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Gender Mainstreaming in Trade Agreements: "A Potemkin Façade"?

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Gender mainstreaming in trade agreements:

“A Potemkin Façade”?

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Abstract

The distributional outcomes of trade agreements have historically been uneven, creating both “losers” and “winners” and benefiting certain stakeholders while leaving others without benefits or even with negative repercussions. In particular, distributional outcomes can vary between women and men, since they play different roles in society, markets and economies, and they enjoy different opportunities as well. At times, and sometimes by their very nature, trade agreements can restrict opportunities for women and further increase the gender divide. But in recent years, there has been a drastic upsurge in the number of countries that are incorporating commitments on gender equality in their trade agreements.

Currently, of all regional trade agreements (RTAs) in force, around one-third have at least one explicit provision relating to gender equality. Yet few trade agreements clearly provide for how gender-related commitments could be implemented or enforced, and no trade agreement approaches gender on a holistic level, which will ultimately be needed to meaningfully address distributional issues. Most legal provisions incorporated in trade agreements so far have been drafted in the spirit of best endeavour cooperation and are often blamed for being mere “Cinderella” provisions. In order to reverse the distributional inequities, a more comprehensive approach based on women’s roles and economic realities is needed, as is further research on what would improve distribution of opportunities for women. With more and more countries considering gender mainstreaming, this raises an important question: Is “gender mainstreaming” in trade agreements used as a “Potemkin Façade” to hide larger distributional issues? This chapter will not fully answer this question, but it will expand upon possibilities and offer reflections to spark debate and discussions on this concern.

Trade is not “gender neutral”

It is finally becoming a norm to link gender with trade (Bahri, 2021a; Crenshaw Williams, 1989; Korinek *et al.*, 2021; Kuhlmann, 2023a),¹ with gender provisions appearing in an increasing number of regional trade agreements (RTAs).² This signals a movement away from viewing trade as “gender neutral” (Korinek *et al.*, 2021; WTO, 2020), dispelling a decades-long claim that both women and men stand to gain equally from trade. As a significant watershed moment in this shift, a number of countries supported the 2017 WTO Buenos Aires Joint Declaration on Trade and Women’s Economic Empowerment, which led to establishment of the WTO’s

Informal Working Group on Trade and Gender and an enhanced focus on trade and gender. Trade agreements have incorporated gender equality and women's economic empowerment, aligning trade instruments with the broader women's equality movement (Bahri, 2021b, 2022; UN Women, 2001; von Hagen, 2014)³ and forging a closer link between trade and human rights (Aaronson and Chauffour, 2011; Kuhlmann, 2023b),⁴ in furtherance of the United Nations Sustainable Development Goals (SDGs).⁵ For the purposes of this chapter, "gender equality" will be used to refer to the equality of rights, responsibilities and opportunities and equal consideration of the "interests, needs, and priorities of women and men" (UN Women, 2021). Women's empowerment refers to the process of increasing women's access and control over strategic life choices and opportunities in the economic, political and sociocultural spheres (Chen and Tanaka, 2014).

Incorporation of gender concerns in trade agreements is in keeping with a larger trend to integrate social issues, sometimes referred to as "trade and" issues, into trade agreements, although much of the progress in this respect has been more aspirational than binding. Progress in some areas has been more substantial, such as increased incorporation of labour rights in trade agreements,⁶ and integration of environmental matters in RTAs is on the rise as well (Kuhlmann, 2023b).

However, despite advancements and lofty goals, which are discussed in detail below, longstanding distributional issues remain (Engel *et al.*, 2021). In particular, trade's distributional outcomes can vary between women and men, who face different opportunities and challenges and hold very different roles in society, markets and economies (Fontana, 2009; Fontana and Paciello, 2010). Women tend to be disproportionately impacted by the negative effects of trade liberalization and face greater barriers when engaging in economic activity. Some of this is due to gender bias in education and training, along with inequality in wages and distribution of resources and unequal access to productive inputs such as credit, land and technology (ITC, 2015, 2020). Because of the changing dynamics of employment caused by trade, women's jobs and livelihoods can be put at risk, especially when industries that predominantly employ women are disrupted (Bahri, 2021a).

In particular, women face a number of challenges due to the more uncertain and precarious nature of their work, the lack of social safety nets, lack of affordable finance and credit, inadequate physical and reputational collateral, and their role in unpaid and informal work (Kuhlmann, 2023a; UNCTAD, 2020). These include factors that directly impede women's access to productive resources (such as capital, property ownership or employment markets), which negatively impact women's economic and social independence (Duflo, 2012). The barriers that women face also include legal hurdles to inheritance, contractual ability, and property ownership (World Bank, 2019). Although digital trade has given rise to new opportunities for women, they are also particularly affected by the digital divide (AfCFTA Secretariat and UNDP, 2020), which, when combined with legal issues, impacts women's ability to leverage new opportunities offered by digital trade or e-commerce.

Women also face a number of regulatory barriers (or "regulatory gateways"; Kuhlmann, 2021, 2023a)⁷ that limit their participation in markets. These include domestic rules and regulations that fall within the category of non-tariff measures such as sanitary and phytosanitary (SPS) measures, standards and border measures, many of which are not gender-responsive (Kuhlmann, 2023a).⁸ In terms of border measures, women traders face procedural challenges

“ Distributional challenges are not limited to trade in goods, as they also include discriminatory practices in services sectors, where women tend to be heavily involved.

and safety issues at the border (Apiko *et al.*, 2020), although the implementation of the WTO's Trade Facilitation Agreement⁹ has simplified measures and encouraged digitalization of border procedures in order to reduce waiting time. Women traders also often lack information on cross-border regulations and procedures (Fundira, 2018), putting them at a disadvantage and subjecting them to costly and sometimes dangerous delays at border crossings.

