

## Global Economic Governance and Women

### *Why Is the WTO a Difficult Case for Women's Representation?*

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#### ABSTRACT

This chapter describes why the World Trade Organization (WTO) has proven such a great challenge for the representation of women and women's interests. Some progress has been made since the Aid-for-Trade programme, which cooperates with the WTO, incorporated gender mainstreaming in 2011. This includes the adoption of the 2017 Joint Declaration on Trade and Women's Economic Empowerment and the inauguration of the WTO Gender Research Hub in 2021. Nevertheless, to date the WTO has lagged behind other international organizations, including organizations of global economic governance, in representing women and their interests. The chapter posits the following reasons in historical context: (i) Women did not 'get in on the ground floor' at the WTO; (ii) The locus of power at the WTO rests with the members (exemplified by the requirement for consensus and the 'single undertaking', the importance of member proposals, and the institutional weakness of the Secretariat); (iii) The relative lateness and weakness of WTO involvement with civil society, compared to other institutions of global economic governance; (iv) The formative clashes during the 1980s and 1990s between gender and trade activism and trade liberalization; (v) The *lex specialis* nature of the WTO dispute settlement system; (vi) The WTO is primarily a 'hard-law' institution.

<sup>\*</sup> This chapter draws on the author's PhD dissertation: Judit Fabian, 'Towards a Theory of Democratic Global Economic Governance: Hybridization of Soft and Hard Law in the Case of Gender within the World Trade Organization' (PhD Thesis, Carleton University 2015). Specifically, it draws on chapter 5 of the dissertation, entitled 'A Proxy for GEG II: Why the WTO Is the 'Hardest Case' amongst the Institutions of GEG', 258–365. The chapter has undergone significant revision.

## 4.1 INTRODUCTION

In June 2016, for the first time, a ‘gender perspective on trade’ was discussed as part of the Annual Session of the Parliamentary Conference on the WTO, entitled ‘What Future for the WTO?’<sup>1</sup> The event was organized by the Inter-Parliamentary Union and the European Parliament on the premises of the World Trade Organization (WTO) in Geneva. This is important. Why? Because by 2016, most institutions of global governance had begun to incorporate gender perspectives, while for the most part trade governance, whether national, regional, or international, had been resistant to gender considerations despite ongoing efforts for change. This is true both for the European Union’s Directorate-General for Trade (DG TRADE)<sup>2</sup> and the WTO (although less so for EU DG TRADE), which makes it especially remarkable that the above initiative was led by EU Members of Parliament,<sup>3</sup> and the discussion hosted on WTO premises. The press release for the session stated that ‘parliamentarians from 57 countries and the World Trade Organization’s leadership, civil society organizations, all in all around 400 participants’ would be present. Thus, clearly, there was interest and, for the first time, the Outcome Document of the Annual Session made a clear statement about gender mainstreaming: ‘We note that gender mainstreaming and women’s empowerment are instrumental to development strategies for achieving gender equality and are key to the eradication of poverty. Therefore, we encourage policymakers to mainstream [*sic*] gender in macro-economic policies, especially in trade policy.’<sup>4</sup>

Thus, the responsibility to mainstream gender in trade policies remained to be shouldered by WTO member governments as they wished, without

<sup>1</sup> IPU, ‘2016 Annual Session of the Parliamentary Conference on the WTO: What Future for the WTO?, WTO Headquarters, Geneva, 13–14 June 2016, organized jointly by the Inter-Parliamentary Union and the European Parliament’ <[www.ipu.org/splz-e/trade16.htm](http://www.ipu.org/splz-e/trade16.htm)> accessed 8 May 2022.

<sup>2</sup> Elina Viilup, ‘The EU’s Trade Policy: From Gender-Blind to Gender Sensitive?’ (2015) In-Depth Analysis for the European Parliament, DG External Policies <[www.europarl.europa.eu/RegData/etudes/IDAN/2015/549058/EXPO\\_IDA\(2015\)549058\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/549058/EXPO_IDA(2015)549058_EN.pdf)> accessed 8 May 2022.

<sup>3</sup> European Parliament, ‘MEPS to Lead WTO Parliamentary Conference in Geneva’ (10 June 2016).

<sup>4</sup> IPU, ‘2016 Annual Session of the Parliamentary Conference on the WTO – What Future for the WTO?, Geneva, 13–14 June 2016: Outcome Document – Adopted by consensus on 14 June 2016’ <[www.ipu.org/splz-e/trade16/outcome.pdf](http://www.ipu.org/splz-e/trade16/outcome.pdf)> accessed 8 May 2022.

oversight, and without any formal role for the WTO. This remains true despite significant and promising developments at the WTO since 2017, including the Joint Declaration on Trade and Women's Economic Empowerment,<sup>5</sup> the introduction of the Gender Focal Point, the Informal Working Group on Trade and Gender, the International Trade and Gender Research Hub, and the proposed Joint Ministerial Declaration on the Advancement of Gender Equality and Women's Economic Empowerment within Trade.<sup>6</sup> Indeed, the difficulty of mainstreaming gender into global trade governance was reinforced by the WTO's MC12 Outcome Document, paragraph 13 of which contained a profoundly anodyne statement 'recognizing' women's economic empowerment and 'taking note' of the work of the WTO, the United Nations Conference on Trade and Development (UNCTAD), and the International Trade Centre (ITC) on the subject.<sup>7</sup> The paragraph stood as proxy for the Joint Ministerial Declaration mentioned above, which, rather than being approved at MC12 as expected, was placed on hold.

The purpose of this chapter is to paint a picture of why the WTO has proved such a difficult case for the representation of women and women's interests. While other international organizations, including organizations of global economic governance, have incorporated some form of representation of women and their interests, mostly through gender mainstreaming, the WTO has long been resistant. A small exception is through its cooperation with the Aid-for-Trade Programme,<sup>8</sup> which incorporated gender mainstreaming in 2011. While this represented a significant milestone, many undoubtedly remain disappointed.

So why is it that the WTO remains resistant to adopting gender mainstreaming openly? The chapter answers this question by giving six reasons in the following six sections:

<sup>5</sup> WTO, 'Buenos Aires Declaration on Women and Trade Outlines Actions to Empower Women – 12 December 2017' (2017) <[www.wto.org/english/news\\_e/news17\\_e/mc11\\_12dec17\\_e.htm](http://www.wto.org/english/news_e/news17_e/mc11_12dec17_e.htm)> accessed 8 May 2022.

<sup>6</sup> WTO, 'Joint Ministerial Declaration on the Advancement of Gender Equality and Women's Economic Empowerment within Trade', WT/MIN(21)/4 (Draft, 10 November 2021).

<sup>7</sup> WTO, 'MC12 Outcome Document', WT/MIN(22)/24 (22 June 2022).

<sup>8</sup> 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 more effectively access global trading markets and benefit from trade liberalization. See WTO, 'Aid for Trade Fact Sheet' <[www.wto.org/english/tratop\\_e/devel\\_e/a4t\\_e/a4t\\_factsheet\\_e.htm](http://www.wto.org/english/tratop_e/devel_e/a4t_e/a4t_factsheet_e.htm)> accessed 8 May 2022. It takes its ultimate origins from the Integrated Framework, which came into being in 1997 as the collaborative effort of six agencies and organizations: IMF, ITC, UNCTAD, UNDP, WTO, and the World Bank. See WTO, 'Enhanced Integrated Framework' <[www.wto.org/english/tratop\\_e/devel\\_e/teccopp\\_e/if\\_e.htm](http://www.wto.org/english/tratop_e/devel_e/teccopp_e/if_e.htm)> accessed 8 May 2022.

1. Women did not ‘get in on the ground floor’ at the WTO;
2. The locus of power at the WTO rests with the members, as exemplified by:
  - a. the requirement for consensus and the ‘single undertaking’;
  - b. the importance of member proposals; and
  - c. the institutional weakness of the Secretariat;
3. The relative lateness and weakness of WTO involvement with civil society compared to other institutions of global economic governance;
4. The formative clashes during the 1980s and the 1990s between gender and trade activism and trade liberalization;
5. The *lex specialis* nature of the WTO dispute settlement system; and
6. That the WTO is primarily a ‘hard law’ institution.

