

# The Pink Trojan Horse: Inserting Gender Issues into Free Trade Agreements

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**Abstract:** In 2019 three transformative free trade agreements (FTAs) between Chile-Canada, Chile-Argentina and Canada-Israel were updated, including with them for the first time, individual chapters exclusively dedicated to gender. Due to the fact that these gender chapters are at most two years old, there has been little to no academic literature on their effectiveness and impact on gender equality. This paper aims to highlight possible successes and failures of the gender chapters through a review of human rights and labor chapters as examples of best practices that would demonstrate elements necessary to establish an effective gender chapter that would successfully tilt the scales towards gender equality. The research conducted highlighted potential areas of weakness in the gender chapters in terms of lack of specific indicators, lack of specific country analyses of the respective gender equality conditions and industries predominantly employing women in each country, and lack of effective monitoring and evaluation (M&E) mechanisms and subsequent dispute resolution mechanisms. Overall, if policy makers and trade negotiators wish to create effective gender chapters in future agreements, or in subsequent amendments to the 2019 gender chapters, there must be specific attention to the gender sensitivity of trade and the identified areas of weakness.

**Keywords:** International Law, International Trade, Development, Gender, Equality, Parity, Small Medium Enterprises, Free Trade Agreements

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## 1. Introduction

International trade has long been understood as being ‘gender neutral’, in other words simply conferring a benefit on all of society in an indiscriminatory manner. However, gender and legal experts have increasingly dispelled that assumption and have shown that trade affects gender differently depending on industry variation, wealth disparity and specific country models. In response to increased awareness of the need for gender equality and the heightened effect of trade on gender inequality, several countries have recently begun including chapters specifically and exclusively dedicated to gender (gender chapters) in their FTAs. Specifically, in 2019 three FTAs with individual gender chapters were concluded: the Canada-Chile FTA (CCFTA), the Chile-Argentina FTA, and the Canada-Israel FTA (CIFTA). The United States-Mexico-Canada Agreement (USMCA) also included a novel provision on gender and sexual orientation. This paper seeks to understand whether these gender chapters are designed to effectively contribute to increasing gender

equality and will address the issue in eight sections. Section 2 sets the stage for the creation of the 2019 gender chapters. Section 2.1 looks at what the international community has defined as ‘gender’ and ‘gender discrimination’. Based on these definitions Section 2.1 explores the effects of trade on gender. Section 2.2 is an employment snapshot, breaking down women’s participation in various sectors. This is particularly important, as without an understanding of what industries women predominantly work in there will be little to no understanding of how individual trade measures affect women. Section 2.3 argues that there is a need for a ‘gendered’ approach to trade, one that takes into account the role of gender in a given economy, considers its impact in trade negotiations and implements ‘flanking measures’ to mitigate its impact on gender. Section 2.4 analyzes previous international agreements that have included gender provisions and shows the steady increase of gender provisions throughout the late 20th and early 21st centuries. Section 2.5 explains the political, social and economic developments that led to this increase and the creation of three separate gender chapters in

2019. Section 2.6 focuses on the necessary markers that could determine an effective gender chapter, highlighting the need for broad as well as narrow indicators, analyses of the effect of trade on gender by industry, monitoring and evaluation of the implementation of the gender chapter, an effective and all-encompassing dispute resolution mechanism, and, finally, the ability of such dispute resolution mechanism to result in sanctions against parties breaching the provisions of the gender chapter. Section 2.7 assesses the 2019 gender chapters in chronological order, starting with the 2016 Chile-Uruguay FTA, which was the first FTA to include a gender chapter followed by the CCFTA, the Chile-Argentina FTA, the CIFTA, and the USMCA. Finally, Section 2.8 assesses the effectiveness of the existing gender chapters, based on the markers for an effective gender chapter set out in Section 2.6, and highlights their strengths and weaknesses. Gaps include the lack of specific indicators and country specific analyses as well as unclear parameters for the dispute resolution mechanism. Overall, this article aims to demonstrate that, while the gender chapters are revolutionary in their existence and signify a move in international trade policymaking towards considering the effects of trade on gender, they lack the basic elements needed to be truly effective in combating gender inequality.

## 2. Discussion

### 2.1. Gender, Discrimination, and the Effect of Trade

In order to understand the effect of trade on gender it is important to establish what is meant by gender as opposed to sex, what gender discrimination means and how it manifests itself in the world and finally how international trade is not 'gender neutral' and instead affects the genders differently.

Gender is different than 'sex', while sex refers to biology, gender instead refers to "how a person's biology is culturally valued and interpreted" [1] in society's perception of men and women's roles. Gender influences everyday life, how people behave and who they associate with, and people's relationship to the state in society generally. [1] The gender role of women and men is deeply engrained in social structures evinced through traditional household roles, the existence of laws affecting men and women differently, what constitutes acceptable behavior by either gender in society and the overall societal expectations with regards providing for the family both through remunerated employment outside the home and unpaid work within the home. [1]

Due to the traditional roles of men and women and the societal pressures on both genders there has been clear overall discrimination and lack of equality. As highlighted by the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), under Article 1:

"the term 'discrimination against women' shall mean any distinction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on the basis of equality of men and women, of human rights and

fundamental freedoms in the politics, economic, social, cultural, civil or any other field." [2]

The effect of trade on gender is more complex, as generally speaking, trade traditionally has been understood as being 'gender neutral', [3] and with it the belief that the effect of trade and its policies offer the same opportunities to both men and women, regardless of gender. [4] However, increasing research into the effects of trade by trade and gender specialists has evinced that this is in fact not the case. [1]

In order to understand the effect of trade on gender an understanding of the effect of trade on an economy overall is vital. In general, the effect of trade is such to enhance certain activities and diminish others depending on the efficiency of the product. [1] Namely, this refers to the situation where the removal of trade barriers and increased competition creates a situation where products that are the most efficient in terms of allocation of resources and labor benefit from the removal of trade barriers. [5] Industries or activities which cannot survive the pressures from other parties who produce such activities in a more efficient way will in turn be diminished, and the resources will move towards an activity with increased efficiency as a result of the reduction of trade barriers. [5]

The introduction of a tariff, on its face does not appear to affect gender. The tariff is not applied on a gendered basis and there is no direct-action affecting men and women in different ways. However, what needs to be analyzed is who are the displaced workers, how are they being helped to find new employment and is the new employment even available in relation to their previous skill set, part-time or full-time ability, body build etc. [6] For example, the apparel industry is heavily dominated by women, [5] if the reduction of the apparel industry results in, for example, the increase of the timber industry, creating increased jobs in heavy manual labor, the reality may likely be that women are unable to supply the necessary hard labor necessary to meet these new demands. As a result, many women will be unemployed. Further, studies have shown that even if women are working in the industry that is positively affected by international trade, there may still be a negative impact. With the growth of production of an industry there will likely be an increased need for a work force increase, which typically favors full-time workers. [7-8] Women are more likely to work part-time than men due to familial obligations [9] and as a result, will be sidelined by the increased production and need for full-time labor. [9]

It must be also noted that trade can also have a positive effect on gender. In general, formal employment in export industries tends to operate at a higher pay and higher working conditions, [10] this, in turn, affects women's income and status. [1] Referring back to the apparel industry, while women can be affected if their employment is threatened by the industrialization of the sector or the increased need for full-time employment, there can also be many benefits. For example, in Lesotho, the increase of international trade in the apparel industry led to the creation of 38,00 new jobs between 1999 – 2004 with the majority of these jobs given to women. [11] Overall, it is important for trade negotiators and policy makers to consider the potential positive or negative impacts

of trade on gender and to adjust accordingly.

## 2.2. Employment Snapshot: Women's Participation in Labor

The previous example of the effect of a tariff on different industries and specifically on a female-dominated industry such as the apparel industry raises the need to explore industries that are predominantly geared towards female workers.

