

WRITING SAMPLE

Mainstreaming Gender in Trade & Investment Agreements

SUMMARY OF THE WORK

Exploration of the linkages between gender and international trade with special attention to international law. Detailed recommendations to mainstream gender in multilateral and bilateral trade and investment agreements.

Context

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Professor:	Saskia Ravesloot, gender expert for the European Commission and director of a gender and human rights consulting firm



INSTITUT D'ÉTUDES POLITIQUE DE PARIS
PARIS SCHOOL OF INTERNATIONAL AFFAIRS

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Tammy Mayer

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Introduction

Trade and investment agreements have long been considered gender-neutral; yet today more and more countries are adding gender equality chapters to these agreements and for good reason. International trade and investment intend to lower barriers to international flows of goods and services, enabling new markets to open up for both importers and exporters. Ideally women can benefit by becoming exporters themselves, or can take the new jobs that open up, and ultimately integrate themselves into these new markets. However, women in countries of all wealth categories are starting off with significant pre-existing constraints that prohibit their adaption to these new opportunities. These constraints are multiplied for women living in low-income countries. While development aid and bilateral support programs have been working in poor areas to change domestic policies that prevent women from being fully integrated into the economic fabric of their community, very high barriers remain today. Investment agreements are highly enforceable, and come with many incentives to comply. Thus they can be a useful tool to promote a given agenda such as gender equality. Mainstreaming gender into trade and investment agreements has the potential to dramatically change the game and ultimately help women around the world achieve economic freedom.

I. Fundamentals of International Trade and Investment

The World Wars were caused in part by protectionist trade policies that aggravated social conditions and tensions in various countries around the world¹. The General Agreement on Tariffs and Trade (GATT) was signed in 1947 to help tie countries together economically with peacekeeping as the rationale. Today embodied by the World Trade Organization, 164 member states have agreed to multilateral rules for imports and exports in goods and services². Other rules have developed at the WTO regarding multinational corporations wishing to settle in a foreign country (foreign investment).

In addition to the WTO agreements, there are 294 trade agreements in force³ between nations or regions, which aim to facilitate cross border sales of goods and services, ideally increasing business opportunities locally as well as decreasing consumer and business costs with cheaper

¹ "The History of Multilateral Trading System." WTO. Accessed May 3, 2019. https://www.wto.org/english/thewto_e/history_e/history_e.htm.

² "The History of Multilateral Trading System." WTO.

³ "Summary Tables: Some Figures on Regional Trade Agreements." WTO, 2019. <http://rtais.wto.org/UI/publicsummarytable.aspx>.

imports. They can potentially spread technical knowledge to developing countries and ultimately help grow the local economy⁴.

Further, there are 2663 investment treaties in force⁵. Investment agreements were originally established by former colonizing states as a means of protecting their companies operating in former colonies⁶. Today, 92% of the world's economies have signed at least one investment treaty, and many wealthy countries have signed well over 100 agreements⁷. Developed economies often promote investment agreements with developing nations with the threat that if this agreement is not in place their outward investors will not take the risk of settling in such an unstable economic environment⁸. Foreign direct investment represents the largest external source of finance in developing economies⁹, so the threat of disinvestment compels certain poor nations to sign these agreements.

Enforcement of trade and investment agreements

Integrated in the WTO system is a state-to-state dispute settlement mechanism allowing countries to sue other countries in an arbitration tribunal for failing to uphold their agreement to WTO principles. Between 1995 and 2018 over 570 disputes were filed at the WTO¹⁰. Although 117 developing countries are members of the WTO, this mechanism is rarely used against poor countries¹¹.

In addition, investor-state dispute settlement mechanisms are in place in virtually every investment treaty. This mechanism allows foreign investors to use their host state for discriminatory practices or for the frustration of their expected profits. The host state cannot use this mechanism, and neither can local companies. This parallel judicial system gives foreign investors an advantage in the host market and undermines domestic policymaking¹². 85% of disputes are against low and middle-income countries¹³, threatening development efforts with

⁴ Alisa DiCaprio, Amelia U. Santos-Paulino & Maria V. Sokolova. "UNCTAD Research Paper No. 1 UNCTAD/SER.RP/2017/1," July 2017. UNCTAD. https://unctad.org/en/PublicationsLibrary/ser_rp2017d1_en.pdf

⁵ "International Investment Agreements Navigator." UNCTAD Investment Policy Hub. Accessed May 3, 2019. <https://investmentpolicy.unctad.org/international-investment-agreements>.

⁶ UNCTAD. "Investor-State Dispute Settlement: UNCTAD Series on Issues in International Investment Agreements II." 2014. Accessed 25 April 2019, https://unctad.org/en/PublicationsLibrary/diaeia2013d2_en.pdf

⁷ UNCTAD. "International Investment Agreements by Economy." Accessed April 23 2019, <https://investmentpolicyhubold.unctad.org/IIA/IiasByCountry#iialInnerMenu>.

⁸ Fernholz, Tim. "The New NAFTA Gets Rid of Controversial Corporate Legal Rights—for Now." Quartz, October 4, 2018. Accessed 25 April 2019, <https://qz.com/1412330/the-new-nafta-changes-global-corporate-arbitration/>

⁹ UNCTAD. "World Investment Report 2018: Investment and New Industrial Policies." 2018. xii. Accessed 6 April 2019, https://unctad.org/en/PublicationsLibrary/wir2018_en.pdf

¹⁰ "Dispute Settlement - Understanding WTO Dispute Settlement Statistics." WTO. Accessed May 3, 2019. https://www.wto.org/english/tratop_e/dispu_e/dispustats_e.htm.