Distributional challenges are not limited to trade in goods, as they also include discriminatory practices in services sectors, where women tend to be heavily involved (Acharya *et al.*, 2019; Kuhlmann, 2023a).¹⁰ Women are also disproportionately involved in the informal sector, which, while sometimes more flexible, may offer little security and room for advancement (UN Women, 2021).¹¹ Within the informal sector, migrant women face some of the most significant challenges, as the COVID-19 pandemic has underscored (Fitzpatrick and Kelly, 1998; UNCTAD, 2020)

These observations show how distributional effects of trade, as well as trade policy instruments, can impact vulnerable groups and historically disadvantaged communities, including women. For example, a recent World Bank study notes that South African trade reforms generated diversification and growth in exports but that these gains from trade were disproportionate and not experienced as fully by historically disadvantaged communities (Engel *et al.*, 2021). Hence, if not carefully crafted and accompanied by better “bottom-up” measures at the national level, “top-down” trade agreement provisions can act to limit opportunities for women and further increase the gender divide rather than promoting gender inclusion and expanding women's potential to benefit from trade in practice (Bahri, 2021b; Kuhlmann, 2023a).¹² However, when approached with a gender lens and through tailored gender-mainstreaming strategies,¹³ trade agreements may have the potential to generate more economic opportunities and result in reduced barriers for women (Bahri, 2021b; Hyder and Behrman, 2012; Klugman and Gamberoni, 2012). Two things in particular support this claim. First, existing and future trade agreements between countries can increase trade flows and hence lead to more business and employment opportunities for all, including women (Bahri, 2020). Second, through regional or bilateral trade agreements, countries can agree to make domestic changes aimed at bringing down the barriers that women face as employees, entrepreneurs or consumers (Bahri, 2020).

This chapter will explore gender mainstreaming approaches under RTAs to date, critically assessing what has been done in terms of distributional impacts and levelling the playing field between women and men. In doing so, the chapter will reference two frameworks developed by us. One is Bahri's Gender Responsiveness Scale (Bahri, 2019),¹⁴ which textually assesses RTA provisions in light of how well they mainstream gender equity considerations, and the other is Kuhlmann's Inclusive Trade and Development Index (Kuhlmann, 2021), which contextually assesses RTA provisions based on qualitative top-

down factors (differentiation, sustainability and flexibility) and bottom-up factors (equity, inclusion, reduction of regulatory barriers/gateways and implementation) that provide an opportunity to integrate the distributional questions discussed above. The following sections will discuss current RTA approaches and their contributions and shortcomings before turning to how these approaches could be applied more holistically to gender mainstreaming in RTAs.

Current RTA provisions: A comparative approach

The WTO's database on gender provisions in RTAs highlights 300 provisions across about 100 agreements that focus on women's interests or gender equality.¹⁵ This means that almost one-third of RTAs currently in force and notified to the WTO contain gender-related provisions. Broken down by region, of the trade agreements notified to the WTO, 78 per cent of Europe's RTAs contain at least one gender-specific provision; in comparison, this figure is 38 per cent for North America, 20 per cent for South America, 32 per cent for Africa and 14 per cent for RTAs in the Asia-Pacific region (Bahri, 2021b). These five regions – Europe, North America, South America, Africa and the Asia Pacific – will be used for comparison. A look at the individual countries shows that most recently Canada, Chile and the European Union have been leaders in including gender provisions in RTAs (Bahri, 2021b). However, while many countries have applied a gender lens to their trade agreements,¹⁶ many others have yet to do so. Moreover, some such as the United States, have taken a partial approach, with a predominant focus on gender-focused labour rights obligations.

Although incorporation of gender in trade agreements is a relatively new trend, there is some historical precedent, linking gender to trade instruments in Europe and Africa. One of the first references to the inter-relationship between gender and commerce can be found in the Treaty on the Functioning of the European Union (TFEU), which contains a binding commitment on equal pay for equal work for women and men (Bahri, 2022).¹⁷ Now, Europe's trade agreements address gender in the broader context of sustainable development, social development and social cohesion, which encompasses labour, education, health, human rights and the environment.

African trade agreements also have a history of incorporating gender-sensitive provisions that date back to the 1980s (Gammage and Momodu, 2020). Examples include African regional economic communities (RECs) such as the East African Community (EAC),¹⁸ the Common Market for Eastern and Southern Africa (COMESA),¹⁹ the Southern African Development Community (SADC),²⁰ the Economic Community of West African States (ECOWAS)²¹ and the Economic Community of Central African States (ECCAS).²² More recently, South American RTAs have advanced the field further through incorporation of separate gender chapters.²³

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Gender provisions in RTAs can be compared based on several common elements. These include: the location of gender provisions; the language of gender provisions, including whether they are of a binding or non-binding nature; and the content of gender provisions, which can be broken down into aspirational and affirmative provisions. The context of gender provisions, or the degree to which provisions are tailored to address specific challenges or opportunities, can most directly address women's needs, roles and circumstances (Kuhlmann, 2023a), linking more closely to distributional issues. These factors are compared in greater detail below.

