

GENDER MAINSTREAMING IN TRADE AGREEMENTS: BEST PRACTICE EXAMPLES AND CHALLENGES IN THE ASIA PACIFIC

Amrita Bahri

Abstract

In recent years, more and more countries have included different kinds of gender considerations in their trade agreements. Yet, many countries have still not signed their very first agreement with a gender equality related provision. Though most of the agreements negotiated by countries in the Asia Pacific region have not explicitly accommodated gender concerns, a limited number of trade agreements signed by countries in this region have presented a distinct approach: the nature of provisions, drafting style, location in the agreements and topic coverage of such provisions contrast with the gender mainstreaming approach employed by the Americas or other regions. This chapter provides a comprehensive account and assessment of gender-related provisions included in the existing trade agreements negotiated by countries in the Asia Pacific, explains the extent to which gender concerns are mainstreamed in these agreements, and summarises the reasons that impede such mainstreaming efforts in the region.

1. Introduction

Without exception, women across the globe have suffered from the economic and social consequences of the COVID-19 pandemic.¹ In particular, women entrepreneurs and employees have been disproportionately impacted due to the pre-pandemic disadvantages they have faced in the economic, social, financial and regulatory ecosystems in which they operate.² These disadvantages may include, but are not limited to, lack of access to educational opportunities; the digital divide between men and women caused by lack of

¹ WTO, 'The Economic Impact of COVID-19 on Women in Vulnerable Sectors and Economies' (2020) <<https://doi.org/10.30875/74a82a3d-en>> accessed 8 May 2022. The study outlines the economic impact of the pandemic on vulnerable sectors including women; Amrita Bahri, 'Women at the Frontline of COVID-19: Can Gender Mainstreaming in Free Trade Agreements Help?' (2020) 23(3) *Journal of International Economic Law* 563-582. The author presents multiple reasons on how COVID-19 has put women to the frontline and explores how trade agreements can help.

² These barriers are discussed in World Bank, 'Women, Business and the Law' (World Bank Reports 2010, 2012, 2014, 2016, 2018, 2019 and 2020); WTO, 'Women and Trade: The role of trade in promoting gender equality' (2020) <<https://wbl.worldbank.org/en/wbl>> accessed 8 May 2022.

affordability and digital know-how; lack of access to productive resources such as land, finances and other assets; disproportionately high tariff and non-tariff barriers faced by women-owned businesses engaged in agriculture and textiles; lack of access to trade-related information and business networks; and disproportionately high burdens in discharging household responsibilities.³ The COVID-19 pandemic is magnifying the impact of the pre-existing barriers that women face, bringing about massive loss of jobs and business opportunities, declining access to education as it goes online, spiralling increases in household responsibilities and domestic violence against women.⁴ Recent studies have shown how limited gains made in respect of gender equality are now at serious risk of being rolled back.⁵

Countries can employ two different approaches to counter these challenges: a bottom-up and a top-down approach. Using a bottom-up approach, countries can directly try to change national laws, culture, and social norms at the domestic level which then permeates to the higher levels of policy making. Alternatively (or complementarily), in the top-down approach, they can use international law to create incentives to bring about a change at the domestic level.

In the realm of women empowerment, international trade law and policies can form part of this “top-down” approach. The WTO’s Joint Declaration on Trade and Women’s Economic Empowerment⁶ is an important step in this direction. The Declaration, signed in December 2017 at Buenos Aires by almost seventy percent of WTO Membership,⁷ reaffirms that ‘international trade and investment are engines of economic growth for both developing and developed countries, and that improving women’s access to opportunities and removing barriers to their participation in national and international economies contributes to

³ ITC, ‘Unlocking Markets for Women to Trade’ (2015) <<https://www.intracen.org/publication/Unlocking-markets-for-women-to-trade/>> accessed 8 May 2022.

⁴ Simonetta Zarrilli and Henri Luomaranta, ‘Gender and unemployment: Lessons from the COVID-19 pandemic’ (UNCTAD 8 April 2021) <<https://unctad.org/news/gender-and-unemployment-lessons-covid-19-pandemic>> accessed 8 May 2022; Gabriela Ramos, ‘Women at the core of the fight against COVID-19 crisis’ (OECD 1 April 2020) <<https://www.oecd.org/coronavirus/policy-responses/women-at-the-core-of-the-fight-against-covid-19-crisis-553a8269/>> accessed 8 May 2022.

⁵ WTO, ‘The Economic Impact of COVID-19 on Women in Vulnerable Sectors and Economies’ (2020) <<https://doi.org/10.30875/74a82a3d-en>> accessed 8 May 2022; Bahri (n 1); World Bank (n 2).

⁶ WTO, ‘Joint Declaration on Trade and Women’s Economic Empowerment on the Occasion of the WTO Ministerial Conference in Buenos Aires in December 2017’ (2017) <https://www.wto.org/english/thewto_e/minist_e/mc11_e/genderdeclarationmc11_e.pdf> accessed 8 May 2022 [Declaration 2017].

⁷ Currently, 127 WTO member countries had signed the Buenos Aires Declaration.

sustainable economic development'.⁸ The Declaration is aligned with and complements the United Nations (UN) Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) 1979⁹ and Goal 5 of the Sustainable Development Goals (UN SDGs) in the UN 2030 Agenda for Sustainable Development.¹⁰

Moreover, recent trends show a promise in terms of the role that Free Trade Agreements (FTAs) can play in this respect.¹¹ Since 2016, there has been an upsurge of FTAs that are carving out space for gender equality concerns through the incorporation of provisions and chapters on trade and gender. These trends show that FTAs can act as laboratories in which to experiment with the complex amalgamation of trade and gender concerns. In this race towards making trade more inclusive, have FTAs proven to be trend-setters? This chapter shows that they have pushed for an inclusive trade agenda aiming to distribute trade benefits in a gender-just manner.

