade expert, [didn't] want at all the dispute settlement system of the WTO to be used for human rights because it's too powerful... Because they don't want dispute. They don't want any sort of adjudication – who's right or wrong. They don't want this logic.⁸⁸⁰

In light of the difficulties faced by a human rights strategy to achieve the representation of women and women's interests within the WTO, it becomes necessary to address in greater detail the specific bodies of hard law and soft law by which the WTO is constructed and of which it partakes. This is done over the course of Chapters 6 and 7.

Finally, the *lex specialis* nature of the WTO DSU necessitates the study's preference for the 'representation of women and women's interests,' rather than terms such as 'gender justice' or 'women's rights,' when considering the question of whether global economic governance can take a democratic turn. The representation of women

⁸⁸⁰ Senior member of WTO Secretariat. Confidential interview transcribed verbatim from digital recording, October 2007.

and women's interests can be translated into WTO rights and obligations, and therefore can facilitate an accurate appreciation of the capacity for a democratic turn in global economic governance. Indeed, by means of descriptive representation in the WTO Secretariat, the Secretariat's research capacity, and the advent of WTO CTD A4T (as explained in Chapter 7), the study finds that the representation of women and women's interests can be pursued under the WTO Agreements as they exist at present.

Conversely, 'gender justice' is a more amorphous concept that would need to be broken into its component parts and translated into the rights and obligations of the WTO Agreements. In itself, it is not justiciable or comprehensible in the *lex specialis* subsystem in which the WTO DSM operates. Indeed, it seems likely that what would emerge from the translation of 'gender justice' would be a concept very similar to 'the representation of women and women's interests.'

Lastly, women's rights would suffer the same difficulty as human rights, in that they would form part of the body of external international law that could inform the interpretations of WTO panelists, but that does not form part of the WTO Agreements, and therefore could not be invoked by WTO and AB panels as a justification for failing to meet WTO obligations. As such, because of the analytical incommensurability between the WTO Agreements and human rights (or women's rights as human rights), to make women's rights the subject of the study's test would be to pre-ordain a negative result, even while the representation of women and women's interests might be possible under the WTO Agreements. Therefore, not only would the study's test conclude prematurely that global economic governance cannot take a democratic turn, but it would do so under the influence of a fundamental conceptual confusion.

Conclusion

In summary, the first two reasons showed that the intellectual and theoretical origins of the WTO, whether in economic scholarship, IR or IPE scholarship, militated against the descriptive and substantive representation of women within the WTO at least as much as for other organizations of global economic governance. Reason 3 dwelt upon the specific difficulties for the representation of women and women's interests posed by the incorporation of GATT 1947 within the newly-founded WTO in 1994; this precluded the possibility of women 'getting in on the ground floor' and accentuated the dynamic of path-dependency. Reason 4 gave an account of the development of the antagonism of gender and trade activism toward neoliberal and institutions perceived as neoliberal. It also discussed how that antagonism, however, justified, made the representation of women and women's interests particularly difficult within the WTO. Reason 5 then showed how the WTO had been relatively closed to civil society for longer than most other institutions of regional and global economic governance. This placed the WTO outside of specific networks of policy diffusion, and contributed to the WTO being particularly resistant to 'gender mainstreaming' and a harder case than most other organizations of global economic governance for the representation of women and women's interests. Finally, reasons 6 through 9 showed that the structure of the WTO itself contributes significantly toward making it the hardest case for the representation of women and women's interests, since it was built on the GATT, requires consensus in decision-making, is fundamentally a forum for negotiation among members, and constitutes a system of *lex specialis*.

If, then, it is accepted that the WTO is in fact the hardest case for the representation of women and women's interests, it must also be accepted that the WTO serves as an effective proxy for global economic governance for the purposes of testing whether global economic governance can take a democratic turn. This is because Chapter 4 established that the WTO was also representative of a general trend of juridification of global economic governance.

It remains, then, to conduct the empirical test of whether global economic governance, as it is currently structured, can take a democratic turn, or whether more robust institutions of governance, such as a global state, must be constructed in order to accomplish the representation of women and women's interests. This testing of whether the WTO can represent women and women's interests occurs in Chapters 6 and 7.

Chapter 6 – Meeting of the Proxies I: Possibilities in WTO Hard Law via the DSB⁸⁸¹

This chapter focuses on WTO hard law, asking whether the representation of women and women's interests could be introduced into the Organization's hard-law structures. This is the first part of the test of the democratic potential of global economic governance. Previous chapters showed how the test is possible by means of three fundamental premises: first, that the representation of women and women's interests is a *sine qua non* of 21st century democracy; second, that the WTO is representative of a general post-1945 trend of juridification in global economic governance; and third, that the WTO is the 'hardest case' for the representation of women and women's interests.⁸⁸² These allow the WTO to serve as a proxy for global economic governance. They also allow the possibility of representing women and women's interests within the WTO to serve as a proxy for the potential of global economic governance to democratize.

As the study's overall framework demonstrates, if the representation of women and women's interests cannot be accomplished within the institutions of global economic governance, a more robust global governing system will be necessary to achieve any

⁸⁸¹ The hypotheticals developed in this chapter are only examples and by no means exhaustive of all possibilities. The directions of the examples and arguments presented here are rooted in confidential interviews conducted by the author; in this sense, the chapter can be said to give an idea about the state of thinking in this area at the WTO and EU DG-Trade bureaucracies at the time of the interviews, although the examples and arguments also stand on their own merits. The development of additional hypotheticals or a further investigation and development of the arguments presented in this chapter would be valuable for further studies, including the development of a possible 'situation complaint', which was not specifically addressed during interviews, but which might have gained more credence due to the global economic crisis that began in 2007. Some of the hypotheticals included here were also included in papers written and presented by the author in 2006 and 2007, prior to any interviews.

⁸⁸² Again, it is sufficient for the WTO to be 'as hard as any other case' for it to meet the criteria of the 'hardest case' test.

objective of democratizing global (economic) governance. Thus, the present chapter and the next explore the WTO for opportunities to represent women and their interests. The present chapter focuses on opportunities within WTO hard law; the next within WTO soft law.

In so doing, the chapter divides into two basic categories the opportunities for representing women and women's interests under WTO hard law, outside of the Secretariat and direct proposals from members. The first category is indirect approaches to the DSB through exceptions to WTO Agreements. The second category is direct approaches to the DSB by filing complaints. Under current WTO hard law, these are the only opportunities for accomplishing the representation of women and women's interests. There is no meaningfully different way to do so at present. The analysis shows, however, that while the opportunities within the two categories are genuine, and give rise to real possibilities for advancing the representation of women and women's interests, in each case it becomes apparent that significant obstacles would be raised that render the possibilities merely technical and make them very unlikely in the near or medium term to lead to the desired outcome. Throughout, the analysis and conclusions are supported by excerpts from confidential interviews with members of the WTO Secretariat.

One option that could bypass some of the structural constraints imposed by and upon the members and the Secretariat (discussed in Chapter 5) is to work intentionally through the DSB. There are two possible ways to work intentionally through the DSB to advance the representation of women and women's interests: first, an indirect approach through exceptions to WTO Agreements; and second, a direct approach through the filing of a complaint. Under both approaches, the fundamental prerequisite is that there be a

conflict between at least two WTO Members, in which at least one of the Members considers that a benefit under the WTO Agreements has been nullified or impaired. As a senior WTO official stated: “in the WTO we intervene only if there’s a clash, a conflict” [...] “If there is no trade restriction, it’s not a WTO issue. So the WTO kicks in if there is a trade restriction as a consequence [of a WTO member’s actions].”⁸⁸³

The distinction between the direct approach and the indirect approach is important because it articulates the perspectives of and possibilities for one who desires to use the WTO to effect change.⁸⁸⁴ From this perspective, to initiate a dispute is to take a direct approach to effecting change. No intermediary action is necessary to begin the process. Thus, a WTO Member employs the direct approach when it *initiates* a dispute with the intention of using the dispute to advance the representation of women and women’s interests. Conversely, to *invite* a dispute by the institution of a policy that nullifies or impairs a benefit under a WTO Agreement is to employ the indirect approach. Thus, to institute a tariff upon Chinese textiles would be to employ the indirect approach because it would invite China to instigate a dispute. The purpose would still be to use the dispute resolution process to legitimize the representation of women and women’s interests

⁸⁸³ Senior member of WTO Secretariat. Confidential interview transcribed verbatim from digital recording, October 2007.

⁸⁸⁴ Thus, to understand whether an initiative is a direct approach or an indirect approach, it is necessary to consider the initiative from the perspective of the party seeking to advance the representation of women and women’s interests. As such, a direct approach might take the form of a complaint against a country that banned cosmetics, or another product predominantly used by women, on religious grounds. The approach is direct because the country seeking to improve the representation of women and women’s interests is the country making the complaint. Conversely, an example of the indirect approach would occur if a country were to ban an import from another country specifically because of that country’s policies concerning women. The approach would be indirect because the country that wanted to advance the representation of women and women’s interests was the country that instituted the trade-distorting policy, which then required the action of the affected country (the filing of a complaint) in order to be addressed by the WTO DSB. However, academically speaking, the two approaches separately treated in this chapter can be said to be the ‘two sides of the same coin’; i.e. the reverse and obverse of the same dispute settlement system.

within the WTO, whether as a topic for official discussion or as justification of a tariff. However, the approach would be indirect because Chinese action would be required for dispute resolution to begin.

In a sense, the distinction between the direct and indirect approach is similar to the distinction between a complainant and a respondent in a legal proceeding. Yet this legal distinction does not capture the most important aspect shared by the direct and the indirect approaches, which is that both are processes instigated by the same party toward the same end – a given reform within the WTO. For the purposes of the study, the reform in question is the advancement of the representation of women and women’s interests.

How Disputes are Settled

Before discussing further these two possibilities, it is important to emphasise a few pertinent aspects of the mechanism by which disputes are settled at the WTO. First, the purpose of the DSM, and therefore of the Dispute Settlement Body (DSB) is to settle disputes, not specifically to adjudicate, determine fault, or authorize retaliation.⁸⁸⁵ The DSB is not a court; neither is it an expression of sovereign power. Rather, it is a forum that facilitates reconciliation between two or more WTO members. This has a constraining effect on DSB and Appellate Body reports, and would require that the representation of women and women’s interests be central to a dispute, not tangential or related, for it to receive meaningful comment in a given report. Second, disputes addressed by the DSM result only when one member considers that another has failed to abide by its obligations under WTO agreements, or that a legitimately expected benefit

⁸⁸⁵ World Trade Organization, “Understanding the WTO: Settling Disputes,” http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm (accessed 25 May 2012).

has been nullified or impaired.⁸⁸⁶ This means that it is not sufficient for a trade-violation to be present, but it must also be raised formally as a dispute by a WTO member.

Because of these two constraints, in order for the representation of women and women's interests to be addressed under the DSM, at least one WTO member must found a dispute on failure to represent women and women's interests, or make this explicitly the basis of its justification for the violation of a WTO Agreement. The representation of women and women's interests cannot be addressed under the DSM clandestinely or without political implications.

When one member considers that another has failed to meet an obligation, or that a benefit has been nullified or impaired, it files a complaint to this effect with the Dispute Settlement Body, which is the General Council of the WTO convened to consider disputes. This is followed by a mandatory period of 60 days of mediation and consultation between the parties. If they cannot achieve a resolution, the complainant can ask the DSB to establish a panel⁸⁸⁷ to advise the DSB by providing rulings and recommendations. However, since the panel's conclusions can only be rejected by consensus within the DSB (a consensus that must include the complainant), in practice the panel's report is almost impossible to block. More specifically, the first request to establish a panel requires consensus for adoption; the second request, however, can only be blocked by consensus, meaning that a panel must always be established if a complainant continues to desire it.

⁸⁸⁶ *Ibid.*

⁸⁸⁷ *Ibid.*

The panel must be appointed within 45 days of the request being granted, and must deliver its report within 6 months.⁸⁸⁸ There are a number of stages in the panel's established routine. Presentations by the complainant, respondent, and other members who have announced their interest, comprise written submissions initially, followed by a first hearing, rebuttals from each party, and expert testimony. The panel then delivers a descriptive first draft, which summarises the facts of the case and the arguments presented. This is followed by the panel's interim report, including findings and conclusions. The disputants have two weeks to comment. The panel's final report is delivered to all WTO members three weeks following the end of the dispute period. It may include recommendations concerning how to bring the respondent into compliance with its WTO obligations, if deemed necessary. Subject to appeal, the panel's report becomes the DSB's ruling after 60 days, unless opposed by consensus as stated above.⁸⁸⁹

Appeal is available to both sides of a given dispute, but not to interested third parties. Appeals are heard by three members of a permanent seven-member Appellate Body, whose members have been appointed to four-year terms. The Appellate Body can uphold, modify or reverse the panel's findings and conclusions within 90 days. The DSB must then adopt or reject the decision of the Appellate Body within 30 days; again, the decision can only be rejected by consensus of WTO members.⁸⁹⁰

At the end of this process, a member-state found in contravention of its obligations under WTO agreements must within 30 days state its intention to bring itself into compliance within an agreed 'reasonable period.' If the member-state fails to do so,

⁸⁸⁸ *Ibid.*

⁸⁸⁹ *Ibid.*

⁸⁹⁰ *Ibid.*

it must enter into negotiations with the complainant, and come to an agreement on mutually-acceptable compensation within 20 days. Failing this, the complainant may ask the DSB for permission to impose limited, proportionate trade sanctions. In its turn, the DSB must grant the sanctions request within 30 days unless opposed by consensus.⁸⁹¹

The sanctions are intended to be balanced. They are to be effective but not to affect sectors other than that over which the dispute occurred.⁸⁹² Unrelated sectors can only be subject to retaliatory sanctions if sanctions within the dispute's sector would be ineffective. Finally, the timely resolution of disputes is considered essential to the effective functioning of the WTO. As such, it is mandated that the entire process described above be completed within 15 months.⁸⁹³

What is clear from the above is that the representation of women and women's interests could be addressed under the DSM if any member were willing to make it explicitly the subject of a dispute or an exception. If so, a panel would be formed, reports would be produced, a final decision would be reached, and the decision would almost certainly be adopted.

Again, there are two basic ways in which this could be done: first, by the indirect approach, in which a member adopts a policy that invites complaint; and second, by the direct approach, in which a member files a complaint in order to require the adoption of gender as a legitimate matter for trade-policy-related discussions at the WTO. Here again, as LaMarche has argued, and as I stress, although focusing on the negative effects of trade and trade policy upon women is necessary, failing to engage with the legal

⁸⁹¹ *Ibid.*

⁸⁹² *Ibid.*

⁸⁹³ *Ibid.*

structures of the WTO can seriously hinder the achievement of desired and long-lasting results.⁸⁹⁴ Thus, again, the importance of the hybridization of soft law and hard law within the WTO, which could be used to facilitate engagement with women's organizations without requiring them to abandon their critiques of the WTO.

Indirect Approaches through Exceptions in WTO Agreements

The indirect approach would require a member to enact policies restricting trade with another country explicitly upon grounds of gender-based policies, or the lack thereof, in the target country. The purpose would be to invite a DSB complaint and set in motion the dispute-settlement process. Again, it is this invitation that makes the approach indirect. The panel, and likely the Appellate Body, would be required to rule on whether gender policies in question constituted a legitimate exception under Article XX or XXIII of the GATT, the Agreement on Agriculture, the TRIMS Agreement, the Agreement on Subsidies and Countervailing Measures, the GATS Agreement, or the TRIPS Agreement. Therefore, the study must address each of these agreements to determine whether and how each might be used to advance the representation of women and women's interests within the WTO. More specifically, with respect to the GATT, the panel would have to decide whether a trade restriction based upon an objection to a member's gender policy, or the lack thereof, is justifiable under article XX (a), which allows for restrictions necessary to the protection of public morals, or under XX (b), which allows for

⁸⁹⁴ Lamarche found that one of the major problems is the lack of training and education of advocates in the legal aspects of the WTO, which regularly results in tractable complaints only after trade agreements have been signed. Her observation was quite correct, which was also collaborated by the interviews conducted for this research. Lamarche, Lucie, Talk delivered at Norman Patterson School of International Affairs (NPSIA), Carleton University, 2006. Notes on file with the author.

restrictions necessary for the protection of human life or health. As a senior WTO official stated,

Most situations ... will be situations where other treaties [are] invoked as a defense to an allegation: ‘You don’t respect the WTO; you impose restrictions.’ And the country imposing the restrictions [then] says: ‘Yes, I violate Article XI, but I can do that because Article XX says I can take measures necessary for public morals, and what you’re doing is immoral.⁸⁹⁵

These exceptions are further subject to the two blanket prohibitions in the Article’s preamble (‘chapeau’): the first upon arbitrary or unjustifiable discrimination against one country by another, and the second upon disguised restrictions on trade.

Analogous Disputes?

This first possibility would be analogous to the major disputes concerning trade and the environment. In both *United States-Tuna (Mexico, 1991)* and *United States-Tuna (EEC, 1992)*, embargoes placed by the US on imports of tuna caught with ‘purse seine’ nets resulted in complaints filed with the DSB, which led to a ruling in the second dispute justifying the embargo as necessary for the preservation of natural resources.⁸⁹⁶ The same may be said of the two *US-Shrimp* disputes of 1997-98 and 2000-01, which resulted in

⁸⁹⁵ Senior member of WTO Secretariat. Confidential interview transcribed verbatim from digital recording, October 2007.

⁸⁹⁶ World Trade Organization, Committee on Trade and Environment, *GATT/WTO Dispute Settlement Practice Relating to GATT Article XX, Paragraphs (b), (d), and (g)*, WT/CTE/W/203 (8 March 2002), 33-35.

justification of a requirement for ‘trap-door’ nets.⁸⁹⁷ In *US-Gasoline (1995-6)*, emissions standards promulgated by the US Environmental Protection Agency led to the filing of a dispute, which resulted in the important ruling that a policy to reduce the depletion of clean air could be considered a policy to conserve a natural resource under Article XX (g) of the GATT.⁸⁹⁸ Similarly, *EC-Asbestos (1998-2001)*, in which EC prohibitions upon the importation of asbestos products were challenged by Canada, resulted in a ruling that articulated the important principle that members ought to be given latitude in choosing the level of health protection their policies pursue, even when the policies are trade-distorting, and must be protected under GATT Article XX (b).⁸⁹⁹ These cases show how a new issue-area can be brought within the purview of the WTO by using the Article XX exceptions in the GATT. The same logic could in theory be employed to introduce considerations of the representation of women’s interests.

Burda suggests that Article XX (e), which allows for trade restrictions barring the products of prison labour, could be extended to apply to all products of forced labour, and that this could be used to justify restrictions upon products that result from the exploitation or *de facto* forced labour of women.⁹⁰⁰ However, this interpretation has never been tested through a dispute panel or through the Appellate Body.

⁸⁹⁷ World Trade Organization, Legal Affairs Division, WTO Dispute Settlement: One-Page Case Summaries (2009 Edition) (1995-2008), (Geneva: WTO Publications, 2009), 21-22.

⁸⁹⁸ World Trade Organization, Committee on Trade and Environment, *GATT/WTO Dispute Settlement Practice Relating to GATT Article XX, Paragraphs (b), (d), and (g)*, WT/CTE/W/203 (8 March 2002), 38-40.

⁸⁹⁹ *Ibid*, 45.

⁹⁰⁰ Burda, Julien, “Chinese Women After the Accession to the World Trade Organization: A Legal Perspective on Women’s Labor Rights,” in Günseli Berik, Xiao-Yuan Dong and Gale Summerfield, eds., Gender, China and the World Trade Organization: Essays From Feminist Economics (London: Routledge, 2010), 267-268.

In each of the above cases, the formula followed was that a trade distortion was met with a complaint to the DSB, which produced a ruling validating and expanding the available options for protecting the environment under WTO agreements. Yet the rulings did so by means of an interpretation to the effect that the exceptions already present in WTO Agreements contained within them the authorization for the exceptions sought. Thus, violations of WTO obligations were justified by interpretation without adding to or diminishing rights or obligations under the WTO Agreements. The formula would seem, then, to provide a route that ought to be explored with relation to accomplishing the representation of women and women's interests within the WTO. Clearly, proactive trade restrictions, intended to instigate a dispute, constitute a possible and legitimate way to introduce the representation of women's interests within the WTO without agreement of all WTO members; it is roughly analogous to how environmental concerns were introduced through the *US-Shrimp* disputes mentioned above.

It is worth exploring this process in greater detail, since it constitutes one of the most intuitively practicable approaches for advancing the representation of women and women's interests within the WTO. In the 1997-98 iteration, U.S. policy concerning the importation of shrimp was held by the DSB to constitute an arbitrary restriction upon trade, and therefore to violate the GATT.⁹⁰¹ This was followed by U.S. amendments to the policy, and by good-faith but failed attempts to negotiate an agreement between the United States, Malaysia, and other interested countries.⁹⁰² When the dispute was raised a second time in the DSB, in 2000-01, the resulting panel and the Appellate Body decided

⁹⁰¹ World Trade Organization, Committee on Trade and Environment, *GATT/WTO Dispute Settlement Practice Relating to GATT Article XX, Paragraphs (b), (d), and (g)*, WT/CTE/W/203 (8 March 2002), 21.

⁹⁰² *Ibid*, 22.

in favour of the United States. The DSB found that because the U.S. policy allowed for multiple kinds of nets with essentially the same effect, and because a good faith effort had been made to negotiate an agreement (i.e. to find a less trade-distorting solution), the U.S. restrictions were now protected by Article XX (g) of the GATT, allowing for restrictions in trade necessary to the protection of exhaustible natural resources.⁹⁰³ Thus, in the second US-Shrimp dispute, the complaint brought against the American trade restrictions allowed for the reaffirmation of environmental concerns both as a legitimate cause for restricting trade, and as a legitimate area for discussion within the WTO. This was accomplished in the same way that, in the hypothetical first possibility above, a trade restriction that instigates a complaint might do for the representation of women and women's interests. This is, therefore, a process that can be adopted to advance the representation of women and women's interests within the WTO. That experts within the WTO also recognize the replicable or analogical nature of the analysis in *US-Shrimp* is shown in the following lengthy excerpt from an interview with a senior WTO official, which corroborates the study's findings:

Are you using the Vienna Convention to link the two treaties, WTO and human rights? But now there are two different things that are often confused. One is the interpretation of the WTO treaty, the interpretation to understand the scope of the obligation, and etc. A distinct set of situations concern the application of the WTO treaty. That is to say, once you've decided, 'OK, so what does this mean, it means, for instance, a, b, c, d.' We don't have any human rights jurisprudence but we have environmental jurisprudence. And for instance, the WTO says, you can put trade restrictions, that are usually illegal, you can,

⁹⁰³ *Ibid*, 22.

violate Article 11 of the GATT, maintain – if you consider that you need to do that for the environment. I'm making things simpler. And, the term in the Article 20, is that you can always take restrictions on trade for ‘measures relating to the conservation of natural resources.’ So this is written for 60 years. What is a natural resource? So the jurisprudence, as I explained, said, ‘Natural resource,’ so the court looked at CBD convention, all sorts of other existing treaties to define what is a natural resource, and they reached a conclusion that natural resources include clean air, include turtles, include all sorts of things. A distinct operation, as I said, was to say, in that specific dispute, that was a dispute between US and Asian countries, US says, ‘I ban shrimp coming from these countries, although they’re identical to all other shrimps, because when they fish shrimp they kill turtles.’ Then in the debate as to whether or not the specific US measure, at issue, was in violation of the WTO, as defined to include conservation of natural resources further defined to include clean air and turtles and all that – Once you’ve decided what is the meaning of the obligation, as I said, the second operation, the second legal sort of operation is, ‘In this particular is there a violation of the WTO as defined?’ In that second step, then the US said, ‘Yes, yes, it is about conservation of turtles.’ And the US said, ‘Look, I have behaved the same way in many regional trade agreements,’ and pointed to existing agreements, and pointed to existing agreements as evidence of its good faith, and as evidence of its concern over turtles, shrimp, etc, etc. So if you ask me is there a way to introduce human rights, possibly, not using natural resources this time, but, you have another exception that is call public morals. ... So possibly, possibly, we could say, that the EC, US laws, sanctions on Myanmar importation, for instance, could follow the same pattern, being measures necessary for the protection of public morals.⁹⁰⁴

⁹⁰⁴ Senior member of WTO Secretariat. Confidential interview transcribed verbatim from digital recording, October 2007.

Moreover, as shown below, the process can be replicated in the context of exceptions under other WTO Agreements that provide opportunities to advance the representation of women and women's interests. The discussion therefore addresses the possibilities under each Agreement in turn, before considering whether the indirect approach is likely to be effective in practise.

Article XX of the General Agreement on Tariffs and Trade

The Office of the UN High Commissioner for Human Rights agreed with the reasoning concerning analogous disputes in their 2005 study, “Human Rights and World Trade Agreements: Using general exception clauses to protect human rights.” Specifically, the OHCHR argued that the general exceptions for ‘public morals,’ ‘public order,’ and ‘human, animal or plant life or health,’ found together or severally in most WTO agreements, could serve as means to introduce a greater degree of human rights protection into multilateral trade agreements.⁹⁰⁵ The report argued that the Appellate Body’s (AB’s) analysis in the *US-Shrimp* cases, insofar as it articulated how environmental concerns could be addressed within GATT 1994, could be extended by analogy to the introduction of human rights.⁹⁰⁶ The present study shares this argument by analogy, but further holds that it could conceivably be extended to the representation of women and women's interests.

What is clear from the OHCHR study is that the WTO Agreements afford a conceptual possibility of protecting human rights within the context of the protection of

⁹⁰⁵ Office of the United Nations High Commissioner for Human Rights, *Human Rights and World Trade Agreements: Using General Exception Clauses to Protect Human Rights* (New York and Geneva: United Nations, 2005), iii, 2-5.

⁹⁰⁶ *Ibid*, 7-8.

'public morals,' 'public order,' and 'human, animal or plant life or health.' Moreover, where human rights can be protected, there also can women's rights be protected as human rights, and the representation of women and women's interests be advanced. Of course, this does not discount advancement of the representation of women and women's interests without reference to human rights. From this point, however, the discussion becomes more specific and more complex.

First, it is necessary to distinguish between the Marceau-Pauwelyn debate that closed Chapter 5 and the present discussion of exceptions under the WTO Agreements. The former concerned the question of whether extra-WTO human rights treaties overrode conflicting passages in the WTO Agreements, given normal rules of treaty interpretation. It therefore turned on the question of whether the WTO Agreements, and particularly the DSU, constituted *lex specialis*, thereby negating the general principle that later international law takes precedence over earlier. The present discussion, by contrast, concerns the question of whether the various exceptions *within the WTO Agreements* can be understood to protect human rights and the representation of women and women's interests (the latter whether by extension or of its own accord). If they can, then the question becomes the nature and extent of their protection under the WTO Agreements, not whether they are protected.

As the OHCHR study describes, the meaning of 'public morals,' 'public order,' and 'human life or health,'⁹⁰⁷ is determined for the purposes of WTO jurisprudence with reference to four basic sources: first, the ordinary meaning of a given term; second, the legal context of the term, including the preamble of the treaty in which the term appears,

⁹⁰⁷ For convenience, 'human, animal, or plant life or health' (GATT, Article XX, paragraph (b)) is shortened in this discussion to 'human life or health,' since this is the portion of paragraph (b) relevant to a discussion of the representation of women and women's interests.

and relevant WTO case law in which the term is interpreted; third, the international law that applies to both parties to the dispute in which the term has arisen; and fourth, if necessary, the preparatory work of the treaty or treaties, and other such “supplementary means of interpretation.”⁹⁰⁸ For the purposes of the present discussion, only the first two are required to address ‘public morals’ and ‘human life or health,’ while the fourth must also be touched upon in the context of ‘public order.’

That the ordinary meanings of ‘public morals,’ ‘public order,’ and ‘human life or health’ comprehend human rights is uncontroversial. As Howse has stated, “the very idea of public morality has become inseparable from the concern for human personhood, dignity and capacity reflected in fundamental rights.”⁹⁰⁹ The OHCHR study states plainly that “arguing for the exclusion of the norms and standards of international human rights would be very difficult to sustain.”⁹¹⁰ The Universal Declaration of Human Rights also clearly associates ‘human life or health’ with human rights. It states, “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.”⁹¹¹ The ordinary

⁹⁰⁸ Office of the United Nations High Commissioner for Human Rights, *Human Rights and World Trade Agreements: Using General Exception Clauses to Protect Human Rights* (New York and Geneva: United Nations, 2005), 5.

⁹⁰⁹ Howse, Robert, “Back to Court after Shrimp/Turtle? Almost but Not Quite Yet: India’s Short-lived Challenge to Labor and Environmental Exceptions in the European Union’s Generalized System of Preferences,” *American University International Law Review*, vol. 18, no. 6 (2003), 1368. Also cited in Office of the United Nations High Commissioner for Human Rights, *Human Rights and World Trade Agreements: Using General Exception Clauses to Protect Human Rights* (New York and Geneva: United Nations, 2005), 5.

⁹¹⁰ Office of the United Nations High Commissioner for Human Rights, *Human Rights and World Trade Agreements: Using General Exception Clauses to Protect Human Rights* (New York and Geneva: United Nations, 2005), 5.

⁹¹¹ *Universal Declaration of Human Rights*. Adopted on 10 December 1948. <http://www.un.org/en/documents/udhr/> (25 September 2014). Also cited in Office of the United Nations

meaning of ‘public order’ also comprehends a sufficiently wide scope not only to admit protection of human rights, but nearly every other initiative of public policy as well.

The difficulty, then, is not to incorporate human rights, and therefore women’s rights and the representation of women and women’s interests, within the scope of the ordinary meaning of ‘public morals,’ ‘human life or health,’ or ‘public order.’ The difficulty is that the ordinary meaning of these terms would comprehend such a wide range of human activity that the exceptions in the WTO Agreements would serve to protect almost every conceivable trade policy, rendering the WTO Agreements essentially meaningless as governing instruments for international trade. Yet ‘public morals,’ ‘human life or health,’ and ‘public order,’ are exceptions to the WTO Agreements, and must therefore be interpreted in such a way that they do not render the agreements null. Therefore, ‘legal context,’ ‘international law’ and other supplementary means of interpretation, the three other sources of interpretation on which the textual construction of the WTO Agreements can rest, have to be employed as necessary in such a way as to narrow the ordinary meaning of the ‘public morals,’ ‘human life or health,’ and ‘public order’ exceptions so that they continue to have meaning but do not threaten the fundamental purpose of the WTO Agreements.

As such, it is necessary to consider first the context of the exceptions under Article XX of the GATT, particularly since the language of Article XX is mirrored in other WTO Agreements. The exceptions within the remaining WTO Agreements will then be considered sequentially.

As determined by the reports of the Panel and AB in *China-Raw Materials* (2011-12), GATT Article XX exceptions do not apply to the non-GATT WTO Agreements unless they have been explicitly incorporated within the text of those Agreements.⁹¹² This is evidently despite the WTO Agreements constituting a ‘single undertaking’ and therefore constituting a single treaty under international law. As the Panel wrote,

On occasion, WTO Members have incorporated by cross-reference, the provisions of Article XX of the GATT 1994 into other covered agreements. This was done, for example, with the TRIMS Agreement, which explicitly incorporates the right to invoke the justifications of Article XX of the GATT 1994. In the Panel’s view, the legal basis for applying Article XX exceptions to TRIMS obligations is the text of the incorporation of the TRIMS Agreements, not the text of Article XX of the GATT 1994. ... In the Panel’s view, it is reasonable under these circumstances to assume that, were GATT Article XX intended to apply to Paragraph 11.3 of China’s Accession Protocol, language would have been inserted to suggest this relationship. However, as noted above, no such language is found in Paragraph 11.3 of China’s Accession Protocol.⁹¹³

This perspective was not uncontroversial. Lester suggested that further clarification from the AB might be forthcoming, since China had appealed the report.⁹¹⁴

⁹¹² World Trade Organization, Dispute Settlement, Dispute DS394, *China-Measures Related to the Exportation of Various Raw Materials* (Panel Report circulated 5 July 2011; Appellate Body Report circulated 30 January 2012), http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds394_e.htm (accessed 10 June 2014).

⁹¹³ World Trade Organization, *China-Measures Related to the Exportation of Various Raw Materials*, Panel Report (5 July 2011), para. 7.153. Cited at “International Economic Law and Policy Blog,” <http://worldtradelaw.typepad.com/ielpblog/2011/07/gatt-article-xx-as-a-defense-to-non-gatt-agreements.html> (accessed 10 June 2014).

⁹¹⁴ Lester, Simon, Comment of 10 July 2014, “International Economic Law and Policy Blog,” <http://worldtradelaw.typepad.com/ielpblog/2011/07/gatt-article-xx-as-a-defense-to-non-gatt-agreements.html> (accessed 10 June 2014).

Howse went so far as to imply strongly that the Panel had not fully understood the prior AB decision in *China-Publications*.⁹¹⁵ In the event, however, when the AB circulated its report, it upheld the Panel's finding, deciding that the text of Paragraph 11.3 of China's Accession Protocol did not give China recourse to the GATT Article XX exceptions in order to justify its failure to eliminate the specific export duties at issue.⁹¹⁶ By extension, the AB determined that the GATT Article XX exceptions did not apply of their own accord to other WTO Agreements.⁹¹⁷ It follows that they and any other exceptions must be incorporated explicitly within the text of an Agreement in order to be applicable. This means that the context of exceptions for 'public morals,' 'human life or health,' and 'public order,' must be addressed in accordance with each WTO Agreement, save where the exceptions of one agreement are explicitly included in another.

As such, for the purposes of the present discussion, the relevant paragraphs of GATT Article XX are (a) and (b), concerning 'public morals' and 'human life or health.' These, together with the Article's 'chapeau,' read as follows:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in

⁹¹⁵ Howse, Robert, Comment of 12 July 2011, "International Economic Law and Policy Blog," <http://worldtradelaw.typepad.com/ielpblog/2011/07/gatt-article-xx-as-a-defense-to-non-gatt-agreements.html> (accessed 10 June 2014).

⁹¹⁶ World Trade Organization, Dispute Settlement, Dispute DS394, *China-Measures Related to the Exportation of Various Raw Materials* (Panel Report circulated 5 July 2011; Appellate Body Report circulated 30 January 2012), http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds394_e.htm (accessed 10 June 2014).

⁹¹⁷ World Trade Organization, Dispute Settlement, Dispute DS394, *China-Measures Related to the Exportation of Various Raw Materials* (Panel Report circulated 5 July 2011; Appellate Body Report circulated 30 January 2012), http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds394_e.htm (accessed 10 June 2014).

the Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (a) necessary to protect public morals; (b) necessary to protect human, animal or plant life or health. ...⁹¹⁸

GATT Article XX does not mention ‘public order,’ and the study would not be justified in assuming that ‘public order’ can be ‘read in’ to Article XX, despite the suggestion to the contrary in the OHCHR study.

In considering the context of GATT Article XX (a) and (b), it is essential to attend first to the requirements that the protected measure be neither an ‘arbitrary or unjustifiable discrimination,’ nor a disguised restriction upon trade, and that it be ‘necessary.’ As the AB declared in *Brazil-Retreaded Tyres*, the chapeau of Article XX is fundamentally “but one expression of the principle of good faith.”⁹¹⁹ It is, further, an expression of “the doctrine of *abus du droit*, [which] prohibits the abusive exercise of a state’s rights and enjoins that whenever the assertion of a right ‘impinges on a field covered by [a] treaty obligation, it must be exercised *bona fide*, that is to say, reasonably.’”⁹²⁰ This requirement for reasonableness can only serve to limit the potential application of human rights and women’s rights within WTO agreements, because it precludes the absolute and totalizing prerogative of which rights discourse is capable.

To develop with greater precision the limitations upon the applicability of human rights and women’s rights within the WTO, the most important passage of the chapeau of GATT Article XX is the phrase, ‘arbitrary or unjustifiable discrimination between

⁹¹⁸ World Trade Organization, *General Agreement on Tariffs and Trade*, Article XX.

⁹¹⁹ World Trade Organization, Dispute Settlement Body, Appellate Body Report, *Brazil-Retreaded Tyres*, DS332, para. 224.

⁹²⁰ *Ibid*, para. 224.

countries where the same conditions prevail.’ The passage has been considered at length by the AB, producing three principles of direct import. First, the AB determined in *US-Shrimp* that it is not acceptable for a WTO Member to use an exception to justify an economic embargo that would “require other Members to adopt essentially the same comprehensive regulatory programme, to achieve a certain policy goal, as that in force within the Member’s territory, without taking into consideration different conditions which may occur in the territories of those other Members.”⁹²¹ This would seem to counter the possibility that any of the exceptions in GATT Article XX could be used by an importing country to require the adoption of a given human rights regime by any country wishing to export to it.

Second, in *US-Shrimp (Article 21.5-Malaysia)*, the AB determined that “there is an important difference between conditioning market access on the adoption of essentially the same programme, and conditioning market access on the adoption of a programme *comparable in effectiveness*.⁹²² The AB further determined that “a measure should be designed in such a manner that there is sufficient flexibility to take into account the specific conditions prevailing in any exporting Member,”⁹²³ while making clear that this did not imply a requirement to address individually the specific conditions of every exporting Member.⁹²⁴ Again, the standards of ‘comparable effectiveness’ and ‘sufficient flexibility’ limit the extent to which human rights discourse can be employed at the WTO to advance the representation of women and women’s interests. This is because they

⁹²¹ *Ibid*, para. 164.

⁹²² World Trade Organization, Dispute Settlement Body, Appellate Body Report, *US-Shrimp (Article 21.5 – Malaysia)*, DS58, para. 144.

⁹²³ *Ibid*, para. 149.

⁹²⁴ *Ibid*, para. 149.

require WTO Members to attend to the specificity of circumstances in other member-countries, which precludes a blanket *quid-pro-quo* exchange of the adoption of a given human rights regime for the right to trade.

Third, in *Brazil-Retreaded Tyres*, the AB determined upon the need for a ‘rational connection to the objective’ in the application of an Article XX exception.⁹²⁵ This again restricts the capacity for human rights discourse to advance the representation of women and women’s interests within the WTO, because, combined with the standard of ‘comparable effectiveness,’ it creates a requirement for much greater specificity in targeting the use of an exception against a particular traded good or practise. That is to say, the ‘rational connection’ standard requires that there be a defined objective. Then, the ‘comparable effectiveness’ standard requires that the objective be such as can be met by different policies in different countries as necessitated by their respective domestic conditions. Again, therefore, a WTO member cannot simply institute a requirement that any country wishing to trade must adopt a specific set of policies concerning human rights or women’s rights. It follows that the opportunities to use the indirect approach to advance the representation of women and women’s interests are meaningfully limited by the chapeau of GATT Article XX. This is particularly so with respect to the strategy of identifying women’s rights as human rights. Finally, ‘disguised restriction on international trade’ has generally been construed as another kind of arbitrary or unjustifiable discrimination, and serves essentially to ensure that the GATT Article XX exceptions are not used merely as cover for protectionist or ideological programmes.⁹²⁶

⁹²⁵ World Trade Organization, Dispute Settlement Body, Appellate Body Report, *Brazil-Retreaded Tyres*, DS332, para. 227.

⁹²⁶ World Trade Organization, Dispute Settlement Body, Appellate Body Report, *US-Gasoline*, DS2, p. 25, DSR 1996:1, p.3, para. 23.

There remains, in connection with GATT Article XX, the question of what is meant by ‘necessary to protect public morals’ and ‘necessary to protect human, animal or plant life or health.’ There has never been a dispute brought to the DSB concerning GATT Article XX (a) or (b) as they concern human rights, women’s rights, or any other aspect of the representation of women and women’s interests. However, there have been important determinations made by the AB concerning the meaning of ‘necessary,’ which impact upon the indirect approach as a means for advancing the representation of women and women’s interests.

The so-called ‘necessity test’ has been developed by the AB as a two-step process: first, as established in *Brazil-Retreaded Tyres*, the trade-restricting measure must make a demonstrable qualitative or quantitative material contribution to the objective of the exception (i.e. public morals, public health, etc.)⁹²⁷; second, as established in the same case and further developed in *China-Publications*, the trade-restrictive measure must be established as least-trade restrictive by comparison with any reasonable alternatives offered by the member making the complaint.⁹²⁸ Beyond this, the AB in *China-Publications* and *Brazil-Retreaded Tyres* provided further nuance to three aspects of the ‘necessity test.’ First, the AB determined that alternative measures must be ‘reasonably available,’ in that they must not place an undue burden upon the member seeking to use the exception.⁹²⁹ Second, the AB determined that it is the responsibility of the member invoking the exception to show necessity, while the member making the complaint must

⁹²⁷ World Trade Organization, Dispute Settlement Body, Appellate Body Report, *Brazil-Retreaded Tyres*, DS332, paras. 145-147, 150-151.

⁹²⁸ *Ibid*, para. 156. Also World Trade Organization, Dispute Settlement Body, Appellate Body Report, *China-Publications and Audiovisual Products*, DS363, paras. 318-319.

⁹²⁹ World Trade Organization, Dispute Settlement Body, Appellate Body Report, *China-Publications and Audiovisual Products*, DS363, para. 327.

produce any ‘reasonable alternatives’ it desires to see considered.⁹³⁰ Third, the AB recognized that every WTO member enjoys the right to its chosen level of protection under any of the exceptions in the WTO Agreements.⁹³¹

For the indirect approach, the ‘necessity test’ and its subsequent clarification by the AB carry important implications. It leaves no question concerning whether ‘public morals’ or ‘human life or health’ are eligible for protection under the WTO Agreements; they unequivocally are, and to any extent desired by a WTO member. Moreover, ‘public morals’ was allowed in *China-Publications* to comprehend that which ‘disturbs public order or destroys social stability,’ that which ‘jeopardizes social morality,’ and that which ‘jeopardizes the solidarity ... of the nation.’⁹³² All of these definitions were advanced by China and accepted by the US under the rubric of ‘public morals.’ Indeed, the Panel wrote, and the AB did not disagree, that WTO members “should be given some scope to define and apply for themselves the concept of ‘public morals’ ... according to their own systems and scale of values.”⁹³³ Similarly, in *Brazil-Retreaded Tyres*, the AB clearly and consistently refrained from judgment concerning the merit of the Brazilian understanding of ‘human life or health’ as reflected in the trade-distorting policies at issue.⁹³⁴ In short, then, the WTO member invoking the exception is given wide latitude in defining the

⁹³⁰ *Ibid*, para. 319.

⁹³¹ World Trade Organization, Dispute Settlement Body, Appellate Body Report, *Brazil-Retreaded Tyres*, DS332, para. 170.

⁹³² World Trade Organization, Dispute Settlement Body, Appellate Body Report, *China-Publications and Audiovisual Products*, DS363, para. 7.760. Cited in Lang, Andrew, World Trade Law after Neoliberalism: Re-imagining the Global Economic Order (Oxford: Oxford University Press, 2011), 328-329.

⁹³³ World Trade Organization, Dispute Settlement Body, Appellate Body Report, *China-Publications and Audiovisual Products*, DS363, para. 7.759. Cited in Lang, Andrew, World Trade Law after Neoliberalism: Re-imagining the Global Economic Order (Oxford: Oxford University Press, 2011), 329.

⁹³⁴ World Trade Organization, Dispute Settlement Body, Appellate Body Report, *Brazil-Retreaded Tyres*, DS332; See also Lang, Andrew, World Trade Law after Neoliberalism: Re-imagining the Global Economic Order (Oxford: Oxford University Press, 2011), 329.

scope of the terms of which the exception consists. Clearly, women's rights as human rights can be included within the definitions of 'public morals' and 'human life or health' in their context as GATT Article XX exceptions.

Yet, as with the chapeau of Article XX, the AB's elaboration upon the meaning of the 'necessity test' places important limitations upon the capacity for the indirect approach to advance the representation of women and women's interests. This is true regardless of whether the representation of women and women's interests is pursued in itself or as part of a strategy of women's rights as human rights. Again, the purpose of the indirect approach is to invite a complaint to the DSB from another WTO member by means of a trade-restrictive policy, and then to defend the policy under an exception, explicitly arguing that the representation of women and women's interests allows the trade-restrictive policy to be protected under the chosen exception. However, in spite of the wide latitude given to members using the 'public morals,' and 'human life or health' exceptions, the AB's construction of the necessity test in Article XX jurisprudence requires that any indirect approach focus upon a particular good, or a practise in the production of a good, and that this focus be directed against another WTO member or members. More than this, the member invoking the exception must show either by logical progression or by empirical evidence that the particular trade-restrictive measure it has employed is necessary to the preservation of public morals or human life or health precisely because of how women or women's interests would otherwise be affected. That done, the same member is then likely to have to show convincingly that the trade restriction at issue protects women and women's interests as effectively, and in a manner no more trade-restrictive, than any number of other reasonably available alternatives.

It is conceivable that the banning or restriction of a good could protect the representation of women and women's interests. Such goods could conceivably include materials of a misogynistic or pornographic character, hygiene products or pharmaceuticals of doubtful quality, or indeed pharmaceuticals targeting women whose purpose is held to be contrary to 'public morals.' There is little to be gained by detailing individual goods further, and, to be succinct, there can be no doubt that the representation of women and women's interests is comprehended within the meaning of 'public morals' and 'human life or health' in Article XX. Yet the nature of the indirect approach, and the AB's construction of the GATT Article XX exceptions, limit greatly the impact of this approach, because they require every use of the indirect approach to address a particular good exported by a particular country. That is to say, the indirect approach using GATT Article XX can be used to advance individual cases of the representation of women and women's interests, but the requirement to focus upon a particular good and a particular member or members means that the indirect approach using GATT Article XX is ineffective for advancing a programme, and cannot be said meaningfully to advance the representation of women and women's interests within the WTO as a programmatic or standing concern.

