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# Trade and Women—Opportunities for Women in the Framework of the World Trade Organization

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## ABSTRACT

Empowering women is a significant step on the road towards achieving sustainable development, one the of the World Trade Organization's (WTO) main goals. Today, 124 WTO Members and Observers (representing more than 75% of world trade and two-thirds of the WTO membership) support the Buenos Aires Declaration on Trade and Women's Economic Empowerment endorsed in the margins of the 11th WTO Ministerial Conference, which seeks to remove trade barriers women face and foster their economic empowerment. This Declaration has made the WTO a key contributor, and even a leader, on the issue of women's empowerment, in support of development and the 2030 Sustainable Development Goals. At the same time, it is important to note that inclusive trade is, and always has been, at the heart of the WTO's work.

The paper therefore offers a preliminary analysis of the various areas of the WTO where women considerations can be used to contribute to building a more inclusive trade system, whether through the numerous provisions of the WTO covered agreements or within the 'policy space' that currently exists in the WTO framework. By lowering trade barriers, the WTO can help everyone to participate. Supporting the integration of women into international trade is fundamental to ensuring that everyone can reap the benefits of global trade.

## INTRODUCTION

*'There are only six countries in the world at this point in time where there is no legal discrimination at all between men and women [...] We need to work on that'.<sup>1</sup>*

- 1 Christine Lagarde, cited by Sarah Hansen in 'IMF Head Christine Lagarde on Closing the Gender GAP and Navigating Leadership in a Room Full of Suits', *Forbes* (18 June 2019), available at <https://www.forbes.com/sites/sarahhansen/2019/06/18/imf-head-christine-lagarde-on-closing-the-gender-gap-and-navigating-leadership-in-a-room-full-of-suits/#76f74fc15aed> (visited 9 July 2019). The article further states that out of IMF's 189 member countries, nearly 90% have at least one gender-based legal restriction.

Trade can play an important role in driving women's economic empowerment. Currently, more than 90% of countries have laws in place that limit women's participation in global trade.<sup>2</sup> Examples of such restrictions include laws limiting women's ownership and property rights, as well as restrictions on business registration, which present significant constraints for female-led businesses.<sup>3</sup>

Some World Trade Organization (WTO) Members have addressed such limitations. For example, the Indian Government has implemented several initiatives to foster the participation of women in trade, such as the Trade Related Entrepreneurship Assistance and Development Scheme for Women, which provides impoverished and illiterate women entrepreneurs access to capital by way of government grants and loans.<sup>4</sup> Similarly, the Canadian Government runs the 'Business Women in International Trade' programme, which provides key market access tools to businesses certified as 'women-owned' by connecting them with suppliers, providing training, and helping them secure contracts.<sup>5</sup> Small island nations like Samoa have also introduced initiatives, such as the Women in Business Development Initiative (WIBDI), which are aimed at empowering and engaging women in economic activities. WIBDI has helped to encourage female farmers to plant and harvest coconuts to produce virgin coconut oil, and subsequently helped secure markets for the organic virgin coconut oil through exports to the UK, the USA, Australia, and New Zealand.<sup>6</sup>

Addressing domestic discrimination against women is paramount to ensuring greater access to foreign markets. The purpose of this article is therefore to look at the policy space that exists for women-related initiatives in areas covered by the WTO Agreements.

## **I. THE BUENOS AIRES DECLARATION ON TRADE AND WOMEN'S ECONOMIC EMPOWERMENT**

On the margins of the 11th WTO Ministerial Conference,<sup>7</sup> 118 WTO Members and Observers endorsed the Buenos Aires Declaration on Trade and Women's Economic Empowerment. This was a significant development, as for the first time in the history of the WTO, a joint initiative supported efforts to increase the participation of women in trade and remove the barriers faced by women.

- 2 International Trade Center, 'What role for women in international trade?', <http://www.intracen.org/news/What-role-for-women-in-international-trade/> (visited 24 May 2019).
- 3 Jeni Klugman, 'The 2030 Agenda and the Potential Contribution of Trade to Gender Equality', <https://www.tralac.org/images/docs/10610/the-2030-agenda-and-the-potential-contribution-of-trade-to-gender-equality-ictsd-september-2016.pdf> (visited 19 May 2019).
- 4 Ministry of Micro Small and Medium Enterprises, 'Government of India, Access to Credit: TREAD', <http://www.dcmsme.gov.in/schemes/treadwomen.htm> (visited 27 May 2019).
- 5 The Canadian Trade Commissioner Service, Supplier Diversity, <https://www.tradecommissioner.gc.ca/businesswomen-femmesdaffaires/supplierdiversity-diversification-des-fournisseurs.aspx?lang=eng> (visited 27 May 2019).
- 6 Trade for Development News, 'Samoa: Harnessing the Economic Power Of Women, Villages And Traditional Cultures To Access New Markets', <https://www.enhancedif.org/en/publication/2016-10/samoa-harnessing-economic-power-women-villages-and-traditional-cultures-access> (visited 1 July 2019).
- 7 The 11th WTO Ministerial Conference took place in Buenos Aires, Argentina, from 10 to 13 December 2017.

Today, 124 WTO Members and Observers, representing more than 75% of world trade and two-thirds of the WTO membership, support the Buenos Aires Declaration, as a vital element in better understanding the links between trade and women's economic empowerment and, in turn, make trade more inclusive.

### **A. The Buenos Aires Declaration highlights the role of trade in empowering women**

The objective of the Buenos Aires Declaration is to find the best ways to tackle the trade barriers faced by women.<sup>8</sup> A key element of the debate is the evidence that suggests that empowering women leads to economic efficiency, which in turn has a positive impact on economic growth and poverty reduction. Women's economic empowerment is a major factor in achieving gender equality, which is one of the UN's Sustainable Development Goals (SDGs). Discussions are currently being held about how to achieve this change, with suggested action in various areas, e.g. education, healthcare, access to credit, cultural change, legal reforms, access to childcare, support to small and medium enterprises (SMEs), and other sectors where there is a predominance of women workers, to name but a few. Initiatives in this regard have been undertaken or are planned by various international organizations, NGOs, and individual governments.

Additionally, increasing women's participation in trade has been identified as one of the elements to empower women around the world.<sup>9</sup> The results of trade liberalization have been largely positive for women, particularly considering their more disadvantaged position in the workforce.<sup>10</sup> For example, greater trade liberalization provides better access for women to employment opportunities, particularly in developing countries.<sup>11</sup>

Against this background, this paper aims at opening the analysis of the various areas within the WTO framework where particular attention to the situation of women in different parts of the world and different sectors of the economy could contribute to building a more inclusive trade system.

8 The Declaration's proponents have used the Declaration as a framework to exchange information and best practices on how to encourage women's participation in the economy. Detailed information is available and regularly updated on [https://www.wto.org/english/tratop\\_e/womenandtrade\\_e/womenandtrade\\_e.htm](https://www.wto.org/english/tratop_e/womenandtrade_e/womenandtrade_e.htm) (visited on 9 July 2019).

9 Joint Declaration on Trade and Women's Economic Empowerment on the Occasion of the WTO Ministerial Conference in Buenos Aires in December 2017, [https://www.wto.org/english/thewto\\_e/minist\\_e/mc11\\_e/genderdeclarationmc11\\_e.pdf](https://www.wto.org/english/thewto_e/minist_e/mc11_e/genderdeclarationmc11_e.pdf) (visited 10 July 2019).

10 Alexandre Larouche-Maltis and Barbara Maclaren, 'Making-Gender Responsive Free Trade Agreements', [https://www.conferenceboard.ca/temp/e9945dc7-f6d6-4f63-9f81-e2e856685978/10077\\_GenderandTrade-RPT.pdf](https://www.conferenceboard.ca/temp/e9945dc7-f6d6-4f63-9f81-e2e856685978/10077_GenderandTrade-RPT.pdf) (visited 20 May 2019).

11 International Labour Office, 'Trade and Employment: From Myths to Facts', [https://www.ilo.org/wcmsp5/groups/public/---ed\\_emp/documents/publication/wcms\\_162297.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_emp/documents/publication/wcms_162297.pdf) (visited 19 May 2019).

## **B. Momentum on trade and gender is building in the WTO**

Empowering women has been specifically identified as having a ‘snowball effect of development’<sup>12</sup> and, within the WTO, women’s empowerment has been linked to development. In June 2017, the WTO Director-General appointed a Trade and Gender Focal Point with the mandate to frame and structure the WTO’s actions on trade and gender.<sup>13</sup>

The 2018–19 WTO Trade and Gender Action Plan is based on four main objectives: raising awareness of the links between trade and gender, supporting WTO Members’ activities in this area, analysing and collecting new data on the impact of trade measures on gender issues, and providing training for government officials and Secretariat staff. Based on the Action Plan, the WTO has conducted four training sessions on trade and gender since March 2019. The training is designed for government officials from Members and Observers that benefit from WTO technical assistance, and it explains the nexus between trade and women’s economic empowerment in the context of WTO rules and explores different perspectives on how to implement WTO rules in a way that is sensitive to the particular situation of women in many parts of the world and encourages full participation and gender equality.

The WTO has also embarked on an economic research project on trade and gender with the World Bank Group. A joint report will be published in 2019.

## **II. AID FOR TRADE, THE TRADE POLICY REVIEW MECHANISM**

The Buenos Aires Declaration identifies two existing WTO instruments that can be used to make trade more inclusive: The Aid for Trade Initiative and the Trade Policy Review (TPR) Mechanism.

### **A. Aid for Trade**

The Declaration provides that the proponents ‘have agreed to collaborate on making our trade and development policies more gender-responsive, including by . . . [e]nsuring that Aid for Trade supports tools and know-how for analysing, designing, and implementing more gender-responsive trade policies’.

Aid for Trade supports developing and least-developed countries in building their trade capacity and increasing their exports by turning market access opportunities into market presence. It does so by addressing four key areas: trade policy and regulations, economic infrastructure, building productive capacity, and trade-related adjustment.

This WTO-led Initiative works with a broad cross-section of stakeholders to highlight needs (of developing and least-developed country members and regional organizations), mobilize resources (including donors, international financial institutions,

12 See [https://www.wto.org/english/tratop\\_e/devel\\_e/a4t\\_e/gr17\\_e/genderbrochuregr17\\_e.pdf](https://www.wto.org/english/tratop_e/devel_e/a4t_e/gr17_e/genderbrochuregr17_e.pdf) (visited 6 July 2019). Furthermore, the G20 leaders at the Osaka Conference held 28–29 June 2019 have issued a communique mentioning gender equality as essential for achieving sustainable and inclusive economic growth; see [https://www.g20.org/pdf/documents/en/FINAL\\_G20\\_Osaka\\_Leaders\\_Declaration.pdf](https://www.g20.org/pdf/documents/en/FINAL_G20_Osaka_Leaders_Declaration.pdf) (visited 6 July 2019).

13 See [https://www.wto.org/english/tratop\\_e/womenandtrade\\_e/womenandtrade\\_e.htm](https://www.wto.org/english/tratop_e/womenandtrade_e/womenandtrade_e.htm) (visited 10 July 2019).

and other international organizations), and monitor impacts and effectiveness (with the Organisation for Economic Co-operation and Development (OECD) and other international organizations).

