

Formulating a Transnational Framework for the Promotion of a Gender-Positive Trade Environment

Maria Panezi

Executive Summary

- ▶ There are multiple international, regional and transnational governance structures that can promote women's economic empowerment.
- ▶ The WTO has recently adopted a more proactive stance on women's economic empowerment.
- ▶ A gender-positive trade environment is crucial to the realization of SDG 5 and achieving gender equality

Introduction

In December 2017 in Buenos Aires, during the 11th World Trade Organization (WTO) Ministerial Conference more than two thirds of the WTO member states agreed to support the Declaration on Trade and Women's Economic Empowerment (hereinafter: the 2017 Declaration). The Agreement includes efforts to collect various sets of data related to women in international trade and provides for a platform for the sharing of best practices. The WTO may be the more obvious forum for the discussion on women and trade, but it is not the only forum. This Policy Brief will explore some of the international and regional frameworks, including the WTO itself that can help promote female economic empowerment and proliferation of cross-border trade opportunities for female entrepreneurs.

The brief first will discuss Sustainable Development Goal (SDG) 5 on Gender. The SDGs, despite being soft law in status, could be said to summarize the contemporary

principles of international justice. As such they provide a useful background for the examination of more concrete rules at the regional and national level. Second, the brief will briefly discuss the 2017 Declaration and the existing WTO agreements that can allow for gender-responsive trade policies. Next, I will discuss the three existing regional or free trade agreement (FTA) gender chapters, between Canada and Chile, Chile and Uruguay and Canada and Israel. In this context I will propose the creation of a model chapter that may allow for the proliferation of similar initiatives, coupled with national implementation strategies.

The brief will contribute to the discussion on how these various regimes that can create and promote a gender positive environment. A gender-positive trade environment is one where women feel empowered to pursue the role of the exporter and the entrepreneur. It is an environment where women consider it natural to explore markets beyond their own national market to sell their products and know that the national regulatory systems of their country of origin and the country of destination for their products



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and services will be fully accessible, transparent and enabling (Panezi, 2018). A gender-positive trade environment is crucial to the realization of SDG 5 and achieving gender equality.

Sustainable Development Goal 5

The SDGs appear in the UN General Assembly Declaration adopted on September 25th 2015. They set an ambitious timeline, fifteen years, and even more ambitious target goals, as evidenced from the title of the Declaration: “Transforming our world: the 2030 Agenda for Sustainable Development.”

Despite the fact that the SDGs are targets to work towards, the international community has already, through decades of negotiations and institutional evolution, created an SDG-relevant international legal order consisting of various frameworks, which are not only functional but also legally binding. A series of resolutions from organizations and institutions such as the UN General Assembly, the UN Human Rights Council, the International Labour Organization or the Food and Agricultural organization exist- among many more-, demonstrating various levels of commitment in realizing specific mandates. The same mandates at the core of these institutions can in many cases be found summarized in the SDGs. For SDG 5, three examples of existing agreements that are a part of realizing gender equality are the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the UN Convention on the Rights of the Child (24 paragraph 3) and the Declaration on the Elimination of Violence against Women.

Goal 5 entitled “Achieve gender equality and empower all women and girls” contains many provisions that could be used as context for female economic empowerment. From the general 5.1 “End all forms of discrimination against all women and girls everywhere” to more specific goals such as 5.4 on the recognition of female participation in the informal economy “Recognize and value unpaid care and domestic work through the provision of public services, infrastructure and social protection policies and the promotion of shared responsibility within the household and the family as nationally appropriate”, 5.5 discussing leadership and participation in decision-making in economic life, which is a necessary component for economic empowerment “Ensure women’s full and effective participation and equal opportunities for leadership at all levels of decision-making in political, economic and public life” and 5.a b and c

- a. Undertake reforms to give women equal rights to economic resources, as well as access to ownership and control

over land and other forms of property, financial services, inheritance and natural resources, in accordance with national laws; b. Enhance the use of enabling technology, in particular information and communications technology, to promote the empowerment of women and c. Adopt and strengthen sound policies and enforceable legislation for the promotion of gender equality and the empowerment of all women and girls at all levels.

