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A critical legal analysis of gender equality in international trade agreements

Uma análise jurídica crítica da igualdade de gênero nos acordos comerciais internacionais

Parul Shukla

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A critical legal analysis of gender equality in international trade agreements*

Uma análise jurídica crítica da igualdade de gênero nos acordos comerciais internacionais

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Abstract

Trade can greatly improve women's lives by creating new job opportunities, increasing consumer choice, and increasing women's market position in society. If not properly monitored and regulated, it can also lead to unemployment and concentrate the work in low-skilled jobs. Given the complexity and particularity of the relationship between trade and gender, it is important to assess the potential impact of trade policies on men and women and develop appropriate evidence-based strategies to ensure that trade provides power for all. Data are limited and there is a lack of understanding of the relationship between women's economic roles as workers, consumers, and decision makers and the importance of gender equality in international trade. Hence, in order to understand the importance of gender equality in international trade, as well as to ascertain the role of WTO in ensuring the same and what are the challenges in having a gender inclusive rather a women rights supportive scenario in International trade. With this in mind, this paper examines discriminatory legislation and other obstacles women face as business leaders and entrepreneurs through a doctrinal method of study. It also highlights examples of existing legislative measures both in national and international forum which aims at elimination of discrimination against women in business and economy. Further, this research paper will also analyse the various regional treaty agreements, free trade agreements & Bilateral Investment Treaties and how they have addressed the issue of gender equality or women related provisions while negotiating and drafting the agreements. Thus, this paper ponders upon the legal issues like, "What steps have been taken in the international legal scenario to eliminate discrimination against women in the economic sphere?, What are the provisions of CEDAW, SDG which advocates for inclusion of women in the economic sector?, How far WTO arrangements are gender neutral and so far what measures have been taken by WTO to ensure equal participation of women in the global trade? To answer this questions, the methodology adopted in the development of this research is bibliography, descriptive and exploratory and the paper will engage in critical legal analysis by interpretation of various provisions of trade agreements.

Keywords: *Gender & Trade, WTO, Regional Treaty Agreements, FTA, BITs, CEDAW, SDGS.*

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Resumo

O comércio pode melhorar muito a vida das mulheres ao criar novas oportunidades de emprego, aumentar a escolha do consumidor e aumentar a posição das mulheres no mercado na sociedade. Se não for devidamente monitorado e regulamentado, também pode levar ao desemprego e concentrar o trabalho em empregos de baixa qualificação. Dada a complexidade e particularidade da relação entre comércio e gênero, é importante avaliar o impacto potencial das políticas comerciais sobre homens e mulheres e desenvolver estratégias apropriadas baseadas em evidências para garantir que o comércio forneça poder para todos. Os dados são limitados e há uma falta de compreensão da relação entre os papéis econômicos das mulheres como trabalhadoras, consumidoras e tomadoras de decisão e a importância da igualdade de gênero no comércio internacional. Assim, a fim de compreender a importância da igualdade de gênero no comércio internacional, bem como averiguar o papel da OMC na garantia da mesma e quais são os desafios em ter um cenário inclusivo de gênero e não de apoio aos direitos das mulheres no comércio internacional. Com isso em mente, este artigo examina a legislação discriminatória e outros obstáculos que as mulheres enfrentam como líderes empresariais e empreendedoras por meio de um método de estudo doutrinário. Também destaca exemplos de medidas legislativas existentes tanto em fóruns nacionais como internacionais que visam a eliminação da discriminação contra as mulheres nos negócios e na economia. Além disso, este trabalho de pesquisa também analisará os vários acordos de tratados regionais, acordos de livre comércio e tratados bilaterais de investimento e como eles abordaram a questão da igualdade de gênero ou disposições relacionadas às mulheres ao negociar e redigir os acordos. Assim, este trabalho pondera sobre questões jurídicas como: “Que passos foram dados no cenário jurídico internacional para eliminar a discriminação contra a mulher na esfera econômica? Quais são as disposições da CEDAW, ODS que defende a inclusão das mulheres no setor econômico?, Até que ponto os acordos da OMC são neutros em termos de gênero e até agora quais medidas foram tomadas pela OMC para garantir a participação igualitária das mulheres no comércio global? Para responder a essas questões, a metodologia adotada no desenvolvimento desta pesquisa é bibliográfica, descritiva e exploratória e o trabalho en-

volverá a análise jurídica crítica por meio da interpretação de diversos dispositivos dos acordos comerciais.

Palavras-chave: Gênero e Comércio, OMC, Acordos de Tratados Regionais, FTA, BITs, CEDAW, SDGS.

1 Introduction

The Sustainable Development Goals have envisaged an inclusive development. Women’s developmental targets are addressed in Goal 5 of this list. It goes a step further from the MDGs in recognising that women are not just one segment must even among these there are many vulnerable groups. Women should be included in all the verticals of the business of the world and this includes trade. Women have not been well represented as exporters and have not been able to contribute to many of the countries’ economies. For example International Trade Centre data report specifies that only one out of five companies which are into international exports is managed by a woman owner and businesses like these remain very vulnerable to impediments in international trade.¹

Women’s marginalization has been accepted as a necessary “collateral damage” of trade reforms followed due to its possible advantage in the direction of improving the balance of payments of a country. Therefore trade measures and trade agreements have to be looked into because they could play a role in giving priority to women’s well-being.² There is thus a need to study the interrelation of gender and participation of women in trade. Trade has both positive and negative effects on women. If women participate as entrepreneurs, they are more likely to employ women and thereby contribute to bridging gender gaps in employment. This would in turn improve the social standing of women and which in return add to larger participation of women in the economy.

¹ Report titled “Unlocking Markets for Women to Trade”, 5 (ITC, Geneva, 2015), Accessed on 10th May 2021, [http://www.intracen.org/uploadedFiles/intracenorg/Content/Publications/women_in_trade_web\(1\).](http://www.intracen.org/uploadedFiles/intracenorg/Content/Publications/women_in_trade_web(1).)

² ZARRILLI, Simonetta. *International trade is at risk of leaving Women behind*. Available in: http://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=1741&Sitemap_x0020_Taxonomy=Trade,%20Gender%20and%20Development;#2139;#UNCTAD%20. Accessed on: 10 May 2021.

The research article titled, “Freedom from Violence, Full Access to Resources, Equal Participation, and Empowerment: The Relevance of CEDAW for the Implementation of the SDGs,”³ examines “how the monitoring processes on CEDAW implementation can be used for promoting gender-sensitive SDG implementation. It also analyzes the possible synergies between the SDGs and CEDAW, in particular with respect to the national, regional, and global follow-up and review processes under the SDGs.” In the UN Women Report titled “Roadmap for Women’s Economic Empowerment in India”⁴, various issues acting as barriers in economic inclusion of the women has been discussed. Especially this report stresses on the informal and agricultural sector. This report also highlights policy recommendations that are needed for improving women’s economic empowerment.

While, the Quantum Hub Research Report, titled “Women’s Economic Empowerment in India: A Policy Landscape Study”⁵ has suggested that “investing in women’s economic empowerment (WEE) has important linkages with gender equality, poverty eradication, and inclusive growth”. As per the report evidence, it shows that “increasing the share of household income controlled by women, either through their own earnings or cash transfers, translates into greater investment in children’s education, health, and nutrition.” Additionally, report points out that “women who have access to property and credit are able to ease hardships for their families during financial shocks”. So, women’s economic empowerment can have an overall positive impact on the country’s GDP growth and economic activity.

Further, reports such as those of the World Bank⁶, World Economic Forum which include *Annual Global*

*Gender Gap Report*⁷ and the *Industry Gender Gap Report* point to statistics which show how women fare in business related numbers.

So, there are several factors associated with a more global world strengthen the incentives for action toward greater gender equality, which are as follows:

- Gender inequality is more costly in an integrated world because it diminishes a country’s ability to compete internationally—particularly if the country specialises in female-intensive goods and services.
- International peer pressure has also led more countries than ever to ratify treaties against discrimination.
- Growing media exposure and consumers’ demands for better treatment of workers has pushed multinationals toward fairer wages and better working conditions for women.
- Globalisation is shifting gender roles and norms:
- Increased access to information, primarily through television and the Internet, allows countries to learn about social mores in other places, which can change perceptions and promote the adoption of more egalitarian attitudes.
- Economic empowerment for women reinforces this process by promoting changes in gender roles and allowing women to influence time allocation, shift relative power within the household and exercise agency more broadly.

