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MAKING THE INTERNATIONAL TRADE REGIME WORK FOR GENDER EQUALITY

Dissertation submitted by

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in fulfilment of the requirements for the degree of

Doctor of Philosophy

in the School of Law at the University of the Witwatersrand

under the supervision of Professor **Jonathan Klaaren** and Dr **Adila Hassim**

Declarations

I declare that this dissertation is my own, unaided work. I further declare that this dissertation has never before been submitted for any degree or examination in any university.

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This dissertation has been submitted with our permission as supervisors appointed by the University.

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CHAPTER I

INTRODUCTION

1. BACKGROUND OF THE STUDY

Studies over the past two decades have given increasing attention to the gender dimensions of international trade. These studies show that the international trade regime[1] affects gender equality in various ways, and that the regime does not have similar impact on men and women.[2] For instance, trade in services such as tourism, finance and information technology have resulted in greater integration of the female work force in the sector.[3] Similarly, the share of female workers in light-manufacturing sectors, in particular in export processing zones, has significantly increased.[4] On the negative side, the growth in export-crop production has lead to the displacement of female subsistence farmers in the agrarian economies of Africa, Asia and Latin America.[5] And further, cheap imports of certain products, such as staple crops and textiles, have displaced

[1] For the purposes of this study, 'the trade regime' refers to the legal and institutional structures of the World Trade Organisation (WTO).

[2] These studies include: M Williams *Gender Mainstreaming in the Multilateral Trading System: A Handbook for Policymakers and Stakeholders* (2003); L Beneria *Gender, Development and Globalization: Economics as if People Mattered* (2003); M Fontana et al *Global Trade Expansion and Liberalization: Gender Issues and Impacts* (1998); S Jokes & A Weston *Women and the New Trade Agenda* UNIFEM (1994); Z Randriamaro *Gender and Trade Bridges* (2006); M Fontana 'The Gender Effects of Trade Liberalization in Developing Countries: A Review of the Literature' Discussion papers in economics, University of Sussex (2003); A-N Tran-Nguyen & AB Zampetti *Trade and Gender: Opportunities and Challenges for Developing Countries* UNCTAD (2004).

[3] See, for example, UN Conference on Trade and Development (UNCTAD) 'Expert Meeting on Mainstreaming Gender in order to Promote Opportunities' TD/B/COM.3/EM.14/2 28 August 2001.

[4] See, for instance, Nordas, reporting on employment gains for women from trade liberalisation from studies in five developing countries. HK Nordas 'Is Trade Liberalization a Window of Opportunity for Women?' WTO Economic Research and Statistics Division Staff Working Paper (2003).

[5] See for instance Z Garcia, *Impact of Agricultural Trade on Gender Equity and Rural Women's Position in Developing Countries* (2004).

women's agricultural produce from local markets, and the many female workers concentrated in the textile sector.[6]

The United Nations (UN), based on the evidence of the gendered effects of trade from these studies, has expressed the need for initiatives in trade-policy making to identify the social effects of trade beyond the interests of producers, to include broadly conceived welfare measures.[7] This was echoed in the Beijing Platform for Action at the Fourth World Conference on Women, which called on governments to ensure that domestic policies related to international trade agreements should not have an adverse impact on women's new and traditional economic activities.[8] Similarly, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) expert committee has urged governments as well as international organisations to mainstream gender in trade and financial institutions to maximise the benefits for women from trade activities.[9] The Platform for Action further called on the UN to give consideration to inviting the World Trade Organisation (WTO) to consider how it might contribute to the implementation of the Platform for Action.[10]

In light of these calls, in this thesis I ask the question: 'Can the international trade regime promote the objective of gender equality?' The objective of the study is to explore the relationship between gender-equality concerns and the operations of the trade regime so as to examine ways whereby the regime can be utilised to promote the objective of gender equality. I argue in this thesis that gender is a cross-cutting issue in many of the regime's areas of competence, including, and in particular, the current Doha development round.

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[6] For a detailed analysis of the gender effects of international trade regulation, see the 1999 UN analysis of statistics on women's participation in the global economy. UN ESCOR 1997 session 33rd meeting UN.DOC.A/52/3.
[7] UN *1999 World Survey on the Role of Women in Development: Globalization, Gender and Work* (1999).
[8] UN *Report of the Fourth World Conference on Women, Beijing 1995* Annex II U.N. DOC. A/CONF.177/20 (1995) 165(k).
[9] UN *Commission on the Status of Women, Report on the Forty-Sixth Session 2002* U.N. DOC. E/2002/27-E/CN.6/2002/13 (2002).
[10] UN (note 8 above) 343.

That gender equality is a development goal, or is an extricable part of development, is no longer a contested issue. International economic institutions such as the World Bank have taken gender-equality goals on board on the premise that development cannot be achieved without giving due consideration to gender inequality.[11] In fact, gender inequality is now widely recognised as one obstacle to achieving development. In light of this, an assessment of the current development round necessarily triggers the question: is gender equality a consideration or a factor considered in the design and implementation of the Doha agenda and that of the trade regime as a whole? How does gender fit into the development agenda of the trade regime? A large part of this thesis is dedicated to analysing this issue and establishing the close interaction between gender-equality concerns and the operations of the trade regime.

2. THE INTERNATIONAL TRADE REGIME AND GENDER EQUALITY

In the jurisprudence of the WTO, the issue of gender is hardly raised. The one instance where the language of gender made it in the jurisprudence is in the *Hormones* case.[12] In the report of the Appellate Body (AB) of the WTO on this case,[13] the potential cancer-causing effects of hormone-treated beef on women was raised. The AB, although acknowledging the possibility of hormones leading to breast cancer, downplayed the danger by pointing out that, according to the evidence submitted in the case, only a very small fraction of the total population of women would be affected.[14]

[11] See, for instance, the World Bank's policy document on 'Engendering Development: Through Gender Equality in Rights, Resources, and Voice' (2001).
[12] See the Appellate Body Report on the *Hormones Case*. WTO Appellate Body Report on European Community Measures Concerning Meat and Meat Products, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998).
[13] Ibid.
[14] Ibid.

This decision by the AB can be seen as one instance where a 'kind of gender analysis', though in a very limited sense, occurred within the WTO.[15] Given that breast cancer affects more women than men, the very fact that the AB went to the trouble of analysing the adverse effect of the hormone in question on women as a group shows its willingness to recognise that there could indeed be a gender-differentiated outcome. The logical conclusion of this analysis would be that the AB has the potential to find in favour of gender-differentiated impacts of trade rules as well.[16]

Despite the absence of gender issues within the jurisprudence of the WTO, academic debate as well as activist writing on the relationship between gender and trade is increasingly gaining momentum. The debate on gender and trade occurs along the same lines as the debate on the intersection or relationship between trade and non-trade issues, such as the environment, labour and human rights. This debate is usually understood as a contest between trade and non-trade issues. For example, should trade rules trump norms on human rights, the environment or gender? Or should trade give way to other objectives, such as advancing gender equality, thereby allowing states to override their trade commitments to advance other policy objectives. When these issues arise in the context of the trade regime, they appear to be a question regarding its proper boundaries.[17]

A brief review of the literature indicates that the scholarship on gender and trade is a recent development.[18] Their relationship has been examined from various perspectives. For the most part, however, the debate has focused on pointing out

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[15] There are cases where gender-disaggregated data have been called for and have also been used. See WTO Background Data Press 167_6 'Employment can be economic activity' WTO Services and Agriculture Negotiations Press 167 <http://www.wto.org/french/news_f/pres00_f/pr167_f.htm> 21/11/08.

[16] Meaning that if the effect of the hormones were found to have an adverse gender-differentiated impact, the rules through which the use of the hormones is to be authorised would end up having unfair gender-differentiated impact as well.

[17] ATF Lang 'Reflecting on "Linkage": Cognitive and Institutional Change in the International Trading System' (2007) 70 *The Modern Law Review* 523, 530.

[18] McGill, for example, states that trade-and-gender scholarship came into the picture in the past two decades. E McGill 'Poverty and Social Analysis of Trade Agreements: A More Coherent Approach?' (2004) 27 *Boston College Int and Comparative LR* 371, 411.

the substantive relationships between gender relations and the international trade regime. It is mostly a rebuttal of the widely perceived view that takes international trade as a gender-neutral process of transforming national inputs into internationally traded items.

Depending on the points of emphasis, at a very general level two different categories of opinion on the gender-trade interaction can be discerned from the ongoing debate: that international trade positively influences gender equality, and that it has adverse impacts on the lives of certain categories of women. The contribution of the expansion of trade to the employment of women in the manufacturing and services sectors is often raised as one positive outcome of trade liberalisation from a gender perspective.[19] In the manufacturing sector in particular, trade is found to provide women with employment opportunities, and this is believed to have the effect of empowering them.[20] However, questions have been raised about the real gains for women from these kinds of employment opportunities. This is because the kind of employment that trade liberalisation creates is characterised by low pay, poor and harsh working conditions, and informal jobs with little or no security.[21] In addition, there is the argument that these new employment opportunities do not come with any reductions in women's reproductive roles, and thus add to their work burden.[22]

The second aspect of the gender-trade interaction relates to the adverse impact of trade on the lives of women. Generally these impacts can further be classified into two overlapping categories. The first comprises the adverse impacts of the increased trade on the lives of women. One central objective of the trade regime is to increase trade by removing trade barriers across borders. This eventually leads to an increase in the volume, as well as value, of internationally trade items. Such an increase in trade would impact negatively on the lives of women in a variety of

[19] S Jokes & A Weston *Women and the New Trade Agenda* UNIFEM (1994).
[20] Ibid.
[21] N Cagatay *Trade, Gender and Poverty* UNDP (2001).
[22] Ibid.

ways. For example, increased trade in the agricultural sector may encourage large-scale production of export crops, which could lead to the area cultivated by women subsistence farmers being diminished.[23] In some instances, it has led to women being evicted from their farm land through a policy supported by governments. These outcomes force women into off-farm jobs, which do not necessarily increase their real income.[24] In the services sector, too, women are likely to lose out in the process of expansion as a result of escalating prices.[25]

The second category comprises the implications that trade rules and measures by themselves may have on gender equality. These mainly come into play where a particular trade rule comes into conflict with a measure aimed at advancing gender equality. Accordingly, domestic policies and measures of governments aimed at promoting gender equality may be challenged by multinational corporations as unfair barriers to trade.[26] There are also tensions between promoting gender equality and the obligations of states to remove barriers to trade under the international trade regime.[27] The implication is that trade rules may restrain the ability of governments to implement policies directed at gender equality.[28]

How can one address these gender concerns that arise in relation to the trade regime? How can one capitalise on the positive gains for women from trade? Experience shows that reforms or revisions aimed at promoting other non-trade objectives within the regime have been carried out by relying on the very obligations that the parties have undertaken in the legal instruments governing the regime. A very good example here would be the case of the environment, which is to some extent addressed within the trade regime by using the WTO agreement

[23] Z Randriamaro *Gender and Trade Overview Report* BRIDGE (2006) 20-24.
[24] Ibid.
[25] S Walker 'Human Rights, Gender and Trade' in Tran-Nguyen & Zampetti (note 2 above).
[26] P Sparr 'A Gender Primer of Trade and Investment' International Gender and Trade Network (IGTN) <http://www.igtn.org/pdfs/80_Primer.pdf> 12/06/06.
[27] AB Zampetti 'The Impact of WTO Rules on the Pursuit of Gender Equality' in Tran-Nguyen & Zampetti (note 2 above).
[28] Ibid.

itself as a basis for pursuing environmental concerns. For example, the establishment of a committee on trade and environment is justified by the obligations the members of the WTO have undertaken to conduct trade in accordance with the objective of sustainable development. The Ministerial Decision that established this committee in 1994 states:

> Ministers, [r]ecalling the preamble of the Agreement establishing the World Trade Organisation ... which states that members' "relations in the field of trade and economic endeavor should be conducted … 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 …" decide to direct the first meeting of the General Council of the WTO to establish a Committee on Trade and Environment …[29]

Experience also shows that revisions or reforms aimed at addressing non-trade concerns within the regime can be triggered by strong public demand or outcry. The public-health issue raised in relation to the Trade-Related Aspects of Intellectual Property Rights (TRIPS) is a good example here.[30] The adoption of the Declaration on TRIPS and Public Health, which accorded some flexibilities in the application of intellectual property rights for developing and least-developed countries is premised upon the need for the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) to be part of the wider national and international action to address the gravity of the public-health problems such as HIV/AIDS, tuberculosis, malaria and other epidemics afflicting many of these countries.[31]

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[29] For a detailed analysis of how environmental issues are addressed within the WTO, see WTO 'Trade and Environment' <http://www.wto.org/english/tratop_e/envir_e/envir_e.htm> 12/12/08.
[30] The issue of public health in relation to TRIPS is discussed in detail in Chapter VI of the thesis.
[31] See WTO 'Declaration on the TRIPS Agreement and Public Health' WT/MIN(01)/DEC/2 20 November 2001.

However, these approaches have not been utilised for the purpose of taking up gender equality as an agenda that can be addressed within the trade regime. I argue in this thesis that the legal instruments of the WTO implicitly identify gender equality as a legitimate goal of the regime, and this justifies the due consideration of gender issues within it. Further, I contend that the demand for the regime to addresses the concerns of those whose interests are affected by the operations of trade has recently been gaining momentum. Women, in particular poor women living in developing and least-developed countries, fall in this category. This provides the justification for the regime to give due consideration to gender concerns that arise in relation to international trade. There is a lack of literature employing these approaches to address the various aspects of this issue. This study attempts to employ these approaches and examines how gender equality can be located as a legitimate objective of the trade regime.

3. ISSUES ADDRESSED IN THE STUDY

The main question that goes to the heart of the research envisaged in this study is to examine whether the international trade regime can be utilised to promote the objective of gender equality. This question is to be examined in light of the linkage framework which addresses the intersection between trade and what are called 'non-trade concerns' within the trade regime. In answering this main question, the research will address the following questions.

- How does the 'trade and' debate, which forms the broader framework for analysing the interaction between trade and other issues – which may be issues affected by trade or issues affecting trade – inform the trade-gender interaction?

- What is the relationship, at both the theoretical and legal levels, between the trade regime and gender equality? What do feminist theories say about

the trade regime? How do the legal norms governing both fields interact – are there conflicts? Do they complement one another?

- What does gender equality constitute? What are the standards employed to assess the effect of trade rules on gender equality? How is the gender issue in international trade framed?

- Is gender equality a legitimate objective, forming part of the goals or purposes of the regime? Do the stated objectives of the international trade regime refer either explicitly or implicitly to gender-equality concerns? If so, what are the modalities or mechanisms to be employed to promote gender equality through the trade regime?

4. RESEARCH METHODS AND SCOPE OF THE STUDY

This study largely employs legal research methods. In particular, it relies on several categories of methodologies utilised in international economic law. These include doctrinal analysis, normative analysis and empirical or socio-legal methods. Doctrinal analysis mainly involves the use of treaty provisions and case law to explain the law.[32] The aim is to engage in legal interpretation to clarify the law by looking into authoritative texts.[33] In Chapter II of the thesis I rely extensively on doctrinal analysis to determine the purposes of the trade regime. I look into the establishing agreement of the WTO as an authoritative text for understanding the goals and purposes of the regime. I rely on the analysis of primary sources, such as the various WTO agreements and other international instruments, as well as cases from the Dispute Settlement Body (DSB) of the WTO.

[32] Shaffer lists five categories of legal methods used in international economic law scholarship. These are doctrinal analysis, normative advocacy, empirical approaches, theoretical exposition and the new legal realism approaches. See G Shaffer 'A New Legal Realism: Methods in International Economic Law Scholarship' in D Arner et al (eds) *International Economic Law: The State and Future of Discipline* (2008) 29, 29-30.
[33] James Hogg et al *Research Methods for Law* (2007) 3.

In addition to examining the various texts of the WTO, in this thesis I set out to advance the objective of gender equality through the instrumentality of the trade regime. In line with this, I examine how the WTO agreements need to be interpreted and how the institutional structure needs to be reformed to advance the objective of gender equality. In this respect, normative analysis or advocacy informs another legal method of the research. This particular methodology is used in international economic-law scholarship. It is used to advance a particular normative goal and then address how the institution, treaty or case law needs to be reformed, revised or interpreted to advance that normative goal.[34]

Empirical or socio-legal analysis constitutes the third category of methodology employed in this thesis. This strand of legal method uses interdisciplinary approaches to study law in its broader political and social contexts.[35] It is frequently employed in international economic-law scholarship to examine the relationship between trade and what are called 'non-trade' issues, such as the environment, labour and human rights.[36] As such it is the most appropriate methodology for examining the relationship between international economic law and gender, which constitutes the subject matter of this study. In the various chapters of the thesis I examine the relationship between gender issues and international trade regulation through the WTO. For instance, I look into how feminist theories view the trade regime by engaging in feminist analysis of the regime. This is a clear example of interdisciplinary analysis. I rely on secondary sources for this socio-legal analysis. Sources from published academic and research works, including journal articles, books, internet sources and relevant reports are used as secondary sources.

For the most part, this study engages in legal analysis. This form of analysis helps to identify areas of tension between international trade law and other legal

[34] Shaffer (note 32 above) 30.
[35] Hogg et al (note 33 above) 4-6.
[36] Shaffer (note 32 above) 32-34.

frameworks that promote gender equality. It is hoped that the various frameworks developed and employed in this study for carrying out legal analysis may be useful to various stakeholders, such as trade negotiators and other government officials. These frameworks are very important to inform debates at both the national and international levels about the proper role of trade in development strategies in general, and gender-equality objectives in particular.[37]

This study does not delve into examining the effect of regional trade agreements on the lives of women. Similarly, the effect of bilateral trade agreements falls outside of the scope of the study. The scope is limited to addressing the institutional and legal structures of the WTO. The various agreements of the WTO will therefore form the focus of analysis.

5. OUTLINE OF CHAPTERS

The current chapter has given a background and an introduction to the subject matter of the study: gender equality and the international trade regime. In addition, the chapter outlines the overall objectives of the study.

Chapter II looks into the issue of linkage in international trade law. It analyses linkage in light of the main research question framed in the study. It begins by providing a working definition of linkage as it relates to the trade regime. It then analyses the linkage issue from the perspective of two different but related phenomena that result in the linkage of non-trade concerns to the trade regime. These are power or competence allocation and the objectives of the regime, on the one hand, and the legitimacy of the regime, on the other. The chapter concludes by showing how the linkage debate may be used to understand the purposes of the regime in contemporary times.

[37] McGill draws similar conclusions regarding legal analysis tools that are used to carry out legal analysis of trade agreements from poverty and development perspectives. See McGill (note 18 above) 371-372.

Chapter III inquires into the relationship between gender equality and the trade regime from the perspective of feminist theories. It is an attempt to establish the relationship between gender and trade at the theoretical level. Apart from establishing the trade-gender nexus, this chapter examines how the exercise of linking a gender-equality agenda to the trade regime fares from the perspective of feminist analysis. It begins by mapping out the analytical frameworks to be employed to draw a feminist perspective of international trade law. Based on these frameworks, it then proceeds to construct a feminist analysis of the trade regime. It thus examines what is possible, permissible or desirable as far as creating a link between gender equality and the trade regime is concerned in light of feminist analysis.

Chapter IV aims at establishing the relationship between gender and international trade at the level of legal rules. In this chapter, an attempt is made to investigate how changes in trade and economic processes, as reflected in legal rules, impact on gender equality. The analysis pursued in this chapter is based on the legal frameworks governing international trade and the various instruments dealing with gender-equality issues. The legal analysis looks into the interactions between the governing legal instruments/documents in both fields. Two specific trade agreements, the Agreement on Agriculture (AOA) and the General Agreement on Trade in Services (GATS), form the subject of analysis. Legal instruments dealing with gender-equality concerns range from treaties and covenants at both the international and regional levels to national laws of various types. Two sets of human rights of women enshrined in many of these legal instruments, the right to food and the right to health, will be examined in light of their interaction with the two trade agreements mentioned above. The legal analysis goes further to investigate how the tension between GATS requirements and the right to health, in particular access to health-care services, plays out in the South African setting. The South African National Health Act forms the case study for the chapter. Some of the questions that this chapter addresses include: Does one instrument undermine the objectives and existing effectiveness of the other? Does one

instrument make the conditions for the realisation of the objectives of the other impossible or difficult? Do the instruments in both fields complement or support one another? The chapter analyses these question in light of the AOA and GATS.

Based on the analysis of the relationship between gender and trade in Chapters III and IV, Chapter V looks into two points which constitute possible gender issues in international trade regulation. These are the effect of trade regulation on women in poverty and its effect on the reproductive role of women. Based on these two issues, the chapter conceptualises gender equality in the context of trade liberalisation.

Chapter VI attempts to link gender-equality concerns to the international trade regime. The argument in this chapter is formulated in the following manner. Firstly, because the trade regime has the objective of raising of standards of living and the objective of sustainable development and further, these objectives necessarily entail considerations of gender-equality concerns, gender concerns may be implicitly read as constituting one of the objectives of the trade regime. Secondly, the legitimacy of the trade regime demands that it addresses the concerns of those whose interests are affected by the operations of trade. In order to protect its credibility and legitimacy, the regime is required to deal with issues of gender equality. These two points form the basis for linking gender-equality concerns to the trade regime. These two arguments are developed further in this chapter. The chapter then examines how the linkage between gender-equality concerns and trade regulation can actually be implemented to give it practical effect in the operations of the regime.

Chapter VII provides the conclusions and the main findings of the study.

TRADE NEGOTIATIONS AND THE CURRENT STATE OF AFFAIRS

Before delving into the main subject matter of this study, it would be important to provide the context within which the very issue of gender and trade arise. This is the structural context of trade negotiations and in particular the current state of affairs in the WTO negotiations.

The multilateral trading system of the WTO is characterized as rules based system where negotiations between member states define the contents of these rules. The discussion of a 'non-trade' or social issue such gender equality with in the context of international trade regulation raises some questions about the dynamics underlying the negotiation that lead to the inclusion or exclusion of different topics from the rules and norms of the trading system. One such question is how do some issues make it to the negotiating table and/or agenda while others fail to do so? What is the nature and dynamics of trade negotiations?

The rules and norms enshrined in the various agreements of the WTO are representative of the position of the member states on a particular topic. And behind the issue of position lies the power question. Those member states having the economic and/or political strength have the power to determine the agenda and ultimately the design of trade norms in one way or another. One commentator has expressed this dynamics as a negotiating context characterized by unequal power relations.[38] Drahos further asserted that the pursuit of self interest by states dominates the negotiating process and thereby may not actually result in welfare enhancing outcome.[39] He concludes, in this process, weaker states may incur further losses.[40] This view can be substantiated by the negotiating history of the

[38] P Drahos When the Weak Bargain with the Strong: Negotiations with in the World Trade Organizations (2003) 8 *Int'l Negotiations* 79, 82.
[39] Ibid.
[40] Ibid.

WTO. A very good example is the introduction of intellectual property rights regime with in the WTO framework.[41]

The power dynamics in the context of the WTO reflects itself in different ways. Economically strong states may gear the negotiations in the direction that is beneficial to advancing their interests. Just as strong states may flex their power in the negotiating table, the relatively weaker states may form coalitions and achieve similar objectives. The latter phenomenon is becoming an important feature of multilateral trade negotiations in recent times. For instance, the failure of the Cancun Ministerial in 2003 is in part attributed to the collective position adopted by developing countries.[42] These countries were poised to be more aggressive because of their view that the expansion of a WTO agenda would end up excluding issue which are thought to be important for their economic interests.[43]

With this understanding of the dynamics of trade negotiations, it is important to note that any attempt to introduce and pursue a given objective within the trade regime must gain the backing of some number of member states that can push the agenda. It is imperative to get the political will and endorsement of member states that have the power to sway decisions in the negotiating table. To this end, those engaged in pushing new objectives and policy goals into the framework of the trade regime should strive to align their cause to the immediate interests of at least some particular member states.

It is the same negotiating dynamic – the power imbalance – that brought the Doha Development Agenda which was the result of the current round of trade negotiations, the Doha Round. Previous rounds of trade negotiations have resulted in disappointments to many of the developing country members of the WTO. In

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[41] Ibid. Several commentators cite TRIPS a very good example of the underlying power imbalance in the WTO negotiations. For further discussions on this, see the chapter on Linkages in international trade law.
[42] See R E Baldwin Failure of the WTO Ministerial Conference at Cancun: Reasons and Remedies http://www.ssc.wisc.edu/~rbaldwin/cancun.pdf 19/09/09.
[43] Ibid.

2001, the ninth round of trade negotiation was launched in Doha. The Doha Round came out of the Fourth Ministerial Conference. The Ministerial provided the mandate for negotiations on several subject matters which were mainly meant to addresses the grievances of developing country members of the WTO. The main areas of negotiation are in agriculture, services, market access for non-agricultural products, trade-related intellectual-property rights, anti-dumping and subsidies, regional trade agreements and dispute-settlement understanding. In addition, the mandate was provided to negotiate on implementation related issues. Implementation-related issues refer to problems raised particularly by developing countries with regard to the implementation of WTO rules that came out of the Uruguay Round of negotiations.

As many commentators have noted, the Doha Round came about due to the dissatisfaction of developing countries over the substance as well as implementation of the Uruguay Round of trade agreements. The call to rebalance the Uruguay Round outcomes led to the birth of the Doha Round, and the growing engagement of developing countries, with their 'positive agenda' of making the system work for them, led to what was to be termed the Doha Development Agenda.[44] The development agenda recognises that 'international trade can play a major role in the promotion of economic development and the alleviation of poverty'.[45] Several commentators argue that the Doha Round has placed development and poverty alleviation at the centre of the work of the trade regime.[46] It is against this structural and current affairs background that the remainder of this thesis investigates the achievement of gender equality through the international trade regime.

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[44] UN Millennium Project 2005 *Trade for Development* Taskforce for Trade (2005) 25.
[45] See the 2001 Doha Declaration Ministerial Conference adopted on 14 November 2001, WT/MIN(01)/DEC/1.
[46] See, for instance, D Cass *The Constitutionalization of The World Trade Organization: Legitimacy, Democracy, and Community in the International Trading System* (2005). See also Abbott (note 2 above) 18. See further K von Moltke 'Trade and Sustainable Development in the Doha Round' in M Moore (ed) *Doha and Beyond: The Future of the Multilateral Trading System* (2004) 1.

CHAPTER II

LINKAGE WITHIN THE INTERNATIONAL TRADE REGIME

1. INTRODUCTION

The underlying question this study attempts to address is whether the international trade regime can be utilised to advance the objective of gender equality and if so, how? The first task, therefore, is to see how gender-equality concerns relate to the trade regime. Is this relationship such that it may possibly lead to the consideration of gender concerns within the trade regime? To the extent that there is a relationship, what should the role of the trade regime be as far as advancing gender equality is concerned? What should be the nature and degree of consideration of gender issues by the trade regime? Would the consideration of gender concerns within the trade regime advance gender equality? These questions fit very well within the broader discourse which seeks to establish the place of other policy concerns, namely non-trade concerns, within the trade regime.

The place of non-trade concerns is directly related the boundaries of the trade regime. What should fall within the ambit of the regime, and what should be outside? This is also a question on the role and purpose of the trade regime in contemporary times, which in turn raises a number of issues.[47] Why include non-

[47] Apart from the immediate questions that arise in the realm of trade, the relationship between trade and non-trade concerns raises a bigger question regarding the role of the trade regime in global governance. According to Guzman, the success of the trade regime in the international trade arena has not been matched in other areas, such as human rights and environmental protection. Moreover, despite its success in managing trade, the impact of the regime on non-trade issues has raised serious concerns. One suggestion put forward by Guzman is to develop a strategy that would allow states to discuss trade and non-trade interests in a single forum. Given its relative success, Guzman suggests the trade regime of the WTO to be that forum. It is in this context that the role of the trade regime in global governance is raised. See A Guzman 'Global Governance and the WTO' (2004) 45 *Harvard Int L J* 303. For a detailed analysis of the role of the WTO in

trade concerns within the trade regime? How to integrate non-trade concerns within the regime? What should the degree of integration be between trade and non-trade issues and, finally, what should the outcomes of such integration be?

This chapter looks into the linkage issue in light of these questions. It begins by providing a brief introduction and a working definition of linkage as it relates to the trade regime. The chapter then analyses the linkage issue from the perspective of two different but related phenomena resulting in the linkage of non-trade concerns to the trade regime. These are power or competence allocation and the objectives of the regime, on the one hand, and the legitimacy of the regime, on the other. The chapter concludes by showing how the linkage debate may be used to understand the purposes of the regime in contemporary times.

1.1 Background and definition of linkage

The practice of creating a link between issues has been in use in international state relations for quite a long time. In international trade, too, linkage dates back to the early years of trading relations among nations. The foundational agreements on international trade, such as the bilateral friendship, commerce, and navigation treaties of the 19th and early 20th centuries comprised an amalgam of different issues.[48] Slave trade, religious freedom, labour rights and the environment have been some of the prominent issues that were linked to trade agreements among nations.[49]

The formally regulated international trading system, too, is replete with linkages. The failed International Trade Organisation (ITO), which was intended to serve as

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global governance, see GP Sampson (ed) *The Role of the World Trade Organization in Global Governance* 2001. The pros and cons of this discussion are also examined later in this chapter.

[48] S Charnovitz 'Linking Topics in Treaties' (1998)19 *University of Pennsylvania J Int Econ L* 329, 331. Roessler, arguing alone the same lines, confirms that linkages between trade and other policy areas have been a feature of the multilateral trade order. See F Roessler 'Domestic Policy Objectives and the Multilateral Trade Order: Lessons from the Past' (1998) 19 *U Pa J Int'l Econ L* 513.

[49] Charnovitz (note 2 above) 331.

an umbrella organisation for international trade, had quite broad operational spheres. Important social issues such as labour-rights protection were linked to trade.[50] Similarly, the GATT agreement of 1947 has concretised some linkages, although to a much more limited degree.[51] The general exceptions under GATT Article XX address social concerns ranging from environmental protection to human health. Linkage in international trade law gained new ground around the mid-1990s.[52] In particular, during the Third Ministerial Conference of the WTO, developed countries put a concerted effort into linking environmental protection as well as labour standards to trade negotiations.[53] This move was highly opposed by developing countries, and it also led to the emergence of critiques of the trade regime from environment and labour-rights activists.[54] Developing countries were of the view that these new 'non-trade' issues might be used for protectionist

[50] Towards the end of the Second World War, the initiative by world leaders to establish an international economic institution saw three processes: a multilateral negotiation on tariff reduction, a clause on general obligations on tariff reduction (GATT) and the establishment of the ITO. GATT was completed in 1947 and served as a forum to handle problems concerning trading relationships among signatory countries. For a general history of GATT and the WTO, see JH Jackson *The World Trade Organization Constitution and Jurisprudence* (1998).

[51] Steger, confirming this stand, argues that the issue of whether and how the trading system should deal with economic and social policies that are not strictly within the purview of the WTO has been with us since the inception of GATT. DP Steger 'Afterward: The "Trade and …" Conundrum – A Commentary' (January 2002) 96 (1) *American J of Int L* 135, 135-136.

[52] This view is shared by a number of trade scholars writing on the linkage issues in international trade. See, for instance, ATF Lang 'Reflecting on "Linkage": Cognitive and Institutional Change in the International Trading System' (2007) 70 *The Modern Law Review* 523, 530; S Cho 'Linkage of Free Trade and Social Regulation: Moving Beyond the Entropic Dilemma' (2005) 5 *Chi J Int'l L* 625; O Perez 'Multiple Regimes, Issue Linkage, and International Cooperation: Exploring the Role of the WTO' (2005) 26 *U Pa J Int'l Econ L* 735.

[53] See DW Leebron *Linkages* (January 2002) 96(1) *American J of Int L* 5, 6-7.

[54] It is important to note that the stand of the various critiques on linkage was quite different. Environmentalists, for example, were divided into two camps. Some advocated for utilising the trade regime to enforce the relatively weak international environmental standards. A similar view is shared by labour-rights advocates who claim that weak labour standards can be enforced through mechanisms such as trade sections. On the other end of the spectrum were those opposed to the incorporation of environment into the trade regulating system for fear that the system might prioritise trade liberalisation at the expense of environmental protection. Similarly, on the labour front, there was a strong fear that stringent labour standards would be used to disguise protectionist policies by developed states. For both sides of the arguments on the trade-labour linkage, see J Bhagwati 'Linkage of Trade and "Non-Trade" Issues: Competition Policy and Labour Standards' in R Pethig & M Rauscher *Challenges to the World Economy* (2003) 233-243. Similarly, Granger and Siroen look in detail into the pros and cons of labour-protection clauses in trade agreements by interest groups within both developing and developed countries. See C Granger & J-M Siroen Core Labour Standards in Trade Agreements: From Multilateralism to Bilateralism (2006) 40(5) *J of World Trade L* 813. For a detailed analysis of the trade-environment linkage, see O Perez *Ecological Sensitivity and Global Legal Pluralism: Rethinking the Trade and Environment Conflict* (2004).

purposes.[55] Similarly, critics by and large did not trust the trade regime to advance non-trade objectives because of its bias towards trade-liberalisation values, as well as its lack of experts in the areas of environment and labour.[56]

An equally important factor that contributed to the intensification of the linkage debate around the same time was the expansion of trade into the new areas of services and intellectual-property protection. These new areas opened the door for the consideration of other candidate issues, such as labour and human rights. This was either because these new issues affect other areas, such as health, for example, in case of TRIPS or they showed the possibility of the inclusion of new issues in the trade arena.[57]

The linkage phenomenon has been analysed and presented from different but related perspectives. For some scholars, it is a natural phenomenon resulting from the substantive relationships that exist among the various aspects of economic and social life. Cho argues:

[L]inkage seems an inevitable phenomenon considering the multiplicity of values that individuals, states, and institutions pursue [and] such values and policy objectives are not formulated or analyzed in isolation. Rather, they tend to be addressed in combination by means of relational approaches that emphasize areas of mutual influence. This relational posture, which is strongly influenced by the current high level of economic interdependency, is itself a function of the natural

[55] India, for example, has led a large bloc of developing countries opposing any link between the WTO and labour rights, primarily based on economic arguments that claim that such linkage on the part of developed countries is motivated by protectionism. For a detailed analysis, see K Kolben 'The New Politics of Linkage: India's Opposition to the Workers' Right Clause' (2006) (13) *Indian J of Global Studies, 225*.

[56] Perez (note 8 above) 51.

[57] Bhagwati, for instance, wrote that the inclusion of the TRIPS in the WTO demonstrated that if a new issue can be included for protecting capital (as TRIPS legitimised the extraction of royalty payments on inventions), it can also be done for the protection of nature (in the case of environment) and that of labour. See J Bhagwati 'Afterward: The Question of Linkage' (January 2002) 96(1) *American J of Int L* 126, 127-128.

linkage among the values in question.[58] For others, it is the result of a purposeful endeavour on the part of various actors at the national and international levels.[59] Accordingly, even though there may not be any substantive relations between two issues, merging them may lead to an outcome which is acceptable to the negotiating parties.[60]

Arguments based on efficiency, as well as the dominant position of the WTO in international arena, have also been used to explain linkage. It is regarded as more efficient to address policy goals in one forum, rather than pursuing them in different forums.[61] And where the WTO is concerned, the dominant position it has gained from its relative success in enforcing its rules invites calls for linkage, which is ultimately aimed at influencing the linked issues.[62]

The treatment of non-trade concerns with trade issues within a 'trade regulating system' strongly suggests that linkage can be treated as a natural phenomenon.[63] There are a multitude of competing values espoused by individuals, institutions or organisations, as well as states, that are associated with the regulation of international trade.[64] For example, multinationals that have commercial presence in a given state would prefer a lesser degree of regulation, for instance in the form of lower labour standards. However, the state in question may prefer to maintain a

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[58] Cho (note 6 above) 631. Leebron looks at this natural phenomenon as linkage brought about by substantive relationships that exist between the linked areas. He argues that where the application of one set of norms stands in the way of the realisation of the goals of another set of norms, it may call for the reformulation of the norms of one to advance the goals of the other. See Leebron (note 7 above) 12-13.

[59] See J Alvarez 'The WTO as a Linkage Machine' (January 2002) 96(1) *American J of Int L* 146, 147. Similar argument is made by Leebron at note 7 above . Cho (note 6 above) 631.

[60] The grand bargain in the Uruguay Round, whereby developing countries agreed to the inclusion of intellectual-property protection within the purview of WTO in exchange for disciplines in agriculture and a timetable for phasing out textile quotas, is raised as an example for this type of linkage. For a detailed analysis, see J Braithwaite & P Drhos *Global Business Regulation* 2000. Leebron calls this strategic linkage. See Leebron (note 7 above) 12-14.

[61] Charnovitez (note 2 above) 331.

[62] CR Kelly 'Power, Linkage and Accommodation: The WTO as an International Actor and its Influence on Other Actors and Regimes' (2006) 24 *Berkeley J of Int L* 79, 80-81.

[63] The implication here is that linkage becomes inherent to trade regulation, a situation intensified by growing economic interdependence that renders decision making in isolation impossible.

[64] Cho (note 6 above) 626.

firm regulatory hand to ensure better working conditions. Or, the state may in fact opt for lower labour standards to gain a competitive advantage to attract investment – while individual citizens and civic organisations may insist on better working conditions and adequate wages. This illustrates that there is an inseparable but competitive interaction between the promotion of free trade and other values. An attempt at addressing one value would have implications on the other. For example, a strong environmental measure may be interpreted as protectionist, while a lax environmental measure may amount to unfair competitive practice, leading to a race to the bottom. In this sense, the resulting linkage between trade issues and non-trade concerns is indeed a natural phenomenon.

Just as linkage can be characterised as natural, there are instances in which it can equally be characterised as a purposeful act.[65] The purposes vary from one context to another. A linkage may be a compromise whereby all negotiating parties secure some gains from the deal. It may also be a strategy used by one party to force another into an agreement. Accordingly, weak states may form an alliance to pressurise powerful states to agree to a deal,[66] or powerful states may link an issue to pursue their own interest against weak states.[67] Where linkage is purposeful, it implies that the justification for it does not arise from a substantive relationship that may exist between either the norms or the goals of the trade regime and the non-trade concern linked thereto. Rather, the linkage arises because the trade regime is found to be the best forum for trade-off with respect to

[65] This view is shared by many scholars. See, for example, Alvarez (note 13 above), Bhagwati (note 11 above), Cho (note 6 above) 630.
[66] Although it has not yet been successfully concluded, the emphasis on a development agenda at Doha may be attributed to the alliance among developing countries.
[67] Various bilateral agreements with stringent environmental, labour and human-rights conditionalities are good examples in this regard. For instance, the European Union (EU) has included human-rights, environmental and gender considerations in its trade agreements with the Africa-Caribbean Pacific (ACP) states. See JH Jackson 'Reflections on the Possible Research Agenda for Exploring the Relationship between Human-Rights Norms and International Trade Rules' in FM Abbott et el (eds) *International Trade and Human Rights: Foundations and Conceptual Issues* (2005) 23, 20-21.

issues for which it is difficult to secure an agreement. This kind of linkage is also referred to as strategic linkage. [68]

In all of the above scenarios, linkage appears to be an attempt to fit or accommodate more issues within the trade regime. While it is true that trade regulation would have consequences on other policy areas and further packaging of issues has been a practice in international trade regulation, these very facts show that the role and purpose of the trade regime can accordingly be shaped to meet the demands or needs of contemporary society and state relations in the trade arena. Based on this, linkage can simply be framed as a question of what the trading system is for, and what its purposes should be in contemporary times.[69] This thesis follows this line of understanding of linkage in international trade law.

2. CONCEPTUALISING LINKAGE IN THE TRADE REGIME

Linkages in trade regulation come in different forms. An issue may be linked to trade because it is substantively related to it. It may also occur to further other policies through the instrumentality of trade. In this case, trade may be used as an incentive or alternatively as a sanction to bring about the desired changes in other policies.

In whatever form it may come, linkage ultimately becomes a question of the proper boundaries of the trade regime.[70] As briefly discussed above, questions about these boundaries came about the 1990s, when the impacts of trade regulation on areas such as environment and labour began to be articulated. With

[68] Leebron (note 7 above) 5, 12.
[69] This line of argument for framing the concept of linkage is followed by a number of trade scholars. See Lang (note 6 above), Cho (note 6 above), JL Dunhoff 'The Death of the Trade Regime' (1999) 10 *European J of Int L* 733, FJ Garcia 'The Trade Linkage Phenomenon: Pointing the Way to the Trade Law and Global Social Policy of the 21st Century (1998) (2) *University of Pennsylvania J of Int Economic L* 201. See also Jackson (note 21 above).
[70] For a detailed analysis of the origins as well as the history of the linkage debates, see Lang (note 6 above) 23-549. See also D Cass *The Constitutionalization of The World Trade Organization: Legitimacy, Democracy, and Community in the International Trading System* (2005).

the expansion of the subjects of trade regulation to include services and intellectual-property rights under the Uruguay Round, the boundaries of the WTO became a major subject of analysis.

Arguments on the matter typically took a certain form, reflected in terms of a contest between different values: namely, trade and non-trade values.[71] Similarly, the 'trade and' debate became the characterising vocabulary for the discussions on the boundaries of the international trade regime.[72]

However, scholars in international trade law argue that understanding linkage as a contest of trade versus other values or policy issues is problematic.[73] This is because the focus on the contest between the different values will move one value forward only at the expense of the other.[74] This inevitably brings us back to the starting point for determining which value should trump the other. This dilemma is succinctly put by Cho when he argues:

> [T]he conventional approach to linkage has been negative, as symbolized by the use of such terms as "clash" or "conflict." [] This negative perspective often leads to a "dialogue of the deaf" framed in terms such as "[f]ree trade versus labor standards" or "growth versus the environment." []The predictable result is at best a zero-sum reconciliation in which trade and nontrade values cancel or offset each other under clashing or conflicting circumstances. Against the backdrop of expanding interdependency upon the contemporary international trade landscape, such zero-sum effects, if allowed to become widespread, will undermine the global trading system by greatly reducing the net value added.[75]

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[71] Lang (note 6 above). See also Jackson (note 21 above). According to Perez, the theme of conflict and animosity dominated the 'trade and ...' debate. Perez (note 6 above).
[72] Lang (note 6 above) 525-532. It is interesting to note here the distinction between the vocabulary of 'trade and ...' and that of 'linkage'. For example, Perez (note 6 above) sees linkage in a positive light for thinking about the relationship between WTO regime and other international regimes, as opposed to the 'trade and ...' debate, which signifies a conflict between the WTO and other international regimes. According to Perez, linkage seems to signify synergy and mutual support between the trade and non-trade issues in question.
[73] See, for instance, Jackson (note 21 above). See also Lang (note 6 above).
[74] Jackson (note 21 above) 21.
[75] Cho (note 6 above) 645-646.

Instead, Jackson argues, the focus should be on how to maximise the goals in the contested fields.[76] For Cho, for example, this means 'a much broader ideal of "integration" that ensures that both trade values and [non-trade] social values are upheld in a coherent and synergetic, rather than competing fashion'.[77] This leads to the search for a new telos for the trade regime.[78]

The views of Lang fit squarely into these claims where he suggests that the focus should be on what the desired goals and purposes of the trade regime ought to be.[79] This understanding takes the concept of linkage to another level: to the level of re-defining and re-characterising the proper role and purpose of the trade regime in contemporary times. According to Dunhoff, the linkage issues of contemporary times call into question the conventional premises justifying the existence of the trade regime.[80] They signal the need for a new theoretical model for explaining the purposes of the trade regime.[81] In conclusion, although linkage is seen to arise where there are controversies on the boundaries of the trade regime, ultimately it is a question as to the desired role and purpose of the trade regime in contemporary times.

Perhaps a cautionary note that may be raised here is that, although linkage seeks to re-characterise the telos and purposes of the trade regime, this may not lead to the view that the regime can become a global governance institution for all matters.[82] Accordingly, in the process of redefining the purposes of the regime,

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[76] Jackson (note 21 above) 21-22.
[77] Cho (note 6 above) 646.
[78] Garcia (note 23 above), arguing along the same lines, states that the trade linkage phenomenon is changing not only the way we understand, but also the formulation and direction of, trade policy itself. See also Cho (note 6 above) 646.
[79] Lang (note 6 above) 525-540.
[80] See Dunhoff (note 23 above) 733.
[81] Ibid.
[82] There are some arguments favouring the WTO as a global governance institution. Following the success of the WTO, some people take the view that different issues may be amalgamated, so that it could serve as a global governance institution. See, for instance, Guzman (note 1 above), Sampson (note 1 above). Their opponents argue that the WTO cannot and should not become a global governance institution. One of the reasons they cite relates to the rigorous enforcement mechanism of the WTO, which hinders cross-issue bargaining to incorporate more regulatory

the WTO should not lose its institutional identity and capacity as a trade organisation.[83] In this regard, Cho argues that the WTO should contribute to the constructive harmonisation of trade and social values, leaving adequate room for co-operation with other sector-specific international regulatory agencies as well as nation states.[84] However, this should be done from the standpoint of a trade organisation.[85]

2.1 Understanding the purposes of the trade regime

Understanding linkage as a question of what the purpose of the trade regime should be sets the scene and provides the groundwork for determining the place of non-trade concerns within the trade regime. It tells us what can and/or should be done in the realm of trade to address some of these non-trade issues. It is in this sense that linkage answers the underlying question of this thesis: whether the regime can advance gender equality.

How do we determine the purposes of the trade regime? Where should we look for the references or sources, and what are they? After identifying the references, we then ask whether these sources reflect or accommodate non-trade concerns. The final inquiry is to determine whether gender equality could be one of these non-trade concerns.

There are two broad categories of data used for determining the purposes of the regime. Legal sources constitute the first set. Falling under this are the issues of

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matters. See JO McGinnis and ML Movsesian *Against Global Governance in the WTO* (2004) 45 *Harvard Int L J* 353.

[83] Cho (note 6 above) 647. See also S Cho 'Towards an Identity Theory of International Organization' <http://works.bepress.com/cgi/viewcontent.cgi?article=1035&context=sungjoon_cho> 12/11/08.

[84] Cho (note 6 above) 647. A similar argument is made by P Sutherland et al 'Challenges Facing the WTO and Policies to Address Global Governance' in GP Sampson (ed) *The Role of the World Trade Organization in Global Governance* 81, 83-84. They claim that although the mandate of the WTO must be adjusted, the issues of coherence and co-operation in the current multilateral system of institutions need to be addressed.

[85] Cho (note 6 above) 647.

power or competence allocation and the objectives of the WTO as enshrined in the legal instruments of the regime. The second category relates to the legitimacy of the regime. The basic consideration here is what the various stakeholders expect from it in contemporary times. Are its policies and actions acceptable in the eyes of these stakeholders?[86] These two points of reference seek to re-examine and re-question the goals and purposes of the trade regime.

Linkage from the legal perspective focuses on the legal instruments of the WTO and the legal discourse. Legal discourse is one key site that articulates the issues that the trading system is designed to address.[87] It does this through examining legal texts, formal jurisprudence, various commentaries and scholarship on and around trade law and the dispute-settlement system.[88] Textual analysis of legal instruments, for example, WTO agreements in this case, is one starting point for determining the issues the trade regime is meant to address. Textual analysis looks into the manner of power or competence allocation between the WTO and its member states. Further, it investigates the wording and content of the various legal texts to ascertain the issues of concern of the regime.

Understanding the issues that the trade regime is meant to advance requires looking at more than the relevant legal texts. This takes us to the point of legitimacy. Legitimacy is understood to refer to different but related concepts in various contexts. In this study, when legitimacy is relied upon as one focus to determine the purposes of the trade regime, the reference is to an assessment of the contributions of the trade regime to the contemporary social, economic and

[86] Elizabeth Fortin, using Bourdieu, formulates the legitimacy argument as follows. Struggles to influence law and policy making take place among individuals with different cultural meanings and understandings of the world who see legitimacy as embodied in different things. Fortin claims that, for Bourdieu, these meanings and understandings are created within a particular field and they delineate porous boundaries of that field. Accordingly, Fortin concludes that in a particular field people will have a particular understanding of the resources and relations which are considered to be valuable in that field. E Fortin 'The Communal Land Rights Act 2004 – a Betrayal of Law's Legitimacy? Engagements with Land Tenure Reform in Post Apartheid South Africa' Paper presented at SAIFAC Seminar Series (October 2008).
[87] For instance, it is within the establishing legal instruments that one is able to find out the objectives of the organisation. Lang (note 6 above) 542.
[88] Ibid.

political conditions of the world. In this context, questions regarding the purposes of the trade regime in part attempt to respond to challenges to its authority. The challenges emanate from what is expected of the regime in contemporary social, economic and political conditions. This directly probes into the purpose of the trade regime vis-à-vis the socio-economic conditions of the world.[89]

It should be clear from the foregoing that there are different ways of construing the linkage question in international trade law. These constructions of the linkage question are very much interrelated. For instance, the legitimacy of the trading system is a matter decided in part by reference to the values or issues that the system advances. If the values have widespread support, it significantly contributes to strengthening the system's legitimacy. Again, the values or issues are determined in part by the power relationship between the central organisation and the constituting states. That is, it is those issues that surround the competencies that states have transferred to the organisation that would be advanced by the organisation.

The following sections examine in detail each of the linkage constructions briefly outlined above. In so doing, the sections provide answers to the fundamental questions of linkage as it relates to the international trade regime, namely: what are the purposes of the trade regime from the perspective of legal texts, and from the perspective of legitimacy?

2.2 Linkage from the legal perspective: contents of legal texts

2.2.1 Wording and content of legal texts

2.2.1.1 The importance of legal texts in ascertaining the object and purpose of an international organisation – the international law context

[89] Ibid 529-530.

The purposes or goals of an international organisation are engraved in its founding instruments.[90] Founding instruments such as charters, establishing agreements or, generally, treaties[91] describe the purposes justifying the existence of the organisation in question. In order to ascertain the purposes, one therefore has to refer to these legal instruments. International law rules regarding treaty interpretation, mainly established in the Vienna Convention on the Law of Treaties[92] (VCLT), are instrumental in identifying the object and purposes of a treaty or charter establishing an international organisation.[93]

According to Article 31(1) of the VCLT, one of the references for purposes of interpretation[94] is the object and purpose of a treaty.[95] These treaties may refer to, firstly, the various rights and obligations to which a treaty gives expression in its normative content, and secondly, the state of affairs envisaged by the parties to be attained by applying the treaty in question.[96] This latter understanding is also referred to as the telos of a treaty.[97] Given that the linkage framework constructed above seeks to find out the goals that the trade regime is meant to achieve, the second understanding of object and purpose becomes very relevant for this discussion.

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[90] Cho, discussing identity theory of international organisations, argues that the objective and purpose of an international organisation is its rationale for existence, and it is found engraved in its charter. See Cho (note 37 above) 11.
[91] International organisations are created by a multilateral treaty which is usually referred to as the constituting, founding or governing instrument. It can also be referred to as the constitution of the organisation. States constitute the principal members (they are also referred to as intergovernmental organisations). See A Aust *Modern Treaty Law and Practice* (2007) 392-395.
[92] Vienna Convention on the Law of Treaties, May 23,1969, 1155, 8 I.L.M. 679 (1969).
[93] Aust (note 45 above) 394. For a detailed discussion on the interpretation of treaties, see U Linderfalk *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (2007).
[94] According to Linderfalk, interpretation in treaties may mean different things. It may be one way of understanding the meaning of a treaty, or it could be a technique for clarifying an unclear text of a treaty. In this study, it is mostly used in first sense. See ibid 10-11.
[95] Article 31 of the VCLT (note 46above).
[96] U Linderfalk 'On the Meaning of the 'Object and Purpose' Criterion, in the Context of the Vienna Convention on the Law of Treaties, Article 19' (2003) 72 *Nordic J of Int* L 429, 433-434.
[97] Ibid 434.

Where do we look for the telos of a treaty? The first and perhaps the major reference is the text of the treaty.[98] Linderfalk argues that the telos of a treaty is determined based on the text of the treaty in question, understood in accordance with the ordinary meaning to be given to terms.[99] From the text of a treaty, the most prominent place where the objects or telos may be found is the preamble. Qureshi, for example, states that the object and purpose of a treaty can be found in the preamble of the agreement and can also be derived from the whole of the agreement.[100] Hilf, supporting this view, argues that basic objectives and principles are often expressed in a preamble or at least in other prominent positions in a legal text.[101] In the following section, the WTO legal text will be analysed to ascertain the purposes justifying the existence of the organisation.

2.2.1.2 The object and purpose of the WTO – legal texts in WTO law

What are the telos of the WTO? The major source for ascertaining this is the organisation's establishing agreement. The Marrakesh Agreement is the legal text that gave birth to the WTO. It is ideal for investigating the issues that the WTO is meant to address because 'in the context of the WTO … the Marrakesh Agreement takes priority over other WTO Agreements [and] its objects and purposes must stand at the apex of the configuration of objects and purposes set in the WTO Agreements'.[102] In addition, the preamble of the establishing agreement is particularly relevant because it carries an important interpretative weight. The

[98] See VCLT (note 46 above).
[99] Linderfalk (note 47 above) 211.
[100] AH Qureshi *Interpreting WTO Agreements* 2006, 18.
[101] See M Hilf 'Power, Rules and Principles – Which Orientation for WTO/GATT Law?' (2001) *J of Int. Economic L* 111.
[102] Qureshi (note 54 above) 18-19. This stand can also be ascertained by reference to Article XVI (3) of the Marrakesh Agreement which states that '[i]n the event of a conflict between a provision of this Agreement and a provision of any of the Multilateral Trade Agreements, the provision of this Agreement shall prevail to the extent of the conflict'.

preamble has been used to adjudicate quite a number of cases by the DSB of the WTO.[103]

In its preamble, the Marrakesh Agreement lists the objectives that the trade regime is intended to advance.[104] The relevant part reads:

> *Recognizing* that their relations in the field of trade and economic endeavor 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,
>
> *Recognizing* further that there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development, ...[105]

Although the list of objectives is quite extensive, two opposing views have dominated as indicators of the purposes of the WTO. One view emphasises economic objectives as the only and appropriate goals of the trade regime. The other criticises a narrow economic focus, holding that from its inception the WTO

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[103] These include The *US-Gasoline* case, the *Brazil-Dissected Coconut* case, the *US-Shrimp* case, *India-Quantitative Restrictions* case, the *Turkey-Textiles* case and the *Brazil-Aircraft* case. In these cases, references to the preambular provisions have significantly influenced the outcomes of the cases. For a detailed discussion of how the DSB used the preamble in these cases, refer to the WTO Analytical Index on the Marrakesh Agreement <http://www.wto.org/english/res_e/booksp_e/analytic_index_e/wto_agree_01_e.htm#pB1> 23/11/08.

[104] The discussion in the previous sub-section has shown that according to the VCLT (Article 31 in particular) the legal text of a treaty, including the preamble, is an important legal source for ascertaining the object and purpose of a treaty. Based on this, the preamble of the WTO would constitute a major legal source for identifying the telos of the regime.

[105] Maaraskesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 33 I.L.M. 1144(1994).

has been intended to promote economic and other objectives, in particular social objectives, in an even manner.[106]

A number of trade scholars argue that WTO agreements are about advancing free trade. According to this view, the leading objective of the trade regime is an economic one,[107] and the objective of the WTO is thus to liberalise trade that crosses national boundaries and to pursue the benefits described as comparative advantage in economic theories.[108] The trade regime, by imposing discipline upon the various trade restrictions of states, reduces inefficiencies brought about by these restrictions and permits markets to operate free of state intervention.[109] Therefore, the emphasis is on trade liberalisation and, ultimately, growth in gross domestic product (GDP) and income.

This narrowly focused objective of trade liberalisation is contested by quite a number of scholars in the field. The contest ranges from rejecting free trade as an untenable goal,[110] to including free trade as one among a range of objectives of the trade regime. Taking the moderate opposing view, scholars advocate for an expanded list of objectives for the trade regime. Broad-based objectives find support from the very text of the establishing agreement of the WTO, as well as its various agreements.[111] Let's briefly examine this position.

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[106] JT Gathii 'Recharacterizing the Social in the Constitutionalization of the WTO: A Preliminary Analysis' (2001) *Widener Law Symposium J* 7 137.

[107] Dunhoff (note 23 above) 737. For example Gallagher states that although the WTO has espoused objectives such as sustainable development, the primary goal of the orgainzaion is to increase trade and development. See Gallagher KP 'Globalization and the Nation-State: Reasserting Policy Autonomy for Development' in Gallagher KP (ed) *Putting Development First: The Importance of Policy Space on the WTO and the International Financial Institutions* 2005 1, 3.

[108] Ibid.

[109] Ibid.

[110] Some even go to the extent of dismissing free trade as an objective of the WTO. See Charnovitz, who argues that the WTO was not established to achieve free trade and that goal is absent from the Marrakesh Agreement, but rather the goals of the agreement are reciprocal and mutually advantageous tariff reduction and eliminations of discriminatory treatment in international trade. See S Charnovitz 'The WTO and the Rights of the Individual' *Intereconomics* March/ April 2001 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=282021> 12/11/08.

[111] Cass strongly supports this view. See Cass (note 24 above) 225.

From the section of the preamble cited above a number of objectives can be identified. These include raising of standards of living, promoting sustainable development, and ensuring that the economic needs of developing countries and, in particular, least-developed countries are given due attention in the trade relations of states. Although these objectives have economic elements they are not entirely or necessarily expressed in economic ends. As such, they all broaden the free-trade focus of the regime.

Sustainable development has at least two major components: optimal use of the environment and human development. Optimal use of the environment and resources implies that trade-liberalisation objectives may be put on hold where they lead to suboptimal use of the environment. Hence, environmental protection may not necessarily go hand in hand with expanding trade and increasing GDP and income. Instead, economic growth is to be achieved in an environmentally sustainable way, which shows that trade must be conducted with an eye to environmental sustainability.[112]

Likewise, human development is much more than an increase in GDP or the income of individuals. It is about expanding the real freedom and choices of people. This includes the freedom to avoid starvation, undernourishment and premature morbidity; the freedom to be literate; and the freedom to enjoy political participation.[113] These are intrinsic freedoms. In addition, freedom also includes instrumental freedom, which is important to promote intrinsic human freedom.[114] Examples here include economic opportunities which individuals enjoy to utilise resources for consumption and production, as well as the various social arrangements that society makes for education, health care and the like in order to influence the individual's freedom to live a better life.[115] This entails that the telos

[112] Cass argues that these are alterations to the preamble of the GATT 1947, which focused on economic development as mere growth. Ibid 248.
[113] A Sen *Development as Freedom* (1999) 36.
[114] Ibid 37-38.
[115] Ibid 37-38.

of development in the WTO means much more than the narrowly focused growth in incomes and GDP.

Similarly, although raising standards of living is closely linked to levels of economic development, it entails much more than an increase in income and GDP. It is also very much related to the human-rights standard of an adequate standard of living. The right to an adequate standard of living, in turn, encompasses several specific socio-economic rights, and it is the fulfilment of these rights that may guarantee an adequate standard of living.[116] This implies that human-rights concerns, in particular socio-economic concerns, may well form part of the telos of the trade regime.

Coming to the issue of addressing the development needs of developing and least-developed countries, the various texts of WTO agreements target these needs of these countries by permitting flexibilities in the use of trade measures by these countries.[117] Examples of this kind of leeway include flexibility to protect infant industries in these countries and the use of quantitative restrictions to alleviate balance of payment problems.[118] Based on these flexibilities, Cass argues that in relation to developing states, the telos of economic development, rather than free trade, appears to be more explicit.[119] In addition, the preambular provision that calls for positive efforts to ensure that developing countries secure a share in the growth in international trade recognises the distributive aspects of economic development envisaged in the regime.[120]

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[116] P Bailey 'The Right to an Adequate Standard of Living: New Issues for Australian Law' (1997) (4) *Australian J of Human Rights* 25.
[117] Cass (note 24 above) 247.
[118] See for example Understanding on the Balance of Payments Provisions of the General Agreement on Tariffs and Trade 1994, in 1 Uruguay Round of Multilateral Trade Negotiations: Legal Instruments Embodying the Results of Uruguay Round of Multilateral Trade Negotiations Done at Marrakesh on April 15, 1994 (1994). 33 I.L.M. 1158.
[119] Cass (note 24 above) 247.
[120] Ibid 248.

One can therefore argue that reference to the preamble of the Marrakesh Agreement indicates that the telos of the regime is not limited to economic ends, nor simply to advancing free trade. This view is supported by other textual references in the various agreements. Accordingly, another textual base for identifying the issues that the trade regime is meant to consider relates to the various exceptions included in the agreements. A closer examination of the legal instruments on international trade law, the GATT/WTO instruments, reveals that the objective of trade liberalisation is accompanied by various departures and exceptions which at times give priority to objectives other than free trade. A number of departures from the rules that aim at disciplining trade restrictions were included in the founding document of GATT 1947. Interestingly, some of these exceptions, in particular Article XX of GATT and its counterparts in the other agreements, explicitly refer to non-trade concerns such as health and environment for due consideration in the conduct of trade.

