

Making Trade Agreements Work for Women Empowerment: How Does It Help, What Has Been Done, and What Remains Undone?

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Abstract

In the recent years, there has been an upsurge in the number of FTAs that are mainstreaming gender equality concerns in their trade agreements. But is gender mainstreaming enough, and does it mean that countries that ‘mainstream’ gender equality concerns in their trade agreements also ‘adopt’ actions to address these concerns? What is gender mainstreaming in trade policy context? How can trade agreements help in fostering women empowerment? What kinds of relevant provisions have already been included in existing trade agreements, and what remains undone? This article seeks to respond to these questions.

Keywords: gender mainstreaming, trade agreements, women empowerment, shortcomings.

Resumen

En los últimos años, ha habido un aumento en el número de acuerdos de libre comercio que están incorporando elementos sobre la igualdad de género en sus acuerdos comerciales. Pero, ¿es suficiente la transversalización de género y significa que los países que ‘integran’ preocupaciones sobre la igualdad de género en sus acuerdos comerciales también ‘adoptan’ acciones para abordarlas? ¿Qué es la transversalización de género en el contexto de la política comercial? ¿Cómo pueden ayudar los acuerdos comerciales a fomentar el empoderamiento de las mujeres? ¿Qué tipo de disposiciones pertinentes ya se han incluido en los acuerdos comerciales vigentes y qué queda pendiente? Este artículo busca dar respuesta a estas preguntas.

Palabras clave: transversalización de género, acuerdos comerciales, empoderamiento de la mujer, carencias.

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Introduction

The World Trade Organization (WTO) has recently issued the text of Draft Ministerial Declaration on the Advancement of Gender Equality and Women's Economic Empowerment in Trade.¹ This is proposed to be adopted at the upcoming 12th Ministerial Conference. Once adopted, the Declaration will confirm the WTO's mandate for work on trade and women's economic empowerment. It will represent an important step towards women empowerment considerations being considered in the context of trade policies. The Declaration will oblige members to mainstream gender equality perspective in Aid for Trade programs and collect gender-disaggregated data. It also provides to the WTO Secretariat a role in coordinating research work on trade and gender.

Other strides have also been made in this respect. There are several programs established by global economic institutions like the Organization for Economic Co-operation and Development (OECD), the International Trade Centre (ITC) and the United Nations Conference on Trade and Development (UNCTAD) that also seek to use trade policy instruments to promote women empowerment (ITC, 2020, 2021; Korinek, Moisé, & Tange, 2021; OECD, 2021; UNCTAD, 2021a, 2021b). Moreover, recent trends have shown a promise in terms of the role that Free Trade Agreements (FTAs) can play in this respect. In the recent years, there has been an upsurge of FTAs that are mainstreaming gender equality concerns in their trade agreements, albeit in different ways, formats and drafting styles. However, there is a difference in 'mainstreaming concerns' and 'adopting actions'.

Gender mainstreaming entails the inclusion of gender equality concerns in the drafting of FTAs. Yet, gender mainstreaming is a process that does not in itself suggest or even guarantee that countries that employ this process have also adopted actions to address these concerns. Adoption of an action would require countries to take an affirmative action to strengthen women empowerment or reduce gender inequality. In most of the trade agreements in force today that have incorporated gender equality related provisions, countries have merely mainstreamed these concerns in the drafting of these agreements but have stayed away from committing themselves to an affirmative action in this respect.

Against this backdrop, it becomes pertinent to study the inter-linkages between trade agreements and gender equality concerns, and this paper attempts to further this understanding by contributing to the discussion on gender mainstreaming in trade agreements. In particular, the questions this paper seeks to address are the following: what is gender mainstreaming in trade policy context? and how can it help strengthen women empowerment? how have countries included gender-related concerns in their trade agreements so far? and what remains undone in this respect? This paper seeks to address these questions with the help of textual analysis, as the author has engaged in in-depth text analysis of all existing trade agreements currently in force and notified to the WTO.² All trade agreements were assessed to identify those agreements that contain gender-explicit provisions. Those provisions which use terms directly related to 'gender', 'women', 'female', 'maternity' or a similar expression in an explicit manner are

¹ The Declaration's draft can be accessed here: <https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=278631,278632,278621&CurrentCatalogueIdIndex=1&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=False> accessed 12 November 2021

² As on 1 June 2021. WTO Regional Trade Database, <https://rtais.wto.org/UI/PublicMaintainRTAHome.aspx>

considered as ‘gender-explicit provisions’ in this study.³ Once the agreements with gender-explicit provisions were identified, and thoroughly examined in light of the relevant scholarship, the author carried out semi-structured interviews with trade negotiators and policymakers engaged in the negotiation of trade and gender provisions to discuss their understanding of the selected gender-related provisions and gather confirming and conflicting views. These findings were useful in corroborating, endorsing or refuting the previously gathered findings from literature review and textual analysis.

This paper contains four sections. In the following section, the author attempts to define the fundamental expression of ‘women empowerment’ used throughout this article. The second section provides discussion on what is gender mainstreaming in trade policy context and why trade agreements can make an effective intervention. The next section looks at five different ways that countries have most commonly employed to mainstream gender-related concerns in their trade agreements. The last section identifies and discusses three major shortcomings most-commonly found in gender-related provisions incorporated in the existing trade agreements.

What is Women Empowerment?