Globally, studies have shown that women are less likely to participate in the labor market than men. In 2018, a study by the International Labor Organization (ILO) found that only 48.5% [12] of women participated in the global labor market, which was 26.5% less than the participation of men. [13] Additionally, this gap has only reduced by 2% since 1990 and studies have argued that this already marginal rate of approval is expected to halt and possibly even reverse in the next decade. [12]

The reason for the large difference in labor participation between genders is due to the amount of unpaid work in which women engage. There is an increased likeliness for women to engage in domestic and family work, often unpaid, and even if paid this work is likely to be part-time [14] or temporary. In fact, it has been found that women shoulder 2.5 times more unpaid work than men do [15] and comparably spend only half as much time doing paid work as men. [15]

Other than the difference between paid and unpaid participation there is also a difference in women's participation depending on the industry. The three predominantly female dominated industries are services, the informal (non-agricultural) sector, and agriculture. A study in 2015 found that globally 62% of women were engaged in the services industry. [16] This figure changes depending on the region, for example in Latin America, the Caribbean, Eastern Europe, and Southern Europe women's participation in the services industry is 70%. [6] Women are heavily engaged in the agriculture industry however, some studies attribute over 60% of the global labor force in agriculture to women while others argue that the figure is closer to 40%. [17] Perhaps most importantly in relation to gender equality, women tend to engage in the agricultural industry for the purpose of subsistence production to ensure food security rather than for production to gain profit. [18] The focus on food security by women in agriculture further increases their dependence on employment and increases the possible negative impact of trade provisions affecting agriculture. [18]

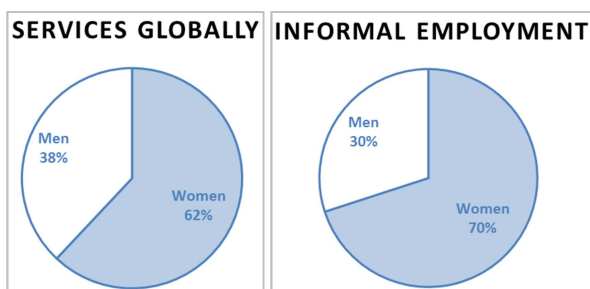


Figure 1. Women's Representation in Services and the Informal Sector [31].

Finally, women are also more likely to be engaged in the informal (excluding agriculture) sector than men, and the informal sector is currently dominated 70% by women [4] (see Figure 1 Women's Representation in Services and the Informal Sector). The informal sector exists outside the purview of government regulation without the social protections offered through formal jobs in the formal economy. [19] The lack of formal regulation in the informal sector increases the likelihood of women working in unsafe working conditions and increases their exposure to sexual harassment. [18]

## 2.3. Argument for a Gendered Approach to Trade

In light of the previous arguments explaining the differences in the effect of trade on men and women, there is a clear need for a gendered approach to trade, namely a trade policy that considers the different effects of trade on genders and adjusts accordingly. [1] There are two main arguments in favor of adopting a gendered approach to trade, an economic argument and a human rights argument.

The economic argument is rooted in the goal of trade liberalization of promoting economic growth, development and prosperity among nations. [20] This can be seen in the preamble to the Agreement Establishing the World Trade Organization, in that trade relations shall be conducted:

“with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of trade in goods and services... in accordance with the objectives of sustainable development.” [21]

As numerous studies have shown, economic growth is undermined by gender inequality. [22] In general terms, gender equality leads to inefficient allocation of resources and restricts access to resources. [22] The inclusion of equal opportunities for women could enhance a country's overall competitiveness and performance. [23] Quantitatively, in 2015, a McKinsey study found that advancing women's equality through increased participation in the workforce could contribute \$12 trillion to the global GDP by 2025 based on a conservative approach.<sup>1</sup> [24] When McKinsey analyzed a ‘full potential’ scenario in which women and men had full gender equality and held identical roles in the labor market, they concluded that GDP could rise by as much as \$28 trillion, or 26% globally by 2025. [24]

To put it simply, “the more involved [women] are, the more economies grow.” [6] This is mainly due to the ‘power of the purse’. [25] Research has shown that when women have increased access to their own income, their status and bargaining power increase and in turn they invest on average 90% of their incomes back into their families through health and education [4] and their communities. [25] The ‘power of the purse’ as a result creates a ‘snowball’ effect [25] throughout society and universally increases living standards

<sup>1</sup> The \$12 trillion assessment was dependent on states following a ‘best in the region’ approach and matching their rate of improvement of gender equality to the fastest-improving country in their region.

and reduces poverty.

The human rights argument focuses on quality of life rather than the impact of gender equality on the economy and economic growth. Gender equality has been recognized as a human right [23] by the international community in several multilateral conventions and declarations such as the previously mentioned CEDAW, the Universal Declaration of Human Rights<sup>2</sup> [26-27] and the European Convention of Human Rights.<sup>3</sup> [28-29] Gender equality increases access to health care, education and enables both genders to enjoy a decent standard of living.

Both the economic and human rights arguments have shaped the UN's Agenda 2030 adopted in 2016, with gender and trade reflected in numerous sustainable development targets. [30]

#### 2.4. The Inclusion of Gender in International Trade Agreements

While the primary focus of this paper is the introduction of gender chapters in FTAs in 2019, the existence of gender in international trade agreements is not a completely new phenomenon. The first gender chapter agreed to in an FTA was in 2016 under the Chile-Uruguay FTA, and the first gender related article in an international trade agreement was agreed to in 1957 in the Treaty establishing the European Economic Community (EEC). [31] The EEC required each member state to guarantee the application of the principle of equal pay for men and women. More than 25 years later, in a different continent in 1983, the Treaty Establishing the Economic Community for Central African States (ECCAS) [32] was the first Regional Trade Agreement (RTA) signed by developing countries to include a gender provision. The gender provision, under the social affairs section of the agreement, committed the member states to developing collective research and policies towards increasing the economic, social and cultural status of women both in urban and rural areas.<sup>4</sup> [33] Finally, the gender provision called for increased efforts towards the integration of women in development activities. 1992 marked the first gender provision relating to the general principle of equality between genders [34] in the EU Maastricht Treaty.<sup>5</sup> [35] That same year, the North American Free Trade Agreement (NAFTA) [36] established a side agreement on labor cooperation which included provisions focused on the elimination of employment discrimination based on sex and equal pay for men and women<sup>6</sup> [37].

2 UDHR Article 2: "everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion..."

3 ECHR, Article 1: "the enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion..."

4 ECCAS, Article 60 (2) (b): develop collective research by appropriate policies aimed at improving the economic, social and cultural status of *women* in urban and rural areas and increasing their integration in development activities."

5 TEU Article 6: Each Member State shall ensure that the principle of equal pay for male and female work is applied.

6 NAFTA, Article 49 (g): elimination of employment discrimination on the basis of grounds such as race, religion, age, sex, or other grounds as determined by each Party's domestic laws; (h) equal pay for men and women.

More recently, there has been a slow but steady increase in the inclusion of gender-related provisions in Regional Trade Agreements (RTAs). In 2018, the World Trade Organization (WTO) conducted a study showing that of 74 RTAs analyzed each included at least one provision explicitly referring to gender or a gender-related matter. [38] Outside of these 74 RTAs with explicit gender provisions, many more were found to address gender through other cross-cutting issues such as through the protection of human rights, labor, [39] sustainable development or the protection of vulnerable groups. [38] The steady increase of the inclusion of implicit and explicit gender related provisions in RTAs is depicted in Figure 2 below.

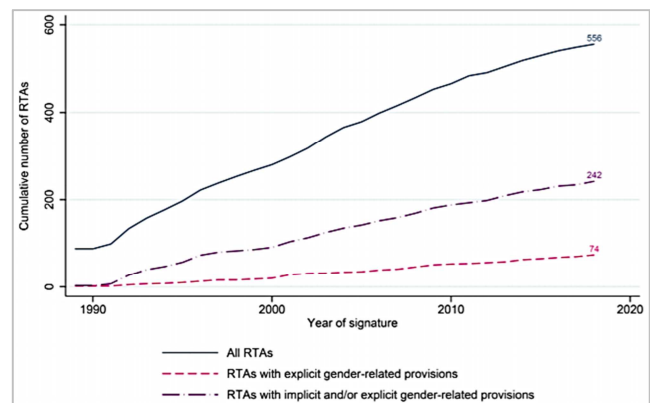


Figure 2. Evolution of RTAs with Gender Related Provisions [41].