Some of these exceptions and departures[121] include: that states may impose safeguards when import surges injure or threaten domestic industry;[122] that they may protect intellectual-property rights in a manner conducive to social and economic welfare;[123] that they may impose barriers to goods and services for purposes of protecting health and the environment;[124] long-term implementation periods for developing and less-developed countries for different agreements;[125]

[121] This section draws from Cass's analysis, which lists evidence for the various departures from free trade in the WTO system. It is not an exhaustive list. See ibid 243-244 and 247-248.
[122] See Article XIX of GATT General Agreement on Tariffs and Trade1994, Apr. 15, 1994 Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 33 I.L.M. 1167 (1994). See also Agreement on Safeguards, Apr. 15, 1994, WTO Agreement, Annex 1A, 33I.L.M. 81(1994).
[123] See Article VII of the Agreement on Trade Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 33 I.L.M. 1197 (1994).
[124] Article XX of GATT (note 76 above). See also Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 33 I.L.M. 1125, 1153 (1994). See further, Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 18 I.L.M. 1079(1979).
[125] See, for example, the TRIPS Agreement (note 77 above).

and, under the AOA, decisions concerning the possible negative effects of the reform programme on least-developed and net-food-importing countries.[126]

In addition to emphasising the place of non-trade issues in trade, these exceptions play a vital role in the regulation of trade. According to Lang, they provide balancing mechanisms for the implementation of the various objectives of the regime.[127] The exceptions, in one way or another, tolerate and at times encourage trade restrictions and state interventions in trade. For example, permissions for adjustments to protect states' balance of payment situations; conditional license to impose safeguard measures in the event of import surges causing injury to the domestic industry; and the general exceptions clause, which allows states to adopt trade-restrictive measures for reasons of health, environment and national security, can be cited as examples.[128]

It becomes evident from the discussion above that the textual analysis of the trade regime does not favour a narrow, economic-centred objective for the regime. The various exceptions clauses, as well as departures, either tolerate or actively encourage state measures that restrict trade liberalisation. In so doing, these provisions are giving the green light for the protection of other policy goals or objectives in and through the trade regime. Likewise, the preamble of the agreement establishing the WTO lists a number of objectives for the trade regime aside from those focused on specifically economic goals.

In addition to the textual analysis of the agreements of the WTO, contextual analysis[129] also supports the view that the regime has broad objectives. Cass

[126] See Agreement on Agriculture, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, [no I.L.M citation].
[127] Lang (note 6 above) 546.
[128] Cass (note 24 above) 89.
[129] This draws from Article 31(2) of the VCLT (note 46 above) which states that context refers to, in addition to the text of the treaty, any agreement made relating to the treaty which was made between all the parties in connection with the conclusion of the treaty, and any instrument made by one or more parties in connection with the conclusion of the treaty and accepted by parties as an instrument related to the treaty.

argues that the context of the covered agreements emphasises that economic development, rather than free trade, is the overriding goal of the regime. Cass cites as an example the alterations in the preamble from GATT 1947 to the WTO-establishing agreement, which now includes ideas of sustainable development and attending to the needs to poor countries, as an example.[130] Additional evidence for a broader objective comes from the expansion of the trade agenda to discipline the trade in agriculture and textiles, which are found to be of vital importance to developing and less-developed countries.[131] Similarly, the current round of negotiations, the Doha development agenda, focuses on the role of international trade in promoting economic development and alleviating poverty.[132] This places the needs of developing and least-developed countries at the centre of the negotiations, strengthening the argument that a broader objective is envisaged under the WTO-establishing agreement.

On the bases of both the textual and contextual analysis, it is safe to argue that the trade regime does indeed have very broad objectives, ranging from expanding trade to ensuring that countries receive growth of trade commensurate with their development needs, thereby adding on a redistributive mission. As far as what constitutes the objectives of the trade regime is concerned, some authorities underscore the potential for the trade regime to engage in global governance.[133] This, they claim, is due to its success in the practice of package deals as well as its dispute-settlement system.[134] This potentially allows the consideration of all kinds of issues within the ambit of the WTO.[135]

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[130] Cass (note 24 above) 248.
[131] Ibid.
[132] The Doha Declaration in paragraph 2 states that trade can play a major role in the promotion of economic development and the alleviation of poverty. See the 2001 Doha Declaration Ministerial Conference adopted on 14 November 2001, WT/MIN(01)/DEC/1.
[133] See for instance Guzman (note 1above).
[134] MCEJ Bronckers 'More power to the WTO' (2001) 4 *J of Int Economic Law* 41.
[135] Ibid. (note 86 above). Even Jackson argues that there is nothing a priori that prohibits the WTO from considering and pursuing other objectives. See JH Jackson *Sovereignty, the WTO and Changing Fundamentals of International Law* (2006) 128-134.

2.2.1.2.1 Should the WTO accord equal weight to its different objectives?

Although it can be argued that the trade regime has broad objectives beyond trade liberalisation, there is often criticism to the effect that in its various operations, the WTO almost exclusively focuses on pursuing economic goals, even at the expense of other stated goals, such as the social ones.[136] Should the WTO accord equal weight in its operations to all its various objectives?

There are indeed legal justifications for requiring that the organisation give adequate attention to the implementation of its various objectives. The first comes from legal doctrine. Most treaties usually have more than one telos.[137] Linderfalk argues that in such situations 'we cannot comfortably consider one [objective and purpose] to be weightier than others'.[138] Hence, there is no a priori conclusion that one objective should override the other. This ultimately suggests that all aspects of the telos should receive adequate attention in interpretation and implementation.

Secondly, the jurisprudence of the WTO doesn't support economic objectives overriding the other objectives of the regime. The DSB of the WTO, in particular the AB, has in several cases relied on objectives such as sustainable development and addressing the development needs of developing and least-developed countries to override trade measures.[139] The WTO jurisprudence shows that these non-trade objectives and principles indeed form part and parcel of the agreements of the WTO, which form the terms of reference for the DSB. This justifies the use

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[136] Cass (note 24 above) 23. See also A Kwa 'Rethinking the Trading System Dialogue on Globalization' Friedrich Ebert Stiftung Dialogue on Globalization Occasional Papers 2007 32-33 at <http://library.fes.de/pdf-files/bueros/genf/04613.pdf> 12/07/08.

[137] This is more common than a treaty having one single object and purpose. See Linderfalk (note 47 above) 216-218.

[138] Ibid 216-217.

[139] See the WTO Analytical Index on the Marrakesh Agreement <http://www.wto.org/english/res_e/booksp_e/analytic_index_e/wto_agree_01_e.htm#pB1> 23/11/08, which discusses the various applications of the different objectives of the establishing agreement in DSB proceedings.

of broader objectives in legal interpretation of the agreements and in eventually giving adequate effect to them.

Finally, the objective of the trade regime that ensures that both trade and non-trade values be upheld in a coherent and synergistic manner, rather than as competing values, is reflected in the preamble of the WTO charter.[140] The relevant part reads:

> Being *desirous of contributing to these objectives* by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations ... [my emphasis].

This paragraph clearly states that it is with the intention of contributing to *all* of the WTO's objectives that members have entered into the WTO agreements. The preamble therefore neither states trade liberalisation to be the sole goal of the trade regime, nor does it prioritise trade liberalisation over the other goals or objectives of the regime.

To conclude, there are arguments to support the view that the WTO, in its various operations, should accord equal weight to its different objectives. The preamble of the establishing agreement is broad, with a number of objectives. And it does not in the least prioritise trade objectives over others. Further, it is claimed that "[e]mphasising economic over political [or other] goals is undesirable because although 'free trade is an important goal; it is not the only one' ".[141] This is supported by both legal doctrine and the WTO jurisprudence.

Another and most important justification is based on the legitimacy of the WTO system. It is imperative for the legitimacy of the trade regime to take account of objectives other than the mere economic one. It is equally important for the

[140] Cho (note 6 above) 646.
[141] Cass (note 24 above).

regime to pursue its economic goals in a manner that shows sensitivity to the other important goals, such as those in the social dimension.[142] Section 2.3 looks into the linkage debate from the perspective of the legitimacy of the trade regime.

2.2.3.1 Power allocation

There are two broad categories used for determining the purposes of the regime. Legal sources, constituting power or competence allocation and the objectives of the WTO as enshrined in the legal instruments of the regime, constitute the first of these. This section looks into power allocation for identifying the purposes of the regime.

Power or competence allocation is matter that arises with the formation of any intergovernmental organisation. In the case of the WTO, in the process of competence allocation between the WTO and its member states, it is possible to identify instances whereby non-trade concerns may fall under the jurisdiction of the WTO. This section discusses these instances. The objective of this discussion is to show that non-trade concerns may well constitute legitimate issues to be addressed by the regime.

International institutions provide the framework for co-operation or co-ordination among states. Usually, these institutions are treaty-created international governmental organisations. The treaties that create these institutions set the basis for the distribution of power between the institution and its constituting member states.[143] In effect, the treaties delineate the powers of states and the powers of the new institution. On the part of states, this exercise entails relinquishing part of

[142] D Esty 'The World Trade Organization's Legitimacy Crisis' (2002) 1 *World Trade Rev* 722, 722-726.
[143] Jackson(note 89 above) 54.

their sovereignty to the new institution. This is where the tension between the traditional conception of state sovereignty and international institutions arises.[144]

The main question underlying this tension is the allocation of governmental power. Should the power to decide over policy matters 'x' and 'y' be reserved to the nation state or should it be transferred to international institutions?[145] Or, putting it differently, should policy matters 'x' and 'y' fall under the purview of the nation state or that of the international institution?

How is the sovereignty question involving allocation of power addressed in the context of the WTO? This question is both normative and descriptive. It is usually the combination of these two attributes, the normative and the descriptive, that make the matter controversial. Descriptive analysis, for instance based on treaty provision, may allocate issue 'x' to the WTO, but normative analysis may dictate otherwise. It thus becomes imperative to examine the entire picture closely. In the context of the WTO, there are two reference points for determining the allocation of power. These are the agreement or treaty of the WTO and the judicial arm of the WTO – the DSB.

2.2.3.1 The 'WTO treaty' allocating power

The WTO treaty established the organisation. Like all the other institution-creating treaties, it serves as a basis for the distribution of powers or competence at two levels: between the WTO and the member states, and within the various organs of the WTO. The main concern of this section relates to the first of these. The reason for the reference to the treaty document is to see the subject areas the treaty is meant to regulate. Accordingly, the subject matters included within the treaty document are competencies reserved to the WTO. Although this inquiry

[144] The traditional conception of sovereignty basically refers to the right of a nation to monopolise power with respect to its territory and citizens. See ibid 60.
[145] Ibid 72.

appears to be straightforward, there are issues that make the power allocation through the establishing treaty document controversial and at times indeterminate.

When a state consensually transfers its competencies to an international institution, the transfer may be total or partial. That is, the state may turn over the whole subject matter of the area or only some sub-parts of it.[146] It thus follows that the mere inclusion of a subject matter in a treaty document does not automatically result in the international institution having overall competence over it. What is within and what is outside of the ambit of the international institution therefore depends on the degree or extent of competence over the subject matter that the state has parted with.

This is a very contentious issue. One point of controversy raised regarding the expansion of the competence of the WTO through the addition of new subject areas is the fear that the WTO may address the entire area when some aspects of it, it is argued, are either largely domestic in nature or should be addressed by other international institutions. The environment is a good example in this respect. Environmentalists fear, with regard to the inclusion of the environment within the competence of the WTO, that the organisation may end up setting standards for environmental measures. This is not desirable given the prominence given to trade-liberalisation values at the WTO and its lack of environmental expertise. This is an issue addressing the level of aggregation of new issues to the WTO system.

Another issue is that multilaterally negotiated international treaties are more likely than others to have ambiguities and gaps. These may either be purposeful or a result of negligence or miscommunication by the parties, but in either case they may make it difficult to ascertain what lies within and what lies outside the ambit of the international institution. Again, this may lead to controversy. While states

[146] Ibid 215.

may wish to preserve their competence in a particular area, the institution may wish to extend its competence in the face of unclear treaty provisions.

Most of the points raised in relation to allocation of power through the WTO agreement show the uncertainties that prevail as to what should and what should not fall within its ambit. The DSB plays important role in ascertaining the allocation of competence between the WTO and its member states.

2.3.2.2 The DSB allocating power

The DSB of the WTO consists mainly of the Panels and the AB. These can serve as sites for the allocation of power between the WTO and the member states. The procedural rules and interpretative methodologies employed by these bodies may have an impact on the powers allocated to the WTO and those powers reserved for the member states.

The numerous uncertainties that can arise in a treaty due to gaps and ambiguities in the language used gives rise to the need for treaty interpretation. The particular techniques employed to accomplish this may have implications for power allocation. Of the various interpretative techniques employed by the DSB of the WTO, the techniques with effect on power allocation include evolutionary interpretation, teleological interpretation, some notions of balancing in interpretation, and standard of review.[147]

Evolutionary interpretation is a methodology or technique of interpretation whereby interpretation of a term or terms in (WTO agreements, in our case) is based not on their meaning at the time of the conclusion of the (WTO) agreement, but on the basis of the interpreter's (the Panel or the AB) perceptions of the

[147] For a detailed analysis of interpretative techniques employed by the DSB in the WTO, see Qureshi (note 52 above). See also J Pauwelyn *Conflict of Norms in Public International Law – How WTO Law Relates to Other Rules of International Law* (2003).

contemporary concerns of the international community.[148] This approach is influenced by the view that the use of broad and unspecified terms in a treaty implies an intention on the part of the drafters that such terms are to be interpreted in an evolutionary manner.[149]

The evolution may either extend the meaning of the term or terms or it may diminish their scope. In so doing, a provision of a treaty may either expand or contract the reach of the provision, thereby either adding to the obligations of the members, or detracting from their benefits under the treaty. In terms of power allocation, therefore, it may constitute a transfer of power from the states to the treaty body, the WTO, or vice versa.

The AB in the *US-Shrimp*[150] case employed evolutionary interpretation. In choosing this technique, the AB stated that a term in a treaty may have an evolutionary meaning which may be evident from the treaty itself.[151] The AB argued that the term 'exhaustible natural resources' in Article XX (g) was crafted more than 50 years previously.[152] Further, it claimed that the term is not 'static' in its content or reference, but is rather evolutionary by definition.[153] Accordingly, it should be interpreted 'in light of contemporary concerns of the community of nations about the protection and conservation of the environment'.[154] These contemporary concerns, as embodied in 'modern international conventions and

[148] JP Kelly 'The Seduction of the Appellate Body: Shrimp/Sea Turtle I and II and the Proper Role of States in WTO Governance' (2005) 38 *Cornell Int Law J* 459, 461.
[149] Pauwelyn (note 101 above) 267.
[150] The *US-Shrimp* case was brought against the United States (US) by four countries. These countries claimed that the US banned the import of shrimp products into the US unless the shrimp products were harvested in a manner that protects sea turtles. According to their claim, this requirement by the US internal legislation is inconsistent with the US obligations under the WTO. The US, on the other hand, argued that some of the turtles that were killed while harvesting shrimp are endangered species. So shrimp products that enter the US should be harvested in a manner that does not harm turtles. The first-level Panel ruled against the US, claiming that unilateral measures to protect the environment were inappropriate in multilateral organisation.
[151] Appellate Body report on *US-Shrimp* para 130. See WTO Report of the Appellate Body: United States-Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R (Oct. 12, 1998).
[152] Ibid para 129.
[153] Ibid para 130.
[154] Ibid para 129.

declarations',[155] ascertain that the sea turtles, which are the subject of controversy in the case, are exhaustible natural resources. Accordingly, the AB expanded the categories of resources covered by the phrase "exhaustible natural resources'[156] from the traditional conception, limited to non-living resources, to the evolved conception, which includes living organisms. In light of power allocation, this expansion may end up in transferring power from the members to the WTO.[157] This is because the trade in living organisms, which was not made subject to the exceptions clause of GATT (Article XX), now falls under the exception.

Similarly, teleological interpretation, a technique which interprets the text of a treaty in a way viewed as best adapted to fulfilling the object and purpose of the treaty,[158] may modify the power allocation between the member states and the WTO.[159] The jurisprudence of the DSB shows that 'object and purpose' in the context of the WTO may refer to two things. These are the 'object and purpose' of the treaty as a whole, as is found in the preamble, and the 'object and purpose' of the particular norm or provision, which is the subject of interpretation.[160] The first understanding draws from the Vienna Convention rules on interpretation.[161] This understanding has been employed by the Panel of the WTO.[162] The second, on the other hand, is an approach developed by the AB of the WTO. In more than one occasion, the AB has 'expressed its task as examining the object and purpose of a particular provision'.[163] In the *US-Shrimp* case, the AB stated that 'a teleological interpretation should consider the provision itself being interpreted, not the whole

[155] The AB cited the Convention on Biological Diversity (CBD).
[156] Kelly (note 102 above) 467.
[157] Ibid 462. Elsewhere, Kelly opposes the approach of teleological interpretation which goes against the consents of states. JP Kelly 'The WTO and Global Governance: The Case for Contractual Treaty Regimes' (2001) 7 *Widener Symposium J* 109.
[158] M Lennard 'Navigating by the Stars: Interpreting the WTO Agreements' (2002) 5 *J of Int Economic Law* 17, 21.
[159] Jackson (note 89 above)182.
[160] Lennard (note 112 above) 28.
[161] Article 31(1) of the Vienna Convention reads: '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.*" Emphasis added.
[162] Lennard (note 112 above) 28.
[163] Appellate Body Report on *US-Shrimp*.

agreement'.[164] It thus appears that the AB is not in favour of teleological interpretation.

Expansive teleological interpretation in light of the 'object and purpose' of the larger WTO agreement has the potential to broaden the competence of the WTO. Scholars argue that issues such as human rights can well be read into the preamble's reference regarding the objective of raising the standard of living for all and the promotion of sustainable development.[165]

Standard of review is another interpretative technique with an effect on power allocation. A judicial body entrusted with the task of dispute resolution might be required to examine the consistency of a law or an action by a national government with a provision of the treaty instrument. In such cases, the international judicial body is 'reviewing' the legal appropriateness of the laws or actions of the national authority.[166] The standard of review defines the degree to which an international judicial organ should 'second guess' the laws and actions of member states in order to determine whether these are consistent with the treaty or not.[167] It is argued that the international judicial body should respect the laws and actions of national governments up to a certain point and that point is what is usually referred to as the standard of review.[168]

There are two components to standard of review. These are review of the factual issues, done by national authorities, and review of the legal interpretations of the

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[164] Ibid.
[165] R Howse and M Mutua 'Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization' (2000) <http://www.ichrdd.ca/english/commdoc/publications/globalization/wtoRightsGlob.html> 05/06/06.
[166] JH Jackson & SP Croely 'WTO Dispute Procedures, Standard of Review and Deference to National Governments' (1996) 90 *American J of Int law* 193, 195.
[167] M Osech 'Standards of Review in WTO Dispute Resolution' *J of Int Economic Law* (2003) 635, 637.
[168] Jackson & Croely (note 120 above) 194.

treaty provisions, done by national authorities.[169] In the WTO context, review of factual issues takes two different forms: the determination of whether a certain event did occur or take place, which relates to the raw evidence,[170] and the factual conclusions to be derived from the raw evidence.[171] The question is what standard of review the international judicial organ, in this case the Panels of the WTO, should apply in reviewing the 'raw' evidence and the factual conclusions drawn therefrom.[172]

The review of legal interpretations generally looks into the consistency or inconsistency of a member's law or action with the relevant provisions of the treaty, the WTO agreements.[173] Here the standard of review question is to what extent Panels and the AB should review legal interpretations of WTO law as submitted by national authorities.[174] In both cases the question is, 'who should ultimately decide on questions of [factual evidence] and the legal consequences derived from those facts?'[175]

> Standard of review has important implications for power allocation between the international institution and the national governments concerned. In the context of the WTO, one commentator has clearly stated, standards of review subtly balance out the delicate conflict over legal and political authority between Panels and national authorities in trade and trade-related matters governed by the WTO. They prominently determine, though not exclusively and 'through a relatively genteel language', as to which body – WTO adjudicating body or national authority – is empowered to ultimately decide on controversial matters of facts and law.[176]

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[169] S Zleptnig 'The Standard of Review in WTO Law: An Analysis of Law, Legitimacy and Distribution Legal and Political Authority' (2002) 6 *European Integration online papers* 2 European Community Studies Association Austria (ECSA-A), vol. 6, October 2002 at http://ideas.repec.org/a/erp/eiopxx/p0090.html 12/06/08.
[170] Oesch (note 121 above) 641.
[171] Ibid.
[172] Ibid 640.
[173] See A Guzman 'Determining the Appropriate Standard of Review in WTO Disputes University of California' (2008) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1270894> 12/11/08. See also Osech (note 121 above) 641.
[174] Oesch (note 121 above) 641.
[175] Zleptnig (note 123 above) 2.
[176] Osech (note 121 above) 637. See also Guzman (note 127 above) 3.

So at the heart of the standard of review issue lies the question of appropriate power allocation.

The review power an international judicial institution enjoys affects the scope and manner of national or domestic decision-making power possessed by states.[177] There are two, perhaps extreme, ends in the spectrum of review powers of an international judicial body. The judicial body may go for complete deference to the decisions and measures of states. The decisions and measures taken by states will be adopted as they are. Accordingly, the policy considerations behind these laws or actions remain unquestioned. In such cases, the standard of review is less intrusive of state decision-making and therefore of state sovereignty. The scope of regulatory powers of states will remain unaltered.

Standard of review may also take a de novo determination by the judicial body of the case before it. The judicial body will take it upon itself to make a determination by investigating the issue afresh. The judicial body's review of the state action from scratch may involve at arriving at different conclusions. In so doing, the judicial organ would be engaging in reassessing the policy considerations behind the state action. In the event that it substitutes its own findings and conclusions for a state decision, it effectively transfers the competence of the state over the matter in question to the international institution. In such cases, the actions or the rulings of a state may be altered by the judicial organ. This alteration happens without explicit transfer of power from state to the international institution taking place. The reallocation of power is effected through judicial intervention.[178]

[177] Guzman (note 127 above) 3-4. See also C Button 'The WTO's "Objective Assessment" Standard of Review and Panel Review of Health Measures' in Andrew Mitchell *Challenges and Prospects for WTO Law* (2005) 85, 88-90. See Cass (note 24 above) 188.
[178] Ibid 190. See also Guzman (note 127 above) 2-4.

Coming to the WTO, Jackson proposes that there is no explicit language in the dispute-settlement understanding nor in the Uruguay Round texts regarding the standard of review that should be applied by the Panels and AB in all cases.[179] In the absence of clear provision on standard of review, it is through the process of judicial law making that standard of review is to be defined.[180] The judicial body, the DSB of the WTO, has generally been making reference to Article 11 of the Dispute Settlement Understanding (DSU) to determine standard of review.[181] According to this article, the function of Panels is to assist the DSB in discharging its responsibilities under this understanding and the covered agreements. Accordingly, a Panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.

What is perhaps relevant for the purpose of standard of review is the part which provides for Panels to make an objective assessment of the matter before them, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements. The AB has stressed on different occasions that as regards the question of standard of review, Article 11 of the DSU supports neither de novo nor deferential review, but objective assessment.[182]

The AB has stated that Article 11 is applicable to Panel review of both factual findings and legal interpretations.[183] The standard of review adopted by Panels and the AB in practice differ when it comes to the review of factual findings and legal interpretations. The difference in turn has implications on the degree of intrusiveness of the standard of review on state competence.

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[179] Jackson (note 89 above) 169. See also Button (note 131 above) 88-91.
[180] Zleptnig (note 123 above) 3.
[181] Jackson (note 89 above) 171. Guzman (note 127 above) 3. Button (note 131 above) 88-89.
[182] Cass (note 24 above) 187-188. See Button (note 131 above) 90-91.
[183] Oesch (note 121 above).

As far as the review of fact finding is concerned, the AB has stressed that 'Panels … are not required to accord to factual evidence of the parties the same meaning and weight as do parties'.[184] Commentators have concluded that as regards review of fact findings, deference does not appear to be the order of the day.[185] In cases where the question relates to the review of factual determinations drawn from the raw evidence, the AB mandates a Panel to examine thoroughly and critically a domestic authority's explanation of how the 'raw' evidence supports its overall factual conclusion.[186] The standard of review employed here relates more closely to a de novo review.[187]

Factual conclusions that ultimately lead to decisions and laws of states involve political, economic, ethical, and other societal considerations.[188] As a result, depending on the weight accorded to one or more of these considerations, there might be circumstances in which more than one factual conclusion can be drawn from the basic facts.[189] The choice as to which factual conclusion is legitimate and relevant should therefore be left to state authorities who are properly positioned to prioritise. The practice of a close to de novo review by WTO Panels of factual conclusions submitted by states effectively puts the Panels in charge of deciding on policy considerations behind state actions and laws. This is highly intrusive of state competence.

As far as review of legal interpretations of WTO law submitted by states goes, both Panels and the AB are called upon to examine interpretations of WTO law de novo, and not to defer to members' interpretative conclusions.[190]This appears to

[184] See the AB report on Australian-salmon case. See WTO Report of the Appellate Body: Australia - Measure Affecting Importation of Salmon, WT/DS18/AB/R (Oct. 20, 1998).
[185] Osech (note 121 above) 651.
[186] Ibid 652.
[187] Ibid 652.
[188] Guzman (note 127 above) 2. See also Osech (note 121 above) 640.
[189] See Button (note 131 above) 100-101. See also Osech (note 121 above) 641.
[190] Ibid 657. See also Button (note 131 above) 101.

be in line with the proper task of the Panels and Appellate Body that they are correctly positioned to interpret WTO agreements.

The stand taken on standard of review boils down to power allocation. As the Appellate Body has stressed in one case, [t]he standard of review appropriately applicable in the proceedings in [the covered agreements], of course, must reflect the balance established in [the agreement] between the jurisdictional competence conceded by Members to the WTO and the jurisdictional competences retained by the Members for themselves.'[191] The WTO approach that accords different degrees of review may open the door for different outcomes in power allocations. It may either maintain the power allocation as it is, or may end up reallocating powers to the WTO which previously were thought to belong to the nation state. Where it reallocates power or competence, it is likely that new issues would end up within the jurisdiction of the WTO. This opens the door for linking non-trade issues to the trade regime.

2.2.3.2.1 A note on the DSB allocating power

This section has looked into how the WTO DSB might, in the process of adjudicating a dispute, affect power allocation between the members and the WTO. However, the DSU, in its Article 3(2) states that the DSB cannot add to or diminish the rights and obligations of the members provided in the covered agreements through its recommendations and rulings.[192] So how does this requirement of the DSU sit with the power-(re)allocating role of the DSB?

According to Jackson, there does not appear to be a conflict between the role of the DSB and the requirements of the DSU. Jackson argues that 'any right and obligation is defined by the dispute settlement procedures', which are part and parcel of the entire treaty, setting the various rights and obligations of members,

[191] Cass (note 24 above) 189.
[192] The relevant part of the DSU Article 3(2) says: '"Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."'

'and thus any DSB recommendations or rulings are part of the rights and obligations'.[193] Jackson further argues that any conclusion otherwise would diminish the ability of the DSB to carry out its functions, which would in turn diminish the rights and obligations of the members.[194]

To conclude, the realignment of power, or competence allocation, that takes place through the treaty and its interpretation may expand the reach or jurisdiction of the WTO. In such instances, matters which were thought to be outside of the regime may be addressed through it. As a result, the process of competence allocation between the WTO and its member states may bring on board non-trade concerns which constitute legitimate issues to be addressed by the regime.

2.3 Linkage from the perspective of the legitimacy of the trade regime

Understanding the issues that the trade regime is meant to advance requires looking at more than the relevant legal texts. This takes us to the point of legitimacy. Legitimacy is understood to refer to different but related concepts in various contexts. In this study, when legitimacy is relied upon as one focus to determine the purposes of the trade regime, the reference is to an assessment of its contributions to the contemporary social, economic and political conditions of the world. In this context, questions regarding the purposes of the trade regime in part attempt to respond to challenges to the authority of the regime. The challenge emanates from what is expected of the regime in these contemporary conditions. This directly probes into the purpose of the trade regime vis-à-vis the lived socio-economic conditions of the world's population.[195]

2.4 Linkage from the perspective of legitimacy

[193] Jackson (note 89 above) 191.
[194] Ibid 191-2.
[195] Lang (note 6 above) 529-530.

The controversy regarding the purview of the trade regime may signal a challenge to the authority of the regime with regard to at least some of the subject areas it addresses or is said to have failed to address. A challenge to authority may in turn bring the legitimacy of the trading system or regime into question.[196]

2.4.1 Defining legitimacy

The discussion on linkage from the perspective of legitimacy starts by exploring the concept of legitimacy. The concept is used in various contexts. It is generally an evaluative criterion for measuring the acceptability of the authority of a government or an institution. It refers to 'a quality that society ascribes to an actor's identity, interests, or practices, or to an institution's norms, rules and principles.'[197]

It can have different aspects or dimensions. Input and output legitimacy form a pair of such dimensions. Input legitimacy focuses on the process of decision making.[198] Output legitimacy, on the other hand, focuses on effectiveness of the decisions made.[199] Accordingly, decisions are legitimate when they effectively promote the common welfare of all the stakeholders affected by the decision in question. Some scholars view these as the narrow and broad dimensions of legitimacy.[200] According to the narrow dimension, the concerns relate to formal procedures followed to arrive at a decision and, in the broad context, the 'societal acceptability' of the government or institution in question is the main measure of legitimacy.[201] It is important to note that input and output legitimacy are very

[196] According to Nanz, it is only when a political order is being manifestly challenged by a state's citizens that lack of legitimacy is invoked as the cause of the crisis. See P Nanz 'Democratic Legitimacy and Constitutionalisation of Transnational Trade Governance: A View from Political Theory' in C Joerges and E-U Petersmann (eds) *Constitutionalism, Multilevel Trade Governance and Social Regulation* (2006) 59, 61.
[197] See C Reus-Smit 'International Crisis of Legitimacy' (2007) (44) *International Politics* 157.
[198] M Elsig The World Trade Organization's Legitimacy Crisis: What Does the Beast Look Like (2007) (41) *J of World Trade* 75, 83-88.
[199] Ibid 9-14.
[200] S Cho 'A Quest for WTO's Legitimacy' (2005) 4 *World Trade Review* 391, 392.
[201] Ibid 392-394.

much related. If decision-making procedures are not participatory and inclusive of all the affected stakeholders, it is likely that the outcome of the decision may not necessarily reflect the interests of all stakeholders.

2.4.1.1 The legitimacy of the WTO

The challenges to the authority or decisions of the WTO come mainly from two fronts. The decisions and actions of the WTO, now more than ever, increasingly involve trade-offs with other policy goals[202] such as environmental protection, health policy and human-rights protection. This is in part due to the deepening of economic interdependence, which has shifted the focus of trade negotiation from tariff reductions to positive integration through rules and standard setting. The trade-offs ultimately end up prioritising trade objectives over other valid policy goals. These decisions and actions of the WTO have brought about substantial discontent with regard to the other policy goals. A related challenge to the decisions and actions of the WTO comes from the distributive consequences of its actions. The view is that the WTO does not take sufficient account of the distributive or economic effects of its decisions. These two points relate mainly to output legitimacy as briefly defined above. Interestingly, these points also raise questions of input legitimacy.

In both instances, WTO decisions and actions affect areas that are beyond the narrow realm of trade and tariffs.[203] This has important implications. One implication is that WTO decisions are no longer technical matters that can be handled by technocrats only.[204] This is only true because the reach of WTO decisions on other policy goals requires, not mere technical expertise, but rather

[202] Esty (note 96 above) 13. See also DP Steger 'The Challenges to the Legitimacy of the WTO' in S Charnovitz et al (eds) *Law in the Service of Human Dignity* (2005)202, 202-203. Steger argues that challenges to the WTO's legitimacy arise in part because the WTO now administers a complex set of agreements that reach deeply into subjects formerly the exclusive domain of governments, such as intellectual property, health, and safety standards and services.
[203] Esty (note 96 above) 13. See Steger (note 156 above) 202.
[204] Esty (note 96 above) 10.

value judgment.[205] Therefore, WTO decisions should now be acceptable in the eyes of not only the trade officials and diplomats, but the wider community. It also follows that trade technocrats cannot be counted upon to balance adequately policy goals that go beyond the narrow realm of trade adequately.[206] This in turn calls for wider participation in the decision-making process. Therefore, the manner and procedure of decision making is closely contested, bringing input legitimacy to the picture.

2.4.2 Output legitimacy

2.4.2.1 Trade-offs with other policy goals

One challenge to the authority of the WTO comes from the trade-offs its decisions involve vis-à-vis other policy goals. In its various operations, the trade regime is now increasingly entertaining other policy goals. This takes place both in the various working groups and committees of the WTO and, most prominently, in the dispute-settlement system. The main thrust of the argument is that the WTO is prioritising trade objectives at the expense of other valid policy goals.[207] This significantly affects its legitimacy, which by and large emanated from its efficiency.[208]

The trade regime has been relatively successful compared to other international institutions due to its good performance.[209] However, with its expansion and its effect on other policy goals, good performance or efficiency could no longer be the basis for legitimacy. This is because, as we have noted, WTO decisions are no longer mere technical matters to be handled by trade experts alone. To the extent that those other policy goals are affected, balancing of trade and other goals

[205] Ibid 13.
[206] D Esty 'Beyond the Club Model' a comment on RB Porter et al (eds) *Efficiency, Equity, and, Legitimacy: The Multilateral Trading System at the Millennium* (2001).
[207] Ibid.
[208] Ibid.
[209] Ibid.

should not prioritise trade goals and, secondly, should not be left to the WTO alone. This opens the door to wider participation. In effect, it is both the substance and the procedure of its decision making that are being questioned. Substance- or merit-wise, the trade regime should accord similar weight to all policy goals involved. And the decisions involving this balancing should be carried out with the participation of all stakeholders. In this way, the challenge to the authority of the trade regime may be addressed. This effectively replaces legitimacy based on efficiency with a form of social legitimacy.[210]

Social legitimacy may have implications on what should fall within the boundaries of the trade regime and what should remain outside. For the sake of its legitimacy, the trade regime may need to take account of other objectives and also to advance all objectives in an even manner. To achieve this, it may need to afford other stakeholders the opportunity to participate in its decision-making procedures.

2.4.2.2 Distributive effects of WTO decisions

To a large extent, the challenges to the legitimacy of the trading system come from concerns regarding the distributive consequences or economic effects of its rules and decisions.[211] This can be related mainly to the output dimension of legitimacy. The argument in this regard is that the distributive effects of WTO decisions should be acknowledged.[212] This goes to recognise that trade liberalisation and, generally, the decisions of the WTO create benefits and burdens.[213] It dispels the pro-trade illusion that trade liberalisation works to the

[210] See, for example, Krajewski arguing that the third WTO Ministerial Conference in Seattle revealed a severe legitimacy crisis of the WTO and its decision-making procedures. M Krajewski 'Democratic Legitimacy and Constitutional Perspectives of the WTO Law' (2001) 35(1) *J of World Trade* 167, 167-168. See also Esty (note 158 above).
[211] AB Zampetti 'Democratic Legitimacy in the World Trade Organization: the Justice Dimension' (2003) 37 *J of World Trade* 105, 118.
[212] D Kennedy, quoted in Cass (note 24 above) 228.
[213] Zampetti (note 165 above)118.

benefit of all those involved. It also dispels the view that distributive-justice issues are extraneous to the WTO and its various operations.[214]

The argument goes on to call for the proper monitoring of the effects of WTO decisions. This will involve addressing the undesirable effects of its decisions and actions. The manner and extent to which WTO decisions affect existing inequalities across states and between individuals differ from one sector to the other. They are also a function of the level of economic development of the states in question. For instance, the rules and decisions have differential impacts on citizens, whereby 'those in the least privileged socio-economic position [such as women] [end up] bearing the harsher consequences of the [rules and decisions]'.[215]It therefore follows that monitoring the distributive effects of WTO decisions needs to be done on sector by sector basis, as well as taking into account the level of economic development of the members concerned.

In the context of developing and least-developed countries, for example, one can generally examine the economic or distributive effects of WTO rules and decisions from two perspectives:[216] adjustment costs and implementation-related costs. Adjustment issues arise from the dislocations caused by trade liberalisation measures of the WTO. These include preference erosion, increase in food imports, reductions in tariff revenue, and other economic and social costs in specific sectors.[217] The escalating prices of basic services due to privatisation and liberalisation and the escalating prices of medicine due to stringent intellectual-property laws also fall under the category of adjustment costs of WTO rules.

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[214] Ibid.
[215] Cass (note 24 above) 228.
[216] Pogge argues that the main objection to the legitimacy of the WTO relies upon the observation that the rules and principles of the WTO do not bring about distributive justice where the burden of liberalisation rests upon poor countries while the benefits disproportionately go to the rich countries. Pogge quoted in Thomas Cottier 'The Legitimacy of the WTO Law 13' <http://www.lcv.ua.ac.be/files/The_Legitimacy_of_WTO_Law_cottier_final.pdf> 23/11/08.
[217] International Lawyers and Economists against Poverty (ILEP) *An African Perspective on Aid for Trade* 2006, 7< http://www.odi.org.uk/iedg/Projects/Aid4trade_files/aid_for_trade_african_persp.pdf > 22/06/07

Taking the rules on tariff reduction or liberalisation, for instance, one finds that they lead to reduction in revenues for states. In developing and least-developed states, where tariff revenues constitute a high percentage of total public sector resources, tariff reductions without accompanying ways of raising revenue adversely affect welfare. Similarly, tariff reduction in the agricultural sector would lead to a surge in the import of cheap, subsidised agricultural products from developed countries. As local producers do not benefit from subsidisation, since their states are not capable of extending subsidies to the local producers, their products cannot compete with the cheap imports in the local markets. The local producers would, as a result, be displaced from the domestic market. This would lead to a loss of livelihood for the local producers.

Implementation-related costs mainly relate to upgrading one's systems to conform to the requirements of WTO rules. This may involve the creation of new institutions, employment of scarce-skilled personnel etc.[218] WTO rules on the protection of intellectual-property rights afford a good example of the adverse economic effects of WTO rules and decisions. The issue of cost of implementation that comes with the regulatory instrument of TRIPS is a glaring case in point. The harmonisation of intellectual-property legislation and the administrative costs of implementation of this legislation are economically taxing. For developing and less-developed states, such resources could well be used for much-needed developmental projects. The implementation of TRIPS also has adjustment costs. Tighter intellectual-property rights protection has led to the problem of access to essential medicines. This has raised important questions about the effects of the TRIPS agreement on public health and welfare in developing and least-developed countries.

Developed countries also face problems from the distributive effects of WTO rules and decisions. The often-cited case is the effect of the trade regime on

[218] Ibid 7.

domestic labour markets in developed states.[219] The rules of the trade regime result in the reduction of barriers to trade and, to a certain degree, investment. With the reduction in barriers, products as well as services can now be sourced from countries where the costs of production are low. This has direct implications on the labour force. It may benefit skilled workers who can cross borders where their skills are in demand, but the picture is quite grim for unskilled workers. According to Rodrick, 'the services of large segments of the population [constituting unskilled workers] can be more easily substituted by the services of other people across national boundaries'.[220] This situation erodes the bargaining power of these workers, and leads to greater instability in earnings and job insecurity in general.[221] So from the perspective of developed countries, the argument in this case is that increased trade due to a reduction in trade barriers brings about adjustment issues for unskilled workers.

2.4.3 Input legitimacy

The distributive or economic effects discussed above are largely to do with substantive issues or matters relating to the effectiveness of the actions of the regime. They respond to the substantive merits of WTO actions. However the substantive defects in terms of the neglect of distributive effects of WTO rules are in part attributed to its working procedures.[222] Procedural and substantive defects therefore feed each other.[223] This is the main reason why it is claimed that input and output dimensions of legitimacy are very much interrelated.

The procedural issues pertaining to legitimacy generally relate to limitation in access and participation, weak deliberative process, transparency and

[219] Cass (note 24 above) 228.
[220] D Rodrick *Has Globalization Gone Too Far?* 1997, 4.
[221] Ibid 4-5.
[222] Zampetti (note 165 above) 106.
[223] Ibid.

accountability.[224] These procedural matters call for reforms of several different aspects of the decision-making procedure. These include, among other things, deliberation among a variety of social actors such as non-governmental organisations (NGOs), interest groups, government officials from different departments and other international institutions,[225] and the opening up of WTO procedures, such as those of the dispute-settlement process.

2.4.4 Legitimacy from historical account

The legitimacy of the trade regime has been a major driver in shaping its purposes, a fact that underscores the regime's dynamic nature. This assessment is supported by the historical account of the trade regime. The adoption of GATT came shortly after the end of the Second World War. The protectionist policies of states in their trade relations are regarded as the main reason for the war. The period between the two world wars saw the erection of trade policies which were both protectionist and encouraged state intervention. These were followed by dear economic and political costs at the global level. Economically, protectionist measures led to various retaliatory measures by trading partners, which in turn greatly harmed exports.[226] Politically, state relations were adversely affected by the influence of exporting industries, which played an important role in determining state trade and foreign policies.[227] The devastating effects of the war underlined the need for economic co-operation among states.

In the design of the new economic co-operation arrangement, the GATT system, due emphasis was given to the need to protect domestic social interests. GATT devised rules on trade remedy, escape clauses, balance-of-payments exceptions

[224] Ibid. See also Cass (note 24 above) 222-224.
[225] Nanz (note 150 above) 75. A similar argument is made by Elsig (note 152 above) 10.
[226] AM Ezrahi 'Opting Out of Opt-Out Clauses: Removing Obstacles to International Trade and International Peace' (1999) (31) *L and Policy in Int Business* 123.
[227] Ibid 3.

and renegotiation provisions to protect the interests of the members' domestic constituencies while at the same time pursuing liberalised trade.[228]

This arrangement resulted in the participants concluding a bargain whereby, in exchange for open or liberalised trade policies, states would be able to provide various kinds of safety nets to minimise the dislocations resulting from international trade.[229] It is usually this bargain that is referred to as the 'embedded liberalism compromise'. According to Dunhoff, 'It [the bargain] 'embeds' a liberal international economic order within a larger commitment to interventionist domestic policies.'[230]

For some trade scholars, the deal of embedded liberalism has, from the very beginning, accounted for due recognition of social issues within the trade regime. These scholars argue that at least some of the so-called non-trade issues within the trade regime are not new, but in fact have been there from the very inception of the regime.[231] This is particularly true of social issues.[232] The framework that allows states to deal with social issues has been crafted into the various exceptions clauses of GATT. Trade scholars argue that, however, the original balance between free trade and social protection has, since the Uruguay Round, been tilted in favour of free trade. This, they claim, is caused by the addition of new subject areas in the trade regime in the name of liberalisation.

Some findings claim that the new issues of the trade regime either directly or indirectly affect the implementation and realisation of states' other policy goals. This is due to the close relationship or interdependence among the issues involved. Or, conversely, the states' other policy goals may stand in the way of the newly included issues within the trade regime. Therefore, the expansion of the trade agenda has resulted in a corresponding expansion of trade-related issues.

[228] Dunhoff (note 23 above) 739.
[229] Ibid 739.
[230] Ibid 739.
[231] Gahtii (note 60 above).
[232] Ibid.

Governments' ability to manage the dislocations caused by trade liberalisations has been seriously compromised.[233] As a result of the expanded trade regime, its other goals, namely social goals, could not be properly addressed.[234] Its ability to advance all of its goals or objectives evenly has also been seriously undermined.

To conclude, the fact that the purposes and the task of the regime have been reformulated is evident from historical examination. The geo-political environment prevailing at the time of the adoption of GATT 1947 advocated for social protection. However, with the advent of the WTO, the purpose and the task of regime was reformulated into the lamination of government interferences in global trade.[235] Based on this historical account, it becomes possible to redefine the purposes of the regime in contemporary times.

3. CONCLUSIONS

This chapter has set out to answer the linkage question in international trade law. Linkage in this study is framed in terms of what the role of the trade regime should be in contemporary times. In examining this question, the chapter began by looking into the purposes of the regime. Two broad categories of sources are used for determining these purposes. Legal sources, which include power or competence allocation and the objectives of the WTO as enshrined in the legal instruments of the regime, and the legitimacy of the regime.

Examination of the legal sources indicate that trade regime has very broad objectives, ranging from expanding trade to ensuring that countries receive growth of trade commensurate with their development needs which adds on a redistributive role to the regime. Similarly, considerations of legitimacy generally show that the trade regime should address the concerns of various stakeholders whose interests are affected by its operations. Based on these two points, it is

[233] Ibid.
[234] Ibid.
[235] Lang (note 6 above) 528-529.

argued in this chapter that the role of the trade regime can and ought to be aligned to the demands of contemporary economic, social and political realities. This opens the door to the possibility for redefining and re-characterising the proper role and purpose of the trade regime in contemporary times. It further opens the possibility for considering the role the trade regime can play in various non-trade concerns or issues where such issues intersect with the operations of the regime.

CHAPTER III

GENDER AND TRADE: EXPLORING THE THEORETICAL FRAMEWORK OF THE RELATIONSHIP

1. INTRODUCTION

The research question this thesis analyses is whether the trade regime can be used to promote gender equality and if so, how. This analysis is to be carried out in the context of the ongoing linkage debate in the international trade regime. Linkage in this context is a question of the proper boundaries of the regime. These are to be determined by reference to, firstly, the objectives of the WTO together with the power or competence allocations made through WTO instruments, and, secondly, the legitimacy of the WTO. While answering the boundary question, these two points probe into the purposes of the trade regime and attempt to establish its possible and desirable role in contemporary times. To answer the research question, then, the first task would be to establish the theoretical relationship between the two subjects: gender equality and the trade regime. This chapter and the one following it establish the relationship between gender and trade at the theoretical and legal levels respectively.

Apart from establishing the trade–gender nexus, this chapter also attempts to examine how the exercise of linking a gender-equality agenda to the trade regime fares from the perspective of feminist analysis.[236] It thus examines what is

[236] This directly relates to the issue of the legitimacy of the trade regime. Legitimacy, as defined in Chapter II, measures the acceptability of the authority of an institution, the WTO in this case, based on its decision-making procedures and the effectiveness as well as distributive consequences of its decisions. Accordingly, this chapter is an assessment of the legitimacy of the trade regime from feminist perspectives. It assesses the decision-making processes and the consequences of the

possible, permissible or desirable in creating a link between gender equality and the trade regime in light of feminist analysis.

The chapter is divided into two major sections. The first is introductory, showing the relative absence of feminist engagements with international trade law and making a case for such interrogation in feminist legal research.

The second section engages in feminist analysis of the WTO. The trade regime appears to be a non-gendered and gender-neutral discourse. This raises a question as to the sort of analytical framework/s that can adequately address the relationship or interactions between lives of women and the operations of the international trade regime. The section begins by mapping out the analytical frameworks to be employed to draw a feminist perspective of international trade law. The empirical studies on the effect of trade on gender relations indicate that it is poor women, located mostly in developing and less-developed countries, that bear the brunt of the dislodging effects of trade liberalisation. In the developed economies where liberalisation has resulted in adverse impacts, it is in the majority of cases poor women, concentrated in low-paying jobs, that are dislocated from their livelihood. And these are often women of colour and immigrants. From the empirical evidence, it may possible to discern gender/sex, class, race and geographical location as key analytical frameworks.

Based on these frameworks, the section then proceeds to construct a feminist analysis of the trade regime. This part of the section relies heavily on existing feminist arguments in law and economics, and attempts to adapt and use them vis-à-vis international trade regulation. Four themes in feminist theories are used to analyse the trade regime. One is the presumed neutrality and objectivity of law and economics, which results in the absence of women's experiences and interests from the norms of trade law as well as its institutional structures. Another is the

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decisions of the WTO on gender relations by examining how gender inclusive the decision-making process is, and its implications on gender relations.

market–state dichotomy, which delegitimises state interventions in the operations of markets and gives centrality to efficiency, rather than people. The argument is that, given women's location in the reproductive sector of the economy and their reliance on state provision of services to carry out their reproductive burdens, these outcomes adversely affect the interests of women. A third theme is that the discriminatory nature of the trade regime against third-world states, which is reflected in practices such as 'single undertaking' and the non-operative special and differential provisions for developing states may perpetuate poverty in the developing world. These features of the regime incapacitate governments of poor states from benefiting from trade and thus being in a position to meet their obligations towards fulfilling the socio-economic needs of their citizens. A fourth theme is the argument that the trade regime's objective of free trade is dependent upon the exploitation of female labour in both the reproductive and productive sectors. The main point here is that the roles played by women in the reproductive sector of the economy, which go unremunerated and are also a necessary element of all modes of production, help sustain the objective of free trade while at the same time exploiting women.

The examination of these feminist perspectives on the trade regime points to two possible directions on the way forward. The first approach is a rejection of the regime, and stems from the belief that the underlying principles of the trade regime are inimical to the interests of women. The second approach, building on these critiques of the regime, attempts to reform the system so as to address the adverse impacts of trade on the lives of women. This reformist approach advocates for the integration of a gender agenda into the WTO framework. This chapter hopes to shed light on the conceptual and theoretical relationships between gender relations and international trade regulation.

2. EXPLAINING THE WEAK ENGAGEMENT OF FEMINIST SCHOLARSHIP ON INTERNATIONAL TRADE LAW

The relationship between feminist theories and international trade law is a relatively unexplored area.[237] Similarly, very little feminist legal analysis has so far appeared on international trade law.[238] This section attempts to explain the relative absence of feminist legal analysis of international trade law and tries to make a case for such engagements.

An examination of the literature on gender and international trade reveals that there are some explanations for the relative absence of a developed feminist legal scholarship in international trade law. According to Childs, one possible reason is the fact that "both subjects are relatively youthful bodies of legal knowledge and debate".[239] This is particularly true of international trade law. The regulation of international trade began with GATT in 1947 and it was only in 1995 that institutionalised trade regulation through the WTO came into being.

Another explanation lies in the fact that trade-impact review has not focused so much on the social impacts of trade. It is in the last two decades that the consequences of the process of international economic integration for different countries and different groups of people within a country have begun to be scrutinised. It is also in this context that feminist legal analysis of international trade law appears.

Thirdly, much of the feminist academic as well as activist work has focused on equity measures at the domestic level.[240] This is promoted by women's general

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[237] M Childs 'Feminist Perspectives on International Economic Law' in AH Qureshi (ed) *Perspectives in International Economic Law* (2002) 163.
[238] KN Schefer 'Macroeconomics, Poverty Reduction Strategies, and Women of Dolphins, Doha and Women' NCCR Working Paper Series at <http://www.nccertrade.org/images/stories/publications/speaking%20notes%20gender.pdf> 22/06/08.
[239] Childs (note 2 above) 162.
[240] L Kaucher *Taking the Broader Picture: Why Feminist Academia Needs to Take Account of International Trade* Paper prepared for the UK Political Studies Association – Womenand Politics Annual Conference 2006 2 at < http://www.sps.ed.ac.uk/gradschool/psafem/pdf/TheImportanceofafeminist.pdf > 12/07/07. Reference in this chapter to the international trade regime is to the WTO agreements and the institutional structures that administer these agreements.

lack of access to resources and the work is aimed at facilitating these measures in the domestic setting.[241] The trade-liberalisation agenda of the WTO, which occurs at the macro-economic and the international level, has appeared to be far removed from the daily engagements of feminist activists.

Fourthly, the absence of feminist legal perspectives from international trade law discourse can also be explained by the rather late engagement of the feminist legal critique of international law in general.[242] International law has resisted feminist analysis.[243] Its subject matter, in particular public international law, has been regarded as gender neutral in its application.[244] It was only those areas of international law that applied directly to individuals, such as international human rights issues, that attracted feminist analysis.[245] Accordingly, feminist analysis of international human-rights law has occupied centre stage, leaving international trade law neglected as a focus of feminist analysis.

The relative absence of feminist scholarship in international trade law should not lead to the assumption that feminist critique in this area is any less necessary and valuable.[246] In fact, feminist analysis is both timely and necessary for at least two related reasons. For quite some time, feminist critiques have identified the structural problems of the neoliberal economic model.[247] Both feminist economists and feminist political economists have been instrumental in pointing out the gender biases underlying the global economic order. However, as Kaucher points out, it is in the international trade regime, which includes the laws and

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[241] Ibid 2.
[242] Childs (note 2 above) 162.
[243] H Charlesworth, C Chinkin & S Wright 'Feminist Approaches to International Law' (1991) 85 *The American J of Int Law* 613, 614.
[244] Ibid 614.
[245] Ibid 614.
[246] F Beveridge 'Further Feminist Readings on International Economic Law' in AH Qureshi (ed) *Perspectives in International Economic Law* (2002) 177. See also Catherine Hoskyns, who provides a detailed analysis exploring the interactions between the two fields. C Hoskyns 'Linking Gender and International Trade Policy: Is Interaction Possible? Center for the Study of Globalization and Regionalization' (2007) <http://www2.warwick.ac.uk/fac/soc/csgr/research/abstracts/217> 12.11.07.
[247] Kaucher (note 5 above) 1.

governing institutions of international trade, that the neoliberal global economic order is being fixed into legal structures of the WTO.[248] This legalisation of the international trading system has important implications. Firstly, it may have the effect of giving the system legitimacy, thus closing the door for scrutinising its underlying principles. Secondly, the WTO system, backed by its dispute-settlement system, is arguably the strongest form of international law, and as a result may possibly undermine other forms of law relevant for women. Thirdly, the legalisation of the trading system may prohibit or make it more onerous for states to reverse their commitments, or even prohibit them from doing so.[249] Due to these reasons, the legal system of international trade law needs scrutiny equal to, if not more than, that which is accorded to the neoliberal economic model and global governance.

A related fact that supports feminist engagement with international trade law, perhaps, is that the international law system is becoming more and more skewed towards advancing the perceived economic interests of a few states and corporations.[250] The international trade legal system is one important instrument utilised to this end. This, it is argued, diverts attention and resources from the enforcement of the human rights of women,[251] especially in the sphere of socio-economic rights. Hence, there is a need critically to assess the legal framework of the WTO from a feminist perspective.

Any discussion on feminist perspectives in international trade law deals with quite a number of lines of thought on the relationship between these two fields. This is inevitably so, given the variety of feminist theories themselves. The following

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[248] Ibid. These include practices such as non-discrimination and reciprocal trade relations which lead to unfair competition between the rich and the poor countries of the world. The contents and the effects of these principles and practices are discussed in detail below.
[249] Ibid 3. This is particularly true of the General Agreement on Trade in Services (GATS), in terms of which states cannot backtrack on their commitments to liberalise their services sectors. This approach of GATS 'locks in' sector-specific commitments with a built-in penalty for any 'roll back' on commitments.
[250] AX Fellmeth 'Feminism and International Law: Theory, Methodology, and Substantive Reform' (2000) 22 *Human Rights Quarterly* 658, 661-662.
[251] Ibid.

section attempts to highlight some of the analytical frameworks that can be employed to construct feminist critiques of international trade law. These analytical categories are variously employed in different feminist theories. Some may run through as common themes in many of these theories, while others may be particular to one or more of them.

3. CATEGORIES OF ANALYSIS IN FEMINIST THEORIES

In feminist theories, certain categories of analysis are employed to explain the various forms of power imbalance that shape gender relations in societies. These categories are also referred to as analytical frameworks. The most common include gender/sex, race, class, and geographical location. Some are widely shared among the different feminist theories, while others predominantly feature in only some of the theories. For instance, in radical feminist theory sex plays an important role in explaining gender inequality. Proponents of this theory argue that sexual oppression is the main explanation for women's oppression in society. Accordingly, for radical feminists women are oppressed because they are women.[252] In Marxist feminist theory, class oppression is seen as the source of all inequalities in society. Sexual oppression is merely another dimension of class power.[253] Socialist feminist theory combines both gender/sex and class as analytical frameworks. Here, both sex and class are sources of gender inequality; however, sex oppression is given primacy over class.[254]

Why do feminist theories employ different categories of analysis? What is the significance of using one category rather than another? These questions essentially lead to the bigger question of the reason behind the existence of several feminist theories.[255] A simple explanation for this complex question may

[252] C Beasley *What is Feminism?: An Introduction to Feminist Theory* (1999) 54.
[253] Ibid 60.
[254] Ibid.
[255] Beasley warns that the fact that different analytical frameworks are employed by different feminist theories should not lead to the conclusion that feminism is like an empty shell into which any number of different concerns and explanations may be poured. Ibid 28.

be that different feminist theories emphasise what they perceive to be the core reasons for gender inequality, and these reasons differ from one theory to the other. Eventually they constitute different feminist issues, which are explained by one or another analytical framework, or a combination of many.

The category of analysis utilised in a particular feminist theory shows the contexts that foreground that theory. The use of a wide variety of categories in explaining gender relations may help to address the contentious issues of diversity among women in any feminist analysis by capturing different contexts. This is because a singular focus on any one category, such as gender/sex, tends to homogenise the experiences of women. In so doing it obscures power relations along the lines of race, class and geographical location, which also shape gender relations. To elaborate this with an example from the trade regime, positing gender/sex as a singular category of analysis may not be adequate to capture the interaction of international trade with gender relations. This is because not all women are equally disadvantaged by, or equally benefit from, the international trade regime. A simple example here is to note that a white upper- or middle-class woman in the United Kingdom does not experience the effects of agricultural trade liberalisation in the same way as a female black subsistence female farmer in Niger. In fact, empirical evidence suggests that while some affluent women in developed countries actually benefit from trade liberalisation, the majority of poor women, especially in developing countries, are adversely affected by the system.

This diversity, however, does not deny the possibility of a feminist-based critique of the trade regime. It merely shows how, through the mediation of other factors such as race, class, and location, gendered identities are shaped differently. Most importantly, it shows that any feminist perspective on the international trade regime should scrutinise the multiple and simultaneous forces in operation which place women at a particularly disadvantageous position, or otherwise, in the operations of the trade regime. In addition, contextual analysis which aims at

paying attention to the different sources of power will also enable one to draw a broad enough view or conception of gender equality vis-à-vis the trade regime.[256]

3.1 Feminist analytical frameworks for exploring the gender–international trade regime nexus

The brief discussion above illustrates that various analytical categories can be utilised to analyse the situation of women and to design programmes, policies and laws aimed at contributing towards the betterment of their lives. Of course, this exercise may not be easy. At times, the discourse which is the subject of the analysis may appear to be far removed from the categories of feminist analysis, such as gender relations. Such is the case with the international trade regime. The trade regime appears to be a non-gendered and non-racialised discourse.[257] The most important question that this raises is: what sort of analytical framework/s can adequately address the relationship or interactions between the lives of women on the ground and the macro-level international trade regime?

The empirical studies on the effect of trade on gender relations so far may shed some light on the categories of analysis that could possibly be employed to carry out a feminist analysis of international trade. Often times, these studies indicate that it is poor women, located mostly in developing and less-developed countries, that bear the brunt of the dislodging effects of trade liberalisation.[258] In the

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[256] CT Mohanty ' "Under Western Eyes" Revisited: Feminist Solidarity through Anticapitalist Struggles' (2003) 28 *Signs: Journal of Women in Culture and Society* 499,502.

[257] See M Durano 'Gender Issues in International Trade' IGTN Working Paper 2002 <http://www.genderandtrade.net/Archives/Marina's%20paper.htm> 3/03/08. See also Mohanty (note 21 above) 510.

[258] For gender impacts of trade liberalisation in the various sectors see Z Randriamaro *Gender and Trade Bridges* 2006 http://www.bridge.ids.ac.uk/reports/CEP-Trade-OR.pdf 12/08/07. This cutting-edge work analyses the effects of trade on women based on empirical evidence from various studies in the different sectors as well as regions of the world. See also M Fontana 'The Gender Effects of Trade Liberalization in Developing Countries: A Review of the Literature' Discussion Papers in Economics, University of Sussex (2003). See M Fontana et al *Global Trade Expansion and Liberalization: Gender Issues and Impacts* (1998) Bridges Report 42 at http://www.bridge.ids.ac.uk/reports/re42c.pdf 12/07/07. On agriculture see also Z Garcia *Impact of Agricultural Trade on Gender Equity and Rural Women's Position in Developing Countries* (2004) at http://www.glow-boell.de/media/de/txt_rubrik_5/SuS_Garcia.pdf 10/04/07. For the

agricultural sector, for example, an extensive empirical study by Fontana et al gives evidence on the adverse effects on women of increased export cash crops in Africa. Similar findings by Garcia attest to the loss of livelihoods by women subsistence farmers in developing and less-developed countries due to the liberalisation of the sector. Similarly, in the services sector, with liberalisation, the cost of services rises, forcing women to make up for shortfalls in their caring responsibilities.[259]

In the developed economies where liberalisation has resulted in adverse impacts, it is in the majority of cases poor women, concentrated in low-paying jobs that are dislocated from their livelihoods. And these are often, women of colour and immigrants.[260] The findings of Christina and MacDonald, in their overview on the impact of the North American Free Trade Agreement (NAFTA) on women in Canada, show the adverse effects of NAFTA on immigrant women and women of colour. From the empirical evidence, it is possible to discern gender/sex, class, race and geographical location as some of the analytical frameworks that may be used for feminist analysis of the trade regime. I turn now to a brief examination of these frameworks.