‘Empowerment’ is a contested concept. It can have several meanings depending upon different perspectives, and therefore it has no single definition. Zimmerman defines it as the notion of people having the ability to understand and control themselves and their environments—including social, economic, and political factors—expanding their capabilities and horizons and elevating themselves to greater levels of achievement and satisfaction (Zimmerman, 1990). Chamberlain employs a mental health perspective in defining ‘empowerment’, and refers to it as a process that has a number of elements including decision-making power, access to information and resources, and access to opportunities (Chamberlain & Schene, 1997). Page and Czuba view empowerment as a multidimensional social process that helps people gain control over their own lives and provide power to people that they can employ in their own lives, communities and society, by acting on issues they define as important (Page & Czuba, 1999).

In the context of gender equality, the term ‘empowerment’ or ‘women empowerment’ refers to a socio-political concept that involves cognitive, psychological, economic and political dimensions (Stromquist, 1988). The cognitive dimension involves women’s understanding of the factors that may result in their subordination and their ability to make choices that may go against the cultural or social expectations. The psychological dimension includes women’s belief that they have the ability to improve their social and economic conditions. The political dimension includes the ability to understand and appreciate one’s situation and mobilize resources for social change (Lubem & Sarah, 2018; Stromquist, 1988). The economic dimension entails women’s access to economic opportunities that can increase their economic independence. Women are disempowered if they are prevented from arriving at their actual potentials and if they face barriers that create economic disadvantages such as lack of access to education or limited

³ The explicit expressions that were used to identify gender-explicit provisions in agreements in this assessment are: women, girl, woman, girls, maternity, gender, childcare, sex, mother [in English]; mujer, mujeres, género, niñas, niños, sexo, equidad, maternidad, paternidad, paternal, maternal, igualdad, atencion infantil [in Spanish]. Gender-explicit words used for listing products or entities are not included in this assessment. ‘Gender-implicit provisions’ are those provisions which address the issues of gender in an indirect and implicit manner through areas such as, but not limited to, human rights, vulnerable groups focus, labour discrimination, corporate social responsibility, intellectual property rights and SMEs.

land ownership. Women's empowerment can therefore be viewed as the process of correcting gender disparity in a society that leads to improving the condition and status of women in all spheres of her life (UNFPA, 2008). Women are therefore empowered when they have the liberty to take control and ownership of their lives and make choices.

For the context of this study, economic empowerment of women depends upon the non-existence of barriers that can directly impede women's access to productive resources and their overall participation in the economy. The barriers that can directly impede women's participation in economy are related to the denial of economic rights such as lack of access to productive resources including property and finance.⁴ In Bahrain for instance, the law designates the husband as the head of family and requires the wife to obtain permission from her husband for tasks such as opening a bank account or registering a business (World Bank, 2019). In Chad, Guinea-Bissau and Niger, married women need husband's permission to open a bank account (World Bank, 2018). Without owning a bank account, women cannot engage in financial transactions. They also cannot build a track record of their credit worthiness. Without a track record of their credit worthiness, women cannot apply for capital. This barrier worsens for women in countries that still have in place men-favoring inheritance laws. According to Women, Business and the Law report, 33 countries have laws that do not provide the same inheritance rights to sons and daughters (World Bank, 2019). Unequal inheritance rights limit women's access to start-up capital and other productive resources, therefore denying women an effective access to business opportunities.

The barriers that may indirectly impede women's participation in economy entail denial of social, cultural, or familial rights; these barriers may include lack of access to education or health facilities, domestic violence, time poverty resulting from disproportionate household responsibilities, and subordination of gender. An example of subordination can be seen in Bahrain, where a rapist may avoid punishment if he agrees to marry his victim.⁵ Although this law is intended to protect women from the social stigma that may come with this bodily harm, the psychological effects of such a policy are grave for women. The law allows the rapist to unilaterally initiate a divorce at a later point of time; hence, marrying the victim (even though for a short period of time) is a straightforward way to avoid the punishment. These considerations make women less likely to report rape and lead their lives with the inflicted psychological-scars and fears.⁶

The denial of social rights may not directly present an immediate threat to a woman's ability to be employed or start a business, but it may put women a few steps farther from attaining economic independence. For example, women can be psychologically-scarred due to domestic violence and

⁴ As per the World Bank report "Women, Business and the Law 2016", 90% of the 173 studied countries have at least one law impeding women's access to economic opportunities (World Bank, 2015). Approximately 50 percent of the women in the world do not have bank accounts or access to other financial services. The International Finance Corporation estimates that as many as 70 percent of women-owned SMEs in developing countries do not have access to financial institutions and services. International surveys have shown that women-led businesses have a much lower probability of obtaining credit and are charged a higher interest rate for loans if they get approved (Muravyev, Talavera, & Schäfer, 2009).

⁵ Article 353, Bahrain Penal Code (Bahrain, 1976).

⁶ In Japan for instance, while women spend an average of 7 hours and 34 minutes on household chores each day, men only spend 1 hour and 23 minutes on an average (The Japan Times, 2019); According to a study by International Labour Organization, women in Tanzania tend to withdraw from employment at an earlier age than men due to their care-giving responsibilities. In many countries and households, women are still expected to leave their jobs once they get married or once they have children (Kagnicioglu, 2017).

disproportionate household responsibilities; this could jeopardize their confidence to progress in their professional endeavors (Bahri, 2020; Kabeer, 2003). On the other hand, barriers that directly impede women's access to productive resources (such as capital, property-ownership or employment markets) not only negatively impact women's economic independence; they impact women's societal independence (Duflo, 2012). The denial of economic rights may not necessarily present an immediate threat to human life or health, but it does significantly affect the ability of women to exercise essential human capabilities. For example, working women with access to financial resources may be less exposed to domestic violence or family subjugation and may have more decision-making power over household matters as compared to women that are not economic actors themselves and are hence dependent on others (Kurshan, 2000). This discussion shows how different forms of women empowerment are intricately related to and dependent on each other.⁷ It also shows how empowerment of women can define gender roles and that women empowerment can be viewed as a process to achieve the goal of gender equality, which can be defined as a state in which access to rights or opportunities is not affected by gender (UN Women, 2021).