This chapter provides a comprehensive account and assessment of gender-related provisions included in the existing trade agreements negotiated by countries in the Asia Pacific, considers the extent to which gender concerns are mainstreamed in these agreements, and examines the reasons that impede such mainstreaming efforts in the region. Section 2 provides an overview of different gender mainstreaming trends in trade agreements. Section 3 clarifies what gender mainstreaming entails in trade policy context. Section 4 provides an overview of those trade agreements signed by Asia Pacific countries that have accommodated gender equality concerns. Section 5 concludes and provides a discussion on potential barriers and hesitations that impede gender mainstreaming efforts in this region.

2. An Overview of FTAs Mainstreaming Gender Concerns

In recent years, more and more countries have included gender considerations in their trade agreements, albeit in different ways, formats and drafting styles. Some FTAs have a whole chapter with a number of provisions on trade and gender, but no compulsory and enforceable

⁸ *ibid.*

⁹ UN, 'Convention on the Elimination of All Forms of Discrimination against Women', UNGA Res. 34/180 (18 December 1979).

¹⁰ UNDP, 'The Sustainable Development Goals' (2015) Goal 5.

¹¹ The expression 'Free trade agreement' or 'FTA' in this paper 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, association agreements, strategic partnership agreements, and such others.

obligations.¹² Some FTAs have a single gender-explicit provision, but that single provision creates a legally binding obligation.¹³ Some countries have sought to work on these concerns via cooperative actions, including exchange of best practices and organisation of capacity-building workshops;¹⁴ while others have reserved the right to regulate particular services that directly impact women or services related to nutrition or childcare for instance.¹⁵ In some agreements, all we find are general statements wherein parties acknowledge the importance of the role of women in trade and commerce.¹⁶ In other agreements, we find affirming and reaffirming provisions, wherein parties commit to engaging in concrete actions or reaffirm their commitments made under other international instruments.¹⁷ Moreover, several agreements are completely silent or merely make a single mention of expressions relating to gender equality, and others mention gender-explicit expressions more than 40 times in their main text.¹⁸

In most agreements, gender-related provisions are non-binding, and are drafted with non-mandatory expressions and “soft” permissive grammatical constructions.¹⁹ However, a handful of countries have drafted such provisions with legally binding obligations.²⁰ Gender-related provisions are considered as legally-binding when they are drafted with mandatory verbs (such as “shall” or “must”) and their implementation is compulsory in nature, and enforceable under dispute settlement mechanisms.²¹ Most of the gender-related provisions are found in chapters on cooperation, which mostly are excluded from the agreement’s dispute settlement mechanism’s scope.

¹² Modernized Canada-Chile Free Trade Agreement (CCFTA) (enforced on 5 February 2019) and Modernized Canada-Israel Free Trade Agreement (CIFTA) (enforced on 1 September 2019) [Both include standalone chapters on gender; Canada-Chile FTA (chapter N bis) and Canada-Israel FTA (chapter 13)].

¹³ Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Montenegro, of the other part (1 May 2010) Art. 101. [It obliges Montenegro to adjust its domestic legislation to provide for working conditions and equal opportunities for women and men].

¹⁴ Modernized Canada-Chile Free Trade Agreement (CCFTA) (5 February 2019) [It includes multiple cooperation activities focused on enhancing women’s access to trade as employees, employers and consumers.].

¹⁵ Free Trade Agreement between New Zealand and the Republic of Korea (20 December 2015).

¹⁶ The Canada – Honduras Free Trade Agreement (1 October 2014) [It only contains a general statement on the importance of gender equality within Annex 1; it is a cooperation activity mentioned in best endeavour language.].

¹⁷ The Free Trade Agreement between the United States of America and the Republic of Korea (15 March 2012) [Parties reaffirm their commitments to ILO Conventions.]; Modernized Canada-Chile Free Trade Agreement (CCFTA) (enforced on 5 February 2019) [Parties reaffirm their commitments to CEDAW].

¹⁸ For instance, Modernized Canada-Chile Free Trade Agreement (CCFTA) (5 February 2019).

¹⁹ Modernized Canada-Chile Free Trade Agreement (CCFTA) (5 February 2019); Modernized Canada-Israel Free Trade Agreement (CIFTA) (1 September 2019).

²⁰ For instance, Agreement establishing an Association between the European Union and its Member States, on the one hand, and Central America on the other, OJL 346 (15 December 2012) and the United States-Mexico-Canada Agreement (USMCA) (1 July 2020).

²¹ Graham Cook, *A Digest of WTO Jurisprudence on Public International Law Concepts and Principles* (Cambridge University Press 2015) Chapters 15 and 16, 225-360.