Location of gender provisions in RTAs

Gender provisions are often assessed based on their location in RTAs. Location varies considerably across RTAs and regions, and it matters in terms of agreement commitment and implementation (Bahri, 2022). Gender-related provisions can appear in: agreement preambles and objectives; annexes; non-specific articles on related issues such as labour, agriculture and intellectual property;²⁴ specific articles on gender; side agreements, which are often focused on related issues such as labour (e.g. Canada–Colombia and Canada–Costa Rica FTAs); and even stand-alone gender chapters in RTAs or separate protocols (e.g. Canada–Panama, Canada–Chile, Canada–Israel, Chile–Argentina, Chile–Brazil and Chile–Uruguay FTAs) (Bahri, 2019; Kuhlmann, 2023a; Monteiro, 2021). The placement of gender and trade provisions has been comprehensively assessed, and it informs how gender is viewed in the larger context of a trade agreement and impacts the degree and depth of commitments (Kuhlmann, 2023a; Monteiro, 2021).

Frontloading gender commitments in an agreement's preamble or general objectives can help to mainstream a gender perspective. Although neither an agreement's preamble nor general objectives are legally binding, nor do they contain any precise or concrete commitments, they help set the tone for an agreement. The preamble is a vital part of any international instrument or agreement, as it can be instrumental in determining the intentions of the negotiators or drafters of the agreement at the time it was concluded.²⁵ In disputes arising out of a given agreement, decision-makers can consider the wording used in the preamble to identify the parties' underlying objectives and intentions. One recent example is the Preamble to the 2018 Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which stresses “the importance of promoting ... gender equality...”, alongside environmental protection, labour rights, sustainable development and indigenous rights.

Following earlier examples in Europe and Africa, Latin America (particularly Chile) has taken the lead on employing a more comprehensive approach with the incorporation of standalone gender chapters (Bahri, 2021b). A few other countries, namely Canada and Israel, have adopted a similar chapter-focused approach. Gender chapters so far cover parties' acknowledgment of women's role in international trade, commitments to cooperate on reducing barriers to trade, procedures and institutions for implementing commitments, and reaffirmations of commitments to international treaties and conventions, such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and International Labour Organization (ILO) conventions (such as in the US–Republic of Korea, Canada–Israel and Canada–Chile FTAs) (Bahri, 2021b). To date, only a handful of countries have signed RTAs with standalone gender chapters: Argentina, Brazil, Canada, Chile, Ecuador, Israel, Japan, the United Kingdom and Uruguay. In the near future, more countries are expected to follow this trend. Chile, for example,

is negotiating a gender chapter with Paraguay, and, together with Colombia, Mexico and Peru, is considering the inclusion of a gender chapter in the agreement between the Pacific Alliance and Associates (Canada, New Zealand and Singapore).²⁶ Recently, Canada, Chile and New Zealand negotiated the first-ever freestanding international cooperation agreement on trade and gender – the Global Trade and Gender Arrangement (GTGA) – which was signed in August 2020 (Mexico, Colombia and Peru have since joined as well), and includes commitments on non-discrimination, cooperation, exchange of good practices, and non-derogation from gender protections to promote trade and investment, using a legal construct increasingly common in the labour and environmental areas.

Other countries and regional bodies have negotiated supplementary or independent instruments that integrate gender equality and trade concerns, such as separate protocols,²⁷ recommendations,²⁸ or standalone agreements (GTGA, 2020) (Bahri, 2021b). A separate gender protocol (Protocol on Women and Youth in Trade) is also under negotiation under the African Continental Free Trade Area (AfCFTA) Agreement. Supplementary instruments subsequently negotiated and agreed to by the parties are generally required to stay within the scope defined by the main agreement. Hence, a protocol could be a welcome addition if it is used to expand upon an agreement's provisions on gender equality through more precise commitments. In some cases, such as the SADC and the AfCFTA, a protocol approach is consistent with the nature of the trade instrument (Kuhlmann and Agutu, 2020), and would be roughly equivalent to a gender chapter in the main agreement text.

Language of gender provisions

Another lens through which gender provisions can be assessed is their language. When combined with location, language points to commitment of the parties and the degree to which individuals and communities can rely upon the rights and obligations referenced in the agreement. While the trend to include gender is promising, many provisions are drafted in the form of general acknowledgements of gender equality (Bahri, 2021b), with the use of non-mandatory verbs and “soft” permissive grammatical constructions (Bahla and Wood, 2019; Aaronson and Chauffour, 2011). This is common across other social provisions in RTAs, with the exception of certain provisions, such as labour provisions.²⁹

Across gender provisions in RTAs, most do not contain any language on implementation or enforcement, with the exception of provisions in the Canada–Israel FTA, some of Chile's FTAs³⁰ and African agreements; however, more careful examination of these provisions highlights some important gaps. For example, the language in the Canada–Israel FTA provides that the jurisdiction of the agreement's dispute settlement will apply to its chapter on trade and gender only on an “opt-in” basis, requiring the parties' consent and effectively undermining its enforceability (Bahri, 2021b). A number of RTAs, such as the CPTPP and the Canada–Chile Free Trade Agreement (CCFTA),³¹ include language explicitly excluding gender-related provisions from the application of dispute settlement (Bahri, 2021b). With the exception of labour rights, other human rights provisions in RTAs are largely not enforceable, relying instead on dialogue and coordination among the parties (Aaronson and Chauffour, 2011).

In some agreements, mainly the most recent ones, countries are using “partially binding” language that neither amounts to binding commitments nor mere best endeavour promises. In such cases, countries use a combination of binding and non-binding expressions, such as the use of “shall”

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before or after “cooperate” or “may” or “consider” combined with “endeavour” or “prioritize”. These combinations of soft and hard expressions keep the provisions non-binding in nature, but they may still have a stronger symbolic force. One example is Article 25.2 of the USMCA, which states that “each Party shall seek to increase trade and investment opportunities” through a number of cooperation activities listed in the same provision.