3.1.1 Gender/sex, class, race and location

Gender/sex is used as a category of analysis is used in both liberal and radical feminist theories. Liberal feminism, which proceeds from the assumption that men and women are the same, advocates for the removal of barriers that bar women from participating in public life on an equal basis with men. The singular focus is therefore to secure rights for women the rights with which men are

services sector, see DI Riddle 'A Gender Based Analysis of International Trade in Services: The Experiences of Developing Countries' in A-N Tran-Nguyen & AB Zampetti (eds) *Trade and Gender: Opportunities and Challenges for Developing Countries* (2004) 176. Chapter 4 also discusses the effects of trade on women's human rights in the agriculture and services sectors.

[259] Randriramaro (note 23 above) 26-28.

[260] See G Christina & L MacDonald 'NAFTA and Economic Restructuring: Some Gender and Race Implications' in I Baker (ed) *Rethinking Restructuring: Gender and Change in Canada* 1996, 165-186. See also Mohanty (note 21 above) 510-522.

endowed in law. It usually portrays women's rights versus men's rights as the only basis of feminist analysis and coalition. In radical feminism, too, sex is used as a category of analysis. Radical feminism, however, emphasises the power differences between men and women, which have served to oppress women. This strand of feminism advocates for women to break free from male-dominated societal structures. Its conception of equality extends to actual social, legal, and economic equality. Therefore, it goes beyond the demand for equal opportunity and formal equality in law, as advocated for by liberal feminism.

Class, race and location have been identified as other important categories of feminist analysis. In this sense, class refers to an economic relationship expressing productive and reproductive relations in society. Defining economic class as it relates to women is a difficult task. Women's crucial roles in production and reproduction are regarded as key to undermining their social status and power. The commonalities in women's gendered work in the productive as well as the reproductive sphere lead to the conceptualisation of women's economic class.[261] They are reflected, among other things, in terms of segregation of women's work, low pay and the unpaid labour in the reproductive sector. Economic class as a category features prominently in Marxist, socialist and materialist feminist theories. It is also an import analytical framework in post-colonial/third-world and post-modern feminist theorising (and in post-modern theorising in general). In the first set of theories, although the degree of emphasis differs, the struggle against women's oppression is linked to the fight against capitalism, which in turn is claimed to be relying on women's labour for its survival.[262] In the second set of theories, class is usually regarded as one among the simultaneous sources of women's oppression.[263] Here the importance of class as an organising category is understood as interconnected or interwoven with other forms of oppression.

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[261] R Roth 'Race, Gender and Class: The Identity Politics of Post-modernity or the Socialist Project?' <http://leo.oise.utoronto.ca/~rroth/Raceclassgender.htm> 12/01/08.
[262] R Hennessy & C Ingraham *Materialist Feminism: A Reader in Class, Difference and Women's Lives* (1997) 2-12.
[263] Ibid 2-12.

Race as a category of analysis in feminist theorising features in post-modern and post-colonial feminist theories. In these theories, race as analytical framework is to be understood in intersection with other frameworks such as class and gender. Race is a social construction which recognises difference among social categories on the basis of which individuals are identified and identify themselves, and it signifies a representation of relations of power between these social categories.[264] According to Brewer, where racial demarcation is embedded in the laws, economy, institutional structures etc of a society, it becomes one of the determining factors in shaping one's gender identity.[265]

Geographical location is important as an analytical framework in post-modern and post-colonial feminist theorising. This category helps to contextualise the analysis under consideration. This, in turn, is particularly important from a feminist perspective, because it overcomes the problem of essentialising women's experiences. It helps to avoid generalisations. Location signifies the lived experiences of women vis-à-vis a certain discourse.

In contemporary feminist theories, in particular post-colonial/third-world and post-modern feminist theories, there is a tendency towards developing intersectional analysis, which gives equal or similar weight to gender, race, economic class and other categories of analysis in the global context.[266] What does such a framework of 'intersectional' categories do or mean?

The different categories of analysis used in feminist theorising are said to be relational in character.[267] They describe relations among people and hence they

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[264] RM Brewer 'Theorizing Race, Class and Gender: The New Scholarship of Black Feminist Intellectuals and Black Women's Labour' in SM James & A Busia (eds) *Theorizing Black Feminisms: The Visionary Pragmatism of Black Women* (1994) 13, 17.
[265] Ibid.
[266] Roth (note 26 above).
[267] C Mohanty 'Rac-ing Class and Gender (and Nation): Reconciling the Either Or' in M Themba (ed) *Race and Public Policy* 33-35.

are not embedded in people.[268] Accordingly, race is not embedded, nor is gender/sex. Instead, race and sex/gender determine how a black woman relates to the world. According to Mohanty, a focus on one category to the exclusion of another or others has the effect of leaving out the experiences and knowledge brought about by these relational categories. For instance, in the example of a black woman, focusing only on the category of gender/sex erases experiences of being black. An 'intersectional' framework provides a comprehensive and more accurate picture which makes the web of human relationships visible.[269] Its advantage is that it makes it possible to pay attention to the realties of the most disenfranchised, and this broadens the conceptions of justice and equality.[270]

What do these categories of analysis bring to the table in analysing the gender–trade nexus? The following section attempts to answer this question. It examines the trade regime through the lens of these categories as they are employed in different feminist theories.

3.2 The trade regime through the lenses of feminist analysis

This section on feminist perspectives relies heavily on feminist arguments in law and economics, and attempts to adapt and use these arguments in engaging with international trade regulation. Four themes in feminist theories are used to analyse the trade regime. These are the presumed neutrality and objectivity of law and economics; the market-state dichotomy; the discriminatory nature of the trade regime against third-world states, which is reflected in practices such as single undertaking and the non-operative special and differential provisions for developing states; and finally the regime's objective of free trade, which is dependent upon the exploitation of female labour in both the reproductive and productive sectors. The discussion is accordingly structured in four sections. Each examines one strand of these feminist perspectives to analyse the trade regime.

[268] Ibid 33.
[269] See ibid 35. See also Roth (note 26 above).
[270] Mohanty (note 32 above) 34-35.

3.2.1 The presumed neutrality and objectivity of law and economics

3.2.1.1 The neutrality and objectivity of law and economics through feminist lenses

Do the norms of international trade law address the interests of women? This section attempts to investigate this query by looking into the relationship between gender and law, particularly international trade law. One theme, which may perhaps be characterised as a common thread in many feminist theories is a critique of the normative presumption of the neutrality and objectivity of the law.[271] This critique is based on some of the many dichotomies that have formed the basis for structuring gender relations. The binary oppositions with particular relevance in this context are the objective/subjective and the legal/social dichotomies.[272] As in other binary oppositions, there is a gendered and hierarchical relationship involved in these pairings. While the objective and the legal are considered to be attributes of the male, the latter two are characterised as female attributes.

Law makes claims to objectivity.[273] This claim derives from legal methods, which attempt to separate legal issues from factual experiences arising from the implementation of legal rules.[274] They do so through the abstraction and generalisation of human experiences. This is possible when one adopts certain assumptions about human nature.[275] The norm for determining what human nature is has been the male standard.[276] Accordingly, as the law's claims to objectivity of

[271] H Charlesworth 'The Hidden Gender of International Law' (2002) 16 *Temple Int & Comp LJ* 93, 96.
[272] R Graycar & J Morgan *The Hidden Gender of the Law* (2002) 56-57. See also H Charlesworth & C Chinkin *The Boundaries of International Law: A Feminist Analysis* (2000) 48-52.
[273] Graycar & Morgan (note 37 above) 48.
[274] Ibid.
[275] AC Scales The Emergence of Feminist Jurisprudence (1986) 95 *The Yale L J* 1373, 1376-1378.
[276] Ibid.

the law are based mainly on male experience, they tend to overlook the experiences of women. This means that they do not properly capture the whole of human experiences, and hence may not necessarily be neutral.

A more problematic aspect of this is the argument that the law's claim to objectivity makes it distinct from the actual biases of decision makers.[277] This is advanced to show the distinction between the legal and the political. The problem with such a construction is that it makes political struggles and underlying structural inequalities invisible and places them outside of the boundaries or parameters of the law.[278] Moreover, since law is not entirely and always objective and neutral with regard to social groups in society, the basis for the distinction between the legal and the political cannot at all times stand. This point is important in that it illustrates the way the boundaries of law are drawn. It shows that the manner in which the boundaries of law are drawn is in important ways political in nature.[279]As such, this leaves some, if not all, of the boundaries of law always open to legitimate challenge.[280]

It is on the basis of a similar rationale that international law claims to be impartial and objective,[281] and more so when it comes to international trade law, for two reasons. Firstly, the underlying assumptions and principles of trade theory, which are constructed in economic terms, are said to be neutral and objective.[282] The main reference here is to economic principles such as comparative advantage. Similarly, trade theories are mainly informed by such assumptions of economics as: trade is a natural activity from which both parties to the exchange will gain, open trade generates growth and in the end creates welfare for all, open trade

[277] Charlesworth (note 36 above) 93.
[278] Beveridge (note 11 above) 178-179.
[279] For a detailed analysis of the boundaries of international law from feminist perspectives, see Charlesworth & Chinkin (note 37 above). See also Beveridge (note 11 above) 180.
[280] Beveridge (note 11 above) 180. Charlesworth & Chinkin (note 37 above) make similar assessment.
[281] Charlesworth (note 36 above) 93.
[282] See WA Wiegers 'Economic Analysis of Law and "Private Ordering": A Feminist Critique' (1992) 42 *The University of Toronto L J* 170, 170-171.

creates efficiency, and so forth.[283] Secondly, these assumptions and principles are based on the neoclassical economic vision of human behavior – competitive individualism – which women have been assumed and expected not to portray. Therefore, the entire assumption behind trade theory excludes women. Thirdly, trade theory deals with the aggregate picture at the macro level. It does not concern itself with the micro level and thus does not seek to identify and deal with the outcomes of the trade processes, at the social level in particular.[284] Similarly, trade policy makers continue to view it as neutral, and focus on macro-economics as disconnected from its social impacts on the ground.[285] This implies that trade decision making is apolitical. Both of these explanations point to a construction of the relationship between the economic and the social where the economic sphere is given primacy over the social sphere. This in turn draws from the dichotomy between the economic and the social, which, it is argued, is deeply gendered.[286]

Having economics as a fundamental basis of international trade law means the supposed objectivity of the latter is based on two grounds. One is, as we have just noted, the claim of objectivity of economics, which underlies trade policy. The other is the legal nature itself of international trade law: like other laws in general, it is generally assumed that international trade law is objective and neutral to an equal, if not greater, degree.

Within the focus of this study, the question that this invites is what implications this presumed 'objectivity' of international trade law has when viewed from a feminist perspective. It is submitted that the presumed neutrality and objectivity of international trade law and the consequences that follow from such an

[283] See Shell's account of how essentially positive account of how global free trade maximises real economic welfare. GR Shell 'Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization' in R Howse (ed) *The World Trading System: Critical Perspectives on the World Economy* (1998) 333, 344. See also Hoskyns, referring to these rationals underlying the trade regime (note 11 above) 8-9.
[284] Hoskyns (note 11 above) 8.
[285] M Pheko 'Gender and Trade Issues in Africa' Paper prepared for NEPAD Secretariat (2005).
[286] Beveridge (note 11 above) 179.

assumption are reflected on at least three levels: the level of rule making, the level of trade-policy review, and the level of rule enforcement.

3.2.1.1.1 Failure to take account of women's experiences vis-à-vis trade regulation

Rule making has two related components. As argued above, trade policy takes into account the overall flows at the macro level, with an emphasis on the 'overall' and the long term. This macro-level economic analysis views the household and the domestic sphere as outside of the market.[287] Feminist methodology, on the other hand, starts its analysis with women's livelihoods and experiences. In relation to the outcomes of trade processes, this essentially implies an emphasis on the micro level.[288] If, as feminist economists have convincingly shown, trade does indeed have differential impacts on women and men and therefore is not gender neutral,[289] a gender-blind rule making which focuses on the macro level is potentially problematic for the interests of women. International trade law may not take into account the lived experiences of women in relation to international trade. As a result, the law is often designed without regard to the socio-structural disadvantages that bar some women from making use of the opportunities it creates as well as equal participation in trade. The potential effect of this is that the law not only operates to the detriment of efforts that aim at affording equal socio-economic opportunities for women, but it may also further perpetuate inequality.

Another feminist critique regarding rule making can be found in the ever-expanding legal obligations related to trade liberalisation and the accompanying

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[287] There is a strong view among feminist economists that the macro-level economic analysis that focuses on monetary aggregates such as total output and expenditure has a male bias because it omits a whole area of production – that of unpaid production of human resources. See J Peterson & M Lewis *The Elgar Companion to Feminist Economics* (1999) 89-91.
[288] Hoskyns (note 11 above) 7-8.
[289] For an extensive discussion of the various considerations and issues in gender policy making see I Coche et al 'Gender Issues in Trade Policy Making' (2006) at <http://www.sice.oas.org/Genderandtrade/GenderIssuesinTP_e.asp#II> 25/07/07.

resistance to the inclusion of social issues in the legal framework of the WTO.[290] This is a question that relates to the deeply contested boundaries of international trade law. For example, while issues of intellectual property find their way into the legal framework of the WTO, human rights in their entirety are relegated as political matters and left to states. However, the most important reasoning to support this distinction in setting boundaries to trade law is based on political considerations. For instance, it was the trade-off between developed and developing countries that expanded the WTO to deal with intellectual property issues.[291] Therefore, intellectual-property issues were included in the WTO for strategic and political reasons. This goes to show that international trade law is far from being objective and neutral. Instead, political pressures and designs are central to determining its boundaries. Accordingly, the apparent absence of gender in the normative framework of the WTO in no way reflects that gender interests are not legitimate or appropriate as matters worthy of consideration by the trade regime. Rather their exclusion is a manifestation of the low political weight assigned to them.

It becomes clear from the above that an important critique of rule making in international trade from feminist perspectives is that trade theory does not address itself to the social effects and consequences that flow from open trade. This perhaps stems from the assumption that the trade regime will have beneficial social consequences for all in the long run, and proponents of this view refuse to revisit this flawed assumption. Although there is a general recognition that the effect of trade will be uneven both within and between states, it is argued that the effects will be specific to each country.[292] Therefore, for proponents of open trade, other policies and forums than trade policies and trade forums should

[290] Beveridge (note 11 above).
[291] While developed countries agreed to give concessions on agriculture and the trade in textiles, developing and least-developed countries agreed on the inclusion of intellectual property issues.
[292] K Dervis 'Growth, Inequality and Global Development: Who is Being Left Behind?' <http://www.ideas4development.org/growth-inequality-and-global-development-who-is-being-left-behind/en/> 07/02/08.

manage the resulting consequences of trade.[293] A similar stand seems to be adopted by the WTO framework. The only trade-policy review carried out by the WTO focuses exclusively on how WTO rules have been implemented by governments, and their impact on the multilateral trading system.[294] According to Annex 3 of the Marrakesh Agreement, however, the review mechanism enables the regular collective appreciation and evaluation of the full range of individual members' trade policies and practices, and of their impact on the functioning of the multilateral trading system. The trade-policy review focuses exclusively on how WTO rules have been implemented by governments and their impact on the multilateral trading system. The exclusion of trade policy review based on other grounds other than those actually used in the WTO review, such as welfare and well-being, is therefore open to challenge. Feminists have shown that the distinction between the macro and the micro is an artificial one that fails to take account of the social impacts of the trade policy.

3.2.1.1.2 Failure to take account of women's experiences vis-à-vis trade in adjudication of trade disputes

In line with the attitude to rule making, at the level of rule enforcement, neutrality is attributed to the WTO DSB. The DSB is said to be a rules-based system.[295] It replaced the power-oriented dispute-settlement structure under GATT.[296] It is claimed that a rules-based system entails neutrality in the interpretation, scope and application of the norms of international trade law.[297] This conclusion logically draws from the objectivity of the law and legal methods. According to feminist critique of law, however, the law is itself value-laden. Hence, the decisions and findings of the rules-based DSB will inevitably involve choices which may be

[293] Hoskyns (note 11 above) 8-10.
[294] See Annex 3 of the WTO-establishing agreement dealing with Trade Policy Review Mechanism (TPRM).
[295] D Cass *The Constitutionalization of the World Trade Organization: Legitimacy, Democracy, and Community in the International Trading System* (2005).
[296] Ibid.
[297] Beveridge (note 11 above) 179.

value-laden.[298] From the perspective the WTO framework, in addressing the interests of women, this means no consideration of women's experiences and the differential impact of trade on women and men. This eventually may have the potential to perpetuate inequality and frustrates the measures that can be taken to address the socio-economic consequences that women suffer.

3.2.1.2 Neutrality and objectivity of international trade as reflected in the institutional structures of the regime

Is the claim for the neutrality and objectivity of the trade regime reflected in its institutional structures? If so, what is the effect of this on gender relations from feminist perspectives?

3.2.1.2.1 State dominance in the WTO

One feminist critique of international law is the persistent dominance of states in international law, which has rendered women analytically invisible.[299] State dominance in international-law discourse is criticised for at least two important reasons. One is the claim that states cannot represent the interests of women at the international level because women are not adequately represented at the national level.[300] Accordingly, state dominance in international law will only reflect the values and interests of the dominant – the male.

Can this democratic deficit critique be extended to international trade law? Childs indeed does so. She advances that this is one potential concern to be raised with regard to the WTO trade regime, and that it is more pronounced when it comes to the WTO legal regime. The WTO is a member-driven organisation. Although

[298] Ibid.
[299] K Knop 'Re/statements: Feminism and State Sovereignty in International Law' (1993) 3 *Transnational L & Contemporary Problems* 293.
[300] Fellmeth (note 15 above) 670.

other forms of organisations, such as customs unions, are members, its membership is mainly state centred. It has very limited room for other actors, such as non-governmental organisations (NGOs).[301] This is despite international trade law's role in regulating the activities of private actors, with significant consequent internal effects.[302] Even though the rights and obligations that accrue from the WTO rules are said to be state rights and obligations, it is private actors that are involved in trade activities, not the very states themselves. Therefore WTO rules indeed apply to private actors.[303]

In responding to the challenges posed by the centrality of states in international discourse, Childs suggests several strategies, such as enhancing the influence and participation of NGOs and networking through female-dominated structures.[304] The challenge to state dominance in the discourse on international trade law, and therefore the call for less statism, advocates for more room for other actors – such as NGOs – in the legal discourse of the WTO.[305] However, Childs makes some reservations about the benefits of providing more room for NGOs. Childs argues that there is no guarantee that NGOs will be more sympathetic to feminist concerns in this arena than the existing participants are. She further argues that the lack of democratic accountability may make them less susceptible than states to some forms of feminist activism.[306] Similarly, Beveridge is skeptical about a sweeping agreement as to the advantages of NGO participation in the WTO discourse. She claims that NGO participation is neither a good nor a bad thing per

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[301] See S Charnovitz 'Opening the WTO to Non-Governmental Interests' (2000) 24 *Fordham Int L J* 173-216.
[302] Charnovitz shows that the WTO agreements affect individual rights in different ways. For instance, some give individuals rights in national laws, and some procedural rights in the WTO. See S Charnovitz 'The WTO and the Rights of the Individual' *Intereconomics* (March/ April 2001) at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=282021> 14/02/08.
[303] This conclusion is supported by both by Charnovitz (note 67 above) and Fellmeth (note 15 above) 672.
[304] Childs (note 2 above) 169.
[305] It is interesting to note here that although there is greater call for NGO participation in the WTO process, at least in practice, if not at the normative level, NGOs already play a considerable role in the various processes, such as the DSB. See J Dunoff 'The Misguided Debate over NGO Participation at the WTO' (1998) 1 (3) *J of Int Economic L* 433-456.
[306] Childs (note 2 above) 169.

se, but will have different effects in different institutions and on different issues, and advises for a more careful consideration.[307]

3.2.1.2.2 Less and/or more state

At this juncture, a point that may perhaps need clarification relates to the different feminist perspectives calling for 'less and/or more state'. Feminists criticise state dominance in international trade-law discourse, and call for engagement by NGOs and women's groups. Another voice from feminist ranks advocates for 'more state' at the international level. This is particularly true for proponents of third-world feminism. Recently, third-world feminist movements have been focusing on issues of economic and social justice. At the international level, their emphasis is on how institutions and structures of international law in the economic sphere are perpetuating inequality and poverty by facilitating the exploitation of third-world states (and third-world women).[308] They claim that global capitalism, with its institutional structures, features as one analytical framework among others in explaining the disadvantages of third-world women. Because of this, the generation, control and redistribution of resources[309] inevitably become a central agenda of third-world feminist movements. But the goal of redistribution cannot be achieved on its own.[310] It can only be effected by the state.[311] This is where the call for 'more state' comes in. However, as shown above, the market–state dichotomy, which justifies the underlying principles of international trade law such as non-discrimination, by de-legitimising state intervention, bars the state from engaging in redistribution. International trade-law principles hence advocate for less state, while redistribution and similar imperatives called for by third-world feminists call for more state.

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[307] Beveridge (note 11 above) 187.
[308] Charlesworth & Chinkin (note 37 above) 47.
[309] C Johnson-Odim 'Common Themes, Different Contexts' in C Mohanty et al 'Third World Women and the Politics of Feminism' quoted in Charlesworth & Chinkin (note 37 above) 47.
[310] M Thornton 'Feminism and the Changing State: The Case of Sex Discrimination' (2006) 21 *Australian Feminist Legal Studies* 152, 164-165.
[311] Ibid.

Looked at literally, the call for 'less state' and 'more state' may appear contradictory. But in actual fact, these two calls are complementary. This is because the call for less or more state, as the case may be, is done at different levels. While 'less state' is advocated at the level of international law discourse (to allow more space for non-state actors), 'more state' is called for at the domestic or internal level. Accordingly, it is good to have more room for actors other than states at the international level to influence decision-making and make the interests of women more visible: hence, 'less state'. At the domestic level, on the other hand, 'more state' is required to engage meaningfully in redistribution and improve the lives of women. In this regard, international trade norms should not diminish state policy-making capacity or space.

3.2.1.2.3 Gender imbalance in the WTO structures and gender mainstreaming at the WTO

There is gender imbalance in the institutional structures of the WTO.[312] Although gender imbalance is rather a common feature in most international institutions, the extent of the imbalance is greater than usual when it comes to the WTO.[313] For instance, men dominate the DSB of the WTO, which is responsible for settling disputes between states. From the beginning, all seven members of the Appellate Body were men.[314] Except for the introduction of one female member of the DSB, this figure has remained unchanged.[315] Similarly, women are appointed infrequently as members of WTO panels.[316]

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[312] This feminist critique relates to the relative absence of women in international legal institutions See Charlesworth & Chinkin (note 37 above). For a specific reference to the WTO, see Childs (note 2 above) 167.
[313] Childs (note 2 above) 167.
[314] See LM Jarvis 'Women's 'Rights and Public Morals Exception of GATT Article XX' (2000) 22 *Michigan J of Int L* 219.
[315] See <http://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm>, describing the current members of the DSB of the WTO and how they are appointed. 09/11/07.
[316] J Linehan 'Women and Public International Litigation' Background Paper prepared for the Project on International Courts and Tribunals (2002) <http://www.pict-pcti.org/publications/PICT_articles/Women1.pdf> 09/11/07.

What is the implication of gender imbalance in the distribution of power in the various institutional structures of the WTO? It has been pointed out repeatedly that the mere presence of women does not guarantee that gender perspectives will be brought to the work of any international institution, including the WTO.[317] Despite this, the absence of women on its own also has some undesirable consequences. For instance, male dominance in the structures of the WTO may make it far less likely that the WTO will be presented with women's diverse experiences.[318] It is also in this context that Childs makes a case for more representation of women, arguing additionally that international bodies have a professional development and training role for their employees, and therefore it is critical that these bodies strive to ensure equitable access to such opportunities.[319]

The absence of a gender mainstreaming initiative is another shortcoming of the WTO. Scholars argue that mainstreaming focuses on how decisions are made.[320] This raises the question whether decision makers are informed about the gender impacts of their decisions.[321] The WTO will not fare well in efforts geared towards gender mainstreaming, as it has not yet implemented gender-mainstreaming policies.[322] This perhaps makes it one of the few international institutions that has not ventured into this project. Even the other international financial institutions (IFIs), the World Bank and the International Monetary Fund (IMF), have ventured into gender mainstreaming, although the strategies employed and their effectiveness may be debated. This has been one source of criticism against the WTO.

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[317] Childs (note 2 above) 168.
[318] 'WEDO Primer: Women and Trade - A Gender Agenda for the World Trade Organization (1999) <http://www.wedo.org/files/genderagendaWTO_primer.htm> 09/11/07.
[319] Childs (note 2 above) 168.
[320] F Beveridge 'Feminist Perspectives in International Economic Law' in D Buss & A Manji (eds) *International Law: Modern Feminist Approaches* (2006) 173, 184.
[321] Ibid 184 -185.
[322] J Fabian *Mulier Economicus: Gender and the WTO* (2007) 14 at http://www.cpsa-acsp.ca/pdfs/2007_Programme.pdf 12/11/07.

Gender mainstreaming attempts to assess the implications of all policies and measures on the respective situations of women and men at the planning, implementation, monitoring and evaluation stages.[323] Policies and measures in all political, social and economic spheres are made subjects of analysis. From this understanding, it becomes evident that gender mainstreaming from the outset recognises that there are gender differences and inequalities. It then proceeds to examine how these differences and inequalities are relevant to the particular subject under discussion. Finally, it attempts to identify opportunities through which these inequalities can be narrowed.

The absence of gender mainstreaming initiatives in the WTO raises several questions. It would appear that the very existence of gender differences or inequalities in relation to international trade is not duly recognised; is this so? Does it further show the belief that whatever gender differences and inequities may exist, they do not have implications for how trade might affect and be affected by these differences? Does it portray a lack of belief that the trade regime could provide opportunities to narrow these inequalities? The answer may lie in the combination of these three questions. At any rate, it is safe to say that the absence of a gender-mainstreaming initiative reinforces the underlying assumption that trade is a gender-neutral process of turning inputs into tradable goods and services.

3.2.2 The market–state dichotomy

The second argument from feminist perspectives focuses on the market-state dichotomy and its effect on the lives of women. Do the underlying principles of international trade law take the interests and needs of women into account? Charlesworth argues that international law is gendered.[324] According to her, one way of unpacking the hidden gender of international law is to ask: '"What types

[323] 'UNDP 'Gender Mainstreaming: an Overview' <http://www.un.org/womenwatch/osagi/pdf/e65237.pdf> 09/11/07.
[324] Charlesworth (note 36 above) 95.

of values are woven into the fabric of international law?"' In this section, a similar approach is adopted to investigate if international trade law is, in fact, gendered.

Of the several underlying principles pertaining to the international trade regime of the WTO, the two most important are reciprocity and non-discrimination. The preamble of the establishing agreement of the WTO reads:

> *Being desirous* of contributing to these objectives [of the WTO] by entering into *reciprocal* and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and *to the elimination of discriminatory treatment* in international trade relations… (My emphasis)

These principles contribute significantly to the achievement of the various objectives of the trading system. Further, they shape the manner in which trade relations of states are to be conducted. As such, they lay the foundation for the legal framework of the WTO.

The main argument in this section is as follows. Reciprocity and non-discrimination are said to derive from the dichotomy drawn between state and market. The market–state dichotomy, which has been legitimatised by conceptions of the natural and autonomous nature of the market, in turn has two implications on gender relations. Firstly, it de-legitimises any form of state intervention,[325] such as redistribution, aimed at helping or transforming the economically weak sections of society.[326] Secondly, it gives centrality to efficiency, rather than people and social goals, thereby leading to the domination of economic interests over all aspects of political and social life.[327] This, it is argued, disproportionately affects women.

[325] Beveridge (note 85 above) 190-191.
[326] L Beneria 'Globalization, Gender and the Davos Man' (1999) 5 *Feminist Economics* 61, 69.
[327] Ibid 75.

3.2.2.1 Non-discrimination and reciprocity in the WTO

Reciprocity is a very important principle of the WTO trading system. The perceived need for this principle rests on economic rationales. Under its operation, trade negotiations are supposed to bring about reductions to trade barriers, such as tariffs.[328] According to Bagwell and Staiger, reciprocity in these negotiations serves to bring about efficiency in trade, and refers to '"the ideal of mutual changes in trade policy which bring about changes in the volume of each country's imports that are of equal value to changes in the volume of its exports."'[329] It is claimed that reciprocity helps to fix world prices between negotiating parties by ensuring that neither partner experiences loss of terms of trade through tariff reduction.[330] It ensures a balance of concessions.[331] Accordingly, when governments tamper with concessions already given, for instance by withdrawing them, the balance will be strained. WTO rules prohibit state interventions in concessions by penalising any tampering with them. To ensure efficiency reciprocity, requires states to adopt a hands-off approach when dealing with the market.

The principle of non-discrimination is closely related to reciprocity, and is intended to bring about the elimination of discriminatory treatment in the international trade relations of states. It has two components: the 'most favoured nation' treatment (MFN) and the national treatment (NT). While MFN treatment applies to all agreements of the WTO, the application of NT may vary in different agreements; for instance, NT may not be applicable in the services agreement. The MFN rule requires that a service or good made in one country be treated no less favourably than a like service or good that originates from any other country. Accordingly, the best treatment offered by a member country to any other country

[328] K Bagwell & RW Staiger Multilateral Trade Negotiations, Bilateral Opportunism and the Rules of GATT/WTO (2005) 67 *J of Int Economics* 268, 269.
[329] K Bagwell & RW Staiger *Economic Theory and Interpretation of GATT/WTO* (2003) 18 at <http://www.columbia.edu/~kwb8/EconInterpWTO.pdf > 12/11/07.
[330] Bagwell & Staiger (note 93 above) 269-70.
[331] Bagwell & Staiger (note 94 above) 18.

serves as a benchmark for MFN treatment. The principle of NT requires that once foreign goods and/or services enter a member country, they should be treated no less favourably than like domestic goods and/or services in terms of internal measures such as taxes.

In a similar way to reciprocity, the two sets of non-discrimination principles rest on economic justifications. From an economic perspective, non-discrimination through MFN is rationalised on grounds of efficiency. If a state policy does not discriminate among foreign suppliers, then both importers as well as consumers in the state will have the incentive to buy from the lowest-cost foreign supplier.[332] Likewise, the NT requirement guarantees that the low-cost foreign supplier which has been the preferred supplier does not lose its favourable status through the imposition of internal taxes which may offset the low cost.[333] In both instances, it is the supplier that can provide the product or service at the lowest possible cost that will gain the market. This, from an economics point of view, is efficient trade. It therefore follows that the non-discriminatory policy of a state ensures efficient trade in an economic sense.

3.2.2.2 Non-discrimination and reciprocity through feminist lenses

When viewed from feminist perspectives, these economic justifications prove to be problematic. These principles delegitimise state intervention and position social interests in opposition to economic interests, and even as inferior to them.[334]

It is evident from the brief discussion above that both non-discrimination and reciprocity advocate for minimal and at times no state interference in the

[332] B Hoekman '*The WTO: Functions and Basic Principles*' in B. Hoekman et al (eds), *Development, Trade and the WTO: A Handbook* (2002) 41, 42.
[333] Ibid.
[334] Beveridge (note 85 above) 190.

operations of the market. The stand on state neutrality in relation to the functions of the market draws from the dichotomy between state and market.[335] Although the laissez-faire theory[336] behind the free market is complex, one can proceed with a fairly simplified account of its basic tenets. One such tenet submits that the market is natural, in that it reflects the actual supply and demand in economic relations among people.[337] An accompanying tenet asserts the autonomous nature of the market:[338] it is not created by the state and can function independently of the state.[339] These two tenets advocate for state neutrality with respect to the operations of the market.[340]

The market–state dichotomy is found to be problematic when viewed from feminist perspectives. The problems are twofold. The first relates to the very construction of the dichotomy. Feminists have managed to show that the construction of the market–state dichotomy is flawed and can be challenged as *non-existing*. The second problem relates to the consequences that flow from adopting this dichotomy.

To start with the first problem, feminist critical thinking has shown that the market is not a natural phenomenon, but is rather a social construction.[341] This is true at both the national and international or global levels. The construction of the laissez-faire market economy required continuous, centrally organised and controlled interventionism by the state.[342] The intervention took several different forms. Among these are various legislative initiatives and the increased

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[335] Ibid190-191.
[336] For the history and detailed examination of this theory, see J Mulberg *Social Limits to Economic Theory* (1995).
[337] FE Olsen 'The Family and the Market: A Study of Ideology and Legal Reform' (1983) 96 *Harvard Law Review* 1497, 1502.
[338] Ibid 1502-4.
[339] Ibid .
[340] Ibid .
[341] M Danner and G Young 'Free Markets and State Control: A Feminist Challenge to Davos Man and Big Brother' (2003) 11 *Gender and Development* 82, 86. See also Beneria (note 91 above).
[342] See the discussion on The Great Transformation by Karl Polanyi in L Beneria 'Globalization, Gender and the Davos Man' (1999) 5 *Feminist Economist* 61-83.

administrative functions of the state.[343] The continuous state intervention towards the formation of the laissez-faire market economy shows that this phenomenon is planned.[344]

At the international level, the growth in global markets has been the result of similar interventions.[345] This time around, the intervention has been mostly from international forces beyond national boundaries of states.[346] These forces are mainly the free-trade areas, the common markets and the IFIs: the World Bank and the IMF.[347] These forces dictated the design of national policies aimed at freeing the market from interventions. Deregulation serves as a very good example in this regard.[348] Deregulation served to erode economic borders between countries, leading to the creation of free markets. An interesting phenomenon in the growth of the global market is the interventions by international forces that brought about a policy of non-intervention at the domestic arena on the part of nation states. While international forces intervened in state matters to facilitate the global free market, this required of states not to intervene in the operations and outcomes of market forces internally. It thus follows that the construction of the market–state dichotomy at both the national and global level is flawed. Therefore the market cannot be separated from states and international bodies; in fact, it depends upon them for its creation. This finding is significant from a feminist perspective because if the market is a social construction, a different form of construction is feasible.[349] This raises the question: what are the consequences of the market–state dichotomy on gender relations/feminist thoughts?

Although concept is flawed, the construction of the current forces of global market is premised on the market–state dichotomy. The WTO principles of non-discrimination and reciprocity, which advocate for minimal state intervention in

[343] Beneria (note 91 above).
[344] Ibid.
[345] Danner & Young (note 106 above) 86.
[346] Beneria (note 91 above) 65-66.
[347] Ibid 66.
[348] Ibid.
[349] Danner & Young (note 106 above) 86.

the operations of the market, attest to this conclusion. The dichotomy, which has been legitimatised by conceptions of the natural and autonomous nature of the market, has two implications on gender relations. Firstly, as noted above, it delegitimises any form of state intervention,[350] such as redistribution, aimed at helping or transforming the economically weak sections of society.[351] Empirical research findings suggest that the global market has generated imbalances and inequalities, as well as maldistribution of resources within and among countries.[352] These studies paint a gloomy picture from a gender perspective. Global trade has in many cases increased the vulnerability of women.[353] In the face of such consequences, state interventions become crucial for dealing with inequalities. Non-intervention will only perpetuate inequality, and may further create new inequalities.

Secondly, as also noted above, the market-state dichotomy gives centrality to efficiency rather than people and social goals, thereby leading to the domination of economic interests over all aspects of political and social life.[354]According to Beveridge, it "positions social interest as somehow opposed to market interest".[355] The prioritisation of economic or market interests over other aspects of social and political life will disproportionately affect women. A larger proportion of populations in the world engage in an unpaid production,[356] and around the world women are disproportionately represented in the unpaid work force. The unpaid

[350] Beveridge (note 85 above) 190-191.
[351] See S Bisnath 'The WTO, GATS and TPRM: Servicing Liberalization and Eroding Equity Goals' in L Beneria and S Bisnath (eds) *Global Tensions: Challenges and Opportunities in the World Economy* (2004)155, 163-164. Bisnath makes a similar argument in relation to trade in the services sector.
[352] While some people argue that more open trade may lead to increased income inequality, others, short of attributing causality, agree that increased income inequality across and within countries can be correlated with the deepening of market integration. See AO Sykes 'International Trade and Human Rights: An Economic Perspective' in FM Abbott et al (eds) *International Trade and Human Rights: Foundations and Conceptual Issues* (2006) 69, 81. for the former view, and see Dervis (note 57 above) for the latter view.
[353] See the various references on the adverse effect of trade liberalisation on women in note 2 above.
[354] Beneria (note 91 above) 75.
[355] Beveridge (note 11 above). 191.
[356] Beneria (note 91 above) 69.

production is only indirectly linked to the market.[357] As a result, this form of economic activity is not elevated to the status of economic or market interests. The needs and interests of the majority of women will come only second to the demands of economic efficiency – the market. This implies that women's interests will be advanced provided only that they do not get in the way of the parameters of market efficiency. This becomes very problematic when the market itself is producing undesirable distributive consequences in the social life of people. A very good illustration of this outcome is the decline in the provision of social services. This is dictated by the market either through reducing government revenue or through shrinking the policy space of nation states. Women rely heavily on social-service provisions in order to carry out their reproductive functions properly.

3.2.3 Discriminatory aspects of the trade regime against third-world states

3.2.3.1 Discriminatory practices in the WTO

The third argument from feminist perspectives deals with the discriminatory aspect of the trade regime against third-world states and its consequences on the lives of women. Two themes emerge from postcolonial theorising which are relevant for analysing the phenomenon of discrimination in the international trade regime. These are the currently discriminatory aspects of international action vis-à-vis third-world states, and giving voice to the most oppressed people.[358] These themes can accordingly be adapted to analyse the trade regime from a feminist perspective. The focus of analysis from a post-colonial feminist perspective would be on the discriminatory aspects of international trade law vis-à-vis third-world developing and least-developed states, and their effect on women, and the

[357] See Peterson & Lewis (note 52 above).
[358] B Lyon 'Discourse in Development: A Post-Colonial Agenda for the United Nations Committee on Economic, Social and Cultural Rights (2002) 10 *J of Gender, Social Policy and the Law* 536, 552-553.

attempt to give voice to those sections of society most oppressed and affected by the operations of trade – women.

In what ways does the international trade regime discriminate against third-world states? Two features epitomise this phenomenon: the underlying principle of non-discrimination, and the requirement of single undertaking practised in the WTO.

3.2.3.1.1 Non-discrimination – impact on third-world states and women

The principle of non-discrimination, as briefly elaborated above, relates to the discriminatory aspects of international trade law vis-à-vis developing and least-developed third-world states. As discussed earlier, non-discrimination in international trade law has two components, the MFN and NT rules. These rules seek to enforce an important legal principle – equality before the law.[359] While the MFN rule guarantees equal treatment to products from different countries, NT assures equal treatment for foreign products in relation to national products. Together they create equal conditions of competition[360] for all products in the market. The logical conclusion is that these rules create equal pressures towards reform and adjustment[361] for all the participants in the market – nationals and non-nationals.[362] This is irrespective of the relative positions of the participants in the market, as well as the relative positions of beneficiaries from the market. Some may be poor; others may be rich. Unequals may thus end up getting equal treatment. A principle of non-discrimination between the developed first world and the developing third world may serve to perpetuate poverty in the latter. The adverse effects of this unfortunate outcome are disproportionately shouldered by women who constitute the majority of the poor in these countries.

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[359] T Cottier 'From Progressive Liberalization to Progressive Regulation' *J of Int Economic L* 795, on line 3 November 2006.
[360] Ibid 796.
[361] Ibid.
[362] S Walker 'Human Rights, Gender and Trade' in A-N Tran-Nguyen and AB Zampetti (eds) Trade and Gender Opportunities and Challenges for Developing Countries (2004) 321, 322-329.

The discriminatory aspects of international trade law vis-à-vis third world-states result in the perpetuation of poverty, which above all victimises women. This is because women are more vulnerable to poverty due to the operations of different layers or axes of power that result in gender inequality.[363] Access to resources is conditioned upon established gender hierarchies in societies. As is evidenced by several studies, women lack access to and control over productive resources and property. Similar gendered hierarchies have placed the burden of reproductive functions on women. This has wide-reaching implications.

Location also has a major influence on who may be further marginalised by the dislodging effects of discriminatory trade practices. Among the world's poor women, the majority are found within the developing and less-developed world – the third-world/southern states.

There are thus a number of factors, such as gender-based division of labour, gendered access to resources, and location-based differences in the extent of poverty, which result in a differential impact of poverty on women and deepen the extent to which they experience poverty. Accordingly, if trade tends to perpetuate poverty, those that are more vulnerable will sink further into the poverty trap. Hence, the combination of these factors imply that 'equal pressure for reform' and 'equal adjustment to trade', as predicated upon the non-discrimination principle of the WTO, constitute a fallacy.

In the second theme of post-colonial theory mentioned above lies the aim of giving voice to the most oppressed. One methodology for identifying the most oppressed or disadvantaged is the use of the 'intersectional' framework. This entails recognition of the multiple and simultaneous sources of oppression, which helps to identify the most oppressed in a society. The discussion above illustrates

[363] VM Mogahadam 'The Feminization of Poverty and Women's Human Rights' SHS Papers on Women's Studies/Gender Research (2005) 6 <http://portal.unesco.org/shs/en/files/8282/11313736811Feminization_of_Poverty.pdf/Feminization%2Bof%2BPoverty.pdf> 09/11/07.

that it is women that bear the brunt of the discriminatory trade principles that perpetuate poverty in the third world. This is not mere coincidence. It is in fact the result of a combination of forces/factors that make women more vulnerable to poverty. Determined by gender and location, among other conditions, they account for the fact that certain categories of women – poor women in the developing world – are more affected by trade than others. This captures the second theme: identifying the most oppressed sections of society and articulating their situation. It is when the situation of these women is articulated through the lenses of various forces that determine distribution of power that one is able to identify the extent and degree of their oppression. Women of the third-world states are the most oppressed as a result of the operations of the trade regime because they are affected at multiple levels.

The principle of non-discrimination can also be examined in light of feminist understandings of the concept of equality. Equality in feminist legal analysis has come to signify substantive equality. However, it is evident that the principle of non-discrimination as applied in the trade regime advocates for formal equality, which has been discredited in feminist theories as inadequate to address the situation of women. In elaborating these concerns, one can borrow from or rely on some of the human-rights approaches employed in the critique of international trade law above.

A very good point of comparison for assessing the inadequacy of the non-discrimination principle in trade law is its manner of application in human-rights law. Non-discrimination is a principle in both human rights and in international trade law, but its application in the two fields differs. In human-rights law, the principle of non-discrimination allows, and at times demands or requires, differential treatment.[364] Since the end goal of human-rights law is to realise the human rights of all, temporary measures such as affirmative action, which grant special treatment, are implemented. This aspect of non-discrimination in human-

[364] Walker (note 127 above) 3.

rights law has two important implications. Firstly, it imposes positive obligations on a state. This in turn requires action, rather than mere inaction, on the part of a state. Secondly, it may entail or bring about redistribution in society. It paves the way for 'social justice'. The application of non-discrimination in human-rights law shows the gaps of the non-discrimination principle in trade law.

A human-rights approach to trade law may have the potential to rectify the undesirable social impacts of the application of this principle in international trade law. The human-rights understanding of non-discrimination, if properly applied in trade law, may mean a different outcome. Firstly, it would allow for differential treatment of countries within the WTO system.[365] Secondly, its application in the field of economic life would open the door for government actions geared towards regulation of the market and ultimately to redistribution. This paves the way for 'economic justice', which in turn levels the playing field for all actors. The most important implication of this approach is that by allowing government actions in the market sphere, it positions social interests and market interests as equally legitimate. In the prevailing conditions of the developing economies, this is absolutely crucial for human development and for addressing structural inequalities in society.

3.2.3.1.2 Single undertaking – impact on third-world states and women

Another manifestation of the discriminatory aspect of trade law vis-à-vis southern states is the practice of single undertaking. This is something that lies somewhere between the very rules themselves and the institutional structure of the WTO. The practice of single undertaking compels all members of the WTO to sign into all

[365] The reference here is not to the 'un-operational special and differential treatment', but an operational one.

the WTO agreements at once.[366] It replaced the doctrine of variable geometry which allowed members of GATT to decide for themselves whether to sign up for the complementary agreements negotiated in the various trade rounds.[367] With the formation of the WTO in the Uruguay round, the concept of single undertaking came into the picture.

A question has arisen as to whether single undertaking is indeed an appropriate mechanism to integrate countries into the trading regime. It is claimed that it disregards the broad range of conflicting economic and development interests which different members pursue within their respective trade policies.[368] It will force developing and least-developed countries to agree to agreements that will place them in unfair competition with the developed countries.[369] Some countries may not have the capacity to implement some of the agreements. The agreement on intellectual-property rights is a good example. It may also be the case that the implementation of some of the agreements may be detrimental to national interests and development priorities. According to some, single undertaking not only retards national development and redistribution efforts[370] but also perpetuates poverty and inequity.[371]

To conclude, the brief discussion above suggests that it may be possible to construct a feminist critique of international trade law based on the underlying principles of the system. The principles of non-discrimination and single undertaking undermine the interests of women, and in particular poor women, in the developing world.

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[366] This excludes what are referred to as plurilateral agreements, which are reserved to consenting members only. These are very few and not that significant from the perspective of the development needs of the developing and least developed members.
[367] Cottier (note 124 above) 792.
[368] Ibid 793.
[369] LL Pheko 'Interlocking Features of Gender, Trade and Poverty' (2006) 2 at <http://www.igtn.org/pdfs//457_GENTA%20-%20Interlocking%20features%20of%20Trade,%20Gender%20and%20Poverty.pdf> 10/11/07.
[370] Ibid 2.
[371] Intellectual property protection is a good example here, where it serves to secure net transfer of millions of dollars from developing countries to developed countries.

3.2.4 The dependence of the free-trade objective of the regime on the exploitation of female labour in both the reproductive and productive sectors

The last of the feminist arguments focuses on the free trade objective of the WTO. A fundamental underlying principle of the international trade regime is free trade. The argument from feminist perspectives in this regard is that this objective is realised through the exploitation of female labour in both the reproductive and productive sectors.[372]

3.2.4.1 The contribution of the objective of free trade to the feminisation of labour

The principal means of encouraging free trade involves the lowering of trade barriers. The barriers in question range from tariffs to all kinds of non-tariff barriers.[373] The pursuit of free trade has significantly contributed to the restructuring of the global economy and production around the world.[374] Studies indicate that trade liberalisation is one of the main factors that has led to restructuring of production worldwide.[375] Other factors, such as rapid advances in technology and transportation, as well as the rising cost of labour in the developed world, have also contributed to the restructuring of the global economy.[376] The restructuring of production, in particular, is reflected, among other things, in terms of the changing international division of labour and the growing integration of the world economy. Changes in labour force, a manifestation of restructuring, will form the focus of this discussion.

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[372] Keating, in the editorial to Oxfam's *Journal on Gender and Development*, explores how international trade relies on unequal division of labour women and men. M Keating 'Editorial on Trade, Gender and Development' (2004) 2(12) *J on Gender and Development* 2.
[373] WTO 'Understanding the WTO: Basic Principles of the Trading System' <http://www.wto.org/english/theWTO_e/whatis_e/tif_e/fact2_e.htm> 12/11/07.
[374] N Kabeer 'Marriage, Motherhood and Masculinity in the Global Economy: Reconfigurations of Personal and Economic Life' Institute of Development Working Paper (2007) 10 <http://www.ids.ac.uk/ids/bookshop/wp/wp290.pdf> 12/11/08.
[375] L MacDonald 'Trade with a Female Face' in A Taylor & C Thomas (eds) *Global Trade and Global Issues* (1999) 53, 56.
[376] Kabeer (note 139 above) 10.

Trade liberalisation has dismantled barriers such as border measures, which has led to a profound increase in the flow of goods and services, as well as people, across borders. This, coupled with the rising cost of labour in the developed world, has facilitated the relocation of manufacturing plants and services in parts of the world where cheap labour is available. The competition brought about by the increasing integration of economies has led to the growth of export-oriented production, such as textiles, electronics, horticulture and so forth, in parts of the world which formerly relied on agriculture and import-substitution industries.[377] The combination of these factors has brought about changes in the labour force. One important face of this change is the feminisation of labour.

The search for cheap and flexible labour in the era of trade liberalisation has led to the feminisation of the work force.[378] Thus, one interesting consequence of economic restructuring is the increase in the percentage of women entering into the work force. Feminists argue that, in addition to this, restructuring is also bringing about changes in women's work.

These changes are seen in terms of the kind of work women do, the hours put in, conditions of work and pay. Women are increasingly moving into the productive economy, where they get paid jobs. Their newly found productive work combines with the old reproductive work to increase the total hours devoted to work tremendously. Part-time work and informalisation of work are becoming growing trends. There is an increase in female workers in the sexual and domestic as well as the service industries.[379] Thus, economic restructuring is creating a new working class, comprised of women.

Just as the productive sector of the economy has seen changes in women's work, similar changes are starting to appear in the reproductive sectors as well. Economic restructuring is blamed for the re-privatisation of women's labour

[377] Ibid 11.
[378] McDonald (note 140 above) 56.
[379] Mohanty (note 21 above) 526.

through its policies, which advocate for less state in the provisioning of services and redistribution of resources in the economy. The staunch support for minimal state shifts the responsibilities for social welfare from the hands of the state to the household and the women therein.[380] This has added to the burden on women as household managers and nurturers.[381]

What is the problem with the feminisation of labour and the changes in women's work brought about by restructurings of production? Feminists argue that the rise in the number of women entering the workforce is not mere coincidence. In this argument, it is in fact the particular nature or type of labour that the current global economic system requires that makes female labour the preferred form of labour. Informal, flexible, cheap and abundant labour characterise the ideal nature of labour demand in the market today.[382] These features, due to the intersection of various societal and structural factors, characterise female labour. Various feminist theories have analysed the relationship between female labour and the operations of global economy.

Female labour, according to some feminist theories, forms the basis for the survival of capitalism. Marxist, socialist and materialist feminist theories form the forefront of this type of theorising. Similarly, feminists have theorised on how different axes of power intersect to place women in a particular position vis-à-vis the capitalist system. Post-colonial or third-world feminist theorising is important in this context. Gender/sex, class, race and location (social and geographical) are the main axes of power analysed by these theories.

As pointed out above, the changing nature of the demand in the labour market is one of the causes for the rapid increase in the feminisation of labour. According to

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[380] S Razavi 'The Relevance of Women's Unpaid Work to Social Policy in Developing Countries' Global Conference on Unpaid Work and the Economy: Gender Poverty and the Millennium Development Goals (2005) 8-11 at <http://www.levy.org/undp-levy-conference/program_documents.asp# >12/04/08.
[381] Ibid 8-9.
[382] Kabeer (note 139 above) 12.

Kabeer, there are several reasons which make women the preferred candidates to satisfy the growing labour demand in the global economy. The first is associated with the informalisation of paid work.[383] The era of globalisation has witnessed greater shift into informal paid work, which is said to have the flexibility the formal work sector lacks. For instance, in the informal sector, labour can easily be drawn in and expelled from production, in line with changing profitability considerations, with no consequences.[384] Flexibility also refers to the amount of time put in for a particular job. This can also vary depending on considerations of profit. The most attractive aspect of flexibility for the employer comes from the fact that the employer is not tied to any formal obligation or costs arising from an employer-employee relationship.

The flexible nature of the informal work setting has meant that women, rather than men, are dominant in the sector. This fact is directly linked to the poor economic status of women[385] and their reproductive duties, which push them into such precarious work. The cuts in social services, the decline in agricultural production due to shifts into export-led production, and the continuous decline in male employment due to the shrinking of public sector make it imperative for women to take paid employment in the informal sector to augment their income.[386] The participation of women in paid informal work can help keep the family out of absolute poverty.[387]

The second feature to account for this situation, according to Kabeer, comes from the 'ideologies of male bread-winner [which] continue to justify [women's] payment as "secondary earners" '.[388] This practically implies that their labour comes in cheap. Thirdly, Kabeer argues, gender discriminations curtail their

[383] Ibid.
[384] Ibid 11.
[385] M Chen et al *Women Work and Poverty: UNIFEM Progress of the World's Women* (2005) 41 & 55.
[386] Kabeer (note 139 above) 12.
[387] Chen et al (note 150 above) 55.
[388] Kabeer (note 139 above) 12.

options.[389] Patriarchy has long placed women on an unequal footing with men in terms of access to education, skill and resources in many societies. As a result, women are confined to activities in which earnings are low and poverty is high.[390] Their labour comes cheap, and they are believed to be less resistant to the prospect of harsh working conditions. Fourthly, migration, both internal and international, has contributed to the rise in the feminisation of labour.[391] Female migration is now increasing. The direction of migration, from the global south to the north, is also changing to encompass migration within the south. Migrant labour is said to be more vulnerable due to various markers of inequality such as gender, racial and ethnic status, as well as ambiguous legal status.[392]

These reasons behind the feminisation of labour, brought about by economic restructuring, which in part is driven by the goal of freer trade and trade liberalisation, give a particular picture of a new and upcoming hierarchical division of labour structured along lines of gender, class, race and geographical locations at the global level.[393] It is through the intersections of these categories of power distribution in society that one can see how women of a particular economic class, race and geographic location end up constituting the new wave of feminised labour. Similarly, it is through these simultaneous operations of power that we can identify how women of a particular economic class, race, ethnicity and geographical location relate to the forces of trade liberalisation, propelled by the objective of freer trade.

A post-colonial or third-world feminist analysis, which captures the intersection of different axes of power in shaping the lives of women, adequately articulates this situation of the feminisation of labour. Through the use of this theory, it is possible to see how axes of power along the lines of race, gender, economic class and geographic locations have intersected to contribute to the unfolding of the

[389] Ibid.
[390] Chen et al (note 150 above) 55.
[391] Kabeer (note 139 above) 13.
[392] Ibid.
[393] Ibid.

phenomenon of the feminisation of labour. Post-colonial feminist theory illustrates that it is not by coincidence that the changing demand in labour in the global economy is shaped in its current form. On the basis of this, it is possible to argue that the trade regime is not a neutral system. Rather, it is a gendered, classed and radicalised system which is affected by geographic location.

The phenomenon of the feminisation of labour and its relations to the objective of freer trade can also be analysed from the perspective of other feminist theories which particularly focus on class/labour as an analytical framework. Marxist feminism identifies hierarchical class relations as the source of all inequalities, while positing sexual oppression as one dimension of class power.[394] Socialist feminism, on the other hand, while agreeing on class oppression as a source of inequalities, posits patriarchy to be the primary source of gender inequality. Similarly, in materialist feminism, capitalism (where class is a defining axis of hierarchical power) and patriarchy are identified as the sources of the exploitation and oppression of women.[395]

What do all these theories say about class as an axis of hierarchical power? To simplify the argument, the main claim from these corners against the objective of freer trade which aims at increasing profit is that this objective is secured through the exploitation of the poor workers by the powerful. It is argued that the accumulation of surplus and profit by the dominant class is directly dependant on the work of the exploited class.[396] Here the feminisation of labour to which the objective of freer trade has contributed through the restructuring of production becomes important. The argument is that the accumulation of profit and surplus in the era of trade liberalisation depends on the exploitation of the newly constituted feminised labour. The claim is further strengthened or reinforced by the role played by women in the reproductive sector of the economy, which goes unpaid.

[394] Beasley (note 17 above) 60.
[395] See R Hennessy *Materialist Feminism and the Politics of Discourse* (1993).
[396] Ibid 30-32.

It should be noted here that the reproductive sector is a necessary element of all modes of production.

To conclude, the underlying principles of the trade regime, such as free trade, epitomise the neoliberal discourse/system which Mohanty and others portray as inimical to the interests of poor women in the developing and less-developed countries, and poor women of minority racial groups in the developed economies. The operation of these principles as discussed in the previous subsections shows how women of a particular social status, race, economic class and even location may be disadvantaged by the operations of the system. For feminists theorising on the basis of these analytical frameworks, the principles that epitomise neo-liberalism (ie freer trade, non-discrimination and reciprocity) are not only inimical to the interests of women, but also dependant upon such gender relations and social arrangements for their survival.[397]

3.2.4.1.1 Positive aspects of feminisation of labour

It is important to note here that some of the phenomena discussed above, such as the feminisation of labour, can be analysed from the perspective of liberal feminism, and a completely different feminist perspective on the trade regime may be adopted. For liberal feminists, the feminisation of labour, at least in the productive sector, is viewed as a positive outcome of the operations of trade.[398] They argue that the increase in world trade has opened opportunities for women to be incorporated into the paid labour force and, for liberal feminists, paid work

[397] See for instance Mohanty who strongly argues that the capitalist system relies on female labour both in the productive and reproductive sectors for its survival. See Mohanty (note 32 above).
[398] See L McDonald *Gender and Canadian Trade Policy: Women's Strategies for Access and Transformation* in Sjolander CT et al (ed) Gendered Discourses/Gendered Practices (2003) . Distinguishing between two types of feminist analysis, she argues that while liberal feminists emphasise improving women's access to opportunities such as employment created by trade, socialist feminists view employment opportunities created by trade as being of limited benefit to women. For a similar view, see S Jokes and A Weston *Women and the New Trade Agenda* (1994), who argue that international trade provides women with new opportunities to improve their status, for example through employment.

is believed to increase the status of women.[399] It is believed to give women greater autonomy within the household. However, this strand of feminist theory also acknowledges the adverse impacts of trade on women in general, and women in the labour in force in particular. Harsh working conditions, low pay and job insecurity are among the important negative effects that these feminists point out. There is a call among liberal feminists to advocate for women's rights within the trade arena,[400] not only to address these adverse impacts, but also to maximise the positive spill-over from trade.

4. RETHINKING THE INTERNATIONAL TRADE REGIME FROM FEMINIST PERSPECTIVES

The four brands of feminist arguments analysed in the sections above point out the various flaws of the trade regime from feminist perspectives. While they differ in the theories used and specific arguments, each of the four positions that we have examined agree that the trade regime is flawed. Based on this analysis, it is possible to construct two possible directions for the way forward.

One of these, which naturally follows from the arguments above, appears to be a rejection of the international trade regime. The rejection approach stems from the belief that the underlying principles of the trade regime are inimical to the interests of women. This is particularly true of the views of third-world feminists. As such, the argument is that as long as the regime is operating on these fundamental bases it would not be wise to expect positive outcomes for the interests of women. They ultimately suggest that it would not be advisable to integrate a gender agenda into the trading system, and preference is given to

[399] McDonald (note 163 above) 55.
[400] Ibid.

alternatives outside of the WTO framework.[401] Some have even expressed the opinion that the incorporation of a gender agenda may be detrimental to the interests of women. One fear is that it may simply serve as an instrument to give legitimacy to the system. Another is that it may end up redefining the understanding of gender equality by redefining priority areas.[402]

The second approach focuses on the possibility of reform. Is it possible to reform the system so as to address the adverse impacts of trade on the lives of women?[403] This approach relies on the various critiques raised against the regime to identify its shortcomings. It then attempts to identify mechanisms for remedying these adverse impacts. Further, it attempts to build on some of the positive aspects of trade, such as increasing employment for women. By so doing, this reformist approach advocates for the integration of a gender agenda into the WTO framework.

This thesis is avowedly built upon the reformist approach to the trade regime. It advocates for taming the system so as to address the needs of women in developing and less-developed countries. Accordingly, the following two chapters of the thesis examine ways of incorporating a gender agenda into the trading

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[401] H Hope 'Between Reform and Rejection: Can a Gender Agenda be Integrated in the WTO?' Conference Report on a Freidrich-Ebert-Stiftung Panel Discussion held in Cancun (2003) <http://library.fes.de/pdf-files/iez/global/02032.pdf> 12/11/07. See also MacDonald (note 163 above), arguing that socialist feminist analysis does not regard the trade system as beneficial to the interests of women.

[402] Hope (note 166 above). See also K Rittich 'The Future of Law and Development: Second Generation Reforms and the Incorporation of the Social' in DM Trubek & A Santos (eds) *The New Law and Economic Development: Critical Appraisal* (2006) 203. Rittich discusses how this fear is very much alive and being justified in the context of the World Bank's gender programmes, where emphasis on some selected areas, such as education, have become the defining issues of gender equality. This approach ignores other important aspects of equality, such as accounting for the reproductive functions shouldered by women.