The topics addressed in gender provisions also vary from one region to the other, as some regions have included provisions on social and healthcare concerns of women (such as Asia Pacific),²² and others have covered purely economic and market-oriented interests (such as North or South America).²³ The location of gender provisions in different agreements is also diverse, as they are included in agreements' preambles, objectives and principles clauses, stand-alone chapters, side agreements, specific provisions, cross-cutting provisions or chapters, protocols, arrangements or even annexes.²⁴

Variations are also found in the level of readiness countries have developed over these years to discuss and negotiate gender concerns in trade policy context. On one hand, various countries in North and South America, Africa and the European Union are leading gender mainstreaming efforts.²⁵ On the other hand, many countries are yet to take their very first step in this regard.²⁶ For example, several countries in Asia Pacific have either opposed the inclusion of gender concerns in trade policy instruments or are reluctant to engage in such negotiations without fully comprehending the impact such provisions can have on their trade, economy, sovereignty and social concerns.²⁷

Most of the agreements negotiated by countries in Asia Pacific are gender-blind, as they do not contain any gender-related or gender-considerate provision.²⁸ As compared to other regions, the Asia Pacific countries have negotiated the lowest number of agreements with provisions relating to gender equality concerns. For example, 38 percent of trade agreements signed by North American countries have included at least one gender-explicit provision.²⁹

²² Amrita Bahri, 'Gender Mainstreaming in Free Trade Agreements: A Regional Analysis and Good Practice Examples' (Gender, Social Inclusion and Trade Knowledge Product Series 2021), <https://wtochairs.org/sites/default/files/7.%20Gender%20mainstreaming%20in%20FTAs_final%20%286%29.pdf> accessed 8 May 2022.

²³ *ibid.*

²⁴ José-Antonio Monteiro, 'Gender-related provisions in regional trade agreements' (2021) WTO Staff Working Papers ERSD-2018-15 <https://www.wto.org/english/res_e/reser_e/ersd201815_e.pdf> accessed 8 May 2022.

²⁵ Bahri (n 22).

²⁶ *ibid.*

²⁷ *ibid.*

²⁸ For instance, Korea-India FTA (1 January 2010) and Korea-Viet Nam FTA (20 December 2015).

²⁹ Author's calculations. For the purpose of this study, the author has assessed all trade agreements that are currently in force and notified to the WTO (as of 15 June 2021), independent of the relative importance of trade flows between parties. Agreements or economic integration mechanisms not yet notified to the WTO or not yet in force are excluded from this study. However, selected trade agreements that are not yet notified or not yet in force are considered to a limited extent if they contain gender-related best practice provisions that can add new or support existing findings presented in this study. Those provisions which use terms directly related to 'gender', 'women', 'female', 'maternity' or a similar expression in the provision in an explicit manner are considered as 'gender-explicit provisions' in this study. '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. These findings are initially published in: Bahri (n 22).

For South American countries, this number is just over 20 percent, and it is 32 percent in the case of African countries.³⁰ As many as 78 percent of the EU's agreements contain at least one gender-explicit provision, even though most of these agreements are not merely trade agreements in a strict sense, and are drafted as association or integration agreements that include gender commitments in social or cooperation pillars of such agreement.³¹ Out of all trade agreements signed by the Asia Pacific countries, only 14 percent have incorporated one or more gender-related or gender-explicit provisions.³²

These numbers show that Asia Pacific is behind compared to other regions in respect of using their trade agreements to further gender equality concerns. Moreover, unlike market, employment or resource-access-oriented gender provisions negotiated by countries in the Americas or East Africa, the focus of gender-related provisions in Asia Pacific has been on women's personal welfare concerns.³³ A handful of agreements that have included such commitments have mainly envisaged women as mothers as they have focussed on enhancing women's access to affordable childcare facilities, and other maternity benefits, and protection of healthcare interests.³⁴ In addition, the style of these provisions is in stark contrast to how such provisions have been drafted by countries in other regions.

3. What is Gender Mainstreaming in Trade Policy Context?

Gender mainstreaming can be defined as “the (re)organization, improvement, development, and evaluation of policy processes so that gender equality perspective is incorporated in all policies at all levels at all stages, by the actors normally involved in policymaking”.³⁵ It is a means to achieve gender equality. Gender mainstreaming in FTAs means the inclusion of gender concerns in the drafting and implementation of FTAs. This is a process by which parties seek to include the gender perspective in trade liberalization efforts and policies. The process of mainstreaming affirms a country's commitment, understanding, and political will to reduce gender inequalities through trade policies and agreements. The process also aims to maximize the positive impact and minimize the negative impact of trade agreements on

³⁰ Author's calculations.

³¹ Author's calculations.

³² The focus of this section is on bilateral trade agreements notified to the WTO and does not address gender issues in regional or transregional integration mechanisms such as the Asia Pacific Economic Cooperation (APEC) forum, nor within the Association of Southeast Asian Nations (ASEAN) or the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP).

³³ Bahri (n 22).

³⁴ Australia-New Zealand Closer Economic Relations Trade Agreement [1 January 1983 (G), 1 January 1989 (G)]; Hong Kong, China-New Zealand Closer Economic Partnership Agreement (1 January 2011).

³⁵ This is the definition proposed by an expert group convened by the Council of Europe (1998).

women's empowerment goals. The term "gender responsiveness" is also used extensively in this chapter, and refers to an assessment of how sensitive, informed, or committed the provisions of a trade agreement are to gender equality.³⁶ 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.

Gender mainstreaming in trade agreements can be employed to strengthen women empowerment. FTAs can play an important role in reducing gender inequality because countries can encourage their trade partners to create laws and procedures that can reduce barriers and create encouraging conditions for women's participation in trade and commerce.³⁷ In this manner, countries can use these negotiating instruments to incentivize change at the domestic level in other countries in exchange for enhanced or unfettered market access. In short, the lure of market access to important markets can be used to enhance gender equality through FTAs.