There is evidence that gender has been an intrinsic part of the Aid for Trade Initiative that began in 2005 and was implemented in 4 phases up to the present day, and countries have been devoting an increasing attention to gender dimensions in this context.<sup>14</sup>

Bilateral donors and beneficiaries have gradually and increasingly integrated gender into their Aid for Trade objectives. The 2019 Monitoring and Evaluation Exercise reveals that women's economic empowerment is a priority for donors and beneficiaries. Today, 84% of donors' strategies and 85% of beneficiaries of national or regional development strategies seek to promote women's economic empowerment.

### **B. The Trade Policy Review Mechanism**

The Trade Policy Review Mechanism (TPRM) was introduced into the General Agreement on Tariffs and Trade (GATT) in 1989 following the Mid-Term Review of the Uruguay Round. The mechanism was confirmed as an integral part of the WTO in Annex 3 of the Marrakesh Agreement establishing the WTO.<sup>15</sup> 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, where applicable, the Plurilateral Trade Agreements, and hence to the smoother functioning of the multilateral trading system, by achieving greater transparency in, and understanding of, the trade policies and practices of Members'.<sup>16</sup>

Since 2015, the trade policies of 111 WTO Members have been subject to multilateral review through the TPRM. During this period, 70% of the WTO Members under review have integrated women's empowerment into their national or regional trade strategy, mostly to enhance women's participation in the workforce. Some Members have explicitly acknowledged that closing the gender gap is especially important because of its correlation with per capita income, growth, development, and poverty reduction.<sup>17</sup>

14 Anoush der Boghossian, 'Women's Economic Empowerment: An Inherent Part of Aid for Trade' (WTO Staff Working Paper, 2019a), [https://www.wto.org/english/res\\_e/reser\\_e/ersd201908\\_e.htm](https://www.wto.org/english/res_e/reser_e/ersd201908_e.htm) (visited 29 May 2019); see also Anoush der Boghossian, adapted from Aid for Trade Monitoring and Evaluation Exercises 2007 to 2019 (WTO Staff Working Paper).

15 See the WTO website, [https://www.wto.org/english/tratop\\_e/tpr\\_e/tprm\\_e.htm](https://www.wto.org/english/tratop_e/tpr_e/tprm_e.htm) (visited 10 July 2019).

16 Annex 3 of the WTO Agreement.

17 Anoush der Boghossian, 'Trade Policies Supporting Women's Economic Empowerment: Trends in WTO Members' (WTO Staff Working Paper, 2019b), [https://www.wto.org/english/res\\_e/reser\\_e/ersd201907\\_e.htm](https://www.wto.org/english/res_e/reser_e/ersd201907_e.htm) (visited 29 May 2019).

Some strategies also aim at promoting female employment and access to male-dominated economic sectors. A few trade strategies also mention that mainstreaming gender is a primary objective.<sup>18</sup> While most Members establish wide and general gender objectives in their trade policies, some are very specific, depending on the country's economic situation, and can be classified into three main areas or sectors:

1. Financial and non-financial incentives to the private sector and women-owned/led Micro and SMEs: 30% of Members have trade policies that support women-owned/led companies.<sup>19</sup> Measures range from offering financial incentives to the private sector to hire women to incentives to promote women's economic empowerment in the export sector.
2. Agriculture and fishery: 15.5% of Members under review have included agriculture and fisheries policies that support women's empowerment.<sup>20</sup>
3. Government procurement: 9% of Members under review have included government procurement policies that support women's empowerment.<sup>21</sup>

The *prima facie* gender-neutral nature of the WTO rules has a dual dimension. On the one hand, because of their gender neutrality, sometimes, WTO rules may be applied in a way that disadvantages women, which is why the commitments mentioned above are important. On the other hand, precisely because the rules are gender neutral, they can be applied in a way that is more sensitive to the situation of women. The following sections of this article will thus explore possible areas where trade and gender considerations can coexist.

### III. THE GATT 1994 AND THE ENABLING CLAUSE

GATT basic transparency provisions allow women to remain better informed not only on the applicable tariff regimes but also on the applicable laws and regulations, as

18 The ILO gives a definition of Gender Mainstreaming: The concept of bringing gender issues into the mainstream of society was clearly established as a global strategy for promoting gender equality in the Platform for Action adopted at the United Nations Fourth World Conference on Women, held in Beijing (China) in 1995. It highlighted the necessity to ensure that gender equality is a primary goal in all area(s) of social and economic development. In July 1997, the United Nations Economic and Social Council (ECOSOC) defined the concept of gender mainstreaming as follows: 'Mainstreaming a gender perspective is the process of assessing the implications for women and men of any planned action, including legislation, policies, or programmes, in any area and at all levels. It is a strategy for making the concerns and experiences of women as well as of men an integral part of the design, implementation, monitoring, and evaluation of policies and programmes in all political, economic, and societal spheres, so that women and men benefit equally, and inequality is not perpetuated. The ultimate goal of mainstreaming is to achieve gender equality. Mainstreaming includes gender-specific activities and affirmative action, whenever women or men are in a particularly disadvantaged position. Gender-specific interventions can target women exclusively, men and women together, or only men, to enable them to participate in and benefit equally from development efforts. These are necessary temporary measures designed to combat the direct and indirect consequences of past discrimination'. See <https://www.ilo.org/public/english/bureau/gender/newsite2002/about/defin.htm> (visited 10 July 2019).

19 Ibid.

20 Ibid. See further in this article.

21 Ibid. See further in this article.



Article X of the GATT 1994 requires their prompt publication. Access to this information is particularly critical for poorer women engaged in cross-border trade in Africa and South Asia, for instance, as evidence has shown that a lack of clarity results in women being subject to extortion and harassment at the border due to exploitation by border officials and those pretending to be border officials.<sup>22</sup>

### A. Non-discrimination and market access rules

Furthermore, a fundamental feature of the GATT is global trade liberalization achieved through the non-discrimination principles, namely, the most favoured nation (MFN) and national treatment (NT) principles, as found in Articles I and III of the GATT, respectively. Under the GATT, discrimination between 'like products' is prohibited. Likeness in turn depends on a holistic analysis of the products' characteristics, end uses, tariff classification, and consumers' tastes and preferences. Ordinarily, a garment manufactured by a woman and a garment manufactured by a man may be considered like products based on these criteria. It is nonetheless possible that based on their 'methods of production' products that appear like can be regulated or taxed differently. For example, a garment manufactured by a woman under exploitative working conditions may not be viewed by consumers as substitutable with a garment that is not (regardless of whether it is produced by a woman or man), provided there is adequate awareness and strong socio-political will against purchasing such products. If the goods made by women in unacceptable working conditions are nonetheless considered like other physically similar goods in a market, treating such goods differently would *a priori* be contrary to basic market access rules of the GATT but as discussed below such inconsistency could possibly find justification. The extent to which a product made by women or made by men are or not like products and therefore should be taxed and regulated similarly, is a matter to be explored and will depend on evidence.

Additionally, the negotiation of new tariffs line could include women-related considerations because Article II:1(b) of the GATT 1994 provides that 'terms, conditions, or qualifications' may be set forth in a Member's schedule as qualifying negotiated import tariffs. The question then arises whether and 'terms and conditions' can include WTO-consistent women-related conditions. In practice, tariff negotiations are conducted on the basis of offers and counter offers. In that context terms, conditions or qualifications relating to women considerations can be added to the offer process and eventually consolidated in the tariff schedule of the relevant importing Member. However, such conditions, terms, or qualifications relating to women-produced goods, similar to conditions on barring goods that are the product of child labour,<sup>23</sup> could prove difficult to negotiate and require significant concessions in return.<sup>24</sup>

22 World Bank Group and World Trade Organization, 'The Role of Trade in Ending Poverty', <http://documents.worldbank.org/curated/en/726971467989468997/pdf/97607-REPLACEMENT-The-Role-of-Trade-in-Ending-Poverty.pdf> (visited 24 May 2019).

23 World Trade Organization, 'Labour Standards: Consensus, Coherence and Controversy', [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/bey5\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/bey5_e.htm) (visited 4 July 2019).

24 For additional information on tariff negotiations, see [https://www.wto.org/english/tratop\\_e/markacc\\_e/nama\\_negotiations\\_e.htm](https://www.wto.org/english/tratop_e/markacc_e/nama_negotiations_e.htm) (visited 4 July 2019).



Furthermore, Article XIII of the GATT 1994 relates to tariff quotas, many of which today include in-quota preferences that are based on seasons or other regulatory distinctions. Under Article XIII, a Member is free to set a lower tariff rate for a specific quantity of a product, once that quantity is met a higher rate may be applied so long as it does not exceed the bound rate for that product. Whether women-based in-quota indications could be WTO consistent remains to be explored.

### B. Exceptions and conditional tariff preferences

But even where a Member's measures or policies regarding women could potentially conflict with their obligations under the GATT, they may nonetheless be justified either under the substantive obligations themselves or through the General Exceptions clause (Article XX). Article XX(a) of the GATT 1994 allows Members to undertake measures necessary for the protection of public morals. The term public morals has been interpreted by the Appellate Body to denote 'standards of right and wrong conduct maintained by or on behalf of a community or nation.'<sup>25</sup> It may be argued that the protection of women's rights as a broader part of human rights norms and principles codified in international legal instruments recognized by WTO Members, squarely falls within this definition.<sup>26</sup> Moreover, GATT jurisprudence has also recognized the possibility of the concept of 'public morals' varying 'from Member to Member', as they are 'influenced by each Member's prevailing social, cultural, ethical, and religious values' thereby encompassing the possibility of measures that go even beyond the minimum rights guaranteed to women in the international human rights conventions as possibly being justifiable under Article XX(a).<sup>27</sup> Furthermore, the Appellate Body, in *EC — Seal Products*, had also emphasized the autonomy of WTO Members in setting the desired level of protection when responding to similar interests of moral concern.<sup>28</sup>

Whether a Member could choose to restrict imports from specific industries in certain Members that are notorious for the ill-treatment of female workers, such as garment manufacturing, brick-making, etc. or where the industries indulge in practices such as unequal pay for equal work, lack of maternity leave, or sexual harassment at

25 WTO Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, para 296. This case, while in the context of GATS has been referred to by subsequent panels in the context of the GATT as well.

26 James Harrison, *The Human Rights Impact of the World Trade Organization* 1st ed. (Oxford: Hart Publishing, 2007) 207–9; Liane M. Jarvis, 'Women's Rights and the Public Morals Exception of GATT Article 20', 22 *Michigan Journal of International Law* 219 (2000), at 237. The notion of women's economic empowerment for example has been recognized as a core feature of the global agenda for advancing women's human rights in the Beijing Declaration and Platform for Action, 1995.

27 WTO Panel Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R and Corr.1, adopted 19 January 2010, as modified by Appellate Body Report WT/DS363/AB/R, para 759. In *US—Shrimp* the Appellate Body found that Article XX should be understood in light of evolving international law. The same rationale of 'evolutionary interpretation' could also be applied to the current state of international human rights law and the notion of sustainable development. Sustainable development explicitly forms a part of the WTO Agreement's preamble and the promotion of gender equality has been clearly recognized as an aspect of sustainable development.