Globalisation has the potential to contribute to greater gender equality. However, in the absence of public policy, globalisation alone cannot end gender inequality. Despite significant increases in agency and in access to economic opportunities for many women in many countries, large gender gaps remain in some areas. Public action is needed to close gender gaps in endowments, agency, and access to economic opportunities. Only then will countries be able to capitalise on the potential of globalisation as a force for greater gender equality. Women’s economic empowerment boosts productivity, increases economic diversification and income equality in addition to other positive development outcomes.⁸ For example, increasing the female employ-

³ RUDOLF B. Freedom from Violence, Full Access to Resources, Equal Participation, and Empowerment: The Relevance of CEDAW for the Implementation of the SDGs. In: Kaltenborn M., Krajewski M., Kuhn H. (eds) Sustainable Development Goals and Human Rights. Interdisciplinary Studies in Human Rights, v. 5. Springer, Cham. https://doi.org/10.1007/978-3-030-30469-0_5

⁴ NADI S. (2020) Roadmap for Women’s Economic Empowerment in India, UN Women. Accessed on 18th May 2021, <https://asiapacific.unwomen.org/-/media/field%20office%20eseasia/docs/publications/2020/10/in-roadmap-for-womens-economic-empowerment-in-india.pdf?la=en&vs=144>

⁵ WOMEN’S Economic Empowerment in India: A Policy Landscape Study 2020, Quantum Hub. Accessed on 19th May 2021, <https://thequantumhub.com/wp-content/uploads/2020/12/Overall-Summary-Documents-WEE-Policy-Landscape-Study-Final.pdf>

⁶ World Bank, and World Bank. “Women and Trade: The Role of Trade in Promoting Gender Equality.” (2020).

⁷ Global Gender Gap Report 2021, WEF Accessed on 18th May 2021, <https://www.weforum.org/reports/global-gender-gap-report-2021>

⁸ International Monetary Fund (2018). Pursuing Women’s Economic Empowerment Accessed on 15th May, 2021 <https://www.imf.org/en/Publications/Policy-Papers/Issues/2018/05/31/pp-053118pursuing-womens-economic-empowerment>

ment rates in OECD countries to match that of Sweden, could boost GDP by over USD 6 trillion,⁹ recognizing, however, that growth does not automatically lead to a reduction in gender-based inequality. Conversely, it is estimated that gender gaps cost the economy some 15 percent of GDP.¹⁰

Women's economic equality is good for business. Companies greatly benefit from increasing employment and leadership opportunities for women, which is shown to increase organizational effectiveness and growth. It is estimated that companies with three or more women in senior management functions score higher in all dimensions of organizational performance. In the context of women as a segment, there is a need to ask the question of why some portions of the law behave differently than what was desired of them. For example, if we consider the economic rights of women flow from the same Constitution in democratic countries. The other rights flowing from a plethora of legislations which look perfect also flow from the same Constitution. They look perfect on the outside and may just have been drafted perfectly. So, if we take the example of terms of international trade and the rights of women entrepreneurs, there are laws which are designed to encourage women.¹¹ For example, in India a woman requiring patent has to go through a less rigorous procedure and waiting.¹² Also, under Indian Constitution, there are laws emanating from art 15(3) of the Constitution of India¹³ and all policies look like either gender neutral or which support women's economic endeavours.

The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) has been ratified by India with some 'réservations'. Even in Post CEDAW era the gender disparity for women and girls with respect to educational enrolment, life expectancy, participation in trade and labour force has remained

although may have considerably shrunk. Gender gaps persist, particularly with regard to higher mortality rates of girls and women, disparities in girls' education, unequal access to economic opportunities and differences in household and societal decision-making

Therefore there is a need to recognise that norms be understood from both a normative and non-normative context and behaviour. There is a need to throw light on and relook at the fundamental provisions and social constructs traceable to the legal system which help women entrepreneurs and those which do not. It is to be understood if women need a separate set of norms or the current laws are sufficient to deal with gender gaps in international trade participation of women and how international organisation like WTO plays a crucial role in protection and promotion of the same, similarly how various regional trade agreements have acknowledged and incorporated provisions promoting gender equality. Thus, this research paper aims at addressing the following research questions:

1. What steps have been taken in the international legal scenario to eliminate discrimination against women in the economic sphere?
2. How far WTO arrangements are gender neutral and so far what measures have been taken by WTO to ensure equal participation of women in the global trade ?
3. What role does Regional Trade Agreements play in inclusion & promotion of women ?
4. What are the provisions of CEDAW which advocates for inclusion of women in the economic sector?

2 Role of World Trade Organisation in Promotion of Gender Equality

The stated objective of the WTO is "to help trade flow smoothly, freely, fairly and predictably." The original GATT was limited to facilitating trade in goods by eliminating so-called 'trade barriers' (e.g. quotas, tariffs) and articulating the basic principles of free trade (i.e. non-discrimination, fiscal and regulatory independence of states)¹⁴. The scope and power of the organiza-

⁹ PwC, Women in Work Index 2018. Accessed on 15th May 2021, <https://www.pwc.co.uk/services/economics-policy/insights/women-in-work-index.html>

¹⁰ CUBERES, David, and Marc Teignier. "Aggregate effects of gender gaps in the labor market: A quantitative estimate." *Journal of Human Capital* 10, n. 1, p. 1-32, 2016.

¹¹ Department of Promotion of Industry and Internal Trade, Draft Patent Rules 2018, Accessed on 16th May 2021. <https://dipp.gov.in/whats-new/draft-patent-rules-2018>.

¹² Department of Promotion of Industry and Internal Trade, Draft Patent Rules 2018, Accessed on 16th May 2021. <https://dipp.gov.in/whats-new/draft-patent-rules-2018>.

¹³ Constitution of India 1949, art. 15(3).

¹⁴ BARFIELD, Claude E. "Free Trade, Sovereignty, Democracy: Future of the World Trade Organization." *Chi. J. Int'l L.* 2 (2001):

tion, however, has greatly increased. Today, “the WTO’s reach includes issues of service provision, intellectual property, health and safety standards, and a vast array of products. It is now the primary actor in international trade, administering multilateral agreements, hosting negotiating sessions, handling disputes, monitoring national trade policies, and providing technical assistance and training for developing countries”.¹⁵ With good reason, the WTO has been described as “the institutional face of globalization.

The WTO has a key role to play in gender equality in global trade. Ongoing talks related to services, agriculture (which employs a large number of women in developing countries), electronic commerce and micro, small and medium sized enterprises are key to identifying and eliminating barriers to women’s participation in trade. The WTO also provides a forum where members discuss tariff and non-tariff barriers across a range of sectors and members’ trade policies. Improving transparency on gender-related policies can help establish good practices and draw attention to the challenges that women face in participating in world trade. As stated in the preamble to the Marrakesh Agreement establishing the WTO, sustainable development is a key objective of the Organization.¹⁶ The preamble states that the WTO should conduct its activities “with a view to raising standards of living ... while allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development”. The preamble also states that a “commensurate share in the growth in international trade” for developing and least developed countries needs to be ensured. The mandate for the Aid for Trade initiative states: “Aid for trade should be rendered in a coherent manner taking full account ... of the overall goal of sustainable development”. Since its establishment over 20 years ago, the WTO has sought to put trade at the centre of development and aid strategies. As a result, trade has helped to lift millions of people out of poverty. The WTO also seeks to ensure that everyone

benefits from the opportunities offered by trade, including women and small businesses.

2.1 Buenos Aires Declaration on Trade and Women’s Economic Empowerment

For the first time in the history of the World Trade Organization, “WTO members and observers have endorsed a collective initiative to increase the participation of women in trade. In order to help women reach their full potential in the world economy”,¹⁷ WTO members and observers agreed to “support the Buenos Aires Declaration on Trade and Women’s Economic Empowerment, which seeks to remove barriers to, and foster, women’s economic empowerment”.¹⁸ However, instead of being good news, this initiative rings several alarm bells. First, “this document does not propose any new approach to the WTO’s way of working or its agreements. Instead of assessing the negative gendered impacts in multiple areas (as described above) of such liberalisation, it proposes more liberalisation as the ultimate solution and a key driver for women’s empowerment. A few cosmetic words here and there cannot change nor address this”.¹⁹ Further, “the initiative has the potential to make the WTO agreements sound very beneficial for women if gender issues are addressed in very trivial and perfunctory ways.”²⁰ The declaration also mentions areas such as government procurement, e-commerce, MSMEs, and GVCs, all of which are new issues in the WTO and have no agreed mandate for WTO intervention or rule making.²¹ These are also areas where rule making has been resisted by most developing and least developed countries as these constrain their policy space and push new forms of libera-

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¹⁵ ACHARYA, Rohini; ALAMO, Olga Falgueras; AL-BATTASHI, Salma Mohamed Thabit; BOGHOSSIAN, Anoush der; GHEI, Naghm; HERRERA, Tania Parceró, JACKSON, Lee Ann *et al.* Trade and Women—Opportunities for Women in the Framework of the World Trade Organization. *Journal of International Economic Law*, v. 22, n. 3, p.323-354, 2019.

¹⁶ HOEKMAN, Bernard M.; MAVROIDIS, Petros C. World Trade Organization (WTO): law, economics, and politics. *Routledge*, 2015.

