

ORIGINAL ARTICLE

Gender Equality Provisions in Trade and Investment Agreements: Are They Widening the Negotiation Capacity Gap?

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Abstract

In the recent years, there has been an upsurge in the number of countries that are mainstreaming gender equality concerns in their trade and investment agreements. These recent developments challenge the long-standing assumption that trade, investment, and gender equality are not related. They also show that gender mainstreaming in trade and investment agreements is here to stay. However, very few countries – mostly developed countries – have led this mainstreaming approach and have made efforts to incentivize other countries to negotiate gender-responsive trade and investment agreements. The majority of developing countries are yet to take their first steps in negotiating such policy instruments with a gender lens, and their hesitation can be grounded in various reasons including fears of protectionism, lack of data, paucity of understanding and expertise, and, more broadly, constraints relating to their negotiation capacity. Moreover, the inclusion of gender-related concerns in the negotiation of such agreements has deepened and widened the negotiation capacity gap between developed and developing countries. In this article, the authors attempt to assess this widening negotiation capacity gap with the help of empirical research, and how this capacity gap can lead to disproportionate and negative repercussions for developing countries more than developed countries.

Keywords: Gender equality; trade agreements; investment agreements; negotiation capacity; developing countries

1. Introduction

It is becoming a norm to link gender¹ with trade,² with gender provisions appearing in an increasing number of free trade agreements (FTAs).³ International investment agreements (IIAs) are also showing some signs of accommodating gender equality concerns

¹Gender refers to the social attributes and opportunities associated with being male and female and the relationships between women and men and girls and boys, as well as the relations between women and those between men. These attributes, opportunities and relationships are socially constructed and are learned through socialization processes.' (UN Women (n.d.) 'Concepts and Definitions', UN Women www.un.org/womenwatch/osagi/conceptsanddefinitions.htm (accessed 4 October 2022)).

²Incorporation of gender in trade agreements can be indicated by inclusion of the terms gender, woman, girl, women, girls, maternity, childcare, sex, mother, etc. It is also important to note that gender should be interpreted broadly to include sex, gender identity, and gender expression, and an understanding of women's experiences should be both 'intersectional' and 'multidimensional' (see K. Kuhlmann (2022) 'Legal and Institutional Dimension of the AfCFTA in the Context of Agricultural Development and Trade', Free Trade Report 'Cultivating Trade: The AfCFTA and Agriculture', 1; J.T. Gathii (2021) 'Writing Race and Identity in a Global Context: What CRT and TWAIL Can Learn from Each Other', *UCLA Law Review* 67, 1610)).

³There are more than 300 provisions across 100 FTA's that refer explicitly to women's interests or gender equality. There are over a third of the FTAs that are currently in force and notified by Members to the WTO.

recently.⁴ Agreements are therefore beginning to include commitments to promote equal opportunities of participation for women and men in the economy, while simultaneously recognizing the importance of gender equality in international trade and investment policies.⁵ This signals a move away from viewing trade and investment as ‘gender neutral’, dispelling a decade-long claim that both women and men stand to gain equally from trade as well as from foreign investment.⁶ Trade and investment policies are now known to create ‘losers’ as well as ‘winners’, as they benefit some and leave others behind.⁷

The distributional outcomes of trade and investment can vary between women and men, since they have different roles in society, markets, and the economy, and they enjoy different opportunities.⁸ Incorporating gender perspective into trade and investment agreements can therefore lead to designing and implementing policies that can facilitate the integration of women into more dynamic economic sectors and also at the same time mitigate gender disparities.⁹ With regard to investment, there are growing concerns regarding the impact that foreign direct investment (FDI) can have on gender equality concerns and the need to incorporate gender-related provisions in bilateral investment treaties (BITs); these concerns are also occupying more space in the decision-making processes of private companies.¹⁰ Studies have shown that companies that integrate the gender equality dimension into their business models can expect benefits in terms of profitability as well as generation of social impact.¹¹

A number of scholarships have now shown that creating explicit linkages between trade and investment policies and larger goals such as gender equality may help both trade and investment to become a vehicle for long-term inclusive development.¹² Trade and investment agreements, in particular, can play an important role in reducing gender inequality as countries can encourage

⁴R. Amaral and L. Daza Jaller (2020) ‘The Role of Regulation and MNEs in Ensuring Equal Opportunities for Women’, *Transnational Corporation Journal* 27(3), 183, https://unctad.org/system/files/official-document/diaeia2020d3a9_en.pdf (accessed 14 November 2022).

⁵Ibid.

⁶WTO (2020) ‘Women and Trade the Role of Trade in Promoting Gender Equality’, World Bank and WTO (30 July 2020, www.worldbank.org/en/topic/trade/publication/women-and-trade-the-role-of-trade-in-promoting-womens-equality (accessed 8 May 2022); OECD (2012) ‘Trade and Gender: A Framework of Analysis’, OECD Trade Policy Papers, www.oecd.org/publications/trade-and-gender-6db59d80-en.htm (accessed 8 May 2022).

⁷A. Roberts and N. Lamp (2022) *Six Faces of Globalization: Who Wins, Who Loses, and Why It Matters*. Harvard University Press.

⁸M. Fontana and C. Paciello (2009) ‘Gender Dimensions of Agricultural and Rural Employment: Differentiated Pathways Out of Poverty’, FAO-IFAD-ILO Workshop on Gaps, Trends and Current Research in Gender Dimensions of Agricultural and Rural Employment: Differentiated Pathways Out of Poverty, 1; also see: M. Fontana (2009) ‘Gender Justice in Trade Policy – The Gender Effects of Economic Partnership Agreements’, *One World Action*.

⁹M. Williams (2003) *Gender Mainstreaming in the Multilateral Trading System: A Handbook for Policy-makers and Other Stakeholders*. Commonwealth Secretariat.

¹⁰See for example UNDP (n.d.) ‘UNDP’s Gender Equality Seal Certification Programme for Public and Private Enterprises: Latin American Companies Pioneering Gender Equality’, UNDP, www.undp.org/sites/g/files/zskgke326/files/publications/2%20Gender%20Equality%20Seal%20Certification%20for%20Public%20and%20Private%20Enterprises%20-%20LAC%20Pioneers.pdf (accessed 2 August 2023); International Labor Organization, ‘Improving Gender Diversity in Company Boards’, www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---act_emp/documents/briefingnote/wcms_754631.pdf (accessed 2 August 2023).

¹¹According to an International Labour Organization (ILO) analysis of data from 186 countries over a 26-year period, there is a positive correlation between an increase in female employment and Gross Domestic Product (GDP) growth. Acumen (2015) ‘Women and Social Enterprises: How Gender Integration Can Boost Entrepreneurial Solutions to Poverty’, https://acumen.org/wp-content/uploads/2017/09/Women_And_Social_Enterprises_Report_Acumen_ICRW_2015.pdf (accessed 8 May 2022).

¹²Gender equality ‘denotes women having the same opportunities in life as men, including access to resources, opportunities and the ability to participate in the public sphere’. (M. von Hagen (2014) ‘Trade and Gender – Exploring a Reciprocal Relationship: Approaches to Mitigate and Measure Gender-Related Trade Impacts’, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, www.oecd.org/dac/gender-development/GIZ_Trade%20and%20Gender_Exploring%20a%20reciprocal%20relationship.pdf).¹² Gender ‘refers to the social attributes and opportunities associated with being male and female and the relationships between women and men and girls and boys, as well as the relations between women and those between men. These attributes, opportunities and relationships are socially constructed and are learned through

their trade and investment partners to create laws and procedures that can reduce barriers and create encouraging conditions for women.¹³ In this manner, countries can use these negotiating instruments to incentivize change at the domestic level in other countries in exchange for enhanced or unfettered market access.¹⁴ The trade and investment talks in general can generate an important domestic momentum at the highest level of decision-making.

Moreover, trade agreements in general have broad scope, and trade negotiations can therefore involve trade-offs between several areas. Hence, there are good theoretical reasons to expect such agreements to make a positive contribution to the empowerment of women. Yet, there is no empirical evidence that reflects the effectiveness for women of such provisions in trade and investment agreements. As a result, among the newer issues being debated for inclusion in trade as well as investment agreements – such as digital trade, e-commerce, environment, labour, and intellectual property – gender-related issues still face a lot of resistance and backlash.¹⁵ This demonstrates that, despite the many strides that have already been made to advance gender issues using trade and investment agreements, serious doubts remain about the suitability of these instruments to lead the *démarche* on gender equality.¹⁶

There are many reasons and hesitations behind countries – mainly developing countries – choosing to stay far away from trade, investment, and gender initiatives so far. One such hesitancy can be the negotiation capacity gap between developed and developing worlds. Developing countries may have insufficient resources that may be required to gather the concrete gender-disaggregated data needed to disentangle the impact of trade and investment on gender roles, to train the negotiators on the inter-relationship between trade, investment, and gender, and to negotiate such provisions with their trade and investment partners who may have more experience and a more nuanced approach when negotiating such provisions.¹⁷ This paper unfolds this challenge, as it provides discussion on the nature of the negotiation capacity gap between developed and developing countries, and how this gap widens even further when it comes to negotiating provisions relating to gender equality. The authors then zoom into a specific example to illustrate how this widening capacity gap resulting from inclusions of gender-related provisions can jeopardize the interest of developing countries if they are forced or somehow incentivized to accept the inclusion of such provisions in their trade and investment agreements. This leads the authors to raise a serious question of whether gender mainstreaming should continue trending in the future trade and investment policy instruments.¹⁸ The authors answer this question in the affirmative, but they also propose a number of recommendations on how this negotiation capacity gap can be minimized in the future negotiating efforts.

socialization processes.’ (UN Women (n.d.) ‘Concepts and Definitions’, UN Women, www.un.org/womenwatch/osagi/conceptsanddefinitions.htm).

¹³A. Bahri (2019) ‘Measuring the Gender-Responsiveness of Free Trade Agreements: Using a Self-Evaluation Maturity Framework’, *Global Trade & Customs Journal* 14(11), 517.

¹⁴These observations are inspired by similar ones made in respect of environmental concerns in trade negotiations in N. Laurens and J.-F. Morin (2019) ‘Negotiating Environmental Protection in Trade Agreements: A Regime Shift or a Tactical Linkage?’, *International Environmental Agreements: Politics, Law and Economics* 19, 533.

¹⁵UNCTAD (n.d.) ‘Gender and Trade: Assessing the Impact of Trade Agreements on Gender Equality’, UNCTAD, ILO, EU and UN Women, 5, https://unctad.org/system/files/official-document/UNWomen_2020d1_en.pdf (accessed 22 October 2022).

¹⁶A. Bahri, D. López, and J.Y. Remy (eds.) (2023) *Trade Policy and Gender Equality*. Cambridge University Press, 2–3.

¹⁷Ibid, 154–155.

¹⁸Gender 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 at all stages, by the actors normally involved in policy-making’ (Council of Europe (1998) ‘Reflections on the Concept and Practice of the Council of Europe Approach to Gender Mainstreaming and Gender Equality, Maryland USA’); Gender mainstreaming is a means to achieve gender equality. For this paper, gender mainstreaming in trade and investment agreements means the inclusion of gender considerations and concerns in the drafting and implementation of trade and investment agreements.