28 Appellate Body Reports, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R adopted 18 June 2014, para 5.199.

the workplace, is yet to be considered in the context of such possible exceptions and justifications.<sup>29</sup> Therefore, although the public morals exception may not have been read to include women's rights by a WTO panel up until now, the state of international human rights law and sustainable development as it stands today makes a compelling argument that women's rights could indeed be included in this exception.<sup>30</sup>

Overall, the existing GATT rules seem to allow multiple possibilities for WTO Members to use taxes, regulations, tariffs, and tariff-rate quotas (TRQs) in a manner that can bring together sustainable trade that includes women considerations.

Importantly, tariff preferences in favour of imports from developing countries are also allowed under the Enabling Clause; in addition, the Appellate Body has made clear that such preferences can be conditioned on compliance with development-related criteria (and women-related considerations are obviously development related) so long as similarly situated countries are treated similarly in the application of such development conditions.<sup>31</sup> That is to say, Members could potentially choose to lower or remove import duties from products coming from a vulnerable economies on the condition that they treat women fairly or create working conditions that can lead to their empowerment, thus to enhancing the development of such exporting countries.

#### IV. THE TRADE FACILITATION AGREEMENT

The Trade Facilitation Agreement (TFA) interprets and expands certain GATT provisions. At first glance, it appears to be gender neutral. There are no explicit references to women-related issues anywhere in the text. At the same time, there is little doubt about the TFA's potential to enhance the role of women in trade, both domestically and at the cross-border level.

##### A. Direct impact

A considerable share of the TFA's benefits is predicted to go to small traders in developing economies, many of whom are female. Studies have found the TFA to particularly support SMEs and to provide opportunities for women to participate in economic activities.<sup>32</sup> Significant reductions in cost and time of doing business will make it easier to engage in international trade.<sup>33</sup> Women are also expected to profit from a

29 Rachel Harris And Gillian Moon, 'GATT Article XX and Human Rights: What Do We Know from the First 20 Years?', 16 Melbourne Journal of International Law (2015).

30 Since the Appellate Body has recognized the concept of complementary approaches towards achieving a policy objective in WTO Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres (Brazil—Retreaded Tyres)*, WT/DS332/AB/R, adopted 17 December 2007, a measure related to women's rights taken as a part of a broader comprehensive strategy on women's empowerment, could also be considered necessary for the protection of public morals.

31 WTO Appellate Body Report, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, adopted 20 April 2004, para 154.

32 For more information, see WTO Secretariat, *World Trade Report 2016: Levelling the trading field for SMEs*, at 14 and 18.

33 According to the WTO's 2015 World Trade Report, the full implementation of the Trade Facilitation Agreement will reduce Members' trade costs by an average of 14.3%. Import times are predicted to be cut by almost 50 (47)% with cuts in export time being even higher—estimates predict a 91% reduction over the current average.

regularization of informal commerce, which promises to strengthen their role and to facilitate their integration into global supply chains. This is likely to have an especially strong impact in the developing world, where the majority of informal workers are female and operate in the shadows without the support from the formal economy.<sup>34</sup>

By advocating automation and enhancing the use of information technologies, the TFA further provides an increased level of protection to vulnerable traders<sup>35</sup> and reduces discrimination (such as in the form of longer waiting times,<sup>36</sup> demands for extra payments,<sup>37</sup> and higher risks of being suspected of non-compliance<sup>38</sup>). Infrastructure upgrades at the border, especially the increased use of automation and the resulting decrease in reliance on physical inspection, are equally expected to have a positive impact by creating a safer environment for female entrepreneurs.<sup>39</sup>

### B. Additional implementation synergies

Additional possibilities for a strengthened role of women are provided by the TFA's innovative design, which confers a considerable degree of flexibility on governments when deciding on how to put the reforms into practice and what to prioritize.<sup>40</sup> There is also room for gender-related objectives in another key component of the TFA's unique implementation architecture: the aid response by donor Members, which constitutes a *sine qua non* for implementation commitments of developing economies and provides room for support of female entrepreneurs. The entitlement of developing and least-developed countries to designate TFA provisions as requiring assistance—and the possibility to delay their implementation until the requested capacity has been acquired—offers a powerful incentive for the provision of substantive support.

An additional framework for relevant activities is provided by the TFA's requirement for each WTO Member to establish a National Trade Facilitation Committee (NTFC).<sup>41</sup> Governments have a free hand in deciding on the composition of their NTFCs, which are set to play an important role in the TFA's implementation and provide a broad framework for addressing issues of particular interest to female traders.

34 See, for instance, UNIFEM, 'Sharing the Findings of the Baseline Studies on Women in Informal Cross-Border Trade in Africa', Addis Ababa: ECA/ATPC Inception Workshop on Mainstreaming Gender into Trade Policy, World Bank (2009). See also a Policy Brief by USAID under the Enabling Agricultural Trade Framework, 'Women in Cross-Border Agricultural Trade' (2012), as well as Simeon Djankov et al., 'Going Informal: Benefits and Costs', World Bank (2002), which lists a series of obstacles associated with informal trade such as limited access to formal credit, increased vulnerability to harassment and the inconsistent application of trade policies.

35 By introducing a series of measures that limit human interaction at the border (such as the electronic submission of paperwork), the Agreement reduces the risk of discrimination and harassment.

36 A survey in India found that women must wait almost 40 (37)% longer than men to see the same customs official. For more information, see Kate Higgins and Liz Turner, 'Integrating Poverty and Social Analysis into Aid for Trade Programmes: Trade Facilitation and Trade-Related Infrastructure', United Kingdom Department for International Development (2010).

37 Friedrich Ebert Stiftung and Collaborative Centre for Gender and Development, 'Women and Cross-border Trade in East Africa: Opportunities and Challenges for Small Scale Women Traders' (2006).

38 See, for instance, Maria Olanda Bata et al., 'A report on a joint rapid assessment of informal cross border trade on the Mozambique–Malawi Border regions', SARP (2005).

39 For additional information, see USAID, 'Enabling Agricultural Trade', Policy Brief No. 4 (2012).

40 See Section II of the TFA.

41 Article 23.2 of the TFA.

Currently, those Committees do not appear to be a platform for the promotion of gender equality. A recent United Nations Conference on Trade and Development (UNCTAD) study found that NTFCs 'are far from being gender-balanced bodies.'<sup>42</sup> On average, women make up little more than a third of all members (36%). Almost two thirds of all NTFCs (62%) are chaired—or at least co-chaired—by men.<sup>43</sup> Most of these Committees further do not consider gender mainstreaming a priority (or even just relevant).<sup>44</sup>

A limited reflection of women-related aspects was also found in a survey on trade facilitation implementation conducted by the five UN Regional Commissions in 2017.<sup>45</sup> Measures involving female traders showed comparatively low implementation rates. Only around 20% of the surveyed 120 economies from eight regions had given special consideration to related matters as part of their existing trade facilitation policies or considered them for prospective action.<sup>46</sup>

So far, the role of women in trade facilitation has not featured prominently in discussions of the WTO's membership. With attention on gender issues globally on the rise, this might change in the not too distant future.

## V. THE AGREEMENT ON TECHNICAL BARRIERS TO TRADE

Regulations and standards have become increasingly important, affecting the capacity of producers to participate in global markets.<sup>47</sup> In this regard, the Technical Barriers to Trade (TBT) Agreement aims to ensure that technical regulations, standards, testing, and certification procedures do not create unnecessary obstacles to trade, while recognizing the right of Members to pursue legitimate policy objectives.<sup>48</sup>

The relevant areas under the TBT Agreement identified as conducive to women empowerment and gender equality are those that encourage transparency of, and access to, information on technical regulations, standards, and conformity assessment procedures and measures designed to give women businesses privileged access to markets through certain technical regulation or international standards requirements.

42 UNCTAD, 'Fostering Gender Mainstreaming in National Trade Facilitation Committees', Policy Brief No 65 (2018).

43 Ibid.

44 Ibid.

45 United Nations, 'Trade Facilitation and Paperless Trade Implementation', Global Report 2017, 5.

46 The survey contained two specific questions relating to women: the first—question 46—asked whether 'The existing trade facilitation policy/strategy incorporates special consideration of women involved in trade.' A second (question 47) enquired whether the 'Government has introduced trade facilitation measures to benefit women involved in trade.'

47 Raphael Kaplinsky and Mike Morris, 'How Regulation and Standards Can Support Social and Environmental Dynamics in Global Value Chains', Geneva, Issue Paper: ICTSD (2017).

48 WTO Website, [https://www.wto.org/english/tratop\\_e/tbt\\_e/tbt\\_e.htm](https://www.wto.org/english/tratop_e/tbt_e/tbt_e.htm) (visited 28 May 2019).

### A. Transparency in the TBT Agreement

The TBT Agreement addresses the need for effective transparency obligations and contains comprehensive and specific transparency obligations both *ex ante* and *ex post*.<sup>49</sup>

The obligation of advance notification of any trade-restrictive measure is contained in the following provisions: Articles 2.9–2.10 for technical regulations, Articles 5.8–5.9 for conformity assessment procedures, and Annex 3 paragraphs J and L to N for standards. This aspect is relevant for women businesses since notifications can serve as a warning that allows them to bring their production processes into compliance with the requirements of a given measure and can increase women's ease of access to a given market.

Additionally, the TBT Agreement also obliges WTO Members to ensure that all adopted technical regulations and conformity assessment procedures are 'published promptly or otherwise made available in such a manner as to enable interested parties in other Members to become acquainted with them'. The relevant provisions in this regard are Article 2.12 for technical regulations and Article 5.9 for conformity assessment procedures. Such *ex-post* transparency provisions can help women-led businesses as newcomers to achieve compliance.

Finally, Article 10 imposes an obligation on Members to provide information to other Members regarding any questions they may have regarding the enacted measures. This is especially valuable for women businesses with little experience in how to access foreign markets or how to comply with some of the requirements in certain measures.

### B. International standards

Article 2.4 mandates the use of recognized international standards or relevant parts thereof as a basis for a Member's technical regulations except when such standards or relevant parts would be an ineffective and inappropriate means to fulfil the legitimate objectives pursued. Additionally, Article 2.5 provides for a rebuttable presumption of not creating an unnecessary obstacle to trade if a technical regulation is based on a relevant international standard. Therefore, it can be argued that WTO Members may follow existing international standards that are gender responsive and facilitate the greater inclusion of women in trade (which would come into existence as a result of the initiative of the United Nations Economic Commission for Europe (UNECE) mentioned below) in designing their technical regulations. Measures based on such women-sensitive standards would be presumed as not creating an unnecessary obstacle to trade and would be easier to show conformity with a Member's obligations under the TBT Agreement. Conversely, Members also have the liberty to depart from international standards that may be perceived as deficient in attaining the legitimate goal of pursuing measures that lead to women's empowerment.