The indirect approach using GATT Article XX therefore does not suffice to meet the requirements of the test imposed by the present study to determine whether the WTO can take a democratic turn. What is more, it is conceivable that the 'public morals' exception, particularly given the AB's construction of the chapeau and necessity test of GATT Article XX, could be used to protect a 'public morals' regime that would be considered to impede the representation of women and women's interests. This becomes

particularly evident if one considers the restrictions upon women in a country such as Saudi Arabia, combined with the AB's determination that every WTO member enjoys a right to protect 'public morals' to the extent the member deems appropriate.

Finally, whether pursuant to GATT or any other WTO Agreement, the indirect approach operates under two further important limiting factors. First, it is entirely possible that the indirect approach would be unsuccessful in that the Panel or Appellate Body could decide against the representation of women and women's interests. This can only increase caution in the use of the indirect approach, further militating against its effectiveness in advancing the representation of women and women's interests. Second, in the WTO's DSU, and in the operations of the DSB, there is no formal doctrine of *stare decisis*, meaning that Panel and AB decisions do not constitute binding precedents. Although in practise AB constructions of textual meaning have tended to be highly influential, and although the decision of like cases in relatively like manner is necessary to the legitimacy of any judicial system, the absence of a formal doctrine of *stare decisis* militates against the effectiveness of the indirect approach in advancing the representation of women and women's interests generally.

Agreement on Agriculture (AoA)

The Agreement on Agriculture (AoA) places aggregate limits upon the domestic support members may give even to subsistence farmers. These restrictions cause particular concern with respect to gender equality, since, for example, most women farmers in developing countries work in subsistence agriculture. However, the Agreement

also contains provisions for ‘special and differential treatment’,⁹³⁵ of developing-country members, and ‘green box’⁹³⁶ exemptions to aggregate limits upon such areas as disaster relief, domestic food aid, extension services and stockholding for food security.⁹³⁷ It is perhaps conceivable that initiatives could be framed to advance the representation of women and women’s interests with respect to agriculture in terms of ‘special and differential treatment’ for developing country members and ‘green box’ exemptions for members generally. However, this would require a very expansive, indeed tortured, reading of the four exemptions mentioned above, and the possibility is generally not credited.

This viewpoint is demonstrated in the following excerpt from an interview with a senior WTO official, which addresses the unlikelihood of pursuing women’s rights as human rights within the context of the DSB and the AoA:

Yes, but what I’m saying is this: from a legal point of view, the Agreement on Agriculture may impose ... a heavier burden on women, I agree. But now, as a lawyer, you have to find a word in the WTO treaty that is gendered, so that you could say, ‘I’m

⁹³⁵ Part IX: Article 15: Special and Differential Treatment: 1. In keeping with the recognition that differential and more favourable treatment for developing country Members is an integral part of the negotiation, special and differential treatment in respect of commitments shall be provided as set out in the relevant provisions of this Agreement and embodied in the Schedules of concessions and commitments. 2. Developing country Members shall have the flexibility to implement reduction commitments over a period of up to 10 years. Least-developed country Members shall not be required to undertake reduction commitments. http://www.wto.org/English/docs_e/legal_e/14-ag_01_e.htm (accessed 8 September 2013).

⁹³⁶ In WTO terminology, subsidies in general are identified by “boxes,” which are given the colours of traffic lights: green (permitted), amber (slow down — i.e. be reduced), red (forbidden). In agriculture, things are, as usual, more complicated. The Agreement on Agriculture has no red box, although domestic support exceeding the reduction commitment levels in the amber box is prohibited; and there is a blue box for subsidies that are tied to programmes that limit production. There are also exemptions for developing countries (sometimes called an “S&D box”, including provisions in Article 6.2 of the agreement). http://www.wto.org/english/tratop_e/agric_e/agboxes_e.pdf (accessed 8 September 2013).

⁹³⁷ Zampetti, Americo Beviglia “The Impact of WTO Rules on the Pursuit of Gender Equality,” in Anh-Nga Tran-Nguyen and Americo Beviglia Zampetti, eds., *Trade and Gender: Opportunities and Challenges for Developing Countries* (New York: United Nations: UNCTAD, 2004), 307.

not clear of [i.e. ‘on’] the meaning; I will look at these other treaties to understand the meaning.’ But you’re not entitled to go to other treaties unless there is ambiguity in the WTO term, and unless the other treaty and the WTO deal with the same subject matter as Article 30 of the Vienna Convention. Now what is the subject matter? You can stretch it, but ... on the Agreement on Agriculture, I just don’t know what sort of setting would allow you to, you know, ‘green box’ – you cannot go from the word ‘green box’ to the word ‘human rights treaty.’⁹³⁸

In short, although technically possible, pursuing the representation of women and women’s interests using the indirect approach and the AoA would be tortured in its construction and unlikely of success.

Agreement on Trade-Related Investment Measures

The Agreement on Trade-Related Investment Measures prohibits investment measures that are inconsistent with the principles of National Treatment and the General Elimination of Quantitative Restrictions. Conceivably, TRIMS could be applied to prohibit policies that explicitly discourage the hiring of women. As one senior WTO official stated, “if you have an investment programme that says, ‘I’ll give you more if you don’t hire women,’ possibly somebody could say [that] violates TRIMS.”⁹³⁹ It must be allowed that this is an unlikely scenario.

Far more likely is that TRIMS could be used to prohibit members from enacting policies that would favour women-owned local suppliers or that oblige investors to

⁹³⁸ Senior member of WTO Secretariat. Confidential interview transcribed verbatim from digital recording, October 2007.

⁹³⁹ Senior member of WTO Secretariat. Confidential interview transcribed verbatim from digital recording, October 2007.

purchase a specific amount of goods from women-owned businesses.⁹⁴⁰ These policies can be protected by means of the Article XX⁹⁴¹ GATT exceptions, and conceivably with recourse to Article XXI (c)⁹⁴² of GATT, because Article 3 of TRIMS explicitly incorporates the GATT exceptions. It states that “All exceptions under GATT 1994 shall apply, as appropriate, to the provisions of this Agreement [i.e. TRIMS].”⁹⁴³ Again, GATT Article XX provides for general exceptions, while Article XXI provides for security exceptions. The argument from Article XX has been discussed at length above and would be conducted in essentially the same manner under the auspices of Article 3 of TRIMS as under Article XX of GATT directly. The same opportunities would present themselves under the ‘public morals’ and ‘human life or health’ exceptions, and the same significant constraints and risks would arise. In short, the indirect approach using the exceptions under Article XX does not suffice to produce an affirmative answer to the study’s test, regardless of whether the exceptions are addressed in themselves or mediated through Article 3 of TRIMS.

It is still more unlikely that the GATT Article XXI security exceptions could advance the representation of women and women’s interests by means of the indirect

⁹⁴⁰ Zampetti, Americo Beviglia “The Impact of WTO Rules on the Pursuit of Gender Equality,” in Anh-Nga Tran-Nguyen and Americo Beviglia Zampetti, eds., *Trade and Gender: Opportunities and Challenges for Developing Countries* (New York: United Nations: UNCTAD, 2004), 308.

⁹⁴¹ Article XX: General Exceptions: Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: Paragraph (b) necessary to protect human, animal or plant life or health.

http://www.wto.org/English/docs_e/legal_e/gatt47_02_e.htm (accessed 10 September 2013).

⁹⁴² Article XXI: Security Exceptions: Nothing in this Agreement shall be construed: Paragraph (c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

http://www.wto.org/English/docs_e/legal_e/gatt47_02_e.htm (accessed 10 September 2013).

⁹⁴³ World Trade Organization, *Agreement on Trade Related Aspects of Investment Measures* (TRIMS), 1994, Article 3.

approach. This is equally true regardless of whether the exceptions are addressed directly under GATT or through TRIMS Article 3. Of the exceptions in GATT Article XXI, only paragraph (c) provides a conceptual possibility for advancing the representation of women and women's interests. It reads as follows: "[Nothing in this Agreement shall be construed] to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security."⁹⁴⁴

As such, the text might be said to provide conceptual space for human security, which might in turn provide an opening for the representation of women and women's interests. However, there has been no jurisprudence concerning GATT Article XXI under the WTO, and GATT-era practise strongly argues against a 'human security' reading. More specifically, pursuant to paragraph (c), India's 1994 background document advocating simplified balance-of-payments noted that countries facing UN sanctions in 1994 were not issued import licenses.⁹⁴⁵ Equally, Norway's 1993 import licensing notification, together with those of Cyprus and Brazil in 1994, noted that import licenses were not issued for countries sanctioned by UN resolutions.⁹⁴⁶ Clearly, then, the emphasis concerning paragraph (c) has been placed on the 'international' aspect of 'international peace and security,' and the operative understanding under the GATT regime was that paragraph (c) served to excuse GATT members from providing MFN

⁹⁴⁴ World Trade Organization, *General Agreement on Tariffs and Trade (GATT)*, Article XXI, paragraph (c).

⁹⁴⁵ L/5640/Add. 7/ Rev. 6, 18 August 1994; also BOP/321 of 24 October 1994. Cited in World Trade Organization, *GATT Analytical Index – Guide to GATT Law and Practice* (Geneva: WTO Secretariat, 1995), 605.

⁹⁴⁶ L/5640/ Add. 54; L/5640, 24 January 1994; and L/5640/Add.2/Rev.4, 13 October 1993. Cited in World Trade Organization, *GATT Analytical Index – Guide to GATT Law and Practice* (Geneva: WTO Secretariat, 1995), 605.

treatment to other GATT members facing UN sanctions. There is no evidence that a concept similar to human security was comprehended by GATT members under GATT Article XXI, and there is no evidence to suggest that the representation of women and women's interests can be advanced pursuant to GATT Article XXI, whether addressed under GATT itself or through Article 3 of TRIMS.

Agreement on Subsidies and Countervailing Measures

At present, the Agreement on Subsidies and Countervailing Measures provides no possibility to advance the representation of women and women's interests by means of the indirect approach. Its purpose is to restrict the use of subsidies and to ensure that they accord with the interests of WTO members. This can have the effect of prohibiting low-cost loans or tax credits to women entrepreneurs if the policies are shown to injure a domestic industry, if they are tied to domestic-content requirements or export performance, or if they are held to be an actionable subsidy or to cause "serious prejudice" to a WTO member.⁹⁴⁷ However, the remedy in this case would have to be more direct and positive, in legal terms, than for AoA or TRIMS, because the SCM Agreement does not include an 'exceptions' clause like GATT Article XX.

Zampetti suggests the incorporation of a provision that would exempt from challenge "subsidies granted as assistance to disadvantaged groups." Indeed, the WTO Ministerial Conference in Doha agreed that such a proposal "should be considered further

⁹⁴⁷ Zampetti, Americo Beviglia "The Impact of WTO Rules on the Pursuit of Gender Equality," in Anh-Nga Tran-Nguyen and Americo Beviglia Zampetti, eds., *Trade and Gender: Opportunities and Challenges for Developing Countries* (New York: United Nations: UNCTAD, 2004), 309-10.

by the appropriate WTO body.”⁹⁴⁸ Accordingly, the SCM Agreement constitutes an important example where the text of an agreement must be altered if the agreement is to provide an opportunity for the indirect approach to advance the representation of women and women’s interests. Such a revision is of course possible by means of multilateral negotiations; however, given the distaste of Canadian and other delegations for American ‘set-asides,’ a revision of this sort seems unlikely.

General Agreement on Trade in Services

The purpose of the General Agreement on Trade in Services is the elimination, with particular exceptions, of restrictions upon access to service markets in all sectors, including education and health care. The GATS directly affects service sectors that are crucial to development and to the provision of human rights and security. As well, the GATS ‘freezes’ sector commitments, rendering irrevocable, for example, a member’s decision to allocate authority for the provision of health care to public or to private interests, coupled with an agenda for the “progressive liberalization” of service industries incorporated within the GATS.⁹⁴⁹

The cumulative effect of these provisions is to prohibit the differential treatment of domestic and foreign service-providers in those sectors where a member has agreed to consign the provision of services to private interests. In such cases, a member cannot

⁹⁴⁸ The proposal would be along the lines of the now lapsed article 8 on non-actionable subsidies (“green light” subsidies). The article defined, *inter alia*, the category of “assistance to disadvantaged regions,” but there was no mention of disadvantaged groups.

Zampetti, Americo Beviglia “The Impact of WTO Rules on the Pursuit of Gender Equality,” in Anh-Nga Tran-Nguyen and Americo Beviglia Zampetti, eds., *Trade and Gender: Opportunities and Challenges for Developing Countries* (New York: United Nations: UNCTAD, 2004), 310.

⁹⁴⁹ Zampetti, Americo Beviglia “The Impact of WTO Rules on the Pursuit of Gender Equality,” in Anh-Nga Tran-Nguyen and Americo Beviglia Zampetti, eds., *Trade and Gender: Opportunities and Challenges for Developing Countries* (New York: United Nations: UNCTAD, 2004), 312.

demonstrate a preference for a service-provider, whether foreign or domestic, simply because the service-provider advances the cause of the representation of women and women's interests as a matter of policy. Such a preference would have to be justified under the general exceptions clauses of the GATS Article XIV as a measure necessary to 'public morals' or 'public order,' or it would have to be shown that the preferred provider is different from other providers. Finally, WTO members that desire to prefer providers that support the representation of women and women's interests, or indeed any other 'exception,' must schedule each and every such exception.⁹⁵⁰

It could be argued that a more effective method would be to incorporate a clause establishing an overarching exemption for measures designed to accomplish the representation of women and women's interests with respect to trade in services. Such a clause would have a significant effect from within the current legal structures of the WTO, and would require change, in structural and legal terms, only to an agreement already extant, rather than to the institutional structure of the WTO. For example, such a clause is included by the United States in their schedule of exemptions to the Government Procurement Agreement. The clause states that the Agreement does not affect "preferences or restrictions associated with programs promoting the development of distressed areas and businesses owned by minorities, disabled veterans and women."⁹⁵¹ As a result, the U.S. government allocated "five percent of all prime contracts and sub-contracts to small businesses owned by women and visible minorities."⁹⁵² This allocation was worth US\$5.7 billion in 1997 and both in 1997 and 1998 more than half of the

⁹⁵⁰ *Ibid*, 313 and note 41.

⁹⁵¹ *Ibid*, 312 note 39.

⁹⁵² Peebles, Dana, Status of Women Canada Policy Research, *Increasing Gender Inputs into Canadian International Trade Policy Positions at the WTO*, (Ottawa: Status of Women Canada, 2005), 75.

contracts went to small businesses owned by women of colour.⁹⁵³ However, this programme is amongst the most prominent of the American ‘set-asides’ that have caused such discontent amongst other WTO members, including Canada and other developed countries. As such, it is very unlikely that the necessary consensus could be reached to amend the GATS by incorporating a clause similar to that in the American schedule of exceptions to the GPA.⁹⁵⁴

The GATS Article XIV exceptions, mentioned above, incorporate the language of GATT Article XX very precisely. The chapeau of GATS Article XIV repeats the prohibitions upon ‘arbitrary or unjustifiable discrimination’ and ‘disguised restriction on trade.’ The exceptions themselves must again be ‘necessary’; they also repeat the language of ‘public morals’ and ‘human, animal or plant life or health,’ while adding an exception for ‘public order.’

The ‘public morals’ and ‘human life or health’ exceptions have been addressed above under GATT itself. That their interpretation under GATS is to be informed by GATT jurisprudence, and is essentially the same as the interpretation given to the GATT exceptions, was established by the AB in *US-Gambling*. There, the AB declared that

Article XIV of the GATS sets out the general exceptions from obligations under that Agreement in the same manner as does Article XX of the GATT 1994. ... Similar language is used in both provisions, notably the term ‘necessary’ and the requirements set

⁹⁵³ *Ibid*, 75.

⁹⁵⁴ Canada, in its capacity as a WTO Member, strongly dislikes these American preferential allocations, or ‘set-asides,’ as they are known colloquially. Lamarche argues that the American use of ‘set-asides’ has militated against Canada’s adoption of similar policies at a domestic level, and has caused other countries to pursue exclusions, exemptions and exceptions to a greater extent. In this way, the American ‘set-aside’ policy, laudable in itself, seems unintentionally to have militated against women’s interests and trade liberalization at least to an extent. (3 August 2006 email exchange with Lucie Lamarche, Professeur, Sciences Juridiques, Université du Québec à Montréal).

out in their respective chapeaux. Accordingly, like the Panel, we find previous decisions under Article XX of the GATT 1994 relevant for our analysis under Article XIV of the GATS.⁹⁵⁵

Thus, as far as it concerns ‘public morals’ and ‘human life or health,’ the study must make the same conclusion about the indirect approach under GATS Article XIV as it made under GATT Article XX. That is to say, the inclusion of the exceptions for ‘public morals’ and ‘human life or health’ provides scope within GATS for the advancement of the representation of women and women’s interests, whether in itself or as part of a human-rights-based strategy. However, the legal constraints imposed by the chapeau of GATS Article XIV and the ‘necessity test,’ together with the political constraints imposed by the nature of the indirect approach itself, constitute such important limitations that the ‘public morals’ and ‘human life or health’ exceptions in GATS Article XIV do not suffice through the indirect approach to produce an affirmative answer to the study’s test.

There remains the ‘public order’ exception, which has not yet been addressed because it is not included within the GATT Article XX exceptions. As the UNHCHR report notes, ‘public order’ has a long conceptual history in European civil law jurisdictions, particularly in French civil law as ‘*ordre public*.’⁹⁵⁶ There, it was used as a rationale for imposing the interest of the state or the civil authority upon private transactions, including invalidating those deemed in contravention of fundamental

⁹⁵⁵ World Trade Organization, Dispute Settlement Body, Appellate Body Report, *US-Gambling*, DS285, para. 291.

⁹⁵⁶ Office of the United Nations High Commissioner for Human Rights, *Human Rights and World Trade Agreements: Using General Exception Clauses to Protect Human Rights* (New York and Geneva: United Nations, 2005), 10.

domestic law, and therefore subversive to ‘public order.’⁹⁵⁷ Under international law, ‘public order’ appears in many international treaties, but “its precise content or ambit of application does not appear to be defined in any of them.”⁹⁵⁸ For example, EU directive 64/221 cites ‘public order’ as a legitimate justification for derogation from obligations concerning the free movement of workers and services under the Treaty of Rome, as well as the freedom of establishment.⁹⁵⁹

Therefore, like ‘public morals’ and ‘human life or health,’ ‘public order’ is certainly capable of comprehending the representation of women and women’s interests, whether as part of human rights or no. However, as with ‘public morals’ and ‘human life or health,’ under the WTO Agreements the meaning of ‘public order’ is severely curtailed. In GATS, the footnote to Article XIV (a) restricts the application of the ‘public order’ exception to those cases where “a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.”⁹⁶⁰ This mirrors the language used by the European Court of Justice (ECJ) in *R v. Bouchereau*, interpreting the Treaty of Rome.⁹⁶¹

⁹⁵⁷ McCrudden, Christopher, “International Economic Law and the Pursuit of Human Rights: A Framework for Discussion of the Legality of ‘Selective Purchasing’ Laws under the WTO Government Procurement Agreement,” *Journal of International Economic Law*, vol. 2, no. 1 (1999), 41. Also cited in Office of the United Nations High Commissioner for Human Rights, *Human Rights and World Trade Agreements: Using General Exception Clauses to Protect Human Rights* (New York and Geneva: United Nations, 2005), 10.

⁹⁵⁸ Office of the United Nations High Commissioner for Human Rights, *Human Rights and World Trade Agreements: Using General Exception Clauses to Protect Human Rights* (New York and Geneva: United Nations, 2005), 10.

⁹⁵⁹ *Treaty Establishing the European Economic Community* (Treaty of Rome), Title III.; For EU Directive 64/221, see Craig, Paul and Grainne De Búrca, eds., *EU Law: Text, Cases and Materials*, 5th ed. (Oxford: Oxford University Press, 1998). Also cited in Office of the United Nations High Commissioner for Human Rights, *Human Rights and World Trade Agreements: Using General Exception Clauses to Protect Human Rights* (New York and Geneva: United Nations, 2005), 10.

⁹⁶⁰ World Trade Organization, *General Agreement on Trade in Services (GATS)*, Article XIV, para. (a), footnote 5.

⁹⁶¹ Case 30/77, *R v Bouchereau*, 1977, ECR 1999, CMLR 800. Cited in Office of the United Nations High Commissioner for Human Rights, *Human Rights and World Trade Agreements: Using General Exception Clauses to Protect Human Rights* (New York and Geneva: United Nations, 2005), 10.

The ‘public order’ exception has been addressed only once by the AB. In *US-Gambling*, the AB affirmed, first of all, that GATS Article XIV reflected the same right of WTO Members to determine their desired level of protection of ‘public order,’ as had GATT Article XX for ‘public morals.’⁹⁶² The AB further determined that “Members should be given some scope to define and apply for themselves the concepts of ‘public morals’ and ‘public order’ in their respective territories, according to their own systems and scales of values.”⁹⁶³ Finally, the AB incorporated within its definition the requirement of the footnote to Article XIV that ‘public order’ comprise the ‘fundamental interests of a society, as reflected in public policy and law.’ It did so by extension, accepting the Panel’s conclusion that Congressional reports and testimony showed that the *Wire Act*, the *Travel Act*, and the *Illegal Gambling Business Act*, all passed by the U.S. Congress, fell within the meaning of the footnote to GATS Article XIV, pertaining as they did to “money laundering, organized crime, fraud, underage gambling and pathological gambling.”⁹⁶⁴ In short, it may be inferred in a general sense that measures addressing concerns of similar seriousness can fit comfortably within the meaning of ‘public order’ in GATS Article XIV as articulated by the AB. This is admittedly and necessarily a vague criterion, but it is sufficient to show that the representation of women and women’s interests, both on its own and as an expression of human rights, is comprehended within GATS Article XIV (a).

Yet the same constraints encountered with respect to GATT Article XX also apply to the indirect approach under GATS Article XIV, and render it insufficient to

⁹⁶² World Trade Organization, Dispute Settlement Body, Appellate Body Report, *US-Gambling*, DS285, para. 291.

⁹⁶³ *Ibid*, para. 6.461.

⁹⁶⁴ *Ibid*, para. 296.

constitute a democratic turn. As discussed above, the restrictions of the chapeau and the ‘necessity test’ preclude a programmatic approach, and require an approach that focuses with each case upon the effects of a given product or service upon a given country at a given time. Moreover, perhaps even more than ‘public morals,’ the ‘public order’ exception can be used to protect policies that suppress or subvert the representation of women and women’s interests, as easily as it can be used to advance the same.

This is not to neglect the genuine possibility for the indirect approach to legitimize the representation of women and women’s interests as part of a country’s underlying philosophy of trade governance within the WTO regime. It is even possible in individual cases for a given country to use the indirect approach to pursue the representation of women and women’s interests by making it a *de facto* condition for trading in a particular product or service. However, the limitation of the indirect approach to one particular product or service in one particular country at one time, the limitations of the ‘necessity test,’ and the requirement that the use of exceptions not be ‘arbitrary or unjustifiable discrimination’ or a ‘disguised restriction on trade,’ all combine to preclude the indirect approach from democratizing the WTO as such, and limit it to the possibility of individual, incremental steps toward the representation of women and women’s interests under the WTO regime.

It is clear, though, that the indirect approach through exceptions to the WTO Agreements is a fundamentally conservative approach; it is a far more powerful tool for the protection of existing policy than for fostering a change in policy. Indeed, the exceptions to the WTO Agreements are designed to preserve existing policy, notwithstanding the remainder of the Agreements. It is for this reason that the term

‘possibility’ is key; indeed, here is a powerful example of the reflexivity of juridification. For it is inherent in the indirect approach that there is always an equal possibility of it being used with equal effectiveness to protect policies that preclude or suppress the representation of women and women’s interests, whether in itself or considered as an expression of human rights. This is particularly so with respect to the ‘public morals’ and ‘public order’ exceptions in GATT, GATS, and other WTO agreements, especially when they intersect with discourses of religion and security.

Agreement on Trade-Related Aspects of Intellectual Property Rights

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) promotes and enforces private rights to intellectual property. The extent to which TRIPS presents an opportunity for the indirect approach is uncertain. Article 27, paragraph 2 defined ‘limited exceptions’ to patentable subject matter in the following terms:

Members may exclude from patentability inventions, the prevention within their territory of which is necessary to protect *ordre public* or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law.⁹⁶⁵

This is an interesting textual variation upon the exceptions in GATT Article XX and GATS Article XIV, in that it defines ‘public order’ and ‘morality’ to include ‘human life and health.’ Unfortunately, there has to date been no Panel or AB report that defines

⁹⁶⁵ World Trade Organization, *Agreement on Trade-Related Aspects of Intellectual Property*, 1994, Article 27, paragraph 2.

the scope of the exceptions in TRIPS Article 27(2). Should a cause arise under TRIPS Article 27(2), it is almost certain that the terms ‘public morals,’ ‘public order’ and ‘human life or health’ would be defined almost exactly as they were under GATT and GATS. However, there are two further variations that indicate that the scope of the exceptions might be defined more narrowly under TRIPS than under GATT and GATS. The first is that the exceptions are defined as ‘limited exceptions,’ in contrast to the ‘general exceptions’ of GATT Article XX. This could be read to suggest that the TRIPS exceptions ought to be given a narrower scope for application than the GATT exceptions; it virtually assures that they will not be given wider application. Moreover, the provision that the exceptions not be made ‘merely because the exploitation is prohibited by their law,’ while its exact definition is uncertain, clearly entails a further restriction upon the Article 27(2) exceptions, and has no parallel in GATT or GATS. As such, it too could signify a narrower scope for exceptions under TRIPS than under GATT or GATS.

It may therefore be concluded that TRIPS cannot provide better opportunities for the indirect approach through exceptions than GATT or GATS. Indeed, it is very likely that the indirect approach has fewer opportunities to advance the representation of women and women’s interests under TRIPS. As such, all that has been stated above concerning the limitations, constraints, enforced incrementalism and reflexivity of the indirect approach also applies to TRIPS, with the proviso that the limitations and constraints under TRIPS may in fact be greater.

Yet there is a further dimension to TRIPS that must be addressed in the context of the indirect approach. TRIPS’ assertion of private rights to intellectual property becomes particularly problematic when rights of private property are asserted with respect to

pharmaceuticals that treat HIV/AIDS, to contraceptives, and to grains or fertilizers used by women subsistence farmers.⁹⁶⁶ Such assertions of private intellectual property can lead to higher prices and the decreased availability of these products, particularly in developing countries. This could in turn provide greater impetus from WTO Members to use the indirect approach with respect to TRIPS, and greater reason for WTO Panels to interpret the Article 27(2) exceptions as widely as the text and previous AB reports (on GATT and GATS particularly) can justify. At a minimum, such a consideration could argue against giving significant weight to the phrases ‘limited exceptions’ and ‘not merely because the exploitation is prohibited by their law.’ This could place TRIPS Article 27(2) at a level essentially equivalent to GATT Article XX and GATS Article XIV in terms of the opportunities it provides through the indirect approach for advancing the representation of women and women’s interests.

More generally, the TRIPS agreement highlights some of the fundamental problems with the global state-based trade governance system. Women’s lack of access is exacerbated in the case of minority women’s groups because they are often unable to advocate and represent their legal rights. As an example, Peebles argues that TRIPS threatens indigenous women’s role in retaining indigenous knowledge, since they are usually unable to access the resources required to obtain the support of the state to defend their interests via the WTO dispute settlement process.⁹⁶⁷ In this case, women’s capacity to have their interests represented within the WTO, regardless of the inherent usefulness of the indirect approach, is hindered by the general difficulty of incorporating a gendered

⁹⁶⁶ Zampetti, Americo Beviglia “The Impact of WTO Rules on the Pursuit of Gender Equality,” in Anh-Nga Tran-Nguyen and Americo Beviglia Zampetti, eds., *Trade and Gender: Opportunities and Challenges for Developing Countries* (New York: United Nations: UNCTAD, 2004), 315.

⁹⁶⁷ Peebles, Dana, Status of Women Canada Policy Research, *Increasing Gender Inputs into Canadian International Trade Policy Positions at the WTO*, (Ottawa: Status of Women Canada, 2005), 77.

understanding of trade-related economic activity within the WTO's state-based system. The difficulty is still greater for women who are members of a permanent minority in a multinational state.

Despite these difficulties, it is at the legal level that potential solutions to these concerns are being developed within the framework of the TRIPS Agreement itself, although many would argue that these solutions are not sufficient for the problems at hand. In the area of health care, WTO members are now permitted to allow imports from countries where patented drugs are sold more cheaply, and to permit, in cases of emergency, the use of a patented product without the patent holder's consent. In the 2001 Doha Declaration, ministers further emphasized the ability of members to use the flexibilities already present in the TRIPS Agreement to protect public health; this further supports an interpretation of Article 27(2) that gives weight to the exceptions, and reduces the importance of the qualifiers 'limited exceptions' and 'merely because the exploitation is prohibited by their law.' They also extended exemptions upon pharmaceutical patent protection for LDCs until 2016. Finally, in 2003, an agreement was reached to allow countries producing generic copies of patented drugs to export the drugs to eligible countries.⁹⁶⁸ Whether these developments are sufficiently robust can rightly be questioned, but their legal development could facilitate the legitimization of initiatives promoting women's interests, especially in LDCs, and especially if they can be extended not only to health care, but to agricultural concerns as well. Yet even if these developments could only at most be incremental and insufficient, they also by definition allow a degree of progress toward the representation of women and women's interests,

⁹⁶⁸ Zampetti, Americo Beviglia "The Impact of WTO Rules on the Pursuit of Gender Equality," in Anh-Nga Tran-Nguyen and Americo Beviglia Zampetti, eds., *Trade and Gender: Opportunities and Challenges for Developing Countries* (New York: United Nations: UNCTAD, 2004), 316-317.

and they support an interpretation of TRIPS Article 27(2) that gives weight to the exceptions therein at a level similar to the exceptions in GATT Article XX and GATS Article XIV.

The Indirect Approach – Conclusions

The above analysis of WTO Agreements shows that the indirect approach through exceptions can provide genuine but incremental and limited opportunities for the advancement of the representation of women and women's interests. In particular, the requirement for negative consensus to reject an Appellate Body report allows individual members scope for effective action well beyond what is possible through the Secretariat or by a member's proposal. The indirect approach, therefore, is a more viable option. Nevertheless, the uncertainty of the indirect approach is also clear. First, a member could only maintain a trade restriction with domestic support. Second, another member must file a complaint, which might fail to happen, or might happen only after significant delay. Third, the consequences for the relations between the complainant, the respondent, and interested third parties could be significant, unanticipated, and more damaging than expected. Fourth, the dispute could be resolved against the complainant, causing a setback that would *de facto* serve as a precedent for future cases. This is a significant risk, since it is far more difficult to prove an exception under the WTO Agreements than to prove the existence of a trade-distorting practice.

Interviews conducted with WTO experts corroborated both the possibility of the indirect approach and its limited applicability. For example, one senior WTO official asserted that the indirect approach is a conceptual possibility, but that its practical

possibility is probably limited to a case instigated by a trade-distorting policy predicated upon the use of the ‘public morals’ exception. The official stated,

The only situation where I see something ... is where a rich country, let's say EC, US, bans importation from a country, [let's say] Saudi Arabia, and then they're sued. [Saudi Arabia says,] ‘Why did you ban [our product/service]?’ And [EC, US] say ‘Because we believe it's against public morals.’ Why? Because Saudi Arabia is violating 33 human rights treaties that says women are equal. So then it's possible. But, yeah, then, I mean it's conceptually possible.”⁹⁶⁹

Regardless of the technical possibility, there is much reason to question the effectiveness of trade sanctions and other trade-distorting policies as a means of advancing the representation of women and women’s interests within the WTO.⁹⁷⁰ For example, Elliott and Freeman, in their study of the relation of trade sanctions to foreign policy, could reach no more definitive a conclusion than that trade sanctions have succeeded in some cases and not in others.⁹⁷¹ Von Schoppenthau notes the adverse consequences of trade sanctions for those whose employment is lost as a result.⁹⁷²

⁹⁶⁹ Senior member of WTO Secretariat. Confidential interview transcribed verbatim from digital recording, October 2007.

⁹⁷⁰ Burda, Julien, “Chinese Women After the Accession to the World Trade Organization: A Legal Perspective on Women’s Labor Rights,” in Günseli Berik, Xiao-Yuan Dong and Gale Summerfield, eds., Gender, China and the World Trade Organization: Essays From Feminist Economics (London: Routledge, 2010), 268.

⁹⁷¹ Elliot, Kimberly Ann and Richard B. Freeman, Can Labour Standards Improve Under Globalization? (Washington: Institute for International Economics, 2003), 80. Also cited in Burda, Julien, “Chinese Women After the Accession to the World Trade Organization: A Legal Perspective on Women’s Labor Rights,” in Günseli Berik, Xiao-Yuan Dong and Gale Summerfield, eds., Gender, China and the World Trade Organization: Essays From Feminist Economics (London: Routledge, 2010), 268.

⁹⁷² Von Schoppenthau, Philip, “Trade and Labour Standards: Harnessing Globalization?” in Klaus Günter Deutsch and Bernhard Speyer, eds., World Trade Organization Millenium Round: Freer Trade in the Twenty First Century (New York: Routledge, 2001). Also cited in Burda, Julien, “Chinese Women

Finally, Burda argues that “in China, trade sanctions could have a negative effect on working women, especially those employed in export-related jobs in dormitory factories.”⁹⁷³ Indeed, if such a result were often replicated, the indirect approach through exceptions would present a genuine danger that the representation of women and women’s interests could paradoxically and inaccurately become powerfully associated with economic hardship.

Thus, while more than a technical possibility, the indirect approach must be considered a difficult, uncertain and long-term possibility for accomplishing the representation of women and women’s interests within the WTO at a level sufficient to constitute a democratic turn. Even if a given member-state had domestic support, if another member were to file a complaint, if there were no unpleasant unintended consequences, and if the dispute were resolved favourably, there would remain a requirement for the same process to be repeated a number of times in many contexts to create the norms and expectations that would accomplish the representation of women and women’s interests within the WTO. In sum, the indirect approach is a tool to be used cautiously to achieve limited and incremental progress toward the representation of women and women’s interest within the WTO regime.

After the Accession to the World Trade Organization: A Legal Perspective on Women’s Labor Rights,” in Günseli Berik, Xiao-Yuan Dong and Gale Summerfield, eds., Gender, China and the World Trade Organization: Essays From Feminist Economics (London: Routledge, 2010), 268.

⁹⁷³ Burda, Julien, “Chinese Women After the Accession to the World Trade Organization: A Legal Perspective on Women’s Labor Rights,” in Günseli Berik, Xiao-Yuan Dong and Gale Summerfield, eds., Gender, China and the World Trade Organization: Essays From Feminist Economics (London: Routledge, 2010), 268.

The Direct Approach

What has not been tried is the direct approach, the second of the approaches mentioned at the outset of the chapter. Under the direct approach, a WTO member, intending to accomplish the representation of women and women's interests within the WTO, would file a complaint with the DSB asserting that a gender-based policy, or the lack thereof, within another member's economy, constitutes a restriction or distortion of trade that contravenes the member's obligations under WTO agreements. An EU DG-Trade official suggested that the direct approach might be used in a case of "importation of women's cosmetics being banned based on religious grounds, let's say in the Middle-East, saying that women should not wear make-up. Or it could be any product specifically made for women – this could invoke a dispute."⁹⁷⁴ Another example, which the study proceeds to develop at length, is a member's failure to address wage disparity between genders in its textile industry. This could be construed as an unfair and trade-distorting advantage to the industry. The key here would be to conceptualize the relationship between women and trade as an instrument for providing unfair and trade-distorting advantages within the global trading system. This would make it indisputably a WTO issue, as opposed to capacity building, affirmative action, or another such means for reducing inequality generally between men and women, which are not issues proper to the WTO.

Under the direct approach, if a member were to file a complaint to this effect with the DSB, then the DSB would be obligated to establish a panel to consider the issue, absent a consensus (including the complainant) to the contrary. Indeed, the requirement

⁹⁷⁴ Senior member of EU DG-Trade. From confidential interview notes taken in manuscript, October 2007.

for reverse consensus means that the process would have to proceed through the entire 15-month routine, and conclude with a ruling from the Appellate Body, unless the complainant decided to abandon the complaint. Thus, the rules of dispute settlement at the WTO, as they stand at present, would require that once a complaint were filed, in the manner described above, the legitimization of the representation of women and women's interests as an area of official discussion within WTO law would follow of necessity, and would not be avoidable. This would be a meaningful advance toward the representation of women and women's interests.

Moreover, the rules concerning the burden of proof in the DSB would require that, once the complainant had met the burden of showing a distortion of trade, the respondent member-state would have to show how the distortion could be justified under the exceptions listed in Article XX of the GATT (following the present example of a dispute concerning textile exports).⁹⁷⁵ That is, the respondent would have to argue either that intra-sector, sex-based wage disparity is necessary to human life and health (pursuant to paragraph 'b' of Article XX), or that it is necessary to the preservation of public morals (pursuant to paragraph 'a'). It would not be difficult for the complainant to meet the original burden of proof, since a significant volume of supporting evidence exists.⁹⁷⁶

⁹⁷⁵ World Trade Organization, Committee on Trade and Environment, *GATT/WTO Dispute Settlement Practice Relating to GATT Article XX, Paragraphs (b), (d), and (g)*, WT/CTE/W/203 (8 March 2002), 5-6.

⁹⁷⁶ See, for example, Corley, Marva, Yves Perardel and Kalina Popova, "Wage Inequality by Gender and Occupation: A Cross-country Analysis," Employment Strategy Papers, Employment Trends Unit, Employment Strategy Unit, International Labour Office (ILO), 2005, no. 20; Organization for Economic Cooperation and Development (OECD), OECD Employment Outlook (2008); Humphries, Jane, "The Gender Gap in Wages: Productivity or Prejudice or Market Power in Pursuit of Profits," Social Science History, vol. 33, no. 4 (Winter, 2009); Oostendorp, Remco H., "Globalization and the Gender Wage Gap," World Bank Economic Review, vol. 23, no. 1 (2009); and Reilly, Barry and Puja Vasudena Dutta, "The Gender Pay Gap and Trade Liberalization: Evidence for India," PRUS Working Paper, no. 32, University of Sussex, UK (2005).

Should the respondent member continue with the dispute, the cat would then be out of the bag, so to speak, particularly in the case of public morals. The respondent would have no choice but to argue that women are less valuable than men, and that that is why they are paid less. However, to do so would seem to violate numerous other international and national obligations. So not only would the representation of women and women's interests be legitimized as an issue in trade governance, but the outcome of the dispute, especially if the case were sustained, would have serious implications for furthering the understanding of gender justice on a global scale, for coherence between bodies of International Law, for the representation of women and women's interests, and therefore for the possibility of democratic global economic governance.

In considering the likely outcome of such a dispute, and the relative advantages and disadvantages of the indirect and direct approaches, a further point must be considered. The direct approach would have the great advantage of employing in its favour the systemic bias of the WTO toward trade liberalization. This bias would work against the indirect approach. Essentially, the bias is expressed by means of the greater burden of proof imposed upon the indirect approach than the direct approach. The direct approach would have to prove only that an unfair trade practise exists that violates the terms of the GATT or another WTO obligation. Conversely, the indirect approach would have to prove that a trade distortion is justifiable as an exception under the relevant WTO Agreement. This would also entail showing that the exception is neither "arbitrary or unjustifiable discrimination between countries where the same conditions prevail," nor "a disguised restriction on international trade,"⁹⁷⁷ nor any of the other qualifiers that limit

⁹⁷⁷ World Trade Organization, *General Agreement on Tariffs and Trade (GATT)*, Article XX ('chapeau').

the scope of exceptions to WTO Agreements. Far greater difficulty, therefore, faces the indirect approach than the direct approach in this respect.

Even so, for all its promise, and like all other possibilities reviewed in this chapter, the direct approach faces difficulties that could be very hard to surmount. The most plausible tactic under the direct approach would be to define a wage disparity between men and women as a trade-distorting subsidy. Perhaps the archetypal example here would be the textile industry in China, where it has been well established that such a wage disparity exists.

A ‘Violation Complaint’ Under SCM

The difficulty, however, would be to have a gendered wage disparity accepted under the relevant statutory definition of a subsidy within the WTO Agreements. Article I of the Agreement on Subsidies and Countervailing Measures allows that a subsidy exists only when “there is a financial contribution by a government or any public body within the territory of a Member.”⁹⁷⁸ In turn, the Agreement allows only four instances of this kind of a ‘financial contribution’: where “a government practice involves a direct transfer of funds, potential direct transfers of funds or liabilities”; where “government revenue that is otherwise due is foregone or not collected”; where “a government provides goods or services other than general infrastructure, or [where a government] purchases goods”; and where “a government makes payments to a funding mechanism, or entrusts or directs

⁹⁷⁸ World Trade Organization, Agreement on Subsidies and Countervailing Measures, http://www.wto.org/english/docs_e/legal_e/24-scm.pdf (accessed 12 April 2013).

a private body” to carry out either the financial contribution or the provision of goods and services described above.⁹⁷⁹

Clearly, a wage disparity cannot constitute either a transfer of funds or a provision of services. This would leave open only the second possibility, that it constitutes a deliberate foregoing of revenue. Here, an argument might be constructed in a case similar to that of China. As Burda has noted, Chinese law mandates that “Chinese women enjoy equal rights with men in all spheres of life.”⁹⁸⁰ Moreover, article 48 of the Chinese constitution “underlines that the state protects the rights and interests of women, [and] applies the principle of equal pay for equal work for men and women alike.”⁹⁸¹ Articles 21 and 22 of the *Law on the Protection of Rights and Interests of Women* also requires that women receive equal pay for equal work.⁹⁸² Further, the *Women Workers and Employees Labour Protection Regulations* also require that equal pay be given for equal work.⁹⁸³

That there exists a gendered wage disparity in the Chinese textile industry is well established. For example, Braunstein and Brenner have shown the existence of gendered wage disparities in the manufacturing sector.⁹⁸⁴ Ngai has shown that about 80 percent of low-paying production jobs in China’s dormitory labour system are held by women,

⁹⁷⁹ *Ibid.*

⁹⁸⁰ Burda, Julien, “Chinese Women After the Accession to the World Trade Organization: A Legal Perspective on Women’s Labor Rights,” in Günseli Berik, Xiao-Yuan Dong and Gale Summerfield, eds., *Gender, China and the World Trade Organization: Essays From Feminist Economics* (London: Routledge, 2010), 261.

⁹⁸¹ *Ibid.*, 261.

⁹⁸² *Ibid.*, 261.

⁹⁸³ *Ibid.*, 261.

⁹⁸⁴ Braunstein, Elissa and Mark Brenner, “Foreign Direct Investment and Gendered Wages in Urban China,” in Günseli Berik, Xiao-Yuan Dong and Gale Summerfield, eds., *Gender, China and the World Trade Organization: Essays From Feminist Economics* (London: Routledge, 2010), 222-229.

while “factory directors, managers and most of the foremen” are males.⁹⁸⁵ These disparities contravene the statutory requirements quoted above. It could therefore be argued that they constitute a wilful refusal to enforce selected laws concerning gender equality within China’s textile industry and other manufacturing industries, and that this constitutes, by means of lost taxation revenue that would otherwise have had to be paid, a conscious and wilful refusal to collect government revenue that would have been owing had passages cited above from China’s constitution and other statutes been enforced to ensure gender equality in practice.

This seems to be the only argument that could achieve the desired result, and it is at least a plausible interpretation and application of the text of the relevant Agreement. Nevertheless, it is not the most straightforward argument, which would be that an absence of wages, regardless of the reason for or merits of its existence, cannot be counted as government revenue owing, simply because the wages are not revenue and the taxes upon them do not yet exist. As such, a resolution to a dispute favourable to the representation of women and women’s interests would require other political factors to militate in its favour, such as the political culture of the time, public awareness of gendered wage disparity, or the political and philosophical predispositions of the members of the Appellate Body. In short, a resolution favourable to the representation of women and women’s interests would require members of the Appellate Body to be predisposed in its favour for one reason or another. This can certainly happen in a judicial context; judicial interpretations can change over time, as happened in Canada with

⁹⁸⁵ Ngai, Pun, “Gendering the Dormitory Labor System: Production, Reproduction, and Migrant Labor in South China,” in Günseli Berik, Xiao-Yuan Dong and Gale Summerfield, eds., *Gender, China and the World Trade Organization: Essays From Feminist Economics* (London: Routledge, 2010), 243.

respect to Aboriginal rights between the 1960s and 1980s,⁹⁸⁶ and as happened in the United States over the second half of the 20th century with respect to 2nd Amendment jurisprudence.⁹⁸⁷ Indeed, the AB itself has determined that the terms of WTO Agreements should be interpreted in an ‘evolutionary’ manner.⁹⁸⁸ Nevertheless, under the direct approach as outlined above, the desired interpretation is the less likely scenario.