Beyond general guidance and soft law proclamations, the SDGs do not offer much more. They summarize the desires of the global community but other national and transnational regulatory and policymaking frameworks need to be involved actively to realize the SDGs with concrete measures. The next parts will attempt at outlining the transnational frameworks for gender and trade and examine some aspects in the way they can promote women’s economic empowerment.

The WTO Context: the 2017 Declaration and beyond

In December 2017 in Buenos Aires, during the 11th World Trade Organization (WTO) Ministerial Conference more than two thirds of the WTO member states agreed to support the Declaration on Trade and Women’s Economic Empowerment. During the WTO Ministerial Conference, which took place in Buenos Aires, 118 out of 164 WTO member states joined forces to sign the Declaration on Trade and Women’s Economic Empowerment. In the meanwhile, a number of other countries have made statements supporting the declaration.

The Agreement includes efforts to collect various sets of data related to women in international trade and provides for a platform for the sharing of best practices. Among other goals the agreement, which seems to have almost no legally binding muscle, proposes collaboration in:

sharing [...] experiences relating to policies and programs to encourage women’s participation in national and international economies through World Trade Organization (WTO) information exchanges [...] and voluntary reporting during the WTO trade policy review process; [...] sharing best practices for conducting gender-based analysis of trade policies and for the monitoring of their effects; [...] sharing methods and procedures for the collection of gender-disaggregated data, the use of indicators, monitoring and evaluation methodologies,



and the analysis of gender-focused statistics related to trade; [...]working together in the WTO to remove barriers for women's economic empowerment and increase their participation in trade...

The declaration further sets a date to report on progress, 2019, only 11 years before the date set as a desideratum for the achievement of the SDGs. Similarly to the gender chapters in FTAs, given the cooperative and non-binding nature of these texts, it is unclear what type of national response will induce progress sufficient enough to achieve SDG 5 targets.

In the WTO there may exist some other gender-responsive trade policies in other agreements. These exist not as specific gender-related policies but through assistance to developing country industries, infant industries, and any measures designed to benefit SMSEs. To the extent that female-owned firms fall under one of the above categories, then they can benefit from WTO rules. Examples of agreements are the Trade Facilitation Agreement, the notion of "infant industries" in the General Agreement on Tariffs and Trade (GATT), if a female owned firm is in an infant industry sector, e-commerce-related provisions that have been shown to be helpful to women participating in cross-border trade and government procurement opportunities stemming from the Government Procurement Agreement.

A preferential nation-wide trade assistance program designed based on gender, that deviates from the Most Favoured Nation clause and from the National Treatment clause does not have a justification platform in Article XX of the GATT, unless somehow one is to invoke (in a *very creative way*) the notion of public morals or there is another dimension in the measures (regarding health, life, natural resources) that allows for exceptions. The author believes that a public morals justification under Article XX for gender policies would have slim chances of surviving in the Dispute Settlement stages, panels or appeal.

Given the statistics of women participants in trade in low profit yielding sectors such as SMSEs, WTO agreements may be useful to some extent- if they enable or assist the participation of SMSEs in trade. The counterpoint to this positive element is that the participation in sectors for mostly SMSEs remains a problem in and of itself as it frequently keeps women entrepreneurs locked in lower revenue yielding sectors without the ability to really "go global." Another possible positive element behind successful participation of women in global trade is the expansion of e-commerce platforms. The lack of a "face" to the merchant eliminates potential gender barriers. Despite positive spill-overs of e-commerce, female participation in electronic trade does not solve the problem of women's economic position or the discriminatory intent

wherever it exists.