How Can Trade Agreements Help Strengthen Women Empowerment?

Free trade agreements have shown an impressive accommodation of several sustainable development goals. In 2011, the WTO estimated that 75 percent of the countries have negotiated free trade agreements (FTA) that include provisions on human rights (Aaronson & Chaffour, 2011). In recent, there has also been a proliferation of agreements that have included labour rights, and as of 2016, about 136 countries have negotiated at least one free trade agreement with a labour provision (Harrison, 2019; ILO, 2017). In addition, countries increasingly have used trade agreements to co-operate on environmental matters by including environmental protection and climate change related provisions in various trade agreements and economic partnerships (Martínez-Zarzoso, 2018). Currently, of all free trade agreements in force, around 20 percent have an explicit commitment on gender equality (Monteiro, 2021).

These inclusions, however, only narrate half the story. The other half is about the negative social and environmental impact trade agreements and economic partnerships can have on various sustainability concerns including gender equality, environment, and labor standards. The relationship between trade and sustainable development is not always positive. For example, global agricultural trade has caused massive deforestation and biodiversity loss in producer countries. The intensive farming of soya and palm oil in exporting countries like Brazil, Indonesia, and Malaysia have caused rainforest and habitat destruction, over-farming, and the destruction of soil and water (Balogh & Jámbor, 2020). Trade may also be an obstacle to combating climate change as increased industrial production could eventually increase CO₂ emissions (Dong, He, Li, Mou, & Dong, 2020).

Trade liberalization and agreements may also exacerbate existing gender inequalities as they can put livelihoods and employment of women at risk, and they can disrupt industries where women are mostly employed (M Fontana, 2009; Marzia Fontana & Paciello, 2010; Levinsohn, 1999). At the same time,

⁷ For this study, "women's empowerment" refers to the process of increasing women's access to control over the strategic life choices that affect them and access to the opportunities that allow them fully to realize their capacities. Women's empowerment as an economic, political, and sociocultural process challenges the system of sexual stratification that has resulted in women's subordination and marginalization in order to improve women's quality of life' (Michalos, 2014).

studies have shown that trade agreements – if negotiated with a gender lens - can translate into more economic opportunities, enhanced market access, and fewer barriers for women (Hyder & Behrman, 2012; Klugman & Gamberoni, 2012). Hence, trade agreements can have both positive and negative impacts on women in trade. The inclusion of gender perspective in trade agreements can therefore help to maximize the benefits and minimize the negative impact these instruments may otherwise have on the role of women as employers, employees and consumers and their access to economic opportunities. That brings us to our next two questions: what is gender mainstreaming, and how does it help?

Gender mainstreaming is defined as “the (re)organization, improvement, development, and evaluation of policy processes so that a gender equality perspective is incorporated in all policies at all levels and stages, by the actors normally involved in policy-making” (Council of Europe, 2021). Gender mainstreaming is a means to achieve gender equality. Gender mainstreaming in FTAs means the inclusion of gender considerations and concerns in the drafting of FTAs. The process of mainstreaming affirms a member’s understanding, awareness or political will to reduce gender inequality through trade policies and agreements. The term ‘gender responsiveness’ is also used extensively in this article; it refers to a process that assesses how sensitive, informed, or committed the provisions of a trade agreement are to issues relating to gender equality. In other words, the way and extent to which an agreement mainstreams gender equality considerations defines how responsive that agreement is to gender equality concerns.⁸

In the recent years, we have witnessed a sharp increase in the number of FTAs mainstreaming considerations relating to women empowerment (Monteiro, 2021). These recent developments challenge the long-standing assumption that trade and gender are not related. They also show that gender mainstreaming in trade agreements is here to stay. However, to make trade agreements work in this respect, it is vital for certain countries to champion this change. The countries leading this change can incentivize other countries to negotiate gender-responsive trade agreements. FTAs can play an important role in reducing gender inequality as countries can encourage their trade partners to create laws and procedures that can reduce barriers and create encouraging conditions for women’s participation in trade and commerce (Bahri, 2019). In this manner, countries can use these negotiating instruments to incentivize change at the domestic level in other countries in exchange for an enhanced or unfettered market access. In short, the lure of market access to important markets can be used to enhance gender equality through free trade agreements.

What has been Achieved so far?

More and more countries are including gender equality concerns in their trade agreements, albeit in different ways. Some FTAs have a whole chapter on gender, but no legal obligations.⁹ Some FTAs have a single provision, but that single provision creates a strong legal obligation related to gender equality or non-discrimination based on sex.¹⁰ In some agreements, countries have included provisions that reflect

⁸ These definitions initially proposed by the author in Bahri (2019).

⁹ Canada-Chile and Canada-Israel Agreements [Both include standalone chapters on gender]; The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (enforced, 30 December 2018) [It does not have a standalone chapter on gender; the provisions on gender are mainly included in the chapter on development.]

