

## Measuring the Gender-Responsiveness of Free Trade Agreements: Using a Self-Evaluation Maturity Framework

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### Abstract

In the recent years, we have witnessed a sharp increase in the number of free trade agreements (FTAs) with gender-related provisions. The key champions of this evolution include Canada, Chile, New Zealand, Australia and Uruguay. These countries have proposed a new paradigm, i.e., a paradigm where FTAs are considered vehicles to achieving the economic empowerment of women. This trend is spreading like a wild-fire to other parts of the world. More and more countries are expressing their interest in ensuring that their FTAs are gender-responsive and not simply gender-neutral or gender-blind in nature. In March 2018 for example, the majority of members in the EU Parliament approved a motion called ‘Gender in EU Trade Agreements’.<sup>1</sup> This motion states that any future trade agreements that EU joins must include a chapter on gender issues. The evolution of FTAs in this respect is further fueled by the WTO’s Joint Declaration on Trade and Women’s Economic Empowerment. More recently, in July 2019, many donor and recipient countries at the Global Review of WTO’s Aid for Trade have jointly voiced their willingness to incorporate gender concerns in their trade agendas and agreements. Many other developments have followed this trail. The momentum is on, and we can expect many more agreements in the future to include stand-alone chapters or exclusive provisions on gender issues. This paper is an attempt to tap into this ongoing momentum, as it puts forward a newly-designed self-evaluation maturity framework to measure gender-responsiveness of trade agreements. The proposed framework is to help policy-makers and negotiators to: (i) measure gender-responsiveness of trade agreements; (ii) identify areas where agreements needs critical improvements; and (iii) receive recommendations to improve the gender-fabric of trade agreements that they are negotiating or have already negotiated. This is the first academic intervention presenting this type of gender-responsiveness model for trade agreements.

**Keywords:** Gender-Responsiveness, Trade Agreements, Maturity Framework, Economic Empowerment, Women

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<sup>1</sup> WIDE+, ‘European Parliament Adopts Resolution Gender in EU Trade Agreements’, <https://wideplus.org/2018/03/13/european-parliament-adopted-resolution-gender-in-eu-trade-agreements/> (accessed 14 August 2019)

## **Introduction: Catalyzing Women Empowerment through Free Trade Agreements**

Gone are the days when gender inequality was viewed as a purely ethical or moral concern; it is now recognized as a significant challenge to economic development. Achieving women's economic empowerment has now become a compelling business case. The world economy suffers when women – who account for one half of the world's working-age population – are not included in the economy and are impeded from contributing to economic growth and development. Inclusive growth is the cornerstone of sustainable development.<sup>2</sup> In the words of Kofi Annan, 'there is no tool for development more effective than the empowerment of women and girls.'<sup>3</sup> Multiple interventions are required to achieve women's economic empowerment, and international trade is arguably one of the required and effective interventions in this respect.

Women's empowerment and international trade share an intricate and complex relationship as the former can be achieved through an effective regulation of the latter.<sup>4</sup> The WTO's Joint Declaration on Trade and Women's Economic Empowerment reinforces this view. The Declaration, signed in December 2017 at Buenos Aires by almost seventy percent of WTO membership, reaffirms that 'international trade and investment are engines of economic growth for both developing and developed countries, and that improving women's access to opportunities and removing barriers to their participation in national and international economies contributes to sustainable economic development'.<sup>5</sup> The Declaration seeks to build a framework that can guide Members to adopt or adapt gender-responsive trade policies to eliminate barriers to trade for women. This multilateral initiative aligns with and complements the UN Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) 1979<sup>6</sup> and Goal 5 of the Sustainable Development Goals<sup>7</sup> in the United Nations 2030 Agenda for Sustainable Development.

This is a promising development in the multilateral trading system, as it marks a concrete starting point to future deliberations and discussions on how trade can accommodate gender justice

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<sup>2</sup> A Alesina and D Rodrick, 'Distributive Politics and Economic Growth', 109(2) *The Quarterly Journal of Economics* (1994) 465; Ricardo Hausmann, Laura D. Tyson, Saadia Zahidi, *The Global Gender Gap Report* (World Economic Forum, 2010), [http://www3.weforum.org/docs/WEF\\_GenderGap\\_Report\\_2010.pdf](http://www3.weforum.org/docs/WEF_GenderGap_Report_2010.pdf) (accessed 14 August 2019)

<sup>3</sup> United Nations Press Release (WOM/1586, 10 November 2006), <https://www.un.org/press/en/2006/wom1586.doc.htm> (accessed 14 August 2019)

<sup>4</sup> Anna Hutchens, 'Empowering Women through Fair Trade? Lessons from Asia', 31(3) *Third World Quarterly* (2010) 449

<sup>5</sup> Joint Declaration on Trade and Women's Economic Empowerment, signed at WTO Ministerial Conference (Buenos Aires, December 2017) [hereinafter referred to as 'Declaration']

<sup>6</sup> Convention on the Elimination of All Forms of Discrimination against Women, Adopted and opened for signature, ratification and accession by United Nations General Assembly (resolution 34/180) (New York, 18 December 1979)

<sup>7</sup> Transforming Our World: The 2030 Agenda For Sustainable Development, United Nations (A/RES/70/1) (New York, 25 to 27 September 2015)

concerns.<sup>8</sup> This Declaration is an anchoring commitment agreed upon in a multilateral setting. Symbolically, it is quite empowering. Yet, we cannot ignore its limitations. First, the declaration is completely non-binding in nature. Neither does it impose any obligation on signing members to undertake actions, nor does it confer any right on any member to justify an otherwise WTO-inconsistent measure. Second, it seeks to prepare a framework to guide its members to reformulate their trade policies in a gender-responsive manner; yet, it does not contain any action plan or proposed measures or strategies for doing so. Neither does the declaration provide any guidance to its signatory members on how to ratify this instrument in their domestic laws and procedures. Third, it has no enforcement or implementation mechanism, and hence is completely left to the good-will intentions and best-efforts of the signatory members. Fourth, the declaration is not universally accepted, as almost one-third of the WTO Membership has refused to join this endeavor.

Critiques have called the declaration a ‘Trojan Horse’, which may bring in more contentious issues to the already stalled multilateral trade negotiations<sup>9</sup>, as it can ‘allow developed countries to use the advantage of more forward gender policies to obstruct exports from underdeveloped nations’.<sup>10</sup> In addition, non-signatory countries have argued that WTO is not the appropriate forum to discuss gender issues as ‘gender does not relate to trade and hence WTO should refrain from bringing in non-trade issues’ on its agenda.<sup>11</sup> Many critics have therefore questioned the use of the WTO framework to generate social changes such as empowerment of women. There seems to be a greater unease among WTO membership towards the inclusion of gender issues in the multilateral trading agenda as compared to the inclusion of other new generation issues such as digital trade, e-commerce, labor and intellectual property. These observations show that the WTO’s multilateral space has various limitations that impede its efforts to accommodate gender concerns. The multilateral trading system may not be fully prepared to sign onto these issues, but the recent trends show a very important role that FTAs can play in this respect.