Content of gender provisions

While location and especially language are important, assessing the content of gender provisions requires a deeper approach. Many gender provisions are distinctly different in their role and function, and they often create very different types of obligations. Here we assess two categories of provisions, aspirational and affirmative. Aspirational content encompasses descriptive language stressing the importance of addressing gender issues and tends to be of a less concrete nature that does not lead to specific commitments. Affirmative content encompasses functional provisions that create some sort of commitments that require parties to take positive action, such as incorporation of other international agreements or cooperation provisions. Across both of these dimensions, context should be considered, as it relates to the roles that women hold economically and socially, such as employees and mothers, and it ties content to distributional impact.

Aspirational content

Aspirational provisions that highlight women or gender or recognize the importance of women’s economic empowerment are among the most common in RTAs and tend to appear in agreement preambles or objectives clauses,³² making them among the least binding and most ambiguous in terms of substantive commitments but nevertheless important for signalling the intent of the negotiators or drafters (Bahri, 2021b).³³ Based on Bahri’s Gender Responsiveness Scale, agreements or provisions containing aspirational content tend to be the least gender-responsive (categorized as Level I), and they serve mainly to acknowledge principles and priorities and build awareness (Bahri, 2019).

Aspirational provisions need not be limited to agreement preambles and objectives, however. The Development Chapter of the CPTPP (Chapter 23) includes aspirational provisions on women and economic growth (CPTPP, Article 23:4(1)), which “recognise that enhancing opportunities in their territories for women, including workers and business owners, to participate in the domestic and global economy contributes to economic development.” This language precedes a non-mandatory cooperation clause “shall consider undertaking cooperative activities”, which is focused on a number of activities, including training, advice and exchange of information (CPTPP, Article 23:4(2)).

Affirmative content

Current gender provisions also encompass affirmative content that goes beyond mere symbolic or aspiration-based provisions, as it creates some sort of obligation, even though many provisions remain non-binding. Affirmative content generally includes: (i) affirmations of recognition and adherence to other international agreements on gender, such as CEDAW;³⁴ (ii) provisions outlining cooperation on gender issues; (iii) institutional provisions including the establishment of committees for cooperation and exchange of information; (iv) establishment of core human rights commitments, such as those to eliminate discrimination against women, in line with CEDAW and ILO conventions; (v) exceptions, waivers and reservations; (vi) minimum legal standards and voluntary standards (such as corporate social responsibility); and (vii) dispute resolution mechanisms (ITC, 2020; Kuhlmann, 2023b; Kuhlmann *et al.*, 2020).³⁵ As noted, the latter often consist of soft committee-based provisions to amicably resolve differences, even though there is very limited precedent for a shift away from soft dispute resolution.

Reaffirmations that recognize other international agreements on gender and other related areas, such as CEDAW and ILO conventions, are particularly common in RTAs. Examples include the 2008 SADC Protocol on Gender and Development and the Canada–Israel and Canada–Chile FTAs. While reaffirming statements can be an important way of recognizing other legal instruments, they tend to serve to reinforce prior commitments rather than create new obligations. These commitments are seen as having a slightly higher level of responsiveness than mere aspirational provisions (categorized as Level II) under Bahri's Gender Responsiveness Scale.

Provisions on cooperation are also very common, although they tend to be best endeavour provisions that do not directly affect the rights of RTA parties. These provisions can focus on a number of things, including enhancing women's access to education, skill development, digital training, health services and productive resources to increasing representation of women in decision-making and policy roles (Bahri, 2019).³⁶ Alone, cooperation provisions qualify as acceptable (Level III) under Bahri's Gender Responsiveness Scale.

Some of these provisions do establish institutional mechanisms to foster cooperation, such as the creation of new committees and working groups, which would qualify them as advanced commitments (Level IV) in Bahri's Gender Responsiveness Scale. For example, Article 13.3 of the Canada–Israel FTA notes that: "Parties shall encourage the involvement of their respective government institutions, businesses, labour unions, education and research organizations, other non-governmental organizations, and their representatives, as appropriate, in the cooperation activities." At the moment, cooperation provisions appear to be the trend in gender

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and other social provisions in RTAs (Kuhlmann, 2023b), regardless of the distributional issues they are meant to address.

Some RTAs also incorporate core human rights commitments, most commonly the commitment to eliminate discrimination against women, particularly in the workplace. These go beyond references to other treaties and conventions to incorporate binding rights into RTAs. Examples include commitments in the SADC Protocol on Gender and Development on gender-based violence and human trafficking, which are actually quite binding in language (“shall” “enact and enforce legislation”) and nature.³⁷ Another example is the EU–Montenegro Agreement, which requires that Montenegro provide for better working conditions and equal opportunity for women under its domestic law.³⁸ This latter example is also notable, since it is a singular clause that is particularly binding and affirmative.

RTAs can also include gender-specific reservations, waivers or legal standards. These may include the right to subsidize social services, such as childcare, or gender-responsive government procurement schemes (e.g. in the U.S–Central America–Dominican Republic Agreement). In a number of cases, however, these reservations and standards are quite narrowly applied. Several RTAs incorporate gender-responsive rights to regulate provisions in the context of investment, but these do not appear to apply more broadly to the application of trade rules.³⁹ Others, such as the USMCA,⁴⁰ incorporate reservations in services schedules, but they are applied to specific sectors (here, broadcasting services), without broader horizontal commitments.