¹¹ Chad P. Bown Bernard M. Hoekman. "Developing Countries and Enforcement of Trade Agreements: Why Dispute Settlement Is Not Enough," 2007. The World Bank. <https://openknowledge.worldbank.org/handle/10986/7525>

¹² Armand De Mestral. "Investor-State Arbitration Between Developed Democratic Countries". September 2015. Accessed 25 April 2019, <https://www.cigionline.org/publications/investor-state-arbitration-between-developed-democratic-countries>

¹³ OECD. "Investor-State Dispute Settlement Public Consultation: 16 May - 9 July 2012." 17.

arbitration fines reaching hundreds of millions of dollars¹⁴ and the domestic public interest policies being overturned¹⁵.

II. Linkages Between Trade and Gender

Baseline gender inequalities

The economic disadvantages women face are numerous, and while they vary from country to country they are seen in every region of the world. However the economic prospects of women are particularly devastating in certain countries, especially poor countries and areas with extreme poverty, due to laws and cultural norms that block women from financial freedom. For instance in certain countries it is illegal for women to work in certain sectors, and laws allow husbands to prevent their wives from taking a job¹⁶. In areas where women engage in small-scale subsistence farming, it is more difficult for female-headed households to access agricultural inputs such as seeds, pesticides and fertilizer, as well as to access output markets¹⁷. Women have less access to education, leading to women making up two thirds of the world's illiterate population¹⁸. This has a profound negative effect on their economic activity. Even when a woman has employment, in many developing countries her earnings go directly to the male head of the home and she does not control the family budget¹⁹. In these regions, women are less likely to have access to formal financial institutions such as banks. Further, many countries limit women's access to land ownership and inheritance, further curtailing their ability to accumulate wealth and control their own livelihoods²⁰. As UNCTAD's report states, "women's financial autonomy is a precondition for achieving economic efficiency and equal social status."²¹

¹⁴ Transnational Institute. "Profiting from Injustice." November 27, 2012. Accessed 25 April 2019, <https://www.tni.org/en/briefing/profitting-injustice>.

¹⁵ Armand De Mestral. "Investor-State Arbitration Between Developed Democratic Countries".

¹⁶ Charles Kenny & Megan O'Donnell. "Making Global Trade More Gender-Inclusive," February 6, 2017. Center for Global Development. <http://www.cgdev.org/publication/making-global-trade-more-gender-inclusive>

¹⁷ "Investing in people to fight poverty in Haiti," 2014. World Bank. p150 & 176

¹⁸ "The World's Women 2015: Trends and Statistics," 2015. United Nations. P59. <https://unstats.un.org/unsd/gender/downloads.html>

¹⁹ "The World's Women 2015: Trends and Statistics," 2015. United Nations. P194.

²⁰ "The World's Women 2015: Trends and Statistics," 2015. United Nations. P198.

²¹ "Mainstreaming gender in trade policy" p12.

Women's contribution to the economy

Gender equality is strongly positively correlated with real GDP per capita growth²². Conversely, many other sources confirm that, “by crippling part of their human capital, unequal societies tend to be less efficient.”^{23, 24}

Women's contribution to international trade performance

In regards to liberalizing a country's trade policy, there are two main findings. First, gender inequality in regards to access to employment and levels of education decreases a country's international trade²⁵. Second, the wage gap has a profound impact on foreign investments: “women workers have been particularly sought by the export-oriented industry because women are generally more readily available, less unionized and less expensive.”²⁶ The wage gap is thus a comparative advantage for low-skilled women to access employment in the manufacturing of labor-intensive goods²⁷. Contextualizing the first finding with the second, we realize that access to employment and minimal education, combined with unequal pay standards, enable women to take these labor-intensive export-oriented jobs. Thus, both gender inequality and improved equality facilitate women's contribution to a given country's economy.

Benefits to women from trade liberalization

Research shows that increased trade liberalization leads to faster economic growth and less absolute poverty in poor countries²⁸. As more women tend to live in poverty, this could be seen as a benefit to women. Theoretically trade and investment agreements provide both women and men with increased economic opportunities as both workers and entrepreneurs. New jobs arrive by way of foreign businesses and of local businesses starting to take advantage of the new market opportunities. In fact, women are getting greater access to new employment opportunities in the formal labor market²⁹; especially manufacturing jobs in exporting sectors

²² “Pursuing Women's Economic Empowerment,” May 2018. International Monetary Fund. P5.
<https://www.imf.org/en/Publications/Policy-Papers/Issues/2018/05/31/pp053118pursuing-womens-economic-empowerment>.

²³ “Mainstreaming gender in trade policy,” March 19, 2009. UNCTAD. P3.
https://unctad.org/en/docs/ciem2d2_en.pdf.

²⁴ Gonzales, C., S. Jain-Chandra, K. Kochhar, M. Newiak, and T. Zeinullayev. “Catalyst for Change: Empowering Women and Tackling Income Inequality,” 2015. International Monetary Fund.
<https://www.imf.org/external/pubs/ft/sdn/2015/sdn1520.pdf>.

²⁵ Busse M and Spielmann C. “Gender inequality and trade,” 2006. *Review of International Economics*, 14 (3): 362–379.