Anecdotal evidence points to the fact that poor female representation in standard-setting affects the way that standards are produced, with insufficient consideration

49 For an extensive discussion on the transparency provisions of the TBT Agreement, see Denise Prévost, 'Transparency Provisions under the TBT Agreement' in Tracy Epps and Michael Trebilcock (eds), *Research Handbook on the WTO and Technical Barriers to Trade*, (Edward Elgar Press 2013), 120–163.

of women's specificities in the outputs.<sup>50</sup> Some specific issues relating to standards identified as impacting women businesses are higher costs of compliance and difficulty accessing resources for compliance. In addition, since girls and women still lack access to education in certain parts of the world,<sup>51</sup> they may lack the skills required to comply with and thereby benefit from standards, for example, literacy, numeracy and therefore risk being excluded from standard-governed value chains and also international trade.<sup>52</sup>

In this context, the UNECE Working Party 6 has started the 'Gender-Responsive Standards Initiative' with participation from international standardizing bodies such as the International Telecommunication Union, International Electrotechnical Commission, International Organization for Standardization, national and regional standards bodies, governmental authorities, regional, and intergovernmental organizations as well as NGOs, involving thus a wide variety of actors, that could provide useful input for building business practice conducive to women's empowerment.<sup>53</sup>

The initiative proposes the inclusion of women in standard-creation and standard-compliance at multiple levels, namely (i) improving the gender balance of participants in the development of standards, (ii) ensuring that the content of standards is gender responsive, and (iii) monitoring the implementation of standards to achieve gender balance. This proposal has been presented to the TBT Committee demonstrating the relevance of the TBT Agreement in allowing for policy space in which such initiatives can unfold even though not directly regulated by the Agreement.<sup>54</sup>

### C. Does the TBT Agreement allow for women-based regulatory distinctions?

The final range of measures aimed at the empowerment of women that could be covered by the TBT Agreement includes those production and process methods (PPM) based

50 Sally Smith et al, 'Voluntary Sustainability Standards and Gender Equality in Global Value Chains', Geneva, Issue Paper: ICTSD (2018).

51 See for example the Global Partnership for Education, <https://www.globalpartnership.org/blog/28-million-girls-without-access-education> (visited 2 July 2019) which reports that 28 million women in West and Central Africa lack access to education. Furthermore, girls that do have access will most likely not stay in school because of social barriers, such as unequal gender norms, child marriage, and early pregnancy in the region.

52 See ICTSD, <https://www.ictsd.org/tags/gender> (visited 28 May 2019).

53 See UNECE, <http://www.unecce.org/tradewelcome/steering-committee-on-trade-capacity-and-standards/tradewp6/thematic-areas/gender-initiative.html> (visited 28 May 2019). The UNECE goals are to challenge the perception that standards and technical regulations are gender neutral and to enhance the contribution of standards in achieving sustainable development goal 5 on 'Empowering Women and Girls'. WTO, Committee on technical Barriers to Trade, 'Activities of the United Nations Economic Commission for Europe (UNECE) Related to the Work of the WTO TBT Committee' (Statement by UNECE, G/TBT/GEN/247 29 June 2019).

54 While it is unclear where private standards position themselves in the WTO, it is worth noting that there has been an upsurge in voluntary sustainable standards initiatives including new business level certification and commitment pledges, the Women's Empowerment Principles, the Gender Equality Seal. Nonetheless, it is important to note that one of the standardizing bodies which takes part in the UNECE lead initiative, namely the ISO, is a recognized standardizing body in the context of the TBT Agreement, as acknowledged by the Appellate Body in the case of *US—Tuna II*. (WTO Appellate Body Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, adopted 13 June 2012).



on women-based regulatory distinctions: for example, one Member adopts a regulation that only allows women-fabricated clothing to obtain a certain label or to enter its market, or perhaps one Member restricts all products from Members where industries are accused of discriminating against or mistreating women workers.

The question then arises whether WTO Members can formulate policies and regulations that treat and regulate differently products that are otherwise physically like or similar, or even identical, on the basis of the methods or means of production, in order to promote societal values and interests such as women empowerment. A similar consideration exists under the GATT non-discrimination rules discussed above. To the extent such a measure would fall within the TBT Agreement's ambit, it would also have to conform with Article 2.1.<sup>55</sup>

Article 2.1 sets out the non-discrimination principle (MFN and NT) applicable to technical regulations, where like products from all origins should not be treated less favourably than domestic products. Since the TBT Agreement does not include a provision that is similar to Article XX of the GATT 1994, Article 2.1 has been interpreted as containing a two-stage requirement. A WTO Member's regulation based on women considerations would be presumed WTO-consistent unless another WTO Member demonstrates that the challenged regulation has a detrimental impact on imported products and, that the detrimental impact does not stem from a legitimate regulatory distinction. As a whole, this requirement can be interpreted as allowing for differential treatment between otherwise like products in pursuance of a reasonable and justifiable objective in a fair, even-handed manner.

Furthermore, under Article 2.2, Members can enact technical regulations insofar as they are not more trade restrictive than necessary with a view to achieving a legitimate objective. Since sustainable development is a legitimate WTO objective,<sup>56</sup> and gender equality has been determined to be a sustainability goal,<sup>57</sup> technical regulations enacted with the aim of achieving gender equality for instance may indeed be held to be consistent with the TBT Agreement as long as they are in conformity with Article 2.1 and do not constitute an unnecessary barrier to trade under Article 2.2.

The TBT Agreement can therefore play an important role in fostering inclusiveness and empowerment, proving that WTO law does not operate as a limiting framework but rather allows for, and encourages, the attainment of socio-economic goals.

## VI. THE AGREEMENT ON AGRICULTURE

### A. The importance of women in agriculture

Women play an important dual role in agriculture, as producers and caretakers of the household food security. According to the World Bank, the share of women in the agricultural labour force in 2018 ranged from only 2% in high-income countries to

55 For a detailed discussion on this issue, see Gabrielle Marceau, 'Do PPM Concerns Have a Future?' in Denise Prévost, Iveta Alexovičová and Jens Hillebrand Pohl (eds), *Restoring Trust in Trade: Liber Amicorum in Honour of Peter Van den Bossche*, (Hart Publishing, 2018), 175–197 (forthcoming).

56 See Preamble of the WTO Agreement.

57 SDG 5 refers to achieving gender equality and empowering all women and girls.



66% in low-income countries.<sup>58</sup> Women also face more barriers to accessing assets and productive resources. According to the Food and Agriculture Organization (FAO), if women had the same access as men, they could increase their farm yields by 20–30%, raise total agricultural output in developing countries by 2.5–4%, and reduce the number of hungry people in the world by 12–17%.<sup>59</sup> Given the contributions women make to the agriculture sector, the Agreement on Agriculture (AoA) has an important role to play in helping to address this situation.<sup>60</sup>

### **B. Policy space for Members' measures**

The AoA provides policy space for governments to take measures that benefit the sector in general (gender-neutral measures) as well as measures that can be used to specifically target women (gender transformative measures). The AoA includes disciplines on trade-distorting support to agricultural producers, while at the same time defining and allowing without limitation non-, or minimally, trade-distorting support (i.e. Green Box support). The AoA also disciplines border measures by reducing trade barriers and enhancing predictability, thereby increasing the export opportunities for agricultural products. The AoA aims at reducing production and trade distortions in the agricultural sector and at enhancing market access abroad. The disciplines therefore benefit both men and women in a gender-neutral way.

The AoA also allows governments to take gender transformative measures aimed at supporting a women-friendly production and trading environment. For example, the Green Box (i.e. Annex 2 of the AoA) allows for unlimited support through measures that can support women such as training, research, extension, and advisory services.<sup>61</sup> High-quality and timely information on new technologies and production techniques are crucial for farmers to enhance their productivity and increase their income. Measures aimed at providing these types of general services can be designed to target specific constraints faced by women to enhance their integration in the rural economy. In 2013, a Ministerial Decision<sup>62</sup> provided additional guidance on the types of measures included in the Green Box, expanding the illustrative list of general services identified in the AoA to include measures related to land reform and rural livelihood security, such as rural employment programmes, issuance of property titles, and farmer settlement

58 The share of women in agricultural employment was 19% in upper middle-income countries, 29% in middle income countries, and 44% in lower middle-income countries. World Bank (2019), *Employment in agriculture, female* (% of female employment) (modeled ILO estimate), <https://data.worldbank.org/indicator/SL.AGR.EMPL.FE.ZS> (visited 28 May 2019).

59 FAO, 'The State of Food and Agriculture, Women in Agriculture—Closing the Gender Gap for Development' (Rome 2011), <http://www.fao.org/3/a-i2050e.pdf> (visited 3 June 2019).

60 For a comprehensive overview on gender-based patterns and constraints in rural development, in the context of agriculture, see UNCTAD, 'The Least Developed Countries Report 2015—Transforming Rural Economies' (2015), [https://unctad.org/en/PublicationsLibrary/ldc2015\\_en.pdf](https://unctad.org/en/PublicationsLibrary/ldc2015_en.pdf) (visited 2 June 2019).

61 According to the FAO, while women make up on the average close to half of the agricultural labour force in developing countries, only 5% of all agricultural extension services are directed at women and only 15% of the world's extension agents are women. FAO, 'The State of Food and Agriculture, Women in Agriculture—Closing the Gender Gap for Development' (Rome 2011), <http://www.fao.org/3/a-i2050e.pdf> (visited 3 June 2019).

62 WTO Ministerial Decision—General Services, (WT/MIN(13)/37 or WT/L/912), adopted on 7 December 2013.

programmes that can be used to enhance women's access to land and improve their employment conditions.

Other Green Box measures such as direct payments in the form of structural adjustment assistance, regional assistance, and domestic food aid can also be used to help women. The AoA provisions in Article 6.2 also allow WTO Members to provide unlimited support through input subsidies to resource poor farmers, many of whom are women.

WTO Members are required to notify their domestic support in order to allow for an effective review of the implementation of their Uruguay Round commitments. These notifications indicate that some Members use the AoA's provisions to target women. For example, the Dominican Republic notified the provision of extension and advisory services targeting the integration of rural women in productive and commercial activities. Guatemala has also been using flexibilities included in the Green Box to provide credit support to small producers in Zacapa and Chiquimula in the north western part of Guatemala. The programme's target group comprised 5200 direct beneficiaries, and it hoped to benefit at least 3200 women.

While many measures have been taken to help women in the agricultural sector, more needs to be done. Enhancing women's participation in the agricultural sector is good for the economy, for social justice as well as for poverty alleviation and food security. Governments can take advantage of the useful flexibilities included in the AoA to enact policies that would support women in agriculture.

## **VII. THE AGREEMENT ON THE APPLICATION OF SANITARY AND PHYTOSANITARY MEASURES AND THE STANDARDS AND TRADE DEVELOPMENT FACILITY**

Like other WTO covered agreements, the Sanitary and Phytosanitary Measures (SPS) Agreement at first glance appears to be gender neutral. It covers measures taken to ensure food safety and to protect animal and plant health, aiming to ensure that such measures are not more trade-restrictive than is necessary for health protection. Since women often play a central role in agriculture and in agri-food value chains, SPS measures can be expected to have a significant impact on their activities. Compliance with SPS measures often requires significant investment, implying economies of scale. It may thus be more difficult for smaller producers and traders, including women, to comply with such measures.<sup>63</sup> By disciplining overly burdensome or discriminatory SPS requirements and streamlining health-related border controls, the gender-neutral rules of SPS Agreement lower trade costs for all producers.<sup>64</sup> To the extent that women are disproportionately affected by these costs, they should be among the main beneficiaries as discussed below in (A). The SPS Agreement favours capacity building to enable developing country exporters to comply with SPS requirements and thus to gain and maintain access to export markets. SPS-related capacity building activities

63 Spencer Henson, 'Gender and Sanitary and Phytosanitary Measures in the Context of Trade: A Review of Issues and Policy Recommendations' (Geneva, International Centre for Trade and Sustainable Development (ICTSD), 2018).