Structural barriers still exist and need to be eliminated, perhaps not through trade provisions but through other policies. The few provisions in WTO agreements, together with the 2017 Declaration, which is non-binding, can become a useful platform to foster and promote momentum for change, to reverse the more limited, compared to men, participation of women in international trade. However, this is not enough. National laws and concrete assistance is necessary to keep the agreement from being an empty promise.

More needs to be done within the WTO leadership as well. A positive first step has occurred at the Office of the Director General at the WTO where officials are beginning to explore gender as a lens of analysis in trade. Moreover, the WTO has produced a report recently on women at the organization. The report contains comprehensive data from the last twenty years at the WTO which explored in detail demonstrate a large deficit in female leadership at the organizational (institutional) and leadership (political) level. If significant steps are taken within the WTO to increase the participation of women at all levels of trade governance and similar cross-cutting thinking is adopted across the organization- amongst the economists or the lawyers-, this step will definitely help with women's economic empowerment and will strengthen the SDGs. The face of trade leadership matters as do overall trade participation statistics and gender-conscious international bureaucracies.

Gender and Trade Chapters in Free Trade Agreements

There are very few examples to date of gender chapters in FTAs and this part will discuss the existing ones. In 2017, Canada and Chile amended their free trade agreement and included a stand-alone gender chapter in the updated FTA. The chapter is very similar to the one Chile and Uruguay included in their 2016 free trade agreement (the texts in appear almost identical). In 2017, the modernized Canada-Israel FTA (CIFTA) also entered into force with an even more robust gender chapter.

The Canada-Chile FTA gender chapter is part of Appendix II, Chapter N *bis* entitled "Trade And Gender." Under General Provisions the agreement references SDG 5 and sets the background by acknowledging:

1. ... the importance of incorporating a gender perspective into the promotion of inclusive economic growth, and the key role that gender-responsive policies can play in achieving sustainable socioeconomic development. Inclusive



economic growth aims to distribute benefits among the entire population by providing equitable opportunities for the participation of women and men in business, industry and the labour market.

Also:

4. The 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 enhances their participation in national and international economies, and contributes to sustainable economic development.

and

5. The Parties also acknowledge that women's enhanced participation in the labour market and their economic independence and access to, and ownership of, economic resources contribute to sustainable and inclusive economic growth, prosperity, competitiveness, and the well-being of society.

Canada and Chile have made commitments to "adopt, maintain and implement effectively their gender equality laws, regulations, policies and best practices" and "promote public knowledge of its gender equality laws, regulations, policies and practices." Beyond that there is mention of International Agreements, especially CEDAW, and a longer article on cooperation programs and activities that commits to gather data and best practices regarding female entrepreneurship and economic participation.

The Chapter also sets up a Trade and Gender Committee whose main function is to facilitate cooperation, collect data and make recommendations. As part of mainstreaming gender considerations, the Committee:

...may work with other committees, working groups and subsidiary bodies established under this Agreement, the Council established under the Agreement on Labour Cooperation or, as appropriate, the Council established under the Agreement on Environmental Cooperation. In the context of this work, the Committee shall encourage efforts by these committees, working groups,

subsidiary bodies, and these Councils, to integrate gender-related commitments, considerations and activities into their work.

The Chapter is explicitly not subject to Dispute Resolution and the Labour chapter prevails in case of an inconsistency with the Gender chapter.

Canada modernized the 1997 Canada-Israel Free Trade Agreement (CIFTA) to include a series of measures incorporating the Canadian Progressive Trade Agenda. According to Global Affairs Canada:

With the inclusion of new progressive elements on gender, small and medium-sized enterprises and corporate social responsibility, as well as labour and environmental protections, the modernized CIFTA will signal the importance of progressive trade and ensuring that the benefits and opportunities that flow from trade and investment are more widely shared.