¹⁰ Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Montenegro, of the other part (enforced, 01 May 2010), Article 101 [It obliges

their awareness or recognition of gender inequality as a problem.¹¹ In other agreements such as the Canada-Israel FTA (Government of Canada, 2019), parties commit themselves to various activities directly related to women empowerment, and these activities envisage women not merely as an employee or labor but also as an entrepreneur, leader, decision-maker and scientist (Art. 13.3). Some agreements include gender-related provisions purely as labour standards; others include such provisions as market-enhancing commitments in various sectors including investment, agriculture, and fisheries. A systemic look at most of the trade agreements that currently include gender-related provisions show five different ways in which countries have most commonly included such provisions in their trade agreements. This section provides a discussion, together with examples, on these five prevalent ways of gender mainstreaming.

Inclusion of standalone chapters, subsequent recommendations, or dedicated arrangements

One approach that countries have employed in adding provisions to enhance women empowerment in their trade agreements is by including a standalone chapter on trade and gender. This chapter can serve as an umbrella chapter for all kinds of provisions on gender including cooperation activities, legal standards, affirmations, and reaffirmations. Chile has taken a lead on employing this approach, as it has included a standalone chapter on gender and trade in multiple FTAs including Canada-Chile, Chile-Argentina, Chile-Brazil, and Chile-Uruguay. These chapters so far have ranged from parties' acknowledgment of women's role in international trade, commitments to cooperate on reducing their barriers to trade, identifying procedures and institutions for implementing the commitments, to reaffirming their commitments to international conventions such as CEDAW and ILO.

So far, only six countries - Chile, Canada, Uruguay, Argentina, Israel, and Brazil - have signed FTAs with standalone chapters on trade and gender. However, more and more countries are committing to negotiate trade and gender chapters within the context of trade negotiations. This is a new approach of gender mainstreaming; all existing agreements with such chapters were negotiated in the last 5 years.¹² Hence, one would not expect to see such a rapid increase in the number of ongoing negotiations that are considering an inclusion of such a chapter as countries might want to wait and watch whether such chapters might actually help. Yet, multiple countries are currently negotiating new trade agreements or attempting to modernize existing ones with an exclusive chapter on trade and gender.¹³

Another way of mainstreaming gender equality considerations in trade policy instruments is by negotiating supplementary or independent instruments that integrate gender equality and trade concerns. These instruments can provide a second opportunity of including sustainability issues within trade policy context to parties that have not done so during the negotiation and drafting of the main trade agreement.

Montenegro to adjust its domestic legislation to provide for working conditions and equal opportunities for women and men.]

¹¹ Article 9.3, Vietnam - Chile Free Trade Agreement (enforced, 1 January 2014) (República de Chile, 2014).

¹² Inclusion of trade and gender chapters is a recently employed approach, though some previous agreements have included standalone chapters on women empowerment or gender equality. See for instance East African Community agreement's chapter titled "Enhancing the Role of Women in Socio-Economic Development" (Chapter 22).

¹³ The EU and Chile for example are negotiating such a chapter for the EU-Chile Association Agreement, wherein both countries have tabled their own draft chapter in this respect.

So far, they have either taken the shape of protocols (SADC, 2008), recommendations (Government of Canada, 2020), or even standalone arrangements¹⁴.

The Comprehensive Economic and Trade Agreement signed between the EU and Canada only includes a single gender explicit provision that prohibits sex-based discrimination against foreign investors (Art. 8.10). Though this is the only gender-related commitment found in the entire agreement's text, parties subsequently have adopted a standalone recommendation on trade and gender (Government of Canada, 2020). In this Recommendation, parties create a work plan to gather and analyse gender-disaggregated data, carry out the agreement's gender impact assessment, add a gender lens to the implementation of this agreement, conduct webinars on trade and gender, and regular reporting on these activities. It remains unclear whether a subsequent adoption of such a recommendation can form part of an FTA per se if it is not mentioned or incorporated by reference into that agreement's text; yet such developments allow parties to work together on activities that may bring about positive outcomes for women at the domestic level. In particular, recommendations focused on collection of data and commissioning of research to better understand the gender and trade nexus and gender impact of trade agreements can inform future trade policymaking and negotiations in the future.

Another recent development in this respect is the recently signed Global Trade and Gender Arrangement (GTGA, 2020). In August 2020, Chile, Canada, and New Zealand (and Mexico in 2021) came together to sign this Arrangement, which is a standalone and independent instrument not attached to any particular agreement. It is interesting to note that through this instrument, parties impose commitments on their respective governments as well as on the business stakeholders. In context of trade in services, the parties undertake to ensure that no sex-based discrimination is made in measures relating to licensing requirements and procedures, qualification requirements and procedures, or technical standards relating to authorization for the supply of a service. Parties also seek to "encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate into their internal policies those internationally recognised standards, guidelines, and principles that address gender equality that have been endorsed or are supported" by that member states (GTGA, 2020). The parties in this instrument identify a wide range of cooperation activities to enhance the ability of women, including workers, entrepreneurs, business women and business owners, to fully access and benefit from the opportunities created by this Arrangement (GTGA, 2020). Yet, it is not clear what kind of opportunities are being referred to in this statement, as this arrangement is neither an understanding on trade agreement nor attached to any other trade agreement that may be seen as creating trade opportunities for women in these economies.