#### 4.2 PATH-DEPENDENT HISTORY

##### 4.2.1 Reason 1: A Simple Fact – Women Did Not ‘Get in on the Ground Floor’

To begin, there was no possibility for women to ‘get in on the ground floor’<sup>9</sup> at the founding of the WTO in 1994 because the WTO was, so to speak, built on the ‘mezzanine’ while the General Agreement on Tariffs and Trade (GATT) occupied the ‘ground floor’. The ‘ground floor’ was created during the ratification of the GATT in 1947,<sup>10</sup> and adopted in full as part of the founding agreements of the WTO in 1994.<sup>11</sup> This means that the WTO was not a ‘new’ organization created from whole cloth. Rather, it was incorporated in full and built upon the GATT regime, the history of which spanned almost five decades.

As Vickers describes, following North,<sup>12</sup> ‘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

<sup>9</sup> The phrase ‘getting in on the ground floor’ is borrowed from Vickers. See Jill Vickers, ‘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.

<sup>10</sup> General Agreement on Tariffs and Trade 1994, 1867 UNTS 187 33 ILM 1153 (1994) (GATT 1994).

<sup>11</sup> Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, 1867 UNTS 154 33 ILM 1144 (1994) (Marrakesh Agreement or WTO Agreement).

<sup>12</sup> Douglass C. North, *Institutions, Institutional Change and Economic Performance* (Cambridge University Press 2011).

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 times 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'.<sup>13</sup> Walby adds that restructuring occurs almost exclusively at critical junctures, building upon the ideas of 'rounds of struggle' developed by Edwards, and 'rounds of accumulation' developed by Massey.<sup>14</sup> Thus, one could argue that the creation of the WTO could have been an opportunity for the representation of women and their interests provided by restructuring.

The difficulty posed by the WTO is that, as stated, 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 of this path-dependency that made the representation of women and women's interests especially difficult. The foundation of the WTO in 1994 was not, therefore, an opportunity to 'get in on the ground floor'. It was not an opportunity created by restructuring, since the restructuring was partial and conditioned by the GATT, by subsequent rounds of multilateral trade negotiations, and by almost five decades of global trade governance under the GATT regime. All of these factors 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

<sup>13</sup> Geoffrey Underhill, 'Markets, Institutions, and Transaction Costs: The Endogeneity of Governance' (2007) World Economy & Finance Research Programme Working Paper 25, 34 <<https://ideas.repec.org/p/wef/wpaper/0025.html>> accessed 8 May 2022.

<sup>14</sup> Sylvia Walby, *Gender Transformations* (Routledge 1997) 76–78, 99. See also Richard Edwards, *Contested Terrain: The Transformation of the Workplace in the Twentieth Century* (Basic Books 1979); and Doreen Massey, *Spatial Divisions of Labour: Social Structures and the Geography of Production* (Macmillan 1984).

1947 or 1994, there was little 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 was little success in raising the subject within the WTO until at least 2017. For example, the 2004 Sutherland Report<sup>15</sup> simply did not mention gender or women despite its mission to recommend reforms ensuring the WTO's continued viability. The 2007 Report of the First Warwick Commission, in its turn, made only fleeting mention of women and gender, and did not address either substantively in any way.<sup>16</sup> This is despite a relatively widespread understanding in 2007 of the gendered effects of trade, even within the WTO Secretariat.<sup>17</sup> As one member of the Secretariat put it in 2007:

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,

<sup>15</sup> WTO, 'The Future of the WTO: Addressing Institutional Challenges in the New Millennium, Report by the Consultative Board to the Director-General Supachai Panitchpakdi' (2004) <[www.wto.org/english/thewto\\_e/10anniv\\_e/future\\_wto\\_e.pdf](http://www.wto.org/english/thewto_e/10anniv_e/future_wto_e.pdf)> accessed 8 May 2022 (Sutherland Report). The Board's objective 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' (ibid 2). The Report made thirty-seven recommendations that its authors considered practical and realizable (ibid 4). Chaired by Peter Sutherland, the other members were Jagdish Bhagwati, Kwesi Botchwey, Niall FitzGerald, Koichi Hamada, John H. Jackson, Celso Lafer, and Thierry de Montbrial. The Board had no woman member.

<sup>16</sup> The Warwick Commission, 'The Multilateral Trade Regime: Which Way Forward? – The Report of the First Warwick Commission' (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 First Warwick Commission was chaired by Pierre Pettigrew, Canadian Minister for International Trade under Prime Ministers Jean Chretien and Paul Martin. It included nineteen members (fourteen were men and five women).

<sup>17</sup> Confidential interviews conducted at the WTO Secretariat (Geneva, September–October 2007) and EU DG TRADE (Brussels, September–October 2007). On file with author.

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.<sup>18</sup>

Silence such as that of the Sutherland Report supports Hawkesworth's contention that feminist knowledge is erased by evidence blindness, which in turn insulates vested interests that are themselves gendered (and racialized).<sup>19</sup> In this way, it made sense that the traditional silence of the GATT/WTO regime concerning women and gender would be preserved and extended. Young, who was a member of the Warwick Commission, expressed this dynamic when she stated 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'.<sup>20</sup> In this context, the placement of the WTO 'outside' the United Nations (UN) system as a related organization<sup>21</sup> becomes even more important, since the WTO falls 'outside' the mandate of UN Women to promote and advance gender mainstreaming throughout the UN system.<sup>22</sup>

<sup>18</sup> Interview with senior member of WTO Secretariat (Geneva, Switzerland, October 2007). On file with author.

<sup>19</sup> Mary Hawkesworth, 'Policy Discourse as Sanctioned Ignorance: Theorizing the Erasure of Feminist Knowledge' (2009) 3(3–4) *Critical Policy Studies* 268–289, 283–285.

<sup>20</sup> Brigitte Young, 'Structural Power and the Gender Biases of Technocratic Network Governance in Finance' in Gülay Caglar, Elisabeth Prügl, and Susanne Zwingel (eds) *Feminist Strategies in International Governance* (Routledge 2013) 270.

<sup>21</sup> 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. It is now widely recognized that 'the WTO system is only one part of a much broader set of international rights and obligations that bind WTO Members'. To this end, the WTO maintains 'institutional relations with ... some 140 international organisations that have observer status in WTO bodies. The WTO also participates as an observer in the work of several international organizations. In all, the WTO Secretariat maintains working relations with almost 200 international organisations in activities ranging from statistics, research, standard-setting, and technical assistance and training. Although the extent of such cooperation varies, coordination and coherence between the work of the WTO and that of other international organizations continues to evolve'. See WTO, 'The WTO and Other Organizations' <[www.wto.org/english/thewto\\_e/coher\\_e/coher\\_e.htm](http://www.wto.org/english/thewto_e/coher_e/coher_e.htm)> accessed 8 May 2022. However, UN Women does not appear to be included in the 200 international organizations mentioned above. See WTO, 'International Intergovernmental Organizations Granted Observer Status to WTO Bodies' <[www.wto.org/english/thewto\\_e/igo\\_obs\\_e.htm](http://www.wto.org/english/thewto_e/igo_obs_e.htm)> accessed 8 May 2022.

<sup>22</sup> UN 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 Issues and Advancement of Women' (March 2001) <[www.un.org/womenwatch/osagi/pdf/report.pdf](http://www.un.org/womenwatch/osagi/pdf/report.pdf)> accessed 8 May 2022. Also see UN Women, 'Gender Mainstreaming' <[www.un.org/womenwatch/osagi/gendermainstreaming.htm](http://www.un.org/womenwatch/osagi/gendermainstreaming.htm)> accessed 8 May 2022.