4. Trade Agreements Signed by Asia Pacific Countries: Best Practice Examples

The Asia-Pacific region is home to almost half of the world's population, and hence any action to reduce gender inequality by countries in this region can impact the lives of many women in the world. Moreover, the region accounts for almost 37 percent of world GDP at purchasing power parity and major economic powers like the US, China, Australia, India,

³⁶ As defined within the UN Gender Equality Glossary, "gender" refers to "*the roles, behaviors, activities, and attributes that a given society at a given time considers appropriate for men and women. In addition to the social attributes and opportunities associated with being male and female and the relationships between women and men and girls and boys, gender also refers to the relations between women and those between men. These attributes, opportunities and relationships are socially constructed and are learned through socialization processes. They are context/ time-specific and changeable. Gender determines what is expected, allowed and valued in a woman or a man in a given context*". Gender equality "*refers to the equal rights, responsibilities and opportunities of women and men and girls and boys. Equality does not mean that women and men will become the same but that women's and men's rights, responsibilities and opportunities will not depend on whether they are born male or female. Gender equality implies that the interests, needs and priorities of both women and men are taken into consideration, recognizing the diversity of different groups of women and men. Gender equality is not a women's issue but should concern and fully engage men as well as women. Equality between women and men is seen both as a human rights issue and as a precondition for, and indicator of, sustainable people-centered development*". See UN Women, 'Gender Equality Glossary', <<https://www.un.org/womenwatch/osagi/conceptsanddefinitions.htm>> accessed 8 May 2022.

³⁷ Amrita Bahri, 'Measuring the Gender-Responsiveness of Free Trade Agreements: Using a Self-Evaluation Maturity Framework' (2019) 14(11) Global Trade & Customs Journal 517-527.

Singapore, Japan, and Taiwan are also situated here.³⁸ These states in Asia Pacific play an important economic role as they contribute significantly to the world economy.³⁹

In total, the 66 countries in the Asia Pacific region have notified a total of 152 trade agreements to the WTO that are currently in force.⁴⁰ Amongst these, 22 agreements have gender-explicit provisions; that is, only about 14 percent of its agreements have some sort of gender-consideration.⁴¹ The countries that lead the gender mainstreaming trend in this region are Australia, New Zealand, Singapore, South Korea, and Vietnam, and most recently Japan. The most commonly found provisions are drafted in the form of “right to regulate” reservations. These reservations help countries to strike a balance between protection of investment or trade liberalization and the signatory’s policy space to regulate on issues such as national security, public health, environment, and gender equality, among others.⁴²

4.1. Best Practice Examples

The FTAs’ gender provisions negotiated by countries in this region mostly relate to women’s personal welfare concerns. Access to affordable childcare facilities, and other maternity benefits, protection of healthcare interests, and physical safety are considered as some of the effective enablers for empowering women in this region. The Australia-New Zealand Closer Economic Agreement (ANZCERTA),⁴³ for example, contains a reservation wherein New Zealand reserves the right to regulate in the area of social services including childcare.⁴⁴ Childcare challenges pose a significant barrier to work, especially for mothers, who disproportionately take on unpaid responsibilities when they cannot find affordable

³⁸ World Population Review, ‘Asia-Pacific Countries 2022’ <<https://worldpopulationreview.com/country-rankings/apac-countries>> accessed 8 May 2022.

³⁹ IMF, ‘Regional Economic Outlook for Asia and Pacific’ (October 2021) <<https://www.imf.org/en/Publications/REO/APAC/Issues/2021/10/15/regional-economic-outlook-for-asia-and-pacific-october-2021>> accessed 8 May 2022; FAO, ‘Economic and Demographic Developments’ <<https://www.fao.org/3/w7705e/w7705e07.htm>> accessed 8 May 2022.

⁴⁰ WTO, ‘Regional Trade Agreements Database’ <<https://rtais.wto.org/UI/PublicMaintainRTAHome.aspx>> accessed 8 September 2022

⁴¹ The focus of this section is on bilateral trade agreements notified to the WTO and does not address gender issues in regional or transregional integration mechanisms such as the Asia Pacific Economic Cooperation (APEC) forum, nor within the ASEAN or CPTPP. Findings initially presented in: Bahri (n 22).

⁴² David Gaukrodger, ‘The balance between investor protection and the right to regulate in investment treaties: A scoping paper’ (2017) OECD Working Papers on International Investment No 2017/02 <<https://doi.org/10.1787/82786801-en>> accessed 8 May 2022.

⁴³ Australia-New Zealand Closer Economic Relations Trade Agreement (1 January 1989).

⁴⁴ *ibid* Annex II.

childcare.⁴⁵ Provision of affordable childcare facilities is therefore vital, as their absence limits women's employment opportunities and educational aspirations.

Similar provisions regarding the right to regulate in respect of childcare services are also found in the Peru-South Korea FTA⁴⁶ and the South Korea-Central America FTA.⁴⁷ In addition, in Annex I to the South Korea-Central America FTA, Costa Rica reserves the right to prevent the issuance of licenses to sell alcoholic beverages in certain zones and areas (such as near child nutrition centres). This is not a gender explicit provision *per se*, but it is relevant in the sense that it prohibits the selling of alcohol around child nutrition centres, and it is mostly women that are responsible for child nutrition and other caregiving responsibilities which include accompanying children to such centres.⁴⁸ Hence, such a restriction may enhance physical safety of mothers from people who may, under alcoholic influence, engage in socially undesirable behaviour and hence may become a cause of concern for their safety during this commute.

