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CHAPTER 23

PROGRESSIVE  
TRADE: LABOUR  
AND GENDER

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## I. INTRODUCTION

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BOTH gender equality and labour concerns, sometimes referred to as ‘non-trade issues’, are largely excluded from the WTO rulebook. Yet, because trade ultimately affects and is affected by both labour and gender concerns, they have found a place in existing bilateral and regional FTAs.<sup>1</sup> Moreover, they are inseparable sides of the same coin since labour provisions such as workers’ rights, reasonable work hours, parental leave or childcare, occupational safety and health, minimum wage, and anti-discrimination directly impact female workers. These issues are related to an extent that multiple trade agreements have incorporated these concerns into one single legal provision. For instance, the Canada-Ukraine FTA provides for the elimination of discrimination in respect of employment and occupation based on gender.<sup>2</sup> Likewise, in the Canada-Costa Rica Agreement on Labour Cooperation, an agreement adopted alongside the two States’ FTA, the parties confirm that their domestic laws, regulations, procedures and practices shall reflect labour standards including elimination of discrimination and equal pay for women and men.<sup>3</sup> These examples show the inter-relation between these concerns.

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There are, however, various differences in the way labour and gender provisions are drafted and incorporated in existing trade agreements. The first difference lies in the sheer number of existing FTAs that include such provisions. Over 30 per cent of FTAs in force include labour provisions but only around 20 per cent accommodate gender equality concerns (sometimes equating them with labour concerns).<sup>4</sup> Moreover, the language of these provisions is very different. While many labour provisions are drafted as binding legal obligations with the use of ‘hard’ verb constructions, most of the gender equality provisions are drafted with non-mandatory verb and ‘soft’ permissive grammatical constructions.<sup>5</sup> Almost all FTAs have explicitly and unambiguously excluded gender-related provisions and chapters from the application of their dispute settlement machineries, rendering these provisions less enforceable than most labour provisions. These differences indicate that trade policy instruments have accommodated both

<sup>1</sup> The term ‘free trade agreements’ or ‘FTAs’ 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, preferential agreements, economic partnership agreements, and such others.

<sup>2</sup> Annex 13-A of the Canada-Ukraine FTA. Similar provisions can be found in the Canada-Honduras FTA, the Canada-Columbia FTA and the Canada-Panama FTA.

<sup>3</sup> Agreement on Labour Cooperation Between the Government of Canada and the Government of the Republic of Costa Rica.

<sup>4</sup> Authors’ calculations.

<sup>5</sup> R. Bhala and C.N. Wood, ‘Two Dimensional Hard-Soft Law Theory and the Advancement of Women’s and LGBTQ+ Rights Through Free Trade Agreements’ 47(2) *Georgia Journal of International and Comparative Law* (2019) 299, at 306 (the authors state 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).

labour and gender concerns, but they have developed a larger appetite for labour standards than for gender issues. This might be, in part, because labour, as one of three main manufacturing inputs together with capital and raw materials, is seen as a trade-germane interest. That might not be the case for other ‘supposedly’ non-trade-germane social concerns such as gender equality.<sup>6</sup> Another probable reason is the long relationship between trade and labour standards, stretching at least as far back as the founding of the ILO, and possibly all the way back to the colonial slave trade.<sup>7</sup>

C23.P17 This chapter provides an overview of the growing influence of both labour standards and gender equality concerns in contemporary trade debates, and in particular how existing FTAs have increasingly accommodated both types of issues. In the following sections, the chapter will first chart out the relationship between trade and labour and thereafter discuss the nexus between trade and gender concerns.

## C23.S2 II. TRADE AND LABOUR

C23.P18 The trade-labour relationship can be characterized in three main ways: in terms of the link between the trade in goods and labour standards; in terms of labour trade flows, that is, migration and the trade in services;<sup>8</sup> and finally, in terms of the effect of trade liberalization on employment. Although these three aspects are interlinked, assessing the employment effects of trade liberalization is mainly a task for economists rather than lawyers.<sup>9</sup> This section will thus focus primarily on the first type of relationship, and to a limited extent on the second.

C23.P19 The first subsection recalls the recent history of how the global trade and labour governance frameworks developed following World War II. This history is necessary to understand why recent developments in the area of trade and labour have emerged from a surge of labour chapters in FTAs. The second subsection explores these developments by outlining and comparing labour chapters of several FTAs. The third subsection then analyses the impact and enforcement mechanisms in those labour chapters. Finally, the section concludes by noting that the number, scope, and potential for enforcement

<sup>6</sup> D. LeClercq, ‘The Disparate Treatment of Rights in Trade’ 90 *Fordham Law Review* (2021) 1 (the author notes that this appetite depends largely on whether the non-trade concerns are related to trade and whether they impact production or trade costs).

<sup>7</sup> A. Smith, J. Harrison, L. Campling, B. Richardson, and M. Barbu, *Free Trade Agreements and Global Labour Governance* (Abingdon: Routledge, 2021) at 16–18.

<sup>8</sup> For an overview of labour and migration aspects in the GATS, see S. Charnovitz, ‘The (Neglected) Employment Dimension of the World Trade Organization’ in V.A. Leary and D. Warner (eds), *Social Issues, Globalisation and International Institutions* (Leiden: Brill, 2006) 157, at 133–135. The welfare gain from reducing barriers to migration remain substantial, see World Bank, *Moving for Prosperity: Global Migration and Labor Markets* (Washington, DC: World Bank Group, 2018) at 1.

<sup>9</sup> See, e.g., ILO, *Handbook on assessment of labour provisions in trade and investment arrangements* (Geneva: ILO, 2017) 25–30. The OECD has published several studies on the subject, at < <https://www.oecd.org/trade/topics/trade-and-jobs/> > (last visited 14 June 2021).

of labour provisions have all increased, and offers some reflections on the factors that appear to be driving these developments.

## A. Parallel worlds: a brief history of two governance systems

In the aftermath of World War II, the third Bretton Woods institution originally intended to govern international economic relations, alongside the IMF and the World Bank, was the International Trade Organization.<sup>10</sup> Article 7 of its charter stated that ‘all countries have a common interest in the achievement and maintenance of fair labour standards related to productivity, and thus in the improvement of wages and working conditions as productivity may permit’, and gave the ILO a consultative role.<sup>11</sup> However, the putative members were unable to reach an agreement and the rules on trade in goods were extracted and re-packaged as the GATT 1947. Labour standards were largely ignored but for Article XX(e) of the GATT, which permits the restriction of imports of goods made using prison labour.<sup>12</sup> As a consequence, global trade governance under the GATT 1947, and global labour governance led by the ILO, developed more or less in parallel during the twentieth century.

In 1983, the United States started experimenting with tying labour standards to trade preferences under the Caribbean Basin Economic Recovery Act, which offered unilateral tariff treatment to several regional partners.<sup>13</sup> In 1986, such conditionality was extended to its general tariff preferences (GSP) program.<sup>14</sup> The European Union followed suit in the 1994 reform of its own GSP program.<sup>15</sup> However, developing countries were staunchly opposed to linking labour standards with trade, mainly due to fears of potential protectionism.<sup>16</sup> Having kept labour issues out of the negotiations that led to the creation of the WTO in 1995, the issue came to the forefront during the first WTO Ministerial Meeting in Singapore in 1996. In a victory for developing countries, the introduction of a ‘social clause’ was rejected by WTO Members. Instead they agreed on the following statement:

<sup>10</sup> C. VanGrasstek, *The History and Future of the World Trade Organization*, (Geneva: WTO, 2013) at 40.

<sup>11</sup> Havana Charter for an International Trade Organization (Havana Charter, ITO Charter 1948) (United Nations [UN] Doc E/CONF.2/78).

<sup>12</sup> Note however that import restrictions related to labour standards, child and forced labour may also be possible to justify under the public morals exception in Article XX(a) of the GATT 1994, or Article XIV(a) of the GATS. See the further discussion regarding these provisions in the context of gender at fns 112–123 and accompanying text below.

<sup>13</sup> Caribbean Basin Economic Recovery Act, 1983, 97 Stat. 369.

<sup>14</sup> Smith et al, above fn 7, at 27–30.

<sup>15</sup> Ibid., at 30.

<sup>16</sup> R. Howse, B. Langille and J. Burda, ‘The World Trade Organization and Labour Rights: Man Bites Dog’ in Virginia A. Leary and Daniel Warner (eds), *Social Issues, Globalisation and International Institutions* (Leiden: Brill, 2006) 157, at 174–182.

C23.P22 We renew our commitment to the observance of internationally recognized core labour standards. The International Labour Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards. We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question. In this regard, we note that the WTO and ILO Secretariats will continue their existing collaboration.<sup>17</sup>

C23.P23 Although the debate around a trade-labour linkage has continued, the WTO has avoided serious engagement on this issue ever since, despite the acknowledgement in its Preamble that ‘trade ... should be done with a commitment to raising living standards and ensuring full employment ...’<sup>18</sup>

## C23.S4 B. The return of labour standards

C23.P24 Despite its rejection of a trade-labour linkage, the 1996 Ministerial Declaration nevertheless contains an unequivocal recognition of the importance of ‘core labour standards’. The then ILO Director-General, Michel Hansenne, seized on this recognition, as well as the recognition of the ILO as the competent body, to seek to revitalize the organization’s standard-setting agenda.<sup>19</sup> As a result, in 1998, ILO Members adopted the Declaration on Fundamental Principles and Rights at Work (‘1998 Declaration’).<sup>20</sup> The 1998 Declaration recognizes four ‘principles concerning fundamental rights’, namely: freedom of association and the right to collective bargaining; elimination of forced labour; elimination of child labour; and elimination of workplace discrimination.