Inclusion of gender-explicit reservations, waivers, or legal standards

Another way countries have commonly employed to include gender equality considerations in trade agreements is by including reservations and special protections. By carving out reservations, countries reserve a right to engage in a measure that could otherwise be inconsistent with their obligations under a given agreement. Examples of reservations include right to subsidize provision of social services including protection of maternity needs including childcare, women-favoring government procurement schemes, and supplier diversity initiatives favoring women businesses. Special protections entail provisions that carve out advantages or favors for women employees or employers solely based on their

¹⁴ For instance, GTGA (2020).

gender. Examples include exemption from paying customs duties for cross border women traders up to a certain amount of trade or mandating businesses to offer health insurance for pregnant women employees.

In United States - Dominican Republic - Central America (USTR, 2005), parties reserve a right to craft government procurement schemes that may be favorable for certain groups including women (Annex 9.1.2(b)(i)). A similar provision is found in the EU - Canada, where parties reserve a right to offer favorable government procurement programs for the provision of social services or grants such as childcare (Art. 9.2). This waiver can allow countries to carve out procurement schemes that are favorable for women and thereby enhance their market access. Another example of different kind of reservation is found in the USMCA (USTR, 2020), which provides for a special reservation to protect market access of indigenous women engaged in cross border trade in services. This cultural reservation is made in the form of a concession to preserve culture, languages, knowledge, traditions, and identity with a special focus on the integration on women and promotion of gender equality (Annex 15-E). This reservation seeks to simplify women's market access across borders.

It is particularly interesting to see that these commitments are generally drafted with binding expressions, and hence they seem to create legal obligations and rights for the parties. These reservations and protections can help countries to guarantee benefits and protections for women that they otherwise may not be able to extend either through their domestic law or through a legal standard as that might require changes in domestic laws. Notwithstanding this observation, several countries have also added legal standards that require a change in their domestic laws and regulations. In a side labor cooperation agreement signed in parallel to Canada Jordan FTA (Government of Canada, 2012a), for example, in Annex 1, parties undertake a commitment to ensure that its labor law and practices embody and provide protection for the internationally recognized labor principles and rights including the elimination of discrimination in respect of employment and occupation (including equal pay for women and men). This binding provision obligates parties to change their domestic laws to include legal obligation of equal pay for equal work. However, similar obligations are included in other FTAs with permissive expressions, putting in doubt if the parties to those agreements are legally bound to harmonize their laws with this principle. For example, in Canada - Costa Rica (Government of Canada, 2012b), in Annex 1, parties seek to reflect in their laws, regulations, procedures and practices principles and rights recognized in the ILO Declaration on Fundamental Principles and Rights at Work, in particular, the principle of equal pay for women and men. It is unclear whether a commitment to 'reflect' could be seen as a legal obligation to 'harmonize' domestic laws with this commitment.

Inclusion in cross-cutting provisions

The gender-related provisions have also featured in cross-cutting provisions and chapters. The Parties in the EU - Eastern and Southern Africa States Interim Agreement (European Union, 2012), for example, in Art. 35, seek to encourage the participation of women in the fishing industry by developing the capacity of women engaged in fisheries. Moreover, the EU-EAC (not yet in force) has two gender-explicit provisions; one of which relates to agriculture and the other to fisheries. In the chapter on agriculture, members make a commitment to address socio-cultural barriers that impede women's participation and potential in agriculture industry.¹⁵ In Article 89, members seek to work on enhancing participation of

¹⁵ EU-East African Community, (not in forced yet), Article 85.

marginal groups in fishing industry through promotion of gender equity in fisheries. Hence, this agreement calls for the promotion of gender equity in fisheries and agriculture. However, these commitments are not binding, as they are mostly stated as possible areas of cooperation. Moreover, both sectors – agriculture and fisheries – are known for majorly employing female workforce as the low wages and poor working conditions for their employees suit their labor-intensive conditions. These best practice examples show that the inclusion of gender concerns in cross-cutting issues has so far been done to improve women’s market access and capacity in traditional areas that may not be as lucrative as other sectors such as e-commerce, digital trade, and manufacturing industries.

However, there are some agreements, though very few, where parties have sought to mainstream gender provisions in lucrative areas such as foreign investment. One example is the EU – Canada’s Article 8.10, which contains a binding obligation that prohibits sex-based discrimination against foreign investors. This provision encourages women businesses to engage in foreign investment without fears or uncertainties of being discriminated on the bases of their owners’ sex. As these examples show, cross-cutting provisions with gender-explicit commitments make a considerable inroad for women businesses and workforce in various sectors and markets. Yet, the fundamental problem with these inclusions so far has been that most of these gender-related provisions are couched in best endeavor and cooperation language; they appear in a variety of places in FTAs texts or side instruments, but almost none of them are binding or enforceable.

Inclusion in agreement’s preamble or objectives’ clause

Countries in some FTAs have incorporated gender-related commitments in their very preamble, albeit in different ways. One recent example is the African Continental Free Trade Agreement (AFCFTA), as its Preamble amongst other things recognizes the importance of gender equality “for the development of international trade and economic cooperation” (African Union, 2019). The Preamble of the EU - Papua New Guinea/Fiji incorporates gender equality in an indirect manner (European Union, 2009). It does not directly mention any explicit gender expression, but it incorporates by reference the objectives of Cotonou agreement. Article 1 of Cotonou Agreement states its objectives, one of which is that members must take “systematic account shall be taken of the situation of women and gender issues in all areas – political, economic and social” (European Union, 2000b).

