

# Finding Feet on Trade Agreements: Empowering Women Entrepreneurs Amidst a Pandemic

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*The Covid-19 pandemic has deepened the existing gender inequalities. In particular, it has dealt a significant blow to women entrepreneurs, as it has magnified the pre-pandemic disadvantages women have faced in the economic, social, financial and regulatory ecosystems they operate in, particularly due to the nature and size of their businesses. The article outlines three main reasons that explain why women entrepreneurs have been disproportionately impacted during this health pandemic. It then explores how trade agreements can help women overcome the barriers that impede their entrepreneurial potential and help their businesses sustain the pandemic-inflicted market disruptions.*

**Keywords:** Trade Agreements, Women Entrepreneurs, Business, COVID-19 Pandemic, Empowerment, Trade Policy

## 1 INTRODUCTION

Whenever there is a crisis, whether it is economic, financial, or related to health or climate change, women are generally hit the hardest.<sup>1</sup> Crises can reveal or worsen many obstacles women already face in trade and their economic development.<sup>2</sup> This can also be seen when natural disasters take place. For example, many more women than men die during a natural disaster because, as compared to men, they are

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<sup>1</sup> *An Uneven and Gender-Unequal COVID-19 Recovery: Update on Gender and Employment Trends* (ILO 26 Oct. 2021), [https://www.ilo.org/wcmsp5/groups/public/—ed\\_emp/documents/publication/wcms\\_824865.pdf](https://www.ilo.org/wcmsp5/groups/public/—ed_emp/documents/publication/wcms_824865.pdf) (accessed 13 Dec. 2021); Maria Floro & Annika Tornqvist Emcet Tas, *The Impact of the Economic Crisis on Women's Economic Empowerment* (World Bank Jan. 2009).

<sup>2</sup> Amrita Bahri, *Women at the Frontline of COVID-19: Can Gender Mainstreaming in Free Trade Agreements Help?*, 23(3) *J. Int'l Econ. L.* 563 (2020).

generally under-equipped to deal with the impact of natural disasters, mainly due to the lack of access to required resources and information.<sup>3</sup>

Globally, many women have suffered from the economic and social consequences of the COVID-19 pandemic.<sup>4</sup> In particular, women entrepreneurs have been disproportionately impacted due to the disadvantages they have faced in the economic, social, financial and regulatory ecosystems that surround them.<sup>5</sup> These disadvantages may include lack of access to educational opportunities including business training; the digital divide between men and women, caused by the lack of affordability and digital know-how; lack of access to productive resources such as finances and other assets; high tariff and non-tariff barriers faced by businesses in sectors where women are most engaged such as in agriculture and textiles; lack of access to trade-related information and business networks; and a disproportionately high burden to discharge household responsibilities.<sup>6</sup> The crisis of COVID-19 has exacerbated the impact of these pre-existing challenges for women entrepreneurs.<sup>7</sup> The article's first section provides an in-depth discussion on three of these challenges in particular: (1) the vulnerable nature of women's businesses and the sectors they operate in that have been affected by the crisis; (2) reduced access to finance; and (3) fettered access to digital learning and e-commerce opportunities.

There are two different yet complementary approaches to dealing with the challenges that the pandemic has magnified: bottom-up or top-down. The bottom-up approach calls for efforts at the national level that may involve designing regulations that can facilitate the operations of women-owned businesses, enhancing women's access to finance, enhancing opportunities to avail business training, and developing funds or relief programs for women's businesses. The top-down approach calls for employing international trade policies to trigger these changes at

<sup>3</sup> Sarah Bradshaw & Maureen Fordham, *Women, Girls and Disasters: A Review for DFID* (Department for International Development, UK Aug. 2013), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/844489/withdrawn-women-girls-disasters.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/844489/withdrawn-women-girls-disasters.pdf) (accessed 9 Aug. 2021); Also see Tom Parker, *Tsunami Prompts Women's Swimming Lessons* (BBC News 6 May 2005), [http://news.bbc.co.uk/2/hi/south\\_asia/4517589.stm](http://news.bbc.co.uk/2/hi/south_asia/4517589.stm) (accessed 12 Jul. 2021).

<sup>4</sup> WTO, *The Economic Impact of COVID-19 on Women in Vulnerable Sectors and Economies* (2020), <https://doi.org/10.30875/74a82a3d-en> (accessed 9 Jul. 2021). [the study outlines the economic impact of the pandemic on vulnerable sectors including women]; see Bahri, *supra* n. 2 [the author presents multiple reasons on how COVID-19 has put women to the frontline and explores how trade agreements can help].

<sup>5</sup> These barriers are discussed in 'Women, Business and the Law', World Bank reports 2010, 2012, 2014, 2016, 2018, 2019 and 2020; Also see WTO, *Women and Trade: The Role of Trade in Promoting Gender Equality* (2020), [https://www.wto.org/english/res\\_e/publications\\_e/women\\_trade\\_pub2807\\_e.htm](https://www.wto.org/english/res_e/publications_e/women_trade_pub2807_e.htm) (accessed 9 Jul. 2021).

<sup>6</sup> For details, see ITC, *Unlocking Markets for Women to Trade* (2015), <https://intracen.org/resources/publications/unlocking-markets-for-women-to-trade> (accessed 9 Jul. 2021).

<sup>7</sup> Simonetta Zarrilli & Henri Luomaranta, *Gender and Unemployment: Lessons From the COVID-19 Pandemic* (UNCTAD 8 Apr. 2021), <https://unctad.org/news/gender-and-unemployment-lessons-covid-19-pandemic> (accessed 9 Jul. 2021); Gabriela Ramos, *Women at the Core of the Fight Against COVID-19 Crisis* (OECD 1 Apr. 2020), <https://www.oecd.org/coronavirus/policy-responses/women-at-the-core-of-the-fight-against-covid-19-crisis-553a8269/> (accessed 9 Jul. 2021).

the domestic level, as trade agreements may have the potential to provide for the required policy solutions.<sup>8</sup> This article, in its second section, considers the ‘top-down’ approach and explores the potential of the existing trade agreements to empower women entrepreneurs.<sup>9</sup>

Many of the existing trade agreements contain provisions relating to gender equality that can possibly provide a basis for and be translated into national trade policies to support women. Some of these provisions deal with the social, physical or human resource aspects of the pandemic-worsened barriers for women, such as deteriorating access to health care and education and spiralling violence and discrimination against women.<sup>10</sup> Similarly, and in parallel, trade agreements contain various provisions that seek to directly mitigate the economic barriers women face such as insufficient access to finance, trade information, international markets, and trade-related capacity-building programmes.<sup>11</sup> This article seeks to identify and assess the latter category of provisions that directly deal with women’s business and market access interests. By focusing on these specific examples, this article casts light on those provisions that can help women-owned businesses deal with the economic implications of the Covid-19 pandemic. It also offers reflections on how such provisions can be adjusted in the future so the promises they contain can be put into action.

Trade agreements can empower women-owned businesses and can foster change that can help mitigate economic losses inflicted by the pandemic. Two reasons in particular support this claim.<sup>12</sup> First, existing and future trade agreements

<sup>8</sup> Domestic laws and policies also have a huge role to play in this respect; however, this discussion remains outside the scope of this article. Moreover, trade agreements may have the potential to contribute in this respect, but it is not certain whether the current trade agreements are achieving that purpose or contributing in a positive manner due to a lack of concrete evidence.

<sup>9</sup> A women-owned business is defined as one i.e.,: (1) more than 50% owned by one or more women, (2) whose management and control lie with one or more women, (3) where a woman is a signatory of the business’s legal documents and financial accounts, and (4) which is operated independently from businesses that are not owned by women. A women-led business is also defined as one i.e.,: (1) at least 25% owned by one or more women, (2) whose management and control lie with one or more women, (3) which has at least one-third of the board of directors comprised of women, where a board exists, (4) where a woman is a signatory of the business’s legal documents and financial accounts, and (5) which is operated independently from businesses that are neither led nor owned by women. [ISO, *IWA 34:2021(en): Women’s Entrepreneurship – Key Definitions and General Criteria* (2021), <https://www.iso.org/obp/ui/#iso:std:iso:iwa:34:ed-1:v1:en> (accessed 22 Sep. 2022)] In this article, the terms ‘women-owned businesses’ or ‘women businesses’ or ‘women-run businesses’ are used interchangeably to refer to such businesses.

<sup>10</sup> Such as the Eurasian Economic Union Agreement (EAEU) (enforced, 1 Jan. 2015) and the Agreement establishing an Association between the European Union and its Member States, on the one hand, and Central America on the other (EU – Central America) (enforced, 1 Aug. 2013). For more details, see Amrita Bahri, *Gender Mainstreaming in Free Trade Agreements: A Regional Analysis and Good Practice Example* (Gender, Social Inclusion and Trade Knowledge Product Series 2021), [https://www.genderandtrade.com/\\_files/ugd/86d8f7\\_ea7e603922c54ff7a9e1f81e594a5d9f.pdf](https://www.genderandtrade.com/_files/ugd/86d8f7_ea7e603922c54ff7a9e1f81e594a5d9f.pdf) (accessed 22 Sep. 2022).

<sup>11</sup> Such as the Chile – Israel Free Trade Agreement and the Modernized Canada – Chile Free trade Agreement (Canada – Chile) (enforced, 5 Feb. 2019). For details, see Bahri, *supra* n. 10.

<sup>12</sup> For this study, “women’s empowerment” refers to the process of increasing women’s access to control over the strategic life choices that affect them and access to the opportunities that allow them fully to

between countries can increase trade flows and hence lead to more business opportunities for all, including women.<sup>13</sup> Second, through regional or bilateral trade accords, countries can encourage their trade partners to reduce trade barriers and create a business-conducive environment for women entrepreneurs.<sup>14</sup> The multi-faceted crisis of the global health pandemic presents an opportunity to explore how trade policies, including the pursuit of free trade agreements, can contribute to women's empowerment in the context of economic recovery in the post-COVID-19 world.<sup>15</sup>

The authors have employed both empirical research and textual analysis of gender provisions in trade agreements to gather the findings presented in this article. The first section benefits from findings gathered from original empirical research with the help of semi-structured interviews and questionnaire-based surveys.<sup>16</sup> The interviews were carried out using selectively designed and individuated sets of questions. The interviewees were identified through a purposive snowball sampling approach, which involves making an 'initial contact with a small group of people' related to the area under investigation and then utilizing these contacts to establish further relevant contacts.<sup>17</sup> Interviews were carried out in two batches. In the first batch, one of the authors interviewed representatives from women's business associations based in South Asia, Latin America and East Africa. These interviews led to the second batch of interviews, where the interviewing author interviewed women entrepreneurs in South Asia and Latin America engaged in different sectors, including tourism, manufacturing, services, agriculture, hospitality, Information Technology (IT), communications and event management, and textiles.<sup>18</sup> In parallel with these interviews, the authors gathered 800+ responses from questionnaire-

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realize their capacities. Women's empowerment as an economic, political, and sociocultural process challenges the system of sexual stratification that has resulted in women's subordination and marginalization in order to improve women's quality of life'. [Y. Z. Chen, H. Tanaka, *Women's Empowerment*, in *Encyclopedia of Quality of Life and Well-Being Research* (A. C. Michalos ed., Springer 2014)] .

<sup>13</sup> See Bahri, *supra* n. 2, at 564, 565.