Finally, affirmative provisions also include dispute settlement provisions. If legally binding, these would qualify as the highest level in Bahri’s Gender Responsiveness Scale (Level V: Optimizing). The trend, however, is to either exempt gender provisions from dispute settlement, include provisions without establishing a channel for implementation or enforcement, or to locate these provisions in the cooperative parts of the agreement.⁴¹ There is, thus, often no penalty for non-compliance or way in which to ensure that gender provisions are implemented in practice. Some exceptions do exist, however, such as the SADC Gender Protocol, which refers disputes to the SADC Tribunal following attempts at amicable resolution.⁴²

As argued in the conclusion, the nature of the affirmative provisions included in agreements so far are also inherently difficult to implement, due to their broad and sometimes vague nature and the lack of contextual integration beyond aspirational provisions, meaning that most affirmative provisions are not tailored to address pressing distributional issues faced by women in particular economies and industries, as called for under Kuhlmann’s Inclusive Trade and Development Index. Affirmative provisions also often lack definitions of “women’s empowerment” or “gender equality” (Bahri, 2021b). This disconnect between women’s roles and challenges and current RTA provisions is quite significant, and current provisions are often not tailored to address the realities of women as they relate to a country’s or industry’s conditions and women’s needs (Kuhlmann, 2023a).

Gender provisions in context

While it is helpful to assess gender provisions based on their location, language and content, context is equally, if not more, important. Context relates to women’s roles, needs and opportunities, and contextual approaches necessarily go beyond aspirational language and broad affirmations.

We see the beginnings of a contextual approach in some RTAs, which highlight women's roles and exhibit important regional differences. North American and European trade agreements tend to view women in a primarily economic and market-oriented context, and other regions take more of a social approach. For example, the Treaty on the Eurasian Economic Union and the EU–Central America FTA focus on economic barriers that women face, such as access to employment and access to information, along with the need for trade-related capacity-building programmes (Bahri, 2021b); while in the Canada–Israel FTA, women's roles extend beyond their role as employees to include positions as entrepreneurs, leaders, decision-makers and scientists. Other regions' RTAs, such as those in Asia-Pacific focus more on the social dimension and reference healthcare, maternity services, and the elimination of violence and discrimination based on sex (AfCFTA Secretariat and UNDP, 2022). Further, in Africa, RTAs focus on women's access to resources, promoting female entrepreneurship, and enhancing women's representation in political and decision-making positions (Bahri, 2021b).

Table 1 below summarizes different women's roles, divided by regions that have employed such context and a corresponding practice examples.

Table 1: Women's roles by region

Women's role	Regional and representative trade agreements
Women as representatives and decision-makers and social sectors	East and South Africa (COMESA, EAC Treaty)
Women as mothers	Asia-Pacific, Middle East, North Africa (ANZCERTA, Peru–Republic of Korea, Republic of Korea–Central America)
Women as employees	Europe (EU trade agreements with Republic of Korea, Ukraine and Viet Nam), North America (Canada–Jordan)
Women as business owners	Europe (EU–South Africa), South and North America (Chile–Israel; Canada–Chile)
Women's role in growth and development	East Africa (COMESA) and South America (Chile–Uruguay)

Note: ANZCERTA – Australia–New Zealand Closer Economic Relations Trade Agreement; COMESA – Common Market for Eastern and Southern Africa; EAC – East African Community.

As shown in Table 1, most of the current agreements largely focus on women in their roles as mothers, employees or cultural or social actors, and not on their roles as entrepreneurs or decision-makers. Moreover, trade agreements currently do not address the context in which women are engaged economically or contain gender-specific provisions related to sectors that are most relevant for them, such as agriculture (Kuhlmann, 2022), where the distributional effects tend to be more pronounced.

Women play many roles in the agricultural sector, including as primary producers of food and primary providers for their households and also as traders and processors of agricultural products, creating strong links between agricultural trade and human rights, food security, health, livelihoods and the SDGs (Bayat and Luke, 2020; Brown *et al.*, 1995; Kuhlmann, 2017, 2023a). Here, trade's distributional impacts can result from shifts in production away

“ Women also tend to face particularly challenging regulatory hurdles including legal barriers relating to access to land and finance and the ability to comply with standards and SPS measures.

from local or family consumption which tends to involve women to a greater degree, to more export-led growth which tends to focus on more capital-intensive, cash-based sectors and crops. Women also tend to face particularly challenging regulatory hurdles including legal barriers relating to access to land and finance and the ability to comply with standards and SPS measures,⁴³ the latter of which can require significant investment, economies of scale and technical capacity (Acharya *et al.*, 2019; Henson, 2018; Kuhlmann, 2023a). Women's limited access to agricultural inputs (including seeds, technology and extension services) has a regulatory dimension as well and impacts the ability to transition into higher value-added production and ultimately benefit from trade opportunities (FAO, 2015; STDF, 2015; UNCTAD, 2019). All of these considerations could be addressed through tailored provisions focused on goods and services, non-tariff measures, rules areas like intellectual property rights, capacity building and access to finance, among others.

This example highlights the disconnect between trade's distributional impacts and the limited degree to which current trade agreements address women's needs in context. Ideally, location, language and content of gender provisions should relate to women's roles economically and socially, leading to concrete ways in which to improve women's lives. However, these contextual aspects are weakly integrated into current RTAs, as they either appear in aspirational provisions that have less impact on their actual implementation or as best endeavour cooperation provisions that are not at all enforceable in nature. This dichotomy leads us to assess whether the current inclusions of such gender provisions is merely an attempt to construct a “Potemkin Façade” or whether it is a “Cornerstone Work” that can provide a basis to ensure that trade agreements in the future work for women.