Today, we are witnessing a sudden upsurge of trade agreements that are carving out space for gender issues in their trade agendas. A new generation of free trade agreements is increasingly incorporating provisions and chapters on trade and gender. Pioneering FTAs in this respect are

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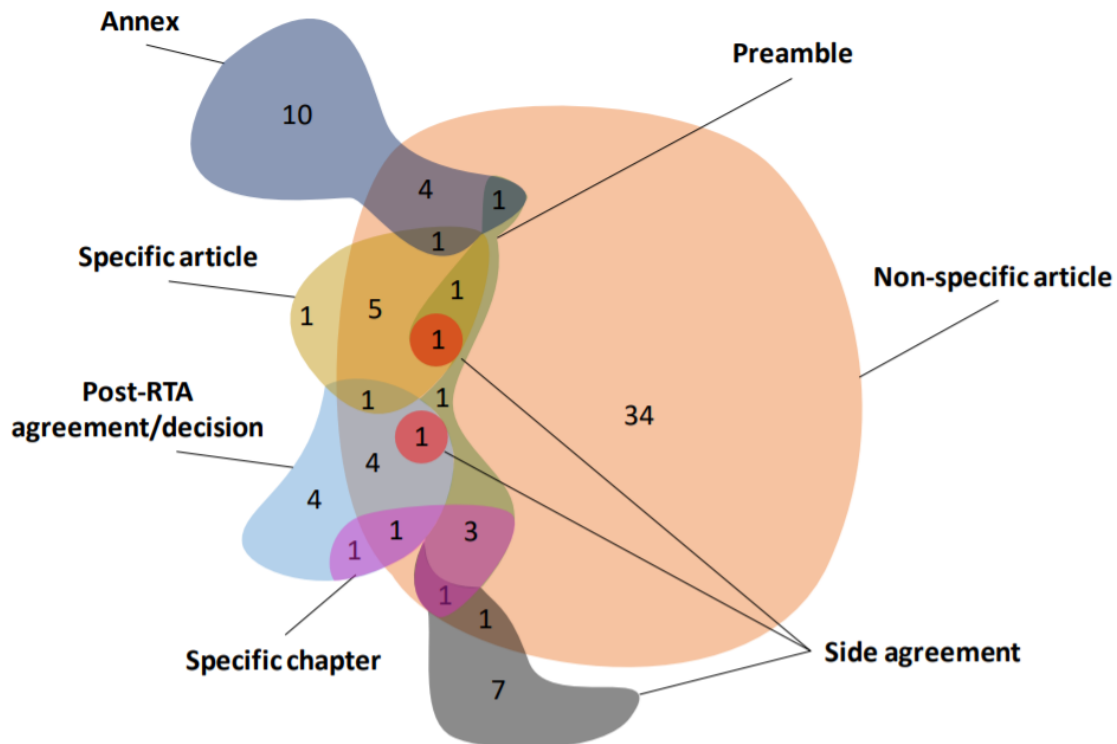
<sup>8</sup> According to UN Women, gender is a socio-cultural concept defined as ‘the social attributes and opportunities associated with being male and female and the relationships between women and men and girls and boys, as well as the relations between women and those between men’. [Haifa Bensalem, ‘Gender as Included in Bilateral and Multi-Party Trade and Integration Agreements’, CUTS International Research Study (2017) 7, <http://www.cutsgeneva.org/pdf/STUDY%20%20Gender%20and%20Trade.pdf> (accessed 12 August 2019)]

<sup>9</sup> Roberto Bissio, ‘Is “gender” a Trojan horse to introduce new issues at WTO?’ (Third World Network, 11 December 2017), <https://twnetwork.org/wto/%E2%80%9Cgender%E2%80%9D-trojan-horse-introduce-new-issues-wto>

<sup>10</sup> Ananya 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/>

<sup>11</sup> Suresh Prabhu, Indian Minister of Industry and Commerce (Indian Press Conference, WTO Ministerial Conference, Buenos Aires, 11 December 2017)

signed between Chile-Uruguay, Chile-Canada, Chile-Argentina and Canada-Israel.<sup>12</sup> While the chapters on gender are quite similar in these agreements, FTAs in general have embraced gender issues in a very diverse manner.<sup>13</sup> Provisions relating to gender are drafted in different ways. Some are drafted in a permissive language coupled with best-endeavor expressions; others are either drafted with affirmative language or firmer styles including the use of obligatory expressions. These provisions are also found in different parts of the FTAs. They can be found in the agreement's preamble, stand-alone chapters, side agreements, specific provisions, cross-cutting provisions or chapters, or even annexes. The figure below illustrates the frequency with which these provisions are found in different parts of an agreement.



**Figure 1: Structure of gender-related provisions in Regional Trade Agreements (WTO Study 2018)**

\*Source: This illustration is taken from the WTO Staff Working Paper Series 2018.<sup>14</sup>

This Figure shows that most of the gender-related provisions are found in non-specific articles.

<sup>12</sup> Chile Uruguay Free Trade Agreement (Chile Uruguay FTA) (2016); Chile Canada Free Trade Agreement (CCFTA) (2019); Chile Argentina Free Trade Agreement (Chile Argentina FTA) (2019); Canada Israel Free Trade Agreement (CIFTA) (2018)

<sup>13</sup> For more information, see Alicia Frohmann, 'Gender Equality and Trade Policy', World Trade Institute Working Paper No. 24/2017 (December 2017), [https://www.wti.org/media/filer\\_public/8b/a8/8ba88d03-1a2b-4311-af6a-629d9997c54c/working\\_paper\\_no\\_24\\_2017\\_frohmann.pdf](https://www.wti.org/media/filer_public/8b/a8/8ba88d03-1a2b-4311-af6a-629d9997c54c/working_paper_no_24_2017_frohmann.pdf) (accessed 13 August 2019)

<sup>14</sup> Jose-Antonio Monteiro, 'Gender-Related Provisions in regional Trade Agreements', WTO Economic Research and Statistics Division, Staff Working Paper ERSD-2018-15 (18 December 2018), at page 15

Non-specific articles are those provisions which indirectly consider gender perspective within cross-cutting issues such as labor, intellectual property and agriculture. These provisions also include articles that refer to a broad range of social issues including gender.<sup>15</sup> In addition, about 16 agreements have included gender provisions in their side agreements.<sup>16</sup> Another interesting finding as seen from this figure is that very few FTAs have incorporated dedicated chapters or provisions directly related to a gender perspective.<sup>17</sup> These findings show that even though FTAs in recent years are including more and more provisions on gender, this perspective is often sidelined by the way these provisions are positioned in the agreements. Just a handful of agreements have endeavored to mainstream gender by including these provisions in a stand-alone chapter or as specific and explicit gender provisions.<sup>18</sup> The infrequent mainstreaming of gender perspective reflects resistance against and/or lack of political willingness towards this issue.