<sup>14</sup> *Ibid.*

<sup>15</sup> However, studies have also shown how trade policies can undermine women's empowerment. For more details, see Chinhui Juhn, Gergely Ujhelyi & Carolina Villegas-Sanchez, *Men, Women, and Machines: How Trade Impacts Gender Inequality*, Working Paper 18106 (2012), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2066403](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2066403) (accessed 19 Oct. 2022) [authors observe that trade liberalization has increased the ratio of female blue-collar worker to male blue-collar workers as well as the relative wage of female blue-collar workers, but there's little evidence of increasing female shares in white-collar occupations.]; Also see Lilia Domínguez-Villalobos & Flor Brown-Grossman, *Trade Liberalization and Gender Wage Inequality in Mexico*, 15(4) *Feminist Econ.* 53 (2010), <https://www.tandfonline.com/doi/abs/10.1080/13545701.2010.530582> (accessed 19 Oct. 2022).

<sup>16</sup> These interviews and surveys were carried out by one of the authors as part of the WTO's Regional Surveys 2019–2020. [details withheld; on file with authors].

<sup>17</sup> Alan Bryman, *Social Research Methods* 202 (4th ed., Oxford University Press 2012).

<sup>18</sup> All interview summaries are on file with the authors.

based surveys that were sent to women entrepreneurs engaged in exporting and importing goods and services.<sup>19</sup> These findings were useful in corroborating, endorsing or refuting the findings gathered from interviews.

The discussions presented in the second section of this article are developed with the help of textual analysis, where the authors engaged in in-depth textual analysis of all existing trade agreements currently in force and notified to the World Trade Organization (WTO).<sup>20</sup> All trade agreements were assessed to identify those agreements that contain gender-explicit provisions. The provisions that use terms directly related to 'gender', 'women', 'female', 'maternity' or a similar expression in an explicit manner are considered as 'gender-explicit provisions' in this study.<sup>21</sup> Once the agreements with gender-explicit provisions were identified, and thoroughly examined in light of the relevant scholarship, the authors carried out semi-structured interviews with trade negotiators and policymakers engaged in the negotiation of trade and gender provisions to discuss their understanding of the selected gender-related provisions and gather confirming and conflicting views on the matters that are covered in this article.

## 2 COVID-19'S NEGATIVE IMPACT ON WOMEN ENTREPRENEURS IN INTERNATIONAL TRADE

Women entrepreneurs involved in international trade have been hit hard by the COVID-19 crisis due to three main reasons: (1) women's businesses are generally small, and most of them operate in the sectors that are affected the most by the crisis; (2) the crisis has further reduced some women's access to finance, and COVID-19 recovery packages have not helped; and (3) women entrepreneurs have faced fettered access to digital learning and e-commerce opportunities. The following subsections explain and assess these three reasons.

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<sup>19</sup> The questionnaire had a set of questions, arranged in the following categories: barriers women entrepreneurs face; whether and how these problems are magnified by the pandemic; whether they received any support from their government; status of their ownership and education and preparedness level; information on the nature of their businesses and number and types of employees, among others. All responses are on file with the authors.

<sup>20</sup> As on 1 Jun. 2022, all 355 agreements currently in force and notified to the WTO have been assessed by the authors. WTO Regional Trade Database, <https://rtais.wto.org/UI/PublicMaintainRTAHome.aspx> (accessed 22 Sep. 2022).

<sup>21</sup> The explicit expressions that were used to identify gender-explicit provisions in agreements in this assessment are: women, girl, woman, girls, maternity, gender, childcare, sex, mother [in English]; mujer, mujeres, género, niñas, niños, sexo, equidad, maternidad, paternidad, paternal, maternal, igualdad, atención infantil [in Spanish]. Gender-explicit words used for listing products or entities are not included in this assessment. 'Gender-implicit provisions' are those provisions which address the issues of gender in an indirect and implicit manner through areas such as, but not limited to, human rights, vulnerable groups focus, labour discrimination, corporate social responsibility, intellectual property rights, and SMEs.

1.1 WOMEN BUSINESSES ARE GENERALLY SMALL, AND THEY OPERATE IN SECTORS THAT HAVE BEEN HIT THE HARDEST, SUCH AS AGRICULTURE

Globally, Micro, Small and Medium Enterprises (MSMEs) have been hit hard by the economic spill over of the COVID-19 pandemic.<sup>22</sup> Small businesses drive economic growth, but they tend to be vulnerable to changes in the economy or market forces beyond their control, such as to a health pandemic which can alter the market dynamics for a considerable period of time.<sup>23</sup> Small businesses may not have as much capacity and resources to survive a global economic meltdown or a recession as compared to large multinational companies.<sup>24</sup> This is especially the case with MSMEs that are engaged in export and import of goods and services, mainly because of the pandemic-triggered disruptions in service economies<sup>25</sup> and temporary export restrictions<sup>26</sup> imposed on several products such as drugs, medical equipment, agricultural products and cereals.<sup>27</sup> This has affected women's businesses, as women-owned businesses are generally smaller (and hence more vulnerable) than men-owned businesses, and that they own close to ten million of the emerging economies' MSMEs.<sup>28</sup> The WTO Regional Surveys 2019–2020 show that, in South Asia, East Africa and Latin America, 46.3% of women-owned businesses have less than ten employees and 27% have between eleven and thirty employees.<sup>29</sup>

<sup>22</sup> Alexander W. Bartik, Marianne Bertrand, Feng Lin, Jesse Rothstein & Matt Unrath, *Measuring the Labor Market at the Onset of the Covid-19 Crisis*, Working Paper 27613 (NBER Jul. 2020), <http://www.nber.org/papers/w27613> (accessed 9 Jul. 2021). [This article presents the results of a survey of over 5,800 small businesses in the United States].

<sup>23</sup> *Coronavirus (COVID-19): SME Policy Responses* (OECD 15 Jul. 2020), [https://read.oecd-ilibrary.org/view/?ref=119\\_119680-di6h3qgi4x&title=Covid-19\\_SME\\_Policy\\_Responses](https://read.oecd-ilibrary.org/view/?ref=119_119680-di6h3qgi4x&title=Covid-19_SME_Policy_Responses) (accessed 21 Apr. 2020). [Empirical research finds that due to COVID-19, more than half of SMEs now already face severe losses in revenues, with many having only a few months' reserves to withstand the crisis].

<sup>24</sup> See e.g., Gert Wehinger, *SMEs and the Credit Crunch: Current Financing Difficulties, Policy Measures and a Review of Literature*, 2013(2) OECD J. Fin. Mkt. Trends 115 (2014); Ali Asgary, Ali Ihsan Ozdemir & Hale Özyürek, *Small and Medium Enterprises and Global Risks: Evidence from Manufacturing SMEs in Turkey*, 11(1) Int'l J. Disaster Risk Sci. 59 (2020).

<sup>25</sup> UNCTAD, *Supporting Small Businesses is Critical for COVID-19 Recovery* (26 Apr. 2021), <https://unctad.org/news/supporting-small-businesses-critical-covid-19-recovery> (accessed 9 Jul. 2021).

<sup>26</sup> For details on existing restrictions, see ITC, *Global Map of COVID-19 Temporary Trade Measures* (17 Jun. 2021), <https://www.macmap.org/covid19> (accessed 6 Nov. 2021).

<sup>27</sup> Simon Evenett, *Tackling COVID-19 Together: The Trade Policy Dimension* (Global Trade Alert 23 Mar. 2020), <https://www.globaltradealert.org/reports/51> (accessed 1 Jun. 2020). [A case study on medical ventilators shows that this pandemic has led to zero-sum behaviour towards foreign trade].

<sup>28</sup> According to the World Bank, Micro, Small and Medium Enterprises (MSMEs) are defined as follows – micro enterprises: 1–9 employees; small: 10–49 employees; and medium: 50–249 employees. However, the local definition of MSMEs varies from country to country, and is based not only on the number of employees, but also on other variables such as turnover and assets. [Khrystyna Kushnir, Melina Laura Mirmulstein & Rita Ramalho, *Micro, Small, and Medium Enterprises Around the World: How Many Are There, and What Affects the Count?* (IFC & World Bank 2010), <https://www.mfw4a.org/sites/default/files/resources/Micro%20Small%20and%20Medium%20Enterprises%20Around%20the%20World%20How%20Many%20Are%20There%20and%20What%20Affects%20the%20Count.pdf> (accessed 7 Aug. 2021)].

<sup>29</sup> The percentage drops when looking at bigger firms: only 4.6% of women-owned business employ between fifty-one and 100 staff, and only 3.3% of them own companies with more than 100 employees.



Lack of presence in international markets (owing to their small size and capacity) also prevents women entrepreneurs from using trade as an engine for business expansion and as a tool to weather the occasional economic storms.<sup>30</sup> With their focus on domestic markets, these businesses may stay disconnected from opportunities offered by foreign trade, and this becomes a significant reason for why they remain small and hence they are relatively more vulnerable to economic crises as compared to men-owned businesses. As a result, women entrepreneurs are often caught in this negative loop: their small size prevents them from accessing finance and trade, which prevents them from diversifying and growing; hence, they remain small and vulnerable to crisis-like situations.

Moreover, most women-owned businesses tend to operate in sectors that have been hit the hardest by this pandemic. One such sector significantly impacted by the pandemic is the agriculture sector. In the Southern Africa Development Community (SADC) region for example, women contribute to 60% of total food production and carry out more than 70% of agricultural work as subsistence farmers.<sup>31</sup> Women play a crucial role in food security, as they are critical in agriculture not only as subsistence farmers, but also as producers of export crops, as suppliers and/or vendors to informal food markets, and as cross-border food traders.<sup>32</sup> They are therefore key players in the domestic food supply chain as well as in the regional or international value chains. Due to the COVID-19 pandemic, female farmers have had to face the closure of informal food markets (where they generally sell their products); and owing to the global lockdowns and the resultant restrictions on border crossings, they have also faced difficulties in cross-border food trading, further restricting their market access opportunities.<sup>33</sup>

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This is also the case in developed countries. [WTO survey, *Assessing Women Entrepreneurs' Knowledge Gap on Trade in East Africa, South Asia, and Latin America*, (unpublished, on record with authors, 2019–2020).] Confirmed in findings from questionnaire-based survey.

<sup>30</sup> According to the WTO survey (WTO survey, *Assessing Women Entrepreneurs' Knowledge Gap on Trade in East Africa, South Asia, and Latin America*, (forthcoming 2023)), only about 27% of women in these regions export.

<sup>31</sup> *Food and Nutrition Security Strategy 2015–2025* 13 (SADC 2014), <https://www.resakss.org/sites/default/files/SADC%202014%20Food%20and%20Nutrition%20Security%20Strategy%202015%20-%202025.pdf> (accessed 9 Jul. 2021).

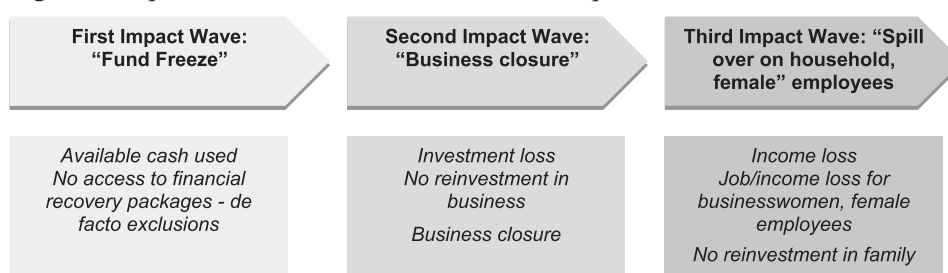
<sup>32</sup> Nonetheless, female entrepreneurship is very low in the agriculture sector as women in agriculture are mostly informal or subsistence workers. For details, see Cheryl Doss and SOFA Team, *The Role of Women in Agriculture 2* (FAO Mar. 2011), <http://www.fao.org/3/am307e/am307e00.pdf> (accessed 9 Jul. 2021).