The next section of this paper provides a backdrop on trade, investment, and gender provisions, and how this discussion is being led by the developed world. Section 3 talks about challenges and constraints faced by developing countries, based on several interviews conducted by the authors over the past two years. Section 4 explores the argument of the widening negotiating capacity gap with the help of data collected from the WTO research database on trade and gender, and it also provides an example on how the negotiation capacity gap can operate against the interests of developing countries. Finally, section 5 raises and addresses the question of whether gender mainstreaming in such policy instruments should be discouraged at all if it can potentially harm the interests of developing countries.¹⁹

This paper benefits from the practical insights gathered from more than 35 semi-structured interviews that the authors carried out with the help of selectively designed and individuated sets of questions. The interviewees were identified through the purposive snowball sampling approach which enabled the authors to make an ‘initial contact with a small group of people’ that were related to the area under investigation and then utilize them to establish further related contacts.²⁰ Different perspectives from government officials and policy makers, private sector representatives, international organization representatives, trade lawyers, and academics were taken into account. The claims made by different interviewees were verified and cross-checked against the observations provided by interviewees from different disciplines, backgrounds, regions, and with different experiences. In particular, the interviewees included policymakers and negotiators from countries in South East Asia, North America, South America, and East Africa, and the majority of these interviewees were from developing countries. Their claims and perceptions were further corroborated, endorsed or refuted with the help of existing agreements, current scholarship, media reports, and official studies.

2. Trade, Investment, and Gender Provisions

2.1 Gender Provisions in Trade Agreements

Research and reports from the International Trade Centre (ITC),²¹ the World Trade Organization (WTO),²² the World Bank,²³ and United Nations Conference on Trade and Development (UNCTAD),²⁴ for example, have shown that trade policy and its instruments, such as trade agreements, have affected women and men differently. According to the WTO and the World Bank’s Women and Trade joint report issued in 2020, a closer look at the trade policies reveals their disproportionate effects on women in terms of wages, consumption, welfare, and the quality and quantity of jobs available to them.²⁵ Alongside, the debate on whether the existing provisions in international trade agreements are gender sensitive, gender neutral, or gender blind has largely developed over the past few years.²⁶ Moreover, the debate on whether countries need to focus on

¹⁹The term ‘developing countries’ is quite heterogeneous in nature, as it ranges from small developing countries which are predominantly based on subsistence agriculture, to large and emerging economies such as China, Brazil, Mexico, and India. These diversely developed countries have very different levels of development, market size, and foreign trade interests. Moreover, they have diverse experience of international trade negotiations. In this context, the findings in this article may not be relevant more generally to all developing countries on an equal scale.

²⁰A. Bryman (2012) *Social Research Methods*. Oxford University Press, 202.

²¹ITC (n.d.) ‘Women’s Economic Empowerment’, ITC, www.intracen.org/itc/women-and-trade (accessed 10 November 2022).

²²WTO (n.d.) ‘Women and Trade’, WTO, www.wto.org/english/tratop_e/womenandtrade_e/womenandtrade_e.htm (accessed 10 November 2022).

²³World Bank (n.d.) ‘Trade and Gender’, World Bank, www.worldbank.org/en/topic/trade/brief/trade-and-gender (accessed 10 November 2022).

²⁴UNCTAD (n.d.) ‘Gender Equality’, <https://unctad.org/en/Pages/DITC/Gender-and-Trade.aspx> (accessed 10 November 2022).

²⁵WTO, *supra* n. 6.

²⁶V. Hughes ‘Gender Chapters in Trade Agreements: Nice Rhetoric or Sound Policy?’, CIGI Online, 9 October 2019, www.cigionline.org/articles/gender-chapters-trade-agreements-nice-rhetoric-or-sound-policy/ (accessed 10 November 2022).

a whole agreement approach towards gender mainstreaming (and whether it is possible to accomplish this) is also being increasingly explored.²⁷

The number of trade agreements with gender-related provisions has grown significantly over the past few years.²⁸ Increasingly, trade agreements have started to include a chapter dedicated to trade and gender, which mostly covers issues ranging from cooperation activities to institutional arrangements, including the establishment of a trade and gender committee and dedicated consultation procedures.²⁹ However, most of the gender-related provisions are still spread throughout the text of an FTA – in the preamble,³⁰ and in chapters on labour,³¹ investment,³² cooperation,³³ sustainable development,³⁴ or small and medium enterprises (SMEs).³⁵ For example, the United States–Mexico–Canada Agreement (USMCA)³⁶ includes explicit provisions on gender equality in its labour chapter when referring to cooperation and elimination of discrimination in the workplace.³⁷

It is noteworthy that, in spite of the increasing number of gender provisions and specific chapters on trade and gender in FTAs, the commitments made to address gender equality through such instruments are mostly aspirational in nature. In South America, Chile and Uruguay stand out, as they have negotiated standalone gender chapters in trade agreements that recognize the importance of gender mainstreaming for achieving inclusive economic growth. Yet, although the trade agreements negotiated by these countries have frontloaded the objective of gender equality and are gender responsive in nature,³⁸ some provisions are particularly detrimental to this goal. For example, although the chapter on trade and gender in the trade agreement between Chile and Canada³⁹ includes some exemplary provisions on awareness promotion and cooperation in this respect, the chapter is explicitly excluded from the scope of the agreement's dispute settlement chapter meaning thereby that these provisions are completely unenforceable. In agreements where there is no specific chapter on women and trade, gender-related provisions are often tied to other cross-cutting issues such as environment and labour (as in the case of the USMCA⁴⁰). Most, if not all gender-related provisions, are couched in the language of best

²⁷Ibid.

²⁸J.-A. Monteiro (2021) 'The Evolution of Gender-Related Provisions in Regional Trade Agreements', WTO Economic Research and Statistics Division, 2, www.wto.org/english/res_e/reser_e/ersd202108_e.pdf

²⁹Examples of such agreements include: Free Trade Agreement between the Government of Canada and the Government of the Republic of Chile (signed 5 June 2017, entry into force 5 February 2019), part IV bis- N bis; Argentina–Chile Free Trade Agreement (signed 2 November 2017, entry into force 1 May 2019), ch. 15. However, such an increase is mostly limited to agreements signed by countries that have already negotiated a trade and gender chapter in one of their more recent agreements (such as Canada or Chile).

³⁰Agreement between the United States, Mexico, and Canada (USMCA) (signed 30 November 2018, entry into force 1 July 2020); Canada–Israel Free Trade Agreement (signed 28 May 2018, entry into force 1 September 2019).

³¹USMCA, *ibid.* ch. 23; Argentina–Chile FTA, ch. 12.

³²USMCA, *ibid.* ch. 14; Argentina–Chile FTA, ch. 8, Canada–Chile FTA, Part 3, ch. G.

³³Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part (signed 18 November 2002, entry into force 1 February 2003), part III; Revised Treaty of the Economic Community of Central African States (ECCAS) (entry into force 1984, amendment added in 2019), ch. 18.

³⁴Agreement establishing an association between the European Union and its Member States, on the one hand and Central America on the other (signed 29 June 2012, entry into force 1 October 2013), part IV, Title VIII; Free Trade Agreement between the European Union and the Socialist Republic of Vietnam (signed 27 June 2012), ch. 13.

³⁵USMCA, *supra* n.31, ch. 25; Free Trade Agreement between the United Kingdom of Great Britain and Northern Ireland and Australia (signed 17 December 2021), ch. 18.

³⁶USMCA, *ibid.*

³⁷USMCA, *ibid.* ch. 23: article 23.12.

³⁸A. Bahri (n.d.), 'Mainstreaming Gender Considerations in Free Trade Agreements: "Building Back Better" in Post Covid-19 World', <https://wtochairs.org/sites/default/files/92%20Final-Amrita%20Bahri-Mexico.pdf> (accessed 10 November 2022).

³⁹Chile–Canada FTA, *supra* n. 30, Appendix II, ch. N bis.

⁴⁰USMCA, *supra* n. 31, ch. 23 and ch. 24.

endeavours and cooperation language.⁴¹ Moreover, the topics addressed in gender-related provisions also vary from one region to the other, as some regions have included provisions on social and healthcare concerns of women, while others have grounded these provisions in purely economic and market-oriented interests.⁴² Hence, there is no common template for gender provisions in trade agreements.⁴³

In December 2017, 121 WTO members gave their support to the Declaration on Trade and Women's Economic Empowerment,⁴⁴ which seeks to foster women's economic empowerment and eliminate barriers to women in trade. The declaration is not binding, but there is some value in the large number of countries that joined forces to recognize the importance of the issue in such a multilateral setting. Pursuant to the 2017 Declaration, supporting WTO members have committed to a series of outreach and research efforts covering a gender-based analysis of trade policy, women's participation in public procurement and international value chains, gender in trade agreements, and bridging the gender-based digital divide.⁴⁵ Moreover, at least six WTO members have used the Trade Policy Review Mechanism to highlight the progress on trade and gender issues, which seems to indicate that the topic is gaining traction and attention among WTO members.⁴⁶ Several members have also come together to create the WTO's Informal Working Group on Trade and Gender, which seeks to bring together WTO members and observers seeking to intensify efforts to increase women's participation in global trade.⁴⁷ Moreover, the Joint Initiative on Services Domestic Regulation, concluded at the WTO Ministerial Conference 12 in 2021, for the first time added a gender equality provision into a WTO plurilateral agreement, as it includes a provision that prohibits gender discrimination while authorizing for the supply of a service.⁴⁸

These developments reaffirm that the incorporation of gender perspective into trade agreements can lead to policies that can maximize opportunities, facilitate the integration of women into more dynamic economic sectors, mitigate gender disparities, and also enable women's empowerment and well-being. Creating explicit linkages between trade policy and larger goals such as gender equality and women's economic empowerment may help trade become a vehicle for long-term inclusive development.⁴⁹ Moreover, two reasons in particular support this claim. First, existing and future trade agreements between countries can increase trade flows, which can then lead to an increase in economic opportunities for all, including women.⁵⁰ Second,

⁴¹WTO, *supra* n. 6.

⁴²*Ibid.*

⁴³*Ibid.*

⁴⁴WTO (2017) 'Joint Declaration on Trade and Women's Economic Empowerment on the Occasion of the WTO Ministerial Conference in Buenos Aires Declaration', WTO, www.wto.org/english/tratop_e/womenandtrade_e/buenos_aires_declaration_e.htm; www.wto.org/english/thewto_e/minist_e/mc11_e/genderdeclarationmc11_e.pdf (accessed 10 November 2022); also see: n.d., ITC (2020) 'Delivering on the Buenos Aires Declaration on Trade and Women's Economic Empowerment', ITC, www.wto.org/english/tratop_e/womenandtrade_e/tig_rpt_dec20_e.pdf (accessed 10 November 2022).

⁴⁵Six thematic workshops were held in 2018 and 2019: Financial Inclusion Seminar (11 October 2019); Women in Digital Trade (1 July 2019); Women and Trade in Trade Agreements (28 March 2019); Women in Global Value Chains (1 October 2018); Enhancing Women Entrepreneurs' Participation in Public Procurement (25 June 2018); Gender Based Analysis of Trade Policy (16 March 2018), for more info, see Buenos Aires Declaration, *supra* n. 44, www.wto.org/english/tratop_e/womenandtrade_e/buenos_aires_declaration_e.htm (accessed 10 November 2022).

⁴⁶The six WTO members are: the European Union (WT/TPR/G/357), Iceland (WT/TPR/G/361), Gambia (WT/TPR/G/365), Montenegro (WT/TPR/G/369), Philippines (WT/TPR/G/368), and Colombia (WT/TPR/G/372).