²⁶ “Mainstreaming gender in trade policy”

²⁷ Busse M and Spielmann C. “Gender inequality and trade,” 2006.

²⁸ Alisa DiCaprio, Amelia U. Santos-Paulino & Maria V. Sokolova. “Regional trade agreements, integration and development: UNCTAD Research Paper No. 1 UNCTAD/SER.RP/2017/1,” July 2017. UNCTAD.
https://unctad.org/en/PublicationsLibrary/ser_rp2017d1_en.pdf

²⁹ “The Role of Trade in Ending Poverty,” 2015. WTO and the World Bank Group. P36.
https://www.wto.org/english/res_e/booksp_e/worldbankandwto15_e.pdf

and in services³⁰. Nonetheless, after reading countless reports on the impacts of trade on gender, there is a dearth of concrete examples of the positive benefits of trade on women. Reports that would be expected to include the benefits of trade for women are lacking in examples of any direct positive impacts³¹.

Negative impacts of trade on women

Negative impacts of trade on developing economies

Most studies of trade integration agreements show that low-income countries benefit less than upper income economies.³² Further, in spite of lowering extreme poverty, in-country inequality increases because the benefits from trade are mainly directed to skilled workers.³³

Pre-existing gender discriminatory policies

Trade and investment liberalization impacts the prices and production of goods and services, employment and the government's ability to generate revenue from taxes³⁴. Once these changes are in place, the population must adapt to the new conditions, which can include switching from shrinking sectors to expanding sectors.

Women, especially in developing countries, have a hard time adjusting to the new economic conditions due to pre-existing gender inequalities and also the deficiencies in local government institutions capacity to moderate this transition with safety nets, training and policies to ease women's adaption to and integration in the new economy³⁵.

UNCTAD reports, "the overall effect of trade policies on women's well-being largely depends on factors such as pre-existing policies, the extent of the gender gap, and the ability to which women are able to react to economic changes."³⁶ As nearly all trade and investment agreements today are gender-blind, there are no measures in these agreements in place to mitigate the pre-existing inequalities. Thus, women start with unequal access to resources and power, and thus have unequal access to the benefits of international trade.

³⁰ "World Development Report 2012 Gender Equality And Development," 2012. World Bank. P255-256. <https://siteresources.worldbank.org/INTWDR2012/Resources/7778105-1299699968583/7786210-1315936222006/Complete-Report.pdf>

³¹ These reports include "World Development Report 2012: Gender Equality And Development," "Unlocking Markets for Women to Trade," and "The Role of Trade in Ending Poverty," authored by the WTO, World Bank Group and the International Trade Center.

³² Alisa DiCaprio, et al. "Regional trade agreements, integration and development."

³³ Alisa DiCaprio, et al. "Regional trade agreements, integration and development."

³⁴ "Mainstreaming gender in trade policy" P5

³⁵ "Mainstreaming gender in trade policy" P6

³⁶ "Mainstreaming gender in trade policy" P3

Liberalization generates human rights concerns

While not specific to women, trade agreements exacerbate human rights concerns. In 2015 a group of UN experts wrote a letter saying trade agreements lower “the threshold of health protection, food safety, and labour standards, by catering to the business interests of pharmaceutical monopolies and extending intellectual property protection”³⁷

Gender concerns for trade liberalization in developing countries

Unequal access to new market opportunities

Trade liberalization theoretically opens up new markets for local entrepreneurs to invest in. However, with lower access to capital and land rights as mentioned earlier, women are not in a position to invest in an export-oriented business³⁸.

In developing countries “a relatively large number of small enterprises are run by women,” but women often have less access to credit, technical knowledge and marketing, so they are less able to expand their companies to be able to compete in global markets³⁹. Further, as there is a significant gender gap in sharing household tasks, “women lack sufficient time to pursue actions that reduce the poverty and vulnerability of their households.”⁴⁰ These pre-existing gender gaps thwart women’s efforts and desires to take advantage of the new opportunities international trade agreements can potentially provide.

Competition in agriculture and food production

In developing countries, women are generally responsible for providing food through subsistence farming, and cash by selling some of the extra food⁴¹. Trade liberalization often decreases the prices of some food crops via cheaper imports. Lower prices may occur as a result of generous agricultural subsidies in the origin country that create massive over production and dumping of surplus in foreign markets⁴². As agricultural workers “are already struggling with increasing costs of production”⁴³ this new competition can be particularly damaging. Further,

³⁷ “UN Experts Voice Concern over Adverse Impact of Free Trade and Investment Agreements on Human Rights.” Office of the United Nations High Commissioner for Human Rights, June 2, 2015. <https://www.ohchr.org/FR/NewsEvents/Pages/DisplayNews.aspx?NewsID=16031&LangID=E>.

³⁸ “The Role of Trade in Ending Poverty,” 2015. P35.

³⁹ “Mainstreaming gender in trade policy,” 2009. p.8.

⁴⁰ “The Role of Trade in Ending Poverty,” 2015. P35.

⁴¹ “Mainstreaming gender in trade policy,” 2009. P7.

⁴² Sengupta, Ranja. “Addressing Gender and Trade Issues in Trade Agreements: Creating More Problems than Solutions?” DAWN (blog), July 4, 2018. <http://dawnnet.org/publication/addressing-gender-and-trade-issues-in-trade-agreements-creating-more-problems-than-solutions/>.