#### 2.5. The Spark Leading to the Inclusion of Gender Chapters

The evolution of gender provisions in RTAs and other international agreements is clearly indicative of an upward trend. However, up until 2016, there was never an explicit separate chapter relating to gender in a free trade agreement, [42] and, up until 2019, the 2016 Chile-Uruguay FTA was the single exception to the almost universal application of mere references to gender in international agreements.

The question is, therefore, what sparked the inclusion of gender chapters in FTAs. Overall, there has been an increased approach towards gender mainstreaming in domestic and international policy making. [43] Gender mainstreaming refers to a strategy employed by policy makers and public interest groups as a means to achieve gender equality through ensuring the inclusion of gender perspectives in areas associated with development, including the implementation and monitoring of government policies, programs, projects and agreements. [3]

More generally, gender theorists and legal scholars have argued that the inclusion of gender chapters in FTAs is due to five factors. These factors include the fact that more women are now engaged in trade policy making at senior levels. [43] There has also been an increase of women trading on international markets and owning and managing export firms. [44] Advocacy campaigns concerning gender issues have continued to grow and have, as such, highlighted the relevance of gender equality and its issues pertaining to development. [44] As previously demonstrated there has been an increase in

awareness and research on the effect of trade policy on gender by international organizations and academia resulting in increased knowledge and commitments to gender. [44] Finally, as demonstrated by the McKinsey report, there has been an increasingly widespread belief that gender inclusivity in trade is vital for long-term economic growth and development.<sup>7</sup> [24]

## 2.6. Elements of a Strong and Effective Gender Chapter

Before analyzing the substance of the new gender chapters, it is important to first understand what is needed in order to create a gender chapter that will have positive effects on gender equality and that will achieve the goals it was supposedly set out to achieve.

Drawing on previous examples from labor and human rights chapters and provisions this section seeks to argue that for a gender chapter to be effective it must include (I) a combination of broad and narrow indicators of gender equality, (II) an industry-specific analysis of the effect of trade on gender, (III) monitoring and evaluation, (IV) an effective dispute resolution mechanism and (V) the ability of such dispute resolution to impose sanctions.

### 2.6.1. Broad and Narrow Indicators of Gender Equality

In order to effectively achieve gender equality through a gender chapter, there needs to be an understanding of the areas affecting gender equality. Determining areas of gender inequality has generally been addressed through indicators. Indicators have been defined as “specific information on the state or condition of an object, event, activity or outcome that can be related to [gender] norms and standards... that can be used to assess and monitor the promotion and implementation” [45] of gender standards. The use of indicators has been praised as making communications and goals more concrete and effective, increasing record-keeping efficiency, and improving overall monitoring. [45] The use of well-defined and articulated indicators can “improve public understanding of the constraints and policy trade-offs and help in creating broader consensus on social priorities.” [45] McKinsey, [24] the United Nations Sustainable Development Goals (UN SDGs) [46] and the Women, Business and the Law Project (WBL) formed under the World Bank Group [47] have all created indicators which seek to measure the main barriers to gender equality and to demonstrate whether any in gender inequality change has occurred. Matching these barriers with specific gender inequality indicators in a trade agreement, assessing and tracking the indicators with a monitoring and reviewing mechanism, and establishing adequate enforcement mechanisms through dispute resolution mechanisms and sanctions would create a gender chapter capable of effectively balancing the scales of gender.

**Table 1.** Key Indicators to Assess Gender Equality.

McKinsey Report	World Bank WBL Project
Equality in Work	Mobility
Essential Services and Enablers of Economic Opportunity	Workplace
Legal Protection and Political Voice	Pay
Physical Security and Autonomy	Marriage
	Parenthood
	Entrepreneurship
	Assets
	Pensions

McKinsey has divided its 15 indicators of gender equality for a study of 95 countries into four large subsections: equality in work, essential services and enablers of economic opportunity, legal protection and political voice and physical security and autonomy. [24] Equality in work looks at the perceived wage gap for similar work, the lack of women in leadership positions, and the disproportionate number of women working in unpaid work and not in the formal labor market compared to men. Essential services and enablers of economic opportunity looks at access to health care through reproductive and maternal health, education, financial services, and ‘digital connectivity’. Legal protection and political voice look to laws protecting individuals against violence, the right to inherit property, the right to find work and be fairly compensated for such work. [24] For example, laws prohibiting a woman from obtaining a passport without the consent of her husband, or laws placing the man as the head of the household and requiring the women to live in that household would fall under this indicator. [48] Physical security and autonomy has also been used as an indicator and refers to selective abortions due to societal preference of baby boys over girls, early marriages and evidence of women being victims of violence by their intimate partner. [49]

The World Bank Women, Business, and the Law (WBL) Project has created eight indicators for gender parity [50] as shown in Table 1. WBL looks at rights and conditions relating to mobility, workplace, pay, marriage, parenthood, entrepreneurship, assets and pensions. Mobility refers to a woman’s freedom of movement, and her right to choose where to live. For example, Article 153 of Senegal’s Family Code states that the choice of the marital home “belongs to the husband; the woman is required to live there with him, and he is obliged to receive her.”<sup>8</sup> [51] Workplace refers to laws restricting a woman’s decision to work and whether adequate legal protection exists relating to workplace discrimination and sexual harassment through associated penalties or civil remedies. Pay indicates whether there is legislation mandating the “equal remuneration for work of equal value.” [52] WBL finds the standard under the International Labor Organization (ILO) of ‘equal pay for equal work’ to be insufficiently

<sup>7</sup> There is also a possible argument that the chapters are a response to the UN SDGs 2030 Agenda. A demonstration of the international community’s commitment to gender equality and empowerment.

<sup>8</sup> It must be noted that also under Article 153 of the Senegalese Family Code, if the husband’s residence provides physical or moral dangers to the wife, she may, under certain exceptions be authorized to live with her children in a separate residence to be decided by the Justice of the Peace. Original French Text: “Lorsque la résidence fixée par le mari présente pour la famille des dangers d’ordre physique ou d’ordre moral, la femme peut, par exception, être autorisée à avoir pour elle et ses enfants un autre domicile fixé par le juge de paix”.



rigorous [52] and instead refers to Chapter 226 of the Employment Act of Kenya as good practice which establishes that “an employer shall pay his employees equal remuneration for work of equal value.” [53] Marriage analyzes whether there is a legal obligation for women to obey their husbands and whether she can be the legal head of her household. For example, under Article 316 of the Mali Family Code “the wife must obey her husband, and the husband must protect his wife.” [54] Further under Article 58 of the Jordan Civil Status Code, “the husband is the head of the household.” [55] Parenthood refers to right to paid maternity leave, paternity leave and the treatment of pregnant workers.<sup>9</sup> [56] Entrepreneurship assesses legal constraints to women starting and running a business. Such legal constraints include a woman’s ability to sign a contract, register a business or open a bank account. [57] Assets refer to property ownership and inheritance, the right to have authority over assets during a marriage and the right to a valuation of their non-monetary contribution. [58] The final indicator, pensions, refers to the equalization of retirement ages, including the impact of gaps or absence from employment due to childbearing or children care towards pension benefits. [59] For example, a difference in retirement ages, such as in Brazil where women retirement age is 60 versus 65 for men, has been shown to be counterproductive towards gender equality. [60] In fact, studies have shown that increases in retirement ages result in increased female labor supply thus contributing not only to gender equality but also to overall economic growth. [56]

Finally, Table 2, reflects the UN Sustainable Development Goals, specifically, Goal 5 and its corresponding targets and indicators. The UN SDGs are made up of 17 Goals defined through a list of 169 SDG Targets. [61] These targets are agreed to be tracked through 231 individual indicators. [61] Goal 5 of the UN SDG seeks to “achieve gender equality and empower all women and girls” [46] and contains a wide array of targets and indicators. While Goal 5 specifically and exclusively deals with gender, gender is encompassed in many other goals as well. Other gender references include, Goal 1, on the elimination of poverty in all its forms everywhere, which under Target 1. b aims to “create... gender-sensitive development strategies.” [63] Goal 4 on education and lifelong learning for all, refers to gender under Target 4.5 calling for the elimination of “gender disparities in education,” [64] and under Target 4.7 for all learners to acquire the knowledge needed to promote sustainable development, through various means including “gender equality.” [64]

The Targets under Goal 5 as seen in Table 2, are mostly vague and all-encompassing such as “end all forms of discrimination against women and girls” [46] however they are supplemented by specific indicators, such as “legal frameworks in place to promote, enforce and monitor equality and non-discrimination on the basis of sex.” [46]

**Table 2.** United Nations Sustainable Development Goals, Goal 5 on Gender Equality and Empowerment of Women and Girls, Targets, and Indicators [46].