Chapter Thirteen of the Agreement is entitled Gender and Trade. The structure and provisions are very similar to the general provisions in the Canada-Chile FTA. The same applies for the next articles on International Agreements and Cooperation Activities and a similar Trade and Gender Committee. The same disclaimer about the prevalence of the Trade and Labour chapter is included here too.

Despite of all the similarities, there is a big departure from all previous gender and trade chapters that is worth discussing: the extension of dispute settlement to the gender and trade chapter. Under Article 13.6 entitled "Dispute Settlement" the agreement provides:

1. The Parties shall make all possible efforts, through dialogue, consultations and cooperation, to resolve any matter that may arise relating to this Chapter.
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).

Given the nature of the chapter, mostly focusing on cooperation and sharing of best practices and the prioritization of the labor chapter over the gender chapter, it is difficult to imagine a case where the gender chapter reaches dispute settlement. Semantics however are very



important. Attaching dispute settlement to the chapter is a very powerful symbol of the agreement taking the gender parameter more seriously than previous agreements.

When the renegotiations of NAFTA were taking place, there was hope that Canada, given the emphasis on the Progressive Trade Agenda, was going to push for a gender chapter in the amended agreement- possibly of similar nature as the Chile-Canada FTA, without dispute settlement attached to it and focusing only in cooperation, which would be easier to negotiate. The final text of the negotiated agreement, now called the United States–Mexico–Canada Agreement or USMCA did not end up containing a gender chapter. Such chapters, given their cosmetic content so far, are political in nature thus the gender chapter was probably the first to be dropped in a tough negotiation. What ultimately ended up in the USMCA deal amounts to a “vague encouragement to be nice” included in Article 14.17 under the title “Corporate Social Responsibility”:

The Parties reaffirm the importance of each Party encouraging enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate into their internal policies those internationally recognized standards, guidelines, and principles of corporate social responsibility that have been endorsed or are supported by that Party, which may include the OECD Guidelines for Multinational Enterprises. These standards, guidelines, and principles may address areas such as labor, environment, gender equality, human rights, indigenous and aboriginal peoples’ rights, and corruption.

In the “Local Presence obligation for Cross-Border Trade in Services Chapter” Mexico included a reference to indigenous women and the principles of gender equality.

The lack of legal force is obvious in the Trade and Gender chapters in the Chile Uruguay bilateral trade agreement and Canada’s newest bilateral trade agreements with Chile and Israel despite the latter’s extension of dispute settlement mechanism to the trade and gender chapter. Given the strength (or lack thereof) of such texts, it is unclear what type of progress we can hope for, beyond monitoring and reporting, in the years leading up to 2030.

All three existing gender chapters in FTAs are very small steps in possibly the right direction. If gender chapters were to remain as few and with such lukewarm language –language not really creating substantive obligations or rights- not much progress is made. There needs to be a proliferation of chapters to form a type of spaghetti bowl of

gender chapters in FTAs. A possible next step is for any of the existing adopters of gender chapters, Chile, Canada, Israel and Uruguay, to formulate and put forward an extended and more prolific version of their “Gender and Trade” chapter as a model chapter. The EU has demonstrated a commitment at the level of the EU Parliament to make efforts to include gender chapters in future FTAs. The EU also announced that the updated Chile EU Trade Agreement will contain a gender chapter.

The proliferation of such chapters can help expand the cross-border collection of gender-specific data and the refinement of a collective regional or global “gender lens.” To engage in this discussion will hopefully trigger a process of awareness on the actual impact of trade policies in sectors where women are mostly active or ones that are gender-imbalanced with limited female participation because of the nature of trade provisions. The collection of trade data and gender mainstreaming in trade are necessary before drafting and adopting more successful inclusive trade policies.