Potemkin façade or cornerstone?

Potemkin façades are a façade or show designed to hide an undesirable fact or condition, and the term has come to define any kind of initiative taken for the purposes of deceiving others or to provide a misleading impression, usually with an ulterior motive. It is in this same sense that this term is used in this chapter, as the key issue we are seeking to assess is whether the inclusion of gender provisions in existing trade agreements is merely a window-dressing attempt to hide the negative impacts of trade liberalization on women.

As can be seen in the previous sections, trade agreements so far have covered a wide range of concerns, including increasing women's access to resources, markets, health services and education; improving labour standards and business conditions for women traders; and women's protection against sex-based violence and their empowerment as mothers and social or cultural actors. These interests are vital, and they are at the forefront of the protection of basic human rights. Yet, countries so far have assumed all these commitments (with very few

exceptions) on a voluntary basis, using permissive grammatical constructions and soft verbs (Bhala and Wood, 2019),⁴⁴ with most provisions caved out of the scope of dispute settlement without meaningful repercussions.

This shows that countries so far have undertaken gender commitments in a rather modest and non-binding manner, and they have left the implementation of these activities to available resources and willingness. Countries are not yet ready to undertake these commitments as binding and enforceable (Bahri, 2021a). One challenge is that countries sometimes view more binding commitments as “legal inflation” or “moral imperialism”, which more advanced economies can use to impose their values and norms or “level the playing field” through protectionism (Aaronson and Chauffour, 2011; Bahri, 2021b; Kuhlmann, 2023b; van Hees, 2004).

A negotiator from a developing country explains this hesitation in the following words: “If we do not know what we are negotiating, and which provision will be harmful for us, negotiating these provisions with a binding character could be a huge risk for us, as we do not know how they are going to be used by our developed country partners.”⁴⁵ This observation shows that, when it comes to the inclusion of gender provisions in trade agreements, developing countries can be wary of the intentions of the developed world. Some countries can oppose engagement on gender and other sustainability issues mainly because they link it to their past experiences with the WTO, where, in the words of a trade negotiator, “they were taken for a ride on some such progressive issues by the developed world”.⁴⁶ These statements show a clear trust deficit when it comes to discussions on gender equality, and countries’ efforts to impose binding standards on others may be perceived as a Trojan horse attempt by some, as these provisions may have the capacity to derail developing countries’ hitherto achieved progress.

These observations reflect a preference of some countries towards the inclusion of gender issues through a route of cooperation, as that is often seen as a viable starting point. The value of aspirational provisions cannot be underrated, as these provisions can still change the normative environment of trade negotiations and can pave the way for negotiating gender-related commitments for countries with a less developed appetite or understanding on these matters. Voluntary provisions, therefore, provide a “safe abode” for countries with hesitations and challenges.

Yet, there are clear advantages of binding and enforceable provisions, and some countries are taking a step further in negotiating gender commitments with binding force (Bahri, 2021a).⁴⁷

Binding and enforceable provisions can bolster a country’s level of commitment towards the implementation of the provisions they undertake in their agreements. In particular, for countries with a low level of political appetite to deal with such matters through international policy instruments, these provisions in their binding form could act as a “top-down” trigger for their public officials to ponder various domestic solutions they could invoke to implement the trade agreements they have signed. These provisions could persuade governments to amend their domestic laws and procedures that create regulatory hurdles for women in trade, responding to Kuhlmann’s “Regulatory Gateways” dimension. These provisions, especially in the form of minimum legal standards and other commitments to adapt laws, can especially help countries bring about domestic legal and procedural changes, as governments will have to change domestic legislation and frameworks as per the commitments they undertake in these agreements as they ratify and implement these agreements.⁴⁸ Such an approach could be particularly important for

“ If we do not know what we are negotiating, and which provision will be harmful for us, negotiating these provisions with a binding character could be a huge risk for us, as we do not know how they are going to be used by our developed country partners.

smaller enterprises and vulnerable communities (Kuhlmann, 2021), which may need the legal clarity to enforce their interests under an agreement. This is an example of a contextual approach, which would bridge the disconnect between distributional impacts and trade commitments, yet it is not common in RTAs.

Building upon such commitments, governments could take other actions to help women reduce the barriers they otherwise face in accessing trade opportunities through work on enhancing women's access to productive resources such as finance and information and up-scaling their level of education and skill development in areas that can lead to lucrative opportunities. However, in order for this to work, it is important that these provisions directly correspond and respond to the barriers women face in accessing opportunities offered by international trade. Such provisions would also further incorporate context and address the deep disconnect between provisions and barriers faced.

Another problem with the content of the aspirational as well as affirmative provisions is the difficulty that countries face with their actual domestic implementation. One negotiator observed the following:

“We should not be forced to implement things that our country is not otherwise prepared to implement. We do not want to talk about enforcement or implementation yet; we want to start with cooperation and exchange of ideas to begin with.”⁴⁹

These observations reflect a strong sentiment that some countries are reluctant to engage in trade and gender discussions, especially when they are made to operate under a constant fear of being sued or facing sanctions. Moreover, another important dimension of these statements is the problem associated with putting such commitments into action. As the previous sections have shown, current gender provisions are often included in trade agreements without any accompanying provisions on how such provisions might be implemented by the respective countries. In this sense, countries draft such provisions often without providing any clarifications or details on which stakeholders or committees might be responsible for monitoring or implementing such provisions, which procedures might be useful for their implementation, how the parties will monitor or review their implementation and impact, and how countries might go about financing their implementation.