C23.P25 The recognition of the ‘principles concerning fundamental rights’, as well as the designation of seven (now eight) Conventions as ‘fundamental’,<sup>21</sup> was not uncontroversial.<sup>22</sup> Nevertheless, references to the Declaration and fundamental labour standards rapidly proliferated across a range of FTAs among ILO Members interested in taking

<sup>17</sup> Singapore Ministerial Declaration, (WT/MIN(96)/DEC) (adopted, 13 December 1996), Article 4.

<sup>18</sup> Recital 1 in the preamble to the WTO Agreement.

<sup>19</sup> ILO, ‘The ILO, standard setting and globalization—Report of the Director-General’, (1997) <<https://www.ilo.org/public/english/standards/reim/ilc85/dg-rep.htm#I.%20LAYING%20THE>> (last visited 14 June 2021).

<sup>20</sup> ILO, *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up*, adopted by the International Labour Conference at its Eighty-sixth Session, Geneva, 18 June 1998.

<sup>21</sup> ILO, ‘History of the ILO: ILO Declaration on Fundamental Principles and Rights at Work’, at <<https://libguides.ilo.org/c.php?g=657806&p=4649148>> (last visited 14 June 2021).

<sup>22</sup> See P. Alston, ‘“Core Labour Standards” and the Transformation of the International Labour Rights Regime’ 15 *European Journal of International Law* (2004) 457, and the response by F. Maupain, ‘Revitalization Not Retreat: The Real Potential of the 1998 ILO Declaration for the Universal Protection of Workers’ Rights’ 16 *European Journal of International Law* (2005) 439.

on-board labour concerns. The ILO reports that, by 2019, 85 of the 293 FTAs notified to the WTO contained labour provisions.<sup>23</sup> Of these, around two thirds refer to the 1998 Declaration, around a fifth to the Worst Forms of Child Labour Convention, and around a tenth to the ILO Decent Work Agenda, the 2008 Social Justice Declaration, or to the eight fundamental Conventions.<sup>24</sup> References to the fundamental Conventions are particularly common in EU FTAs, and were even introduced in a recent reform of its anti-dumping instrument.<sup>25</sup> In 2019, 18 of the European Union's 42 FTAs contained labour chapters.<sup>26</sup> Other prolific users of labour provisions are the United States and Canada.<sup>27</sup>

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As with the introduction of a labour linkage in its GSP program, the United States was a pioneer in including labour standards in trade agreements. In 1994, it secured agreement on the North American Agreement on Labour Cooperation (NAALC) as an annex to NAFTA. All subsequent US FTAs have directly incorporated labour clauses.<sup>28</sup> These have tended to refer to the 1998 Declaration. However, given that the United States has only ratified two fundamental ILO Conventions, its focus has been on the establishment and maintenance of domestic legal processes rather than the incorporation of international standards.<sup>29</sup> Therefore, the core obligation in most US FTA labour chapters reads '[a] Party shall not fail to effectively enforce its labour laws, through a sustained or recurring course of action or inaction, in a manner affecting trade [or investment] between the Parties ...'<sup>30</sup> In earlier FTAs, such as the 2005 Dominican Republic–Central America Free Trade Agreement (CAFTA-DR), this is the only labour provision subject to dispute settlement. On the other hand, that agreement also allows a party to demand monetary payments from the party found in breach in function of the severity of the breach and as long as the breach persists (albeit limited to 15 million USD per year).<sup>31</sup>

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Subsequent FTAs negotiated by the United States did away with this type of compensation, but widened the scope of dispute settlement to the entire labour chapter,<sup>32</sup>

<sup>23</sup> ILO, *Labour provisions in G7 trade agreements* (Geneva: ILO, 2019), at 15.

<sup>24</sup> *Ibid.*, at 14.

<sup>25</sup> Articles 1(4)(b) and 1(5)(c) of Regulation (EU) 2018/825 of the European Parliament and of the Council of 30 May 2018, OJ 2020 L 143, p. 1.

<sup>26</sup> ILO, above fn 23, at 15.

<sup>27</sup> *Ibid.*, at 15.

<sup>28</sup> Smith et al, above fn 7, at 35.

<sup>29</sup> J. Harrison, 'The Labour Rights Agenda in Free Trade Agreements' 20 *Journal of World Investment & Trade* (2019) 705, at 716.

<sup>30</sup> Article 16.2.1.a of the CAFTA-DR; Article 17.31.a of the US-Colombia Trade Promotion Agreement (TPA); Article 19.5.1 of the CPTPP.

<sup>31</sup> Articles 16.6.6; 20.17; 20.18.2 of the CAFTA-DR. Canada has used a similar approach, see, e.g., Articles 20(4) and (5). Canada-Colombia Agreement on Labour Cooperation.

<sup>32</sup> For a helpful overview, see C. Cimino-Isaacs, 'Labour Standards in the TPP' in C. Cimino-Isaacs and J.J. Schott (eds), *Trans-Pacific Partnership: An Assessment* (Washington, DC: PIIE, 2016) 261, at 286–287.

including provisions on court access and due process.<sup>33</sup> Moreover, later FTAs require that the parties ‘shall adopt and maintain’ what is referred to as the four ‘rights’<sup>34</sup> of the 1998 ILO Declaration.<sup>35</sup> In addition, labour chapters in US FTAs invariably establish a Labour Affairs Council made up of cabinet level officials and designated national contact points, responsible for coordination and implementation.<sup>36</sup>

C23\_P28 The US approach was transposed to the TPP. It was not further changed by the eleven countries who incorporated the TPP into the CPTPP, following the United States’ withdrawal from the former. Compared to previous US FTAs, the CPTPP adds an obligation to adopt regulations governing ‘acceptable conditions of work’ concerning ‘minimum wages, hours of work, and occupational safety and health.’<sup>37</sup> Moreover, Article 19.6 extends the goal of eliminating forced labour among the FTA members, to also discourage the importation of goods produced through forced labour in non-Member countries. The CPTPP also establishes a consultative body of civil society stakeholders, and an opportunity for individuals to make public submissions on any issues arising under the labour chapter.<sup>38</sup>

C23\_P29 The innovations introduced in the CPTPP were maintained between the United States, Canada and Mexico in the USMCA.<sup>39</sup> Notably, the United States had negotiated bilateral ‘labour plans’ under the TPP with Vietnam, Brunei, and Malaysia containing extensive commitments to improving domestic labour standards.<sup>40</sup> These were shelved under the CPTPP, but the USMCA contains a similar annex requiring Mexico to pass laws protecting collective bargaining rights.<sup>41</sup> In other respects, the USMCA goes further than the CPTPP or any other FTA to date. A major innovation is a ‘rapid response labour mechanism.’<sup>42</sup> This mechanism allows FTA members to file complaints

<sup>33</sup> See, e.g., Article 16.3 of the CAFTA-DR; Article 17.4 of the US-Colombia TPA. See also Article 19.8 of the CPTPP.

<sup>34</sup> Whether the ILO Declaration refers to ‘rights’ or ‘principles’ is not clear, see J. Agustí-Panareda, F.C. Ebert, and D. LeClercq, ‘ILO Labor Standards and Trade Agreements: A Case for Consistency’ 36 *Comparative Labor Law & Policy Journal* (2015) 347, at 363–367.

<sup>35</sup> See, e.g., Articles 17.2 and 17.4 of the US-Colombia TPA. See also Articles 19.3 and 19.8 of the CPTPP.

<sup>36</sup> Articles 16.4 and 16.5 of the CAFTA-DR; Articles 17.5 and 17.6 of the US-Colombia TPA. See also Article 19 of the TPP.

<sup>37</sup> Article 19.3.2 of the CPTPP.

<sup>38</sup> Articles 19.9 and 19.14 of the CPTPP. See also Articles 19.10 (‘Cooperation’) and 19.11 (‘Cooperative Labour Dialogue’) of the CPTPP.

<sup>39</sup> Known as the USMCA in the United States, CUMSA in Canada, and TMEC in Mexico. See also Chapter 8 of this handbook.

<sup>40</sup> Cimino-Isaacs, above fn 32, at 271–274; Congressional Research Service, ‘Worker Rights Provisions and U.S. Trade Policy’, (16 July 2021), at < <https://crsreports.congress.gov/product/pdf/R/R46842#page=43&zooom=100,116,597> > (last visited 14 June 2021), at 27.

<sup>41</sup> Annex 23-A of the USMCA. See further D.A. Gantz, *An Introduction to the United States-Mexico-Canada Agreement* (Cheltenham: Edward Elgar Publishing, 2020), at 76–78.