### 4.3 'HIGH' POLITICS

#### 4.3.1 Reason 2: *The Locus of Power Rests with the Members*

##### 4.3.1.1 The Requirement for Consensus and the 'Single Undertaking'

Decisions at the WTO are made by consensus, barring certain exceptions.<sup>23</sup> 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, members that have shown themselves unsympathetic to gender equality.<sup>24</sup> Moreover, the 'single undertaking' requirement<sup>25</sup> – that nothing be agreed until everything is agreed – strengthens this

<sup>23</sup> See Art. IX of the Marrakesh Agreement. 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. The 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. See WTO, 'Whose WTO Is It Anyway?' <[www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org1\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org1_e.htm)> accessed 8 May 2022. Aside from these exceptions, the WTO is governed by consensus. Having said that, it must be stressed that consensus-based decision-making in WTO proceedings entails the absence of a dissenting vote, rather than express and 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 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 the process of legitimizing and advancing the representation of women and women's interests within the WTO easier. Nevertheless, 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 so interpreted by parties desirous of the failure of an initiative. As such, it is entirely correct to state that 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.

<sup>24</sup> For example, the countries Goetz describes as having done much to cause an impasse at the 2012 Commission on the Status of Women (CSW), scuttle the 2015 Fifth World Conference on Women, and reduce or eliminate feminist civil society participants from their CSW delegations, are by and large also WTO members. This includes Russia, Turkey, the Holy See (a WTO observer), and several North African and Middle Eastern countries. Other examples are legion. Anne Marie Goetz, 'The New Competition in Multilateral Norm-Setting: Transnational Feminists and the Illiberal Backlash' (2020) 149(1) *Daedalus* 165–166.

<sup>25</sup> WTO, 'Ministerial Declaration – Ministerial Conference, Fourth Session, Doha, 9–14 November 2001', WT/MIN(01)/DEC/W/1 (20 November 2001) para. 47.

veto to cover the entirety of WTO negotiations at any given time. This greatly increases the difficulty of representing women and women's interests at the WTO.

Amongst institutions of global economic governance, only in the WTO can the vote of a single member block a change in rules. By contrast, the International Monetary Fund (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.<sup>26</sup> Voting power at the World Bank and its component parts – International Bank for Reconstruction and Development (IBRD), International Development Association (IDA), International Finance Corporation (IFC), Multilateral Investment Guarantee Agency (MIGA) and International Centre for Settlement of Investment Disputes (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.<sup>27</sup>

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 to 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 veto any initiative. The same is true for the UN General Assembly and for any other organization in which decisions are taken by majority vote of all members.<sup>28</sup> It follows that any organization with a voting system that is not consensus-based will be more open to movement towards the representation of women and women's interests, and to the introduction of 'new issues' in general, as compared to 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's 'incompatible triangle', in which they highlight that consensus combines with the 'single undertaking' and the member-driven nature of the WTO to render the decision-making process still more

<sup>26</sup> IMF, 'Factsheet – IMF Quotas' (25 March 2014) <[www.imf.org/external/np/etr/facts/quotas.htm](http://www.imf.org/external/np/etr/facts/quotas.htm)> accessed 8 May 2022; IMF, 'IMF Executive Directors and Voting Power' (19 August 2014) <[www.imf.org/external/np/sec/memdir/eds.aspx](http://www.imf.org/external/np/sec/memdir/eds.aspx)> accessed 8 May 2022.

<sup>27</sup> World Bank, 'International Bank of Reconstruction and Development: Voting Power of Executive Directors' <<http://siteresources.worldbank.org/BODINT/Resources/278027-1215524804501/IBRDEdVsVotingTable.pdf>> accessed 8 May 2022.

<sup>28</sup> UNGA, 'Methods and Procedures of the General Assembly', A/RES/362 (22 October 1949) Rule 82 et seq.

difficult.<sup>29</sup> Mentioned as one of the reasons for the difficulties of the 2001 Doha Round, the ‘single undertaking’ has a legal 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 without active opposition, the ‘single undertaking’ would 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’.<sup>30</sup> 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 likely even absent active opposition.

#### 4.3.1.2 The Importance of Member Proposals

The importance of member proposals constitutes another obstacle to the representation of women and their interests in the WTO, as illustrated by the following quote from a senior member of the Secretariat: “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.”<sup>31</sup>

<sup>29</sup> Manfred Elsig 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* (Cambridge University Press 2011) 291.

<sup>30</sup> *Ibid* 300.

<sup>31</sup> Interview with senior member of WTO Secretariat (Geneva, Switzerland, October 2007). On file with author.

It might be thought that the location of power within the WTO membership constitutes an opportunity to represent women and women's interests, since it removes the potential obstacle of an intransigent bureaucracy. However, closer examination shows it to be on balance a significant hindrance, since it resists orderly agenda creation and makes veto use institutionally simple and painless.<sup>32</sup> It is fundamental to the structure and identity of the WTO that it be primarily a forum for negotiation among members concerning the governance of international trade. In practice, this largely takes the form of negotiations concerning the administration of trade agreements and further liberalization of global trade. This places the burden of initiating change upon the members themselves and 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 their accordance with international administrative or human rights law.

Conversely, the WTO's primary function as a forum for negotiation can create a disordered atmosphere for discussion in which any member delegation can place any issue area on the agenda, essentially without reference to other members' or external prioritization. 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 that resists orderly construction of agendas for negotiation and the introduction of new issue areas.

Within this structure, 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 area be brought within the purview of the WTO in a manner that all members could accept. Given the difficulties of reaching consensus in general during the Doha Round, given the necessary expansion of the WTO's scope and that one member's vote can block any prospective WTO agreement, and given members' differences in gender regimes, this approach is probably impossible.

Second, a proposal could treat the representation of women and women's interests as part of 'non-trade' initiatives already within the WTO's purview, or already being considered. For example, Director-General Lamy stressed in his speeches the importance of human rights, and research was done in collaboration with the International Labour Organization (ILO) as early as 2007.<sup>33</sup>

<sup>32</sup> This does not preclude political costs of veto use, which could be painful; nevertheless, the location of power within the WTO membership means that there is no mandatory structural cost to veto use deriving from WTO law or procedural rules.

<sup>33</sup> Marion Jensen and Eddy Lee, "Trade and Employment: Challenges for Policy Research" (2007) ILO and WTO Joint Study <[www.ilo.org/wcmsp5/groups/public/-dgreports/-dcomm/-publ/documents/publication/wcms\\_091038.pdf](http://www.ilo.org/wcmsp5/groups/public/-dgreports/-dcomm/-publ/documents/publication/wcms_091038.pdf)> accessed 8 May 2022.

Although the latter did not concern gender, the ILO is explicitly concerned with redistribution. In theory, sustainable development could also provide an opening for the representation of women and women's interests, as occurred in the EU's DG TRADE.<sup>34</sup>

Third, many have argued for a 'social clause' in WTO agreements, which would allow 'trade-distorting' policies to be justified as a social good.<sup>35</sup> Such a clause was included in the 1947 Havana Charter and discussed during negotiations leading to the WTO's founding. Certainly, the representation of women and women's interests could in theory constitute a social good. However, a social clause is unlikely to be adopted, having been rejected at the December 1996 WTO Ministerial Conference because it was understood to threaten the comparative advantage of low-wage developing countries.<sup>36</sup> This is important 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)<sup>37</sup> could incentivize policies in developing countries that promote the representation of women and women's interests by granting extra market access to developing countries that adopted the preferred policies.<sup>38</sup> This approach concerning labour standards has been implemented with success by European countries towards developing countries since 1971.<sup>39</sup> Moreover, the GSP was upheld by the WTO Appellate Body in 2004 as long as GSP standards were tied to 'objective' factors and the implementing WTO member did not discriminate between countries meeting the standards.<sup>40</sup>

<sup>34</sup> Interview with member of EU DG TRADE (Brussels, Belgium, October 2007). On file with author.

<sup>35</sup> Julien Burda, '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* (Routledge 2010) 263–265.