Moreover, these provisions range from a simple demonstration of awareness that gender issues need to be taken into consideration in trade agendas, to legally-binding obligations and enforcement mechanisms that mandate the implementation of gender provisions. At one end of the spectrum, we have agreements that merely show some awareness in this respect by acknowledging the importance of gender concerns as a social value amongst other non-economic issues. For example, Article 9.3 of Chile-Vietnam FTA demonstrates some awareness by providing that gender will be considered as one of the issues in the fields of cooperation and capacity building.<sup>19</sup> A relatively more gender-responsive agreement is the Cotonou Agreement, which is an economic partnership agreement between the European Union and the ACP countries (Africa, Caribbean and Pacific). It explicitly acknowledges the importance of gender equality for economic development.<sup>20</sup> The Chile-Uruguay and Chile-Canada agreements go a step further. In addition to acknowledging the importance of gender issues for economic development and international trade, they provide a list of cooperation activities and institutional mechanisms that can enable members to carry out trade in a gender-sensitive manner.<sup>21</sup> At the other end of the spectrum, we have the Israel-Canada FTA which is perhaps the most advanced FTA in this respect. In addition to providing for explicit acknowledgments, affirmations of members' commitment to work in this respect, list of cooperation activities and institutions to make trade more inclusive, it for the first time in an FTA subjects gender-related provisions to a

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<sup>15</sup> For example, Chile-Uruguay FTA (Chapter 11.9/6 on Labour); USMCA (Article 14.17 on corporate social responsibility, Article 23.9 on sex-based discrimination in the workplace, Article 25.2 on investment and SMEs)

<sup>16</sup> For example, Labour side agreement (Canada-Colombia FTA, Annex 1); Labour side agreement (Canada-Costa Rica FTA, Annex 1 and 3)

<sup>17</sup> For example, Canada-Chile FTA (Appendix II – “Trade and Gender” Chapter); Modernized Canada-Israel FTA (Chapter 13 – “Trade and Gender” Chapter)

<sup>18</sup> See note 12

<sup>19</sup> Article 9.3, Chile Vietnam FTA

<sup>20</sup> Article 31 of the Agreement underscores the importance of adopting women-favoring measures and contemplates for its members ‘a gender sensitive approach at all levels of development cooperation, including macroeconomic policies, strategies and operations.’

<sup>21</sup> See CIFTA Article 13.3 and 13.4 and CCFTA Article N *bis*-03 and N *bis*-04

dispute settlement mechanism with a binding yet non-compulsory jurisdiction.<sup>22</sup>

What has happened in recent years that led to this evolution of new generation FTAs? This change can be attributed to a number of factors.<sup>23</sup> More women have recently acquired decision-making roles at senior levels in trade policy-making and trade negotiations. More women entrepreneurs are now engaged in cross-border trade. In addition, civil society and advocacy groups, together with scholars, have showcased the negative impacts trade can have on gender situations in various countries.<sup>24</sup> This has led to the realization that it is important to monitor the gender dimension of trade policies and negotiations. Finally, recent studies have shown that economic growth and development largely depend on the economic empowerment of women and their inclusion in trade and commerce. A 2015 Report by the McKinsey Global Institute has shown that advancing gender equality could add nearly USD 28 trillion to global annual GDP.<sup>25</sup> These findings have provoked significant discussion and deliberations at the international as well as national levels.

It is no surprise that the countries which have more readily signed FTAs with gender provisions (such as Canada and Chile) score high on the women business and law global index (WBL). On the other hand, the countries which are yet to sign a single agreement with gender-related provisions (many in the Middle East or Africa) score low on this index.<sup>26</sup> This demonstrates that the extent to which FTAs embrace gender concerns largely relies on the political willingness of the administrations in power. This can best be exemplified by the Chilean example, wherein gender became an explicit component of Chile's trade policy during Michelle Bachelet's second administration from 2014-2018.<sup>27</sup> A country's cultural and religious setting, which may assign a subordinate role to females, can also dictate and define the level of gender-responsiveness its

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<sup>22</sup> See CIFTA Article 13.6 subparagraph 2

<sup>23</sup> Some of these factors are enlisted in Simonetta Zarilli, 'The gender chapters in trade agreements: A true revolution?' (ICTSD, 14 November 2017), <http://www.ictsd.org/opinion/the-gender-chapters-in-trade-agreements-a-true-revolution> (accessed 13 August 2019); UNCTAD, 'The New Way of Addressing Gender Equality Issues In Trade Agreements: Is It A True Revolution' (Policy Brief No. 53, October 2017), [https://unctad.org/en/PublicationsLibrary/presspb2017d2\\_en.pdf](https://unctad.org/en/PublicationsLibrary/presspb2017d2_en.pdf) (accessed 13 August 2019)

<sup>24</sup> N Cagatay, *Trade, Gender and Poverty* (New York: UNDP, 2011); Kate Lappin, 'Free Trade or Women's Rights?' (Strategic Review, 12 January 2018), <https://worldview.stratfor.com/article/free-trade-or-womens-rights> (accessed 13 August 2019)

<sup>25</sup> McKinsey Global Institute, 'The Power of Parity: How Advancing Women's Equality Can Add \$12 Trillion to Global Growth' (September 2015)

<sup>26</sup> The WBL as calculated by the World Bank is based on several country-wise indicators such as women-friendly laws and procedures relating to mobility, employment, remuneration, marriage, motherhood, entrepreneurship and access to finance. World Bank Group, 'Women, Business and the Law 2019: A Decade of Reform' (27 February 2019), <http://pubdocs.worldbank.org/en/702301554216687135/WBL-DECADE-OF-REFORM-2019-WEB-04-01.pdf> (accessed 13 August 2019)

<sup>27</sup> Dorotea Lopez, Felope Munoz, Javiera Caceres, 'Gender Inclusion in Chilean Free Trade Agreements' (Working Paper), page 14 [on record with the author]; Bachelet's administration is widely known for its works and accomplishments relating to gender issues. For more information, see Linda Stevenson, 'The Bachelet Effect on Gender-Equity Policies' 39(4) *Latin American Perspectives* (2012) 129

trade agreements and trade policies can achieve.<sup>28</sup> These factors explain at least in part the varying levels of gender responsiveness in different FTAs signed by different countries.