[403] There are strong supporters of the reformist approach. Advocates point out some of the attempts that have been under way to incorporate gender concerns into the trade agenda in trade forums other than the WTO. The argument is that some of these approaches could be introduced into the WTO system. Sustainability impact assessment, which also takes account of gender trade impact review, is a good example in this regard. This has been employed by the European Union (EU), although the success is debated by various groups. Some also argue that the possibility for a gender equality agenda is implicit in the WTO legal framework but more needs to be done to make explicit use of this opportunity. See Fabian (note 87 above) 14. This thesis attempts to pursue these arguments further.

system. This exercise is hoped to attend properly to the foundations of the feminist critique of the trade regime raised in this chapter.

CHAPTER IV

GENDER AND TRADE: EXPLORING THE LEGAL FRAMEWORK OF THE RELATIONSHIP

1. BACKGROUND

In exploring the relationship between gender and trade, the previous chapter operated from theoretical perspectives. This chapter aims to establish this relationship at the level of legal rules. An attempt will be made to investigate how changes in trade and economic processes, as reflected in legal rules, impact on gender equality. The analysis pursued in this chapter is therefore based on the legal frameworks governing international trade and the various instruments dealing with gender-equality issues.

The analysis looks into the interactions among the governing legal instruments/documents in both fields. Two specific trade agreements, the Agreement on Agriculture (AOA) and the General Agreement on Trade in Services (GATS), will form the subject of the analysis in the trade field. Legal instruments dealing with gender-equality concerns range from treaties and covenants at both the international and regional levels to national laws of various types. CEDAW and the Optional Protocol on the Rights of Women are some examples. Two sets of human rights of women enshrined in many of these legal instruments, the right to food and the right to health, will be examined in light of their interaction with the two trade agreements above.

The interactions between these agreements and these rights show that the agreements do indeed undermine women's human rights to food and health. The AOA undermines a state's capacity, and therefore its commitments, to fulfil progressively the conditions necessary for the realisation of the right to food. This is mainly due to the inadequate attention given to the non-trade objective of food security in the AOA's implementation and enforcement mechanisms. Similarly, GATS undermines women's human rights to health by failing to exclude essential services such as health care from the ambit of the agreement, and through its stringent domestic regulatory requirements, and through the architecture of the agreement, which locks in state commitments under GATS with a built-in penalty for any roll-backs, which, in turn, is in inherent tension with the progressive realisation of socio-economic rights such as access to health care. The cumulative effect of these features is that GATS has the effect of limiting access to health-care services, mainly by limiting the policy-making space available to states to ensure that vulnerable groups such as women have access to services.

The chapter is divided into four sections, the fourth being a brief conclusion. Section 2 introduces the concept and mechanisms of legal analysis. Section 3, which has two parts, engages in legal analysis of the two relevant trade agreements under the WTO. The first part looks into the interactions between the AOA and women's human right to food; the second addresses the intersection between the right to access to health-care services and GATS. Here the legal analysis goes further to investigate how the tension between GATS requirements and the right to health, in particular access to health-care services, plays out in the South African setting. The South African National Health Act has important objectives and special provisions which aim at ensuring that vulnerable groups are given access to health care. Examination of the Act and the country's commitments under GATS reveal that the Act contains a number of deviations from these commitments. This in effect implies that the country would be in a

position to implement its obligations under GATS only where it abandoned some of the provisions of the Act, which would defeat the purposes of the Act.

2. LEGAL ANALYSIS: WHAT AND WHY?

2.1 What is legal analysis?

In order to examine the relationship between gender and trade, the analysis employed in this chapter relies on the legal frameworks governing the two areas. It mainly involves investigating the interactions among the legal norms of both fields, and is hence a legal analysis. I have selected two trade agreements and two sets of human rights of women, drawn from legal instruments on women, for purposes of analysis in this chapter. These are the AOA and GATS, and the right to food and the right to health, respectively.

Legal analysis basically looks into the interaction between two or more sets of legal norms. The interactions may take different forms. At a general level, one can see positive or negative interactions. If the implementation of one set of norms contributes to the realisation of another, the interaction between the norms is a positive one. However, if the implementation of one set of norms has negative implications on the implementation of another, then the interaction is generally a negative one.

A negative interaction can further be examined at two levels. There could be a negative interaction resulting from direct conflict between two legal norms. Direct conflict occurs where one norm mandates or prohibits an action that another norm conversely prohibits or mandates. Secondly, there could be a negative interaction where one set of legal norms undermines the effectiveness of another set.[404] In

[404] R Howse & RG Teitel 'Beyond the Divide: The Covenant on Economic, Social and Cultural Rights and the World Trade Organization' Occasional Paper Dialogue on Globalization (2007) 8-9 <http://library.fes.de/pdf-files/iez/global/04572.pdf> 8/12/07.

this case, there may not be a direct conflict, as described above, between the two norms under consideration.[405] Based on this, the points of inquiry in analysing the interactions between gender and trade could take the following forms.

2.1.1 Direct conflict

2.1.1.1 Trade and human rights of women[406]

1. Are there any overt gender biases in the contents of the various trade agreements?
2. Do trade commitments conflict with a country's international commitments relevant to women?
3. Do trade commitments conflict with a country's domestic laws relevant to women (such as constitutions, national statutes, regulations and directives)?
4. Do trade commitments in any way contribute to promoting the human rights of women embodied in international commitments as well as domestic laws of states?

2.1.2 Trade norms undermining the effectiveness of norms on women

2.1.2.1 Trade and state capacity:

[405] G Marceau 'WTO Dispute Settlement and Human Rights' (2002) 13 European J of Int L 753. Marceau emphasises that cases of direct conflict between norms is a much narrower concept and the same applies applies to the interaction of WTO norms and other legal norms, such as human rights. See also D Dalke 'Enforcing Human Rights through the WTO: A Critical Appraisal' Centre for Trade Policy and Law Occasional Papers in International Trade Law and Policy (2004).

[406] These two frameworks of analysis have been widely employed for carrying out gender-based trade-impact reviews from a legal perspective. See S Gammage et al 'Trade Impact Review' Women's Edge Coalition (2002) at <http://www.womensedge.org/components/com_kb/attachments/tradeimpactreviewfinal.pdf> 05/03/06.

One set of norms may undermine the effectiveness of another in various ways. In the context of trade, what is often invoked in empirical research is the impact of trade rules on state capacity to implement its obligations in the economic and social life if its people. Capacity is looked at from the perspectives of both the economic capacity of a state and its policy-making space. So the questions in relation to gender and trade are:

1. Do trade agreements diminish the capacity of a state to protect, promote and fulfil the human rights of women (for instance, in affecting the financial or economic capacity of the state)?
2. Do trade agreements diminish governments' policy-making space in relation to gender issues?
3. Do trade agreements diminish state policy space in other areas, which in turn may have implications on gender-policy making?
4. Do trade agreements capacitate the state, either by creating policy space or by financially enabling the state to adopt and implement policies aimed at advancing the human rights of women?

This chapter sets out to answer some of these questions while analysing the interactions between women's rights to food and health in light of the AOA and GATS. Although the chapter does not address all of these questions, it is important to note that they constitute the general framework for conducting a legal analysis of trade agreements from a gender perspective.

2.1.3 Equality and non-discrimination

Equality and non-discrimination are fundamental to almost the entire set of women's human rights. The principle of non-discrimination is one instrument that operationalises the concept of gender equality. Discrimination can either be direct or indirect. In both cases where discrimination is evident, such discrimination defeats the ends of gender equality.

In examining the interaction between the two sets of human rights of women and the two trade agreements, this legal analysis ultimately seeks to establish whether any interactions between the two lead to the violation of the non-discrimination principle. Accordingly, we need to ask would a conflict between a trade norm and a legal norm on gender equality result in direct or indirect discrimination against women? Similarly, would the undermining of the effectiveness of legal norms on gender due to a WTO norm lead to direct or indirect discrimination against women?

The concept of overt gender bias relates to direct discrimination. This occurs when the discrimination is directly the result of exclusion or distinction based on sex, and has the purpose of impairing or nullifying the enjoyment of human rights of women.[407] Direct discrimination is not commonly at issue in relation to international trade rules.

Indirect discrimination, on the other hand, occurs when seemingly gender-neutral policies or laws lead to unintended and undesirable consequences by omitting to analyse gender-based effects of the particular policies and laws in question.[408] Accordingly, even though policies and laws appear to be gender neutral, they may have certain adverse consequences for women relative to men because of the existing roles that women assume in society. Such consequences may not have been intended by the law or policy makers.

In relation to trade rules and policies and their impact on the human rights of women, indirect discrimination is more commonly at issue than cases of direct discrimination.[409] Literature exists that documents the differential impact of trade

[407] S Walker 'Human Rights, Gender and Trade' in A-N Tran-Nguyen & AB Zampetti *Trade and Gender: Opportunities and Challenges for Developing Countries* UNCTAD 2004, 331.
[408] Ibid 331.
[409] Ibid 332.

rules and regulations on women relative to men.[410] The majority of these studies claim that women are disproportionately shouldering the adverse consequences brought about by the implementation of trade norms. One way of examining these claims is to investigate how trade rules interact with the human rights of women contained in various instruments. From the list of questions framed above, those addressing the impact of trade rules undermining the effectiveness of norms on women's rights relate to cases of indirect discrimination. It is these questions that will be examined in the coming sections.

2.2 Why a legal analysis?

In contrast to much of the writing on gender and trade, this chapter attempts to carry out a legal analysis of the relationship between them. This approach is prompted by some important considerations. Firstly, the research is carried out within the legal and institutional framework of the international trade of the WTO. As such it has to identify the possible legal issues that may arise in the interaction between gender and trade. Thus a legal analysis is in line with the methodology and objectives of the study. Secondly, examining and further analysing the actual impact of trade on women is indeed difficult. It poses a major methodological problem. For instance, it may be difficult to isolate the impact of trade from the many other factors which may also contribute to the unfolding of various phenomena. A good example in this regard is the effect of Structural Adjustment Programmes (SAPs) in many developing and least-developed

[410] For gender-differentiated impacts of trade liberalisation rules and policies and their adverse impacts on the lives of women in various sectors, see Z Randriamaro *Gender and Trade Bridges* (2006). See also M Fontana 'The Gender Effects of Trade Liberalization in Developing Countries: A Review of the Literature' Discussion Papers in Economics, University of Sussex (2003). See M Fontana et al *Global Trade Expansion and Liberalization: Gender Issues and Impacts* A Study Preapared for the Department of International International Development, UK (1998) on agriculture. See also Z Garcia *Impact of Agricultural Trade on Gender Equity and Rural Women's Position in Developing Countries* (2004) at http://www.glow-boell.de/media/de/txt_rubrik_5/SuS_Garcia.pdf 25/10/07. For the services sector, see DI Riddle 'A Gender Based Analysis of International Trade in Services: The Experiences of Developing Countries' in Tran-Nguyen & Zampetti (note 4 above) 175.

countries.[411] Furthermore, the analysis is complicated by the fact that different aspects of various trade agreements may have different effects. For instance, while one agreement may hinder access to essential services, other agreements may open up employment opportunities for women.

I suggest that a feasible approach to ascertaining whether and to what extent these trade agreements affect the human rights of women is to analyse the way the rules are formulated, designed and imagined,[412] and then analyse the way they interact with the various legal instruments dealing with these rights. Generally this involves an examination of the rights of and obligations upon states that the trade rules entail. The next step is then to evaluate the extent to which these rights and obligations have a bearing in legal terms on first - the human rights of women and second - the capacity of states to promote these rights.

This is an important exercise because trade rules have a significant influence on the extent to which states can implement economic, social and cultural policies and the corresponding rights. The rights and obligations contained in the different trade rules constitute the conditions of possibility[413] for either the realisation of the human rights of women or obstacles standing in the way of such objectives.

Lastly, as some commentators have noted that analysing the WTO in terms of the legal instruments that it consists of helps to evaluate the social or human side of the treaty provisions, such as the preamble.[414] A number of social goals are found in the preamble. Analysing the legal framework may shed more light on the way the treaty instrument has been structured.

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[411] The contents of trade policy are very similar to the prescriptions of these programmes.
[412] K Rittich 'The Future of Law and Development: Second Generation Reforms and the Incorporation of the Social' (2005) 26 Michigan J of Int. L 204.
[413] Ibid.
[414] Howse & Teitel (note 1 above) 7.

3. LEGAL ANALYSIS OF SELECTED TRADE AGREEMENTS

The various trade agreements under the WTO give rise to a number of trade commitments that require of states to take different kinds of trade measures. Although the trade measures and commitments in the agreements differ in nature and degree, it is possible to identify and categorise them into broad groups. These include commitments in relation to tariffs, domestic regulations, harmonisation of standards, disciplining of subsidies, and commitments regarding non-tariff barriers. Of those that feature in more than one agreement, some are prominent in specific trade agreements. In order to analyse the interactions between these trade commitments and government commitments relevant to gender, an attempt will be made to investigate the contents and implications of the trade commitments. This discussion relies on investigation of two specific trade agreements, the AOA and GATS, where these commitments feature prominently.

3.1 The Agreement on Agriculture

The AOA came into being as part of the Uruguay Round of negotiations. Its objective is to establish a fair and market-oriented agricultural trading system.[415] The agreement covers basic agricultural products as well as products derived from them. Processed agricultural products also fall within its ambit. The rules and commitments under the agreement are said to rest on three important pillars: increasing market access, reducing trade-distorting domestic support, and reducing export subsidies.[416] With regard to the first of these, the AOA introduced a tariff-only protection for agricultural products, coupled with reduction commitments, so as to increase market access for them. With regard to domestic support, which is said to have a trade-distorting effect, the agreement aims at

[415] See The Uruguay Round Reform Programme for Trade in Agriculture <http://www.wto.org/english/tratop_e/agric_e/ag_intro00_contents_e.htm> 20/12/08.
[416] See generally Agreement on Agriculture, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, [no I.L.M citation].

disciplining and reducing it. Similarly, the agreement sets out to limit the use of trade-distorting export subsidies, with important reduction commitments in place. These trade objectives of the agreement are balanced by provisions on special and differential treatment for developing, less-developed and net-food-importing countries.[417] In addition, non-trade concerns such as food security and protection of the environment feature in the agreement.[418]

The reform of agricultural trade which began with the AOA in the Uruguay Round is still in the process of negotiation. The current comprehensive negotiations started in early 2000 and are still continuing as part of the Doha Round. They are aimed at substantial improvements in market access; reductions of all forms of export subsidies, with a view to phasing them out; and substantial reductions in trade-distorting domestic support.[419] There is further agreement that in the current negotiations special and differential treatment for developing countries shall be an integral part of all elements of the negotiations.[420] They are also to be made operationally effective so as to enable developing countries to take account of their development needs effectively, including food security and rural development.[421] Similarly, the current negotiations take note of the non-trade concerns reflected in the proposals submitted by members, and confirm that these will be taken into account in the negotiations as provided for in the AOA.[422]

In this section, I will examine some of the following questions for purposes of legal analysis. Does the AOA come in conflict with the human rights of women? Does this agreement undermine the effectiveness of the various human-rights norms on women? Does the AOA in any way promote the human rights of women? These are the questions in light of which a legal analysis of the AOA from a gender perspective is to be carried out in this section.

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[417] These special provisions will be discussed in detail in the coming sections.
[418] The Uruguay Round Reform Programme for Trade in Agriculture (note 13 above).
[419] See the Doha Mandate on Agriculture from the Doha Ministerial Declarations <http://www.wto.org/english/tratop_e/agric_e/dohaagmandate_e.htm> 20/12/08.
[420] Ibid.
[421] Ibid.
[422] Ibid.

3.1.1 The AOA and the right to food: a gender perspective

The most important human right with direct relevance to the AOA is the right to food. The UN Committee on Economic, Social and Cultural Rights, in its 12th General Comment, elaborates on the normative contents of Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR on the right to food. The General Comment outlines certain core contents for the right to food, which it relates to the 'the availability of food in quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substance, and acceptable within a given culture'.[423] Availability and accessibility thus constitute important dimensions of the right to adequate food. According to the General Comment, availability refers to either the possibility of feeding oneself directly from productive resources, or a well-functioning distribution and marketing system.[424] Similarly, accessibility encompasses both economic and physical accessibility, the former implying personal and/or household financial costs associated with acquisition of sufficient food.[425]

There is a simple and straightforward connection between the right to food and the regulation of trade in agricultural products. Regulation through the AOA plays an important role in either limiting or augmenting the distribution and accessibility of food.[426] These in turn constitute important dimensions of the core contents of the right to adequate food.[427] The right to food and the related concept of food security will therefore be used to evaluate the possible interactions between the AOA and the human rights of women.

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[423] UN Economic and Social Council 'The Right to Adequate Food' (Art 11): 12/05/99. E/C.12/1999/5. (General Comments).
[424] Ibid
[425] Ibid.
[426] KR Gray 'Right to Food Principles Vis a Vis Rules Governing International Trade' (2003) 3 <http://www.cid.harvard.edu/cidtrade/Papers/gray.pdf> 14/10/07.
[427] UN Economic and Social Council (note 20 above) General Comment 12. See also Gray (note 23 above) 3.

There are a number of factors that warrant a gender-based legal analysis on the possible relationship between the right to food and the AOA. First in line is the special relationship between women and agriculture. In many developing and least-developed countries rural households play dual roles as both producers and consumers of agricultural produce. In these countries, agricultural production as well as marketing systems are dominated by rural households and are characterised as gendered.[428] Although there may be variations in the location of men and women from place to place, one is able to discern a general trend in the gendered nature of the agricultural system. In sub-Saharan Africa, for example, farming is a predominantly female activity.[429] Women in the region are mainly responsible for the production of staple food both for consumption and for the domestic markets. The figure comes close to 80 per cent of basic-foodstuff production in both cases.[430] The figure from the Food and Agriculture Organisation (FAO) gives a general picture of the role of women in agricultural production. FAO studies indicate that women produce about two thirds of the world's food.[431] This phenomenon is generally recognised as the feminisation of agriculture.[432]

In addition to the production of food, women play an important role in the domestic trading of agricultural produce. In West Africa, for instance, women dominate the trade in staple food. In Southern Africa, particularly Zimbabwe, women dominate the marketing of fresh agricultural produce in the urban areas.[433] Similarly, in Guinea, up to 90 per cent of the trading in staple food is carried out

[428] S Baden 'Gender Issues in Agricultural Liberalization' (revised) BRIDGE (1998) 11 <http://www.bridge.ids.ac.uk/reports/re41c.pdf> 13/01/08.
[429] Ibid 12.
[430] The data regarding women and agriculture gives a general picture, showing the percentage of rural women involved in agricultural sector (90 per cent of rural women in Africa), the percentage of labour input by women in the sector (60-80 per cent), the percentage of agricultural output produced by women (about 80 per cent of basic food in Africa), and the percentage of agricultural marketing for which women are responsible (about 60 per cent). FAO 'A synthesis report of the Africa region; Women, agriculture and rural development' at <http://www.fao.org/docrep/x0250e00.HTM> 14/11/2006.
[431] Ibid.
[432] Ibid.
[433] Baden (note 25 above) 11.

by women.[434] The trading of agricultural produce is an extension of women's role in household provisioning.[435]

Another factor necessitating a closer examination of the interaction between the right to food and the trade in agricultural produce from a gender perspective is the very nature of the right. The right to food is closely linked to quite a number of other human rights. Its realisation or non-realisation will thus go a long way towards ensuring a person's well-being. In relation to women, it is also linked to reproductive functions. Underfed mothers and mothers-to-be are biologically affected.[436] This may directly result in the birth of children with compromised human-development processes, including brain development. These and other related considerations lend some importance to a gender-based inquiry of the interaction between the right to food and the AOA.

The following two issues will form the basis of the legal inquiry regarding this interaction from a gender perspective.

1. The preamble to the AOA underlines the importance of both trade-related and non-trade objectives. These are mainly to do with the liberalisation of the agricultural sector and the right to food security, respectively. However, these objectives do not find similar expressions in the various obligations that the agreement imposes on states. The liberalisation obligations, which mainly relate to tariff reductions, the reduction of domestic support, and the reduction and elimination of export subsidies, feature prominently in the agreement. The non-trade objectives, however, lack any meaningful implementing and enforcement mechanisms. There is

[434] Ibid 11.
[435] Ibid 12.
[436] UN Economic and Social Council 'Updated Study on the Right to Adequate Food and to be Free from Hunger' <http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/ff220c7e04411faa802567c90039c745?Opendocument> 09/10/07.

an imbalance in the enforcement of the objectives which ultimately undermines the right to food.

2. The second point relates to the architecture of the agreement. The manner in which the liberalisation obligations are designed, as well as the structure of the ongoing negotiations, have the effect of limiting the range of policy interventions that may be utilised by states to support some non-trade objectives related to agricultural trade. The right to food and food security feature prominently in this regard. This structure of the AOA may not support, and, further, may clash with, ensuring the right to food and food security, and fostering self-sufficiency.[437]

The argument proceeding from these two points is that the imbalance in the implementation of the objectives, as well as the architecture of the AOA, may have the potential to undermine the right to food by making some of the policies that are considered desirable to promote or protect the right to food less feasible.[438]

3.1.2 The imbalance in the implementation/enforcement of the objectives of the AOA

Does the AOA pose an obstacle to the realisation of the right to food and food security? When does the difficulty in accessing food brought about by the liberalisation objectives of the agreement amount to either a violation of, or an obstacle to, the realisation of the right to food and food security?[439] Analysing these questions from a legal perspective is not easy. Let's first examine the contents of the right to food and the resulting obligations that it entails upon states.

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[437] AB Zampetti 'The Impact of WTO Rules on the Pursuit of Gender Equality' in Tran-Nguyen & Zampetti (note 4 above) 293, 308.
[438] C Stevens et al 'The WTO Agreement on Agriculture and Food Security' 31 <http://www.dfid.gov.uk/pubs/files/agriculture-food-security.pdf> 18/09/07.
[439] 3D Trade Human Rights and Equitable Economy 'Integrating Human Rights into the Future of Agriculture' (2004) <http://www.3dthree.org/pdf_3D/3DAg+HRenglish-couleur.pdf> 16/10/07.

The right to food[440] is a fundamental human right recognised in a number of international human-rights instruments. The ICESCR and CEDAW recognise this fundamental right. What is the content of the right to food and food security, and what does it entail in terms of state obligation? Article 11 of the ICESCR reads:

> *1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.*
>
> *2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programs, which are needed:*
>
> *(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;*
>
> *(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.*[441]

The specific state obligations that arise from this provision include obligations to respect, protect and fulfil these rights. The obligation to respect implies that states should not take actions that deprive people of their existing access to adequate food.[442] The obligation to protect requires that states should enforce appropriate laws to prevent third parties, including powerful people and corporations, from depriving individuals of their access to adequate food.[443] Finally, the obligation to fulfil means that the state should identify vulnerable groups and implement

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[440] There is a very close connection between the right to food and food security.
[441] International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993U.N.T.S.(ICESCR)
[442] C Smaller 'Planting the Seed: A Human Rights Perspective on Agriculture Trade and the WTO' 3D Trade Human Rights and Equitable Economy (2005) 4 <http://www.fao.org/righttofood/KC/downloads/vl/docs/AH261_eng.pdf> 13/09/07.
[443] Ibid 4.

policies to ensure their access to adequate food by facilitating their ability to feed themselves.[444] Government is also required, as a last resort, to provide adequate food to those who cannot feed themselves.[445] Generally speaking, states have obligations to prevent starvation and to take additional steps to ensure that people enjoy their right to adequate food.[446]

The state obligations that derive from the human right to food are not limited to a state's domestic territory. They extend to the territories of other countries. Accordingly, states are expected to take measures to guarantee the fulfilment of the right to food through international co-operation.[447] In its general comment on the right to food, the UN Committee on Economic, Social and Cultural Rights has emphasised that this right be given due attention in all relevant agreements.[448] How does the AOA fare in this regard?

The objective of the AOA supports the liberalisation of the agricultural sector. The relevant part of the agreement on the objectives of the AOA, paragraph two of the preamble, reads: 'Recalling that their long-term objective … "is to establish a fair and market-oriented agricultural trading system …".'[449]

This objective finds expression in the various obligations the agreement imposes that are meant to facilitate the 'right to export'.[450] There are three important obligations. These relate, firstly, to market access, which is achieved through the removal of non-trade barriers and the cutting of tariffs. Secondly, there is the obligation to reduce domestic support, and, finally, member states have the obligation to reduce and remove export subsidies.[451] These obligations together aim at establishing a market-oriented agricultural trading system which is supportive of the 'right to export'.

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[444] Ibid 4.
[445] Ibid 4.
[446] Gray (note 23 above) 10.
[447] UN Economic and Social Council General Comment 12 (note 20 above) General Comment 12 para 36.
[448] See ibid para 19. See also Gray (note 23 above) 10.
[449] See WTO AOA (note 13 above).
[450] 3D (note 36 above) 2.
[451] Articles IV, VI and VIIII of the AOA (note 13 above).

Some scholars claim that the strong emphasis on, and the drive to protect, the right to export exhibited in the provisions of the agreement undermine the right to food security and the livelihood of those engaged in the sector in a capacity other than 'exporting'.[452] The primary reference here is to subsistence and small-scale producers. Subsistence farming mainly covers food production for household consumption, while small-scale farming may well extend to production for local market consumption. Statistics from several sources, including the FAO, indicate that the majority of the world's subsistence farmers are women.[453] As mentioned previously, in Sub-Saharan Africa, for instance, women produce up to 80 per cent of basic foodstuffs, for household consumption as well as for domestic sale,[454] and two-thirds of the world's food is produced by women.[455] These statistics are significant in terms of food security.

The reduction of import tariffs, which is one obligation under the AOA, has been found to be the cause of import surges in some countries. According to an FAO study, in 15 countries, the AOA has resulted in an increase in food imports which was accompanied by a decline in domestic food production.[456] In a similar study involving 39 developing countries, Madeley reported that liberalisation has led to the displacement of local farmers, who are pushed out of the domestic market due to the dumping of cheap subsidised food imports.[457] Further, due to the expansion

[452] Maria Floro, in arguing that export expansion in agriculture has threatened food security, as evidenced in parts of Africa, the Caribbean and Central America, advances similar argument. See M Floro ,Gender Concerns on International Trade Discussions at the FfD Conference and WTO Agenda Women and Development (2001) at http://www.kulu.dk/Financing/Seminar/mariafloro.htm 18/10/08. See also Keating, exploring the implications on poor women in developing countries of a trading system that prioritises exports over food security and sustainability. M Keating 'Editorial on Trade, Gender and Development' (2004) 2(12) *J on Gender and Development*.
[453] FAO (note 27 above), 3D (note 36 above) 2-3.
[454] Ibid.
[455] Ibid.
[456] Gray (note 23 above) 13.
[457] Ibid 13. See also Randriamaro (note 7 above) 20-24.

of export in agriculture, women subsistence producers have lost their access to land following a rise in cash-crop production, especially in Africa.[458]

The removal of state support, mandated under the AOA, further marginalises small and poor producers in terms of access to productive resources.[459] These factors lead to a decline in food production. There are empirical studies attesting to this outcome.[460] The overall effect has been an increase in rural poverty and inequality, among small-scale rural landholders in particular.[461] If the liberalisation brought about by the agreement has a de facto discriminatory impact on small-scale producers, the majority of whom are women,[462] the argument is that it is not supportive of ensuring food security and fostering self-sufficiency. Indeed, *de facto*, these outcomes will disproportionately affect women.[463] It can therefore be said that the agreement as it stands at the very least poses an obstacle to the progressive realisation of women's human right to food and food security.

Recognising these adverse impacts, the preamble of the agreement provides for the consideration of non-trade objectives such as food security. The relevant part reads:

> *Noting* that commitments under the reform program should be made in an equitable way among all Members, having regard to non-trade concerns, including food security and the need to protect the environment; having regard to the agreement that special and differential treatment for developing countries is an integral element of the negotiations, and taking into account the possible negative effects of the implementation of the reform program on least-developed and net food-importing developing countries; ...[464]

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[458] See Floro (note 49 above).
[459] See CS Donal 'The "Good Wife": Struggles over Resources in the Kenyan Horticulture Sector' (2001) 37 *J of Development Studies* 39.
[460] CG Gonzalez 'Institutionalizing Inequality: the WTO Agreement on Agriculture, Food Security, and Developing Countries' (2002) 27 Columbia J of Envtl L 433, 477.
[461] Gray (note 23 above) 14.
[462] 3D (note 27 above).
[463] Randriamaro (note 7 above, 21) supports this conclusion.
[464] See the preamble to the WTO AOA (note 13 above).

The agreement further makes some special provisions, which are intended to ease the burden of liberalisation in the sector. It also makes special provisions with a view to protecting certain categories of people and countries from the undesirable consequences of liberalisation in the sector. Two measures incorporated in the agreement are important in this regard. These are the special and differential treatment mechanisms (Article 15 of the AOA) and decisions on measures concerning the possible negative effects of the reform programme on least-developed countries and also on net-food-importing countries (Article 16 of AOA).[465]

The special and differential treatment provisions mainly take the form of increased flexibility for developing countries as far as implementing their reduction commitments are concerned. Many developing countries claim that this is inadequate.[466] They have emphasised that they want special and differential treatment to mean more than a longer period to adjust to the dislocations brought about by liberalisation. They have suggested the inclusion in any new agreement of meaningful measures such as improvements in accessing the markets of the developed countries, greater flexibility in providing domestic support, and different forms of protection than are permitted to developed countries.[467]

The Marrakesh Ministerial Decision on Measures Concerning the Possible Negative Effects of the Reform Program on Least-Developed and Net Food-Importing Developing Countries (NFIDCs) was adopted to implement Article 16 of AOA. The decision has two major problems. The first is that it mainly addresses short-term costs to NFIDCs and LDCs resulting from liberalisation. For instance, it provides for food aid and short-term financing for food import. These short-term interventions do not go a long way towards ensuring food security, which is tied to a country's food sovereignty. Secondly, and most importantly,

[465] Articles XV and XVI of the AOA Ibid.
[466] Gray (note 23 above) 15.
[467] A Mathew & K Ingersent 'The WTO Negotiations in the Field of Agriculture and Food' (2001) 87-88 <http://www.europarl.europa.eu/workingpapers/agri/pdf/135_en.pdf> 23/07/07.

this decision has not been adequately implemented. This in part stems from the fact that the implementing instrument, ie the ministerial decision, does not create any mandatory obligations nor any enforcement and monitoring mechanisms.

Although it appears from the enumerated objectives of the agreement that an attempt is made to address both the trade and non-trade concerns that arise from it, not all objectives find similar or equivalent enforcement and implementation mechanisms. The non-trade objectives such as food security do not have well-designed implementing provisions nor enforcement mechanisms that would counter the feared adverse impacts of agricultural trade liberalisation. Consequently, it is not clear if a developing-country state can be considered as justified if it bypasses some of the obligations of the AOA using these objectives. For instance, can a developing country raise additional tariffs beyond the bound rate, or quantitative restrictions on imports, based on reasons of long-term food self-sufficiency and food security, as stipulated in the preamble?[468] In other words, it is not clear how this objective will stand when it comes in tension with the provisions prohibiting, for example, quantitative restrictions.

3.1.2 The architecture of the AOA

Another threat to the right to food comes from the architecture of the agreement, which poses a threat in two ways. Firstly, the existing obligations of the AOA are constraining to policies and programmes aimed at advancing food security. Secondly, the trend and structure of the ongoing negotiations are likely to reduce the possibility of reversing the undesirable consequences and changes brought about by the SAPs[469] and continuing liberalisation in the sector. These commitments limit the evolving policy options available to states in the future,

[468] There are special safeguard measures but their application is conditional, such as when there is sudden surge of imports, and they cannot be long-term solutions as they cannot be implemented in the long term.
[469] Stevens et al (note 35 above) 31. See also Gray (note 23 above).

creating the lock-in effect. There is thus a tension with the progressive realisation of the right to food.

Certain threats emanate from the agreement in its current status. Many developing countries which rely heavily on the sector are locked into their commitments emanating from the rules on agriculture. They are therefore left with few or no possibilities to introduce or re-introduce policies that support their agricultural sector.[470] A very good example illustrating this state of affairs is the case of tariff binding. In many countries the requirement to bind tariffs for all agricultural products was made through the use of the 'once-and-for-all' opportunity to set the bound tariffs of countries.[471] Accordingly, many developing counties implemented a uniform rate of tariff binding and reduction for all agricultural products. But tariffs are important border measures that would help to protect domestic farmers.[472] One aspect of state obligation emanating from the right to food is the obligation to protect. Protection may require a state to establish a buffer which makes it possible for those on the verge of losing their livelihood to become capable of gaining their source of livelihood.[473] Accordingly, if developing-country governments wished to raise tariffs beyond the bound rate to provide higher protection, for example, for basic food stuffs and other sensitive agricultural products,[474] the AOA might prove constraining. This is important from the perspective of women, as basic food stuffs are mainly produced by women.[475] The agreement may thus constrain governments from implementing various policy tools to protect local producers and enhance the right to food.

Domestic farmers and the domestic market can be protected through measures ranging from additional duties to quantitative restrictions. A study by the FAO

[470] Smaller (note 39 above) 10.
[471] A bound tariff means a rate over which states cannot go in setting their tariffs. Only some of these bound rates are close to the current applied rate.
[472] These measures have been put as concrete proposals and are under discussion in the current framework of negotiations. See the July Framework Package at <http://www.wto.org/english/tratop_e/dda_e/dda_package_july04_e.htm> 22/10/07.
[473] A Eide, C Krause & A Rosas (eds) *Economic, Social and Cultural Rights: A Text Book* (1995) 143.
[474] Gonzalez (note 57 above) 482. See also Stevens (note 35 above) 42.
[475] FAO (note 27 above).

indicated that low-income countries of Africa may in fact prefer to implement border measures.[476] Under the special and differential treatment provisions of the AOA, least-developed countries are exempt from the obligations of tariff cutting.[477] However, the rule for market access in agricultural products being 'tariffs only', the space for implementing quantitative border measures for protection is not available.

Coming to the second point, the architecture established in the AOA is such that it provides a framework for ongoing negotiations which may result in future agreement. The fear of many developing and least-developed countries is that the new disciplines may be more constraining for the evolution of polices of developing countries aimed at ensuring the right to food.[478] A very controversial issue in this regard relates to domestic support measures.

It is argued that, as it stands, that 'WTO disciplines have not [as yet] proved constraining to domestic support policies that developing countries want to implement'.[479] In fact, under the special and differential treatment mechanism of the AOA, developing countries may provide domestic support to low-income and resource-poor producers.[480] This is particularly important for subsistence producers – women farmers. Similarly, developing-country governments can make use of the special and differential treatment provisions, in particular the 'green box' exemptions,[481]to provide domestic support in areas such as extension service, stockholding for food security, domestic food aid and disaster relief.[482]

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[476] Ibid.
[477] Article XVI of the AOA (note 13 above).
[478] Stevens et al (note 35 above) 41; Gonzalez (note 57 above) 433.
[479] Zampetti (note 34 above).
[480] Article XVI of the AOA (note 13 above).
[481] Ibid.
[482] Zampetti (note 34 above) 308. Green box exemptions in the AOA refer to measures that are exempt from reduction commitments and applies to both developed and developing country Members but in the case of developing countries special treatment is provided in respect of governmental stockholding programmes for food security purposes and subsidized food prices for urban and rural poor. The general criteria for exemptions are that the measures must have no, or at most minimal, trade-distorting effects or effects on production. They must be provided through a publicly-funded government programme (including government revenue foregone) not involving transfers from consumers and must not have the effect of providing price support to producers.

These and similar measures, such as regulation of food prices and subsidies, are in line with state obligations to protect the right to food.[483]

However, the fear in this regard comes from the architecture of the current negotiations which have weakened the special and differential treatments available to developing and least-developed countries.[484] There is a tendency towards changing the contents of special and differential treatment to long-term implementation and eventual phasing out of the system, and replacing it with reciprocal obligations. For instance, developing countries are uneasy about the implications of the current discipline for future domestic-support options.[485] It is claimed that the trend is towards the erosion of the special and differential treatments. If it continues unchecked, the result will further constrain developing-country governments from instituting policies of domestic support geared towards securing the right to food.[486]

To conclude, in relation to the AOA, the discussion above illustrates in brief the potential of the AOA to undermine a state's capacity, and therefore its commitments, to fulfil progressively the conditions necessary for the realisation of the right to food. This mainly emanates from the inadequate attention given to some of the important non-trade objectives, such as food security, in the implementation and enforcement mechanisms. The indeterminate status of the non-trade objectives in the AOA implies that states may not successfully invoke them to implement policies that may clash with their existing obligations under the AOA. In effect, state policy-making space is adversely affected. States' financial capacity may also be affected in situations where they cannot implement policies designed to raise revenue for ensuring food security. The architecture of the agreement has similar implications. It may prove constraining to policies and

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See explanations of the AOA at <http://www.wto.org/english/tratop_e/agric_e/ag_intro00_contents_e.htm> 14/06/07.

[483] Eide et al (note 70 above) 144.

[484] Stevens (note 35 above) 41.

[485] See Gonzalez (note 57 above) 433-435.

[486] Ibid 433-434.

programmes aimed at advancing food security. This in turn may undermine states' commitments to ensuring food security. In conclusion, it may be argued that the AOA may undermine the right to food contained in the various human-rights instruments. The logical conclusion with respect to the human rights of women, in this particular case the right to food and food security, is that this agreement poses an obstacle to promoting these rights.

3.2 General Agreement on Trade in Services

Does GATS undermine government commitments to promote the human rights of women? Important human-rights considerations raised in relation to GATS include access to essential services, such as health-care services, energy and education. These relate to a whole range of socio-economic rights of women. From a legal perspective there are generally three basic issues in the discussion of gender and trade in trade in services. These are:

1. GATS does not clearly carve out those services that are immune from the scrutiny of the agreement, thereby affecting access to essential services for the poor, of which women constitute the majority.

2. GATS restricts the available policy instruments that can potentially be employed by states to promote social justice and thereby contribute to gender equality.

3. The negotiating structure or mechanism, coupled with the structure of the agreement itself, is inherently in tension with the progressive realisation of the socio-economic rights that dominate the services sector.

3.2.1 GATS and public services

Like its predecessor GATT, and in line with one of the stated objectives of the WTO, GATS is aimed at reducing barriers to trade. It is specifically designed to reduce the barriers in trade in services. These barriers mainly come in the form of regulations and legislation of states where the services in question are being traded. The barriers are therefore domestic in nature. Hence it can be said that the main targets of this agreement are the various regulations and legislations that in one way or another have an adverse bearing on the conduct of trade in the services sector. It follows from this that the emphasis in GATS is not on the types of services, but rather on the manner of the regulation of services.

As far as the types of services that fall under the purview of GATS is concerned, Articles III (b) and (c) of GATS read

> *(b) 'services' includes any service in any sector except services supplied in the exercise of governmental authority;*
>
> (c) 'a service supplied in the exercise of governmental authority' means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers ...

The types of services carved out as exceptions or immune from regulation through GATS are services supplied in the exercise of governmental authority. Further, it is when a service is supplied neither on a commercial basis nor in competition with one or more service suppliers that it is deemed to be supplied in the exercise of governmental authority.

The first issue that arises with regard to such mechanism of categorisation is the difficulty it poses in ascertaining what indeed falls under the exception. There may be uncertainties in some situations. For instance, how can private and public services of a non-commercial nature coexist without being in competition?[487]

[487] Zampetti (note 34 above) 312.

Hence there is general uncertainty about the scope of the 'public service' exception.[488]

The second issue is that when one looks at the qualifying elements – supplied neither on a commercial basis nor in competition with other service suppliers – the definition of the specified exceptions leaves little room for what are regarded as public or essential services.[489] In almost all countries, there are private service suppliers in almost all sectors that provide services. It may be service supplied alongside the government, or the government may be altogether absent from some sectors. But most public services, for instance, are provided by both private and government providers. It may also be the case that such public services have a fee even when they are provided by the government. This automatically opens public or essential services to the categorisation of 'services provided on a commercial basis and in competition with one or more service providers'. It can therefore be said that GATS includes the provision of nearly all services, including public or essential services, such as education and health care.[490]

What is the implication of the 'scoping' of the exception in GATS? Whether the question is put in terms of the clarity of the scope of the exception, or the little room it leaves for public services, the conclusion is that GATS does not outright carve out essential services as services supplied in the exercise of governmental authority. The direct implication of this is that such services will be open for commercial competition. Commercialisation, in turn, may not advance the ethos of public-service provision, which is designed to ensure universal access. When viewed from a gender perspective, the consequences are said to affect women disproportionately. How? Let's first examine the special relationship between essential services and women.

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[488] Gammage (note 3 above) 60.
[489] Further qualifications in NAFTA, for instance, have managed to carve out certain essential services from the purview of the application of NAFTA.
[490] Zampetti (note 34 above) 312.

As discussed in Chapter III here is a special relationship between women and services; a relationship of dependency in which, owing to the particular roles they play in society, women rely heavily on service provision. Service provision becomes essential for women to carry out their reproductive role, and also in the care of the elderly. Such roles require the utilisation of services such as health care, education, and the provision of natural resources such as water and energy, to name a few. These are the services which are normally referred to as essential or fundamental services. Access to such essential services facilitates the reproductive role of women, thereby easing the burden on them and the time they spend on these functions. Therefore the access, affordability and availability of these essential services may go a long way in determining the general well-being of women. Access is usually facilitated when such provision is done on a non-commercial, or at least a non-competitive, basis. Traditionally, the provision of essential services is either partially or wholly funded by states in most developing countries. To a large extent this holds true in developed countries as well. This has enabled women to have better access to essential services.

It is argued that the mere fact that essential services are not carved out as supplied in the exercise of governmental authority may not be problematic per se.[491] The argument goes on to assert that the consequences that flow from opening such services to commercial competition can be managed through appropriate government regulation. This holds true in principle. It is even in line with government obligations to ensure equitable access to essential services for its people. However, the concern can, perhaps, be understood when one examines the consequent obligations that arise when the service in question is not carved out as one that is supplied in the exercise of governmental authority. This takes us to the second issue outlined above, that of strict domestic regulation under GATS.

3.2.2 Domestic regulation under GATS

[491] Riddle (note 7 above) 175.

As it has been stated, the main emphasis of GATS is on the various regulations and legislations that affect trade in services. The agreement does not, in principle, prohibit governments from regulating services in their territory. Paragraph four of the preamble to the agreement reads:

> *Recognizing the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives and, given asymmetries existing with respect to the degree of development of services regulations in different countries, the particular need of developing countries to exercise this right; ...*[492][My emphasis]

Article VI of GATS is the principal article dealing with domestic regulations. Its main purpose is 'to provide some guidance as to where necessary legitimate regulation ends and protection of domestic service industries against foreign or domestic rivals begins'.[493] This article sets down guidelines and criteria on the manner of regulation. The two main features associated with this are the requirements of 'due process' and 'good regulation'.[494] Our emphasis here is on 'good regulation'.[495] What does this constitute for the purposes of GATS? Some of the guidelines are set out in Article VI (1) and (4) of the agreement:

> *1. In sectors where specific commitments are undertaken, each Member shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner.*
>
> *4. With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Council for Trade in Services shall, through*

[492] See the preamble of the General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 33 I.L.M. 1167 (1994).
[493] P Delimatsis 'Don't Gamble with GATS – The Interaction between Articles VI, XVI, XVII and XVIII in the light of the US – Gambling Case' (2006) 40 (6) *J of World Trade*1059, 1062.
[494]Ibid.
[495] "Due process" requirements are mainly laid out under Article 6 of GATS.

appropriate bodies it may establish, develop any necessary disciplines. Such disciplines shall aim to ensure that such requirements are, inter alia:

(a) based on objective and transparent criteria, such as competence and the ability to supply the service;

(b) not more burdensome than necessary to ensure the quality of the service;

(c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.

It should be noted that the application of Article VI (1), which deals with domestic regulations, applies to 'all measures of general application affecting trade in services'. So, before interrogating the implications of 'good regulation', let's first see what measures affecting trade in services are. There are two elements in this definition: measures by members and measures affecting trade in services. The main interest here is trying to identify what constitutes 'measures' for the purposes of GATS. The term is defined in Article XXVIII (a):

(a) 'measure' means any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form; ...

Further, Article I (3) reads:

For the purposes of this Agreement:

(a) 'measures by Members' means measures taken by:

(i) central, regional or local governments and authorities; and

(ii) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities; ...

Combining these two definitions, all forms of government activity and all forms of government intervention (bearing in mind, of course, the qualification of 'affecting trade in services')[496] potentially fall under the purview of GATS.[497] These may include laws, regulations, rules, decisions of courts and administrative authorities etc. Ordinarily these constitute justifiable public-policy instruments of states[498] employed to achieve various policy objectives. They are also a prerequisite for the efficient supply of the particular service under consideration.[499]

Coming back to the issue of 'good regulation', some recurring criteria are discernable from Article VI. These are found in the phrases: 'in a reasonable, objective and impartial manner', 'objective and transparent criteria', 'not more burdensome than necessary' and 'not constitute unnecessary barriers to trade'. These guidelines or criteria, then, are what make for 'good regulation'. According to GATS, measures, which basically are policy instruments of states, should be administered 'in a reasonable, objective and impartial manner'. Similarly, these same policy instruments should 'not [be] more burdensome than necessary' and should 'not constitute unnecessary barriers to trade'.

If domestic regulations are policy instruments utilised by states for achieving various policy ends, it is inevitable that such instruments will be designed to influence the outcome of a particular objective under consideration. As a result, objectivity, reasonableness and even impartiality will be very much dependent upon the particular context of every state in question. Generally speaking, the

[496] This qualification does not in any way detract from the far-reaching consequences of the definition and purview of GATS on domestic regulation, for two reasons. Firstly, 'services', as we have seen earlier, cover almost all sectors, including essential public services. Secondly, 'affecting trade in services', according to the Appellate Body, is to be given a meaning covering as wide scope as possible.
[497] Dispute Settlement: World Trade Organization, 3.13 GATS UNCTAD 2003, 6.
[498] Delimatsis (note 90 above) 3.
[499] Ibid 3.

standard of what is necessary, reasonable and objective is quite subjective.[500] It may differ from state to state.[501] In light of this, would the purpose of non-discrimination, which guides the domestic regulatory regime of a state under Article VI, be plausible?

Article VI (4) (b), for instance, shows the type of qualification to be considered for determining whether a particular regulation is 'not more burdensome than necessary' in relation to trade in services. It says: '*not more burdensome than necessary to ensure the quality of the service'*. According to this, the factor to be considered in assessing a given regulation connects to its impact on or contribution to the quality of the service. Certainly, quality of service is an important consideration. But it is not the only consideration. When a government issues a domestic regulation to regulate the supply of services, it may use the instrument for addressing other objectives. For instance, in issuing licences for health-care providers, can a government geographically assign health-care services through a domestic regulation in order to ensure equality of access?[502] Similarly, can a government put its emphasis on reproductive health-care services as opposed to generalised health services?

In most countries, gender equality is a national objective stated in constitutions and national development policies. States may and do employ various policy instruments to advance this objective. As far as gender concerns in the services sector are concerned, states may put policy instruments such as pro-gender laws and regulations in place. Dorothy Riddle argues: '[D]eveloping country governments need to address through appropriate regulations, concerns about, inter alia, working conditions, health and safety, employment and pay equity, and

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[500] M Williams 'The General Agreement on Trade in Services: The Debate between the North and the South' International Gender and Trade Network 2001 at <http://www.ppl.nl/bibliographies/wto/files/975.pdf> 22/06/07.
[501] Ibid.
[502] D Bronson & L Lamarche 'A Human Rights Framework for Trade in the Americas' 2001, 14 at http://www.dd-rd.ca/site/what_we_do/index.php?id=1512&subsection=themes&subsubsection=theme_documents 18/05/08.

then ensure that such regulations are enforced for all domestic and foreign service suppliers.'[503]

However, such regulations should be 'good regulations' vis-à-vis the above-outlined criteria. So ultimately the question is, would the requirement of 'good regulation' have the effect of limiting state policy space? Would such a requirement end up undermining the hard-gained human rights of women in the field of socio-economic rights? How would policy instruments like the one aimed at promoting gender equality fare in light of the criteria listed above? Howse and Mutua ask a similar question: would such criteria limit, in intent or effect, the ability of governments to impose social obligations on foreign and competitive domestic service providers?[504]

To conclude, although the potential for conflict is undeniable, the provision on domestic regulations has not been a subject of much controversy under GATS. This is because the discipline to be applied to them is still under negotiation. Therefore the possible impacts of the provision have been relatively weak thus far.[505] The analysis above, however, shows the need to monitor the structure and the nature of future negotiations.

3.2.3 Limitations on market access and national treatment under GATS

Specific obligations come into effect when a member country makes a specific commitment with regard to a particular service sector in its schedule of commitments. These include the important obligations of market access and what

[503] Riddle (note 7 above) 186.
[504] R Howse & M Mutua 'Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization' (2000) 77. <http://www.ichrdd.ca/english/commdoc/publications/globalization/wtoRightsGlob.html> 05/06/06.
[505] Delimatsis (note 90 above) 3.

is termed national treatment.[506] These specific commitments or obligations contained in members' schedules are significant in that they determine the implications, both positive and adverse, flowing from GATS.

When a member makes specific commitments on market access or national treatment for a specific service sector, it is entitled to subject them to certain conditions and qualifications, which are sometimes referred to as limitations. It can do so by specifying these conditions and qualifications in its schedule of commitments. Therefore, the obligations of a member on market access and national treatment with regard to a particular service sector very much depend on the contents of the specific commitments found in its schedule.

Generally, market-access limitations relate to possible quantitative restrictions. Any measure, in whatever form it may be, with the effect of quantitative restriction falls under this category.[507] A good example is restriction on the number of service suppliers. Under GATS, states cannot uphold such limitations unless they specifically set them in their schedules as limitations to their market-access provisions at the time of undertaking the commitment.[508]

Limitations in respect of national treatment generally relate to those measures that may modify the conditions of competition in favour of the services and service suppliers of one member compared to another member. GATS requires that if states wish to make use of such limitations, they can do so by imposing them at the time of undertaking specific commitments to market access and national treatment.[509]

[506] Articles XVI and XVII of GATS (note 89 above).
[507] Delimatsis (note 90 above)
[508] Article XVI of GATS (note 89 above).
[509] Article XVI (1) of GATS (note 89 above).

This, however, does not prohibit later action by states. This is because, as some argue, the structure of GATS is flexible and pro-development.[510] As such, it reserves the rights of states to change their laws and regulations on the commitments that they have already undertaken in specific sectors as policies evolve.[511] For instance, in order to foster gender equality, a government may decide that private-sector supply of a particular service should be replaced by public-sector provision.[512] This may fall under quantitative restriction. Similarly, a government that has made commitments in the health sector may introduce a subsidy or incentive programme to retain or attract nurses employed in public health-care establishments. While such programmes directly contribute to gender equality as women dominate the nursing sector, they may run afoul of the commitment to national treatment. A government may also afford preference to those services and service providers that maintain a gender employment quota. Preferences, in turn, may affect the conditions of competition for those engaged in the sector in question, and thereby run contrary to national treatment. GATS would not prevent such actions, but it allows them only under certain conditions.[513] The most controversial of these is that the introduction of such new laws or regulations should be accompanied by compensation for trading partners that may be affected by them.[514] This stems from the unique approach or methodology employed in GATS, which 'locks in' sector-specific commitments with a built-in penalty for any 'roll-back' on commitments.[515] Article XXI (1) (a) and (2) (a) provide as follows:

Article XXI

Modification of Schedules

[510] Riddle (note 7 above) 186.
[511] Article XXI of the GATS (note 89 above) Zampetti (note 34 above) 313.
[512] Ibid 313.
[513] For example, it can be done after a three-year period, according to Article XVI of GATS (note 89 above).
[514] Article XXI(2)(b) of GATS (note 89 above); Zampetti (note 34 above) 313.
[515] Article XXI of GATS (note 89 above) as elaborated in Zampetti (note 34 above). See also Gammage (note 3 above).

> 1. *(a) A Member (referred to in this Article as the 'modifying Member') may modify or withdraw any commitment in its Schedule, at any time after three years have elapsed from the date on which that commitment entered into force, in accordance with the provisions of this Article.*
>
> *2. (a) At the request of any Member the benefits of which under this Agreement may be affected (referred to in this Article as an 'affected Member') by a proposed modification or withdrawal notified under subparagraph 1(b), the modifying Member shall enter into negotiations with a view to reaching agreement on any necessary compensatory adjustment. In such negotiations and agreement, the Members concerned shall endeavor to maintain a general level of mutually advantageous commitments not less favorable to trade than that provided for in Schedules of specific commitments prior to such negotiations.*

Sub articles (3) (a) and (4) (a) of the same article underline the inevitability of compensatory payment where a trading partner is affected by the modification or withdrawal of a commitment.

> *3. (a) If agreement is not reached between the modifying Member and any affected Member before the end of the period provided for negotiations, such affected Member may refer the matter to arbitration. Any affected Member that wishes to enforce a right that it may have to compensation must participate in the arbitration.*
>
> *4. (a) The modifying Member may not modify or withdraw its commitment until it has made compensatory adjustments in conformity with the findings of the arbitration.*

The Appellate Body has recently shown its stand with regard to possible rolling back on commitments undertaken in relation to market access (*United States versus Antigua, US – Gambling case*). In this case, the Appellate Body was 'prudent to discourage any circumvention of undertaken commitments under market access obligations'.[516]

[516] Delimatsis (note 90 above)17.

This approach poses significant problems when viewed in light of the progressive realisation of socio-economic rights. This is especially true when it comes to essential services such as health, energy and education. There appears to be an inherent tension between the general principle of progressive realisation of socio-economic rights and the approach of locking commitments in with an inbuilt penalty for modification.[517] The problem is further compounded by the built-in agenda of progressive liberalisation.[518]

The ICESCR obliges states to take steps with a view to achieving progressively the full realisation of the rights recognised therein.[519] The requirement of progressive realisation affords states the possibility of realising these rights over time. This requirement must, however, be understood and read in the light of the overall objective of the covenant – to establish clear obligations for state parties in respect of the full realisation of the rights.[520]

As previously discussed, the obligations towards fulfilling these rights take the form of respect, protection and fulfilment.[521] Overall, through progressive realisation, the aim is to ensure incremental realisation of socio-economic rights to citizens of a state. This may be achieved through, for instance, the obligation to protect, which would involve measures such as freedom of action and protection from more powerful economic interests.[522] State legislation giving preference to women owned services suppliers may possibly qualify as an example of protection from powerful economic interests. The progressive realisation of human rights can also be achieved through the obligation to fulfill. This is particularly important for the vulnerable and poor sections of society where no other possibility exists for the realisation of socio-economic rights. The obligation to fulfil may be carried out by way of either facilitation or direct provision. Direct

[517] See Zampetti (note 34 above); Gammage (note 3 above).
[518] See Zampetti (note 34 above); Gammage (note 3 above).
[519] See ICESCR (note 38 above).
[520] Eide et al (note 70 above).
[521] Ibid 23.
[522] Ibid 24.

provision, for example, could consist in making available what is required to satisfy basic needs.[523] Such progressive actions may be associated with improvements in the available resources of the state. A government with improved financial capacity, for instance, may replace the private supply of, for example, essential services such as energy or water services, with public provision. However, this sort of measure may constitute a quantitative restriction on market access under GATS. In conclusion, while progressive realisation aims to ensure incremental realisation of socio-economic rights to citizens of a state, progressive liberalisation in GATS and its approach aim, incrementally, to lock in limitations to market access and national treatment.

This approach of locking commitments in imposes a significant burden on governments to make sure that they list every conceivable limitation from the outset. However, some limitations may prove necessary only after some time. Similarly, limitations or conditions may be dictated by new developments, including economic developments, in the state in question. This approach of GATS may thus discourage states from taking new measures, lest such measures be followed by demands for some form of compensation.[524] Most importantly, it has the potential to limit the policy space available to states to implement various policy objectives, including gender equality. Consequently, it undermines the human rights of women; in particular, the socio-economic rights of women.

In the following section, I will analyse these tensions – between the requirements of GATS and the rights of women to access services – with a case study from South Africa. I will look into one specific right, access to health-care services, in light of the requirements of GATS. This analysis will be based on the South African National Health Act.

[523] Ibid 24.
[524] Gammage (note 3 above) 61.

3.2.4 Case analysis: GATS and the South African National Health Act of 2004

Setting the context for discussion:

Before delving into examining the relationship between the National Health Act and South Africa's commitments under GATS, it would be quite useful to give some context describing the sequence of events for the discussion.

The South African government became a party to the GATS agreement in 1994. The commitments in the health services sector were also entered into in the same year. These commitments were made by the Apartheid government before the democratic transformation took place in the country.[525]

The National Health Act was passed in 2004. This Act was passed with the aim of rectifying the imbalances in access to health services by the poor, people in the rural areas as well as women and children. As the details of the discussion in the following sections will show the Act is intended to correct the discriminatory policies adopted by the Apartheid government. Perhaps one can argue that the commitments that the country undertook under GATS could constitute one such discriminatory policy of the previous government.

It was only after the adoption of the Act that the potential conflict between certain provisions of the Act in particular the provision on "Certificate of need" and the GATS commitment to unlimited market access became an issue. Some commentators have noted that South African Trade Negotiators have consistently denied that the country's health services are not covered by its commitments

[525] See the World Trade Organization outlining the various schedules of commitments of the different countries. <http://docsonline.wto.org/GEN_highLightParent.asp?qu=+%28%40meta%5FSymbol+GATS%FCSC%FC%2A%29+and+%28+%40meta%5FTitle+South+Africa+%29&doc=D%3A%2FDDFDOCUMENTS%2FT%2FSCHD%2FGATS%2DSC%2FSC78%2EWPF%2EHTM&curdoc=12&popTitle=GATS%2FSC%2F78> 17/08/07.

under GATS. This position would naturally undermine the country's commitments to promote the right of access to health services.

According to the South African Health Review of 2006 (SAHR), it appears that the government has come to realize the potential conflict between its commitments under GATS and the overarching Health Act. The review notes "the commitments made by the previous Apartheid regime under the World Trade Organization's GATS have the potential to undermine the intention and implementation of the National Health Act."[526]

The provision on "certificate of need" which constitutes the major site of conflict has not as yet been promulgated by the President of the Republic.[527] As such, the potential conflict has been averted for the time being. This is perhaps an indication that the current government is indeed fully aware of the potential problems that the promulgation of this provision would have for its international commitments.

Case Analysis

South Africa, as a signatory of GATS, has undertaken specific commitments in various sectors. GATS adopts a Sectoral Classification List (W-120) which members employ for the purpose of scheduling their commitments in the various sectors and sub-sectors.[528] This classification is further supplemented by the more detailed UN Provisional Central Product Classification (CPC), which gives the actual scope of each sector and sub-sector.

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[526] See the Chapter on The GATS and South Africa's National Heath Act in the 2006 South African Health Review, 19-30.
[527] It is important to note that Section 36 of the Act has not as yet been proclaimed by the President.
[528] The list has 12 services sectors. These are: business including professional; communication; construction and related engineering; distribution; educational; environmental; financial; health related and social; tourism and travel related; recreational, cultural and sporting; transport and a final section dedicated to all other services not mentioned here.

South Africa's commitments are in the following sectors: communication, construction and related engineering, environmental services, financial services, tourism and travel services, and business services. Under each sector, sub-sectors have been specified in the schedule. This case analysis looks into South Africa's commitments in relation to the health sector. So where does the health sector fall within the GATS?

The health service sector in the GATS classification is split between two sectors: business, including professional services, and health-related and social services. South Africa has not made any commitments in the health-related and social services sector. Rather, its commitments as regards the health sector come under the classification of business and professional services. This sector covers two sub-sectors that are relevant for the purpose of this discussion. These are medical and dental services, and services provided by midwives and nurses. South Africa has undertaken specific commitments in both.

The details of what each sub-sector comprises have not been outlined in South Africa's schedule. This is to be ascertained by reference to the United Nations' Provisional Central Product Classification (CPC – which has been used as a common classification system to define the scope of the commitments made during the negotiations of GATS.[529] According to the CPC reference, the two sub-sectors include the following services:

CPC 9312 Medical and dental services

This class is further subdivided into three sub-classes, of which two are relevant for this discussion. These are 'General medical services' (93121) and 'Specialized medical services' (93122).

'General medical services' cover:

[529] The reference to 'CPC' in South Africa's schedule ascertains the correctness of the reference.