Targets	Indicators
1 End all forms of discrimination against women and girls everywhere	1 Whether or not legal frameworks are in place to promote, enforce and monitor equality and non-discrimination on the basis of sex
2 Eliminate all forms of violence against all women and girls	1 Proportion of ever-partnered women and girls aged 15 years and older subjected to physical, sexual or psychological violence
3 Eliminate all harmful practices, such as child, early and forced marriage and female genital mutilation.	1 Proportion of women aged 20-24 years who were married or in a union before age 15 and before age 18
4 Recognize and value unpaid care and domestic work	1 Proportion of time spent on unpaid domestic and care work, by sex, age and location
5 Ensure women’s full and effective participation and equal opportunities for leadership at all levels of decision-making in political, economic and public life.	1 Proportion of seats held by women in national parliaments and local governments and proportion of women in managerial positions  1 Proportion of women aged 15-49 years who make their own informed decisions regarding sexual relations, contraceptive use and reproductive health care
6 Ensure universal access to sexual and reproductive health and reproductive rights	2 Number of countries with laws and regulations that guarantee full and equal access to women and men aged 15 years and older to sexual and reproductive health care, information and education

Returning to what should be included in an effective gender chapter, there is a debate surrounding whether to include broad or narrow indicators. Some theorists argue that indicators should be broad so as to encompass all obligations enshrined in gender agreements and human rights treaties concerning treaties. [65] For example, in terms of human rights, broad commitments such as the obligation to “respect, protect, fulfill” human rights would effectively constitute a broad indicators that could help track both violations of human rights and the steps needed for a state to implement towards the progressive realization of human rights. [66] The logic is that a broad indicator, can cover all prospective issues [67] and the state practitioners can subsequently narrow the list depending on the needs and climate of the specific state. [65]

Other theorists have argued that a broad indicator approach is too burdensome and thus impractical for governments. [65] In the absence of specific indicators it is unclear which provisions are being violated and harder to hold perpetrators accountable, [68] particularly, in countries already struggling with upholding human rights standards. [68] Adopting instead a short list of specific key indicators keeps the task manageable and allows regulators to set specific standards towards achieving those goals. [69]

Building on both of these theories, perhaps, the best solution would be to incorporate both broad and narrow objectives in an effective gender chapter, such as was accomplished through the inclusion of broad targets and specific indicators in the UN SDGs.

9 [80] at 4. Assessment of Parenthood: WBL confers positive scores for the parenthood indicator for states providing a minimum of 14 weeks of paid maternity leave where the government provides 100% maternity leave benefits.

For an effective gender chapter, this could be done by explicitly referring to the Goal 5 Targets and Indicators or through a broad statement signaling the parties intention and agreement towards the elimination of all discrimination against women and the elimination of all forms of violence towards women (UN SDG). The gender chapter could then highlight a shortlist of indicators derived from the WBL, SDGs, and McKinsey report that would be necessary to achieve these goals, such as the implementation of laws protecting women against discrimination and sexual harassment in the workplace, [47] the implementation of laws protecting a woman's right to movement, [47] property and inheritance [58] and an equal pension. [14] Combining these three approaches to gender indicators could create a gender chapter that captures evolving areas of gender discrimination while also creating ascertainable goals for policy markets to work towards post the ratification for the FTA. The additional advantage of taking already existing indicators would be that they are already being collected and thus cost neutral additions.

### 2.6.2. Addressing Effect of Trade on Gender by Industry

To supplement the use of broad and narrow indicators for an effective gender chapter in an FTA there is also a need for an assessment to be made by industry of the effects of trade on gender. As previously discussed, international trade affects different industries in different countries in different ways and, importantly, affects gender as a result.

According to the OECD, there is a clear need for trade negotiators to take into account the effect of trade on gender and to specifically include a gender sensitive framework for each industry affected by a trade agreement. [70] A gender sensitive framework calls for the need to take into account a gender perspective in overall trade policy negotiations, design and implementation [71] and calls for the implementation of 'flanking measures' to counter act such an impact. [70] A gender sensitive framework and assessment of necessary flanking measures needs to be carried out by either the trade negotiators or other agencies within an existing government. For example, in the US framework, the International Trade Commission (ITC), under the Trade Act of 2002 was created as an independent federal agency charged with reporting on the effect of trade agreements on the US economy. [72] The Agency reports on economic and social impacts of trade but strikingly fails to look at the impact on gender. [73] In the US context, the inclusion of a gender sensitive framework assessment could practically be added to the purview of the ITC's mandate. [73]

As previously discussed, agriculture is the second largest woman dominated industry in which women are largely engaged in for purposes of food security and providing for their families rather than profit. [18] The liberalization of trade in agriculture poses a threat to the ability of women to provide for their families.<sup>10</sup> [74] During the negotiations of the

Dominican Republic-Central American Free Trade Agreement (DR-CAFTA) democratic members sent a packet to Congress titled "Women Say No to DR-CAFTA". [75] The packet addressed the impact of the FTA as contributing to the poor working conditions of women, the privatization of public goods and services and in reference to agriculture, the impact of DR-CAFTA on food security due to the resulting changes in agriculture production. [76] Changes to food security and women's ability to work and feed their families need to be addressed when negotiating the agriculture portion of a free trade agreement. Flanking measures need to be taken to counteract these negative effects. [71] An example of an effective flanking measure could be a tax incentive to promote woman-run businesses. [12] A way to measure the impact of an effective agricultural flanking measure could be through the targets and indicators established for Goal 2 of the UN SDGs on ending hunger and achieving food security. [77] For instance, Target 2.3 calls for the doubling of "agricultural productivity and income of small-scale food producers, in particular women" the corresponding indicator being the "average income of small-scale food producers by sex." [78]

In relation to services, with services being the primary area in which women are employed and dominate, [16] an impact of international trade on services could have a detrimental impact on women and as such gender equality. [79] For example, increased competition from trade liberalization creates a tiered system of different levels of health care provisions, [16] which could, in turn, affect the quality of health care services provided for the poor.<sup>11</sup> [18, 44] Trade liberalization has, as a result, affected a woman's access to high quality health care services and as such as negatively affected women and in turn has contributed to gender inequality. An example of a flanking measure that could address this burden could be the creation of government funded programs providing high quality health care to affected low income women.<sup>12</sup> [81] Flanking measures could also follow targets set out under Goal 3 of the UN SDGs to "ensure healthy lives and promote well-being for all at all ages."<sup>13</sup> [81, 82]

Other than agriculture and services there could be additional impacts on apparel, industrial work, the informal sector and others. [83] Overall, in order to create a truly effective gender chapter consideration must be afforded to the gender sensitivity of provisions affecting industries and flanking measures must be considered within the chapter or by

<sup>10</sup> *Id.* The effect on women's ability to provide for families partially stems international trade in increasing demand of production of "cash crops" and instead sourcing food crops from imports, thus competing with locally produced food crops and decreasing their price. The predominant effect on women is due to women generally working as 'small scale food-crop farmers' which cannot compete with the international markets.