<sup>33</sup> The importance of these markets is often under-valued. According to the Livestock Research Institute (ILRI), in most developing countries, more than 80% of livestock product is sold in informal food markets, and they are often located in places where consumers cannot have access to supermarkets. [Kristina Roesel & Delia Grace, *Food Safety and Informal Markets: Animal Products in Sub-Saharan Africa* (Routledge 2015)]; Women account for about two-thirds of the world's 600 million poor livestock keepers. [FAO, *Women Farmers and Resilience in the Face of Climate Change* (FAO 8 Mar. 2017), <http://www.fao.org/gender/insights/detail/en/c/980095/> (accessed 14 Sep. 2021)]. Also see Marc C. A. Wegerif, *Informal Food Traders and Food Security: Experiences from the Covid-19 Response in South Africa*, 12 *Food Sec.* 797 (2020).

1.2 THE CRISIS HAS EXACERBATED ONE PARTICULAR BARRIER THAT WOMEN ALREADY FACED; I.E., ACCESS TO FINANCE, AND COVID-19 RECOVERY PACKAGES HAVE NOT HELPED

One factor that could impede the revival of women-owned businesses in the post-pandemic world is the lack of access to finance.<sup>34</sup> Approximately 50% of women in the world do not have bank accounts or access to other basic financial services.<sup>35</sup> Women without bank accounts generally have no credit history and hence limited access to credit. This barrier is being worsened by the ongoing pandemic. As a result of the pandemic, women entrepreneurs have suffered a triple financial shock, which can best be explained in terms of three impact waves.

*Figure Triple Financial Shock for Women Entrepreneurs Amidst COVID-19*



Source: Authors' work

1.2[a] *First Impact Wave: The 'Fund Freeze'*

Women entrepreneurs are facing a 'fund freeze',<sup>36</sup> i.e., a shortage in the cash reserves due to loss of sales, lack of customers and supply chain restrictions. This 'fund freeze' is worsened by the fact that many women-owned businesses have generally not been able to access the financial recovery packages designed by their governments.<sup>37</sup>

<sup>34</sup> *In Liberia, Mobile Banking to Help Ebola-Affected Women Traders* (UN Women 14 Nov. 2014), <https://www.unwomen.org/en/news/stories/2014/11/in-liberia-mobile-banking-to-help-ebola-affected-women-traders> (accessed 19 Aug. 2021). [shows how Ebola virus disrupted the economic empowerment gains made in affected countries, and that women took much longer time than men to return to their economic security and livelihoods post Ebola crisis].

<sup>35</sup> UN Women, *Innovation for Gender Equality 5* (UN Women 2019), <https://www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/Library/Publications/2019/Innovation-for-gender-equality-en.pdf> (accessed 21 Apr. 2020).

<sup>36</sup> The term women entrepreneurs used during the WTO SAWDF Trade Dialogues – Session of 29 Jun. 2020. [details withheld; on file with authors].

<sup>37</sup> *Women 'Systematically Excluded' from COVID Response, Despite Being Worst Affected* (UN News 22 Mar. 2021), <https://news.un.org/en/story/2021/03/1087982> (accessed 9 Jul. 2021); Findings also gathered in interviews with women entrepreneurs [details withheld].



As a response to the pandemic's economic impact, many governments have employed recovery packages to offer financial support to small businesses. However, these responses are generally not adapted to women's specific needs and situations. According to United Nations Development Programme (UNDP)'s COVID-19 Global Gender Response Tracker,<sup>38</sup> only 9% of all recovery measures taken globally can support women's economic and financial security.<sup>39</sup> The 'fund freeze' impact has perpetuated for women businesses as they are de facto excluded from most of the support packages, partly because the designing and implementation of support schemes have not taken women entrepreneurs' specific situation into account nor have they specifically targeted women businesses.<sup>40</sup> Many women entrepreneurs were unable to access the credit schemes set up by their governments because of onerous requirements such as filing of complex paperwork, providing supporting documents in physical form, and satisfying the prerequisites that implicitly excluded most women-businesses as they required the applying firms to have a minimum number of employees or accepting burdensome financial arrangements.<sup>41</sup>

Most of the support schemes are designed for larger small and medium-sized enterprises (SMEs) or companies with formal employees and office locations, thereby making it difficult for many women entrepreneurs to access these support schemes, as in many countries, women are either self-employed, have informal employees supporting their businesses, or work from their homes.<sup>42</sup> Moreover, some recovery

<sup>38</sup> The COVID-19 Global Gender Response Tracker monitors responses taken by governments worldwide to tackle the pandemic, and highlights those that have integrated a gender lens. [*COVID-19 Global Gender Response Tracker* (UNDP), <https://data.undp.org/gendert tracker/> (accessed 22 Sep. 2022)].

<sup>39</sup> The tracker found that most of the gender-sensitive measures are found in respect of combating violence against women and girls, which has escalated since the start of the pandemic, and very limited measures are identified in respect of women's economic insecurity. Moreover, the limited number of economic and fiscal measures that mention gender concerns are not designed to support women-dominated sectors of the economy or protect women's businesses. Two exceptions in this respect are the measures employed by Georgia and Turkey. In Georgia, an economic support scheme is designed to mitigate the socio-economic effects of COVID-19, wherein women-run businesses and women applicants receive extra points during the assessment of applications. In Turkey, the Ministry of Trade has announced a grant programme for women cooperatives to alleviate the economic impacts of COVID-19, wherein each cooperative could appeal for up to TRY 150,000 (equivalent to USD 19,000) under the Cooperatives Support Programme of the Ministry. [*COVID-19 Global Gender Response Tracker Factsheet: Europe and Central Asia 3, 4* (UN Women & UNDP Dec. 2020), <https://www.eurasia.undp.org/content/rbec/en/home/library/gender-equality/COVID19-Global-Gender-Response-Tracker.html> (accessed 2 Jun. 2021)].

<sup>40</sup> See *Women 'Systematically Excluded' from COVID Response*, *supra* n. 37; UNDP, *Women's Absence from COVID-19 Task Forces Will Perpetuate Gender Divide* (UNDP 22 Mar. 2021), <https://www.undp.org/press-releases/womens-absence-covid-19-task-forces-will-perpetuate-gender-divide-says-undp-unwomen> (accessed 17 Dec. 2021).

<sup>41</sup> Some governmental schemes incorporate loan conditions for SME development that require the recipient to co-share the loan on a 50/50 basis with the financial institutions. But because of their lack of finance, women cannot afford to cover bank interest rates or even share such a loan. [Interviews with women exporters, Jun. 2020].

<sup>42</sup> *Are Women Entrepreneurs More Likely to Work Out of Home?* (OECD Mar. 2019), <https://www.oecd.org/gender/data/are-women-entrepreneurs-more-likely-to-work-out-of-the-home.htm> (accessed 17 Dec. 2021).

programmes simply provided options for continuing existing loans (in the form of concessions for existing performing or non-performing loans for example).<sup>43</sup> Women entrepreneurs could not benefit from such schemes because, as discussed before, they often do not seek finance from established financial institutions due to lack of access to bank accounts, credit history and collaterals.<sup>44</sup> Owing to these reasons, many women-owned businesses could not formally qualify to apply for these schemes.<sup>45</sup>

### 1.2[b] *Second Impact Wave: 'Business Closures'*

According to the WTO Regional Surveys, 67% of women entrepreneurs on an average reinvest in their businesses.<sup>46</sup> But the 'fund freeze' has made this harder. As a consequence, women are facing business closures, temporarily or in some cases even permanently.<sup>47</sup> Globally, according to the World Bank, women businesses have 6% more likelihood to close their businesses than male-owned firms.<sup>48</sup> The sectors where most of the closures have taken place during the pandemic are travel and tourism<sup>49</sup>; hospitality and event services,<sup>50</sup> education and childcare services,<sup>51</sup> and performing arts and entertainment.<sup>52,53</sup> The majority of women entrepreneurs are concentrated in these sectors.

<sup>43</sup> *COVID-19 Government Financing Support Programmes for Businesses* (OECD 2020), <https://www.oecd.org/finance/COVID-19-Government-Financing-Support-Programmes-for-Businesses.pdf> (accessed 11 Jan. 2022); Interviews with women exporters, Jun. 2020.

<sup>44</sup> The SME Finance Forum reports that women-owned businesses account for 32% of the MSME financial gap, representing a total of USD 1.7 trillion of unmet credit demand. *To Improve Women's Access to Finance, Stop Asking Them for Collateral* (WEF 18 Jun. 2019), <https://www.weforum.org/agenda/2019/06/women-finance-least-developed-countries-collateral/> (accessed 9 Jul. 2021).

<sup>45</sup> WTO SAWDF Trade and Gender Dialogue – Session 1 on 29 Jun. 2020; Interviews with women entrepreneurs.

<sup>46</sup> See WTO survey, *supra* n. 30.

<sup>47</sup> Marie Caitriona Hyland, Nona Karalashvili, Silvia Muzi & Domenico Viganola, *Female-Owned Firms During the COVID-19 Crisis* (World Bank Group 29 Jul. 2021), <http://documents.worldbank.org/curated/en/890571627634660709/Female-Owned-Firms-during-the-COVID-19-Crisis> (accessed 23 Dec. 2021).

<sup>48</sup> Markus Goldstein, Paula Gonzalez Martinez, Sreelakshmi Papineni & Joshua Wimpey, *The Global State of Small Business During COVID-19: Gender Inequalities* (World Bank Blogs 8 Sep. 2020), <https://blogs.worldbank.org/developmenttalk/global-state-small-business-during-covid-19-gender-inequalities> (accessed 9 Jul. 2021).

<sup>49</sup> with 54% business closures.

<sup>50</sup> with 47% business closures.

<sup>51</sup> with 45% business closures.

<sup>52</sup> with 36% business closures.

<sup>53</sup> John Schneider, *Global State of Small Business Report* (Facebook Apr. 2021), <https://about.fb.com/wp-content/uploads/2021/04/Global-State-of-Small-Business-Report-March-2021.pdf> (accessed 9 Jul. 2021).

### 1.2[c] *Third Impact Wave: ‘Spill Over on Household and Female Employment’*

As a result of losing their businesses, many women entrepreneurs have lost their means of income and subsistence as most of them, as sole owners, are only engaged in one business at a time.<sup>54</sup> This entails that post business closures, these entrepreneurs could no longer contribute to their households’ finances. This has had a severe impact on their family welfare (such as children’s education and nutrition) as empirical findings have shown that women contribute significantly to their household expenses (such as rent, education, health, and food).<sup>55</sup>

According to United Nations Conference on Trade and Development (UNCTAD), MSMEs employ more than two-thirds of the global population.<sup>56</sup> And businesswomen tend to employ more women as compared to businesses owned by men.<sup>57</sup> For companies with less than ten employees, 57% of their workers are female.<sup>58</sup> For firms with between eleven and thirty employees, 18% workers are female.<sup>59</sup> These female workers have faced job losses as a direct consequence of businesses’ closures, often without benefiting from unemployment packages as they often work informally or as part-time workers.<sup>60</sup>

### 1.3 WOMEN ENTREPRENEURS HAVE FACED FETTERED ACCESS TO DIGITAL LEARNING AND E-COMMERCE OPPORTUNITIES

To survive the COVID-19 challenges, women entrepreneurs are transforming their traditional business models as they are going digital and fostering their online presence with consumers choosing to shop online.<sup>61</sup> In a US survey from April

<sup>54</sup> 55% of women entrepreneurs are the sole owners of their business in South Asia, Latin America and East Africa. [See WTO survey, *supra* n. 30].