Services consisting in the prevention, diagnosis and treatment by doctors of medicine of physical and/or mental diseases of a general nature, such as consultations, injections (limited and/or periodical), physical check-ups, etc. These services are not limited to specified or particular conditions, diseases or anatomical regions. They can be provided in general practitioners' practices, and also delivered by out-patient clinics, attached to firms, schools, etc.

'Specialized medical services' cover:

> *Diagnosis and treatment services by doctors of medicine of diseases of a specific nature, delivered in a specialists' practice or health institution (including hospital in-/out-patient clinics).*
>
> *These services are defined as those limited to specific or particular conditions, diseases or anatomical regions (except dental services), such as medical services for the following: nervous system; eye; ear, nose and throat; respiratory system; circulatory system; digestive system; hepatobiliary system and pancreas; musculoskeletal system connected tissues; skin, subcutaneous tissue and breast; endocrine, nutritional and metabolic diseases and disorders; kidney and urinary tract; male reproductive system; female reproductive system; pregnancy, childbirth and puerperium; newborns and other neonates; blood and bloodforming organs; myeloproliferative disorders; infectious and parasitic diseases; mental diseases and disorders; substance use and substance induced organic mental disorders; injuries, poisonings and toxic effects of drugs; burns; factors influencing health status and other contacts with health services (e.g. rehabilitation, aftercare, etc.).*

Exclusion: Services of medical laboratories are classified in subclass/93199 (Other human health services n.e.c.).

CPC 93191 Services provided by midwives and nurses

CPC 93191 is entitled 'Deliveries and related services, nursing services, physiotherapeutic and Para-medical services'. The services included are the following:

> Services such as supervision during pregnancy and childbirth and the supervision of the mother after birth. Services in the field of nursing (without admission) care, advice and prevention for patients at home, the provision of maternity care, children's hygienics, etc. Physiotherapy and para-medical services are services in the field of physiotherapy, ergotherapy, occupational therapy, speech therapy, homeopathy, acupuncture, nutrition instructions, etc.

As stated earlier, the health-service sector in the GATS is split between two sectors: business including professional services, and health-related and social services. So in order to see exactly which aspects of health service are excluded from South Africa's commitment under GATS, let's see what the health-related and social services sector, to which South Africa has not made any commitments, comprises.

Health-related and social services sector;

> *The [health-related and social services] sector includes hospital services, services delivered under the direction of medical doctors chiefly to in-patients aimed at curing, reactivating and/or maintaining the health status; other human health services, ambulance services, residential health facilities services other than hospital services; social services with or without accommodation. The definition of health related and social services does not include medical and dental services, veterinary services and the services provided by nurses, midwives etc., which have been grouped separately under professional services.*[my emphasis]

Accordingly, it is health services provided within hospitals and residential health facilities and ambulance services that are included in this sector. This essentially means almost all human health services administered outside of hospitals by doctors, nurses, midwives and other health professionals are covered by South

Africa's commitments.[530] These include general practitioners' practices, clinics, and even certain specialised health services provided in hospitals through outpatient treatment.[531] Having ascertained the aspects of health services to which South Africa has made commitments, we need to examine the nature of those commitments.

The following table[532] shows the relevant part of South Africa's commitment in relation to the sub-sectors identified above.

Sector or sub-sector	Limitations on market access	Limitations on national treatment
1.Business services		
A. Professional services		
h. Medical and dental services (CPC 9312)	1) none 2) none 3) none 4) unbound except as indicated in the horizontal section	1) none 2) none 3) none 4) unbound except as indicated in the horizontal section
j. Services provided by (i) midwives and nurses (CPC 93191)	1) unbound 2) none 3) none 4) unbound except as indicated in the horizontal section	1) unbound 2) none 3) none 4) unbound except as indicated in the horizontal section

[530] S Sinclair 'The GATS and South Africa's National Health Act: A Cautionary Tale' (2006) <http://www.queensu.ca/msp/pages/Project_Publications/Series/PapersNo11.pdf> 17/08/07.
[531] Ibid 12-13.
[532] See South African Schedule of Commitments (note 122 above).

As discussed in the previous section, when a country makes a specific commitment in a given sector or sub-sector it is entitled to put limitations to the obligations that kick in with the specific commitments – market access and national treatment. Let's briefly look into how to unravel the meaning of this schedule.

The numbers 1 to 4, to which the qualifications 'none' and 'unbound' are attached, refer to the different modes of supply of services. There are four modes of supply.[533] These are:

1. Cross-border trade
2. Consumption abroad
3. Commercial presence
4. The movement of natural persons

Accordingly, (1) in the schedule above refers to cross–border trade, (2) refers to consumption abroad. (3) refers to commercial presence while (4) refers to the movement of natural persons.

If a state inscribes 'none' in its schedule with regard to any one of the above four modes of supply, it means that the state has imposed no limitations for the sector or sub-sector in question. It therefore implies that the state agrees to give full market access and/or complete national treatment for the sector or sub-sector in question in that particular mode of supply. On the other hand, the inscription of 'unbound' has the opposite effect. Accordingly, if a state has inscribed 'unbound' in its schedule with regard to any one of the four modes of supply, it means that the state has not made any commitment to give market access and/or national treatment in the sector or sub-sector in question. The implication is that the state is free to maintain or even introduce limitations with regard to market access and national treatment for that sub-sector.

[533] Article I (2) of GATS (note 89 above).

As is evident from the above explanation, the danger arises when a state has entered 'none' in its schedule, as it means there are no sector-specific limitations for the specified mode of supply. The focus of this analysis will therefore be limited to the modes of supply in the two sub-sectors where South Africa has opted not to impose any limitations.

For all the medical and dental services listed above, there are no restrictions on market access in the first three modes of supply: cross-border, consumption abroad and commercial presence. For instance, South Africa cannot limit the number of foreign health services that wish to establish commercial presence in the country. Similarly, in these three modes, South Africa has undertaken not to impose restrictions on national treatment. Accordingly, for example, South Africa cannot maintain a subsidy or preferential treatment to local health-service providers unless it affords the same treatment to like foreign health providers having a commercial presence in the country. For the services provided by midwives and nurses, no limitation is imposed on market access and national treatment for the consumption abroad and commercial presence modes of supply.

How would South Africa's National Health Act fare in light of the commitments the country has undertaken in the sub-sectors detailed above?

3.2.4.1 The National Health Act

Access to health services is a fundamental human right enshrined in the Constitution of the Republic of South Africa, 1996. The Constitution imposes certain obligations upon the state to guarantee and fulfil this right. It clearly sets the requirement that the state must take reasonable legislative and other measures within its available resources to achieve the progressive realisation of the right of the people of South Africa to have access to health-care services, including

reproductive health care.[534] It is progressive from a gender perspective in that it spells out access to reproductive health as a major component of the right. In line with this, the government has promulgated the National Health Act 61 of 2003.

The Act is intended to assist in the progressive realisation of the constitutional right of access to health-care services, including reproductive health care. To this end it sets a number of objectives. The relevant part of the object of the Act reads:

> *The objects of this Act are to regulate national health and to provide uniformity in respect of health services across the nation by –*
>
> *a) establishing a national health system which –*
> *i) encompasses public and private providers of health services; and*
> *ii) provides in an equitable manner the population of the Republic with the best possible health services that available resources can afford;*
> *c) protecting, respecting, promoting and fulfilling the rights of –*
> *i) the people of South Africa to the progressive realization of the constitutional right of access to health care services including reproductive health care;*
> *iv) vulnerable groups such as women, children, older persons and persons with disabilities ...* (My emphasis.)

Some of the objectives that stand out as the guiding principles are uniform and equitable provisions of health-care services to the population of the Republic, as well as the aim of regulating both public and private health-care providers. These principles are distributive in nature. They are meant to respond to the present crisis, especially in relation to HIV and AIDS, as well as the imbalances from the past.

Given these imbalances, the distributive natures of the guiding principles of the Act are timely. To properly implement or carry out its distributive objectives, the Act employs various instruments to allow for the proper implementation of its

[534] Section 27(2) of the South African Constitution.

distributive objectives. One important instrument is the requirement of a 'certificate of need'. The Act basically requires health-services providers to obtain certificate of need in order to engage in the provision of health-care services. Section 36 of the Act, dealing with the issuing of these certificates, provides the following:[535]

> *Certificate of need*
>
> *36. (1) A person may not [without a certificate of need] –*
>
> *(a) establish, construct, modify or acquire a health establishment or health agency;*
> *(b) increase the number of beds in, or acquire prescribed health technology at, a health establishment or health agency;*
> *(c) provide prescribed health services; ...*
>
> *(3) Before the Director-General issues or renews a certificate of need, he or she must take into account-*
>
> *(a) the need to ensure consistency of health services development in terms of national, provincial and municipal planning;*
> *(b) the need to promote an equitable distribution and rationalization of health services and health care resources, and the need to correct the inequities based on racial, gender, economic and geographical factors;*
> *(c) the need to promote an appropriate mix of public and private health services;*
> *(d) the demographics and epidemiological characteristics of the population to be served;*
> *(e) the potential advantages and disadvantages for existing public and private health services and for any affected communities;*
> *(f) the need to protect or advance persons or categories of persons designated in terms of the Employment Equity Act, 1998 (Act No. 55 of 1998), within the emerging small, medium and micro-enterprise sector;*
> *(h) the need to ensure that ownership of facilities does not create perverse incentives for health service providers and health workers; ...*
>
> *(5) The Director-General may issue or renew a certificate of need subject to –*

[535] It is important to note that Section 36 of the Act has not as yet been proclaimed by the President. Nonetheless the analysis to be carried out with respect to this particular section still holds true, and shows the tension between South Africa's commitments under GATS and its national legislation.

(v) any criterion contemplated in subsection (3).

(6) The Director-General may withdraw a certificate of need of agency;

(d) if the health establishment or the health agency, as the case may be, or a health care provider or health worker working within the health establishment, persistently violates the constitutional rights of users or obstructs the State in fulfilling its obligations to progressively realize the constitutional right of access to health services. (My emphasis.)

The three subjects of Section 36 are health establishments, health agencies and person/s providing health-care service. According to the definitions in the Act, 'health establishment' refers to a public or private institution designed to provide inpatient or outpatient treatment; diagnostic or therapeutic interventions; or nursing, rehabilitative, palliative, convalescent, preventative or other health service.[536] 'Health agency' basically means a person or a health establishment involved in the supply and employment of health-care personnel.[537] And 'person/s providing health care' includes those providing reproductive health care, emergency medical services, basic health services and medical treatment as contemplated in Section 27 of the Constitution.[538]

Almost all human health services administered outside of hospitals by doctors, nurses, midwives and other health professionals are covered by South Africa's commitments under GATS. Possible establishments included in the commitment are general practitioners' practices, nursing clinics, diagnostic clinics and out-patient clinics.[539] All of these are governed by the Act. And further, as all persons providing health care are governed by the Act, it is safe to assume that persons providing medical services and specialised medical services, as well as midwives and nurses, are governed by the Act. Therefore it is again safe to assume that the Act applies to the health-service sectors for which South Africa has made

[536] Section 1 of the National Health Act.
[537] Ibid.
[538] Ibid.
[539] Sinclair (note 127 above) 22.

commitments under GATS. Accordingly, these health establishments and persons providing medical service are required to have a certificate of need. How would a certificate of need fare in light of South Africa's commitment under GATS?

According to South Africa's commitment under GATS, health establishments, other than hospitals, with commercial presence are granted unlimited market access and national treatment. General practitioners' practices, nursing clinics, diagnostic clinics and out-patient clinics cannot face any market-access limitations. They are additionally entitled to national treatment. Similarly, health establishments with commercial presence and providing services provided by midwives and nurses, such as nursing clinics, out-patient clinics and reproductive clinics, are entitled to national treatment without any limitation and further cannot face any market-access limitation.

Basically, when one looks at the criteria set for the issuance of a certificate of need, the Act accords the authorities (the Director-General) the power to issue or even refuse certificate based on community needs.[540] In addition, the Act allows the authorities to attach additional conditions, assessed on the basis of community needs, when issuing the certificate. This requirement of a certificate of need comes into conflict with South Africa's commitment under GATS Article XVI (2) (a). This article dictates that a country that has undertaken not to impose any limitations on market access and national treatment is not allowed to maintain any qualification to its unlimited commitment. A certificate of need qualifies the unlimited commitment and is hence a violation of GATS.

In the face of such conflict, South Africa has two options. One, it can maintain the Act and face a compensation claim by members whose interests may be affected. Or, it can take the route of withdrawing or modifying its commitment, but with the same consequence. Alternatively, in order to avoid the conflict, it can choose not to implement those aspects of the Act which are contrary to its GATS

[540] Ibid 21.

obligations – in this case, to abolish or significantly modify the requirement of a certificate of need. This, however, defeats the very core objective of the Act: its distributive objective. In all possible scenarios, the conclusion is that South Africa's GATS obligations may stand in the way of full and adequate implementation of the National Health Act.

3.2.4.2 The National Health Act and GATS: a gender perspective

As we have seen, the commitments that South Africa has undertaken under GATS cover health establishments other than hospitals, such as general practitioners' practices, nursing clinics, diagnostic clinics and out-patient clinics. And, most importantly, the services particularly mapped out – services provided by midwives and nurses – are relevant almost exclusively to women. These services and establishments are particularly relevant from women's perspective for at least two reasons. Firstly, they address the immediate and day to day concerns of women, particularly with regard to reproductive health. Provision of contraceptive services, pregnancy and delivery services are good examples in this regard. Secondly, they are more accessible to women than the well-established and limited number of big establishments, such as hospitals.

It has been stated earlier that the National Health Act aims at uniform and equitable provisions of health-care services to the population of the Republic. This distributive objective of the Act is relevant from a gender perspective for a number of reasons. Firstly, it responds to imbalances in the access to health-care services brought about by the apartheid regime. The health-care system under the apartheid regime was characterised by serious inequalities and inefficiencies.[541] It was only a small percentage of the population that benefited from health-care services provided by the private sector, and the public health sector was

[541] Ibid.

fragmented and characterised by geographical and racial inequalities.[542] Further, these services were poorly developed and inaccessible to the majority of the population, in particular the poor.[543] As a result, the majority of the population, including women, had limited or no access to health-care services.

Secondly, it is well acknowledged that women bear a disproportionate burden of reproductive-health problems. During the apartheid era there was no comprehensive reproductive-health policy.[544] Maternal-health services were characterised by overcrowding and understaffing.[545] Similarly, services for victims of sexual violence were fragmented. In stark contrast to primary and reproductive-health services, contraceptive provisions aimed at controlling the black population growth were in place.[546] All of these factors combined left women, especially poor black women, at a particular disadvantage in terms of access to health services. Ensuring access to equitable and uniform health services, which the Act endeavors to do, would therefore greatly benefit women who disproportionately bear the burden of the problem.

Thirdly, the distributive objective of the Act responds quite urgently to the health crisis brought about by the HIV and AIDS pandemic in the country. The pandemic follows a distinctive age and gender distribution, with young women at greater risk of infection compared to men.[547] And, overall, proportionally more women are affected than men.[548] Therefore the objective of ensuring access to equitable and uniform health services would significantly benefit women, who are again disproportionately burdened by the problem. The Act therefore has particular significance from a gender perspective.

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[542] D Cooper et al 'Ten Years of Democracy in South Africa: Documenting Transformation in Reproductive Health Policy and Status' (2004) 12 (24) *J of Reproductive Health Matters* 70.
[543] Ibid 71.
[544] Ibid 71.
[545] Ibid 71.
[546] Ibid 71.
[547] Ibid 77.
[548] Sinclair (note 127 above).

In addition to these general observations derived from the distributive objectives of the Act, the Act uses gender as a criterion to ensure uniform and equitable access to health-care services. One such criterion which the authorities must consider before issuing a certificate of need for health- care service providers is

"'the need to promote an equitable distribution and rationalization of health services and health care resources, and the need to correct the inequities based on racial, gender, economic and geographical factors [my emphasis]

Given the imbalances in access to health-care services, and in particular reproductive–health-care services to women, this specific criterion may require decision makers to emphasise broadening access to reproductive-health facilities. Following a similar analysis, it may require the geographical allocation of health-service facilities. The authorities may thus shift service providers and resources to health establishments that cater for reproductive health needs of the low-income population, the rural population etc, who geographically may be concentrated in specific areas. Authorities may implement this by restricting the number of health-service providers in a given sector, or by restricting the provision of certain services exclusively through government monopolies or through contracts with exclusive service suppliers for the service in question, for instance, public-sector ARV provision or treatment.

These measures, however, are not allowed under GATS. This is because these kinds of restrictions effectively put limitations on service providers accessing the South African health-sector market. It is a kind of quantitative restriction. Therefore, South Africa's commitment of unlimited market access prohibits maintaining and implementing such measures.

Another criterion with a gender dimension to be considered by the authorities in granting certificate of need is

"'the potential advantages and disadvantages for existing public and private health services and for <u>*any affected communities*</u> [my emphasis]

Accordingly, before issuing a certificate of need, the authorities must examine the potential effect on existing service providers and any affected community of bringing in a new service provider on existing service providers and any affected community. As briefly discussed above, there is a very high concentration of resources in the private sector. However it is only a small percentage of the population that has the capacity to utilise this sector and is therefore benefiting from it. On the other hand, the public sector, which caters for the health needs of the majority of the population, does not have adequate resources. This leaves the majority in a precarious position. Women, owing to their biological needs and the greater risk they face from HIV and AIDS, lose out a lot from the precarious position of the public service.

Such considerations may result in restricting growth in areas or markets that are considered to be served[549] while, on the other hand, encouraging expanded services to cater for poorly served regions or sectors of the population, such as women.[550] Accordingly, the provision of health-care in reproductive services may be preferred, compared to other health sectors. Similarly, to meet the needs of the vulnerable, such as women, conditions such as providing health services for the predominant use of low-income communities may be attached to the certificate. Government monopoly could also be a preferred option to meet these ends. However, such measures have the effect of restricting the market access of health-care service providers. In light of South Africa's commitment to unlimited market access, they are therefore a no-go area.

A third consideration with gender relevance in granting a certificate of need, according to Section 36 of the Act, is

[549] Ibid 24.
[550] Ibid 24.

"'*the need to protect or advance persons or categories of persons designated in terms of the Employment Equity Act, 1998 (Act No. 55 of 1998), within the emerging small, medium and micro-enterprise sector* [my emphasis]

Women are among the categories of designated persons in the Employment Equity Act. The objective of protecting and advancing women employed in the health-service sectors can be achieved through a variety of measures. Two avenues can be considered here. Firstly, the government could make the advancement of women a condition of market access. Accordingly, the government or local authorities may negotiate with a foreign service provider to train women[551] or to reserve a certain percentage of its available work force for women, etc. This avenue is clearly incompatible with the unlimited market-access commitment of South Africa under GATS.

The second possibility is for the government to take it upon itself to grant government subsidies, preferential loans or loan guarantees to service providers that implement some form of empowering programmes for women and women employees. For instance, the public health sector is losing health professionals, mainly qualified nurses, the majority of whom are women, to the private sector,[552] which offers more favourable pay and opportunities. Government could implement incentives or subsidies to retain these nurses in the public sector.[553] Such incentives might also attract nurses from the private sector. However, this kind of government intervention, which specifically targets the public sector, discriminates against the private-sector service providers. And under GATS, South Africa has committed itself to providing unlimited national treatment to foreign service providers. Such discriminatory treatment is therefore a violation of the country's GATS commitments.

[551] Ibid 24.
[552] Ibid 26.
[553] Ibid 26

Black economic empowerment (BEE)[554] requirements create a similar situation. BEE applies to the health-services sector, and there are major requirements that are relevant from a gender perspective. The draft Health Charter of 2005, in operationalising BEE targets, stipulates that by 2010, 50 per cent of the work force in the health service will comprise women.[555] The enforcement of such targets, while clearly beneficial from a gender perspective, would violate the country's obligations on both market access and national treatment.

To conclude, it is undoubtedly true that the implementation of some of these measures under the Act which run afoul of the country's GATS commitments would indeed improve women's access to health-care services. This can be ascertained by reference to earlier policy interventions of the state which have proved successful in broadening their access. The possible indicators of the types of measures that can be contemplated in this regard are those policies and measures, especially reproductive-health policies, implemented by the government so far, that have indeed improved women's access to health-care services. These include the introduction of free primary-level health services for women and children, free health care for pregnant women, the provision of abortion services by certified midwives and by any facility with a 24-hour maternity service, the roll-out of three free Pap smears in a lifetime, the provision of sexual-assault services by all public-sector doctors and private practitioners, the provision of prevention of mother-to-child transmission of HIV, and the introduction of public-sector ARV treatment. If these and similar interventions are to be compromised by the requirements of GATS, women's access to health care services will seriously be compromised.

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[554] According to the Broad Based Black Economic Empowerment Act of 2003, Black Economic Empowerment (BEE) means the economic empowerment of all black people including women through diverse but integrated socio-economic strategies that include; increasing the number of black people that manage, own and control productive assets, human resources and skill development, achieving equitable representation in all occupational categories and levels in the work force, preferential procurement and investment in enterprises that are owned and managed by black people.

[555] Sinclair (note 127 above) 27.

Similarly, with regard to measures that can improve the status of women employed in the health services sector, GATS may tie the hands of the state from implementing them. In so doing, it would undermine the capacity of the state to realise progressively women's right to access health-care services. The fact that South Africa's commitments under GATS would stand in the way of implementing potential gender-sensitive measures disadvantages women, although not in intent, in practice. GATS therefore may have the effect of indirect discrimination against women.

4. CONCLUSIONS

The legal analysis briefly carried out in this chapter with regard to two selected trade agreements shows that trade agreements may have the potential to undermine state capacity to advance the human rights of women, thereby undermining the effectiveness of the human-rights framework. This is evident in relation to the AOA as well as GATS. In relation to the AOA, trade rules tend to restrict the ability of states to formulate policies aimed at promoting the right to adequate food and food security. The chapter has shown that due to the special role that women play in food production in many parts of the developing world, AOA disproportionately disadvantages women.

Similarly, under GATS, access to essential services, including health care, is adversely affected by the stringent requirements of GATS rules. This comes about in two related ways. Firstly, GATS fails to exclude essential services such as health care from the ambit of the agreement thereby opening such services to the private sector which in many instances has led to steep increase in prices for the majority of the poor including women. Secondly, through its stringent domestic regulatory requirements and the architecture of the agreement it locks in state commitments made in various areas of services with a built in penalty for any roll backs. This in turn is in inherent tension with the progressive realization of socio-economic rights such as access to health care. Based on these, it is argued in this

chapter that that GATS has the effect of limiting the access to essential services such health care services mainly by limiting the policy making space of states to ensure access to services to vulnerable groups such as women.

GATS's effect of limiting policy space is illustrated further by examining how South Africa's commitments under GATS affect the implementation of its National Health Act. The Act requires health services providers to obtain certificate of need in order to engage in the provision of health care services. This certificate is to be issues taking into account various conditions including community needs, and further the Act allows the authorities to attach additional conditions assessed on the basis of community needs when issuing the certificate. Gender sensitive considerations may well form part of these conditions. However, according to South Africa's commitment under GATS, health establishments other than hospitals with commercial presence are granted unlimited market access and national treatment. As a certificate of need qualifies the unlimited commitment of the country under GATS it becomes a violation of GATS. This is a clear case of conflict whereby GATS ends up limiting policy making space of the government which aims to take community needs among others into account to ensure wider access to health care services.

One way of resolving this kind of conflict or tension between the requirements of trade agreements and human rights of women is to allow states the necessary policy-making space to draw up policies that are supportive of the human rights of women. Chapter VI explores the various mechanisms through which trade rules can help states design and implement human-rights-friendly domestic policies which can address the interests of women.

CHAPTER V

UNDERSTANDING GENDER EQUALITY IN THE CONTEXT OF INTERNATIONAL TRADE

1. INTRODUCTION

This chapter examines two possible gender issues in international trade regulation: the effect of the international trade regime on poor women, and the effect of trade on the reproductive role of women.[556] There is recognition that international trade regulation may lead to increased income inequality.[557] The growing inequality and the continuous reductions in the real income of the less fortunate effectively undermine the standards of living of the poor.[558] The possibility of international trade adversely affecting the poor sections of society brings into the picture a gender issue, because the majority of the world's poor are women, and women experience poverty in a more forceful way.

Similarly, the discussions on the interactions of gender and trade in Chapters III and IV[559] show that trade rules and, generally, the regulation of international trade are found to aim primarily at increasing efficiency and advancing freer trade. This in turn externalises social costs and concerns into the non-market or reproductive sphere. This tends to disadvantage women, as they are mainly responsible for the reproductive sector.

These two matters, the effects on women in poverty and on their reproductive roles arising from the operations of trade, relate mainly to the socio-economic

[556] These are issues derived from the discussion on the relationship or interactions between gender and trade in the previous two chapters, III and IV.
[557] This issue has been discussed in detail in Chapter III, in relation to the postcolonial feminist critique of the trade regime. It is also substantiated by economists. See, for example, AO Sykes 'International Trade and Human Rights: An Economic Perspective' in FM Abbott et al (eds) *International Trade and Human Rights: Foundations and Conceptual Issues* (2006) 81.
[558] Ibid 75.
[559] Chapter IV in particular looks into the effect of trade regulation in the services and agricultural sector, which highly disadvantages women.

rights of women. This is because these rights relate directly to the day to day material conditions of women.[560] As such, the rights attend to the welfare of women. Further, they shift at least some of the burden of women's reproductive work to the broader society.[561] In so doing, they directly challenge the gender-based division of labour and resources.[562] The realisation of socio-economic rights therefore challenges fundamental issues of gender inequality that arise in relation to trade. These are the poor welfare of women (poverty); the unfair division of labour, which puts a huge work burden on women (reproductive vs productive work); and the unpaid work of women, which results in their low status.

Substantiating these points, the chapter continues the groundwork for answering the research question of the thesis – whether the trade regime can promote gender equality. One measure of the possible role of the trade regime in promoting gender equality will therefore be its contribution towards the fulfilment of the socio-economic rights of women. Accordingly, the question of the thesis can be evaluated in terms of this parameter. This chapter therefore frames the gender issues arising in international trade as issues relating to the socio-economic rights of women.

1.1 Background

The interactions between trade and gender-equality concerns are complex. The complexity implies that there is a need for a framework for understanding and analysing the relationship between gender-equality concerns and international trade regulation. A variety of frameworks are employed in the literature dealing

[560] B Stark 'International Human Rights Law, Feminist Jurisprudence, and Nietzsche's "Eternal Return": Turning the Wheel' in RL Teske & MA Tetreault (eds) *Conscious Acts and the Politics of Social Change* (2000) 124, 130-131.
[561] Ibid. This is further substantiated in later sections.
[562] Ibid.

with gender and trade. Some are legal frameworks, while others are expanded frameworks drawing from the social sciences.

The first of these frameworks establishes direct and indirect pathways for the interactions between gender and trade.[563] According to this, there is a direct interaction where trade agreements and policies influence the supply of goods and services, which in turn constitute the basket of socio-economic rights of women. For instance, where trade rules and policies affect either positively or adversely women's access to services such as health, energy and water, such rules have direct impact on gender equality.

The interactions are indirect when trade agreements, trade policies or the distribution of goods and services through trade flows interact with other factors which may in turn shape gender relations. A very good example here is the change in women's labour-market participation brought about by the reduction of barriers in the manufacturing sector, which in turn led to increased trade in manufactured goods. Labour-market participation may positively contribute to gender equality where it increases the decision-making power of women in the household. It may also have negative effects where it increases their work burden.

A similar but slightly different framework tries to make a distinction between the effects of trade rules, on the one hand, and the effect of actual trade flow, on the other, on gender relations.[564] This is similar to the direct pathway of the above framework. However, it differs in that it does not take into account other

[563] The direct and indirect pathways in the gender–trade interactions are employed as a framework in various examples of literature on gender and trade. Growen et al, in discussing the effect of trade liberalisation on the reproductive health rights of women in developing countries, employ these two pathways as frameworks. The direct pathway relates to how trade affects the supply of reproductive health services and goods, while the indirect one relates to how trade affects women's demands for such services through changes in their labour-force participation. See C Growen et al *Trading Women's Health and Rights: Trade Liberalization and Reproductive Health in Developing Economies* (2006).

[564] This framework is used in an extensive study on gender and trade by the UN Conference on Trade and Development (UNCTAD). See AB Zampetii 'The Impact of WTO Rules on the Pursuit of Gender Equality' in A-N Tran-Nguyen & AB Zampetti (eds) *Trade and Gender: Opportunities and Challenges for Developing Countries* (2004), 293.

intermediary factors, such as labour-market participation, which may change the original position of women and their reaction to changing patterns of trade. The focus here is on changes on the side of trade.

A related framework, which also investigates the interactions and is employed in legal literature, is that of normative legal analysis, which mainly involves investigating the interactions between the legal norms – trade norms – and the various norms on gender equality.[565] The focus of analysis may be a specific human right of women or a range of human rights, or, likewise, a specific trade agreement or the entire framework of the WTO. For instance, there are a number of studies on how TRIPS affect the right to health,[566] and there are also studies focusing on the effect of the trade regime on human-rights protection in general.[567]

All of these frameworks have been extensively employed in this study in the different chapters. Chapter IV, which examines the interactions between the legal rules governing gender equality and trade regulation, utilises the framework of legal analysis. In addition, it employs the framework analysing the impact of trade rules and increased trade on gender relations. Chapter III, on feminist perspectives, uses the framework that looks into the direct and indirect pathways of interaction between gender and trade. Based on these frameworks, the two gender issues in international trade to be addressed in this chapter have been identified: the effect of trade on women in poverty and its effects on the reproductive role of women.

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[565] S Gammage et al 'Trade Impact Review' (2002) at <http://www.womensedge.org/components/com_kb/attachments/tradeimpactreviewfinal.pdf> 05/03/06.
[566] See ibid.
[567] See ibid; R Howse & M Mutua 'Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization 2000' at <http://www.ichrdd.ca/english/commdoc/publications/globalization/wtoRightsGlob.html> 05/06/06.

There are two further important methodological points to take note of in examining the gender–trade nexus. The first is that trade policies such as liberalisation are implemented not only through the WTO, but also through other international financial institutions (IFIs), namely the World Bank and the International Monetary Fund (IMF), and this is done, for instance through the different conditionalities. So at times there may be multiple implementation factors to be considered. Secondly, a further aspect of the complex relationship between gender and trade is that these interactions are highly dependent on the specific contexts of each country and the prevailing circumstances in a specific time period. Accordingly, a similar trade rule or policy may have different impacts in different countries or within a country.

The complexities surrounding the gender–trade interactions indicate that trade rules and policies may not have uniform impacts on different categories of women. The impact is very much affected by the existing situations of women when they come into interaction with trade rules, policies and the resulting flow of goods and services. This also tells us that, as the situation of all women is not identical, it is likely that trade may have both positive and adverse impacts on gender relations.

These observations warrant certain preliminary conclusions when it comes to the gender–trade nexus. Firstly, existing situations or circumstances of women significantly affect how the gender–trade interactions play out. This, however, does not mean that trade rules and policies do not play a role in shaping gender relations further. Secondly, although there are differences among women, certain commonalities in gender relations can be observed. A very good example here is the reproductive role of women. Such commonalities can form the bases for analysing a gender–trade interaction.[568] It is therefore possible to talk about certain distinct gender issues that arise in international trade regulation.[569]

[568] It is often stated that the effect of trade on poor women is similar to that on poor men, and there is thus there is no need to distinguish between men and women on the basis of poverty. Such a

2. GENDER ISSUES IN INTERNATIONAL TRADE

This section elaborates upon the two identified gender issues in international trade regulation. These are:

1. Gender, poverty and trade – the effect of the trade regime on women in poverty[570]
2. Trade and the reproductive role of women – the effect of trade on the reproductive role of women

2.1 Poverty, gender and the regulation of international trade

2.1.1 Introduction

The social effects of international trade regulation are a subject of strong contest and debate. Within the parameters of social effects, a number of specific issues can arise, including - human rights, labour rights, gender concerns, development and poverty reduction. There are strong views which support the proposition that trade regulation contributes positively towards these ends. Similarly, opponents argue strongly that trade regulation has adverse social effects. The two sets of

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conclusion assumes that poverty is experienced in the same manner by men and women. But the reality is that poverty in itself is gendered. Accordingly, although the contribution of trade towards alleviation of poverty is crucial to improving the situation of women, it may not necessarily make them or leave them non-poor.

[569] This answers the question of what the gender issues in trade are, and how they are different from other development issues. It should, however, be noted that the development or poverty issues are very important foundations for discussing gender issues in the regulation of international trade.

[570] There exists strong basis for identifying this as one of the gender issues in international trade. According to Elson, there is reason to be concerned that it is poor women who are particularly adversely affected by neo-liberal policies (underlying the trade regime), either directly in the present, or in terms of adversely affecting the prospect for the progressive realisation of their socio-economic rights. See D Elson 'Gender Justice, Human Rights and Neo-liberal Economic Policies' in M Molyneux & S Razavi (eds) *Gender Justice, Development, and Rights* (2002) 78, 91-92.

views are usually divided along the lines of discipline. For instance, while economists take quite a positive stand on the role of trade in improving the lives of people, human-rights advocates blame the trade regime for deteriorating human-rights conditions. Interestingly, the arguments of both sides are supported by rich empirical data.

Despite the raging contest on the social effects of trade, there are some points of agreement between these two blocs. One such point, which is very important from the perspective of this thesis, is the recognition that international trade regulation may adversely affect the human rights of the poor sections of society. Thus, some economists argue that more open trade may lead to increased income inequality.[571] Others, short of attributing direct causality, agree that increased income inequality across and within countries can be correlated with the deepening of market integration and openness that propelled global growth.[572] The growing inequality and the continuous reductions in the real income of the less fortunate effectively undermine their standards of living.[573] In human-rights terms, this may well be translated into adverse impacts on socio-economic rights, in particular the right to an adequate standard of living. Human-rights scholars strongly support this view. In fact, strong arguments exist in the human-rights field that show how increased trade is implicated in increasing poverty in many of the developing and least developed countries of the world.[574]

One point that can be gathered from the area of agreement between economists and human-rights scholars is that the relative position of people, especially in economic terms, determines to a large extent how trade may impact on their lives. Accordingly, their situation before the advent of trade is an important consideration. Unfortunately, the point of agreement ends here. There are

[571] See Sykes (note 2 above).
[572] K Dervis 'Growth, Inequality and Global Development: Who is Being Left Behind?' at <http://www.ideas4development.org/growth-inequality-and-global-development-who-is-being-left-behind/en/> 23/06/08.
[573] Sykes (note 2 above) 75.
[574] There are statistics to support this, such as those in UN human-rights studies on agriculture, services and TRIPS.

significant differences and debates on how and why trade in actual terms adversely affects the living standards of the poor, what can possibly be done to address this, and who should be responsible for addressing these concerns.

Economists, for instance, measure poverty mainly in income terms. Accordingly, where trade is said to lead to a decline in the standards of living of the poor, the outcome is measured in terms of a decline in income. A decline in other measures of welfare, which may or may not be directly be related to income, may not receive adequate consideration. Similarly, in terms of responses to this problem, economists argue for targeted measures aimed at increasing income.

Human-rights as well as gender advocates, on the other hand, measure poverty through multi-dimensional factors such as income, access to public services, assets, and time. Accordingly, where a decline in the standard of living of poor people is attributed to trade, the consideration extends to the impact of trade not only on income but also on access to public services, assets and time. This may mean that the impact is measured on a whole basket of socio-economic rights. The responses therefore go beyond targeted measures aimed at increasing people's incomes.

The possibility of international trade adversely affecting the poor sections of society brings into the picture a gender issue.[575] Given that the majority of the world's poor are women and that women experience poverty in a more forceful way, it becomes important to investigate how the a priori conditions pertaining to women's poverty are understood, and how trade interacts with poverty; the role of trade regulation in alleviating and/or aggravating the level of poverty among women; what measures are required to address it and how responsibility should be apportioned. The sections that follow address these issues.

[575] For a detailed discussion on the effect of trade on poverty in the developing world from a feminist perspective, see Chapter III.

2.1.2 Poverty as a gender issue in international trade regulation

In the Chapters III and IV, I have attempted to examine the relationship between gender-equality issues and the operations of the trade regime. This exercise, which was carried out from both theoretical and legal perspectives, has shown certain patterns of interaction between the two fields. Firstly, trade rules and, generally, the regulation of international trade are primarily aimed at increasing efficiency, and they advance freer trade. This objective advocates for a minimal state. This in turn delegitimises state interventions aimed at re/distribution and equity, including gender equality in and through the market. And secondly, the distributive effects of trade regulation on the economies of developing and less developed states are found to worsen the situation of the poor in both which in turn maintains and even creates gender inequalities in these countries.

These effects resulting from the operations of trade mainly relate to the material conditions of women in their day to day lives, namely their welfare and their reproductive functions. These in effect constitute socio-economic rights issues.

2.1.3 Socio-economic rights: special importance from a gender perspective

2.1.3.1 Human rights of women

Human rights of women can be understood to refer to the entire spectrum of human rights as enshrined in various human-rights instruments. This understanding follows from the universal application of human rights. Therefore, women, as one half of the human population, are owners or custodians of human rights. Although this understanding appears to be logical, its implementation and translation in practice does not automatically guarantee the protection of all aspects of women's lives. This has led to the adoption of human-rights

instruments that deal specifically with women. Accordingly, human rights of women can also be understood to refer to the content of these international human-rights instruments.[576] As Charlesworth states, these instruments are mainly elaborations of the norm of non-discrimination found in other human-rights instruments. Further, these instruments have also been instrumental to a certain degree in identifying those aspects of women's life that were thought to be outside of the realm of human-rights protection, and elevated those aspects to the status of human rights. Violence against women, which is now recognised as a violation of human rights, is a very good example in this regard.[577] Women's human rights therefore refer to those enshrined in general human-rights instruments as well as human-rights instruments specifically dealing with women.

2.1.3.2 Socio-economic rights of women: a gender perspective

Although the entire list of human rights is invaluable to women, certain categories are especially important from the perspective of women's needs. The main reference here is to socio-economic rights. Statistics have shown that women face the severest human-rights challenges in the area of socio-economic rights.[578] Some, for instance, show that women work 13 per cent longer hours than men on average, that two thirds of women's working time is spent on unpaid work, and that 70 per cent of those living in absolute poverty are women.[579]

There are also important considerations that make socio-economic rights important sites for articulating women's struggle towards the attainment of social

[576] H Charlesworth 'What are Women's Human Rights?' in RJ Cook (ed) *Human Rights of Women National and International Perspectives* (1994) 58, 59.
[577] According to Charlesworth, this approach has resulted in the creation of a specialised branch of human rights which has allowed the marginalisation of women's human rights. This is seen, for example, in terms of the fragile nature of the implementation mechanisms of women's human rights. See ibid 59.
[578] K Frostell & M Scheinin 'Women' in A Eide et al (eds) *Economic, Social and Cultural Rights: A Text Book* (2001) 331.
[579] Ibid.

and economic objectives.[580] These rights are important from a gender perspective because they resonate with the requirements and understandings of substantive equality. One can appreciate this through an investigation of the concept of formal equality. Simply put, formal equality holds that inequality arises from the differential treatment of similarly situated persons. The operating comparator in this conception of equality is the advantaged person or group. If a person fails to be in a similarly situated position to the comparator, then differential treatment would be justified and the principle of equality will remain unaffected. Formal equality therefore does not account for differences or the reasons behind differences.

In this conception of equality women lose out hugely. This is because women may not be found in a 'similarly situated position' to men – the comparator – for a variety of reasons. One such reason could be their unique characteristics that come from nature or their biological make up, such as pregnancy. Another important reason is the role society has assigned to women that makes them different and treats them as subordinate to men. For instance, roles such as child rearing that are predominantly assigned to women and undervalued by society may not find a similarly situated comparator for purposes of comparison. Because of this, most aspects of women's lives may not be captured in the formal conception of equality. This has important implications, one of which is that it is in this aspect of women's lives that the real disadvantages that they face persist. Further, this is where the material conditions necessary for a life of dignity are lacking and women's poverty is experienced.

Substantive equality, on the other hand, attends to those aspects of women's lives that are the sources of disadvantage. It promotes those rights that are necessary to live a decent and dignified life with meaningful choices. These are predominantly socio-economic rights, which are significant from a substantive gender-equality

[580] K Rittich 'Feminism After the State: The Rise of the Market and the Future of Women's Rights' in I Merali & V Oosterveld (eds) *Giving Meaning to Economic, Social and Cultural Rights* 95, 96-102.

perspective in two important ways. Firstly, these rights directly relate to the material conditions of women.[581] In this respect, they attend to the welfare of women. Secondly, socio-economic rights shift at least some of the burden of women's reproductive work to the broader society.[582] By so doing, they directly challenge the gender-based division of labour and resources.[583] These two points will be substantiated throughout the chapter.

The realisation of socio-economic rights therefore challenges fundamental causes of gender inequality. These are the poor welfare of women; the unfair division of labour, which puts a huge work burden on women (reproductive vs productive work); and the unpaid work of women, which results in their low status. In this context socio-economic rights are utilised as instruments for the realisation of substantive gender equality. The following three sections examine this claim in light of the operations of the trade regime.

Based on the relationship between substantive equality and socio-economic rights, gender equality for the purpose of this study can be understood to refer to the fulfilment of the socio-economic rights of women. This directly resonates with substantive equality, which is defined in terms of the promotion of substantive rights, that is, rights to the material preconditions necessary to live a decent and dignified life with meaningful choices.[584] Substantive equality is intimately linked to socio-economic rights since these rights are premised on the need to facilitate improved access to resources and services necessary for a fulfilled human existence.

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[581] Stark (note 5 above) 130-131.
[582] Franceshet and Macdonald argue that demands for socio-economic rights would enable women to make claims on states that would reduce women's welfare burdens. S Franceshet & L Macdonald 'Hard Times for Citizenship: Women's Movements in Chile and Mexico' Paper prepared for the 2003 Canadian Political Science Association Annual Meeting Dalhousie University 8 at <http://www.cpsa-acsp.ca/paper-2003/macdonald_1.pdf> 12/06/08. See also Stark (note 5 above) 130-131.
[583] See Franceshet & Macdonald (note 27 above) 8; see also Stark (note 5 above) 130-131.
[584] S Seguino 'The Road to Gender Equality: Global Trends and the Way Forward' in Z Berik & Y Rodgers (eds) *Macroeconomic Orthodoxy and Globalization: What's In It for Women?* 8-12.

2.1.4 Trade, gender and poverty

2.1.4.1 Poverty and development reconceptualised

Poverty has traditionally been defined in terms of shortfalls in personal income and private consumption.[585] These measures of poverty are very much related to the market criteria of income and consumption. The effects of market operations such as trade liberalisation have been evaluated in terms of their positive or adverse impacts on personal income and consumption.

The same line of analysis applies to measure the effect of trade on growth and development. Here the predominant view is that trade liberalisation results in economic growth, thereby increasing personal income and consumption. This view admits that there may be losers in this process, but it also sees that the losers will eventually be compensated by the gains from trade. On the basis of this argument, it becomes logical to translate the view that trade liberalisation, which is believed to bring about development, also helps eradicate or at least reduce poverty. However, a different understanding of poverty challenges this view. And further, a different understanding of poverty may show how trade liberalisation may be complicit in creating incentive structures that may perpetuate poverty.[586]

The market criteria of income and consumption have began to be challenged as inadequate measures of growth and development and, by implication, inadequate for the understanding as well as the measures of poverty. The initial making of this challenge coincided with the time when the understanding of development was beginning to be reconceptualised. Human development replaced the narrow

[585] N Cagataya 'Gender and Poverty' UNDP (1998), 5 at <http://www.iknowpolitics.org/files/Gender%20and%20Poverty.pdf> 10/03/08.
[586] N Cagataya 'Trade, Gender and Poverty' UNDP (2001) 26.

understanding of development based on market criteria.[587] Similarly, human poverty replaced the concept of income or consumption poverty.[588]

A human-development conception of development broadened the understanding and the measures of development. Human development 'is about creating the environment in which people can develop their full potential and lead productive, creative lives in accord with their needs and interest'.[589] Economic growth thus becomes a mere means or instrument intended to enhance people's choices. The creation of an environment in which people can lead a productive lives, fulfilling their needs and interests, requires that certain basic conditions be met. These include long and healthy lives, and access to the resources, including knowledge and information, needed for a decent standard of living.[590]

In a similar way, the understanding and measures of poverty also changed. This is only logical, given the widely held view or premise that growth and development automatically translate into the eradication, or at least the reduction, of poverty. This new and alternative understanding views poverty in a broad and multidimensional way. In the new analysis, access to common property resources and state provision of commodities started to be taken in to account.[591] In addition, the concept of poverty was broadened to include lack of dignity and autonomy.[592] The expanded understanding of poverty draws from the insight that being non-poor implies a freedom from the necessity to perform activities that

[587] The first section of Chapter VI addresses itself to detailed discussion of human development and how it relates to the trade regime.
[588] Cagataya (note 31 above) 2.
[589] UNDP 'The Human Development Concept' at <http://hdr.undp.org/en/humandev/> 12/03/08.
[590] Ibid.
[591] See Cagataya (note 30 above) 5.
[592] See UN International Research and Training Institute for the Advancement of Women (INSTRAW) 'Women and Poverty: New Challenges' at <http://www.un-instraw.org/en/images/stories/Beijing/womenandpoverty.pdf>12/03/08. This report defines women's poverty in terms of lack of access to economic resources, autonomy and services. See also Cagataya (note 30 above) 5.

may be limiting one's choices in terms of pursuing one's lifestyle.[593] The expanded and current understanding of poverty directly corresponds to the broad view of human development. According to Cagataya, a concept of poverty that includes personal consumption, common property resources, state-provided commodities, assets, time, dignity and autonomy relates to the concept of human development.[594]

2.1.4.2 Gender in the reconceptualised view of poverty and development

Gender represents power relations between the sexes, with women being the less powerful in this respect. The power relation is evident in all aspects of life, including the division of labour, division of work, distribution of income, wealth, education, public resources and services. In the division of labour, women are assigned the unpaid role of caregiver. This extends beyond their children to the elderly, men and the community in general. Women also work for longer hours than men in most societies. However, this is not compensated by higher income. On the contrary, women earn less income despite the long working hours. The picture is also gloomy when it comes to access to resources. Statistics around the world show that women have less access to resources, including public services. These facts illustrate that women lack power.

Women's lack of power, structured by gender relations in society, means that there is an additional intermediary factor that makes women experience poverty differently and in a more forceful way.[595] For instance, if one takes the constraints

[593] On the understanding of poverty as freedom, see A Sen *Development as Freedom* (1999). Sen argues that the condition of poverty is an obstacle to individual freedom. See also Cagataya (note 30 above) 5.
[594] See Cagataya (note 30 above).
[595] Cagataya (note 31 above) 14-15. See also N Kabeer *Reversed Realities: Gender Hierarchies in Development Thought* (1994) Kabeer argues that household measures of poverty render invisible inequalities within households which are gender based. See A Whitehead 'Failing Women: Sustaining Poverty Gender' in *Poverty Reduction Strategy Papers* Report for the UK Gender and Development Network at <http://www.siyanda.org/docs/gad_failingwomen.pdf> 20/10/08.

on access to public services and resources in general as one among the multidimensional measures of poverty, it is very likely that women will be found to be poorer relative to men. This is because women's access to resources is further constrained by their lack of power. Cagataya, illustrating the effect of this power differential along gender lines on the experience of poverty states: 'Viewed from the lens of [the broader and current understanding of] human poverty women and girls can be poorer relative to men within households classified as poor … [and] in households that are classified as non-poor.'[596] Gender inequalities in all aspects of life make women more vulnerable to poverty. The concept of human poverty therefore shows a special relationship between gender inequality and poverty.

As discussed above, a broader understanding of poverty includes consideration of a number of factors, such as access to common property resources, access to state-provided commodities and services, access to public resources, and possession or the lack thereof of assets, time, dignity and autonomy. The reconceptualised understanding of poverty is able to capture important aspects of life which are instrumental in the realisation of human development. In what follows some of these aspects which are particularly important from a gender perspective will be analysed.

2.1.4.2.1 Time poverty

As one dimension of poverty, time is important in analysing the non-monetary aspect of people's welfare. This stems from the view that the welfare of individuals is a function of not only their monetary income but also of their freedom in allocating the use of their time.[597] The factor for consideration here is

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Whitehead argues that poverty is gendered and that men and women are often poor for different reasons, and experience as well as overcome poverty in different ways.

[596] See Cagataya (note 30 above).

[597] E Bardasi & Q Wodon 'Measuring Time Poverty and Analysing its Determinants: Concepts and Applications to Guinea' 1 at <http://economicsbulletin.vanderbilt.edu/2006/volume10/EB-06J20004A.pdf>12/03/08.

that some individuals may not have enough time for rest and leisure after the time they spend on working: hence 'time poverty'. The nature of the work may range from labour-market participation, which falls under the category of productive work, to reproductive work, including domestic work.

Looked at from another perspective, time allocation and any constraints on it are believed to have implications on income levels and consumption rates in general.[598] Here, the consideration is that those who are extremely pressed for time may not be able to allocate sufficient time for certain other income-generating activities, as a result of which they would be forced to make trade-offs.[599] Accordingly, certain activities may be left unattended. Time poverty may thus constrain one from transforming one's assets, such as labour, into income and, generally, well-being.

Both aspects are important from a gender perspective. Statistics show that women in general have long working hours.[600] On average, women work more hours in productive sectors than men. Further, they shoulder the burden of the reproductive sector. In sub-Saharan Africa, for example, women have to work long hours on domestic chores and the collection of water and wood, in addition to working in the fields and other productive sectors.[601] Women may not have enough time for rest and leisure after the time they spend on working, which means that they experience time poverty. Consideration of time poverty reveals how the unpaid work in the reproductive sector is distributed.[602] It shows that the allocation of the unpaid caring tasks to women leaves them with relatively limited time to participate in the paying economy. This may force them to make trade-offs

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[598] Ibid.
[599] CM Blackden & Q Wodon (eds) 'Gender, Time Use and Poverty in Sub-Saharan Africa' World Bank Working Paper No 73 1, 3 at <http://siteresources.worldbank.org/INTAFRREGTOPGENDER/Resources/gender_time_use_pov.pdf> 31/10/08.
[600] This draws from the fact that they shoulder the burden of the reproductive sector, or what is called the unpaid care economy, on their own.
[601] Bardasi & Wodon (note 40 above) 1-2.
[602] D Budlender 'Women and Poverty Beyond Beijing' (2005) 64 *Agenda* 32.

between their caring tasks and their effort towards increasing their income. In this context, time poverty may leave women in a position where they may not be able to satisfy their basic needs because they choose to do their reproductive work. This is one way in which time poverty may exacerbate one's poverty by putting constraints on the use of one's assets, such as labour. Alternatively, it may leave the welfare of the family and community, including women and children, worse off by absenting women's input in the caring sector.

Trade plays an important role in women's time poverty. Trade creates new market opportunities. This has resulted in the influx of male migration to urban areas to take advantage of these new opportunities.[603] This, feminist economists argue, could exacerbate women's time poverty and their triple burden of productive, reproductive and community work.[604] Trade liberalisation may also open up new employment and market opportunities for women. This has been the case, for instance, in the export-processing zones, light-manufacturing sectors and services sector, in particular tourism. In Asia and Latin America, for example, women have been incorporated in these new employments. However, the potential gains from this are questionable, because the resulting reduction in time available for caring work results, in turn, in less rest and leisure time for women. This is one important concern as far as the well-being and welfare of women is concerned.

On another front, feminist economists have long argued that women's reproductive role may constrain the available time to engage in the labour market.[605] As a result, women may not be in a position to transform their labour, which constitutes one important asset, into income and well-being in general. In such instances of time poverty, women are forced to make trade-offs among their

[603] N Jones & H Baker Untangling Links between Trade, Poverty and Gender ODI Briefing paper 2008, 2-3 at <http://www.odi.org.uk/publications/briefing/bp38-mar08-trade-poverty-gender.pdf> 11/02/08.
[604] Ibid. See also Elson (note 15 above) 93-95.
[605] See UN Development Fund for Women (UNIFEM) 'Progress of the World's Women' (2005). Chapter 2 of this report discusses in detail the nature and measure of women's paid and unpaid work and its implications on women's labour-market participation. See also Jones & Baker (note 46 above) 2; Elson (note 15 above) 95.

various activities. Changes in the available time for caregiving, due to new employment for women, will have a spillover impact on children, and girl children in particular.[606] Girl children, especially in rural areas, are required to offset the shortfall in the care work, severely affecting their schooling, leisure time and development.[607]

2.1.4.2.2 Access to resources and poverty

Poverty is also evaluated in terms of access or the lack thereof to common property resources, state-provided commodities and services, and public resources. Although the common denominator is access or the lack thereof, the objects of access differ.

Services generally refer to the everyday utilities that are instrumental in fulfilling our daily needs. Some may be provided by government. The term 'resources', on the other hand, covers a wider concept. Resources are also necessary for and instrumental in creating services. They may be common property, such as fuel wood and wild food, or public resources such as roads. Poverty is closely intertwined with services and resources, lack of access to which is an intrinsic part or aspect of what it means to be poor. This lack of access may be a cause, as well as a consequence, of poverty.

State-provided commodities include services, subsidies and social safety nets. Services include health and education, which are particularly important from a gender perspective. These are resources that determine the burden or ease of women's reproductive roles. They also determine the extent to which women can transform their capabilities into increasing their income and consumption. They also have implications on the welfare levels of women. State-provided

[606] See UNIFEM (note 48 above); Jones & Baker (note 46 above) 2-3; Elson (note 15 above) 95.
[607] Jones & Baker (note 46 above) 2. This is where the intergenerational impact of women's poverty becomes evident; time poverty, in this instance, is transmitted from mothers to girl children.

commodities are highly dependent upon public expenditure. As a result, their availability is very much affected by levels of public expenditure, with higher levels contributing to greater access. Conversely, the lower the public expenditure, the less the access. Less access to state-provided commodities, in turn, may translate into a variety of dimensions of poverty. This can be seen in three ways.

Firstly, it affects women's welfare. Where access to services such as health care is affected, health status as one measure of welfare may be severely affected. Education is another example of a commodity that goes a long way towards determining welfare. Secondly, women may face challenges in translating their capabilities into higher income. For instance, with no education, skills or training, women may find it difficult to integrate into the labour market. With their health compromised due to lack of or poor services, their productivity will be adversely impacted. Thirdly, these services are essential if women are to carry out their reproductive role adequately. Cuts in services due to low public expenditure may increase the burden on women, and/or seriously compromise the welfare of families and communities.

The effect of trade rules on this dimension of poverty can be examined in light of trade's impact on levels of public expenditure. Trade rules affect public expenditure in two important ways. Firstly, they may significantly affect the level of public expenditure. This is particularly true in developing and less developed countries which very much rely on revenue from tariffs and taxes for public expenditure.[608] Trade rules may, to a certain extent, determine the distribution of wealth among nations, in particular among developed and developing countries.[609] This, too, will have implications on the level of public expenditure because it determines the amount of resources available for such ends. Secondly, trade rules also influence the manner in which the available resources can be

[608] UN Millennim Project 2005 *Trade for Development* Taskforce for Trade (2005) 135.
[609] Trade rules such as TRIPS help transfer wealth from the poor countries to the rich.

redistributed within national boundaries. This mainly happens through the impact of trade rules on state policy space.[610] Trade may compromise the policy space of states by prohibiting them from adopting certain types of policies which are said to be contrary to the rules of trade,[611] or, through a reduced fiscal capacity, it may limit policy options. Similarly, burdensome rules may reduce fiscal capacity which in turn limits policy space.

If the access, or the lack thereof, to state-provided commodities and services which form one dimension of poverty, and women's access to these is reduced or limited, then women may be included in the category of people likely to be poor. Consequently, trade rules may be complicit in perpetuating poverty among women. Cuts in services and, government-provided commodities are inconsistent with commitments to gender equality because they exacerbate women's pre-existing economic and social inequality, and cause gender-specific harms.[612]

2.1.5 Poverty as socio-economic rights deprivation/violation

In many corners of the world, poverty is associated with human-rights deprivation. If poverty is to be seen as a denial of human rights, it should be well recognised that the women trapped in poverty suffer from the denial of their human rights.[613] Therefore, programmes to eliminate or alleviate poverty require attention to women's human rights.[614] One can examine two related claims

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[610] For a detailed discussion of the effect of trade rules on policy space refer to Chapter VI, section 2.1.2.3.1.
[611] This point is extensively used by various authors. See SA Aaronson & JM Zimmerman *Trade Imbalance: The Struggle to Weigh Human Rights Concerns in Trade Policy Making* (2008) 67; Zampetii (note 9 above). See also Gammage et al (note 10 above); A Cosby 'New Views of Trade and Sustainable Development: Using Sen's Conception of Development to Re-examine the Debates' TIPS/IISD Trade Knowledge Workshop (2003) at http://www.tradeknowledgenetwork.net/pdf/tkn_new_views_trade_sd.pdf 17/08/08.
[612] G Brodsky & S Day *Beyond the Social and Economic Rights Debate: Substantive Equality Speaks to Poverty* (2002) 187 at http://www.povertyandhumanrights.org/docs/11_DAY_BRODSKY.pdf 28/06/06.
[613] VM Moghadem 'The Feminization of Poverty and Women's Human Rights' SHS Papers on Women's Studies/Gender Research UNESCO (2005) 1-2.
[614] Ibid.

regarding the relationships among poverty, trade and human rights. Firstly, the various dimensions of poverty analysed above may be understood as constituting deprivations or violations of the socio-economic rights of women. Secondly, the perpetuation of poverty due to trade rules, which is adversely affecting women, can be said to hinder the creation of an environment whereby the socio-economic rights of women may be fulfilled.

The second claim is quite important. Indeed, according to some authorities, it is difficult, if not impossible, to establish a violation of a socio-economic right by the rules of the trade regime,[615] it is quite possible to establish a direct conflict between a trade rule and a socio-economic rights requirement.[616] However, the very fact that trade rules may create an obstacle for the creation of the necessary environment for the realisation of socio-economic rights may amount to an indirect violation. The second claim above attends to such a scenario. I will next examine how the different dimensions of poverty may be translated into deprivations of socio-economic rights and/or as serious obstacles to the realisation of these rights.

Access to state-provided commodities and services has been identified as one determinant of poverty. A number of elements may fall within this basket of commodities and services: including basic social services, clean water, health care, education and training, and social security. These in turn constitute various socio-economic rights as enshrined in various human-rights instruments. It is also possible to locate the other elements of the broad definition of poverty, such as time poverty, asset poverty and dignity, in socio-economic rights. If one lacks the necessary time for like adequate sleep and rest or leisure time in general, this affects one's welfare. It may, for example, affect one's health. On another front, one may not have the necessary time to convert an asset such as a skill, training or

[615] See G Marceau 'WTO Dispute Settlement and Human Rights' (2002) 13 *European J of Int L* 753, 753-824. See also A Sajo 'Socio-Economic Rights and the International Economic Order' (2001) 35 *NYU J Int L and Politics* 221.
[616] See Chapter II above for a conflict between the requirements of GATS and the South African National Health Act, for instance.

labour into increased income so as to improve one's living conditions. In this respect, time is often viewed as a resource. The lack of this resource may have implications for socio-economic rights, such as the right to an adequate standard of living.

Various provisions in the Universal Declaration of Human Rights (UDHR), ICESCR and the CEDAW illustrate the point that the various dimensions of poverty can indeed be located as socio-economic rights violations.

States Parties shall ... ensure to women equal rights with men in ... education, ... access to health care .... States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure ... that they participate in and benefit from rural development and ... shall ensure to such women the right ... to have access to adequate health care facilities...; to benefit ... from social security programmes; ... to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, ransport and communications.

Convention on the Elimination of All Forms of Discrimination Against Women, Articles 10, 11, 12, 13, and 14.

Everyone ... is entitled to the realization ... of the economic, social and cultural rights indispensable for his dignity .... Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services.... Everyone has the right to education ....

Universal Declaration of Human Rights, Articles 22, 23, 25, 26.

States Parties ... the right of everyone to a decent living for themselves and their families .... the right of everyone to social security, including social insurance .... the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.... the fundamental right of everyone to be free from hunger .... to the highest attainable standard of physical and mental health .... to education ....

International Covenant on Economic, Social and Cultural Rights, Articles 6, 7, 9, 11, 12, 13.

It is evident that the condition of being poor, understood in terms of lack of access to services and state-provided and common property resources, and lack of assets, time and dignity, corresponds to the non-fulfilment or non-realisation of various socio-economic rights. The implication is that the realisation of a number of the socio-economic rights identified in the provisions quoted above may create the necessary environment to lift the poor out of the condition of poverty.