The indicator of “gender responsiveness” should not be confused with a measure to assess the impact of an agreement on women’s empowerment or gender justice, or as a tool to assess whether an agreement will have positive or negative impact on the gender situation in a given country. Gender-responsiveness is merely an indicator which evaluates how sensitive, or informed, or committed the provisions of a trade agreement are to issues relating to gender. This is the meaning of the term “gender responsiveness” in this paper, and it is sometimes used interchangeably with other expressions such as “gender sensitivity”, “gender commitment” and “gender consideration”.

The levels of gender-responsiveness can differ significantly in trade agreements. This paper is not advocating that all countries should consider forming new or revising their existing FTAs in a gender-responsive manner. It also does not argue that all FTAs in the future should optimize gender-responsiveness. It is not possible to formulate an ideal level of gender-consideration that every FTA should attain. The incorporation of a gender perspective needs to be tailored to the economic, political and cultural contexts of the countries involved.<sup>29</sup> This paper seeks to propose a method by which countries can measure the gender responsiveness of their FTAs, and using a diagnostic tool, countries can then develop a roadmap to achieve the desired level of gender maturity for their FTAs in accordance with their needs, willingness and resources.

In this paper, the author puts forward a newly-designed self-evaluation maturity framework to measure gender-responsiveness of trade agreements. The proposed framework can help policy-makers and negotiators to: (i) measure gender-responsiveness of trade agreements; (ii) identify the areas where such agreements need critical improvement; and (iii) receive recommendations on how to improve the gender-fabric of trade agreements they are negotiating or have already negotiated. This is the first academic intervention that presents a model in this respect. The paper in the following section explains this framework and the five defining benchmarks it is based upon.

### **The Self-Evaluation Maturity Framework: Explanation and Analysis**

The Maturity Framework is an instrument to measure certain capabilities and to identify appropriate actions to increase such chosen capabilities.<sup>30</sup> The application areas of these

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<sup>28</sup> Jeni Klugman and Elisa Gamberoni, ‘Gender and Trade: A Fresh Look at the Evidence’ (International Trade Forum Magazine, 1 July 2012), <http://www.tradeforum.org/Gender-and-trade-A-fresh-look-at-the-evidence/> (accessed 15 August 2019)

<sup>29</sup> UN Women Watch, ‘Gender Equality & Trade Policy’ (Resource Paper, 2011), [https://www.un.org/womenwatch/feature/trade/gender\\_equality\\_and\\_trade\\_policy.pdf](https://www.un.org/womenwatch/feature/trade/gender_equality_and_trade_policy.pdf) (accessed 14 August 2019)

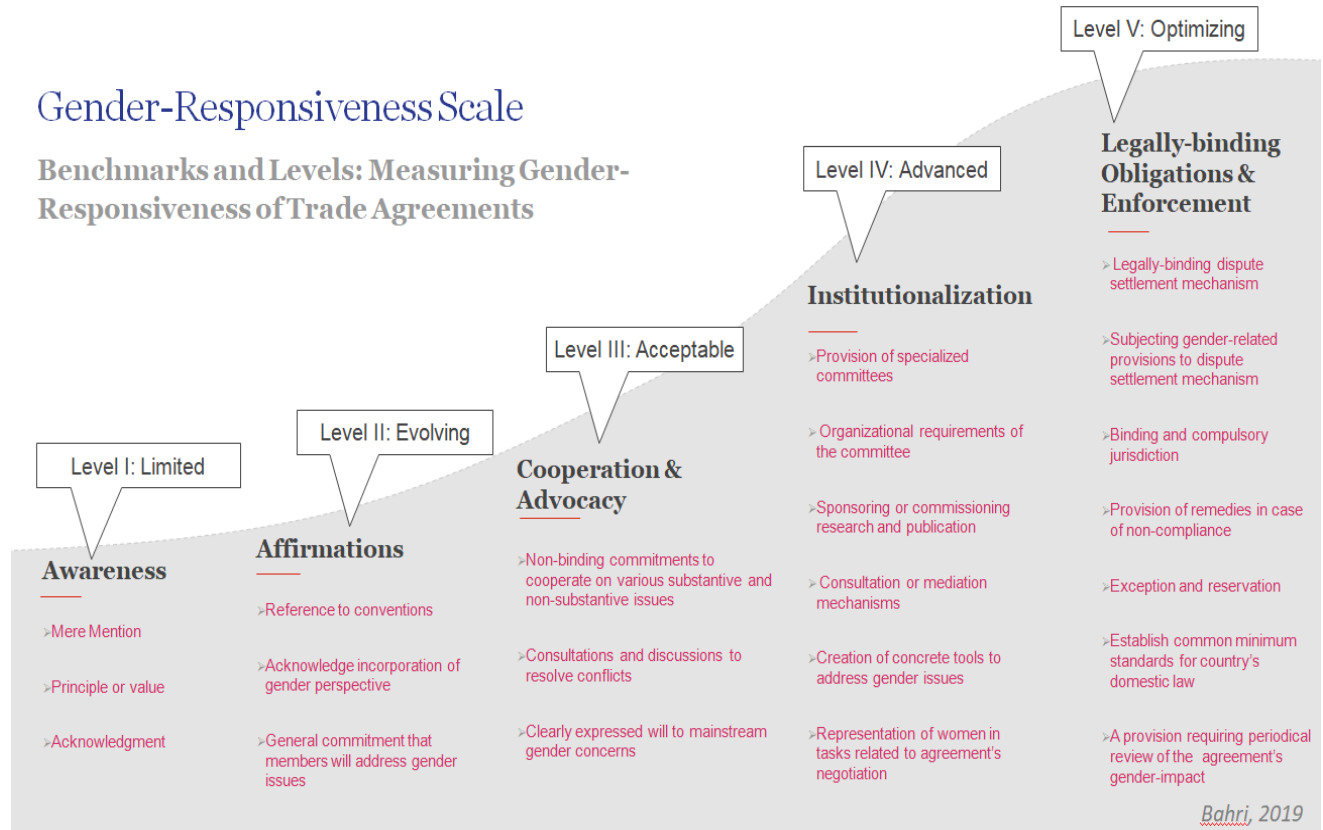
<sup>30</sup> Michael Kohlegger, Ronald Maier, Stefan Thalmann, ‘Understanding Maturity Models Results of a Structured

frameworks typically range from cognitive science to business applications and engineering but are seldom used or applied in international law and relations studies. This paper attempts to bring this methodology to international trade, as it proposes a maturity framework that can measure the level of gender-responsiveness with an approach based on three principles: qualitative, cumulative and progressive .