<sup>55</sup> Women mostly contribute to their family’s expenses, which is the second largest pillar of investment for them after their businesses [see WTO survey, *supra* n. 30].

<sup>56</sup> *Global Initiative Towards Post-Covid-19 Resurgence of the MSME Sector* (UNCTAD), <https://unctad.org/project/global-initiative-towards-post-covid-19-resurgence-msme-sector> (accessed 9 Jul. 2021).

<sup>57</sup> WTO Regional surveys 2019–2020; *Female Entrepreneurs Much More Likely to Employ Women* (INC Dec. 2018), <https://www.inc.com/kimberly-weisul/these-entrepreneurs-hired-very-few-men.html> (accessed 19 Dec. 2021).

<sup>58</sup> See WTO survey, *supra* n. 30.

<sup>59</sup> *Ibid.*

<sup>60</sup> Linda Shields, Jenny Hall & Abdullah Mamun, *The ‘Gender Gap’ in Authorship in Nursing Literature*, 104(11) *J. Royal Soc’y Med.* 457 (2011); Thomas Baum, *International Perspectives on Women and Work in Hotels, Catering and Tourism*, GENDER Working Paper 1/2013, 39–40 (ILO 2013), [https://www.ilo.org/wcmsp5/groups/public/@dgreports/@gender/documents/publication/wcms\\_209867.pdf](https://www.ilo.org/wcmsp5/groups/public/@dgreports/@gender/documents/publication/wcms_209867.pdf) (accessed 21 Mar. 2020).

<sup>61</sup> According to a global survey conducted by Accenture, 160% is the expected future increase in e-commerce purchases from new or low-frequency users. [Accenture, *How Will COVID-19 Change the Consumer?* (Accenture May 2020), [https://www.thedreamcollective.com.au/wp-content/uploads/2020/06/Accenture\\_How-will-COVID-19-change-the-consumer.pdf](https://www.thedreamcollective.com.au/wp-content/uploads/2020/06/Accenture_How-will-COVID-19-change-the-consumer.pdf) (accessed 5 Oct. 2020)]; In the US, about 31% of shoppers believe they will purchase more online now than before COVID-19.

2020, it was reported that one-fourth of women entrepreneurs in the US have transformed their businesses as they have started to offer online services to their customers and 15% have identified online marketing as a mean to address the challenges created by the pandemic.<sup>62</sup> However, this digital transformation may not apply to all sectors and all women entrepreneurs equally. According to the International Institute of Rural Reconstruction (IIRR), digitalization represents a challenge hardly overcome for rural women entrepreneurs, especially in Africa and Asia.<sup>63</sup> There is therefore a need to enhance women's access and participation in digital learning, infrastructure, financing and trade, in the absence of which digitalization may disadvantage women, especially in the regions where they are being left behind in this respect.<sup>64</sup> The growing trend of digital trade and e-commerce needs to be accompanied by supporting policies and trainings for women as the gender digital divide continues to persist.<sup>65</sup> The question therefore remains whether digitalization and 'going online' are enough to support women entrepreneurs.<sup>66</sup>

Furthermore, consumer patterns are changing, creating opportunities and new challenges. Post-COVID-19 consumers now require a complete understanding of their products, such as information on manufacturing processes and sourcing of raw materials.<sup>67</sup> They also want to be able to trace the product from its raw material stage to its final shape. New technologies can provide this information to consumers.<sup>68</sup> However, women entrepreneurs may have difficulties in adapting to this new

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[Dotcom Distribution 2020 E-commerce Consumer Study (Dotcom 2020), <https://dotcomdist.com/2020-dotcom-distribution-e-commerce-consumer-study-adapting-to-the-rapidly-changing-ecommerce-landscape/> (accessed 13 Jul. 2021)].

- <sup>62</sup> Diana International Research Institute, *Survey: Women Entrepreneurs in a Time of Covid-19* 1 (Babson College Apr. 2020), <https://www.babson.edu/media/babson/assets/cwel/DIRI-COVID-19-Pulse-Survey-Results.pdf> (accessed 9 Jul. 2021).
- <sup>63</sup> Pamela Bella Nyamutoka Katooro, *Opinion: Support Rural, Women-Led Entrepreneurs Amid the COVID-19 Pandemic* (Devex 28 Apr. 2020), <https://www.devex.com/news/opinion-support-rural-women-led-entrepreneurs-amid-the-covid-19-pandemic-97030> (accessed 9 Jul. 2021).
- <sup>64</sup> Wendy Cukier, *State of Women Entrepreneurship in Canada* 7 (The Women Entrepreneurship Knowledge Hub 25 Mar. 2021), <https://wekhconference.ca/state-of-women-entrepreneurship-2021/> (accessed 9 Jul. 2021).
- <sup>65</sup> In 2019, the proportion of women using the Internet globally was 48% compared to 58% of men in the same year. The proportion of women using the Internet is higher than that of men in only 8% of countries. [*Bridging the Gender Divide* (ITU 2021), <https://www.itu.int/en/mediacentre/backgrounders/Pages/bridging-the-gender-divide.aspx> (accessed 9 Jul. 2021)].
- <sup>66</sup> The WTO Regional Surveys 2019–2020 show that 45% of women entrepreneurs have received no clear information on customs requirements and have difficulty accessing the information on international export/import, including tariffs. This knowledge gap is a key obstacle and an additional cost to trade.
- <sup>67</sup> Remi Rosmarin, *Sustainability Sells: Why Consumers and Clothing Brands Alike Are Turning to Sustainability as a Guiding Light* (Business Insider 22 Apr. 2020), <https://www.businessinsider.fr/us/sustainability-as-a-value-is-changing-how-consumers-shop> (accessed 9 Jul. 2021).
- <sup>68</sup> Jérôme Duberry, *Blockchain: une meilleure traçabilité pour un consommateur éclairé* (Le Temps 1 Dec. 2019), <https://blogs.letemps.ch/jerome-duberry/2019/12/01/tracabilite-pour-un-consommateur-eclairé/> (accessed 9 Jul. 2021). There are also many examples in the private sectors that have for instance developed QR codes and barcodes that consumers can use to trace where the cotton or the wool or the cloths come

technology due to insufficient digital skills coupled with a lack of access to affordable technological infrastructure and online platforms. Trading is costly, and the need to adapt to digital technologies amidst the pandemic has increased this cost. With insufficient financial means, small businesses have found it difficult to cover these rising trade costs that may call for investment in specialized IT systems and applications, pandemic-induced digital inspections and compliance requirements, and digital training of their workforce.<sup>69</sup> This shows how COVID-19 has made conducting business and business models more complex, and that trade digitization and digital economy are other challenges that women entrepreneurs would now need to deal with.

## 2 HOW TRADE AGREEMENTS CAN HELP

### 2.1 HOW CAN EXISTING TRADE AGREEMENTS HELP?

The oldest free trade agreement that contains a gender provision is the Treaty of Rome establishing the European Economic Community signed in 1957.<sup>70</sup> Since then, and in the 1980s, African countries have negotiated and adopted many trade agreements containing ambitious gender-related provisions and standalone chapters.<sup>71</sup> While this trend had originated in Africa, it has expanded to other continents and in particular to South and North America. Many countries have realized that they can use these legal provisions as a policy toolbox that can provide solutions to gender inequality in their country.<sup>72</sup> They can also leverage the use of gender provisions in trade agreements to support their domestic initiatives in this respect.

Since 2016, there has been an upsurge of Free Trade Agreements (FTAs) that are carving out space for concerns relating to women's empowerment.<sup>73</sup> However, a

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from. See L'Usine Nouvelle, *Des consommateurs au fait de la traçabilité* (9 Sep. 2001), <https://www.usine-nouvelle.com/article/des-consommateurs-au-fait-de-la-tracabilite.N194> (accessed 9 Jul. 2021).

<sup>69</sup> OECD, *Fostering Greater SME Participation in a Globally Integrated Economy* (SME Ministerial Conference, Mexico City 22–23 Feb. 2018), <https://www.oecd.org/cfe/smes/ministerial/documents/2018-SME-Ministerial-Conference-Plenary-Session-3.pdf> (accessed 11 Dec. 2021).

<sup>70</sup> Treaty establishing the European Economic Community (EEC Treaty) (enforced, 1 Jan. 1958).

<sup>71</sup> Some examples are: the Treaty for the Establishment of the East African Community (EAC) (enforced, 7 Jul. 2000), Arts 5, 6, 9, 50, Ch. 22; Common Market for Eastern and Southern Africa (COMESA) (enforced, 8 Dec. 1994), Ch. 24; Economic Community of West African States (ECOWAS) (enforced, 23 Aug. 1995), Arts 3, 63; Southern African Development Community (SADC) (enforced, 1 Sep. 2000), Arts 5, 6, 12, 14.

<sup>72</sup> Some examples of trade agreements are: the Modernized Canada-Israel Free Trade Agreement (CIFTA) (enforced, 1 Sep. 2019), Art. 13.1; see Canada – Chile, *supra* n. 11, Ch. N bis, Art. N bis-01; Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (enforced, 30 Dec. 2018), Art. 23.4; see EAC, *supra* n. 71; Art. 121.

<sup>73</sup> The expression 'Free trade agreements' or 'FTA' in this chapter is used to refer to all international trade agreements (except the WTO multilateral agreements) and may include regional trade agreements, plurilateral agreements, bilateral agreements, economic partnership agreements, and such others. For details on gender in trade agreements, see José-Antonio Monteiro, *The Evolution of Gender-Related Provisions in Regional Trade Agreements*, Staff Working Paper ERS-2021-8 (WTO Economic Research

good majority of these agreements have not included provisions directly related to women's business or market access interests. A large number of gender-related provisions so far have focused on education and training,<sup>74</sup> representation of women in decision-making roles,<sup>75</sup> women's employment,<sup>76</sup> labour standards,<sup>77</sup> equality and non-discrimination,<sup>78</sup> physical safety,<sup>79</sup> protection of maternity<sup>80</sup> and healthcare concerns.<sup>81</sup> These areas are indeed crucial, as work on education, training, or maternity rights could help women enhance their entrepreneurial capacity in the

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and Statistics Division 24 Feb. 2021), [https://www.wto.org/english/res\\_e/reser\\_e/ersd202108\\_e.pdf](https://www.wto.org/english/res_e/reser_e/ersd202108_e.pdf) (accessed 2 Feb. 2022).