2.1.6 Poverty and gender inequality: distinctions from an equality perspective

Is women's poverty the same as gender inequality? Would poverty alleviation automatically improve gender relations and promote gender equality? These points call into question the distinctions between women's poverty and gender inequality, if any. This is a matter of some importance to determine strategies aimed at promoting gender equality. If there are significant distinctions between the two, strategies aimed at one, for instance poverty alleviation, may not necessarily address the other – gender inequality – and vice versa.

Two interesting points are raised in relation to the discussion on gender inequality and women's poverty. One is the view, widely held among international financial institutions, particularly the World Bank, that poverty reduction or alleviation strategies will lead to gender equality.[617] This view stems from locating women's subordination in poverty.[618] According to this understanding, gender inequality is primarily caused by poverty. It thus follows that poverty alleviation yields greater gender equality. As a corollary, this view also asserts that fighting gender inequality contributes to poverty alleviation. Following from this, the promotion of gender equality is instrumental in tackling poverty.

[617] Rittich (note 25 above) 98-104.
[618] C Jackson 'Rescuing Gender from the Poverty Trap' (1996) 24 *World Development* 489, 498.

There is another point of view, widely held among feminist scholars, which holds that not all of women's subordination is derived from poverty. Although it shares the belief that poverty and gender inequality are not entirely separate social phenomena, it acknowledges that gender-based disadvantages exist outside of the phenomenon of poverty.[619] Domestic violence, personal insecurity, limited opportunities and oppressive gender ideologies are some of the subordinations or disadvantages from which women who are not poor may suffer.[620] As a result, poverty policies may not necessarily be appropriate for tackling these gender-inequality issues.[621] This view is therefore wary of the belief among financial and development institutions and agencies that poverty alleviation will automatically improve the situation of all women.

What does this mean, especially when looked at in light of the research question of this thesis: 'Can the international trade regime promote gender equality?'? Three important considerations may derive from the distinction between gender inequality and poverty. The first is that the assertion that the realisation of a number of the socio-economic rights, as identified in the various provisions of human-rights instruments, may create the necessary environment to lift the poor out of the condition of poverty may not hold equally true for gender inequality. Hence, fulfilling socio-economic rights, though doing so may alleviate poverty, does not necessarily fully address gender inequality. This implies that more is required by way of tackling gender inequalities. This is where a combined effort, such as gender mainstreaming in all walks of life, such as in political participation and poverty alleviation, becomes indispensable. For instance, the combined effect of the two instruments essential for women, the CESCR and CEDAW, may become important.

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[619] Ibid 498.
[620] Ibid 503. Even here, it is possible to see a close relation to poverty. For instance, domestic violence may be exacerbated by poverty. Similarly, personal security may be related to economic independence.
[621] Ibid 500-501.

Secondly, to the extent that certain dimensions of gender inequality are intrinsically related to poverty, the realisation of socio-economic rights will positively influence gender equality. Through adjustments in the trade regime those dimensions of gender inequality that are intrinsically related to poverty may be addressed. Accordingly, where the trade regime is found to be complicit in perpetuating poverty in developing and less developed countries, adjustments may possibly promote gender equality where they create the necessary environment, at both the national and international levels, for the realisation of socio-economic rights. The possibility and the manner in which trade can achieve this will be examined in the next chapter.

The third consideration is that the distinction simply shows that there are dimensions of gender inequality which may not necessarily be positively influenced by poverty alleviation. In such cases the realisation of socio-economic rights or the creation of a positive environment for the realisation of these rights may not have a direct impact on gender inequality. This, however, does not negate the value of socio-economic rights for promoting gender equality. It also shows that some dimensions of gender inequality may be outside the scope of what can possibly be done through the trade regime. This point simply demonstrates the multifaceted nature of gender in/equality and gender relations.

3. WOMEN'S UNPAID LABOUR AND THE ABSENCE OF TRANSFORMATION IN GENDER RELATIONS

Discussions on the interactions of gender and trade in Chapters III and IV show that trade rules and, generally, the regulation of international trade are found to aim primarily at increasing efficiency and advancing freer trade. This in turn externalises social costs and concerns into the non-market or reproductive sphere. This tends to disadvantage women as they are mainly responsible for the reproductive sector.

The patterns of interaction also show that there are certain structural disadvantages that discriminate against women, as a result of which they do not stand to benefit from the operations of the trade regime as it stands. These are: the location of women's work in the economy that is to say in reproductive sphere, which is unpaid; the demands of the reproductive sphere on women; and the non-consideration of the role and contribution of the reproductive sector to the productive market economy.

The failure to account for unpaid work is an obstacle to progress in transforming gender relations. It results from the artificial distinctions made between the public and private, or productive and reproductive, spheres of life (that is, economic vs social issues). It also results from advocating for a minimal state which in turn delegitimises state interventions aimed at redistribution and equity in and through the market.

Accordingly, another measure of the role of the trade regime in promoting gender equality constitutes firstly, determining the extent to which it reduces the work burden of women, and secondly, evaluating the contribution of the regime towards bringing about transformations in gender relations. Does the trade regime thrive from these distinctions? Or can it contribute to the collapse of the artificial distinctions made between the productive/market and reproductive/social aspects of life? The disappearance of those distinctions would ensure that due recognition is given to the role and contribution of the reproductive sector and the unpaid work of women to the productive sector.

3.1 Socio-economic rights and the increased work burden on women

Women take primary responsibility for reproductive work in almost all societies. The main activities of the sector include child care, housework, cooking, care for the elderly and community work. Two factors contribute to the gender inequality that results from the division of labour that assigns the reproductive sector to

women. These are the value attached to reproductive work, and the burden that this kind of work puts on women.

One measure of women's work burden is time.[622] The hours put in to carry out activities falling within reproductive sphere determine the extent of burden that women carry. This in turn goes a long way towards showing the nature and extent of gender inequality, which disadvantages women. Studies from various countries show women spend between 64 per cent to 88 per cent of their time on child care.[623] Similarly, a UN Development Programme (UNDP) report that included estimates of the share of the unpaid reproductive work across countries showed that on average women work more hours than men in both developing and industrial countries.[624] This has certain implications on gender in/equality. Firstly, it indicates that the reproductive work is important in determining women's total work time.[625] It determines the amount of time available for paying or productive work. Secondly, it shows that women bear a larger burden of total work time compared to the large percentage of men who engage only in productive work.[626] Accordingly, the reproductive work burden weakens gender equality by limiting women's ability to participate in the labour market and also by imposing a disproportionate amount of work on women. Ultimately, the organisation of the reproductive sector determines the life choices that women make and their welfare.

One can add here the value attached to reproductive work as another manifestation of gender inequality arising from the gender division of labour. It is

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[622] M Blin 'Export Oriented Policies, Women's Work Burden and Human Development in Mauritius' Working Paper School of Oriental and African Studies (2006) 16-18 at <http://www.soas.ac.uk/economics/research/workingpapers/28832.pdf> 16/03/08.
[623] L Beneria *Gender, Development and Globalization: Economics as if People Mattered* (2003) 144-151.
[624] See UNIFEM (note 48 above) 29.
[625] See Beneria (note 66 above) 146-147. See also UNIFEM (note 48 above) 29-30, confirming similar findings.
[626] Beneria (note 66 above) 150.

unpaid work, and not included in national income accounts.[627] This is further discussed under section 4 below.

From a human-rights perspective, women's work burden can be seen as constituting a deprivation of basic socio-economic rights. This claim can be assessed in different ways. Firstly, the disproportionate work burden on women implies that they may not have sufficient time for leisure.[628] Feminist economists such as Cagataya argue that this in turn may have serious implications for their general welfare. As mentioned previously, lack of sufficient time for rest may, for instance, affect one's health, and there is extensive evidence to show the adverse health impact on women of their reproductive and productive work burden.[629]

Secondly, the disproportionate work burden on women may be an obstacle to the enjoyment of an adequate standard of living, which is a socio-economic right enshrined in the ICESCR. This right entails the creation of an environment under which individuals can obtain the resources necessary to support their basic needs and to enjoy an adequate standard of living.[630] The work burden of women limits the resources or tools available to them which they could put to use to fulfil their basic needs. Such resources might include labour, training, education and skills. The increased work burden means women may not have time to integrate themselves into the labour market. Similarly, it may not give women time to add value to their labour through education. Furthermore, their work burden may not give women sufficient time to retrain so as to be integrated into new labour markets.

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[627] For a detailed discussion on value and measurement of unpaid work see INSTRAW *Measurement and Valuation of Unpaid Contributions: Accounting through Time and Output* (1995).
[628] Blin (note 65 above) 6. See also Elson (note 79 above) 93-95.
[629] See World Health Organisation (WHO) *Women's Health in South East Asia* 2000. See also Blin (note 65 above) 6.
[630] J Oloka-Onyango 'Beyond the Rhetoric: Reinvigorating the Struggle for Economic and Social Rights in Africa' 1995 26 *Cal. W. Int'l L. J.* (1995) 41.

3.2 Access to services/public resources and women's work burden

Public services and public resources in general play a vital role in the work burden of women. The access or the lack of access may determine the amount or extent of the work burden on women. Access to services facilitates women's work in both the household and the community. Essential services such as water and energy, health care, subsidised goods and services including transport, and commodities all play important roles in the reproductive sector. The provision of services and public resources potentially amounts to a form of cross-subsidising of the reproductive work of women. This can also be seen as a form of redistributing the load of the reproductive function among all members of society. These services and resources, as discussed above, constitute aspects of various socio-economic rights, and their realisation contributes to easing women's work burden. As Stark succinctly puts it, '[socio-]economic rights shift at least some of the burden of women's nurturing work to the broader society'.[631]

Lack of access to services and public resources in general means that women's workload will increase. For instance, where health-care services are not available it is usually women and girl children that step up to take care of the sick and the elderly. Similarly, women will be forced to look for water and alternative sources of energy where such services are not readily available. In sub-Saharan Africa for instance, this exercise essentially means walking long distances for long hours in search of water and fuel wood.

3.3 Trade rules/operations and the increased burden on women

[631] Stark (note 5 above) 130-131.

As discussed earlier, in section 2, the provision of services and public resources is very much dependent on two elements: public expenditure and regulation by the state. Public expenditure basically refers to the resources available for governments to provide essential services. Regulation, on the other hand, relates to the autonomy of governments to implement policies that are supportive of the public provision of services and resources. It is argued that trade rules and the operations of international trade may affect both elements.

The liberalisation of the services sector under GATS has opened up a strong possibility for private-sector provisioning of what are called essential services, such as health care, education, energy etc. The high cost usually associated with private provisioning shifts some of the unmet needs for welfare on to families.[632] This directly implies that more care work is being transferred on to the family, and on to women in particular, who assume the primary burden of care work.[633] This has huge implications for increasing the work burden of women.

Moreover, the women who are expected to step up to fulfil the deficit in care work are themselves not in a position to access social services that are now provided on a commercial basis.[634] The abilities of states to regulate reasonable access to these social services may be limited owing to their commitments under GATS. For example, unless at the time of liberalising a particular services sector states enter reservations to the agreement in order to introduce conditions to, and limitations on, market access as well as provision of services, such as price regulation, any latter introduction of such conditions would face serious hurdles. Although financial subsidies by governments to compensate those with lower or

[632] S Razavi 'The Relevance of Women's Unpaid Work to Social Policy in Developing Countries' Global Conference on Unpaid Work and the Economy: Gender poverty and the Millennium Development Goals (2005) 8-11 at <http://www.levy.org/undp-levy-conference/program_documents.asp#> 12/04/08.
[633] Ibid 8-9.
[634] S Bisnath 'The WTO, GATS, and TRIMS: Servicing Liberalization and Eroding Equity Goals?' in L Beneria & S Bisnath *Global Tensions: Challenges and Opportunities in the World Economy* (2004) 115. Bisnath discusses how women's access to various services is highly compromised due to liberalisation in the services sector. See also Ravazi (note 75 above) 8-11.

no income may open the way for the poor women to access services and thus ease their burden, this too may not be a viable option in light of states' commitments under the various trade rules. For example, reductions in revenue from tariffs resulting from commitments in other trade agreements may prohibit states from supporting the provisioning of social services on reasonable terms. Trade rules may thus end up increasing the work burden of women in the reproductive sector.

3.4 Women's unpaid work, gender relations and trade

One area of focus in the gender and trade debate is the systematic undervaluing and marginalisation of women's unpaid work in the home and community.[635] Women shoulder the unpaid work burden, the activity that maintains the labour force, the family and the community. This provides an important input into the productive sphere in both the private and the public sectors. The international trading system depends on this input for its survival. However, international trade regulation and trade-policy analysis often obscure these facts by creating a distinction between the operation of the market and the social context in which it exists. This is what is referred to above as the artificial distinctions between the economic and the social.

According to Elson, the reproductive sector, including care activities, is conceived more as a social function than as an economic activity, and is hence regarded as outside of the economy.[636] However, Elson argues, these activities are very much

[635] A Lawson 'Women and Trade' NAOW Issue Paper No 6 at <http://www.nawo.org.uk/upload/documents/document46.pdf> 12/04/08.
[636] D Elson 'Gender-Neutral, Gender-Blind, or Gender-Sensitive Budgets? Changing the Conceptual Framework to Include Women's Empowerment and the Economy of Care in Gender Budget Initiative' Background Papers Commonwealth Secretariat (1999).

economic, in the sense that they require the use of scarce resources, such as women's labour, and because they provide vital inputs for the economy in the private and public realms.[637] So one line of inquiry from a gender perspective is to challenge a depoliticised trade liberalisation and regulation regime, and reconnect the economic with the social.[638]

Feminist economists argue that the economic theory espoused by the WTO and the macro-economic policies that the WTO oversees fail to take into account women's unpaid household work.[639] It is logical to argue that the same trend is observed in the various rules and regulations of the trade regime. On the other hand, trade lawyers often ask how the issue of the unpaid labour of women relates to the operations and regulations of international trade. So, what does it mean when it is said that trade agreements and the trade regime in general need to recognise women's unpaid labour, and why or to what end? What does it mean when one argues that the trade regime should take into consideration the contribution of unpaid labour to the productive economy? Is it possible for the trade regime to play a role in compensating women for their unpaid labour in any way?[640]

There are different ways of characterising unpaid work. Unpaid work is basically work that is unremunerated either directly or indirectly.[641] It is also characterised as work that is not included in the national accounting system, even though it may be a paying activity.[642] This work predominantly falls into four sectors; subsistence production, household economy or domestic work, work in the informal sector and volunteer work.[643]

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[637] Elson (note 79 above).
[638] Lawson (note 78 above).
[639] J Bhagwati *In Defense of Globalization* (2007) 79-81.
[640] These are some of the questions that Bhagwati raised. Ibid 79-81.
[641] I Hirway 'Integrating Unpaid Work into Development Policy' Global Conference on Unpaid Work and the Economy: Gender Poverty and the Millennium Development Goals (2005) 1 at <http://www.levy.org/undp-levy-conference/papers/paper_Hirway-Session1.pdf> 12/04/08.
[642] Ibid 1-3.
[643] L Beneria 'The Enduring Debate Over Unpaid Labor' (1999) 138 *Int Labor Review* 288, 289.

Subsistence production is most common in developing and less developed countries. It generally includes rural household activities such as backyard cultivation of vegetables, and subsistence-based activities in agriculture, fishing and forestry,[644] and is a source of livelihood for the majority of poor women in less developed countries. Women are also often responsible for domestic work. Domestic work includes household production, which is carried out by women and ranges from food preparation for family consumption, cleaning, and taking care of children to every activity that goes into taking care of, or providing the day to day needs, of the family. The distinction between subsistence production, such as food cultivation, and domestic work, such as fetching wood fuel and water, is very fine. The main distinction lies in the fact that the former is said to represent 'marketable goods',[645] while domestic work cannot easily be measured in market terms, nor is it classified under the conventional understanding of work in economic terms.

Coming to the informal sector, activities such as home work, preparing and selling food on streets, self-employment and work in micro-enterprises constitute some of the common forms of informal work.[646] Women are found to be highly concentrated in informal sectors in most countries. The informal sector in the majority of cases involves paid activities which, however, are not accounted for in national accounting systems. Volunteer work constitutes another site of unpaid work. It is mostly carried out in community contexts and usually the beneficiaries are not members of immediate family.[647] Although unpaid, volunteer work may substitute services which otherwise would have to be paid for in the market.[648]

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[644] See UNIFEM (note 48 above) Chapter 2; Beneria (note 86 above) 289.
[645] Beneria (note 86 above) 289-290.
[646] For a detailed analysis of informal employment and women, see L Beneria 'Shifting the Risk: New Employment Patterns Informalization and Women's Work' at <http://www.arts.cornell.edu/poverty/Papers/Beneria_InformalizationUrbana.pdf> 23/01/08.
[647] Beneria (note 86 above) 293.
[648] Ibid 293-295.

Feminist economists have often argued in favor of accounting for and recognising the unpaid work performed by women. The push for accounting for women's work resulted in the concept of work being rethought and redefined so as to include unpaid work, and also in the development of different ways of measuring unpaid work, for instance, in national accounting systems.[649] The redefined concept of work removed the emphasis on the market element. Implied in this understanding is giving value to work that may not necessarily be connected to the market. As Benerai and others argue, one of the purposes of accounting for unpaid work is to assess its contribution to social welfare and human well-being through the wealth that this form of work generates. If the wealth created by unpaid work is given due recognition – for instance, in national accounting systems and labour-force statistics – this would pave the way for the equitable distribution of the wealth created – for instance, through gender-aware budgets. Based on this analysis, accounting for women's unpaid work may possibly entail adequate compensation for unpaid work. This could be one form of equitable distribution of the wealth resulting from unpaid work, and could take various forms, such as direct-subsidy provision of services such as water, energy, health.

Accounting for unpaid work is very important in the gender–trade debate. There are two important reasons for this. First, accounting for the contribution of the reproductive sector shouldered by women is vital because this division of labour and the values attached to it determine an unequal participation of women and men in the benefits and outcomes of liberalisation policies.[650] Accordingly, the role of women in this sector determines the degree and manner of women's access to opportunities and resources related to trade policies. Accounting for unpaid work through provision of public services and jobs may thus increase women's opportunities as well as their access to resources.

[649] INSTRAW (note 70 above). See also Beneria (note 86 above) 294.
[650] ES Salvador 'Trade, Gender and Equity in Latin America: Generating Knowledge for Political Action A Comparative Study of Care Economy: Argentina, Brazil, Chile, Colombia, Mexico and Uruguay IGTN (2007) 8.

Second, one ground of feminist critique of the operations of the trade regime is that the rules encourage the externalisation of the costs of the market economy into the non-market economy. A typical case in point is the liberalisation of services and the associated decline in access to services. Similarly, the decline in public expenditure resulting from the decline in revenues from tariff cuts can be raised as equally relevant examples here. As evidence from different parts of the world indicates, the shortfall in these situations is usually shouldered by women's unpaid work in the household, subsistence and informal sectors. The accounting of unpaid labour would mean that there is no aspect of an economy that runs free of cost. Accordingly, accounting for unpaid work, for instance through adequate compensation, may ensure that there is no longer a 'cost-free' sphere of the economy where costs from liberalisation can be dumped and externalised.

Another method or approach for recognising the contribution of unpaid work may entail regulation. Adequate regulation may guarantee the quality and accessibility of services necessary to replace or at least ease the burden of unpaid work. In this way, regulation can lay the framework for the adequate compensation of unpaid work.

Accounting for unpaid work through compensation is also directly related to building the capabilities of those engaged in this form of work. This is because compensation may allow women to substitute unpaid labour with purchased services and labour in and through the market, thereby relieving them of this burden. For instance, child care, care of the elderly and the sick, and household chores may fall in this category. Alternatively, compensation, together with proper regulation, may result in adequate and sustainable income from this form of work. In this regard, the proper consideration of the value of subsistence and informal work may fetch sustainable income for women. For instance, regulation may protect women subsistence farmers in sub-Saharan Africa from cheap imports.

To conclude this section, accounting for unpaid work has two related impacts on gender equality. Firstly, it undermines the gender division of labour which devalues women's contribution. And secondly, it will equip women with the capability to do things that they are actually capable of doing, such as labour-market participation and securing a sustainable livelihood from one's labour, but have been unable to do due to the gender division of labour. Accounting for unpaid work through compensation and regulation ultimately leads to the realisation of socio-economic rights of women as it makes available to them the resources and tools that they can then put to use to fulfil their basic needs. These resources include labour, training, education, skills and adequate income for one's work. Further, accounting for unpaid labour results in distributing the costs of unpaid work across all members of society. This in turn leads to transformation of gender relations, as accounting tacitly opens the door for the adequate valuation of unpaid work and, by implication, of women's contribution.

4. CONCLUSIONS

Sections 2 and 3 above have shown the connection between the operations of trade and aspects of gender in/equality which may be directly related to those operations. Poverty, the increased work burden on women and the unpaid labour of women have been found to be important aspects of gender in/equality with direct relevance to trade regulation. The discussion above also attempted to illustrate how these three aspects of gender in/equality are linked to women's socio-economic rights. In addition, the contribution of trade regulation in the creation of the necessary environment for the realisation of socio-economic rights has been examined. This has been done by examining the connection between socio-economic rights and trade regulation.

If one can frame the issues of gender in/equality that arise in connection with trade regulation as deprivations or violations of socio-economic rights, then what

are the necessary conditions that should be fulfilled to realise the socio-economic rights of women in and through trade regulation?

The primary responsibility for ensuring that women enjoy human rights, including socio-economic rights, lies with governments. Accordingly, it is mainly through the instrumentality of government action that changes to the rights of women would be brought about. The contribution of the trade regime to the promotion of socio-economic rights would therefore be measured in terms of its effect on state action and state capacity.

As discussed above through various examples of access to services above, two of the most determinative factors for the realisation of socio-economic rights are equitable distribution of resources and proper regulation. One can derive these factors from the nature of the obligations that socio-economic rights entail. The obligations for fulfilling these rights are very much linked to 'available resources'. Further, these rights require positive actions for their realisation through, among other things, regulation.

Resource distribution and proper regulation are particularly relevant in the gender–trade nexus because these are the areas where trade regulation can potentially play a significant role in relation to gender equality. For instance, as pointed out above, trade regulation may affect resource distribution among and within states. It may also affect the regulatory capacity of states.

The logical question that follows is: can the trade regime – the institutional and legal framework of the WTO – contribute positively towards the realisation of the socio-economic rights of women through equitable distribution of resources and proper regulation to this end? What are the legal bases for this? What are the measures that can be taken? These questions are to be addressed in the next chapter.

CHAPTER VI

LINKING GENDER EQUALITY TO THE INTERNATIONAL TRADE REGIME

1. INTRODUCTION AND BACKGROUND

The previous chapter has identified two related gender issues that arise in international trade. One way of addressing these issues is to link the objective of gender equality to the trade regime, and this chapter attempts to make that link. It relies on the theoretical framework of linkage constructed in Chapter II, according to which linkage is understood as a question regarding the purposes of the trade regime. This framework sets the scene for answering the place of non-trade concerns such as gender equality within the regime.

The approaches used to determine the purposes of the trade regime fall into two broad categories: the legal sources, and arguments based on the legitimacy of the system. Falling under the first category are power or competence allocation, and the objectives of the WTO as enshrined in the legal instruments of the regime. Power or competence allocation takes place through the treaty instrument and its interpretation through the DSB. The process of competence allocation between the WTO and its member states may bring on board non-trade concerns into the trade regime, thereby re/shaping and/or expanding its purposes. Similarly, the treaty instrument consists of a number of objectives and principles which are

overarching in importance and useful for interpretation of the various rules of the system. A focus on the stated objectives of the trade regime gives an indication of what the desired goals and purposes of the trade regime are. Based on these objectives, it is possible to identify the proper role and purpose of the trade regime in contemporary times.

The second source for determining the purpose of the trade regime relates to its legitimacy. The decisions and actions of the WTO have brought about substantial discontent in connection with policy goals such as the environment, labour and human rights. Similarly, the distributive or economic impact of its actions are said to affect various sections of society adversely, in particular, poor and vulnerable people. The claim is that the WTO does not take sufficient account of the distributive or economic effects of its decisions. The basic consideration where legitimacy is concerned is what the various stakeholders expect from the regime in contemporary times. Are its policies and actions acceptable in the eyes of these stakeholders? These two points of reference seek to re-examine and re-question the goals and purposes of the trade regime based on the needs or demands of contemporary times.

In this chapter, the argument for linking gender concerns to the trade regime is formulated on two levels. One, because the trade regime has the objectives of raising standards of living and of sustainable development, and further, because these objectives necessarily entail considerations of gender equality, gender concerns are implicitly read as constituting one of the objectives of the trade regime. And two, the legitimacy of the trade regime demands that it addresses the concerns of those whose interests are affected by the operations of trade. Women, in particular poor women living in developing and least-developed countries, are among the vulnerable groups adversely affected by the operations of trade. In order to protect its legitimacy, the regime is required to deal with issues of gender equality that arise in relation to trade. These two points form the basis for linking gender-equality concerns to the trade regime.

The WTO's objective of sustainable development has the potential to promote gender equality. It is argued in this chapter that development in the WTO should mean human development, which in turn is about expanding individual freedoms. Expanding human freedom depends on a number of factors, such as increasing individual incomes; improving social and economic conditions, such as facilities for health care and education; and political and civil rights.[651] Trade can play both direct and indirect roles in enhancing human development. The direct role comes through the contribution of trade in stimulating economic growth, which in turn expands the material base for fulfilling human needs.

Indirectly, trade regulation has serious implications on domestic policies and on the capacities of states to gain from trade, both of which directly impact on human development. The role of domestic policy making on human development is influenced by the environment created for it through, among other things, trade regulation. In this regard, the major role of trade in enhancing human development is to eliminate impediments to reform aimed at enhancing human development at the domestic level.[652] Another indirect role of trade in enhancing human development relates to its role in building the capacity of states. States should be in a position to make use of trade opportunities so as to capitalise on the gains from trade. In co-ordination with other agents of development, the trade regime can contribute to building the capacities of countries to gain from trade.[653] Finally, apart from lack of capacity, an absence or lack of meaningful market opportunities play a role in limiting countries' gains from trade. Here too the trade regime can assist poor countries by prioritising those trade issues that are of concern to developing and least-developed countries where poverty abounds.[654]

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[651] A Sen *Development as Freedom* (1999) 1.
[652] KW Abbott *Development Policy in the New Millennium and the Doha 'Development Round'* (2003) 18. See also UN Millennium Project 2005 *Trade for Development* Taskforce for Trade (2005) 231.
[653] UNDP *Making Global Trade Work for People* (2003) 24. See also UN Millennium Project 2005 (note 2 above) 231.
[654] JP Trachtman 'Legal Aspects of a Poverty Agenda at the WTO: Trade Law and Global Apartheid' (2003) 6 J of Int Economic L 3, 3-5.

Similarly, in its objective of the raising of standards of living, trade can promote gender equality. Standard of living, in human rights terms, relates to the bundle of socio-economic rights. This objective implies that trade rules should create the necessary environment for states to produce and implement policies that can raise standards of living. These are policies aimed at improving the socio-economic rights of their people such as the right to health, access to medicines, and access to various sets of services. Two avenues can be taken to promote an adequate standard of living. Firstly, action-oriented measures may be put in place which have to do with the design of government actions such as laws, policies, programmes and strategies aimed at creating the favourable and necessary environment for people to enjoy their socio-economic rights.[655] The trade regime should give states adequate policy space to formulate policies that are supportive of socio-economic rights. The second route is the goods- and/or services-oriented measures,[656] which may take the form of actual provision of goods and services or enabling people to provide for themselves. This is the area where the question of resources becomes vital. States need resources to provide material benefits to women, primarily to improve their welfare, and secondly to build their capabilities, in particular, to ensure that they are in a position to take up market opportunities. This is where initiatives of the trade regime, such as aid for trade, become important. Aid for trade is a perfect example of how trade rules can be made proactive to facilitate states' adoption of policies which are human-rights friendly.

Coming to legitimacy, the argument for linkage advocates that in order to protect its legitimacy, the regime is required to deal with issues of gender equality. The legitimacy problems of the regime come from the challenges it is facing in terms of its decision-making processes as well as the distributive consequences of its decisions. To salvage its legitimacy, the regime needs to identify participatory and

[655] See S Freedman *Human Rights Transformed: Positive Rights and Positive Duties* (2008) 67-91.
[656] Ibid 67-91.

inclusive ways of decision making, as well as address the undesirable distributive consequences of its decisions. Through its contribution to human development and to raising people's standard of living, the regime can contribute to improving the lives of poor women as well as ease women's burden in the reproductive sector, thereby positively addressing the distributive consequences of its decisions.

Similarly, the regime can make its decision-making processes and procedures participatory and representative, especially from a gender perspective, through the adoption of gender-equality and gender-mainstreaming goals within the regime, the establishment of a structure within the trading system to address gender issues, and the use of existing structures and operational mechanisms to address gender issues. Further, giving voice to gender-interest groups and NGOs and collaboration with other international organisations, such as UN agencies, working on gender issues are equally important ways of enhancing input legitimacy.

2. PART I: GENDER EQUALITY AS AN OBJECTIVE OF THE TRADE REGIME

2.1 The objective of sustainable development – objective as a linkage framework

2.1.1 Introduction

The linkage framework constructed in Chapter II relies in part upon the stated objectives of the trade regime for establishing what the role and purpose of the regime should be. The reason for looking into the objectives of the trade regime is to see whether improving the socio-economic rights of women can be located as one of the purposes of the regime.

As previously discussed, the preamble of the WTO establishing agreement is one good source for identifying what the stated objectives of the organisation are.[657] From the various objectives stated in the preamble those related to the socio-economic rights of women will be closely examined. The preamble clearly states:

> *Recognizing* that their relations in the field of trade and economic endeavor should be conducted with a view *to raising standards of living*,[my emphasis] 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*, [my emphasis] 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 ...

Sustainable development is one of the stated objectives of the WTO. What does this objective mean and what does it entail? The purpose of this investigation is to establish how the objective of sustainable development is related to substantive gender equality as defined in Chapter V. This will ultimately bring gender equality into the ambit of WTO objectives. The section then proceeds to show how the trade regime can implement the objective of promoting sustainable development in a way that also promotes gender equality. This will be one measure of the contribution of the trade regime towards advancing gender equality.

2.1.2 The understanding of sustainable development in the WTO[658]

[657] D Rodrick *The Global Governance of Trade as if Development Really Mattered* UNDP (2001) 9. Rodrick asks: 'What are the objectives that the WTO should serve?' In answering this, he makes direct reference to the preamble of the establishing agreement of the WTO. See also M Hilf 'Power, Rules and Principles – Which Orientation for WTO/GATT Law?' (2001) *J of Int Economic* L 111. Hilf argues that basic principles and objectives are often expressed in a preamble, or at least in other prominent positions in a legal text.

[658] Sustainable development, in the preamble of the WTO, may relate to three possibilities: the situation of developing countries, the fate of future generations and the environment. In this section, much of the focus will be on the first point. See Hilf (note 7 above).

The meaning of development in the WTO draws from an understanding of the link between economic growth and development, and the role of trade in this regard.[659] Openness and trade liberalisation are believed to lead to economic growth, which in turn leads to development.[660] This is a rather simplified version of the link between trade and development. According to many economists, this view underlies the WTO regime.

However, development is much more than economic growth. The latter is usually measured in terms of GDP growth, which is then translated in terms of income. A broad definition of development, such as the one advocated by Sen, would give a more comprehensive outlook on the relationship between trade and development. Further, the broad understanding of development gives precise and measurable elements which the trade regime can influence positively. These, for example, may include dimensions of poverty reduction, eradication of hunger, social empowerment and building peoples' capabilities, gender equality, and the various procedural dimensions of trade regulation, such as bringing disadvantaged people in as stakeholders in the trade regime. Based on these elements, the required substantive, normative and procedural changes in the legal and institutional frameworks of the regime can be analysed. The following section asks whether the development objectives of the WTO can be defined in terms of promoting individual freedom or human development.[661] If so, what would such an understanding entail?

2.1.2.1 Development as human development

A wide range of debates on the meaning of development have highlighted the various aspects or dimensions of the development process. The dimensions range

[659] WTO *World Trade Report 2003* 79-82.
[660] Ibid 88-95.
[661] E-U Petersman 'Introduction: Mini-symposium on Developing Courtiers in the Doha Round' (2005) *J of Int Economic L* 347, 352.

from a strong focus on increasing real income to poverty reduction and considerations of the environmental impacts of economic growth.

The ever-increasing level of poverty around the world has attracted a lot of attention in the articulation of development policy. This aspect of development forms an important point of investigation for the purpose of this study. Sen defines development as expanding the real freedoms that people enjoy.[662] This is in contrast to a narrower view which identifies development with growth in personal income, industrialisation and increase in GDP.[663] Freedom here relates to substantive freedoms which are indispensable for enriching human life.[664] These include the freedom to avoid starvation, undernourishment and premature morbidity; the freedom to be literate and the freedom to enjoy political participation.[665] These are intrinsic freedoms. In addition, the concept includes instrumental freedom, which is important to promote intrinsic human freedom.[666] Examples here include the economic opportunities that individuals enjoy to utilise resources for consumption and production, as well as the various social arrangements that society makes for education, health care and the like to influence the individual's freedom to live a better life.[667]

If development is about expanding individual freedom, it then follows that expanding human freedom depends on a number of factors. These include individual incomes and social and economic conditions, such as facilities for health care and education as well as political and civil rights.[668] It is the fulfilment or promotion of these various factors that expands individual freedom. Accordingly, conditions of poverty, poor economic opportunities, systematic

[662] Sen (note 1 above) 1.
[663] Ibid 1.
[664] Sen calls these constitutive freedom. Ibid 36.
[665] Ibid 36.
[666] Ibid 37-38.
[667] Ibid 37-38.
[668] Ibid.

social deprivation and neglect of public facilities constitute major obstacles to individual freedom.[669]

From this broad and rich understanding of development and its relationship to poverty,[670] it is logical to see poverty as a condition that comprises much more than mere lowness of income. This is because, just as income is not the sum total of human development, the lack of income cannot be the sum of total human deprivation.[671] Sen persuasively argues that poverty must be seen as the deprivation of basic freedoms rather than a matter of inadequate income[672] because people will still be deprived if they are illiterate or unhealthy, or feel personal insecurity. The condition of poverty denies people the possibility of achieving the kind of life they value.[673] This rich understanding of human development and poverty resonate with the understanding of substantive gender equality.

2.1.2.2 The stand of the WTO on human development

There are certain indications that development may well be understood in its broader form of human development in the context of the WTO. In the 2003 *World Trade Report*, development was defined in terms of expanding the opportunities of people to choose a life they have a reason to live.[674] Further, growth in income has been identified as just one important means of expanding this opportunity (or freedom).[675] Similarly, the report acknowledges that poverty encompasses not only material deprivation, but also low levels of education and

[669] Ibid.
[670] That development seen in terms of economic growth or GDP growth is an indicator of decline in poverty.
[671] UNDP (note 3 above) 24.
[672] Sen (note 1 above) 87.
[673] Ibid 87.
[674] The 2003 World Trade Report was dedicated to examining the linkages between trade and development.
[675] WTO (note 9 above) 79-81.

health, greater vulnerability and powerlessness to influence key decisions.[676] These constitute the broad understanding of human development.

In addition to the endorsements above, there are other grounds for extending the argument that the understanding of development in the preamble of the WTO should follow the rich view of development as the expansion of human freedom. The agreements under the Uruguay Round require WTO members, not just to liberalise trade in goods, but also to making specific policy choices on services, investment and intellectual property.[677] These choices affect employment, education, public-health, movements of capital and labour, and ownership of and access to technology.[678] All of these constitute what Sen called intrinsic as well as instrumental freedoms. In particular, most of them make up the various social arrangements that society makes for education, health care and the like, in order to influence the individual's freedom to live a better life. Given this, ultimately, it can be said that trade agreements affect human development. Indeed, many believe that these changes to international trade regulation brought about by the Uruguay Round link global trade under the WTO much more closely to human development.[679]

2.1.2.3 What role for trade policy in enhancing human development?

In the previous section, the applicability of human development in the context of the WTO, that is, as a part of its objectives, has been highlighted. In this section, we examine what such an understanding of development within the WTO would entail. What kind of role should the trade regime play in enhancing human development? What forms of measures, both normative and institutional, are required to this end?

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[676] Ibid 79-81.
[677] UNDP (note 3 above) 3.
[678] Ibid 3.
[679] Ibid 3. This is compared to GATT which more or less concentrated on border measures and trade in goods.

Trade can play both direct and indirect roles in enhancing human development. The direct role usually comes through the contribution of trade in stimulating economic growth.[680] Growth expands the material base for fulfilling human needs. This can happen in two ways. In the first place, trade may create employment-led growth, which improves household incomes.[681] Secondly, it may also increase government revenue.[682] In both instances, how the extra income and the increased revenue are spent determines their effect on human development.[683] This is where government policies become important. In addition, complementary domestic policies are important to enable trade to create larger benefits for society. These points take us to the indirect role trade plays in enhancing human development. Two different issues may be raised here. These are the effect of trade regulation on domestic policies, and its effect on the capacities of states to gain from trade.

Government policies at the domestic level play a very crucial role in human development – for instance, those policies geared towards reducing inequality contribute to enhancing people's choices and, possibly, the outcomes that stem from those choices. However, domestic policies are shaped by a number of factors, one of which is trade regulation. The possible role that domestic policy making may play in human development is influenced by the environment created by, among other things, trade regulation. Accordingly, the multilateral trading system can and should be held accountable for influencing the environment in which government choices are made.[684] This environment may be positive where it gives sufficient room for states to pursue human-development-friendly policies. It may be negative where it is an obstacle to the development of such policies.

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[680] This is a widely shared and more or less uncontested view among economists. See UNDP (note 3 above) 2.
[681] Ibid 26.
[682] Ibid 26.
[683] Ibid 26.
[684] Ibid 3-4. See also Rodrick (note 7 above), emphasising the importance of domestic policy and institutions for human development, and how trade regulation affects these.

There are strong arguments supporting the view that trade regulation restricts government choices and opportunities and, further, channels them in inappropriate directions.[685] Such constraints would prove to be obstacles for creating policies aimed at enhancing human development. If the trade regime has the objective of enhancing human development, it should enable governments to design policies which promote human development. Accordingly, in this regard, the major role of trade in enhancing human development is to eliminate impediments to reform aimed at enhancing human development at the domestic level.[686]

The second issue relates to the capacity of states. States should be in a position to make use of trade opportunities so as to capitalise on the gains from trade. The main obstacle for developing and least-developed countries in this regard is the lack of capacity to utilise trade opportunities. The trade regime could possibly contribute to building these capacities, in co-ordination with other agents of development.[687] This is another opportunity for the trade regime to engage in enhancing human development.

Apart from lack of capacity, the absence or lack of meaningful market opportunities play a role in limiting countries' gains from trade. Here, too, the trade regime can help developing and least-developed countries maximise their gains from trade. It can achieve this by prioritising those trade issues that are of concern to developing and least-developed countries where poverty abounds.[688] Let's briefly discuss what each one of these roles of the trade regime in promoting human development requires, and how these can be implemented in practice in the WTO.

[685] UNDP (note 3 above) 63.
[686] Abbott (note 2 above) 18. See also UN Millennium Project 2005 (note 2 above) 231.
[687] UNDP (note 3 above) 68. See also UN Millennium Project 2005 (note 2 above) 231.
[688] Trachtman (note 4 above) 3-5.

2.1.2.3.1 The trade regime eliminating impediments to policy reform/formulation

The policies under consideration may fall outside of traditional trade policy, being mainly social policies and economic policies in general. They are intended to afford opportunities to the poor to take advantage of economic opportunities, as well as to address their deprivations.[689] Trade should enhance social policies that protect the poor and promote the economic and social advancement of men and women.[690] The trade regime should not stand in the way of states adopting policies of this nature which are crucial for human development. However, impediments may come from constraining trade rules, reduced fiscal capacity of states and economically demanding or taxing obligations arising from the trade regime.[691] Understanding these impediments and what is required of the trade regime to address them requires looking into the whole issue of policy space in the context of international trade regulation.

Policy space in the context of international trade

The WTO does not, as such, prohibit states from advancing various policy objectives, such as human-rights protection and gender equality, which are crucial to human development. However, trade rules could affect the type as well as effectiveness of policies that states can adopt to advance non-trade concerns such as human rights.[692] This comes about because trade rules do constrain the behaviour of governments, and this is mostly reflected when there are interactions or intersections between trade and other non-trade policy objectives.[693] This is

[689] Abbott (note 2 above). See also M Williams *Gender Mainstreaming in the Multilateral Trading System: A Handbook for Policy Makers and Other Stakeholders* (2003) 20.
[690] Ibid 20.
[691] S Page 'Policy Space: Are WTO Rules Preventing Development?' Overseas Development Institute Briefing Paper (2007) 2. Page analyses the definition of policy space that is raised in the context of trade regulation in terms of these parameters.
[692] SA Aaronson & JM Zimmerman '*Trade Imbalance: The Struggle to Weigh Human Rights Concerns in Trade Policy Making*' (2008) 67.
[693] Ibid 62.

what is usually referred to in international trade law as the 'policy space' issue or debate. The issue of policy space in the gender-trade nexus falls within this overall framework.

Policy space is one of the contentious issues in the discussion on the 'trade and …' debate.[694] International trade regulation through the WTO is blamed for reducing the policy space of developing countries to formulate polices that support a variety of non-trade concerns.[695] These include environmental protection, strong labour laws to protect the rights of workers, policies aimed at promoting the socio-economic rights of their citizens, and policies that address their development needs. The 2006 Trade and Development Report of UNCTAD concluded that the rules and commitments of the international trading regime restrict the de jure ability of developing nations to adopt national development policy. In a similar note it, Gallagher and others argue that "the trading regime is restricting the ability of developing countries to put in place the proper policies to raise standards of living in their countries."[696]

The policy space arguments that arise in the 'trade and …' debate come in different forms. The following scenarios have been described as the different facets of the policy space debate.

Firstly, trade may compromise states' policy space by prohibiting them from adopting certain types of policies which are said to be contrary to the rules of

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[694] Page (note 41 above).
[695] See UNCTAD *Trade and Development Report, 2006*. See also Gallagher who argues that existing and proposed rules for the global economy are restricting policy space for development in the nations that need development the most. Gallagher KP 'Globalization and the Nation-State: Reasserting Policy Autonomy for Development' in Gallagher KP (ed) *Putting Development First: The Importance of Policy Space on the WTO and the International Financial Institutions* 2005 1, 2. Similar assessment is made by Wade who argues that agreements such as TRIPS and GATS greatly restrict the right of a government to carry out policies that favors the growth and upgrading of domestic industries. See Wade RH 'What Strategies Are Available for developing Countries Today? The World Trade Organization and the Shrinking of "Development Space"' Gallagher KP (ed) *Putting Development First: The Importance of Policy Space on the WTO and the International Financial Institutions* 2005 80, 89.
[696] Gallagher (note 45 above) 10.

trade.[697] This is a direct effect of trade regulation on policy space. According to Page, the constraints or limitations directly relevant to the WTO and from which states seek freedom are primarily legal ones, stemming from WTO commitments.[698] As used in this framework, the limitations may come from an outright prohibition. Accordingly, a state cannot legitimately or legally maintain a policy in question and still be in line with the requirements of WTO rules. So what is envisaged here is a case of direct conflict.

The conflict between South Africa's black economic empowerment (BEE) policy and its commitments in the services sector under GATS is a good example. Similarly, the conflict between South African National Health Act and the country's commitments under GATS is another example. Both of these issues are discussed in detail in chapter IV.[699] Likewise, there appears to be an inherent tension between the general principle of progressive realisation of socio-economic rights on the one hand and the approach of locking in commitments with an inbuilt penalty for modification in GATS.[700] Through progressive realisation, the aim is to ensure incremental realisation of socio-economic rights to citizens of a state. Progressive actions towards realisation may be associated with improvements in the available resources of the state. But locking restrictive commitments in does not go hand in hand with this. How can this dilemma be resolved?

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[697] This point is extensively used by various authors. See Aaronson & Zimmerman (note 42 above); AB Zampetti 'The Impact of WTO Rules on the Pursuit of Gender Equality' in A-N Tran-Nguyen & AB Zampetti (eds) *Trade and Gender: Opportunities and Challenges for Developing Countries* UNCTAD 2004, S Gammage et al (2002) 'Trade Impact Review' Women's Edge Coalition (2002) <http://www.womensedge.org/components/com_kb/attachments/tradeimpactreviewfinal.pdf> 05/03/06. See also A Cosby 'New Views of Trade and Sustainable Development: Using Sen's Conception of Development to Re-examine the Debates' TIPS/IISD Trade Knowledge Workshop (2003).

[698] Page (note 41 above) 2.

[699] Chapter IV examines how GATS rules conflict with South Africa's National Health Act and this in turn disproportionately affects women.

[700] See Zampetti (note 47 above) and Gammage (note 47 above).

Where there appears to be direct conflict between a domestic policy and a requirement of the trade regime, the regime may include various measures to reduce the adverse impacts of such conflicts. First in line is to accord sufficient flexibilities to states to implement policies, even where such policies conflict with their trade obligations. Flexibilities under the TRIPS Agreement are good examples here (these will be discussed in detail in this chapter). A related measure of flexibility is delayed implementation. This avoids the possible clash between domestic policies and trade-law requirements for some time. Generous transition periods for such purposes have been suggested in the literature.[701]

Secondly, trade liberalisation may lead to a race to the bottom in the regulation of important policy objectives.[702] Thus pressures from competition may force countries to adopt policies which may not be supportive of some non-trade concerns. This situation will indirectly compromise the policy space of states.[703] This could be a problem for both developing and developed countries, although the extent and effect may differ.

The framework where competition as a result of increased trade leads to a race to the bottom, thereby leaving states no room to adopt policies and regulations which are supportive of non-trade policies, is equally applicable in the context of the gender-trade nexus. This may take the form of lax labour laws and policies, as in the case, for example, of the pressure on South Africa to loosen its labour policies.[704] In South Africa, a two-tiered labour system, with strong labour regulation for skilled workers and less stringent labour regulation for unskilled workers, was suggested by the official opposition party – the Democratic Alliance – in order to attract investment and restore the confidence of foreign capital.[705] The government, however, didn't pursue this proposal. It is interesting to see here

[701] Abbott (note 2 above) 18.
[702] See Cosby (note 47 above).
[703] One needs to relate this to the general framework used to discuss trade and non-trade concerns. This framework looks into the effects of trade rules as well as the effects of increased trade on non-trade concerns.
[704] Aaronson & Zimmerman (note 42 above) 80.
[705] Ibid 80.

that such an approach, if implemented, would disproportionately affect black women who make up the majority of the unskilled workers as a result of discrimination in access to education and training.

Another example: South Africa has a strong BEE policy which aims at correcting past imbalances and discriminations. This policy is increasingly viewed by foreign investors as too demanding and burdensome. In 2006, in an effort to attract investment and compete in the world market, South Africa revised its BEE requirement as it applies to foreign investors.[706] Hence, the pressure to remain competitive has limited previously available policy options aimed at advancing other social objectives, such as black empowerment.

It is under these circumstances that calls for using the trade regime as an instrument to enforce other issues are made. Their intention is to use trade as an instrument to force countries to adopt optimal regulation with regard to other issues, such as environmental and labour standards.

Thirdly, reduced fiscal capacity may limit policy options. Trade regulation may make it impossible for states to adopt and implement policies aimed at pursuing certain non-trade concerns, mainly because of the financial constraints that the implementation of trade rules entails.[707] This is true, especially, in the context of developing and less-developed countries, where as much as 18 per cent and 34 per cent respectively of government revenue for social spending is drawn from tariffs.[708] Trade rules may thus prove to limit the possible policy options that states can utilise to advance certain objectives or policies. Cuts in public service or an inability to provide public services, such as health and energy supply, are good examples.

[706] Ibid 84.
[707] See Zampetti (note 47 above). See also Gammage (note 47 above).
[708] UN Millennium Project 2005 (note 2 above) 135.

This can also be understood in terms of the interaction of regulatory and economic policies which ultimately results in limited policy space.[709] Accordingly, although a certain policy may not be prohibited by trade rules, states may not be able to implement it for lack of resources. For instance, subsidies to local producers may not be prohibited; however, the ability to pursue such a policy may be restrained by a lack of the resources necessary to do so.

How can the trade regime contribute to enhancing human development in contexts where trade regulation leads to reduced fiscal capacity? It can achieve this objective in a number of ways. Firstly, in order to avoid large and abrupt reductions in revenues from tariffs, phased tariff reductions may be adopted as an alternative mechanism.[710] This may allow time for adjustments as well as the development of alternative tax sources and structures.[711]

The process, however, needs to be complemented with international assistance. This may take two different forms. The first relates to technical assistance to enable countries to design and implement alternative tax sources.[712] This may require training and the setting up of institutions and various government structures. The second has to do with adjustments related to losses incurred as a result of tariff cuts. This is addressed in detail under the section on aid for trade.

In addition to phased tariff reductions, developing and less-developed countries should be given additional flexibilities in terms of, for example, determining which products should be open to tariff cut.[713] Additional consideration for flexibility includes examining which products would lead to potential government revenue losses.[714] If the losses significantly disrupt revenue, cuts in tariffs for such products may be delayed.

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[709] Page (note 41 above) 2.
[710] UN Millennium Project 2005 (note 2 above) 135-136.
[711] Ibid 136.
[712] Ibid 136.
[713] Ibid 143.
[714] Ibid 143.

The fourth area in which measures may be taken relates to burdensome rules reducing fiscal capacity, which in turn limits policy space. In this context, reduced fiscal capacity is brought about by economically demanding obligations arising from the trade regime. This may be seen from two related perspectives. The first relates to those rules that require the establishment of various institutions and the training of personnel just to meet a country's obligations. Examples include the rules of TRIPS and Customs valuations. Hoekman asks whether laws such as TRIPS constituted priorities from a development perspective, especially for poor countries.[715] Even if states adhere to the requirements of such rules, the potential benefits from these agreements are limited from a development perspective.[716] For instance, Cambodia has made significant investment to comply with the requirements of TRIPS. It has drafted and amended its laws and trained its lawyers and judges.[717] According to Hoekman, it is questionable whether the benefits offset the costs the country incurred to comply.[718]

The trade regime can contribute to enhancing human development in contexts where trade regulation results in burdensome rules which threaten to reduce fiscal capacity. Different approaches have been suggested in the literature on how to deal with resource-intensive rules of the trade regime. One possibility is when trade rules demand significant investment which may divert scarce resources from the much-needed priorities of poor countries, such countries should be given the choice to opt out of these kinds of rules.[719] This is one form of flexibility which goes beyond the current practice of delayed implementation. Certain criteria may be employed to determine what constitutes resource intensiveness and also how to assess the capacities of countries to implement such rules. With regard to the determination of the capacity of states, it may be a matter of affording such

[715] Bernard Hoekman *Making the WTO More Supportive of Development* (2005) 15 at http://www.imf.org/external/pubs/ft/fandd/2005/03/pdf/hoekman.pdf 13/07/08.
[716] Ibid 15.
[717] Ibid 15.
[718] Ibid 15.
[719] UN Millennium Project 2005 (note 2 above) 184. See also Trachtman (note 4 above) 10-12.

flexibility to all developing and least-developed countries.[720] Other possible criteria include considerations along the lines of states' institutional capacities and their levels of per capita income.[721]

One of the most important considerations for determining whether a country ought to implement or opt out of resource-intensive rules is to evaluate the development pay-offs of the rules in question. Although some rules may demand considerable resources, their implementation may have considerable development pay-offs. This takes us to another possibility, which focuses on the national development priorities of poor states. In this case, WTO rules requiring significant resources would only be implemented where implementation is found to support the attainment of national development strategies.[722] These modalities provide sufficient flexibility to respond to the development needs of poor states.

The second, and less obvious, case of burdensome rules comes from the various standards that exporters from developing and less-developed countries have to meet in order to export into the markets of developed countries. The standards included in the 'technical barriers to trade' (TBT) and 'sanitary and phytosanitary measures' (SPS) requirements are good examples in this regard. The potential benefits from exports are hugely compromised by some of the demanding requirements, which are economically taxing for the governments of poor states to implement.[723]

The most important consideration from the perspective of the trade regime is to ensure that these standards are not used for protectionist purposes.[724] This not only robs poor countries of their scarce resources to meet these standards, it will

[720] B Hoekman 'Operationalizing the Concept of Policy Space in the WTO: Beyond Special and Differential Treatment' (2004) 8 J of Int Economic Law 405, 412-413. See also C Stevens 'The Future of STD for Developing Countries in the WTO Institute for Development Studies' Working Paper 163 (2002).
[721] Ibid 412-413.
[722] Ibid 412.
[723] UN Millennium Project 2005 (note 2 above) 135.
[724] Ibid 156.

also nullify any meaningful gains from the exports. However, where the standards are not used for protectionist purposes, meeting them would serve the development interests of poor countries by opening up trade opportunities in the developed world. In such cases, poor countries need to be supported to meet these standards. Significant assistance must be provided to these countries to construct the institutional frameworks and infrastructure to meet standards.[725]

Some of these agreements already provide for such assistance. For instance, the TBT agreement states that members shall provide assistance to meet the needs of developing countries in this regard. The assistance in this case relates mainly to technical assistance. There are suggestions that poor countries may benefit from these provisions if they are strengthened further, for example, by making them mandatory.[726]

2.1.2.3.2 The trade regime facilitating the building of capacities to increase gains from trade

Building the capacities of developing and least-developed countries to increase their gains from trade may take two different but related forms. The first focuses on what is usually referred to as technical capacity building. Some refer to it as 'soft aid for trade'.[727] The second form focuses on building the supply-side capacity of these countries so as to enable them to utilise market opportunities. This is the 'hard aid for trade'.[728] The trade regime can help facilitate these endeavours in co-ordination with other multilateral and bilateral donors and development organisations. Both of these issues will be discussed in depth in the section on aid for trade.

[725] Ibid 156-157.
[726] Ibid 223.
[727] Abbott (note 2 above) 19.
[728] Ibid 19.

2.1.2.3.3 The trade regime focusing on trade concerns and issues with huge development pay-offs

Increasing the gains from trade is one mechanism for building on programmes aimed at human development. An issue often raised in this regard is the need to ensure that matters of importance to developing and less-developed countries be given priority at the negotiating table.[729] Several issues would arise here. For instance, expanding the market access of developing and less-developed countries into the developed world is a good example. The major barriers that these countries face include high tariffs and a variety of non-tariff barriers.

This route would have huge development pay-offs if the areas for market access corresponded to those sectors which advantage developing countries. These include labour- intensive manufacturing, textiles and clothing, temperate agricultural products and labour-intensive services.[730] According to Trachtman, there is strong consensus that liberalisation by developed countries in the field of agriculture, textile and tropical products would be an important way of improving the livelihoods of the poor in developing countries.[731]

These sectors have the potential to impact positively on gender equality. Empirical evidence shows that exporting labour-intensive manufactures tends to increase women's employment.[732] This in turn increases the resources available at household level to meet their economic and social needs.[733]

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[729] Ibid 8.
[730] Ibid 16.
[731] Trachtman (note 4 above) 6-8.
[732] It is worth noting that the quality of employment and its impact on gender job segregation is adverse. See M Williams 'Gender and Trade: Impacts and Implications for Financial Resources for Gender Equality' International Gender and Trade Network (IGTN) (2007) 6 at http://www.igtn.org/pdfs//Gender%20and%20Trade%20and%20financing%20gender%20equality%20-%202007.pdf 22/11/08.
[733] Ibid 16.

On the same note, enhancing the returns from exports of developing and less-developed countries will hugely increase the gains from trade.[734] Similarly, affording protection to areas of interest to these countries may be beneficial. One area that is often raised in the literature is providing intellectual-property protection for traditional knowledge,[735] in which these countries have comparative advantage.

2.1.2.4 Engendering trade's contribution to human development

Chapter V highlighted the importance, from a gender perspective, of understanding poverty in terms of human poverty and development as human development, from a gender perspective. Human development has the potential to address the specific concerns and needs of women in the development process.[736] How would a human-development objective of the trade regime address the socio-economic rights issues of women?

All of the contributions of the trade regime in enhancing human development enumerated above could have direct impact on gender equality. This is so primarily because of the strong connection between substantive gender equality and human development. The areas of focus or emphasis in human development, ie intrinsic and instrumental freedoms, are significant from a gender perspective. For instance, when we look at intrinsic freedoms such as issues of food security, we find that these represent material conditions that disproportionately affect women. Similarly, women are severely deprived of instrumental freedoms, such as health care and education, due to a number of factors revolving around powerlessness and their reproductive burden. Accordingly, targeting human development would have the potential to address the specific needs of women.

[734] Abbott (note 2 above) 8.
[735] Ibid 16.
[736] Williams argues that a trade regime that promotes sustainable human development is instrumental in delivering on gender equality. See Williams (note 39 above) 20.

Eliminating obstacles to pro-poor growth, for instance, would have special gender-specific positive outcomes.

In order to maximise the results from human-development-based interventions, it becomes important to identify ways of giving the possible contributions of trade a gender-sensitive or gender–aware dimension. This basically involves identifying the gender aspects of these responses. This analysis from a gender perspective will be carried out under section 2.1.2.

2.1.2.5 What do we have now, and what reforms and measures are needed?

The Doha Development Agenda will be the major focus of analysis for evaluating what the trade regime is doing towards addressing its development mandate in a manner that is human-development oriented. The Doha Round which was launched in 2001 marked the ninth round of trade negotiations in the combined history of the GATT and the WTO. It came out of the Fourth Ministerial Conference and provides the mandate for negotiations on a number of subjects. The 21 subjects listed in the declaration relate to negotiations on several subjects and other work related to implementation, analysis and monitoring. Some of the main areas of negotiation are in agriculture, services, market access for non-agricultural products, trade-related intellectual-property rights, anti-dumping and subsidies, regional trade agreements and dispute-settlement understanding. Work on implementation-related issues refers to problems raised particularly by developing countries about implementation of WTO rules arising from the Uruguay Round.

The Doha Round came about due to the dissatisfaction of developing countries over the substance as well as implementation of the Uruguay Round of trade agreements. The call to rebalance the Uruguay Round outcomes led to the birth of

the Doha Round, and the growing engagement of developing countries, with their 'positive agenda' of making the system work for them, led to what was to be termed the Doha Development Agenda.[737] The development agenda recognises that 'international trade can play a major role in the promotion of economic development and the alleviation of poverty'.[738] Several commentators argue that the Doha Round has placed development and poverty alleviation at the centre of the work of the trade regime.[739] One strategy adopted under Doha for realizing its development and poverty alleviation goals is to integrated developing countries into the global markets through the initiative of aid for trade.

In this section, special focus will be placed on aid for trade. The aid for trade initiative encompasses the various roles (in particular the ones briefly discussed above) that trade can play to contribute to human development. This will attempt to show what aid for trade constitutes, its various human-development dimensions, what has been achieved so far, and what more needs to be done to influence human development positively.

2.1.2.5.1 Aid for trade

What is aid for trade?

That trade is an instrument for fulfilling other policy objectives, such as human development, has been underlined in the previous sections. Further, for trade to assist countries in achieving this objective, mere implementation of trade-liberalisation rules would not suffice. Appropriate domestic policies, increased market access and the capacity to utilise these opportunities are equally important.

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[737] UN Millennim Project 2005 (note 2 above) 25.
[738] See the 2001 Doha Declaration Ministerial Conference adopted on 14 November 2001, WT/MIN(01)/DEC/1.
[739] See, for instance, D Cass *The Constitutionalization of The World Trade Organization: Legitimacy, Democracy, and Community in the International Trading System* (2005). See also Abbott (note 2 above) 18. See further K von Moltke 'Trade and Sustainable Development in the Doha Round' in M Moore (ed) *Doha and Beyond: The Future of the Multilateral Trading System* (2004) 1.

However, low-income countries, especially least-developed countries, lack the capacity to utilise existing and potential trade opportunities. For them to arrive at a position where they are able to benefit from market opportunities, they require assistance.[740] This is where the initiative of aid for trade comes into the picture.

Aid for trade has multiple objectives, but a principal impetus for it is rooted in the belief that trade can contribute to growth and that aid, as well as market access, is needed to promote trade in some countries.[741] According to the WTO task force on aid for trade,[742] its primary aim is to 'help developing countries, particularly Least Developed Countries (LDCs), to build the supply-side capacity and trade-related infrastructure that they need to assist them to implement and benefit from WTO Agreements and more broadly to expand their trade.'[743] The aid-for-trade facility is said to help these countries increase exports of goods and services, integrate into the multilateral trading system, and benefit from liberalised trade and increased market access.[744] The effective implementation of aid for trade will enhance growth prospects and reduce poverty in these countries and distribute the global benefits of trade more equitably across and within developing countries.[745] The latter point has been one of the major points of dissatisfaction of developing countries with the trade regime.

What is the WTO's role?

