

# Trade-Gender Alignment of International Trade Agreements: Insufficiencies and Improvements

Manjiao CHI<sup>\*</sup> & Zhiyuan YIN<sup>\*\*</sup>

*There is a growing call for gender equality in international trade. Enhancing trade-gender alignment of international trade agreements (ITAs) is a major way to make ITAs gender-responsive. In recent years, an increasing number of gender provisions have been incorporated in ITAs, which can be roughly categorized in four major types from normative perspective: declaratory, aspirational, obligatory, and exceptive. While these provisions help draw attention to gender issues associated with international trade and investment, their normativity, enforceability and effectiveness remain at an insufficient level in general. Given the sensitivity and complexity of gender issues in many states, it seems unrealistic and undesirable to transform ITAs into a major discourse for states to address gender concerns, but it still makes sense to enhance trade-gender alignment of ITAs. This impliedly calls for incorporating larger number and more types of gender provisions in ITAs, enhancing their normativity and enforceability through suitable means, and harmonizing national gender laws and ITA gender provisions to create synergies for pursuing gender equality.*

**Keywords:** Gender equality, International trade agreements, Gender-trade alignment, Normativity, Compliance

## 1 INTRODUCTION

Global demand for protection and advancement of gender equality keeps growing. This is probably best shown by the fact that the United Nations (UN) has adopted achieving gender equality and empowering women as one of the sustainable development goal (SDGs).<sup>1</sup> Gender equality is not merely a policy issue, but a legal one as well. Leading international lawyers have argued that international law should be reconstructed while based on gender equality,

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<sup>\*</sup> Professor, School of Law, University of International Business and Economics (UIBE), China. Email: chimanjiao@uibe.edu.cn.

<sup>\*\*</sup> LLM Candidate, School of Law, London School of Economics (LSE), UK. Email: z.yin13@lse.ac.uk.

<sup>1</sup> United Nations, *Transforming Our World: The 2030 Agenda for Sustainable Development* (21 Oct. 2015) (UN Doc.: GA/RES/70/1), at 14 and 18.

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which requires reassessing core principles and all regimes of international law through a gender equality lens.<sup>2</sup>

In the field of international trade law, growing attention has been paid to promoting and achieving gender equality through trade. Notably, states are increasingly referring to women's economic empowerment, gender equality and women's rights in their trade policy instruments in recent years.<sup>3</sup> The reason for this seems realistic and apparent: as international trade can create job opportunities and material wealth for women to maintain livelihood, achieve independence, enhance economic rights, and subsequently pursue political and cultural rights, effective governance of international trade could play a crucial role in achieving gender equality.<sup>4</sup>

Achieving gender-responsive trade, or inclusive trade in the broader sense, has rapidly become a topical issue in international trade governance. As international trade agreements (ITAs), including free trade agreements (FTAs), regional trade agreement (RTAs) and international investment agreements (IIAs), play a central role in global trade governance, making gender-responsive ITAs is widely deemed as a major way to achieving gender-responsive trade.<sup>5</sup> This naturally and impliedly requires that trade-gender alignment of ITAs, also known as trade-gender nexus, should be enhanced, so that ITAs could be more effective in playing the dual roles of promoting free trade and advancing gender equality.

While there are abundant discussions on how trade could help empower women especially in developing states from policy perspective, specialized study on the topical and generalized issue of trade-gender alignment of ITAs from

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<sup>2</sup> See e.g., Hilary Charlesworth, Christine Chinkin & Shelley Wright, *Feminist Approaches to International Law*, 85(4) Am. J. Int'l L. 613, 615 (1991), doi: 10.2307/2203269; Hilary Charlesworth, *Feminist Methods in International Law*, 92(2) Am. J. Int'l L. 379, 394 (1999), doi: 10.2307/2997996; Christine Chinkin, *Feminism, Approach to International Law*, Max Planck Encyclopedia Pub. Int'l L. (2010), <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e701> (accessed 10 Jul. 2024).

<sup>3</sup> See Caroline Dommen, *Gender Equality in WTO Trade Policy Review: The Case of Germany* 6 (Dec. 2023), <https://library.fes.de/pdf-files/international/20815.pdf> (accessed 10 Jul. 2024).

<sup>4</sup> Amrita Bahri, *Women at the Frontline of COVID-19: Can Gender Mainstreaming in Free Trade Agreements Help?* 23(3) J. Int'l Econ. L. 563, 571 (2020), doi: 10.1093/jiel/jgaa023; United Nations, *Women in Development: Report of the Secretary-General*, UN Doc. A/77/243 (28 Jul. 2022); Jane Korinek et al., *Trade and Gender: A Framework of Analysis* (Paris: OECD Publishing 2021); OECD, *SIGI 2019 Global Report: Transforming Challenges into Opportunities* (Paris: OECD Publishing 2019); Elisabeth Porter, *Rethinking Women's Empowerment*, 8(1) J. Peacebuilding Development 1, at 1–14 (2013), doi: 10.1080/15423166.2013.785657; Nadia Rocha & Roberta Piermartini, *Trade Drives Gender Equality and Development* (2023), <https://www.imf.org/en/Publications/fandd/issues/2023/06/trade-drives-gender-equality-and-development-rocha-piermartini> (accessed 10 Jul. 2024).