⁴³ Sengupta, Ranja. “Addressing Gender and Trade Issues in Trade Agreements.”

access to newly cheaper imported producer goods doesn't often benefit subsistence-oriented smallholders, because they do not spend on these costs to begin with⁴⁴.

When a country liberalizes its trade policies, farmers must adapt by either trying to compete with the new imports or by shifting to an export-crops. In both instances, farmers must invest in new technology and techniques in order to compete⁴⁵. However, women working in agriculture are less likely to have access to credit, agricultural inputs and knowledge⁴⁶. These factors can push women to abandon their small business, resorting to only subsistence farming or to taking a job in another sector. In addition, in developing countries when both foreign and domestic farmers shift production to export-crops, this raises the risk of food insecurity for local populations⁴⁷.

Lacking land rights, forced evictions and increased insecurity

Although women make up nearly half of the agricultural workers worldwide, they only officially own about 20% of the land⁴⁸. When developing countries open up to foreign investment, often more arable land is cultivated. Foreigners have new rights to own or work the land and since in many developing nations land ownership is based on informal customs, the state may expropriate the land to sell to foreign investors ("land-grabbing")⁴⁹. This leads to forced evictions, which are often militarized, threatening the security of the women who may be involved in land rights disputes⁵⁰. Land grabs can also remove access to land that were sources of water, fuel and plants for medicinal purposes⁵¹.

Intellectual property rights impacts access to seeds

The WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the provisions for intellectual property rights in many trade and investment agreements block people from informal seed saving, selling and sharing⁵². The exception usually included is applied to small landholders who grow subsistence crops only, however the rule is specific to landowners. Women are not typically landowners, or the land rights are too vague to know who owns the land, so this exception is extremely gender biased. Obligated to use corporate seeds, the

⁴⁴ "Mainstreaming gender in trade policy," 2009. P9.

⁴⁵ "Mainstreaming gender in trade policy"

⁴⁶ "Investing in people to fight poverty in Haiti," 2014. World Bank. p150 & 176

⁴⁷ Lappin, Kate. "Free trade or women's rights ?" 2018. Strateic Review.

<https://worldview.stratfor.com/article/free-trade-or-womens-rights>

⁴⁸ Rachel Noble. "From Rhetoric To Rights: Towards Gender-Just Trade," 2018. Action Aid UK.

https://www.actionaid.org.uk/sites/default/files/publications/from_rhetoric_to_rights_towards_gender-just_trade_actionaid_policy_briefing.pdf

⁴⁹ Rachel Noble. "From Rhetoric To Rights: Towards Gender-Just Trade," 2018. P18.

⁵⁰ Lappin, Kate. "Free trade or women's rights ?" 2018.

⁵¹ Lappin, Kate. "Free trade or women's rights ?" 2018.

⁵² "Gender Equality & Trade Policy: Resource Paper," 2011. United Nations Inter-Agency Network on Women and Gender Equality (IANWGE). P12.

https://www.un.org/womenwatch/feature/trade/gender_equality_and_trade_policy.pdf

high cost of buying new seeds or paying royalties on saved seeds every year can be a serious financial hardship for small-scale farmers⁵³.

Intellectual property rights push up medicine prices

The WTO's strong intellectual property rights protection agreements (TRIPS and TRIPS-plus) push medicine prices higher by reducing access to generic brands, and when families have to choose who to treat due to cost considerations the man is privileged over the woman.⁵⁴

Women are pushed into exploitative industries

Whereas the movement of women from agriculture to manufacturing and services⁵⁵ may be seen as a neutral event, this is far from reality. Women typically leave the agriculture work near their homes to work in economic sectors known for exploitation and violence against women. They may become migrant domestic workers, for example. When women in developing countries find paid employment in the manufacturing sector, work is temporary and low-paid⁵⁶. With this financial instability, women may increase their paid employment, but they do not escape poverty⁵⁷. This is particularly true in female-headed households.

Privatization places greater burdens on women

A WTO agreement under negotiation, called the Trade in Services Agreement (TiSA)⁵⁸, aims to open up services in the signatory countries to global competition, which may include the privatization of public services. This action would be extremely difficult to reverse and would place a very high burden on women⁵⁹. Economics has shown that markets are not good at providing public services like health, water, energy, education, care, or social services. In light of these expected deficits following privatization, women will be disproportionately required to provide these services for their communities⁶⁰. This relates to a concern brought up in the 2015 letter by UN experts in human rights, as they called for “a just balance between the protection afforded to investors and the States’ responsibility to protect all persons under their

⁵³ “UPOV 91 and trade agreements: Compromising farmers’ right to save and sell seeds,” October 2018.

⁵⁴ Sengupta, Ranja. “Addressing Gender and Trade Issues in Trade Agreements.”

⁵⁵ “World Development Report 2012 Gender Equality And Development,” 2012. World Bank. P255-256. <https://siteresources.worldbank.org/INTWDR2012/Resources/7778105-1299699968583/7786210-1315936222006/Complete-Report.pdf>

⁵⁶ “Mainstreaming gender in trade policy”

⁵⁷ “Mainstreaming gender in trade policy”

⁵⁸ “Scott Sinclair. “TiSA Troubles: Services, Democracy And Corporate Rule In The Trump Era,” 2017. Rosa-Luxemburg-Stiftung. https://www.rosalux.eu/fileadmin/user_upload/Publications/2017/TISA-UK.pdf

⁵⁹ Rachel Noble. “From Rhetoric To Rights: Towards Gender-Just Trade,” 2018. P9.