Moreover, even if a gendered wage disparity were determined to constitute a trade-distorting subsidy, it is not certain that the direct approach would achieve the desired result, since it would be unclear whether countervailing measures could be

⁹⁸⁶ Of course, the greatest change occurred with the enshrinement of Aboriginal rights within the Constitution of Canada in 1981, as exemplified by *Delgamuukw*, 1997, *R v. Marshall*, 1998, *R v. Horse*, 1988, *R v. Sioui*, 1990, and many other cases in Canadian jurisprudence. However, significant change in the position of Aboriginal and treaty rights had already come to pass before 1981. See, for example, the contrast between *R v. White and Bob*, 1964, and the dissenting opinion of Bora Laskin (later Chief Justice of the Supreme Court of Canada) in *Calder*, 1973. For a fuller discussion, see Borgal, Colin Stewart, The Empire of These Subconscious Loyalties: A Normative Defence of Judicial Review (Kingston, Ontario, Canada: M.A. thesis, Department of Political Studies, Queen’s University, 2005).

Essentially, two profound changes occurred during this period. First, the position of aboriginal treaty rights evolved from being one body of law amongst many, to being the fundamental law of Canada after 1982. Of course, the most important moment in this evolution was the constitutional reform of 1982, but there was nonetheless a growing sense in 1960s, 1970s and early 1980s jurisprudence that the ‘honour of the Crown’ was at stake in the enforcement of aboriginal treaty rights in a way that was not the case in criminal law, laws and regulations concerning natural resources, and laws and regulations concerning private property. Second, over the course of the 1970s and 1980s the concept of ‘Aboriginal rights’ was developed and gained credence. ‘Aboriginal rights’ also became the fundamental law of Canada by means of the constitutional reform of 1982, and the concept was developed further by Supreme Court of Canada jurisprudence during the 1980s and 1990s. This came to define ‘Aboriginal rights’ in such a way as to incorporate continuous use of specific land or resources by a particular Aboriginal band or tribe, creating significant scope for the overturning of statute law in Canada pursuant to ‘Aboriginal right.’

⁹⁸⁷ See, for example, Hardy, David T., “Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment,” Harvard Journal of Law and Public Policy, vol. 9 (1986), 559-638. See also Ross, Bobbie K., “Emerging Second Amendment Jurisprudence” (17 August 2011), <http://apps.americanbar.org/litigation/committees/minority/articles/summer2011-second-amendment-jurisprudence.html> (accessed 2 March 2014).

The interpretation of the Second Amendment to the United States Constitution evolved from the guarantee of a right to bear arms by joining a ‘well-regulated militia,’ to the guarantee of an almost untrammeled right to bear arms individually as a private citizen, rendering the ‘well-regulated militia’ clause a mere example or rhetorical justification.

⁹⁸⁸ World Trade Organization, Report of the Appellate Body, *United States – Import Prohibitions of Certain Shrimp and Shrimp Products*, AB-1998-4, WT/DS58/AB/R (12 October 1998), para. 130.

For the evolution of interpretation of WTO law generally, see Lang, Andrew, World Trade Law After Neoliberalism: Re-imagining the Global Economic Order (Oxford: Oxford University Press, 2011).

defined and implemented. Definition would be challenging because the extent of the gendered wage disparity would be difficult to quantify; yet, to be legitimate, countervailing measures would have to be offsetting, not applied haphazardly. Implementation would be difficult because it could be seen to counter China's low-wage comparative advantage, and because, regardless of all else, China's position as one of the world's largest exporters might cause many countries to judge the cost of the direct approach, whether concerning China or other net-export countries, to be greater than the reward. In short, then, while the direct approach can be considered a technical possibility, it must be considered unlikely to come to pass or produce the desired results.

That said, even if neither the direct nor the indirect approach produced a ruling absolutely in favour of the representation of women and women's interests within the WTO, the legitimization of gender as an issue-area within the WTO would be advanced for three reasons. First, regardless of the outcome, any dispute that proceeds through the DSM necessarily requires significant reasoned discussion in a legal setting concerning the relationship between sex/gender and trade. This could only help to legitimize the representation of women and women's interests as an issue-area within the WTO. Second, any such dispute must produce a number of rulings that clarify the relationship between sex/gender and the legal texts upon which the obligations of WTO members are based. This must have the effect of removing points of uncertainty and defining in greater detail the specific points of controversy between advocates of gender justice and the legal architecture of global trade governance. Third, a ruling that shows significant incompatibility between the legal architecture of global trade governance and the pursuit

of gender justice would be very likely to raise public awareness of the relationship between gender and trade, and could give rise to civil society or public protest.

A ‘Non-Violation Complaint’ – GATT Article XXIII:1(b)

In a similar manner, but perhaps more expansively, GATT Article XXIII:1(b) provides at least as important an opportunity to advance the representation of women and women’s interests under the direct approach. The text of paragraph (b) of Article XXIII 1 reads as follows:

If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of: (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement.⁹⁸⁹

A complaint under Article XXIII:1 (b) is a so-called ‘non-violation complaint.’ A non-violation complaint may be used to challenge any measure applied by another Member, even if it does not conflict with GATT 1994, provided that it results in ‘nullification or impairment of a benefit.’

This would seem well suited to address the selective lack of enforcement of Chinese laws requiring wage equality, as discussed in the example above. Most importantly, a complaint filed under Article XXIII 1 (b) would have the great benefit of not having to define China’s selective enforcement of its wage-equality laws as a subsidy.

⁹⁸⁹ World Trade Organization, *General Agreement on Tariffs and Trade*, Article XXIII, 1.

Rather, Article XXIII 1 (b) concerns itself with the nullification or impairment of an expected benefit under GATT 1994, regardless of whether the measure is mentioned explicitly in the text of the Agreement. It is worth noting that neither Burda nor Zampetti addresses Article XXIII: 1(b) as an opportunity to advance human rights or gender justice.

The rationale for Article XXIII:1(b) was described in the Panel Report for *EEC-Oilseeds I*. Paragraph 144 of the Report states the following:

The idea underlying [Article XXIII 1. (b)] is that the improved competitive opportunities that can legitimately be expected from a tariff concession can be frustrated not only by measures proscribed by the General Agreement but also by measures consistent with the Agreement. In order to encourage contracting parties to make tariff concessions they must therefore be given a right of redress when a reciprocal concession is impaired by another contracting party as a result of the application of any measure, whether or not it conflicts with the General Agreement.⁹⁹⁰

Disputes filed under Article XXIII 1(b) are rare. There have been only 8 such disputes since the advent of the GATT in 1947.⁹⁹¹ Nevertheless, these have included prominent cases where claims were successful, such as *EC-Asbestos*, *EEC-Oilseeds I* and *Japan-Film*. In the latter, the United States claimed that large retail stores and sales promotion techniques, used for distributing photographic film and paper, nullified or

⁹⁹⁰ World Trade Organization, Panel Report, *EEC-Oilseeds I*, para. 144.

⁹⁹¹ World Trade Organization, Panel Report, *Japan-Film*, para 10.36.

The eight cases are the following: Report of the Working Party on *Australia-Ammonium Sulphate*; Panel Report, *Germany-Sardines*; Panel Report, *Uruguay-Recourse to Article XXIII*; Panel Report, *EC-Citrus*; Panel Report, *EEC-Canned Fruit*; Panel Report, *Japan – Semi-Conductors*; Panel Report, *EEC-Oilseeds I*; Panel Report, *US-Sugar Waiver*.

impaired benefits gained by the United States from Japanese tariff concessions made during three rounds of multilateral trade negotiations.⁹⁹²

In its report for Japan-Film, the Panel established a three-part test to determine the legitimacy of a claim under Article XXIII 1(b). First, the complainant must show that a measure has been applied by another WTO member. Second, the complainant must then show the benefit accruing under the agreement in question. Third, the complainant must finally show the nullification or impairment of the same benefit, and that it has resulted from the measure shown in the first part of the test.⁹⁹³ Added to this, the complainant must further show that the measure said to have caused the nullification or impairment could not reasonably have been anticipated from the policies of the respondent.⁹⁹⁴ All of these were the case in Japan-Film, as they were in EEC-Oilseeds 1 and EC-Asbestos, when Canada claimed that the EC's ban on asbestos products constituted a non-violation impairment of benefits accrued under the GATT.

As such, Article XXIII 1(b) constitutes a genuine opportunity for the advancement of the representation of women and women's interests. This becomes clear if one considers the example of the Chinese textile industry, discussed above, with reference to the three-part test articulated in Japan-Film. In the case of China's textile industry, the 'measure' would be its selective enforcement of its own wage-equality laws. The benefit could be identified within Part I, paragraph 2 (A) of China's Accession Protocol, whereby it undertakes to "apply and administer in a uniform, impartial and reasonable manner all its laws, regulations and other measures of the central

⁹⁹² World Trade Organization, Panel Report, *Japan-Film*.

⁹⁹³ *Ibid*, para. 10.41.

⁹⁹⁴ *Ibid*, paras. 10.76-79.

government.”⁹⁹⁵ Under this argument, it would follow that China’s failure to apply its laws concerning wage equality in a ‘uniform, impartial and reasonable manner’ effectively reduced the cost of production for domestic textiles producers. This in turn could be held to have diminished the ability of non-Chinese textile manufacturers to compete with Chinese manufacturers, thereby impairing a legitimately held expectation of greater market access resulting from China’s accession to the WTO. In this case, the impairment of the expected benefit would be quantifiable and could be shown clearly. Moreover, its causal connection with the ‘measure’ at issue would be readily apparent.

In this context, it is also important to stress that it would not be necessary for the measure to conform to the definition of a subsidy discussed above in order for it to constitute a successful claim of nullification or impairment under Article XXIII 1(b). This is because Article XXIII 1(b) requires only the application of ‘any measure’ or ‘the existence of any other situation’ wherein a legitimately expected benefit has been nullified or impaired.

Thus far, Article XXIII 1(b) seems a promising opportunity for the advancement of the representation of women and women’s interests within the WTO. However, an important difficulty with this articulation of the direct approach is that it is not easily iterable. A further difficulty is the great danger to the legitimacy and cohesion of the WTO that would be created by continual recourse to Article XXIII 1(b). Concerning the first point, the DSB jurisprudence is quite clear that Article XXIII 1(b) is to be used sparingly. In Japan-Film, the Panel stated this principle in the following paragraph:

⁹⁹⁵ World Trade Organization, *Protocol on the Accession of the People’s Republic of China*, Part I, para. 2 (A) 2.

Although the non-violation remedy is an important and accepted tool of WTO/GATT dispute settlement and has been ‘on the books’ for almost 50 years, we note that there have only been eight cases in which panels or working parties have substantively considered Article XXIII 1(b) claims. This suggests that both the GATT contracting parties and WTO Members have approached this remedy with caution and, indeed, have treated it as an exceptional instrument of dispute settlement. We note in this regard that both the European Community and the United States in the EEC-Oilseeds case, and the two parties in this case, have confirmed that the non-violation nullification or impairment remedy should be approached with caution and treated as an exceptional concept. The reason for this caution is straightforward. Members negotiate the rules that they agree to follow and only exceptionally would expect to be challenged for actions not in contravention of those rules.⁹⁹⁶

This reticence argues the unlikelihood that Article XXIII 1(b) can be used repetitively as a tactic to advance the representation of women and women’s interests. This is because the interpretive construction given to the text of the Article makes clear that it is meant to apply to narrow and limited circumstances only. Moreover, were claims under Article XXIII 1(b) made with increasing frequency, it would be reasonable to expect the resulting jurisprudence to seek to narrow their application still further. This follows from the reasoning in *Japan-Film*, already cited above, that WTO Members have agreed to specific provisions in the WTO Agreements, and do not expect to be subject to challenges, and potentially to penalties, for actions not in direct contravention of the WTO Agreements.

⁹⁹⁶ World Trade Organization, Panel Report, *Japan-Film*, para. 10.36.

This reasoning in turn leads to the second point, which is that the frequent and widespread application of Article XXIII 1(b) would have a badly destabilizing effect and would tend to render meaningless the commitments made and exceptions granted under the WTO Agreements. This is because the most straightforward construction of the meaning of the Article would allow a claim against any nullification or impairment of an expected benefit for any reason. Were this provision applied regularly, the numerous exceptions to tariff reductions included in every WTO Agreement would become meaningless. This in turn would largely negate the justification for many countries of their membership in the WTO, since it would upset the balance between tariff-reduction and protection of domestic economic and cultural strengths that has allowed most members to accede to the WTO. In short, were Article XXIII 1(b) employed regularly in a manner that advanced the representation of women and women's interests, the significance of the gains would be largely voided by the damage to the system of global trade governance represented by the WTO. Instead, Article XXIII 1(b) is perhaps best understood to represent the opportunity to achieve a single important advancement or legitimization of the representation of women and women's interests within the WTO. This could best be obtained under the direct approach by the pursuit of a single case, or a small number of closely related cases, of the kind described above with respect to wage equality in the Chinese textile industry.

In sum, like the other approaches and possibilities considered, the direct approach through the DSB initially appears very hopeful and founded on a strong argument, but on closer analysis is revealed to be difficult of application and strictly limited in result. Indeed, the direct approach must be considered less likely to produce a result than the

indirect approach, though a favourable result through the direct approach would achieve a much greater advancement of the representation of women and women's interests.

Conclusion

Having thus completed half of the test, it is possible to conclude that WTO hard law is at least technically capable of progress toward the representation of women and women's interests. However, the approaches most likely to produce results would also produce the results of least significance; conversely, the most significant results are the least likely to be achieved. This conundrum is essential to understanding why many call for new institutions of global economic governance and for counterpublics.

The chapter has shown that both indirect and direct approaches under the Dispute Settlement Mechanism could be used to legitimize the effects upon women of trade policy and trade liberalization as justification for instituting trade-distorting measures including trade sanctions, while remaining in compliance with WTO Agreements. This would be a meaningful step toward the representation of women and women's interests at the WTO. Indeed, it is possible that a number of disputes could have the effect of normalizing the representation of women and women's interests as a factor to be considered in domestic trade policies and in future rounds of multilateral trade policy negotiations. Such a development would also constitute an important advancement toward the representation of women and women's interests at the WTO.

However, as the chapter has shown, there are many reasons why this may never come to pass and why the representation of women and women's interests by means of WTO hard law remains unlikely. First, the indirect approach via the DSM relies on

members taking the initiative, on decisions under the DSM that support the representation of women and women's interests, and on those decisions being sufficiently frequent and generalizable that they begin to normalize the representation of women and women's interests as *de facto* a legitimate exception under WTO agreements. Even then, such normalization would essentially be a reflection of a change in the sensibilities of the Membership. It would, for example, make the formal enumeration of the representation of women and women's interests as an exception much more likely under future WTO agreements; however, until such a formal enumeration, the legitimacy of the representation of women and women's interests as an exception would remain *de facto* and could be reversed by a change in Membership sentiment. The direct approach via the DSM is also a technical possibility, but it would require a specific interpretation of labour practices and subsidies that runs counter both to received DSM jurisprudence and to the longstanding refusal of WTO Membership to consider labour policies and practises a legitimate exception to WTO agreements. The other possibility under the direct approach, the use of Article XXII (1)b, could achieve a one-time advance of significance, but could not be employed multiple times without destabilizing the WTO itself.

In sum, then, while meaningful progress is possible within WTO hard law toward the representation of women and women's interests, it would only be partial, hesitant and of uncertain duration. While this is without question better than no representation at all, it cannot be said that WTO hard law allows for a democratic turn in any manner but as a long-term and hesitant project, because the unqualified representation of women and women's interests is a *sine qua non* of any modern democracy. What remains, then, is to determine in Chapter 7 whether it is possible within WTO soft law to achieve the

representation of women and women's interests with sufficient completeness, rapidity and permanence that it would justify a conclusion that the WTO can indeed take a democratic turn, or whether in fact there must be new institutions and counterpublics in order to democratize the global level.

Chapter 7 – Meeting of the Proxies II: The Trojan Horse of Aid for Trade, or the Hybridization of Soft and Hard Law *within* the WTO⁹⁹⁷

Judit Fabian: I'm just wondering, would that, wouldn't it be perhaps a possibility to bring in [...] gender through some kind of a soft law mechanism?

Interviewee: [...] a coherent world is a world where each organization respects each other. A soft mechanism would be good, if especially we offered a forum for states to discuss the conflicts they create. In this sense, yes. But what people will say is that they would prefer if trade is discussed in another forum, rather than having [more issues] here. So there's: 'You talk about trade if you want in your forum, but we don't want to talk here about human rights [or gender].' But, yeah, it's possible to have a soft mechanism.⁹⁹⁸

Exchange with Senior member of WTO Secretariat
Confidential interview⁹⁹⁹
3 October 2007

⁹⁹⁷ An earlier version of this chapter was first presented in 2007 as a paper entitled “The Legitimacy of Mulier Economicus: the Cases of APEC, the WTO and the EU” to the conference *Pathways to Legitimacy?* organized by the Centre for the Study of Globalisation and Regionalisation (CSGR) and Global Governance, Regionalisation and the Regulatory Framework (GARNET) and held at the University of Warwick between September 17-19 in Coventry, United Kingdom. The paper was subsequently revised and presented at a number of conferences and settings – please refer to the appendix to the present study. The first version of the paper, which remained largely unchanged, was also sent, electronically, to the WTO Secretariat in 2007 in advance of having conducted my interviews, which was years prior to the WTO’s official turn towards recognizing and operationalizing the gender and trade connection. The paper argued that it can and should be done through a soft law mechanism, which is, as the current chapter shows, what happened later. Hence, the first half of the chapter is almost entirely unchanged from the 2007 paper. The second half of the chapter engages with how the actual policy developments materialized years later and the implications of that development, bringing up to date my earlier analyses.

⁹⁹⁸ Although the interviewee did not share more on this topic in 2007, in hindsight, this short exchange seems to resemble the idea of introducing gender mainstreaming into the Aid for Trade Programme 3 years later, in 2010.

⁹⁹⁹ Transcribed verbatim from digital recording.

On June 5, 2009, something unprecedented happened. As part of the celebration of its 450th anniversary, the University of Geneva awarded an honorary doctoral degree to Director-General Pascal Lamy.¹⁰⁰⁰ In his acceptance speech, Lamy said “globalization and the opening up of trade can work in favour of universal human rights, by which I mean civil and political rights as well as economic and social rights.”¹⁰⁰¹ Although Lamy said this as a private person and not as the Director-General of the WTO, a large number of people, many governments, and much of civil society, had been waiting for what he said, including those for whom the necessity of incorporating gender in the WTO is clear. Lamy concluded his speech with the following:

By awarding me this distinction today, dear friends, you have added to my responsibilities. It is for me, now, to propose that in future, we share this responsibility by working to build an international order in which, to quote Jean Jacques Rousseau, “The stronger is never strong enough to be forever master, unless he transforms his force into right, and obedience into duty.” To which Simone Weil added, on a more personal and meditative note: “It is a duty for every man to uproot himself in order to attain the universal, but it is always a crime to uproot others.”¹⁰⁰²

Although these are thoughtful words from someone who arguably has a track record of being a visionary and commands great respect even from his opponents and

¹⁰⁰⁰ Along with Dr Lyndon Rees Evans, former Irish President Mary Robinson and Archbishop Desmond Tutu.

¹⁰⁰¹ Pascal Lamy, Address to the University of Geneva – Dies Academicus Ceremony of Award of a Doctor Honoris Causa, 5 June 2009, http://www.wto.org/english/news_e/sppl_e/sppl128_e.htm (accessed 12 January 2015).

¹⁰⁰² *Ibid.*

challengers, we also know that Rousseau's vision of citizenship did not include women.

What was Lamy telling us with the above reference?

The reference to Rousseau and Weil occurred about the same time as the introduction of the 'Aid for Trade' initiative. In hindsight, this seems appropriate. As will be shown in this chapter, 'Aid for Trade' is an initiative that facilitates hybridization of soft law and hard law in the context of the WTO. It originated from within the WTO, is led by the WTO, and is implemented to a very great extent through the Enhanced Integrated Framework (EIF), which also originated with the WTO. Nevertheless, 'Aid for Trade' is a partnership initiative among a number of agencies and organizations of global economic governance, and is operated at arm's length from the WTO. Most importantly, 'Aid for Trade' makes addressing the gendered outcomes of trade policy an explicit part of its mandate. So, what Lamy meant was maybe something like the following: 'The WTO can represent women and their interests, but only by interacting with what is outside the WTO.' This chapter shows how it was done, the structures that made it possible and what the accomplishment means for global economic governance. That is to say, the chapter shows how the creation of the WTO Committee on Trade and Development in Aid-for-Trade session (WTO CTD A4T) constituted the entry point that allowed significant advancement in the WTO's representation of women and women's interests, and significant capacity for future advancement, almost in the manner of a Trojan Horse.

The chapter takes up the test from Chapter 6, which looked at WTO hard law and concluded it provided genuine but limited and incremental opportunities for advancing the representation of women and women's interests within the WTO, but that these were

not, and were unlikely to become, sufficient to constitute a democratic turn in global trade governance. Moreover, some of the initiatives discussed in Chapter 6 carried significant risk that they could be used to protect a domestic regime that suppressed the representation of women and women's interests. Thus, Chapter 6 did not provide sufficient evidence to answer in the affirmative the study's fundamental question: 'Can global economic governance take a democratic turn?'

The next question, then, is whether there exists any initiative or approach to which the WTO can be party short of comprehensive restructuring or the creation of a new institution that would allow for the representation of women and women's interests within global trade governance. If the result of the second part of the test is as great a cause for pessimism as that of the first part, it will be necessary to conclude that only the force of counterpublics and/or more robust institutions of global economic governance (or even government) could represent women and their interests. However, in the event, the chapter shows that WTO soft law provides significant opportunities for the advancement of the representation of women and women's interests. More importantly, it shows that the complex interplay of legitimacy, soft law, and hard law allows for a different conclusion. It justifies the preference explained in Chapter 2 in favour of global governance over global government, and therefore supports IGI, particularly with respect to the need for and benefits of the hybridization of hard law and soft law.

The chapter begins by discussing the need for legitimacy in trade governance, which is exemplified by the development of what Steinkopf Rice has described as counterhegemonic pressure. Whether the pressure described by Steinkopf Rice qualifies as 'counterhegemonic' is debatable and relatively unimportant. What is unquestionable,

and what is shown clearly by Steinkopf Rice's work, is that significant pressure is being exerted upon the WTO by numerous NGOs to improve the WTO's representation of women and women's interests. Clearly, the pressure is the result of a widely shared perception that the WTO does not represent women and women's interests sufficiently well. Equally clearly, this perception supports the study's position that the WTO does not meet the particular *sine qua non* of 21st century democracy upon which the present study is focused – the representation of women and women's interests represents. This must derogate from the legitimacy of the WTO as an institution of international trade governance.

The question therefore becomes how to relieve the pressure Steinkopf Rice describes, and thereby improve the legitimacy of the WTO, if none of the options discussed in Chapter 6 are practicable possibilities to effect sufficient advancement in the near or medium term. In answer, it is shown that soft law has been successful toward advancing the representation of women and women's interests in contexts other than the WTO, including APEC and EU DG-Trade. Here again, a difficulty presents itself, because the WTO derives its legitimacy largely from its hard law model based on consensus-decision-making, well-defined obligations, effective dispute settlement, and effective penalties for non-compliance.

However, unlike in Chapter 6, a solution presents itself in the form of hybridization that would allow the WTO to maintain the advantages and legitimacy of its hard law model, while incorporating some of the advantages of soft law. Indeed, the chapter shows that the WTO has already begun to do this, consciously or not, through the 'Aid for Trade' programme within its Enhanced Integrated Framework. Moreover, 'Aid

for Trade' includes the gendered effects of trade governance among the key areas of its work. Therefore, the study is able to conclude that the hybridization of soft law and hard law is a genuine, effective mechanism for representing women and women's interests within the WTO and its activities.

The legitimacy of any institution of governance depends upon its ability to represent its constituents. This is no less true of the WTO, whose constituents are its member states. As Steinkopf Rice has shown, both the WTO and its constituent members are subject to significant pressure from a range of interests to address the gendered nature of outcomes of trade governance and trade liberalization. Her work shows no fewer than 21 distinct gender and trade advocacy groups, all of them pressuring the WTO and its members to represent women and women's interests far more effectively.¹⁰⁰³ Certainly, if unaddressed, it would degrade the WTO's legitimacy.

The problems cited in Chapter 6, hindering the proposed solution to the representation of women and women's interests within the WTO, may be summarised as follows: the need to cross a high threshold of political will to obtain the desired result through the Secretariat or the Membership; and the requirement to obtain a very unlikely series of favourable results multiple times to obtain the desired result through either the direct or the indirect approach to the DSB. Both of these problems may be attributed to the WTO's primarily hard law structure. The first results from the high risk to members of adopting new regulations in a structure where the regulations are enforceable and their contravention is very likely to result in a meaningful tangible penalty. The second results from a well-defined dispute-settlement system of several steps, including appeals, the

¹⁰⁰³ Steinkopf Rice, Julie, "Viewing Trade Liberalization through a Feminist Lens: A Content Analysis of the Counterhegemonic Discourse of Gender and Trade Advocacy Groups," Sociological Spectrum, vol. 30 (2010), 314.

results of which are binding. Given these considerations, both of which are functions of a hard law system, WTO members must approach potential new obligations very carefully; they are not to be undertaken lightly in such a system.

If its primarily hard law structure is a fundamental cause, and perhaps the fundamental cause, of the difficulty of representing women and women's interests within the WTO, it would seem that the introduction of soft law presents an ideal solution. Yet exactly here the conundrum at the center of the present investigation is evident. The WTO derives its legitimacy in large part from its hard law structure, but its inflexibility is now actually beginning to threaten that legitimacy, because it makes continual evolution of the WTO, and democratization in particular, difficult to achieve. At the same time, the movement toward a soft law model would seem to threaten either the precision of WTO Agreements or the effectiveness of enforcement that gives the WTO much of its legitimacy amongst its members. It is also uncertain that measures introduced to augment and preserve the WTO's legitimacy, if introduced as soft law measures, would on their own be sufficiently effective to do so. It is this complex interplay between legitimacy, hard law, soft law, and the representation of women and women's interests, as well as their resolution through hybridization, that occupies the remainder of the chapter.

Soft and Hard Law, Legitimacy, and Gender Analysis: What can be Learned from APEC and EU DG-Trade?

There are two different but complementary ways of approaching legitimacy in the context of the representation of women and women's interests. On one hand, the successful incorporation of 'gender mainstreaming' within APEC, despite its lack of an

enforcement mechanism, was made possible because it adheres more closely to a soft law model. This confers upon APEC a measure of legitimacy derived from publics and civil society organizations. Nonetheless, APEC's soft law approach limits the scope of measures that it can adopt and enforce. This diminishes APEC's ability as an institution to adopt measures and enforce them effectively, which must reduce to some extent the legitimacy it derives from its member-governments.

On the other hand, the continued juridification of the WTO, including its continued movement toward a hard law model, has brought the institution greater scope and effectiveness but has limited the extent to which it has been able to represent women and women's interests. The WTO, then, enjoys significant legitimacy derived from governments but suffers from diminished legitimacy derived from publics and civil society organizations.

An important finding, therefore, is the presence of two complementary correlations: first, the correlation between a high degree of legitimacy derived from publics and civil society organizations, the adoption of a soft law model, and openness to the representation of women and women's interests; and second, the correlation between a high degree of legitimacy derived from governments, the gradual adoption of a hard law model, and greatly diminished openness to the representation of women and women's interests. Though they differ, these are complementary rather than contradictory correlations because they can be reconciled by hybridization of hard law and soft law. Hard law measures can bolster where necessary legitimacy derived from governments, soft law measures can bolster where necessary legitimacy derived from publics and civil society organizations, and both can be accomplished as necessary within the same

institution. Indeed, the point is not that an institution be either hard law or soft law, but that it maintain the balance between them that best allows the fulfillment of its purpose, while retaining the flexibility necessary to change when the balance is lost or circumstances change. This is, in short, a nexus of hybridization, juridification and path-dependency, and it is necessary to all sustained democracy and democratization.

In turn, these correlations place in a clearer light one of the most important questions of this chapter: why it is that a particular trade governing body addresses the representation of women and women's interests, perhaps through 'gender mainstreaming', while another does not. This is also to ask a double-sided question concerning the legitimacy of gender analysis and the representation of women and women's interests within global trade governance: whence is legitimacy derived for a given international trade organization, and to what extent is the discussion of the connection between sex/gender, trade and the representation of women and women's interests legitimate within the organization? By comparing APEC with the WTO, and by highlighting their differences, the study begins to address this question.¹⁰⁰⁴

Soft Law and Legitimacy - APEC

It is well accepted within the literature that APEC is an excellent and stubborn example of a soft law model. As Kahler states, "the Asia-Pacific region offers an

¹⁰⁰⁴ To preempt an obvious criticism, it must clearly be stated here that these correlations do not imply causal relationships between soft law, legitimacy from organizations, populations and civil societies, and openness toward incorporating 'gender mainstreaming', or between hard law, legitimacy from member governments, and a far lesser degree of openness toward incorporating 'gender mainstreaming'. Certainly, there are important reasons, and much room for speculation, concerning why the two groups of three seem to be correlated; however, to assign a causal priority to the legal regime, the source of legitimacy, or the openness toward 'gender mainstreaming', much less to adduce reasons for this priority, would seem to be a task of extreme difficulty, and one whose resolution must in the end be arbitrary.

important example of low legalization and possibly an explicit aversion to legalization.”¹⁰⁰⁵ In support of this assertion, he argues that in organizations with significant Asian participation, “formal rules and obligations [have been] limited in number; codes of conduct or principles have been favoured over precisely defined agreements; and disputes have been managed, if not resolved, without delegation to third-party adjudication.”¹⁰⁰⁶

Specific instances of APEC’s preference for and adoption of a soft law model are numerous. For example, the Kuching Consensus, which articulates the ground rules for ASEAN participation in APEC, expressly requires that APEC “should not lead to the adoption of mandatory directives for any participant to undertake or implement.”¹⁰⁰⁷ The 1994 Bogor Declaration, which endorsed the endeavour to liberalize trade and investment, was vaguely phrased and included a timetable that allowed different countries to implement the Declaration at different speeds. The advocacy of peer pressure and Concerted Unilateral Action (CUA), rather than binding measures, has also been adopted, and the Non-Binding Investment Principles, adopted as part of the Manila Action Plan, constitute commitments less obligatory and less precise than those already made by APEC countries under the WTO’s Trade-Related Investment Measures agreement.¹⁰⁰⁸ Further, the second and third Eminent Persons Councils (EPCs), reduced a recommendation of the first EPC for a dispute settlement mechanism to a recommendation for a service that would “provide assistance in resolving (and thus, over

¹⁰⁰⁵ Miles Kahler, “Legalization as Strategy: The Asia-Pacific Case,” *International Organization*, vol. 54, no. 3 (Summer 2000), 549.

¹⁰⁰⁶ *Ibid*, 549.

¹⁰⁰⁷ *Ibid*, 557.

¹⁰⁰⁸ *Ibid*, 558.

time, perhaps avoiding) economic disputes among its members.”¹⁰⁰⁹ Finally, the 2002 Osaka Action Plan includes ‘flexibility’ as one of its key provisions and requires ‘Individual Action Plans,’ (IAPs) toward trade liberalization, wherein “APEC Member Economies set their own timelines and goals, and undertake these actions on a voluntary and non-binding basis.”¹⁰¹⁰

This preference for soft law made it a relatively uncontroversial initiative to establish a research unit within APEC. The Policy Support Unit was established by APEC Ministers in September 2007 to provide independent research and analysis support to APEC Members and key stakeholders.¹⁰¹¹ PSU research projects must be approved by the PSU board, and of course the PSU can be tasked by APEC Members to provide specific research or analysis.¹⁰¹² Crucially, however, the PSU is solely responsible for its research conclusions, is able to assist in the design of research proposals, and is empowered to propose research and analysis it judges will advance the priorities of APEC.¹⁰¹³ This flexibility may well have been made possible by APEC’s soft-law model, and it contrasts markedly with the significant restrictions placed upon the research capacity of the WTO Secretariat (discussed in Chapter 5). Thus, again, the relatively soft-law structure of APEC correlates with greater advancement of the representation of women and women’s interests in comparison to the WTO, although the practical effect of

¹⁰⁰⁹ *Ibid.*, 559.

¹⁰¹⁰ www.apecsec.org.sg/apec/about_apec/how_apec_operates/action_plans_.html (accessed 29 June 2014).

¹⁰¹¹ Asia-Pacific Economic Cooperation, “Policy Support Unit,” <http://www.apec.org/About-Us/Policy-Support-Unit.aspx> (accessed 29 June 2014).

¹⁰¹² *Ibid.*

¹⁰¹³ *Ibid.*

this advancement is much less clear in a soft-law context than it would be in a hard-law context.

Plainly, APEC is an organization composed first of all of representatives of member governments; nevertheless, within APEC's soft law framework, and to a far greater extent than in the WTO, the member governments are concerned with domestic legitimacy and, to a far greater extent than the WTO, APEC itself derives its legitimacy from populations and civil society organizations.

One of the most important reasons why legitimacy in APEC derives so largely from populations and civil society organizations, and why APEC is so amenable to a soft law model, may be seen by juxtaposing two important observations. First, as Narine argues, most Asia-Pacific states are preoccupied with building states' legitimacy and domestic institutions.¹⁰¹⁴ Domestic political legitimacy, he argues, is key to explaining the reluctance of Asia-Pacific states to build strong regional institutions. Asian states believe that regional institutions should enhance, rather than challenge, the sovereignty of members.¹⁰¹⁵ Second, as Beeson and Jayasuriya argue, the distinction between public and private sectors is not only fundamentally blurred in countries such as Japan, Taiwan, and South Korea, "it is essentially meaningless in some of the third tier of developmental states," such as Indonesia.¹⁰¹⁶ This means that the population as a whole, including any civil society that has developed, is inextricably tied to the need to buttress state sovereignty at the international level, thus requiring a continual domestic focus amongst

¹⁰¹⁴ Narine, Shaun, "State Sovereignty, Political Legitimacy and Regional Institutionalism in the Asia-Pacific," *The Pacific Review*, vol. 17, no. 3 (2004), 444.

¹⁰¹⁵ *Ibid*, 424.

¹⁰¹⁶ Beeson, Mark and Kanishka Jayasuriya, "The Political Rationalities of Regionalism: APEC and the EU in Comparative Perspective," *The Pacific Review*, vol. 11, no. 3 (1998), 329.

most Asia-Pacific states, constraining their ability to agree to binding measures in international organizations and making them far more amenable to a soft law model.

In effect, the predominance of the soft law model of East Asian regional institutions such as APEC, and their derivation of legitimacy to a great extent from populations and civil society organizations, is the result of “the failure to constitute an independent arena of economic space outside the state.”¹⁰¹⁷ In turn, according to Beeson and Jayasuriya, this may be traced to “the dominance of cameralist forms of political rationality in much of East Asia.”¹⁰¹⁸ In a cameralist political rationality, “the market is identified with the goals and objectives of state security,” government regulation and the market are intended to serve the welfare of the general population, and arguments for regional markets and organizations are framed in terms of “their ability to contribute to national development.”¹⁰¹⁹ Again, the focus here is upon the domestic populace and civil society organizations as the sources of legitimacy. That is to say, the market is not necessarily less ‘free,’ since ‘free markets’ themselves are heavily regulated and ordered; however, the regulation of a ‘cameralist’ market would likely be more openly directed toward the welfare of the collective.

Kahler describes four reasons for the predominance in APEC of the soft law model and of legitimacy derived from populations and civil society organizations. First, he cites the lack of demand amongst the business sectors of East-Asian APEC members for juridified dispute-settlement mechanisms at the regional or international level. Second, Kahler mentions the frequently-cited difference between Western legal

¹⁰¹⁷ *Ibid*, 335.

¹⁰¹⁸ *Ibid*, 335.

¹⁰¹⁹ *Ibid*, 316.

institutions and the less adversarial “Asian legal culture and institutions.”¹⁰²⁰ That Kahler makes significant and trenchant criticisms of this line of argumentation does not change its popularity or wide acceptance, which he also admits. Third, domestic political explanations, including political homogeneity and sovereignty costs, reduce the desire amongst Asia-Pacific states for international organizations aligned with a hard law model.¹⁰²¹ Fourth, Kahler suggests that the relatively low degree of juridification in the Asia-Pacific may be instrumental and strategic, which is to say that, to the extent that hard law international institutions are rare in the Asia-Pacific region, they fail to be seen by Asia-Pacific states as an effective means to other desired ends.¹⁰²² Again, throughout Kahler’s four reasons one sees the predominance of domestic sources of legitimacy including, to a very great extent, legitimacy derived from populations and civil society organizations.

Finally, one can find this derivation of legitimacy in recent documents produced by APEC. For example, ‘stakeholder participation’ features prominently within APEC’s ‘scope of work,’ through the APEC Business Advisory Council (ABAC), the APEC Study Centre Consortium (ASCC), through the Gender Focal Points Network, and through APEC’s openness to Non-Member Participation.¹⁰²³ The observer status accorded to ASEAN, the Pacific Economic Cooperation Council, and the Pacific Islands Forum Secretariat also supports the predominance of legitimacy derived from populations

¹⁰²⁰ Kahler, Miles, “Legalization as Strategy: The Asia-Pacific Case,” *International Organization*, vol. 54, no. 3 (Summer 2000), 560.

¹⁰²¹ *Ibid*, 561.

¹⁰²² *Ibid*, 562.

¹⁰²³ www.apecsec.org.sg/content/apc/about_apc/how_apc_operates/stakeholder_participation.html (accessed 29 June 2014).

and civil society organizations.¹⁰²⁴ Lastly, this understanding of APEC's derivation of legitimacy also derives from the peer-review process to which IAPs are submitted, wherein academic experts and the APEC Business Advisory Council are consulted.¹⁰²⁵

Hard Law and Legitimacy - WTO

It is widely accepted in the literature that the WTO tends more toward a hard law than a soft law model, while APEC does the opposite. The WTO's tendency toward hard law is easily seen both in its institutions and in its agreements. The measurements established by Abbott, Keohane *et al.*, or by Davidson, serve here as useful benchmarks. Concerning precision, the GATT Agreements, the *Marrakesh Agreement* establishing the WTO, the Dispute Settlement Understanding, and the TRIPS, TRIMS and SPS Agreements, are all highly precise documents that articulate in detail the requirements of individual members and the allowable exceptions. Concerning obligation, all WTO agreements are binding upon all members at all times, unless explicitly stated otherwise. Even Ministerial Declarations are frequently taken to have binding force, although this is not quite as clearly or so universally true. Members in violation of agreements open themselves to legitimate retaliation by other members. Concerning delegation, the WTO employs a Dispute Settlement Body, with appeal to an Appellate Body, in order to resolve disputes between its members. The decision of the Appellate Body is binding upon the parties to the dispute, and failure to comply with the decision opens the party in violation to legitimate retaliation by the other party. Moreover, the decisions of the

¹⁰²⁴ www.apecsec.org.sg/content/apec/about_apec/how_apec_operates/apec_observers.html (accessed 29 June 2014).

¹⁰²⁵ www.apecsec.org.sg/content/apec/about_apec/how_apec_operates/action_plans_.html (accessed 29 June 2014).

Appellate Body have increasingly come to be regarded as legal precedents that strongly influence subsequent decisions upon similar questions. Similarly, with reference to Davidson's criteria, the rules tend far more toward a binding and precise nature, and the Dispute Settlement Mechanism is more juridical than diplomatic.

That the structures of the WTO locate its legitimacy almost solely in the Organization's member-governments, through their representatives, is amply affirmed in the academic literature, by advocates and by those who complain of a democratic deficit. According to Howse and Nicolaidis, the original GATT regime operated as a bargain between governments of members under the rubrics of 'embedded liberalism' and 'cooperation under anarchy.'¹⁰²⁶ Embedded liberalism precipitated a legitimacy crisis that continues to the present, because it had the effect of reducing relations between GATT members fundamentally to relations of power. This was particularly so with respect to relations between developed and developing country GATT members. The response during the 1990s was 'constitutionalism,' wherein it was asserted with increasing vigor that the institutions of the global trade regime, and particularly of the WTO, derived a particularly powerful legitimacy because they comprised a nascent constitution of global governance and because they incorporated international law.¹⁰²⁷ 'Embedded liberalism' must not be understood here simply as synonymous with neoliberalism, but as a mode of organization peculiar to the GATT/WTO regime that could be amended by 'constitutionalism.' That is to say, the idea of 'constitutionalism' was to make explicit and formal to a much greater degree the constitutional order of the GATT/WTO regime,

¹⁰²⁶ Howse, Robert and Kalypso Nicolaidis, "Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity?" *Governance: An International Journal of Policy, Administration, and Institutions*, vol. 16, no. 1 (January 2003), 76.

¹⁰²⁷ *Ibid*, 80-83.

while ‘embedded liberalism’ would leave the constitutional order more implicit and unstated, for example by the use of guidelines or general rules. The latter is ‘liberal’ in that the actions of the members of the organization would be less bound by formal, explicit constitutional rules. Regardless, whether tending toward ‘embedded liberalism’ or ‘constitutionalism,’ the source of the GATT’s and then the WTO’s legitimacy was the governments of members, without explicit reference to domestic polities, civil societies or NGOs.

One sees the continuation of this basis of legitimacy in the suggestions for further reform. Howse and Nicolaidis argue that the WTO must be institutionally sensitive to the superior credentials in some areas of other institutions of governance, including domestic institutions; that it must be more politically inclusive of parties other than member-governments; and that it must practice top-down empowerment, which would include differentiated applicability for underdeveloped countries, and would address particular and widespread domestic problems at the international level.¹⁰²⁸ These suggestions of course imply that the WTO is insufficiently sensitive and inclusive, and that its power remains concentrated within the institution. This in turn implies that the basis for the legitimacy of the WTO derives to a very great extent from its member-governments through their representatives. The same may be said of the calls for parliamentary-style democratization of the WTO from Rommetvedt and Zampetti.¹⁰²⁹

The following tables summarize, as the preceding discussion illustrated, that when an organization (APEC) tends toward a soft law model, it tends to derive its legitimacy

¹⁰²⁸ *Ibid*, 86-90.

¹⁰²⁹ See, for example, Rommetvedt, Hilmar, “The Institutionalization of a Parliamentary Dimension of an Intergovernmental Organization: the WTO,” *World Trade Review*, vol. 10, no. 4 (2011), 423-446; Also Zampetti, Americo Bevilgia, “Democratic Legitimacy in the World Trade Organization: The Justice Dimension,” *Journal of World Trade*, vol. 37, no. 1 (2003), 105-126.

largely from organizations, populations and civil societies, and when an organization (WTO) tends toward a hard law model, it tends to derive its legitimacy largely from its member governments through their representatives.

Table 6: Soft Law and Hard Law in APEC and WTO

| | APEC | WTO |
|-----------------|--|--|
| Soft Law | Generally imprecise, non-binding suggestions and principles | Trade Policy Review Mechanism |
| | APEC Best Practices for RTAs and FTAs | Marrakesh Agreement Preamble with respect to Sustainable Development & Quality of Life |
| | Non-Binding Investment Principles | |
| Hard Law | Not much | Generally precise, binding agreements and treaties |
| | | Dispute Settlement Mechanism |
| | | TRIPS |
| | | SPS |

Source: Author

Table 7: Legitimacy in APEC and WTO

| | APEC | WTO |
|--|---|--|
| Organizations, populations, and civil society | <p>'Stakeholder Participation' a prominent factor in APEC's 'Scope of Work'</p> <p>APEC Business Advisory Council</p> <p>APEC Study Centre Consortium</p> <p>Academic consultation & peer-review process for Individual states' Action Plans</p> <p>Asia-Pacific states' fuzzy public/private distinction & concern for increasing domestic political legitimacy</p> | 3rd-party Amicus Curiae Briefs allowed at the discretion of each DSB and AB panel. |
| Member-governments | <p>Meetings & negotiations conducted primarily by heads of state and ministers</p> | <p>Agreements & treaties negotiated by member-government representatives</p> <p>Agreements & treaties ratified by member-governments</p> <p>Dispute settlement bodies nominated by member-governments</p> |

Source: Author

The Legitimacy of ‘Gender Mainstreaming’ within APEC and the WTO

The correlations in the above tables point toward the question of the legitimacy of analysis concerning the representation of women and women’s interests within APEC and the WTO. Following the previous section, it can be argued that APEC’s adherence to a soft law model and the significant extent to which it derives its legitimacy from members’ domestic populations, organizations and civil societies, make the organization more open to research and analysis concerning the representation of women and women’s interests.

In 1998, a ministerial meeting on women led to the creation of a Task Force on the Integration of Women in APEC, which was charged with developing a framework for women’s integration. This framework was produced in 1999, and the Advisory Group on Gender Integration was established to integrate the framework by 2001. Also in 1999, APEC’s Human Resource Development Working Group introduced gender equality guidelines for project management in APEC. In 2001, the North-South Institute’s “Gender Mainstreaming: Good Practices from the Asia-Pacific Rim,” defined an effective mechanism for the incorporation of women within APEC, and in 2002, after the second Ministerial Meeting on Women was held in Mexico, the Ad Hoc Advisory Group on Gender Integration was replaced by the permanent Gender Focal Points Network.¹⁰³⁰

Then, in 2011, the Gender Focal Points Network and the Women’s Leadership Network were combined to create the Policy Partnership on Women and the Economy (PPWE) – a “single public-private entity to streamline and elevate the influence of

¹⁰³⁰ Fabian, Judit, “Mulier Economicus: Gender and the WTO,” *Annual Meeting of the Canadian Political Science Association*, York University, Ontario, Canada (1-3 June 2006), 46-47.

women's issues within APEC.”¹⁰³¹ The institutional role of the PPWE within APEC is to report on “APEC gender activities and outcomes”¹⁰³² to the Senior Officials Meeting (SOM) Steering Committee on Economic and Technical Cooperation (SCE – thus SOM-SCE). The goal of the PPWE is to “provide linkages between APEC working groups, APEC economies and the APEC Secretariat to advance the economic integration of women in the APEC region for the benefit of all members.”¹⁰³³ To date, the PPWE has met twice: its inaugural meeting at its establishment in May 2011 in Big Sky, Montana, United States; and a second meeting in June of 2012 at St. Petersburg, Russia. In May of 2014, the APEC Women and the Economy Forum was convened in Beijing, China, with significant involvement of PPWE.¹⁰³⁴

At the 2011 and 2012 meetings, members agreed eight tasks to be considered fundamental to PPWE. They were and remain the following, quoted verbatim rather than paraphrased to avoid confusion:

- (1) Assist APEC groups and actively cooperate with them to identify and address priority gender equality and women and the economy issues;
- (2) Promote and report on women's representation across APEC and within individual groups;
- (3) Assess the use of gender equality criteria in project proposals;
- (4) Collect and share best practices in gender equality integration;
- (5) Support and report on the progress of implementation of gender integration within individual groups and across APEC economies;
- (6) *Proactively engage*

¹⁰³¹ Asia-Pacific Economic Cooperation, “Policy Partnership on Women and the Economy,” <http://www.apec.org/Groups/SOM-Steering-Committee-on-Economic-and-Technical-Cooperation/Working-Groups/Policy-Partnership-on-Women-and-the-Economy.aspx> (accessed 29 June 2014).