<sup>42</sup> Annexes 31-A and 31-B of the USMCA. These apply between the United States and Mexico, and Canada and Mexico, respectively. See further K. Claussen, ‘A First Look at the New Labour Provisions in the USMCA Protocol of Amendment’ *IELP blog* (12 December 2019), < <https://ielp.worldtradelaw.net/2019/12/a-first-look-at-the-new-labor-provisions-in-the-usmca-protocol.html> > (last visited 14 June 2021).

of a possible ‘denial of rights’ of free association and collective bargaining at individual facilities of another member. The complaint is adjudicated by a three-person panel under strict deadlines. The mechanism also envisages domestic processes being put in place in order for individuals to bring evidence of denial of rights to the attention of their governments. The first two cases under this mechanism were initiated in May 2021.<sup>43</sup> The potential for enforcement is also enhanced by language lowering the threshold for when violations of labour rights and standards are presumed to ‘affect trade’, and thus can be subject to the agreement’s dispute settlement. This responds to what had been perceived as an overly onerous standard<sup>44</sup> imposed by the panel in the US-Guatemala dispute under the CAFTA-DR.<sup>45</sup> The Panel had found that trade was only affected by the non-application of labour laws if exporting producers could be shown to have acquired a competitive advantage, and that the United States had failed to show this.<sup>46</sup> The clarifications in the USMCA suggest that the mere trading or production of competing goods is sufficient to show trade affectation, and introduces a rebuttable presumption that any derogation from labour laws does affect trade and investment.<sup>47</sup>

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Two other developments are worth mentioning. First, Article 23.8 of USMCA extends labour rights protection to migrant workers. Second, trucks and passenger vehicles are only considered as originating in a USMCA member, and thereby eligible for preferential tariff treatment, if the wage rate is at least USD 16/hour.<sup>48</sup> This marks the first time that rules of origin are used to set definitive minimum wage conditions on certain goods.<sup>49</sup>

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The other major user of labour chapters in its trade agreements is the European Union. Compared to the United States, all of the EU Member States have ratified the fundamental ILO Conventions.<sup>50</sup> It is therefore surprising to find that, just as under the GSP program, the European Union has been playing catch-up on the inclusion of labour provisions in its FTAs. Research suggests that the European Union has tended to take a less confrontational approach to labour enforcement.<sup>51</sup> Where the United States openly

<sup>43</sup> Congressional Research Service, above fn 40, at 36–37.

<sup>44</sup> See Harrison, above fn 29, at 719, and Chapter 8 of this handbook, where the authors note that Article 31.11 of the USMCA responds to the US-Guatemala dispute by allowing the use of anonymous testimony.

<sup>45</sup> *In re Guatemala—Issues Relating to the Obligations (U.S. v. Guatemala)*, Final Report, CAFTA-DR Arb. Panel (14 June 2017) (US-Guatemala Panel), < [http://www.sice.oas.org/tpd/usa\\_cafta/Dispute\\_Settlement/final\\_panel\\_report\\_guatemala\\_Art\\_16\\_2\\_1\\_a\\_e.pdf](http://www.sice.oas.org/tpd/usa_cafta/Dispute_Settlement/final_panel_report_guatemala_Art_16_2_1_a_e.pdf) > (last visited 14 June 2021).

<sup>46</sup> US-Guatemala Panel, paras 190, 196, 501, 503–507.

<sup>47</sup> Footnotes 4–5 and 8–14 to Articles 23.3–23.5 and 23.7 of the USMCA.

<sup>48</sup> Chapter 4, Annex 4-B, Appendix, Article 7.3(a) of the USMCA.

<sup>49</sup> F.C. Ebert and P.A. Villarreal, ‘The renegotiated ‘NAFTA’: what is in it for labour rights?’ *EJIL: Talk!* (11 October 2018), at < <https://www.ejiltalk.org/the-renegotiated-nafta-what-is-in-it-for-labour-rights> > (last visited 14 June 2021).

<sup>50</sup> ILO, ‘Ratifications by country’, at < <https://www.ilo.org/dyn/normlex/en/f?p=1000:11001::NO::> > (last visited 14 June 2021).

<sup>51</sup> Smith et al., above fn 7, at 129–133; ILO, *Social Dimensions of Free Trade Agreements* (Geneva: ILO, 2015), at 69.



admits that labour chapters are a tool to even the playing field, the European Union has emphasized its support for sustainable development and universalist aspirations.<sup>52</sup> In fact, since the 2011 EU-Korea FTA, the European Union has merged its labour and environmental chapters into a joint ‘sustainable trade’ chapter (except in CETA).<sup>53</sup> Furthermore, although those chapters are subject to dispute settlement, they preclude any suspension of trade benefits in response to violations.<sup>54</sup> The European Commission has suggested that a sanctions-based approach might be less effective; that it is difficult to assess the harm caused by breaches of sustainable trade provisions; that sanctions would therefore mean narrowing the scope of the sustainable trade chapters; and that it would not be acceptable to trading partners.<sup>55</sup> Moreover, EU agreements have included less strict references to the implementation of specific labour standards into domestic law, relying instead on a reaffirmation of the 1998 Declaration<sup>56</sup> and an obligation to make ‘continued and sustained efforts’ to ratify and implement all fundamental ILO Conventions.<sup>57</sup> EU agreements have traditionally also contained no requirements to provide for due process and effective legal remedies under domestic law, except in CETA.<sup>58</sup>

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Nevertheless, the differences between the EU and US approaches should not be overemphasized.<sup>59</sup> Both refer to the rights or principles of the 1998 Declaration, prohibit derogation from or weakening of enacted laws,<sup>60</sup> provide for dialogue and cooperation at both the governmental and non-governmental levels,<sup>61</sup> and for recourse to a panel of experts to settle disputes. Recent EU agreements also add clauses similar to the CPTPP, protecting worker safety and health, providing for ‘minimum employment standards’ and ‘non-discrimination in respect of working conditions, including for

<sup>52</sup> Harrison, above fn 29, at 717, 724. See also M. Bronckers and G. Gruni, ‘Retooling the Sustainability Standards in EU Free Trade Agreements’ 24 *Journal of International Economic Law* (2021) 25, at 25, 32, 33, 37, 40.

<sup>53</sup> See, e.g., Chapter 12 of the EU-Singapore FTA; Chapter 13 of the EU-Vietnam FTA.

<sup>54</sup> See, e.g., Article 13.16 of the EU-Korea FTA; Article 12.16.1 of the EU-Singapore FTA; Article 13.16.1 of the EU-Vietnam FTA.

<sup>55</sup> EC Non-Paper, ‘Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreements’ (26 February 2018), at < [https://trade.ec.europa.eu/doclib/docs/2018/february/tradoc\\_156618.pdf](https://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156618.pdf) > (last visited 14 June 2021), at 3. See further G.M. Durán, ‘Sustainable Development Chapters in EU Free Trade Agreements: Emerging Compliance Issues’ 57 *Common Market Law Review* (2019) 1031, at 1058–1065, and the contrary view in Bronckers and Gruni, above fn 52, at 37–50.

<sup>56</sup> See, e.g., the first sentence of Article 23.3.1 of CETA (‘Each Party shall ensure that its labour law and practices embody and provide protection for the fundamental principles and rights at work which are listed below’) is not present in other EU agreements.

<sup>57</sup> See, e.g., Articles 13.4.2–13.4.4 of the EU-Viet Nam FTA; Article 13.4.3 of the EU-Korea FTA.

<sup>58</sup> Article 23.5 of CETA, demonstrating Canada’s influence in the negotiations. But see also the discussion at fn 68 below.

<sup>59</sup> Smith et al., above fn 7, at 36.

<sup>60</sup> See, e.g., Article 13.7 of the EU-Korea FTA; Article 13.3 of the EU-Vietnam FTA; Articles 23.4 and 23.5 of the USMCA. See also Bronckers and Gruni, above fn 52, at 30–32.

<sup>61</sup> Although an innovation in the USMCA, this has been a mainstay in EU FTAs, see Smith et al., above fn 7, at 42–43.

migrant workers’, with reference to the ILO Decent Work Agenda and 2008 Declaration on Social Justice.<sup>62</sup>

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However, the recent EU-UK Trade Cooperation Agreement (TCA),<sup>63</sup> negotiated following Brexit, has adapted the traditional EU approach in certain respects. On the one hand, the TCA includes the traditional references to the promotion of ILO labour standards seen in other recent EU agreements, and these remain subject to panel arbitration but are excluded from retaliation.<sup>64</sup> On the other hand, the TCA contains a ‘non-regression’ provision whereby the parties agree not to ‘weaken or reduce, in a manner affecting trade or investment between the Parties, its labour and social levels of protection below the levels in place [on 31 December 2020], including by failing to effectively enforce its law and standards.’<sup>65</sup> This resembles traditional non-derogation clauses, but is more extensive.<sup>66</sup> In particular, ‘enforcement’ includes ‘an effective system of labour inspections’, the availability of ‘administrative and judicial proceedings’, and ‘appropriate and effective remedies, including interim relief, as well as proportionate and dissuasive sanctions.’<sup>67</sup> This more closely approximates the US or Canadian approach, as also reflected in CETA.<sup>68</sup> Notably, the non-regression clause, which also exists with respect to environmental commitments, does allow for suspension of benefits in case a panel finds the TCA has been violated.<sup>69</sup> In addition, the TCA contains a ‘rebalancing’ clause. If ‘material impacts on trade or investment . . . are arising as a result of significant divergences’ in the areas of ‘labour and social, environmental or climate protection’, ‘either Party may take appropriate rebalancing measures to address the situation.’<sup>70</sup> These measures can be taken after 14 days of consultation, unless the other party requests the establishment of an arbitration panel. The panel must rule on the legality of the proposed rebalancing measures within 30 days. If the panel fails to do so, the measures can be imposed three days later and the other party may take proportionate countermeasures.<sup>71</sup> This ensures that the rebalancing measures are not held up due to panel delays.<sup>72</sup>

<sup>62</sup> See, e.g., Article 4.10 of the (draft) EU-Mercosur FTA; Articles 23.2–23.3 of CETA.

<sup>63</sup> Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, OJ 2021 L 149, p. 10.

<sup>64</sup> Articles 399 and 409 of the TCA.

<sup>65</sup> Article 387.2 of the TCA.

<sup>66</sup> See also the provisions cited at fn 60 above; Bronckers and Gruni, above fn 52, at 32–33.

<sup>67</sup> Article 388 of the TCA. In reference to the ILO tripartite structure, the parties also agree to ‘respect the role and autonomy of the social partners at a national level’.

<sup>68</sup> See above fn 58.