⁶⁰ “Public debt, austerity measures and the International Covenant on Economic, Social and Cultural Rights E/C.12/2016/1,” July 2016. Committee on Economic, Social and Cultural Rights. P2.

https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f2016%2f1&Lang=en

jurisdiction.”⁶¹ It is important, therefore to maintain state responsibility for the provision of public goods.

Agreements are undemocratic and lack inclusion in decision-making

The negotiation of trade and investment agreements is notoriously opaque. The lack of transparency in the contents of the negotiations is a problem faced by communities worldwide and is not unique to developing countries⁶². This undermines democracy and reduces the legitimacy of the agreements among the general public. Lacking transparency for all groups means that decisions on trade policy and international agreements are made about trade without input from women from impacted communities.

As has been seen, there are significant barriers for women to benefit from trade and investment agreements, and women shoulder many negative externalities of these agreements. Clearly these agreements are in no way “gender-neutral.”

III. Gender Inequality in International Law

Multiple international conventions oblige signatories to end gender-based economic inequality and discrimination against women. The ILO has two conventions (#100⁶³ and 111⁶⁴), and Article 11 of the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)⁶⁵. Other declarations support ending gender economic inequalities such as the United Nations Universal Declaration of Human Rights, the United Nations Covenant on Social and Economic Rights, and SDG 5 in the 2030 Agenda for Sustainable Development. However, there continues to be a lack of policy coherence between what is agreed upon at the international level and what policies are implemented at the local and regional levels.

⁶¹ “UN Experts Voice Concern over Adverse Impact of Free Trade and Investment Agreements on Human Rights.” Office of the United Nations High Commissioner for Human Rights, June 2, 2015.

<https://www.ohchr.org/FR/NewsEvents/Pages/DisplayNews.aspx?NewsID=16031&LangID=E>.

⁶² “Investment Policy Framework for Sustainable Development,” 2015. UNCTAD.

https://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf

⁶³ “Ratifications of C100 - Equal Remuneration Convention, 1951 (No. 100).” International Labor Organization.

https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312245:NO

⁶⁴ “Ratifications of C111 - Discrimination (Employment and Occupation) Convention, 1958 (No. 111).” International Labor Organization.

https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312256:NO

⁶⁵ “Convention on the Elimination of All Forms of Discrimination against Women,” 1979. United Nations.

<https://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx>

2017 WTO Declaration on Trade and Women's Economic Empowerment

In 2017 120 WTO member countries signed a declaration in support of women's economic empowerment. The declaration essentially declared awareness of gender implications in trade, called for countries to share experiences and to share data, and finally announced workshops on a variety of themes to continue discussion.⁶⁶

Highly criticized by women's groups around the world.

This declaration, however, was the target of an open letter signed by over 200 organizations from every continent⁶⁷. The letter condemns the declaration as being too narrowly focused on how it defines the impact of trade on women, and for bringing up "new issues" under the guise of gender equality, such as public procurement, which has no prior WTO agreement connected to it⁶⁸. Others have also criticized the WTO declaration saying, "This document does not propose any new approach to the WTO's way of working or its agreements. Instead of assessing the negative gendered impacts in multiple areas of such liberalization, it proposes more liberalization as the ultimate solution and a key driver for women's empowerment."⁶⁹ Further, the issues that need to be tackled are those not mentioned in the Declaration including traditional topics of agriculture subsidies, informal work in the export sector, intellectual property rights related to medicine and natural resources.⁷⁰ Finally, women's groups were not involved in writing of the agreement, which demonstrates the disconnect between the WTO and the gender-based aims they claim to be pursuing.

Gender in current trade and investment agreements

In 2017 62, or one fifth, of all of the world's trade agreements included at least one provision explicitly referring to women and gender issues⁷¹. However, there are only four that have a whole chapter dedicated to gender, the first of which was in the agreement between Chile and Uruguay in 2016⁷². Then, the Chile-Canada⁷³ and Chile-Argentina⁷⁴ agreements followed in 2017, and Canada-Israel in 2018⁷⁵.

⁶⁶ "2017 Buenos Aires Declaration on Trade and Women's Economic Empowerment," 2017. WTO. https://www.wto.org/english/thewto_e/minist_e/mc11_e/genderdeclarationmc11_e.pdf

⁶⁷ "Women's Rights Groups call on Governments to reject the WTO Declaration on Women's Economic Empowerment," 2017. <http://craadoi-mada.com/wp-content/uploads/2018/02/Statement-on-WTO.pdf>

⁶⁸ "Women's Rights Groups call on Governments to reject the WTO Declaration on Women's Economic Empowerment," 2017.

⁶⁹ Sengupta, Ranja. "Addressing Gender and Trade Issues in Trade Agreements."

⁷⁰ Sengupta, Ranja. "Addressing Gender and Trade Issues in Trade Agreements."

⁷¹ "Speech by WTO DG Azevêdo: Workshop on Gender Considerations in Trade Agreements," March 28, 2019. https://www.wto.org/english/news_e/spra_e/spra253_e.htm.

⁷² "Policy Brief: The New Way Of Addressing Gender Equality Issues" p 3.