⁴⁷Women and Trade (2020) 'Informal Working Group on Trade and Gender', WTO, www.wto.org/english/tratop_e/womenandtrade_e/iwg_trade_gender_e.htm

⁴⁸WTO (2021) 'Declaration on the Conclusion of Negotiations on Services Domestic Regulation', WTO, WT/L/1129 (2 December 2021).

⁴⁹This discussion is inspired by UNCTAD's Course on trade and gender linkages: the gender impact of technological upgrading in agriculture; WTO, 'Gender Aware Trade Policy: A Springboard for Women's Economic Empowerment', 4, www.wto.org/english/news_e/news17_e/dgra_21jun17_e.pdf (accessed 8 May 2022).

⁵⁰A. Bahri (2020) 'Women at the Frontline of COVID-19', *Journal of International Economic Law* 23(3), 563, 565, <https://academic.oup.com/jiel/article/23/3/563/5903660> (accessed 4 October 2022).

through regional or bilateral trade accords, countries can encourage their trade partners to reduce trade barriers and create a business- and employment-conducive environment for women as entrepreneurs and employees.⁵¹

Trade negotiations and trade agreements can also be used as effective tools for raising awareness on gender-related concerns. Yet, greater thoughtful engagement and capacity building efforts are needed from national governments and global institutions engaged in the global governance of this issue. That said, a gender-mainstreaming approach in trade agreements can succeed only if policymakers comprehend the distinct realities women face globally and how these realities vary from nation to nation. Moreover, in order for this to work, it is important that the content and context of these provisions, in addition to their language and location, directly correspond and respond to the barriers women face in accessing opportunities offered by international trade. Currently, there is a disconnect between the provisions' content and the distributional impacts of trade liberalization on the one hand and the barriers faced by women in trade on the other. Even though trade liberalization may have increased employment opportunities or health facilities for women, it has not necessarily improved their employment conditions, or market access, or business opportunities.⁵² It is therefore important that the content of gender provisions relate to both the economical and social roles of women, the challenges that women face, and the need to expand opportunities in lucrative industries for women. However, these contextual aspects are weakly integrated into current FTAs.

2.2 Gender Provisions in Investment Agreements

Foreign direct investment (FDI) is a key feature of economic globalization, and it indicates long-term commitment and economic ties, with different levels of impact on the social, economic, cultural, and gender structures of the region receiving the investment. FDI is, in most part, regulated by trade agreements (that are increasingly covering investment) and IIAs signed between governments – the government of the country receiving the investment and the government of the home of the investor country sending the investment.

IIAs are categorized into two types: (i) bilateral investment treaties (BITs) and (ii) treaties with investment provisions. A BIT is an agreement between two countries regarding the promotion and protection of investments made by parties from the respective countries in each other's territory. They are international agreements establishing the terms and conditions for private investment by natural and legal persons of one state in another state. The great majority of IIAs are BITs,⁵³ and this section will focus on those, and in particular on model BITs proposed by governments, as those are the types of international investment agreements where relevant gender provisions are currently being developed.

There are clear linkages through which trade and investment agreements can affect gender dynamics. As mentioned above, negotiators of international trade agreements have progressively included gender provisions or gender chapters in FTAs. In the realm of IIAs, the picture is different as very few model BITs currently include gender provisions. Even when they do, these provisions do not impose binding obligations on corporations. Out of 84 model agreements published online by the UNCTAD Investment Policy Hub,⁵⁴ only seven explicitly address gender, albeit through broadly worded provisions that refer to 'fair and equitable treatment' between men and women.⁵⁵

⁵¹Ibid.

⁵²K. Kuhlmann and A. Bahri (2023) 'Gender Mainstreaming in Trade Agreements: "A Potemkin Facade"?', WTO Publication, forthcoming.

⁵³UNCTAD (n.d.) 'Investment Policy Hub', UNCTAD, <https://investmentpolicy.unctad.org/international-investment-agreements/model-agreements> (accessed 8 May 2022).

⁵⁴Ibid.

⁵⁵The Model BITs that mention gender were signed by Morocco (adopted 1 June 2019), Belgium–Luxemburg (adopted 28 March 2019), Netherlands (adopted 22 March 2019), Slovakia (adopted 2019), India (adopted 28 December 2015), and Serbia (adopted 2014) (As on the date of this writing, December 2022).

Among the few examples of countries that have submitted model BITs containing gender provisions are the Netherlands (model revised in 2019)⁵⁶ and Canada (model revised in 2021).⁵⁷ Amid the interesting changes introduced by the Netherlands, the 2019 model agreement includes a commitment to promote equal opportunities and participation for women and men in the economy.⁵⁸ The preamble recognizes the importance of gender equality in international trade and investment policies, and Article 6, paragraph 3 of the model agreement underscores ‘the importance of incorporating a gender perspective into the promotion of inclusive economic growth’ and that ‘Contracting Parties commit to promote equal opportunities and participation for women and men in the economy’.⁵⁹

More recently, in May 2021, the Government of Canada introduced its model BIT with several provisions addressing gender issues. Among the main changes included in this model, Canada highlights provisions on gender equality, including ‘a number of new provisions that aim to help women and other groups benefit more from the agreements, and to ensure that investment protections do not impede policies promoting gender equality’.⁶⁰

The Dutch and the Canadian model BITs are relevant because they set the scene for a new generation of IIAs, as they highlight 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, they mostly focused on gender equality in arbitral dispute resolution and the gender division among arbitrators.⁶¹ This seems to be changing in light of the recent model BITs, but the impact of investment treaties and FDI on gender equality are notions that still need to have more concrete ground in international investment treaties. The mere existence of gender provisions in investment agreements does not guarantee that gender concerns will be implemented and enforced at the firm level, the policy level, or even through domestic legislations.⁶² Moreover, this also applies to the effectiveness of gender provisions in trade agreements as there is no empirical or concrete evidence on whether the existing provisions in trade agreements have led to any benefits for women or whether they have been implemented on the ground.

It is worth noting that having gender provisions in model BITs has not worked as a precondition for signatories to include gender provisions in the BITs they negotiate and sign. In fact, a quick overview of the most recently signed BITs in force⁶³ shows that there is little correlation

⁵⁶Kingdom of the Netherlands, ‘Model Investment Agreement’ (adopted 22 March 2019), <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download> (accessed 8 May 2022).

⁵⁷Government of Canada, ‘2021 Model Foreign Investment Protection Agreement’ (adopted 12 May 2021), www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/2021_model_fipa-2021_modele_apie.aspx?lang=eng (accessed 8 May 2022).

⁵⁸Netherlands model Investment Agreement, supra n. 57, Section 3: article 6, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download>.

⁵⁹Ibid.

⁶⁰Government of Canada, ‘2021 FIPA model – Summary of main changes’, www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/2021_model_fipa_summary-2021_modele_apie_resume.aspx?lang=eng (accessed 8 May 2022). Special attention in that regard should be paid to Article 3 (Right to Regulate), Article 8 (Minimum Standard of Treatment), and Article 16 (Responsible Business Conduct). Canada Model FIPA, supra n. 56, Section B: articles 3, 8 and 16, www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/2021_model_fipa-2021_modele_apie.aspx?lang=eng (accessed 10 November).

⁶¹UNCTAD (2020) ‘Mainstreaming Gender Equality in Investment Promotion’, UNCTAD, https://unctad.org/system/files/official-document/diaepcbinf2020d7_en.pdf; European Commission, ‘Gender Equality: Commission Ensures Excellence and Improves Gender Balance in Trade and Investment Arbitration’, European Commission, December 2020, https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2485.

⁶²K. Dawarr (2021) ‘A Guide to Include Gender in Investment Agreements’, bkp Economic Advisors, https://f24ee6fb-4b62-404b-9f2a-699446259e43.filesusr.com/ugd/c947e9_90de7f0187c44ad196566de5e8a0263b.pdf.

⁶³According to the UNCTAD Investment Policy Hub, currently there are 2,270 BITs in force, <https://investmentpolicy.unctad.org/international-investment-agreements>

between countries that have included a mention of gender in their model BITs and countries that have signed BITs that addressed gender.⁶⁴ For example, 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.⁶⁵ Conversely, whereas Morocco's 2019 model BIT⁶⁶ addressed gender, its most recent BIT – signed with Japan in August 2020⁶⁷ – does not.

It is hard to have a definitive answer on why there is this disparity between model BITs and investment agreements signed by countries including or not including gender provisions. Unlike the existing trade policy realm, investment agreements do not come under the umbrella of or complement the rule-making of a universal organization such as the WTO. The role that WTO is playing in this respect could be considered as one of the reasons as to why the inclusion of gender provisions in international trade agreements seems to be improving faster and gaining more traction as compared to investment agreements. Moreover, empirical findings on the relationship between gender inequality and FDI are highly specific to the context. For example, some evidence suggests that gender inequality can attract FDI, as some foreign investors may want to exploit the gender disparity in host countries to maximize their profit margins.⁶⁸ Moreover, research also suggests that reduction of gender gaps in access to education can help increase investment in low-skilled manufacturing industries.⁶⁹

Gender mainstreaming requires that gender perspectives be embedded in the development of public policy, in the legal and economic research, in the allocation of resources and planning, and in the implementation and monitoring of social programs and projects. The implementation of gender-mainstreaming approach to trade and investment agreements also requires transparency about women's accountability and participation in decision-making processes.⁷⁰ However, this is a notion largely understood and invoked by developed countries negotiators that are bringing model gender-provisions to the negotiation table for the past years. The same is not true for most developing and least-developed countries, with much more complex realities, and with comparatively lesser capacity and understanding on the need to adopt a gender lens to their trade and investment agreements.⁷¹

⁶⁴Kamala Dawarr, supra n. 63.

⁶⁵See for example the Cooperation and Facilitation Investment Agreement Between the Federative Republic of Brazil and the United Arab Emirates (signed 15 March 2019). For more information, see Ana Sarmento, 'The Scope of New Brazilian Investment Protections: Intellectual Property and the Limits of an Alternate Approach' (2021) 52(2) University of Miami Inter-American Law Review.

⁶⁶Kingdom of Morocco, 'Model Investment Treaty' (adopted 1 June 2019), <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5895/download> (accessed 8 May 2022).

⁶⁷Agreement between the Kingdom of Morocco and Japan for the Promotion and Protection of Investment (signed 8 January 2020, entry into force 23 April 2022).

⁶⁸M. Hoai and D.-T. Bui (2018) 'Gender Inequality and FDI: Empirical Evidence from Developing Asia-Pacific Countries', *Eurasian Economic Review* 8(3), 393.

⁶⁹R.G. Blanton and S.L. Blanton (2015) 'Is Foreign Direct Investment "Gender Blind"?', *Feminist Economics* 21(4), 61; also see: A.D. Mitchell and J. Munro (2019) 'No Retreat: An Emerging Principle of Non-Regression from Environmental Protections in International Investment Law', *Georgetown Journal of International Law* 50, 627.

⁷⁰R.V. Amaral and L.D. Jaller, supra n. 4.

⁷¹M. von Hagen (2014) 'Trade and Gender – Exploring a Reciprocal Relationship', Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH; UNCTAD (2014) 'Looking at Trade Policy Through a "gender lens"', UNCTAD (UNCTAD/DITC/2014/3), <https://unctad.org/topic/gender-equality/trade-policy-through-a-gender-lens> (accessed 1 August 2023). However, the African region presents an exception in this respect, as a number of agreements in this region have accommodated several provisions on gender equality, including the most recent African Continental Free Trade Area and its Protocol on Women and Youth which is still under negotiation (see for example Article 3 and 27 of the Agreement). This exception shows that there may not always be a positive correlation between a country's readiness to assume gender equality commitments in its trade policy instruments and its level of development or its rating in international gender equality indexes, such as the UNDP Gender Development Index or the OECD Social Institutions and Gender Index.