¹⁷ DER BOGHOSSIAN, Anoush. *Women’s economic empowerment: An inherent part of Aid for Trade*. No. ERSD-2019-08. WTO Staff Working Paper, 2019.

¹⁸ RIVOLI, Pietra. *The travels of a t-shirt in the global economy: An economist examines the markets, power, and politics of world trade. New preface and epilogue with updates on economic issues and main characters*. John Wiley & Sons, 2014.

¹⁹ GONZÁLEZ, Arancha. “Pressing for progress with SheTrades.” In *International Trade Forum*, no. 1, pp. 3-3. International Trade Centre, 2018.

²⁰ TRUE, Jacqui. “Trading-off gender equality for global Europe? The European Union and free trade agreements.” *European Foreign Affairs Review* 14, no. 5 (2009).

²¹ Hannah, Erin, James Scott, and Rorden Wilkinson. “The WTO in Buenos Aires: The outcome and its significance for the future of the multilateral trading system.” *The world economy* 41, n. 10, p. 2578-2598, 2018.

lisation, often in disguise, for which they are not ready. Liberalisation of these areas could in fact create adverse impacts on weaker constituencies in developing countries, including women as described above.²²

The apprehension is corroborated by the fact that “the follow-up discussion schedule proposed by the WTO and partners covers topics such as government procurement and the digital economy, all new issues not under WTO mandate, but not on important traditional issues such as agriculture; informal work of women in export industries; and access to medicines, services and natural resources; many of which are seen to be important issues for women in developing countries.”²³ This Declaration “does not seem to have any mandate from or been designed in consultation with progressive women’s rights groups that have been raising concerns about gender and trade for a long time. This is reflected in a letter which was released in response to the Declaration and was endorsed by 164 (now about 190) women’s rights groups and their allies.”²⁴ This challenged the premise of the Gender Declaration and called on Member States “to refrain from adopting the proposed “Joint Declaration on Trade and Women’s Economic Empowerment”²⁵. It said “we appreciate that governments are increasingly recognising the gendered impact of international trade and trade rules imposed through the WTO and preferential trade agreements. However, this declaration fails to address the adverse impact of WTO rules and instead appears to be designed to mask the failures of the WTO and its role in deepening inequality and exploitation”.²⁶ They argued that “in any case women’s rights groups felt that gender and trade in any fora must be discussed and ac-

ted on with their engagement, consent and based on their recommendations.”²⁷ The current approach in the WTO indicates instrumentalisation and misuse of women’s rights groups’ genuine concerns on gender impacts of trade by using them as a Trojan horse.

A question to explore is also which space is best suited for achieving gender equality or readjustment against the adverse impacts of trade policy and liberalisation. Is it the “trade agreements, or should it be done in other enabling spaces such as the Human Rights mechanisms, or should it be done through domestic policy i.e. through a mix of enabling domestic macroeconomic policy (including sector-specific policies) and supportive policy to trade policy.”²⁸ In the current scenario of hard trade negotiations driven by large commercial interests and influenced directly by mega MNCs, the latter two are clearly better spaces. The overall approach of trade agreements, at multilateral, bilateral and plurilateral levels, has so far been to push for more aggressive liberalisation which works against women’s rights and equality in general. As long as this approach does not change, talking or attempting to make rules about gender and trade remains cosmetic and is actually an effort to hijack issues of real concern to simply push more liberalisation. It is also clear that “any effort to address gender and trade has to be encased in an enabling trade policy for developing countries without which women in these countries cannot benefit”.²⁹

2.2 SPS & WTO With Respect To Women Centric Provisions

Over the period March 2010 to March 2018 the SPS Committee met a total of 25 times. The minutes of these meetings, whilst not providing a comprehensive record of the proceedings, do provide a good sense of the issues that were raised and discussed. The words “gender” or “women” occur a total of four times in the

²² Ibid

²³ Acharya, Rohini, Olga Falgueras Alamo, Salma Mohamed Thabit Al-Battashi, Anoush der Boghossian, Naghm Ghei, Tania Parcero Herrera, Lee Ann Jackson et al. “Trade and Women—Opportunities for Women in the Framework of the World Trade Organization.” *Journal of International Economic Law* 22, no. 3 (2019): 323-354.

²⁴ Women, U. N. “Promoting Women’s Economic Empowerment: Recognizing and Investing in the Care Economy.” *Issue Paper, UN Women, New York* (2018).

²⁵ MONTEIRO, José-Antonio. *Gender-related provisions in regional trade agreements*. No. ERS-2018-15. WTO StafWagner, Constance Z. “Looking at regional trade agreements through the lens of gender.” *Louis U. Pub. L. Rev.* 31 (2011): 497.f Working Paper, 2018.

²⁶ STATEMENT: Women’s Rights Groups Call on Governments to Reject the WTO Declaration on Women’s Economic Empowerment Asia Pacific Forum on Women, Law and Development (APWLD), Accessed on 14th May 2021. <http://apwld.org/statement-womens-rights-groups-call-on-governments-to-reject-the-wto-declaration-on-womens-economic-empowerment/>.

²⁷ STATEMENT: Women’s Rights Groups Call on Governments to Reject the WTO Declaration on Women’s Economic Empowerment Asia Pacific Forum on Women, Law and Development (APWLD), Accessed on 14th May 2021. <http://apwld.org/statement-womens-rights-groups-call-on-governments-to-reject-the-wto-declaration-on-womens-economic-empowerment/>.

²⁸ HASSAN, Hend. The relationship between gender equality, women empowerment and sustainable development. *New Trends in Sustainable Business and Consumption*, p. 41, 2020

²⁹ CHEMALI, Elie-Charbel A. *The future of the international trade system*. PhD diss., Notre Dame University-Louaize, 2019.

minutes of these meetings. Two of these four occurrences relate to the nature of SPS measures being applied by a WTO member state, namely, French labelling provisions for BPA in food contact materials out of concern for the potential risks to pregnant women and young children, and Japanese maximum residue levels (MRLs) for pesticide that take account of the likely dietary intake of both men and women. The two further references are part of reports on SPS-related technical assistance, namely the need to specifically focus on women (by the STDF) and the fact that technical assistance projects had benefited women (by the International Trade Centre (ITC)).³⁰

A further indication of the limited extent to which gender issues are considered by the SPS Committee is provided by the inventory of specific trade concerns raised by WTO member states that is maintained by the SPS Secretariat. This inventory provides a summary of the nature of the respective SPS measure and the concern raised. Across the entire inventory, the words “gender” and “women” occur once; related again to French labelling requirements for BPAs in food contact materials.³¹ The functioning of the SPS Committee, of course, very much reflects the nature of the SPS Agreement, and the rights and responsibilities that it enacts on WTO member states. The agreement itself makes no mention of the socio-economic impacts of trade-related SPS measures, including the impacts on women and even the implications for poverty. Whilst the SPS Agreement recognises that low and middle-income countries can face challenges in complying with trade-related SPS measures, and furthermore in complying with their responsibilities under the Agreement, these concerns mainly relate to weaknesses in the SPS capacity of these countries. More generally, whilst Article XX of the GATT enables member “states to take measures in pursuit of public policy concerns, even where these may violate their WTO obligations, no specific mention is made of social or economic considerations, including gender Montour 2014.”³²

³⁰ HENSON, Spencer. *Gender and Sanitary and Phytosanitary Measures in the Context of Trade: a Review of Issues and Policy Recommendations*. 2018

³¹ WOLFE, Robert. Reforming WTO Conflict Management: Why and How to Improve the Use of ‘Specific Trade Concerns’. *Journal of International Economic Law*, v. 23, n. 4, p. 817-839, 2020.

³² HENSON, Spencer. *Gender and Sanitary and Phytosanitary Measures in the Context of Trade: a Review of Issues and Policy Recommendations*. 2018.

Reflecting the routine business of the SPS Committee, the responsibilities and expertise of delegates largely lie with technical aspects of food safety, plant health or animal health, and/or trade. In the case of larger WTO member states, “the delegation can consist of multiple members. Rarely, however, do delegations include individuals with expertise and/or responsibilities related to the socioeconomic impacts of trade-related SPS measures, and most notably gender”.³³ This is a potential weakness of the Committee at the current time, in terms of the resources at its disposal for in-depth discussions of the often complex gender issues associated with trade-related SPS measures. Looking to the future, the SPS Committee could and should be the forum in which WTO member states raise and discuss the gender issues associated with trade-related SPS measures. Furthermore, it can be instrumental in promoting gender mainstreaming in the promulgation of national SPS measures, and in the provision of SPS-related technical assistance. Achieving such a radical shift in the proceedings of the SPS Committee, however, will require sustained leadership by the most influential WTO member states. This can include “consistently raising gender issues on a case-by-case basis, applying concerted pressure for a regular gender agenda item, and including gender specialists in their national delegations”.³⁴

2.3 Recent Steps Taken By WTO For Women Empowerment & Inclusion

In June 2017, the WTO nominated for the first time a Trade and Gender Focal Point tasked with coordinating work among divisions, taking stock of what the WTO is doing, and considering opportunities for further work and new initiatives.³⁵

The WTO will frame and structure its actions based on four objectives:

- 1) raising awareness on the link between trade and gender;
- 2) facilitating WTO members’ action on trade and gender;

³³ HENSON, Spencer. *Gender and Sanitary and Phytosanitary Measures in the Context of Trade: a Review of Issues and Policy Recommendations*. 2018.