⁷³ "Appendix II – Chapter N bis–Trade and Gender." Canada-Chile Agreement. https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/chile-chili/fta-ale/2017_Amend_Modif-App2-Chap-N.aspx?lang=eng

Criticism to the new gender chapters of trade agreements

The primary objection to these gender chapters is that they do not remedy the damage caused by the rest of the agreement. UNCTAD offers several specific deficiencies of the extant gender chapters of trade agreements:

- “Specific gender-related standards that could affect trade under the agreements are not included and, instead, reference is made to the implementation of gender equality commitments included in global conventions.
- Milestones or specific goals are not included.
- Dispute settlement mechanisms do not apply to the trade and gender chapters.
- Harmonization of gender-related legislation between the parties is not mandated.
- Potential impacts of trade liberalization pursued under the agreements on women’s well-being and economic empowerment are not addressed.”⁷⁶

IV. Recommendations

There are many possible recommendations to reform both the multilateral and bilateral trade agreements as well as domestic trade policy. Ultimately, it is necessary to mainstream gender into each of these mechanisms to address the depth of inequality that women, and especially poor and marginalized women, face around the world⁷⁷. For the purposes of this paper, we will only address recommendations for reform to the multilateral and bilateral trade agreements, however domestic trade policy must be reformed for there to be policy coherence from the international to the national levels.

Multilateral reform at the WTO

Following the WTO’s 2017 Declaration on Trade and Women’s Economic Empowerment there may be an opportunity to push for mainstreaming of gender at the in this multilateral forum. It would be possible to potentially have reforms there then influence and guide regional and national trade policies to promote women’s economic participation and increase access to opportunities⁷⁸.

⁷⁴ Frohmann, Alicia. “An Opportunity for a Gender Equality Focus in Trade Policy?”

⁷⁵ Frohmann, Alicia. “An Opportunity for a Gender Equality Focus in Trade Policy?”

⁷⁶ Policy Brief: The New Way Of Addressing Gender Equality Issues” p 3-4.

⁷⁷ “Virtual Institute Teaching Material On Trade And Gender Volume 1,” 2014. UNCTAD, P26.
<https://vi.unctad.org/tag/vol1.html>

⁷⁸ Frohmann, Alicia. “An Opportunity for a Gender Equality Focus in Trade Policy?”

Specific measures that could be taken include a very overt gesture in the GATT by changing Article 20 to explicitly state that a state's efforts to protect human rights and women's rights as excludable to dispute settlement. This would more clearly protect a state's right to regulate public interest policies that support gender equality. In addition, the rule governing agricultural subsidies must be modified to limit the ability for any country to dump underpriced food crops in foreign markets. These subsidies distort market prices, often to the detriment of developing nations. The open letter to WTO speaking out against the 2017 Declaration also recommended that the WTO "allow for pro-poor public stock holding of food," and "ensure that states can fully utilize intellectual property flexibilities to provide access to medicines, seeds, technologies that advance women's human rights."⁷⁹

Agreeing to include gender chapters in bilateral and regional trade agreements

Negotiating gender into the agreement

While some nations may not have a gender equality agenda, those that do may be hesitant to request incorporating a gender chapter in a bilateral trade agreement. However, taking the example of the sustainable development chapters and environmental provisions that are now included in many trade agreements, it is completely possible to make this request and negotiate a chapter that is acceptable to both parties. Even if the gender elements do not fit the ideal guidelines, there are four very positive possible outcomes: raised awareness of gender issues in trade; increased participation of civil society in the discussion around trade agreements; increased ease of finding funds to finance gender equality-related activities; and improved gender-based cooperation between the signatories⁸⁰.

Bilateral capacity building assistance

As low-income countries sometimes have challenges adapting to the norms and public sector activities required of international trade, wealthier countries offer bilateral capacity building grants and concessional loans (official development assistance, ODA) to support adaption to new trade agreements. At the WTO, this project is called Aid for Trade, and as of 2015 there is a mandate to include gender equality this initiative⁸¹. If implemented, this would have a positive effect on gender outcomes in developing nations, as bilateral aid such as this has the potential to offer necessary skill-building expertise and assistance. Awaiting reform of the WTO, bilateral trade agreements can explicitly state in the text that gender should be mainstreamed into the development cooperation between the parties (as is the case for the EU-Mexico Global

⁷⁹ "Women's Rights Groups call on Governments to reject the WTO Declaration on Women's Economic Empowerment," 2017.

⁸⁰ "Mainstreaming gender in trade policy" p15

⁸¹ "Empowering Women through Aid for Trade." WTO. Accessed May 1, 2019.

https://www.wto.org/english/tratop_e/womenandtrade_e/empoweringwomen_e.htm.

Agreement).⁸² This has been done successfully in regards to environmental standards, so using the same format for gender issues is logical⁸³.

The Think 20 group has suggested, “G20 development donors should require reform in the legal framework governing women’s economic participation as a condition of official development assistance.⁸⁴ However, this kind of conditionality would be burdensome to developing countries, themselves in the infancy of implementing their own gender norms, and also restrict access to important funds to the poor women and families who the ODA would intend to help. An alternative would be to condition future disbursements of the ODA rather than the entire assistance package, so that initial disbursements may be used to attend to the legal reforms necessary to meet the conditional requirements.

Some agreements already call for gender-related capacity building assistance including EU-Mexico (2018)⁸⁵, EU-East African Community Economic Partnership Agreement (expected 2019), Dominican Republic-Central America-United States free trade agreement (2005), and the US-Peru Free Trade Agreement (2006)⁸⁶.