<sup>69</sup> Article 410 of the TCA.

<sup>70</sup> Article 411 of the TCA.

<sup>71</sup> Article 411.3 of the TCA.

<sup>72</sup> According to Article 13.15.2 of the EU-Korea FTA, the Panel of Experts must normally issue its report within 90 days. Although there were explicable reasons for certain delays, the EU-Korea Panel (see fn 81 below) only delivered its report after 387 days. Likewise, the WTO Appellate Body has not been able to meet its prescribed 90-day deadline in Article 17.5 of the DSU.

C23.P34 Rebalancing thus allows almost instantaneous retaliation, subject to an enhanced ‘material’ impact test, caused by ‘significant’ divergences. Its use in addition to the normal panel procedures will likely depend on the severity of the legal standard these terms will be found to imply, as well as the general level of trust and cooperation between the parties. Moreover, whether the non-regression and rebalancing clauses, or so-called ‘level playing field’ provisions, will be incorporated in subsequent agreements is not certain. These provisions are a result of specific exigencies and negotiation positions in the context of Brexit,<sup>73</sup> and the fact that the TCA provides for decreased rather than increased levels of trade liberalization. Nevertheless, the European Union appears to be progressively moving towards a more assertive enforcement policy.<sup>74</sup> In particular, although the TCA still exempts the general sustainable trade provisions from retaliation following dispute settlement, it might signal a future willingness to carve out an exception with respect to non-regression of existing standards.

C23.P35 As the above discussion suggests, most labour chapters are found in FTAs between developed and developing countries. Yet there are exceptions, demonstrating that developing countries are not as such averse to addressing trade and labour.<sup>75</sup> For example, Chile included an extensive labour chapter modelled on the TPP in its 2016 FTA with Uruguay,<sup>76</sup> and also included a labour provision (albeit brief) in its 2017 FTA with Argentina.<sup>77</sup> Indeed, given the large and diverse membership of the CPTPP, the TPP provisions on labour may become an influential template for other agreements, including between developing countries.

## C23.S5 C. Enforcement and effectiveness

C23.P36 Some commentators have expressed doubts about the effectiveness and enforceability of labour clauses.<sup>78</sup> However, recent developments, although not yet certain, suggest

<sup>73</sup> I. Hallak, ‘The Level Playing-Field for Labour and Environment in EU-UK Relations’ *EPRS Briefing* (April 2021), at < [https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/690576/EPRS\\_BRI\(2021\)690576\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/690576/EPRS_BRI(2021)690576_EN.pdf) > (last visited 14 June 2021), at 9.

<sup>74</sup> See the EU trade strategy communications discussed in Hallak, above fn 73, at 6, and see EC, above fn 55. There also appears to be a willingness to condition tariff reductions on the implementation of sustainable trade provisions; potentially in the EU-New Zealand FTA being negotiated, where New Zealand has called for the sustainable trade chapter to be covered by standard dispute settlement. See B. Coates, ‘Seeking Progress Towards Climate-supportive Trade: The EU-NZ FTA Negotiations’ *The Greens/EFA* (July 2021), at < [https://www.greens-efa.eu/files/assets/docs/seeking\\_progress\\_towards\\_climate\\_supportive\\_trade\\_-\\_the\\_eu-nz\\_fta\\_negotiations.pdf](https://www.greens-efa.eu/files/assets/docs/seeking_progress_towards_climate_supportive_trade_-_the_eu-nz_fta_negotiations.pdf) > (last visited 14 June 2021), at 41–42.

<sup>75</sup> Smith et al., above fn 7, at 37, referring to labour agreements within Mercosur, the SADC and the Caribbean Community.

<sup>76</sup> Chapter 11 of the Chile-Uruguay FTA. However, Article 11.15 exempts that chapter from the dispute settlement chapter.

<sup>77</sup> Article 11.6 of the Chile-Argentina FTA.

<sup>78</sup> For a recent overview, see Smith et al., above fn 4, at 41–49, as well as the outcome of the authors’ own case studies at 129–134.

that enforcement may improve. First, the USMCA offers important innovations. As discussed in the previous section, the agreement lowers the high legal standard imposed by the US-Guatemala Panel for when violations of labour rights are deemed to ‘affect trade’, and thus may result in a finding that the FTA has been violated.<sup>79</sup> Furthermore, the rapid response mechanism, including domestic complaints procedures, as well as the minimum wage requirement introduced through the rules of origin have the potential to provide for efficient and targeted enforcement. As also discussed in the previous section, a trend of increased enforcement is likewise evident in EU practice.<sup>80</sup> At a minimum, these developments suggest an increased readiness by politicians to view labour provisions as not only a means to deflect concerns about trade liberalization, but as having actual and demonstrable effects.

C23.P37

Second, in contrast to the US-Guatemala Panel—which was the first and so far only US labour dispute which resulted in a panel ruling—a recent panel ruling under the EU-Korea FTA has taken a more labour-friendly approach. The European Union argued that Korea’s laws did not ‘respect, promote, and realise’ the principle of freedom of association in accordance with the 1998 Declaration, as incorporated into the FTA. Similar to the US-Guatemala Panel, the Panel first addressed whether the dispute concerned ‘trade-related aspects of labour’. The Panel found that the ‘key international labour principles and rights’ of the 1998 Declaration were universalist in nature, and as such could not be circumscribed and are ‘inherently related to trade’.<sup>81</sup> The panel supported this observation by invoking the chapter’s references to sustainable development and the parties’ desire to create a ‘floor’ of labour rights as an integral component of that approach.<sup>82</sup> This dismissal of a trade-relatedness test for the provision at issue thereby presents a notable contrast to the approach taken by the US-Guatemala panel.<sup>83</sup>

C23.P38

On substance, the panel mostly agreed with the European Union. Korea had pointed out that the Declaration did not itself impose any legal obligations and that Korea had not ratified ILO Conventions C.87 and C.98 concerning freedom of association.<sup>84</sup> Although Article 19.5 of the ILO Constitution<sup>85</sup> makes clear that ILO membership only imposes a limited set of obligations beside those that Members take on by ratifying specific conventions, the panel considered that, as stated in the Declaration, ILO Members ‘have an obligation arising from the very fact of membership’ to realize the fundamental

<sup>79</sup> See above fns 44 to 47 and accompanying text.

<sup>80</sup> See above fn 74.

<sup>81</sup> Panel of Experts Proceeding Constituted under Article 13.15 of the EU-Korea FTA (‘EU-Korea Panel Report’), (20 January 2021) at < [https://trade.ec.europa.eu/doclib/docs/2021/january/tradoc\\_159358.pdf](https://trade.ec.europa.eu/doclib/docs/2021/january/tradoc_159358.pdf) >, accessed 14 June 2021 > (last visited 14 June 2021), at paras 65 and 95.

<sup>82</sup> *Ibid* at paras 69–79, 95.

<sup>83</sup> D. LeClercq, ‘Guest Post: The Panel Report under the EU-Korea Trade Agreement Concerning Labor Practices: What are the Purposes of Trade Agreements as they Relate to the ILO’s Fundamental Labor Rights?’ *IELP blog* (8 February 2021), < <https://ielp.worldtradelaw.net/2021/02/guest-post-the-panel-report-under-the-eu-korea-trade-agreement-concerning-labor-practices-what-are-t.html> > (last visited 14 June 2021).

<sup>84</sup> EU-Korea Panel Report, para 106.

<sup>85</sup> ILO, *Constitution of the International Labour Organisation* (1 April 1919).

principles enumerated therein.<sup>86</sup> The panel noted, however, that ‘States are bound to respect principles contained in human rights instruments whether or not they have ratified them’ and that this is a ‘highly unusual situation in international law’.<sup>87</sup> Thus, even though commentators had expressed doubts that the 1998 Declaration’s somewhat unclear language of ‘principles concerning fundamental rights’ could easily be transposed and enforced through FTAs,<sup>88</sup> the Panel interpreted those references as not only aspirational but as entailing concrete commitments.

C23.P39 Taken together, the enhanced provisions in the USMCA, the TCA and the European Union’s success before the EU-Korea Panel suggest that the enforcement of labour chapters may improve. Notably, despite the lack of a means to suspend benefits under the EU-Korea FTA to enforce the ruling, Korea not only committed to make the necessary changes to its domestic laws, but also to ratify three out of four outstanding fundamental Conventions, including on freedom of association and collective bargaining.<sup>89</sup>

## C23.S6 D. An emerging trade-labour linkage

C23.P40 There is a natural and undeniable link between trade and labour. Labour is one of the three basic inputs next to capital and raw material in goods manufacturing, and has an even more central role to play in trade in services. However, despite numerous proposals for how such a link could be operationalized at the global level,<sup>90</sup> the WTO membership has refused to engage on this issue ever since the Singapore Declaration. Nevertheless, as shown above, the ILO’s response in the form of its 1998 Declaration, through the efforts of certain ILO Members, has in effect re-introduced labour rights into the global trade regime via the FTA back door.

C23.P41 Furthermore, insofar as States are serious about moving the trade regime in the direction of sustainable development<sup>91</sup> and about integrating the social aspect inherent in that concept,<sup>92</sup> they must move away from the Singapore paradigm of treating trade and labour as conflicting notions. Indeed, the EU-Korea FTA panel

<sup>86</sup> Article 2 of the 1998 ILO Declaration.

<sup>87</sup> EU-Korea Panel Report, para 108.

<sup>88</sup> Agustí-Panareda et al., above fn 34, at 364–367.