Including gender equality considerations in the preamble is an effective way to mainstream gender equality concerns in a trade agreement as the preamble can be instrumental in determining the intentions of the negotiators or drafters of the agreement at the time when it was concluded.¹⁶ Similar benefits are seen with the trend of including such commitments in an agreement’s general ‘objectives’ clause. Most FTAs in its first few provisions lays down a general clause that spells out the objectives parties seek to achieve through this agreement. Sometimes, parties include a commitment relating to gender equality in such general clauses. East African Community is an example of such an inclusion (EAC, 2009). In Article 5, wherein parties set out the objectives of the Community, they also commit to mainstreaming gender in all its endeavors and enhancing the “role of women in cultural, social, political, economic and technological development”.

¹⁶ Article 31 of the Vienna Convention on the Law of Treaties requires that an agreement must be interpreted in light of its context, object and purpose.

These inclusions can influence the way other provisions of the FTA are interpreted. Article 31 of the Vienna Convention on the Law of the Treaties (VCLT) (WTO, 2019) provides that “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose” (United Nations, 1969). Such an inclusion, like inclusion in the preamble, can therefore help in solving a dispute by allowing other provisions of the FTA to be interpreted in light of the agreement’s objectives. However, other than this benefit, such general clauses do not contain any concrete commitments. They only include broad objectives that can neither be enforced nor implemented unless they are coupled with further inclusion of related commitments in the agreement’s text.

Inclusion of cooperation-based affirmations or reaffirmations

Countries in various FTAs have included affirmative provisions on cooperation activities they wish to engage in with their trading partners. Some FTAs include provisions that merely touch upon the prospect of enhancing gender equality without identifying precise activities on how that might be achieved. Other FTAs through these provisions delve into different aspects of women empowerment and focus on reducing various barriers that impede women’s access to international trade. These provisions range from enhancing women’s access to education, skill development, digital training, health services and productive resources to increasing representation of women in decision-making and policy-making roles.

The parties in Canada-Israel FTA, Art. 13.3, commit themselves to various cooperation-based activities directly related to women empowerment (Government of Canada, 2019). These activities focus on a range of issues including access to education or skill development opportunities in fields that can translate to high-paid job opportunities for women (such as science, technology, engineering, mathematics and information and communication technology). Other activities parties aim to engage in are the encouragement of financial inclusion for women, advancement of women’s leadership and development of women’s networks in business and trade, increase in women’s representation in decision-making roles in the public and private sectors, and promotion of female entrepreneurship and women’s participation in international trade (ITC, 2020). Other activities they seek to engage in include the conduct of gender-based analysis, sharing methods and procedures for the collection of sex-disaggregated data, the use of indicators, and the analysis of gender-focused statistics related to trade (Government of Canada, 2019). The parties raise the bar in this accord as they provide a dedicated implementation mechanism through the creation of a Trade and Gender Committee that is responsible for organising and facilitating the cooperation activities, report on the progress and make recommendations and all efforts for the implementation of the identified activities (Art. 13.4).

Certain FTAs contain explicit reference to international conventions or instruments that relate to women rights or gender equality concerns. These references are found in the form of reaffirmations, wherein parties seek to reiterate the legal commitments they have made under other international instruments such as the CEDAW, ILO conventions or United Nations Sustainable Development Goals. Both Canada – Israel and Canada – Chile FTAs refer to international conventions or frameworks that are directly related to gender issues, such as Sustainable Development Goal 5 and International Labour Organization conventions (Canada–Israel, Article 13.1; Canada–Chile, Article N bis-02). By making these references, the parties to these agreements recall their commitments to achieve gender equality and empower all women and girls. They also seek to acknowledge the importance of women participation in the labor

market and for sustainable and inclusive economic growth and prosperity. Indirect inclusion by referring to a relevant international instrument can help countries to comply with and respect the commitments they have undertaken under other instruments. However, general statements as well as reaffirming provisions are almost always put forth as best-endeavor promises, and they are generally included without any effort to identify mechanisms that might be responsible for the implementation of such promises.

What Remains Undone?

The discussions so far show that several milestones have already been achieved in respect of making trade agreements work for enhancing women's empowerment. Yet, a lot more remains to be done. In particular, three major shortcomings can be seen in most of the gender-related provisions added in the existing trade agreements. These shortcomings include the following: (i) most of these commitments are drafted as best endeavor promises; (ii) the countries so far have negotiated these provisions without identifying or providing for their enforcement or implementation mechanism; (iii) and these legal provisions have been added in the current accords without any attempt to provide a definition or limit the scope of expressions such as 'women empowerment' or 'gender equality'.

Promises, Promises and more Promises

A heavy majority of gender-related provisions included in the existing trade agreements are drafted with non-mandatory verbs and 'soft' permissive grammatical constructions (Bhala & Wood, 2018).¹⁷ The countries have undertaken these commitments in a rather modest and non-binding manner, and they have generally left the implementation of these activities on their available resources and willingness.¹⁸ The reasons are clear. Countries are probably not ready to undertake these commitments as binding and enforceable. Hence, gender mainstreaming approach so far has been based on the spirit of cooperation, wherein parties seek to use cooperation as a route to start this dialogue with others.

Cooperation provisions related to women empowerment have focused on various areas and on protecting the interests of women as employees, entrepreneurs, consumers, mothers and decision-makers.¹⁹ These provisions have sought to encourage the parties to cooperate on aspects that can empower women in multiple ways by enhancing women's access to markets and economic opportunities and helping women overcome the barriers that currently impede their access to economic opportunities.²⁰ These promises have included, among others, increasing women's access to education and training²¹,

¹⁷ Authors point out that most gender related commitments in USMCA and CPTPP are aspirational and non-binding, and hence non-enforceable, and that they are sometimes drafted with vagueness and ambiguity, and so they are susceptible to myriad interpretations.