<sup>36</sup> *Ibid* 264.

<sup>37</sup> WTO, 'Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, Decision of 28 November 1979', L/4903 (29 November 1979).

<sup>38</sup> Burda, 'Chinese Women after the Accession to the World Trade Organization' (n 35) 268–271.

<sup>39</sup> *Ibid* 269.

<sup>40</sup> *Ibid* 269–270. See also Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R (31 August 2004). Although both panel report and Appellate Body report in this case determined that India's complaint was justified, the Appellate Body 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 all developing countries that met the criteria received the same preferences.

While GSP might create minor advances, it is unlikely to improve the representation of women and women's interests significantly because it is not properly a WTO initiative, but a member-initiated and member-specific set of preferences. Further, pursuant to the WTO Agreements, GSP can be applied only to developing countries, reducing considerably its potential to accomplish the representation of women and women's interests globally. Moreover, it is specifically designed to allow developed countries to tie trade preferences to policy preferences vis-à-vis developing countries. The connection of GSP with developing countries could also lead to its association with discourses of colonialism, creating resentment and possibly associating the representation of women and women's interests with 'the West' or 'the North' and concerns about undermining developing countries' sovereignty, culture, and traditions.<sup>41</sup>

#### 4.3.1.3 The Institutional Weakness of the Secretariat

Another possible avenue for the representation of women and their interests would be for the WTO bureaucracy to lead by example, including by the gender composition of its staff and the potential to initiate research. The problem here is the institutional weakness of the Secretariat, which 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 for negotiation. It also severely restricts the Secretariat as an access point for introducing the 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'.<sup>42</sup> The Sutherland Report similarly notes that the Secretariat cannot take a more active, agenda-setting role, and expresses regret that this should be so.<sup>43</sup>

<sup>41</sup> Oona A. Hathaway, 'The Cost of Commitment' (2003) 55(5) *Stanford Law Review* 1821–1862; Elizabeth Whitsitt, 'A Comment on the Public Morals Exception in International Trade and the EC – Seal Products Case: Moral Imperialism and Other Concerns' (2014) 3(4) *Cambridge Journal of International and Comparative Law* 1376–1391.

<sup>42</sup> Manfred Elsig, '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* (CIGI & Wilfrid Laurier University Press 2010) 71.

<sup>43</sup> Sutherland Report (n 14).

What one finds upon closer inspection is that while the Secretariat became fairly successful in achieving equal representation of women and men,<sup>44</sup> the real loci of power within the WTO continued for a long time to be dominated by men; it remains uncertain how the Secretariat could effectively address this if the members did not want to. Indeed, while the WTO does not publish the gendered composition of its members' delegations,<sup>45</sup> the gendered composition of the Appellate Body and of the various Councils of Chairpersons under the General Council for two decades after the WTO's founding is very telling. Among Appellate Body members in 2013, six were men and only one a woman.<sup>46</sup> From 1994 until 2013, former members included fourteen men and only three women.<sup>47</sup> Among chairpersons of the General Council in 2013, thirteen were men and only one a woman.<sup>48</sup> Among chairpersons of the Trade Negotiations Committee Council, nine were men and only one a woman.<sup>49</sup> Of chairpersons of the Council for Trade in Goods, the 2013 division was ten men and three women.<sup>50</sup> For Trade in Services, remarkably enough, the division was two men and two women.<sup>51</sup> For chairpersons of the Committees of Plurilateral Agreements, the division in 2013 was two men and no women.<sup>52</sup>

This represents a significant disparity and suggests that even descriptive gender equality in the Secretariat<sup>53</sup> has had little effect upon the gender

<sup>44</sup> WTO, 'Overview of the WTO Secretariat' <[www.wto.org/english/thewto\\_e/secret\\_e/intro\\_e.htm](http://www.wto.org/english/thewto_e/secret_e/intro_e.htm)> accessed 8 May 2022. 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 remained an imbalance in the most senior grades and executive levels in favour of the descriptive representation of men.

<sup>45</sup> See also Maria Sokolova and Matthew Wilson, 'Setting Up the Table Right: Women's Representation Meets Women's Inclusion in Trade Negotiations' (Chapter 7 in this book).

<sup>46</sup> WTO, 'Appellate Body Members' <[www.wto.org/english/tratop\\_e/dispu\\_e/ab\\_members\\_descrp\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm)> accessed 8 May 2022.

<sup>47</sup> Ibid.

<sup>48</sup> WTO, 'Current WTO Chairpersons' <[www.wto.org/english/thewto\\_e/secret\\_e/current\\_chairs\\_e.htm](http://www.wto.org/english/thewto_e/secret_e/current_chairs_e.htm)> accessed 8 May 2022.

<sup>49</sup> Ibid.

<sup>50</sup> Ibid.

<sup>51</sup> Ibid.

<sup>52</sup> Ibid.

<sup>53</sup> WTO, 'Overview of the WTO Secretariat' (n 44).

composition of those bodies and councils where it was dictated by the members. Indeed, the member-centric structure of the WTO inhibited for many years any initiative to balance the gender composition of delegations to the WTO, and of course the balanced descriptive representation of women is no guarantee of the substantive representation of women's interests.

By the early 2020s, the situation had improved but only to a limited extent. It must be noted that the ongoing Appellate Body crisis has affected these figures; nevertheless, by the expiration of the term of the last sitting Appellate Body member on 30 November 2020, of twenty-seven former Appellate Body members only five were women.<sup>54</sup> Among chairpersons of the General Council in November 2021, nine were men and six women.<sup>55</sup> Among chairpersons under the Trade Negotiations Committee Council, five were men and four women (though this includes the Committee on Agriculture, Special Session, and the Sub-Committee on Cotton).<sup>56</sup> Of chairpersons under the Council for Trade in Goods, nine were men and five women.<sup>57</sup> For Trade in Services, four were men and none women.<sup>58</sup> Finally, the only chairperson of a Committee of Plurilateral Agreements was a woman.<sup>59</sup> Again, this is an improvement from the very low bar of 2013, but it is a long way from parity.

How then might the representation of women and women's interests be achieved more fully and effectively? A senior member of the Secretariat described succinctly both the technical possibility of success and the most significant impediment: '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 . . . Just say, if we can expand our research, if we can be . . . a little more of an independent Secretariat.'<sup>60</sup>

One possibility, initially appealing, would have the Secretariat becoming more independent and investigating the representation of women and women's interests on its own initiative. The Secretariat is the only part of the WTO with a quasi-executive capacity to which greater independence could be delegated by WTO members. However, to be made formally, any

<sup>54</sup> WTO, 'Appellate Body Members' (n 46).

<sup>55</sup> WTO, 'Current WTO Chairpersons' (n 48).

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.*

<sup>60</sup> Interview with senior member of WTO Secretariat (Geneva, Switzerland, October 2007). On file with author.

such reform would require the consensus of WTO members, as would any determination to follow the Secretariat's findings. This might require expanding the scope of the WTO and would certainly require expanding the Secretariat's mandate and size. Thirteen years into the WTO's existence, it was considered highly unlikely to come to pass – 'never, never, never', as one interviewee put it.<sup>61</sup> Elsig echoed this sentiment three years later when he noted that 'the reluctance of Members to delegate powers to the Secretariat has not changed [since 1994]'.<sup>62</sup> The prospect has not become significantly more likely during the ensuing years.

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 currently no reason to believe that the members would allow the Secretariat to arrogate to itself any such power.

Further, interviews with its senior members show that the political culture within the Secretariat before 2010 was not amenable to proactive reform: '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. ... That's one thing I've experienced very much – you have a conservative school and a progressive school.'<sup>63</sup> Another interviewee stated plainly that 'the Secretariat in the WTO has zero initiative power. It can never propose something'.<sup>64</sup>

In sum, the locus of WTO power in its membership has created a number of hindrances and disincentives that have militated against the representation of women and women's interests. These are functions of the ease with which a single member can both block any initiative and introduce any topic for discussion. Further, the structure of the WTO has constrained the Secretariat's ability to promote the representation of women and women's interests. Nevertheless, acting within these constraints, the WTO and the Secretariat have since 2017 taken important steps toward addressing gender. The 2017 WTO Declaration on Trade and Women's Economic

<sup>61</sup> Ibid.