3. Constraints and Challenges Developing Countries Face

As the discussion in the previous section has shown, the recent developments in this field challenge the long-standing assumption that trade, investment, and gender are not interconnected. However, there is significant variation in the level of understanding and readiness among countries to discuss and negotiate gender-related concerns in trade and investment policy context. On the one hand, various countries – especially some in North and South America, European Union, and East Africa – are leading gender mainstreaming efforts; on the other hand, many countries – particularly those in Asia Pacific, Middle East, and the Caribbean – are yet to take their very first step in this regard.⁷² Moreover, the onset and prolonged setback of the COVID-19 pandemic has also altered countries' willingness to work on gender equality concerns particularly within the context of their trade and investment policy agenda.⁷³ There are many reasons behind countries – mainly developing countries – choosing to stay far away from such initiatives so far.

One hesitation countries have faced is the fear of losing their comparative advantage through possible trade-restrictive measures that could be protectionist in nature.⁷⁴ Critics may hesitate in joining gender-responsive trade and investment agreements as the inclusion of these issues can allow developed countries to use the advantage of their more forward gender policies to obstruct imports coming from developing countries.⁷⁵ Using these provisions that might at times be based on vaguely defined expressions such as 'gender equality' or 'women empowerment', members could justify various retreats from free trade and liberalization efforts. Hence, fears of protectionism deter countries with wide gender inequality, discriminatory laws, and cultural barriers or with little willingness to improve the domestic situation in this respect.

Developing countries can be wary of the intentions of the developed world, and they can go on the defensive side, as they can link such inclusions to their past experiences with the negotiations where in the words of a trade negotiator, 'they were taken for a ride on some such progressive issues by the developed world'.⁷⁶ Some negotiators, when probed further on this comment, point to the importance being given now to the non-economic issues such as labor and environment and the rising pressure to create binding norms that are solely based on such non-trade issues. These comments show that there is a trust deficit when it comes to discussions on gender equality. This issue can at times be perceived as a Trojan horse, as it may have the capability to derail developing nation's hitherto achieved progress.⁷⁷ Therefore, any global initiative on gender mainstreaming in trade and investment policies cannot be successful unless this trust deficit is addressed.⁷⁸ Unless consensus and comfort zones are built around these discussions, it will be difficult to have a common ground.

Lack of political will to leverage such agreements to empower women is one of the other key factors that can impede gender mainstreaming efforts.⁷⁹ Gender equality matters have traditionally not enjoyed political priority in trade and investment agendas of many countries, and these

⁷²Research findings from A. Bahri (2021) 'Gender Mainstreaming in Free Trade Agreements: A Regional Analysis and Good Practice Examples', Gender, Social Inclusion and Trade Knowledge Product Series, https://wtochairs.org/sites/default/files/7.%20Gender%20mainstreaming%20in%20FTAs_final%20%286%29.pdf

⁷³A. Bahri, *supra* n. 51; also see: nd, UNCTAD, 'Covid-19 threatens four "lost decades" for gender equality', UNCTAD (1 October 2021), <https://unctad.org/news/covid-19-threatens-four-lost-decades-gender-equality> (accessed 10 November 2022).

⁷⁴J. Bhagwati (1994) 'Free Trade: Old and New Challenges', *The Economic Journal* 104(423), 231, <https://academiccommons.columbia.edu/doi/10.7916/D8Z89KV4/download> (accessed 10 November 2022).

⁷⁵A. Singh, 'Explained: India's Refusal to Back WTO Declaration on Gender Equality in Trade,' QRIUS(15 December 2017), <https://qrius.com/explained-india-refusal-gender-equality-trade/>; Interview with a trade negotiator (details withheld, on file with author).

⁷⁶Interview with a trade negotiator (details withheld, on file with author)

⁷⁷R. Bissio, 'Is "Gender" a Trojan Horse to introduce new issues at WTO?', Third World Network (December 2017), www.twn.my/title2/wto.info/2017/ti171212.htm (accessed 4 November 2022).

⁷⁸Interview with a trade negotiator (details withheld, on file with author).

⁷⁹C. Dommen, 'Mainstreaming Gender in Trade Policy: Practice, Evidence, and Ways Forward', IISD (November 2021), www.iisd.org/system/files/2021-11/mainstreaming-gender-in-trade-policy.pdf (accessed 11 November 2022).

issues have taken an even more back seat amidst the growing health and economic concerns of countries across the world amidst the ongoing health pandemic (i.e. the COVID-19 pandemic), war and other crises leading to major trade and investment disruptions.⁸⁰ To see real advancement in this respect, commitment to these issues needs to come from the highest levels of administration, i.e., the political stakeholders including legislators and parliamentary members.⁸¹ Political will at the highest level can frontload gender equality considerations in the national and international discussions. It is because the political salience of a particular concern in a nation plays a vital role in determining whether that concern is addressed in the negotiating room, as a country's lawmakers' views may factor into negotiators' calculus when considering the content and scope of an agreement's language as that agreement will require the lawmakers' approval for its ratification.⁸²

An attempt to address gender equality concerns may also be seen as an attempt to engage in 'cultural imperialism', as countries could 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.⁸³

Another reason behind this hesitancy can be the capacity gap between developed and developing worlds. Developing countries may not have the required capacity to understand the inter-relationship between trade, investment, and gender, gather concrete gender-disaggregated data to disentangle the impact of trade and investment on gender roles, and negotiate such provisions with their trade and investment partners who may have a more nuanced approach and experience of negotiating such provisions. One negotiator from a developing country confirms these concerns in the following observation:

We look at it as an agenda of developed countries as they have more capacity to address gender inequality problems as compared to developing countries. They have better conditions of equality, and they have more resources to gather data on understanding the impact of trade on gender roles. Developing countries do not have that kind of capacity, and so we cannot enter into binding commitments without having a look at concrete evidence on how trade and gender impact and interact with each other.⁸⁴

This observation shows that due to paucity of data, limited resources to gather the required data and under-developed understanding and expertise on these issues, developing countries are generally reluctant to sign into commitments that they do not fully comprehend.⁸⁵ And this hesitation is comprehensible, as the nexus between trade, investment, and gender is far from straightforward. Lack of understanding and awareness on how trade, investment, and gender equality are related impede gender mainstreaming efforts. Lack of understanding may also manifest itself in disbelief in and indifference to this approach. Some observers for instance have suggested that 'references to gender in trade agreements are no more than nice rhetoric, and that they do not address the full range of gender equality issues at stake'.⁸⁶ In particular, one senior government

⁸⁰K. Staudt (2003) 'Gender Mainstreaming: Conceptual Links to Institutional Machineries', in S.M. Rai (ed.), *Mainstreaming Gender, Democratizing the State*. Manchester University Press, 40.

⁸¹E. Viilup (2017) 'EU Trade Policy: Gender-Sensitive or Gender Blind?', *GREAT Insights Magazine* 5(6), <https://ecdpm.org/work/shifts-in-trade-development-volume-5-issue-6-december-2016-january-2017/eu-trade-policy-gender-sensitive-or-gender-blind> (accessed 10 November 2022).

⁸²W.A. Reinsch, J. Lim, and A. Brodsky, 'Negotiating Trade Agreements: Gender as a Priority, CSIS(04 May 2021), www.csis.org/analysis/negotiating-trade-agreements-gender-priority (accessed 10 November 2022).

⁸³A. Bahri and D. Boklan (2022) 'Not Just Sea Turtles, Let's Protect Women Too: Invoking Public Morality Exception or Negotiating a New Gender Exception in Trade Agreements?', *European Journal International Law* 33(1), 237; also see: R. Jenkins (2011) 'Moral Imperialism', in D. Chatterjee (ed.), *Encyclopedia of Global Justice*. Springer.

⁸⁴Interview with a trade negotiator (details withheld, on file with author).

⁸⁵M. Hearson (2018) 'When Do Developing Countries Negotiate Away Their Corporate Tax Base?', *Journal of International Development* 30, 233–255.

⁸⁶V. Hughes, *supra* n. 27.

aide has said that the efforts relating to female empowerment in the context of economic activities are ‘nothing’ and that ‘[i]t’s just about being nice to women, which is fine, but is that it?’.⁸⁷ Such views reflect indifference, which may be borne out of lack of understanding and paucity of research in this area.

Even though there is increased international visibility now being given to the gender equality dimension of trade and investment agreements, multiple countries still struggle to understand and fully appreciate how these issues are inter-related. Several countries believe that FTAs and BITs are policy instruments that are only concerned with market access concerns, and hence they are not appropriate forums to discuss issues that are, strictly speaking, not market access issues, and therefore countries should refrain from including non-trade and non-investment issues as part these agendas.⁸⁸

The absence of gender disaggregated data that disentangle the effects of trade liberalization from other simultaneous changes on the situation of women also makes it difficult to assess the empirical impact of gender mainstreaming in trade and investment agreements.⁸⁹ Data need to show information on the social and economic situation of women in relation to men affected or influenced by trade liberalization and foreign investment. This should include reciprocal-relationship information on costs and benefits of trade and investment for men and women and costs and benefits of women empowerment on international trade, investment, and economic growth. This dual-analysis can help establish a direct linkage between trade, investment, and gender.⁹⁰ Such data reflecting a reciprocal relationship of trade, investment, and gender equality are crucial to steer trade liberalization towards inclusive growth and to address existing gender inequalities for better and more inclusive outcomes. Moreover, since the relationship between gender, investment, and trade is very country and industry specific, specific data analysis of the impact of trade and investment on women and vice versa is needed on a case by case basis. The collection of data at this vast scale comes at a cost, and many developing countries may not be able to afford this cost.⁹¹

Lack of understanding, paucity of data, and insufficient political willingness can translate into absence of expertise within government offices in this respect. A trade negotiator notes that some trading partners just do not want to talk about gender ‘while they are engaged in trade negotiations with “us” for various reasons’.⁹² They believe that trade is gender neutral, or that FTA is no place for gender considerations, or that FTA is not a tool to advance social issues.⁹³ Countries holding these views have no incentive or motivation to create capacity and expertise in negotiating agreements with a gender lens. Absence of expertise on gender issues within government departments responsible for carrying out trade and investment negotiations is therefore another impediment that needs to be overcome in this respect.⁹⁴ Policy-makers need to possess some

⁸⁷T. McTague et al., ‘Trump Blows Up G7 Agenda’, Politico (30 May 2018). www.politico.eu/article/donald-trump-blows-up-g7-summit-agenda-canada/ (accessed 10 November 2022).

⁸⁸S. Prabhu, Indian Minister of Industry and Commerce (Indian Press Conference, WTO Ministerial Conference, Buenos Aires, 11 December 2017), <https://commerce.gov.in/press-releases/address-by-the-minister-for-commerce-and-industry-shri-suresh-prabhu-at-plenary-session-of-the-11th-ministerial-conference-of-the-wto-in-buenos-aires-argentina/>.

⁸⁹K. Higgins (2012) ‘Gender and Free Trade Agreements: Best Practices and Policy Guidance’, The North–South Institute, www.nsi-ins.ca/wp-content/uploads/2012/11/2012-Gender-and-Free-Trade-Agreements-Best-Practice-and-Policy-Guides.pdf (accessed 10 November 2022).