¹⁸ See for instance, trade and gender chapters in Canada – Chile and Canada-Israel FTAs.

¹⁹ One example can be seen in Canada – Chile FTA, Article N *bis*-03 paragraph 4, subparagraph (a)

²⁰ See, for instance, Article 9.3, Vietnam - Chile FTA.

²¹ EU-Algeria, art 78 (European Union, 2005); EU – Central America, art 43 (European Union, 2013); EU- Egypt, art 42 (European Union, 2004); EU-Lebanon, art 42 (European Union, 2006); EU-Lebanon, art 46 (European Union, 1998).

representation of women in decision-making roles²², women's employment²³, equality and non-discrimination²⁴, physical safety²⁵, and protection of maternity²⁶ and healthcare concerns²⁷. These inclusions are impressive, but these commitments are purely based on the spirit of cooperation and are not drafted as enforceable or binding obligations. Hence, however lengthy the list of cooperation activities may appear to be in each FTA, their implementation has so far been left to the mercy of the concerned parties.

Lack of Enforcement and Implementation

The recent developments show that the lure of market access to important markets can be used to enhance women's empowerment through FTAs. However, almost no FTA so far contemplates how gender-related commitments could be implemented or enforced. As of today, most of the FTAs that incorporate gender equality concerns do not clarify precise procedures for implementation; nor do they identify channels to finance these activities.²⁸ In addition, as seen in the case of CPTPP, almost all FTAs have explicitly and unambiguously excluded gender-related provisions and chapters from the application of their dispute settlement mechanisms.

The absence of applicable dispute settlement procedures implies that a country's failure to comply with these obligations or commitments or affirmations has no direct consequence.²⁹ The only exception is the Canada-Israel FTA that provides, for the very first time, a binding dispute settlement procedure that is applicable to its chapter on trade and gender.³⁰ Unfortunately, this also seems to be a cosmetic attempt to provide for an enforcement mechanism because the parties have subjected the binding jurisdiction of this mechanism to their consent, making its jurisdiction non-compulsory in nature.³¹ With respect to this agreement's gender-related provisions, if Canada was to employ a trade policy measure that Israel believed hindered the participation of women in the workforce, Israel could bring a challenge against that measure. This dispute can be decided by a panel that can issue a legally binding decision as to whether the measure in question violates the terms of the agreement's trade and gender chapter. However, both countries would have to consent to take the matter through the agreement's dispute settlement process. It is unlikely that a responding country whose measure is challenged will agree to the binding jurisdiction of such a panel.

²² Canada - Israel FTA, art 13.3 (Government of Canada, 2019); EU - Central America, art 47 (European Union, 2013); EU-Chile, art 45 (República de Chile, 2003); EU-Ukraine, art 420 (European Union, 2014); Eastern and Southern Africa PTA, art 154 (ESA, 1982); East African Community, art 121 (EAC, 2009).

²³ FTA Republic of China (Taiwan) - Nicaragua, Annex 18.01 (Government of China (Taiwan), 2008); USMCA, art 23.12 (USTR, 2020); Canada - Jordan FTA, art 1 (Government of Canada, 2012a)

²⁴ CAFTA-DR, Annex 16.5 (USTR, 2005); United States – Colombia TPA, Annex 17.6 (USTR, 2012); CPTPP, art 19.10 (Government of New Zealand, 2018); EU-South Africa, art 86 (European Union, 2000a).

²⁵ Peru – Australia FTA, art 20.2 (Government of Australia, 2020); FTA EU-Singapore, Appendix 8-B-1 (European Union, 2019); FTA Central America - Korea, Annex I Schedule of Costa Rica (Republic of Korea, 2019).

²⁶ EU - Tunisia, art 65 (European Union, 1998); FTA New Zealand – Republic of Korea, Annex II (Government of New Zealand, 2015); Treaty on the Eurasian Economic Union, art 96 (Eurasian Commission, 2015).

²⁷ FTA Malaysia-Turkey, art 9.13 (Government of Malaysia, 2015); USMCA, art 23.12 (USTR, 2020).

²⁸ As per authors' calculations, using ITC maturity toolkit (ITC, 2020).

²⁹ Initially discussed in Bahri (2020)

³⁰ Canada-Israel FTA, Chapter 19 (Government of Canada, 2019).

³¹ Canada-Israel FTA, Art. 13.6 (Government of Canada, 2019).

These discussions show that there is a half-opened door in FTAs that countries need to push open further by finding different ways of implementing or enforcing their gender-related commitments.³² Some recent agreements have endeavored to push open that door further. The CETA investment chapter includes a binding gender-explicit provision. Article 8.10(d) of the agreement states that a party will breach its obligation to provide fair and equitable treatment to foreign investors if any of its measures constitutes “targeted discrimination on manifestly wrongful grounds, such as gender...”. These developments show that the trade community is recognizing that trade policy can be used as a tool to empower women. This represents a drastic change in trade policymaking mindset. Yet, such provisions are more of an exception as very few agreements have so far included such binding and enforceable obligations. Hence, to ensure that the gender-related commitments included so far in trade agreements can become a ‘game-changer’ for women in the future, it is crucial to rethink how these commitments might be financed, implemented, and enforced.

Defining ‘Women Empowerment’ and ‘Gender Equality’

The terms ‘gender equality’ and ‘women empowerment’ have not been defined in any multilateral or regional trade agreement. No international organization has tabled a definition for the consideration of all countries so far. This means that there is to date no universally accepted definition of those concepts.