³⁴ *Supra* f.n. 34

³⁵ HANNAH-MOFFAT, Kelly. Gridlock or mutability: Reconsidering gender and risk assessment. *Criminology & Pub. Pol’y*, v. 8, p. 209, 2019.

3) generating new data on the impact of trade on women;

4) providing training to government officials and to women entrepreneurs.

i. Technical assistance

The WTO's Technical Assistance plan 2018-2019 includes a section on gender providing a mandate for the WTO to develop a training module on trade and gender. The objective of the module is to focus "on trade policy with the aim to raise awareness and enhance the aptitude of policy makers to incorporate gender considerations in their analysis and trade policy development or negotiations".³⁶

ii. Women entrepreneurs' programme

The WTO is planning to create a women entrepreneurs' programme to provide women with specific tools and information on how to use trade for their economic development.

iii. Empowering women through Aid for Trade

The final report of the Aid for Trade Task Force, created in 2006, provides a clear mandate for gender equality to be included in the Aid for Trade initiative: "Aid for trade should be rendered in a coherent manner taking full account ... of the gender perspective and of the overall goal of sustainable development ... Donors and partner countries jointly commit to the harmonization of efforts on cross-cutting issues, such as gender."³⁷ Subsequent Aid for Trade global reviews have highlighted a broad range of areas in which Aid for Trade has had a positive impact on women's economic empowerment.

3 Role of Regional & Foreign Trade Agreements in Gender Inclusion

3.1 The Evolution of Gender-Related Provisions in Regional Trade Agreements

Regional Trade agreements (RTAs) are sometimes considered as laboratories in which new types of pro-

visions are negotiated to address recent trade-related issues. Although the inclusion of gender-related provisions in RTAs is not a recent phenomenon, only a limited but increasing number of RTAs refer explicitly to gender-related issues. These gender-related provisions are highly heterogeneous and differ in terms of location in the RTA, language, scope and commitments. Some of the most detailed gender-related provisions are found in stand-alone chapters on gender. Cooperation provisions on gender-related issues, including labour, health and social policy, remain the most common type of gender-related provisions found in RTAs.³⁸

The inclusion of "provisions referring explicitly to gender is not a recent phenomenon. The very first gender-related provision was found in the 1957 Treaty of Rome establishing the European Economic Community (EEC) requiring each member state to guarantee the application of the principle of equal pay for women and men. More than 25 years later, the 1983 Treaty establishing the Economic Community of Central African States (ECCAS) was the first RTA signed by developing countries to include a gender-related provision"³⁹. The provision found in the article on cooperation in social affairs committed the parties to develop collective research aimed at improving the economic, social and cultural status of women in urban and rural areas and increasing their integration in development activities.⁴⁰ Nine years later, the first gender-related provisions referring to the general principle of equality between men and women were found in the 1992 Maastricht Treaty of the European Union (EU). The same year, the North American Free Trade Agreement (NAFTA) established in its labour cooperation agreement a couple of provisions referring in more detail to gender-related labour principles, namely the elimination of employment discrimination based on sex and equal pay for women and men. As suggested by these four RTAs, and confirmed in greater detail below, gender-related provisions found in RTAs address various issues and remain highly heterogeneous.

³⁸ MONTEIRO, José-Antonio. *Gender-related provisions in regional trade agreements*. No. ERSD-2018-15. WTO Staff Working Paper, 2018.

³⁹ SARTER, Eva K. "The Legal Framework Of Contracting: Gender Equality, The Provision Of Services And European Public Procurement Law." *Wagadu: A Journal of Transnational Women's & Gender Studies* 14 (2015).

⁴⁰ MONTEIRO, José-Antonio. *The evolution of gender-related provisions in regional trade agreements*. No. ERSD-2021-8. WTO Staff Working Paper, 2021.

³⁶ WORLD BANK. "Women and Trade: The Role of Trade in Promoting Gender Equality." (2020).

³⁷ The final report of the Aid for Trade Task Force, (2006)

The following gender-relevant issues apply in relation to FTA and RTAs and trade policy:⁴¹

1. Trade negotiations often represent and reproduce existing gendered structures. Men are thus overrepresented and women underconsulted.
2. TAs/RTAs are not gender neutral if they don't distinguish between (trade outcomes for) men and women, in fact, they are gender blind.
3. Gender-differentiated distributional effects of trade are not identified, if no gender-relevant (social and economic) impact assessments are conducted.
4. Trade reforms, policies, trade agreements and AfT will –without knowledge about gender-related impacts of trade- not include any corrective measures and/or additional clauses.
5. Trade negotiations, for (trade) policy reforms and AfT need to take into account TArelevant gendered impacts through potentially expanding (or contracting) sectors.
6. The overall losses in government revenues through tariff cuts and compensatory efforts need to be:

a) analysed and calculated and

b) designed in a way not overly affect women, children and the poor.

3.2 RTAs & Gender Specific Provisions

Over the years, the number of RTAs with explicit gender-related provisions has increased slowly but relatively steadily. “RTAs representing 14% of all agreements analysed, include at least one provision explicitly referring to gender or gender related issues”.⁴² Of these 83 agreements, “58 (70%) were negotiated between developed and developing economies (North-South RTAs), 13 (16%) between developing economies (South-South RTAs) and 12 (14%) between developed economies (North-North RTAs)”⁴³. In total, “67 RTAs with gender-related provisions have been notified to the WTO and are currently in force. 13 other RTAs with gender-related provisions have either not yet entered

⁴¹ HANNAH, Erin; SCOTT, James; WILKINSON, Rorden. The WTO in Buenos Aires: The outcome and its significance for the future of the multilateral trading system. *The world economy*, v. 41, n. 10, 2578-2598, 2018.

⁴² MONTEIRO, José-Antonio. *The evolution of gender-related provisions in regional trade agreements*. No. ERSD-2021-8. WTO Staff Working Paper, 2021.

⁴³ MONTEIRO, José-Antonio. *The evolution of gender-related provisions in regional trade agreements*. No. ERSD-2021-8. WTO Staff Working Paper, 2021.

into force or been notified to the WTO. Three remaining RTAs with gender-related provisions are no longer in force.”⁴⁴

Table 1 - Main structures of gender-related provisions

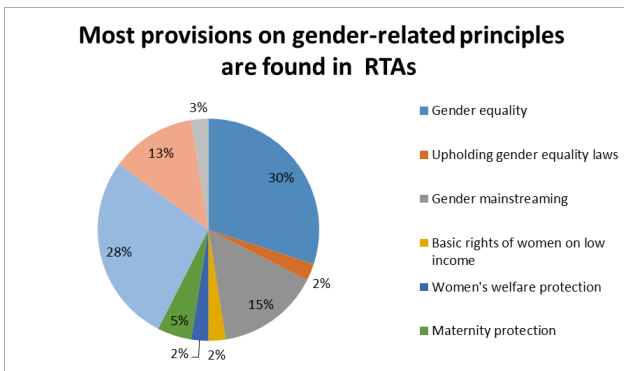
Structure of gender-related provisions	Number of RTAs
1. Main text of the RTA	76
- Preamble	12
- Non-specific article(s) on gender	64
- Specific article on gender	10
- Specific chapter on gender	9
- Annex(es)	17
2. Side document(s) to the RTA:	12
- Side letters	1
- Joint statement(s)	1
- Protocol(s)	2
- Labour cooperation agreement	8
3. Post-RTA agreements/decisions on gender:	13
- Declaration(s)/recommendation(s)	4
- Decision(s)/resolution(s)/directive(s)	6
- Agreement(s)/Protocol(s)	3

Table 2 - Main types of gender-related provisions

Types of Gender Related Provisions	Number of RTAs	First Year
1. Definitions	1	1999
2. Principles	19	1992
3. International agreements and instruments	10	1999
4. Domestic gender-related policies	40	1957
- Right to regulate	9	1992
- Adoption	19	1992
- Harmonization	8	1992
- Uphold	4	2006
5. Exemptions/Reservation measures	7	2003
6. Corporate social responsibility	5	2017
7. Cooperation	69	1983

⁴⁴ RUBÍNOVÁ, Stela; SEBTI, Mehdi. The WTO Global Trade Costs Index and its determinants. No. ERSD-2021-6. *WTO Staff Working Paper*, 2021.