The approach is *qualitative* because it focuses on assessing the gender-fabric of FTAs by identifying characteristics that incorporate gender perspective, as opposed to measuring quantitative variables such as the frequency with which gender-specific terminology is used in a trade agreement. It does so with the help of five qualitative benchmarks. The model is *cumulative* because it operates on a point-based system which functions with the help of a survey questionnaire. Each question has multiple-choice answers; each multiple-choice answer carries a different impact factor. The scores in this point-based system are aggregated, and the final score reflects whether and to what extent an agreement satisfies each of the five benchmarks. It is a *progressive* approach because the benchmarks are sequenced in an impact-wise manner. As you move from one benchmark to the next, positive responses to the survey questions will have an exponential impact on the agreement's maturity level. Likewise, requirements to achieve the higher levels of gender-responsiveness become more and more complex when you move from the first two benchmarks to the next two benchmarks, and finally to the last benchmark.

The benchmarks and their requirements are not compatible with the MECE principle (MECE: Mutually Exclusive and Collectivity Exhaustive). These benchmarks are not mutually exclusive as they can overlap and converge in several situations. The defining elements of these benchmarks are not collectivity exhaustive as it is possible to identify and incorporate new elements to the existing list. It is important for a framework to be comprehensive; however, all frameworks must draw a balance between their comprehensiveness and manageability. The more comprehensive a framework becomes, the less manageable it gets. The more manageable a framework, the less comprehensive it will become. The proposed framework strikes a balance between being comprehensive and manageable. Owing to this reason, the benchmarks and their elements are not fully comprehensive and exhaustive in nature. Let us now take a look at the following illustration of the proposed framework.





**Figure 2: Gender-Responsiveness Maturity Framework**

As Figure 2 illustrates, five benchmarks are used to measure the gender-responsiveness of FTAs: Awareness, Affirmations, Cooperation & Advocacy, Institutionalization and Legally-binding Obligations & Enforcement. These benchmarks have been identified after carrying out a structured content analysis of a variety of FTAs. The analysis comprised several steps. First, selected FTAs with gender-related provisions were read. Then, explicit and implicit gender-related provisions in the selected FTAs were identified.<sup>31</sup> Subsequently, these provisions were analyzed. Based on this analysis, five benchmarks were articulated along with their defining elements. The five benchmarks establish five different standards for gender-responsiveness; they correspond directly to five levels of maturity which are: limited, evolving, acceptable, advanced, and optimizing.

<sup>31</sup> The agreements mentioned in the recent WTO study on gender and regional trade agreements were read and analyzed for this content analysis. In this study, explicit gender-related provisions are those which use the terms relating to gender, women, female or a similar expression in the provision in an explicit manner. Implicit gender-related provisions are those which, without making any explicit reference to gender, address the issues of gender in an indirect manner through human rights, vulnerable groups focus, labor discrimination, corporate social responsibility, intellectual property rights and small and medium enterprises. [Jose-Antonio Monteiro, 'Gender-Related Provisions in regional Trade Agreements', WTO Economic Research and Statistics Division, Staff Working Paper ERSD-2018-15, 18 December 2018]

“Awareness” stands at the first level, which corresponds with “limited” gender-responsiveness on the maturity scale. As a given FTA moves up the scale to other benchmarks, its level of gender-responsiveness gradually increases. This means that as agreements satisfies the benchmarks, they move up on the maturity scale. An agreement which satisfies the second benchmark of “affirmations” will have higher gender-responsiveness than an agreement that satisfy the first benchmark of “awareness”. This progression goes on until the fifth benchmark, which optimizes gender-responsiveness. An agreement that satisfies the defining elements of the fifth benchmark – “legally-binding obligations and enforcement” – reflects the highest level of gender-responsiveness in this scale. Let us take a closer look at what each of these benchmarks mean and the elements that define them with the help of some examples.

### ***Benchmark I: Awareness***

Trade agreements that merely have awareness-based provisions find themselves at the “limited” level of gender-responsiveness as they are the least gender-responsive in nature. These provisions can be found in the form of having a mere mention of the term women/female/girl/gender (or a related term) in the text, or an acknowledgement of the role of women in trade and development. In such an agreement, it is also possible to find some mention of gender concerns as a social, human rights or moral value. Several existing FTAs satisfy these elements. For example, the Side Agreement on Labor Cooperation between Honduras and Canada contemplates a list of areas on which the two countries may be able to cooperate in the future, and gender is included as one of the issues in this list.<sup>32</sup> Another example of this benchmark is the Australia - Peru FTA, which not only mentions the term “gender”, it also acknowledges the role of women in trade and development.<sup>33</sup>

### ***Benchmark II: Affirmations***

At this level, the agreements in addition of being aware of gender concerns should recognize or affirm the importance of a variety of gender-responsive objectives of foreign trade such as achieving women’s empowerment, reduction of gender gaps and gender-based discrimination, and reduction of barriers that women face in trade and commerce. Furthermore, the agreements can reaffirm their commitments under international instruments such as conventions, treaties, international labor instruments and UN sustainable development goals. They can also contain general commitments to address gender issues without providing for any concrete tools of implementation. The agreements satisfying the elements from this (and the previous) benchmark have the maturity level of “evolving” gender-responsiveness.

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<sup>32</sup> Agreement on Labor Cooperation between Canada and Honduras, Annex 1: Cooperative Activities, paragraph 1 subparagraph (i) (2014)

<sup>33</sup> Peru and Australia Free Trade Agreement (PAFTA), Article 22.4: Women and Economic Growth (2018)

Several existing FTAs satisfy this benchmark. For example, Argentina – Chile FTA provides for an explicit mention of Goal 5 of the Sustainable Development Goals in the United Nations 2030 Agenda for Sustainable Development.<sup>34</sup> The parties in this agreement also reaffirm their commitments under other international instruments such as the CEDAW 1979.<sup>35</sup> The parties to this FTA also ‘recognize the importance of promoting gender equality policies and practices, improving capacities and developing the potential of Parties in this area, including non-governmental sectors, to advance equality of rights, treatment and opportunities between men and women and in eliminating all forms of discrimination against women’.<sup>36</sup> Moreover, the parties ‘recognize the importance of incorporating a gender perspective in promoting inclusive economic growth and the key role that gender policies can play in achieving greater sustainable development’.<sup>37</sup>

### ***Benchmark III: Cooperation & Advocacy***

The agreements at this level demonstrate the members’ commitments to cooperate nationally and internationally on various issues relating to gender and the overall empowerment of women. Provisions in such agreements can be found in different forms, including the following: (i) Inclusion of non-binding commitments to cooperate on various cross-cutting issues that benefit women as employees, consumers and entrepreneurs. These provisions can include areas such as labor, MSMEs, government procurement, agriculture, services and IPR; (ii) Inclusion of gender-explicit non-binding commitments to cooperate on aspects that can empower women in multiple ways including skill enhancement, leadership and entrepreneurship development, access to education, bridging digital divide, access to finance, development of networks and alliances; (iii) All activities are mentioned as potential areas of cooperation and dependent on the country’s willingness and resources to implement them; (iv) Provision of non-binding and non-compulsory consultations and discussions forums to resolve differences or disputes arising from the interpretation or implementation of gender-focused provisions; and (v) Mainstreaming gender concerns with inclusion of gender-specific provisions in preamble, or a stand-alone chapter, or multiple explicit and implicit provisions, or a side agreement focused on gender and trade, or frequent use of gender-specific terminology. The agreements that demonstrate these elements (together with the elements from the previous benchmarks) attain the “acceptable” level of gender-responsiveness.