⁹⁰WEF (2018) ‘The Global Gender Gap Report’, WEF, https://www3.weforum.org/docs/WEF_GGGR_2018.pdf (accessed 11 November 2022).

⁹¹For example: see UNCTAD (n.d.) ‘Data and Statistics for More Gender-Responsive Trade Policies in Africa, the Caucasus and Central Asia’, <https://unctad.org/project/data-and-statistics-more-gender-responsive-trade-policies-africa-caucasus-and-central-asia> (accessed 11 November 2022).

⁹²Interview with a trade negotiator (details withheld, on file with author).

⁹³Ibid.

⁹⁴ITC (2020) ‘Mainstreaming Gender in Free Trade Agreements’, Geneva: ITC, <https://intracen.org/media/file/2411> (accessed 10 November 2022).

expertise on how to add a gender lens during negotiation, what it means to add a gender lens, what are different options in this respect, and what different forms of drafting styles and language would imply. The following section unfolds this challenge further, as it provides discussion on the nature of the negotiation capacity gap between developed and developing countries, how this gap widens when it comes to negotiating provisions relating to gender issues, and how can such inclusions harm the interest of developing countries if they are forced or somehow incentivized to accept the inclusion of such provisions in their trade and investment agreements without possessing the relevant expertise and understanding.

4 The Widening Negotiating Capacity Gap and Its Possible Adverse Impact

4.1 Meaning of Negotiation Capacity Gap

During international negotiations, developing countries commonly face resource constraints that impede their efforts to carry out the required assessments of costs and benefits for the specific proposals they are intending to table or are faced with from their counterparts. Page takes a dig on the human resource constraints in the following words: ‘Compared to the delegations of leading industrialized countries, developing negotiating teams have fewer delegates, are underpaid, and enjoy inferior technical support before and during meetings.’⁹⁵ Take for example the negotiations leading to the signing of USMCA. During these negotiations, Mexican negotiators confirm that they sometimes felt very similar resource constraints. The Mexican negotiators for various chapters were sometimes outnumbered by the relatively higher number of counterparts they had to work with from the US and Canada.⁹⁶ This human resource constraint was aggravated by the fact that, alongside the USMCA, Mexico was negotiating other agreements which increased the demand of human resource, experience, and subject-matter expertise on the Ministry of Economy.⁹⁷ Other constraints could be paucity of information, as different sets of information and data may be needed to inform the negotiations as they progress.⁹⁸

Other developing countries facing similar asymmetrical negotiating scenarios can relate to these challenges that they can potentially face in negotiating trade agreements with countries that have relatively stronger bargaining positions. With resource constraints, small trading stakes and weak negotiating clout, developing countries often find themselves on an uneven playing field especially when they participate in negotiations with developed countries.⁹⁹ There are many structural factors such as the lack of negotiating experience, lack of required resources including finance, human resource expertise and information, inadequate knowledge and information on the legal and economic impact of trade policy decisions, and unequal bargaining power which affects the participation of developing and least developed countries in international

⁹⁵S. Page (2003) ‘Developing Countries: Victims or Participants’, ODI and Globalisation and Poverty Programme, <https://cdn.odi.org/media/documents/2418.pdf>

⁹⁶Interview with a former negotiator (details withheld).

⁹⁷Such as the ‘Comprehensive and Progressive Agreement for Trans-Pacific Partnership (signed 8 March 2018, effective 30 December 2018), Agreement on Cooperation and Facilitation of Investments between the Federative Republic of Brazil and the United Mexican States’ (signed 26 May 2015, entry into force 7 October 2018) and ‘Agreement between the Government of the United Mexican States and the Government of the Argentina Republic for the Promotion and Reciprocal Investment Protection’ (signed 13 November 1996, entry into force 22 June 1998), ‘Partnership, Political Coordination and Cooperation Economic Agreement between the European Community and Its Member States, of the One Part, and the Mexico, of the Other Part’ (signed 27 February 2001, entry into force 1 March 2001) ‘Additional Protocol to the Framework Agreement of the Pacific Alliance’ (signed 10 February 2014, entry into force 1 May 2016), and other bilateral agreements. (Further findings in: A. Bahri and M. Lugo (2020). Trumping Capacity Gap with Negotiation Strategies: The Mexican USMCA Negotiation Experience’, *Journal of International Economic Law* 23(1), 1.

⁹⁸Ibid.

⁹⁹Ibid.

trade negotiations.¹⁰⁰ In other words, developing countries can face ‘capacity-constraints’ while participating in trade negotiations.

The expression ‘capacity-constraint’ in the context of this study refers to a situation where lack of required resources can impede a country’s ability to conduct effective negotiations. The problem of insufficient negotiating capacity becomes even more severe if an agreement is being negotiated between one or more developing countries on the one hand and developed nations on the other. This situation can be more appropriately described as the problem of ‘negotiation capacity gap’ between the developing and the developed world.¹⁰¹ The term ‘capacity gap’ in this context refers to a situation where one participant in the negotiation process may have insufficient resources that are required for negotiation as against other participants that, owing to their level of economic growth, nature of economic sectors, and trading stakes, may have no or little difficulties in mobilizing the required resources.¹⁰²

4.2 Gender Mainstreaming Can Widen This Capacity Gap

Previous scholarships have assessed the negotiating capacity gap between developed and developing countries in respect of other concerns such as the ones relating to trade and environment, and have shown that these concerns are mostly advocated by developed countries. For example, two champions of including environmental provisions in their trade agreements are the USA and the EU, and most of the developing countries have stayed away from including such provisions especially in the South–South FTAs.¹⁰³ Moreover, several scholars suggest that negotiators normally tend to include social concerns such as provisions on environment in their agreements when the costs of compliance for their nation to implement such provisions is generally low and the probability of their compliance is comparatively high.¹⁰⁴ In many situations of negotiating such provisions, the primary aim of environmental provisions is to ensure that the existing domestic environmental regulations of that country can be maintained in the future, and therefore the inclusion of such provisions is unlikely to have a considerable impact in terms of their effectiveness on advancing environmental law or protecting the environment.¹⁰⁵ In general, it is the developed countries that have well-developed environmental standards embedded in their domestic regulations, and therefore they have incentives to push for and gain expertise on negotiating such provisions in their international policy instruments.

Likewise, the increase in inclusion of gender provisions in FTAs is far from being universal, as this campaign so far has largely been led by developed (mostly high income and some upper middle income) countries.¹⁰⁶ High income countries such as Canada, Chile, UK, and EU and upper

¹⁰⁰J. J. Nogues (2002) ‘Unequal Exchange: Developing Countries in the International Trade Negotiations’, 4, Murphy Institute Conference on ‘The Political Economy of Policy Reform’, www.tulane.edu/~dnelson/PEReformConf/Nogues.pdf (accessed 5 March 2019).

¹⁰¹A. Bahri (2018) ‘Public Private Partnership for WTO Dispute Settlement: Enabling Developing Countries’, Edward Elgar, 25–26.

¹⁰²The resources required may include information, evidence, human resource, number of lawyers or economists or other subject matter experts, and finances.

¹⁰³S. Jinnah and J.F. Morin (2020) *Greening Through Trade: How American Trade Policy Is Linked to Environmental Protection Abroad*. Cambridge: MIT Press.

¹⁰⁴K. Milewicz, J. Hollway, C. Peacock, and D. Snidal (2016) ‘Beyond trade: The Expanding Scope of the Nontrade Agenda in Trade Agreements’, *Journal of Conflict Resolution* 62(4), 743–773; Hathaway (2003), ‘The Cost of Commitment’, *Stanford Law Review* 55(5), 1821 (the author has referred to this as ‘sovereignty view’, wherein countries take into account the cost of such a commitment to their national sovereignty).

¹⁰⁵N. Laurens and J.F. Morin (2019) ‘Negotiating Environmental Protection in Trade Agreements: A Regime Shift or a Tactical Linkage?’, *International Environmental Agreements* 19, 533–556.

¹⁰⁶In this paper, the authors have used the World Bank classification on countries’ income level to divide countries into groups, in a way that high income and upper middle income economies are generally considered as developed or emerging economies. The World Bank, ‘The World by Income and Region’, <https://datatopics.worldbank.org/world-development-indicators/the-world-by-income-and-region.html> (accessed 4 November 2022).

middle income countries such as Mexico, Brazil, Argentina, Uruguay, and Ecuador are some of the front-runners of this approach.¹⁰⁷

In particular, Canada and Chile are two pioneers that have given prominence to gender-related provisions in trade agreements.¹⁰⁸ Our research findings show that high and upper middle income economies have negotiated more agreements with gender provisions and that their agreements have featured a higher number of gender provisions than the agreements negotiated between lower middle income and low income economies. As per our findings, countries in the high income and upper middle income category have so far negotiated 770 gender-explicit provisions, and if we break down this count into the number of sub-provisions, the number is as high as 2204 sub-provisions that contain an explicit mention of women's interests.¹⁰⁹ As a contrast, lower middle income and low income countries have so far negotiated 415 gender-explicit provisions with 1313 sub-provisions in their respective trade agreements. Moreover, a majority of countries that have signed trade agreements with gender provisions are found in high income and upper middle income brackets, as 98 of these countries have signed agreements with at least one gender-explicit provision, as opposed to 55 lower middle income and low income countries which have signed agreements with gender-explicit provisions.¹¹⁰

The gap in these numbers is quite prominent. However, one of the factors contributing to this gap is that high income and higher middle income countries have generally negotiated a higher number of trade agreements than the ones negotiated by low income and low middle income countries. Another problem with this calculation is that some trade agreements are signed between high income and low income countries, and hence these agreements are counted more than once as they are included in the count of all countries that are party to them. Hence, these findings may not provide conclusive evidence to illustrate the negotiation capacity gap as such, but they can serve as one of the indicators to show that developing countries (mostly the lower income countries) have generally preferred to stay away from trade and gender discussions. Moreover, the number of provisions or sub-provisions may not be as important as the substance or content of provisions on gender in a given agreement; nevertheless, these findings are based on the inference that if the number of provisions and sub-provisions is high in an agreement, that agreement would probably contain more commitments or promises relating to women or gender equality. Another possible limitation of restricting this analysis to only gender-explicit provisions is that there is so far a lack of understanding on whether and to what extent gender-related provisions can help women overcome their barriers and improve their access to trade and investment opportunities. However, it is assumed that whenever countries negotiate and add gender-explicit provisions in these policy instruments, they intend to ensure that the resultant trade and investment opportunities can be accessed by both women and men without women having to face the barriers they currently face. This assumption may not stand if a country negotiates such provisions only as a window-dressing exercise.

These numbers therefore lead to an inference that it is mostly high income and upper middle income countries that have pioneered in the negotiation of gender-responsive trade agreements. However, in addition to the level of development or income levels, other factors can also play an

¹⁰⁷Ibid.