64 Similar to the TFA.

need to incorporate consideration for gender issues into the design, implementation, and evaluation phases, identifying good practices in this regard.<sup>65</sup> The Standards and Trade Development Facility (STDF) is taking the lead in making the case for the need to mainstream gender into SPS capacity building activities (B).<sup>66</sup>

### A. The impact of SPS measures on women

In a similar vein to the difficulties women face in complying with international standards in the TBT context, women producers and traders can face significant burdens in complying with SPS requirements. Women sometimes lack critical skills (e.g. literacy, numeracy) and/or face greater difficulties than men in accessing the necessary resources (e.g. financing, equipment, regulatory information).<sup>67</sup>

One way in which the SPS Agreement may be particularly useful to women is by making it easier and less costly to access regulatory information. The SPS Agreement requires notification of draft regulations and publication of final regulations. While larger traditional companies can afford to invest in accessing such information, smaller producers and traders, may benefit disproportionately when this information is easily available.

In this context, the ePing Alert System,<sup>68</sup> a joint initiative by the United Nations Department of Economic and Social Affairs, the International Trade Centre and the WTO was created to make information about SPS and TBT regulations even more accessible, enabling public and private sector actors to sign up for alerts when there are new requirements on products or issues of interest. It even contains a feature that allows diffusing such regulatory information by SMS to producers who may lack access to email. This can make it possible to reach producers and traders in the non-traditional and informal sector, which often includes a high share of women.<sup>69</sup>

To date, the SPS Committee has not directly addressed gender issues in its discussions. Nevertheless, through its provisions disciplining the use of SPS measures, the SPS Agreement has the potential to facilitate the inclusion of women-sensitive standards in international trade. That is to say, while the SPS Agreement does not prescribe specific SPS requirements, it strongly encourages Members to harmonize their measures on the basis of international standards. For instance, some international standards, in particular food safety standards developed by the Codex Alimentarius, a collection of standards, guidelines, and codes of practice to protect consumer health and promote fair practices in food trade, take into account vulnerable populations, in particular children

65 Spencer Henson, 'Gender and Sanitary and Phytosanitary Measures in the Context of Trade: A Review of Issues and Policy Recommendations' (Geneva, International Centre for Trade and Sustainable Development (ICTSD), 2018).

66 STDF Briefing Note, Inclusive Trade Solutions: Women in SPS Capacity Building, [http://www.standardsfacility.org/sites/default/files/STDF\\_Briefing\\_note\\_13.pdf](http://www.standardsfacility.org/sites/default/files/STDF_Briefing_note_13.pdf) (visited 29 May 2019).

67 Spencer Henson, 'Gender and Sanitary and Phytosanitary Measures in the Context of Trade: A Review of Issues and Policy Recommendations' (Geneva, International Centre for Trade and Sustainable Development (ICTSD), 2018).

68 See <http://www.epingalert.org/en> (visited 29 May 2019).

69 For example, in Africa, 89.7% of employed women are in informal employment, see [https://www.ilo.org/wcmsp5/groups/public/---dgreports/--dcomm/documents/publication/wcms\\_626831.pdf](https://www.ilo.org/wcmsp5/groups/public/---dgreports/--dcomm/documents/publication/wcms_626831.pdf) (visited 3 July 2019).

and pregnant women, and the different dietary habits of men and women, e.g. when establishing limits for toxins and agrochemicals in food. Governments are thus nudged into adopting women-sensitive requirements and measures. For example, one of the few times that women have explicitly been mentioned in the SPS Committee was as part of a discussion on a French labelling provision for bisphenol A (a chemical found in plastics suspected of having adverse health effects) in food contact material that specifically addressed risks for pregnant women and young children.

### **B. The STDF: inclusive trade solutions—women in SPS capacity building**

The STDF, a global partnership that helps developing countries to gain and maintain access to markets by tackling SPS gaps, is keen that its work generates benefits for women in trade. Looking ahead, by developing linkages with gender-focused initiatives, the STDF will be able to ensure that trade-related SPS capacity building assistance also focuses and impacts on women and gender equality.

The STDF looks at the impact on women and gender equality, from the initial stages of project conception, approval, and throughout its implementation and evaluation. Good practice lessons on how the STDF's projects have built women's skills and know-how to meet SPS requirements have been shared through multimedia, news, events, and publications.

In Nepal, the STDF partnered with the Enhanced Integrated Framework on the construction of a ginger washing facility to support 8000 ginger-producing households. In addition, over 2000 farmers and cooperatives, such as the Chandra Kala Rai's ginger female-run cooperative—were trained at field schools on good agricultural practices. Although the objective of the project was not to support women directly, the project led to post-harvest losses being cut by 30%, higher profit margins, and a more than 60% increase in farmers' incomes (60% of whom were women). The STDF website has published a result story on this project.<sup>70</sup>

Women and men along the supply chain are responsible for meeting international SPS requirements. Yet, women working in agricultural value chains face more obstacles in plugging the knowledge gap that exists on SPS issues. It makes good business sense to support women farmers, processors, and traders to learn about good agricultural and manufacturing practices to help them produce and export safe products. In practice that means empowering women by building their skills and know-how to meet SPS measures through targeted training support.

## **VIII. THE SUBSIDIES AND COUNTERVAILING MEASURES AGREEMENT**

In pursuing the economic empowerment of women, by enhancing their presence in business and trade, some governments will have subsidies in mind as one of their preferred tools.

70 [http://www.standardsfacility.org/sites/default/files/STDF\\_PG\\_329.pdf](http://www.standardsfacility.org/sites/default/files/STDF_PG_329.pdf) (visited 29 May 2019).

### A. Policy space within the disciplines of the SCM Agreement

The use of subsidies by WTO Members is restricted by the disciplines contained in the Subsidies and Countervailing Measures (SCM) Agreement. In a nutshell, a financial contribution in any of the forms listed,<sup>71</sup> by a government or public body within the territory of a Member, that confers a benefit, will be considered a subsidy within the meaning of the SCM Agreement.<sup>72</sup> Furthermore, the SCM Agreement disciplines will only apply to subsidies that are specific.<sup>73</sup> Subsidies are prohibited only when contingent upon export performance or upon the use of domestic over imported goods,<sup>74</sup> and actionable only when they cause adverse effects to other WTO Members' interests.<sup>75</sup> Bearing these disciplines in mind, governments could therefore design programmes that provide opportunities for women in business and trade that do not conflict with the SCM Agreement.

Firstly, governments could design programmes that provide a financial contribution without conferring a 'benefit' in the sense of Article 1.1(b). Such a benefit is conferred only when the financial contribution 'is provided on terms that are more advantageous than those that would be available to the recipient on the market'.<sup>76</sup> Therefore, it could be argued that a loan programme destined specifically for companies owned by, directed by, or mainly employing women would not confer a benefit if awarded on commercial terms.<sup>77</sup> Even without preferential terms, the increased availability of loans for these companies could encourage their business initiatives. That is all the more true since, at least for developing countries, the limited financing available for women-led enterprises has itself been an obstacle to business growth.<sup>78</sup>

Alternatively, a government could design programmes that, even though falling within the SCM definition of a subsidy, would not be specific to an enterprise or industry or group of enterprises or industries under Article 2. According to Article 2.1(b), there is no specificity where the granting authority or legislation establishes objective criteria or conditions governing the eligibility for, and the amount of, a subsidy. Footnote 2 to Article 2.1(b) defines objective criteria as 'neutral, which do not favour certain enterprises over others, and which are economic in nature and horizontal

71 In the form of direct transfer of funds, foregone revenue, the provision of goods or services or purchase of goods or income or price support, Article 1.1 of the SCM Agreement.

72 Article 1.1 of the SCM Agreement.

73 Article 2 of the SCM Agreement.

74 Articles 3.1(a) and (b) of the SCM Agreement.

75 Articles 5 and 6 of the SCM Agreement.

76 If the financial contribution does not make the recipient better off *vis-à-vis* the relevant market, then it has no trade-distorting potential. (WTO Appellate Body Report, *Canada—Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999, paras 157 and 158). See also, WTO Appellate Body Report, *Canada—Certain Measures Affecting the Renewable Energy Generation Sector / Canada—Measures Relating to the Feed-in Tariff Program*, WT/DS412/AB/R / WT/DS426/AB/R, adopted 24 May 2013, para 5.163.

77 See Article 14(b) of the SCM Agreement.

78 Examples of factors leading to limited financing are the application paperwork, which has been found to be more burdensome for women entrepreneurs, and the requirement of husbands being the co-signatories for women's loan applications in countries such as the Philippines. See APEC Secretariat, 'Access to Trade and Growth of Women's SMEs in APEC Developing Economies: Evaluating Business Environments in Malaysia–Philippines–Thailand', APEC Policy Partnership on Women and the Economy (2013), at 16–18.

in application, such as number of employees or size of enterprise'. Although this has not been tested to date, it is possible that, *inter alia*, the ratio of women employees in the company, the number of women in senior positions, or the existence of a female founder or CEO could constitute such objective criteria or conditions.

Finally, even if the selected measure is a specific subsidy, there is still room for action in conformity with the SCM Agreement, since the granting of specific subsidies (other than those contingent on export performance or on the use of domestic over imported goods) is not, in and of itself, prohibited under the SCM Agreement. Rather, such subsidies are potentially subject to action if they cause certain types of adverse effects, in certain circumstances, as defined in the SCM Agreement.<sup>79</sup> A government could design a wide variety of subsidy programmes for companies owned by, directed by, or mainly employing women, provided that those subsidies do not fall under the category of prohibited subsidies. Accordingly, and to minimize the risk of multilateral action or application of countervailing measures, a government could, for example, help SMEs and micro, small and medium enterprises (MSMEs) with the aforementioned characteristics upon their establishment, over the course of their development and when facing financial difficulties, and not when already competing strongly in local or international markets. The goal could be for those companies to grow to compete strongly locally or internationally, but without the continued use of subsidies.

## B. Notifications

The SCM Agreement's notification requirements can contribute to enhancing the participation of women in business and trade. Article 25 requires Members to notify their subsidies, including a description of the measure and its policy objective. Measures taken by one Member to increase participation of women in business and trade can serve as a means for encouragement and as an example for other Members seeking the same objective.

In conclusion, the SCM Agreement appears to provide substantial policy space for governments to design measures that economically empower women.<sup>80</sup> Applied thoughtfully, such type of measures could be useful to achieve the pursued objective, while avoiding trade-distortive effects.

79 These actions could be multilateral dispute settlement, and consequent remedies, or the imposition of countervailing measures by an importing Member that has conducted an investigation in which it was determined that subsidized imports of an imported product are causing injury to the domestic industry producing the like product.

80 Arguably, the existing policy space in the SCM Agreement suffices to accommodate policies that empower women in business and trade and negotiating a carve out would therefore not be necessary. Nevertheless, a carve out would allow Members to empower women through subsidies that are contingent upon export performance or the use of domestic over imported goods, or that are potentially causing adverse effects. Such a carve out could be formulated similarly to Article 8 of the SCM Agreement, for example, by excluding the actionability of subsidies demonstrated to pursue the goal of enhancing women's participation in trade. The potential challenges of such an attempt would lie in the difficulty of estimating *ex ante* the potential benefits of such a policy and the trade costs and prevention of misuse.