<sup>11</sup> [70] Studies have shown that the majority of those living in poverty are women. Specifically, 70% of those living in extreme poverty are women.

<sup>12</sup> Gretchen Borchlet, *The Impact Poverty Has on Women's Health*, 43 (3) Human Rights Magazine (Aug. 1 2018). Affordable Care Act (ACA) addresses areas of discrimination faced by women with regard to health care by outlawing insurance providers refusal to sell insurance to women with pre-existing conditions such as prior pregnancy or having a Cesarean delivery. ACA has also outlawed charging women more than men for the same insurance covered.

<sup>13</sup> Under Target 3.7 ensuring "universal access to sexual and reproductive health-care services" and Target 3.8 to "achieve universal health coverage, including... access to quality essential health care service." Access to health care services under Targets 3.7 and 3.8 are to be measured by its corresponding indicators of women having their need for family planning "satisfied with modern methods" and 'coverage of essential health services'.

the respective state in order to address potential impacts on gender equality.

### 2.6.3. Monitoring and Review

To ensure that the state parties are actively working towards implementing the indicators previously discussed there is a need for a committee or independent body to monitor and periodically review state party actions as well as any possible actions of private entities in the states affecting gendering equality.

The reason for the need for monitoring and review is that the gender impact assessment should not be a “one-off policy, but an ongoing and dynamic process.” [84] The committee should continuously review and evaluate whether the indicators effectively drive the parties to include more progressive legislation and secure increased gender equality for its citizens and companies. [84] The committee should also have the right to suggest amendments to its government in case indicators need to be amended due to unexpected impacts on gender in the states. [84]

In order to increase transparency and encourage the involvement of public interest groups and interested stakeholders [3] there should be a process to allow interested parties to submit complaints to the committee.<sup>14</sup> [85] The committee in turn should have the right to submit any credible complaints to a dispute resolution mechanism with the power to impose sanctions.

### 2.6.4. Effective, All-Encompassing Dispute Resolution Mechanism

Building on the need for indicators and sector specific flanking measures and monitoring and review there is a need for a dispute resolution mechanism to resolve implementation issues. Without an effective dispute resolution mechanism there is no way to ensure that the indicators

Many FTAs have a dispute resolution provision that allows the parties to refer a dispute falling under its purview to a dispute resolution mechanism of the choice of the parties.<sup>15</sup> [36] For example, in the DR-CAFTA FTA, the parties agreed to refer disputes relating to the improper enforcement of provisions of the FTA, including but not limited to, issues of labor, investment expropriation and the environment. [86] For a gender chapter to be effective there is a need for the dispute resolution mechanism of the FTA to also encompass disputes related to the gender chapter. Further there is a need for parties to have recourse to dispute resolution for all matters relating to gender equality, not only matters of gender relating to trade. This would enable parties to raise claims against corporations

and entities in the other party that abuse gender rights.

The need for an all-encompassing dispute resolution mechanism was exhibited in a series of labor issues that arose between 2011 and 2017 in Guatemala. [87] In 2011 the US required the creation of a panel under the CAFTA-DR dispute resolution clause due to Guatemala’s failure to “effectively enforce its labor laws, through a sustained recurring course of action or inaction, in a manner affecting trade between the parties.” [88] After prolonged proceedings the panel eventually decided in favor of Guatemala and found that they had not violated their commitments under the CAFTA-DR. [86] The Panel came to the positive finding for Guatemala on the basis that despite the fact that Guatemala had repeatedly failed to comply with eight court orders and reinstate employees dismissed for unionization and collective bargaining, which the Panel said could be characterized as “sustained or recurring course of action or inaction” [89] this failure had not affected the trade between the parties. The result of this Panel decision demonstrated the lack of resources through labor chapters of free trade agreements for labor advocates. [90] Further, the Panel decision essentially legitimized Guatemala’s anti-union activities and went against the wording of the CAFTA-DR calling for “non-interference in formation of a union.” [91]

Translating the CAFTA-DR example to a gender chapter, if the dispute resolution mechanism only applies to ‘trade related matters’ then a corporate or a state party could effectively continue to discriminate on the basis of gender in a “sustained or recurring course of action or inaction” [89] but fail to face any legitimate consequences due to its non-application to trade.

### 2.6.5. Imposition of Target Sanctions

Supplementing the dispute resolution mechanism, for there to be an effective implementation of a gender chapter there needs to be an ability for the created panel to impose sanctions on a non-complying party. Referring back to the Guatemalan example discussed above. Under the DR-CAFTA there was another labor-related issue in a Korean-owned factory in Guatemala. [92] The Korean-owned plant refused to allow government labor inspectors to inspect their facilities and determine whether there was adequate compliance with labor standards. Subsequently, due to the Guatemalan government’s lack of resources and will to compel such inspections, the factory was never inspected, resulting in lack of enforcement or protection of the workers’ labor rights. [92] If a gender chapter does not contain language calling for enforcement of decisions of a dispute resolution panel or other enforcement actions through the threat or imposition of sanctions, the chapter will lack ‘teeth’ [93] or any ability to actually facilitate change.

In the human rights arena, there has been discussion over whether sanctions for human rights abusers should be comprehensive or targeted. [94] Comprehensive sanctions are directed at entire states as a whole and affect the entire population through for example: trade restrictions, travel restrictions and embargoes. In the past, comprehensive sanctions have been criticized for their lack of effectiveness in

14 UN Women, *Communications Procedure*, <https://www.unwomen.org/en/csw/communications-procedure>. The Commission on the Status of Women considers complaints by any individual, NGO, or group to submit complaints ‘containing information relating to alleged violations of human rights that affect the status of women in any country in the world.’ The commission considers these submissions for purposes of their research. In the case of a gender chapter committee, a similar structure of complaint procedure could be instituted.

15 [错误!未定义书签。] For example, NAFTA has three main areas of dispute settlement under investment (Chapter 11), review of anti-dumping and countervailing duty administrative actions (chapter 19) and general dispute settlement (chapter 20).



relation to the detrimental humanitarian effects they create in the entire state as a result. For example, humanitarian aid groups have been unable to transfer vital aid assisting malnourished children and other vulnerable groups due to the imposition of trade restrictions and embargoes. [87]

For an effective gender chapter, comprehensive sanctions are, therefore, likely not the most effective form of sanctions, as the women who are already facing gender discrimination will likely face more hardship as a result of a comprehensive sanction indiscriminately affecting the entire population of the state. [97] As previously discussed, trade is not gender neutral, therefore an indiscriminate comprehensive sanction will likely affect women in different ways than men and as a result further threaten their status.

The ideal situation is, therefore, most likely to create targeted sanctions. Targeted sanctions, also known as ‘smart sanctions’ are directed at individuals and companies. [1] In the past they have been used to target terrorism but have recently been expanded to retaliate against human rights abusers. [95] A targeted sanction minimizes civilian suffering through freezing the assets or implementing foreign aid reductions and capital restrictions of the individual targets.<sup>16</sup> [96] Gender equality could greatly benefit from the extension of targeted sanctions as a tool for the dispute resolution mechanism. [1] For instance, in the Guatemalan example, the Korean-owned company’s refusal to comply with the inspection order [92] could be enforced through the target sanctions of asset freezing or perhaps, less radically, a suspending of their export license. If the company wished to continue operations and have its assets unfrozen, it would be required to comply with the inspection order. This same model could be used in a gender chapter with a dispute resolution mechanism imposing target sanctions on gender abusing companies and entities and limiting its impact on the women and other civilians already impacted by the gender discriminatory action.