[740] C Healey et al 'Aid for Trade After the Hong Kong Ministerial – An Introductory Text' International Lawyers and Economists against Poverty Background Brief 8 (2006) 3.
[741] KA Elliott 'Ensuring that Aid for Trade Delivers for Development: Indicators for Measuring the Impact' WTO High-Level Conference on Mobilizing Aid for Trade: A Global Review (2007) 2.
[742] It is a taskforce established by the WTO in 2005.
[743] WTO 'Aid for Trade Task Force 'Recommendations of the Task Force on Aid for Trade' WT/AFT/1 (2006) 1.
[744] Ibid 1.
[745] Ibid 1.

As a global trade body, the WTO is responsible for ensuring that countries can effectively participate in and benefit from world trade.[746] This, as has been stated, requires much more in terms of building the capacities of states, which raises the issue of assistance. The main challenge in this regard is to get the many existing development-assistance mechanisms to work together more effectively.[747] Further, facilitating the sourcing of assistance is equally challenging. This is where the role of the WTO comes into the aid-for-trade framework. It has a catalytic role to play by ensuring that the agencies responsible for development understand the trade needs of WTO members, and encouraging them to deliver solutions.[748] This is in line with the WTO's responsibility for promoting 'coherence in global economic policy making'.[749] Aid for trade is said to be a clear example of how the WTO has a growing stake in other global policy arenas besides trade, such as development.[750]

In discharging its roles, the WTO has been engaged in two core functions. The first is advocacy in sourcing additional funds for assistance. The WTO Director-General has engaged in a series of consultations with partner institutions on securing additional financial resources for aid for trade.[751] The results of the consultations showed positive outcomes. Donors remain committed to scaling up their aid for trade, and it was made clear that a number of new and non-traditional donors are also willing to be part of the process.[752]

The second relates to monitoring and evaluation of aid for trade through different kinds of review processes which will take place through global, donor and

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[746] WTO Aid for Trade Fact Sheet <http://www.wto.org/english/tratop_e/devel_e/a4t_e/a4t_factsheet_e.htm> 23/07/08.
[747] Ibid.
[748] Ibid.
[749] The 1993 'Declaration on the Contribution of the WTO to Achieving Greater Coherence in Global Economic Policy Making' mandated the WTO to co-operate with the Bretton Woods institutions with a view to achieving global policy coherence. WTO's role in aid for trade comes from this mandate. See Elliott (note 91 above) 5-6.
[750] WTO (note 96 above).
[751] Ibid.
[752] Ibid.

country-based monitoring.[753] The processes look into a number of issues. For instance, the 2008 road map for aid for trade lists as strategies for global monitoring the following: updating donor and partner-country questionnaires, exploring ways of increasing partner-county involvement, examining how Trade Policy Reviews (TPRs) could be further adapted to aid-for-trade monitoring, building on existing work, and identifying a cluster of indicators to benchmark progress in building trade capacity.[754] In addition to its advocacy and monitoring roles, the WTO also participates in the actual disbursement of a share of aid for trade through the Doha Development Agenda Trust Fund and the Integrated Framework.[755]

What are the components or categories of aid for trade?

There is a broad consensus on what the major components of aid for trade should be. These are technical assistance, infrastructure development, trade development, building productive capacity, trade-related adjustment and other trade-related needs.[756] Some of these may contribute to growth in the short term, while others, such as capacity building, are to have growth effects in the long-term.[757] We now briefly examine what each of the components of aid entails. The discussion also evaluates the human-development dimensions of these components and further examines ways of making them gender sensitive.

There is a strong case for arguing that aid for trade has the potential for dealing with gender-equality concerns that arise in international trade regulation. This is because aid for trade is made up of a broad pool of subjects which give sufficient room for addressing human-development concerns. And from a gender

[753] WTO Committee on Trade and Development Aid for Trade '2008 Aid for Trade Road Map'WT/COMTD/AFT/W/6 (2008) 1.
[754] Ibid 1.
[755] Ibid 1-2.
[756] Ibid. The task force lists these six categories as constituting aid for trade.
[757] This would have serious implications for the possible positive effects of the trade regime on human development in general and gender-equality measures in particular.

perspective, the broad pool opens the door for addressing both targeted and non-targeted gender-equality measures.

In addition, one of the recommendations of the WTO task force on gender and trade strongly urges that gender considerations should be one of the guiding principles in the design and implementation of aid for trade. It reads: '[A]id for Trade should be rendered in a coherent manner taking full account, *inter alia*, of the gender perspective and of the overall goal of sustainable development.' These considerations require developing ways of making aid for trade gender sensitive.

i. Technical assistance

Technical assistance, which is also referred to as trade-related technical assistance and capacity building (TACB), is one of the main components of aid for trade. It basically involves helping beneficiary countries to develop trade strategies, negotiate more effectively, and implement outcomes.[758] A variety of activities are implemented to achieve this. These include the training of trade officials, policy analysis, support for national stakeholders to articulate commercial interest and identify trade-offs, assistance with dispute issues, and institutional and technical support to facilitate implementation of trade agreements and to adapt to and comply with rules and standards.[759]

Technical assistance provides support for governments of poor countries in determining appropriate policies. This requires policy analysis, which involves analysis of various proposals and positions, and assessing the impacts of various policies and trade reforms on various sections of society.[760] This serves as a good entry point for evaluating the human-development impacts of trade and can also be the basis for influencing policies with good pay-offs from the perspective of human development.

[758] WTO (note 93 above).
[759] Ibid 2.
[760] UN Millennium Project 2005 (note 2 above) 241.

Technical assistance, in particular the aspect of policy analysis, should focus on enabling countries to assess the possible role of international trade in their national development strategies and to weigh the pros and cons of different options.[761] This would require supporting a domestic policy-making process that helps countries place their WTO commitments in the context of broader national development strategies.[762] According to Deere, in practical terms this can be implemented through policy analysis, research and advice which are designed in ways that allow developing countries to acquire advice on a range of different policy options and implications.

In this regard, emphasis should be placed on helping countries to determine the costs of implementation of their WTO commitments.[763] This will help determine how much of a budgetary constraint the implementation of various agreements imposes on the country concerned. Government can then design ways of offsetting leakages from, for example, their social-support programmes. Perhaps countries should even be given a 'cooling off' period, to be incorporated into trade-negotiation processes during which an assessment of the budgetary cost of implementation is carried out.[764]

Along the same lines, the assessment may extend to considering the development and social implications of the commitments. Here considerations such as which section of the population benefits or is adversely affected by commitments and, further, what policies are required either to further the benefits or to adjust to the negative impacts, need to be taken into account. Accordingly, policy analysis should identify developing-country needs for assistance, assess the appropriate transition and sequencing of policy reform to meet WTO obligations, monitor the

[761] C Deere' International Trade Technical Assistance and Capacity Building' Human Development Report Office Occasional Paper (2005) 1-2.
[762] Ibid 1-2.
[763] Ibid 23-25.
[764] Ibid 24.

social and economic impacts of the implementation of new trade policies, and develop appropriate responses.[765]

Through technical assistance and trade-related capacity building, the WTO can play important role in assisting countries in identifying their interests in negotiations, assessing the impacts of various policies and trade reforms in various sections of society, such as the poor and the vulnerable.[766] Considerations of various policies and their implications provide the perfect opportunity to analyse factors that should carry weight in a process of this sort. Gender is one such factor. Gender-based analysis of various policies and their impacts will support decision makers with policy advice and options that are consistent with gender-equality objectives.[767] This primarily requires recognition of the fact that women, in their multiple roles as producers, workers and caregivers, are affected differently by trade reforms.[768] Accordingly, one way of ensuring that trade-related capacity building and technical assistance are gender sensitive is routinely to factor in the gender effects of trade policies and programmes. This in turn can be implemented in different ways.

The design of trade-policy reform, for instance, may include an upfront analysis of where the poor are located in terms of production, income and consumption, assessing which groups may be seriously detrimentally affected and determining what type of complementary reforms would best offset these potential losses.[769] This can be a very good entry point for carrying out gender analysis.

Accordingly, in identifying the poor and other losers from trade reform, gender can be included as an important criterion to be considered. This is supported by the fact that women fare worse in terms of factors such as income and

[765] Ibid 24.
[766] UN Millennium Project 2005 (note 2 above) 241.
[767] Canadian International Development Agency (CIDA) 'Gender Equality and Trade Related Capacity Building: A Resource Tool for Practitioners' (2003) 3.
[768] Williams (note 82 above) 14-15.
[769] UN Millennium Project 2005 (note 2 above) 233.

consumption, which have been outlined above as criteria. A gender analysis here reveals the shortcomings of these criteria, considered in isolation, in identifying the possible effects of trade reform in a comprehensive manner. For example, a mere reference to income may exclude women who mostly engage in the reproductive sector or the care economy, which is not remunerated. Hence this criterion effectively excludes women from the pool of those groups affected by trade reform.

Similarly, a focus on production would have an adverse impact on women. This is because their activities in social reproduction do not amount to the conventional understanding of production. Accordingly, the supposed effect of trade reform on production will fail to capture effects on women who engage in production in terms of their reproductive activities. One can make similar assessment regarding consumption. Consumption levels are different for girls and women compared to men. This difference needs to be taken into account when determining how consumption is affected by trade reform. This is because shortfalls in consumption at the household level, for example, may not tell the true picture of consumption levels among members of a household. This is a typical example of how technical assistance may assist countries to design policies aimed at enhancing gender equality.

In addition to identifying the potential benefits of and also losers in a trade-policy reform, technical assistance may help countries determine the costs of implementation of WTO commitments and the implication of this on their budgets. This process determines the budgetary needs and any additional assistance required in terms of aid for carrying out these obligations. This is where trade-offs between various other programmes and trade measures will be assessed. Gender analysis of trade-policy reform at this stage can successfully assess the implications of such trade-offs on gender equality. This is because gender equality is one of those areas which require allocation of resources for

both targeted and non-targeted interventions.[770] Hence, any significant effect on budgets as well as aid may have impacts on gender equality intervention.

ii. Trade-related adjustment

A second component of aid for trade is aid aimed at facilitating and managing adjustments arising from the implementation of trade commitments. It has been an acknowledged fact that not everyone benefits from trade liberalisation and that there will be losers in the process. In this context, loss may arise from costs incurred from liberalisation carried out by other countries, and from costs arising from the implementation of one's own liberalisation. Export-revenue losses due to preference erosion and higher costs of imports, such as food imports, may fall under the first category.[771] Increasing levels of liberalisation by developed countries may lead to an erosion of preferences for developing countries. A simple example here is that the removal of tariffs nullifies the benefits of those that benefited from tariff exemptions.[772] Similarly, the phasing out of export subsidies and decreases in domestic support will push prices of agricultural products in world markets.[773] This may adversely affect net–food-importing countries.

In the second category, the cost of implementation of new WTO rules, loss of tariff revenues and dislocations of local producers, all resulting from one's own liberalisation, can be cited as examples.[774] The discussion on policy space has shown that this may be a cause for limiting the capacity of states to adopt policies aimed at improving human development.

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[770] Williams (note 82 above) 2. Williams distinguishes between targeted gender-equality measures, as those that directly reduce gender inequality and empower women, and non-targeted ones, as those that are directed at improving social development but with spillover effects on gender equality.
[771] Elliott (note 91 above) 3.
[772] Healey et al (note 90 above) 15-16.
[773] Ibid 15.
[774] Elliott (note 91 above) 3.

All of these losses need to be offset by complementary policies so as to cushion those adversely affected by trade liberalisation. This is where adjustment issues come into the picture. One of the recommendations of the WTO aid-for-trade task force puts forward the concept of adjustment as supporting developing countries to put in place accompanying measures that assist them to benefit from liberalised trade.[775] As the sources of losses are different, the responses in terms of adjustment may also differ. For instance, losses in revenue result in different adjustment issues compared to dislocations of local producers. However, in almost all cases, there is a significant need for international assistance and often this takes the form of financial assistance. Let's briefly examine the different types of adjustment assistance feasible in the trade regime.

Technical assistance in the form of policy analysis helps identify the poor and the marginalised most likely to be affected by costs incurred from trade liberalisation, and those likely to be most severely affected. The damage may be caused by loss of tariff revenues, loss of revenues from exports and additional costs from implementation of trade rules. Adjustment-related initiatives help these sections of society cope with the adverse impacts. The possible policy choices in this context include general social safety nets, targeted safety nets and limitation of reforms in markets for purposes of limiting the impact of trade reform on the poor.[776]

Targeted safety nets can be instituted where losses from a trade measure can be directly linked to social losses.[777] For example, if the losses are in a specific sector, such as loss of jobs in the textile sector, safety-net programmes may target those who have lost their jobs. In such instances, programmes such as retraining of personnel in other productive sectors may prove useful.

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[775] WTO (note 93 above) 2.
[776] UN Millennium Project 2005 (note 2 above) 232.
[777] There is some scepticism about targeted safety nets. According to the task force on the UN Millennium Project on trade and development, it may be difficult to distinguish between those who are harmed as a result of liberalisation and those who are harmed due to normal turnover of the economy. However, argument can also be made that in some sectors such a distinction may be possible. UN Millennium Project 2005 (note 2 above).

General safety nets are said to have a wide-reaching effect. Goods and services that will be in general shortfall in times of adjustment may be used as criteria for designing such programmes. Usually this will apply to the basic necessities, such as food.[778] Hence safety-net programmes that provide subsidised food, direct cash-transfer programmes and food for work may be implemented.[779]

Similarly, services such as health, water and energy may be limited for the poor where liberalisation may result in transfer of service provision to private service providers. Here consumer subsidies targeted at the most needy consumers may be adopted as part of adjustment strategies.[780] This may be a step in the direction of ensuring access to basic services by the poor.

All of these safety-net programmes and measures require substantial resources to implement, which governments of poor countries generally lack. This is where international assistance is required, and securing sufficient funds to meet these adjustment measures is important. The aid-for-trade initiative, under its adjustment component, intends to do this.

Another measure that falls under the category of adjustment is to limit market reforms so as to minimise the negative effect of trade on the poor. For instance, liberalisation in the agricultural sector may subject local producers to dislocation. This has been reported in Africa, where local producers have been dislocated from the domestic market due to cheap food imports. In such cases, measures that would allow affected categories some time for adjustment may be employed. These may include such measures as gradual liberalisation and adoption of safeguard measures.[781]

[778] Ibid 233.
[779] Ibid 233.
[780] Ibid 233-4.
[781] WTO *World Trade Report 2008: Trade in a Globalising World* 154.

The most important issue to be raised in relation to adjustments is that it is usually those social groups under economic stress that would be adversely affected by adjustment issues. Within these groups, women are particularly vulnerable.[782] Recognition and acknowledgment of this fact should be the starting point of any adjustment programme. It calls for a serious gender analysis to be carried out while designing adjustment programmes. How is this to be implemented in practical terms?

Some of the considerations may relate to identifying the areas of production and employment that suffer as a consequence of trade measures, which sex group is most disadvantaged by the changes, and possible adverse effects on informal and household economies.[783] Based on this assessment, when policy responses such as safety nets are designed, the gender-differentiated problems arising from a particular trade reform should be identified.[784] Countries should then be able to include in their social safety-net policies programmes addressing the distinct needs of women as a group.[785] Two examples can be used to illustrate this point. The effect of liberal**is**ation in two sectors, services and agriculture, especially in sub-Saharan Africa, have had distinct gender dimensions.[786]

A gender-focused impact assessment of GATS implementation and subsequent privat**is**ation on gender and poverty eradication needs to be carried out. Based on this assessment, specific measures to protect the access of the poor to public services and natural resources such as water should be designed.[787] In the services sector, poor women would be hard hit by shortfalls in available and affordable services due to liberal**is**ation. This not only affects their own personal welfare, but extends to add burden to their reproductive roles. It also affects the welfare of

[782] CIDA (note 117 above) 17.
[783] Williams (note 39 above) 162-163.
[784] CIDA (note 117 above) 17.
[785] Ibid 17.
[786] These gender dimensions have been discussed in detail in Chapter IV, where the interactions between gender equality norms and the AOA and GATS have discussed.
[787] Williams (note 39 above) 165-166.

those under the care of women. Where safety-net programmes and consumer subsidies are designed this fact should be taken into account.

In the agricultural sector, similar gender-specific needs may arise. In this sector, one of the suggested adjustment measures is to limit market reforms by way of gradual liberal**is**ation and/or the introduction of safeguard measures. In this regard, Williams argues that consideration should be given in the trade agreements on agriculture to the particular situation of women farmers in the South.[788] Most of these women do not engage in commercial farming; rather, they farm for food self-sufficiency for their families. These smallholding farmers in the South are not able to compete with and meet the obligations of international competition.[789] Accordingly, Williams argues for the exclusion of food products in countries in the South from the discipline of import control, and domestic support to ensure food security, which includes accessibility, affordability and adequate nutrition.[790]

iii. Infrastructure development

Infrastructure development as one component of aid for trade focuses on the financing, building and development of physical infrastructure, including roads, ports and telecommunications. While trade-related infrastructure may focus on those infrastructures that are essential to facilitate trade, there may well be some overlaps with general social development. This is because these physical infrastructures would also be useful for social development.

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[788] Ibid 164-165.
[789] This has been raised in a number of Food and Agriculture Organisation (FAO) studies and reports. See Z Garcia 'Agriculture, Trade Negotiations and Gender' <http://ftp.fao.org/docrep/fao/009/a0493e/a0493e.pdf> 11/10/08. See also Williams (note 39 above) on this issue.
[790] Williams (note 39 above) 164-165.

Physical infrastructure is important for trade. Available market opportunities can only be utilised where goods produced can reach consumers at a competitive price. In many least-developed countries, dysfunctional infrastructure is one of the most common obstacles to taking advantage of available opportunities.[791] Infrastructure development comes in handy to improve the competitiveness of these countries. This is one of the reasons for the claim that it forms one of the most important elements of aid for trade.

Pro-trade infrastructure development can lead to the building of more physical infrastructure. Women may be differently affected by the design and development of physical infrastructure, such as roads.[792] If physical-infrastructure development concentrates only on areas far removed from the location of women, it may not hold immediate benefit for them. The term 'location of women' refers not only to geographic location but to women's economic activities, as well as the goods and services women require in their day to day lives, in particular their reproductive roles.

Based on this, Williams argues that physical infrastructure should be designed in a manner that takes into account the needs of women. This basically means consideration of women's location. For instance, what considerations should be taken into account when designing the building of roads? From a gender perspective, the focus should extend beyond construction of main roads and include feeder roads.[793] Feeder roads are critical to the survival and expansion of women smallholder farmers, because such facilities will increase their access to markets and their ability to be independent of middlemen.[794] It will also hugely impact their incomes. Access to bigger markets may lessen women's dependency on less remunerative farm-gate pricing structures.[795]

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[791] Healey et al (note 90 above) 19.
[792] Williams (note 82 above) 14-15.
[793] Ibid 15.
[794] Ibid 14-15.
[795] Ibid 15.

Gender-sensitive design and development of physical infrastructure has two advantages. Firstly, it will open opportunities for women to util**is**e available markets. This will increase their participation in trade, which in turn will increase their income. Secondly, it will facilitate women's access to various goods and services. The advantage for women is twofold: it will have positive implications on their welfare, and in addition will ease the burden implicit in their reproductive functions. Better access to goods and services through, for example, better transport, better roads and better communication will go a long way towards easing the burden of women.

To conclude aid for trade has the potential to address the adverse impacts of trade regulation on women. Through adjustment measures, it addresses the needs of those dislocated by trade liberal**is**ation. Through measures such as trade development, infrastructure development and capacity building, it is possible to enhance women's participation in trade and hence positively influence gender equality through trade. In addition, measures such as infrastructure development will have the spillover effect of easing the reproductive burden of women.

iv. Trade development and building productive capacity

According to the WTO task force on aid for trade, trade development as one component of aid for trade involves investment promotion, analysis and institutional support for trade in services, business-support services and institutions, public-private sector networking, e-commerce, trade finance, trade promotion, market analysis and development. Another component focuses on building productive capacity. Internal factors in the form of very severely limited capacity have been identified as major barriers standing in the way of developing and, in particular least-developed, countries taking advantage of trade possibilities.[796] This has focused attention on the need to build this capacity. As a component of aid for trade, this basically involves expanding the capacity of people to produce goods and services that are tradable, and that facilitate trade.[797] These two components are complementary. While the second one aims to enable producers to produce tradable goods and services, the first ones intends to facilitate the actual trading of these products.

Building productive capacity tends to focus on the micro level and on a bottom-up private-sector approach.[798] As such, under this component, funds intended for trade-capacity-building are supposed to be channelled to the farmers and entrepreneurs who engage in production and trade.[799] One criterion for deciding on how to channel funds is to rely on the specific supply-side constraints that these producers have identified in production as well as in getting their goods to market.[800] Some of the challenges include education and training, lack of adequate inputs, lack of resources, storage and transportation.[801] For instance, in the agricultural sector, land and water resources, agricultural extension services,

[796] Ibid 17-19.
[797] Elliott (note 91 above) 5.
[798] Healey et al (note 90 above) 17-19.
[799] Ibid 18.
[800] Ibid 17.
[801] CIDA (note 117 above) 14-16.

farm inputs, pest control and post-harvest protection may count as major supply-side obstacles. Similarly, on the marketing side challenges may include access to market information, advice on market standards and quality control, marketing and distribution channels in the various sectors,[802] weak institutional support, poor standards of compliance, excessive business regulations, and lack of access to capital.[803]

The emphasis on a micro-level and bottom-up private-sector approach in building trade or supply-side capacity offers a very good opportunity to address gender-related supply-side needs. The specific focus on farmers and entrepreneurs affirms this assessment. Statistics in the developing and least-developed countries show that women are concentrated among subsistence farmers and micro as well as small and medium-sized enterprises. And further, these productions and business operate in the majority of cases in the informal sector.

Women's business and initiatives may be affected by the flow of funding and technical assistance aimed at building trade capacity and the design of trade development. Usually, trade strategies are designed in a gender-blind manner without due consideration for the specific roles and contributions as well as needs of women and men entrepreneurs.[804] This may, for instance, result in assistance and funding that focuses only on the formal economy. This in turn fails to capture the trade activities of women because they mostly operate in the informal sector. The main lesson in this regard is to do gender analysis. This will take into account differences between male- and female-owned enterprises, for example in terms of sectoral specialisation and their location in the economy.[805]

[802] Ibid 14-16.
[803] Healey et al (note 90 above) 17.
[804] CIDA (note 117 above) 14.
[805] Ibid 14-15.

Generally, therefore, there is a need to tailor programmes and projects focused on expansion of trade and investment to the needs of women. [806] This is true in both the agricultural and non-agricultural sectors, in the latter of which women-owned small and medium enterprises dominate. Women, in fact, comprise a substantial proportion of the micro- and small-enterprise sector, but the importance of this work tends to be ignored in policy discussions.[807] This will effectively exclude the specific needs of women entrepreneurs from possible funding.

In the agricultural sector as well, the ability of women producers to engage in trade and then to expand to non-traditional agricultural exports and generate sufficient income to re-invest in non-traditional export crops, as well as to meet subsistence and household needs, is constrained by a number of factors.[808] These include scale of operations, time constraints because of multiple roles, unequal access to credit, and gender roles, which act as barriers to business development.[809] In conclusion, assistance for capital upgrading and technological improvement in the small-business sector has to be gender aware and sensitive to the priorities and concerns of women-owned businesses.[810] This kind of gender-specific needs-based analysis brings into the open areas that need to be addressed to build and expand the trade capacity of women.

In addition to incorporating gender concerns within the broadly classified categories of aid for trade components, what sort of mechanisms can be utilized to ensure the adequate incorporation of gender equality concerns in the aid for trade framework? Should there be an explicit commitment to promoting gender equality causes/concerns with in this framework? In what other ways could gender equality objectives be incorporated in the framework? Are there examples or country experiences that can be cited as cases of best practice? The following

[806] Williams (note 82 above) 15.
[807] CIDA (note 117 above) 14-15.
[808] Ibid 14-15.
[809] Ibid.
[810] Williams (note 39 above) 168-169.

section attempts to identify more concrete ways of incorporating gender in the aid for trade framework.

Engendering aid for trade

In this section, I will discuss two mechanisms whereby the aid for trade framework can be engendered. These are: including the component of poverty reduction as a component of aid for trade and opening the aid for trade initiative to active participation by various interest groups including governments of beneficiary countries. These approaches can be complementary to the discussion above. I also note the value in this context of making the objective of gender equality explicit.

Poverty reduction as a component/objective of aid for trade

The components of aid for trade discussed in detail in the previous section are specifically focused on the areas of technical assistance, trade related adjustment, infrastructure development as well as trade development and building productive capacity. Although one can argue that these components have dimensions that extend to reducing poverty, none of them directly target poverty reduction as an objective of the aid for trade initiative. As it stands, the relationship between poverty reduction and aid for trade is not discussed.[811] Further, reports from review of ongoing aid for trade programmes by various donor countries shows that few donors have a link to poverty in their aid for trade programmes.[812]

However, there is a strong case to argue for the inclusion of a poverty reduction agenda in the aid for trade framework. Wiig, in assessing the effectiveness of aid

[811] A Wiig Aid for Trade: A Miss-Directed Initiative? CMI Working Paper. Paper presented at the annual FOPRISA Conference in Pretoria, Nov. 2008 http://www.cmi.no/publications/file/?3445=aid-for-trade-a-misdirected-initiative (19/09/09).
[812] Ibid. 1. See also the OECD report on the review of the aid for trade programmes of various countries cited in Wiig. OECD The Development Dimension. Trade Related Technical Assistance: What do Recent Evaluations Tell Us? 2007.

for trade for poverty reduction in the Southern African Development Community (SADC) region provides the following argument supporting this conclusion. According to Wiig, as poverty reduction is characterized as an ingredient of development, the argument goes; the legitimacy of aid for trade depends on its contribution to poverty reduction in the beneficiary countries.[813] The question that follows is how we ensure that aid for trade brings about poverty reduction.

Empirical studies from developing countries indicate that two sets of hurdles stand in the way of these countries reaping the benefits of trade. These are market access problems and internal constraints. Access into the markets of developed countries especially in agricultural commodities remains to be a big hurdle for developing countries to increase trade and the gains there from.[814] In those countries that enjoy preferential access to the markets of developed countries, internal constraints pose the problem for increasing trade. The SADC region is a good example in this regard. The region benefits from the AGOA as well as Everything but Arms initiatives of the United States and European Union respectively. However, for this region internal constraints remain a huge problem for increasing exports and gaining from the benefits of trade. These constraints include poor product standard, low productivity and competitiveness, low value added, lack of export diversification and high trading costs.[815] There is a strong consensus that aid for trade has the potential to reduce these constraints thereby enhancing trade performance.[816]

Wiig argues that reducing these internal constraints and trading costs through aid for trade can have poverty reducing impact where such aid concentrates in the

[813] Ibid 1-2.
[814] K Bird Aid for Trade: Building a Route Out of Poverty, Speaking notes from the Second Global Aid for Trade Review – Aid for Trade: Assessing Impact and Effectiveness Geneva July 2009.
[815] See Wiig note 161 above and Bird note 164 above explaining in detail the nature of internal constraints that many developing countries face.
[816] Bird (note 164 above) 1-2. See also the rational for aid for trade as discussed in the earlier section.

sectors where the poor abound.[817] In the SADC region, Wiig cites, there is an obvious poverty impact to be gained by reducing trading costs and improving transmission mechanisms of agricultural products within SADC where the poor are mainly in agriculture.[818] It is important to note here that the majority of the poor in agriculture in the region are also women. Similarly, in the manufacturing sector, reducing trading costs may have similar poverty reducing impact. This could happen where trade generates increasing employment for the poor and low skilled work force which would ultimately help to increase wages and income.[819] Here too, women are found concentrated in the low skill and poor sections of the workforce.

Has poverty reduction been included as an objective and/or component of aid for trade initiatives by donor countries? In its aid for trade monitoring report of 2009, the EU's aid for trade strategy has been highlighted. An important component of this strategy is the commitment of the EU to enhance the impact of aid for trade on sustainable poverty reduction.[820] The aim of this strategy is to enhance the understanding and implementation of aid for trade in ways that contribute to inclusive growth and poverty reduction so as to act upon the linkages between trade, poverty and inequality.[821] Although it is difficult to assess the impact of this strategy as it is in its early stages,[822] it can be said that it is a commendable approach for introducing and linking the concept of poverty reduction to the aid for trade framework.

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[817] Wiig (note 161 above) 19. Similar argument and assessment is made by Njinkeu who claims that for many African exporters trading costs pose the main challenge to trade and aid for trade aimed at improving competitiveness, export promotion would go a long way in reaping the benefits of trade. See Dominique Njinkeu An African Perspective on Aid for Trade in Domeinique Njinkew et. al. Aid for Trade and Development (Cambridge University Press: 2009).
[818] Wiig (note 161 above) 18-19.
[819] Wiig (note 161 above) 19.
[820] See Commission of the European Union Communities staff working paper accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions Aid for Trade Monitoring Report 2009, 10 at http://ec.europa.eu/development/icenter/repository/COMM_NATIVE_SEC_2009_0442_4_Aid-for-Trade-monitoring-report-2009_EN.pdf 19/09/09.
[821] Ibid.
[822] The above report confirms that the UK and Sweden have commissioned studies on how to implement the pro-poor focus on the aid for trade initiative. Ibid.

A related avenue through which aid for trade can contribute to poverty reduction and thereby become more gender sensitive is through a possible contribution to the informal sector where women predominate. The challenge is therefore how to link aid for trade to the informal sector. The main channel of linkage here can be linking aid for trade to the private sector. Empirical evidence and past experience show that the private sector has been recognized as an important partner in the aid for trade initiative.[823] The private sector in the form of small and medium sized enterprises (SMEs) is considered to be an important engine of growth.[824] This fact makes it an important candidate in the aid for trade framework.[825]Given the likelihood that the aid for trade component focused on building productive capacity is likely to focus on those SMEs that operate in the formal sector, there is a need for redirecting the focus to the SMEs operating in the informal sector.

Empirical evidence from Kenya, Uganda and Tanzania show that Business Membership Organizations (BMOs) are crucial for linking aid for trade with the private sector.[826] BMOs serve as intermediaries between donors and domestic recipients of aid for trade; they are instrumental for assessing needs for aid, diagnostic, implementation as well as assessing effectiveness of aid.[827] Women's cooperatives are equivalents to BMOs. These cooperatives representing women operated SMEs in the informal sector can serve as intermediaries between donors and recipients of aid for trade. By including these cooperatives in the BMOs or alternatively dealing with them directly, it may be possible to link aid for trade to the informal sector. This would allow the direct flow of funds to women owned SMEs and their possible integration in the expansion of trade.

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[823] See the section above on trade development and building productive capacity for a detailed analysis of aid for trade contributing to the private sector.
[824] See A Agboghoroma et al. (eds.) Aid for Trade: Making Trade Effective for Development Case Studies of Kenya, Tanzania and Uganda PricewaterhouseCoppers and Hamburg Institute of International Economics 2009, 41 at http://www.wto.org/english/tratop_e/devel_e/a4t_e/a4t_july09_session4_e.pdf 19/09/09.
[825] Ibid.
[826] Ibid.
[827] For detailed analysis of BMOs and their role in facilitating the aid for trade initiative in favour of private sector development see Agbohotoma et al note 174 above.

To conclude, integrating poverty reduction as an objective or component of the aid for trade framework is one direct means of incorporating gender equality within the framework. This is because as discussed in the previous section on the relationship between gender equality and poverty, reducing poverty has direct impact on improving gender equality.

Participatory approaches in the design of Aid for Trade initiatives

One of the defining features of the aid for trade facility is that it is a demand driven initiative. Accordingly, the beneficiaries of this facility are required to identify their needs and priorities. This puts the onus of including gender concerns onto the beneficiary states. This can also be seen as opening the opportunity for states to put development or poverty related concerns on the agenda of aid for trade. Here the role of civil society, interest groups and relevant government offices/bureaus becomes important.

In Cambodia for example through a partnership between the Ministry of Women's Affairs, UNDP and the International Trade Center (ITC), it has been possible to channel the aid for trade facility to poor women producers.[828] The aid has been directed to enhancing sustainable livelihoods through the generation of employment and higher income for women and women producers in one of the poorest provinces of Cambodia.[829] The programme also aims to enhance enterprise level export competitiveness in selcted sectors with special emphasis on women-owned enterprises. Further, the programme aims to strengthen the production capacity of women craft producer groups and build sustainable linkages with the market.[830] An important catalyst for the targeting as well as implementation of the aid for trade initiative in favour of women has been the

[828] International Trade Centre (ITC) 2nd Aid for Trade Review for Asia and the Pacific 28-29 May 2009 http://www.intracen.org/AidforTrade/documents/Asia-Pacific/concept_paper_asia.pdf 19/09/09.
[829] Ibid.
[830] Ibid.

Ministry of Women's Affairs. Its active participation has meant that fund or aid could be specifically directed to women which otherwise would have not been so.

Similarly, there are many NGOs and interest groups representing the poor and marginalized sectors of society such as women in many developing countries. These NGOs and interest groups play an active role to ensure that the interests of the poor are adequately represented in the international trade arena.[831] They achieve this through connecting the informal sector and micro firms to the trade community, researching and publishing papers and policy recommendations that can be used by governments of donor as well as recipient countries, and generally reaching small and non-influential actors more effectively.[832] This form of participation guarantees that aid responds to the priorities and needs of recipients. NGOs and interest groups working with poor women can effectively identify the needs and priorities of women and can help shape the structure of aid for trade in a manner that responds to their needs.

Explicit gender equality objective

One criticism that can be labelled against the aid for trade framework from the perspective of gender is the fact that the gender aspect is still implicit. Its possible contributions to gender equality are not explicitly acknowledged. The only reference to gender in this framework is one of the recommendations of the WTO task force on gender and trade strongly urges that gender considerations should be one of the guiding principles in the design and implementation of aid for trade. It reads: '[A]id for Trade should be rendered in a coherent manner taking full account, *inter alia*, of the gender perspective and of the overall goal of sustainable development.' This is despite the fact that the framework or initiative has come into being very recently (2005) and at a time when the social including gender impacts of trade agreements have been widely articulated among international

[831] Agboghoroma et al. (eds.) (note 174 above) 41-43.
[832] Ibid. 42.

development institutions such as the World Bank and various governments and NGOs.

Despite the failure to clearly advocate for a gender equality objective within the aid for trade framework, some donor countries have taken the initiative to include gender equality as one of the objectives for the framework. Explicitly putting gender equality objectives has certain advantages. The most important of these is it would demand a strategy for its implementation. Accordingly, instead of attempting to retrieve and read possible gender aspects to the framework, one can directly refer to the gender targeted programmes. This is also crucial for monitoring and evaluating the success of the entire framework from a gender perspective.

2.2 The objective of raising the standard of living for all

2.2.1 Introduction

This section looks into another of the objectives of the trade regime so as to locate gender-equality concerns within the regime. As stated earlier, the preamble of the establishing agreement of the WTO is one good source for identifying the stated objectives of the organisation.[833] From the various objectives stated in the preamble, one closely related to the socio-economic rights of women is that of raising standards of living. The preamble states:

> *Recognizing* that their relations in the field of trade and economic endeavor should be conducted with a view *to raising standards of living*,(my emphasis) 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

[833] Rodrick (note 7 above). See also Hilf (note 7 above).

> 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.

Raising the standard of living for all is one of the stated objectives of the WTO. What does this mean and what does it entail? Different categories of sources can be examined to establish the meaning of this objective. Firstly, we look at sources within the WTO framework, such as the DSB and Ministerial Declarations, and, generally, the structures of the WTO that have, in the process of using this objective, given it some content. Secondly, the meaning of this objective can be established by analysing it in relation to other objectives that appear in the preamble. Accordingly, we establish what some of the other objectives are and how they relate to one another. Thirdly, given that the objective of an adequate standard of living is an established human-rights standard, the relevant human-rights instruments dealing with standard of living will be examined.[834] The purpose of this investigation is to establish how the objective of raising the standard of living is related to substantive gender equality.

3. DEFINING THE OBJECTIVE OF RAISING OF STANDARDS OF LIVING FOR ALL

3.1 Use within the WTO framework

3.1.1 Ministerial Declarations

The discussion in Chapter II has shown the legal relevance of the preamble of the WTO.[835] The objectives contained in the preamble have been relied upon by various structures of the WTO. Mainly, the DSB and the Ministerial have used

[834] See International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993U.N.T.S.(ICESCR)

[835] The legal relevance of the preamble can be further examined by reference to its use in various DSB proceedings. See the WTO Analytical Index on the Marrakesh Agreement <http://www.wto.org/english/res_e/booksp_e/analytic_index_e/wto_agree_01_e.htm#pB1> 23/11/08.

these objectives to support various rulings and decisions. The *Shrimp-Turtle* case and the TRIPS declaration on public health are good examples in this regard.

The objective of raising the standard of living has been used in some Ministerial Declarations. At the first Ministerial of the WTO, the Singapore Ministerial, the Ministerial Declaration reaffirmed that the principal objective of international trade since the establishment of the GATT, and now with the WTO, has been the 'raising [of] standards of living worldwide'. Two years later, in the 1998 Geneva Ministerial Declaration, too, the objective of raising standards of living was highlighted. The 2001 Doha Declaration indirectly reaffirms the objective of raising standards of living: although it does not talk about one specific objective, it nonetheless affirms members' commitments to the objectives set out in the establishing agreement of the WTO. Included therein is the objective of raising standards of living. These Ministerial Declarations do not seem, however, to give further guidance as to what the contents of this objective should be. They more or less repeat the wording of the preamble of the WTO establishing agreement without much elaboration.

These declarations, however, indicate that the main purpose behind expanding trade and increasing employment is ultimately to raise people's standard of living worldwide. Trade is thus a means to achieve better living standards. This view is strongly supported by trade scholars. For instance, Rodrick argues that it is accepted in the agreement establishing the WTO that the purpose of the world trade regime is to raise living standards all around the world rather than to maximise trade per se.[836] It therefore follows that expanding trade was viewed as a means of raising of standards of living rather than as an end in itself.[837] This is an important observation, given the fact that it dispels the view that the sole purpose of the trade regime is trade liberalisation.[838]

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[836] Rodrick (note 7 above) 9.
[837] Ibid 9.
[838] See J Dunhoff 'The Death of the Trade Regime' (1999) 10 *European J of Int Law* 733, 737. Dunhoff elaborates on the view held by many that the sole purpose of the trade regime is to liberalise trade so as to pursue the benefits of comparative advantage. This view is similar to what

Raising living standards, as the Singapore Ministerial indicated, has been an established objective of the GATT system, and has been used as such. In particular, it formed one of the bases for the adoption of what is known as Part IV of GATT.[839] As GATT is part and parcel of the current WTO legal framework, this usage gives a more elaborate indication of the objective's intended meaning and content in the context of the WTO.

3.1.1.1 Raising of standards of living and Part IV of GATT

Part IV of GATT on trade and development bases its existence on the objectives of raising standards of living and the progressive development of economies of all countries. While these are said to be important to all contracting parties, Article 1(a) of Part IV makes them particularly important from the perspective of less-developed countries. This is justified in Article 1(c) of Part IV by the low levels of standard of living prevailing in these countries.

It can be gathered from the above that standard of living is very much linked to countries' levels of economic development. This relationship allows us to make a connection between the various objectives in the current WTO preamble, most specifically, the raising of standards of living and sustainable development. Accordingly, to the extent that standard of living increases with increased levels of economic development, these two objectives of the WTO overlap in some respects. Based on this connection, it is also possible to establish the meaning and measures of standard of living in the preamble by reference to those used in relation to development.

The examination of the objective of sustainable development in Part I above has shown that there are strong grounds for arguing that this objective should be

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Rodrick condemns when he speaks of the trade regime's role being portrayed as 'maximizing trade per se'.

[839] See GATT Part IV.

construed as referring to human development. What such an understanding entails on the part of the trade regime has also been highlighted. Further, based on the strong connection between substantive gender equality and human development, the implications of the WTO objective on gender equality have been stressed. In addition, some practical modalities for implementing this objective in a manner that would favour gender-equality initiatives have also been highlighted. Accordingly, if the objective of raising of standards of living is to be interpreted in light of the objective of sustainable development, it implies that the former implicitly encompasses gender-equality objectives.

In the following section, the meaning and content of the objective of raising standards of living for all will be examined from a human-rights perspective.

3.2.2 Adequate standard of living as a human-rights standard

3.2.2.1 Definition and content

In both language and spirit, the objective of raising standards of living is close to the human-rights standard of an adequate standard of living.[840] The latter is an established human-rights standard enshrined in various human-rights instruments, such as the UDHR, ICESCR and CEDAW as well as regional human-rights instruments. The UDHR, in its Article 25, 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, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.' Similarly, the ICESCR, in Article 11, provides: 'The States Parties to the present Covenant recognize the right of everyone to an adequate

[840] C Kaufmann & S Heri 'Liberalizing Trade in Agriculture and Food Security: Mission Impossible?' (2007) 40 *Vanderbilt J of Transnat'l L* 1039, 1041.

standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.'

However, the meaning and exact content of what constitutes an 'adequate standard of living' is not elaborated in these provisions. They simply give an indication of what an adequate standard of living may include: such basic necessities as food, clothing, housing and medical care.[841] According to Eide, however, an adequate standard of living requires more than the basic necessities.[842]

The content of the right can also be ascertained by reference to the relationship between it and other rights in the ICESCR. The right to an adequate standard of living is said to be a central right in the ICESCR because most of the socio-economic rights in the covenant appear to be derivatives from this core right.[843] They can be regarded as detailing various aspects of it.[844] The logical conclusion is that without some realisation of the right to an adequate standard of living, other socio-economic rights would have little meaning.[845] Hence, it can be said that the right to an adequate standard of living encompasses several specific socio-economic rights, and it is the fulfillment of these rights that may guarantee an adequate standard of living.

The definition and content of the right as enshrined in human-rights instruments shows that this standard is not to be measured in terms of income alone. Thus a human-rights-based understanding broadens its content so as to include a number of socio-economic rights. This understanding is very similar to the understanding arrived at after examining the broad view of sustainable development as human development, as enshrined in the WTO preamble. Hence, it is possible to

[841] A Eide 'The Right to an Adequate Standard of Living Including the Right to Food' in A Eide et al (eds) *Economic, Social and Cultural Rights: A Textbook* (2001) 133.
[842] Ibid 133.
[843] P Bailey 'The Right to an Adequate Standard of Living: New Issues for Australian Law' (1997) 4 (1) *Australian J of Human Rights* 25, 27-28.
[844] Ibid 20-21.
[845] Ibid 20-21.

conclude that the two objectives – the raising of standards of living and sustainable development – require similar approaches and measures for their successful achievement.

3.2.3 Engendering raising of standard of living

In Chapter V, we established that substantive gender equality requires the fulfilment of various socio-economic rights of women. It has been shown that an adequate standard of living encompasses various socio-economic rights. This broad understanding therefore corresponds well with substantive gender equality. Based on this connection, it is possible to argue that such equality is an essential component of an adequate standard of living. As such, gender equality can be said to be an implicitly recognised objective of the trade regime.

3.2.4 The WTO objective of raising of standards of living: what should it mean, and what it should it entail?

When we say that the WTO has the objective of raising standards of living, it means that the trade rules should enable governments to act in a manner that raises standards of living. This could refer to the economic or social, and even political, spheres of action. It also implies that trade rules should create the necessary environment for states to produce and implement policies that can raise standards of living – policies aimed at improving the socio-economic rights of their people, such as the right to health, access to medicines, and access to various sets of services. What does this entail?

Two avenues can be taken to promote adequate standards of living. Firstly, action-oriented responses, and secondly, goods/services-oriented responses are

readily recognisable from the nature of socio-economic rights.[846] Action-oriented responses have to do with the design of government actions such as laws, policies, programmes and strategies aimed at creating the favorable environment necessary for people to be able to enjoy their socio-economic rights.[847] These bundles of acts constitute first steps in the progressive realisation of socio-economic rights. What should the trade framework do to achieve this? The answer may be directly related to policy issues raised in trade regulation, for instance, the question of policy space. So the question then becomes whether the trade regime gives states adequate policy space to formulate policies that are supportive of socio-economic rights. How can such an environment be created through the trade regime? This matter has been addressed to some extent on the section on the role of trade in policy formulation. In this section, too, this question will be examined in light of the TRIPS Agreement.

The second route is the goods- and/or services-oriented response.[848] This may take the form of the actual provision of goods and services, or of enabling people to provide for themselves. This is the area in which the question of resources becomes vital. States need resources to provide material benefits to women, primarily to improve their welfare, and secondly to build their capabilities so as to ensure, in particular, that women are in a position to take up market opportunities. Can the trade regime be helpful in this regard? Here the aid-for-trade initiative of the regime becomes important. It is a perfect example of how trade rules can be made proactive to facilitate the adoption by states of policies that are human-rights friendly. How aid for trade operates, and how it can be made beneficial for advancing the socio-economic rights of women, has been dealt with in sections 2.1.2.5 and 2.1.2.6 above.

The following section attempts to illustrate to what extent the issue of domestic policy space, in particular limitations arising from WTO legal obligations, can

[846] Freedman (note 5 above) 67-91.
[847] Ibid 67-91.
[848] Ibid 67-91.

(and has) been addressed in a manner that creates the necessary environment for states to produce and implement policies. The TRIPS Agreement will be examined in light of the human right to health, including access to medicine.

3.2.4.1 The TRIPS Agreement

3.2.4.1.1 Introduction

The inquiry in this section is to establish whether the TRIPS Agreement affords the necessary support for states to formulate and implement policies that are supportive of promoting the right to health. This will be examined from a gender perspective.

The TRIPS Agreement deals mainly with the protection of intellectual-property rights and requires members of the WTO to establish minimum standards for protecting and enforcing them. Two interests are at stake in the protection of these rights: those of the inventors and creators, on the one hand, and those of the general public to make use of the inventions and creations, on the other. The protection of intellectual property through the enforcement of creators' and/or inventors' monopoly rights provides the required incentive for ensuring future inventions and creations. At the same time, certain limitations are set on these rights to allow the general public to use the inventions and creations.

A wide range of subjects is covered by the TRIPS Agreement. They include patents, copyright, trademarks, and trade secrets. Some of these subject areas, namely patents, trade secrets and trademarks, are relevant to health-related matters.[849] Patent protection has proved to be the most controversial area when it comes to the agreement's implications for health matters. It has

[849] WHO & WTO Secretariat 'WTO agreements and Public Health: A Joint Study' (2002) 39 <http://www.wto.org/english/res_e/booksp_e/who_wto_e.pdf> 07/06/08.

been criticised for its potential, and in some instances actual, detrimental impacts on the availability and affordability of drugs or medicines, especially in developing countries.[850] The right to health is therefore the most important human right with direct relevance to the TRIPS Agreement.

3.2.4.1.2 TRIPS and the right to health

The main human-rights instrument containing the right to health is the ICESCR. Article 12 of the ICESCR requires states to 'recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health'. In addition, the covenant lists a number of measures that states are required to implement to protect the right to health. A general comment on the above article (General comment No 14) by the UN Committee on Economic, Social and Cultural Rights states that the right to health extends not only to timely and appropriate health care, but includes all the attendant underlying determinants of health.[851] Included in this list are safe drinking water, adequate sanitation, adequate supply of food, and housing.[852] The committee further underlined four guiding principles for purposes of evaluating the level of state compliance in meeting its obligations towards protecting the right to health. These principles, which make up the basic elements of the right, are availability, accessibility, acceptability and quality of health care.[853] According to the committee, availability connotes functioning public health-care facilities, goods and services.[854]Accessibility, on the other hand, connotes a situation where there is

[850] G Sampath 'Gender and the Agreement on Trade Related Aspects of Intellectual Property Rights: Exploring Some Interlinkages' in Tran-Nguyen & Zampetti (note 47 above) 251, 253.
[851] UN Secretariat, Economic and Social Council, Committee on Economic, Social and Cultural Rights
'General Comment No. 14: The Right to the Highest Attainable Standard of Health (Article 12 of the
International Covenant on Economic, Social and Cultural Rights)' E/C12/2000/4 (2000) para 11.
[852] Ibid.
[853] Ibid.
[854] S Musungu 'The Right to Health, Intellectual Property and Competition Principles' in T Cottier et al (eds) *Human Rights and International Trade* (2005) 302.

equitable access to and rational use of quality essential medicines.[855] Access to essential medicines is thus one component of the right to health.

This, viewed from the perspective of gender equality, implies that both men and women have equal access to all medicinal resources required to realise their respective health needs.[856] However, the health needs of men and women differ due to natural, or biological, and socio-economic factors.[857] Such differences give access to essential medicines a gender dimension. Accordingly, women's biological and anatomical needs may give rise to different, and perhaps additional, requirements for access to essential medicines. The main reference here is to the reproductive health needs of women. This may require access to medicines that help women to control their fertility, drugs that help in the treatment of sexually transmitted diseases, and drugs essential for maternal care.[858]

Another factor that gives access to essential medicines a gender dimension is the high prevalence of HIV and AIDS among women in comparison to men. Statistics show that more women than men are infected with the HIV virus. It is also a well documented fact that currently more women live with HIV than men. Similar picture exists when one examines the infection rate. The infection rate is higher among young women than it is among men. For instance, this is precisely the case in South Africa.[859] According to the WHO, the proportion of pregnant women infected with the virus is rising. Deaths due to HIV and AIDS constitute the number one cause of premature mortality in South Africa.[860]

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[855] Ibid 302.
[856] Sampath (note 200 above) 258.
[857] A Hassim et al. '*Health and Democracy: A Guide to Human Rights, Health Law and Policy in Post Apartheid South Africa* 2007, 353 <http://www.alp.org.za/modules.php?op=modload&name=News&file=article&sid=351> 09/10/07.
[858] Sampath (note 200 above) 266.
[859] Hassim et al (note 207 above) 354.
[860] Ibid 354.

It is evident that access to essential medicine is indispensable as far as women's right to health is concerned. What state obligations exist with regard to ensuring access to essential medicines? This question needs to be assessed in light of state obligations emanating from the right to health. Those that emanate from Article 12 of the ICESCR are the obligation to respect, protect and fulfil. The obligation to respect mainly requires states not interfere with the realisation of the right to health. For instance, a state cannot legislate to limit or prevent the sale of essential medicines or the population's access to health care.[861] The obligation to fulfil may require the provision of preventive and primary health care through public institutions as needed.[862] With regard to the obligation to protect, the state is required to prevent the dissemination of threats to health. According to Article 12 (2) (c) of ICESCR, this could include entail steps to prevent, treat and control epidemic, endemic and other diseases.

The legal issues arising from the interaction between TRIPS and the human right to health from a gender perspective are:

1. Would the strengthened patent protection under TRIPS limit access to essential medicines and therefore undermine the right to health?

2. The rules under the TRIPS agreement are said to afford considerable discretion on how they are to be implemented. This, it is argued, enables states to implement policies to safeguard public health. TRIPS flexibilities provide adequate policy space for governments to implement their obligations to respect, to protect and fulfil the right to access to essential medicines, which is part of the right to health care.

[861] General Comment (note 201 above).
[862] Ibid.

The trade commitments in the TRIPS agreement may therefore contribute to promoting the human rights of women.

3.2.4.1.3 The negative aspects of TRIPS problematised from a gender perspective

Gender, TRIPS and access to essential medicine

It is clear from the discussion above that women have needs peculiar to them when it comes to access to essential medicines. As highlighted above, access to essential medicines is a fundamental human right. It constitutes an important aspect of the right to health care, which is provided for in various human-rights instruments, including CEDAW. These impose obligations upon states to realise women's right to access medicines. What are the determinant factors from the perspective of the TRIPS Agreement that either facilitate or stand in the way of the realisation of this right?

Accessibility refers to the physical availability of medicines as well as their financial affordability.[863] These components of access are interrelated. For instance, although physical availability may be affected by factors such as geographical locations and production capacity, price or affordability has a significant bearing on physical availability. Both of these components of access are affected by several factors, with patent protection being of particular importance.

The patent protection provided for by the TRIPS Agreement affects access to and, in particular, the affordability or price of medicines in two ways. Firstly, it has increased the scope of protection by introducing product patents.[864] In many developing countries, patents are not applicable to food and

[863] Hassim et al (note 207 above) 438. Sampath (note 200 above).
[864] Ibid 259.

pharmaceutical products.[865] India is a good example in this regard. While the process of manufacturing the particular medicine or food product may be patented, the medicine or food itself cannot be patented.[866] The patent protection provided under TRIPS now extends to products, and as a result, medicinal products now enjoy patent protection. Secondly, the agreement has increased the length of patent protection.[867] It provides 20 years of protection for exclusivity for the patent holder. During this period competition is excluded, which may lead to higher prices. It has in effect created exclusive rights for patent holders over medicinal products for a longer period of time. This effectively eliminates competition or the production of generic substitutes, which leads to price hikes of patented medicinal products.[868] In developing countries, the high prices resulting from patent protection have seriously compromised the abilities of communities and governments to manage infectious and others diseases effectively.[869]

From a gender perspective, the effect of patent protection on the price or affordability of essential medicines is significant. This is because the medicines or drugs important for women's health needs – especially in relation to HIV and AIDS, and also reproductive health – are patented. With regard to HIV and AIDS, the available data shows that the availability of the anti-retroviral treatment drugs (ARVs) is affected by patent protection. A study conducted in relation to ARVs shows that patent protection in a country is associated with price increases.[870] In South Africa, for instance, the

[865] P Ranjan 'International Trade and Human Rights: Conflicting Obligations' in T Cottier et al (eds) *Human Rights and International Trade* (2005) 313.
[866] Ibid 313.
[867] It should be noted that some developing countries had shorter periods, while some had longer periods of protection; for example, 16 years for South Africa.
[868] Evidence from different countries is mixed, due to the interference of other factors including at the local/national policy level. But the potential for price hikes is a strong and real one. Sampath (note 200 above).
[869] Musungu (note 204 above) 306-7.
[870] Lucchini et al, cited in Sampath (note 200 above) 264.

high price of medicines, which is caused by patent protection, sometimes counts as the only or the most significant barrier to accessing medicine.[871]

A similar fear exists in relation to medicine necessary for the reproductive health needs of women. Although it is not clear whether many reproductive health medicines are patented at present, there is still a danger in this respect as more and more essential medicines are getting patent protection.[872] The price rises induced in part by patents make women more vulnerable due to their gendered needs. It is therefore apparent that patents in practice may have the potential to disadvantage women disproportionately. It is also fair to say that the strengthening of patent protection under TRIPS has had the effect of limiting the enjoyment of women's right to health[873] as set out in different instruments.

3.2.4.1.4 The positive aspect of TRIPS

States can take a number of legislative and regulatory measures to facilitate women's access to essential medicines. Among them, legislative measures are recognised as one means of realising the obligations imposed by the right to health. The Committee on Economic, Social and Cultural Rights has stated that in many instances legislation is highly desirable, and in some cases indispensable, in fulfilling state obligations.[874]

These measures mainly affect the price of patented medicinal products. Such measures include introducing competition while the drug/s in question

[871] Hassim et al (note 207 above) 441. To substantiate this claim, according to Adila Hassim et al, the expiry of a patent which paved the way for the introduction of competition in the form of generics led to a 50 percent reduction on the price of a particular medicine, fluconazole. Ibid 449.
[872] Sampath (note 200 above) 266.
[873] Musungu (note 204 above) 307.
[874] Ibid 303.

is/are under patent[875] and introducing competition in the form of alternative generics immediately after the expiry of the patent.[876] The important question is, how do these regulatory measures of states fare in light of the TRIPS Agreement?

As pointed out above, the agreement has important flexibilities that facilitate access to essential medicines. It is argued in some corners that they afford states sufficient policy and regulatory space to overcome the hurdles of patent protection in fulfilling state obligations to ensure access to essential medicines. These flexibilities come from the agreement's objectives and guiding principles, which together aim to strike a balance between the rights of inventors/creators and those of the public. They further derive from the Doha Declaration on the TRIPS Agreement and Public Health and the WTO Decision on Paragraph 6. Let's briefly examine them, so as to determine whether they indeed provide the necessary policy space for states to legislate laws and regulations to pursue their obligations vis-à-vis the right to health.

- **Article 8 principles**

Article 8 of the agreement enshrines the principles underlying TRIPS. This article, which clarifies how the obligations under TRIPS may affect the freedom of states to handle public-policy issues, came about as a response to the expressed fear of developing countries.[877] These countries were worried at the time of the negotiations that TRIPS might limit their ability to pursue public-health policies by restricting the space in which to do so. Article 8 allows states to adopt measures necessary to protect public health when

[875] Hassim et al (note 207 above) 447. Sampath (note 200 above). The reference here is to compulsory licensing and parallel importation.
[876] Hassim et al (note 207 above) 449. Sampath (note 200 above). The main reference here is to the Bolar exception.
[877] NP de Carvalho *The TRIPS Regime of Patent Rights* 2 ed (2005) 137.

formulating and amending their laws in the field of intellectual property.[878] It is said to afford states the policy space to take such measures, and it is up to the states to make use of this space in their laws and regulations.

- **Article 30 exceptions to patent rights conferred through patent protection**

Article 30 of the TRIPS Agreement allows states to derogate from the exclusive rights or protections given to the patent holder so as to utilise the invention without the permission of the patent owner. It thus provides an exception to patent rights. This article is a typical illustration of how TRIPS attempts to balance the interests of the patent holder for protection with those of the general public to make use of the patented product. Instead of defining the nature and extent of the permissible exceptions, the article provides a general test to be used to determine their admissibility.[879] The tests are: the exception must be limited, it may not unreasonably conflict with the normal exploitation of the patent, and, finally, it may not unreasonably prejudice the interests of the patent owner, taking into account the legitimate interests of third parties.[880]

From state practice as well as the jurisprudence of the DSB of the WTO, one can discern certain exceptions which are most commonly invoked on the basis of Article 30. These are examined below.

ii. Early working exception/ Bolar exception

[878] Article 8 of the TRIPS agreement.
[879] S Musungu & C Oh 'The Use of Flexibilities in TRIPS by Developing Countries: Can They Promote Access to Medicine?' Study for the Commission on Intellectual Property Rights, Innovation and Public Health (2005) 32.
[880] Article 30 of the TRIPS agreement.

This exception allows the use of a patented product for the purpose of obtaining approval of a generic product before the expiry of the patent protection.[881] This exception is significant in terms of facilitating access to essential medicines. This is because it facilitates the marketing of a generic version immediately after the expiry of the patent.[882] Because the introduction of a generic alternative takes time,[883] price may still stand in the way of accessing a particular drug even after its patent has expired. The use of this exception is said to speed up the approval of generic competition by as much as three years.[884]

This exception is particularly important to those developing countries with the potential to produce generic medicines. It is equally important for countries that may not have the capacity to produce, because such an exception would enable the products of a foreign company to enter their markets soon after the expiry of the patent.[885]

Although the exception has been used in the national laws of a number of developing countries, many African countries have not included it in their domestic legislation.[886] South Africa is one of those that has done so. The Patent Act, in Section 69A, provides that the making and use of a patented product on a non-commercial basis and for purposes of obtaining registration under any law that regulates the manufacture, and sale of the product shall not constitute infringement of the patent. This section was introduced into the Act as an amendment in 2003.[887] It is in line with the

[881] Musungu & Oh (note 229 above) 33.
[882] Ibid 33.
[883] Hassim et al (note 207 above) 449. One must take research, testing and registration into account … all of which need to be satisfactorily done prior to the introduction of a generic alternative of a patented drug.
[884] Musungu & Oh (note 229 above) 33.
[885] Ibid 34.
[886] Ibid 33.
[887] Hassim et al (note 207 above) 461.

TRIPS Agreement flexibility which allows for regulatory exceptions, such as those for the purpose of research and registration.