The signatories to the FTA between Hong Kong, China and New Zealand⁴⁹ reserve the right to regulate certain services that relate to female professionals and women's health interests. In Annex II and III to Chapter 13 on Services, the signatories reserve their right to regulate services provided by nurses, a profession which is significantly dominated by female professionals.⁵⁰ The reservation also extends to services relating to childcare, maternity deliveries, services provided by midwives, services relating to supervision during pregnancy, childbirth and the supervision of the mother after birth.

In the agreement between ASEAN and South Korea,⁵¹ Singapore reserves the right to regulate certain types of social services including statutory supervision services related to the provision of accommodation for women and girls detained in a place of safety under Section

⁴⁵ ILO, 'The gender gap in employment: What's holding women back?' (ILO Infostories 2017) <<https://www.ilo.org/infostories/en-GB/Stories/Employment/barriers-women#footer>> accessed 8 May 2022.

⁴⁶ Free Trade Agreement between the Republic of Korea and the Republic of Peru (1 August 2011).

⁴⁷ Republic of Korea-Central America Free Trade Agreement (1 November 2019).

⁴⁸ Lisa C. Smith, Usha Ramakrishnan, Aida Ndiaye, Lawrence Haddad, and Reynaldo Martorell, 'The Importance of Women's Status for Child Nutrition in Developing Countries' (2003) International Food Policy Research Institute Research Report No. 131 <<https://ebrary.ifpri.org/utils/getfile/collection/p15738coll2/id/48032/filename/43490.pdf>> accessed 8 May 2022.

⁴⁹ Free Trade Agreement between the Government of the People's Republic of China and the Government of New Zealand (1 October 2008).

⁵⁰ Nuriye Buyukkayaci Duman, 'Reflections of Female Domination in the Profession over the Nursing Strength: Turkey Sample' (2012) 3(24) International Journal of Business and Social Science 182-187.

⁵¹ 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 (1 January 2010).

160 of the Singapore's Women's Charter (CPC 93312).⁵² Section 160 stipulates four cases in which the Director General (DG)⁵³ may order detention or commitment of woman or girl: (a) where a lawful guardian has requested the DG to detain her in a place of safety or to commit her to the care of a fit individual; (b) or if the DG feels that she is in need of protection and whose lawful guardian cannot be found; (c) or if DG believes that she has been ill-treated and is in need of protection; (d) for whom the DG considers to be in a moral danger. In these cases, Singapore reserves the right to regulate its supervision services for women and girls. This provision can be construed as both favourable as well as unfavourable for women and girls. It can be seen as a favourable provision as it seeks to protect physical safety of women and girls. However, the fourth instance mentioned above, where DG can order detention or "commitment" if a woman or a girl is considered to be in a moral danger, gives unfettered discretion to the DG. This is because the concept of "morality" is very subjective and may change or evolve from place to place and with the passage of time. Another problem with this provision is the use of the word "commitment". It is not defined in the statute itself, but the scope of this expression could extend to decisions relating to adoption, allocation to foster care homes or welfare centres, or even decisions related to matrimony. If that is the case, and if the statute is interpreted to allow the DG to interfere with a woman's or a girl's life in all these aspects owing to the DG's moral judgment, it could be seen as an undue interference with, and a violation of, women's right to freedom. Hence, in this sense, such a legal provision could be a double-edged sword and its impact would depend on how it is applied by the country.

The above-mentioned examples show that, unlike in other regions, several countries in the Asia Pacific region have signed FTAs with legally binding reservations. South Korea and New Zealand seem to have currently led this approach, as they have negotiated several agreements with a binding "right to regulate" provision. In the New Zealand-South Korea FTA,⁵⁴ parties have reserved the right to regulate certain health and social services that relate to female professionals and women's health interests. In Annex II, which relates to Services and Investment, parties have reserved the right to adopt or maintain any measure with respect to maternity deliveries and related services, including services provided by midwives, and

⁵² Singapore's Women's Charter (CPC 93312) §120 <<https://sso.agc.gov.sg/Act/WC1961?ProvIds=PII-#pr2->> accessed 8 May 2022.

⁵³ "Director-General" means the Director-General of Social Welfare and includes any person who is authorised by him to perform any of the duties or exercise any of the powers of the Director-General under this Act [Part I, Act].

⁵⁴ Free Trade Agreement between New Zealand and the Republic of Korea (20 December 2015).

with respect to childcare. In the South Korea-Singapore FTA,⁵⁵ Chapter 9 on cross-border trade in services does not apply to subsidies or grants (including government-supported loans, guarantees and insurance) or social services provided in conjunction with childcare (Article 9.2). Also, in Chapter 10 on investment, parties have reserved the right to regulate foreign investment in respect of childcare services (Article 10.2).

Though countries in the Asia Pacific region have not engaged previously in negotiating a standalone chapter on trade and gender in their trade agreements, a recent development is worth mentioning. Japan and the UK have signed a Comprehensive Economic Partnership Agreement with a standalone chapter titled “Trade and Women’s Economic Empowerment”.⁵⁶ This includes declarative statements on the importance of enhancing opportunities for women in the domestic and global economy. It also contains parties’ affirmations on cooperation activities aimed at improving the access of women to markets, technology and financing and developing women’s leadership and business networks. Parties have also committed to work on activities related to the WTO’s Joint Declaration on Trade and Women’s Economic Empowerment. Japan and the UK have also agreed to establish a Working Group to oversee and implement the cooperation activities mentioned in the chapter. The agreement’s preamble is gender-explicit, and states that the parties seek to “increase women’s access to and ability to benefit from the opportunities created by this Agreement and to support the conditions for women to participate equitably in the domestic and global economy”.⁵⁷ Such provisions in a trade agreement are unique in this region.