¹⁰³² *Ibid.*

¹⁰³³ *Ibid.*

¹⁰³⁴ *Ibid.*

key members of PPWE, including private sector members and ABAC; (7) Collaborate and assist in the development of project proposals in the area of women in the economy; (8) Propose recommendations and areas of priority for advancing gender equality and women and the economy integration in APEC.¹⁰³⁵

This capacity for wide-ranging activity, research and initiative again contrasts sharply with the limitations placed upon the WTO Secretariat, as discussed in Chapter 5. It is instructive in this context to recall that a senior member of the WTO Secretariat, cited in Chapter 5, stated plainly that “the Secretariat in the WTO has zero initiative power. It can never propose something.”¹⁰³⁶ The same member recounted how a talk given concerning potential human-rights-based arguments against US trade restrictions upon Myanmar caused an investigation by the WTO General Council of the WTO Director General and the Secretariat.¹⁰³⁷ Thus, again, the correlation is made clear between the soft-law structure of APEC and the much greater extent to which APEC, compared to the WTO, has purposefully advanced the representation of women and women’s interests.

The result of this work was the practice of ‘gender mainstreaming’ at APEC, which required all proposals related to general or sectoral policies and programmes to be analyzed from a gender-equality perspective in order to ensure positive and equitable impacts. Thus, ‘gender mainstreaming’ entailed “the full participation of women in all aspects of life and [addressed] access issues to increase women’s participation in areas

¹⁰³⁵ *Ibid.*

¹⁰³⁶ Senior member of WTO Secretariat. Confidential interview transcribed verbatim from digital recording, October 2007.

¹⁰³⁷ Senior member of WTO Secretariat. Confidential interview transcribed verbatim from digital recording, October 2007.

where they [were] weakly represented.”¹⁰³⁸ ‘Gender mainstreaming’ also required the collection of sex-disaggregated data. Thus, APEC became the first multilateral economic organization to have incorporated ‘gender mainstreaming’ throughout its policy initiatives.

‘Gender mainstreaming’ in APEC has had concrete results including, for example, an important study of the effect upon women workers of the ending of the Multi-Fibre Agreement.¹⁰³⁹ APEC has also aided the Northern Homebased Worker’s Network in Thailand, which supports women in handicrafts production. Finally, APEC initiated the APEC Women in Aquaculture: APEC Fisheries Working Group project, which, although ultimately unsuccessful, was of obvious importance as a precedent.¹⁰⁴⁰ In short, in both general policy requirements and specific policy initiatives, APEC has shown itself not just amenable but welcoming toward the representation of women and women’s interests.

In contrast, the representation of women and women’s interests within the WTO at present is very limited. In 1996, a Women’s Caucus was created at the WTO Ministerial. In 1998, the WTO Ministerial formed the Informal Working Group on Gender and Trade (IWGGT). In 2000, the Women’s Caucus produced a two-page declaration addressing the implementation of the *Agreement on Agriculture* from a gender perspective. Finally, in 2003, the first session devoted to gender and trade was held at a WTO Public Symposium. Virtually nothing of import was accomplished

¹⁰³⁸ Fabian, Judit, “Mulier Economicus: Gender and the WTO,” *Annual Meeting of the Canadian Political Science Association*, York University, Ontario, Canada (1-3 June 2006), 11.

¹⁰³⁹ Hoskyns, Catherine, “Linking Gender and International Trade Policy: Is Interaction Possible?” Centre for the Study of Globalisation and Regionalisation, Working Paper 217 / 07 (February 2007), 14.

¹⁰⁴⁰ Fabian, Judit, “Mulier Economicus: Gender and the WTO,” *Annual Meeting of the Canadian Political Science Association*, York University, Ontario, Canada (1-3 June 2006), 19.

officially within the WTO proper toward the representation of women and women's interests between 2003 and 2009.

Even the advent of Aid-for-Trade in 2007 did not arise out of an explicit concern for the impact of trade liberalization upon women. As the analysis in this chapter shows, the Aid-for-Trade initiative is of great import with respect to the representation of women and women's interests within the WTO. However, it has never been couched explicitly by the WTO as an initiative to advance the representation of women and women's interests, particularly in its incarnation as the WTO CTD A4T. That it has done so in fact is not quite unintentional, since a roundtable on "the gender dimension of the Enhanced Integrated Framework" was convened, and a short report published, by the ITC, the WTO, Zambia and Lao PDR in April 2008.¹⁰⁴¹ However, it may fairly be said, and the analysis in this chapter shows, that the extent to which Aid-for-Trade is capable of advancing the representation of women and women's interests within the WTO is by and large a happy accident. That so little has been otherwise achieved may be ascribed in large part to the binding, hard law nature of most of the WTO's legal structure, which deters WTO members from adopting sex-specific measures and from representing women's interests more generally.¹⁰⁴²

The following table compares the openness of each organization to the representation of women and women's interests. While APEC's openness is official and

¹⁰⁴¹ "The Gender Dimension of the Enhanced Integrated Framework," Expert Roundtable Jointly Organized by ITC, WTO, Government of Zambia and Government of Lao PDR, Geneva (29-30 April 2008), http://www.intracen.org/uploadedFiles/intracenorg/Content/About_ITC/Where_are_we_working/Multi-country_programmes/Women_and_trade/The%20gender%20dimension%20of%20EIT.pdf (accessed 29 June 2014).

¹⁰⁴² Judit Fabian, "Mulier Economicus: Gender and the WTO," *Annual Meeting of the Canadian Political Science Association*, York University, Ontario, Canada, 1-3 June 2006, 46-7.

concrete (in terms of output), the WTO has had only informal or external experience with gender analysis.

Table 8: Legitimacy of the Representation of Women and Women's Interests in APEC and WTO – Some Highlights

| APEC | WTO |
|--|---|
| Openness to the Representation of Women and Women's Interests | No 'gender mainstreaming' or other systematic consideration of gender perspective |
| 'Gender mainstreaming' mandatory in all APEC policies and initiatives | |
| Two ministerial meetings on women held; led to creation of task force on the integration of women in APEC | Women's caucus founded in 1996 |
| Creation of framework for the integration of women in APEC (1999) | Informal Working Group on Gender & Trade (IWGGT) formed in 1998 |
| Advisory Group on Gender Integration established to implement framework in 2 years | 2000 – Women's Caucus produced a two-page declaration addressing the implementation of the Agreement on Agriculture (AoA) and the General Agreement on Trade in Services (GATS) from a gender perspective |
| Permanent Gender Focal Points Network established in 2002 | 2003 – First session on trade and gender held at a WTO Public Symposium: Cosponsored by CIDA, SWC, and DFAIT: "Women as Economic Actors in Sustainable Development." |
| Policy Partnership on Women and the Economy established in 2011 (combining GFPN and WLN) | 2003 – "Gender Equality, Trade and Development" session sponsored by CIDA and DFAIT; held in conjunction with the Cancun WTO Ministerial Conference |
| Second PPWE meeting in 2012 (at St. Petersburg, Russia) | 2003 – Industry Canada officials brief the Canadian trade minister concerning gender issues before entering negotiation |
| APEC Women and the Economy Forum convened in May 2014 (at Beijing, China) | |

Source: The above information was collected from the various sources used in the present study.

The Correlations Revisited and the Suggestion of Hybridization

The fundamental question directing this section of the study is why some trade regimes address the representation of women and women's interests while others do not. The analysis of APEC, which does, and the WTO, which does not, highlights two interesting and complementary correlations: that when an international organization tends toward a soft law model, it tends to derive its legitimacy largely from populations and civil society organizations, and it tends to be more open to incorporating 'gender mainstreaming' and other measures of the representation of women and women's interests; when an international organization tends toward a hard law model, or toward juridification, it tends to derive its legitimacy largely from its member governments through their representatives, and it tends to be less open to the incorporation of 'gender mainstreaming'.

The problem is that while APEC's soft law model allows for 'gender mainstreaming' in all of APEC's institutions, the imprecise and non-binding measures adopted by APEC give little reason for members to adopt effectual and precise measures actually to accomplish the representation of women and women's interests. They do give opportunity and legitimacy, though, and that must not be underrated. On the other hand, the hard law model to which the WTO adheres is effective at requiring specific behaviour from its members, but this very effectiveness greatly diminishes the likelihood that WTO members will come to an agreement concerning the effective incorporation of 'gender mainstreaming' or other measures to accomplish the representation of women and women's interests within trade-law and policy. As discussed earlier, this suggests the need for the hybridization of soft and hard law models to combine, over time, the

openness and popular legitimacy of the soft law model with the precision, obligation and effectiveness of the hard law model, and thereby effectively and legitimately accomplish the representation of women and women's interests within global trade governance.

The potential benefits of hybridization are significant. First and foremost, it would legitimize and enable agreement, in a general and high-level sense, about the introduction of 'gender mainstreaming'. In other words, hybridization would allow for compromise between an immediate agreement to incorporate 'gender mainstreaming', and the specific and binding policies to be enacted later that are required for its institution.¹⁰⁴³ In effect, hybridization buys time in negotiation; it allows for agreement now upon what can be agreed to by all, and it allows the more difficult points to be left for later without threatening the entire negotiation.¹⁰⁴⁴

Hybridization also decreases the dangers of the uncertain consequences of instituting new policy.¹⁰⁴⁵ Effectively, as an example, it could allow WTO members to begin with a soft law agreement to introduce gender equality analysis, and move toward a hard law agreement to incorporate women's interests in all WTO policies. The movement could occur gradually, by increment, as the consequences of each new increment became clear and members became comfortable with each new increment. This use of hybridization to move incrementally between soft law and hard law models would also mitigate and amortize contracting costs and sovereignty costs to members.¹⁰⁴⁶

¹⁰⁴³ Abbott, Kenneth W. and Duncan Snidal, "Hard and Soft Law in International Governance," *International Organization* vol. 54, no. 3 (Summer 2000), 444-447.

¹⁰⁴⁴ *Ibid*, 446.

¹⁰⁴⁵ *Ibid*, 441-442

¹⁰⁴⁶ *Ibid*, 434, 436-437

Hybridization, then, would make it easier and less risky to address and accomplish the representation of women and women's interests within the WTO. This would augment the WTO's legitimacy derived from populations and civil society organizations, without sacrificing the effectiveness of the hard law model that is one of the most important bases of the WTO's legitimacy with member-governments.

Objections

Two important objections immediately present themselves. First, it might be argued that the WTO, being an organization whose purpose is the global governance of trade, must address and moderate the concerns of numerous regional entities, and that this must make the representation of women and women's interests within the WTO too difficult and complex a task. The second objection is that gender is not relevant to the WTO, since the WTO deals only with trade and trade-related issues. This objection continues by asserting that, in order to be amenable to the incorporation of gender, the WTO would have to be more like the EU and consider 'social aspects' such as labour mobility and social policy.

In response to the first objection, it must be admitted that the WTO must accommodate numerous regional institutions, and its binding agreements must be ratified by member-governments. This admission becomes rather less significant, however, when it is recalled that the largest and most powerful regional organization, the European Union, employs what is perhaps the most robust policy of 'gender mainstreaming' of any international organization or transnational government. The policy of the EU reads as follows: "gender mainstreaming is the (re)organization, improvement, development and

evaluation of policy processes so that a gender equality perspective is incorporated in all policies, at all levels, and all stages, by the actors normally involved in policy-making.”¹⁰⁴⁷ This understanding of ‘gender mainstreaming’ was adopted by the EU in 1996 as part of its gender equality policy.

It is also very important to note that both the EU and its practice of ‘gender mainstreaming’ represent an effective hybridization of hard law and soft law models. As Bayne notes, the Maastricht Treaty, for example, “created a union with three pillars: first, the European Community, narrowly defined, covering economic and social issues; second, political cooperation, mainly in foreign policy; and third, the realm of justice and home affairs. Both the second and third pillars are soft law edifices.”¹⁰⁴⁸ Similarly, the definition of ‘gender mainstreaming’ employed by the EU incorporates the requirement that it be employed in all policies and at all levels and stages, while at the same time defining ‘it’ as the somewhat less precise “gender equality perspective.” Finally, it ought to be emphasized that ‘trade’ is a hard law component of the Maastricht Treaty, which reaffirms that an international organization steeped in hard law, such as the WTO, remains amenable in principle to the incorporation of gender.

To the second objection, it can be responded simply that APEC, a regional organization that is nearly as focused upon trade as the WTO is, applies ‘gender mainstreaming’ to all of its policies. Moreover, as described above, APEC’s ‘gender

¹⁰⁴⁷ Council of Europe, *Gender Mainstreaming: Conceptual Framework, Methodology and Presentation of Good Practices*, Final Report of Activities of the Group of Specialists on Mainstreaming. EG-S-MS (98) 2 rev., Strasbourg (May 1998), 15. Also cited in Hoskyns, Catherine, “Linking Gender and International Trade Policy: Is Interaction Possible?” Centre for the Study of Globalisation and Regionalisation, Working Paper 217 / 07 (February 2007), 3.

¹⁰⁴⁸ Bayne, Nicholas, “Hard and Soft Law in International Institutions: Complements, Not Alternatives,” in John J. Kirton and Michael Trebilcock, eds., Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance (Aldershot: Ashgate Publishing Ltd., 2004), 348.

mainstreaming' has produced concrete initiatives, which is somewhat remarkable for an organization that makes such extensive use of a soft law model. Further, one can answer the objection by asserting that the WTO simply is not so myopically trade-oriented, since the Marrakesh Agreement does not state only that trade liberalization ought to be pursued, but that it ought to be pursued within trade relations structured so as to raise standards of living and achieve sustainable development.¹⁰⁴⁹ Finally, as discussed above, by including the many 'exceptions' discussed at length in Chapter 6 (and others not discussed), most WTO agreements incorporate concern for human welfare, rather than trade policy or trade liberalization alone.

A Renewed WTO? The IF, the EIF, and Aid for Trade

The question, then, is whether the WTO can achieve a hybridization that could be expected to accomplish the representation of women and women's interests, probably through a kind of 'gender mainstreaming'. The answer is that, in a sense and in embryonic form, it already has. There are, of course, soft law elements in the TRIMS Agreement and in the Trade Policy Review Mechanism, but neither of these has produced research or initiatives that address the representation of women and women's interests. Aid for Trade has done so under the auspices of the WTO but not within the WTO, and that is remarkable enough. Yet it is the manner in which Aid for Trade has made such an accomplishment possible that makes it such a particularly remarkable example, and so valuable to the present study.

¹⁰⁴⁹ *Agreement Establishing the World Trade Organization*, Preamble, paras. 1 and 4.

Aid for Trade is a WTO-led programme whose purpose is to provide financial assistance to developing countries, and particularly to Least Developed Countries (LDCs), in order that they may be able more effectively to access global trading markets and to benefit from trade liberalization.¹⁰⁵⁰ According to Mshomba, Aid-for-Trade fulfils a four-part rationale: first, to facilitate and improve African participation in the WTO; second, to finance the implementation of WTO Agreements; third, to help ameliorate supply side constraints; and fourth, to alleviate adjustment costs in the wake of diminished tariff revenue. However, as will be shown, the structural significance of Aid-for-Trade to the WTO and global economic governance is greater than this.¹⁰⁵¹

Aid for Trade takes its ultimate origins from the Integrated Framework (IF), which came into being in 1997 as the collaborative effort of six agencies and organizations: IMF; ITC; UNCTAD; UNDP; WTO; and the World Bank.¹⁰⁵² It pursued a threefold mandate: “to mainstream trade into LDCs’ national development plans such as Poverty Reduction Strategy Papers (PRSPs); to assist in the coordinated delivery of trade-related assistance in response to needs identified by LDCs; [and] to develop the capacity of LDCs to trade, including through capacity building and addressing supply constraints.”¹⁰⁵³ It should be noted that the initial mandate of the IF was more limited than the mandate of the Enhanced Integrated Framework (EIF) is at present, since it stressed the provision to LDCs of assistance in development ‘mainstreaming,’ of

¹⁰⁵⁰ World Trade Organization, “Aid for Trade Fact Sheet,” http://www.wto.org/english/tratop_e/devel_e/a4t_e/a4t_factsheet_e.htm (accessed 22 April 2013).

¹⁰⁵¹ Mshomba, Richard E., “Africa and the Doha Round,” in Wilkinson, Rorden and James Scott, eds., Trade Poverty, Development: Getting Beyond the WTO’s Doha Deadlock, (London: Routledge, 2013) 177.

¹⁰⁵² World Trade Organization, “Enhanced Integrated Framework,” http://www.wto.org/english/tratop_e/devel_e/teccop_e/if_e.htm (accessed 22 April 2013).

¹⁰⁵³ World Trade Organization, *Recommendations of the Task Force on an Enhanced Integrated Framework*, Preamble.

technical assistance, and of assistance in developing capacity to trade.¹⁰⁵⁴ Only under the rubric of capacity-building could direct financial assistance be justified; it was not the primary purpose of the IF originally. Neither women nor gender are mentioned in the original mandate of the IF. Nevertheless, it established an important contact between the WTO and the UN system. More than this, Ostry states that the IF was originally intended to demonstrate the improved international coherence that was supposed to be a result of the Uruguay Round. This is an important legacy, because by extension it also provides the original rationale for the EIF and Aid-for-Trade. Moreover, improved coherence with the UN system and other IOs also provides an originary rationale for the closer involvement of the EIF and Aid-for-Trade with gender analysis and the representation of women and women's interests.¹⁰⁵⁵

Even so, scholars, practitioners, stakeholders, contributors and beneficiaries alike considered that the IF was insufficient to accomplish its aims. It was thought, in particular, that the IF was neither unified nor focused enough, that this led to incoherence between IF technical assistance and the development plans of LDCs, and that the funds contributed by the IF were too little, too infrequent and poorly targeted.¹⁰⁵⁶ As a result, a task force was established in 2006 to provide recommendations for an Enhanced Integrated Framework (EIF) that would constitute a reliable and helpful vehicle for the provision of financial, technical and planning assistance to LDCs. That the EIF was intended to be a much more robust initiative, with financial assistance far more central to

¹⁰⁵⁴ *Ibid.*

¹⁰⁵⁵ Ostry, Sylvia, "Energy Security and Sustainable Development: The WTO and the Energy Charter Treaty," in John Kirton, Marina Larionova, and Paolo Savona, eds., Making Global Governance Effective: Hard and Soft Law Institutions in a Crowded World, (Farnham, England: Ashgate, 2010) 135.

¹⁰⁵⁶ For example, Prowse, Susan, "Aid for Trade: Supporting Trade: Preference Reform," Centre for Global Development Working Paper 224 (2010).

its mandate, was made evident in the 2005 Hong Kong Ministerial Declaration and the recommendations, from the subsequent year, of the Task Force on an Enhanced Integrated Framework. As the recommendations state, the EIF was to be comprised of three specific elements: first, the provision of “increased, predictable, and additional funding on a multi-year basis”;¹⁰⁵⁷ second, the strengthening of the ‘in-country’ component of the IF, particularly by “mainstreaming trade into national development plans and poverty reduction strategies”;¹⁰⁵⁸ and third, the improvement of “IF decision-making and management structures to ensure an effective and timely delivery of the increased financial resources and programmes.”¹⁰⁵⁹

Eight years later, these remain the fundamental elements of the EIF; the programme now operates a multi-donor fund of USD 250 million, with which it is currently helping 47 LDCs.¹⁰⁶⁰ This activity is managed by means of a governance structure divided between an in-country component and a global component. The former is comprised of three further parts: first, a National EIF Focal Point, who leads EIF processes in the LDC receiving funding, and who is generally a senior government official of the LDC; second, the EIF Donor Facilitator, who represents the donor community and works “to facilitate donor co-ordination and donor/government dialogue on trade issues and Aid for Trade”;¹⁰⁶¹ and third, the EIF National Steering Committee, which is “the senior-level forum for decision-making and coordination among

¹⁰⁵⁷ World Trade Organization, *Recommendations of the Task Force on an Enhanced Integrated Framework*, Preamble.

¹⁰⁵⁸ *Ibid.*

¹⁰⁵⁹ *Ibid.*

¹⁰⁶⁰ World Trade Organization, “Enhanced Integrated Framework,” http://www.wto.org/english/tratop_e/devel_e/teccop_e/if_e.htm, (accessed 22 April 2013).

¹⁰⁶¹ *Ibid.*

government partners on trade, the private sector, civil society and the donor community.”¹⁰⁶² The global component is divided into four parts: first, the EIF Steering Committee, which ensures the overall effectiveness and transparency of the EIF process; second, the EIF Board, which is the primary decision-making body for the EIF with respect to matters of policy, finances, and operations; third, the EIF Executive Secretariat, which is housed within the WTO and supports the EIF; and fourth, the EIF Trust Fund Manager, who is “represented through the United Nations Office for Project Services (UNOPS) as selected by the EIF Board.”¹⁰⁶³

Concurrently with the advent of the Enhanced Integrated Framework, the WTO launched the ‘Aid for Trade’ initiative at the 2005 Hong Kong Ministerial, and in February of 2006 established a task force whose purpose was to ‘operationalize’ Aid for Trade. Unlike the EIF, Aid for Trade is specifically a programme. It has to this point fewer of the trappings of an institution, such as a permanent secretariat, but it may still be said to be quasi-institutionalized. Indeed, Aid for Trade is implemented through other institutions and frameworks, such as the EIF, the International Trade Center (ITC), and the Standards and Trade Development Facility (STDF). The Task Force made recommendations, which were adopted by the General Council, to strengthen needs identification at the country-specific level, and to match more accurately donor responses with country needs.¹⁰⁶⁴ The Task Force Report also made a number of recommendations for implementation, the most important of which were the establishment of a monitoring body within the WTO that would undertake ‘periodic global reviews’ based on

¹⁰⁶² *Ibid.*

¹⁰⁶³ *Ibid.*

¹⁰⁶⁴ World Trade Organization, “Development: Aid for Trade: Task Force,” http://www.wto.org/english/tratop_e/devel_e/a4t_e/implementing_par57_e.htm (accessed 22 April 2013).

stakeholder input, and the establishment by the Director-General WTO of an ‘ad hoc’ consultative group to review the implementation of Task Force recommendations.¹⁰⁶⁵

The Task Force clearly established that the rationale of Aid for Trade, as a programme, was to assist “developing countries to increase exports of goods and services, to integrate into the multilateral trading system, and to benefit from liberalized trade and increased market access.”¹⁰⁶⁶ The scope of ‘Aid for Trade,’ as a programme, was defined to include 6 categories: assistance in the development, analysis and understanding of trade policies and regulations; trade development, including investment promotion, business support services, market analysis, networking and e-commerce assistance, amongst other areas; development of trade-related physical infrastructure; building productive capacity; trade-related adjustment, including adjustment to liberalized trade; and “other trade-related needs.”¹⁰⁶⁷

The Task Force noted that aspects of Aid for Trade are best assigned either to the country, regional or global level, depending upon the aspect being considered.¹⁰⁶⁸ This has led directly to the biannual Regional Reviews conducted by all Aid for Trade partner agencies, and to the biannual Global Reviews, which are conducted by the WTO. The global periodic reviews are conducted with input to the WTO from beneficiary countries, donors, the regional level, multilateral agencies, and the private sector.¹⁰⁶⁹ The Regional Reviews are conducted by all partner agencies, and have evolved into a means of

¹⁰⁶⁵ *Ibid.*

¹⁰⁶⁶ World Trade Organization, *Recommendations of the Task Force on Aid for Trade* (27 July 2006), para. B.

¹⁰⁶⁷ *Ibid.*, para. D.

¹⁰⁶⁸ *Ibid.*, paras. F.5.1-F.5.3.

¹⁰⁶⁹ World Trade Organization, “Development: Aid for Trade: Task Force,” http://www.wto.org/english/tratop_e/devel_e/a4t_e/implementing_par57_e.htm (accessed 22 April 2013).

preserving the most valuable case studies.¹⁰⁷⁰ In addition, the WTO Director General established the Aid for Trade Advisory Group in 2007, which ensured that the Task Force Recommendations would be effectively implemented and which comprises the following partner agencies: the African Development Bank; the Asian Development Bank; the European Bank for Reconstruction and Development; the IMF; the Inter-American Development Bank; the Islamic Development Bank; the ITC; the OECD; UNCTAD; UNDP; UNECA; UNIPO; the World Bank; and the World Customs Organization.¹⁰⁷¹ Finally, the Task Force Recommendations make clear that the Aid for Trade programme adheres to the Paris Declaration on Aid Effectiveness.¹⁰⁷²

What is important in the above is that the EIF and Aid for Trade are well-established, well-funded, and at least quasi-institutionalized programmes being led by the WTO in partnership with several other agencies of global economic governance. Their activities are not to be taken lightly and cannot be curtailed or stopped, nor can the WTO rescind its leadership or involvement, without a consensus vote of the WTO Membership. Thus, in the following discussion of the use of the hybridization of soft law and hard law to allow for representation of women and women's interests within the WTO regime, three points of importance must be remembered. First, the activities of the EIF and Aid for Trade are already very significant; they concern 47 LDCs directly and, under the current scope of Aid for Trade, could be expanded to include all developing countries. Second, the EIF and Aid for Trade already constitute a significant expansion of the

¹⁰⁷⁰ World Trade Organization, "Development: Aid for Trade," http://www.wto.org/english/tratop_e/devel_e/a4t_e/aid4trade_e.htm (accessed 22 April 2013).

¹⁰⁷¹ *Ibid.*

¹⁰⁷² World Trade Organization, *Recommendations of the Task Force on Aid for Trade* (27 July 2006), Appendix A.

original Integrated Framework initiative; supporting the view that further expansion is a practical possibility. Third and finally, the EIF and Aid for Trade tie the WTO by means of governance structures to numerous other organizations and agencies of global economic governance, several of which are within the UN system; as will be shown, this has important implications for WTO policy.

It must next be established whether and to what extent the EIF and Aid for Trade are able to represent women and women's interests. Here one finds significant evidence that the representation of women and women's interests is not only possible within the EIF and Aid for Trade, but is happening. Of course, from the advent of the EIF and Aid for Trade in 2006, to the expert roundtable of 2008, there was little in either the EIF or Aid for Trade to advance the representation of women and women's interests. That changed, however, with *The Gender Dimension of the Enhanced Integrated Framework*, which was the official report, with recommendations, of the 2008 expert roundtable organized by the ITC, the WTO, the Government of Zambia and the Government of Lao PDR. The report, which was neither very long nor of great depth, nevertheless made clear the falsity of assuming gender neutrality in areas fundamental to trade, including customs procedures, access to transport, kinds and availability of employment, and trade-related law and regulations.¹⁰⁷³ The report identified "gender-based constraints to trade" and called for "women's interests in trading and producing" to be addressed and accounted

¹⁰⁷³ *The Gender Dimension of the Enhanced Integrated Framework*, Expert Roundtable Jointly Organized by ITC, WTO, Government of Zambia and Government of Lao PDR, Geneva (29-30 April 2008), http://www.intracen.org/uploadedFiles/intracenorg/Content/About_ITC/Where_are_we_working/Multi-country_programmes/Women_and_trade/The%20gender%20dimension%20of%20EIT.pdf (accessed 22 April 2013)

for within the EIF's Diagnostic Trade Integration Studies (DTIS).¹⁰⁷⁴ These insights are used by the EIF as a tool for monitoring and evaluation of financial assistance to LDCs. A second roundtable was held in 2010 on the same topic to similar effect.

Between 2011 and 2013, a number of concrete initiatives were introduced at EIF and within the Aid for Trade partner agencies that actively advanced the representation of women and women's interests and that impacted policy even within the WTO. Within the EIF, the DTIS template and checklist now recommend the inclusion of sex-disaggregated data in the DTIS report wherever possible.¹⁰⁷⁵ Further, under "trade, poverty reduction and sustainable development," the DTIS Template suggests that gender implications be addressed, that gender-disaggregated data be gathered from the Poverty Reduction Strategy Papers (PRSPs), and that particular attention be given to the impacts of trade liberalization on gender equality and upon "trade opportunities that could particularly benefit women."¹⁰⁷⁶

The policies of the International Trade Center, which calls itself the only wholly 'Aid for Trade' organization,¹⁰⁷⁷ are still more direct and expansive in their efforts to advance the representation of women and women's interests. In 2011 the Centre established 'gender mainstreaming' as an official policy fundamental to all of its activities. This was a significant commitment, since "only twenty-four percent of 2010 ITC projects demonstrated any gender dimension within them,"¹⁰⁷⁸ and only thirty-six

¹⁰⁷⁴ *Ibid.*

¹⁰⁷⁵ Enhanced Integrated Framework, "Compendium of EIF Documents: A User's Guide to the EIF," *Annex II. 2: DTIS/DTIS Update Template and Checklist*, 51, para. 8.

¹⁰⁷⁶ *Ibid.* 54, para. 22.

¹⁰⁷⁷ International Trade Center, "About ITC: Aid for Trade," <http://www.intracen.org/about/aid-for-trade/> (accessed 22 April 2013).

¹⁰⁷⁸ International Trade Center, *ITC Gender Mainstreaming Policy* (28 April 2011), 7.

percent of ITC staff were women.¹⁰⁷⁹ In addition to presenting empirical and economic-welfare-based arguments for ‘gender mainstreaming’, the ITC in 2011 made the following commitments: first, “to make its strategic framework and performance indicators gender-responsive”; second, “to train staff in gender mainstreaming”; third, “to mainstream gender in all projects”; fourth, “to gender-sensitize reporting, monitoring and evaluation”; and fifth, “to [achieve] gender parity in staffing and to create an enabling work environment.”¹⁰⁸⁰

That the ITC is working to fulfil its ‘gender mainstreaming’ commitments is given ample evidence by ITC’s *Strategic Plan 2012-2015*. The Plan names “a better understanding of women and trade” as one of the ITC’s strategic priorities.¹⁰⁸¹ In so doing, the Plan makes the following important and unequivocal statement of the centrality of the representation of women and women’s interests to its activities:

ITC’s corporate objective is to improve the availability and use of trade intelligence to ensure that it is accessible to all, men and women alike. This commitment extends to providing trade intelligence that is gender-disaggregated. As part of ITC’s innovative Women and Trade Programme, ITC is expressly committed to systematically mainstreaming a gender-responsive approach in all areas of its work, and particularly in its provision of trade intelligence – which ITC considers to be a fundamental tool for addressing trade capacity constraints.¹⁰⁸²

¹⁰⁷⁹ *Ibid*, 8.

¹⁰⁸⁰ *Ibid*, 10-11.

¹⁰⁸¹ International Trade Center, *Strategic Plan 2012-2015* (March 2012), 13.

¹⁰⁸² *Ibid*, 13.

Finally, even the WTO itself has begun to address the representation of women and women's interests within the context of its 'Aid for Trade' commitments. Thus, the WTO's *Aid for Trade Work Programme* for 2012-13 notes that the Third Global Review of Aid for Trade, conducted by the WTO in 2011, found 'gender equality' to be an important element of the WTO's broader sustainable development agenda.¹⁰⁸³ In its turn, the *Work Programme* recognizes gender equality as one of the 'broader objectives' with which it is important for trade and trade policy to accord.¹⁰⁸⁴ It also makes note of the often precarious position of 'female traders' in their dealings with customs officials, particularly in developing and least developed countries.¹⁰⁸⁵

In the section that addresses private sector development, the importance of the creation of employment for women is specifically emphasised. The *Work Programme* further notes that the Third Global Review found particular value in public-private partnerships for "creating new opportunities for female entrepreneurs,"¹⁰⁸⁶ and that there exists a requirement for specific export strategies for women in trade.¹⁰⁸⁷ Finally, on the 11th of June 2010, an employment opportunity was posted on the WTO website that included the following as a general function of the position: "Design and populate an appropriate baseline to enable effective monitoring of progress against key logframe indicators, milestones, and targets, ensuring a focus on gender and inclusion."¹⁰⁸⁸ Clearly, then, in the EIF and in the partner agencies and organizations of Aid for Trade, including

¹⁰⁸³ World Trade Organization, Committee on Trade and Development: Aid for Trade, *Aid-for-Trade Work Programme 2012-2013: Deepening Coherence*, 2.

¹⁰⁸⁴ *Ibid*, 5.

¹⁰⁸⁵ *Ibid*, 9.

¹⁰⁸⁶ *Ibid*, 9.

¹⁰⁸⁷ *Ibid*, 9.

¹⁰⁸⁸ World Trade Organization, "Vacancy Notice: EXT/L/10-20; Title: Coordinator, Monitoring and Evaluation" (accessed 11 June 2010).

the WTO, there have been significant and tangible policies implemented in order to advance the representation of women and women's interests.

What remains, then, is to examine whether the EIF and Aid for Trade constitute an example of hybridization and, if so, whether and in what manner they allow for the representation of women and women's interests within the WTO. The former comprises two requirements: that the EIF and Aid for Trade constitute a soft law model, in contrast to the largely hard law model of the WTO; and that the governance structures of the EIF, Aid for Trade and the WTO allow for a sufficient interrelation between them.

Most Aid for Trade funding, and nearly all that is granted to LDCs, regardless of origin, is distributed through the EIF. That the EIF constitutes a largely soft law model is clear and easily established. It uses a grant system as its funding mechanism, whereby grants are distributed in-country on a project-by-project basis. Specific project approval is granted by the in-country EIF Focal Point, who, as described above, is usually a senior government official in the country receiving aid.¹⁰⁸⁹ The funding itself is monitored through the Diagnostic Trade Integration Study (DTIS) process. The process requires that the recipient country have a strategy to reduce poverty in a coherent manner across development projects and that the strategy be promulgated as a Poverty Reduction Strategy Paper (PRSP).¹⁰⁹⁰ This creates a framework through which all Aid for Trade-funded projects can be justified, but it only requires that the project be in accordance with the PRSP; it does not dictate how exactly the project is to place itself in accordance with

¹⁰⁸⁹ Enhanced Integrated Framework, http://www.enhancedif.org/EN%20web%20pages/About%20the%20EIF/Who's_who.htm (accessed 22 April 2013).

¹⁰⁹⁰ Enhanced Integrated Framework, "Compendium of EIF Documents," http://www.enhancedif.org/documents/EIF%20toolbox/EIF_User_Guide_Compendium.pdf (accessed 22 April 2013), 24.

the PRSP or what precise metrics the project must meet in order to do so. In other words, the PRSP sets general requirements about outcomes, and establishes general principles to be followed, but does not mandate or prohibit specific actions. In this, it accords with one of the fundamental characteristics of soft law as defined by Davidson.

The same is true of pre-DTIS funding, the purpose of which is to “facilitate the operationalization of other [later] Tier 1 and Tier 2 projects”¹⁰⁹¹ by establishing “the conditions for the EIF Country to make the arrangements for the DTIS to be conducted,”¹⁰⁹² by establishing “the basic overall governance structure proposed by the EIF process for mainstreaming trade,”¹⁰⁹³ and by providing the conditions necessary for an institutional structure that could ensure “the involvement of local stakeholders and donors with the government.”¹⁰⁹⁴ Equally, the donor partners in pre-DTIS Aid for Trade funding under the EIF commit only to the provision of funds for the following general purposes, which may be tailored or augmented to a significant degree to meet the needs of the recipient country: the procurement of equipment for the Focal Point, the National Steering Committee or the National Implementation Unit; consultancy toward establishing EIF operations; necessary travel; and “development of written and other sensitization tools and material.”¹⁰⁹⁵

Pre-DTIS project funding is essentially to be used to sensitize national stakeholders to the importance of mainstreaming trade, to the EIF process, and to the role of DTIS. Again pre-DTIS, the funding is expected to produce the foundation of the

¹⁰⁹¹ *Ibid*, 27.

¹⁰⁹² *Ibid*, 27.

¹⁰⁹³ *Ibid*, 27.

¹⁰⁹⁴ *Ibid*, 27.

¹⁰⁹⁵ *Ibid*, 28.

National Steering Committee, the identification of key stakeholders, their training in the EIF process, and the preparation of the EIF country to take full ownership of the DTIS process.¹⁰⁹⁶ Thus, again, one finds a soft law model for the distribution of pre-DTIS Aid for Trade that allows significant malleability of requirements so as to meet local conditions by maintaining only generalized commitments from both recipient countries and donor agencies and organizations.

Again, the same pattern holds through Tier I and Tier II DTIS funding and through the Mid-Term Project Evaluation. The DTIS template is framed in terms of required sections and recommended specific topics. Thus, for example, under the required heading of ‘Trade, Poverty Reduction and Sustainable Development,’ one finds recommendations such as the following: “if appropriate data are available, the DTIS may examine the links between trade and poverty by making use of quantitative estimates of the county-level and in sectors. If data are not available, a qualitative assessment can be made.”¹⁰⁹⁷ Similarly, the Mid-Term Review, while used to justify a second year of funding for a Tier I project, nonetheless is framed in terms of specific high-level requirements combined with more general but lower-level enquiries designed to show how Tier 1 funding contributed to attaining a given high-level requirement. Thus, for example, where the requirement is to have a trade policy and export development strategy and where the objective of the review is to show how Tier 1 DTIS funding helped to attain the requirement, the lower-level questions are whether the country has a trade policy, whether it has integrated its trade policy into sector strategies, and how inter-

¹⁰⁹⁶ *Ibid*, 27.

¹⁰⁹⁷ *Ibid*, 54.

ministerial coordination has supported such strategies.¹⁰⁹⁸ Again, these fall under a soft law model because they are minimally prescriptive questions. Except in a general sense, they do not dictate an answer, but leave specifics of policy to the discretion of the individual project and in-country authorities. A typical hard law model, in a similar circumstance, would ask whether specific and well-defined criteria had been met.

In several other ways the above measures fall under the rubric of soft law. To follow Davidson's threefold definition, compliance is certainly tied to the provision of funds, but in a relatively undefined manner that leaves much room for the discretion of the Trust Fund Manager. Dispute settlement therefore is, of necessity, more diplomatic than juridical. The principles articulated in the documents reviewed above tend toward imprecision rather than precision and allow significant flexibility in their implementation, as has been shown. It is also worth noting that the *Paris Declaration on Aid Effectiveness*, to which all of the partner agencies and organizations of the EIF and Aid for Trade subscribe, is a further example of a soft law model. It frames all other aid initiatives, but in itself it is a statement of nonbinding general principles, to which its signatories commit, concerning how best to make the provision of aid more effective and what that means.¹⁰⁹⁹ Thus, it may be concluded that with respect to their commitments under the EIF and Aid for Trade, the WTO and its partner agencies have entered into obligations under what is largely a soft law model.

The final step, then, is to show that the WTO has in fact come to partake of a hybridized model of soft law and hard law, and that this has advanced the representation

¹⁰⁹⁸ Enhanced Integrated Framework, *Mid-term Project Evaluation Guidance Note: For EIF TIER 1 Funded Projects: Support to National Implementation Arrangements* (September 2012), 3.

¹⁰⁹⁹ *Paris Declaration on Aid Effectiveness: Ownership, Harmonisation, Alignment, Results and Mutual Accountability* (2 March 2005).

of women and women's interests within the WTO. The key here is that the governance structures of the EIF and Aid for Trade place *de facto* commitments upon the WTO to address the representation of women and women's interests, but do not require the consensus approval of the WTO membership. They do not fall within the jurisdiction of the Dispute Settlement Mechanism because they are *de facto* and they do not constitute binding justiciable commitments on the part of WTO members.¹¹⁰⁰ They are commitments more of the nature of soft law than those that constitute the Agreements and the institutional structures of the WTO. This allows the representation of women and women's interests two ways into the WTO.

Both ways are predicated upon the same fundamentals: first, that Aid for Trade originated with the WTO and, as an initiative, is led by the WTO; and second, that the WTO is the host and parent of the EIF, that the EIF advances the WTO's trade liberalization agenda, and that virtually all Aid for Trade funding to LDCs is channeled through the EIF. More specifically, the movement toward Aid for Trade began in February of 2005, when G7 Ministers requested proposals from the World Bank and the IMF that would help to ease the transition of developing and least developed countries to

¹¹⁰⁰ Draper *et al* also notice this aspect of the WTO's involvement in the EIF and Aid-for-Trade. They state that Aid-for-Trade is a complement to the Doha Development Agenda, and therefore not subject to binding dispute settlement. They also grasp something of the significance of Aid-for-Trade when they argue that it is the best avenue for facilitating development, and not just adjustment to WTO rules. However, they do not address the significance of the capacity for the daily business of EIF and Aid-for-Trade to be carried on without renewed consensus from the WTO Membership, and they do not address the significance of the EIF and Aid-for-Trade for coherence and cooperation of the WTO with other IOs. Finally, they do not address the significance of the EIF and Aid-for-Trade with respect to soft law or the hybridization of soft-law and hard-law models.

See Draper, Peter, Memory Dube and Morisho Nene, "The Doha Development Agenda and the WTO Can Deliver on Africa's Development Priorities," in Wilkinson, Rorden and James Scott, eds., Trade, Poverty, Development: Getting Beyond the WTO's Doha Deadlock, (London: Routledge, 2013) 206-207.

a more liberalized global trade governance regime.¹¹⁰¹ A similar call was made by the Heads of State of the 2005 G8 summit in Gleneagles.¹¹⁰² Quickly, the WTO took the lead in developing proposals to give practical effect to the desire to ease transitions to liberalized trade. As has been discussed above, this gave rise to the 2005 Hong Kong Ministerial Conference declaration that mandated the creation of the Enhanced Integrated Framework (EIF) and the development of the WTO Work Programme on Aid for Trade.¹¹⁰³

Arguably the most determinative action in opening the WTO to the representation of women and women's interests by means of hybridization has been the establishment of the capacity for the WTO Committee on Trade and Development to sit in Aid-for-Trade sessions as WTO CTD Aid-for-Trade. This has brought Aid for Trade within the WTO's institutional structure as, essentially, its own committee. Outside of the Periodic Global Reviews, it is in this context that nearly all of the discussions and decisions take place concerning Aid for Trade as it relates to the WTO. As the *2012-13 Work Programme* states, "the Committee on Trade and Development in Aid-for-Trade session (CTD Aid-for-Trade) has a critical role to play in the Aid for Trade initiative. It provides an important forum in which partner countries, South-South partners, donor Members and multilateral donors can discuss Aid for Trade issues."¹¹⁰⁴ Thus, by means of the CTD

¹¹⁰¹ World Trade Organization, "Doha Development Agenda: Aid for Trade: Aid for Trade and the WTO Work Programme," http://www.wto.org/english/tratop_e/dda_e/background_e.htm (accessed 22 April 2013).

¹¹⁰² *Ibid.*

¹¹⁰³ *Ibid.*

¹¹⁰⁴ World Trade Organization, Committee on Trade and Development: Aid for Trade, *Aid-for-Trade Work Programme 2012-2013: Deepening Coherence*, 12.

Aid-for-Trade, the WTO has brought the Aid-for-Trade partnership within the WTO structure.

Moreover, when the *Work Programme* states that “operationalization of Aid for Trade lies in the hands of developing countries, regional economic communities and their development partners,”¹¹⁰⁵ it is nevertheless necessarily the case that much important discussion concerning the operationalization of Aid for Trade must take place within the WTO CTD Aid-for-Trade, since it is the single dedicated multilateral forum for convening such discussions. Further, as the *Work Programme* states, “CTD Aid-for-Trade provides an essential oversight role, notably as regards sharing best practices.”¹¹⁰⁶ The sharing of best practices can certainly include the acknowledgement and sharing of practices that advance the representation of women and women’s interests, and this would be done from within the WTO without placing obligations upon the Membership.

However, the existence of the CTD Aid-for-Trade and the importance of its role serve to bind the WTO politically and as an institution much more firmly than this to the representation of women and women’s interests, yet to do so without placing formal obligations upon WTO members individually, severally or collectively. This is, again, because the WTO has taken the Aid-for-Trade partnership within itself by means of the CTD Aid-for-Trade. The partnership includes UN agencies and organizations such as the World Bank and, most especially, the International Trade Centre. As discussed earlier, all agencies and organizations within the UN system have been mandated to incorporate ‘gender mainstreaming’. Moreover, the ITC is the only wholly ‘Aid-for-Trade’ organization, its involvement is essential to any management of the Aid-for-Trade

¹¹⁰⁵ *Ibid*, 13.