<sup>89</sup> EC, ‘EU-Korea FTA 7th Committee on Trade and Sustainable Development Joint Minutes’, at < [https://trade.ec.europa.eu/doclib/docs/2021/may/tradoc\\_159567.pdf](https://trade.ec.europa.eu/doclib/docs/2021/may/tradoc_159567.pdf) > (last visited 14 June 2021).

<sup>90</sup> See, e.g., W. Plasa, *Reconciling International Trade and Labor Protection: Why We Need to Bridge the Gap between ILO Standards and WTO Rules* (Lanham, MD: Lexington Books, 2015); C. Barry and S. G. Reddy, ‘International Trade and Labour Standards: A Proposal for Linkage’ 39 *Cornell International Law Journal* (2006) 545.

<sup>91</sup> See the first recital in the preamble to the WTO Agreement; EC, ‘Annex to the Trade Policy Review—An Open, Sustainable and Assertive Trade Policy’ (18 February 2021), at < [https://trade.ec.europa.eu/doclib/docs/2021/february/tradoc\\_159439.pdf](https://trade.ec.europa.eu/doclib/docs/2021/february/tradoc_159439.pdf) > (last visited 14 June 2021), at 3–5.

<sup>92</sup> See, e.g., UNGA, ‘Transforming our world: the 2030 Agenda for Sustainable Development’ A/RES/70/1 (adopted on 25 September 2015), at 2 (‘We are committed to achieving sustainable development in its three dimensions—economic, social and environmental’).

could be said to have taken a step in that direction.<sup>93</sup> Furthermore, the available empirical research does not appear to confirm that the enforcement of labour standards leads to protectionism.<sup>94</sup>

C23.P42

A revitalised trade-labour linkage has thus been driven by the step-by-step introduction of ever widening labour chapters in FTAs, a more pro-active stance on enforcement, and a renewed emphasis on sustainable development. In addition, in recent years, more sceptical globalization narratives have emerged, shifting the political focus more squarely to the losers of globalization.<sup>95</sup> Indeed, the more protectionist narrative of the Trump administration likely contributed to a bipartisan opening for US Congressional Democrats<sup>96</sup> to push for the unprecedented labour innovations in the USMCA.

C23.P43

Whether these recent political shifts towards sustainable development and the losers of globalization will endure, remains to be seen. Although labour issues also recently re-entered the fringes of the on-going WTO negotiations on fisheries,<sup>97</sup> there is a risk that labour standards will become politicized. For instance, China has taken exception to certain countries' import restrictions over allegations of forced labour in Xinjiang.<sup>98</sup> For now, FTAs will thus remain the main avenue through which the emerging trade-labour linkage is likely to continue to develop.

<sup>93</sup> See above fn 82 and accompanying text. See also the reformulated wording of the Singapore Declaration ('labour standards should not be used for protectionist trade purposes'; 'comparative advantage should in no way be called into question'), into: 'violation of fundamental principles and rights of work *cannot* be invoked ... as a legitimate comparative advantage' in, e.g., Article 4.9 of the (draft) EU-Mercosur FTA, Trade and Sustainable Development Chapter (emphasis added); Article 12.3.5 of the EU-Singapore FTA.

<sup>94</sup> See, e.g., EU-Korea Panel Report, para 88, referring to the oft-quoted report OECD, *Trade, Employment and Labour Standards: a Study of Core Workers' Rights and International Trade* (Paris: OECD Publishing, 1996), as well as ILO, above fn 2, at 22. See also C. Carrère, M. Olarreaga and D. Raess, 'Labor Clauses in Trade Agreements: Hidden Protectionism?' *Review of International Organizations* (2021), at < <https://link.springer.com/article/10.1007/s11558-021-09423-3> > (last visited 14 June 2021); K. Bandyopadhyay, 'The Impact of Global Labour Standards on Export Performance' in A. Negi, J.A. Pérez-Pineda and J. Blankenbach (eds), *Sustainability Standards and Global Governance* (Singapore: Springer, 2020), 113–129. For the classical statement of the opposite argument based on economic theory, see J. N. Bhagwati, 'Trade Liberalization and Fair-Trade Demands: Addressing the Environmental and Labour Standards Issues' 18 *World Economy* (1995) 745.

<sup>95</sup> N. Lamp, 'How Should We Think about the Winners and Losers from Globalization? Three Narratives and Their Implications for the Redesign of International Economic Agreements' 30 *European Journal of International Law* (2020) 1359.

<sup>96</sup> Gantz, above fn 41, at 79.

<sup>97</sup> USTR, 'United States Urges WTO Members to Address Forced Labour on Fishing Vessels in Ongoing Fisheries Subsidies Negotiations' (26 May 2021), at < <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/may/united-states-urges-wto-members-address-forced-labour-fishing-vessels-ongoing-fisheries-subsidies> > (last visited 14 June 2021).

<sup>98</sup> Y. Hayashi, 'U.S. Steps Up Pressure on Businesses Over Forced Labor in China' *Wall Street Journal* (9 August 2021), at < <https://www.wsj.com/articles/u-s-steps-up-pressure-on-businesses-over-forced-labor-in-china-11628501400> > (last visited 1 September 2021).

### III. TRADE AND GENDER EQUALITY

C23.S7

#### A. Introduction

C23.S8

C23.P44

The focus on the nexus between international trade and gender equality predates the establishment of the WTO. One of the first acknowledgements of the inter-relationship between gender and commerce can be traced back to the TFEU of 1957.<sup>99</sup> In 1995, the World Trade Organization's Marrakesh Agreement enshrined the objective of sustainable development in its preamble. A quarter-century later, the discussion about sustainable development in policy circles has evolved dramatically, and the nexus between trade and gender equality has become far better understood and accepted. The Addis Ababa Agenda of Action<sup>100</sup> for instance, which builds a clear network between international trade and gender equality, reads as follows: 'Recognizing the critical role of women as producers and traders, we will address their specific challenges in order to facilitate women's equal and active participation in domestic, regional and international trade.'<sup>101</sup> Furthermore, the 2030 Agenda for Sustainable Development recognizes international trade as an engine for inclusive and sustainable economic growth, and an important means to achieve the UN's 2030 Sustainable Development Goals (SDGs).<sup>102</sup> The most recent multilateral instrument that reinforces this view is the WTO's Joint Declaration on Trade and Women's Economic Empowerment, which seeks to build a framework to guide Members to adopt or adapt gender-responsive trade policies.<sup>103</sup>

C23.P45

Multiple developments in recent years have sought to create an inclusive trading environment, both at the multilateral as well as at regional and bilateral levels. The following subsections provide a discussion on how gender equality considerations are addressed in multilateral and regional/bilateral trade forums.

C23.S9

#### B. Multilateral Initiatives

C23.P46

The WTO's webpage on 'Women and Trade' starts with the following phrase: 'Trade can play an important role in driving women's economic empowerment. The WTO therefore seeks to build a more inclusive trading system that will allow more women to

<sup>99</sup> Article 157 of the TFEU.

<sup>100</sup> UN, 'Third International Conference on Financing for Development (FfD3)' (13-16 July 2015), at <<https://www.un.org/esa/ffd/ffd3/conference.html>> (last visited 9 June 2021).

<sup>101</sup> UNDESA, 'Addis Ababa Action Agenda of the Third International Conference on Financing for Development' (Addis Ababa Action Agenda) (2015), at 90.

<sup>102</sup> UNGA, 'Transforming our world: the 2030 Agenda for Sustainable Development' A/RES/70/1 (21 October 2015), at <<https://www.refworld.org/docid/57b6e3e44.html>> (last visited 13 November 2020).

<sup>103</sup> 'Buenos Aires Joint Declaration on Trade and Women's Economic Empowerment' (WTO Ministerial Conference, 12 December 2017) (2017 Buenos Aires Declaration).

participate in trade and to reap the economic benefits of global trading.<sup>104</sup> The question remains as to how the WTO can contribute to building a more inclusive trading system.

C23.P47

None of the WTO's Multilateral and Plurilateral Agreements or Ministerial Decisions explicitly mentions concerns relating to gender equality. Moreover, the WTO jurisprudence so far has been completely silent on gender issues.<sup>105</sup> Yet, recent developments and studies show that the WTO can contribute in several ways. In the last few years, the WTO has engaged in notable efforts including various outreach events<sup>106</sup> and research outputs<sup>107</sup> that have contributed to enhancing the understanding on trade and gender equality. In addition, the WTO in 2017 nominated a specialized division—'The WTO Trade and Gender Focal Point'—which is responsible for handling trade and gender issues. This division is responsible for coordinating work among divisions, taking stock of what the WTO is doing, exploring opportunities for further work and introducing new initiatives to promote inclusive trade. The Focal Point has four key functions: (i) raising awareness and understanding of the relationship between trade and gender; (ii) facilitating WTO Members' actions and policies on trade and gender; (iii) generating new data to better understand the impact of trade on women; and (iv) capacity-building through the provision of training on trade and gender issues to public and private stakeholders.

C23.P48

Another important institutional development in this respect was the 2020 agreement of several WTO Members to establish an Informal Working Group on Trade and Gender. The Informal Working Group's objectives are threefold: (i) share best practices among Members on increasing women's participation in trade; (ii) consider and clarify what a 'gender lens' is in the context of international trade and review how a gender lens could usefully be applied to the work of the WTO; (iii) review and discuss gender-related analytical work produced by the WTO Secretariat and explore how best to support the delivery of the WTO Aid for Trade work programme.<sup>108</sup>

C23.P49

These developments and initiatives reaffirm the intention and willingness of the WTO as an organization to engage in making trade more inclusive. With nearly universal membership, there is no doubt that WTO can play an important role in preparing a framework for the regulation of inclusive and sustainable

<sup>104</sup> WTO, 'Women and Trade', at < [https://www.wto.org/english/tratop\\_e/womenandtrade\\_e/womenandtrade\\_e.htm](https://www.wto.org/english/tratop_e/womenandtrade_e/womenandtrade_e.htm) > (last visited 9 June 2021).