- <sup>74</sup> Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, of the one part, and the People's Democratic Republic of Algeria, of the other part (EU – Algeria) (enforced, 1 Sep. 2005), Art. 78; *see* EU – Central America, *supra* n. 10, Art. 43; Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Arab Republic of Egypt, of the other part (EU – Egypt) (enforced, 1 Jun. 2004), Art. 42; Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, of one part, and the Republic of Lebanon, of the other part (EU – Lebanon) (enforced, 1 Apr. 2006), Art. 42; Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Tunisia, of the other part (EU – Tunisia) (enforced, 1 Mar. 1998), Art. 46.
- <sup>75</sup> *See* CIFTA, *supra* n. 72, Art. 13.3; *see* EU – Central America, *supra* n. 10, Art. 47; Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part (EU – Chile) (enforced, 1 Feb. 2003), Art. 45; Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part (EU – Ukraine) (enforced, 23 Apr. 2014), Art. 420; Agreement for the Establishment of the Preferential Trade Area for Eastern and Southern Africa (enforced, 30 Sep. 1982), Art. 154; *see* EAC, *supra* n. 71, Art. 121.
- <sup>76</sup> Free Trade Agreement between the Republic of China (Taiwan) and the Republic of Nicaragua (Nicaragua – Chinese Taipei) (enforced, 1 Jan. 2008), Annex 18.01; United States-Mexico-Canada Trade Agreement (USMCA) (enforced, 1 Jul. 2020), Art. 23.12; Canada – Jordan Free Trade Agreement (enforced, 1 Oct. 2012), Art. 1.
- <sup>77</sup> Free trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part (EU – Korea, Republic of) (enforced, 1 Jul. 2011), Art. 13.4; *see* EU – Ukraine, *supra* n. 75, Art. 291; Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam (EU – Viet Nam) (enforced, 1 Aug. 2020), Art. 13.4.
- <sup>78</sup> Dominican Republic – Central America – United States Free Trade Agreement (CAFTA-DR) (enforced, 1 Mar. 2006), Annex 16.5; United States – Colombia Trade Promotion Agreement (United States – Colombia) (enforced, 15 May 2012), Annex 17.6; United States – Peru Free Trade Agreement (United States – Peru) (enforced, 1 Feb. 2009), Annex 17.6; *see* USMCA, *supra* n. 76, Art. 23.9; Free Trade Agreement between Canada and the Republic of Peru (Canada – Peru) (enforced, 1 Aug. 2009), Annex I; Canada – Ukraine Free Trade Agreement (enforced, 1 Aug. 2017), Annex 13-A; Free Trade Agreement between Canada and the Republic of Colombia (Canada – Colombia) (enforced, 15 Aug. 2011), Annex I; *see* CPTPP, *supra* n. 72, Art. 19.10; Treaty Establishing the European Community (enforced, 1 Jan. 1958), Art. 3; EU – South Africa, Art. 86.
- <sup>79</sup> Free Trade Agreement between Australia and the Republic of Peru (Australia – Peru) (enforced, 11 Feb. 2020), Art. 20.2; Free Trade Agreement between the European Union and the Republic of Singapore (EU – Singapore) (enforced, 21 Nov. 2019), Appendix 8-B-1; Agreement on Trade in Goods Under the Framework Agreement on Comprehensive Economic Cooperation Among the Governments of the Member Countries of the Association of Southeast Asian Nations and the Republic of Korea (ASEAN – Korea, Republic of) (enforced, 1 Jan. 2010), Appendix.
- <sup>80</sup> *See* EU – Tunisia, *supra* n. 74, Art. 65; Free Trade Agreement between New Zealand and the Republic of Korea (New Zealand – Korea) (enforced, 20 Dec. 2015), Annex II; *see* EAEU, *supra* n. 10, Art. 96.
- <sup>81</sup> Free Trade Agreement Between the Government of Malaysia and the Government of the Republic of Turkey (Malaysia – Turkey) (enforced, 1 Aug. 2015), Art. 9.13; *see* USMCA, *supra* n. 76, Art. 23.12.



long run, but agreements so far have generally not engaged in commitments that directly relate to market access or entrepreneurial capacity of such businesses. However, there are some exceptions to this observation, as a number of legal provisions in the existing trade agreements relate directly to market access concerns and can possibly help in mitigating the impact of the challenges discussed in the article's first section. This section presents several examples, which are discussed under three following categories that correspond to the three kinds of barriers that are discussed in the article's first section: (1) Protection of small businesses and expansion of market access in relevant industries; (2) Access to finance; and (3) Access to digital learning and e-commerce entrepreneurial capacity.

#### 2.1[a] *Protection of Small Businesses and Expansion of Their Market Access in Relevant Industries*

As discussed in the previous section, a provision aimed at enhancing MSMEs' market access can also help businesses owned by women. Several trade agreements seek to enhance and protect SMEs' market access. In the EU – South Africa FTA, parties seek to develop and strengthen micro enterprises (MEs) and SMEs in South Africa, and this provision could be read to include parties' commitment to enhance their market access.<sup>82</sup> The parties through this provision also seek to promote 'cooperation between SMEs in the Community and in South Africa in a manner that is sensitive to gender equality'.<sup>83</sup> In particular, the parties seek to work on increasing SMEs' access to finance, skills training, technology and marketing, and providing them with appropriate technical support, and establish appropriate channels to improve the flow of information relating to business trends and joint ventures.

Another relevant agreement is the United States Mexico Canada Agreement (USMCA), as its parties commit to work on enhancing trade and investment opportunities for SMEs.<sup>84</sup> They seek to achieve this in multiple ways that include: (1) promotion of cooperation between the Parties' small businesses through dedicated SME centres, incubators and accelerators, and export assistance centres; (2) engage in activities to promote SMEs owned by under-represented groups, including women; (3) exchange information and best practices on improving SME access to capital and credit, SME participation in covered government procurement opportunities, and helping SMEs adapt to changing market conditions; and (4) encourage SME's participation in web-based platforms to share information and best practices to help them connect with international suppliers, buyers, and other potential business partners.

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<sup>82</sup> EU – South Africa, *supra* n. 78, Art. 54.

<sup>83</sup> *Ibid.*, Art. 54.

<sup>84</sup> See USMCA, *supra* n. 76, Art. 25.2.



Other FTAs have included provisions on enhancing women businesses' market access in specific industries (such as agriculture). For example, the EU – East African Community (EAC)<sup>85</sup> (not yet in force) has 2 gender-explicit provisions; one of which relates to agriculture and the other to fisheries. In its chapter on agriculture, members make a commitment to address socio-cultural barriers in agriculture for women. In Article 89 on Inland Fisheries and Aquaculture Development, members seek to work on enhancing participation of marginal groups in fishing industry by developing capacity of women traders involved in fisheries. However, these commitments are not binding, as they are drafted as best endeavour provisions. Hence, these examples show that the inclusion of gender concerns in cross-cutting issues has so far been done to improve women's market access and capacity mainly in traditional areas that may not be as lucrative as other sectors. Almost no agreement so far has included a gender explicit commitment on increasing women businesses' market access to lucrative and booming industries such as textiles and apparels, manufacturing, financial services and cross border trade in services. However, there are two exceptions in this respect. The EU – Canada's Article 8.10 on investment protection contains a binding obligation that prohibits sex-based discrimination against foreign investors.<sup>86</sup> This provision can facilitate women's access to investment opportunities as it encourages women-owned businesses to engage in foreign investment without fears on being discriminated on the basis of their owners' sex. As this example shows, cross-cutting provisions with gender-explicit commitments can make some inroads for women businesses in various sectors and markets.

Moreover, as discussed in the previous section, current COVID-19 relief packages explicitly or implicitly exclude women-owned businesses from their list of beneficiaries. Hence, going forward, governments may consider offering various support schemes to small businesses in their respective countries that can particularly impact women entrepreneurs. These schemes could take the shape of state-aid, government bail-outs, loans or subsidies, and existing trade agreements provide some windows to implement such schemes without having to worry about their legal consistency with trade obligations. One such measure could take the form of sales tax payment waivers for domestically produced goods by women-owned businesses. This measure could be taken to support those businesses that are most severely hit by the pandemic and to help them sustain or revive their operations.<sup>87</sup>

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<sup>85</sup> Economic Partnership Agreement between the European Union and the Eastern African Community (EU – EAC) (not in force yet), Art. 85.

<sup>86</sup> Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union, of the other part (EU – Canada) (enforced, 21 Sep. 2017), Art. 8.10.

<sup>87</sup> The US's Alabama Department of Revenue has extended relief to small retail businesses that are unable to pay their sales tax liabilities. This includes tax exemption, late payment penalty waivers and extension of deadlines, see *Alabama Department of Revenue Coronavirus (COVID-19) Updates* (Alabama Department of Revenue), <https://revenue.alabama.gov/coronavirus-covid-19-updates/> (accessed 2 Jul. 2021).

For a temporary period of time during or after the pandemic, countries may also consider crafting women-favouring government procurement measures. Adoption of gender-responsive government procurement initiatives may help in increasing the participation of women-owned enterprises in the bidding process, which in turn could help to revive women-owned SMEs that might have had to scale down or face closures during the pandemic. However, such measures may not be consistent with their existing trade obligations unless they are included in trade agreements as an exception or a reservation.<sup>88</sup>

There is no concrete data to confirm the extent to which women are excluded from government procurement opportunities, though the International Trade Centre (ITC) estimations show that women entrepreneurs supply only 1% of this market worldwide.<sup>89</sup> The reasons behind this insignificant participation rate include lack of information on bidding opportunities, inability to meet the bidding requirements due to lack of time, expensive standards and certification requirements, large and capital-intensive nature of contracts, lack of knowledge about bidding procedures, problems in accessing the required trade financing procedures, and bureaucracy and red tape related to the bidding and selection process.<sup>90</sup>

Governments as both market regulators and participants are best placed to make procurement procedures gender-considerate by minimizing the barriers that generally impede women's access. Using existing policy reservations in their FTAs, governments can provide procurement-related assistance to MSMEs to encourage their participation in public tenders. This assistance could be provided as capacity building programs or in the form of a subsidy or a price preference.<sup>91</sup> Existing FTAs accommodate similar commitments. In the United States – Dominican Republic – Central America FTA, for example, parties reserve a right to craft

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<sup>88</sup> WTO Members may need to assess this proposal's compatibility with the WTO Agreement on Government Procurement if they are party to this plurilateral agreement. For details on this sector's potential, see *Empowering Women Through Public Procurement* (ITC 2014), <https://www.intracen.org/uploadedFiles/intracenorg/Content/Publications/Women%20procurement%20guide-final-web.pdf> (accessed 17 Nov. 2021).

<sup>89</sup> Some women entrepreneurs interviewed for this research confirmed that to survive the pandemic, they reoriented their businesses towards the production of medical equipments, especially in the textile sector (as they started making masks, gloves and such other products). One interviewee expressed that their businesses were largely excluded from the bids governments issued for PPEs, as the bids required companies to have certain number of employees and asset-capacity. [Findings from empirical surveys, details withheld.] *Empowering Women Through Public Procurement*, *supra* n. 88.

<sup>90</sup> Eliza Niewiadomska, *Facilitating Participation of Women-Owned Small and Medium-Sized Enterprises in Local and Global Public Procurement Markets* (Workshop on Enhancing the Participation of Women Entrepreneurs and Traders in Government Procurement, Geneva 25 Jun. 2018), [https://www.wto.org/english/tratop\\_e/womenandtrade\\_e/programme\\_workshop\\_e.htm](https://www.wto.org/english/tratop_e/womenandtrade_e/programme_workshop_e.htm) (accessed 2 Jul. 2021).