## IX. THE GENERAL AGREEMENT ON TRADE IN SERVICES

This section discusses whether, and if yes how, the General Agreement on Trade in Services (GATS) could potentially benefit female service suppliers and service companies that employ (primarily) women.<sup>81</sup>

In 2017, services accounted for 65% of world GDP.<sup>82</sup> The service sector has the potential to help enhancing the participation of women in business and trade—considering notably the following:

- Based on 2018 data, worldwide female labour-force participation is highest in services. The 55.5% of working women are employed in services, up from 38% in 1991—compared to only 27.5% in agriculture and 17% in industry.<sup>83</sup>
- Employment in service sectors is associated with urban areas, more advanced education levels, and higher growth. Countries with large service sectors tend to have higher shares of female employment and a lower gender wage gap.<sup>84</sup>
- Also, since services usually are less capital intensive,<sup>85</sup> they can offer women a facilitated access to employment and qualifications.

The GATS defines ‘trade in services’ as encompassing four modes of supply, namely: the cross-border supply from the territory of one WTO Member into the territory of another Member (mode 1), consumption abroad (mode 2), the supply of a service through the establishment of a commercial presence in the territory of another Member (mode 3), and the supply of a service by a service supplier through the presence of natural persons in the territory of another Member (mode 4). Consequently, and depending on the market access and national treatment commitments each Member has undertaken under the Agreement, the GATS not only imposes obligations on a Member in respect of its treatment of foreign *services*, but also in respect of its treatment of foreign *natural and legal persons* within its territory. Members’ GATS commitments regarding more particularly modes 3 and 4 define the terms and conditions upon which foreign service suppliers<sup>86</sup>—among which female service suppliers and service companies that employ (primarily) women—and their services may enter the market, as well as the conditions applying to them once they have entered the market.

81 Firms with female top managers (% of firms), firms with female participation in ownership (% of firms).

82 World Bank, World Bank Development Indicators, ‘Services, Value Added (% of GDP)’ indicator, available at <https://data.worldbank.org/indicator/NV.SRV.TOTL.ZS> (visited 5 July 2019).

83 See the indicator ‘employment in services, female (% of female employment, modelled ILO estimate)’; World Bank, World Development Indicators, <https://data.worldbank.org/indicator/SL.SRV.EMPL.MA.ZS?view=chart> (visited 5 July 2019). By comparison, worldwide 44.5% of men in employment work in services, 28.7% in agriculture, and 26.8% in industry. Between 1995 and 2015, women’s worldwide employment in services has increased from 41% to 62%. Thus, nearly two out of three women in employment work in the services sector. International Labour Organization, ‘Women at Work: Trends 2016’, Geneva 2016, xiii; [https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms\\_457317.pdf](https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_457317.pdf) (visited 5 July 2019).

84 Rendall, Michelle, ‘The Service Sector and Female Market Work’, Working Paper No. 312, University of Zurich Department of Economics, (2014), [http://www.econ.uzh.ch/ipcdp/Papers/ipcdp\\_wp312.pdf](http://www.econ.uzh.ch/ipcdp/Papers/ipcdp_wp312.pdf) (visited 5 June 2019).

85 Notably as compared to industrial activities.

86 I.e., both natural and legal persons.



### **A. General, gender-neutral rules that may be especially useful to women**

A first potential contribution of the GATS is its possibility to guarantee, through legally enforceable market access and national treatment commitments, the access to foreign markets for services and service suppliers—including for women service suppliers and service companies employing (primarily) women.

Importantly, the GATS is a flexible agreement that allows each Member to adjust the conditions of market entry and participation to its sector-specific objectives and constraints. Members are free to designate the sectors, in which they are ready to assume market access, national treatment, and/or so-called ‘additional’ commitments regarding any of the four modes of supply.<sup>87</sup> The Schedules of Commitments are elaborate documents in which each Member identifies the service sectors that it intends to commit to and carefully defines the level of market access and/or national treatment commitments that it wishes to undertake (including limitations thereto).

The negotiation of such commitments under Article XIX of the GATS, which mandates periodic negotiations towards achieving a progressively higher level of trade liberalization in services, could potentially increase female participation in services trade—especially if focusing on sectors accounting for a high share of women employment.<sup>88</sup> Ultimately, the ‘women-empowering-effect’ will depend on the sectoral coverage of, and conditions attached to the commitment scheduled by Members. Commitments range from ‘none’ (a Member maintains no market access and/or national treatment limitation) to ‘unbound’ (a Member remains free to introduce or maintain measures inconsistent with market access and/or national treatment)—and anything in between. Members may also undertake positive, so called ‘additional commitments’ regarding services-related licensing and qualifications requirements and procedures, and technical standards.

The GATS also contains transparency obligations: notably the obligation to publish or otherwise make publicly available all measures of general application affecting trade in services and to establish national enquiry points mandated to respond to other Members’ information requests. Furthermore, 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 (potentially also including the prevention of gender-based discrimination, although this has never been tested in practice).<sup>89</sup> In addition, service suppliers in all sectors must be able to use national tribunals or procedures in order to challenge administrative decisions affecting trade in services.<sup>90</sup> Such trade cost-reducing transparency and domestic regulatory obligations are particularly important for women, notably because they tend to work more in SMEs.

87 See notably Articles XVI, XVII, and XVIII of the GATS.

88 Such sectors notably are: wholesale and retail trade, tourism, hotel and restaurant, education, health care (notably nurses), social assistance, and personal services—but increasingly also professional, computer and related, and research and development services.

89 Article VI:1 of the GATS, ‘Domestic Regulation’. See also especially the negotiating mandate on domestic regulation in para 4 of the same article.

90 At the request of an affected service supplier (Article VI:2 of the GATS ‘Domestic Regulation’).

Due to the importance of the domestic regulatory environment for services trade, the GATS provides for a specific negotiating mandate in Article VI:4. Article VI:4 mandates the negotiation of any ‘necessary’ disciplines to prevent domestic regulations (e.g. licensing and/or qualification procedures and requirements, technical standards) from constituting unnecessary barriers to trade in services. In that context, Canada proposed a provision aimed at ensuring that ‘such measures [relating to authorization for the supply of a service] do not discriminate between men and women.’<sup>91</sup>

### B. ‘Unregulated’ space in the GATS allowing Members to adopt measures specifically empowering women

The GATS expressly recognizes the right of Members to regulate the supply of services in accordance with their own policy objectives.

As mentioned earlier in this article, many countries have laws in place preventing women from accessing international trade opportunities. However, no WTO Member has included any *explicit* gender-based market access or national treatment limitation in its Schedule of Commitments. In sectors where a Member has undertaken market access commitments, it cannot maintain or adopt any of the (six) numerical limitation-types specified under GATS Article XVI:2—unless it has listed a corresponding market-access limitation in its Schedule. Would a Member that specifically limits the number of *female* service suppliers or prohibits them altogether in any given service sector, need to introduce a corresponding market access limitation (respectively leave the sector altogether ‘unbound’<sup>92</sup>)? The letter of Article XVI:2(a) *does not* address gender-based limitations on the number of service suppliers. Similarly, the concept of ‘likeness’ of (services and) service suppliers under Article XVII has never been tested from a gender standpoint<sup>93</sup> but the national treatment obligation of the GATS can be made subject to conditions that could possibly include women-related conditions.

As long as a measure adopted by a Member does not violate the GATS’ substantive obligations,<sup>94</sup> as well as the commitments undertaken by that Member in its Schedule

91 For a more general description of Canada’s progressive trade agenda, see <https://www.cigionline.org/articles/advancing-gender-equality-through-trade> (visited 5 July 2019).

92 ‘Unbound’ means ‘not consolidated’ (no market access commitment).

93 E.g., Article XVII of the GATS (‘National Treatment’) provides that ‘in the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own *like* services and service suppliers’ (emphasis added). This obligation—which is not a general obligation but applies only in sectors included in a Member’s Schedule of specific commitments—relates to the need to ensure equal conditions of competition for *foreign* services and service suppliers as compared to *national* ones. Provided a Member committed a sector on a (fully bound) national treatment basis, could a case be made based on the supposed discrimination of (foreign) *female* service suppliers as compared to their (domestic) *male* colleagues? The question has never been raised.

94 Notably the general MFN (Article II), transparency (Article III), and domestic regulation (Article VI) obligations.

of Commitments,<sup>95</sup> the Member would be free to maintain or adopt measures affecting trade in services that favour women or promote their participation in services trade.<sup>96</sup>

### C. Exceptions that could be applied to help women's interests

As with the exceptions in Article XX of the GATT, the general exceptions in Article XIV of the GATS could arguably be invoked to justify GATS-inconsistent measures: notably under Article XIV(a) regarding measures 'necessary to protect public morals or to maintain public order'—subject to compliance with the requirements of the provision.

Finally, the LDC Services waiver<sup>97</sup> allows WTO Members to grant preferences to services and service suppliers from LDCs, notwithstanding the GATS' MFN obligation. Arguably, to help foster the inclusion of women from LDCs in international trade, Members could, under this waiver, grant preferential treatment in the form of preferential market access (or extending national treatment, e.g. by accessing grants or tax breaks) to services and services exporters from LDCs in sectors employing predominantly women.<sup>98</sup>

## X. THE AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS

Intellectual property rights (IPRs) are the rights given over creations of the human mind, e.g. artistic works and inventions. They usually give the creator an exclusive right over the physical manifestations or expressions of their ideas for a specific period of time.<sup>99</sup> Currently, cross-border flows of knowledge are more intertwined than ever with trade.<sup>100</sup> According to UNCTAD, trade in creative goods and services grew by 134% between 2002 and 2011.<sup>101</sup> Thus, being able to acquire, enforce, and trade in IPRs in foreign markets can be an important source of income for women all over the world.

### A. Women's works in a rapidly evolving world

For much of modern history, few women reaped the benefits in creative and innovative *métiers*, such as architecture, literature, music, and science. In some cases, women circulated their works anonymously or using male pseudonyms.<sup>102</sup> Crafts, like needlework,

95 Market access, national treatment, and 'additional' commitments. Note that, unlike in the GATT, national treatment (Article XVII) is not a general obligation under the GATS. It applies only to scheduled service sectors—subject to possible limitations inscribed in a Member's schedule.

96 E.g., providing fiscal incentives to encourage women-run service businesses; reducing tariffs for services enterprises with high female employment ratios such as tourism, hotel and restaurant services; or policies and regulatory frameworks encouraging banks/financial institutions to offer gender-focused products and services helping women to access start-up capital.

97 Nairobi\ignorespacesWaiver\ignorespacesDecision, [https://www.wto.org/english/thewto\\_e/minist\\_e/mc10\\_e/1982\\_e.htm](https://www.wto.org/english/thewto_e/minist_e/mc10_e/1982_e.htm) (visited 10 June 2019).

98 However, the inclusion of women-considerations in the waiver has not been considered or discussed for the time being.

99 WIPO, 'What is Intellectual Property?', [https://www.wipo.int/edocs/pubdocs/en/intproperty/450/wipo\\_pub\\_450.pdf](https://www.wipo.int/edocs/pubdocs/en/intproperty/450/wipo_pub_450.pdf) (visited 1 June 2019).