Without working out the implementation mechanics, it is difficult to see how such commitments would ever be put to application. To ensure that these provisions do not remain mere “Cinderella” promises, however, it is important that countries in future trade negotiations give some thought to the creation of dedicated procedures and institutions that can bring

these commitments to life. RTAs also need to spell out the milestones and objectives they are expected to achieve, along with a timeline by which to achieve them. One of the most important things in this regard is to provide for funding arrangements to finance gender-related activities. As of today, even the most advanced RTAs in terms of gender do not clarify precise procedures or identify channels to finance these activities.

One final aspect to consider in assessing whether such provisions are merely façades or can be seen as cornerstones is the level of precision with which they are drafted. So far, a very high majority of gender provisions are drafted with very little precision and significant vagueness, with frequent use of ambiguous expressions often without any attempt to address their definition or scope. This reflects a low level of commitment towards positive change. Greater precision would reflect a higher level of commitment because countries would have limited discretion regarding implementation in an identified area. Nevertheless, the value of aspirational provisions, which are often drafted with vague language, must not be underrated; as previously noted, such provisions can still change the normative environment of trade negotiations. Countries sometimes need some flexibility in assuming commitments (Kuhlmann, 2020), particularly when they do not know how an agreement will affect women in practice. Vaguely worded treaty provisions can create flexibility by giving countries more room to manoeuvre. However, the vaguer the rules are, the more power countries may have in interpreting them, and, in the end, these vague rules may not foster much of the needed flexibility.

Conclusion

Based on our assessment, current trade agreements do not adequately address the distributional issues that are central to more inclusive trade, and RTAs rarely focus on how gender-related commitments could be tailored, implemented, enforced or applied. Yet the inclusion of such provisions in trade agreements can encourage positive changes at the domestic level and help women access economic opportunities once put into action. Hence, it may be too harsh to consider these provisions completely as façades, as countries have made genuine attempts to not merely acknowledge the problem as it stands but also to deliberate upon the possible solutions to amplify economic opportunities for women in trade. Sometimes these attempts have been merely symbolic, and on other occasions, they have been either misdirected (as they do not directly address important distributional issues) or entered into with a low level of ambition or commitment (in the form of vague and/or best endeavour commitments which are completely unenforceable). In line with this assessment, more significant changes could be contemplated in terms of the content, language and contextual specificity of future provisions.

Women's economic empowerment will depend upon crafting and applying commitments designed to address the social and economic aspects of women's work and livelihoods. It will also require the lowering of barriers that affect women's participation in the economy and impede their access to productive resources, including legal dimensions. All of these aspects speak to whether RTAs adequately incorporate equity and inclusion, particularly in order to address distributional issues and promote women's economic opportunities, enhanced skills, entrepreneurship, access to finance and bridging the digital divide, among others.

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Endnotes

1. Incorporation of gender in trade agreements can be indicated by inclusion of the terms gender, woman, girl, women, girls, maternity, childcare, sex, mother, etc. (Bahri, 2021a). It is also important to note that gender should be interpreted broadly to include sex, gender identity and gender expression, and an understanding of women's experiences should be both "intersectional" and "multidimensional" (Crenshaw Williams, 1989; Gathii, 2020; Kuhlmann, 2022).
2. There are more than 300 provisions across 100 FTAs that refer explicitly to women's interests or gender equality. This is over one-third of the FTA that are currently in force and notified by WTO members (Bahri, 2021b).
3. A number of terms and concepts can be used to describe a greater role for women in trade; many of these date back to the "early days of contemporary public policy debate on gender inequality" (Bahri, 2021b). "Gender equality" is used here to refer to equality of rights, responsibilities and opportunities and equal consideration of the "interests, needs, and priorities of women and men" (Bahri, 2022; UN Women, 2001; von Hagen, 2014).
4. In addition to gender, a number of other human rights appear in trade agreement provisions, including labour rights, privacy rights, political participation, due process, access to information provisions, cultural rights, indigenous rights and access to affordable medicines (Aaronson and Chauffour, 2011). Several human rights instruments are particularly relevant in the gender context, including the United Nations, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol; also referred to as Protocol on the Rights of Women in Africa) (2005).
5. Gender provisions in trade instruments also advance the SDGs, including Goal 5 on gender equality.
6. As of 2016, about 136 countries had negotiated RTAs with at least one labour provision (Harrison, 2019; ILO, 2017; Martínez-Zarzoso and Oueslati, 2018).
7. "Legal and regulatory gateways" are the decision points and hurdles contained within a legal or regulatory process (licence, registration or permit, for example) that "correspond with practical steps that enterprises and other stakeholders encounter in navigating a particular aspect of the legal and regulatory system." They also "signify intervention points to make the rules more equitable, inclusive and efficient." (Kuhlmann, 2021).
8. These measures are all linked to WTO disciplines as well (see Acharya *et al.*, 2019).
9. *Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization*, WTO document WT/L/940, 28 November 2014.
10. Women are increasingly involved in services, ranging from retail and financial services to tourism and hospitality, to healthcare.
11. Informal work includes part-time work, home-based work and other informal sector activity.
12. "Bottom-up" approaches involve national laws, culture and social norms at the domestic level and can have a more direct impact on household livelihoods, taking gender dynamics and gendered impacts into account. On the other hand, "top-down" international law and policies can establish state-to-state commitments and treaty provisions that can contribute to the empowerment of women (see Bahri, 2021b; Kuhlmann, 2022).
13. Gender mainstreaming is a means for achieving gender equality and can be defined as "the (re)organization, improvement, development, and evaluation of policy processes so that a gender equality perspective is incorporated in all policies at all levels and stages, by the actors normally involved in policy-making" (Council of Europe, 1998). In an RTA context, it refers to the process of incorporating gender considerations and concerns into the design of the RTA.
14. "Gender responsiveness" refers to a process that assesses how sensitive, informed or committed the provisions of a trade agreement are to issues relating to gender equality; that is, how an agreement mainstreams gender equality considerations (Bahri, 2019).
15. Available at https://www.wto.org/english/tratop_e/womenandtrade_e/gender_responsive_trade_agreement_db_e.htm.
16. Applying a "gender lens" in the context of trade agreements is a process by which parties seek to include a gender perspective in trade liberalization efforts and policies. Mainstreaming affirms a country's commitment, understanding and political will to reduce gender inequalities through trade policies and agreements (see Bahri, 2022).
17. Article 157 of the TFEU imposes an obligation on each EU member to ensure that the "principle of equal pay for male and female workers for equal work or work of equal value is applied" in their respective jurisdictions.
18. Article 1 of the Treaty for the Establishment of the East African Community (1999) (EAC Treaty).
19. The Treaty Establishing the Common Market for Eastern and Southern Africa (1993) (COMESA Treaty).
20. Article 4(c) of the Treaty of the Southern African Development Community (revised 2015) (SADC Treaty).
21. Treaty of the Economic Community of West African States (1975, revised 1993) (ECOWAS Treaty (Revised)).