<sup>91</sup> Price preference involves 'granting a price preference or margin of preference to firms that are eligible for preferential treatment. In these cases, the procuring entities artificially increase the bid prices of the non-preferred firms by a set number of percentage points while making no adjustments to the bid prices of the preferred firms. Award is then made to the firm with lowest evaluated (as opposed to proposed) price'. See *Empowering Women Through Public Procurement*, *supra* n. 88.

government procurement schemes that may be favourable for certain groups including women.<sup>92</sup> This waiver can allow countries to carve out procurement schemes that are favourable for women. However, to strengthen such policies, it is crucial to agree to a precise definition of women-owned enterprises. This is where the International Organization for Standardization's (ISO) latest attempt at defining women-owned companies can come in handy.<sup>93</sup> It may be useful to integrate this definition in current trade and procurement policies, as this can help in narrowing down the scope of such provisions and making their content more precise.<sup>94</sup>

#### 2.1[b] *Access to Finance*

As described in the previous section, lack of access to finance is one of the key barriers that impede women's entrepreneurial efforts in international trade. Recognizing this barrier, some WTO members, such as Mexico, have set up financial support programmes for MSMEs, with specific quotas for women-owned companies to receive such funding.<sup>95</sup> Others have established specific 'women's fund' to provide affordable finance to women-owned companies, mostly to start-up enterprises.<sup>96</sup> Financial support usually takes the form of credit guarantees, securities, grants, loans or subsidized financing (loans accompanied by a grace period and a favourable debt-equity ratio).<sup>97</sup> These support programs can help entrepreneurs in overcoming the pandemic-inflicted impact of the problems they have faced in accessing finance and financial instruments.

This barrier is also acknowledged in several FTAs that include commitments on mitigating this obstacle for women. In Canada – Israel FTA,<sup>98</sup> the parties seek to cooperate on, among other things, promoting financial inclusion for women through the provision of financial training, an increase in access to finance, and financial assistance.<sup>99</sup> The EU – Cameroon<sup>100</sup> provides a list with the areas of assistance for parties to work on under the Economic Partnership Agreement's Regional Fund, which is a funding instrument that was created by and for Central

<sup>92</sup> See CAFTA-DR, *supra* n. 78, Annex 9.1.2(b)(i).

<sup>93</sup> See ISO, *supra* n. 9.

<sup>94</sup> *Ibid.*

<sup>95</sup> WTO, *Trade Policy Review for Mexico*, WT/TPR/G/352/Rev.1, 13 (23 Jun. 2017).

<sup>96</sup> See Anoush der Boghossian, *Trade Policies Supporting Women's Economic Empowerment: Trends in WTO Members*, Staff Working paper ERSD-2019-07, 7 (WTO Economic Research and Statistics Division 25 Apr. 2019), [https://www.wto.org/english/res\\_e/reser\\_e/ersd201907\\_e.pdf](https://www.wto.org/english/res_e/reser_e/ersd201907_e.pdf) (accessed 2 Aug. 2021).

<sup>97</sup> WTO, *Trade Policy Review for Guyana*, WT/TPR/G/320, 3 (28 Jul. 2016); WTO, *Trade Policy Review for Gambia*, WT/TPR/G/365, 6, 9, 13 (21 Nov. 2017).

<sup>98</sup> See CIFTA, *supra* n. 72.

<sup>99</sup> *Ibid.*, Art. 13.3. A similar commitment is found in Australia – Peru, *supra* n. 79, Art. 22.4.

<sup>100</sup> Interim Agreement with a view to an Economic Partnership Agreement between the European Community and its Member States, of the one part, and the Central Africa Party, of the other part (EU – Cameroon) (enforced, 4 Aug. 2014).

Africa. In this list of possible areas of assistance, the promotion of entrepreneurship among women is listed as one of the activities that members endeavour to undertake for improving SMEs access to finance and other resources.<sup>101</sup> In EU–South Africa,<sup>102</sup> parties include a standalone provision on ‘Micro–Enterprises and Small and Medium–Scale Enterprises’. Through this provision, parties aim to develop and strengthen MEs and SMEs in South Africa by providing required them with the financial assistance.<sup>103</sup>

In Australia – Peru,<sup>104</sup> the Parties in its ‘Development’ chapter recognize that enhancing opportunities in the global economy for women business owners can contribute to economic development. To enhance the ability of businesswomen to fully access and benefit from the opportunities created by this Agreement, the Parties seek to exchange information and experience, and provide training on programs that can help women enhance their access to finance and financial instruments.<sup>105</sup> In Chile–Uruguay FTA,<sup>106</sup> Parties include a similar commitment in their dedicated chapter on Gender and Commerce, but the provision specifically outlines the need for them to cooperate on promoting financial inclusion as well as financial education for women.<sup>107</sup> A similar provision is included in Argentina–Chile,<sup>108</sup> wherein Parties seek to focus in particular on enhancing women’s businesses’ access to credit, financial education and financial assistance.<sup>109</sup>

The discussion shows that various countries in existing trade agreements have committed to and recognized the need to enhance women’s access to finance, but the countries so far have not gone into the ‘how’ part, i.e., ‘how’ they can enhance women’s access to finance as it depends on a number of factors including access to financial education, basic financial services, trade finance instruments, affordable credit and acceptable collaterals. Hence, what remains to be seen so far are concrete commitments and plans on how parties can enhance women’s access to finance. In particular, in future trade agreements, countries can agree on setting up strategies, developing better financial inclusion policies and appropriate legislation to regulate these issues. Countries can also appoint a committee that may be responsible for identifying procedures to improve women’s businesses’ access to finance and to financial and non–financial services, including through innovative financing

<sup>101</sup> *Ibid.*, Annex I, s. B.

<sup>102</sup> See EU – South Africa, *supra* n 78.

<sup>103</sup> *Ibid.*, Art. 54.

<sup>104</sup> See Australia – Peru, *supra* n. 79.

<sup>105</sup> *Ibid.*, Art. 22.4.

<sup>106</sup> Acuerdo de Libre Comercio entre la República de Chile y la República Oriental del Uruguay (Chile – Uruguay) (enforced, 13 Dec. 2018).

<sup>107</sup> *Ibid.*, Art. 14.3, Ch. 14.

<sup>108</sup> Free Trade Agreement between the Argentine Republic and the Republic of Chile (Argentina – Chile) (enforced, 1 May 2019).

<sup>109</sup> *Ibid.*, Art. 15.3.

mechanisms as these mechanisms can in particular provide affordable credit to women entrepreneurs running small formal and informal businesses. Moreover, when countries assume commitments on financial access, it is important for them to acknowledge that both public and private stakeholders of their financial sector can play an important role in supporting private sectors' access to finance. Hence, to put such commitments into action, it may be important for countries to develop transparent and predictable frameworks for collaborating with private stakeholders through public-private partnerships (PPP) or blended finance mechanisms.<sup>110</sup>

### 2.1[c] *Access to Digital Learning and E-commerce Entrepreneurial Capacity*

In an increasingly digitally enabled society, the significant challenge that still remains is the inclusion of women in digital trade. The global pandemic has made it clear that digital access is no longer a luxury but an absolute necessity, as seen in the first section of this article. In this era, increasing women's participation and know-how in this sector has become imperative. Yet, more men than women continue to have access to digital technologies and literacy, particularly in Least-Developed Countries.<sup>111</sup>

As was exposed through the pandemic, lack of digital literacy and lack of access to affordable digital infrastructure has undermined millions of women's capacity to cope with the pandemic-initiated challenges and has caused further social and economic inequalities. At the same time, the unpreparedness of national regulations to absorb the move to digital trade, online payments and economic digitalization in general has made the situation even worse in many developing countries hit by the crisis.<sup>112</sup> Hence, addressing digital inclusion and inequality in digital trade will be significant across all aspects of women's economic engagement, as digital economy is an area that cannot be overlooked if we want trade to enhance business interests of women entrepreneurs, especially amidst the pandemic-inflicted surge in digital trade.

The existing trade agreements so far have not been that vocal about the need to enhance women's access to digital technologies and e-commerce opportunities;

<sup>110</sup> 'Blended finance is the strategic use of development finance for the mobilisation of additional finance towards sustainable development in developing countries'. [See *Blended Finance* (OECD), <https://www.oecd.org/dac/financing-sustainable-development/blended-finance-principles/#:~:text=Blended%20finance%20is%20the%20strategic,providing%20financial%20returns%20to%20investors> (accessed 12 Jun. 2021)].

<sup>111</sup> Plan International, *Plan International Briefing Paper: Digital Empowerment of Girls* (PLAN International 2018), <https://plan-international.org/publications/digital-empowerment-of-girls> (accessed 17 Jun. 2021).

<sup>112</sup> *The Illusion of Digital Inclusion in the Post COVID-19 World* (UNESCAP 7 May 2021), <https://www.unescap.org/blog/illusion-digital-inclusion-post-covid-world> (accessed 12 Dec. 2021); *E-commerce and the Digital Economy in LDCs: At Breaking Point in COVID-19 Times* (UNCTAD Mar. 2022), [https://unctad.org/system/files/official-document/dtlstict2022d1\\_en.pdf](https://unctad.org/system/files/official-document/dtlstict2022d1_en.pdf) (accessed 15 May 2022).

however, there are very few examples of recently concluded trade agreements where parties have acknowledged this barrier. Although few FTAs deal with digital inclusion, the Digital Economy Partnership Agreement (DEPA)<sup>113</sup> between Chile, New Zealand, and Singapore (South Korea has just initiated the process of joining) is a leading example as it includes specific language that emphasizes digital inclusion for marginalized groups including women. This is an Agreement wherein Parties recognize ‘the importance of expanding and facilitating digital economy opportunities by removing barriers’ and cooperating ‘on matters relating to digital inclusion’.<sup>114</sup> Further, Joint Committees and Contact Points are established to oversee the implementation of these provisions.<sup>115</sup>

In the EU and the Organisation of African, Caribbean and Pacific States (OACPS) Agreement<sup>116</sup> (EU-OACPS), which still awaits signing and coming into force, the parties commit to supporting lifelong learning and equitable quality education at all levels, and they outline that special attention for women’s education should be given to science, technology, engineering and mathematics and digital education.<sup>117</sup> This proposed agreement also benefits from a standalone provision titled ‘ICT and Digital Economy’, wherein parties have assumed a commitment on promoting and supporting digital entrepreneurship particularly by women and MSMEs, and the digital transformation of MSMEs.<sup>118</sup> In this proposed Agreement, parties have provided a special emphasis on developing targeted digital literacy and skills, and enhancing women’s access to affordable and reliable technology.

In the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (‘CPTPP’),<sup>119</sup> parties consider undertaking cooperative activities (such as exchanging information and experience on programmes) aimed at enhancing women’s access to technology. The UK-Australia FTA<sup>120</sup> is another recent example that merits being considered here. In this FTA, parties recognize the global nature of digital trade and the need to facilitate women’s participation in digital trade and technology.<sup>121</sup> They also commit to undertaking cooperation activities that support

<sup>113</sup> Digital Economy Partnership Agreement (‘DEPA’) between Singapore, Chile & New Zealand (enforced, 7 Jan. 2021).

<sup>114</sup> *Ibid.*, Art. 11.1.

<sup>115</sup> *Ibid.*, Art. 12.1.