As can be seen from these examples, several agreements in this region seek to protect maternity and safety concerns of women. Hence, signatories to these agreements have envisaged the role of women as mothers and caretakers and not as employees, entrepreneurs or decision-makers. This discussion shows why there is merely a slightly opened door in FTAs that countries in this region need to push further by recognising women’s economic interests and including commitments on enhancing women’s participation in their markets and economies. Moreover, as noted before, only about 14 percent of bilateral trade

⁵⁵ Free Trade Agreement between the Government of the Republic of Korea and the Government of the Republic of Singapore (2 March 2006).

⁵⁶ UK-Japan Agreement for a Comprehensive Economic Partnership (31 December 2020). This agreement is not considered in the calculation of gender explicit words found in agreements in this region, as the agreement is not yet notified to the WTO as of 8 May 2022).

⁵⁷ *ibid*, Preamble.

agreements in this region contain provisions with gender-explicit expressions.⁵⁸ This can be attributed to various hesitations that may impede such efforts in this region. The following section provides a discussion on three of such factors.

4.2. Potential Factors Impeding Gender Mainstreaming Efforts

There are various factors that could have hindered the negotiation of bilateral trade agreements with gender provisions in this region. These factors may include, among others, lack of understanding and expertise, paucity of gender-disaggregated data, lack of political willingness, fear of protectionism, high cost of compliance and low probability of compliance, and fears of cultural imperialism.⁵⁹ The discussions in this section focus on the latter three factors, i.e., the high cost and low probability of compliance; fears of cultural imperialism; and lack of understanding and relevant expertise.

A first deterrent for countries in the Asia Pacific region could be the high cost and low probability of compliance. 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.⁶⁰ Hence, countries may not usually engage in cooperation efforts that require departure from their domestic policies and practices or the ones that require countries to act differently than they would otherwise act. The cost of compliance is therefore fundamental to a country's decision to join an agreement which may require that country to change the *status quo* in respect of its laws, policies and practices.

The further a country's practices and policies discourage gender inequality and adhere to universally accepted gender equality norms, the more likely it is that the country will accept such a commitment in its trade policy instruments. Countries with practices and policies that do not adhere to commonly accepted norms (such as the elimination of discrimination based on sex) and hence are ranked poorly in gender-related indexes, might be less likely to accept

⁵⁸ However, the large and comprehensive regional and trans-regional economic integration mechanisms to which countries in the region are party, such as APEC, ASEAN and the CPTPP, include gender issues to a certain extent. APEC is pioneering in this respect.

⁵⁹ Based on findings gathered during interviews with trade negotiators and policymakers (details withheld).

⁶⁰ George W Downs, David Rocke and Peter Barsoom, 'Is the Good News About Compliance Good News About Cooperation?' (1996) 50(3) *International Organization* 379-406; *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' (1997) 63(3) *Journal of Public Economics* 331-349; Contrary view in Beth A. Simmons, 'International Law and State Behavior: Commitment and Compliance in International Monetary Affairs' (2000) 94(4) *The American Political Science Review* 819-835 (as authors observe that 'international legal rules do alter governments' interests in compliant behavior').

such a provision.⁶¹ Together with this cost of compliance, another deterrent could be the uncertainty as to the inconvenience countries might face with such gender commitments, as countries can invoke these provisions to justify a value that may either only be remotely related to gender equality or a value that is not shared or observed by other countries.

The cost of compliance associated with gender-responsive trade agreements for several countries in this region could be discouragingly high, as most are found to have the widest inequality between women and men across health, education, economy, laws and politics (with few exception of countries that score a high rating such as Japan, Australia and New Zealand) as per Global Gender Gap Reports⁶² or World Bank's Women, Business and the Law Reports.⁶³ Hence, negotiating gender-responsive trade agreements may often require a departure from domestic policies for some of these countries and countries may also face difficulties in the ratification and implementation of such agreements, especially if they require changes in domestic laws, policies and practices.

A second deterrent may be the fear of cultural imperialism. Trade agreements with commitments on gender equality or interpretation of gender-explicit provisions can allow another country (i.e., a trade partner) to effectively define the moral or cultural values of foreign jurisdictions without regard for their moral norms. If country A justifies a measure that bans or restricts trade with country B because country B ranks poorly on *WEF Gender Gap Reports* or because it does not adhere to its commitments under International Labour Organization (ILO) conventions, country B could perceive this as country A's attempt to impose its own cultural standards on country B. An actual WTO case demonstrates this problem. The WTO Appellate Body's (AB) ruling in *EC – Seals*⁶⁴ may be seen as legitimizing moral imperialism that was inherent in the EU Seal Regime, as it could be seen as an attempt by the EU to impose its moral values on foreign jurisdictions without any consideration for their moral interests.⁶⁵ This imposition in a sense also contradicted the

⁶¹ Oona A Hathaway, 'The Cost of Commitment' (2003) 55(5) *Stanford Law Review* 1821-1862. The author has referred to this as 'sovereignty view', wherein countries take into account the cost of such a commitment to their national sovereignty.

⁶² WEF, 'Closing the Gender Gap Accelerators' <<https://www.weforum.org/projects/closing-the-gender-gap-accelerators>> accessed 8 May 2022.