The USMCA by way of an example partially achieves this level as it provides for non-binding commitments to cooperate on various substantive cross-cutting issues that can benefit women

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<sup>34</sup> Argentina and Chile Free Trade Agreement, Article 15.1 paragraph 2 (2019)

<sup>35</sup> Ibid, Article 15.2

<sup>36</sup> Ibid, Article 15.1 paragraph 2

<sup>37</sup> Ibid, Article 15.1 paragraph 1

such as labor<sup>38</sup>, agriculture<sup>39</sup>, SMEs<sup>40</sup> and IPR<sup>41</sup>. In addition, it also provides an option to its parties to work on a number of cooperation activities to improve the working conditions for women in employment.<sup>42</sup> However, these activities focus on the role of women as an employee or labor. The Canada – Chile FTA advances further in this respect, as the list of cooperation activities provided in this agreement goes beyond the role of women as employees or labor.<sup>43</sup> The cooperation activities listed in this FTA envisage women as entrepreneurs, leaders, policy-makers, consumers, scientists, technologists and engineers.<sup>44</sup> It imposes a non-binding commitment on the parties to ‘promote women’s full participation and advancement in society by encouraging capacity-building and skills enhancement of women at work, in business, and at senior levels in all sectors of society (including on corporate boards)’.<sup>45</sup> It also contemplates other useful actions such as ‘promoting financial inclusion and education as well as promoting access to financing and financial assistance’, ‘advancing women’s leadership and developing women’s networks’, and ‘promoting female entrepreneurship’.<sup>46</sup> In this respect, this FTA is more of an exception, as most FTAs have only considered cooperation focused on traditional roles for women.

We need to change the focus areas of such cooperation activities in future FTAs, so they can encourage women to undertake studies in STEM and skill-based training for high-paid career opportunities such as aerospace, rail, IT, system design, engineering, business services, leadership roles and legal profession.<sup>47</sup> These new roles will also enable women to move away from the traditional stereotype jobs that the societies have imposed on them such as farming, nursing or household responsibilities. The provisions on cooperation have another problem: all FTAs so far have left their implementation to the willingness and available resources that concerned parties may have. For example, Article N bis-03.6 of Canada – Chile FTA explicitly states that the ‘priorities for cooperation activities shall be decided by the Parties based on their interests and available resources’.<sup>48</sup> Other new generation FTAs have also incorporated similar provisions.<sup>49</sup> Hence, however lengthy the list of cooperation activities may appear to be in the FTAs, their implementation has so far been left at the mercy of the concerned parties.

Even though it may not be viable or affordable to include binding commitments in respect of all or most of the areas mentioned in the cooperation activities, FTAs can endeavor to include

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<sup>38</sup> United States-Mexico-Canada Agreement (USMCA), Chapter 23: Labor (2018)

<sup>39</sup> Ibid, Chapter 3: Agriculture

<sup>40</sup> Ibid, Chapter 25: Small and Medium Sized Enterprises

<sup>41</sup> Ibid, Chapter 20: Intellectual Property

<sup>42</sup> Ibid, Article 23.12 paragraph 5 subparagraphs (j) and (l)

<sup>43</sup> See CCFTA Article N bis-03 paragraph 4

<sup>44</sup> Ibid

<sup>45</sup> Ibid, subparagraph (a)

<sup>46</sup> Ibid, subparagraphs (c), (d) and (g)

<sup>47</sup> Making Gender-Responsive Trade Agreements’ (see note 70), at 21

<sup>48</sup> See CCFTA Article N bis-03 paragraph 6

<sup>49</sup> See CIFTA Article 13.3 and Chile and Uruguay FTA Article 14.3

binding commitments on the two most vital areas for women empowerment: education and skill-development. As long as women remain under-qualified and less-skilled than men, they are likely to remain in low-paid jobs with poor working conditions and job security. Hence, improving women's access to education and skill-development opportunities is a crucial cooperation activity that should be focused upon in future FTAs. This focus should accompany some understanding or commitment on financing these activities by the concerned governments. In Mexico for example, the Government launched a "More and Better Jobs for Women" campaign in association with the International Labor Organization to train 400 women working in the informal sector in entrepreneurship skills and make them aware about the access to finance opportunities.<sup>50</sup> Countries can undertake commitments to launch similar campaigns or programs on a regular basis; however, some countries may not have the incentives or sufficient finances to fund such activities. In such cases, financing could potentially come from WTO's Aid for Trade (A4T) Program, whose focal point since 2011 has been the economic empowerment of women.<sup>51</sup> WTO can offer an advantage or enhanced funding through its A4T Program to countries showing a greater willingness to include gender perspective into their trade policies and agreements. The A4T Program can provide financial incentives to countries negotiating FTAs with "acceptable" gender-responsiveness or higher. This "carrot and stick" approach can create incentives for A4T recipient countries to measure their FTAs gender-responsiveness and consider raising them to a desirable level in light of its domestic context.

Another way to bring an agreement closer to this level is by mainstreaming gender perspective in the agreement's text. Including gender equality considerations in the preamble is an effective way of mainstreaming gender perspective. The preamble is a vital part of any international instrument or agreement, as it can be instrumental in determining the intentions of the negotiators or drafters of the agreement at the time when it was concluded.<sup>52</sup> In disputes arising out of a given agreement, decision-makers can consider the wording used in the preamble to identify the parties' objectives and intentions underlying the agreement.<sup>53</sup> The CPTPP is an example of this mainstreaming approach, as it explicitly and unambiguously mentions 'the importance of promoting...gender equality...' in its preamble.<sup>54</sup>

#### ***Benchmark IV: Institutionalization***

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<sup>50</sup> Kate Higgins, 'Gender and Free Trade Agreements: Best Practices and Policy Guidance' (The North-South Institute Research Report, March 2013), <http://www.nsi-ins.ca/wp-content/uploads/2013/03/2013-Gender-and-FTAs-Best-Practices-and-Policy-Guidance.pdf> (accessed 15 August 2019)