One success from a diplomatic and geopolitical standpoint is the departure from rights’-based language in the gender chapters and the framing of female economic empowerment in socio-economic terms. The upside to framing this in economic terms is that countries that insist on the antiquated view that “human rights and trade do not mix” will not find a strong basis to object to the relationship between gender and trade if that is not set in “human rights” terms. Instead, emphasizing “sustainable socioeconomic development”, “inclusive economic growth” and “equitable opportunities” changes the focus of the relationship between gender and trade as a revenue issue or economic opportunity, which may appeal to states where rights’ language is not convincing per se.

Conclusion

In the last five years gender and trade has received increased attention at the regional and global level, which continues to be fueled at the national and intergovernmental level. Two useful next steps outlined in this brief are first, the creation of a model chapter that will assist in the proliferation of gender chapters in trade agreements and second, the adoption of more concrete provisions that move beyond the set up of committees and data sharing at the FTA level.

Regardless of any progress at the international level however, all roads lead to Rome: governments need to pick up this agenda and actively engage domestically gender data collection, gender impact analysis of laws affecting international trade, assistance of female entrepreneurs through gender quotas in procurement policies, setting up the commissions outlined in regional trade agreements,



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loan facilitation, educational programmes and engaging in constant best practices'-sharing with other countries of successful domestic policies, among many of possible options.

Finally, only a genuinely transnational approach, with local

initiatives, on-going sub-national support, strong national measures, regional agreements and the promotion of the gender file at the WTO level can produce meaningful change and allow for more participation of women in cross-border trade.



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Further reading

Willem Adema et al, OECD, Enhancing Women's Economic Empowerment through Entrepreneurship and Business Leadership in OECD Countries, Background Report to China Development Research Foundation project on Enhancing Women's Economic Empowerment through Entrepreneurship and Leadership in the Midst of China's New Urbanization
www.oecd.org/gender/Enhancing%2520Women%2520Economic%2520Empowerment_Fin_1_Oct_2014.pdf

Canada's Progressive Trade Agenda <https://www.canada.ca/en/global-affairs/news/2017/12/international-tradeministertochampioncanadasprogressivetradeagen.html>

Maria Panezi, The Case for Developing a Model Chapter on Gender and Trade and editor of the series: *Reshaping Trade through Women's Economic Empowerment* April 5, 2018.
<https://www.cigionline.org/articles/case-developing-model-chapter-gender-and-trade>

Trade Impact Working Group <https://genderchampions.com/impact/trade>

Buenos Aires Declaration on Women and Trade outlines actions to empower women
https://www.wto.org/english/news_e/news17_e/mc11_12dec17_e.htm

WTO, Joint Declaration on Trade and Women's Economic Empowerment on the Occasion of the WTO Ministerial Conference in Buenos Aires in December 2017, online:
www.wto.org/english/thewto_e/minist_e/mc11_e/genderdeclarationmc11_e.pdf

Frohmann, A., 2018. *Gender Equality and Trade Policy* (No. 1150) WTI Working paper No 24/2017 page 4, Simonetta Zarilli, THE NEW WAY OF ADDRESSING GENDER EQUALITY ISSUES IN TRADE AGREEMENTS: IS IT A TRUE REVOLUTION?
http://unctad.org/en/PublicationsLibrary/presspb2017d2_en.pdf

About the author

Maria Panezi is a research fellow with CIGI's International Law Research Program. She holds a Ph.D. in Law from Osgoode Hall Law School at York University, where she was a Nathanson Fellow and a Comparative Law and Political Economy Fellow.

Maria's doctoral dissertation is titled, *Through the Looking Glass: Transparency in the WTO*. She received her first law degree from Athens University in Greece, and was called to the Athens Bar. She has published articles on issues related to public international law and was a W. C. Langley Scholar of International Legal Studies at New York University School of Law, where she received her LL.M.

Maria has been an adjunct professor at Osgoode Hall Law School and has taught ethical lawyering in a global community as well as law and economics, for which she received the Ian Greene Award for Teaching Excellence. She has also been a visiting scholar at Harvard Law School and the Fletcher School of Law and Diplomacy.

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