<sup>105</sup> A mere browse through the Panel or Appellate Body reports shows that none of them so far have been vocal about gender concerns.

<sup>106</sup> Outreach efforts include conferences, seminars, round table discussions and workshops on trade and women empowerment. WTO, 'Women and Trade', above fn 104.

<sup>107</sup> The most recent outputs are: World Bank Group & WTO, 'Women and Trade: The role of trade in promoting gender equality' (2020); R. Acharya et al, 'Trade and Women—Opportunities for Women in the Framework of the World Trade Organization' 22(3) *Journal of International Economic Law* (2019) 323; WTO, 'Women and the WTO Gender Statistics (1995-2016)' (2017); WTO, 'Gender Aware Trade Policy A Springboard for Women's Economic Empowerment' (2017); J.-A. Monteiro, 'Gender-related provisions in Regional Trade Agreements' (December 2018).

<sup>108</sup> WTO, 'Interim Report Following the Buenos Aires Joint Declaration on Trade and Women's Economic Empowerment' WT/L/1095/Rev.1 (25 September 2020), at 2.



trade.<sup>109</sup> In particular, it can contribute through the GATS, the Agreement on Agriculture, the Aid for Trade Program,<sup>110</sup> the Trade Policy Review Mechanism, the Trade Facilitation Agreement and the Revised Agreement on Government Procurement. These agreements and mechanisms do not contain a single gender-explicit commitment or provision, yet current scholarship has shown how their gender-considerate application can foster women empowerment and women participation in trade and commerce.<sup>111</sup> In addition, countries could potentially invoke GATT Article XX(a) to strengthen women's empowerment through foreign trade. The public morals exception has been considered as a 'catch-all' exception for measures that might relate to or affect any value that a country may view as a matter of its public morals.<sup>112</sup> This exception has been used in WTO agreements, as well as in the majority of FTAs.

C23.P50

Public morals range from views related to religion,<sup>113</sup> human rights,<sup>114</sup> consumption of alcohol,<sup>115</sup> drug trafficking and corruption,<sup>116</sup> gambling,<sup>117</sup> consumer protection,<sup>118</sup> and protection of animals.<sup>119</sup> Certain moral interests are shared more commonly than others, as opposed to being country-specific.<sup>121</sup> Gender equality is not specifically mentioned in Article XX, but it is recognized as a fundamental moral norm by the majority of WTO Members in multiple international conventions and treaties.<sup>122</sup>

<sup>109</sup> The WTO can contribute by helping to prepare a set of guidelines for drafting and implementation of gender-responsive FTAs in the future. In addition, efforts can be directed at amending the current WTO texts to include provisions that can protect women's economic interests, or negotiating new instruments such as joint statement initiatives.

<sup>110</sup> WTO, Nairobi Ministerial Declaration, adopted on 19 December 2015, WT/MIN(15)/DEC.

<sup>111</sup> R. Acharya et al, 'Trade and Women—Opportunities for Women in the Framework of the World Trade Organization' 22(3) *Journal of International Economic Law* (2019) 323, at 327; WTO and World Bank, 'Women and Trade: The role of trade in promoting gender equality' (2020), at < [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) > (last visited 21 July 2021); Global Alliance for Trade Facilitation, 'The TFA through a gender lens', at < <https://www.tradefacilitation.org/global-alliance-publications/the-tfa-through-a-gender-lens/> > (last visited 21 July 2021).

<sup>112</sup> L.M. Jarvis, 'Women's Rights and the Public Morals Exception of GATT Article 20' 22(1) *Michigan Journal of International Law* (2000) 219.

<sup>113</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 August 1999), at < [https://www.wto.org/english/tratop\\_e/tpr\\_e/tp476\\_e.htm](https://www.wto.org/english/tratop_e/tpr_e/tp476_e.htm) > (last visited 28 September 2020).

<sup>114</sup> The United States restricted importation of products made by indentured child labor. See Treasury and General Government Appropriations Act of 1998, Pub. L. No. 105-61, § 634, 111 Stat. 1272, 1316 (1997).

<sup>115</sup> Indonesia restricted importation of alcohol for moral reasons. See WTO Secretariat, 'Report on the Trade Policy Review of Indonesia' (23 May 2007), at < [https://www.wto.org/english/tratop\\_e/tpr\\_e/tp378\\_e.htm](https://www.wto.org/english/tratop_e/tpr_e/tp378_e.htm) > (last visited 21 July 2021).

<sup>116</sup> See Panel Report, *Colombia – Textiles*, adopted 22 June 2016, paras 7.338–39.

<sup>117</sup> Appellate Body Report, *US – Gambling*, adopted 20 April 2005.

<sup>118</sup> Appellate Body Report, *Brazil – Taxation*, adopted 11 January 2019.

<sup>119</sup> Appellate Body Report, *EC – Seal Products*, adopted 18 June 2014.

<sup>120</sup> N.F. Diebold, 'The Morals and Order Exceptions in WTO Law: Balancing the Toothless Tiger and Undermining Mole' 11(1) *Journal of International Economic Law* (2007) 43, at 49–50.

<sup>121</sup> M. Wu, 'Free Trade and the Protection of Public Morals: An Analysis of the Newly Emerging Public Morals Clause Doctrine' 33(1) *The Yale Journal of International Law* (2008) 221.

<sup>122</sup> Such as the 2017 Buenos Aires Declaration; Convention on the Elimination of All Forms of Discrimination against Women, Adopted and opened for signature, ratification and accession by United

Hence, a country could invoke the morality exception in a trade dispute that challenges the WTO-consistency of a support measure or a trade restriction that seeks to protect women's economic interests, arguing that the protection of women's economic interests amounts to the protection of its country's moral interests. These measures might become especially crucial or even indispensable during or in the post-pandemic world to revive and support certain industries that can have a considerable impact on women employees, entrepreneurs and consumers. These measures could take the shape of government bail-outs, loans, subsidies, or gender-responsive government procurement initiatives, and may not be fully compatible with WTO laws. This is an ambitious interpretation of the morality exception, and it could face intense scrutiny.<sup>123</sup> However, the adoption of multilateral declarations by WTO Members, such as the WTO's Joint Declaration on Trade and Women's Economic Empowerment 2017, shows that the Members may be developing an appetite for protecting these concerns through trade policy instruments.

C23.P51

The WTO's Joint Declaration on Trade and Women's Economic Empowerment 2017 is an anchoring commitment encouraging women empowerment as it is agreed upon in a multilateral setting.<sup>124</sup> It provides that 'international trade and investment are engines of economic growth for both developing and developed countries, and that improving women's access to opportunities and removing barriers to their participation in national and international economies contributes to sustainable economic development'.<sup>125</sup> This is a promising development in the multilateral trading system as it marks a concrete starting point for future deliberations and discussions on how trade can accommodate gender equality concerns.<sup>126</sup> Yet we cannot ignore its limitations. First, it seeks to prepare a framework to guide WTO Members to reformulate their trade policies in a gender-responsive manner; however, it does not contain any action plan or proposed measures or strategies for doing so. Furthermore, the declaration does not provide any guidance to its signatory members on how to implement the instrument domestically. Second, it has no enforcement or implementation mechanism, and hence is completely left to the good-will intentions and best endeavours of the signatory

Nations General Assembly (resolution 34/180) (New York, 18 December 1979); 2030 UN Agenda for Sustainable Development, Goal 5.

<sup>123</sup> A. Bahri and D. Boklan, 'Not Just Sea Turtles, Let's Protect Women Too: Invoking Public Morality Exception or Negotiating a New Gender Exception in Trade Agreements?' *European Journal of International Law* (2022, forthcoming).

<sup>124</sup> WTO, 'Joint Declaration on Trade and Women's Economic Empowerment on the Occasion of the WTO Ministerial Conference in Buenos Aires in December 2017', at < [https://www.wto.org/english/thewto\\_e/minist\\_e/mc11\\_e/genderdeclarationmc11\\_e.pdf](https://www.wto.org/english/thewto_e/minist_e/mc11_e/genderdeclarationmc11_e.pdf) > (last visited 14 June 2021).

<sup>125</sup> Ibid.

<sup>126</sup> According to UN Women, gender is a socio-cultural concept defined as 'the social attributes and opportunities associated with being male and female and the relationships between women and men and girls and boys, as well as the relations between women and those between men' See H. Bensalem, 'Gender as Included in Bilateral and Multi-Party Trade and Integration Agreements' 2017 CUTS International Research Study 7, at < <http://www.cutsgeneva.org/pdf/STUDY%20%20Gender%20and%20Trade.pdf> > (last visited 12 August 2019).

members. Third, the declaration is not universally accepted, as almost one third of the WTO Membership has not joined this endeavour.<sup>127</sup>

C23.P52 If WTO Members could not achieve consensus on a completely non-binding declaration drafted with various best endeavour promises, it is not conceivable that they will agree on an explicit inclusion of gender language in the WTO's rulebook. These observations show the limitations of WTO's multilateralism in this respect. However, recent trends show the promising role of FTAs.