## 2.7. The Inclusion of Gender Chapters in Free Trade Agreements

The gender chapters of the Chile-Uruguay, Canada-Chile (CCFTA), Chile-Argentina and Canada-Israel FTA (CIFTA) are revolutionary in that not only are they the first dedicated gender chapters in FTAs, but also three of them (CCFTA, Chile-Argentina and CIFTA) were all concluded in 2019. As such, 2019 marked a revolutionary year for gender and free trade agreements. Following Section 2.6 on the elements necessary for an effective gender chapter, this article now turns to the elements incorporated in the actual gender chapters of FTAs.

The FTAs are assessed below in order of their entry into enforcement, starting with the Chile – Uruguay FTA, the first FTA to include a gender chapter, followed by the CCFTA, the Chile Argentina FTA, the CIFTA and finally, an assessment of the provision on gender in the USMCA. While the

provision in the USMCA is not a separate chapter it is important to see the development of gender provisions and how the gender chapters have influenced their substance.

### 2.7.1. Chile-Uruguay FTA (2016)

In 2016, Chile and Uruguay made the unprecedented move to include an entire chapter on gender in their FTA. As shown below in Table 3, the first six articles of Chapter 14 have been incorporated in the almost exact form in the gender chapters of subsequent FTAs.

Most importantly, this makes clear that the Chile-Uruguay FTA has become the foundation for the subsequent gender chapters of 2019 not only in terms of changing the attitude towards including gender in trade negotiations but also in terms of the provisions and wordings in the subsequent FTAs.

Table 3. Chile-Uruguay FTA [97].

Chile-Uruguay FTA (Chapter 14)	
Article 14.1	Acknowledges the importance of eliminating discrimination against women at all levels and in all sectors of the population. Highlights the impact of gender equality as a driver of economic growth and socio-economic development and emphasizes trade as a channel through which this can be achieved.
Article 14.2	Reaffirms the parties’ intention of promoting and implementing international agreements dealing with gender.
Article 14.3	Parties assert their willingness to cooperate in the agreed-upon areas. Cooperation aimed at the promotion of developing the skills and competencies of women in the workplace, their roles in decision making positions in the public and private sectors, and through the creation of networks of women to encourage the inclusion of women in the workforce and better labor standards and practices.
Article 14.4	Establishes a Gender Committee to be composed of governmental representatives of each Party responsible for relevant gender and trade matters. Tasks include facilitating the exchange of information between Parties regarding the formulation and implementation of national policies aimed at creating gender equality
Article 14.5	Parties to make all possible efforts through dialogue, consultations and cooperation to resolve matters relating to the interpretation and application of the Chapter.
Article 14.6	Any issue arising from this chapter is not subject to the FTA’s dispute settlement mechanism.
<i>Noteworthy Elements: The first FTA chapter in existence, subsequent gender chapters have incorporated Articles 14.1 – 14.6 almost identically.</i>	

### 2.7.2. Canada-Chile FTA (CCFTA) (2019)

Canada and Chile are the strongest advocates in terms of incorporating gender chapters into free trade agreements. In fact, all of the FTAs with gender chapters from 2019 included either one or both of them. Canadian officials have stated that Canada’s objectives in including a separate gender chapter were fourfold. Through a gender chapter, Canada wanted to reaffirm the “importance of incorporating a gender perspective into economic and trade issues,” to reaffirm its commitment to international agreements on women’s rights and gender equality, to “provide a framework for parties to the

<sup>16</sup> For example, the Global Magnitsky Human Rights Accountability Act (2012) provides the executive branch to impose targeted sanctions towards perpetrators of gross human rights violations.

agreement to undertake cooperation activities on issues related to gender and trade,” and finally, to establish a trade and gender committee as well as other institutional gender related provisions. [97]

The provisions of the Chapter N *bis* of the CCFTA as demonstrated below in Table 4 are very similar to those of the Uruguay-Chile FTA but for the inclusion of the UNSDGs and the CEDAW.

**Table 4.** Canada-Chile FTA (CCFTA) [98].

<b>Canada-Chile FTA (CCFTA)</b>
<b>(Appendix II - Chapter N <i>bis</i>)</b>
Article N <i>bis</i> -01
2. Parties recall Goal 5 of the Sustainable Development Goals of the United Nations 2030 Agenda (UNSDG 2030) for Sustainable Development, to achieve gender equality and empower all women and girls.
3. Parties reaffirm the obligations in the Agreement on Labor Cooperation.
4. Parties acknowledge that international trade and investment are engines of economic growth and that improving women's access to opportunities and removing barriers in their countries contributes to sustainable economic growth.
Article N <i>bis</i> -02
1. Parties reaffirm their commitment to effectively implement the obligations under the <i>Convention on the Elimination of all Forms of Discrimination Against Women</i> (CEDAW).
2. Parties reaffirm their commitments to implementing other international agreements addressing gender equality or women's rights to which they are parties.
Article N <i>bis</i> -03
2. Parties shall carry out cooperation activities designed to improve the capacity and conditions for women.
4. Areas of cooperation may include developing programs to encourage women's participation, improving access to STEM, promoting financial inclusion, advancing leadership and developing women's networks, sharing methods and procedures for the collection of sex-disaggregated data
5. Parties to carry out activities in the cooperation areas of paragraph 4 through
Workshops, seminars, dialogues, internships, collaborative research, specific exchanges of specialized technical knowledge and technical assistance
Article N <i>bis</i> -04
1. Establishes a Trade and Gender Committee composed of representatives from each Party's government institutions responsible for trade and gender
2. Committee shall determine, organize and facilitate the cooperation activities under Article N <i>bis</i> -03, facilitate the exchange of information between the Party's experiences, discuss joint proposals, invite international donor institutions, private sector entities, NGOs to assist with development and implementation of cooperation activities, at request of a Party consider and discuss any matter arising relating to the interpretation and application of this Chapter.
3. Committee shall meet annually to consider any matter arising under this Chapter.
8. Within two years of the first meeting of the Committee, the Committee shall review and implementation of this Chapter and shall report to the Commission
9. Parties to develop mechanisms to report publicly on the activities developed under this Chapter.
Article N <i>bis</i> -06
Non-application of the Dispute Resolution clause provided for under Chapter N.
<i>Noteworthy Elements: Chapter follows the same structure as the Chile-Uruguay FTA and is very similar substantively. Established a Gender Committee identical to the one in the Chile – Uruguay FTA with the same responsibilities aimed at aiding communication between the Parties. The main differences between the Chile – Uruguay FTA and the CCFTA is the reference to the UNSDG 2030 and the CEDAW. Finally, under Article N <i>bis</i>-07 the Gender Chapter shall prevail over any inconsistencies with the former Agreement on Labor Cooperation.</i>

### 2.7.3. Chile – Argentina FTA (2019) [99]

On June 26, 1996, Chile and MERCOSUR, which is comprised of Argentina, Brazil, Paraguay and Uruguay signed the Economic Complementation Agreement No. 35 (ACE No. 35). In 2017 Chile and Argentina agreed to negotiate a new agreement solely between the two countries to “expand and deepen their economic trade relations.” [100] The text was

incorporated as an additional protocol of the ACE No. 35 however, it only applies to Chile and Argentina. The FTA is unique amongst the other FTAs with gender chapters as a reference to the party's commitments to incorporate gender into the international trade agenda and to promote equality is included in the preamble of the entire agreement rather than only in the chapter. [101]

**Table 5.** Chile-Argentina FTA [102].

<b>Chile-Argentina FTA</b>
<b>(Chapter 15)</b>
Preamble
Parties indicate that they wish to promote and incorporate gender into the international trade agenda so as to encourage equality of rights, treatment and opportunities between men and women in different sectors including business, industry and the workforce, with the ultimate goal of achieving inclusive economic growth in both countries.
Article 15.1
Makes reference to the SDGs of 2030 seeks to highlight the importance of addressing gender issues to create economic growth.
Article 15.2
Refers to the importance of implementing the commitments under CEDAW.
Establishes the importance of complying with the commitments acquired in the ILO Conventions including (i) Convention No. 100, concerning Equal Remuneration for Men and Women Workers for Work of Equal Value; (ii) Convention No. 111, concerning Discrimination in Respect of Employment and Occupation; and (iii) Convention No. 156, concerning Equal Opportunities and Equal Treatment for Men and Women Workers
Article 15.5
Addresses consultations and establishes that Parties shall make all possible efforts to resolve any matter that may arise under the Chapter.
Clarifies that the Chapter will not be used to impose obligations or commitments with respect to other chapters of the agreement.