<sup>62</sup> Elsig, 'WTO Decision-Making' (n 42).

<sup>63</sup> Interview with senior member of WTO Secretariat (Geneva, Switzerland, October 2007). On file with author.

<sup>64</sup> Ibid.

Empowerment,<sup>65</sup> currently signed by 127 WTO members and observers,<sup>66</sup> is exactly the sort of initiative from which institution-level WTO engagement with gender can begin to emerge. It is member-driven but firmly within the realm of soft law and soft power, it sidesteps the weakness of the Secretariat and the requirement for consensus, but it nonetheless speaks for the WTO as an institution and constitutes a significant statement of intent. It has also given cover to the Informal Working Group on Trade and Gender, the Gender Focal Point, and the Secretariat's Gender Research Hub, which have provided fora for discussing and coordinating research on trade and gender taking place outside the WTO. It may be that in years to come, these initiatives are looked upon as the beginning of a critical mass of support for formal, institutional, member-driven engagement with gender at the WTO.

#### 4.4 'LOW' POLITICS

##### 4.4.1 Reason 3: *The Relative Lateness and Weakness of WTO Involvement with Civil Society*

The WTO took significantly longer to include civil society contributions than the World Bank, IMF, Asia-Pacific Economic Cooperation (APEC), and other institutions of global economic governance. This isolated 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 international organizations (IOs).<sup>67</sup> This is important because, in general, it appears that IOs that engaged more extensively and earlier with civil society than the WTO also did a great deal more than the WTO between 1994 and 2014 to advance the representation of women and their interests. This is true even if 'gender mainstreaming' during this period was relatively less successful at the IMF than at the World Bank, and less

<sup>65</sup> WTO, 'Joint Declaration on Trade and Women's Economic Empowerment on the Occasion of the WTO Ministerial Conference in Buenos Aires in December 2017' (2017) <[www.wto.org/english/thewto\\_e/minist\\_e/mc11\\_e/genderdeclarationmc11\\_e.pdf](http://www.wto.org/english/thewto_e/minist_e/mc11_e/genderdeclarationmc11_e.pdf)> accessed 8 May 2022.

<sup>66</sup> WTO, 'Eleventh WTO Ministerial Conference: Buenos Aires Declaration on Women and Trade Outlines Actions to Empower Women' (12 December 2017) <[www.wto.org/english/news\\_e/news17\\_e/mc11\\_12dec17\\_e.htm](http://www.wto.org/english/news_e/news17_e/mc11_12dec17_e.htm)> accessed 8 May 2022. Also WTO, 'Interim Report Following the Buenos Aires Joint Declaration on Trade and Women's Economic Empowerment' (25 September 2020) <<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/L/1095R1.pdf&Open=True>> accessed 8 May 2022.

<sup>67</sup> Jacqui True and Michael Mintrom, 'Transnational Networks and Policy Diffusion: The Case of Gender Mainstreaming' (2001) 45(1) *International Studies Quarterly* 27–57.

successful at the World Bank than, for example, in development projects operating under the aegis of German or European agricultural policy.<sup>68</sup> It is also true even if the adoption of mainstreaming at organizations such as the World Bank was more successful as policy than practice.<sup>69</sup> Indeed, the WTO did significantly less than other IOs to represent women and their interests during the first two decades of its existence.

True and Mintrom argue that transnational networks amongst non-state actors, particularly international non-governmental organizations (INGOs), offer the ‘most compelling explanation’ for the diffusion of ‘gender mainstreaming’ across 110 countries and numerous international organizations by 2001.<sup>70</sup> They show a strong correlation between openness to policy networks supportive of gender mainstreaming, adoption of gender mainstreaming policies by national governments, and adoption of high-level mechanisms to implement gender mainstreaming, such as independent central government ministerial portfolios. Even though their analysis focuses upon states, it nonetheless constitutes a strong argument that openness to such networks is an important contributory factor to institutional adoption of ‘gender mainstreaming’ policies in general, including within global economic governance.

The WTO’s position outside the gender mainstreaming mandate of UN Women makes it crucial that it be open to transnational networks of policy diffusion. That it was more open in 2014 than in 1994 is well-established; for example, NGO attendance at WTO Ministerial Conferences increased from 108 in 1996 to 812 in 2005. Nevertheless, many experts argued that WTO engagement with NGOs and other civil society organizations (CSOs) was more superficial and slower in development than in other IOs during the same period. For example, Clark describes how the World Bank improved its relationship with CSOs during the late 1980s and 1990s.<sup>71</sup> The Bank expanded operational collaborations with CSOs, engaged them in ‘country-level strategy and policy formation’, expanded its public disclosure of information, established international structured dialogue with CSOs, including consultative forums on major topics and policies, and sought to convince member governments to pursue greater engagement with CSOs.

<sup>68</sup> Jacqui True, ‘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* (Routledge 2011) 81–83.

<sup>69</sup> *Ibid* 81.

<sup>70</sup> True and Mintrom, ‘Transnational Networks’ (n 67) 37.

<sup>71</sup> John D. Clark, ‘The World Bank and Civil Society: An Evolving Experience’ in Jan Aart Scholte and Albrecht Schnabel (eds) *Civil Society and Global Finance* (Routledge 2002) 112–114.

By contrast, for most of its first two decades, the WTO did not engage or support the involvement of CSOs in a way that approached what the World Bank introduced. Thus, in 2010 Bonzon labelled 'rudimentary' three of the most important policy documents governing WTO engagement 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.<sup>72</sup> He emphasized that the Guidelines stated that NGOs could not be directly involved in WTO work,<sup>73</sup> and that closer cooperation with NGOs could be achieved 'through appropriate processes at the national level'.<sup>74</sup> This testifies to the absence of will within member governments at the time for the WTO itself to engage closely or very actively with civil society.

Conversely, as van den Bossche notes, during the same period, the UN Economic and Social Council (ECOSOC) provided for three levels of NGO engagement, granting 'general consultative status', 'special consultative status', or 'roster status'. The first of these granted rights well beyond the level of access or engagement granted by the WTO to any NGO or CSO.<sup>75</sup> Even the IMF may be said to have engaged civil society at least as extensively as the WTO, if not more so. In the 1990s and early 2000s IMF management began to seek closer relationships with Jubilee 2000, Caritas International, and Oxfam, amongst others, while also implementing Poverty Reduction Strategy Papers (PRSPs), the Poverty Reduction and Growth Facility (PRGF), the Heavily Indebted Poor Countries (HIPC) initiative,<sup>76</sup> and the Independent Evaluation Office (IEO).<sup>77</sup> Moreover, IMF and CSO meetings

<sup>72</sup> Yves Bonzon, '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* (CIGI & Wilfrid Laurier University Press 2010) 288.

<sup>73</sup> WTO, 'Guidelines for Arrangements on Relations with Non-Governmental Organizations', WT/L/162 (23 July 1996), para VI.

<sup>74</sup> Ibid.

<sup>75</sup> Peter Van Den Bossche, '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* (CIGI & Wilfrid Laurier University Press 2010) 315–316.

<sup>76</sup> IMF, 'Factsheet – Debt Relief under the Heavily Indebted Poor Countries (HIPC) Initiative' (24 March 2014) <[www.imf.org/external/np/exr/facts/hipc.htm](http://www.imf.org/external/np/exr/facts/hipc.htm)> accessed 8 May 2022.