22. Article 60(2)(b) of the Treaty for the Establishment of the Economic Community of Central African States (1983) (ECCAS Treaty).
23. See: Chile–Uruguay FTA (2016); Chile–Canada FTA (2019); Chile–Argentina FTA (2019); Canada–Israel FTA (2018); Chile–Ecuador Acuerdo de Complementación Económica (2020); UK–Japan Agreement for a Comprehensive Economic Partnership (2020).
24. See Chile–Uruguay FTA (2016) (Chapter 11.9/6 on labour) and the United States–Mexico–Canada Agreement (USMCA) (Article 14.17 on corporate social responsibility, Article 23.9 on sex-based discrimination in the workplace, Article 25.2 on investment and small and medium-sized enterprises) (Bahri, 2019).
25. Article 31 of the Vienna Convention on the Law of Treaties (Vienna Convention) requires that an agreement must be interpreted in light of its context, object and purpose.
26. Personal communication with a trade negotiator.
27. Articles 20 and 22 of the SADC Protocol on Gender and Development (2008).
28. The CETA Trade and Gender Recommendation is a supplementary document adopted after signature and enforcement of the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union. It contains recommendations on gender mainstreaming.
29. For example, Article 23.9 of the USMCA states that “each Party shall implement policies that it considers appropriate to protect workers against employment discrimination on the basis of sex”.
30. Other examples include the Chile–Uruguay FTA (2016), which provides for the creation of a gender committee to monitor and implement the envisaged commitments and a commitment of parties to solve issues regarding application and interpretation through consultations and dialogue. The Chile–Canada FTA (2019) raises the bar higher by providing operation requirements and functions for its trade and gender committee, as well as a mechanism of parties to engage in consultation to resolve disputes. The Chile–Ecuador FTA (2020) defines contact points and responsibilities as well as a dedicated bilateral consultation mechanism to solve differences that may arise from provisions in the trade and gender chapter. This mechanism is based on mutually acceptable resolution.
31. CCFTA, Article N bis-06: Non-application of Dispute Resolution.
32. For example, Article 5 of the EAC Treaty sets out the objectives of the community and includes the parties’ commitment to mainstream gender equality in all its endeavours and enhance the “role of women in cultural, social, political, economic and technological development”.
33. Inclusion of such language can also influence the way other provisions are interpreted in accordance with Article 31 of the Vienna Convention.
34. For example, the SADC Protocol on Gender and Development (2008).
35. These are taken from several sources we have written.
36. For example, affirmations on cooperation activities aimed at improving access of women to markets, technology and financing and developing women’s leadership and business networks under the UK–Japan Agreement for a Comprehensive Economic Partnership.
37. Article 20:6 of the SADC Protocol on Gender and Development.
38. Article 101 of the Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Montenegro, of the other part (enforced, 2010).
39. For example, Article 10.2 of the Republic of Korea–Singapore FTA provides that parties reserve the right to regulate foreign investment in respect of childcare services.
40. Article 32.6 of USMCA includes a cultural reservation in the context of broadcasting services to preserve culture, languages, knowledge, traditions and identity, with a special focus on the integration of women and promotion of gender equality.
41. CCFTA, Article N bis-06: Non-application of Dispute Resolution.
42. See Article 36 of the SADC Protocol on Gender and Development.
43. The WTO’s Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), with which most RTAs align, contains important disciplines and an emphasis on capacity building and Special and Differential Treatment (see Articles 9 and 10 of the SPS Agreement, which are often incorporated into RTAs).
44. Most gender-related commitments in USMCA and CPTPP are aspirational and non-binding, and hence non-enforceable, and are sometimes drafted with vagueness and ambiguity, and so they are susceptible to myriad interpretations.
45. Personal communication with a trade negotiator.
46. Personal communication with a trade negotiator.
47. Bahri (2021a) notes how some African countries have assumed binding commitments; however, these commitments have been included without any provision for their enforcement mechanisms.
48. Personal communication with a trade negotiator.
49. Personal communication with a trade negotiator.