<sup>116</sup> Partnership Agreement Between [the European Union/the European Union and its Member States], of the one part and Members of the Organisation of African, Caribbean and Pacific States, of the other part (not signed, draft proposal), [https://ec.europa.eu/international-partnerships/system/files/negotiated-agreement-text-initialled-by-eu-oacps-chief-negotiators-20210415\\_en.pdf](https://ec.europa.eu/international-partnerships/system/files/negotiated-agreement-text-initialled-by-eu-oacps-chief-negotiators-20210415_en.pdf) (accessed 22 Sep. 2022).

<sup>117</sup> *Ibid.*, Art. 28.

<sup>118</sup> *Ibid.*, Art. 48.

<sup>119</sup> See CPTPP, *supra* n. 72, Art. 23.4.2.

<sup>120</sup> Free Trade Agreement between the United Kingdom of Great Britain and Northern Ireland and Australia (UK – Australia) (signed, 15 Dec. 2021).

<sup>121</sup> *Ibid.*, Arts 14.21, 24.1, 24.2.

women entrepreneurs to access the full benefits and opportunities created by this Agreement, and identify that one of the priority areas for them in this respect would be enhancing women's access to online business tools and opportunities to strengthen digital skills.<sup>122</sup> Although these provisions are cooperation-based and are explicitly left outside the Agreement's dispute settlement mechanism's scope,<sup>123</sup> they are not included without accompanying procedures of implementation. Parties in this FTA outline various procedures that include collection of sex-disaggregated data, use of indicators, monitoring and evaluation methodologies, analysis of gender statistics related to trade, and undertaking research on trade and gender equality.

It is important to note that the trade agreements discussed above with relevant provisions on technology or digital trade were either negotiated in the last few years or are still undergoing negotiations (as in the case of EU – OACPS). Moreover, increasing women's participation in the digital economy and increasing their e-commerce entrepreneurial capacity requires bringing together three related aspects, i.e., (1) access to digital learning, (2) access to digital infrastructure, and (3) access to e-commerce platforms and opportunities. In this sense, two problems can be seen with the existing inclusions. First, these recent FTAs that mention the related concerns mainly focus on the need to enhance women businesses' access to digital learning or infrastructure, and they continue to remain silent on 'how' they might put these promises into action. Second, almost all FTAs in force so far have focused on access to digital learning or infrastructure, mostly leaving out the third component of increasing their businesses' access to e-commerce platforms and opportunities. As a result, most of the existing agreements do not include concrete commitments, including the means countries may employ to enhance women's access to digital financial wallets and e-banking, and e-commerce platforms which could lead to an overall increase in women's participation in the economy. The use of digital platforms for example may offer women with many additional opportunities, including the possibility to overcome challenges related to mobility restrictions, accessing new markets and knowledge, connecting with potential markets and customers, and enjoying flexible work hours and modes.

## 2.2 WHAT REMAINS MISSING? THREE DRAWBACKS WITH THE EXISTING PROVISIONS

Despite the proliferation of gender-related provisions and chapters in the existing trade agreements, current approaches merely scratch the surface of what they can achieve in respect of empowering women's businesses. This is mainly because the current gender provisions often fall short of enhancing equity and inclusiveness by

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<sup>122</sup> *Ibid.*, Art. 24.2.

<sup>123</sup> *Ibid.*, Art. 24.4.



not directly addressing the concrete challenges women face and in respect of the sectors in which they work. This section in particular identifies three shortcomings that these existing provisions may face in respect of their effective implementation and acceptability. The section also puts forward certain recommendations on how future policy work can strengthen these provisions and cater more effectively to the mentioned interests.

2.2[a] *Important Terms Such as ‘Women Empowerment’ or ‘Gender Equality’ Are Not Defined*

The terms ‘gender equality’ and ‘women empowerment’ have not been defined in any multilateral or regional trade agreements, with the only exception of the EAC Treaty<sup>124</sup> which has defined ‘gender’ as the ‘the role of women and men in society’. This is not the first time we are witnessing the issue of lack of definition for fundamental concepts or terms in international trade law. Various other important concepts remain undefined in international trade agreements and, in particular, in WTO Agreements. Two such examples are the lack of definitions for ‘developing countries’<sup>125</sup> and ‘national security exception’.<sup>126</sup> Another example is that of the ‘public morality’ exception, as it also lacks a universally accepted definition.<sup>127</sup> Public morals can range from views related to religion,<sup>128</sup> human rights,<sup>129</sup> consumption of alcohol,<sup>130</sup> drug trafficking and corruption,<sup>131</sup> gambling,<sup>132</sup> consumer

<sup>124</sup> See EAC, *supra* n. 71, Art. 1.

<sup>125</sup> See e.g., GATT’s Art. XVIII and the Enabling Clause officially called the ‘Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries’. For details, see Aniekan Ukpe & Sangeeta Khorana, *Special and Differential Treatment in the WTO: Framing Differential Treatment to Achieve (Real) Development*, 20(2) J. Int’l Trade L. & Pol’y 83 (2021).

<sup>126</sup> See e.g., Art. XXI, GATT 1994. For more details, see Daria Boklan & Amrita Bahri, *The First WTO’s Ruling on National Security Exception: Balancing Interests or Opening Pandora’s Box?*, 19(1) World Trade Rev. 123 (2020).

<sup>127</sup> P. Serpin, *The Public Morals Exception After the WTO Seal Products Dispute: Has the Exception Swallowed the Rules?*, 2016(1) Colum. Bus. L. Rev. 219 [author observes how this protectionist tool can undermine the progress made towards trade liberalization and agreements over the past few decades]. The US – Gambling Appellate Report, for instance, has left open the fundamental issue of what values or interests qualify as public morals and whether a state can unilaterally define its own public morals [Appellate Body Report, United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/AB/R, adopted 20 Apr. 2005].

<sup>128</sup> Israel restricted importation of non-Kosher meat products. [See WTO Secretariat, *Report of the WTO Secretariat on the Trade Policy Review of Israel* (13 Aug. 1999), [www.wto.org/english/tratop\\_e/tpr\\_e/tp476\\_e.htm](http://www.wto.org/english/tratop_e/tpr_e/tp476_e.htm) (accessed 12 Nov. 2021)].

<sup>129</sup> The USA restricted importation of products made by indentured child labour. [See Treasury and General Government Appropriations Act of 1998, Pub. L. 105-61, § 634, 111 Stat. 1272, 1316 (1997)].

<sup>130</sup> Indonesia restricted importation of alcohol for moral reasons. [See WTO Secretariat, *Report on the Trade Policy Review of Indonesia* (23 May 2007), [www.wto.org/english/tratop\\_e/tpr\\_e/tp378\\_e.htm](http://www.wto.org/english/tratop_e/tpr_e/tp378_e.htm) (accessed 17 Nov. 2021)].

<sup>131</sup> Panel Report, Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear, WT/DS461/R, adopted 22 Jun. 2016.

<sup>132</sup> Communication from Antigua and Barbuda, United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/26, 25 Apr. 2013.

protection<sup>133</sup> and the protection of animals.<sup>134</sup> Literature suggests that a stringent approach to the application of the public morals exception may infringe a country's legitimate interests and sovereign rights to protect the values that its society regards as important.<sup>135</sup>

Likewise, a gender-related legal provision could impose on nations a significant cost in terms of their sovereignty, as it can allow countries to interfere in the domestic affairs of other countries and place limits (through trade agreements) on their ability to deal with matters relating to their social, political, economic, cultural and even religious affairs.<sup>136</sup> However, this cost could vary due to a number of factors, including a given country's gender gap rating as per World Economic Forum (WEF) *Global Gender Gap Reports*<sup>137</sup> or *World Bank's Women, Business and the Law Reports*.<sup>138</sup> This is mainly because the countries' willingness and appetite for such inducements rely on their domestic conditions, as countries may not be willing to be a part of agreements that contain obligations they cannot comply with.<sup>139</sup>

Moreover, the broad and undefined scope of 'gender equality' can result in a shift towards unilateralism and may allow countries to disguise an illegal protectionist measure as a policy objective. A country's significant concern could be the extent to which a legal provision relating to gender can allow countries to stretch the already-stretched concept of gender equality. If country A justifies a measure that bans or

<sup>133</sup> Panel Report, Brazil – Certain Measures Concerning Taxation and Charges, WT/DS472/R, adopted 11 Jan. 2019.

<sup>134</sup> Appellate Body Report, European Communities – Measures Prohibiting the Importation and Marketing of Seal Products, WT/DS400/AB/R/WT/DS401/AB/R, adopted 18 Jun. 2014; Nicolas F. Diebold, *The Morals and Order Exceptions in WTO Law: Balancing the Toothless Tiger and Undermining Mole*, 11(1) J. Int'l Econ. L. 43, 49, 50 (2007).

<sup>135</sup> See Diebold, *supra* n. 134, at 44.

<sup>136</sup> Sovereignty cost refers to the amount of power or authority a sovereign country would otherwise have but needs to surrender it when it joins an international treaty that place limits on and encourages interference in its domestic affairs. Kathryn Sikkink, *Human Rights, Principled Issue-Networks, and Sovereignty in Latin America*, 47(3) Int'l Org. 411 (1993) [noting that the 'doctrine of internationally protected human rights offer[s] one of the most powerful critiques of sovereignty as currently constituted']. Abbott and Snidal note that the 'sovereignty costs' are low when states 'simply make international commitments that limit their behavior in particular circumstances', but that these costs are higher when 'states accept external authority over significant decisions'. [Abbot & Snidal, *Hard and Soft Law in International Governance*, 54(3) Int'l Org. 421 (2000)]. For a contrary view, see Reus-Smit, *Human Rights and the Social Construction of Sovereignty*, 27(4) Rev. Int'l Stud. 519 (2001) [author observes that sovereignty and human rights are interrelated and should be seen as two contradictory values].

<sup>137</sup> World Economic Forum, *Closing the Gender Gap Accelerators*, <https://www.weforum.org/projects/closing-the-gender-gap-accelerators> (accessed 22 Sep. 2022).

<sup>138</sup> World Bank Group, *Women, Business and the Law 2021* (World Bank 2021), <https://wbl.worldbank.org/en/wbl> (accessed 22 Sep. 2022).

<sup>139</sup> George W. Downs, David Rocke & Peter Barsoom, *Is the Good News About Compliance Good News About Cooperation?*, 50(3) Int'l Org. 379 (1996); see also James C. Murdoch & Todd Sandler, *The Voluntary Provision of a Pure Public Good: The Case of Reduced CFC Emissions and the Montreal Protocol*, 63(3) J. Pub. Econ. (1997) 331; Contrary view in Beth A. Simmons, *International Law and State Behavior: Commitment and Compliance in International Monetary Affairs*, 94(4) Am. Pol. Sci. Rev. 819 (2000) (as authors observe that 'international legal rules do alter governments' interests in compliant behavior').

restricts trade with country B because country B ranks poorly on the *WEF Gender Gap Reports* or because it does not adhere to its commitments under International Labour Organization (ILO) conventions, country B can see this as country A's attempt to impose its own cultural standards on country B. The principal concern here is that countries could take advantage of their unequal market power or use these concerns indirectly to diminish other countries' comparative advantage by exporting their own social or cultural model to those with a different set of values and concerns.