¹¹⁰⁶ *Ibid*, 13.

initiative, and it has instituted one of the most comprehensive ‘gender mainstreaming’ programs of any International Organization. In effect, then, the WTO cannot maintain a meaningful level of involvement with the Aid-for-Trade partnership, and certainly cannot do so from within the context of the CTD Aid-for-Trade, unless it accepts that the ITC and other organizations within the UN System must take a prominent role. It cannot do that unless it accepts that gender equality and the representation of women and women’s interests will play a significant role in the discussions and proceedings of the WTO CTD Aid-for-Trade. Thus, the WTO as an institution is bound to advance the representation of women and women’s interests, not because its members are under a specific obligation to do so, but because the political cost of doing otherwise is too high for the WTO as an institution and will remain so as long as Aid for Trade remains an effective initiative. This is exactly how soft law works to achieve results, and it is possible within the WTO exactly because of the hybridization of soft law and hard law within the organization.¹¹⁰⁷

The same principle holds for the EIF. Regardless of the origin of the EIF as an initiative of the WTO, it has been separated administratively from the WTO, it has its own Executive Secretariat, it is an active and independent partner in Aid-for-Trade, it is indeed the vehicle through which almost all Aid-for-Trade funding is distributed to LDCs, and it has made the study of the gendered effects of trade liberalization, and their amelioration where possible, one of its central concerns. Thus, again, by means of the hybridization of soft law and hard law, the WTO as an institution occupies a position whereby it is in effect obligated to advance the representation of women and women’s

¹¹⁰⁷ It should be added here that this result is achieved not precisely because of the force of the UN mandate to compel behaviour from UN organizations, which is debatable, but because ITC is essential to Aid-for-Trade within the WTO, and because ITC has wholly and enthusiastically adopted and implemented the gender mainstreaming mandate.

interests. To fail to do so, the WTO would have to cease to involve itself with the EIF, and would therefore have to cease to involve itself meaningfully with Aid-for-Trade, outside of the Periodic Global Reviews.

This hybridization of hard law and soft law in the context of Aid for Trade has a further important effect that advances the representation of women and women's interests. The WTO CTD Aid-for-Trade is provided with an impetus to request that the WTO Secretariat undertake research concerning Aid-for-Trade. Indeed, this has already been done. The *2012-13 Work Programme* includes the following recommendation: "The WTO Secretariat is encouraged to examine how Aid for Trade interfaces with the broader coherence agenda, both with the work of other Committees and with external organizations, notably through the organization of periodic workshops on topics of interest to members."¹¹⁰⁸ The coherence agenda explicitly includes the gendered effects of trade liberalization.¹¹⁰⁹

The above recommendation therefore entails a consequence of the first order: it authorises the WTO Secretariat to undertake any research it pleases concerning the gendered effects of trade liberalization without having to be requested to do so by any WTO member. As discussed in Chapters 4 and 5 above, this is a significant addition to the legitimate scope of WTO research; however, having been done as a consequence of the hybridization of soft law and hard law within the WTO, it has required no change in the restrictions upon the ability of the Secretariat to undertake its own research without first obtaining membership approval. In the context of the capacity for the WTO to

¹¹⁰⁸ World Trade Organization, Committee on Trade and Development: Aid for Trade, *Aid-for-Trade Work Programme 2012-2013: Deepening Coherence*, 13.

¹¹⁰⁹ *Ibid*, 5.

represent women and women's interests, this is a moment rather like the Promethean gift of fire. Its potential is very great, particularly with respect to the capacity for the WTO and its members to be made aware of the gendered effects of trade agreements, problems caused by them and potential solutions to them.

Conclusion

Thus, the study returns to the fundamental question of whether the WTO can accomplish the representation of women and women's interests. The answer is that it can by means of the hybridization of soft law and hard law models. Certainly, by means of CTD Aid-for-Trade, the Secretariat can undertake research concerning the gendered effects of trade liberalization, and propose solutions in that context advancing the representation of women and women's interests. Equally, as shown above, the hybridization entailed by the EIF and Aid for Trade allows for the WTO to give effect to measures and initiatives that represent women and women's interests in the context of LDCs and developing countries. Experiences and lessons learned through EIF and Aid for Trade will also be applicable in many instances to the representation of women and women's interests in trade governance involving developed countries.

More than this, hybridization constitutes an iterable template for the representation of women and women's interests within the WTO in at least three ways. First and most importantly, there will undoubtedly be other instances in the future when a soft law programme, an initiative or an organization is created involving the WTO in order to address a particular concern. Each of these will undoubtedly contain opportunities based in the flexibility of their soft-law structures that were unintended by

their framers. As in the cases of the EIF and Aid for Trade, these might well be opportunities to advance the representation of women and women's interests with respect to a given issue area. This is simply because the framers of any initiative, programme or institution, no matter how subtle, cannot predetermine fully the effects of their efforts or the interpretations that will be placed upon the texts they produce.

Second, the WTO can participate in initiatives involving UN agencies and organizations. Whether as lead or not, any such initiative will necessarily fall under the UN's gender mainstreaming mandate, and will therefore involve the WTO in the representation of women and women's interests. If the WTO is able to take the lead in any such initiative, and particularly if the initiative can be brought within the WTO in the way that Aid for Trade and the EIF were brought within the WTO CTD, then the UN's gender mainstreaming mandate will have also to be brought within the WTO for the purposes of the given initiative. Hybridization is particularly important on this point, because it minimizes the number of times a consensus of WTO members will be required.

Third, and finally, it is possible for the WTO to create an arm's length soft law initiative or programme intended specifically to address the gendered aspects of trade liberalization or the representation of women and women's interests in the context of international trade. This, of course, remains unlikely because it would require the consensus of the membership. Nevertheless, it must be allowed that hybridization makes even this more likely, since a soft law initiative would require the members to bind themselves to articles of much less specificity and much greater flexibility than an agreement such as the GATT or the DSU.

Thus, on at least two points, concerning the research possibilities of the Secretariat and unintended opportunities under future initiatives, the WTO can make meaningful advances toward the representation of women and women's interests. This is beyond the important advances that are being made by means of Aid for Trade and the EIF. Further, on at least two other points, leading partnerships with UN agencies, and the creation of initiatives from within the WTO, hybridization allows for a much greater possibility of achieving the necessary consensus of the Membership, because it reduces the potential political cost of the initiative. For these reasons, it is possible to answer the study's fundamental question in the affirmative, and to allow that the representation of women and women's interests is possible within the WTO. This is so as long as 'representation' is understood in the dynamic sense articulated in Chapter 2, following particularly the work of Urbinati.

Conclusions can be reached on seven further points, four of which will be developed in the concluding chapter. First, although it is necessary for counterpublics to exert pressure, it is equally necessary and perhaps more effective for transnational advocacy networks on gender and trade to engage with institutions of global economic governance in order to advance the representation of women and women's interests (including, for example, IGTN and APEC WLN / Women Economy Forum). Second, the representation of women and women's interests can be accomplished within the WTO and the answer to the study's test is in the affirmative. Third, it follows from this that the democratization of global economic governance, without the formation of a global government, is not made impossible by an inability to represent women and women's interests within the WTO. Fourth, hybridization of soft and hard law within an institution

is an important tool for achieving the democratization of International Organizations. Fifth, hybridization counters path-dependency and for that reason is necessary to institutional survival. Sixth, hybridization is iterable across contexts, organizations, and gradations between soft and hard law. Seventh and finally, the capacity for the WTO to represent women and women's interests, the maintenance of the possibility that global economic governance might democratize without recourse to global government, the usefulness of hybridization as a tool to achieve both of these ends, and the capacity for hybridization of soft law and hard law to counter path-dependency, all support the prospects of Inclusive Global Institutionalism, as discussed in Chapter 2, to contribute meaningfully to the theoretical literature of global governance.

This is because, first, IGI requires the flexibility that comes from the hybridization of soft law and hard law models, even while it requires the legitimacy that comes from the stability, access and effectiveness produced by juridification. Second, this is also because IGI requires the inclusion of civil society and equal access to institutionalization, even while it requires the cautious maintenance of formal distinctions between international institutions and the simplicity of an incremental approach to democratic reform. In sum, IGI creates a framework for holding the tensions of global governance in a productive balance of juridification, path-dependency and hybridization.

When viewed in light of the frameworks of a global democratic state, 'multitude,' or a new world order of networks ('empire'), as discussed in Chapter 2, a democratic turn in global economic governance does not seem possible to achieve and maintain. However, in light of the five principles of IGI, which produce the nexus of juridification, path-dependency and hybridization that is necessary to any sustained democratization and

any stable democracy, then the answer must be that a democratic turn in global economic governance is not impossible. This is what the study has shown by means of its test of the hardest case for the representation of women and women's interests.

Chapter 8 – Conclusion

The study began reflexively, with the assertion that it was to be concerned first and foremost with democracy. More specifically, it set for itself the problem of whether global economic governance could take a democratic turn. The difficulty was how to plot a course that would lead to a convincing answer. Here, as in most modern democracies, representation was the key concept and the insight that made the project practicable. In short, the representation of women and women's interests could itself represent, or serve as a proxy for, the possibility of a democratic turn, since it is a *sine qua non* of democracy in the 21st century. In addition, the WTO could represent, or serve as a proxy for, global economic governance generally. This was for two reasons. First, the WTO constituted a case as hard as any other for accomplishing the representation of women and women's interests amongst institutions of global economic governance. Second, the GATT/WTO regime of international trade governance underwent the same decades-long post-WWII process of juridification as did global economic governance and global governance generally.

It followed that if the representation of women and women's interests could be introduced within the WTO, then it should be able to be introduced generally within GEG and GEG should be able to take a democratic turn. Conversely, it also followed that if the representation of women and women's interests could not be so accomplished, then significant reforms in the structure of global economic governance would have to be undertaken if it were to take a democratic turn. That is to say, global economic governance would have to become global economic government, and far more robust

institutions would have to be constructed, in order to produce a democratic turn. The study, then, rested upon a test of whether the representation of women and women's interests could be accomplished within the WTO. The course and structure of the study is fundamentally the establishment and conduct of this test.

In following this course, and in contributing its part to this structure, Chapter 2 established the place of the study within recent and important academic literature, while also explaining the urgency of the study's test of the democratic potential of GEG, which derives from a decades-long trend of juridification of global governance, the reflexivity of juridification, and the path-dependency of juridification. In so doing, Chapter 2 built a framework for democratic global economic governance. It defined the terms of the theoretical discourse that provided the groundwork for the study as a whole. It defined the five principles of IGI – inclusion, caution, simplicity, legitimacy, and flexibility – and how they constitute a coherent idea of global governance. It further defined the nature of the movement between hard law and soft law, and how hard law and soft law can be hybridized within International Organizations of global economic governance. Perhaps most importantly, Chapter 2 also defined juridification in a way that is new to social science research, framing the study's employment of the concept of juridification in terms of the 6 types of what the study calls the 'Modified Blichner-Molander Typology': A) constitutive juridification; B) law's expansion and differentiation; C) increased conflict solving by reference to law; D) increased judicial power; E) legal framing; and F) increased robustness.

Finally, Chapter 2 explained why IGI is to be preferred over three other prominent ideas of democratic governance: a global democratic state; 'multitude,' or civil society;

and a new world order of networks. In short, this is because IGI insists that the institutions of global governance remain separate from each other, that the present system of global governance be democratized a far as possible before new institutions are created for the purpose, and that the hybridization of soft law and hard law be advanced as far as possible in order to counter path-dependency and to allow for innovation, evolution and deeper democratization. IGI represents the idea that the best means of democratizing the global level is to increase gradually the ability of the existing system of institutions of global governance to represent diverse groups and interests, rather than by means of either an ideal cosmopolitan democracy or evolution toward a global state and government.

Chapter 3 justified the case of the representation of women and women's interests as a proxy for democratization. It did so first by establishing that the representation of women and women's interests is a *sine qua non* of democracy in the 21st century. Second, it analyzed Pitkin's typology of representation, critiquing particularly the indeterminacy and the difficulty of operationalizing her concepts of substantive representation and potentiality. Instead, an argument was made that a more expansive understanding of representation, such as that advanced by Urbinati, was necessary for the study of the possibility of democratic governance at the global level. Using this expanded understanding of representation, the chapter then argued that gender mainstreaming could in fact improve both descriptive and substantive representation of women, contrary to a significant body of literature concerning women and representation. The argument was necessary to the study because a test of whether the representation of women and women's interests can be accomplished within the WTO must first establish that both

substantive and descriptive representation of women are possible in the context of IOs. As Chapter 3 showed, gender mainstreaming is one policy alternative that would make such representation possible.

Chapter 4 established that the WTO could be representative of global economic governance and was in fact representative of the post-WWII trend of juridification of global governance generally, and of global economic governance in particular. It did so by employing the Modified Blichner-Molander typology of juridification, developed in Chapter 2, and by showing that parallel processes of juridification could be observed at the levels of global governance, global economic governance, and the WTO.

The chapter first established the general post-WWII trend of juridification of global economic governance with reference to each of the seven types of juridification in the modified Blichner-Molander typology. It then analyzed the juridification of the GATT/WTO in a series of seven moments: first, of the movement from the proposed ITO to the GATT and the WTO; second, the continual increase of parties to the GATT and the WTO; third, the evolution of dispute settlement from Articles XXII and XXIII under the GATT to the DSB of the WTO; fourth, the evolution of the relationship between development and international trade governance, from GATT Part IV through the Doha Development Agenda; fifth, the increasing complexity and scope of international trade governance, as shown by the development of codes and agreements outside GATT 1947 and GATT 1994, as well as the establishment of subordinate councils within the WTO to govern these agreements (GATS and TRIPS were two of the most prominent examples); sixth, increasing consultation of and cooperation with NGOs and other civil-society interests; and seventh, the proliferation of Preferential Trade Agreements, particularly

since the 1980s. Each of these moments exemplified at least one, and usually several, types of juridification, and could therefore be mapped to the corresponding types in the juridification of global economic governance generally. Again, this established that the WTO could be used as a proxy for GEG in the study's test.

Chapter 5 then established that the WTO was 'the hardest case' amongst institutions of global economic governance for accomplishing the representation of women and women's interests. It did so by analyzing 9 'Reasons' that make the WTO a case as hard as any other for the representation of women and women's interests. Again, as long as the WTO is at least as hard a case as any other institution of global economic governance, then if the representation of women and women's interests can be accomplished within the WTO, it should be possible to accomplish the same within the other institutions of global economic governance.

The aforementioned nine 'Reasons' were the following: first, the traditional gender blindness of International Relations scholarship and International Political Economy scholarship; second, the traditional gender blindness of economic thought and the consequent need to construct *Mulier Economicus*; third, that it was not possible for women to 'get in on the ground floor' at the founding of the WTO in 1994, since GATT 1947 constituted the 'ground floor'; fourth, the antagonism of gender and trade activism toward neoliberal economics and institutions perceived as neoliberal; fifth, that the WTO was relatively closed to civil society involvement for longer than most other institutions of regional and global economic governance; sixth, the requirement for consensus at the WTO, and the 'single undertaking,' which make institutional change at the WTO especially difficult to achieve; seventh, that the locus of power within the WTO rests with

the members; eighth, the limited ability of the WTO Secretariat to improve the representation of women and women's interests at the WTO; and ninth, that the WTO dispute settlement system is a *lex specialis* system, which deprives the identification of women's rights as human rights of much of its effectiveness as a strategy for advancing the representation of women and women's interests within the WTO.

Some of these reasons were specific to the WTO, while others were common to global economic governance generally or were products of particular disciplines or sub-disciplines of scholarship that addressed a wider area than the WTO alone. However, it was the cumulative effect of all of these reasons, all of which applied to the WTO, and some exclusively to the WTO, that produced a resistance to the representation of women and women's interests within the WTO not exceeded by any other institution of global economic governance. This in turn constituted the final qualification necessary to make the WTO an effective proxy for global economic governance in the study's test.

Chapters 3, 4 and 5 together thereby established the validity of the study's test of the potential for global economic governance to take a democratic turn.

The proxies thus established, they meet in the study's test, which was conducted over the course of Chapters 6 and 7. Reasons 5 through 9 of Chapter 5 had already established that the representation of women and women's was unlikely to be achieved by WTO member proposals and negotiation or by Secretariat initiative. This left only the alternatives of WTO hard law (to be approached through the DSB) and WTO soft law. In Chapter 6, therefore, the study tested the possibility of the representation of women and women's interests within WTO hard law. Although WTO hard law provided a number of technical possibilities for the representation of women and women's interests, each was

opposed by formidable institutional, procedural and political obstacles that were too great to allow a meaningful likelihood of being overcome, or that allowed progress too small to be called the representation of women and women's interests.

Chapter 6 articulated two approaches toward achieving the representation of women and women's interests by using the DSB. The first, the indirect approach, required that a WTO Member institute a trade-distorting policy against the poor representation of women and women's interests in another Member's (or Members') industry. The purpose would be to induce the targeted Member or Members to file a complaint with the DSB, thereby to legitimate the representation of women and women's interests as a topic of discussion in international trade governance and trade law, and perhaps even to legitimate the representation of women and women's interests as a reason for trade distortion (in the parlance of WTO law). This approach was called 'indirect' because it required the action of a third party to initiate the dispute-settlement process.

The second approach to the DSB, the 'direct' approach, entailed a direct complaint made proactively by one WTO Member against another on the basis of a failure to represent women and women's interests in a given industry. The approach was 'direct' because it did not require the action of a third party in order to initiate dispute settlement proceedings. With respect to the direct approach, the chapter considered each of the major WTO Agreements: GATT; AoA; TRIMS; SCM; GATS; and TRIPS. Each provided genuine opportunities in a technical sense, but the opportunities were of minimal significance in themselves, and of narrowly circumscribed application. Moreover, the direct approach would rely on DSB decisions that supported the

representation of women and women's interests, and on the decisions being sufficiently frequent and generalizable that they could begin to normalize the representation of women and women's interests as *de facto* a legitimate exception under WTO Agreements. The direct approach also produced a technical possibility, but one that would require a specific interpretation of labour practises and subsidies that ran counter to received DSB jurisprudence and to the longstanding refusal of the WTO Membership to consider labour policies and practises a legitimate exception to WTO Agreements.

Further obstacles encountered in Chapter 6 were the consensus-based model of decision-making within the WTO, and the very nature of hard-law commitments, which constituted a significant disincentive against innovation. Thus, the test of WTO hard law in Chapter 6 afforded only partial, hesitant and uncertain movement toward the representation of women and women's interests, and could not be said to allow for a democratic turn except perhaps as a long-term and hesitant project. Had it been necessary to conclude the study following the conclusion of Chapter 6, the answer to the test could only have been in the negative.

Chapter 7, however, applied the study's test to WTO soft law, and particularly to the possibilities afforded by the hybridization of hard law and soft law. In so doing, the chapter found that the 'Aid-for-Trade' initiative, which resides within the Enhanced Integrated Framework (EIF) and is headed by the WTO, actually serves as a kind of Trojan Horse by which effective representation of women and women's interests could be accomplished within the WTO.

Chapter 7 placed this possibility within the problem of legitimacy; indeed, it was one of the chapter's key insights that the problem of the representation of women and

women's interests is inseparable from the problem of organizational legitimacy. This is because gender mainstreaming is the most likely means by which to achieve the representation of women and women's interests, and in the context of IOs it is most easily instituted within a soft-law framework, but most effective within a hard-law framework. At the same time, the WTO derives most of its legitimacy precisely from the hard-law nature of its institutional structure. The chapter therefore asked what might be the central question for determining whether global economic governance can take a democratic turn; that is, whether the WTO can achieve a hybridization of hard law and soft law that could be expected to accomplish the representation of women and women's interests. Hybridization, the chapter argued, might be able to balance legitimacy with flexibility in such a way as to make the desired representation possible within the WTO.

As it happened, Aid-for-Trade constituted a superior example of what is made possible by means of hybridization. EIF called for what amounted to gender mainstreaming in 2008, and both Aid-for-Trade and the EIF adopted gender mainstreaming between 2008 and 2011. Both are soft-law constructs. Aid-for-Trade originated with the WTO and is led by the WTO. The EIF is hosted by and originated with the WTO, and advances the WTO's agenda of trade liberalization. Virtually all Aid-for-Trade funding is channeled through the EIF. In this context, it was determinative for the study's test that the WTO Committee on Trade and Development was enabled to sit in Aid-for-Trade session as WTO CTD Aid-for-Trade. Thus, as Aid-for-Trade and the EIF made (between 2008 and 2011) the welfare of women in trade, and a gendered understanding of trade policy and barriers to trade, central to all of their initiatives, it had the effect of introducing official consideration of the gendered nature and effects of trade

within the WTO. This accomplishment was made possible because the soft-law nature of EIF and Aid-for-Trade allowed the introduction of gender analysis without a new consensus of WTO Members, while the removal of the WTO from its EIF and Aid-for-Trade commitments would have required such a consensus.

As Chapter 7 showed, the introduction of what amounted to gender mainstreaming within EIF and Aid-for-Trade carried several important consequences, which together allow the study's test to be answered in the affirmative. First, when combined with the coherence agenda in the 2012-13 *Aid-for-Trade Work Programme*, it authorized the WTO Secretariat to undertake any research it pleased concerning the gendered effects of trade liberalization, without requiring the specific consent of a WTO Member. Second, it made hybridization an iterable template for the representation of women and women's interests within the WTO in three ways: a) it made clear that soft-law initiatives in future would unavoidably offer unforeseen opportunities to advance the representation of women and women's interests; b) in the context of involvement with UN agencies and organizations, it allowed the WTO to accommodate and help to fulfil UN Women's mandate to promote gender mainstreaming; and c) hybridization made it more likely that new initiatives could be introduced at the WTO, since soft-law initiatives would carry a lesser potential political cost for WTO Members. From these conclusions, it was determined that the representation of women and women's interests was at least a possibility within the WTO, and therefore the democratization of global economic governance was at least not an impossibility.

It would be well here to reflect a little further upon four of the conclusions with which Chapter 7 closed. First, the conclusion that it is necessary and perhaps more

effective to engage with institutions of global governance is in response to the predominance of counterhegemonic discourse and organizing within feminist activism and literature concerning gender and trade and gender and global governance. This includes the empirical analysis of Steinkopf Rice, but it also includes the calls for the establishment of counterpublics by Benhabib and Fraser amongst others. This is not to discount the importance of counterpublics, which apply pressure on institutions of global governance and construct alternative possibilities for those institutions. Nevertheless, a focus on counterpublics brings with it a significant risk of ghettoization and of missing the opportunities sought. It can discount the willingness of those within a given institution to effect the desired change as well as the difficulty of effecting any change within any institution. Conversely, engagement can gain the advantage of fostering any institutional willingness to overcome path-dependency, while counterhegemonic discourse and mobilization can appear inherently oppositional and mobilize all of the latent strength of any institution against the desired change.

Second, one of the most significant of the study's findings is that the hybridization of soft law and hard law counters the path-dependency of institutions. It is also potentially one of the study's findings that is most fruitful for future research. The essential idea is that institutions must be able to accommodate to changing circumstances if they are to survive, and therefore must evolve. At the same time, path-dependency is also essential to institutional survival because it reinforces successful developments and strengthens an institution in its habits, thereby conditioning the expectations of constituents and buttressing legitimacy. However, path-dependency, if left uncountered, will cause the demise of any institution; ultimately the institution will become outmoded

in relation to the change that surrounds it, if it does not evolve sufficiently to address relevant change.

Path-dependency is an inertial force countering such change. Hybridization, on the other hand, allows and fosters change. It brings a mechanism for flexibility within the institution and creates a means by which new interpretations and initiatives can be advanced continually. Of course, were this the only impulse guiding an institution, it would soon lose coherence and legitimacy. It is therefore not only path-dependency or hybridization that is necessary to institutional survival, but the balance and interaction between the two. This creates the change within stability that is necessary for the survival of any institution.

Third, hybridization is iterable across contexts and institutions. This again holds potential to be a fruitful area of future research. This is because the opening of any hard-law institution to a soft-law initiative will increase the scope of what can be agreed upon within the institution, of what the institution can address in its proceedings, and of whom the institution can represent. The same holds for any institution taking advantage of soft-law provisions already within its structure. In studying the potential further applications of hybridization, then, one could endeavour to determine the means to extend the representation of women and women's interests further within the WTO in the context of developed countries. One could also study the possibility for the representation of women and women's interests, and indeed of democratization more generally, by means of hybridization within other institutions of global economic governance.

Fourth, the test applied over the course of the study is itself iterable to other institutions and contexts, where it can be applied to determine to an initial extent the

capacity of any sector or institution to begin to democratize. This is, in fact, a further step toward a theory of Inclusive Global Institutionalism as an approach to the question of global governance and the democratization of the global level. It is, of course, well beyond the scope of the present study to articulate any such theoretical perspective in full. However, its outlines would entail a prioritization of global governance over global government, of a more representative than participatory model, of a need to balance oppositional power with productive engagement, of the need to counter path-dependency with hybridization of soft-law and hard-law models, of a preference for democratizing by gradual steps the system of global governance as it currently exists, of the expansion of the global governance system only as little as is necessary for its democratization, and of the capacity to extend the test employed by the study to other areas of global governance. In this way, the present study incorporates an agenda for future research that could extend over a long period and that holds strong potential to provide important insights concerning the capacity for the global level to democratize and the form that such an evolution might take.

The Study and Its Literature

Over the course of the study, several conclusions became clear concerning the literature reviewed in Chapter 2. That is, it became evident that the study afforded grounds to confirm particular aspects of the literature, while refuting or amending others, and that it made original contributions to the literature. The study was able, in particular, to clarify two important conceptual relationships: the first between juridification and hybridization; the second between representation and gender. The study also clarified the

nature and import of the five concepts that underlie Inclusive Global Institutionalism (IGI): inclusion; caution; simplicity; legitimacy; and flexibility.

Juridification and Hybridization

The study showed the relationship between juridification and hybridization to be essential to the development and survival of any institution of governance, as well as to its democratization. That is to say, institutions of governance exercise functions of governance by means of the creation and application of laws and legal processes, and by the modification and conditioning of thought and behaviour in a manner that follows from laws and legal processes. From this it follows that institutions of governance expand by juridification, where juridification is understood as the ingress of law.

In this light, the study showed particularly the insufficiency of International Relations, Legal Studies and Global Governance literatures concerning juridification. First, the comparison of Cutler's or even Bohman's understanding of juridification with the typology of Blichner and Molander showed that while they were in most respects correct in their understandings, they focused too intently upon a relatively small number of aspects of juridification, which comprised only a limited view of what Blichner and Molander demonstrated as juridification's component parts. Cutler focused almost exclusively upon the capacity of juridification to reinforce the power of already powerful interests and institutionalize the disenfranchisement of others. It can certainly do so, but Bohman argued convincingly that juridification also comprises an element of reflexivity that makes juridification a vehicle of access to power as well as abuse of power. However, Bohman also focuses too intently upon the systemic and philosophical

implications of juridification, tending not to specify its procedural and institutional character, where in fact the juridification takes place. This shortcoming is rectified by the study's use of Blichner and Molander's typology. Yet even their typology focuses too intently upon the different forms of juridification *in potentia*, without considering the problem of implementing the policies of which juridification consists. This is why the study added type F, which concerned the juridification of mechanisms of implementation. Thus the study introduced what it called the Modified Blichner-Molander typology of juridification.

This was important because it allowed the study to dwell upon the great complexity of the problem of the democratization of global governance, and particularly of IOs. The flaw in the approaches of Cutler, Bhagwati, and Scholte, amongst others, is that they address only particular aspects of the very complex problem of juridification and democratization, thereby drawing erroneous or insufficient conclusions about a problem oversimplified – for Cutler, too sharp a focus on the coercive potential of juridification; for Bhagwati, as for Williams and IGTN, a counterproductive insistence upon an unrealistic narrowing of the scope of trade governance; and for Scholte, too great a reliance upon the capacity for civil society to effect change. Similarly, while Abbott *et al.*, and Davidson, focus on juridification as essentially the movement from soft law to hard law in its various forms, they neglect the importance of, and the opportunities that arise from, juridification as the movement from hard law to soft law, when accompanied by an increase in the scope of the body of law.

It was this adherence to the complexity of juridification that allowed the study to grasp the essential nature of the relationship between juridification and hybridization.

Specifically, juridification in its complexity and reflexivity is the means and possibility of democratization, including the democratic representation of previously overlooked or oppressed groups and issue-areas. At the same time, juridification is subject to path-dependency, which implies that juridification will proceed beyond what is necessary for democratization, to the point where too great a scope of activity becomes subject to law, and where democratic access to power becomes anti-democratic abuse of power. This is a particularly threatening possibility when one dwells, as the study does, upon the great complexity of juridification. The possibilities for abuse of power are myriad, and they will come to pass, because juridification is necessary to the birth of an institution of governance, to its development and continued existence in the face of changing circumstances, and to its democratization – yet it will not stop there, because the path-dependency of the governing institution will carry its juridification over into abuse of power, unless path-dependency is countered by hybridization of soft law and hard law. This is why the study places such emphasis upon the flexibility of soft law and upon hybridization – because hybridization counters path-dependency. Indeed, it may be stated as a conclusion of the study that juridification is necessary to democracy, and that democracy requires that juridification be harnessed by hybridization. In articulating the relationship in this manner between democracy, juridification, path-dependency, hybridization, soft law and hard law, the study moves beyond what has previously been written on these subjects, and makes an original contribution to the study of politics, governance, democracy, and law.

Representation, Women and IOs

A second original contribution is made concerning the nature of representation, its relationship to sex/gender, and the possibility of democratic representation of women by IOs. As discussed at length in Chapter 3, the study found a literature concerning sex/gender and representation that was very resistant to the idea that women could be represented by and within IOs. This in turn made for a literature very resistant to the possibility of democratizing IOs. The resistance derived from an unnecessarily restrictive understanding of representation, a too-uncritical adoption of Pitkin's taxonomy of representation, and a widespread opinion that gender mainstreaming was not an effective means to advance descriptive representation.

To address the restrictive understanding of representation, the study adopted Urbinati's expansive understanding in the following terms: "representation is a necessarily and continually indirect, fragmented and changing expression of a continually changing and fragmentary sovereign will."¹¹¹⁰ As Chapter 3 argued, this understanding legitimates what may be called 'derivative' representation, and opens the possibility of descriptive and substantive representation of women at IOs. Only with an expansive understanding of representation, such as that employed by Urbinati, and particularly one that prioritizes indirectness, can a democratic turn in global economic governance as it is currently structured be understood as a genuine possibility.

With respect to Pitkin's taxonomy, the study found it necessary to take a more critical perspective upon her concept of 'responsiveness' than has hitherto been adopted. Indeed, it found that 'responsiveness' as Pitkin defined it, although intuitively a strong

¹¹¹⁰ Present study, 127.

and important concept, did not withstand critique. Essentially, Pitkin understood ‘responsiveness’ to be “acting in the interest of the represented, in a manner responsive to them.”¹¹¹¹ This, as Celis stated, was what turned the acts of representatives into substantive representation. The study found three significant difficulties with Pitkin’s concept of responsiveness. The first was its indefinability. ‘Responsiveness’ had no empirical referent, could not be measured, and could be said to be present in any given situation when a representative performed a given action or its opposite. The second was the ‘intersectionality’ of ‘responsiveness.’ Again, ‘intersectionality’ required ‘responsiveness’ to account for the multiple differences of sex, gender, identity, class and ideology in any constituency. This was supposed to mean that ‘responsiveness’ increased as “divergent and even contradictory views [were] included in the representation process.”¹¹¹² However, as Chapter 3 argued, this is the same as to state that representation is most responsive when constituent views are most divergent and contradictory. Thus, ‘intersectionality’ deprives ‘responsiveness’ of an empirical referent, because it too allows any given action and its opposite to be held to be responsive at any given time.

The third difficulty was the ‘potentiality’ of responsiveness. ‘Potentiality’ was meant to be a central feature of ‘responsiveness,’ a constant condition of potential readiness to respond to a constituent’s sense of his or her interests at an undefined future point. Yet here again one is left with no empirical referent on which to base an understanding of the connection between descriptive and substantive representation,

¹¹¹¹ Pitkin, Hanna Fenichel, The Concept of Representation (Berkeley: University of California Press, 1967), 209.

¹¹¹² Celis, Karen, “On Substantive Representation, Diversity and Responsiveness,” Politics & Gender, vol. 8, no. 4 (December 2012), 525.

which connection ‘responsiveness’ is supposed to provide. Thus, under analysis, ‘responsiveness’ emerges more as article of faith than object of study.

The significance of the study’s critique of ‘responsiveness’ was to show that the concept did not suffice as a link between descriptive and substantive representation, and indeed that the nature of substantive representation might make it impossible to establish such a link. This led the study to the necessary conclusion that any investigation of the possibility of the representation of women and women’s interests within and by an IO, and therefore any investigation of the possible democratization of global governance, must consider both substantive and descriptive representation, and must consider them separately. These conclusions are an original contribution to the study of democracy and democratization.

Finally, the study shows that gender mainstreaming could advance both descriptive and substantive representation, a proposition not widely accepted in a literature more inclined to assert its usefulness for substantive representation, and not well inclined to believe the same for descriptive representation. The study showed the latter to be possible by reference to cases in Wales, Northern Ireland, Scotland, South Korea, and the ECJ, as well as to the work of Lombardo and Meier, and to the UN definition of gender mainstreaming. In so doing, the study made the case for the practicability of the conclusion that both substantive and descriptive representation must be considered when assessing the possibility of democratization. In short, the study contributed to the literatures of democratization, representation and sex/gender a fuller understanding of the democratizing possibilities of gender mainstreaming, of the potential for democratic representation within and by IOs, of the difficulty of verifying

the existence of substantive representation, and of how this requires a study of the possibility of democratization to address separately both substantive and descriptive representation.

The Five Principles of IGI

In the process of showing the possibility for a democratic turn at the WTO, the study necessarily reinforced the five principles of IGI with reference to the relevant literatures. As described in Chapter 2, these principles are ‘inclusion,’ ‘caution,’ ‘simplicity,’ ‘legitimacy,’ and ‘flexibility.’ It would be well here, in the study’s conclusion, to review these with relation to the relevant literatures. Their advantages are particularly telling with relation to the nexus of juridification, hybridization and path-dependency, and its crucial importance to democracy and democratization. Indeed, these five principles describe how IGI, as an idea of global democratic governance, harnesses more effectively than competing ideas the crucial nexus of juridification, hybridization and path-dependency. Each of the principles of IGI is required by this nexus.

Inclusion

‘Inclusion,’ as defined in Chapter 2, meant development of the capacity of IOs, as they democratize, to incorporate more fully the actors, groups and identities of civil society. ‘Inclusion’ is of course a fundamental principle of democracy; it is fundamental to the idea of self-government, or the idea that one ought to have, in some degree, a mechanism to influence or participate in the decisions of government by which one is affected. However, the analysis in the study makes clear that inclusion can be threatened

by the interaction of juridification and path-dependency. This is why IGI insists upon hybridization, which introduces soft-law mechanisms that make it easier to include previously excluded groups and issue-areas.

This was shown in Chapter 7, where the incorporation of the soft-law EIF and Aid-for-Trade with the WTO's Committee for Trade and Development made possible significant improvement in the representation of women and women's interests by and within the WTO and global trade. Thus, where democracy requires inclusion as a fundamental principle, and where it is threatened by juridification and path-dependency, hybridization provides a mechanism for its persistence and protection.

In this way, not only is inclusion understood to be a necessary principle of democratic global governance within IGI – no great insight, the principle being all but universally acknowledged in the literature – but by means of the juridification-path-dependency-hybridization nexus, IGI shows why juridification is continually under threat even in a democracy, and why hybridization is necessary to alleviate the threat. Although Bohman certainly recognizes in a general sense the threat posed to inclusion by juridification, nowhere in the relevant literature is its relation to path-dependency or its alleviation by hybridization addressed.

Caution

Chapter 2 defined the principle of caution as an insistence upon first maximizing the democratic potential of existing IOs, and an equal insistence upon maintaining clear distinctions between IOs even when democratizing. This principle was specifically placed in opposition to the danger inherent in Slaughter's 'new world order' of horizontal

and vertical networks and disaggregated states. The danger of Slaughter's conception was that over time it could as easily trend away from democracy as toward it, and if the former, the strength of the networked system, and the absence of checks and balances, would create consequences both disastrous and very difficult to fix.

However, caution stands equally as a warning against the project of building a global state, even if democratic, participatory or cosmopolitan. It argues that such a project ought to be engaged upon as a last resort, not a first choice, and only when it is certain that the individual institutions of global governance cannot achieve an acceptable level of democratization within the global sphere. This would have to include the representation of women and women's interests within every such institution.

Caution is fundamentally concerned with mitigating unintended consequences, which are inevitable and unavoidable in any project of reform or institution building. By insisting upon democratization of individual institutions, caution advances non-domination while restricting the worst effects of unintended consequences to each institution separately. Amongst the most predictable and most destructive unintended consequences would be the accretion of power at the global level to a greater extent, and with less democratic accountability, than had been planned for. By insisting that the institutions of global governance remain constitutionally separate and discrete, the principle of caution precludes the undemocratic accretion of power at a systemic level globally.

The principle of caution also aligns with the structure of international law, which is comprised essentially of a series of treaties made at very different points in time, together with rules for resolving conflicts between the treaties. That is to say,

international law is fundamentally compartmentalized; it is not unified, except as a legal fiction that facilitates conflict resolution. IGI's principle of caution places the existing structure of international law at the service of the democratization of global governance. The other ideas of global democracy discussed in Chapter 2, even Slaughter's 'new world order,' would require a complete revision, if not erasure, of international law, with attendant increase in the risk of unintended consequences, and decrease in the ability to control or contain them. The stature of the WTO DSU and parts of UNCLOS as *lex specialis* reinforces the particularly compartmentalized nature of the international law of global economic governance, as discussed in Chapter 5. Essentially, it mandates IGI's principle of caution in the democratization of global economic governance.

Simplicity

Simplicity follows from and supports caution. Unlike the three other ideas of democratic global governance, IGI's principle of simplicity dictates that the easiest and most straightforward opportunities for democratization be taken. Like caution, simplicity is a principle of risk mitigation, which entails a more modest approach, more in keeping with the extant structure of international law, than the other ideas of global governance discussed in Chapter 2.

Hybridization is crucial to this principle; it allows institutions to begin to democratize simply and incrementally by means of soft-law initiatives that can be amended or abandoned at relatively minimal cost. It also allows successful soft-law initiatives to become part of a given IO's structure. In this sense, IGI's principle of simplicity fosters policy and organizational experimentation within a larger environment

of institutional stability. In the context of the study's test, the WTO's Aid-for-Trade initiative and Enhanced Integrated Framework (EIF) represent a successful application of the principle of simplicity in the pursuit of institutional reform. Both are soft-law initiatives within a generally hard-law structure that were developed to address specific deficiencies in the ability of the WTO to meet the requirements of special and differential treatment for developing countries, and to support economic development in general more effectively. Both have had the additional benefit of providing an initial forum for incorporating the representation of women and women's interests within WTO policy, which is a necessary condition for the democratization of the WTO. Yet the introduction of Aid-for-Trade and the EIF in accordance with IGI's principle of simplicity, and their place as discrete, circumscribed soft-law initiatives within the WTO's hard-law structure, also mean that if they fail or become outmoded, they can be amended or abandoned without endangering the WTO as an institution.

Like caution, therefore, but unlike inclusion, the principle of simplicity stands in contrast to much of the literature of democratic global governance. This is certainly true of most advocates of cosmopolitan democracy, such as Held and Archibugi, and of Slaughter's conception of a proliferation of networked power. However, it is also true of many, such as Zampetti, who advocate the democratization of the WTO. The scope of the reforms Zampetti proposes, and the absence in his work of a clear strategic sequencing of the pursuit of democratic reform of the WTO, increase the likelihood of precisely the systemic instability and unintended consequences that IGI's principles of caution and simplicity are intended to mitigate or preclude. Moreover, the results of systemic instability and negative unintended consequences can easily scuttle both necessary

democratic reform and the original system itself, leaving the project of democratic global governance in a far worse state than it would otherwise have been.

Legitimacy

Chapter 2 made clear that legitimacy in democratic global governance requires juridification; the former is impossible without the latter. Moreover, Chapter 2 also made clear that inclusion, caution and simplicity together support legitimacy; it follows that they also support and require juridification. The principle of inclusion supports the greatest number and widest scope of stakeholders in a given institution and in a project of democratization. In addition, the principles of caution and simplicity mitigate unintended consequences and therefore support the stability of the institution and the project of democratization. Inclusion, caution and simplicity are thus essential components of legitimacy within the construct of IGI; however, they require juridification of the institution itself in order to be made effective. That is to say, it is the process of juridification that creates an institution, gives it force and effect, and brings under its purview an increasing scope of activity. There can be no legitimacy without juridification because there can be no institutional effectiveness without juridification. This is the fundamental premise of Bohman's insight that juridification gives access to power and is therefore necessary to democracy.

In thus linking institutional legitimacy, and particularly democratic institutional legitimacy, with juridification, the study made clear in Chapter 2 and elsewhere how it differs from the analyses of those such as Cutler and Hartmann, whose primary impression of juridification is one of concern for its tendency to reinforce the structure of

power already extant. Rather, the study took a fuller view of juridification, incorporating and expanding upon the views of Bohman, and particularly those of Blichner and Molander. Thus, the study employed a modified version of Blichner and Molander's typology of juridification, which incorporated seven types: (A) 'constitutive'; (B) 'law's expansion and differentiation'; (C) 'increased conflict solving by reference to law'; (D) 'increased judicial power'; (E) 'legal framing'; and (F) 'increased robustness.' All of these types of juridification, in various combinations, together produce the effectiveness of any institution of governance, including those of global economic governance.

Yet, just as clearly, and even given the expansive understanding of juridification represented by the modified Blichner-Molander typology, more than juridification can contribute to the legitimacy of an institution of global economic governance. In Chapter 7, this was shown by comparing the sources of the WTO's legitimacy with those of APEC's legitimacy. Where the WTO, a primarily hard-law system, derived its legitimacy primarily from its member-governments, APEC, primarily a soft-law system, derived its legitimacy from populations and civil-society organizations. IGI therefore holds that legitimacy is best able to be maximized by the hybridization of both hard-law and soft-law elements within a given institution. Thus, soft-law elements can facilitate inclusion even while the principles of caution and simplicity guide the introduction and development of hard-law elements. The association of juridification, hybridization and legitimacy has not previously been developed in the literature of global governance.

Finally, the study also makes clear that the legitimacy of any democratic institution of global governance must be founded in part upon the effective representation of women and women's interests. This follows directly from the stature of the

representation of women and women's interests as a *sine qua non* of democracy in the 21st century. This explicit understanding of the necessity to democracy of the representation of women and women's interests is another of the study's original contributions to the literature.

Flexibility

Yet in Chapter 2 the study also stressed that juridification is subject to path-dependency and therefore will if uncountered lead from access to power to the use of powerful institutions for undemocratic coercion, exclusion and domination. In this, the study accords with the insights of Brunkhorst and Bohman. For this reason, the study defined 'flexibility' as the fifth principle of IGI. Flexibility is made necessary by the very necessity of juridification for democracy, and by the path-dependency of juridification. Moreover, sufficient institutional flexibility can be provided to a path-dependent, continually juridifying hard-law system only by incorporating elements of soft law. That is to say, sufficient flexibility can only be attained by the hybridization of hard law and soft law, and this hybridization is as necessary to the maintenance of democracy as juridification is to its advent.

The potential benefits of hybridization to the democratization of global economic governance were shown in Chapter 7. Specifically, the chapter demonstrated that the soft-law initiatives of the EIF and Aid-for-Trade allowed the representation of women and women's interests to be addressed within the hard-law construct of the WTO Agreements. This allowed the study to conclude that the democratization of the current institutions of global economic governance was at least not an impossibility. In addition,

it suggests that the flexibility provided by hybridization could allow the WTO to incorporate elements of APEC's soft-law model in order to augment its legitimacy amongst populations and civil society organizations. Moreover, the WTO could by means of hybridization introduce gender mainstreaming in accordance with APEC's soft-law approach, allowing elements of gender mainstreaming policy to be 'hardened' as they are shown to be effective in representing women and women's interests, without placing an unworkable administrative burden upon WTO and member-state bureaucracies.

Most importantly, IGI's principles of legitimacy and flexibility, taken together, represent the nexus of juridification, path-dependency and hybridization that is necessary to any stable democracy and any sustained democratization. Juridification is necessary to constitute, develop and strengthen any democratic institution – to provide access to the institutions of power, as well as the institutions themselves. Path-dependency is a necessary feature of any stable and successful institution; it is the product of any institution that regularly fulfils its mandate, and can be counted upon to do so by its constituents and stakeholders. Yet juridification and path-dependency, both absolutely necessary to stable democracy, together produce an institution that is continually growing in power and scope, and which must in due course become exclusive, coercive, pervasive, inefficient, moribund, and profoundly anti-democratic. In short, juridification and path-dependency, so necessary to democracy, if left uncountered, produce leviathan.

Flexibility by means of hybridization is the necessary cure; hybridization counters path-dependency. As was shown in Chapter 7, the incorporation of soft-law elements within a predominantly hard-law structure can increase inclusion, as the EIF and Aid-for-Trade have done by opening the WTO to the representation of women and women's

interests. The incorporation of soft law allows a hard-law institution to counter the path-dependency of juridification by opening itself to new initiatives and new issue-areas without threatening the institution's stability. This achievement of balance within the nexus of juridification, path-dependency and hybridization is what makes possible any sustained democratization and any stable democracy. It therefore opens the possibility of the democratization of global economic governance.