<sup>51</sup> OECD/WTO (2019), *AID FOR TRADE AT A GLANCE 2019: Economic Diversification and Empowerment*, WTO, Geneva/OECD Publishing, Paris

<sup>52</sup> Article 31 of the Vienna Convention on the Law of Treaties requires that an agreement must be interpreted in light of its context, object and purpose [Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679]

<sup>53</sup> 'Making Gender-Responsive Trade Agreements' (see note 70), at 33

<sup>54</sup> Preamble, CPTPP

The agreements at this level prescribe for the establishment of institutions and procedures to provide an implementation-architecture for gender-specific clauses. The provisions under this benchmark can be found in the following forms: (i) Establishment of committees to oversee and monitor the implementation of gender-focused provisions and gender-impact of trade; (ii) Identification of duties, functions, meeting frequencies, funds allocation and other organizational requirements of the committee; (iii) Sponsoring or commissioning research and publication on issues relating to gender and trade; (iv) Identification of procedures for carrying out *ex-ante* or *ex-post* gender-focused impact assessments; (v) Creation of concrete tools to address gender issues such as measures, action plan, programs, legislations, procedures, national contact points; and (vi) Establishment of consultation or mediation mechanisms that can facilitate consultations or mediations to resolve conflicts arising from gender-related concerns. The agreements that contain these elements (together with the elements from the previous benchmarks) attain the “advanced” level of gender-responsiveness.

None of the existing FTAs fully satisfy all the elements of this benchmark, yet several FTAs satisfy most. A handful of agreements have established specialized committees to oversee and monitor the implementation of gender-focused provisions and gender-impact of trade. One example is Chile – Uruguay FTA, which provides for the creation of a Gender Committee (hereinafter referred to as the “Committee”).<sup>55</sup> It also prescribes that this committee shall be composed of representatives from the government institutions responsible for relevant gender and trade matters from each concerned party.<sup>56</sup> The Canada – Chile FTA raises the bar as it also provides for some operational requirements of the committee.<sup>57</sup> Yet, it falls short of clarifying precise functions, financing arrangements and other requirements for the functioning of this committee.

Even the most advanced FTAs in gender concerns such as the ones signed between Canada and Chile or Canada and Israel have not clarified specific details on such a committee’s roles and responsibilities. It is important that future FTAs contemplate and outline the functions of the committees, milestones and objectives it is expected to achieve, and a timeline by which to achieve these milestones. There should be clear provisions on how committee’s work will be monitored, and who will comprise these committees. The most important in this regard is providing for funding arrangements to finance the activities and functioning of such committees if we genuinely intend these committees to function.

Another way to raise the gender-responsiveness of FTAs closer to this benchmark is by incorporating commitments on carrying out research and impact assessment activities. Sponsoring research in trade and gender is an area not yet explored by any existing FTA. The

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<sup>55</sup> See Chile Uruguay FTA, Article 14.4

<sup>56</sup> Ibid, Paragraph 1

<sup>57</sup> See CCFTA Article N *bis*-04

Chile – Uruguay FTA is perhaps the closest example, as it stipulates research and internship opportunities as possible tools to cooperate on gender concerns.<sup>58</sup> Moreover, provisions can be included to encourage or even mandate *ex-ante* and *ex-post* gender-focused impact assessments of the given agreement. In this respect, countries can simply use the UNCTAD Gender & Trade Tool that allows policy-makers to ‘make informed predictions on the gender effects’ of the agreement they are negotiating or considering to revise or modernize in the future.<sup>59</sup>

### ***Benchmark V: Legally-binding Obligations & Enforcement***

The agreements that contain legally-binding obligations and enforcement provisions have the “optimizing” level of gender-responsiveness. These provisions can be quite heterogeneous in nature. Some examples include the following: (i) Establishment of binding and compulsory dispute settlement or decision-making mechanisms with mandatory time-bound process; (ii) Subjecting gender-related provisions to dispute settlement mechanism established under the agreement; (iii) Provision of remedies in case of non-compliance with binding decisions; (iv) Establishment of common minimum standards for the countries’ respective domestic law such as equal pay requirement and maternity compensations; (v) Provision of exceptions (such as a general exception on gender) and reservations (such as a diversity supplier scheme or preferential bids for government purchases) referring to gender; and (vi) Review provision which requires that the implementation of gender-specific provisions shall be reviewed periodically.

None of the existing agreements fully satisfy this benchmark. However, some recent agreements have shown tendencies similar to its defining requirements. Many trade agreements have a dispute settlement mechanism to resolve disputes arising out of the agreements. However, almost all FTAs have explicitly and unambiguously excluded the application of their dispute settlement provisions with respect to the gender-specific provisions and chapters. One such example is Canada – Chile FTA, as it explicitly provides that a ‘...Party shall not avail itself of the dispute resolution mechanism provided for in Chapter N (Institutional Arrangements and Dispute Settlement Procedures) with respect to any matter arising under [Trade and Gender] Chapter’.<sup>60</sup> In the absence of applicable dispute settlement procedures, enforcement of gender-related commitments remains a fundamental problem. In contrast to commitments under WTO or other international agreements, gender considerations cannot be enforced through a binding and compulsory dispute settlement mechanism. This implies that a country’s failure to comply with these obligations or commitments or affirmations has no direct consequence. All existing FTAs rely on good-faith cooperation and best endeavors to solve disputes arising out of gender-specific provisions through consultations, dialogue and cooperation. The only exception is the Israel-Canada FTA that provides (for the very first time) a binding dispute settlement procedure that is

<sup>58</sup> See Chile Uruguay FTA, Article 14.3 paragraph 5 subparagraphs (b) and (c)

<sup>59</sup> UNCTAD, ‘Gender Justice in Trade Policy: The Gender Effects of Economic Partnership Agreements’, <http://www.oecd.org/dac/gender-development/45250133.pdf> (accessed 13 August 2019)

<sup>60</sup> See CCFTA, Article N *bis*-06

applicable to its chapter on trade and gender.<sup>61</sup> Unfortunately, this also seems to be a cosmetic attempt to provide for an enforcement mechanism as the parties have subjected the binding jurisdiction of this mechanism to their consent, making it completely non-compulsory in nature.<sup>62</sup>

In addition to applicable dispute settlement procedures, FTAs should provide for remedies in cases of non-compliance with the decisions taken by the designated decision-makers or arbitrators. In this respect, it is possible to rely on traditional remedies such as financial compensation or suspension of concessions. However, we have seen that these remedies have not proven effective in the multilateral trading system, especially when the interests of a developing or least developed country are at stake.<sup>63</sup> As an alternative, FTAs can act as experimentation laboratories and explore other remedies. For example, a future FTA could allow its members to impose trade sanctions against members violating gender provisions.<sup>64</sup> Another effective enforcement mechanism could be the violating member's exclusion from the agreement's membership or an overall termination of the agreement.<sup>65</sup> These proposals are very bold and can be criticized in a number of ways; however, due to space constraints, this potential critique will not be addressed further.