100 Deborah Elms and Patrick Low (eds.), 'Global Value Chains in a Changing World' (WTO, 2013).

101 As seen in: <https://connectamericas.com/content/orange-economy-infinite-opportunity> (visited 1 June 2019).

102 Dan Burk, 'Bridging the gender gap in intellectual property', WIPO Magazine (2018).

and other domestic activities were considered more 'feminine' and excluded from IPR protection until very recently.<sup>103</sup>

Contemporary empirical research has centered on patents, as they undergo a rigorous review where inventors are clearly identified. Available data shows that a significant gender gap persists. In 2018, the share of women inventors listed in patent applications reached 17%, up from 9.5% in 1995.<sup>104</sup> Only 4.3% of patent applications listed solely women as inventors in 2015, almost double than in 1995, and the applications listing teams with at least one woman have increased from 17 to 29% in the same period.<sup>105</sup> Unfortunately, data is very limited in other areas, such as copyrights, which are important to monetize women's creativity, but are available without formalities. Anecdotal evidence in this area shows a similar trend as in patents, as only 7% of the world's film directors and 20% of screenwriters are women.<sup>106</sup>

## B. IPRs at the WTO

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) brought the realm of creativity and innovation to the rules-based multilateral trading system. It sets the minimum standards of IPR protection for WTO Members and contains sections on enforcement, acquisition, and maintenance of IPRs.<sup>107</sup>

The TRIPS Agreement has ample policy space to foster creativity and innovation: Article 1.1. provides for Members 'to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice', as long as MFN and NT principles are respected, and Article 7 calls for a balance of rights and obligations conducive to social and economic welfare. Along with these provisions, the transparency obligations in Articles 63 and 69 ensure public access to TRIPS-related information.<sup>108</sup> Moreover, reports submitted by Members under Articles 66.2 and 67 provide examples on programmes on technology transfer for LDCs and technical cooperation, which are specifically designed to assist women.<sup>109</sup>

In the TRIPS Council, Members have shared their national experiences on the implementation of a wide range of policies to promote women's participation in the IP system. Delegations acknowledged that '[w]e cannot solve today's problems if half of the global population is marginalized or otherwise incapable of reaching their innovative potential. This is true of many women and girls'. Members also indicated that 'gender diversity is essential for creativity and innovation, but while more and more women are reaching senior levels in science and engineering, the aspiration of reaching

103 Shelley Wright 'A Feminist Exploration of the Legal Protection of Art' (1994).

104 As seen in: [https://www.wipo.int/women-and-ip/en/news/2019/news\\_0002.html](https://www.wipo.int/women-and-ip/en/news/2019/news_0002.html) (visited 1 June 2019).

105 Gema Lax Martínez, Julio Raffo and Kaori Saito, 'Identifying the gender of PCT inventors', WIPO Economic Research Working Paper No. 33 (2016).

106 Presentation by Karyn Temple at the Panel 'Empowering Women in the Creative Industries' (2018).

107 For more details, [https://www.wto.org/english/tratop\\_e/trips\\_e/intel2\\_e.htm](https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm) (visited 4 June 2019).

108 See Members' transparency toolkit, [https://www.wto.org/english/tratop\\_e/trips\\_e/trips\\_toolkit\\_e.htm](https://www.wto.org/english/tratop_e/trips_e/trips_toolkit_e.htm) (visited 1 June 2019). See e-TRIPS Gateway, single point for access to information to the TRIPS Agreement, available at <https://tripsims.wto.org> (visited 7 August 2019)

109 See for example, programmes described in IP/C/W/646/Add.4 and Add.7; and IP/C/W/647/Add.1 and Add.6.

gender equality is not yet fulfilled.<sup>110</sup> Through this active dialogue, it has become clear that successful participation of women's creativity and inventiveness goes beyond the implementation of campaigns to promote the IPR system. A comprehensive approach includes complementary policies on, *inter alia*, education, research, and financing.

There are stimulating examples of the use of IPR protection by women. Research by the Inter-American Development Bank shows that, in Latin America and the Caribbean, women's participation in the Orange Economy<sup>111</sup> is larger than in other sectors by 13%.<sup>112</sup> The mindful use of IPRs has produced tangible results. For example, in May 2019, Nike cancelled the release of a limited-edition shoe and apologized for the 'inaccurate representation' of traditional designs of Guna women from Panama.<sup>113</sup> These designs, or *molas*, have been protected by law since the year 2000, and a certification mark guarantees their authenticity. Fostering creativity and inventiveness is at the core of the 'trade-relatedness' of IPRs. The harmonious application of domestic policies and TRIPS can yield positive outcomes for women worldwide.

## XI. THE AGREEMENT ON GOVERNMENT PROCUREMENT

Public procurement<sup>114</sup> is an important part of economic activity<sup>115</sup> directly impacted by government policies, and thus a viable tool to promote women economic empowerment. Access to and participation in public procurement markets by women-owned businesses has been identified as a crucial element in fostering sustainable economic development and inclusive growth,<sup>116</sup> and that it is explicitly recognized in the SDG that public procurement can facilitate progress in the development agenda.<sup>117</sup>

110 Architecture, visual and performing arts, crafts, film, design, publishing, research and development, games and toys, fashion, music, advertising, software, TV, radio, and videogames are some of the sectors that make up the Orange Economy, as defined by John Howkins.

111 As seen in: <https://connectamericas.com/content/orange-economy-infinite-opportunity> (visited 3 June 2019).

112 Over generations, the women of Guna, an indigenous people from Panama, have specialized in the elaboration of fabrics 'molas' that tell their history and vision. Panama enacted Law No. 20-2000 to protect traditional knowledge related to molas.

113 Referred to throughout as 'procurement'. 'Public procurement' or 'government procurement' refers to the purchase by governments and state-owned enterprises of goods, services, and works.

114 When purchases of procurement contracts of state-owned utilities are also accounted for, the size of procurement markets increases by an additional 2 to 13 percentage points of GDP, meaning that procurement markets can potentially capture up to around 25% of GDP or more. ('Government at Glance 2017', <https://www.oecd.org/gov/government-at-a-glance-2017-highlights-en.pdf> (visited 28 May 2019); see also, WTO, 'WTO and government procurement', [https://www.wto.org/english/tratop\\_e/gproc\\_e/gproc\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gproc_e.htm) (visited 28 May 2019)).

115 See also, ITC, 'Empowering Women through Public Procurement', <http://www.intracen.org/publication/Empowering-Women-Through-Public-Procurement/> (visited 28 May 2019).

116 SDG 12 'Responsible Consumption and Production': Ensure sustainable consumption and production patterns; Target 12.7: Promote public procurement practices that are sustainable in accordance with national policies and priorities; Indicator 12.7.1 Number of countries implementing sustainable public procurement policies and action plans. For additional information of the SDGs, see <http://www.un.org/sustainabledevelopment/sustainable-development-goals/> (visited 28 May 2019).

117 For further information on the GPA, see [https://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_gpa\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm) (visited 28 May 2019).

The WTO's Agreement on Government Procurement (GPA)<sup>118</sup> aims to strike a balance between such goals and the 'primary' purpose of procuring goods and services based on principles of transparency, integrity, and competition in public purchasing.<sup>119</sup>

### A. Improving procurement legislation and systems

Lack of information about tender opportunities, overly complex and burdensome tender procedures, and unreasonable qualification requirements are among the challenges that prevent women businesses from accessing and fully participating in public procurement markets.<sup>120</sup> A first fundamental contribution of the GPA in improving access to procurement markets is to increase transparency, integrity, and supplier inclusiveness of their procurement systems. The resulting enhanced availability of information and procurement opportunities can be expected to be beneficial to women businesses.<sup>121</sup>

As a basic rule, Article IV:4 provides that a procuring entity shall conduct covered procurement in a transparent and impartial manner using methods such as open tendering, selective tendering, and limited tendering, that avoids conflicts of interest and prevents corrupt practices. It also requires the publication of notices and encourages the use of electronic means to ensure that notices are available free of charge and through a single point of access (Article VII:1). Furthermore, the GPA contains obligations for procuring entities to remove unnecessary obstacles to participation (Article VIII:1, Article IX:2 and 3, Article X), put in place fair procedures respecting minimum timelines (Article XI) thus maximizing opportunities.

Importantly for women businesses as potential newcomers, Article XVI:1 provides unsuccessful bidders with the right to request (and receive) an explanation of the reasons why the entity did not select its tender. Also, the GPA's requirements for domestic review of procurement decisions provide women businesses with an important platform to voice their concerns and address unfair practices (Article XVIII).<sup>122</sup>

### B. Policy space

A second contribution lies in providing policy space, guidance, and advice, where needed. With regard to women-owned businesses participation, the extent to which procurement is disaggregated,<sup>123</sup> the use of framework agreements and e-procurement

118 For a discussion of the objectives of public procurement regulations, see Steven Schooner, 'Desiderata: Objectives for a System of Government Contract Law', 11 *Public Procurement Law Review* 103 (2002).

119 ITC, above n 115.

120 See e.g. EBRD, *Public Procurement: Is open competition good for SMEs?*, <https://www.ebrd.com/documents/ogc/public-procurement-is-open-competition-good-for-smes.PDF> (visited 28 May 2019).

121 Article XVIII of the GPA. On the importance of domestic review procedures, and related policy considerations, see Daniel Gordon, 'Bid Protests: The Costs are Real, But the Benefits Outweigh Them', 42 *Public Contract Law Journal* 3 (2013) and 'Constructing a Bid Protest Process: Choices Every Procurement Challenge System Must Make', 35 *Public Contract Law Journal* 3 (2006).

122 Disaggregated procurement is used here as meaning procurement in a non-centralized manner and/or from multiple sources. Women entrepreneurs are well placed to compete for such purchases because the size of the contracts and purchases are relatively small. See also, ITC, above n 115.

123 For additional information on the role of effective e-procurement systems, see EBRD, above n 120.



systems,<sup>124</sup> the design of standard procurement documentation to reduce transaction costs, and other procurement practices come to mind.

The GPA allows its parties to award contracts in smaller lots within a covered procurement. Similarly, the GPA simply reflects, in its annexes, choices individual economies make as to the number of procuring entities and resulting aggregation or disaggregation of the procurement function. Parties also are free to establish opportunities for subcontracting or joint bidding for women-owned businesses.<sup>125</sup> The WTO Committee on Government Procurement serves as an important forum for exchanges on international best practices in making use of the flexibilities described<sup>126</sup> and the WTO's technical assistance can be of further help.<sup>127</sup>

### C. Preferential programmes

The GPA, however, also makes it possible for GPA parties to implement targeted preferential programmes for women-owned businesses.<sup>128</sup> First, by virtue of the rules on coverage specified in the GPA,<sup>129</sup> there is the possibility to apply preferential programmes, such as price preferences, offsets, or set-asides below the threshold values of the GPA—in other words with regard to smaller value procurements. Furthermore, parties can negotiate specific exclusions to their above-threshold coverage to indicate

124 Caroline Nicholas and Anna Caroline Müller, 'SME Participation in Government Procurement Markets: Legal and Policy Considerations under the WTO Agreement on Government Procurement and the UNCITRAL Model Law on Public Procurement', in Thilo Rensmann (ed), *Small and Medium-Sized Enterprises in International Economic Law* OUP, 2017.

125 For additional information, see World Trade Organization, 'Report (2018) of the Committee on Government Procurement', GPA/AR/1, dated 29 November 2018 (the Report is publicly available at <https://docs.wto.org>).