Concluding Points

In final summation, the study has made possible the following conclusions, all of which are avenues of future research, including their theoretical development and empirical verification:

1. That the democratization of global economic governance is not an impossibility.
2. That the representation of women and women's interests is possible within the WTO without fundamental institutional reform.
3. That the representation of women and women's interests is a *sine qua non* of democracy in the 21st century.
4. That the possibility of the democratization of any institution can be tested by means of the 'hardest case' methodology, whether the methodology employs the representation of women and women's interest, or another *sine qua non* of democracy.

5. That descriptive and substantive representation of women can both be advanced by gender mainstreaming, and that both are necessary to any prospect of democratization.
6. That the 5 principles of IGI – inclusion, caution, simplicity, legitimacy and flexibility – constitute a fuller and more complete description of the requirements of democratic global governance than has heretofore been provided in the literature.
7. That the 7 types of the modified Blichner-Molander typology constitute a fuller and more complete description of juridification than has hitherto been provided in the literature.
8. That juridification is necessary to democracy and democratization.
9. That the combination of juridification and path-dependency will undermine democracy if left uncountered.
10. That the hybridization of soft law and hard law is necessary to counter path-dependency.
11. That achieving a balance within the nexus of juridification, hybridization and path-dependency is necessary to any stable democracy and any sustained democratization.
12. That the fundamental challenge to the democratization of the WTO is the over-juridification of WTO hard law, and that this can be ameliorated by the introduction of soft law initiatives.

Appendix

Appendix 1: Ethics Approval Form¹¹¹³



Carleton University Research Office
5th Floor Tory Building
1125 Colonel By Drive
Ottawa, ON K1S 5B6 Canada
Tel: (613) 520-2516
Fax: (613) 520-2521
www.carleton.ca/cu/research/curo/

Ethics Approval Form

This is to certify that the Carleton University Research Ethics Committee has examined the application for ethical approval. The committee found the research project to meet appropriate ethical standards as outlined in the *Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans* and, the *Carleton University Policies and Procedures for the Ethical Conduct of Research*.

New approval

Renewal of original approval

Original date of approval:

| | |
|------------------|--|
| Date of renewal | 21 September 2007 |
| Researcher | Judit Fabian |
| Status | Ph.D. candidate |
| Department | Department of Political Science |
| Supervisor | Prof. Randall Germain |
| Title of project | Working title: Global (Economic) Governance: Nationalism, Gender and the World Trade Organization |

Ethics approval expires on: **21 September 2008**

All researchers are governed by the following conditions:

Annual Status Report: Ethics clearance is valid for one year from date of approval. You are required to submit an Annual Status Report to either renewal approval or close the file. Failure to submit the Annual Status Report will result in the immediate suspension of the project. Funded projects will have accounts suspended until the report is submitted and approved.

Changes to the project: Any changes to the project must be submitted to the Carleton University Research Ethics Committee for approval. All changes must be approved prior to the continuance of the research.

Adverse events: Should any participant suffer adversely from their participation in the project you are required to report the matter to the Carleton University Research Ethics Committee. You must submit a written record of the event and indicate what steps you have taken to resolve the situation.

Suspension or termination of approval: Failure to conduct the research in accordance with the principles of the *Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans* and the *Carleton University Policies and Procedures for the Ethical Conduct of Research* may result in the suspension or termination of the research project.

Leslie J. MacDonald-Hicks
Research Ethics Committee Coordinator
For the Chair of the Carleton University Research Ethics Committee
Prof. Antonio Gualtieri

¹¹¹³ For the purposes of meeting the requirements of the PhD Programme that culminated in the presentation of this thesis, the research needed to be focused and therefore more narrowed than originally proposed. Since the resultant thesis is part of a larger interest in Global (Economic) Governance, data that was collected but was not used for the thesis, including interviews, can be later used as part of a continuing research agenda. This note is also applicable to Appendix 2, 3, and 4.

Appendix 2: Letter of Information

Letter of Information

This interview is being sought in relation to a doctoral research project on the legal framework of the WTO. In particular, the dissertation is concerned with agriculture and International Property Rights as they are subjects of discussion or dispute between the European Union, Canada, the United States, and Japan, and the interaction of gender and nationalism with the liberalization and juridification¹ of global trade through the WTO, understood as an agent of global governance.

This research is conducted by me, Judit Fabian, Ph.D. candidate at the Department of Political Science at Carleton University, Ottawa, Canada under the supervision of Dr. Randall Germain. Our respective contact details appear at the end of this letter.

For this research I will be interviewing approximately thirty (30) representatives of international organizations and NGOs, including the European Union, the World Trade Organization and the International Gender and Trade Network, and academics working in the area.² Each interview is expected to last about 1.5 - 2 hours and will be audio-taped, unless you request otherwise. You may decline to answer any of my questions during the interview. There is no financial compensation for participating in this research. However, I will be glad to send you a summary of my dissertation or the whole dissertation once finished and approved by my university. I would be glad to send you any resulting publications as well. If you agree, I would like your permission to contact you again in future with additional questions and follow-ups.

Your name will appear on my private notes, but it will not appear in the final dissertation. I will refer to you by using a general 'title', e.g. 'a European Commission official', or 'a representative from the Public Relations Office of the WTO'. If you wish, the term referring to you can also be more general. In other words, every effort will be made to strip all identifiers to prevent the reconstruction of identities. This rule will also apply to all other future publications written out of this project (e.g. communications, articles and book chapters), all conversations or presentations (i.e. conference proceedings, lectures, workshops) involving the interviews and all communications through the media.

¹ Moving toward an increasingly juridical model.

² A more detailed list of organizations and a more detailed description of the project is available upon request. A short biographical note or the CV of the researcher, Judit Fabian, as well as copies of the researcher's recent work are also available upon request.

My private notes will be locked-up in a secure place at all-times, and will not be communicated to any other researcher or serve any other current researcher's project. However, they will not be destroyed, as I may have to reuse them for future research projects with topics similar to the topic of this dissertation. In such a case, the same rules of anonymity, confidentiality, security and sharing will apply.

You may withdraw your agreement to participate at any time during this study and have information withdrawn without consequence.

This project was reviewed and received ethics clearance by the Carleton University Ethics Committee. Should you have concern or questions about your involvement in this study, please contact me or my supervisor. You may also contact the Ethics Committee Chair with any ethics concerns or complaints.

Ms. Judit Fabian
B.Sc., B.A., M.A., Ph.D. (ABD)
Ph.D. Candidate
Department of Political Science
Carleton University
1125 Colonel By Drive
Ottawa, Ontario, Canada, K1S 5B6
Tel. (1) 613-729-1885
jfabian@connect.carleton.ca

Dr. Randall Germain
Research Supervisor
Associate Professor (on sabbatical
2007/2008)
Department of Political Science
Carleton University
1125 Colonel By Drive
Ottawa, Ontario, Canada, K1S 5B6
Tel. (1) 613 520 2600 ext. 2771
Fax. (1) 613 520 4064
randall_germain@carleton.ca

Prof. Antonio Gualtieri
Chair, Research Ethics Committee
Carleton University
1125 Colonel By Drive
Ottawa, Ontario, Canada, K1S 5B6
Tel. (1) 613-520-2517
ethics@carleton.ca

Appendix 3: Informed Consent

INFORMED CONSENT

I, the undersigned, voluntarily accept to be interviewed by Ms. Judit Fabian for her doctoral research project on the legal framework of the WTO. In particular, the dissertation is concerned with agriculture and International Property Rights as they are subjects of discussion or dispute between the European Union, Canada, the United States, and Japan, and the interaction of gender and nationalism with the liberalization and juridification¹ of global trade through the WTO, understood as an agent of global governance.

I understand that this interview will last approximately 1.5 - 2 hours, will/will not (please chose one) be audio-taped and that there is no foreseen risk to my participation. I understand that I have the right to refuse to answer any of the questions, and that I can at any time withdraw my agreement to participate to this project. Should I exercise my right to withdraw I will decide at that time if the researcher may use the information I have provided to that point. I understand that there will be no financial compensation for my participation.

I understand that my name will not appear in the final dissertation or in any other publication written out of this project, nor will it be mentioned in any public speeches, but that it will appear on the private notes of Ms. Judit Fabian. I understand that these notes will be securely locked-up by Ms. Fabian and will not be accessed by any other researcher or used for any other current research project without my explicit consent. I understand that the information I give will not be destroyed and might be used for future research projects conducted by Ms. Fabian with topics similar to this dissertation research project, under the same rules of anonymity, confidentiality, security and sharing.

This consent form and research has been approved by the Carleton University Research Ethics Committee.

Signed in (place), (date)

Name of the participant
(please print)

Judit Fabian
B.Sc., B.A., M.A., Ph.D. (ABD)
Ph.D. Candidate
Department of Political Science
Carleton University
1125 Colonel By Drive
Ottawa, Ontario, Canada, K1S 5B6
Tel. (1) 613-729-1885
jfabian@connect.carleton.ca

Signature of the participant

¹ Moving toward an increasingly juridical model.

Research Supervisor:

Dr. Randall Germain
Associate Professor (on sabbatical
2007/2008)
Department of Political Science
Carleton University
1125 Colonel By Drive
Ottawa, Ontario, Canada, K1S 5B6
Tel. (1) 613 520 2600 ext. 2771
Fax. (1) 613 520 4064
randall_germain@carleton.ca

Ethics Committee Contact:

Prof. Antonio Gualtieri
Chair, Research Ethics Committee
Carleton University
1125 Colonel By Drive
Ottawa, Ontario, Canada, K1S 5B6
Tel. (1) 613-520-2517
ethics@carleton.ca

Appendix 4: Summary of Research Trip Associated with Dissertation Research

November 25, 2007

Narrative Report

RE: Graduate Travel-Research Grant provided by funding from the European Commission and Carleton University's Faculty of Graduate Studies and Research and administered by the Center for European Studies at Carleton University, Fall 2007

By: Judit Fabian, B.Sc., B.A., M.A., Ph.D. (ABD), Department of Political Science, Carleton University

First and foremost, I would like to express my gratitude for having been granted the Graduate Travel-Research Fellowship to facilitate my recent research/conference trip associated with my PhD research. The dissertation is provisionally titled '*Global Governance: Nationalism, Gender and the World Trade Organization*' and it includes a significant component concerning the interaction of the European Union within the global trade regime and the WTO. The entire trip consisted of stays in the United Kingdom, in Belgium and in Switzerland. Details are provided below on the British and Belgian segments of the trip, which enjoyed the generous financial support of the Centre.

First, I presented my paper entitled '*The Legitimacy of the Mulier Economicus: APEC, WTO and the EU*' at the CSGR/GARNET conference entitled '*Pathways to Legitimacy? The Future of Global and Regional Governance*', which was a major international conference concerning the building of legitimate authority in global and regional governance, held at Scarman House at the University of Warwick, UK, between 17 and 19 September 2007. My panel was entitled '*Legitimacy and the Institutions of Global Governance*'. I was pleased with how the presentation turned out. The audience was very engaging and diverse, and included representatives of NGOs and academics from diverse disciplines such as Political Science, Law, IPE, and Economics. Numerous countries were also represented, including both developed and developing, and the audience ranged from graduate students to senior academics. This diversity provided an excellent environment for introducing and discussing my work, since my research draws on all the disciplines mentioned above and is global in scope. Importantly, my presentation was followed by a lengthy discussion and I received questions and comments that were very helpful in further shaping and focusing my work and thinking. Two people at the end of the panel called my work seminal and the panel generated discussions beyond both itself and the conference.

While in Brussels, I visited a number of the European Institutions, conducted interviews with members of the European Commission (DG-Trade), identified and made contacts at the EU Parliament and at EESC (European Economic and Social Committee), and identified and made further contacts at the EU Commission (including DG-Trade and DG-Agriculture). In identifying some of my first contacts, the Delegation of the European Commission to Canada provided me with invaluable help.

The experience was very useful, both in terms of having learned a great deal about the institutional culture of the Commission and some of the other EU Institutions, and in terms of my investigation concerning the relationships between, and current research and policy regarding, gender and trade, nationalism and trade, and the European Union and the World Trade Organization. With respect to the connection between gender and trade, my findings point my dissertation in a slightly different direction than what I anticipated prior to conducting the interviews. More specifically, I was made aware of the particular nature and extent of the challenges facing the visibility of gender in DG-Trade. The findings will make the dissertation clearer in focus and will contribute to the dissertation being a more prominent contribution both to academia and to the politics of the "real world." Most importantly, much of the information I have received would have been impossible (or extremely difficult) to find without going to the source in Brussels and talking to the people who are, for example, involved in actual negotiations. My stay in Brussels also provided me with valuable contacts for future research at NGOs, other lobby groups and institutions that are in touch with DG-Trade. Further, DG-Trade has very generously provided me with up-to-date internal materials (non-classified) and EU publications.

Again, I thank the Center for European Studies at Carleton University kindly for having supported my activities. The trip was enormously useful to my research and the contacts and research directions this trip has opened for me have the potential to be influential upon my work for many years to come.

Appendix 5: The Global Institutional Environment with Relation to the Gender and Trade Movement

| | UN | APEC | WTO | Canada | Other |
|--------------|--|---|---|---|--|
| 1970s | <p>1979 - Convention on the Elimination of all forms of Discrimination Against Women (CEDAW).</p> <p>1976-1986 - UN Decade for Women</p> | | | <p>1973 - Canadian Advisory Council on the Status of Women established.</p> <p>1979 - Canada is a signatory to the UN Convention on the Elimination of All Forms of Discrimination Against Women.</p> | |
| 1980s | <p>1981 - Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) entered into force.</p> | <p>1989 - Asia-Pacific Economic Cooperation (APEC) inter-governmental forum is created.</p> | | <p>1987-1988 - Canadian Advisory Council on the Status of Women (CACSW) commissions background papers on the impact of free trade on women.</p> | |
| 1990s | <p>1995 - Fourth World Conference on Women in Beijing. Beijing Declaration and Platform for Action (Commitment for 'gender mainstreaming')</p> | <p>1996 - APEC accepts and supports the Women's Leadership Network's (WLN) call to action for the full participation of women in APEC.</p> <p>1996 - SME Joint Ministerial Statement calls for full participation of women in SME's.</p> <p>1997 - Canada rotation for APEC chair.</p> | <p>1996 - The Women's Caucus created at WTO Ministerial.</p> <p>1998 - WTO Ministerial formed the Informal Working Group on Gender and Trade (IWGGT).</p> | <p>1995 - Canada committed to the Beijing Platform for Action.</p> <p>1995 - Federal Plan for Gender Equality (Status of Women Canada.) To be phased in over 5 years</p> <p>1996 - CIDA supports the WLN through its Gender in APEC project.</p> | <p>1998 - Centre of Concern and Development Alternatives with Women for a New Era (DAWN) began electronic conference on gender and trade. Eventually culminates in the establishment of the International Gender and Trade network (IGTN.)</p> <p>1999 - Canada/ US Women's Trade Summit in Toronto.</p> |

| | | |
|---|--|--|
| <p>1997 - Gender information site added to APEC web site.</p> <p>1997 - APEC Industrial Science and Technology Working Group (ISTWG) establishes Ad Hoc Group on gender, science and technology.</p> <p>1998 - Ministerial Meeting on Women. This led to the creation of the Senior Official's Meeting (SOM) Ad Hoc Task Force on the Integration of Women in APEC to develop a framework to integrate women in APEC. This was to be a one-time event. Policy level decision is made to recognize gender as a cross-cutting issue in APEC.</p> <p>1998 - Creation of the Confederation of Women's Business Councils of APEC.</p> <p>1999 - Framework for the Integration of Women in APEC. The Advisory Group on Gender Integration is established to implement the framework in 2 years.</p> <p>1999 - APEC leaders officially recognized the unique contribution of indigenous women in APEC.</p> <p>1999 - Human Resource</p> | <p>1997 - Creation of interdepartmental subcommittee on APEC and Gender, co-chaired by Status of Women Canada and DFAIT.</p> <p>1997 - First Canadian Businesswomen's Trade Mission to Washington DC.</p> <p>1997 - Trade Research Coalition (TRC) established.</p> <p>1999 - TRC produces report "Beyond Borders: Canadian Businesswomen in International Trade."</p> | <p>1999 - Americas Business Forum presents recommendations to Canada's Minister of Trade during Free Trade Area of the Americas (FTAA) negotiations entitled "Women and the FTAA: Our Contribution to Economic Prosperity."</p> |
|---|--|--|

| | | | | |
|--------------|---|---|---|---|
| | | | | Development Working Group develops gender guidelines for its project management guide. |
| | | | | 1999 - Indigenous Women in Exporting Business Seminar held. |
| 2000s | 2001 - Trade and Development Board of the UNCTAD expert meeting investigating gender issues and trade in services. | 2000 - The APEC SME Ministerial Statements incorporates WLN Statement and Recommendation as an appendix (in full.) | 2000 - Women's Caucus produced a two-page declaration addressing the implementation of the Agreement on Agriculture (AoA) and the General Agreement on Trade in Services (GATS) from a gender perspective. | 2001 - CIDA project to support WLN in APEC ended. |
| | | 2000 - SME Policy Level Group appoints a gender focus point | | 2001 – Status of Women Canada call for proposals: “Trade Agreements and Women.” A total of seven projects completed. |
| | | 2001 - North-South Institute “Gender-Mainstreaming: Good Practices from the Asian-Pacific Rim” Supported by CIDA and Status of Women Canada. | | 2003 - Prime Minister’s Task force on Women Entrepreneurs |
| | | 2001 - Ad Hoc Advisory Group on Gender Integration and the SME Working Group host “Analysis and Evaluation of Gender Statistics Workshop.” | 2003 - First session on trade and gender held at a WTO Public Symposium: Cosponsored by CIDA, SWC, and DFAIT: “Women as Economic Actors in Sustainable Development.” | 2003 - CIDA publishes “Gender Equality and Trade Related Capacity Building: a Resource Tool for Practitioners.” |
| | | 2002 - Second Ministerial Meeting on Women held in Mexico. | 2003 - “Gender Equality, Trade and Development” session sponsored by CIDA and DFAIT; held in conjunction with the Cancun WTO Ministerial Conference. | 2003 – Industry Canada officials brief the trade minister concerning gender issues before entering negotiations |
| | | 2002 - The SOM Ad Hoc Advisory Group on Gender Integration is disbanded. A permanent system of Gender Focal Points Network is established. | 2003 – Industry Canada officials brief the Canadian trade minister concerning | 2004 - DFAIT developed and begun to deliver a |
| | | 2003 - “Supporting Potential | | |

| | | |
|--|--|---|
| Women Exporters" research project by North-South Institute for APEC Committee on Trade and Investment. | gender issues before entering negotiations | course for its trade officials concerning gender and trade |
| | 2009 - Mandate from the Director-General of the WTO recognizes the importance of integrating gender into trade with relation to the WTO's Aid for Trade initiative. | 2004 - High-level Interactive Roundtable on Gender and Trade at UNCTAD XI sponsored by CIDA. |

Source: The above information was collected from the various sources used in the present study.

Appendix 6: The Global Gender and Trade Civil Society Movement and Its Goals

| Thematic code | Advocacy group |
|--|---|
| Gender equality in market structures | APRODEV BRIDGE CAFRA |
| Global Policy Forum | ICA IGTN One World TWN WEDO WIDE WTW |
| Democratization of decision making processes | AWID BRIDGE CAFRA COC DAWN Global Policy Forum ICA IGTN ISIS One World TWN WEDO WIDE WTW |
| Greater global-local cohesion | AWID APRODEV BRIDGE WIDE |
| Accountability through gender specific measures | AWID APRODEV BRIDGE CAFRA COC ICA One World TWN WEDO WIDE WTW Networks AWID BRIDGE CAFRA ESSF ISIS |
| Bottom up trade policies | AWID APRODEV CAFRA |

| | |
|---|---------------------|
| | COC |
| | Global Policy Forum |
| | IGTN |
| | One World |
| | TWN |
| | WEDO |
| | WIDE |
| <hr/> | |
| Alternatives to free market capitalism | CAFRA |
| | CPE |
| | ESSF |
| | IGTN |
| | Prout |
| | WEDO |
| | WIDE |
| | WSSE |

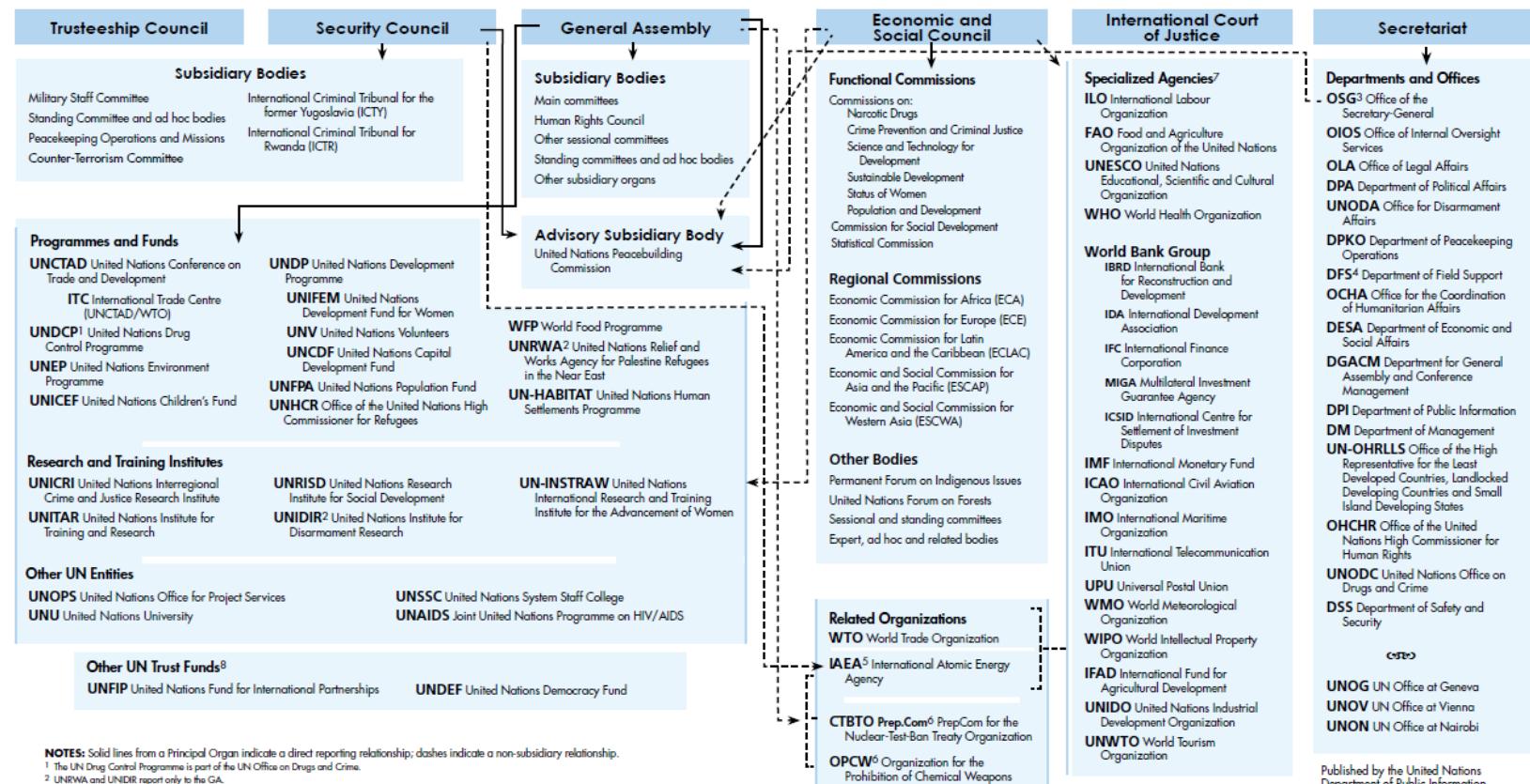
Source: Taken without modification from Steinkopf Rice, Julie, "Viewing Trade Liberalization Through a Feminist Lens: A Content Analysis of the Counterhegemonic Discourse of Gender and Trade Advocacy Groups," *Sociological Spectrum*, vol. 30 (2010), 289–316.

Appendix 7: The United Nations System, as of 2007.



The United Nations System

Principal Organs



NOTES: Solid lines from a Principal Organ indicate a direct reporting relationship; dashes indicate a non-subsidiary relationship.

¹ The UN Drug Control Programme is part of the UN Office on Drugs and Crime.

² UNRWA and UNDR report only to the GA.

³ The United Nations Ethics Office, the United Nations Ombudsman's Office, and the Chief Information Technology Officer report directly to the Secretary-General.

⁴ In an exceptional arrangement, the Under-Secretary-General for Field Support reports directly to the Under-Secretary-General for Peacekeeping Operations.

⁵ IAEA reports to the Security Council and the General Assembly (GA).

⁶ The CTBTO Prep.Com and OPCW report to the GA.

⁷ Specialized agencies are autonomous organizations working with the UN and each other through the coordinating machinery of the ECOSOC at the intergovernmental level, and through the Chief Executives Board for coordination (CEB) at the inter-secretariat level.

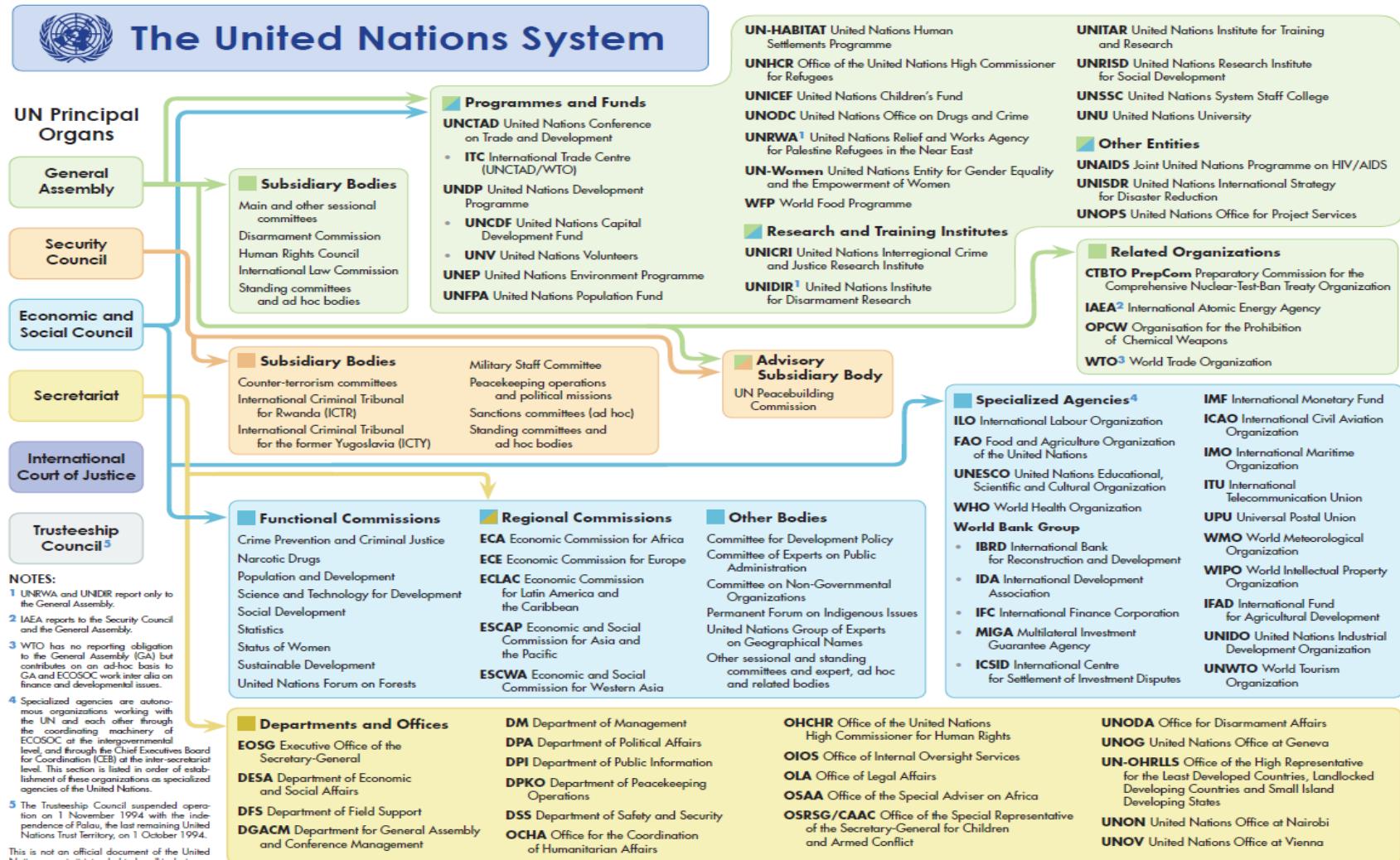
⁸ UNFIP is an autonomous trust fund operating under the leadership of the United Nations Deputy Secretary-General. UNDEF's advisory board recommends funding proposals for approval by the Secretary-General.

Published by the United Nations
Department of Public Information

DP/2470—07-499.50—December 2007—3M

CSTD

Appendix 8: United Nations System, as of 2011.



Appendix 9: GATT Contracting Parties

128 countries had signed GATT by 1994.

On 1 January 1995, the WTO replaced GATT, which had been in existence since 1947, as the organization overseeing the multilateral trading system. The governments that had signed GATT were officially known as 'GATT contracting parties'. Upon signing the new WTO agreements (which include the updated GATT, known as GATT 1994), they officially became known as 'WTO members'.

| GATT Contracting Parties | Date of Signing |
|--------------------------|-------------------|
| Angola | 8 April 1994 |
| Antigua and Barbuda | 30 March 1987 |
| Argentina | 11 October 1967 |
| Australia | 1 January 1948 |
| Austria | 19 October 1951 |
| Bahrain | 13 December 1993 |
| Bangladesh | 16 December 1972 |
| Barbados | 15 February 1967 |
| Belgium | 1 January 1948 |
| Belize | 7 October 1983 |
| Benin | 12 September 1963 |
| Bolivia | 8 September 1990 |
| Botswana | 28 August 1987 |
| Brazil | 30 July 1948 |
| Brunei Darussalam | 9 December 1993 |
| Burkina Faso | 3 May 1963 |
| Burundi | 13 March 1965 |
| Cameroon | 3 May 1963 |
| Canada | 1 January 1948 |
| Central African Republic | 3 May 1963 |
| Chad | 12 July 1963 |
| Chile | 16 March 1949 |
| Colombia | 3 October 1981 |
| Congo, Republic of | 3 May 1963 |
| Costa Rica | 24 November 1990 |
| Côte d'Ivoire | 31 December 1963 |
| Cuba | 1 January 1948 |
| Cyprus | 15 July 1963 |
| Czech Republic | 15 April 1993 |
| Denmark | 28 May 1950 |
| Djibouti | 16 December 1994 |
| Dominica | 20 April 1993 |
| Dominican Republic | 19 May 1950 |
| Egypt | 9 May 1970 |
| El Salvador | 22 May 1991 |
| Fiji | 16 November 1993 |
| Finland | 25 May 1950 |
| France | 1 January 1948 |
| Gabon | 3 May 1963 |
| The Gambia | 22 February 1965 |
| Germany | 1 October 1951 |
| Ghana | 17 October 1957 |
| Greece | 1 March 1950 |
| Grenada | 9 February 1994 |
| Guatemala | 10 October 1991 |

| | |
|--------------------|-------------------|
| Guinea | 8 December 1994 |
| Guinea Bissau | 17 March 1994 |
| Guyana | 5 July 1966 |
| Haiti | 1 January 1950 |
| Honduras | 10 April 1994 |
| Hong Kong | 23 April 1986 |
| Hungary | 9 September 1973 |
| Iceland | 21 April 1968 |
| India | 8 July 1948 |
| Indonesia | 24 February 1950 |
| Ireland | 22 December 1967 |
| Israel | 5 July 1962 |
| Italy | 30 May 1950 |
| Jamaica | 31 December 1963 |
| Japan | 10 September 1955 |
| Kenya | 5 February 1964 |
| Korea, Republic of | 14 April 1967 |
| Kuwait | 3 May 1963 |
| Lesotho | 8 January 1988 |
| Liechtenstein | 29 March 1994 |
| Luxembourg | 1 January 1948 |
| Macao | 11 January 1991 |
| Madagascar | 30 September 1963 |
| Malawi | 28 August 1964 |
| Malaysia | 24 October 1957 |
| Maldives | 19 April 1983 |
| Mali | 11 January 1993 |
| Malta | 17 November 1964 |
| Mauritania | 30 September 1963 |
| Mauritius | 2 September 1970 |
| Mexico | 24 August 1986 |
| Morocco | 17 June 1987 |
| Mozambique | 27 July 1992 |
| Myanmar, Union of | 29 July 1948 |
| Namibia | 15 September 1992 |
| Netherlands | 1 January 1948 |
| New Zealand | 30 July 1948 |
| Nicaragua | 28 May 1950 |
| Niger | 31 December 1963 |
| Nigeria | 18 November 1960 |
| Norway | 10 July 1948 |
| Pakistan | 30 July 1948 |
| Papua New Guinea | 16 December 1994 |
| Paraguay | 6 January 1994 |
| Peru | 7 October 1951 |
| Philippines | 27 December 1979 |
| Poland | 18 October 1967 |
| Portugal | 6 May 1962 |
| Qatar | 7 April 1994 |
| Romania | 14 November 1971 |
| Rwanda | 1 January 1966 |
| Senegal | 27 September 1963 |
| Sierra Leone | 19 May 1961 |
| Singapore | 20 August 1973 |
| Slovak Republic | 15 April 1993 |

| | |
|----------------------------------|-------------------|
| Slovenia | 30 October 1994 |
| Solomon Islands | 28 December 1994 |
| South Africa | 13 June 1948 |
| Spain | 29 August 1963 |
| Sri Lanka | 29 July 1948 |
| Saint Kitts and Nevis | 24 March 1994 |
| Saint Lucia | 13 April 1993 |
| Saint Vincent and the Grenadines | 18 May 1993 |
| Suriname | 22 March 1978 |
| Swaziland, Kingdom of | 8 February 1993 |
| Sweden | 30 April 1950 |
| Switzerland | 1 August 1966 |
| Tanzania | 9 December 1961 |
| Thailand | 20 November 1982 |
| Togo | 20 March 1964 |
| Trinidad and Tobago | 23 October 1962 |
| Tunisia | 29 August 1990 |
| Turkey | 17 October 1951 |
| Uganda | 23 October 1962 |
| United Arab Emirates | 8 March 1994 |
| United Kingdom | 1 January 1948 |
| United States of America | 1 January 1948 |
| Uruguay | 6 December 1953 |
| Venezuela | 31 August 1990 |
| Yugoslavia | 25 August 1966 |
| Zaire | 11 September 1971 |
| Zambia | 10 February 1982 |
| Zimbabwe | 11 July 1948 |

Source: World Trade Organization. *The 128 Countries That Had Signed GATT by 1994.*
http://www.wto.org/english/thewto_e/gattmem_e.htm (August 27, 2013).

Appendix 10: WTO Membership

The WTO has 159 members on 2 March 2013.

| WTO Members | Date of Joining |
|--|------------------------|
| Albania | 8 September 2000 |
| Angola | 23 November 1996 |
| Antigua and Barbuda | 1 January 1995 |
| Argentina | 1 January 1995 |
| Armenia | 5 February 2003 |
| Australia | 1 January 1995 |
| Austria | 1 January 1995 |
| Bahrain, Kingdom of | 1 January 1995 |
| Bangladesh | 1 January 1995 |
| Barbados | 1 January 1995 |
| Belgium | 1 January 1995 |
| Belize | 1 January 1995 |
| Benin | 22 February 1996 |
| Bolivia, Plurinational State of | 12 September 1995 |
| Botswana | 31 May 1995 |
| Brazil | 1 January 1995 |
| Brunei Darussalam | 1 January 1995 |
| Bulgaria | 1 December 1996 |
| Burkina Faso | 3 June 1995 |
| Burundi | 23 July 1995 |
| Cambodia | 13 October 2004 |
| Cameroon | 13 December 1995 |
| Canada | 1 January 1995 |
| Cape Verde | 23 July 2008 |
| Central African Republic | 31 May 1995 |
| Chad | 19 October 1996 |
| Chile | 1 January 1995 |
| China | 11 December 2001 |
| Colombia | 30 April 1995 |
| Congo | 27 March 1997 |
| Costa Rica | 1 January 1995 |
| Côte d'Ivoire | 1 January 1995 |
| Croatia | 30 November 2000 |
| Cuba | 20 April 1995 |
| Cyprus | 30 July 1995 |
| Czech Republic | 1 January 1995 |
| Democratic Republic of the Congo | 1 January 1997 |
| Denmark | 1 January 1995 |
| Djibouti | 31 May 1995 |
| Dominica | 1 January 1995 |
| Dominican Republic | 9 March 1995 |
| Ecuador | 21 January 1996 |
| Egypt | 30 June 1995 |
| El Salvador | 7 May 1995 |
| Estonia | 13 November 1999 |
| European Union (formerly European Communities) | 1 January 1995 |
| Fiji | 14 January 1996 |
| Finland | 1 January 1995 |
| France | 1 January 1995 |

| | |
|----------------------------------|------------------|
| Gabon | 1 January 1995 |
| The Gambia | 23 October 1996 |
| Georgia | 14 June 2000 |
| Germany | 1 January 1995 |
| Ghana | 1 January 1995 |
| Greece | 1 January 1995 |
| Grenada | 22 February 1996 |
| Guatemala | 21 July 1995 |
| Guinea | 25 October 1995 |
| Guinea-Bissau | 31 May 1995 |
| Guyana | 1 January 1995 |
| Haiti | 30 January 1996 |
| Honduras | 1 January 1995 |
| Hong Kong, China | 1 January 1995 |
| Hungary | 1 January 1995 |
| Iceland | 1 January 1995 |
| India | 1 January 1995 |
| Indonesia | 1 January 1995 |
| Ireland | 1 January 1995 |
| Israel | 21 April 1995 |
| Italy | 1 January 1995 |
| Jamaica | 9 March 1995 |
| Japan | 1 January 1995 |
| Jordan | 11 April 2000 |
| Kenya | 1 January 1995 |
| Korea, Republic of | 1 January 1995 |
| Kuwait, the State of | 1 January 1995 |
| Kyrgyz Republic | 20 December 1998 |
| Lao People's Democratic Republic | 2 February 2013 |
| Latvia | 10 February 1999 |
| Lesotho | 31 May 1995 |
| Liechtenstein | 1 September 1995 |
| Lithuania | 31 May 2001 |
| Luxembourg | 1 January 1995 |
| Macao, China | 1 January 1995 |
| Madagascar | 17 November 1995 |
| Malawi | 31 May 1995 |
| Malaysia | 1 January 1995 |
| Maldives | 31 May 1995 |
| Mali | 31 May 1995 |
| Malta | 1 January 1995 |
| Mauritania | 31 May 1995 |
| Mauritius | 1 January 1995 |
| Mexico | 1 January 1995 |
| Moldova, Republic of | 26 July 2001 |
| Mongolia | 29 January 1997 |
| Montenegro | 29 April 2012 |
| Morocco | 1 January 1995 |
| Mozambique | 26 August 1995 |
| Myanmar | 1 January 1995 |
| Namibia | 1 January 1995 |
| Nepal | 23 April 2004 |
| Netherlands | 1 January 1995 |
| New Zealand | 1 January 1995 |
| Nicaragua | 3 September 1995 |

| | |
|---|------------------|
| Niger | 13 December 1996 |
| Nigeria | 1 January 1995 |
| Norway | 1 January 1995 |
| Oman | 9 November 2000 |
| Pakistan | 1 January 1995 |
| Panama | 6 September 1997 |
| Papua New Guinea | 9 June 1996 |
| Paraguay | 1 January 1995 |
| Peru | 1 January 1995 |
| Philippines | 1 January 1995 |
| Poland | 1 July 1995 |
| Portugal | 1 January 1995 |
| Qatar | 13 January 1996 |
| Romania | 1 January 1995 |
| Russian Federation | 22 August 2012 |
| Rwanda | 22 May 1996 |
| Saint Kitts and Nevis | 21 February 1996 |
| Saint Lucia | 1 January 1995 |
| Saint Vincent & the Grenadines | 1 January 1995 |
| Samoa | 10 May 2012 |
| Saudi Arabia, Kingdom of | 11 December 2005 |
| Senegal | 1 January 1995 |
| Sierra Leone | 23 July 1995 |
| Singapore | 1 January 1995 |
| Slovak Republic | 1 January 1995 |
| Slovenia | 30 July 1995 |
| Solomon Islands | 26 July 1996 |
| South Africa | 1 January 1995 |
| Spain | 1 January 1995 |
| Sri Lanka | 1 January 1995 |
| Suriname | 1 January 1995 |
| Swaziland | 1 January 1995 |
| Sweden | 1 January 1995 |
| Switzerland | 1 July 1995 |
| Chinese Taipei | 1 January 2002 |
| Tajikistan | 2 March 2013 |
| Tanzania | 1 January 1995 |
| Thailand | 1 January 1995 |
| The former Yugoslav Republic of Macedonia (FYROM) | 4 April 2003 |
| Togo | 31 May 1995 |
| Tonga | 27 July 2007 |
| Trinidad and Tobago | 1 March 1995 |
| Tunisia | 29 March 1995 |
| Turkey | 26 March 1995 |
| Uganda | 1 January 1995 |
| Ukraine | 16 May 2008 |
| United Arab Emirates | 10 April 1996 |
| United Kingdom | 1 January 1995 |
| United States of America | 1 January 1995 |
| Uruguay | 1 January 1995 |
| Vanuatu | 24 August 2012 |
| Venezuela, Bolivarian Republic of | 1 January 1995 |
| Viet Nam | 11 January 2007 |
| Zambia | 1 January 1995 |

Zimbabwe

5 March 1995

Source: World Trade Organization. *Understanding the WTO: The Organization: Members and Observers.* http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (August 27, 2013).

Appendix 11: WTO Members that were not Contracting Parties to the GATT

32 members.

| WTO Members | Date of Joining |
|---|------------------------|
| Albania | 8 September 2000 |
| Armenia | 5 February 2003 |
| Bulgaria | 1 December 1996 |
| Cambodia | 13 October 2004 |
| Cape Verde | 23 July 2008 |
| China | 11 December 2001 |
| Croatia | 30 November 2000 |
| Democratic Republic of the Congo | 1 January 1997 |
| Ecuador | 21 January 1996 |
| Estonia | 13 November 1999 |
| Georgia | 14 June 2000 |
| Jordan | 11 April 2000 |
| Kyrgyz Republic | 20 December 1998 |
| Lao People's Democratic Republic | 2 February 2013 |
| Latvia | 10 February 1999 |
| Lithuania | 31 May 2001 |
| Moldova, Republic of | 26 July 2001 |
| Mongolia | 29 January 1997 |
| Montenegro | 29 April 2012 |
| Nepal | 23 April 2004 |
| Oman | 9 November 2000 |
| Panama | 6 September 1997 |
| Russian Federation | 22 August 2012 |
| Samoa | 10 May 2012 |
| Saudi Arabia, Kingdom of | 11 December 2005 |
| Chinese Taipei | 1 January 2002 |
| Tajikistan | 2 March 2013 |
| The former Yugoslav Republic of Macedonia (FYROM) | 4 April 2003 |
| Tonga | 27 July 2007 |
| Ukraine | 16 May 2008 |
| Vanuatu | 24 August 2012 |
| Viet Nam | 11 January 2007 |

Appendix 12: WTO Observer Governments

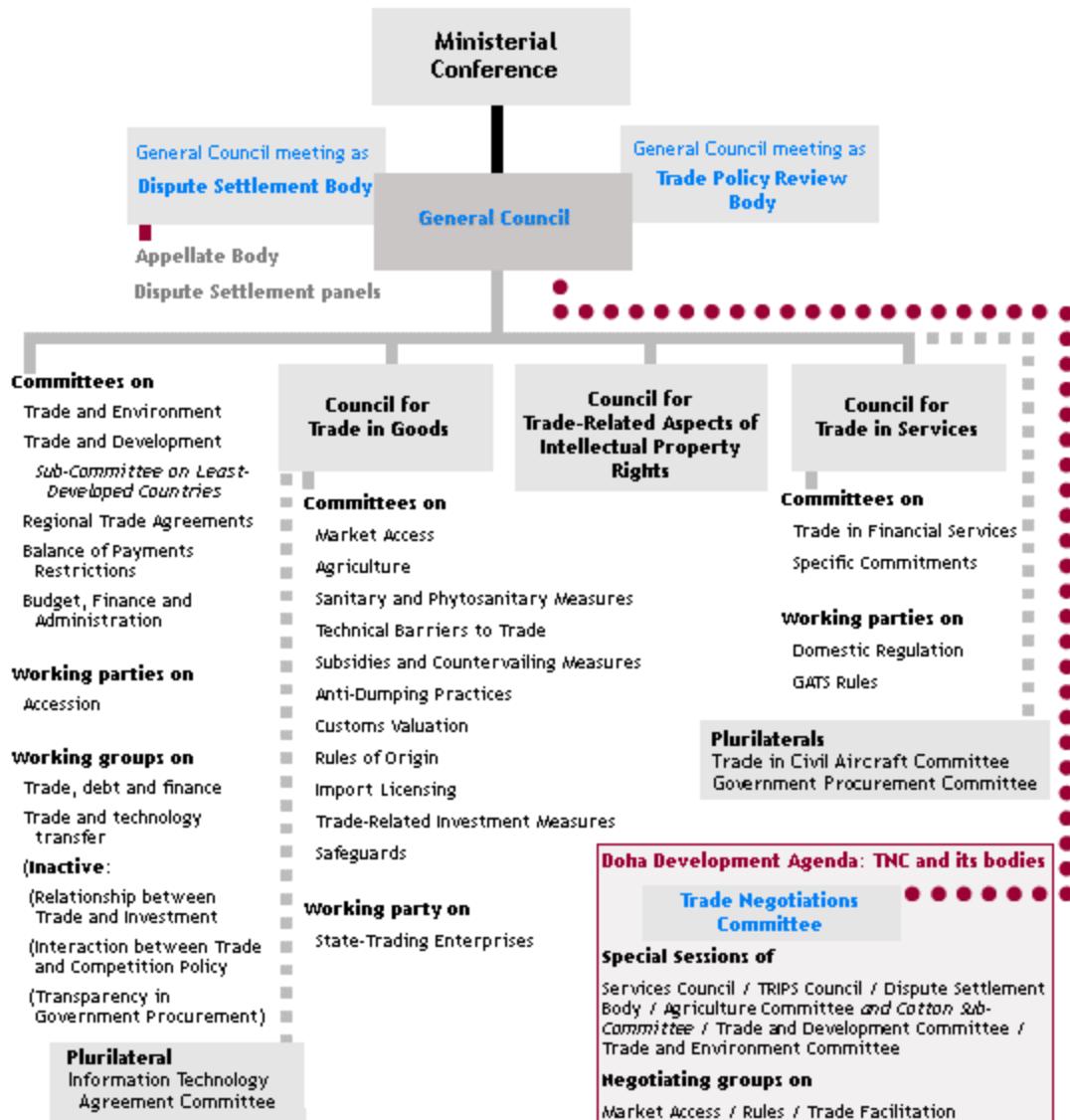
As of 2 March 2013.