## C23.S10 C. Bilateral/Regional Initiatives

C23.P53 Currently, of all existing free trade agreements in force, more than 20 per cent include an explicit commitment to gender equality.<sup>128</sup> In recent years, we have witnessed a sharp increase in the number of FTAs that mainstream gender considerations.<sup>129</sup> The last five years have been phenomenal in this respect. In 2016, Chile signed with Uruguay the very first trade agreement with a standalone chapter on trade and gender, followed by two more agreements with similar chapters, with Argentina in 2017 and Brazil in 2018. In 2018, the European Parliament passed a resolution to include gender equality considerations in all its future trade agreements and the European Commission subsequently endorsed this approach.<sup>130</sup> In the same year, the Parties to CETA adopted the CETA Trade and Gender Recommendation, wherein the Parties recognize the importance of making trade policies more gender-responsive and commit to work on encouraging women's participation in the economy and international trade through various cooperation activities.<sup>131</sup>

C23.P54 In 2019, two modernized FTAs (Canada-Chile and Canada-Israel) came into force with dedicated chapters on women's empowerment.<sup>132</sup> In 2020, two other agreements were signed with such chapters (Chile-Ecuador and United Kingdom-Japan).<sup>133</sup> In the same year, Canada, Chile, and New Zealand signed the Global Trade and Gender Arrangement. Through this Arrangement, the Parties seek to share best

<sup>127</sup> Discussed in A. Bahri, 'Measuring the Gender-Responsiveness of Free Trade Agreements: Using a Self-Evaluation Maturity Framework' 14 (11) *Global Trade & Customs Journal* (2019) 517.

<sup>128</sup> Author's own calculations.

<sup>129</sup> J.-A. Monteiro, 'Gender-Related Provisions in Regional Trade Agreements' WTO Economic Research and Statistics Division (18 December 2018), at < [https://www.wto.org/english/res\\_e/reser\\_e/ersd201815\\_e.pdf](https://www.wto.org/english/res_e/reser_e/ersd201815_e.pdf) > (last visited 9 June 2021).

<sup>130</sup> European Parliament, 'Gender equality in EU trade agreements', 13 March 2018, 2017/2015(INI), at < [https://www.europarl.europa.eu/doceo/document/TA-8-2018-0066\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-8-2018-0066_EN.html) > (last visited 21 July 2021).

<sup>131</sup> CETA Trade and Gender Recommendation, at < <https://trade.ec.europa.eu/doclib/html/158945.htm> > (last visited 21 July 2021).

<sup>132</sup> Modernized Canada-Chile Free Trade Agreement (CCFTA) (enforced, 5 February 2019); Modernized Canada-Israel Free Trade Agreement (CIFTA) (enforced, 1 September 2019).

<sup>133</sup> Chapter 18 of the Chile-Ecuador Acuerdo de Complementación Económica (not yet enforced); Chapter 21 of the UK-Japan Agreement for a Comprehensive Economic Partnership.

practices and promote gender equality, including in international organizations such as the WTO.<sup>134</sup> Multiple reports and studies have assessed the benefits of these developments and proposed ways to frontload gender equality concerns within the trade policy context.<sup>135</sup> These developments affirm that neither international trade nor gender equality is a zero-sum game and that everyone benefits from making trade fair and inclusive. These developments also show that gender mainstreaming in trade agreements is here to stay.

C23.S11

## D. What is gender mainstreaming?

C23.P55

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’.<sup>136</sup> Gender mainstreaming is a means to achieve gender equality and entails the inclusion of gender considerations and concerns in the drafting and implementation of FTAs. This is a process by which parties seek to include gender perspectives in its trade liberalization efforts and policies. It should not be confused with gender-impact assessment of trade agreements, which is a process to assess either *ex ante* or *ex post* the impact of trade agreements on women in member countries.

C23.P56

The process of mainstreaming affirms a Member’s commitment, understanding and political will to reduce gender inequality through trade policies and agreements. The process also aims to maximize the positive impact and minimize the negative impact of trade agreements on women’s empowerment goals. The term ‘gender responsiveness’ is also used extensively in this chapter. 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.

<sup>134</sup> Global Trade and Gender Arrangement, at < <https://www.canada.ca/en/global-affairs/news/2020/08/minister-ng-signs-new-global-trade-and-gender-arrangement-with-chile-and-new-zealand.html> > (last visited 21 July 2021).

<sup>135</sup> See, e.g., OECD, ‘Trade and Gender: A Framework of Analysis’ *OECD Trade Policy Papers* (26 March 2021), at < <https://www.oecd.org/publications/trade-and-gender-6db59d80-en.htm> > (last visited 21 July 2021); ITC, ‘Mainstreaming Gender in Trade Agreements: A New Approach’, at < <https://www.intracen.org/publication/mainstreaming-gender-FTA/> > (last visited 21 July 2021); A. Frohmann ‘Gender Equality and Trade Policy’ *SECO/WTI Academic Cooperation Project Working Paper Series* 2017/2, at < <https://ssrn.com/abstract=3113197> > (last visited 22 July 2021).

<sup>136</sup> M. Verloo, ‘Displacement and Empowerment: Reflections on the Concept and Practice of the Council of Europe Approach to Gender Mainstreaming and Gender Equality’ *Social Politics: International Studies in Gender, State & Society* (2005) 344.

## C23.S12 E. Benefits and Best Practice Examples of Gender Mainstreaming in FTAs

C23.P57 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.<sup>137</sup> 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.

C23.P58 For example, the European Union, Canada, Chile and other WTO Members have undertaken commitments to cooperate on increasing women's access to health services,<sup>138</sup> education,<sup>139</sup> digital know-how<sup>140</sup> and skill development.<sup>141</sup> In the Canada-Israel FTA, the parties seek to increase women's access to finance and other productive resources and encourage conditions for women-owned businesses to flourish by supporting the creation of business networks and improved infrastructure in relevant sectors and industries.<sup>142</sup> In the USMCA, the parties have included waivers and reservations to protect women employees and employers in selected industries.<sup>143</sup>

C23.P59 In the New Zealand-South Korea FTA,<sup>144</sup> the parties reserve the right to regulate certain health and social services that relate to female professionals and women's health interests, in particular with respect to maternity deliveries and related services, including services provided by midwives, and with respect to childcare.<sup>145</sup> The Australia-New Zealand Closer Economic Relations Trade Agreement (ANZCERTA)<sup>146</sup> contains a similar provision with respect to child care.<sup>147</sup> Childcare challenges pose a significant barrier to work, especially for mothers, who disproportionately take on

<sup>137</sup> A. Bahri, 'Measuring the Gender-Responsiveness of Free Trade Agreements: Using a Self-Evaluation Maturity Framework' 14 (11) *Global Trade & Customs Journal* (2019) 517.

<sup>138</sup> Article 44 of CEFTA (in Article 44, parties seek to improve maternal health, and address health priority areas such as sexual and reproductive health and the care for and prevention of sexually transmitted diseases and unwanted pregnancies).

<sup>139</sup> Ch. N-bis of the modernized Canada-Chile FTA (contains commitments on improving educational or skill development opportunities in fields that can translate to high-paid job opportunities for women).

<sup>140</sup> Ibid.

<sup>141</sup> Ibid.; Article 23.4 of the CPTPP.

<sup>142</sup> Chapter 13 of the modernized Canada-Israel FTA.

<sup>143</sup> Article 32.5 of the USMCA (Reservation for indigenous women (cross-border service), protection of women employees).

<sup>144</sup> New Zealand-Korea FTA.

<sup>145</sup> Annex II of the New Zealand-Korea FTA.

<sup>146</sup> Australia-New Zealand Closer Economic Relations Trade Agreement.

<sup>147</sup> Annex II of the Australia-New Zealand Closer Economic Relations Trade Agreement.

unpaid responsibilities when they cannot find affordable childcare.<sup>148</sup> Provision of affordable childcare facilities is therefore vital, as lack of affordable childcare prevents women from progressing in their careers or with their educational aspirations. This right to regulate provision seems to be a women-favouring commitment as it indicates that trade liberalization under this FTA should not affect the parties' right to regulate and provide for childcare services in their respective jurisdictions.

C23.P60

Another development is the CPTPP, which includes two different types of gender commitments. The first type is a labour provision that seeks to promote gender equality as a labour standard, eliminate discrimination against women and further the interests of women.<sup>149</sup> The other type is found in the chapter on development, which includes a provision on women empowerment and their contribution to economic growth and development.<sup>150</sup> The provision states that the parties will 'consider undertaking cooperative activities aimed at enhancing the ability of women, including workers and business owners, to fully access and benefit from the opportunities created by this Agreement.' However, Article 23.9 stipulates that this chapter (i.e., Chapter 23) does not fall under the ambit of the agreement's dispute settlement mechanism, leaving the Parties without any recourse to remedies if these commitments are not acted upon.

C23.P61

These developments show that the lure of market access to important markets can be used to enhance women's empowerment through FTAs. 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>151</sup>

C23.P62

As of today, even the most advanced FTAs incorporating gender equality concerns do not clarify precise procedures for implementation; nor do they identify channels to finance these activities.<sup>152</sup> In addition, as seen in the case of CPTPP, almost all FTAs 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 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>153</sup> Unfortunately, this

<sup>148</sup> K. Parker, 'Women More than Men Adjust their Careers for Family Life' Pew Research Center (1 October 2015), at < <http://www.pewresearch.org/fact-tank/2015/10/01/women-more-than-men-adjust-their-careers-for-family-life/> > (last visited 21 July 2021).

<sup>149</sup> Article 19.10 of CPTPP.

<sup>150</sup> Article 23.4 of CPTPP.

<sup>151</sup> Bhala et al, above fn 5, at 306 (the 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>152</sup> As per authors' calculations, using ITC maturity toolkit: ITC, 'Mainstreaming Gender in Free Trade Agreements' (8 July 2020), at < <https://www.intracen.org/publication/mainstreaming-gender-fta/> > (last visited 25 January 2021).