This is not the first time we are witnessing the issue of lack of definition for fundamental concepts or terms in international trade law. Various other important concepts remain undefined in international trade agreements, and in particular, in WTO Agreements. Three such examples are the lack of definition for crucial terms used frequently in WTO Agreements such as ‘developing countries’³³, ‘like products’³⁴ and ‘national security exception’³⁵.

Another such example is that of the ‘public morality’ exception, as it also lacks a universally accepted definition. Scholars have raised concerns about the overbroad nature of the public morality exception that could provide a cloak for protectionism (Serpin, 2016). Public morals range from views related to religion,³⁶ human rights,³⁷ consumption of alcohol,³⁸ drug trafficking and corruption (WTO, 2016), gambling (WTO, 2013), consumer protection (WTO, 2017), and the protection of animals (WTO, 2014). Literature suggests that a stringent approach to the application of the public morals exception may infringe a country’s legitimate interests and sovereign rights to protect the values that its society regards as important (Diebold, 2008).

³² Originally discussed in, and adapted from, Bahri (2020)

³³ See, for example, GATT’s Article XVIII and the Enabling Clause officially called the “Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries”. For details, see Ukpe and Khorana (2021).

³⁴ See, for example, Articles I and III of GATT 1994. For details, see Choi (2003).

³⁵ See, for example, Article XXI, GATT 1994. For more details, see Boklan and Bahri (2020).

³⁶ Israel restricted importation of non-Kosher meat products. See WTO (1999).

³⁷ The USA restricted importation of products made by indentured child labour. See Treasury and General Government Appropriations Act of 1998, Pub. L. 105-61, § 634, 111 Stat. 1272, 1316 (1997).

³⁸ Indonesia restricted importation of alcohol for moral reasons. See WTO (2007).

Likewise, a gender-related legal provision could impose on nations a significant cost in terms of their sovereignty, as it can allow countries to interfere in the domestic affairs of other countries and place limits on their ability to deal with matters relating to their social, political, economic, cultural and even religious affairs.³⁹ The broad and undefined scope of ‘gender equality’ can result in a shift towards unilateralism and may allow countries to disguise an illegal protectionist measure as a policy objective. The principal concern is the extent to which such a legal provision can allow countries to stretch the scope of this provision beyond gender equality concerns. If country A justifies a measure that bans or restricts trade with country B because country B ranks poorly on the WEF’s Global Gender Gap Reports or because it does not adhere to its commitments under the International Labour Organization’s conventions relating to gender equality concerns, country B can see this as country A’s attempt to impose its own cultural standards on country B.

This example shows how an attempt to address gender equality concerns may be seen as an attempt to engage in ‘cultural imperialism’ and may therefore be used as a protectionist weapon wherein countries could take advantage of unequal market power or use these concerns in an indirect way to diminish other countries’ comparative advantage by exporting their own social or cultural model to those that have a different set of values and concerns. The fears of cultural imperialism and the use of gender standards for protection of domestic industries are in fact the main concerns that several countries have voiced when they have resisted or opposed any development in respect of trade and gender, such as for the signing of the WTO’s Joint Declaration on Women and Trade (Bissio, 2017; Singh, 2017).

Conclusion

While women empowerment can lead to more economic growth, the converse is not true; economic growth does not automatically lead to women empowerment. Hence, efforts need to be made to make that happen. Trade agreements can provide a relevant intervention, as the lure of market access through such agreements can be used to incentivize such changes at the domestic level. However, the promises being promised in these agreements need to either be made implementable or enforceable in nature. That has not been done for majority of the gender-related provisions incorporated in current trade agreements.

So, the glass is half full, as in the recent past, positive strides have been made by various international institutions and countries in reaffirming the need for women empowerment in the context of trade policy agenda. New standalone chapters on trade and gender, dedicated trade and gender arrangements, joint multilateral declarations, outreach events and advocacy efforts and rigorous research in this area is filling up this glass even further. But more is needed, and we need to keep going.

The WTO could be the natural place to lead this process, given its expertise, experience and positioning in global rulemaking on trade issues. But the WTO’s multilateral space has various limitations that impede its potential to mainstream gender-related concerns in trade policy context. These limitations include

³⁹ Sovereignty cost refers to the amount of power or authority a sovereign country would otherwise have but needs to surrender it when it joins an international treaty that place limits on and encourages interference in its domestic affairs (Sikkink, 1993). Abbott and Snidal note that the ‘sovereignty costs’ is low when states ‘simply make international commitments that limit their behavior in particular circumstances,’ but that these costs are higher when ‘states accept external authority over significant decisions.’ (Abbott & Snidal, 2000). For a contrary view, see Reus-Smit (2001) (author observes that sovereignty and human rights are interrelated and should be seen as two contradictory values).

members' concerns that gender-related obligations in trade instruments can usher in a new generation of protectionist actions against selected countries. In the words of a developing country ambassador, "the gender issue can be used to restrain trade from some countries" (IISD, 2021). Moreover, countries may lack the political willingness to reduce gender inequality in their respective jurisdictions. Countries may also believe that gender equality is not directly related to trade and hence must not be included in trade instruments. These difficulties and hesitations seem insurmountable in the current environment of rising protectionism and nationalism.⁴⁰ Hence, the multilateral trading system may not be fully prepared to sign onto these issues at the moment. After all, there is a reason why WTO's texts are completely silent about these concerns and do not accommodate a single gender-explicit provision in this respect.

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⁴⁰ For recent discussions, see Baldwin and Evenett (2020).

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