Case-by-case recommendations

There is no one-size-fits all approach to policy making on any topic, and gender aspects of trade are no different. Subsidies, services, government procurement and various other policies often produce country-specific gender inequalities.⁸⁷ The context of each country is unique and offers different opportunities and challenges. Thus, it is important to use the tools that have already been developed to assess gender gaps relating to trade and to generate a plan to mainstream gender into trade agreements.⁸⁸ Various tools include UN Women’s gender audit methodology⁸⁹, Marzia Fontana and Adrian Wood’s model for assessing the effects of trade on women⁹⁰, UNCTAD’s Trade and Gender Toolbox⁹¹, and the African Union’s Gender Scorecard⁹².

⁸² “Mainstreaming gender in trade policy” p15

⁸³ “Mainstreaming gender in trade policy” p15

⁸⁴ “T20 Summit Communiqué - Argentina,” September 2018. Think 20. <https://t20argentina.org/wp-content/uploads/2018/09/Communiqué-T20-Argentina.pdf>

⁸⁵ “Policy Brief: The New Way Of Addressing Gender Equality Issues In Trade Agreements: Is It A True Revolution?” October 2017. UNCTAD. P2. https://unctad.org/en/PublicationsLibrary/presspb2017d2_en.pdf

⁸⁶ <https://ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text>

⁸⁷ Frohmann, Alicia. “An Opportunity for a Gender Equality Focus in Trade Policy?”

⁸⁸ Frohmann, Alicia. “An Opportunity for a Gender Equality Focus in Trade Policy?”

⁸⁹ “Gender And Trade In Africa: Towards An Agenda For Gender Equity In Trade Policies, Agreements And Outcomes,” 2012. UN Women. http://www1.uneca.org/Portals/atpc/Documents/Mainstreaming_Gender/gender-and-trade-in-africa-draft_March2012.pdf

⁹⁰ Marzia Fontana and Adrian Wood. “Modeling the Effect of Trade on Women at Work and at Home,” 2000. World Development. https://www.pep-net.org/sites/pep-net.org/files/typo3doc/pdf/recommended_readings/WD_vol28_no7.pdf

⁹¹ “Trade and Gender Toolbox. How will the Economic Partnership Agreement Between the European Union and the East African Community Affect Kenyan Women?” 2017. UNCTAD. http://unctad.org/en/PublicationsLibrary/ditc2017d1_en.pdf

⁹² “African Gender Scorecard,” 2015. African Union C omission.

https://au.int/sites/default/files/documents/31260-doc-2015_auc_african_gender_scorecard_en.pdf

Specific recommendations for gender chapters

Overall needs of the chapter

The gender chapter must start with clear language specifying the particular discriminatory barriers that the chapter will address⁹³. Chapters must state outright that parties will set aside funds and create an ongoing funding mechanism to address those discriminatory issues⁹⁴. For oversight and assessments, agreements should specify that gender disaggregated data be captured⁹⁵.

Gender impact assessments

Write an obligation to produce ex-ante and ex-post gender impact assessments and human rights impact assessments into the agreements and adopt as standard operating procedure in domestic trade policy. To be useful, the ex-ante must be conducted during the negotiation phase, before the agreement has been adopted. Two guides exist to accomplish this: (a) MacLaren and Kolaric's model for monitoring gender impacts of trade⁹⁶, with adapted indicators listed in Annex II of Action Aid's "From Rhetoric to Rights: Toward Gender-Just Trade"⁹⁷; and (b) UNCTAD's guide to ex-ante gender analysis of impacts by trade agreements⁹⁸.

Inclusive and meaningful oversight mechanisms and timelines

Specify the review mechanism and timelines in the text of the agreement to create meaningful consultation local women's rights groups⁹⁹. The text should specify that local women's organizations should be empowered to monitor the implementation of the gender provisions of the trade agreements¹⁰⁰, and guaranteed the freedom to carry out their task in complete safety. Emphasis should be made to include local groups in order to gain insight from those operating on the ground, and those who know the local context and culture best. Agreements must specifically aim to build capacity of these groups. Consultation must be conducted in a fully transparent manner, publishing detailed meeting minutes online and otherwise making the monitoring process completely public and transparent.

Conditionality of the agreement on ratification

Use "essential clauses" that nullify the agreement if conditions aren't met, including for ratification of the Convention on the Elimination of All Forms of Discrimination Against Women

⁹³ Charles Kenny & Megan O'Donnell. "Making Global Trade More Gender-Inclusive"

⁹⁴ Charles Kenny & Megan O'Donnell. "Making Global Trade More Gender-Inclusive"

⁹⁵ Multiple sources, but also the Frohmann piece.

⁹⁶ MacLaren, B. and Kolaric, D. "Free Trade Agreements: Monitoring gender impacts" 2013. The North South Institute.

<http://www.nsi-ins.ca/wp-content/uploads/2013/03/2013-Gender-and-FTAs-Monitoring-Impacts-from-a-Gender-Perspective.pdf>

⁹⁷ Rachel Noble. "From Rhetoric To Rights: Towards Gender-Just Trade," 2018.

⁹⁸ "Implementing Gender-Aware Ex Ante Evaluations to Maximize the Benefits of Trade Reforms for Women," 2016. UNCTAD. http://unctad.org/en/PublicationsLibrary/presspb2016d7_en.pdf.