126 The WTO technical assistance programme in the area of government procurement aims to enhance awareness of key concepts, principles, and practices, to exchange information and to share experiences on the implications of different bilateral, regional, and multilateral disciplines. On the request of developing and least-developed WTO Members/observers, WTO Secretariat undertakes technical cooperation activities to assist countries in building capacity in the area of government procurement, including for women-owned businesses. For additional information, see WTO, *Technical cooperation activities*, [https://www.wto.org/english/tratop\\_e/gproc\\_e/gptech\\_coop\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gptech_coop_e.htm) (visited 27 June 2019).

127 See e.g. John Linarelli, 'The limited case for permitting SME procurement preferences in the Agreement on Government Procurement', in Sue Arrowsmith, Robert D. Anderson (eds), *WTO Regime on Government Procurement: Challenge and Reform* (Cambridge University Press, 2011), 444–458.

128 The GPA only applies to high value procurements above parties' thresholds. The schedule of each party contains several annexes which define the concerned party's commitment with respect to four dimensions of coverage: (i) the procuring entities covered by the Agreement (annexes 1–3); (ii) the goods, services, and construction services covered by the Agreement (annexes 4–6); (iii) the threshold values above which procurement activities are covered by the Agreement (specified in annexes 1–3); and (iv) exceptions to the coverage (annex 7). See Article II of the GPA.

129 See above note 128.



exceptions from coverage in notes to specific annexes and in the General Notes in Annex 7.<sup>130</sup> This opportunity has been used by some GPA parties to schedule exceptions for women-owned businesses.<sup>131</sup>

Also, the revised GPA introduces a completely re-designed provision on developing countries,<sup>132</sup> expressly permitting them to adopt or maintain negotiated price preference programmes and offsets,<sup>133</sup> as well as higher initial thresholds as negotiated transitional measures, based on their development needs and subject to transparency requirements.<sup>134</sup>

Overall, the GPA's positive impact on national procurement systems is catalyzed by the international market access opportunities provided to businesses, including women businesses, under the GPA. The e-GPA tool<sup>135</sup> developed by the WTO Secretariat can help women entrepreneurs identify covered goods and services of interest to them.

## XII. REGIONAL TRADE AGREEMENTS

Commitments made by WTO Members in their Regional Trade Agreements (RTAs) are often a precursor to their positions in plurilateral or multilateral negotiations. As with other issues, provisions on gender have been appearing for a few years in RTAs. While most RTAs do not go beyond a recognition of the need to increase participation by women in international trade, there has been a gradual change with recent RTAs including more extensive commitments on gender.

### A. Cooperation between parties on trade and gender issues

Most RTAs primarily aim to ensure cooperation between the parties on trade and gender issues including through an exchange of information and of best practices between the parties. The objective of cooperation can be different depending on the RTA with some parties such as the European Union focusing on education and training as a goal to develop female entrepreneurship and others such as Canada and the USA on

130 For example, Annex 2 of the United States' commitments sets out: 'The state entities included in this Annex may apply preferences or restrictions associated with programmes promoting the development of distressed areas or businesses owned by minorities, disabled veterans, or women'. For additional information on the GPA coverage, see above note 128; and WTO, *Coverage schedules*, [https://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_app\\_agree\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gp_app_agree_e.htm) (visited 27 June 2019).

131 See Article V of the GPA.

132 Offset means any condition or undertaking that encourages local development or improves a Party's balance-of-payments accounts, such as the use of domestic content, the licensing of technology, investment, counter-trade, and similar action or requirement, see Article I of the GPA.

133 See for further detail Anna Caroline Müller, 'Special and Differential Treatment and Other Special Measures for Developing Countries under the Agreement on Government Procurement: the Current Text and New Provisions', in Arrowsmith and Anderson (eds), above n 127.

134 The e-GPA portal provides a single point of access to the market access information under the GPA, together with related information that the GPA Parties are committed to provide. It offers improved transparency and user-friendly accessibility to the relevant information and aims to better publicize the up to \$1.7 trillion in market access opportunities available under the Agreement. In particular, the site enables you to browse and search the Parties' coverage commitments, including by specifying commitments related to women-owned and small businesses. Available at <https://e-gpa.wto.org/> (visited 27 June 2019).

135 For example, the European Union directives on non-discrimination and gender equality, as well as decisions taken by other customs unions including MERCOSUR, the Andean Community, the Central American Common Market, the East African Community, ECOWAS, and COMESA.

gender equality in the workplace. Frequently, such provisions are found in cooperation, trade and sustainable development, or economic policy chapters or sections in the European Union's agreements or the labour side agreement or the chapter for Canada and the USA. Agreements that aim to achieve greater integration such as customs unions furthermore also have provisions that aim to promote gender equality.<sup>136</sup>

### **B. Standalone chapters dedicated to trade and gender issues**

More recently, we have seen the emergence of standalone chapters dedicated to trade and gender issues and which therefore contain more detailed provisions. For example, the review of the Canada–Chile Free Trade Agreement (FTA) (the original agreement entered into force in July 1997) resulted in an amended text which includes a separate annex (Chapter *Nbis*) on trade and gender, a first for Canada and Chile, and a precursor to future agreements involving these countries. Canada has also included a chapter on gender in its renegotiated agreement with Israel (signed in May 2018 and not yet in force).<sup>137</sup> According to the Global Affairs Canada website, Canada is actively seeking to include a chapter on trade and gender in its FTA negotiations with the Pacific Alliance (which also includes Chile).<sup>138</sup> Chile has also increasingly sought to expand provisions on trade and gender in its RTAs, most recently in its RTAs with Uruguay (signed in 2016 but not yet in force) and with Argentina which entered into force on 1 May 2019 while a separate chapter on trade and gender is being discussed in the review of the EU–Chile RTA.<sup>139</sup> These chapters encourage cooperation between the parties for building capacity and skills, financial inclusion, promoting gender equality and women's leadership, and several other issues. They also establish a committee on trade and gender to facilitate the exchange of information and experiences in the implementation of policies to ensure gender equality. Although excluded from the RTA's dispute settlement mechanism in the case of Chile's agreements, that chapter provides for the possibility of consultations between the parties in case of disagreements on the chapter's application and interpretation and the use of the dispute settlement mechanism if the parties are unable to resolve the issue through dialogue and consultations.

The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) which also includes Canada and Chile, takes a different approach, including a 'women and economic growth' section under the Chapter on Development. Provisions in the Chapter include cooperation between the parties including through advice and training to help women build skills and enhance their access to markets, technology, and financing; developing women's leadership networks; and identifying best practices

136 See [https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/israel/fta-ale/text-texte/toc-tdm.aspx?lang=eng&\\_ga=2.178601444.1134392937.1561638542-677825761.1485443059](https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/israel/fta-ale/text-texte/toc-tdm.aspx?lang=eng&_ga=2.178601444.1134392937.1561638542-677825761.1485443059) (visited on 28 June 2019).

137 See [https://international.gc.ca/gac-amc/publications/blueprint\\_2020-objectif\\_2020/highlighting\\_gender\\_trade-mettre\\_accents\\_sur\\_genre\\_commerce.aspx?lang=eng](https://international.gc.ca/gac-amc/publications/blueprint_2020-objectif_2020/highlighting_gender_trade-mettre_accents_sur_genre_commerce.aspx?lang=eng) (visited 28 May 2019).

138 The Chile–Uruguay RTA is available at [http://www.sice.oas.org/trade/CHL\\_URY/CHL\\_URY\\_Text\\_s.pdf](http://www.sice.oas.org/trade/CHL_URY/CHL_URY_Text_s.pdf) (visited 28 May 2019) and Chile–Argentina RTA at: [http://www.sice.oas.org/Trade/ARG\\_CHL/Texto-ALC-Chile-Argentina.pdf](http://www.sice.oas.org/Trade/ARG_CHL/Texto-ALC-Chile-Argentina.pdf) (visited 28 May 2019). The EU–Chile draft textual proposal is at: [http://trade.ec.europa.eu/doclib/docs/2018/june/tradoc\\_156962.pdf](http://trade.ec.europa.eu/doclib/docs/2018/june/tradoc_156962.pdf) (visited 28 May 2019).

139 The 3rd, 11th, and 12th Ministerial Conferences.

for workplace flexibility. The CPTPP provisions in this section have also been used in the Australia–Peru RTA, signed in February 2018 but not yet in force.

Thus, the role played by women in international trade, the need for policies to prevent gender discrimination and to encourage participation by women in international trade are increasingly being recognized by WTO Members in their RTAs. Whether the presence of relatively ‘soft’ rules on cooperation and assistance is sufficient to empower women, remains to be seen.

### XIII. WOMEN’S PARTICIPATION IN THE INSTITUTION’S BODIES.

The WTO institution itself needs to, and is striving to, become gender equal and close the existing gender gap. For example, in the higher WTO bodies, only three Ministerial Conferences have been chaired by women<sup>140</sup> and six have been vice-chaired by women. Furthermore, since 1995, the General Council and the Dispute Settlement Body have each only been chaired by three women<sup>141</sup> and the Trade Policy Review Body by seven. Out of the 27 Appellate Body members, only five have been women,<sup>142</sup> and four of them have been chairperson of the Appellate Body.<sup>143</sup> Of the 288 individuals selected to serve on panels between 1995 and 2018, only 42 were women and only 14 were chairpersons of a panel. In the 34 panels composed in 2018, 19% of the panellists chosen were women. In dispute settlement, the most alarming fact—in light of the current insistence from some Members to have gender neutral adjudicating bodies—is that out of 434 names on the current WTO Indicative List of Governmental and Non-Governmental Panellists, 85 are women, which is just over 19%.

### XIV. CONCLUSION

The above analysis illustrates that while the WTO Agreements are gender-neutral, they make a positive contribution to creating a level playing field and fertile ground for women’s economic activity. For example, the WTO Agreements enshrine the right to review administrative decisions, which guarantee the rule of law in economic and trade operations. Furthermore, the policy space available for Members to promote women’s empowerment within the WTO framework is significant.

As this article has demonstrated, there are three main avenues under which individual governments can pursue the aim of women’s empowerment. First, governments can avail themselves of the considerable policy space left to Members under the WTO agreements. That is to say, Members have ample space to undertake various measures including for example training and teaching activities targeted at empowering women without coming under the purview of specific WTO rules. Second, Members can make use of basic provisions present in the agreements analysed above, such as those mandating transparency or easy access to information in order to aid women-led businesses to succeed in the market. Third and finally, the article has also explored the possibility

140 Ambassador Sunanta Kangvulkulkij, Ambassador Elin Østebø Johansen, and Ambassador Amina Mohamed.

141 Hong Zhao of China, Yuejiao Zhang of China, Lilia R. Bautista of the Philippines, Jennifer Hillman and Merit E. Janow of the United States.

142 Yuejiao Zhang, Jennifer Hillman, Lilia R. Bautista and Hong Zhao of China.

of more substantive gender-focused measures and how they would fit, for example, within non-discrimination or market access provisions. The article has therefore shown that, all in all, Members can find ways to comply efficiently and effectively with their WTO obligations while pursuing initiatives that can lead to more inclusive trade and ultimately to women's empowerment.

To conclude, this article is a first overview and a preliminary exploration of trade-related issues and their relation to gender equality and women's empowerment in the context of some WTO Agreements. It is by no means exhaustive, and the place of gender within other areas of trade such as anti-dumping, import licensing, or customs valuation, remains to be more fully analysed. Thus, it may be worthwhile undertaking further and more specific research to explore deeper the domestic implementation of the WTO Agreements and the effect of the multilateral trading system on women entrepreneurs, exporters, and importers.