<b>Chile-Argentina FTA</b>
<b>(Chapter 15)</b>
<i>Noteworthy Elements: Includes reference to the goal of promoting gender equality in the preamble of the entire agreement. FTA is largely a combination of the Chile-Uruguay FTA and the CCFTA, containing the same six initial articles in the same order. Differentiates the agreement from the previous FTAs by supplementing the CCFTA's reference to the UNSDG 2030 and CEDAW with reference to ILO Conventions on discrimination and equal opportunities.</i>

#### 2.7.4. Canada-Israel FTA (CIFTA) (2019)

The most revolutionary of the gender chapters is undoubtedly the Canada-Israel FTA, due to its extension of the dispute settlement provision to the gender chapter as well. In every other gender chapter previously discussed there is a universal caveat restricting the application of the dispute settlement mechanism to the gender chapter.

As with the other FTAs, this is not the first FTA between the parties. Instead, the new FTA was a renegotiated version of the 1997 FTA between Canada and Israel [103] and was created to “signal the importance of progressive trade, ensuring that the benefits and opportunities that flow from trade and investment are more widely shared.” [103]

**Table 6.** Canada – Israel FTA (CIFTA).

<b>Canada-Israel FTA</b>
<b>(Chapter 13)</b>
Article 13.6
<ol style="list-style-type: none"> <li>1. Incorporates the consultation provisions of previous FTAs, highlighting efforts through dialogue, consultations and cooperation to resolve any issues stemming from the Chapter</li> <li>2. If the Parties cannot resolve the matter in accordance with paragraph 1, they may consent to submit the matter to dispute settlement in accordance with Chapter Nineteen (Dispute Settlement).</li> </ol>
<i>Noteworthy Elements: CIFTA's text is almost identical to the CCFTA agreement which in turn is very similar to the Chile-Uruguay and CAFTA agreements. The fundamental change compared to the other gender chapters is the explicit extension of the FTA's dispute settlement provision to issues arising from the gender chapter.</i>

#### 2.7.5. USMCA

Finally, when negotiating the USMCA, or the ‘New NAFTA’ there was talk of including a gender chapter; however, this goal was ultimately not reached. [104] While the original NAFTA agreement included a side agreement with ‘some language about sex discrimination’ it required significant strengthening. [105] Instead, Prime Minister Trudeau, furthering Canada’s trade policy of including gender in their FTAs, successfully negotiated the inclusion of a reference to gender under Article 23.9 of the USMCA. [106]

As shown in Table 5, Article 23.9 promotes the equality of women in the workplace and calls for parties to implement policies appropriate to protect workers against employment discrimination on the basis of sex, pregnancy, sexual orientation, gender identity and caregiving responsibilities. [106] However, it must also be noted that under footnote 13 of Article 23.9 the U.S. included the caveat that the U.S.’ “existing federal agency policies regarding the hiring of federal workers are sufficient to fulfill the obligations set forth in this Article.” [107]

This provision, whilst not as expansive as the aforementioned gender chapters, is still a significant step,

particularly for the U.S., as this is the first FTA in which the U.S. has agreed to include not only a mention of women’s rights but also the rights of LGBTQ+ through extending the provision to “sexual orientation”. [108]

**Table 7.** United States-Mexico-Canada Agreement (USMCA). [106]

<b>United States-Mexico-Canada Agreement (USMCA)</b>
<b>(Article 23)</b>
Article 23.9
<p>Parties recognize the goal of eliminating discrimination in employment and occupation and support the goal of promoting equality of women in the workplace.</p> <p>Each party shall implement policies it considers appropriate to protect workers against employment discrimination on the basis of sex (including with regard to sexual harassment), pregnancy, sexual orientation, gender identity, and care giving responsibilities; provide job protected leave for birth or adoption of a child and care of family members; and protect against wage discriminations.</p>
<i>Noteworthy Elements: While not as substantive as the other gender chapters, the USMCA marks the first time the United States has agreed to an FTA with a provision relating to gender. Article 23.9 further includes protections for LGBTQ+.</i>

#### 2.8. International Response to Gender Chapters

The international response from government officials and interested stakeholders has been mixed at best and critical at worst. On the positive side, commentators have argued that the inclusion of gender chapters “reflect[s] a new interest of the trade community in gender equality and the recognition that trade can be instrumental in achieving it.” [23] The negative overall response however, has been to argue that these gender chapters do little to further gender equality and are “nothing” and “just about being nice to women.” [109] Notwithstanding these contrasting views, this paper seeks to illustrate that the main reason for the mixed response is the lack of effectiveness of the current chapters. These effectiveness issues concern the need for specific gender-related protections and indicators, country specific analyses, a clear and identifiable purview of the Gender Committees, and an extension of the dispute resolution mechanism which is strikingly absent in all the aforementioned FTAs other than the CIFTA.

##### 2.8.1. Lack of Specific Indicators

None of the FTAs discussed include clear guidance on how to achieve the goals of the gender chapter and, perhaps more importantly, none include specific indicators to track whether the chapter is achieving its goals. For example, critics of the Chile-Uruguay FTA and CCFTA have pointed out that neither FTA includes any specific gender relation protection, not even the provision of equal pay for equal work or any similar standard. [44] UNCTAD regarded the CCFTA as a “welcome step” [110] but noted that, due to the lack of specific goals, the fact that the dispute resolution mechanism did not extend to the gender chapter, and that it did not require the

harmonization of gender-related legislation, it remained a “light component.” [110]

The Chile-Uruguay FTA and CCFTA as seen in Table 3 and Table 4, lack specific indicators other than a reference to “importance of eliminating discrimination against women at all levels and in all sectors of the population” (Table 3). While, as previously discussed, there is a need for broad indicators calling for the eliminating of gender inequality, the provision on eliminating discrimination against women is arguably not even an indicator, it does not affirm the parties commitment to eliminating discrimination against women and only ‘acknowledges’ [112] its importance.

The lack of specific indicators could easily be remedied through the reference under Article N *bis*-01 of the CCFTA in which the parties “recall Goal 5” of the UN SDGs to “achieve gender equality and empower all women and girls,” [112] (Table 2). A clear reference to the goals of the UN SDGs would allow for the establishment of broad indicators to improve the effectiveness of the gender chapter. Further, rather than limiting the reference of the UN SDGs solely to Goal 5, including provisions on gender in the goals relating to health and agriculture would demonstrate the reality that gender affects all areas of trade and must be sufficiently monitored across industries. [50]

With regards to the purview of the gender committees, since the ratification of the gender chapters in the FTAs, only the Canada-Chile FTA has met for its annual gender committee meeting. [114] In the publicized review of the first annual Committee meeting, the parties effectively only celebrated the ratification of the agreement and highlighted a capacity building workshop on women and trade. [114] The Second meeting was more comprehensive and noted that a work plan on trade and gender is currently being implemented and that there had been significant progress in the past two years through workshops and video conferences on gender and trade.

The lack of specific indicators and articulable goals for the gender committee to assess has arguably turned the gender committee into nothing more than a voice to broadcast gender related conferences and workshops held by Canada and Chile annually. There is no assessment of any improvements to gender equality or any monitoring and review of the implementation of gender standards by either party.

### 2.8.2. Country Specific Analyses

As demonstrated in Tables 2-5, the FTAs all virtually follow the same structure and incorporate the first six article of the Chile-Uruguay FTA almost indiscriminately. This has effectively created a situation in which each party to the FTAs with gender chapters has been treated the same with regard to gender equality. This ignores the reality that there are massive differences in how [22] of gender equality is understood and tackled in Chile, Uruguay, Canada, Israel and Argentina.