Afghanistan
Algeria
Andorra
Azerbaijan
Bahamas
Belarus
Bhutan
Bosnia and Herzegovina
Comoros
Equatorial Guinea
Ethiopia
Holy See (Vatican)
Iran
Iraq
Kazakhstan
Lebanese Republic
Liberia, Republic of
Libya
Sao Tomé and Principe
Serbia
Seychelles
Sudan
Syrian Arab Republic
Uzbekistan
Yemen

Note: With the exception of the Holy See, observers must start accession negotiations within five years of becoming observers.

Source: World Trade Organization. *Understanding the WTO: The Organization: Members and Observers*.
http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (August 27, 2013).

Appendix 13: WTO Organizational Chart



Key

- Reporting to General Council (or a subsidiary)
- Reporting to Dispute Settlement Body
- Plurilateral committees inform the General Council or Goods Council of their activities, although these agreements are not signed by all WTO members
- Trade Negotiations Committee reports to General Council

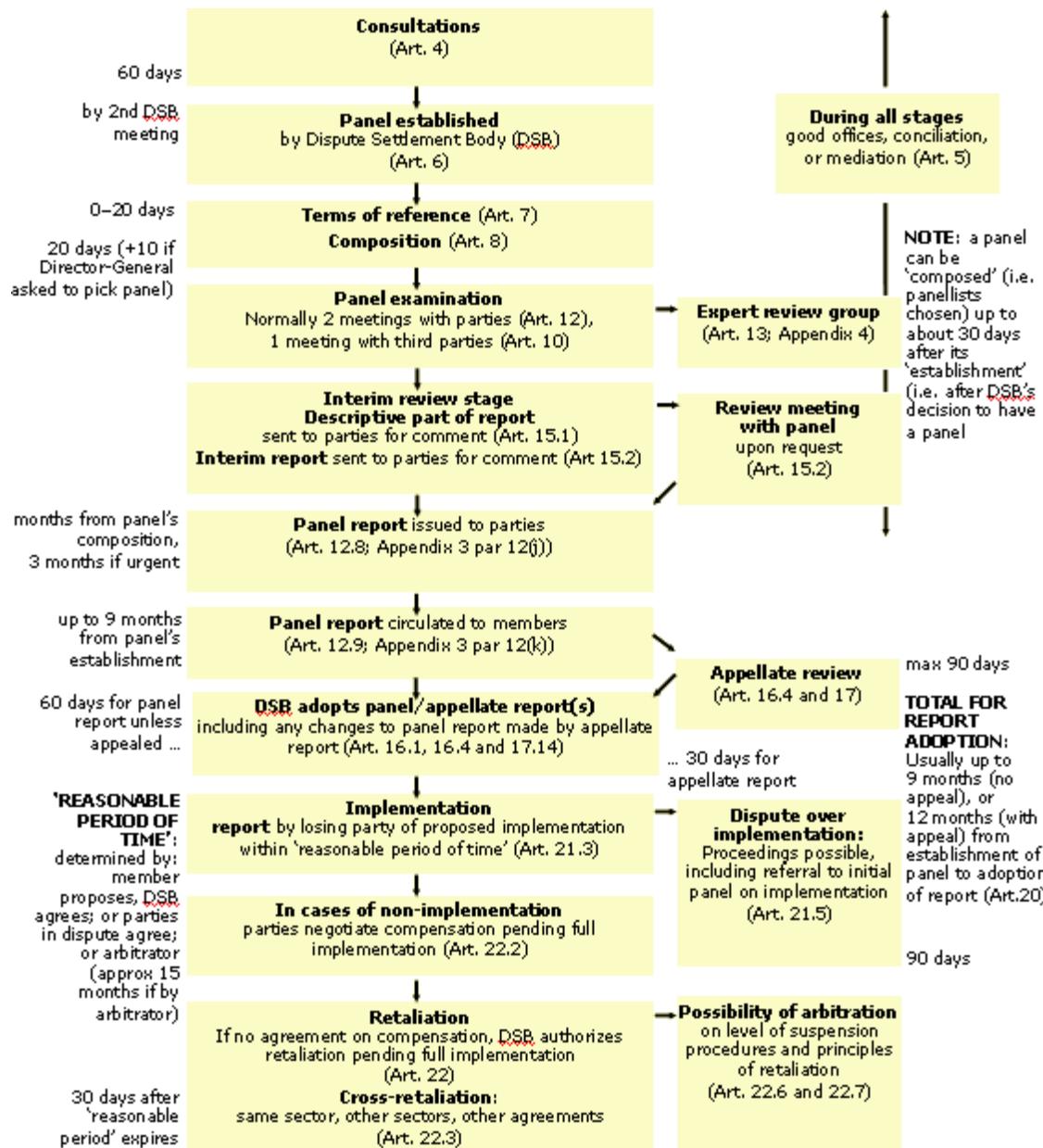
The General Council also meets as the Trade Policy Review Body and Dispute Settlement Body.

The negotiations mandated by the Doha Declaration take place in the Trade Negotiations Committee and its subsidiaries. This now includes the negotiations on agriculture and services begun in early 2000. The TNC operates under the authority of the General Council.

Each year new chairpersons for the major WTO bodies are approved by the General Council.

Source: World Trade Organization. *Understanding the WTO: The Organization: WTO Organization Chart*.
http://www.wto.org/english/thewto_e/whatis_e/tif_e/org2_e.htm (3 February 2013).

Appendix 14: The Panel Process



The various stages a dispute can go through in the WTO. At all stages, countries in dispute are encouraged to consult each other in order to settle "out of court". At all stages, the WTO director-general is available to offer *his* good offices, to mediate or to help achieve a conciliation.

Note: some specified times are maximums, some are minimums, some binding, some not.

Source: World Trade Organization. *Understanding the WTO: Settling Disputes: The Panel Process*. http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp2_e.htm. (27 August 2013).

Appendix 15: APEC Membership

APEC has 21 members.

The word 'economies' is used to describe APEC members because the APEC cooperative process is predominantly concerned with trade and economic issues, with members engaging with one another as economic entities.

| APEC Members | Date of Joining |
|----------------------------|-----------------|
| Australia | 6-7 Nov 1989 |
| Brunei Darussalam | 6-7 Nov 1989 |
| Canada | 6-7 Nov 1989 |
| Chile | 11-12 Nov 1994 |
| People's Republic of China | 12-14 Nov 1991 |
| Hong Kong, China | 12-14 Nov 1991 |
| Indonesia | 6-7 Nov 1989 |
| Japan | 6-7 Nov 1989 |
| Republic of Korea | 6-7 Nov 1989 |
| Malaysia | 6-7 Nov 1989 |
| Mexico | 17-19 Nov 1993 |
| New Zealand | 6-7 Nov 1989 |
| Papua New Guinea | 17-19 Nov 1993 |
| Peru | 14-15 Nov 1998 |
| The Philippines | 6-7 Nov 1989 |
| Russia | 14-15 Nov 1998 |
| Singapore | 6-7 Nov 1989 |
| Chinese Taipei | 12-14 Nov 1991 |
| Thailand | 6-7 Nov 1989 |
| The United States | 6-7 Nov 1989 |
| Viet Nam | 14-15 Nov 1998 |

Source: Asia-Pacific Economic Cooperation. *Member Economies*. <http://www.apec.org/about-us/about-apec/member-economies.aspx>. (February 16, 2013)

Appendix 16: Academic Presentations and Papers with Relation to Doctoral Research

- 2013 “Can Global Economic Governance Take a Democratic Turn? Gender and the WTO.” Presented as part of the *International Political Economy Network Seminar Series* at the Centre for International Policy Studies, University of Ottawa. February 13, Ottawa, Canada.
- 2007 “The Legitimacy of Mulier Economicus: the Cases of APEC and the WTO.” Presented to *Women-Friendly Democracy: Conference in Honour of Jill McCalla Vickers*, Carleton University. November 9-10, Ottawa, Canada.
- 2007 “The Legitimacy of Mulier Economicus: the Cases of APEC, the WTO and the EU.” Presented to *Pathways to Legitimacy?* Centre for the Study of Globalisation and Regionalisation (CSGR) / Global Governance, Regionalisation and the Regulatory Framework (GARNET) Conference, University of Warwick. September 17-19, Coventry, United Kingdom.
- 2006 “Management of Differences: Conceptualizing the Relationship between the Global Trade Regime and Gender Regimes in the Canadian Context.” Presented to *Canada Project Symposium*, International University of Kagoshima. July 6, Kagoshima, Japan.
- 2006 “Mulier Economicus: Gender and the World Trade Organization.” Presented to the *Annual Conference of the Canadian Political Science Association*, York University, June 1-3, Toronto, Canada.
- 2006 “Gender and Trade: Implications for Global Economic Governance.” Presented to the symposium *Cultural Policies, Trade Liberalization, and Identity Politics: Testing the Limits of the State*, University of Windsor. May 12-14, Windsor, Canada.

Appendix 17: Policy Engagement by Invitation with Relation to Doctoral Research

- 2008 “The Legitimacy of Mulier Economicus.” Presentation based on dissertation research. Presented to the symposium on *The Feminist Economics of Trade* organized by the Society for International Development, Ottawa, and hosted by the North-South Institute, Ottawa. February 7, Ottawa, Canada.
- 2006 “Gender and Trade: Implications for Global Economic Governance.” Presentation based on dissertation research. Presented at the conference entitled *Socio-Economic Impacts of International Economic Policy*. The conference was part of the *Russia Trade and Development Project: 2004–2007* by the Centre for Trade Policy and Law, Ottawa, Canada, which facilitated Russia's WTO accession and increased integration into the global economy. <http://www.ctpl.ca/global-connections/russia-trade-and-development-2004%20%932007> November 14-15, Moscow, Russia.

Bibliography of Cited Works

Academic Publications

Abbott, Kenneth W. and Duncan Snidal. "Hard and Soft Law in International Governance." International Organization. Vol. 54. No. 3 (Summer 2000).

Abbott, Kenneth W., Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter, and Duncan Snidal. "The Concept of Legalization." International Organization. Vol. 54. Number 3 (2000).

Aksu, Eşref, ed. Early Notions of Global Governance: Selected Eighteenth-Century Proposals for 'Perpetual Peace.' Cardiff: University of Wales, 2008.

Aksu, Eşref. "Early Notions of Global Governance: Introduction," and "Eighteenth-Century Perpetual Peace Proposals: an Overview." In Aksu, Eşref, ed. Early Notions of Global Governance: Selected Eighteenth-Century Proposals for 'Perpetual Peace.' Cardiff: University of Wales, 2008.

Alvarez, José E. International Organizations as Law-makers. Oxford: Oxford University Press, 2005.

Anderson, Philip W., Kenneth, J. Arrow, and David Pines, eds. The Economy as an Evolving Complex System. Reading, MA, USA: Addison-Wesley, 1988.

Archibugi, Daniel, David Held, and Martin Köhler. Re-Imagining Political Community: Studies in Cosmopolitan Democracy. Stanford: Stanford University Press, 1998.

Archibugi, Daniel. "Principles of Cosmopolitan Democracy." In Daniel Archibugi, David Held, and Martin Köhler. Re-Imagining Political Community: Studies in Cosmopolitan Democracy. Stanford: Stanford University Press, 1998.

Arthur, W. Brian. "Self-Reinforcing Mechanisms in Economics." In Philip W. Anderson, Kenneth, J. Arrow, and David Pines, eds. The Economy as an Evolving Complex System. Reading, MA, USA: Addison-Wesley, 1988.

Bakker, Isabella, ed. Rethinking Restructuring: Gender and Change in Canada. Toronto: University of Toronto Press, 1996.

Bakker, Isabella. "Social Reproduction and the Constitution of a Gendered Political Economy." New Political Economy. Vol. 12. No. 4 (December 2007).

Baldwin, Richard E. "The Causes of Regionalism." The World Economy. Vol. 20. No. 7 (1997).

Bandy, Joe and Jackie Smith, eds. Coalitions Across Borders: Transnational Protest and the Neo-Liberal Order. Lanham: Rowman and Littlefield, 2004.

Bartels, Lorand and Federico Ortino, eds. Regional Trade Agreements and the WTO Legal System. Oxford: Oxford University Press, 2006.

Bartholomew, Amy, ed. Empire's Law: The American Imperial Project and the 'War to Remake the World.' London: Pluto Press, 2006.

Bashevkin, Sylvia B. True Patriot Love: The Politics of Canadian Nationalism. Toronto: Oxford University Press, 1991.

Beeson, Mark and Kanishka Jayasuriya. "The Political Rationalities of Regionalism: APEC and the EU in Comparative Perspective." The Pacific Review. Vol. 1. No. 3 (1998).

Benhabib, Seyla. Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics. Cambridge: Polity Press, 1992.

Berik, Günseli, Xiao-Yuan Dong and Gale Summerfield, eds. Gender, China and the World Trade Organization: Essays from Feminist Economics. London: Routledge, 2010.

Berik, Günseli. "Mature Export-Led Growth and Gender Wage Inequality in Taiwan." In Van Staveren, Irene, Nilüfer Çağatay, Diane Elson and Caren Grown, eds. The Feminist Economics of Trade. New York: Routledge, 2007.

Bhagwati, Jagdish. In Defense of Globalization. New York and Oxford: Oxford University Press, 2004.

Bhagwati, Jagdish. Termites in the Trading System: How Preferential Agreements Undermine Free Trade. Oxford, Oxford University Press, 2008.

Blichner, Lars and Anders Molander. "Mapping Juridification." European Law Journal. Vol. 14. No. 1 (January 2008).

Blichner, Lars and Anders Molander. "What is Juridification?" Working Paper No. 14, Centre for European Studies, University of Oslo (March 2005).

Blyth, Mark, ed. Routledge Handbook of International Political Economy (IPE): IPE as a Global Conversation. London: Routledge, 2009.

Bohman, James. "Constitution Making and Democratic Innovation: The European Union and Transnational Governance." European Journal of Political Theory (July 2004).

Bohman, James. "International Regimes and Democratic Governance: Political Equality and Influence in Global Institutions." International Affairs. Vol. 75. No. 3 (1999).

Bonzon, Yves. "Options for Public Participation in the WTO: Experience from Regional Trade Agreements." In Steger, Debra P., ed. WTO: Redesigning the World Trade Organization for the Twenty-first Century. Waterloo: CIGI & Wilfrid Laurier University Press, 2010.

Borgal, Colin Stewart. The Empire of These Subconscious Loyalties: A Normative Defence of Judicial Review. Kingston, Ontario, Canada: M.A. thesis, Department of Political Studies, Queen's University, 2005.

Boserup, Ester. The Conditions of Agricultural Growth: The Economics of Agrarian Change under Population Pressure. Chicago: Aldine, 1965.

Braunstein, Elissa and Mark Brenner. "Foreign Direct Investment and Gendered Wages in Urban China." In Günseli Berik, Xiao-Yuan Dong and Gale Summerfield, eds. Gender, China and the World Trade Organization: Essays from Feminist Economics. London: Routledge, 2010.

Brownlie, Ian. Principles of Public International Law. 5th Ed. Oxford, 1998.

Brunkhorst, Hauke. "The Co-evolution of Cosmopolitan and National Statehood – Preliminary Theoretical Considerations on the Historical Evolution of Constitutionalism." Cooperation and Conflict. Vol. 47. No. 2 (2012).

Burda, Julien. "Chinese Women after the Accession to the World Trade Organization: A Legal Perspective on Women's Labor Rights." In Günseli Berik, Xiao-Yuan Dong and Gale Summerfield, eds. Gender, China and the World Trade Organization: Essays from Feminist Economics. London: Routledge, 2010.

Burke, Edmund. Reflections on the Revolution in France. 1790; Mineola, New York: Dover, 2006.

Busch, Marc and Eric Reinhardt. "Developing Countries and GATT/WTO Dispute Settlement." Journal of World Trade. Vol. 37 (2003).

Caglar, Gülay, Elisabeth Prügl and Susanne Zwingel. Feminist Strategies in International Governance. London: Routledge, 2013.

Caglar, Gülay. "Feminist Strategies and Social Learning in International Economic Governance." In Caglar, Gülay, Elisabeth Prügl and Susanne Zwingel. Feminist Strategies in International Governance. London: Routledge, 2013.

Cass, Deborah Z. "The 'Constitutionalization' of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade." European Journal of International Law. Vol. 12. No. 1 (2001).

Castiglione, Dario. "A New Agenda for Democratic Representation?" Politics & Gender. Vol. 8. No. 4 (December 2012).

Celis, Karen, and Amy G. Mazur. "Hanna Pitkin's 'Concept of Representation' Revisited: Introduction." Politics & Gender. Vol. 8 (2012).

Celis, Karen. "On Substantive Representation, Diversity and Responsiveness." Politics & Gender. Vol. 8. No. 4 (December 2012).

Chaney, Paul. "Gender, Electoral Competition and Political Behaviour: Preliminary Analysis from the UK's Devolution Programme." Contemporary Politics. Vol. 13. No. 1 (March 2007).

- Chaney, Paul. "Women and Constitutional Change in Wales." Regional and Federal Studies. Vol. 14. No. 2 (Summer 2004).
- Chappell, Louis and Lisa Hill, eds. The Politics of Women's Interests: New Comparative Perspectives. London: Routledge, 2006.
- Chappell, Louise. "Gender Mainstreaming in International Institutions: Developments at the UN *Ad Hoc* Tribunals and the International Criminal Court." In Rai, Shirin M., and Georgina Waylen, eds. Global Governance: Feminist Perspectives. New York: Palgrave, 2008.
- Chase-Dunn, Christopher and Hiroko Inoue. "Accelerating Democratic Global State Formation." Cooperation and Conflict. Vol. 47. No. 2 (2012).
- Clapp, Jennifer. "WTO Agriculture Negotiations and the Global South." In Donna Lee and Rorden Wilkinson, eds. The WTO after Hong Kong: Progress in, and Prospects for, the Doha Development Agenda. London: Routledge, 2007.
- Clark, John D. "The World Bank and Civil Society: An Evolving Experience." In Jan Aart Scholte and Albrecht Schnabel, eds. Civil Society and Global Finance. London: Routledge, 2002.
- Clarkson, Stephen and Stepan Wood. A Perilous Imbalance: The Globalization of Canadian Law and Governance. Vancouver: UBC Press, 2010.
- Clift, Ben and Ben Rosamond. "Lineages of a British International Political Economy." In Mark Blyth, ed. Routledge Handbook of International Political Economy (IPE): IPE as a Global Conversation. London: Routledge, 2009.
- Cohen, Jean L. Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism. Cambridge, UK: Cambridge University Press, 2012.
- Cohen, Marjorie. "The Macdonald Report and Its Implications for Women." Feminist Action (December, 1985).
- Coppedge, Michael, John Gerring *et al.* "Conceptualizing and Measuring Democracy: A New Approach." In Perspectives on Politics: A Political Science Public Sphere. Vol. 9. No. 2 (June 2011).
- Costa, LeeRay, for Asia Pacific Forum for Women Law and Development (APWLD), Chiangmai, "Women Say No to WTO," Conference Reports, Gender, Technology and Development, vol. 4, no. 2 (2000).
- Cox, Robert. "Critical Political Economy." In Björn Hettne, ed. International Political Economy: Understanding Global Disorder. London: Zed Press, 1995.
- Cox, Robert. "The Way Ahead: Toward a New Ontology of World Order." In Robert Wyn Jones, ed. Critical Theory and World Politics. Boulder, CO, USA: Westview, 2001.

- Craig, Campbell. "The Resurgent Idea of World Government." Ethics and International Affairs. Vol. 22. No. 2 (Summer 2008).
- Craig, Paul and Grainne De Búrca, eds. EU Law: Text, Cases and Materials. 5th ed. Oxford: Oxford University Press, 2011.
- Craik, Neil A. "Recalcitrant Reality and Chosen Ideals: The Public Function of Dispute Settlement in International Environmental Law." Georgetown International Environmental Law Review, (1998).
- Crawford, James, ed. Brownlie's Principles of Public International Law. 8th Ed. Oxford: Oxford University Press, 2012.
- Cutler, A. Claire. "Gramsci, Law, and the Culture of Global Capitalism." Critical Review of International Social and Political Philosophy. Vol. 8. No. 4 (December 2005).
- Cutler, A. Claire. Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy. Cambridge: Cambridge University Press, 2003.
- Davidson, Paul J. "The Role of Law in Governing Regionalism in Asia." In Nicholas Thomas, ed. Governance and Regionalism in Asia. 2011; New York: Routledge, 2009.
- Davidson, Paul J. "The Role of Law in Governing Regionalism in Asia." Paper presented at the *Workshop on Governance and Regionalism in Asia*, University of Hong Kong. 8-9 December, 2005.
- Davis, Christina L. Why Adjudicate? Enforcing Trade Rules in the WTO. Princeton: Princeton University Press, 2012.
- Dawson, Thomas C. and Gita Bhatt. "The IMF and Civil Society: Striking a Balance." In Jan Aart Scholte and Albrecht Schnabel, eds. Civil Society and Global Finance. London: Routledge, 2002.
- Deutsch, Klaus Günter and Bernhard Speyer, eds. World Trade Organization Millennium Round: Freer Trade in the Twenty-First Century. New York: Routledge, 2001.
- Deudney, Daniel H. Bounding Power: Republican Security Theory from the Polis to the Global Village. Princeton: Princeton University Press, 2007.
- Diaz, Mateo, M. Representing Women? Female Legislators in West European Parliaments. Oxford, ECPR Press, 2005.
- Diehl, Paul F., ed. The Politics of Global Governance: International Organizations in an Interdependent World. London: Reinner, 2005.
- Dixit, Avinash. "Lawlessness and Economics: Alternative Modes of Economic Governance." Gorman Lectures. University College, London (December 2002). <http://www.econ.ucl.ac.uk/downloads/Lec1.pdf>. Accessed (by Paul J. Davidson) 29 November 2005.

Dorsey, Ellen. "The Global Women's Movement: Articulating a New Vision of Global Governance." In Diehl, Paul F., ed. The Politics of Global Governance: International Organizations in an Interdependent World. London: Reinner, 2005.

Draper, Peter, Memory Dube and Morisho Nene. "The Doha Development Agenda and the WTO can Deliver on Africa's Development Priorities." In Rorden Wilkinson and James Scott, eds. Trade, Poverty, Development: Getting Beyond the WTO's Doha Deadlock. London: Routledge, 2013.

Edwards, R. Contested Terrain: the Transformation of the Workplace in the Twentieth Century. New York: Basic Books, 1979.

Ehlermann, Claus-Dieter. "Tensions between the Dispute-settlement Process and the Diplomatic and Treaty-making Activities of the WTO." World Trade Review. Vol. 1. No. 3 (2002).

Elliot, Kimberly Ann and Richard B. Freeman. Can Labour Standards Improve Under Globalization? Washington: Institute for International Economics, 2003.

Elsig, Manfred. "WTO Decision-Making: Can We Get a Little Help from the Secretariat and the Critical Mass?" In Steger, Debra P., ed. WTO: Redesigning the World Trade Organization for the Twenty-first Century. Waterloo: CIGI & Wilfrid Laurier University Press, 2010.

Elson, Diane, Caren Grown, and Irene van Staveren. "Introduction: Why a Feminist Economics of Trade?" In Van Staveren, Irene, Nilüfer Çağatay, Diane Elson and Caren Grown, eds. The Feminist Economics of Trade. New York: Routledge, 2007.

Elson, Diane, Caren Grown, and Nilüfer Çağatay. "Mainstream, Heterodox, and Feminist Trade Theory." In Van Staveren, Irene, Nilüfer Çağatay, Diane Elson and Caren Grown, eds. The Feminist Economics of Trade. New York: Routledge, 2007.

Eulau, Heinz and Paul D. Karps. "The Puzzle of Representation: Specifying Components of Responsiveness." Legislative Studies Quarterly. Vol. 2, No. 3 (August 1977).

Fabian, Judit. "Mulier Economicus: Gender and the World Trade Organization." Paper presented at the *Annual Conference of the Canadian Political Science Association*, York University, Toronto, Canada. 1-3 June, 2006.

Fabian, Judit. "The Legitimacy of Mulier Economicus: the Cases of APEC, the WTO and the EU." Paper presented at the conference *Pathways to Legitimacy?*, organized by the Centre for the Study of Globalisation and Regionalisation (CSGR) and Global Governance, Regionalisation and the Regulatory Framework (GARNET), University of Warwick, Coventry, United Kingdom. 17-19 September, 2007.

Falk, Richard A., Robert C. Johansen, and Samuel S. Kim, eds. Constitutional Foundations of World Peace. Albany, NY: State University of New York Press, 1993.

Fiorentino, Roberto V., Luis Verdeja, and Christelle Toqueboeuf. *The Changing Landscape of Regional Trade Agreements: 2006 Update*. Discussion Paper No. 12.

World Trade Organization, Regional Trade Agreements Section, Trade Policies Review Division, Geneva, 2007.

Florini, Ann. The Coming Democracy: New Rules for Running a New World. Washington, D.C.: Island Press, 2003.

Fontana, Marzia. "Modeling the Effects of Trade on Women, at Work and at Home: Comparative Perspectives." In Van Staveren, Irene, Nilüfer Çağatay, Diane Elson and Caren Grown, eds. The Feminist Economics of Trade. New York: Routledge, 2007.

Fraser, Nancy. "Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy." Social Text. Nos. 25-26 (1990).

Gabriel, Christina and Laura Macdonald. "Managing Trade Engagements? Mapping the Contours of State Feminism and Women's Political Activism." Canadian Foreign Policy. Vol. 12. No. 1 (2005).

Gabriel, Christina and Laura Macdonald. "NAFTA and Economic Restructuring: Some Gender and Race Implications." In Isabella Bakker, ed. Rethinking Restructuring: Gender and Change in Canada. Toronto: University of Toronto Press, 1996.

Garcia-Rubio, Mariano. "Unilateral Measures as a Means of Forceful Execution of WTO Recommendations and Decisions." In Forlati, Laura Picchio and Linos-Alexandre Sicilianos, eds. Les sanctions économiques en droit international / Economic Sanctions in International Law. Leiden, Netherlands: Martinus Nijhoff Publishers, 2004.

Germain, Randall D. "Financial Governance and Transnational Deliberative Democracy." Review of International Studies. Vol. 36 (2010).

Germain, Randall D. "Global Modalities of Financial Governance: The Public Sphere and Civil Society." In Randall D. Germain and Michael Kenny, eds. The Idea of Global Civil Society: Politics and Ethics in a Globalizing Era. Abingdon, Oxfordshire, UK: Routledge, 2005.

Germain, Randall D. and Michael Kenny, eds. The Idea of Global Civil Society: Politics and Ethics in a Globalizing Era. Abingdon, Oxfordshire, UK: Routledge, 2005.

Germain, Randall D., ed. Globalization and Its Critics: Perspectives from Political Economy. Basingstoke: Macmillan, 2000; New York: Palgrave Macmillan, 2013.

Gill, Stephen and A. Claire Cutler, eds. New Constitutionalism and World Order. Cambridge, UK: Cambridge University Press, 2014.

Gill, Stephen and James Mittelman. Innovation and Transformation in International Studies. Cambridge: Cambridge University Press, 1997.

Gills, Barry. "Re-orienting the New (International Political Economy)." New Political Economy. Vol. 6. No. 2 (2001).

- Grey, Sandra and Marian Sawer. Women's Movements: Flourishing or in Abeyance? London: Routledge, 2008.
- Habermas, Jürgen. The Theory of Communicative Action. Vol. 2. Trans. Thomas McCarthy. Boston: Beacon Press, 1992.
- Harding, Sandra G. The Science Question in Feminism. Ithaca: Cornell University Press, 1986.
- Hardt, Michael and Antonio Negri. Multitude: War and Democracy in the Age of Empire. New York: The Penguin Press, 2004.
- Hardy, David T. "Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment." Harvard Journal of Law and Public Policy. Vol. 9 (1986).
- Hargittai, István. The Martians of Science: Five Physicists Who Changed the Twentieth Century. Oxford: Oxford University Press, 2006.
- Hart, H.L.A. "Positivism and the Separation of Law and Morals." Harvard Law Review, Vol. 71, No. 4 (February 1958).
- Hartmann, Eva. "The Difficult Relation between International Law and Politics: The Legal Turn from a Critical IPE Perspective." New Political Economy. Vol. 16. No. 5 (November 2011).
- Harvey, David. A Brief History of Neoliberalism. Oxford: Oxford University Press, 2005.
- Hawkesworth, Mary. "Policy Discourse as Sanctioned Ignorance: Theorizing the Erasure of Feminist Knowledge." Critical Policy Studies. Vol. 3. Nos. 3-4 (October-December, 2009).
- Hegel, George Wilhelm Friedrich. The Philosophy of Right. Trans. S.W. Dyde. London: George Bell and Sons, 1896.
- Held, David and Anthony McGrew. Globalization / Anti-Globalization. Cambridge: Polity Press, 2002.
- Held, David, and Anthony McGrew, eds. Global Transformations: An Introduction to the Globalization Debate. Cambridge: Polity, 2000.
- Held, David, Anthony McGrew, David Goldblatt and Jonathan Perraton, Global Transformations: Politics, Economics and Culture (Cambridge: Polity Press, 1999).
- Hettne, Björn, ed. International Political Economy: Understanding Global Disorder. London: Zed Press, 1995.
- Heydon, Kenneth and Stephen Woolcock. The Rise of Bilateralism: Comparing American, European and Asian Approaches to Preferential Trade Agreements. New York: United Nations University Press, 2009.

Hinsley, F.H. Power and the Pursuit of Peace: Theory and Practice in the History of Relations between States. Cambridge: Cambridge University Press, 1963.

Hobbes, Thomas. Leviathan. 1651; London: Penguin, 1985.

Hobbes, Thomas. Philosophicall Rudiments Concerning Government and Society [i.e. De Cive]. London: J.C. for Royston, 1651; i.e. Kessinger Legacy Reprints, 2011.

Hoekman, Bernard M. and Michel M. Kostecki. The Political Economy of the World Trading System. New York: Oxford University Press, 2001.

Hoskyns, Catherine. "Linking Gender and International Trade Policy: Is Interaction Possible?" Centre for the Study of Globalisation and Regionalisation (CSGR), University of Warwick, Working Paper 217/07 (February 2007).

Howse, Robert and Kalypso Nicolaidis. "Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity?" Governance: An International Journal of Policy, Administration, and Institutions. Vol. 16. No. 1 (January 2003).

Howse, Robert. "Back to Court after Shrimp/Turtle? Almost but Not Quite yet: India's Short-lived Challenge to Labor and Environmental Exceptions in the European Union's Generalized System of Preferences." American University International Law Review. Vol. 18. No. 6 (2003).

Hudec, Robert E. "GATT Dispute Settlement after the Tokyo Round: An Unfinished Business." Cornell International Law Journal. Vol. 13 (1980).

Hudec, Robert. Enforcing International Trade Law: the Evolution of the Modern GATT Legal System. Salem, NH: Butterworth Legal Publishers, 1993.

Hudec, Robert E., Daniel Kennedy and Mark Sgarbossa. "A Statistical Profile of GATT Dispute Settlement Cases: 1948-1989." Minnesota Journal of Global Trade. Vol 1 (1993).

Hudec, Robert. The GATT Legal System and World Trade Diplomacy. New York: Praeger Publishers, 1975.

Humphries, Jane. "The Gender Gap in Wages: Productivity or Prejudice or Market Power in Pursuit of Profits." Social Science History. Vol. 33. No. 4 (Winter, 2009).

Irwin, Douglas A. Trade Policy Disaster: Lessons from the 1930s. Cambridge, Massachusetts: MIT Press, 2012.

Jackson, John H. "Designing and Implementing Effective Dispute Settlement Procedures: WTO Dispute Settlement, Appraisal and Prospects." In Anne Krueger, ed. The WTO as an International Organization. Chicago: University of Chicago Press, 1998.

Jayasuriya, Kanishka. "Institutional Hybrids and the Rule of Law as a Regulatory Project." In Brian Z. Tamanaha, Caroline Sage, and Michael Woolcock. Legal Pluralism and Development: Scholars and Practitioners in Dialogue. Cambridge: Cambridge University Press, 2012.

Jones, Kent. The Doha Blues: Institutional Crisis and Reform in the WTO. Oxford: Oxford University Press, 2010.

Jones, Robert Wyn, ed. Critical Theory and World Politics. Boulder, CO, USA: Westview, 2001.

Kahler, Miles. "Legalization as Strategy: The Asia-Pacific Case." International Organization. Vol. 54. No. 3 (Summer 2000).

Kant, Immanuel. Perpetual Peace: a Philosophical Essay. Trans. Campbell Smith. 1795; London: Swann Sonnenschein, 1903.

Kellow, Aynsley and Hannah Murphy. "Democratic Accountability in Global Governance: Business and Civil Society in Multiple Arenas." In Tony Porter and Karsten Ronit. The Challenges of Global Business Authority: Democratic Renewal, Stalemate, or Decay? Albany: State University of New York Press, 2010.

Kenney, Sally J. "Breaking the Silence: Gender Mainstreaming and the Composition of the European Court of Justice." Feminist Legal Studies. Vol. 10 (2002).

Killion, M. Ulric. "The Function of Law in Habermas' Modern Society." Global Jurist. Vol. 10. Iss. 2. Article 1 (2010).

Kirton, John J. and Michael J. Trebilcock, eds. Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance. Aldershot, UK: Ashgate Publishing Limited, 2004.

Kirton, John J. and Michael J. Trebilcock. "Introduction: Hard Choices and Soft Law in Sustainable Global Governance" In John J. Kirton and Michael J. Trebilcock, eds. Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance. Aldershot, UK: Ashgate Publishing Limited, 2004.

Kirton, John, Marina Larionova and Paolo Savona, eds. Making Global Governance Effective: Hard and Soft Law Institutions in a Crowded World. Farnham, England: Ashgate, 2010.

Knight, Jack and James Johnson. The Priority of Democracy: Political Consequences of Pragmatism. Princeton, NJ: Princeton University Press, 2011.

Knopff, Rainer and Ted Morton. The Charter Revolution and the Court Party. Peterborough: Broadview Press, 2000.

Kojéve, Alexandre. "Outline of a Doctrine of French Policy." Erik de Vries, trans. Policy Review. No. 126 (1 August 2004).

Kojéve, Alexandre. Outline of a Phenomenology of Right. Bryan-Paul Frost, ed., Bryan-Paul Frost and Robert Howse, trans. Lanham, Maryland: Rowman and Littlefield, 2000.

Kreuger, Anne, ed. The WTO as an International Organization. Chicago: University of Chicago Press, 1998.

- Krook, Mona Lena and Fiona Mackay, eds. Gender, Politics and Institutions: Towards a Feminist Institutionalism. New York: Palgrave Macmillan, 2011.
- Krook, Mona Lena. "Reforming Representation: The Diffusion of Candidate Gender Quotas Worldwide." Politics & Gender. Vol. 2 (2006).
- Krook, Mona Lena. Quotas for Women in Politics: Gender and Candidate Selection Reform Worldwide. Oxford: Oxford University Press, 2009.
- Krugman, Paul, Rethinking International Trade. Cambridge, MA: MIT Press, 1990.
- Krugman, Paul. "Myths and Realities of US Competitiveness." Science. Vol. V (1991).
- Krugman, Paul. "What Do Undergrads Need to Know about Trade?" American Economic Review, Papers and Proceedings of the Hundred and Fifth Annual Meeting. Vol. 83. No. 2 (1993).
- Kuijper, Pieter Jan. "The Law of GATT as a Special Field of International Law – Ignorance, Further Refinement or Self-Contained System of International Law." Netherlands Yearbook of International Law. Vol. 25 (1994).
- Kuiper, Edith. Women's Economic Thought in the Eighteenth Century. Forthcoming, London: Routledge, 2014.
- Lamy, Pascal. "The WTO's Contribution to Global Governance." In Gary Sampson, ed. The WTO and Global Governance: Future Directions. Hong Kong: United Nations University Press, 2008.
- Lang, Andrew. World Trade Law after Neoliberalism: Re-imagining the Global Economic Order. 2011; Oxford: Oxford University Press, 2013.
- Lee, Donna and Rorden Wilkinson, eds. The WTO after Hong Kong: Progress in, and Prospects for, the Doha Development Agenda. London: Routledge, 2007.
- Lee, Donna and Rorden Wilkinson. "The WTO after Hong Kong: Setting the Scene for Understanding the Round." In Donna Lee and Rorden Wilkinson, eds. The WTO after Hong Kong: Progress in, and Prospects for, the Doha Development Agenda. London: Routledge, 2007.
- Levi, Lucio, Giovanni Finizio and Nicola Vallinoto, eds. The Democratization of International Institutions. Centre for Studies on Federalism. London: Routledge, 2014.
- Liebowitz, Debra Jacqueline. Gender and Identity in an Era of Globalization: Transnational Political Organizing in North America. PhD dissertation. New Brunswick, NJ, USA: Rutgers, 2000.
- Lombardo, Emanuela and Petra Meier. "Gender Quotas and Mainstreaming: Sparring Partners in Gender Equality Policies?" Paper presented at the *21st International Political Science Association World Congress*, Santiago, Chile. 12-16 July 2009.

Macdonald, Laura. "Gender and Canadian Trade Policy: Women's Strategies for Access and Transformation." In Claire Turenne Sjolander, Heather A. Smith and Deborah Stienstra, eds. Feminist Perspectives on Canadian Foreign Policy. Toronto: Oxford University Press, 2003.

Macdonald, Laura. "Gendering Transnational Social Movement Analysis: Women's Groups Contest Free Trade in the Americas." In Joe Bandy and Jackie Smith, eds. Coalitions Across Borders: Transnational Protest and the Neo-Liberal Order. Lanham: Rowman and Littlefield, 2004.

Macdonald, Laura. "Trade with a Female Face: Women and the New International Trade Agenda." In Annie Taylor and Caroline Thomas, eds. Trade and the New Social Agenda. London: Routledge, 1999.

Marceau, Gabriel. "WTO Dispute Settlement and Human Rights." European Journal of International Law. Vol. 13. No. 4 (2002).

Massey, Doreen. Spatial Divisions of Labour: Social Structures and the Geography of Production. London: Macmillan, 1984.

Mavroidis, Petros C. "Remedies in the WTO Legal System: Between a Rock and a Hard Place." European Journal of International Law. Vol. 11 (2000).

McCradden, Christopher. "International Economic Law and the Pursuit of Human Rights: A Framework for Discussion of the Legality of 'Selective Purchasing' Laws under the WTO Government Procurement Agreement." Journal of International Economic Law. Vol. 2. No. 1 (1999).

Meyer, Mary K. and Elisabeth Prügl, eds. Gender Politics in Global Governance. Lanham, Maryland: Rowman and Littlefield Publishers, Inc., 1999.

Meyer, Mary K. and Elisabeth Prügl. "Gender Politics in Global Governance." In Mary K. Meyer and Elisabeth Prügl, eds. Gender Politics in Global Governance. Lanham, Maryland: Rowman and Littlefield Publishers, Inc., 1999.

Mshomba, Richard E. "Africa and the Doha Round." In Rorden Wilkinson and James Scott, eds. Trade, Poverty, Development: Getting Beyond the WTO's Doha Deadlock. London: Routledge, 2013.

Murphy, Craig N. International Organization and Industrial Change: Global Governance Since 1850. Cambridge: Polity Press, 1994.

Nagar, Richa, Victoria Lawson, Linda McDowell and Susan Hanson. "Locating Globalization: Feminist (Re)readings of the Subjects and Spaces of Globalization." Economic Geography. Vol. 78, No. 3 (Jul., 2002).

Narine, Shaun. "State Sovereignty, Political Legitimacy and Regional Institutionalism in the Asia-Pacific." The Pacific Review. Vol. 17. No. 3 (2004).

Narlikar, Amrita. "All's Fair in Love and Trade? Emerging Powers in the Doha Development Agenda Negotiations." In Donna Lee and Rorden Wilkinson, eds. The WTO after Hong Kong: Progress in, and Prospects for, the Doha Development Agenda. London: Routledge, 2007.

Ngai, Pun. "Gendering the Dormitory Labor System: Production, Reproduction, and Migrant Labor in South China." In Günseli Berik, Xiao-Yuan Dong and Gale Summerfield, eds. Gender, China and the World Trade Organization: Essays from Feminist Economics. London: Routledge, 2010.

Nicholas Bayne. "Hard and Soft Law in International Institutions: Complements, Not Alternatives." In John J. Kirton and Michael Trebilcock, eds. Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance. Aldershot: Ashgate Publishing Ltd., 2004.

Nieto-Navia, Rafael. "International Peremptory Norms (*Jus Cogens*) and International Humanitarian Law." The Hague, 2001.
<http://www.iccnow.org/documents/WritingColombiaEng.pdf>. Accessed 17 August 2014.

North, Douglass C. Institutions, Institutional Change and Economic Performance. 1990; Cambridge, UK: Cambridge University Press, 2011.

O'Brien, Robert, Anne Marie Goetz, Jan Aart Scholte and Marc Williams. Contesting Global Governance: Multilateral Economic Institutions and Global Social Movements. Cambridge: Cambridge University Press, 2000.

O'Brien, Robert. "The Agency of Labour in a Changing Global Order." In Richard Stubbs and Geoffrey Underhill, eds. Political Economy and the Changing Global Order. 2nd ed. Oxford: Oxford University Press, 2000.

Odell, John and Barry Eichengreen. "The United States, the ITO and the WTO: Exit Option, Agent Slack, and Presidential Leadership." In Anne Krueger, ed. The WTO as and International Organization. Chicago: University of Chicago Press, 1998.

Odell, John. Negotiating the World Economy. Ithaca, New York: Cornell University Press, 2000.

Oostendorp, Remco H. "Globalization and the Gender Wage Gap." World Bank Economic Review. Vol. 23. No. 1 (2009).

Ostrom, Elinor. "Coping With Tragedies of the Commons." Annual Review of Political Science. Vol. 2 (1999).

Ostry, Sylvia. "Energy Security and Sustainable Development: The WTO and the Energy Charter Treaty." in John Kirton, Marina Larionova, and Paolo Savona, eds. Making Global Governance Effective: Hard and Soft Law Institutions in a Crowded World. Farnham, England: Ashgate, 2010.

Palmetter, David and Petros C. Mavroidis. "The WTO Legal System: Sources of Law." American Journal of International Law. Vol. 92 (1998).

- Pangestu, Mari. "Special and Differential Treatment in the Millennium: Special for Whom and How Different?" The World Economy. Vol. 2. No. 9 (September 2000).
- Park, Sanghee. "Does Gender Matter? The Effect of Gender Representation of Public Bureaucracy on Governmental Performance." American Review of Public Administration. Vol. 43. No. 2 (2012).
- Patomäki, Heikki and Teivo Teivainen. A Possible World: Democratic Transformation of Global Institutions. London: Zed Books, 2004.
- Pauwelyn, Joost. "The Role of Public International Law in the WTO: How Far Can We Go?" American Journal of International Law. Vol. 95. No. 3 (July, 2001).
- Peng, Shin-yi. "The WTO Legalistic Approach and East Asia: From the Legal Culture Perspective." Asian-Pacific Law and Policy Journal. Vol. 1 (2000).
- Peterson, V. Spike. "Rereading Public and Private: The Dichotomy that is Not One." SAIS Review. Vol. 20. No. 2 (2000).
- Peterson, V. Spike. "Whose Crisis? Early and Post-modern Masculinism." In Stephen Gill and James Mittelman, eds. Innovation and Transformation in International Studies. Cambridge: Cambridge University Press, 1997.
- Peterson, V. Spike. A Critical Rewriting of Global Political Economy: Integrating Reproductive, Productive and Virtual Economies. London: Routledge, 2003.
- Pitkin, Hanna Fenichel. The Concept of Representation. Berkeley: University of California Press, 1967.
- Popper, Karl. Conjectures and Refutations: The Growth of Scientific Knowledge. 1963; New York: Routledge, 2002.
- Porter, Tony and Karsten Ronit. "The Complexities of Global Business Authority." In Tony Porter and Karsten Ronit, eds. The Challenges of Global Business Authority: Democratic Renewal, Stalemate, or Decay? Albany: State University of New York Press, 2010.
- Porter, Tony and Karsten Ronit, eds. The Challenges of Global Business Authority: Democratic Renewal, Stalemate, or Decay? Albany: State University of New York Press, 2010.
- Porter, Tony. Globalization and Finance. Cambridge: Polity Press, 2005.
- Purvis, Trevor. "Looking for Life Signs in an International Rule of Law." In Amy Bartholomew, ed. Empire's Law: The American Imperial Project and the 'War to Remake the World.' London: Pluto Press, 2006.
- Rai, Shirin M. "Gendering Global Governance," International Feminist Journal of Politics. Vol. 6. No. 4 (2004).