¹⁰⁸J.-A. Monteiro, *supra* n. 29, also see: Argentina–Chile Free Trade Agreement, (Number of provisions 7 and sub-provisions 26); Chile–Uruguay Acuerdo de Complementación Económica (signed 4 October 2016, entry into force 13 December 2018) (Number of provisions: 8 and sub-provisions: 27); Modernised Canada–Chile Free Trade Agreement (Number of provisions: 6 and sub-provisions: 26)

¹⁰⁹Authors' own calculations based on analysing 300 entries listed in the WTO Gender and Trade Database; see Database on Gender and Trade (n.d.) WTO, www.wto.org/english/tratop_e/womenandtrade_e/gender_responsive_trade_agreement_db_e.htm

¹¹⁰This count includes the countries that have signed the AfCFTA with 54 parties, the majority of which belong to the lower middle income and low income countries.

important role such as a country's level of political willingness to work on gender equality concerns, a country's current status quo on gender equality, levels of education and skill development, and economic demography of its markets and industries.¹¹¹ Furthermore, countries which have signed most gender-responsive trade agreements generally tend to have better conditions of gender parity and they score high on the world gender parity indicators.¹¹²

This gap suggests that the trade and gender debate is following the track which was once walked upon by the enthusiasts of trade and environment debate, which also led to contrasting positions and arguments between developed and developing countries as early as 1990s.¹¹³ This debate marks a divide between various economies until this date, and concerns shared by developing countries are similar as they fear that rising environment standards in trade agreements could erect more trade barriers and increase financial burdens on their industries that would result in lower comparative advantages for their economies.¹¹⁴ The debate on trade and labour standards has followed a similar trajectory.¹¹⁵

4.3 Negotiation Capacity Gap Can Harm Developing Countries: A Look at TRIPS Negotiations

The capacity gap between developed and developing countries in trade negotiations can jeopardize the interests of developing countries. This claim is based on previous trade negotiation experiences, one of which is discussed in this subsection, which provides reflections on how trade negotiations leading to the TRIPS Agreement has potentially worked against developing countries' interest. The multilateral and binding TRIPS Agreement appears to be far removed from the concerns typically raised in trade and gender provisions mainly because the existing gender provisions in most of the trade and investment agreements are largely aspirational in nature and are not negotiated in a multilateral setting; however, some existing gender provisions can already be seen as quite intrusive and it is expected that more of such provisions may appear in a binding form in these agreements in the near future.¹¹⁶ It is in this sense that the trade negotiations leading to the TRIPS Agreement is used as an example, because if developing countries are forced or somehow incentivized to accept the inclusion of legally binding commitments on gender equality in their trade and investment agreements without them having the required capacity to understand the implications of, or to negotiate, such commitments, the resulting agreements could jeopardize their interests.

In general, and with a few exceptions, when a developing country negotiates with a large developed country, it can face the problem of unequal capacity to negotiate and bargain. Within the context of trade negotiations, formation of coalitions among developing countries is one natural response to this challenge. But even in a multilateral context, the sources of bargaining power still operate to the advantage of the large developed economies, and developing economies do not always succeed, even when they are organized in coalitions.¹¹⁷ The experience of the Uruguay

¹¹¹The World Bank, supra n. 108; also see: The World Bank, World Development Indicators, <https://databank.worldbank.org/source/world-development-indicators> (accessed 4 November 2022); UDHR, Human Development Report 2021-2022, <https://hdr.undp.org/content/human-development-report-2021-22> (accessed 4 November 2022).

¹¹²World Bank (2015) 'Women, Business and the Law', World Bank, <https://thedocs.worldbank.org/en/doc/702301554216687135-0050022019/original/WBLDECADEOFREFORM2019WEB0401.pdf> (accessed 6 November 2022).

¹¹³UNCTAD Mainstreaming gender in trade policy. Note by the Secretariat. Expert meeting on Mainstreaming Gender in Trade Policy (2009), https://unctad.org/system/files/official-document/ciem2d2_en.pdf (accessed 3 November 2022).

¹¹⁴Ibid.

¹¹⁵ACCI (2006) 'The Evolving Debate on Trade and Labour Standards', IOE Information Paper, International Organisation of Employers, www.wto.org/english/forums_e/ngo_e/posp63_ioe_e.pdf (accessed 10 November 2022); also see: J.M. Salazar-Xirinachs (2000) 'The Trade-Labor Nexus: Developing Countries' Perspectives', *Journal of International Economic Law* 3(2), 377.

¹¹⁶Interviews with three trade negotiators (details withheld, on file with author).

¹¹⁷P. Drahos (2003) 'When the Weak Bargain with the Strong: Negotiations in the World Trade Organization', *International Negotiation* 8(1), 79.

Round, especially the negotiations over intellectual property rights, was a clear example of difference in negotiation capacity and bargaining power between developed and developing countries.

The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”)¹¹⁸ brought about a very important change in international standards relating to intellectual property rights. Because of its far-reaching implications, particularly with respect to developing countries, the agreement has been one of the most controversial components of the WTO system.¹¹⁹ Indeed, during the Uruguay Round negotiations, there were strong disagreements between developed and developing countries on the scope and content of the Agreement. Implementation of the TRIPS Agreement and its review has also been contentious with regard to many aspects. As Carlos Correa describes,

the developed countries (notably the United States) insisted upon the negotiation and adoption of standards on intellectual property rights (“IPRs”) in the Uruguay Round, based on the argument that strengthened protection of IPRs would promote innovation as well foreign direct investment (“FDI”) and technology transfer to developing countries.¹²⁰

Many developing countries felt that despite the balance sought in some of the TRIPS provisions, the Agreement has mainly benefited technology-rich countries. The reason for these concerns during TRIPS negotiation and its implementation had to do with several factors based on the assumptions that (i) higher levels of IPR protection will not lead to tangible increases in FDI or technology transfer to developing countries; and (ii) as a result, the share of developing countries in world research and development expenditures will remain very low.¹²¹

Although there was an understanding during these negotiations that IPRs could promote innovative activities – to the extent that they offer the promise of benefits based on the temporal exclusion of competitors – there must exist at the national level an adequate industrial and technological infrastructure that can incentivize and support innovation, which was not the case in most developing countries during the Uruguay Round negotiations. Furthermore, there was and there still is strong evidence suggesting that most of the rewards from innovation are reaped by a small minority of successful companies, largely concentrated in the developed world.¹²²

Because of the COVID-19 pandemic, the imbalances between developing and developed countries have again arrived at the forefront of the discussion on patent waiver. Historically, patents for pharmaceutical products have acted as a powerful barrier to access technologies and products, particularly by least developed and developing countries. By their essence, patents enable pharmaceutical manufacturers to charge higher prices than those that would have otherwise existed in a competitive environment, i.e., without a patent protection.¹²³ While the ‘high

¹¹⁸Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) (hereinafter TRIPS Agreement).

¹¹⁹G.B. Dinwoodie and R.C. Dreyfuss (2012) ‘The Challenges of the TRIPS Agreement’, *A Neofederalist Vision of TRIPS: The Resilience of the International Intellectual Property Regime* (online edn), Oxford Academic, 24 May 2012, <https://academic.oup.com/book/7873/chapter-abstract/153087903?redirectedFrom=fulltext> (accessed 31 July 2023).

¹²⁰C. Correa (2005) ‘The TRIPS Agreement and Developing Countries’, *The World Trade Organization: Legal, Economic and Political Analysis*. Springer Boston.

¹²¹Ibid.

¹²²C.V. Chien (2022) ‘The Inequalities of Innovation’, *Emory Law Journal* 72, 1 (author explores the relationship between patents, innovation, and the resulting inequality among corporations, countries, and genders)

¹²³See Article 28 of the TRIPS Agreement: ‘1. A patent shall confer on its owner the following exclusive rights:(a) where the subject matter of a patent is a product, to prevent third parties not having the owner’s consent from the acts of: making, using, offering for sale, selling, or importing (6) for these purposes that product;(b) where the subject matter of a patent is a process, to prevent third parties not having the owner’s consent from the act of using the process, and from the acts of: using, offering for sale, selling, or importing for these purposes at least the product obtained directly by that process.2. Patent owners shall also have the right to assign, or transfer by succession, the patent and to conclude licensing contracts.’

prices are said to be justified by the need to recover costly investments in R&D, the magnitude of such investment, as well as the pricing of drugs in developing countries, has been strongly contested'.¹²⁴

With the most recent COVID-19 pandemic, and the other health crisis such as Ebola and AIDS, together with the growing evidence about the negative implications of patents on the relationship between TRIPS and public health have come to be the center of attention.¹²⁵ While it is true, as argued by the pharmaceutical industry in developed countries, that other factors such as infrastructure, logistics, knowhow, and professional support play an important role in determining access to vaccines, it is also true that the prices and availability of crucial pharmaceutical products including vaccines themselves also depend upon the existence of patents, ultimately determining how many will survive or die in pandemics such as COVID-19.¹²⁶

With the concerns over unequal access to the COVID-19 vaccines, countries (such as India and South Africa) in 2021 requested patent waivers for temporary relief on COVID-19-related intellectual property rights, including patents for at least the duration of the pandemic.¹²⁷ The main argument was that more companies in more countries must be able to make vaccines without the threat of being sued by well-resourced legal teams representing the pharmaceutical firms that dominate vaccine supply and have IP ownership on most of the recognized vaccines. According to the WTO members supporting the 'TRIPS waiver', by giving more companies the legal ability to reproduce and replicate COVID-19 vaccines and drugs, a patent waiver could help to increase supplies and pave the way for a more equitable distribution of life-saving technologies.¹²⁸ The challenge here was, of course, the rights that the TRIPS agreement has granted to countries (and therefore to companies) to protect their patents for a long period of time.¹²⁹ This debate was recently put to rest at the WTO's MC-12, wherein members adopted the TRIPS waiver decision that temporarily removes intellectual property barriers around patents for COVID-19 vaccines.

With the adoption of the Ministerial Decision¹³⁰ on the TRIPS Agreement, the developing country members have gained greater scope to take direct action to diversify production of COVID-19 vaccines and to override the exclusive effect of patents through a targeted waiver. Yet, this agreement does not cover the production and supply of COVID-19 diagnostics and therapeutics, and therefore many developing countries have argued that it falls short of their expectation as it is not enough to help developing countries comprehensively address the current and future health challenges. Equitable access to therapeutics and diagnostics, in their view, is critical to detect new cases and new variants, mainly because many developing and least developed

¹²⁴Ibid.

¹²⁵B.K. Baker (2009) 'Patents, Pricing and Access to Essential Medicines in Developing Countries', *American Medical Association Journal of Ethics* 11(7), 527.

¹²⁶A. McMahon (2021) 'Global Equitable Access to Vaccines, Medicines and Diagnostics for COVID-19: The Role of Patents as Private Governance', *Journal of Medical Ethics* 47(3), 142.

¹²⁷Council for Trade-Related Aspects of Intellectual Property Rights (2021) 'Waiver From Certain Provisions of the Trips Agreement for the Prevention, Containment and Treatment of Covid-19' (May 2021) WTO IP/C/W/669/Rev.1, <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q/IP/C/W669R1.pdf&Open=True> (accessed 25 November 2022).

¹²⁸TRIPS Council (2022) 'TRIPS Council Welcomes MC12 TRIPS Waiver Decision, Discusses Possible Extension', WTO, www.wto.org/english/news_e/news22_e/trip_08jul22_e.htm; also see: Q&A with A. So (2021) 'WTO TRIPS Waiver for COVID-19 Vaccines', John Hopkins Bloomberg School of Public Health, <https://publichealth.jhu.edu/2021/wto-trips-waiver-for-covid-19-vaccines> (accessed 25 November 2022).

¹²⁹C.M. Correa (2019) 'Will the Amendment to the TRIPS Agreement Enhance Access to Medicines?', Policy Brief No.57, South Centre, www.southcentre.int/wp-content/uploads/2019/01/PB57_Will-the-Amendment-to-the-TRIPS-Agreement-Enhance-Access-to-Medicines_EN-1.pdf (accessed 25 November 2022).