Types of Gender Related Provisions	Number of RTAs	First Year
- Cooperation principles	17	1992
- Political dialogue	1	2012
- Cooperation forms	8	2016
- Cooperation areas	68	1983
8. Transparency	6	2016
9. Public participation	1	2020
10. Institutional arrangements	11	1993
11. Relation with other chapters/agreements	3	2017
12. Consultations procedures	6	2016
13. Dispute settlement coverage	7	2016



Typically, “gender provisions have been included in the preamble or the development and inclusive growth chapters and in most cases have not been mainstreamed through the entire FTA. These provisions have concerned cooperation on gender and gender-related issues, including labour, health and social policy, workplace discrimination, and equal pay.”⁴⁵ The 1957 Treaty of Rome establishing “the European Economic Community (EEC) also included the first gender-related article to guarantee equal pay.”⁴⁶ Then, the first RTA signed by developing countries to include a gender-related provision was the 1983 Treaty establishing the Economic Community of Central African States (ECCAS). Later in 1992, the Maastricht Treaty on the European Union (EU) included the first gender-related provisions refer-

⁴⁵ BENERÍA, Lourdes, Günseli Berik, and Maria S. Floro. Gender, development, and globalization: Economics as if all people mattered. Routledge, 2015.

⁴⁶ BENERÍA, Lourdes, Günseli Berik, and Maria S. Floro. Gender, development, and globalization: Economics as if all people mattered. Routledge, 2015.

ring to the general principle of equality between women and men.

3.3 How do gender and trade chapters in FTAs help to promote equality in international markets?

For the first time three recent bilateral FTAs have included a chapter dedicated to gender and trade: Canada and Chile, Chile and Argentina, Canada and Israel. These gender-modernised FTAs have already entered into force. An FTA, “between Chile and Uruguay signed on 4 October 2016, also includes a chapter on gender and trade, and it is still pending to enter into force. The content of the trade and gender chapters in each of these FTAs is similar. They include general provisions that highlight the importance of incorporating a gender perspective to promote inclusive growth in light of goal 5 of the SDGs. They affirm their commitment to promoting gender equality through laws, regulations, policies and practices and acknowledge that women’s enhanced participation in the labour market and their economic independence contribute to sustainable and inclusive economic growth”.⁴⁷ The agreements also include “the reaffirmation of the commitment to effectively implement the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) and the commitment to undertake cooperation activities which aim to improve capacity and conditions for women to benefit from opportunities created by the FTA.”⁴⁸

Each FTA mentioned above has established a trade and gender committee with the purpose to determine, organize, facilitate and report on the cooperation activities, and make recommendations on the implementation and operation of the trade and gender chapters, as appropriate. The Canada and Chile FTA has published its work plan for implementing activities on trade and gender. Finally, the chapters “include an article on dispute resolution and settlement, which states that the parties are meant to make every effort through dialogue, consultation and cooperation, to settle any matter

⁴⁷ HILL, Catherine. Enabling rural women’s economic empowerment: Institutions, opportunities and participation. In *Background paper: UN women expert group meeting Accra, Ghana*, p. 20-23. 2011.

⁴⁸ ODERA, Josephine A.; MULUSA, Judy. SDGs, Gender Equality and Women’s Empowerment: What Prospects for Delivery?. *Sustainable development goals and human rights*: Springer, p. 95-118, 2020.

arising in relation to the specifications included in the chapter.”⁴⁹ With the exception of the Canada-Israel agreement, each of the other FTAs with gender chapters explicitly prohibit the parties to use the dispute resolution mechanism for resolving breaches in gender commitments included in the chapters. This lack of recourse to dispute settlement is a cause for concern for women in those countries where resolution of disputes is not reached via dialogue. Thus, while the existence of a gender chapter in the Canada-Chile, Argentina-Chile and Chile-Uruguay FTAs is a sign of significant progress, the Canada-Israel agreement has gone farthest in ensuring gender equality.⁵⁰

Some examples of Free Trade Agreements In Ensuring Gender Neutrality

The African Continental Free Trade Area

The 54 members of the Africa Union recently joined the African Continental Free Trade Area to create a single continent-wide market for goods and services. In its preamble, the treaty establishing this trade zone recognizes the importance of gender equality for international trade and development. Including gender equality considerations in the preamble is an effective way of mainstreaming gender perspectives, as it can be instrumental in determining the intentions of the negotiators or drafters of the agreement.⁵¹ Moreover, Article 3 identifies gender equality as a “general objective, frontloading gender concerns even further in the agreement”. Another interesting example is Article 27, “where parties promise to muster resources to improve the export capacity of women entrepreneurs and small and medium-sized enterprises (SMEs)”. This legal provision is a best practice example, as identifying or mobilizing funds for gender-related commitments is fundamental for their implementation. This provision also supports building the capacity and technical skills of SMEs and women entrepreneurs, which again is a crucial lever for empowerment. The nod to gender equality in the African Continental Free Trade Area agreement and the im-

portance it attaches to gender considerations reflect “a broader appreciation among Africa’s regional economic communities of the key role that women play in domestic economies and the positive impact their inclusion can have on economic growth and development”.⁵²

The United States’ trade agreements with Morocco, Oman, Bahrain, Chile, and Guatemala have used “negotiations to push pre-ratification conditions around labor laws. Oman, for example, had a law that placed severe restrictions on labor organizing within the country and needed to reform the law as a condition for completing a preferential trade agreement (PTA) with the US”⁵³. A similar tool could be used to reform laws restricting women’s rights to work and/or run a business.

In addition, treaty language can address gender inequality. Some existing US bilateral trade agreements include language around gender issues. The Peru Free Trade Agreement includes a labor cooperation and capacity-building mechanism which includes “development of programs on gender issues, including the elimination of discrimination in respect of employment and occupation.”⁵⁴ Future agreements could be more specific about the particular discriminatory barriers to be addressed, and supporting legislation could specifically fund mechanisms to help address those discriminatory issues as well as lay down timelines and review mechanisms.

4 Gender provisions in bilateral investments treaties

There are clear linkages through which trade and investment policies and agreements can affect gender dynamics. Sengupta⁵⁵ categorizes the linkages as the following: “(i) work sphere affecting employment and incomes, terms of employment, work conditions; (ii)

⁴⁹ JAQUETTE, Jane S., and Gale Summerfield, eds. *Women and gender equity in development theory and practice: Institutions, resources, and mobilization*. Duke University Press, 2020.

⁵⁰ MALHOTRA, Nisha, and Andrey Stoyanov. *Analyzing the Agricultural Trade Impacts of the Canada-Chile Free Trade Agreement*. No. 1619-2016-134692. 2008.

⁵¹ KUHLMANN, Katrin; AGUTU, Akinyi Lisa. The African Continental Free Trade Area: Toward a new legal model for trade and development. *Geo. J. Int’l L.* v. 51, p. 753, 2019.

⁵² LUKE, David; MACLEOD, Jamie (eds.). *Inclusive Trade in Africa: The African Continental Free Trade Area in Comparative Perspective*. Routledge, 2019.

⁵³ KENNY, Charles, and Megan O’Donnell. “Making Global Trade More Gender-Inclusive.” *CGD Notes*, February 6, 2017.

⁵⁴ COVARRUBIA, Patricia. The EU and Colombia/Peru free trade agreement on GIs: adjusting Colombian and Peruvian national laws?. *Journal of Intellectual Property Law & Practice*, v. 6, n. 5, p. 330-338, 2011.

⁵⁵ SENGUPTA, R. The gender dynamics of trade and investment and the post-2015 development agenda: A developing-country perspective. *Third World Network*, 2013.

access to resources (land, water, credit, technology); access to basic services (e.g., health, education); (iii) home situation affecting care work, unpaid work, within household inequality/empowerment; (iv) migration, including both domestic and international, and of both men and women; (v) women as consumers; and (vi) affecting the policy space for gender-friendly policies and social policies”⁵⁶. Unlike trade agreements, “very few BITs currently include gender provisions. Out of almost 80 model agreements published online by UNCTAD’s Investment Policy Hub, only six explicitly address gender, albeit through broad provisions that refer to fair and equitable treatment between men and women”⁵⁷. All of the agreements that mention gender were adopted in the last six years, showing a positive trend in this regard. Nonetheless, others from the same time period did not include such protections, which shows that there is still room for growth. A few others make reference to international agreements, such as the Organisation for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises and the United Nations Guiding Principles on Business and Human Rights⁵⁸, suggesting that “companies abide by certain standards of responsible business, by implementing policies that address various issues, including gender.” Among the few examples of countries that have submitted model BITs containing gender provisions is the Netherlands⁵⁹, with the most recent version of the Government’s model BIT recently published by UNCTAD’s Investment Policy Hub platform. Amid the interesting changes introduced, the 2019 model includes “a commitment to promote equal opportunities and participation for women and men in the economy.” The preamble recognizes the “importance of gender equality in international trade and investment policies” and Article 6, paragraph 3 of the Netherlands Model Investment Agreement states the following (emphasis added):

⁵⁶ SENGUPTA, R. The gender dynamics of trade and investment and the post-2015 development agenda: A developing-country perspective. *Third World Network*, 2013.