<sup>77</sup> Thomas C. Dawson and Gita Bhatt, 'The IMF and Civil Society: Striking a Balance' in Jan Aart Scholte and Albrecht Schnabel (eds) *Civil Society and Global Finance* (Routledge 2002) 149–154, 155; IMF, 'Standard Rules for Review and Publication of Evaluation Reports and other IEO Documents' (19 August 2002), <[www.ieo-imf.org/ieo/files/origins/o81902.pdf](http://www.ieo-imf.org/ieo/files/origins/o81902.pdf)> accessed 8 May 2022; IMF, 'Completed Evaluations' <[www.ieo-imf.org/ieo/pages/Completed.aspx](http://www.ieo-imf.org/ieo/pages/Completed.aspx)> accessed 8 May 2022.

ranged between forty-five and seventy-five per year from 2001 through 2005, comprising interaction with 330 different CSOs annually.<sup>78</sup>

Finally, in 1995, APEC founded the APEC Business Advisory Council (ABAC), which contributed to the 2013 APEC Policy Partnership for Food Security (PPfFS),<sup>79</sup> and to the 2011 APEC Business Travel Card Programme.<sup>80</sup> In addition, from 1993, the APEC Study Centers Consortium (ASCC) has met annually to evaluate APEC progress and policy. It comprises fifty APEC study centres in twenty APEC member economies<sup>81</sup> and was established to ‘foster regional cooperation among tertiary and research institutes to promote greater academic collaboration on key regional and economic challenges’.<sup>82</sup> Amongst the WTO’s Public Forum, Institute for Training and Technical Cooperation (ITTC), and Advisory Centre on WTO Law, only the first entailed comparable engagement with civil society before 2014, and none integrated itself equally within member countries.

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 transnational networks of policy diffusion were to hold with IOs, and if the effects of their argument were amplified by path-dependency. It appears that IOs that engaged more extensively and earlier with civil society also did a great deal more by 2014 than the WTO to advance the representation of women and their interests. For example, APEC committed to gender mainstreaming after the Women Leaders Network (WLN) began in 1996 to lobby APEC to include gender issues in its economic forum. It was promoted in 1997 by Canada, which was APEC chair at the time.<sup>83</sup> The support of the Canadian International Development Agency (CIDA) for WLN led to APEC’s Framework for the Integration of Women in APEC,<sup>84</sup> which determined that all proposals related to general or sectoral policies and

<sup>78</sup> Van Den Bossche, ‘Non-Governmental Organizations and the WTO’ (n 75) 320.

<sup>79</sup> APEC, ‘APEC Business Advisory Council – Achievements’ <[www.apec.org/Groups/Other-Groups/APEC-Business-Advisory-Council.aspx](http://www.apec.org/Groups/Other-Groups/APEC-Business-Advisory-Council.aspx)> accessed 8 May 2022.

<sup>80</sup> APEC, ‘APEC Business Travel Card’ <[www.apec.org/about-us/about-apec/business-resources/apec-business-travel-card.aspx](http://www.apec.org/about-us/about-apec/business-resources/apec-business-travel-card.aspx)> accessed 8 May 2022.

<sup>81</sup> APEC, ‘APEC Study Centers Consortium’ <[www.apec.org/Groups/Other-Groups/APEC-Study-Centres-Consortium.aspx](http://www.apec.org/Groups/Other-Groups/APEC-Study-Centres-Consortium.aspx)> accessed 8 May 2022.

<sup>82</sup> *Ibid.*

<sup>83</sup> Christina Gabriel and Laura Macdonald, ‘Managing Trade Engagements? Mapping the Contours of State Feminism and Women’s Political Activism’ (2005) 12(1) *Canadian Foreign Policy* 71–88, 82. The APEC chair, held by Canada at the time (1997), was shared by Lloyd Axworthy, then Minister of Foreign Affairs, and Sergio Marchi, then Minister of International Trade.

<sup>84</sup> APEC, ‘Framework for Integration of Women in APEC’ (1999) <[www.apec.org/~media/Files/Groups/GFPN/02\\_aggi\\_framework.pdf](http://www.apec.org/~media/Files/Groups/GFPN/02_aggi_framework.pdf)> accessed 8 May 2022.

programmes would be analysed from a gender-equality perspective to ensure positive, equitable impacts.<sup>85</sup> APEC thus became the only multilateral economic organization to incorporate ‘gender mainstreaming’ throughout its policy initiatives.

Still other international organizations engaged more closely and extensively than the WTO with civil society and made greater progress towards the representation of women and women’s interests between 1994 and 2014. At the 1999 UN Conference on Financing for Development (UN-FfD), the ‘Monterrey Consensus’ established gender budgeting. By 2000, the UN System comprised 1,300 gender focal points.<sup>86</sup> Moreover, UN Security Council Resolution 1325 called for ‘the integration of gender across UN security policy and operations’.<sup>87</sup> Even if delayed in implementation and of questionable effectiveness,<sup>88</sup> there remained in 2022 no WTO parallel to gender budgeting, Resolution 1325 or the 1,300 gender focal points. The World Bank and UNDP have introduced gender budgeting. This is true even if UNDP ‘emphasises women’s reproductive role in the care economy’,<sup>89</sup> and even if gender budgeting at the World Bank is intended to improve the economic efficiency of women in the care economy, reducing itself to an ‘investment strategy in mothers for growth’.<sup>90</sup> Thus, again, where an institution has engaged more extensively than the WTO with civil society, it has generally been able to represent women and women’s interests earlier and at a level unmatched by the WTO.

#### 4.4.2 Reason 4: *The Clash of Non-compromising Positions – A Brief History of Early Gender and Trade Activism versus Trade Liberalization*

Beginning in the 1980s and extending to the present, a significant proportion of gender/feminist scholars has taken an antagonistic approach to neoliberal economics and to institutions and networks perceived as neoliberal. The development of this perspective took place during the same era that saw the

<sup>85</sup> Heather Gibb, *Gender Mainstreaming: Good Practices from the Asia Pacific Region* (Renouf Publishing 2001) 7.

<sup>86</sup> Jacqui True, ‘Gender Specialists and Global Governance: New Forms of Women’s Movement Mobilisation’ in Sandra Grey and Marian Sawer (eds) *Women’s Movements: Flourishing or in Abeyance?* (Routledge 2008) 97.

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.* 98.

<sup>89</sup> Gülay Caglar, ‘Feminist Strategies and Social Learning in International Economic Governance’ in Gülay Caglar, Elisabeth Prügl and Susanne Zwingel (eds) *Feminist Strategies in International Governance* (Routledge 2013) 261.

<sup>90</sup> *Ibid.*

ascendancy of the institutions and economic and political philosophies later known as neoliberal. This antagonism has extended to globalization, free trade, and international organizations involved in trade issues, such as the WTO. As a member of the WTO Secretariat noted: '[During the late 1990s] ... the debate ... was ... very sharp. It was basically anything done in trade or WTO is bad for gender (i.e., women).'<sup>91</sup> This meant that very little dialogue was possible at all for some time between women's interest groups and the WTO, since women's interest groups tended generally to oppose liberalized trade, while the mandate of the WTO was to promote it.

This clash produced important results: first, the resistance of a significant proportion of women's interest groups to engaging positively with the WTO in order to build an organization more amenable to the representation of women and women's interests; and second, the expectation of WTO personnel, trade negotiators, etc. for a period of time that anyone doing work on gender and trade must be in principle against free trade and therefore the existence of the WTO. Regardless of the merits and the relatively extreme positions of either side, this conflict hindered dialogue and increased the difficulty of representing women and women's interests within the WTO.

Where did it all start? Many point to the Canadian context, where the National Action Committee on the Status of Women (NAC), argued that the 1988 Canada–US Free Trade Agreement (FTA) would impose the greatest costs upon those 'most disadvantaged in the labour force'.<sup>92</sup> Given the structure of the Canadian economy in the mid-1980s, these would predominantly have been women. In the event, the Conservatives were re-elected in Canada, the FTA was ratified, and the NAC's government funding was cut by more than 50 per cent.<sup>93</sup> Even so, as Bashevkin states, the NAC 'identified linkages between free trade ... and the lives of Canadian women' that 'might have been ignored without NAC's intervention'<sup>94</sup> and that 'worked to articulate a feminist perspective on free trade'.<sup>95</sup> Moreover, the NAC's experience with the Canadian government became a very important influence in persuading

<sup>91</sup> Interview with senior member of WTO Secretariat (Geneva, Switzerland, October 2007). On file with author.