The section allows generic companies to register their medicines early so as to sell their products as soon as the patent in question expires.[888] Without the flexibility provided by the TRIPS Agreement, introducing cheaper medicines immediately after the expiry of a patent would not have been possible.

iii. Exceptions for research or experimental use

Another exception which squarely fits in to the requirements of Article 30 is the use of a patented product for research and experimental purposes. This does not constitute an infringement of the rights of the patent holder. Like the previous exception, the research exception is an attempt to balance the interests of the patent holder for protection with those of the general public to make use of the patented product. This is by far the most commonly used exception to patent rights in the national laws of many developing countries.[889]

Commentators suggest that Article 30 of the TRIPS Agreement gives considerable space for states to make use of their national laws so as to advance access to essential medicines and the right to health. The fact that the article does not define the nature or types of permissible exceptions, but rather gives general guidelines, implies that states are left with a fairly wide margin of freedom to devise those exceptions so as to advance their public-health policy goals.[890] However, a study of national laws of many developing

[888] Ibid 461.
[889] Musungu & Oh (note 229 above) 34.
[890] Ibid 34.

countries reveals that the room left by Article 30 has been used only in a limited manner.[891]

- **Article 31 Other use without the authorisation of the patent holder**

Aside from the exceptions for patent protection enshrined under Article 30 of the TRIPS Agreement, Article 31 provides for certain cases whereby patented inventions can be used without the authorisation of the patent holder. This is the case of compulsory licence. Two categories of users that can make use of the patent without the consent of the holder are envisaged under Article 31: a state's government and third parties authorised by the government.[892] Some commentators argue that there is no practical distinction between these two. In both cases, the conditions for using of the patented invention remain the same.[893] According to Carvalho, both constitute cases of compulsory licence. Others argue that there is a possibility for government use of patents without the need to grant compulsory licence.[894] According to Musung and Oh, Article 31 envisages both possibilities: compulsory licence and government use without licence. For them, practical differences arise from the two scenarios. In order to address and capture these differences, I will discuss the implications of each as follows.

i. Compulsory licence

Compulsory licences can play a crucial role in ensuring that patent laws are able to meet public-health needs, including access to essential medicines.[895]

[891] Ibid 34.
[892] Article 31 of the TRIPS agreement.
[893] De Carvalho (note 227 above) 315-316.
[894] Musungu & Oh (note 229 above) 20.
[895] Ibid 16-17.

Compulsory licensing allows for the production of generic medicines by third parties without the consent of the patent holder. This introduces competition in the market as it allows the production of generic medicines while the medicine or drug in question is still under patent. The introduction of these cheaper alternatives increases access by tackling the barrier of high prices. There are, however, certain procedural requirements that should be fulfilled in order to make use of this flexibility. These are listed under Article 31 of TRIPS, and some may prove to be burdensome to developing countries. Among them, the payment of adequate compensation to the patent holder stands out.[896] Many of the developing and least-developed countries may find this financially burdensome.

The agreement lists certain possible grounds that may warrant the issuance of a compulsory licence. Article 31 states that a national emergency, situations of extreme urgency, a measure to remedy anti-competitive practice, and public and non-commercial use of patents as some of the grounds for compulsory licensing. This list, however, is not exhaustive. This has been reaffirmed in the Doha Declaration on TRIPS and Public Health, which categorically recognises the right of each member state to grant compulsory licence and asserts the freedom to determine the grounds upon which such licences are to be granted.[897]

Given that the permissible grounds are not explicitly defined and delineated in Article 31, developing countries are left with wide discretion when designing public-health compulsory-licence laws.[898]Accordingly, grounds such as public interest, which includes public health, may be included. Within this parameter, it may be possible for countries to include the need to ensure availability and affordability of medicines as a legitimate ground for issuing

[896] See the list of conditions under Article 31 of TRIPS.
[897] Para 5(b) of the Doha Declaration on TRIPS and Public Health. Declaration on the TRIPS Agreement and Public Health WT/MIN(01)/DEC/2 20 November 2001
[898] Musungu & Oh (note 229 above) 16.

such licence.[899] From a gender perspective this flexibility is significant. It allows governments to address gender-specific illnesses related to reproductive health which, however, may not necessarily qualify as 'national emergencies' in terms of numbers or gravity.[900] TRIPS already identifies public-health crises, including those related to HIV and AIDS, as legitimate grounds to initiate compulsory licensing. This also serves the interests of women as they are disproportionately affected by the virus.

Another major flexibility under compulsory licensing relates to the amendment of the TRIPS Agreement that enables countries with limited manufacturing abilities to make use of the compulsory-licensing provision. Given that Article 31 requires that the production of patented products under compulsory licensing be predominantly for domestic use, this flexibility would have proved useless for countries lacking the requisite manufacturing capacity. To rectify this, an amendment was introduced in December 2005 which allows certain eligible countries that do not have the manufacturing capacity to import cheaper generics made under compulsory licensing in other countries. Rwanda has become the first country to inform the WTO that it is making use of this particular flexibility.[901]

The national laws of most developing countries provide for compulsory licence. According to Musungu and Oh, in the majority of cases it is broadly framed public interest that is used as a ground for granting compulsory licence. This, as mentioned above, gives wide discretion for countries to construe their laws in a manner that takes account of their health-policy needs, including access to medicine.

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[899] Ibid 13-14.
[900] M Williams 'The TRIPS and Public Health Debate: An Overview' IGTN (2001) 6.
[901] See 'Patents and Health: WTO Receives First Notification Under 'Paragraph 6' System' <http://www.wto.org/english/news_e/news07_e/public_health_july07_e.htm> 14/09/2007.

In South Africa, for instance, compulsory licensing is dealt with in both the Medicines Act and the Patent Act. The Medicines and Related Substances Control Amendment Act 90 of 1997, in Section 15, provides the Minister with powers to prescribe conditions for the supply of more affordable medicines. In pursuing this objective, the Minister is allowed to override exclusive rights of patent holders. Falling into this category is the issuance of compulsory licensing.[902]

One circumstance giving rise to the issuance of compulsory licensing is the state use of patented products for public purposes. This is provided for under Section 4 of the Patents Act. The term 'public purpose' is a very broad[903] category that can include any measure the government deems fit in carrying out its obligations towards ensuring access to essential medicines. This gives the government sufficient regulatory space to increase access to essential medicines. This broad category is in line with the TRIPS Agreement, which does not limit the reasons for which governments may grant compulsory licences.[904] The agreement therefore complements government obligations to ensure access to essential medicines.

ii. Use by government

The concept of use by government of patented inventions without the authorisation of the patent holder arises under Article 31(b) of the TRIPS Agreement. The reference in this article to the concept of public, non-commercial use and patents used by or for the government implies recognition of use by government without the consent of the patent holder.[905] The interesting contribution of this concept under Article 31 is that

[902] There is, however, controversy and a general lack of clarity as to the exact scope and content of the powers conferred by this provision. See Hassim et al (note 207 above) 453.
[903] Ibid 459.
[904] WTO & WHO (note 199 above) 45.
[905] Musungu & Oh (note 229 above) 20.

it shows that governments can make use of a patented invention without the need to issue compulsory licence. In both cases, the use of the patent is without the consent of the patent holder, but there appears to be a distinction between compulsory licence and use by government.

According to Musungu and Oh, the main distinction between use by government and compulsory licence lies in the nature or purpose of the proposed use of the patent. They argue that 'in case of government-use, it would be limited to "public, non-commercial" purposes, whereas compulsory licences would also cover private and commercial use'.[906] The advantage of this distinction lies in the fact that, since the meanings of 'public' and 'non-commercial' use are not defined in the TRIPS Agreement, the phrase would give developing countries a fair degree of space to interpret these terms to suit their public-health-policy objectives.[907] A very good example that Musungu and Oh give that could fall within the broad interpretation of public, non-commercial use is the purchase of antiretroviral medicines for distribution through public hospitals without commercial benefit. This is quite significant from the perspective of improving access to essential medicines for the poor, the vulnerable and women. It could, perhaps, fall under the category of the obligation to fulfil under the right to health. This exception of use by government has additional procedural advantages. Unlike under compulsory licensing, in the case of government use of patents, the requirement of prior negotiations with patent holders will be waived. This allows for speedy action, which allows for the use of patents to be fast-tracked.[908]

- **Article 6: parallel importation**

[906] Ibid 21.
[907] Ibid 21.
[908] Ibid 21-22.

Parallel importation refers to the importation of a patented product from a country where it is marketed at a lower price with the consent of the patent holder.[909] According to Hassim et al, there are several reasons why a patented product may be sold at different prices in different countries. For example, if a generic alternative is available in a country, the resulting competition may result in a lower price for the patented product. But in a second country, where the generic alternative is not available, the price of the patented product could remain high due to a lack of competition, even if that product is not patented in the second country. So the second country would benefit from the low price of the patented product selling in the first country by making use of parallel importation.

It is under Article 6 of the TRIPS Agreement, which deals with exhaustion of patent rights, that parallel importation is addressed. Exhaustion of patent rights is further clarified in the Doha Declaration on the TRIPS Agreement and Public Health to the effect of giving states the discretion to establish their own regime to exhaust the protection of patent rights. It is provided that 'each member is free to establish its own regime for such exhaustion without challenge'.[910] The ultimate aim of this provision is to make the patented medicine or drugs available at a lower cost. To this end it increases access to essential medicines.

3.2.4.1.5 TRIPS flexibilities and the right to health from a gender perspective

It is true that these flexibilities have the potential to benefit women. This is a logical conclusion in that, if the absence of the flexibilities amounts to disproportionately disadvantaging women, its availability should be advantageous to women. The question here is, does this outcome make the

[909] WTO & WHO (note 199 above) 45. See also Hassim et al (note 207 above) 448.
[910] This is subject to the general MFN and NT requirements. See the Doha Declaration on TRIPS and Public Health.

flexibility a mere gender-neutral rule or something more – a rule that promotes gender equality?

The fact that these flexibilities do indeed make it possible for governments to design appropriate policies to facilitate access to essential medicines may be advantageous to women, because it implies that more women may have access to essential medicine than would be the case without the flexibilities. As discussed earlier, access to essential medicines viewed from the perspective of gender equality implies that both men and women have equal access to all medicinal resources required to realise their respective health needs. Since the flexibilities will contribute to increasing women's access and could possibly lead to equal access, it is possible to argue that TRIPS flexibilities may contribute towards promoting gender equality with respect to access to essential medicines.

3.3 Conclusions to Part I

Two gender issues that arise in relation to international trade regulation have been identified in this study. These are the effect of trade regulation on poor women and its effect on the reproductive role of women. In particular, for women in developing and least-developed countries, it has been shown that international trade regulation may have adverse effects. The limitations placed on states' financial and policy-making capacity may indirectly violate the socio-economic rights of women, mainly through obstructing the creation of the necessary environment for the advancement of these rights.

This outcome, however, is out of line with the stated objectives of the trade regime – or at very least, with two of those objectives: sustainable development and the raising of standards of living. These require of the trade regime to address the adverse impacts of trade on women. One way of addressing these issues is to

link the objective of gender equality to the trade regime, and part I of this chapter attempted to make that link. Based on the stated objectives, of the regime, in particular sustainable development and the raising of standards of living, part I of this chapter has attempted to show how the trade regime may contribute to influencing gender equality positively.

Apart from contradicting the stated objectives of the regime, adverse impacts of trade on the socio-economic rights of women seriously affect its legitimacy. This is because its legitimacy depends in part on the efficacy of its decisions and measures in furthering the interests of those affected by the system. It is further determined by the extent to which its decision-making processes accommodate the voices of those affected by its operations. As discussed in earlier chapters, the trade regime fails on both counts. The distributive consequences of its decisions adversely affect the socio-economic rights of women, and its decision-making procedure is devoid of any meaningful gender-oriented participation. What can be done within the legal and institutional structures of the regime to address these problems, and thereby to protect its legitimacy? Part II of this chapter discusses this issue.

4. PART II: THE LINKAGE OF GENDER AND TRADE FROM THE PERSPECTIVE OF LEGITIMACY

4. 1 Introduction

As defined in Chapter II, legitimacy measures the quality of an institution's norms, rules and principles vis-à-vis society's expectations.[911] It has two dimensions. The input dimension focuses on the process of decision making,

[911] C Reus-Smit 'International Crisis of Legitimacy' (2007) 44 *International Politics* 157.

while the output dimension measures the effectiveness of the decisions.[912] Legitimacy in the linkage framework assists in answering the question regarding the role and purpose of the trade regime. The legitimacy issues of the regime come from the challenges it is facing in terms of its decision-making processes as well as the distributive consequences of its decisions. To salvage its legitimacy, the regime needs to identify participatory and inclusive ways of decision making, as well as address the undesirable distributive consequences of its decisions. This would help to shape the role and purpose of the trade regime in contemporary times.

The distributive consequences of the decisions of the WTO from a gender perspective have been discussed in depth in Chapters III, IV and V. The discussion has shown how poor women are highly adversely affected by the operations of the regime. Similarly, it is shown that the trade regime adds to the burden of the reproductive roles of women, and further fails to take account of the contributions of the reproductive sector to the productive economy. Given that the legitimacy of the trade regime demands that it addresses the concerns of those whose interests are affected by the operations of trade, the regime is required to deal with these gender concerns arising from its operations.

4.2 Output legitimacy: gender and the distributive consequences of trade liberalisation

As briefly outlined above, the distributive consequences of trade on gender equality are questions of output legitimacy. The measures necessary to address these output concerns are discussed in detail in part I of this chapter, which has attempted to show the role that the regime can play in promoting the socio-economic conditions of women through the operations of trade. Accordingly, through its contribution to human development and to raising people's standard of

[912] M Elsig The World Trade Organization's Legitimacy Crisis: What Does the Beast Look Like? (2007) (41) *J of World Trade* 75 83-88.

living, the regime can contribute to improving the lives of poor women as well as ease women's burden in the reproductive sector.

The issues surrounding legitimacy don't end here. As discussed in Chapter II, input and output legitimacy are very much related. Defects in one aspect feed into the other. In line with this, it is argued that the adverse distributive effects of WTO decisions – issues of output legitimacy – are in part attributed to its decision-making and working procedures – input dimensions of legitimacy.[913] A similar assessment has been made from a gender perspective. In this regard, Chapter III has highlighted how decision-making processes and structures of the WTO do not reflect adequate gender representation. As a result, the decisions undertaken by the regime may not only be indifferent to the interests of women, but also become harmful. This raises the need to examine ways of making the decision-making processes of the trade regime gender sensitive.

4.3Input legitimacy in the trade regime of the WTO: a gender perspective

As the focus in input legitimacy is on the decision-making structures and procedures of the trade regime, the focus in the remainder of this chapter will be on the governance aspect of the regime. The main question here is how to make these processes and procedures participatory and representative, especially from a gender perspective.

A number of measures can be considered here. These include recognition of gender equality and gender-mainstreaming goals within the regime, the establishment of a structure within the trading system to address gender issues, and the use of existing structures and operational mechanisms to address gender issues.[914] Further, giving voice to gender-interest groups and NGOs, and

[913] AB Zampetti 'Democratic Legitimacy in the World Trade Organization: the Justice Dimension' (2003) 37 *J of World Trade* 105, 116.
[914] These are all recommendations that Williams makes for purposes of mainstreaming gender into the multilateral trade system. See Williams (note 39 above).

collaboration with other international organisations, such as UN agencies working on gender issues, are equally important ways of enhancing input legitimacy. Let's briefly discuss what some of these proposals entail, and how they can be implemented in practice.

4.2.1 Gender mainstreaming in the trade regime

Recognition of gender equality and gender-mainstreaming goals within the trade regime has both substantive and procedural implications. In the substantive aspect, gender mainstreaming has the capacity to influence positively the distributive contents or outcomes of decisions. This is because it basically entails identifying and addressing the relevant gender perspective in every aspect of the activities of an organisation. Adverse gender impacts would therefore be minimised and positive gender impacts boosted. Procedure-wise, also, it can open avenues for more adequate gender representation.

There are certain justifications that call for the adoption of a gender-mainstreaming strategy in the work of the trade regime. Firstly, there is a need to bring about equal participation of women's representation. Secondly, it is important to include gender dimensions of issues discussed in negotiations so as to understand how these issues affect women differently in different parts of the world. Thirdly, because the WTO affects domestic policy making and, further, trade regulation is no longer limited to trade activities and has impact on a wide range of issues including gender, analysing the gender impacts through gender analysis becomes indispensable. Finally, mainstreaming has the potential to reconstruct the very understanding of the mainstream thinking by looking it through a gender lens. This is because mainstreaming gender in various different policy areas reflects the acknowledgment that gender equality cannot be achieved without changes in a wide variety of policies.[915] In the context of development-

[915] V Staveren 'Gender Indicators for Monitoring Trade Agreements' in Van Staveren et al (eds) *The Feminist Economics of Trade* (2007) 257, 257-276.

policy making, for example, the implication of taking a gender mainstreaming approach is that it would lead to the transformation of the mainstream idea of development. On the same note, a gender mainstreaming strategy in the trade regime may bring about a reconstruction, responsive to the interests of women, of the purpose as well as underlying principles of the trade regime.[916] In what follows, the discussion will focus on the meaning of gender mainstreaming in general and in the context of the work of the trade regime.

Gender mainstreaming is a product of the gender and development discourse, which in turn resulted from the various gender-targeted policy interventions, especially in developing countries, and the history of women's movements around the world.[917] The late 1980s and the 1990s witnessed worldwide changing economic realties. The changing world economic order was characterised by restructuring, heightened international competition and rapid advances in technological innovations.[918] The new economic realities induced changes in policies such as structural adjustment, deregulation of markets, privatisation, reduced barriers to trade, reduced tariffs and free-trade areas.[919]

The political and policy responses had their own ramifications in the lives of women in different parts of the world. For instance, in many developing and least-developed countries, with the cuts in social spending, the burden or cost of meeting social needs has fallen on women.[920] Export-led industrialisation, especially in Asia, has contributed to the growth of low-wage employment for women.[921] The existence of winners and losers from the new economic order was recognised early and policy responses were designed accordingly.

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[916] This is precisely what the linkage framework proposed in this study attempts to do – to reconstruct the purpose and role of the trade regime from the perspective of the interests of women.
[917] MP Connelly et al 'Feminism and Development: Theoretical Perspectives' in JL Parpart (ed) *Theoretical Perspectives on Gender and Development* (2000) 51.
[918] Ibid.
[919] Ibid.
[920] Ibid.
[921] Ibid. The real value of the jobs, however, is often questioned as they are characterised as low paying and often come with harmful working conditions.

In the context of gender and trade, two lines of policies were devised. The first set are policies and programmes aimed at alleviating the negative impacts of trade, and the second set aimed at facilitating women's entry into the market.[922] These policies were based on the Women in Development (WID) approach which focused on targeting the practical needs[923] of women through specific policies and programmes. Practical needs or interests respond to the immediate perceived necessities of women, which are identified in a specific context, such as limited access to services. According to this approach, the preoccupation was with how to make women beneficiaries of the opportunities of the trading system. So it merely tried to address the exclusion of women from participation in formal/public markets. It thus did not go so far as to ask why and how women could be disadvantaged by the system, and thus failed to address the structural causes of women's subornation in and through the system.

The Gender and Development (GAD) approach replaced WID in the early 1990s. GAD focused on the socially constructed relations between men and women, with a particular focus on the subordination of women.[924] The unequal power relations between men and women that in turn prevent equitable development and women's participation in development were diagnosed as problems.[925] One of the strategies employed by the GAD approach attempts to identify and address the practical needs, as determined by women and men, to improve their condition. It goes a step further and addresses the strategic needs of women[926] which reflect the underlying causes of women's subordination, such as gender division of labour, and are responsible for shortfalls in their practical needs. This strategy serves to understand gender roles and relations of unequal power incorporated

[922] See Z Randriamaro *Gender and Trade Overview Report* BRIDGE (2006) 30.
[923] There are some distinctions drawn between what are called practical and strategic needs of women. In relation to practical needs, the focus is on immediate needs; with strategic needs, the focus is on addressing underlying gender inequality problems. See C Moser *Gender Planning and Development: Theory, Practice and Training* (1993).
[924] Connelly et al (note 267 above).
[925] Ibid.
[926] Ibid.

into the design and implementations of policies. This, in turn, embraces the process of gender mainstreaming.

Gender mainstreaming is defined as

> ... 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.[927]

In the context of gender and trade, this approach requires recognising that women and men are not equally positioned with regard to international trade processes and therefore are not equal participants or players in the system. This necessarily implies that international trade has a differential impact on women relative to men, in terms of both the distribution of its potential benefits and the adverse impacts.[928] Therefore the main challenge is to identify the linkages between gender inequality or gender relations and the international trade process. This in turn would help us to identify the various causes that disadvantage women in and through trade, and further address these challenges. Mainstreaming does precisely this. In what follows some of the modalities for mainstreaming gender in the trade regime will be examined.

The first action in mainstreaming gender in the trade regime involves the development and adoption of an explicit statement or goal on gender equality and gender mainstreaming. This is an essential precondition for changes in policies,

[927] United Nations Economic and Social Council (ECOSOC) *What is Gender Mainstreaming*? Report of the Economic and Social Council for 1997 (A/52/3, 18 September 1997).
[928] Randriamiaro (note 272 above) 30.

procedures and interventions.[929] Although it is often observed that the existence of good gender policies doesn't guarantee implementation,[930] in a system like the trade regime, where a gender agenda doesn't surface at all, explicit gender statements become indispensable starting points. This strategy has important advantages. Firstly, it plays a role in terms of introducing gender concerns to the regime and familiarising staff with the issues. Secondly, it sets in motion the necessary institutional requirements in terms of resources and staff for meeting this goal.

Experiences from similarly situated financial institutions like the World Bank may provide insights on strategies for gender mainstreaming in the WTO. One strategy used in the bank is to use its own area of focus or specialisation, ie economic efficiency, as a framework for gender issues.[931] This involves packaging gender-equality concerns in the language, method and theories advanced by the bank; for example, presenting evidence that investing in gender equality has huge economic returns.[932] Based on this experience, gender-equality goals in the trade regime can be framed in terms of its own language and theories;[933] for instance, gender equality as an indispensable aspect of sustainable

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[929] C Hannan 'Gender Mainstreaming in the World Bank: Identifying the Potentials and Challenges' Presentation at a panel organised by the World Bank as a side-event to the 46th session of the Commission on the Status of Women (2002).

[930] There is, in fact, an argument against a gender clause because it is believed to be a weak accountability mechanism to ensure consideration of gender issues in the activities of the regime. See M Riley 'Gender, Economics and Advocacy Symposium on Gender and Trade Liberalization; Global-local Processes and Gendered Impacts in Asia and Beyond South Asia' Research Center, City University of Hong Kong 2005 3-4, at <http://www.cityu.edu.hk/searc/Gender_Trade/august22am/Maria%20Riley_revised.pdf> 22/09/08. However, a gender clause supplemented by other strategies, such as persuasion via proof and strategic framing (discussed below), can be successful in introducing gender to the gender-blind framework of the WTO.

[931] C Weaver *The Strategic Social Construction of the World Bank's Gender and Development Policy Norm Agenda* Paper presented at the International Studies Association Annual Meeting, San Francisco (March 2008) 7-13. Weaver analyses persuasion via proof and strategic framing as two examples of gender-mainstreaming strategies in the World Bank. The former uses the tactic of persuasion based on proof that gender equality has economic returns, while the latter, based on the proof, packages gender issues in the language and theories of the bank.

[932] Ibid 7-13.

[933] Some feminist scholars are wary of this strategy because it may lead to a focus on limited aspects of gender in/equality. For instance, Rittich argues that the focus on education and employment as part of economically empowering women may detract from investments in other

development. Similarly, gender analysis in trade can help open up more market opportunities. This is typically the case when it comes to sectors such as manufacturing. Gender analysis shows that it is cheap female labour that has been the driving force in the expansion of the sector, particularly in Asia.[934] Stichele refers this as the efficiency argument.[935] She argues that there is a need to assess equal benefits of trade rules and measures to women and men alike.[936] Where the benefits are skewed, other measures and accompanying polices need to be explored.[937] This ultimately increases the overall gains from trade; hence the 'efficiency argument'.

Two avenues must be pursued simultaneously to mainstream a gender agenda in the trade regime successfully. These focus on the operational aspect and the institutional aspect. The operational aspect mainly involves factoring gender into policies, rules and measures, as well as dispute-settlement outcomes. In effect, it calls for gender analysis to be carried out in the various actions of the regime. A gender analysis of trade liberalisation must include an understanding of the social and cultural construction of the roles and relationships between women and men, which continue to lead to gender inequality.[938] It should then investigate how these differences interact with trade rules and measures. This can be done through carrying out a gender-impact assessment which attempts to identify the harmful distributive consequences and identify areas in which women can benefit from

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aspects of inequality that are embedded in social relations and cultures. This, she argues, will end up redefining the priorities as well as the conventional human-rights-based understanding of gender equality. See K Rittich 'The Future of Law and Development: Second Generation Reforms and the Incorporation of the Social' in DM Trubek & A Santos (eds) *The New Law and Economic Development: Critical Appraisal* (2006). Others, in particular gender advocates in the World Bank, argue that this strategy is useful in opening the door for consideration of gender issues, without which they might not have the chance to be articulated in these gender-blind institutions. See Weaver (note 281 above) 12-14.

[934] See for instance M Fontana et al *Global Trade Expansion and Liberalization: Gender Issues and Impacts* 1998.

[935] See MV Stichele 'A Gender Analysis of Trade and WTO Rules: A Case Study of Ghana' Notes for a talk at the ICDA Conference on Trade, Environment and Gender (1998) 6-8.

[936] Ibid 7.

[937] Ibid 7-8.

[938] S Ruiz 'Engendering International Trade: Gender Equality in a Global World European Women's Lobby on Gender Aspects of International Trade and Globalization in General' (2000) 1-3 <http://www.swc-cfc.gc.ca/pubs/0662661974/200012_0662661974_e.pdf>10/11/08.

trade. A gender-impact assessment requires the use of sex-disaggregated data or statistics. The WTO has already started using sex-disaggregated data.[939] Such data in the areas of agriculture, industry and services have already been presented for discussion during negotiations in the WTO.[940] Similar data can be used for purposes of carrying out gender-impact assessments of WTO agreements.

The Trade Policy Review Mechanism of the WTO is another entry point that can be used for purposes of mainstreaming gender. According to Annex 3 of the Marrakesh Agreement, the purpose of the TPRM is to contribute to improved adherence by all members to rules, disciplines and commitments made under the multilateral trade agreements and consequently to the smoother functioning of the multilateral trading system, by achieving greater transparency in, and understanding of, the trade policies and practices of members.[941] Under objectives in Article A, the Annex states that the review mechanism enables the regular collective appreciation and evaluation of the full range of individual members' trade policies and practices, and of their impact on the functioning of the multilateral trading system.[942]

Although some argue that the trade-policy review focuses exclusively on how WTO rules have been implemented by governments and their impact on the multilateral trading system, there is room in the legal text for expanding the reach of the policy review. Article A (ii) states that the assessment carried out under the review mechanism takes place, to the extent relevant, against the background of the wider economic and developmental needs, policies and objectives of the member concerned, as well as of its external environment.[943] This may open the door for it to cover other ground, such as welfare and well-being, which form part and parcel of 'wider developmental needs, policies and objectives of the Members

[939] See WTO Background Data Press 167_6 Employment be economic activity WTO Services and Agriculture Negotiations Press 167 <http://www.wto.org/french/news_f/pres00_f/pr167_f.htm>21/11/08.
[940] Ibid.
[941] See Annex 3 of the Marrakesh Agreement.
[942] Ibid.
[943] Ibid.

concerned'. Based on this, is possible to formulate gender-aware country trade-policy reviews.

Coming to the institutional aspect of gender mainstreaming, one area of focus is the equal representation of women in WTO structures such as the DSB, various executive positions and even lower line staff. The absence of women in the decision-making structures of the WTO is likely to have some undesirable consequences.[944] For example, it makes it far less likely that the WTO will be presented with women's diverse experiences.[945] Childs also makes a case for more representation of women, arguing that international bodies have a professional development and training role for their employees, and therefore it is critical that these bodies strive to ensure equitable access to such opportunities for women.[946]

The institutional aspect of mainstreaming also calls for the establishment of a gender structure, such as a gender committee or desk, which works in collaboration with other existing committees, such as services, goods and development.[947] This call is in line with the tradition of the WTO working procedure. Committees are forums within the institutional structure of the organisation, in which member governments discuss a range of issues. In addition, while some are issues in their own right, others cut across several WTO topics.[948]

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[944] It is important to note the opposing view: as has been pointed out repeatedly, the mere presence of women does not guarantee that gender perspectives will be brought to the work of any international institution, including the WTO. See M Childs 'Feminist Perspectives on International Economic Law' in AH Qureshi (ed) *Perspectives in International Economic Law* (2002) 168.
[945] Women's Environment and Development Organisation (WEDO) 'WEDO Primer: Women and Trade: A Gender Agenda for the World Trade Organization' (1999) at <http://www.wedo.org/files/genderagendaWTO_primer.htm> 09/11/07.
[946] Childs (note 294 above) 168.
[947] There are people who argue that a gender committee would be marginalised within the WTO, which would allow trade negotiators to ignore gender because it is not their task to deal with it. See Riley (note 280 above) 3-4.
[948] See WTO 'Understanding the WTO' <http://www.wto.org/english/theWTO_e/whatis_e/tif_e/tif_e.htm>22/11/08.

The important point to note here is that some of this discussion could lead to negotiations.[949]

In the context of the WTO, experience shows that these committees have served as the perfect entry points for introducing and articulating a non-trade issue, and bringing it into the workings of the WTO.[950] A gender and trade committee may well serve as a forum for dialogue among governments on the impact of trade policies on gender concerns. To enhance its effectiveness, the work of a gender committee should be complemented by continuous discussion of gender issues in every other committee, to ensure that gender issues do not become marginalised. This is also justified by the fact that gender is a cross-cutting issue.[951]

The participation of women's groups and NGOs has implications for input legitimacy. It helps to strengthen deliberation in decision making within the system.[952] There are some strategic entry points in the structures of the trade regime to give voice to women's groups and NGOs. One of these is the WTO Ministerial meetings,[953] during which various parallel meetings and events are held. These meeting are informative and introduce issues to the trade community, and their outcomes can be presented to WTO officials, which may positively influence their work.[954]

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[949] Ibid.
[950] A very good example here is the committee on trade and environment. Created in 1995, it is the standing forum dedicated to dialogue among governments on the impact of trade policies on the environment, and of environment policies on trade. See WTO 'Trade and Environment' <http://www.wto.org/english/tratop_e/envir_e/envir_e.htm>21/11/08.
[951] Gender could fit well into the work of the various committees, such as development, environment and others. This is because it is possible to construe the gender issues in trade in terms of development questions or environmental issues.
[952] Opposing an increased role for NGOs, some argue that in the international trade-law discourse there is no guarantee that NGOs will be more sympathetic to feminist concerns. See Childs (note 294 above) 169. Although this is a valid concern, experience has shown that there is an emerging alliance of NGOs working in gender issues in international trade. See S Hassanali *International Trade: Putting Gender in the Process Initiatives and Lessons Learned* (2000).
[953] Ibid 17. The Ministerial meeting of the WTO is the top decision-making body of the WTO, and can take decisions on all matters under any of the multilateral trade agreements.
[954] Ibid 17-18.

A very good example in this regard is the Informal Working Group on Gender and Trade (IWGGT) which was created during the WTO's Second Ministerial Conference. This group presented a study on gender analysis of WTO agreements, with particular emphasis on Ghana. The outcome of the study was presented to governments as well as WTO staff.[955] A similar influence of women's organisations on the work of the WTO can be found from the Women's Caucus which was created at the 1996 Ministerial meeting.[956] One of the recommendations of this caucus was the collection of a gender-disaggregated data in all WTO research and work.[957] Such data in the areas of agriculture, industry and services were later presented for discussion during negotiations in the WTO.[958] Hassanali, writing on the role of women's NGOs in the WTO arena, ascribes this as a victory for women's organising.[959]

4.3Conclusions: to Part II

It has been shown in Part II of this chapter that the legitimacy of the trade regime demands that it addresses the deficiencies arising from the distributive consequences of its actions as well as its decision-making structures. From a gender perspective, this can be achieved through a successful implementation of a gender-mainstreaming strategy in the regime. Gender mainstreaming has the capacity to influence the distributive contents or outcomes of decisions positively. This is because it results in identifying and addressing the relevant gender perspective in every aspect of the activities of the regime. As such, it fosters the recognition that women and men are not equally positioned vis-à-vis international trade processes, and therefore are not equal participants or players in the system. Accordingly, it would show that international trade has a differential impact on women relative to men, in terms of the distribution of both its potential benefits

[955] Ibid 17.
[956] ____ 'WTO is Gender Blind' Press release 12 December 1996 (1997) 5(1) *ICDA Journal: Focus on Trade and Development* 55-56.
[957] Ibid.
[958] WTO (note 289 above).
[959] See Hassanali (note 302 above).

and its adverse impacts. As far as decision-making procedures are concerned, it could open avenues for more adequate gender representation. Hence, gender mainstreaming can help bring about a reconstruction of the purposes, as well as underlying principles, of the trade regime in such a way as to render them responsive to the interests of women.

5. OVERALL CONCLUSIONS

The purpose of chapter VI has been to address the gender issues that arise in international trade by linking the objective of gender equality to the trade regime. To accomplish the chapter relied on the linkage framework established in chapter II. Accordingly, I argued that at least two of the stated objectives of the regime support consideration of gender equality concerns within the operations of the trade regime. These are the objectives of sustainable development and that raising the standards of living of people.

This chapter has shown that sustainable development in the WTO should mean human development, which is ultimately is about expanding individual freedoms. Human development has the potential to promote gender equality because it targets both intrinsic and instrumental freedoms which relate directly to the material conditions of women. Such an understanding of development in the WTO would entail on the regime the obligation to play both direct and indirect roles to enhance human development. These include the contribution of trade in stimulating economic growth, its contribution in eliminating impediments to reform aimed at enhancing human development at the domestic level; its role in building the capacity of states so as to enable them to make use of trade opportunities and to capitalise on the gains from trade; and, finally, through its contribution, to assist poor countries by prioritising those trade issues that are of concern to developing and least-developed countries where poverty abounds. The regime's contribution to human development through these and other measures would have a significant positive influence on gender equality.

Similarly, the regime's objective of raising people's standard of living implicitly refers to promoting the objective of gender equality. This is because raising standards of living in and through the trade regime implies that trade rules should create the necessary environment for states to produce and implement policies that can raise standards of living. These are policies aimed at improving the socio-economic rights of their people such as the right to health, access to medicines, and access to various sets of services. These policies directly affect the material conditions of women in their day to day lives.

Another ground for linkage, according to the linkage framework of Chapter II, is the legitimacy of the system. This chapter has shown that in order to protect its legitimacy, the regime is required to deal with issues of gender equality. Legitimacy problems from a gender perspective come from the decision-making processes as well as the distributive consequences of the decisions of the regime. To this end, the chapter proposed that the regime identifies participatory and inclusive ways of decision making, as well as address the undesirable distributive consequences of its decisions. The chapter concluded by advocating for two related mechanisms of implementing the gender-equality objectives of the regime. These are gender analysis and gender mainstreaming in the various activities and operations of the regime.

CHAPTER VII

CONCLUSIONS AND RECOMMENDATIONS

1. INTRODUCTION

There is increasing recognition that trade liberalisation and, generally, international trade regulation through the WTO and its various agreements can have differential impacts on different countries and among different sections of society within a country. Several factors determine the nature and degree to which the impact of trade liberalisation is experienced among different sections of society. The level of economic development of a country, geographic location, class, race and gender constitute some of the important factors. This study mainly uses gender as a factor for analysing the differential impacts of trade rules and regulation on women.

Increasing attention has recently been given to analysing how trade agreements affect women and men differently. It is now well recognised that gender differences in access to resources and services, the gender-based division of labour which puts household and reproductive responsibilities on women, and differential access to employment put women at a disadvantage relative to men in the implementation of trade rules. The implication of this is that a significant section of society is left behind or even harmed by the process of trade liberalisation. Adequate recognition of this fact in trade negotiations and the WTO

is important for meeting the goals of the trade regime, and in particular the development agenda of the Doha Round of negotiations, which is closely tied to poverty alleviation.

With this background, the central focus of the thesis has been to examine whether the international trade regime can promote the objective of gender equality. Three fundamental issues are addressed in the different chapters. Collectively they form the basis for answering this research question – whether the international trade regime can be utilised to advance the objective of gender equality. The first issue relates to the theoretical relationship between the two subjects – are gender-equality concerns and international trade regulation compatible, or are they fundamentally inconsistent in terms of their aims and objectives? In analysing this issue, feminist perspectives have been employed to investigate the underlying principles of the trade regime. The second issue is the interaction or intersection between the two fields at the empirical and legal levels. The question here is how the norms governing one regime relate to the norms of the other. Are there conflicts? Are they complementary? What does the empirical evidence on the ground indicate? When a state implements its obligations in relation to advancing gender equality, do its trade commitments in any way hinder or, alternatively, enhance the implementation of such objectives?

These two issues show a certain pattern as far as the relationship or interaction between gender and trade are concerned. The interactions show that trade regulation may adversely impact the objective of gender equality. This is particularly true as it relates to socio-economic dimensions of gender equality. This takes us to the third issue, which is the attempt to rectify these adverse impacts. This thesis looks into the possibility of utilising the trade regime to influence gender equality positively. It does this by locating gender-equality objectives within the broader goals and purposes of the trade regime, as determined by reference to the legal instruments and accounts of legitimacy of the system. Accordingly, I argue that the legal instruments of the WTO implicitly

identify gender equality as a legitimate goal of the regime. I further argue for the adequate consideration of gender concerns within the trade regime in order to protect its own legitimacy and credibility. These two arguments help frame the answers to the research question of the study. This chapter summarises the arguments and the findings of this study and outlines its conclusions.

Main arguments, findings and conclusions

This section intends to address the main arguments the well findings of the thesis. It analyses the findings of the research in light of the research questions. This study advocates for the reform of the trade regime – the legal as well as the institutional structures – to ensure that the regime is able to address social issues such as gender equality concerns. The study entertained the question regarding the possibility of reforming the system. It further argued for the necessity of such reform. Once the possibility and the need for reform were discussed in detail and argued for, the study went on to examine the obstacles or hindrances that may stand in the way of implementing the reforms. The discussion that follows thus will be a synthesis of the arguments and findings.

Reforming the trade regime: possible and necessary

Necessity of reform

Reforming the trade regime has been on the agenda of various stakeholders for a long time. Environmental, human rights, labour and various other groups have called for the reform of the system so as to ensure that the regime either positively contributes to these areas or at the very least it does not adversely affect these areas. The reform which this study advocates for is analyzed in a similar manner. The trade regime should be reformed first to do away with any adverse impacts that it may have on the lives and wellbeing of poor women. Second, the regime needs a reform so that it can be utilized as an instrument to advance gender

equality concerns. Is a reform of this nature possible? Is such a reform necessary to bring about positive changes in gender equality?

I will first begin by examining the necessity of reforming the system. Having established that there are adequate reasons that call for the reform of the system, I will then delve into examining the possibilities as far as a reform that is gender sensitive is concenred.

The necessity of reforming the trade regime from a gender perspective has been examined from two perspectives. These are legal and theoretical perspectives. The analysis has further been supported by empirical studies and the findings there from. From a theoretical perspective, the main question is what is the nature of the theoretical relationship between the international trading system and gender equality concerns? Further, are these two areas compatible or contradictory and if so, to what extent? The answers to these questions lay the ground as far as the necessity of reform is concenred.

The nature of the theoretical relationship seen from a feminist analysis or perspective shows that the trade regime as it stands is adversely affecting the interests of poor women in developing and less-developed countries of the world. Similar assessments can be made with regard to immigrants and women of colour in developed countries. This is substantiated by the following four major findings.

One; the presumed neutrality and objectivity of law and economics result in the absence of women's experiences and interests from the norms of trade law as well as its institutional structures. Two; given women's location in the reproductive sector of the economy and their reliance on state provision of services to help them shoulder their reproductive burdens, this advocated market-state dichotomy adversely affects their interests. Three; the discriminatory nature of the trade regime against third-world states, which is reflected in practices such as single undertaking and the fact that the special and differential provisions for developing

states are non-operative, may perpetuate poverty in the developing world. This has significant implications for the lives of women, because women constitute the majority of the poor in these countries and they experience poverty more severely than men. Four; the roles played by women in the reproductive sector of the economy, which goes unpaid and is a necessary element of all modes of production, help sustain the objective of free trade, while at the same time exploiting women.

The nature of the relationship between international trade and gender concerns which shows that the regime is adversely affecting the lives of poor women in developing and less developed countries shows that reforming the system is quite an urgent task. Reform is needed to do away with the adverse impacts of trade on the lives and wellbeing of women.

Examining the legal aspect of the relationship between the trade regime and gender equality concerns, a similar outcome is observed. The first inquiry here is to look at how states' obligations towards gender equality relate to or interact with their trade commitments. The main purpose is to assess the compatibility of trade commitments with state commitments to gender equality.

The findings from this analysis indicate that the latter are significantly affected by states' obligations arising from the trade regime. Trade commitments indirectly violate commitments to gender equality through limiting state policy space and/or the financial capacity of states. Policy space is affected by trade rules in four major ways. Firstly, trade may prohibit states from adopting certain types of policies which, although supportive of other policy objectives, are contrary to the rules of trade. Secondly, trade liberalisation creates pressures for competition, which may force countries to adopt policies which may not be supportive of other policy goals. Hence countries may opt for less regulation in areas such as labour, human rights and environmental protection in order to attract trade. Thirdly, and this point is very much related to the financial capacity of states, reduced fiscal

capacity which results from trade rules such as tariff reductions may indirectly limit policy options. This is because, although the trade regime may not prohibit a policy measure, states may not be able to afford to institute policies supporting other objectives. Finally, burdensome rules reducing fiscal capacity may further limit policy space.

The main finding from investigating the relationships between trade rules and various norms on gender equality is that trade rules indirectly violate state commitments to gender equality. This amounts to indirect discrimination against women. The principle of non-discrimination is one instrument that operationalises the concept of gender equality. It can be either direct or indirect. Indirect discrimination occurs when seemingly gender-neutral policies or laws lead to unintended and undesirable consequences that disadvantage women; this from the failure to analyse gender-based effects of the particular policies and laws in question. Accordingly, although trade agreements do not have overt gender-based exclusions disadvantaging women, when these agreements indirectly violate state obligations to gender equality, such commitments result in indirect discrimination against women.

To conclude, examination of the legal relationship between the two areas shows that trade agreements have the potential to and at times actually do violate principles of gender equality through indirect discrimination. This finding supports the need for reforming the system so as to ensure that trade norms do not indirectly discriminate against women.

Having established the reasons or justifications necessitating the reform of the trade system from a gender perspective, the question that follows is, is reform possible if so, how or what are the mechanisms?

Possibility for reform

Is reform of the trade regime a possibility? Can the reform be designed in a gender aware or gender sensitive manner? Reform of course may come in different forms. The reform that is envisaged in this study aims at making the international trade regime work for gender equality. Having this objective or aim in mind, the question is what form reform can accomplish this task? It appears that any gender aware reform requires questioning the very purpose of the trade regime and attempting to see if gender equality can be read as one objective or purpose of the regime.

One approach that makes it possible to question and define the purposes and objectives of the trade regime is the linkage mechanism. The linkage framework in the context of the trade regime is a framework that is used for analyzing the interactions between the so-called 'trade and' issues in international trade law. The 'trade and' debate forms the broader framework for analysing the interaction between trade and other issues – which may be issues affected by trade or issues affecting trade, and are generally referred to as non-trade issues. Where trade affects other issues, or vice versa, questions arise on how to go about managing these interactions. One such question is, should the trade regime have jurisdiction on these non-trade issues – should they be integrated within the trade regime, with the WTO as the overseeing authority?

At the outset, the issues that these intersections raise appear to be questions on the proper boundaries of the trade regime. Should, for example, trade law expand its boundaries to deal with environmental matters, human rights and gender issues? Although the boundaries of the trade regime are indeed at issue, the trade-non-trade interaction encompasses much more than that. I argue in this thesis that it is more a question of what the trading system is for, and what its purposes should be in contemporary times. This argument is necessitated by the very limited understanding of the boundary question, which in practice has been reflected in terms of a zero-sum contest between trade and non-trade values, and resolves their interaction by giving precedence to one issue over the other. Hence, where

trade law comes in conflict with human-rights protection, the way forward would be for either trade law or human-rights protection to trump the other. If, on the other hand, as I argue in this thesis, these interactions are to be seen as raising questions on the purpose and role of the trade regime in contemporary times, the focus would shift to maximising the goals in both areas without sacrificing one for the other. This implies that we are positioning the trade regime to play a role in maximising the goals in the so-called 'non-trade' issues, such as environmental and human-rights protection.

Having framed linkage as a question on the purposes of trade in contemporary times, the focus should be on defining the purposes of the trade regime. There are two sources that one can rely upon: legal sources as well as on accounts of legitimacy. Legal sources relate mainly to the various agreements of the WTO, in particular the establishing agreement. Legal doctrine shows that the purposes of an international organisation are found engraved in its founding instruments. In addition, these instruments delineate the power or competence allocation between an international organisation like the WTO and its members. The roles and purposes of the organisation would revolve around the competencies allocated to it.

The establishing agreement of the WTO is very rich in the lists of objectives of the trade regime. These objectives range from raising of standards of living to sustainable development, and ensuring that the economic needs of developing countries and, in particular, least-developed countries are given due attention in trade relations of states, which are not defined purely in trade terms. Hence they constitute objectives beyond trade liberalisation. In the various agreements of the WTO, too, non-trade issues have been given a prominent position in such a way as to establish that states can override their trade commitments to address these objectives. For instance, some of the exceptions, in particular Article XX of GATT and its counterparts in the other agreements, explicitly refer to non-trade concerns such as health and environment for due consideration in the conduct of

trade. Competence allocation through legal instruments may also be an avenue for addressing non-trade issues within the trade regime. Power allocation in legal instruments may not be clear and straightforward at all times. This opens the door for interpretation by the judicial body, the DSB of the WTO, which may either broaden or limit the reach of the trade regime into non-trade issues. The implication of this is that the legal instruments support broad objectives for the trade regime, and hence some of the so-called non-trade issues do indeed implicitly feature as part and parcel of the objectives the regime is meant to advance.

The purposes of the trade regime are in part determined by the expectations that various stakeholders have of it. Expectations derive from the quality that stakeholders and, generally, society ascribe to the trade regime's practices, norms, rules and principles. This constitutes the account of legitimacy. In recent times the legitimacy of the trading system has come under attack from those who argue that the regime is prioritising trade over other objectives in the face of interactions with objectives such as human rights and environmental protection. In addition, the effects of trade are not evenly distributed, and thus disproportionately impact certain sections of society. The decision-making procedures of the system are also under attack for lack of transparency and participation by all stakeholders. The former constitute substantive or input dimensions of legitimacy, while the latter constitute the procedural or input dimensions of legitimacy.

These challenges to the legitimacy of the regime are indicators of the kind of role that society wants it to play and the purposes it is meant to serve. This view is supported by a historical account of the regime. The legitimacy of the trade regime has been a major driver in shaping its purposes. The regime has served different purposes that society ascribed to it at different times. It has served as a bargain among states, whereby in exchange for open or liberalised trade policies, states would be able to provide various kinds of safety nets to minimise the dislocations resulting from international trade. This bargain, popularly referred to

as ‘embedded liberalism’, served well the geo-political environment prevailing at the time of the adoption of GATT in 1947 by advocating for social protection. Later on, social protection was replaced by a push for minimum state interference in market operations. Hence, with the advent of the WTO, the purpose and the task of regime was reformulated into limiting the role of the state in the market. Based on this historical account, I argue that it is possible to redefine the purposes of the regime to suit the demands of contemporary times and society.

The linkage framework is framed in terms of identifying the purposes of the trade regime in line with the demands of contemporary times. The thrust of the argument in that this framework lays down the possibility for examine the interactions between trade and non-trade issues in terms of the role the regime can play in maximising the goals in both areas, without sacrificing one to the advancement of the other. Accordingly, using the linkage framework, one can show that it is possible to read gender equality objectives as forming part of the objectives of the trade regime. The implication of this conclusion is that, possibilities exist mainly through the linkage framework in the WTO context for considering gender issues within the trade regime.

Mechanisms of reform

The previous sections have shown two important points as far as advocating for the reform of the trading system is concerned. These points relate to the reasons or justifications for reforming the trade regime from a gender perspective and secondly the possibilities for such a reform based on the history and practice of the trade regime. The sections above have shown that the trade regime by and large is found to be inimical to the interests of women especially poor women in developing and less developed countries. This phenomenon establishes the justification and necessity for pursuing the reform of the regime. The linkage framework through which the purposes or objectives of the trade regime can be

re-examined and re-defined set the possibility for reforming the system. The logical question that follows is how we go about implementing the reform.

The mechanisms of reform I advocate for in this thesis mainly rely on the linkage framework described above, in particular linking gender equality concerns and objectives to the trade regime. The linkage mainly takes the form of locating gender equality as one of the legitimate objectives or purposes of the regime. The thrust of this argument is that if one can successfully show that gender equality concerns indeed for part of the legitimate objectives of the trade regime, then this would have serious gender implications on the activities and operations of the regime in two ways. One: the design as well as operation of trade rules would take consideration of possible adverse impacts on gender equality. As such the negative consequences of trade liberalization can be effectively mitigated. Two: pro-active measures would be calculated in the design and implementation of trade rules to ensure that there will always be a positive outcomes towards advancing gender equality through these rules.

The main argument in the thesis is that gender equality, understood mainly in terms of the socio-economic rights of women, forms an important dimension of the telos or objectives of the trade regime. In particular, two of the stated objectives of the establishing agreement of the WTO – sustainable development and the raising of standards of living for all – support this conclusion. Similarly, in contemporary times, the effect of trade on the socio-economic situations of women in developing and less-developed countries require the regime to address gender-related concerns as legitimate objectives.

The objective of sustainable development in the preamble to the establishing agreement of the WTO should be understood to refer to human development.[960] This would allow including gender equality as an objective of the trade regime.

[960] It is important to note here that sustainable development can refer to three things: the situation of developing countries, the fate of future generations and the environment. In this section, much of the focus will be on the first aspect, along with the distributive aspect of development.

This is primarily because human development cannot be achieved without addressing gender inequality. Sen defines development as expanding the real freedoms that people enjoy.[961] Expanding human freedom depends on a number of factors. These include raising individual incomes; improving social and economic conditions, such as facilities for health care and education; and respect for political and civil rights. It is the combination of these factors that enhances freedom. It thus follows that poor economic opportunities; systematic social deprivation, such as inequality based on gender; the neglect of public facilities; and, generally, poverty constitute obstacles to individual freedom.[962]

The concept of human development is very relevant to addressing the interests of women that arise in relation to trade. This is because the areas of focus or emphasis in human development relate directly to the material conditions of women. For instance, freedoms such as the rights to be free from hunger, to education, to health and, generally, to social services are material conditions that determine women's quality of life. The lack of these freedoms significantly compromises human development. Statistics around the world, in particular in developing and less-developed countries, show that women do not fare well on these indicators of individual freedoms. Women are severely deprived due to a number of factors revolving around lack of access to resources and services, and their reproductive burden. Accordingly, targeting human development would have the potential to address the specific needs of women. Given the connection between human development and gender equality, an understanding of development in the WTO as human development forms the basis for placing or reading gender equality as a legitimate objective of the regime.

Coming to the objective of raising standards of living, this objective the trade regime implicitly recognises gender equality as an objective of the regime. It is close to the human-rights standard of an adequate standard of living, which is

[961] A Sen *Development as Freedom* (1999) 1.
[962] Ibid.

enshrined in various global human-rights instruments, such as the UDHR, the ICESCR and CEDAW, as well as regional human-rights instruments.

The right to an adequate standard of living is a central right in the ICESCR. This is because most of the socio-economic rights in the covenant are derivatives from this core right.[963] They can be regarded as detailing various aspects of the right to an adequate standard of living.[964] Accordingly, without some realisation of this right, other socio-economic rights become meaningless. The right to an adequate standard of living therefore encompasses several specific socio-economic rights and it is the fulfilment of these rights that may guarantee an adequate standard of living.

Gender equality is closely related to the achievement of an adequate standard of living. As argued in this thesis, the realisation of gender equality requires the fulfilment of various socio-economic rights of women, and it is that fulfilment that guarantees adequate standard of living. It thus follows that this broad understanding of adequate standard of living corresponds well with gender equality. Based on this, I argue that the socio-economic dimension of gender equality is an essential component of adequate standard of living. As such, gender equality can be said to be an implicitly recognised objective of the trade regime which clearly recognises raising the standard of living as an objective.

As the discussion above shows, although it is possible to locate gender equality objectives as a legitimate objective of the regime, this recognition can only be seen implicitly. The legal texts as well as the jurisprudence of the WTO do not make any direct and explicit reference to gender equality. This has its own adverse implications on the attention that gender equality objectives would get and the manner of implementation.

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[963] P Bailey 'The Right to an Adequate Standard of Living: New Issues for Australian Law' (1997) 22 *Australian J of Human Rights* 25, 25-26.
[964] Ibid 20-21.

Crucially where particular a objective/area is only impliedly stated, then it will be up to the interpreters or those in charge of implementation to give it life and bring it into the open. Accordingly, excavating or retrieving gender equality objectives from the legal texts of the various WTO agreements would be left to the members of the DSB as well as the executive within the WTO. This does not guarantee that the required attention would be accorded to gender equality concerns when agreements are negotiated, implemented or disputes are settled.

In order to ensure that gender equality objectives are indeed given due consideration in the negotiation and implementation of agreements as well as settling of disputes, it is preferable and imperative that gender equality is given explicit recognition as a legitimate objective of the regime. Further, it is also important to lay an adequate and gender-sensitive structure for implementing such an objective.

In light of the above, in order to make the reform agenda more effective from a gender perspective, this thesis advocates for: explicit recognition of gender equality objectives within the trade regime and gender analysis and gender mainstreaming to incorporate and adequately analyze gender issues that may arise in the design and conduct of international trade. I will examine these recommendations for reforming the trade regime from a gender perspective in detail in the following sections.

- Explicit recognition of gender equality objectives

International trade agreements under the WTO do not contain any specific and explicit reference to gender concerns. As the discussion in this thesis has extensively elaborated, gender equality objectives can only be read as implicit to the various objectives listed in the establishing agreement. Williams substantiating this claim states "…trade agreements tend to be gender blind. To date, across the board there is no policy goal related to gender equality nor are

there overall programme goals to promote gender equality and social development dimension of trade policy."[965]

The disadvantages that arise from the lack of explicit reference to gender equality have been highlighted in the previous section. Accordingly, the first step in making the reform of the trade regime towards advancing the goal of gender equality more effective is to adopt this objective in an explicit manner. Gender should be made part and parcel of all trade agreements. Williams argues "[g]ood practices that will promote benefits for women from trade liberalization (policy) must start with a trade policy that is oriented towards poverty elimination and the promotion of gender equality as explicit objectives."[966]

The initiative to incorporate gender equality objectives into trade agreements has already started in regional trade agreements. The experience from these regional trade agreements can be introduced in the WTO context. For instance gender equality objectives are clearly spelt out in the following regional trade agreements: the Common Market for Eastern and Southern Africa (COMESA) and the Southern African Development Community (SADC).

An entire chapter within the COMESA treaty is dedicated to addressing gender issues.[967] In addition COMESA adopted a gender policy in a bid to integrate gender perspectives in all the activities of the common market in 2005.[968] This policy identified what are considered to be barriers towards gender-equality in and through trade in the region and the gender policy goes on to recognize the inadvertent exclusion of women from the benefits of trade.[969] These include

[965] See Mariama Williams The Interface of Research on Gender and Trade with the Negotiations of Trade Agreements and Trade Policy Making International Gender and Trade Network, IGTN 2005, 5 at http://www.generoycomercio.org/areas/investigacion/M_Williams.pdf 18/09/09.
[966] Ibid.7.
[967] See Chapter 24 of the COMESA Treaty.
[968] See the preamble to the COMESA gender policy.
[969] Ibid.

inadequate access to trade information, lack of skill in export management, lack of access to credit.[970]

Similarly, SADC has adopted a gender and development protocol in 2008. In addition to recognizing the objective of gender equality, this protocol goes on to identify those critical areas where women may benefit from trade opportunities and the possible obstacles to this end. The protocol for instance obliges member states to develop subsidized training programmes to develop women's entrepreneurial skills and opportunities to enhance the production, marketing and exporting of quality products by women.[971] In a bid towards advancing gender equality, the protocol requires member states to implement more actions. For example, it requires member states to:[972]

- review their trade policies, protocols and declarations to make them gender responsive;
- include regional women's networks in trade policy structures; (c) create gender quotas in all trade missions;
- ensure equal access by women and men to financial and other markets, including trade negotiation processes.
- member states are required to minimise the negative effects of Free Trade Agreements on vulnerable groups.

Explicit recognition of gender equality objectives would force the adoption of explicit strategies to tackle the barriers to equality in and through trade. Such recognition would impose the duty to translate gender equality principles and ideals into practice. A practical illustration would be the discussion on engendering aid for trade. As the section on engendering aid for trade has discussed in detail, the various mechanisms suggested for incorporating a gender

[970] Ibid.
[971] See article 6 of the SADC Gender and Development Protocol.
[972] Ibid. See also article 7, section 7 of the Protocol.

perspective in various programs of aid for trade, do not have to be implicitly read or arrived at. Instead where there is explicit recognition gender equality objectives, those recommendations would form part and parcel of the guidelines that guide the implementation of aid for trade strategies in a gender sensitive and gender aware manner.

- Gender mainstreaming

This study has shown that gender-equality objectives form part of the telos of the trade regime. This is implicitly read in the various agreements of the WTO and in particular in its establishing agreement. Accordingly, addressing gender concerns that arise in relation to trade is important for the legitimacy of the system. The question then becomes how this objective can be implemented in practice. I have shown in Chapter VI how gender equality could be adequately considered in the operations of the trade regime. Based on the analysis in this chapter, I draw up here certain mechanisms that can be employed to ensure that this goal is achieved. I argue for two related mechanisms of implementing the gender-equality objectives of the regime: gender analysis and gender mainstreaming in the activities and operations of the regime.

In the context of gender and trade, gender mainstreaming requires recognising that women and men are not equally positioned vis-à-vis international trade processes, and therefore are not equal participants or players in the system. This necessarily implies that international trade has differential impacts on women relative to men, in terms of both the distribution of its potential benefits and the adverse impacts.[973] This opens the door to identifying the linkages between gender inequality or gender relations, on the one hand, and the international trade regime, on the other. It would be helpful to identify the various causes for women being disadvantaged in and through trade, and to assess how these challenges can be addressed. How can gender mainstreaming be implemented in the regime?

[973] Z Randriamaro *Gender and Trade Overview Report* BRIDGE (2006) 30.

The development and adoption of an explicit statement or goal on gender equality and gender mainstreaming constitutes the first step of implementation. This is necessary because it constitutes an essential precondition for changes in policies, procedures and interventions.[974] In addition to the adoption of gender equality as a goal, other measures that can be implemented include the establishment of a structure within the trading system dedicated to addressing gender issues, and the employment of existing structures and operational mechanisms to the same end.[975] Similarly, the participation of gender-interest groups and NGOs within the operations of the regime, such as in DSB proceedings, can significantly contribute to giving voice to the concerns and interests of women affected by the system. Collaboration with other international organisations, such as UN agencies working on gender issues, is also important, especially for the purpose of acquiring data on the gender effects of the trade regime.[976]

Generally, there are two avenues that must be followed simultaneously to mainstream a gender agenda in the trade regime successfully. The first focuses on the operational aspect, and the second on the institutional aspect. The operational aspect mainly involves carrying out gender analyses of the operations of the trade regime. This basically means factoring gender into the various policies, rules or agreements, negotiations and various trade measures, as well as the application and interpretation of trade rules in dispute-settlement processes and outcomes. In effect, it calls for gender analysis to be carried out in the different actions of the regime. A gender analysis of trade liberalisation must in turn include an understanding of the social, economic and cultural construction of the roles and relationships between women and men, which continue to lead to gender

[974] C Hannan 'Gender Mainstreaming in the World Bank: Identifying the Potentials and Challenges' Presentation at a panel organised by the World Bank as a side-event to the 46th session of the Commission on the Status of Women (2002).
[975] These are all recommendations that Williams makes for the purpose of mainstreaming gender into the multilateral trade system. See M Williams 'Gender Mainstreaming in the Multilateral Trading System: A Handbook for Policy Makers and other Stakeholders' (2003).
[976] See, for example, studies by UNIFEM, UNDP and UNCTAD referred in various chapters of this study.

inequality.[977] Gender-based analysis should investigate how these differences interact with trade rules and measures. A gender-impact assessment could be utilised for these purposes. This would attempt to identify the harmful distributive consequences and identify areas where women could benefit from trade. This assessment relies greatly on the availability and use of sex-disaggregated data.

The institutional aspect of gender mainstreaming mainly requires the adequate representation of women in the various structures of the trade regime. These include the DSB panels and appellate bodies, the various executive positions and lower-level line staff. Another element of the institutional aspect of mainstreaming may involve the establishment of a gender structure within the trade regime. This could be a gender committee or a gender desk which works in collaboration with other existing committees, such as the committee on services, goods and development.

[977] S Ruiz 'Engendering International Trade: Gender Equality in a Global World' European Women's Lobby on Gender Aspects of International Trade and Globalization in General (2000) <http://www.swc-cfc.gc.ca/pubs/0662661974/200012_0662661974_e.pdf> 10/11/08 1-3.

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