⁵⁷ AMARAL, Renata Vargas; JALLER, Lillyana Sophia Daza. The role of regulation and MNEs in ensuring equal opportunities for women. *Transnational Corporations Journal*, v. 27, n. 3, 2020.

⁵⁸ CERNIC, Jernej Letnar. “Corporate responsibility for human rights: A critical analysis of the OECD guidelines for multinational enterprises.” *Hanse L. Rev.*, v. 4, p. 71, 2008.

⁵⁹ DUGGAL, Kabir AN; VAN DE VEN, Laurens H. *The 2019 Netherlands Model BIT: riding the new investment treaty waves*. 2019. p. 347-374.

“The Contracting Parties emphasize the important contribution by women to economic growth through their participation in economic activity, including in international investment. They acknowledge the importance of incorporating a gender perspective into the promotion of inclusive economic growth. This includes removing barriers to women’s participation in the economy and the key role that gender-responsive policies play in achieving sustainable development. The Contracting Parties commit to promote equal opportunities and participation for women and men in the economy. Where beneficial, the Contracting Parties shall carry out cooperation activities to improve the participation of women in the economy, including in international investment.”⁶⁰

The model also addresses gender issues in “Article 9 (Treatment of investors and of covered investments) and Article 20 (Constitution and functioning of the Tribunal) of the Agreement.” The Dutch model BIT is relevant because it sets the scene for a new generation of international investment agreements and it highlights the importance of incorporating a gender perspective in the promotion of inclusive growth and equal opportunities between men and women. Previously, “when investment agreements mentioned gender equality, they mostly focused on gender equality in arbitral dispute resolution and the gender division among arbitrators”⁶¹. This seems to be changing, but the impact of investment treaties and foreign direct investment on gender equality are notions that need to have more concrete ground in international investment treaties.

A similar trend is observed with regard to BITs. “Of the 2,899 BITs signed to date, only six mention gender in the text of the agreement”. Interestingly, there is little correlation between the countries that addressed gender in their model BITs and the countries that signed BITs that addressed gender. Whereas “Brazil stood out as one of the few countries whose recent model investment agreement did not address gender, the government addresses the issue in most of its recently signed investment cooperation and facilitation treaties”⁶². Con-

⁶⁰ Art. 6, Netherlands Model Investment Agreement 2019

⁶¹ VERBEEK, Bart-Jaap; KNOTTNERUS, Roeline. The 2018 Draft Dutch Model BIT: A Critical Assessment. *Investment Treaty News*, v. 16, n. 2, 2018.

⁶² VERBEEK, Bart-Jaap; KNOTTNERUS, Roeline. The 2018 Draft Dutch Model BIT: A Critical Assessment. *Investment Treaty News*, v. 16, n. 2, 2018.

versely, whereas Morocco's 2019 model BIT addressed gender, its most recent BIT signed with Japan in August 2020 does not.⁶³

5 SDG 5 on Gender Equality

Concerns around the negative consequences of globalization spurred the adoption of the Millennium Development Goals. States pledged to develop an "open trading and financial system" (free trade-based), and also to address the "special needs" of developing countries (fair trade-based). One such special need is gender equality. The third Millennium Development Goal aims to "promote gender equality and empower women," which includes addressing economic gender disparity.⁶⁴

U.N., Goal 3: Promote gender equality and empower women. The U.N. Inter-Agency Network on Women and Gender Equality has stressed that states and international trade institutions must evaluate trade rules and policies to determine whether they deepen or reduce existing gender inequalities. Although trade policy has long been considered "gender-neutral," it is now recognized that international trade in goods and services has a differential impact on gender, particularly in developing countries. For example, female workers comprise a large portion of labor-intensive industries, serving as "cheap labour surplus in developing countries." As compared to men, women are less likely to hold regular wage and salaried employment, are more likely to be employed in the informal economy, and are typically paid less in all parts of the world.⁶⁵ Trade contributes to SDG 5 by creating employment opportunities for women and by increasing women's participation in the economy. When women have their own incomes, they improve not only their standard of living but also their status and bargaining power in the family increase. This is sometimes known as the "power of the purse".⁶⁶

⁶³ AMARAL, Renata Vargas; JALLER, Lillyana Sophia Daza. The role of regulation and MNEs in ensuring equal opportunities for women. *Transnational Corporations Journal*, v. 27, n. 3, 2020.

⁶⁴ Satterthwaite, David, ed. *Millennium Development Goals and Local Processes: Hitting the Target Or Missing the Point?*. Iied, 2003.

⁶⁵ OGATO, Gemechu Shale. "The quest for gender equality and women's empowerment in least developed countries: Policy and strategy implications for achieving millennium development goals in Ethiopia." *International Journal of Sociology and Anthropology* 5, no. 9 (2013): 358-372.

⁶⁶ GROWN, Caren, Chadrika Bahadur, Jessie Handbury, and Diane

Women invest most of their incomes (about 90 per cent - World Bank) back in their families (notably on education and health) and in their communities. Increasing their economic power has therefore a "snowball effect" on society, increasing living standards for all and consequently reducing poverty. In the long run, this leads to changes in social attitudes and an improvement in women's rights.

6 CEDAW & Women Economic Empowerment

As all WTO members are also member states of the U.N., they are bound to U.N. agreements that prohibit gender discrimination. This core principle is elucidated in the Preamble to the U.N. Charter: "We the Peoples of the United Nations Determined . . . to reaffirm . . . the equal rights of men and women and of nations large and small."⁶⁷ CEDAW was adopted by the U.N. General Assembly. CEDAW creates clear guidelines that prohibit discrimination. This applies both to internal structures of business and corporate governance as well as actions of corporations as they discriminate against and impact women externally. CEDAW imposes "a state obligation to ensure women's right to equality in political, social, and economic spheres". It imposes an "obligation on states parties to ensure the full development and advancement of women in all fields, particularly the political, social, economic, and cultural fields"⁶⁸. By explicitly "guaranteeing the exercise and enjoyment of human rights and fundamental freedoms as the purpose of the full development and advancement of women, this locates women as rights-holders, not just as objects or prospective beneficiaries of development policy". CEDAW also specifically requires the taking of "all appropriate measures to ensure that women have rights on the same or equal terms with men in public life (article 7), acquisition of nationality (article 9), education (article 10), employment (article 11), health care (article 12), credit (article 13), and in the rural sector (article 14). State obligation extends to the private sphere as well as

Elson. "The financial requirements of achieving gender equality and women's empowerment." (2006).

⁶⁷ LOCKWOOD JR., Bert B. The United Nations Charter and United States Civil Rights Litigation: 1946-1955. *Iowa L. Rev.* v. 69, p. 901, 1983.

⁶⁸ Article 3, CEDAW

the public sphere: states must take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise (article 2(e)).⁶⁹ This obligation is an obligation on the state party to exercise due diligence to prevent discrimination against women by non-state bodies.

6.1 How CEDAW provides for Economic Inclusion of Women ?

CEDAW protection of women's equality in social and economic rights elaborates on the article 3 equality provision of the CESC, which applies "in particular" to "political, social, economic and cultural fields." Economic and social rights are directed at ensuring women's economic independence and free choices within society.

Among the most important and relevant provisions for women and business are article 4 of the Convention and general recommendation. Article 4 of the Convention allows "for States to adopt temporary special measures to accelerate equality between men and women without being considered discrimination". Article 11 "ensures equal opportunities, free choice of profession, the right to promotion and equal remuneration and equal treatment, among others". Additionally article 13 highlights equal access to bank loans and credit and equal rights in economic and social life. Article 14 specifically addresses "discrimination against women in rural contexts and afford them equal access to economic opportunities through employment or self employment, including through organising self help groups and cooperatives". General recommendation 28 on the core obligations of States parties under article 2 of the Convention highlights obligations not to cause discrimination against women through acts or omissions and to react actively to discrimination against women whether carried out by the State or private actors. The optional protocol to CEDAW also allows the Committee to consider complaints made by individuals about the violations of rights enshrined in the Convention including those related to equality in the work sphere as well as violations of rights by non-state and private sector actors.⁷⁰

⁶⁹ RADAY, Frances. Gender and democratic citizenship: The impact of CEDAW. *International journal of constitutional law*, n. 10, n. 2, p. 512-530, 2012.

⁷⁰ World Health Organization. Preventing gender-biased sex selection: an interagency statement-OHCHR, UNFPA, UNICEF, UN

One factor behind lower female participation in business and trade as both workers and employers is that "79 countries worldwide restrict the type of jobs women can do on the grounds of their sex alone, including 15 countries that have 8 or more such restrictions. Fifteen countries have laws on the books saying husbands may prevent their wives from accepting jobs."⁷¹ Countries "that impose work-hour or industry restrictions have lower female labor force participation rates (45 percent compared with 60 percent with no restrictions)".⁷² And the restrictions stand in contravention of the global norms laid down in Article 11 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW):⁷³

States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

- (a) The right to work as an inalienable right of all human beings;
- (b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;
- (c) The right to free choice of profession and employment...