## 2.2[b] *Gender Provisions Are Full of Promises, Without Enforcement or Implementation Mechanisms*

A heavy majority of gender-related provisions included in the existing trade agreements are drafted with non-mandatory verbs and 'soft' permissive grammatical constructions.<sup>140</sup> The countries have undertaken these commitments in a rather modest and non-binding manner, and they have generally left the implementation of these activities on their available resources and willingness. The reasons are clear. Countries are probably not ready to undertake these commitments as binding and enforceable. Hence, the gender mainstreaming approach so far has been based on the spirit of cooperation, wherein parties seek to use cooperation as a route to start this dialogue with others.<sup>141</sup>

Moreover, almost no FTA so far contemplates how gender-related commitments could be implemented or enforced. As of today, most of the FTAs that

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<sup>140</sup> Raj Bhala & Cody N. Wood, *Two Dimensional Hard-Soft Law Theory and the Advancement of Women's and LGBTQ+ Rights Through Free Trade Agreements*, 47(2) Ga. J. Int'l & Comp. L. 299, 306 (2019) [authors point out that most gender related commitments in USMCA and CPTPP are aspirational and non-binding, and hence non-enforceable, and that they are sometimes drafted with vagueness and ambiguity, and so they are susceptible to myriad interpretations].

<sup>141</sup> For details, see Nadia Hasham, Laura Naliaka, Amrita Bahri, Laetitia Pettinotti & Maximiliano Mendez Parra, *Making the AfCFTA Work for Women: The Nuts and Bolts*, UNECA and ODI Report 2022. Gender mainstreaming is defined as 'the (re)organization, improvement, development, and evaluation of policy processes so that a gender equality perspective is incorporated in all policies at all levels at all stages, by the actors normally involved in policy-making'. [Council of Europe, 'Reflections on the Concept and Practice of the Council of Europe Approach to Gender Mainstreaming and Gender Equality, Maryland USA (1998)']; Gender mainstreaming is a means to achieve gender equality. Gender mainstreaming in FTAs means the inclusion of gender considerations and concerns in the drafting and implementation of FTAs. The process of mainstreaming affirms a member's understanding, awareness or political will to reduce gender inequality through trade policies and agreements. The term 'gender responsiveness' is also used extensively in this article; it refers to a process that assesses how sensitive, informed, or committed the provisions of a trade agreement are to issues relating to gender equality. In other words, the way and extent to which an agreement mainstreams gender equality considerations defines how responsive that agreement is to gender equality concerns. These definitions initially proposed by the author in Amrita Bahri, *Measuring the Gender-Responsiveness of Free Trade Agreements: Using a Self-Evaluation Maturity Framework*, 14(11/12) Global Trade & Cust. J. 517 (2019).

incorporate gender equality concerns do not clarify precise procedures for implementation; nor do they identify channels to finance these activities.<sup>142</sup> In addition, as seen in the case of CPTPP, almost all FTAs with very few exceptions have explicitly and unambiguously excluded gender-related provisions and chapters from the application of their dispute settlement mechanisms. The absence of applicable dispute settlement procedures implies that a country's failure to comply with these obligations or commitments or affirmations has no direct legal consequence. The only exception is the Canada-Israel FTA that provides, for the very first time, a binding dispute settlement procedure that is applicable to its chapter on trade and gender.<sup>143</sup> Unfortunately, this also seems to be a symbolic attempt because the parties have subjected the binding jurisdiction of this mechanism to their consent, making its jurisdiction non-compulsory in nature.<sup>144</sup> However, there are reasons why countries so far may not be prepared to sign onto such provisions with a binding and enforceable nature; one of which previously discussed is that these provisions contain vaguely defined values and expressions.<sup>145</sup> Also, the relationship between gender equality and trade policy is country and industry specific. Specific data analysis on the impact of trade on women in specific industries may therefore be required on a case by case basis before countries can develop their appetite to assume binding and enforceable commitments in this respect.

2.2[b] *Need for an Increased Focus on Non-economic Areas Largely Neglected So Far, Such as Protection of Women Against Violence and Harassment*

For some women, staying at home during the pandemic signified their confinement in unsafe environments with their physically abusive family members.<sup>146</sup> France reported a spike of 30% in domestic violence cases against women during the lockdown.<sup>147</sup> In the United Kingdom, calls to the national abuse hotline increased by 65% during the lockdown.<sup>148</sup> A similar spike in the number of domestic abuse

<sup>142</sup> As per authors' calculations, using ITC maturity toolkit: ITC, *Mainstreaming Gender in Free Trade Agreements* (8 Jul. 2020), <https://www.intracen.org/publication/mainstreaming-gender-FTA/> (accessed 25 Jan. 2021).

<sup>143</sup> See CIFTA, *supra* n. 72, Ch. 19.

<sup>144</sup> *Ibid.*, Art. 13.6.

<sup>145</sup> See Bahri, *supra* n. 10, at 36.

<sup>146</sup> M. Patricia Fernandez-Kelly & Saskia Sassen, *Recasting Women in the Global Economy: Internationalization and Changing Definitions of Gender*, in *Women in the Latin American Development Process* (Christine E. Bose & Edna Acosta-Belen eds, Temple University Press 1995).

<sup>147</sup> *Infographic: The Shadow Pandemic – Violence Against Women and Girls and COVID-19* (UN Women 6 Apr. 2020), <https://www.unwomen.org/en/digital-library/multimedia/2020/4/infographic-covid19-violence-against-women-and-girls> (accessed 26 Apr. 2020).

<sup>148</sup> Megha Mohan, *Coronavirus: I'm in Lockdown With My Abuser* (BBC News 31 Mar. 2020), <https://www.bbc.com/news/world-52063755> (accessed 25 Apr. 2021).

cases is noticed in other countries, including China, Spain and India.<sup>149</sup> This shows how global this problem is.<sup>150</sup> Domestic violence can lead to loss of lives for some; for the survivors, it could cause physical injuries, anxiety and distress. Women can be psychologically scarred due to increased violence and household responsibilities; and this could jeopardize their confidence or psychological set-up to succeed or progress in their professional endeavors.<sup>151</sup>

Some FTAs negotiated by the EU have recognized this problem, and their parties have assumed commitments to reduce domestic violence. One such FTA is the EU – South Africa, wherein parties seek to engage in a dialogue on issues related to violence against women and elimination of discrimination in respect of occupation among other things.<sup>152</sup> In EU – Central America,<sup>153</sup> parties intend to enhance women’s safety, and include in the agreement a commitment to protect the lives of women against anti-personnel mines.<sup>154</sup> Moreover, the Agreement’s Article 41 on Social Cohesion includes a commitment to combat xenophobia and discrimination on the grounds of sex (amongst other grounds). But such provisions are more of an exception than a norm, as they are found in a very limited number of agreements. Future trade negotiations should consider including robust and concrete commitments that extend beyond best endeavour promises relating to anti-discrimination, market access or employment concerns.

### 3 CONCLUDING THOUGHTS

The COVID-19 relief packages have, intentionally or unintentionally, excluded women-owned businesses from their scope and operation. As demonstrated above, the impact of COVID-19 on women’s businesses is evident and similar to the impact of other natural disasters; it goes beyond economic dismay as it also touches upon

<sup>149</sup> Amanda Taub, *A New Covid-19 Crisis: Domestic Abuse Rises Worldwide* (New York Times 6 Apr. 2020), <https://www.nytimes.com/2020/04/06/world/coronavirus-domestic-violence.html?smid=fb-nytimes&smtyp=cur> (accessed 21 Apr. 2021).

<sup>150</sup> UNFPA, *COVID-19: A Gender Lens, Technical Brief Protecting Sexual and Reproductive Health and Rights, and Promoting Gender Equality* (Mar. 2020), <https://www.unfpa.org/resources/covid-19-gender-lens> (accessed 15 May 2020); Andrea Monje, Vivian Roza & Nidia Hidalgo, *Violence Against Women (VAW) In The Context of Covid-19: Lessons and Tools for Latin America and the Caribbean* (IDB Mar. 2020), <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=EZSHARE-1043693673-42> (accessed 27 Apr. 2021).

<sup>151</sup> Pre COVID-19, domestic violence against women had a cost estimated of about 2% of the global GDP and USD 1.5 trillion. [See *The Economic Costs of Violence Against Women* (UN WOMEN 21 Sep. 2016), <https://www.unwomen.org/en/news/stories/2016/9/speech-by-lakshmi-puri-on-economic-costs-of-violence-against-women> (accessed 21 Nov. 2021)].

<sup>152</sup> See EU – South Africa, *supra* 78, Art. 86.

<sup>153</sup> See EU – Central America, *supra* n. 10.

<sup>154</sup> *Ibid.*, Art. 32.

women's health, security and violence, education, housing, food, and survival.<sup>155</sup> The authors therefore question why none of the findings and recommendations outlined in disaster relief strategies have been used when designing measures to mitigate the COVID-19 impact on women's businesses. Is it because governments often work in silos and lack horizontal coordination between ministries and agencies? Or is it because gender has not yet made its way as a priority for government strategies and policies? Or is it simply because the governments are not aware of how the pandemic is having a disproportionate impact on women entrepreneurs and the need thereof to support their businesses? The paucity of sex-disaggregated data may be a key obstacle that impedes the designing of targeted support policies.<sup>156</sup>

Absent gender-responsive support measures, the existing FTAs can be deployed to mitigate the impact of COVID-19 on women entrepreneurs. However, almost no FTA so far contemplates how gender-related commitments could be implemented or enforced, and most of the gender equality considerations included in the existing agreements are drafted with non-mandatory verbs and 'soft' permissive grammatical constructions.<sup>157</sup> As of today, even the most advanced FTAs in respect of gender equality concerns do not clarify precise procedures for the implementation of gender-related commitments; nor do they identify channels to finance these activities.<sup>158</sup> To ensure that trade agreements and policies work to create an inclusive trade environment, they need to be drafted with a gender-responsive approach; a gender-responsive approach calls for the inclusion of commitments that can go well beyond symbolic promises which are not meant or designed to be acted upon.<sup>159</sup>

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<sup>155</sup> *Climate Change: Mitigating the Impact on Women* (European Parliament 5 Dec. 2017), <https://www.europarl.europa.eu/news/en/headlines/society/20171201STO89304/climate-change-mitigating-the-impact-on-women> (accessed 17 Jan. 2022); Anne Bonewit, *The Gender Dimension of Climate Justice* (Policy Department C: Citizen's Rights and Constitutional Affairs, European Parliament Dec. 2015), [https://www.europarl.europa.eu/RegData/etudes/IDAN/2015/536478/IPOL\\_IDA\(2015\)536478\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2015/536478/IPOL_IDA(2015)536478_EN.pdf) (accessed 17 Jan. 2022).

<sup>156</sup> *Better Data and Statistics for Gender Responsive Trade Policy*, Policy Brief No. 70 (UNCTAD Oct. 2018), [https://unctad.org/system/files/official-document/presspb2018d7\\_en.pdf](https://unctad.org/system/files/official-document/presspb2018d7_en.pdf) (accessed 17 Jan. 2022).

<sup>157</sup> Bhala & Wood, *supra* n. 140. [authors point out that most gender-related commitments in USMCA and CPTPP are aspirational and non-binding, and hence non-enforceable, and that they are sometimes drafted with vagueness and ambiguity, and so they are susceptible to myriad interpretations].

<sup>158</sup> As per authors' calculations, using ITC maturity toolkit: ITC, *supra* n. 142.

<sup>159</sup> For more information on the dimensions and benchmarks for negotiating gender-responsive trade agreements, see *ibid.*