<sup>153</sup> Chapter 19 of CIFTA.

also seems to be a cosmetic attempt to provide for an enforcement mechanism because the parties have subjected the binding jurisdiction of this mechanism to their consent, making its jurisdiction non-compulsory in nature.<sup>154</sup> With respect to this agreement's gender-related provisions, if Canada was to employ a trade policy measure that Israel believed hindered the participation of women in the workforce, Israel could bring a challenge against that measure. This dispute can be decided by a panel that can issue a legally binding decision as to whether the measure in question violates the terms of the agreement's trade and gender chapter. However, both countries would have to consent to take the matter through the agreement's dispute settlement process. It is unlikely that a responding country whose measure is challenged will agree to the binding jurisdiction of such a panel. These discussions show that there is a half-opened door in FTAs that countries need to push open further by finding different ways of implementing or enforcing their gender-related commitments.<sup>155</sup>

C23.P63 Some recent agreements have endeavoured to do so. The CETA investment chapter includes a binding gender-explicit provision. Article 8.10(d) of the agreement states that a party will breach its obligation to provide fair and equitable treatment to foreign investors if any of its measures constitutes 'targeted discrimination on manifestly wrongful grounds, such as gender ...'. Though this is the only gender-related commitment found in the entire agreement, the parties subsequently adopted a standalone Recommendation on trade and gender.<sup>156</sup> In this Recommendation, the parties have created a work plan to gather and analyse gender-disaggregated data, carry out the agreement's gender impact assessment, add a gender lens to the implementation of the agreement, conduct webinars on trade and gender, and report on these activities. It remains unclear whether a subsequent adoption of such a recommendation can form part of an FTA per se if they are not mentioned or incorporated by reference into that treaty's text. Yet such developments allow parties to work together in the trade policy space on activities that may inform future policymaking.

C23.P64 Another example is the USMCA, whereby parties have assumed binding and enforceable commitments relating to the protection of labour rights and enhancing trade and investment opportunities for small businesses, including those owned by women.<sup>157</sup> One of these binding commitments concerns the elimination of discrimination on the basis of sex in respect of employment, occupation, and wages. The other aspects are the consideration of gender issues related to occupational safety, health and other workplace practices, the prevention of occupational injuries and illnesses, and the prevention of gender-based workplace violence and harassment. This agreement

<sup>154</sup> Article 13.6 of CIFTA.

<sup>155</sup> Originally discussed in, and adapted from, A. Bahri, 'Women at the Frontline of COVID-19: Can Gender Mainstreaming in Free Trade Agreements Help?' 23(3) *Journal of International Economic Law* (2020) 563.

<sup>156</sup> 'CETA Trade and Gender Recommendation: EU-Canada Work Plan 2020–2021' (16 September 2020), at <[www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/CETA\\_work\\_plan-AECG\\_plan\\_travail-2020-2021.aspx?lang=eng](http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/CETA_work_plan-AECG_plan_travail-2020-2021.aspx?lang=eng)> (last visited 9 June 2021).

<sup>157</sup> Articles 25.2 and 23.12 of the USMCA.

is a milestone in the treatment of enforceable gender issues included in the labour chapter; the provisions are made enforceable through the new Facility-Specific Rapid Response Labour Mechanism that will allow the United States, Mexico and Canada to directly take actions against facilities with labour standards failures.<sup>158</sup> In respect of identifying resources and procedures, the African Continent FTA (AfCFTA) provides a best practice example.<sup>159</sup> The preamble to the AfCFTA recognizes the importance of gender equality for international trade and development. Including gender equality considerations in the preamble is an effective way of mainstreaming a gender perspective in FTAs, because it can be instrumental in determining the intentions of the negotiators or drafters of the agreement at the time when it was concluded. In Article 27, parties commit to mobilizing resources to improve the export-capacity of women entrepreneurs and women-owned SMEs. This provision is a best practice example, because identifying or mobilizing funds for gender-related commitments is fundamental for their implementation. Identification of funding options alongside these commitments can bring such promises a step closer to their implementation. This legal provision also provides for building the capacity and technical skills of SMEs and women entrepreneurs, which again is a crucial lever for women empowerment.

C23.P65 These developments show that the trade community is recognizing that trade policy can be used as a tool to empower women. This represents a drastic change in trade policymaking mindset. Yet, to ensure that the gender commitments included so far in trade agreements can become a ‘game-changer’ for women in the future, it is crucial to rethink how these commitments might be financed, implemented, and enforced.

## IV. CONCLUSION

C23.S13

C23.P66 Labour and gender concerns share a blind spot in WTO law which fails to adequately address them. However, that has not prevented WTO Members from increasingly addressing both labour and gender issues in their FTAs, and often in conjunction.

C23.P67 Another commonality shared by gender and labour standards is that they both form part of the UN human rights framework.<sup>160</sup> It is perhaps in this sense that we can best understand gender and labour provisions as representing ‘progressive trade’, namely in the way that they both extend access to social rights. In this regard, gender and labour rights are probably the set of human rights most directly related to economic activity and international trade.<sup>161</sup>

<sup>158</sup> For details, see above fn 42.

<sup>159</sup> African Continental Free Trade Agreement (enforced 30 May 2019).

<sup>160</sup> See, e.g., UNGA, ‘Universal Declaration of Human Rights’ A/RES/217(III) (adopted 10 December 1948), Articles 2, 22, 23.

<sup>161</sup> Another human right closely related to trade recently recognized in some FTAs are indigenous rights. See Article 20.13 and Annex 15-A of the CPTPP; Articles 24.2, 24.15, 25.2 and 32.5 of the USMCA.



C23.P68 A third aspect that unites trade and gender concern is the issue of sustainable development. Both issues are well integrated into the Sustainable Development Goals.<sup>162</sup> Indeed, the increased willingness of countries to take the idea of sustainable trade more seriously has likely been a contributing factor to the observed increase in gender and labour clauses in FTAs. There are even tentative signs that changes are emerging at the WTO. In this regard, although gender issues still lag behind labour concerns in uptake among FTAs, gender issues have already advanced as far if not further at the WTO level. In particular, gender issues are not directly implicated by the rejection of a ‘social clause’ in the Singapore Ministerial Declaration.<sup>163</sup> Nevertheless, regardless of this important precedent, keeping trade and social issues separate—and in potential conflict—looks increasingly at odds with a conception of sustainable trade built on all three pillars of sustainable development: economic, social and environmental.

C23.P69 Although there is scant empirical evidence that higher labour standards have led to increased protectionism, the potential misuse of social clauses in FTAs will always remain a risk. Fear of protectionism and loss of comparative advantage are thus justified concerns among many developing countries. Another concern is that the integration of trade, gender and labour issues smacks of moral and cultural imperialism.<sup>164</sup> We hope that some of these concerns can be addressed through an inclusive trade agenda directly involving developing countries in negotiations and standard-setting at both the bilateral and multilateral levels, and on the basis of a continued recognition of UN human rights as universal. Another means to avoid protectionism and misuse is designing narrow and targeted enforcement mechanisms, including with strong procedural safeguards and rapid third-party arbitration. The USMCA contains some promising steps in this direction.<sup>165</sup>

C23.P70 We have little doubt that gender, labour, and other potential human rights and social issues will continue to expand their presence across FTAs and throughout global value chains. Given past resistance, how far they will also become integrated into the multilateral trade framework remains to be seen.

C23.P71 **FURTHER READING**

C23.P72 A. Bahri, ‘Measuring the Gender-Responsiveness of Free Trade Agreements: Using a Self-Evaluation Maturity Framework’ 14(11) *Global Trade & Customs Journal* (2019) 517

<sup>162</sup> See UN SDG 2030, Goals 5 (gender equality) and 8 (decent work and economic growth), at <<https://sdgs.un.org/goals>> (last visited 14 June 2021).

<sup>163</sup> See above fn 17 and accompanying text.

<sup>164</sup> See, e.g., on labour A. Panagariya, ‘Trade-Labour Link: A Post-Seattle Analysis’ in Z. Drabek (ed.), *Globalisation under threat: the stability of trade policy and multilateral agreements* (Cheltenham: Edward Elgar, 2001) 101, at 106-108, and generally O.A. Hathaway, ‘The Cost of Commitment’ 2003 *John M. Olin Center for Studies in Law, Economics, and Public Policy Working Papers No. 273*.

<sup>165</sup> See above sections II.C and III.E.

- C23.P73 A. Bahri, 'Women at the Frontline of COVID-19: Can Gender Mainstreaming in Free Trade Agreements Help?' 23(3) *Journal of International Economic Law* (2020) 563
- C23.P74 M. Bronckers and G. Gruni, 'Retooling the Sustainability Standards in EU Free Trade Agreements' 24 *Journal of International Economic Law* (2021) 25
- C23.P75 ILO, *Labour provisions in G7 trade agreements* (Geneva: ILO, 2019)
- C23.P76 V.A. Leary and D. Warner (eds), *Social Issues, Globalisation and International Institutions* (Leiden: Brill, 2006)
- C23.P77 J.-M. Monteiro, 'The Evolution of Gender-Related Provisions in Regional Trade Agreements' 2021 *WTO Economic Research and Statistics Division*, Staff Working Paper ERSD-2021-8
- C23.P78 ITC, 'Mainstreaming Gender in Trade Agreements: A New Approach', at <<https://www.intracen.org/publication/mainstreaming-gender-FTA/>> (last visited 21 July 2021)
- C23.P79 A. Smith, J. Harrison, L. Campling, B. Richardson, and M. Barbu, *Free Trade Agreements and Global Labour Governance* (Abingdon: Routledge, 2021)