6.2 CEDAW & 'Gender-Responsive Budgeting'

The United Nations adopted the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1979, which mainly contained pledges and guidelines for countries to reduce gender inequality. Although CEDAW does not include a specific provision on budgets, its principles require that women have both formal and substantive equality, which means that policies should account for differences in their impact on men and women. Gender-responsive budgeting (GRB) was first introduced at the Fourth World Conference on Women in 1995 in Beijing, China,

Women and WHO. World Health Organization, 2011.

⁷¹ POWELL, Gary N. Women and men in management. Sage Publications, 2018.

⁷² BRAUNSTEIN, Elissa. Gender-inclusive industrialization for growth and development in the context of globalization. *Gender equality and inclusive growth: Economic policies to achieve sustainable development*, 2019.

⁷³ Art. 11, CEDAW ,2006.

to inculcate in decision-makers the principle of looking at national budgets through a gendered lens.

“With representatives from 189 governments, over 17,000 participants and two weeks of debate, the GRB was brought into the mainstream at the event, and governments, NGOs, civil society organisations and academics have advocated for its use since then.”⁷⁴Over the years, various countries have made attempts to create women-centric schemes and allocate funds for them. GRB goes beyond this; it is related explicitly to allocating portions of national budgets to promote women’s advancement and study the gendered impacts of such allocations to different government departments. It also considers how money is raised to make the budget, in terms of direct and indirect taxes and fines, and how this affects men and women differently.

The Fourth World Conference produced the Beijing Platform of Action, which contained the specific reference of using budgets for the advancement of women, in chapter VI (Financial Arrangements) clause 345:⁷⁵

“Full and effective implementation of the Platform for Action, including the relevant commitments made at previous United Nations summits and conferences, will require a political commitment to make available human and financial resources for the empowerment of women. This will require the integration of a gender perspective in budgetary decisions on policies and programmes, as well as the adequate financing of specific programmes for securing equality between women and men.”⁷⁶Australia was the first country to introduce GRB in 1984, even before the Fourth World Conference on Women, and each government ministry was tasked with analysing the effect of the yearly budget on women. Canada followed in 1993 and South Africa in 1995. Since then, over 80 countries have tried some variant of GRB.

⁷⁴ Wotipka, Christine Min, and Francisco O. Ramirez. “World society and human rights: an event history analysis of the convention on the elimination of all forms of discrimination against women.” *The global diffusion of markets and democracy* 3096 (2008): 303-343.

⁷⁵ Women, U. N. “The Beijing declaration and platform for action turns 20.” (2015).

⁷⁶ Women, U. N. “The Beijing declaration and platform for action turns 20.” (2015).

International Commitments to GRB

Year	Agreement	Association with GRB
1979	Convention on the Elimination of All Forms of Discrimination Against Women	Women’s participation in public life is connected to dimensions of the budget: revenue, expenditure, macroeconomics, and decision-making
1995	Beijing Declaration and Platform for Action	Declares the need for integrating a gender perspective in budgetary decisions on policies and programmes, including financing of schemes that promote gender equality
2015	2030 Agenda for Sustainable Development	Commits governments to “a significant increase in investments to close the gender gap”

6.3 Stand Taken By CEDAW Committee

The CEDAW Committee has observed that there is an “urgent need to ensure that globalisation, policies and plans of action that facilitate international trade and the transition to market economic policies are gender-sensitive and improve the quality of life of women”⁷⁷; and that “if sustainable development is to realise economic, social and environmental goals, women’s needs and concerns must be given equal priority with those of men.” Similarly the World Bank has said that “ignoring gender disparities comes at great cost to people’s well-being and to countries’ abilities to grow sustainably, to govern effectively, and thus to reduce poverty.” The CESCR Committee has clarified that the equal right of men and women to the enjoyment of economic, so-

⁷⁷ CEDAW Committee’s Concluding Comments include: Re Cameroon, 23d session (2000)

⁷⁸ World Bank Policy Research Report, Engendering Development: Through Gender Equality in Rights, Resources and Voice (January 2001)

cial and cultural rights is “a mandatory and immediate obligation of states parties.”⁷⁹ This is in itself a major breakthrough as it is acknowledged that the right of women to social and economic equality is not a qualified right, dependent on the ability of the state according to its resources, but rather an absolute right which requires the equitable distribution of existing resources. The Committee has considered “the relationship between gender and economic development: seeking information and expressing concern about the impact on women of economic crisis, structural adjustment programmes, observing that economic growth and development may not benefit women as much as men”⁸⁰. It has requested states to ensure that all poverty alleviation programs fully benefit women to enhance “monitoring of the impact of economic development and changes on women and to take proactive and corrective measures, including increasing social spending, so that women can fully and equally benefit from growth and poverty reduction.” The Committee has also welcomed the introduction of microcredit or microenterprise schemes that facilitate women’s independence through enhancement of their economic self-sufficiency. It has expressed concern about women’s poverty and social exclusion, which have been exacerbated by the global downturn from 2008. The Committee has linked sustainable development with “people-centered human development, based on equality and equity, participation of government and civil society, transparency and accountability in governance.”⁸¹

7 Conclusion & Recommendations

Women’s self-employment is encouraged as it significantly increases women’s income and therefore family wellbeing, and so reduces poverty. In the study of MIDAS–SMEF⁸², “a majority of the respondents said that their parents, husbands, even children, discouraged

them from entering into business”. Buvinic & Furst-Nichols,⁸³ in a study in Brazil, found that “children’s survival rates increased 20 percent when household income was controlled by their mother”. Human rights are not mentioned in WTO law, but the organization has embraced some fair trade values. For example, the Preamble of the Marrakesh Agreement, the document that established the WTO, includes “sustainable development” as an objective.⁴² Members also pledge to enter into reciprocal and mutually advantageous arrangements “directed to the substantial reduction of . . . barriers to trade and to the elimination of discriminatory treatment in international trade relations.”⁸⁴ After its establishment, the WTO framework was immediately used as a medium for human rights protections. One such example is the WTO Dispute Settlement Mechanism’s (DSM) interpretation of Article XX of the GATT in U.S.–Import Prohibition of Certain Shrimp and Shrimp Products. Article XX lays out exemptions from “GATT” rules on environmental protection, one being when the measure constitutes unjustifiable discrimination between countries where the same conditions prevail”⁸⁵. This does not apply if the measure is a disguised restriction on international trade. The DSM held that “Article XX must be considered contextually, and the notion of trade liberalization should not be applied without question.” Rather, many factors should be considered in determining discrimination between countries, including the impact on human rights. Specific WTO agreements focus on the female-dominated agriculture and services sectors and implicate human rights policy. For example, the Agreement on Agriculture imposed regulations in three specific areas: “domestic support, market access, and export subsidies.” These regulations did not go without criticism; the export subsidies agreement, which required developed countries to reduce export subsidies, was condemned for giving developed countries a leg up on exports. Although these regulations required developed countries to reduce export subsidies by at least thirty-five percent between 1995 and 2000, they still allowed these countries to continue to subsidize

⁷⁹ Committee on Economic, Social and Cultural Rights, General Recommendation 28

⁸⁰ I Committee on Economic, Social and Cultural Rights, General Recommendation 28

⁸¹ HRC, General Comment 28, Equality of rights between men and women (article 3), U.N. Doc. CCPR/C/21/Rev 1/Add.10

⁸² SHOMA, Chowdhury Dilruba. “Gender is a human rights issue: The case of women’s entrepreneurship development in the Small and Medium Enterprise sector of Bangladesh.” *Journal of International Women’s Studies* 20, no. 7 (2019): 13-34.

⁸³ BUVINIĆ, Mayra, and Rebecca Furst-Nichols. “Promoting women’s economic empowerment: what works?” *The World Bank Research Observer* 31, no. 1 (2016): 59-101.

⁸⁴ MARRAKESH Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154.

⁸⁵ APPELLATE Body Report, United States–Import Prohibition of Certain Shrimps and Shrimp Products, WTO Doc. WT/DS58/23 (Nov. 26, 2001).

farmers in a way that developing countries could not sustain.⁸⁶The World Bank's World Development Report 2011⁸⁷ said that some countries should pay attention to the elimination of unfair practices towards women. Increasing the level of skill of women would increase such a country's productivity by almost 25 percent. The reason for this is that in the patriarchal society men are considered as the family breadwinner and women are given care-giving responsibilities in the family.⁸⁸ Brush et al. points out: "Many societies mainly define women through roles connected to family and household responsibilities; societal values implicitly interpret women's entrepreneurship as less desirable and, as a result, provide lower normative support."⁸⁹Further, promoting gender related provisions in international trade laws and national legislations can led to the following benefits:

1. Trade can expand women's role in the economy, decrease inequality, and improve women's access to skills and education.