⁶³ World Bank, 'Women, Business and the Law 2021' (2021) <<https://wbl.worldbank.org/en/wbl>> accessed 8 May 2022.

⁶⁴ WTO Appellate Body Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R and WT/DS401/AB/R (18 June 2014) 7.

⁶⁵ Elizabeth Whitsitt, 'A Comment on the Public Morals Exception in International Trade and the EC – Seal Products Case: Moral Imperialism and Other Concerns' (2014) 3(4) *Cambridge Journal of International and Comparative Law* 1376, 1390.

traditions and cultural practices related to seal hunting in Canada and Norway. In other words, by giving legitimacy to animal welfare concerns as a public moral concern, both the WTO panel and the AB subordinated the moral concerns of the indigenous sealing communities in other countries to those of the EU's animal welfare concerns. This is a classic example that reflects how justifying a trade measure under a vaguely defined value (such as morality or gender equality) may allow the responding country to effectively define the moral concerns of foreign jurisdictions without any regard for their morals or even sometimes at the cost of destroying their comparative advantage in a particular product or industry.⁶⁶

Another associated consideration may be the risk of eliminating a country's competitive advantage, given the low cost of women's labour in a particular labour-intensive industry in several countries of this region.⁶⁷ "Cultural imperialism" could therefore be perceived as a protectionist weapon to take advantage of unequal market power, as countries may use gender provisions to enhance their own competitive advantage by imposing their social or cultural model on countries that have a different set of values and concerns. At the European Parliament, some members have openly voiced opposition to the incorporation of gender equality in trade agreements owing to their fears that it might be seen as a "colonialist behaviour". Joachim Starbatty of the European Conservatives and Reformists Group said the following: "If we start putting forward clauses such as the one you are proposing, then we will be laughed at (...). We cannot impose our vision of gender on the world. It's colonialist behaviour."⁶⁸ The fears of cultural imperialism and the use of gender standards for protection of domestic industries are in fact the main concerns several countries have voiced when they have resisted or opposed any development in respect of trade and gender, such as the signing of WTO 2017 Declaration, or even for joining the recently formed WTO informal group to discuss these matters.⁶⁹

⁶⁶ *ibid.*

⁶⁷ *ibid.*

⁶⁸ Claire Guyot, 'EP wants to include gender equality in free-trade agreements' (EURACTIV 14 March 2018) <<https://www.euractiv.com/section/politics/news/ep-wants-to-include-gender-equality-in-free-trade-agreements/>> accessed 8 May 2022.

⁶⁹ Roberto Bissio, 'Is "gender" a Trojan horse to introduce new issues at WTO?' (Third World Network 11 December 2017) <<https://twnetwork.org/wto/%E2%80%9Cgender%E2%80%9D-trojan-horse-introduce-new-issues-wto>> accessed 8 May 2022; Ananya Singh, 'Explained: India's refusal to back WTO declaration on gender equality in trade' (QRIUS 15 December 2017) <<https://qrius.com/explained-india-refusal-gender-equality-trade/>> accessed 8 May 2022; APWLD, 'Statement: Women's Rights Groups Call on Governments to Reject the WTO Declaration on Women's Economic Empowerment' (12 December 2017) <<https://apwld.org/statement-womens-rights-groups-call-on-governments-to-reject-the-wto-declaration-on-womens-economic-empowerment/>> accessed 8 May 2022.

In this connection, one might question how some countries, including Japan, have signed trade accords with gender-related commitments; “cultural imperialism” and the risk of “reduced competitive advantage” could act as limiting factors for these countries as well. The explanation seems to be particularly apt in the case of the UK-Japan CEPA, where both parties share similar levels of human development (i.e. they are both highly developed free market economies).⁷⁰ This finding is in line with a recent study that has shown that parties are more willing to accept gender-related commitments when they are negotiating these provisions with countries that are similarly situated in terms of gender development levels (as measured by the gender development index).⁷¹ Having trade partners with similar domestic conditions minimizes fears of cultural imperialism. In the Asia Pacific region, Japan is the only country that has signed a trade agreement (i.e., the UK-Japan CEPA) with a stand-alone chapter on trade and gender and a set of best practice provisions that seek to empower women economically within the trade policy context. Japan and the UK were both willing to negotiate gender-related legal provisions.⁷² Hence, another important factor is whether both trading partners in a particular agreement are willing and able to assume gender commitments within their trade policy context.

A third factor may be a lack of understanding and relevant expertise. The nexus between trade and gender is far from straightforward, and globalization and trade liberalization have contradictory effects on women’s employment and livelihood.⁷³ In some cases, they generate employment and business opportunities for women; in others, they create burdens by disrupting industries that employ women or are prevalent with small businesses run by women.⁷⁴ Lack of understanding and awareness on how international trade and gender

⁷⁰ UN, ‘World Economic Situation and Prospects 2014: Country Classification’ (2014) <https://www.un.org/en/development/desa/policy/wesp/wesp_current/2014wesp_country_classification.pdf> accessed 8 May 2022.

⁷¹ Monteiro (n 24).

⁷² The UK Government has committed to formulating a post-Brexit trade policy that will uphold gender equality. [More information in ‘Gender sensitive trade policy’ (UK Policy Briefings, September 2019)] <<https://wbg.org.uk/wp-content/uploads/2019/09/FINAL-.pdf>> accessed 8 May 2022; For more information on UK government’s commitments to ‘gender-responsive trade’, see Government of the United Kingdom, ‘Export Strategy: supporting and connecting businesses to grow on the world stage’ (2018) GOV.UK Policy Paper <<https://www.gov.uk/government/publications/export-strategy-supporting-and-connecting-businesses-to-grow-on-the-world-stage/export-strategy-supporting-and-connecting-businesses-to-grow-on-the-world-stage>> accessed 8 May 2022.