¹³⁰12th Ministerial Conference, 'Draft Ministerial Decision on the Trips Agreement (June 2022) WTO WT/MIN(22)/W/15/Rev.2, <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q/WT/MIN22/W15R2.pdf&Open=True> (accessed 25 November 2022).

countries (LDCs) continue to lack access to life-saving drugs and testing therapeutics.¹³¹ This arrangement as per some critiques offers very little that is different from exemptions that are already available to WTO members under the existing TRIPS Agreement.¹³² One of the other most contentious points is the limit the new decision has imposed on the eligibility of beneficiary countries. While any country is able to take advantage of existing WTO flexibilities, under this arrangement, export eligibility is limited only to low and middle income countries, thereby excluding large developing and emerging economies.¹³³

This example shows that the negotiation capacity gap and the lack of bargaining power of least developed and developing countries during the TRIPS Agreement negotiation and possibly during the latest MC-12 negotiations leading to the TRIPS waiver may have resulted in some developing country members accepting a set of rules they were probably not prepared to benefit from. Gender provisions are, of course, a completely different topic, in a completely different scenario. Unlike the TRIPS Agreement which is a binding agreement with enforceable commitments, the existing types of gender provisions in most of the trade and investment agreements are aspirational and non-binding in nature. Hence, with the current gender provisions that are mostly hortatory unlike the TRIPS obligations, their inclusion in trade or investment agreements may not attract the potential risks and challenges which the TRIPS obligations for example may entail for a number of developing countries. Nevertheless, there is a real possibility that some countries – especially the frontrunners of gender mainstreaming approach – will start to negotiate gender-related provisions in a way that makes them binding and enforceable to some extent and in some scenarios.¹³⁴ Moreover, there are some – though very few – agreements that already have featured gender provisions in a binding and/or enforceable manner, and such provisions are mainly drafted as right to regulate provisions¹³⁵ and minimum legal standards.¹³⁶

Gender-related provisions can be considered as enforceable when they fall within the ambit of an agreement's dispute settlement mechanism or are not explicitly excluded from the dispute settlement mechanism.¹³⁷ Gender-related provisions can be considered as legally binding when they are drafted with mandatory verbs (such as 'shall', 'must') and their implementation is made compulsory in nature.¹³⁸ One example of a binding as well as an enforceable provision is Article 23.9 of the USMCA, wherein most gender-related provisions on labor standards related to women's concerns are binding commitments drafted with mandatory verb constructions. In this article, parties commit to implementing 'policies that it considers appropriate to protect workers against employment discrimination on the basis of sex (including with regard to sexual harassment), pregnancy, sexual orientation, gender identity, and caregiving responsibilities; provide job-protected leave for birth or adoption of a child and care of family members; and protect

¹³¹B. Mercurio (2004) 'TRIPS, Patents and Access to Life-Saving Drugs in the Developing World', *Marquette Intellectual Property Law Review* 8, 211.

¹³²TRIPS, supra n. 120, arts 30, and 31, www.wto.org/english/tratop_e/trips_e/ta_docs_e/1_tripsandconventions_e.pdf

¹³³Bryan Mercurio, supra n. 133.

¹³⁴Interview with a trade negotiator (details withheld, on file with author) (however, the interviewee confirms that their country is considering different ways of negotiating and drafting such provisions which can be enforceable either through a specialized procedure or through their agreement's dispute settlement mechanism).

¹³⁵Right to regulate provisions are those wherein countries reserve policy space to regulate specific areas. For example, in Article 10.2 of the Chile–South Korea Free Trade Agreement, the parties reserve a right to regulate provision of services or performance of functions in respect of childcare.

¹³⁶Minimum legal standards often establish a common ground that harmonize the parties' domestic legislation. For example, in Article 99 of the EU–Albania Stabilisation and Association Agreement, parties seek to cooperate on ensuring the adjustment of the Albanian legislation concerning work conditions and equal opportunities for women.

¹³⁷Article N bis-06: Non-application of Dispute Resolution, Canada–Chile FTA

¹³⁸Definitions originally proposed by the author in A. Bahri (2021) 'Gender Mainstreaming in Free Trade Agreements: A Regional Analysis and Good Practice Examples',

Gender, Social Inclusion and Trade Knowledge Product Series.

against wage discrimination'.¹³⁹ In addition to being drafted in a binding language, it is highly enforceable through the USMCA's Rapid Response Labor Mechanism.¹⁴⁰

It is important to highlight that US in the USMCA negotiation was the main player advocating for this provision as well as its enforcement mechanism, even though its ratification imposed – and its consequent implementation continues to impose – a significant compliance cost on Mexico.¹⁴¹ Some believe that this system created unfair competitive advantage against Mexican businesses and the presence of in-country 'labor attaches' in Mexico will raise the specter of foreign interference in the country.¹⁴² Some also believe that this mechanism can become a protectionist tool to block trade, as it can give to the US an instrument to impose tariffs and close markets based on the accusation of a labour standard violation.¹⁴³ This example shows how commitments that start their journey as soft and voluntary standards can take the form of binding and enforceable commitments overtime and how the imposition of that binding standard on a developing country could have the potential of jeopardizing its interests. The same can be feared for gender equality provisions, which, at the moment, are being negotiated in the spirit of cooperation, but can overtime be advocated as binding and/or enforceable. If binding and/or enforceable commitments on gender equality are included in future agreements, they might leave a large escape window wide open – and once opened – these commitments can allow countries to escape the obligations they have otherwise taken under a trade or investment agreement for reasons that may only remotely relate to gender equality considerations.¹⁴⁴ In this manner, such provisions can be used as tools of protectionism against the interests of countries which have wide gender inequality gaps, a large number of which are developing countries. It is therefore important that the concerns on the capacity gap to negotiate such provisions, especially for least developed and developing countries, and hence the impact that inclusion of such provisions can have on countries that assume them in their agreements, are not dismissed or overlooked.

5. So, Should Gender Mainstreaming Stop?

The previous section has shown how negotiation capacity gap between developed and developing countries in these matters can at times jeopardize the interests of developing countries. So, should gender mainstreaming in trade and investment policy instruments stop altogether and not be encouraged in the future? The authors suggest that the answer to this question is a clear 'No', and it is based on two reasons. These two reasons are explained in the following subsection.

5.1 Gender Mainstreaming Should Stay

The first reason for why gender mainstreaming in future trade and investment agreements should stay is because trade and investment policies are not gender neutral as they have differentiated outcomes on different groups of people and societies.¹⁴⁵ This is mainly because economic liberalization – driven by trade and investment liberalization – is a progeny of the market-state

¹³⁹USMCA, supra n. 31, article 23.9

¹⁴⁰Ibid., annex 31-A

¹⁴¹Stephanie Ferguson, 'USMCA Rapid Response Mechanism Makes its Debut', U.S. Chamber of Commerce (8 July 2021), www.uschamber.com/international/trade-agreements/usmca-rapid-response-mechanism-makes-its-debut; M. Corvaglia (2021) 'Labour Rights Protection and Its Enforcement under the USMCA: Insights from a Comparative Legal Analysis', *World Trade Review* 20(5), 648–667. doi:10.1017/S1474745621000239.

¹⁴²Insights from discussions at the 'Remaking Trade Workshop: Social Dimensions of Sustainability', Mexico City, 16–17 July 2023, <https://remakingtradeproject.org/mexicocity>.

¹⁴³A. Esposito and D. Lawder, 'Mexican Businesses Focus on Labor Provisions as they Pore Over USMCA Trade Deal Text', *Reuters* (11 December 2019), www.reuters.com/article/us-usa-trade-usmca-idUSKBN1YF0T6.

¹⁴⁴R.P. Alford (2011) 'The Self-Judging WTO Security Exception', *Utah Law Review* 697, 698, https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1336&context=law_faculty_scholarship (accessed on 28 September 2020); Interview with a trade negotiator (details withheld, on file with author).

¹⁴⁵WTO, supra n. 6; also see: OECD, supra n. 6.

dichotomy.¹⁴⁶ At the core of this dichotomy are the ideas of economic alienation and the primacy of the market forces which emphasize economic efficiency more than social interests such as human rights or gender equality.¹⁴⁷ Therefore, if the future trade and investment policies are designed without taking into account their possible impact on gender powers and opportunities, these policies can magnify the existing gender gaps. It is for this precise reason that gender mainstreaming becomes a crucial tool to ensure that international trade and investment regulations can build a more inclusive environment going further.¹⁴⁸ Particularly, gender mainstreaming in trade and investment agreements can mean the inclusion of gender equality concerns in their drafting and implementation processes. It is a practice which negotiators can apply to minimize the adverse impact and maximize the positive impact of trade and investment liberalization efforts on women in their respective jurisdictions.¹⁴⁹

The second reason is that the largest beneficiary of achieving gender parity is the global south. This is mainly because gender inequality is not only a pressing moral and social problem but also a critical economic challenge. If women, who account for half of the world's working-age population, are impeded from achieving their full economic potential, the global economy will continue to suffer.¹⁵⁰ As per McKinsey Global Institute (MGI) report, 'in a "full potential" scenario in which women play an identical role in labor markets to that of men, as much as \$28 trillion, or 26%, could be added to global annual GDP by 2025'.¹⁵¹ As per this report, both advanced and developing countries stand to gain, but the global south will have significantly larger gains to expect primarily because of the potential they have for improvements in their economic growth trajectory as well as the situation of gender parity since the most oppressed group of women reside in developing countries.¹⁵² Moreover, inequality hurts economic growth.¹⁵³ The reasoning is simple: inequality slows down the accumulation of human capital, thereby depriving all capable individuals of the economic opportunities and opportunities to contribute to economic growth and development.¹⁵⁴ For this reason, leaving women behind can impede the process of growth and development. Trade needs to be inclusive to ensure that the developing societies can achieve sustained and high economic growth – growth that includes contributions from women as well and growth that transforms their economic and social status.

These arguments show how gender mainstreaming in future negotiating efforts is crucial, especially for the developing countries. Yet, for gender mainstreaming to benefit women in developing countries and the economies of global south, it is important that developing countries

¹⁴⁶E. Mengesha (2008) 'Rethinking the Rules and Principles of the International Trade Regime: Feminist Perspectives', *Agenda: Empowering Women for Gender Equity* (78), 13.

¹⁴⁷S. Amin (2010) *Eurocentrism: Modernity, Religion, and Democracy. A Critique of Eurocentrism and Culturalism*, 2nd edn. Monthly Review Press; also see: L.Beneria (2010) 'Globalisation, Gender and the Davos Man', *Feminist Economics* 5 (3), 61, 75.

¹⁴⁸M.C. Harvey and F. Cristani (2022) 'Women and Financial Equality: Rewriting the Rules', in E. Fornalé (ed.), *Gender Equality in the Mirror*. Brill Nijhoff; R.V. Amaral and L.S. Daza Jaller, supra n. 4; R.E.A. Brambilla (2016) 'Postfeminism and Neoliberalism. A Critical Discourse Analysis of Gender Mainstreaming', *Gender, Work and Organisation* 24(3), 314.

¹⁴⁹A. Bahri (2021) 'Making Trade Agreements Work for Women Empowerment', *Latin American Journal of Trade Policy* 4(1), 6. <https://lajtp.uchile.cl/index.php/LAJTP/article/view/65667>.

¹⁵⁰D. Abney and A.G. Laya (2018) 'This is Why Women Must Play a Greater Role in the Global Economy', WEF, www.weforum.org/agenda/2018/01/this-is-why-women-must-play-a-greater-role-in-the-global-economy/ (accessed 4 November 2022).