2. **Exporters employ more women:** "In developing countries, women make up 33 percent of the workforce of exporting firms compared with just 24 percent of non-exporting firms."⁹⁰

3. **Trade creates better jobs for women:** "When women are employed in sectors with high levels of exports, they are more likely to be formally employed in a job with better benefits, training and security."⁹¹

4. **Trade increases women's wages and increases economic equality:** "Developing countries that double their manufacturing exports a typical increase for developing countries that open themselves to trade would see women increase their share of total manufacturing wages from 24% to 30% through a combination of increased employment and higher salaries."⁹²

If we refer to the World Bank Report⁹³, it provides the following challenges with respect to gender equality in trade:

1. Trade policy is inadvertently biased against women, resulting in lower levels of employment and higher prices for consumer goods.

2. Although no country overtly imposes tariffs according to gender, implicit biases can amount to "pink tariffs" that put women at an economic disadvantage; as both producers and consumers.

3. Compared to men, women tend to spend a larger share of their income goods with high tariffs, such as food. Removing import tariffs could help women gain 2.5 percent more real income than men.

4. Targeted policies can help women maximize the benefits of trade. These include removing trade barriers that impede women's access to international markets and improving women's access to education, financial services, and digital technologies.

5. The lack of gender-specific data reinforces biases against women in trade policymaking. Sex-disaggregated data is necessary to assess how different policies and obstacles impact women and men differently

Apart, from that it can be observed from the above study on International Trade & Women Participation that "in 2017, World Trade Organization (WTO) members agreed to a Joint Declaration on Trade and Women's Economic Empowerment, which aims to increase women's participation in trade. While the declaration is non-binding, it includes provisions for sharing on gender-related information in Trade Policy Reviews. It also tries to lower barriers for women in trade while identifying Aid for Trade as an initiative to help develop

⁸⁶ YARWOOD, Lisa. Trade Law as a Form of Human Rights Protection. *NUJS L. Rev.* n. 3, p. 13, 2010.

⁸⁷ WORLD BANK. *World development report 2012: Gender equality and development*. The World Bank, 2011.

⁸⁸ ZOLIN, Roxanne, Michael Stuetzer, and John Watson. "Challenging the female underperformance hypothesis." *International Journal of Gender and Entrepreneurship*, 2013.

⁸⁹ BRUSH, Candida G., Anne de Bruin, and Friederike Welter. "Advancing theory development in venture creation: signposts for understanding gender." In *Women's Entrepreneurship in the 21st Century*. Edward Elgar Publishing, 2014

⁹⁰ BRUSH, Candida G., Anne de Bruin, and Friederike Welter. "Advancing theory development in venture creation: signposts for understanding gender." In *Women's Entrepreneurship in the 21st Century*. Edward Elgar Publishing, 2014,

⁹¹ FUCHS, Victor R. Women's quest for economic equality. *Journal of Economic Perspectives*, v. 3, n. 1, p. 25-41, 1989.

⁹² SCHULTZ, T. Paul. Does the liberalization of trade advance gender equality in schooling and health?. *Routledge*, 2014.

⁹³ WOMEN and Trade: The Role of Trade in Promoting Women's Equality, World Bank Report 2020.

the tools for crafting gender-responsive trade policies. A number of recent bilateral and regional trade agreements are also including chapters on trade and gender.”⁹⁴ But on the one hand, legal enforcement removes flexibility and the possibility of adopting trade policies that coincide with national development strategies. The mere threat of legal action may be sufficient to force a government to change their policies. The dispute settlement process also limits participation and transparency because only governments can act as complainants and defendants in the proceedings. Furthermore, effective participation in a dispute proceeding is very costly and requires specialized training. Finally, the legal forum focuses very narrowly on specific rules and facts, ignoring the broader context and full range of values and factors relevant to justice and development. Gender issues, for example, are usually not legally relevant.

Making progress on the trade and gender agenda will not revitalize the negotiating pillar of the WTO, lead to the successful negotiation of new multilateral rules, or save the dispute settlement system. But getting this agenda right may improve the monitoring functions of the WTO, and it is one pathway for giving the WTO renewed purpose at a time when the other areas of its work are in peril. We must remember that the end game is not shoring up an institution in crisis; it is using trade policy and the multilateral trading system as levers for sustainability, gender equality, welfare and economic opportunities for all. Successfully delivering on this agenda could improve the lived experiences of some of the world’s most vulnerable people.

Recommendations:

1. Adopt a do no harm principle: At a very minimum, WTO members could be encouraged to adopt a “do no harm” principle, ensuring that new agreements (eg. the Trade in Services Agreement, micro, small, and medium enterprises, or MSMEs, E-commerce, FTAs) do not increase gender-based or other forms of inequality. This could involve, for instance, cautioning against EU plans to move away from the WTO practice of listing all service sectors that are included in liberalization to one where all service sectors are automatically liberalized unless explicitly named as excluded. The problem

here is that women are disproportionately represented among workers and users of public services, and we know from past trade agreements that their liberalization has gendered effects as women take on the increased costs (including unpaid care work) that come with the loss of these services. A more cautionary, positive-list approach is therefore preferable.

2. Develop a methodology for conducting gender-impact assessments: All signatories to the WTO declaration have committed to conducting ex ante impact assessments of new trade rules using gender disaggregated data. There is a need to develop a methodology that accounts for the gendered impacts of new and existing trade rules, not just on employment and earnings but also on job segregation and working conditions, consumption and on the provisioning of public services. This includes a consideration of how these things have the potential to increase unpaid labour in the household.

3. Identify ways of using existing WTO rules to achieve gender equality: Already existing flexibilities contained in the WTO Agreements (such as GATT Article XX, the TRIPS public health declaration, or the expired green-light subsidies under the Agreement on Subsidies and Countervailing Measures) may allow carve outs that enable governments to minimize the adverse impacts of trade liberalization on vulnerable populations, particularly on women’s health or on women in working environments that are precarious or “hyper-precarious,” low paying or unpaid. Other WTO agreements, such as the Government Procurement Agreement (GPA), may allow positive gender-based discrimination in pursuit of gender equality. Canada can work with members (and the WTO’s Trade and Gender Focal Point) to explore how the WTO’s Trade Policy Review Mechanism can help identify best practices already underway.

4. Link trade, gender and environmental sustainability: Existing gender and environmental sustainability chapters in trade agreements share the common pitfall that they are typically excluded from dispute settlement. Yet, the impacts of environmental depletion and climate change are inextricably linked to gendered power relations in society. Environmental degradation hits the poor the hardest and, in many countries, women are among the most vulnerable groups that are set to bear the costs of deteriorating environmental con-

⁹⁴ HANNAH, Erin; SCOTT, James; WILKINSON, Rorden. The WTO in Buenos Aires: The outcome and its significance for the future of the multilateral trading system. *The world economy*, v. 41, n. 10, 2578-2598, 2018.

ditions. There is a need to work on gender and trade issues in order to revitalize the discussion about how the global trading system could be put on sustainable footing.

Some other practical recommendations that can be inculcated through legal & policy measures are as follows:

1. Advocate for, and support the provisioning of, gender-responsive public services, from basic infrastructure to social protection
2. Recognize, reduce and redistribute women's unpaid work, including in family enterprises and farms and in care work and domestic chores
3. Bring visibility, recognition and rights to women farmers and women informal workers
4. Ensure that more money reaches women's hands
5. Improve work conditions for women by bringing about wage parity and providing social security and workplace facilities (e.g. childcare)
6. Create an environment that enables women to secure their rights and realize their full potential Push up investments across the four drivers from both government and the private sector Invest in job-oriented skills for women and upskill women entrepreneurs to boost local job demand
7. Establish public and private investment funds to support women's entrepreneurship
8. Significantly improve the work conditions in the informal sector,³ which are currently precarious
9. Increase the number of women in the so-called "non-traditional" jobs and sectors
10. Close the digital gender gap
11. Monitor existing laws, including labour laws, municipal laws, land laws and other laws which affect informal and agricultural women workers and broader policies and programmes

12. Ensure implementation of existing laws and policies to enhance empowerment of women in the informal economy and agriculture

13. Develop a framework for intervention for women microentrepreneurs in the informal economy including those in family enterprises in order to highlight the role of women micro entrepreneurs and to advocate for measures to increase their earnings and scale

14. Need of comprehensive legal and policy framework for the rights of women farmers to ensure the visibility and recognition of women farmers and their entitlements

15. Need for a social security net for informal workers including agricultural workers with a focus on women's needs

16. Restructuring existing statutes in line with CEDAW provisions to ensure protection, inclusion and promotion of women in socio-economic sphere.

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