<sup>92</sup> Marjorie Cohen, 'The Macdonald Report and Its Implications for Women' (Feminist Action December 1985) cited in Sylvia B. Bashevkin, *True Patriot Love: The Politics of Canadian Nationalism* (Oxford University Press 1991) 140.

<sup>93</sup> Ibid 142–144. Also Jill Vickers, Pauline Rankin, and Christine Appelle, *Politics as if Women Mattered: A Political Analysis of the National Action Committee on the Status of Women* (University of Toronto Press 1993) 293–295.

<sup>94</sup> Bashevkin, *True Patriot Love* (n 92) 147.

<sup>95</sup> Ibid 145.

the Mexican women's group *Mujer a Mujer* to join the NAC in opposing the North American Free Trade Agreement (NAFTA).<sup>96</sup>

In the American context, 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 trade liberalization.<sup>97</sup> Their opposition was framed in terms that recalled those used by the NAC in opposition to the Canada–US FTA.<sup>98</sup> Further, gender and trade advocates participated in the Mexican Action Network on Free Trade (RMALC) coalition against NAFTA.<sup>99</sup> Women's NGOs were also involved in the successful broad-based civil society efforts against the Multilateral Agreement on Investment (MAI) in 1998,<sup>100</sup> against 'fast-track' authorization in 1997 for the Clinton Administration to extend NAFTA membership,<sup>101</sup> for a 'social-labour declaration' at the December 1998 Mercusor summit,<sup>102</sup> and against the proposed Free Trade Area of the Americas (FTAA).<sup>103</sup> 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.<sup>104</sup> Finally, gender and trade advocates were involved in opposition to the 1999 WTO Ministerial in Seattle. The 'People's Assembly' held on 29 November 1999 included a session titled 'Women Say No to WTO!'<sup>105</sup>

Steinkopf Rice's analysis identifies key themes advocated by gender and trade organizations that support this contention: 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.<sup>106</sup> Each of these themes is critical of neoliberalism or assertive of the need for gendered trade and economic analysis. More than this, Steinkopf

<sup>96</sup> Debra Jacqueline Liebowitz, *Gender and Identity in an Era of Globalization: Transnational Political Organizing in North America* (Rutgers 2000) 74–75.

<sup>97</sup> *Ibid* 97–99.

<sup>98</sup> *Ibid* 93–97, 229–230.

<sup>99</sup> *Ibid* 228.

<sup>100</sup> *Ibid* 225–226.

<sup>101</sup> *Ibid* 225.

<sup>102</sup> *Ibid*.

<sup>103</sup> *Ibid* 229.

<sup>104</sup> *Ibid*.

<sup>105</sup> LeeRay Costa, 'Women Say No to WTO' (2000) 4(2) *Gender, Technology and Development* 315–322.

<sup>106</sup> Julie Steinkopf Rice, 'Viewing Trade Liberalization through a Feminist Lens: A Content Analysis of the Counterhegemonic Discourse of Gender and Trade Advocacy Groups' (2010) 30(3) *Sociological Spectrum* 289–316.

Rice shows that the nascent gender and trade movement of the late 1980s and 1990s had developed to become a 'global movement' by the mid-2000s. Her research records twenty-one distinct 'gender and trade advocacy groups'<sup>107</sup> worldwide, of which thirteen were in the global north, but seven were in the global south, and one was entirely internet-based.<sup>108</sup>

The challenge, however, is that this movement, developing for over twenty years, had taken shape 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 towards neoliberalism. Regardless of the merits of the arguments, the development and meeting of these oppositional forces made progress towards 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 towards neoliberalism that had produced foundational insights of gender and trade analysis also produced an environment for interaction with the WTO that militated against the adoption of the insights within global trade governance. This was mostly because in many cases those who advanced the insights of gender and trade analysis were opposed to the very existence of the WTO and its body of principles and rules. In such a case, where to begin a dialogue, let alone a negotiation? It was impossible.

Thus, although the antagonism that contributed to this disjuncture was legitimate, essential, and valuable, it came with costs. As Nager and others warned 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'.<sup>109</sup>

<sup>107</sup> 'Gender and trade advocacy group' is Steinkopf Rice's term; the discussion uses her terminology. *Ibid.*

<sup>108</sup> *Ibid.* 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 seventeen in the north; however, her figures are contradicted in this regard by the information on the websites she gives (or, in a few cases, updated versions of the websites).

<sup>109</sup> Richa Nagar, Victoria Lawson, Linda McDowell and Susan Hanson, 'Locating Globalization: Feminist (Re)readings of the Subjects and Spaces of Globalization' (2002) 78(3) *Economic Geography* 257–284, 269.

## 4.5 INTERNATIONAL LAW

4.5.1 Reason 5: The WTO Dispute Settlement System as *Lex Specialis* – Implications for Women's Rights as Human Rights

WTO dispute settlement operates as *lex specialis*, a specialized sub-system of law occupying a distinct place in the interrelationships of international law. This appellation is the subject of an extended controversy in international law literature known as the Marceau–Pauwelyn debate. To simplify, Marceau argued that the dispute settlement mechanism of the WTO is *lex specialis*, whereas Pauwelyn argued that it constitutes treaty law operating normally under the rules of public international law.<sup>110</sup> However, the stronger arguments lie with Marceau's understanding that WTO dispute settlement is *lex specialis*. This is of significance to the representation of women and women's interests 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 the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)<sup>111</sup> in 1980.

The question of *lex specialis* is crucial because, in international law, '*lex specialis derogat generalis*' – 'specialized law derogates from general law'.<sup>112</sup> This means that in cases of conflict, the provisions of the specialized system take precedence over general treaties. Moreover, '*lex posterior generalis non derogat priori specialis*' – 'later general law does not derogate from prior special

<sup>110</sup> The following comprise the basics of the debate: Gabrielle Marceau, 'WTO Dispute Settlement and Human Rights' (2002) 13(4) *European Journal of International Law* 753–814; Joel Trachtman, 'The Domain of WTO Dispute Resolution' (1999) 40(2) *Harvard International Law Journal* 333–378; Pieter Jan Kuijper, 'The Law of GATT as a Special Field of International Law – Ignorance, Further Refinement or Self-Contained System of International Law' (1994) 25 *Netherlands Yearbook of International Law* 227–257; Joost Pauwelyn, 'The Role of Public International Law in the WTO: How Far Can We Go?' (2001) 95(3) *American Journal of International Law* 535–578; Mariano Garcia Rubio, 'Unilateral Measures as a Means of Forcible Execution of WTO Recommendations and Decisions' in Laura Picchio Forlati and Linos-Alexandre Sicilianos (eds), *Les sanctions économiques en droit international / Economic Sanctions in International Law* (Martinus Nijhoff Publishers 2004); Petros C. Mavroidis, 'Remedies in the WTO Legal System: Between a Rock and a Hard Place' (2000) 11(4) *European Journal of International Law* 763–813; David Palmeter and Petros C. Mavroidis, 'The WTO Legal System: Sources of Law' (1998) 92 *American Journal of International Law* 398–413.

<sup>111</sup> Convention on the Elimination of All Forms of Discrimination against Women, 3 September 1981, 1249 UNTS 13 (not reproduced in ILM).

<sup>112</sup> Marceau, 'WTO Dispute Settlement and Human Rights' (n 110) 794.

law'.<sup>113</sup> 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.