⁹⁹ Sharples, Marion. "Four Ways to Make Trade Work for Gender Equality."

¹⁰⁰ Charles Kenny & Megan O'Donnell. "Making Global Trade More Gender-Inclusive"

(CEDAW), and the Optional Protocol to CEDAW¹⁰¹. When it is finalized, make ratification of the UNHRC Binding Treaty for Multinationals an essential clause.

Another essential clause, similar to what was mentioned previously in regards to conditionality of ODA, would be to require that all laws that currently limit women's participation in the economy be eliminated (gender-based job restrictions, husband permission, having a bank account or being paid directly for her work, ability to own land, etc.), as a condition to the agreement being in force.

Maintain CEDAW obligations

All signatories must enact and implement laws and other measures to fulfill their CEDAW obligations¹⁰². Sanctions or fines with specific pre-determined amounts may be applied if any parties make these forms of discrimination legal again in the future.¹⁰³

Intellectual property rights

Exclude seed saving and medicine from the intellectual property rights clauses.

Land rights & foreigners

Specifically outline the parameters for foreign investors to buy and use local land, prohibiting the expropriation of poor farmers for the sake of these corporations¹⁰⁴.

Restrict gender apartheid imports

Using process and production methods (PPP) differentiation, restrict imports manufactured under "conditions of legally enforced discrimination."¹⁰⁵ For example, restrictions would be applied to goods that are produced in sectors that women are excluded from.

Dispute settlement mechanisms

In a best-case scenario, the investor-state dispute settlement mechanism should be removed entirely from the agreement text. This system is biased toward multinational corporations and a severe threat to both domestic institution building as well as public interest laws and policies¹⁰⁶. Should ISDS be included, then a carve out must be established so that no activities taken to combat gender inequality can be the subject of a dispute¹⁰⁷.

¹⁰¹ Lappin, Kate. "Free trade or women's rights ?"

¹⁰² Lappin, Kate. "Free trade or women's rights ?"

¹⁰³ According to some (see Kenny & O'Donnell footnote #6), past case law suggests that sanctions of this type might not be challenged at the WTO.

¹⁰⁴ Lappin, Kate. "Free trade or women's rights ?"

¹⁰⁵ Charles Kenny & Megan O'Donnell. "Making Global Trade More Gender-Inclusive" and reference to this report/proposal: <https://www.cgdev.org/publication/us-law-or-executive-order-combat-gender-apartheid-work-discriminatory-countries>

¹⁰⁶ Sharples, Marion. "Four Ways to Make Trade Work for Gender Equality."

¹⁰⁷ Lappin, Kate. "Free trade or women's rights ?"

In addition, a system must be created to hold multinationals accountable. The agreement can outline the remedies available to women who are victims of discrimination or other human rights violations resulting from the actions of foreign investors. These remedies should include civil and criminal sanctions¹⁰⁸.

Limitations to these recommendations

Trade liberalization, and specifically bilateral agreements exist specifically to reduce trade barriers. By adding the recommendations outline above to an agreement, we are simultaneously lowering barriers with the agreement and raising them with these conditions and obligations regarding gender equality. For proponents of trade agreements, this is counterintuitive, and thus further analysis must be conducted to develop recommendations for convincing trade negotiators and country leaders to move policies in this direction.

Corporations wishing to operate in developing countries can benefit from low wages abroad, but in particular they can reduce costs even further by taking advantage of the gender wage gap. This is particularly useful in labor-intensive industries. Adding an enforceable equal pay component to FTAs would therefore be to the direct detriment to the foreign investors bottom line¹⁰⁹, likely leading to fierce opposition from corporate and industry lobbies.

Conclusion

With Chile and Canada taking leadership roles in pushing for gender equality chapters in their bilateral trade agreements, they are setting the standard for the rest of the world to follow. There are a number of ways countries can take a gender perspective to improving trade policies, and the best thing that can be done is gender mainstreaming in trade and investment policy. First, countries must conduct country and regional-level gender assessments to identify the impacts of trade on gender, and to identify the gaps and opportunities for gender equality. Ultimately “all politics is local,” meaning that the effect of a bilateral agreement or multilateral agreement is limited by the pre-existing policies at the local and national levels. Whatever policies or customs the country has in place will have the final say on progress toward gender equality¹¹⁰. Trade agreements though, can influence the local politics and countries around the world can demand gender equality be incorporated into trade agreements.

Arancha González, the Executive Director of ITC said in March 2019, “Although trade policies should be used to help empower women, this is not a panacea because policy makers cannot

¹⁰⁸ Lappin, Kate. “Free trade or women’s rights ?”

¹⁰⁹ “Virtual Institute Teaching Material On Trade And Gender,” 2014. UNCTAD. p68.
https://unctad.org/en/PublicationsLibrary/gds2014d1_en.pdf

¹¹⁰ “Mainstreaming gender in trade policy” P3

address all gender issues through trade”¹¹¹, however this diminishes the impact trade agreements could potentially and already have on gender equality. Yes, trade is not a panacea, but trade and the highly enforceable nature of the agreements may have a better chance at pushing for gender equality where difficult-to-enforce international conventions have fallen short.

¹¹¹ “DG Azevêdo Highlights Role of Trade Agreements in Enhancing Women’s Empowerment,” March 28, 2019. https://www.wto.org/english/news_e/news19_e/women_28mar19_e.htm.

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