Rai, Shirin M. and Georgina Waylen, eds. Global Governance: Feminist Perspectives. New York: Palgrave, 2008.

Reilly, Barry and Puja Vasudena Dutta. "The Gender Pay Gap and Trade Liberalization: Evidence for India." PRUS Working Paper, no. 32. University of Sussex, UK (2005).

Reinhardt, Eric R. Posturing Parliaments: Ratification, Uncertainty, and International Bargaining. PhD dissertation: Columbia University, 1996.

Rittenhofer, Iris and Caroline Gatrell. "Gender Mainstreaming and Employment in the European Union: A Review and Analysis of Theoretical and Policy Literatures." International Journal of Management Reviews. Vol. 14 (2012).

Rommetvedt, Hilmar. "The Institutionalization of a Parliamentary Dimension of an Intergovernmental Organization: the WTO." World Trade Review. Vol. 10. No. 4 (2011).

Ruggie, John Gerard. "Multilateralism: The Anatomy of an Institution." In John Gerard Ruggie, ed. Multilateralism Matters: The Theory and Praxis of an Institutional Form. New York: Columbia University Press, 1993.

Sampson, Gary, ed. The WTO and Global Governance: Future Directions. Hong Kong: United Nations University Press, 2008.

Scholte, Jan Aart and Albrecht Schnabel, eds. Civil Society and Global Finance. London: Routledge, 2002.

Scholte, Jan Aart, ed. Building Global Democracy? Civil Society and Accountable Global Governance. Cambridge: Cambridge University Press, 2011.

Scholte, Jan Aart. "Conclusion." In Jan Aart Scholte, ed. Building Global Democracy: Civil Society and Accountable Global Governance. Cambridge: Cambridge University Press, 2011.

Schott, Jeffrey J. Free Trade Agreements: US Strategies and Priorities. Washington, DC: Institute for International Economics, 2004.

Sell, Susan K. "Business and Democracy? Pharmaceutical Firms, Intellectual Property, and Developing Countries." In Tony Porter and Karsten Ronit, eds. The Challenges of Global Business Authority: Democratic Renewal, Stalemate, or Decay? Albany: State University of New York Press, 2010.

Sen, Amartya. Development As Freedom (1999; New York: Anchor Books, 2000).

Sevilla, Christina R. "Explaining Patterns of GATT/WTO Trade Complaints." Weatherhead Center for International Affairs. Working Paper Series 98-01 (January 1998).

Shaikh, Anwar, ed. Globalization and the Myths of Free Trade. London: Routledge, 2007

Shaikh, Anwar. "Globalization and the Myth of Free Trade." in Anwar Shaikh, ed. Globalization and the Myths of Free Trade. London: Routledge, 2007.

- Shaw, Martin. Theory of the Global State: Globality as an Unfinished Revolution. Cambridge: Cambridge University Press, 2000.
- Silverstein, Gordon. Law's Allure: How Law Shapes, Constrains, Saves, and Kills Politics. Cambridge: Cambridge University Press, 2009.
- Sjolander, Claire Turenne, Heather A. Smith and Deborah Stienstra, eds. Feminist Perspectives on Canadian Foreign Policy. Toronto: Oxford University Press, 2003.
- Slaughter, Anne-Marie. A New World Order. Princeton: Princeton University Press, 2004.
- Smith, Adam. Theory of Moral Sentiments. 1759; 6th ed., London: A. Millar, 1790; New York: Dover Publications, 2006.
- Squires, Judith. "Is Mainstreaming Transformative? Theorizing Mainstreaming in the Context of Diversity and Deliberation." Social Politics: International Studies in Gender, State and Society. Vol. 12 (2005).
- Squires, Judith. The New Politics of Gender Equality. Hounds Mills: Palgrave, 2007.
- Steger, Debra P., ed. WTO: Redesigning the World Trade Organization for the Twenty-first Century. Waterloo: CIGI & Wilfrid Laurier University Press, 2010.
- Steil, Ben. The Battle of Bretton Woods: John Maynard Keynes, Harry Dexter White, and the Making of a New World Order. Princeton, N.J., USA: Princeton University Press, 2013.
- Steinkopf Rice, Julie. "Viewing Trade Liberalization through a Feminist Lens: A Content Analysis of the Counterhegemonic Discourse of Gender and Trade Advocacy Groups." Sociological Spectrum. Vol. 30 (2010).
- Strange, Susan. States and Markets: An Introduction to International Political Economy. London: Pinter Publishers, 1988.
- Strange, Susan. The Retreat of the State: The Diffusion of Power in the World Economy. Cambridge, UK: Cambridge University Press, 1996.
- Stubbs, Richard and Geoffrey Underhill, eds. Political Economy and the Changing Global Order. 2nd ed. Oxford: Oxford University Press, 2000.
- Swan, Peter. "American Empire or Empires? Alternative Juridifications of the New World Order." In Amy Bartholomew, ed. Empire's Law: The American Imperial Project and the 'War to Remake the World.' London: Pluto Press, 2006.
- Tamanaha, Brian Z., Caroline Sage and Michael Woolcock. Legal Pluralism and Development: Scholars and Practitioners in Dialogue. Cambridge: Cambridge University Press, 2012.
- Tännsjö, Torbjörn. Global Democracy: The Case for a World Government. Edinburgh: Edinburgh University Press, 2008.

Teller, Edward. Better a Shield than a Sword: Perspectives on Defense Technology. New York: Free Press, 1987.

The Warwick Commission. *The Multilateral Trade Regime: Which Way Forward?* The Report of the First Warwick Commission, University of Warwick (December 2007).

Thomas, Nicholas, ed., Governance and Regionalism in Asia (2011; New York: Routledge, 2009.)

Tickner, J. Ann and Laura Sjoberg, eds. Feminism and International Relations: Conversations about the Past, Present and Future. London: Routledge, 2011.

Tickner, J. Ann and Laura Sjoberg. "Introduction: International Relations through Feminist Lenses." In J. Ann Tickner and Laura Sjoberg, eds. Feminism and International Relations: Conversations about the Past, Present and Future. London: Routledge, 2011.

Tickner, J. Ann. Gendering World Politics: Issues and Approaches in the Post-Cold War Era. New York: Columbia University Press, 2001.

Tinnevelt, Ronald and Helder De Schutter, eds. Global Democracy and Exclusion. Oxford: Wiley-Blackwell, 2010.

Tinnevelt, Ronald. "Federal World Government: The Road to Peace and Justice?" Cooperation and Conflict. Vol. 47. No. 2 (2012).

Trachtman, Joel. "The Domain of WTO Dispute Resolution." Harvard International Law Journal. Vol. 40 (1999).

Trebilcock, Michael, Robert Howse and Antonia Eliason. The Regulation of International Trade. 4th Ed. London, Routledge, 2013.

Tremblay, Manon, ed. Women and Legislative Representation: Electoral Systems, Political Parties, and Sex Quotas. New York: Palgrave MacMillan, 2012.

Tremblay, Manon. Quebec Women and Legislative Representation. Vancouver: UBC Press, 2010.

True, Jacqui and Michael Mintrom. "Transnational Networks and Policy Diffusion: The Case of Gender Mainstreaming." International Studies Quarterly. Vol. 45 (2001).

True, Jacqui. "Feminist Problems with International Norms: Gender Mainstreaming in Global Governance." In J. Ann Tickner and Laura Sjoberg, eds. Feminism and International Relations: Conversations about the Past, Present and Future. London: Routledge, 2011.

True, Jacqui. "Gender Specialists and Global Governance: New Forms of Women's Movement Mobilisation." In Sandra Grey and Marian Sawer. Women's Movements: Flourishing or in Abeyance? London: Routledge, 2008.

True, Jacqui. "Mainstreaming Gender in Global Public Policy." International Feminist Journal of Politics. Vol. 5. Iss. 1 (November 2003).

Tushnet, Mark. Taking the Constitution Away From the Courts. Princeton: Princeton University Press, 1999.

Uhlauer, Carole J. "Potentiality and Representation: The Link between Descriptive Representation and Participation in the United States." Politics & Gender. Vol. 8. No. 4 (December 2012).

Underhill, Geoffrey. "Markets, Institutions, and Transaction Costs: the Endogeneity of Governance." Amsterdam School for Social Science Research, WEF Working Paper No. 0025, University of Amsterdam. June 2007.

Urbinati, Nadia and Mark E. Warren. "The Concept of Representation in Contemporary Democratic Theory." The Annual Review of Political Science. Vol. 11 (2008).

Urbinati, Nadia. Representative Democracy: Principles & Genealogy. Chicago: University of Chicago Press, 2006.

Van Den Bossche, Peter. "Non-Governmental Organizations and the WTO: Limits to Involvement?" In Debra P. Steger, ed. WTO: Redesigning the World Trade Organization for the Twenty-first Century. Waterloo: CIGI & Wilfrid Laurier University Press, 2010.

Van Staveren, Irene, Nilüfer Çağatay, Diane Elson and Caren Grown, eds. The Feminist Economics of Trade. New York: Routledge, 2007.

Vickers, Jill. "Gendering Federalism: Institutions of Decentralization and Power-Sharing." In Mona Lena Krook and Fiona Mackay, eds. Gender, Politics and Institutions: Towards a Feminist Institutionalism. New York: Palgrave Macmillan, 2011.

Vickers, Jill. "Is Nationalism Always 'Bad for Women'? In Search of 'Women-friendly' Democracy: Gender/Nation Relations in Modern Nation-States." 2005/2006 Davidson Dunton Research Lecture, Carleton University, 27 March 2006.

Vickers, Jill. "The Problem with Interests: Making Political Claims for 'Women.'" In Louis Chappell and Lisa Hill, eds. The Politics of Women's Interests: New Comparative Perspectives. London: Routledge, 2006.

Vickers, Jill. "Women's Representation, Fragmented Citizenship and Territorial Pluralism: Family Law Reform in Federations, North and South." Paper presented at the *Annual Meeting of the American Political Science Association*, 2012.

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2107509. Accessed 7 July 2013.

Vickers, Jill, Pauline Rankin and Christine Appelle. Politics as if Women Mattered: A Political Analysis of the National Action Committee on the Status of Women. Toronto: University of Toronto Press, 1993.

Viet D. Do and William Watson. "Economic Analysis of Regional Trade Agreements." In Lorand Bartels and Federico Ortino, eds. Regional Trade Agreements and the WTO Legal System. Oxford: Oxford University Press, 2006.

- Viner, Jacob. The Customs Union Issue. New York, Carnegie Endowment for International Peace, 1950.
- Von Schoppenthau, Philip. "Trade and Labour Standards: Harnessing Globalization?" In Klaus Günter Deutsch and Bernhard Speyer, eds. World Trade Organization Millennium Round: Free Trade in the Twenty First Century. New York: Routledge, 2001.
- Walby, Sylvia. Gender Transformations. London: Routledge, 1997.
- Ward, Rachel. "Gender Issues and the Representation of Women in Northern Ireland." Irish Political Studies. Vol. 19. No. 2 (Winter 2004).
- Waring, Marilyn. Counting for Nothing: What Men Value and What Women are Worth, 2nd ed., Toronto: University of Toronto Press, 1999.
- Waring, Marilyn. If Women Counted: A New Feminist Economics. San Francisco: Harper & Row, 1988.
- Waylen, Georgina. "You Still don't Understand: Why Troubled Engagements Continue between Feminists and (critical) IPE." Review of International Studies. Vol. 32 (2006).
- Wendt, Alexander. "Why a World State is Inevitable." European Journal of International Relations. Vol. 9. No. 4 (2003).
- Wilkinson, Rorden and James Scott, eds. Trade Poverty, Development: Getting Beyond the WTO's Doha Deadlock. London: Routledge, 2013.
- Wilkinson, Rorden. The WTO: Crisis and the Governance of Global Trade. London: Routledge, 2006.
- Williams, Marc C. "Civil Society and the WTO: Contesting Accountability." In Jan Aart Scholte, ed. Building Global Democracy? Civil Society and Accountable Global Governance. Cambridge: Cambridge University Press, 2011.
- Williams, Mariama and Marilyn Carr, eds. Trading Stories: Experiences with Gender and Trade. London: Commonwealth Secretariat, 2010.
- Williams, Mariama, Thakur Attil and Marilyn Carr, eds. Gender and Trade Action Guide: A Training Resource. London: Commonwealth Secretariat, 2007.
- Williams, Mariama. "A Perspective on Feminist International Organizing from the Bottom Up: The Case of IGTN and the WTO." In Gülay Caglar, Elisabeth Prügl and Susanne Zwingel, eds. Feminist Strategies in International Governance. London: Routledge, 2013.
- Williams, Mariama. Gender Mainstreaming in the Multilateral Trading System: A Handbook for Policy-makers and Other Stakeholders. London: Commonwealth Secretariat, 2003.
- Winham, Gilbert R. International Trade and the Tokyo Round Negotiation. Princeton: Princeton University Press, 1986.

Winham, Gilbert. The Evolution of International Trade Agreements. Toronto: University of Toronto Press, 1992.

Winters, A.L. *Trade and Poverty, is There a Connection?* World Trade Organization Special Studies No. 5: Trade, Income Disparity and Poverty. Geneva: World Trade Organization, 2000.

Woods, Ngaire, ed. The Political Economy of Globalization. Basingstoke: Macmillan, 2000.

Young, Brigitte. The Political Economy of Trade in Services (GATS): Gender in EU and China. 2008. Published in German only as Die Politische Ökonomie des Dienstleistungsabkommens (GATS). 2008.

Young, Brigitte. "Structural Power and the Gender Biases of Technocratic Network Governance in Finance." In Caglar, Gülay, Elisabeth Prügl and Susanne Zwingel, eds. Feminist Strategies in International Governance. London: Routledge, 2013.

Zalewski, Marysia. "'I Don't Even Know What Gender Is': A Discussion of the Connections between Gender, Gender-mainstreaming and Feminist theory." Review of International Studies. Vol. 36 (2010).

Zampetti, Americo Beviglia. "Democratic Legitimacy in the World Trade Organization: The Justice Dimension." Journal of World Trade. Vol. 37. No. 1 (2003).

Zolo, Danilo. Cosmopolis: Prospects for World Government. Cambridge: Polity Press, 1997.

Official Documents and Judicial Reports

Asia-Pacific Economic Cooperation

Asia-Pacific Economic Cooperation. *Joint Ministerial Statement, APEC Ministerial Meeting on Women*. 15-16 October, 1998.

Gibb, Heather, *Gender Mainstreaming: Good Practices from the Asia Pacific Region*, North-South Institute, Asia-Pacific Economic Cooperation Secretariat (Ottawa: Renouf Publishing, 2001).

European Union

Anasagasti, Miriam and Nathalie Wuiame. European Commission, Directorate-General for Employment, Industrial Relations and Social Affairs, Unit V/D.5. *Women and Decision-making in the Judiciary in the European Union*. Luxembourg: Office for Official Publications of the European Communities, 1999.

Case 30/77. *R v Bouchereau*, 1977. ECR 1999. CMLR 800. (Cited in Office of the United Nations High Commissioner for Human Rights. “Human Rights and Word Trade Agreements: Using General Exception Clauses to Protect Human Rights.” New York and Geneva: United Nations, 2005.)

Council of Europe. *Gender Mainstreaming: Conceptual Framework, Methodology and Presentation of Good Practices*. Final Report of Activities of the Group of Specialists on Mainstreaming. EG-S-MS (98) 2 rev. Strasbourg, May 1998.

EU Directive 64/221. (See Craig, Paul and Grainne De Búrca, eds. EU Law: Text, Cases and Materials. 2nd ed. Oxford: Oxford University Press, 1998. Cited in Office of the United Nations High Commissioner for Human Rights. *Human Rights and Word Trade Agreements: Using general exception clauses to protect human rights*. New York and Geneva: United Nations, 2005.)

Treaty Establishing the European Economic Community (Treaty of Rome).

General Agreement on Tariffs and Trade / World Trade Organization

GATT. *1994 Consultation with India under Article XVIII: 12(b)*. BOP/321. 24 October 1994. Cited in World Trade Organization. GATT Analytical Index – Guide to GATT Law and Practice. 2012; Geneva: WTO Secretariat, 1995.

GATT. *Agreement on Government Procurement* (Tokyo Codes)

GATT. *Agreement on Interpretation and Application of Articles 6, 16, and 23* (Subsidies and Countervailing Duties). (Tokyo Codes)

GATT. *Agreement on Licensing Procedures* (Tokyo Codes)

GATT. *Agreement on Technical Barriers to Trade* (Tokyo Codes)

GATT. *Agreement on the Implementation of Article VII* (Customs Valuation) (Tokyo Codes)

GATT. *Decision of 5 April 1966 on procedures under Article XXIII*.
http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/a2s1p1_e.htm. Accessed 23 August 2013.

GATT. *Dispute Settlement Procedures: Fortieth Session of the Contracting Parties, Action taken on 30 November 1984*. (BISD 31S/9) I.

GATT. *Dispute Settlement Procedures: Fortieth Session of the Contracting Parties, Action taken on 30 November 1984*. (BISD 31S/9) I.

GATT. *General Agreement on Tariffs and Trade* (1947).
http://www.wto.org/English/docs_e/legal_e/gatt47_02_e.htm

GATT. *General Agreement on Tariffs and Trade, Part IV* (1966).

GATT. *Improvements to the GATT Dispute Settlement Rules and Procedures: Decision of 12 April 1989*, (L/6489).

GATT. *Ministerial Declaration adopted on 29 November 1982 (BISD 29S/9)*. ‘Dispute Settlement Procedures’ (BISD 29S/13).

GATT. Panel Report. *EC-Citrus*. L/5776. 7 February 1985, unadopted.

GATT. Panel Report. *EEC-Canned Fruit*. L/5778. 20 February 1985, unadopted.

GATT. Panel Report. *EEC-Oilseeds I*. L/6627. Adopted 25 January 1990. BISD 37S/86.

GATT. Panel Report. *Germany-Sardines*. G/26. Adopted 31 October 1952. BISD 1S/53.

GATT. Panel Report. *Japan – Semi-Conductors*. L/6309. Adopted 4 May 1988. BISD 35S/116.

GATT. Panel Report. *United States – Tuna (Mexico)*. DS21/R. 3 September 1991, unadopted. BISD 39S/15S.

GATT. Panel Report. *Uruguay-Recourse to Article XXIII*. L/1923. Adopted 16 November 1962. BISD 11S/95.

GATT. Panel Report. *US-Sugar Waiver*. L/6631. Adopted 7 November 1990. BISD 37S/228.

GATT. Reply of Brazil to Contracting Parties’ *Questionnaire on Import Licensing Procedures*. L/5640/ Add. 54; L/5640. 24 January 1994 (Questionnaire first circulated 1972). Cited in World Trade Organization. GATT Analytical Index – Guide to GATT Law and Practice. 2012; Geneva: WTO Secretariat, 1995.

GATT. Reply of Norway to Contracting Parties’ *Questionnaire on Import Licensing Procedures*. L/5640/Add.2/Rev.4. 13 October 1993 (Questionnaire first circulated 1972). Cited in World Trade Organization. GATT Analytical Index – Guide to GATT Law and Practice. 2012; Geneva: WTO Secretariat, 1995.

GATT. Reply of Norway to Contracting Parties’ *Questionnaire on Import Licensing Procedures*. L/5640/Add. 7/ Rev. 6. 18 August 1994 (Questionnaire first circulated 1972). Cited in World Trade Organization. GATT Analytical Index – Guide to GATT Law and Practice. 2012; Geneva: WTO Secretariat, 1995.

GATT. Working Party. *Australia – Ammonium Sulphate*, GATT/CP.4/39. Adopted 3 April 1950. BISD II/188.

World Trade Organization and the International Labour Office. Trade and Employment: Challenges for Policy Research. Geneva: WTO & ILO, 2007.

World Trade Organization. *Agreement on Agriculture*.
http://www.wto.org/English/docs_e/legal_e/14-ag_01_e.htm. Accessed 23 August 2014.

- World Trade Organization. *Agreement on Subsidies and Countervailing Measures*. http://www.wto.org/english/docs_e/legal_e/24-scm.pdf. Accessed 12 April 2013.
- World Trade Organization. *Agreement on Trade Related Aspects of Investment Measures* (TRIMS). 1994.
- World Trade Organization. *Agreement on Trade-Related Aspects of Intellectual Property*. 1994.
- World Trade Organization. Committee on Trade and Environment. *GATT/WTO Dispute Settlement Practice Relating to GATT Article XX, Paragraphs (b), (d), and (g)*. WT/CTE/W/203. 8 March 2002.
- World Trade Organization. Dispute Settlement Body. Appellate Body Report. *EC-Tariff Preferences*. Adopted 2004. DS 246.
- World Trade Organization. Dispute Settlement Body. Appellate Body Report. *Brazil-Retreaded Tyres*. Adopted 17 December 2007. DS332.
- World Trade Organization. Dispute Settlement Body. Appellate Body Report. *US-Shrimp*. Adopted 6 November 1998. DS58.
- World Trade Organization. Dispute Settlement Body. Appellate Body Report. *US-Shrimp (Article 21.5 – Malaysia)*. Adopted 21 November 2001. DS58.
- World Trade Organization. Dispute Settlement Body. Appellate Body Report. *US-Gasoline*. Adopted 20 May 1996. DS2. DSR 1996:1.
- World Trade Organization. Dispute Settlement Body. Appellate Body Report. *China-Publications and Audiovisual Products*. Adopted 19 January 2010. DS363.
- World Trade Organization. Dispute Settlement Body. Appellate Body Report. *US-Gambling*. Adopted 20 April 2005. DS285.
- World Trade Organization. Dispute Settlement Body. Appellate Body Report. *China – Raw Materials*. Adopted 22 February 2012. DS394.
http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds394_e.htm. Accessed 10 June 2014.
- World Trade Organization. Dispute Settlement Body. Panel Report. *China – Raw Materials*. DS 394/R and Corr. 1, DS 395/R, DS 398/R. Circulated 5 July 2011. Cited at *International Economic Law and Policy Blog*.
<http://worldtradelaw.typepad.com/ielblog/2011/07/gatt-article-xx-as-a-defense-to-non-gatt-agreements.html>. Accessed 10 June 2014.
- World Trade Organization. Dispute Settlement Body. Panel Report. *US-Gambling*. Adopted 20 April 2005 as modified by Appellate Body report. DS285.
- World Trade Organization. Dispute Settlement Body. Panel Report. *Japan-Film*. Adopted 22 April 1998. DS44.

World Trade Organization. *Environment: Disputes 4. Mexico etc. versus US: ‘Tuna-Dolphin.’* http://www.wto.org/english/tratop_e/envir_e/edis04_e.htm. Accessed 23 August 2013.

World Trade Organization. *GATT Analytical Index – Guide to GATT Law and Practice.* 2012; Geneva: WTO Secretariat, 1995.

World Trade Organization. *General Agreement on Tariffs and Trade (GATT).* 1994.

World Trade Organization. *General Agreement on Trade in Services (GATS).* 1994.

World Trade Organization. *Guidelines for Arrangements on Relations with Non-Governmental Organization.* 23 July 1996. WT/L/162.

http://www.wto.org/english/forums_e/ngo_e/guide_e.htm. Accessed 6 August 2014.

World Trade Organization. *Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health.* Decision of the General Council of 30 August 2003. WT/L/540. And Corr 1. 1 September 2003.

http://www.wto.org/english/tratop_e/trips_e/implem_para6_e.htm. Accessed 20 October 2013.

World Trade Organization. Legal Affairs Division. *WTO Dispute Settlement: One-Page Case Summaries (2009 Edition) (1995-2008).* Geneva: WTO Publications, 2009.

World Trade Organization. *Marrakesh Agreement Establishing the World Trade Organization. Annex 3 – Trade Policy Review Mechanism (TPRM).* 1994.

World Trade Organization. *Marrakesh Agreement Establishing the World Trade Organization.* http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm. Accessed 11 October 2010.

World Trade Organization. *Marrakesh Agreement Establishing the World Trade Organization. Annex 2 – Understanding of Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding (DSU)).* 1994.

World Trade Organization. *Procedures for the Circulation and Derestriction of WTO Documents.* Decision adopted by the General Council on 18 July 1996, WT/L/160/Rev.1.

World Trade Organization. *Protocol on the Accession of the People’s Republic of China.* 2001.

World Trade Organization. *Recommendations of the Task Force on Aid for Trade.* 27 July 2006.

World Trade Organization. *Recommendations of the Task Force on an Enhanced Integrated Framework.* 2006.

World Trade Organization. *The Future of the WTO: Addressing Institutional Challenges in the New Millennium.* Report by the Consultative Board to the Director-General Supachai Penitcpakdi (i.e. *The Sutherland Report*). Geneva, 2004.

World Trade Organization. *Understanding on Rules and Procedures Governing the Settlement of Disputes*. http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm. Accessed 19 March 2014.

World Trade Organization. *Vacancy Notice: EXT/L/10-20; Title: Coordinator, Monitoring and Evaluation*. 11 June 2010.

Organization for Economic Cooperation and Development

Organization for Economic Cooperation and Development (OECD). *OECD Employment Outlook*. 2008.

Paris Declaration on Aid Effectiveness: Ownership, Harmonisation, Alignment, Results and Mutual Accountability. 2 March 2005.

United Nations

Convention on the Prevention and Punishment of the Crime of Genocide. Adopted 9 December 1948. Entered into force 12 January 1951.

Corley, Marva, Yves Perardel and Kalina Popova. *Wage Inequality by Gender and Occupation: A Cross-country Analysis*. Employment Strategy Papers, Employment Trends Unit, Employment Strategy Unit, International Labour Office (ILO). 2005. No. 20

Crawford, James. *International Law Commission, Third Report*. A/CN.4/507.

Fritz-Krockow, Bernhard, and Permешвар Рамоглан, eds., International Monetary Fund Handbook: Its Functions, Policies and Operations. Washington: International Monetary Fund, 2007.

International Court of Justice. *Case concerning the Barcelona Traction, Light and Power Company, Limited, Second Phase*. Judgment of 5 February 1970. ICJ Reports (1970).

International Monetary Fund. Independent Evaluation Office. *Standard Rules for Review and Publication of Evaluation Reports and other IEO Documents*. 19 August 2002. <http://www.ieo-imf.org/ieo/files/origins/081902.pdf>. Accessed 6 August 2014.

International Trade Center. *ITC Gender Mainstreaming Policy*. 28 April 2011.

International Trade Center. *Strategic Plan: 2012-2015*. March 2012.

Tran-Nguyen, Anh-Nga and Americo Beviglia Zampetti, eds. *Trade and Gender: Opportunities and Challenges for Developing Countries*. New York: United Nations: UNCTAD, 2004.

UN Women. *Gender Mainstreaming*.

<http://www.un.org/womenwatch/osagi/gendermainstreaming.htm>. Accessed 10 April 2014.

United Nations Conference on Trade and Development. *Assessment of the Impact of Trade Policy Reform on Countries Acceding to the World Trade Organization: The Gender Dimension*. New York and Geneva: United Nations, 2010.

United Nations. Office of Legal Affairs. *Division for Ocean Affairs and the Law of the Sea. Chronological Lists of Ratifications of Accessions and Successions to the Convention and the Related Agreements as of 29 October 2013*.

www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm. Accessed 23 June 2014.

United Nations. Office of the High Commissioner for Human Rights. *Human Rights and World Trade Agreements: Using General Exception Clauses to Protect Human Rights*. New York and Geneva: United Nations, 2005.

United Nations. Office of the Special Adviser on Gender Issue and Advancement of Women. *Supporting Gender Mainstreaming: The Work of the Office of the Special Adviser on Gender Issue and Advancement of Women*. March 2001.

United Nations. *Our Global Neighborhood: The Report of the Commission on Global Governance*. Oxford: Oxford University Press, 1995.

United Nations. *Report of the Economic and Social Council for 1997*. A/52/3.18. September. <http://www.un.org/documents/ga/docs/52/plenary/a52-3.htm>. Accessed 2 August 2013.

Universal Declaration of Human Rights. Adopted on 10 December 1948.
<http://www.un.org/en/documents/udhr/> Accessed 25 September 2014.

Vienna Convention of the Law of Treaties. Done at Vienna on 23 May 1969; Entered into force on 27 January 1980.

http://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf. Accessed 17 August 2014.

World Bank Group. *Global Economic Prospects 2005: Trade, Regionalism, and Development*. World Bank Publications (Nov. 1 2004).

World Bank. *Integrating Gender into the World Bank's Work: A Strategy for Action*. Washington, DC, USA: World Bank, 2002.

World Intellectual Property Organization. *Convention Establishing the World Intellectual Property Organization*. Stockholm, 14 July 1967. Amended 28 September 1979.
http://www.wipo.int/treaties/en/text.jsp?file_id=283854. Accessed 6 August 2014.

Zampetti, Americo Beviglia. "The Impact of WTO Rules on the Pursuit of Gender Equality." In Anh-Nga Tran-Nguyen and Americo Beviglia Zampetti, eds. *Trade and Gender: Opportunities and Challenges for Developing Countries*. New York: United Nations: UNCTAD, 2004.

Canada

Calder v. British Columbia (Attorney General). 1973. S.C.R. 313.

Delgamuukw v. British Columbia. 1997. 3 S.C.R. 1010.

Foundation of Canadian Women Entrepreneurs. *Best Practices For Women Entrepreneurs In Canada*. Toronto: May 2004.

Goreham, Richard. *Language Rights and the Court Challenges Program: A Review of its Accomplishments and Impact of its Abolition*. Submitted to The Commissioner of Official Languages. Ottawa, 1992.

Peebles, Dana, Status of Women Canada Policy Research, *Increasing Gender Inputs into Canadian International Trade Policy Positions at the WTO*, (Ottawa: Status of Women Canada, 2005)

R v. Horse. 1988.

R v. Marshall. 1998.

R v. Sioui. 1990.

R v. White and Bob. 1964.

R. v. Delgamuukw. 1997. 3 S.C.R. 1010.

Tri-Council Research Ethics Requirements

United States of America

Brown v. Board of Education, 347 U.S. 483 (1954).

Brown v. Board of Education, 349 U.S. 294 (1955).

Roe v. Wade. 410 U.S. 113 (1973).

Other

Prowse, Susan. *Aid for Trade: Supporting Trade: Preference Reform*. Centre for Global Development Working Paper. 2010.

Coherence

Enhanced Integrated Framework. *Compendium of EIF Documents: A User's Guide to the EIF. Annex II. 2: DTIS/DTIS Update template and checklist*.

Enhanced Integrated Framework. *Mid-term Project Evaluation Guidance Note: For EIF TIER 1 Funded Projects: Support to National Implementation Arrangements*. September 2012.

The Gender Dimension of the Enhanced Integrated Framework. Expert Roundtable Jointly Organized by ITC, WTO, Government of Zambia and Government of Lao PDR. Geneva, 29-30 April 2008.

http://www.intracen.org/uploadedFiles/intracenorg/Content/About_ITC/Where_are_we_working/Multi-country_programmes/Women_and_trade/The%20gender%20dimension%20of%20EIT.pdf.

World Trade Organization. Committee on Trade and Development: Aid for Trade. *Aid-for-Trade Work Programme 2012-2013: Deepening Coherence*.

World Trade Organization. *World Trade Report 2011: The WTO and Preferential Trade Agreements: From Co-existence to Coherence*. Geneva: World Trade Organization, 2011.

Websites

Asia-Pacific Economic Cooperation

Asia-Pacific Economic Cooperation. *Action Plans*. <http://www.apec.org/About-Us/How-APEC-Operates/Action-Plans.aspx>. Accessed 25 September 2014.

Asia-Pacific Economic Cooperation. *APEC Business Advisory Council*. <http://www.apec.org/Groups/Other-Groups/APEC-Business-Advisory-Council.aspx>. Accessed 6 August 2014.

Asia-Pacific Economic Cooperation. *APEC Business Advisory Council – Achievements*. <http://www.apec.org/Groups/Other-Groups/APEC-Business-Advisory-Council.aspx>. Accessed 6 August 2014.

- Asia-Pacific Economic Cooperation. *APEC Business Travel Card*. <http://www.apec.org/about-us/about-apec/business-resources/apec-business-travel-card.aspx>. Accessed 6 August 2014.
- Asia-Pacific Economic Cooperation. *APEC Observers*. <http://www.apec.org/About-Us/How-APEC-Operates/APEC-Observers.aspx>. Accessed 25 September 2014.
- Asia-Pacific Economic Cooperation. *APEC Observers*. <http://www.apec.org/About-Us/How-APEC-Operates/APEC-Observers.aspx>. Accessed 6 August 2014.
- Asia-Pacific Economic Cooperation. *APEC Study Centers Consortium*. <http://www.apec.org/Groups/Other-Groups/APEC-Study-Centres-Consortium.aspx>. Accessed 6 August 2014.
- Asia-Pacific Economic Cooperation. *Framework for Integration of Women in APEC*, 1999. http://www.apec.org/~media/Files/Groups/GFPN/02_aggi_framewk.pdf. Accessed 6 August 2014.
- Asia-Pacific Economic Cooperation. *Member Economies*. <http://www.apec.org/about-us/about-apec/member-economies.aspx>. Accessed 16 February 2013.
- Asia-Pacific Economic Cooperation. *Policy Partnership on Women and the Economy*. <http://www.apec.org/Groups/SOM-Steering-Committee-on-Economic-and-Technical-Cooperation/Working-Groups/Policy-Partnership-on-Women-and-the-Economy.aspx>. Accessed 29 June 2014.
- Asia-Pacific Economic Cooperation. *Policy Support Unit*. <http://www.apec.org/About-Us/Policy-Support-Unit.aspx>. Accessed 29 June 2014.
- Asia-Pacific Economic Cooperation. *Stakeholder Participation*. <http://www.apec.org/About-Us/How-APEC-Operates/Stakeholder-Participation.aspx>. Accessed 25 September 2014.

European Union

- CURIA. *Former Members (The Court of Justice, The General Court & The Civil Service Tribunal)*. http://curia.europa.eu/jcms/jcms/Jo2_7014/. Accessed 02 August 2013.
- CURIA. *Presentation of the Members (The Court of Justice)*. http://curia.europa.eu/jcms/jcms/Jo2_7026/. Accessed 02 August 2013.
- European Commission, Trade, Policy, Countries and Regions, Agreements. <http://ec.europa.eu/trade/policy/countries-and-regions/agreements/>. Accessed 12 January 2015.

World Trade Organization

World Trade Organization Secretariat. *Chart 1: Growth in Volume of World Merchandise Trade and GDP, 2005-13.* In Press/658. 12 April 2012.

www.wto.org/english/news_e/pres12_e/pr658_e.htm. Accessed 20 February 2014.

World Trade Organization, *Development: Aid for Trade.*

http://www.wto.org/english/tratop_e/develop_e/a4t_e/aid4trade_e.htm. 22 April 2013.

World Trade Organization. *Agriculture Negotiations: Background Fact Sheet: Tariff Negotiations in Agriculture: Reduction Methods.*

www.wto.org/english/tratop_e/agric_e/agnegs_swissformula_e.htm. Accessed 22 February 2014.

World Trade Organization. *Aid for Trade Factsheet.*

http://www.wto.org/english/tratop_e/develop_e/a4t_e/a4t_factsheet_e.htm. 22 April 2013.

World Trade Organization. *Appellate Body Members.*

http://www.wto.org/english/tratop_e/dispu_e/ab_members_descrip_e.htm. 31 March 2013.

World Trade Organization. *Current WTO Chairpersons.*

http://www.wto.org/english/thewto_e/secre_e/current_chairs_e.htm. 31 March 2013.

World Trade Organization. *Development: Aid for Trade: Task Force.*

http://www.wto.org/english/tratop_e/develop_e/a4t_e/implementing_par57_e.htm. 22 April 2013.

World Trade Organization. *Doha Development Agenda: Aid for Trade: Aid for Trade and the WTO Work Programme.*

http://www.wto.org/english/tratop_e/dda_e/background_e.htm. 22 April 2013.

World Trade Organization. *Domestic Support In Agriculture: The Boxes.*

http://www.wto.org/english/tratop_e/agric_e/agboxes_e.pdf. Accessed 25 September 2014.

World Trade Organization. *Enhanced Integrated Framework.*

http://www.wto.org/english/tratop_e/develop_e/teccop_e/if_e.htm. 22 April 2013.

World Trade Organization. *International Intergovernmental Organizations Granted Observer Status to WTO Bodies.* www.wto.org/english/thewto_e/igo_obs_e.htm. Accessed 24 June 2014.

World Trade Organization. *Legal Texts: GATT 1947: The General Agreement on Tariffs and Trade (GATT 1947).* http://www.wto.org/English/docs_e/legal_e/gatt47_02_e.htm

World Trade Organization. *Member Information: Members and Observers of the WTO.*

http://www.wto.org/english/thewto_e/countries_e/org6_map_e.htm. Accessed 5 September 2013.

- World Trade Organization. *Ministerial Conferences*.
http://www.wto.org/english/thewto_e/minist_e/minist_e.htm. Accessed 3 February 2013.
- World Trade Organization. *Overview of the WTO Secretariat*.
http://www.wto.org/english/thewto_e/secre_e/intro_e.htm. 31 March 2013.
- World Trade Organization. *The 128 Countries That Had Signed GATT by 1994*.
http://www.wto.org/english/thewto_e/gattmem_e.htm. Accessed 27 August 2013.
- World Trade Organization. *The Doha Round*.
http://www.wto.org/english/tratop_e/dda_e/dda_e.htm. Accessed 22 February 2014.
- World Trade Organization. *The WTO General Council*.
http://www.wto.org/english/thewto_e/gcounc_e/gcounc_e.htm. Accessed 3 February 2013.
- World Trade Organization. *Understanding the WTO: Basics: The GATT Years: From Havana to Marrakesh*. http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm. Accessed 3 February 2013.
- World Trade Organization. *Understanding the WTO: Cross-Cutting and New Issues: Labour Standards: Consensus, Coherence and Controversy*.
http://www.wto.org/english/thewto_e/whatis_e/tif_e/bey5_e.htm. Accessed 25 September 2014.
- World Trade Organization. *Understanding the WTO: Settling Disputes: The Panel Process*. http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp2_e.htm. Accessed 27 August 2013.
- World Trade Organization. *Understanding the WTO: Settling Disputes*.
http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm. Accessed 25 August 2014.
- World Trade Organization. *Understanding the WTO: Settling Disputes: A Unique Contribution*. http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm. Accessed 3 February 2013.
- World Trade Organization. *Understanding the WTO: The Agreements: Trade Policy Reviews: Ensuring Transparency*.
http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm11_e.htm. Accessed 3 February 2013.
- World Trade Organization. *Understanding the WTO: The Agreements: Services: Rules for Growth and Investment*.
http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm6_e.htm. Accessed 3 February 2013.
- World Trade Organization. *Understanding the WTO: The Agreements: Intellectual Property: Protection and Enforcement*.

http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm. Accessed 3 February 2013.

World Trade Organization. *Understanding the WTO: The Organization: Members and Observers*. http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm. Accessed 27 August 27 2013.

World Trade Organization. *Understanding the WTO: The Organization: Whose WTO is it Anyway?* http://www.wto.org/english/thewto_e/whatis_e/tif_e/org1_e.htm. Accessed 3 February 2013.

World Trade Organization. *Understanding the WTO: The Organization: WTO Organization Chart*. http://www.wto.org/english/thewto_e/whatis_e/tif_e/org2_e.htm. Accessed 3 February 2013.

World Trade Organization. WTO News: *Speeches by DG Pascal Lamy: “Lamy Calls for Strengthened System of Global Governance.”*

http://www.wto.org/english/news_e/sppl_e/sppl149_e.htm. Accessed 21 April 2014.

World Trade Organization. *WTO: 2009 News Items: 29 April 2009: General Council: Strengthening the WTO as the Global Trade Body.*

http://www.wto.org/english/news_e/news09_e/tnc_chair_report_29apr09_e.htm.

Accessed 11 October 2010.

United Nations

International Monetary Fund. *Factsheet – Debt Relief Under the Heavily Indebted Poor Countries (HIPC) Initiative*. 24 March 2014.

<https://www.imf.org/external/np/exr/facts/hipc.htm>. Accessed 6 August 2014.

International Monetary Fund. *Factsheet – IMF Quotas*. 25 March 2014.

<http://www.imf.org/external/np/exr/facts/quotas.htm>. Accessed 19 August 2014.

International Monetary Fund. *IMF Executive Directors and Voting Power*. 19 August 2014. <http://www.imf.org/external/np/sec/memdir/eds.aspx>. Accessed 19 August 2014.

International Monetary Fund. Independent Evaluation Office. *Completed Evaluations*. <http://www.ieo-imf.org/ieo/pages/Completed.aspx>. Accessed 6 August 2014.

International Trade Center. *About ITC: Mission and Objectives: Aid for Trade*.

<http://www.intracen.org/itc/about/mission-and-objectives/aid-for-trade/>. Accessed 25 September 2014.

World Bank. *International Bank of Reconstruction and Development: Voting Power of Executive Directors*. <http://siteresources.worldbank.org/BODINT/Resources/278027-1215524804501/IBRDDEsVotingTable.pdf>. Accessed 31 March 2013.

Other

BBC News Middle East. *Women in Saudi Arabia to Vote and Run in Elections* (25 September 2011). <http://www.bbc.co.uk/news/world-us-canada-15052030>. Accessed 27 June 2013.

Canadian Political Science Association (CPSA). *Research Ethics*. <http://www.cpsa-acsp.ca/researchethics.shtml>. Accessed 25 September 2014.

Cornell University Law School. Legal Information Institute (LII). *Jus Cogens*. http://www.law.cornell.edu/wex/jus_cogens. Accessed 17 August 2014.

Feminism and Institutionalism – International Network (FIIN), <http://www.femfin.com>. Accessed 12 January 2015.

International Economic Law and Policy Blog. *GATT Article XX as a Defense to Non-GATT Agreements*. <http://worldtradelaw.typepad.com/ielpblog/2011/07/gatt-article-xx-as-a-defense-to-non-gatt-agreements.html>. Accessed 10 June 2014.

Inter-Parliamentary Union. *Women's Suffrage: A World Chronology of the Recognition of Women's Right to Vote and to Stand for Election*. <http://www.ipu.org/wmn-e/suffrage.htm>. Accessed 27 June 2013.

Organization of Women in International Trade (OWIT). *News Archives – 2004: November 2004: Canada Makes Its Mark within International Trade Organization*, Tampa, Florida (OWIT award citation). http://www.owit-toronto.ca/news/news_archive04.html. Accessed 23 August 2014.

Ross, Bobbie K. *American Bar Association: Section of Litigation: Minority Trial Lawyer: Emerging Second Amendment Jurisprudence*. 17 August 2011. <http://apps.americanbar.org/litigation/committees/minority/articles/summer2011-second-amendment-jurisprudence.html>. Accessed 23 August 2014.

The Atlantic. *In Saudi Arabia, A Quiet Step Forward for Women*. 26 October 2011. <http://www.theatlantic.com/international/archive/2011/10/in-saudi-arabia-a-quiet-step-forward-for-women/247351/>. Accessed 27 June 2013.

United States. Central Intelligence Agency. *Library: The World Factbook*. <https://www.cia.gov/library/publications/the-world-factbook/fields/2123.html>. Accessed 27 June 2013.

Coherence

Enhanced Integrated Framework. *New Compendium of EIF Documents*. <http://www.enhancedif.org/en/document/new-compendium-eif-documents>. Accessed 25 September 2014.

Enhanced Integrated Framework. *Who's Who*.
http://www.enhancedif.org/EN%20web%20pages/About%20the%20EIF/Who's_who.htm. 22 April 2013.

Interviews, Emails, Speeches and Transcriptions

Confidential interviews conducted at the WTO Secretariat (Geneva, Switzerland) and at EU DG-Trade (Brussels, Belgium), September-October 2007. Interviews were transcribed verbatim from digital recording or from manuscript notes.

Halonen, Tarja. Speech at the WTO Public Forum, 4 October 2007. Halonen at the time was the Finnish President. Transcription by the author.

King-Akerele, Olubunke. Speech at the WTO Public Forum, 4 October 2007. King-Akerele held the positions of Liberia's Minister of Foreign Affairs and Prime Minister of Liberia. Transcription by the author.

Lamarche, Lucie. Email exchange with author, 3 August 2006. Lamarche at the time was Professeur, Sciences Juridiques, Université du Québec à Montréal, and later Gordon F. Henderson Research Chair in Human Rights and Director of Research at the Human Rights Research and Education Centre at the University of Ottawa, Canada.

Lamarche, Lucie. Talk delivered at Norman Patterson School of International Affairs (NPSIA), Carleton University. 2006. Notes on file with the author.

Lamy, Pascal. Address to the University of Geneva – Dies Academicus Ceremony of Award of a Doctor Honoris Causa. 5 June 2009.

http://www.wto.org/english/news_e/sppl_e/sppl128_e.htm. Accessed 12 January 2015.