¹⁵¹J. Woetzel et al. (2015) 'How Advancing Women's Equality can Add \$12 Trillion to Global Growth', McKinsey Global Institute (September 2015), www.mckinsey.com/featured-insights/employment-and-growth/how-advancing-womens-equality-can-add-12-trillion-to-global-growth (accessed 4 October 2022).

¹⁵²E. Bryan and J. Varat (eds) (2008), 'Strategies for Promoting Gender Equity in Developing Countries: Lessons, Challenges, and Opportunities', Woodrow Wilson International Center for Scholars (July 2008), www.wilsoncenter.org/sites/default/files/media/documents/publication/GenderEquity21.pdf.

¹⁵³F. Cingano (2014) 'Trends in Income Inequality and its Impact on Economic Growth', OECD Social, Employment and Migration Working Papers, No. 163, OECD Publishing, Paris, <https://dds.cepal.org/redesoc/publicacion?id=3780>.

¹⁵⁴*Ibid.*

enhance their capacity to negotiate the intersection between trade, investment, and gender equality. The following section provides some reflections on how developing countries could work on enhancing this negotiation capacity.

5.2 Strategies for Capacity Building: The Three Quick Wins

A number of strategies can be considered for enhancing developing countries' capacity for negotiating matters of gender equality in their trade and investment policy context, and these measures may include delivery of training courses, gathering of gender disaggregated data, development of human resource and expertise through more negotiating experience, and others. Yet there are some quick wins that can be considered in this respect. This subsection outlines three such quick wins to bridge this capacity gap.

5.2.1 Starting Out in a Safe Zone: The Best Endeavor Commitments

Many countries are not ready to undertake legal commitments on gender equality in their market access instruments as binding and enforceable.¹⁵⁵ Therefore, the gender mainstreaming approach so far has been applied on the spirit of cooperation, wherein parties seek to use cooperation as a route to start this dialogue with others.¹⁵⁶ Countries – mainly in the Asia Pacific – have shown a clear preference towards the inclusion of gender issues through a route of cooperation, as that is often seen as a viable starting point.¹⁵⁷ The value of aspirational provisions cannot be underrated, as these provisions can still change the normative environment of trade negotiations and can act as a starting point in negotiating gender-related commitments for countries with less developed appetite or understanding on these matters. This is mainly because countries – in the absence of available data and understanding on these matters – need some flexibility and somewhat large escape windows before they can assume commitments they do not entirely understand and before using trade or investment agreements to protect women when they do not know how these agreements will affect the women in their countries.

It is therefore important that countries, especially the ones that are frontrunners of gender mainstreaming in the developed world, understand the pace of their developing country partners and the need for them to take their own time to develop their appetite before they are expected to negotiate commitments that can be legally binding and enforceable in nature. Countries that may have an appetite for assuming binding commitments in this respect can include such commitments in the agreements they negotiate with partners who are at a similar level of appetite and readiness, but countries should refrain from imposing such commitments on their partners which are probably not there yet and hence need more time to develop their understanding and expertise in this respect.¹⁵⁸

5.2.2 Trust-Building Exercises between Developing and Developed Countries

Developing countries are generally skeptical about addressing social issues in the context of market access negotiations. This trust-deficit is explained by a developing country negotiator in the following sentence: 'If we do not know what we are negotiating, and which provision will be harmful for us, negotiating these provisions with a binding character could be a huge risk for us as we do not know how they are going to be used by our developed country

¹⁵⁵Interview with a trade negotiator (details withheld, on file with author) (however, the interviewee confirms that their developed country partners are pushing for the inclusion of binding gender-related commitments in the trade agreements they are negotiating with them).

¹⁵⁶Ibid.

¹⁵⁷A. Bahri, *supra* n.73.

¹⁵⁸Interview with a trade negotiator (details withheld, on file with author) (where the interviewee from a developed country confirms that they are seriously considering the ways to include binding and enforceable commitments on gender equality in their trade agreements).

partners.¹⁵⁹ This observation shows that when it comes to the inclusion of gender provisions in the trade agreements, developing countries can be wary of the intentions of the developed world. Some countries can be defensive when engaging in gender and other sustainability issues, as they link it to their past negotiating experiences as discussed previously in the article.¹⁶⁰ Another negotiator from global south questions the following: ‘Why do they [developed countries] need to monitor our domestic affairs? It is for us to decide and work on. It should be our responsibility and privilege to decide how we want to bring about domestic social changes in our respective countries, as these changes depend a lot on each countries’ domestic conditions, resource constraints and needs.’¹⁶¹

These statements show that there is clearly a trust deficit when it comes to discussions on gender equality. It is therefore important that future gender mainstreaming advocacy efforts try first to address this trust-deficit, as the consequent ignorance would only make things much worse. This can be addressed with the help of a number of activities. For example, international organizations can conduct capacity-building workshops or workshops to exchange ideas and experiences between developed and developing country members, and they can also hold training sessions to share ongoing research and data on this subject with their members on a regular basis. One recent initiative which can be quite beneficial in this respect is the work happening at the WTO’s Informal Group on Trade and Gender, established on 23 September 2020 as a follow-up to the Joint Declaration on Trade and Women’s Economic Empowerment.¹⁶² It brings together the WTO members and observers to increase their efforts on women’s participation in global trade. Its participating members aim to share best practice on removing barriers to women’s participation in world trade, to exchange views on how to apply a ‘gender lens’ to the work of the WTO, to review gender-related reports produced by the WTO Secretariat, and to discuss how women may benefit from the Aid for Trade initiative.¹⁶³ This is a welcome initiative, and with its membership open to all WTO Members, each country should consider joining this initiative as it can help them share their concerns on this topic and thereby define a more informed approach on these matters going forward.

5.2.3 Engagement of Private Stakeholders

The increasing trend of the inclusion of women’s empowerment concerns in the negotiation of trade agreements creates a need to strengthen an informed dialogue between the public and private sectors. This is mainly because trade negotiators are often not aware of the specific barriers faced by women in their various economic roles, and as a result, they face challenges in carving out or promoting provisions that will successfully address these barriers. At the same time, the private sector is often not equipped to communicate their needs and the barriers they face to a policy audience.¹⁶⁴ Hence, efforts need to be made to build a channel of communication between public and private stakeholders before, during, and post negotiations. Literature has

¹⁵⁹Interview with a trade negotiator (details withheld, on file with author)

¹⁶⁰Interview with a trade negotiator (details withheld, on file with author)

¹⁶¹Interview with a trade negotiator (details withheld, on file with author)

¹⁶²Informal Working Group on Trade and Gender, *supra* n. 48; also see Buenos Aires Declaration on Trade and Women’s Economic Empowerment, *supra* n. 45; also see: Action Plan on Trade and Gender 2021–2026 (WTO, 2021), www.wto.org/english/tratop_e/womenandtrade_e/action_plan_21-26.pdf (accessed 5 November 2022).

¹⁶³CSIS (2021) ‘The WTO Informal Working Group on Trade and Gender: What It Is, What It Should Consider, and What It Could Be’, CSIS (March 2021), www.csis.org/analysis/wto-informal-working-group-trade-and-gender-what-it-what-it-should-consider-and-what-it (accessed 5 November 2022); also see: Aid for Trade (WTO, n.d.), www.wto.org/english/tratop_e/devel_e/a4t_e/aid4trade_e.htm (accessed 5 November 2022).

¹⁶⁴M. Thomas et al. (2019) ‘Women’s Economic Empowerment: Strengthening Public and Private Sector Impact through Accountability and Measurement (SDG 5)’, G20 Insights, www.g20-insights.org/wp-content/uploads/2019/05/t20-japan-tf1-11-women-economic-empowerment-1.pdf (accessed 5 November 2022); also see: E. Markel (2014) ‘Measuring Women’s Economic Empowerment in Private Sector Development’, OECD (July 2014), www.enterprise-development.org/wp-content/uploads/Measuring_Womens_Economic_Empowerment_Guidance.pdf (accessed 5 November 2022).

briefly discussed how the private sector can play a significant role in drafting international norms through negotiated trade agreements.¹⁶⁵ Private industries and companies are the key beneficiaries and victims of international trade and investment policies, and hence some form of public-private coordination in the conduct of trade and investment negotiations is embedded in the very nature of such agreements.¹⁶⁶

A consultation mechanism between government and private sector for conducting trade negotiations can be referred to as the ‘public-private partnerships’ or ‘public-private consultation arrangements’. A recent report notes, with respect to trade negotiations, that with this arrangement in place, ‘the private sector will have clear mechanisms to convey their views (based on their knowledge, practices, and experiences) to government negotiators, who can then receive timely information and inputs from the private sector needed for successful FTA negotiations’.¹⁶⁷ This mechanism can keep the private sector sufficiently informed, supplement the government’s negotiation capacity and resources with privately owned resources and information, and ensure that the negotiation process is well-informed and inclusive in nature. To make these negotiations even more inclusive and comprehensively informed, governments can also engage non-business stakeholders in this process.¹⁶⁸ This engagement can enhance a country’s negotiating-capacity as NGOs, academics, think tanks, and research centers can gather, disseminate and analyze the information and evidence required in trade negotiations; however, many scholars have observed that the plurality of this engagement could hamper or otherwise slow-down the processes of decision- and policy-making at international fronts.¹⁶⁹

6. Conclusion

The relationship between trade and investment agreements and gender equality is a tale of two stories: the first is the result of pressure from civil society and certain political quarters over the perceived dominance of trade policy in international affairs at the expense of social values; the second perhaps is the growing interest and anxiety over the relationship between these legally equivalent but politically asymmetrical sets of international obligations.

With varying levels of political appetites, understanding, and expertise on these matters, it is understandable why countries are employing different approaches towards inclusive trade and investment, but the negotiation capacity gap between developed and developing countries in these matters can at times jeopardize the interests of developing countries. Yet, gender mainstreaming efforts in future negotiations should not stop as they are beneficial in several ways, and especially so for developing countries. However, a future gender-mainstreaming approach in trade and investment agreements can only succeed if policymakers comprehend and take into account the distinct realities faced by women globally and how these realities vary from nation to nation. For gender mainstreaming to benefit women in developing countries and the economies of the global south, it is important that developing countries enhance their capacity to negotiate the intersection between trade, investment, and gender equality. It is equally

¹⁶⁵J. Callista ‘Public-Private Consultation for Free Trade Agreement Negotiations in Canada and Indonesia’, TPSA Research Report (January 2018), www.tpsaproject.com/wp-content/uploads/2017-11-01-Report-1213.01j.pdf (accessed 9 August 2019).

¹⁶⁶H.-j. Je (2018) *Public-Private Relationships in Trade Policy-Making*. World Scientific.

¹⁶⁷J. Callista, supra n. 171.

¹⁶⁸E.-U. Petersmann (2015) ‘Transformative Transatlantic Free Trade Agreements without Rights and Remedies of Citizens?’, *Journal of International Economic Law* 18(3), 579.

¹⁶⁹P.M. Nichols ‘Realism, Liberalism, Values, and the World Trade Organization’, *University of Pennsylvania Journal of International Economic Law* 23(2), 725, 735; also see: E. Hannah, J. Scott, and R. Wilkinson ‘Reforming WTO-Civil Society Engagement’, *World Trade Review* 16(3), 427. For more details, see <https://academic.oup.com/jiel/article-abstract/23/1/1/5730316>

important that developed countries take note of this capacity gap and take into account the conditions and challenges of their developing country partners when it comes to engaging with them on matters beyond the traditional and typical trade and investment provisions.

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