For Marceau, the WTO treaty defines both the applicable law and the jurisdiction and competence of panels with reference to the WTO agreements. As she states, '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'.<sup>114</sup> Since the WTO Dispute Settlement Understanding (DSU) is a *lex specialis* system, international human rights treaties cannot be invoked in a WTO or Appellate Body panel to justify the violation of a WTO obligation, although the contradiction can be highlighted. That is to say, the WTO and Appellate Body panels are not empowered to find that a human rights violation, as such, justifies the violation of a WTO obligation.<sup>115</sup> This means that the identification of women's rights with human rights cannot be a directly effective legal strategy for achieving the representation of women and women's interests at the WTO.

This is significant because the definition of women's rights as human rights has long been a strategy of women's organizations and accepted as fact by many. As Dorsey notes, it can be traced at least to the advent of CEDAW in 1979, and 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.<sup>116</sup>

At a basic level, the structures exist in international law to facilitate and motivate the incorporation of gender concerns within the WTO. As Table 4.1 shows, a number of international agreements and conventions prohibit discrimination based on gender and are supported by the requirement of the 1969 Vienna Convention on the Law of Treaties (VCLT) to 'interpret in good

<sup>113</sup> *Ibid.*

<sup>114</sup> *Ibid.* 764.

<sup>115</sup> *Ibid.* 767.

<sup>116</sup> These four conferences together constituted a crucial milestone in the development of the strategy of identifying women's rights as human rights. For a fuller discussion, see Ellen Dorsey, '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* (Reinner 2005) 418–430.

TABLE 4.1 *Fundamental international agreements and conventions that prohibit all forms of discrimination on the basis of gender*


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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

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faith'.<sup>117</sup> As former Director-General 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)'.<sup>118</sup> The problem is that the agreements in Table 4.1 do no more than prohibit discrimination based on sex/gender; they impose no positive requirement for action. Further, they do not sway the argument concerning *lex specialis* from Marceau's position to that of Pauwelyn. WTO panellists and Appellate Body members remain barred from altering WTO agreements and from determining anything more than that an insoluble conflict exists between the obligations of a given state as a WTO member under WTO law, and the same state's obligations under international law that is not *jus cogens*.<sup>119</sup>

<sup>117</sup> Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, Art. 31.

<sup>118</sup> WTO, 'Understanding the WTO: Cross-Cutting and New Issues – Labour Standards: Consensus, Coherence and Controversy; Consensus on Core Standards, Work Deferred to the ILO' <[www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/beys5\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/beys5_e.htm)> accessed 8 May 2022.

<sup>119</sup> *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'. See Cornell University Law School's Legal Information Institute, 'Jus Cogens' <[www.law.cornell.edu/wex/jus\\_cogens](http://www.law.cornell.edu/wex/jus_cogens)> accessed 8 May 2022. See also Ian Brownlie, *Principles of Public International Law* (Oxford University Press 5th ed. 1998); James Crawford (ed) *Brownlie's Principles of Public International Law* (Oxford University Press 8th ed. 2012) 594–597. For an excellent overview, see also Rafael Nieto-Navia, 'International Peremptory Norms (*Jus Cogens*) and International Humanitarian Law' in Lal Chand Vohrah et al. (eds) *Man's Inhumanity to Man* (Brill Nijhoff 2003) 595.

There is no parallel amongst other institutions of global economic governance to the *lex specialis* DSU of the WTO. Even the UN Convention on the Law of the Sea (UNCLOS) does not comprehend a mechanism for dispute settlement as robust, strong in compliance, or wide in its reach as the WTO Dispute Settlement Mechanism (DSM) (when operating as intended – i.e., prior to its present crisis). For their parts, neither the IMF nor the World Bank incorporates a robust, legalistic mechanism for dispute settlement; nor do they meet Marceau’s criteria to be considered *lex specialis*, as described above. 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 and structurally resistant to human rights discourse to a greater degree than its peer institutions of global economic governance, 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 such institution.

#### 4.5.2 Reason 6: WTO Law Is Primarily Hard Law

WTO law is primarily hard law, which necessarily increases the difficulty and perceived risk of introducing any reform beyond that of any organization comprised to a greater degree of soft law. Following Abbott et al., Davidson 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.<sup>120</sup> 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 the settlement of disputes by a more judicial or more diplomatic model.<sup>121</sup> Similarly, Abbott, Keohane, and others 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 which the authority to implement, interpret, and enforce the rules is delegated.<sup>122</sup> The WTO agreements are considered primarily hard law because they detail their terms and obligations very precisely, they are binding upon WTO members with relatively

<sup>120</sup> Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter, and Duncan Snidal, ‘The Concept of Legalization’ (2000) 54(3) *International Organization* 401–419, 401–404; Paul J. Davidson, ‘The Role of Law in Governing Regionalism in Asia’ in Nicholas Thomas (ed) *Governance and Regionalism in Asia* (Routledge 2008) 224–233.

<sup>121</sup> Davidson, ‘The Role of Law in Governing Regionalism in Asia’ (n 120) 233.

<sup>122</sup> Abbott et al., ‘The Concept of Legalization’ (n 120) 401.

little flexibility of application or interpretation, and they are enforced by a robust, judicial, dispute settlement process with clear sanctions for contravention. In terms of Davidson's gradation, WTO law is far closer to 'binding', 'precise', and 'judicial'. It is difficult to experiment with reform in a hard-law structure, since all members know that any hard-law reform must entail a clear and enforceable commitment. This means hard-law reform is inherently risky and makes it far more difficult to convince WTO members to introduce initiatives such as gender mainstreaming.

By contrast, APEC was able to incorporate gender mainstreaming through-out its policy initiatives fundamentally because its soft-law structure made it possible to do so. The recommendations from the 1998 APEC Ministerial Meeting on Women are illustrative of the soft-law nature of APEC gender mainstreaming commitments. For example, APEC is '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';<sup>123</sup> 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.<sup>124</sup>

These were important initiatives of significant potential that nevertheless were soft law; framed in the language of commitments, they actually committed APEC members to very little. Only the recommendation to implement gender impact analysis mandates action, and the action in that case is further study. Moreover, each recommendation requires only that each APEC member adjust policy in the required direction to their own satisfaction. This is, however, no disparagement. 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 members to agree to the recommendations. In this way, the representation of women and women's interests was made legitimate as a topic of discussion and negotiation within APEC. This

<sup>123</sup> APEC, 'Joint Ministerial Statement' APEC Ministerial Meeting on Women (15–16 October 1998) para. 27 c.

<sup>124</sup> *Ibid.* para. 27.

constituted a meaningful advance for women within APEC and 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 the WTO, similar progress towards ‘gender mainstreaming’ has proven much more difficult to attain. To a significant degree, this is because WTO agreements tend towards hard law, are made harder to attain by the requirement for consensus, and carry a greater risk for the members/contracting parties.

#### 4.6 CONCLUSION

In summary, the six reasons describe how the institutional structure of the WTO, as well as the nature of its interactions with civil society and the wider framework of international law, have made it such a difficult case for the representation of women and women’s interests. Taken as a whole, they provide an understanding of why the WTO is resistant to the representation of women and their interests during an era in which gender mainstreaming has come to be widespread within institutions of global governance.

However, as developed by Fabian,<sup>125</sup> within these reasons lie clues to how the WTO can overcome its institutional resistance. Specifically, the hybridization of soft law and hard law can provide the openness, flexibility, and risk reduction necessary to introduce policies, declarations, and agreements that advance the representation of women and women’s interests.<sup>126</sup> Equally, Aid for Trade can provide a locus for policy innovation and research towards the same end,<sup>127</sup> and WTO declarations and initiatives since 2017 give hope that the WTO Secretariat can take a more active role in researching measures to represent women and their interests through trade governance.<sup>128</sup>

<sup>125</sup> Fabian, ‘Towards a Theory of Democratic Global Economic Governance’ (n \*).

<sup>126</sup> *Ibid* 429–484.

<sup>127</sup> *Ibid* 460–484.

<sup>128</sup> WTO, ‘Joint Ministerial Declaration’ (n 6). Again, these are the Joint Declaration on Trade and Women’s Economic Empowerment, the Gender Focal Point, the Informal Working Group on Trade and Gender, and the International Trade and Gender Research Hub.