One way to drastically increase the gender-responsiveness of FTAs is by including reservations and exceptions. Countries could include supplier diversity initiatives in FTAs. Through these programs, they can obligate or somehow incentivize their multinational companies to reserve a percentage amount of their purchases, which can be made from marginalized groups such as women entrepreneurs. In addition, government procurements represent a significant market for business entities. According to International Trade Centre, only one percent of the global government procurement market is offered to women-owned businesses.<sup>66</sup> Adoption of gender-responsive government procurement commitments for increasing the participation of women-owned enterprises in the bidding process can be encouraged through adding women-favoring reservations in the FTAs relevant provisions.

Countries have in the past included or incorporated by reference the GATT-like exceptions in

<sup>61</sup> See CIFTA, Chapter 19: Dispute Settlement

<sup>62</sup> Ibid, Article 13.6

<sup>63</sup> Marco Bronckers, Naboth van den Broek, Financial Compensation in the WTO: Improving the Remedies of WTO Dispute Settlement, 8(1) *Journal of International Economic Law* (2005), 101, at 105

<sup>64</sup> Angelo Young, 'Trans-Pacific Partnership: Are Free Trade Agreements like TPP really a tool for fixing labor rights abuses?', (*International Business Time*, 6 August 2015), <https://www.ibtimes.com/trans-pacific-partnership-are-free-trade-agreements-tpp-really-tool-fixing-labor-2041003> (accessed 13 August 2019)

<sup>65</sup> Wilma Viteri, 'A Gender Lens on the Trans Pacific Partnership Agreement', (*JERA International Young Women's Program Research*, October 2015), <http://jerainternational.org/wp-content/uploads/2016/05/A-Gender-Lens-on-the-Trans-Pacific-Partnership-Agreement-.pdf> (accessed 14 August 2019)

<sup>66</sup> Gonzalez, 'Public Procurement, a Tool to Boost Women's Economic Empowerment', Speech delivered by ITC Executive Director Arancha González at Scuola di Politiche, Milano 10 November 2017, <http://www.intracen.org/news/Public-Procurement-a-Tool-to-Boost-Womens-Economic-Empowerment/> (accessed 14 August 2019)



their FTAs for the protection of public morals, human health or animal life or environment.<sup>67</sup> In the same manner, a new general exception for gender can be designed and employed by FTAs in the future.<sup>68</sup> No such exception exists to date in FTAs. Countries may hesitate to employ such an exception as it could enable other countries to enact new rules and regulations which could pose as a barrier to trade. It could also enable countries to violate the provisions of the given FTA under the justification of gender exception. This hesitation is understandable, but it is not justifiable. If countries can allow FTA-inconsistent practices and laws to operate if they harm their public morals, or animal health or life, or even plant health or life, how can countries oppose an exception that can reduce gender inequality and include humankind's half population in the journey towards economic growth and development? How are those gender considerations and barriers women face today any less important than the protection of animal health or even the conservation of exhaustible natural resources such as sea-turtles? Alternatively, there is some discussion on whether a general exception on the protection of public morals can also encompass gender considerations in FTAs; however, this is also a controversial proposal and has been met with considerable opposition.<sup>69</sup>

## **Final Thoughts**

Recent trends show that FTAs can be seen as bearers of change; they can act as laboratories in which we can experiment with the complex amalgamation of trade and gender concerns. In this race towards making trade more inclusive and progressive, FTAs have proven to be the fastest runners. They have pushed for an inclusive trade agenda aiming to distribute trade benefits in a gender-just manner. They have shown considerable potential as to enhancing women's participation in international trade through the inclusion of gender-considerate provisions and procedures. They have embraced gender equality considerations that encompass political, social and economic empowerment of women.<sup>70</sup> However, a lot more remains to be done, especially in respect of the enforcement capabilities of FTAs.

Gender provisions in FTAs today either lack enforcement mechanisms or legally-binding commitments as their implementation is often left to the good-will and willingness of the negotiating members. FTAs fall short of containing precise milestones and specific goals in achieving their affirmations in this respect. Most FTAs contain dispute settlement provisions to settle disputes arising from the agreement, yet they unanimously exclude gender provisions from the application of dispute settlement mechanism. Members have also shown reluctance to include provisions that may require a change in their domestic laws and regulations. One

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<sup>67</sup> See USMCA, Article 32.1

<sup>68</sup> Proposal mentioned in 'Making Gender-Responsive Trade Agreements' (note 68), at iv

<sup>69</sup> Jarvis, 'Women's Rights and the Public Morals Exception of GATT Article 20', 22(1) Michigan Journal of International Law (2000) 219

<sup>70</sup> 'Making Gender-Responsive Trade Agreements' (The Conference Board of Canada Report, January 2019), [https://www.conferenceboard.ca/temp/fcf60024-ba6f-426d-a1ca-2e1fb6129905/10077\\_GenderandTrade-RPT.pdf](https://www.conferenceboard.ca/temp/fcf60024-ba6f-426d-a1ca-2e1fb6129905/10077_GenderandTrade-RPT.pdf) (accessed 15 August 2019)

example is the equal pay requirement that often is framed in a permissive language without any binding obligations on the negotiating members to provide for binding equal pay legislation.<sup>71</sup>

FTAs without enforcement mechanisms and binding commitments are a missed opportunity for governments that aim at making their trade progressive and inclusive in nature. However, we cannot generalize the importance of achieving high gender-responsiveness for FTAs negotiated by all the countries. This may be more important for some countries than for others. Deciding the desired level of FTA's gender-responsiveness is a country-specific decision; however, this decision should be taken in an informed manner. Such a decision can only be informed if the negotiators involved in the ongoing negotiations or government officials considering to revise their existing FTAs or negotiate new agreements possess the awareness of the different responsiveness levels FTAs can possibly achieve and how. With the help of the framework proposed in this paper, negotiators dealing with ongoing negotiations can test the gender-responsiveness of the preliminary text to examine whether it appears to achieve the desired level of responsiveness. If they find that the given agreement scores less on the scale as compared to their desired level, the framework can identify the critical areas of improvement and provide some recommendations to enable the agreement to get to the target level. The framework can also be used by policy-makers and government officials to renegotiate existing agreements in a more gender-responsive manner.

With the present day discussions, developments and scholarly works on trade and gender, much of the battle against gender inequality is already won. We need to keep these discussions going in order to win the other half of this battle against gender injustice. The momentum is on. We have to tap into this momentum by continuing discussions and scholarly interventions in this respect.

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<sup>71</sup> See for example USMCA, Article 23.9