⁷³ Markéta von Hagen, ‘Trade and Gender – exploring a reciprocal relationship: Approaches to mitigate and measure gender-related trade impacts’ (OECD 2014) <[https://www.oecd.org/dac/gender-development/GIZ Trade%20and%20Gender Exploring%20a%20reciprocal%20relationship.pdf](https://www.oecd.org/dac/gender-development/GIZ%20Trade%20and%20Gender%20Exploring%20a%20reciprocal%20relationship.pdf)> accessed 8 May 2022.

⁷⁴ UN Women, ‘Gender Equality & Trade Policy’ (2011) UN Women Watch Resource Paper <https://www.un.org/womenwatch/feature/trade/gender_equality_and_trade_policy.pdf> accessed 8 May 2022.

equality are related impede gender mainstreaming efforts. Lack of understanding may also manifest itself in disbelief in and indifference to this approach.

Even though there is an increased international visibility being given to the gender equality dimension of trade, multiple countries fail to understand how these two different issues are interrelated. Several countries believe that FTAs are trade instruments concerned with market access issues, and hence they are not appropriate forums to discuss gender issues.⁷⁵ To overcome this impediment, countries need to ensure that their policymakers and negotiators gain an understanding of how trade can have gendered implications and how inclusion of women in economies is not merely a morally right thing to do but it also has a compelling business case.⁷⁶ The government officials at the negotiating table must understand the gender equality implications of all substantive issues they are negotiating as part of the package. Enhancing this understanding within relevant government ministries responsible for trade negotiations is vital.

Even though multiple advances are made in research on enhancing understanding of this nexus, it has to some extent been held back by limited sex-disaggregated data. Multiple studies have shown a clear correlation between international trade and women as employees, business actors and customers. However, what remains to be done is the gathering of concrete numbers that can attest to validate this correlation. Hence, the paucity of country-wise and industry-wise gender disaggregated data on how trade disciplines impact women is perhaps slowing down the gender mainstreaming efforts in trade negotiations.

Lack of understanding, data and political willingness can translate to complete absence of expertise within government offices in this respect. One trade negotiator has for instance noted that some trading partners just do not want to talk about gender while they are engaged in trade negotiations on the grounds that trade is gender neutral, that FTA negotiations are no place for gender considerations, or that FTA is not a tool to advance social issues.⁷⁷ Countries holding these views have no incentive or motivation to create capacity and expertise in negotiating agreements with a gender lens. The absence of expertise on gender issues within

⁷⁵ Suresh Prabhu, 'Indian Minister of Industry and Commerce' (Indian Press Conference, WTO Ministerial Conference, Buenos Aires, 11 December 2017).

⁷⁶ Jonathan Woetzel, Anu Madgavkar, Kweilin Elingrud, Eric Labaye, Sandrine Devillard, Eric Kutcher, James Manyika, Richard Dobbs, and Mekala Krishnan, 'The Power of Parity: How Advancing Women's Equality can Add \$12 Trillion' (McKinsey Global Institute September 2015) <https://www.mckinsey.com/~media/McKinsey/Featured%20Insights/Employment%20and%20Growth/How%20advancing%20womens%20equality%20can%20add%2012%20trillion%20to%20global%20growth/MGI%20Power%20of%20parity_Full%20report_September%202015.ashx> accessed 8 May 2022.

⁷⁷ Interview with a trade negotiator (details withheld).

government departments responsible for carrying out trade negotiations is therefore another impediment that needs to be overcome in this respect.

Negotiators need to possess expertise on how to add a gender lens to the process of negotiations, drafting and implementation of trade agreements. To build this expertise, negotiators and policymakers should be provided with up-to-date knowledge and developments on these issues through inclusion of debate on these issues in parliamentary discussions and high-level conferences, requiring negotiators to read relevant studies, and carrying out exchange visits to discuss and share experiences with negotiators from other countries in this respect. In addition, negotiators and policymakers can receive hands-on training on the following aspects: (i) how are gender considerations mainstreamed by other countries? (ii) what are some best practice provisions in this respect? (iii) what benefits have other countries realized from gender mainstreaming in the past few years? (iv) what are the main arguments behind mainstreaming gender in trade instruments? (v) what are the different ways of including gender considerations in trade agreements? (vi) how can the negotiators measure the gender-responsiveness of the trade agreements they are either negotiating or renegotiating, and if needed increase this responsiveness content? Answers to such questions would increase the understanding of negotiators and policymakers to reorient trade negotiations by mainstreaming gender equality concerns.

5. Conclusion

As discussed in this chapter, most of the agreements negotiated by countries in Asia Pacific are gender-blind, as they do not contain any gender-related or gender-considerate provisions. The ones that contain gender-related provisions do not include commitments relating to women's economic interests or economic empowerment as they mainly relate to their personal welfare concerns. However, recent developments show that the trade community in this region is slowly recognizing that trade policy can be used as a tool to empower women which represents a positive change in trade policymaking mindset. Yet, to ensure that the gender commitments that are included in trade agreements can become a 'game-changer' for women in the future, it is crucial to think about overcoming limitations and challenges that continue to impede gender mainstreaming efforts in several countries including those of the Asia-Pacific region.