In terms of the different standards of gender-equality in the gender chapter FTA countries reproductive health policies alone are vastly different between the parties. For example, out of the South American parties, Uruguay is the only state

that has decriminalized abortion in the first trimester without a restriction as to the reason for the abortion. [114] Argentina despite indications from the government of the possibility of decriminalizing abortion, continues to criminalize the practice, except for in cases of rape or where the pregnancy will endanger the life of a pregnant woman. [115] Chile in 2017 passed a progressive reform decriminalizing abortion, where the life of the pregnant woman or girl is at risk, where the pregnancy is as a result of rape and where the fetus faces several conditions incapable of surviving outside the womb. [116] However, in the implementation of these reforms, the Constitutional Tribunal upheld restrictions allowing doctors to refuse to perform abortions on the basis of conscience and even allowed entire hospitals to invoke conscience arguments to refuse to provide abortions. [116] This barrier to abortion does not require any justification from the refusing doctor or hospital. [116] While the right of a woman to choose to terminate her pregnancy is a heavily debated topic that intertwines with religion and politics this article is not seeking to argue that not providing women the right to choose is an indication of gender inequality. Instead, the discrepancies between abortion rights and the provision of prenatal health care shows the vast differences in politics between Chile, Argentina and Uruguay. As such it seems unlikely that a gender chapter with virtually the same wording but for minor adjustments would adequately accommodate such differences.

In addition to evaluating the political differences in a country, an assessment of the enforcement of the rule of law and judiciary in each respective state is also needed. The now defunct Transpacific Partnership (TPP) called for the creation of high labor standards but did not call for their enforcement.<sup>17</sup> [117] Mexico has very progressive labor standards and, under Article 123 of the Mexican Constitution [203], equal pay is mandated for equal work and provisions for maternal rest and leave and overtime restrictions are also in place for ‘women of any age’. [118] However, these progressive laws are “seldomly enforced” [118] and, as such, the protections afforded under the Mexican constitution are nothing more than empty promises. [119]

Therefore, in order for the FTA gender chapters to be effective and enforceable there is a need to reframe them based on the country’s specific political situation, the distribution of labor in industries, the legal contexts, and the enforceability of the rule of law in the respective countries.

### 2.8.3. Unclear Parameters CIFTA’s of Dispute Resolution Mechanism

Finally, the CIFTA [120] is the only FTA gender chapter which extends the dispute resolution mechanism to the gender chapter. The lack a dispute settlement mechanism in other gender chapters has been criticized as making the chapters ‘weak’ and ‘merely symbolic.’ [121]

The dispute resolution provision in the CIFTA has been celebrated as giving the gender chapter ‘teeth’. [122] However, as shown below in Table 8 there are serious concerns about its

<sup>17</sup> In the revival of the TPP through the CPTTP these high labor standards were not even included.

implementation. A primary issue identified is the lack of clarity over whether the provisions extend merely to matters concerning trade and actions by state parties or whether it also extends to companies and corporations implementing gender-biased policies. [93] Under Article 19.2 (b) it could be argued that the dispute resolution mechanism extends to abusing companies indirectly. This indirect impact on companies could be seen as the failure of a party to take action against a company imposing a gender biased policy. [123] However, until the dispute resolution mechanism has been invoked on the basis of gender this will be unclear.

Furthermore, the dispute resolution mechanism under Article 19.11 does not allow for sanctions. [124] Instead, under Article 19.13 the parties may deny benefits if they cannot agree on a compensation. [125] The ability to impose targeted sanctions would greatly strengthen the dispute resolution mechanism's power and would confer legitimacy onto the entire chapter. It is unclear what the 'suspension of benefits' refers to however, it likely involves a comprehensive measure which would indiscriminately inflict harm on the entire country, thus worsening the position of already affected women.

**Table 8.** *Dispute Resolution under Canada-Israel FTA (CIFTA) [120].*

<b>Canada-Israel FTA (CIFTA)</b>
<b>Dispute Resolution (Chapter 19)</b>
Article 19.2
The scope and coverage of the dispute resolution mechanism: A measure of the other party that is inconsistent with one of the obligations under the treaty The other party has failed to otherwise carry out one of its obligations under this agreement; or There is nullification or impairment within the meaning of Annex 19.2
Article 19.9
2. Terms of reference of the panel is "to examine, in light of the relevant provisions of the [CIFTA], the matter set out in the notice... to make findings, determinations and recommendations."
4. If requested by a party, the terms of reference shall include the degree of adverse trade effects on a party of a measure found to be inconsistent with an obligation of the agreement or have caused nullification or impairment.
Article 19.11
Panel shall issue reports in accordance with the provisions of the chapter. Report shall include a recommendation for resolution if requested by a party. Recommendation <i>shall not</i> include payment of monetary compensation
Article 19.13
Complaining party may suspend the application of other party benefits of equivalent effect if the final report of the panel determines that a measure is inconsistent with the obligations of this agreement. Complaining party may suspend benefits where the parties have not agreed on compensation and 30 days, or whatever period the parties decide has passed.
<i>Noteworthy Elements: The dispute resolution mechanism extends to measures inconsistent with one of the obligations under the chapter; not only trade related matters. However, there is no right for the panel to impose any sanctions, the right of compensation is left to the parties to decide.</i>

#### **2.8.4. Successes of Gender Chapter**

While there are clear areas in which the gender chapters must be strengthened in order for them to be effective, their mere existence must still be lauded. Before 2016, gender was merely referred to in provisions of a trade agreement or in an

annex, if at all, and there was never a serious consideration of gender in the negotiation of an FTA.

The shortcomings of the gender chapters and gender provisions should not disguise the fact that a shift in international trade has taken place. [23] As per Francois Phillipe Champagne, the Canadian Minister of International Trade, while the chapters may not be fully effective, one should not discount the symbolic effect of the gender chapters and the fact that "gender rights are on the table at all." [121] Further, as per Justin Trudeau, Canada's implementation of gender chapters in its FTAs is a step forward in the sense that it is the first time a Group of Seven country (G7: Canada, Italy, U.S., France, UK, Japan, and Germany) has agreed to a gender chapter in a trade deal. [9] As another G7 country, it is notable and also a step forward that the US agreed to include a provision on gender in the USMCA. [106] While there is not an exclusive gender chapter in the USMCA, as envisaged by Canada, there is a need for the US to address its failures in gender equality, and the gender provision in the USMCA is the first step. [111]

Although a developed country that has branded itself as a leader in democracy, the United States currently ranked as the 49th poorest nation in terms of the gender gap [126] and 96th in the world for female political empowerment [108] out of the World Economic Forum's 2017 Global Gender Gap index of 144 countries. [1279] The U.S., therefore, ranks lower than most, if not all, developed nations for gender, [127] and even the smallest provision in the USMCA is a step towards improving gender equality in the U.S.

Overall, it is clear that, while there are areas in the gender chapters that need critical reform in order to reach the full potential of promoting and furthering gender equality, it must also be noted that these chapters are an important step indicating hopefully a beginning trend [23] towards gender equality and recognition of gender sensitivity in international trade.

### **3. Conclusion**

2019 marked a transformative year for the inclusion of gender in FTAs. With gender chapters in three new FTAs, an additional provision in the USMCA, the importance of gender in FTAs was certainly highlighted. Overall, this paper has demonstrated that while the gender chapters are ground breaking in their existence and signify a move in international trade policymaking towards considering the effects of trade on gender, they lack the basic requirements needed to be truly effective in combating gender inequality. In order to redress the shortcomings and lack of effectiveness of the current chapters, the paper concludes that a number of reforms are required to strengthen the effectiveness of the gender chapters such as the use of specific indicators based on industry and country realities, monitoring and review, effective dispute resolution and the ability to impose real sanctions. Despite these shortcomings, there is hope that the spotlight has shifted to the importance of gender in international trade negotiations and that these chapters are only the beginning of a future rich with expansive, all-encompassing, effective gender chapters in FTAs.

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