<sup>5</sup> See e.g., Kuhlmann Katrin & Amrita Bahri, *Gender Mainstreaming in Trade Agreements: 'A Potemkin Façade'?* (2023), <https://wtochairs.org/mexico/research/gender-mainstreaming-trade-agreements-potemkin-façade-world-trade-organization> (accessed 10 Jul. 2024); Amrita Bahri, *Measuring the Gender-Responsiveness of Free Trade Agreements: Using a Self-Evaluation Maturity Framework*, 14(11/12) Glob. Trade Cust. J. 517, 527 (2019), doi: 10.54648/GTCJ2019064; International Trade Centre, *Gender and Trade: A Fresh Look at the Evidence*, <https://intracen.org/news-and-events/news/gender-and-trade-a-fresh-look-at-the-evidence> (accessed 10 Jul. 2024).

normative perspective remains largely insufficient. This article aims at presenting an exclusive study on this issue: Part I is Introduction; Part II presents a skeletal historical review of trade-gender alignment of ITAs, to set the scene and provide necessary background information for the discussion; Part III categorizes existing ITA provisions relating to gender equality (collectively referred to as ‘gender provisions’) into four major types, and analyses their merits and shortcomings; Part IV, based on the previous discussions, puts forward a few recommendations for enhancing trade-gender alignment of ITAs, so that ITAs could be made more gender-responsive; Part V is a concise conclusion.

## 2 HISTORICAL REVIEW OF TRADE-GENDER ALIGNMENT OF ITAS

Gender equality is a social state rooted in the concept of gender, signifying equal rights, responsibilities and opportunities for both women and men, irrespective of biological sex.<sup>6</sup> It strives to eliminate prejudice and discrimination imposed by societal gender roles, allowing individuals to develop their abilities and make choices freely.<sup>7</sup> Over the years, gender norms concerning non-discrimination and the empowerment of women have been embraced in international law and gradually expanded through the making of treaties and declarations, global feminist movements and other means.<sup>8</sup> As a result, gender equality is now understood as a broad notion that captures all types of measures and conditions related to women’s empowerment.<sup>9</sup>

While gender issues are mainly and traditionally dealt with through international human rights law and international labour law, incorporation of gender provisions in ITAs and, broadly speaking, international economic treaties is not an entirely new phenomenon. It has been observed that, as early as in the 1950s, the Treaty Establishing the European Economic Community (Treaty of Rome) is the first economic treaty to take gender equality into account,<sup>10</sup> which explicitly recognizes the principle of equal pay for men and women.<sup>11</sup> The North American FTA (NAFTA) also incorporates a principle in the side agreement on

<sup>6</sup> UN Women, *Concepts and Definitions*, <https://www.un.org/womenwatch/osagi/conceptsanddefinitions.htm> (accessed 10 Jul. 2024).

<sup>7</sup> *Ibid.*

<sup>8</sup> See e.g., UN Charter, Preamble, Art. 1, para. 3; the Universal Declaration of Human Rights, Preamble, Arts 2 and 7; the Convention on the Elimination of All Forms of Discrimination against Women.

<sup>9</sup> United Nations, *supra* n. 1.

<sup>10</sup> José-Antonio Monteiro, *The Evolution of Gender-Related Provisions in Regional Trade Agreements*, at 4 WTO Working Paper ERSD-2021-8 (24 Feb. 2021), [https://www.wto.org/english/res\\_e/reser\\_e/ersd202108\\_e.pdf](https://www.wto.org/english/res_e/reser_e/ersd202108_e.pdf) (accessed 10 Jul. 2024).

<sup>11</sup> The Treaty establishing the European Economic Community of 1957, Art. 119.

labour cooperation, the elimination of gender-based employment discrimination and equal pay for equal work.<sup>12</sup>

In recent years, leading international economic organizations have played a major role in generating global attention on enhancing trade–gender alignment. In 2017, the WTO announced to make trade and development policies more gender-responsive, in the Buenos Aires Joint Declaration on Trade and Women’s Economic Empowerment.<sup>13</sup> To help achieve such a goal, the WTO also offers policy tools to support members’ efforts in promoting gender equality in trade,<sup>14</sup> and established a database on gender provisions in RTAs.<sup>15</sup> Other organizations have also paid attention to the intersection of ‘women and trade’ and analysed the dynamics between trade, trade policies and women.<sup>16</sup> Notably, the World Bank (WB), the International Monetary Fund (IMF), the UN Conference on Trade and Development (UNCTAD), the Organization for Economic Co-operation and Development (OECD) have examined the impact of trade on women, evaluated the effectiveness of trade policies, provided analytical tools and policy recommendations to the international community.<sup>17</sup>

In the specific context of ITAs, gender equity assesses whether ITAs adequately address the needs of females.<sup>18</sup> While discussions of gender issues seemed scarce in ITA-making before the new Millennium, such a situation has been gradually changed.<sup>19</sup> Roughly speaking, during the first decade of the new Millennium, incorporation of gender provisions in ITAs has become frequent.<sup>20</sup> This allows states to transmit gender equality objectives into concrete legal rules, and paves the way for making gender-responsive ITAs, thus making ITAs a helpful tool for protecting women’s rights and addressing gender disparities. A notable feature of the gender provisions in ITAs in this period is that many of them appear

<sup>12</sup> NAFTA, Art. 49 (g).

<sup>13</sup> WTO, *Joint Declaration on Trade and Women’s Economic Empowerment on the Occasion of the WTO Ministerial Conference in Buenos Aires in December 2017*, [https://www.wto.org/english/thewto\\_e/minist\\_e/mc11\\_e/genderdeclarationmc11\\_e.pdf](https://www.wto.org/english/thewto_e/minist_e/mc11_e/genderdeclarationmc11_e.pdf) (accessed 10 Jul. 2024).

<sup>14</sup> WTO, *Policy Tools*, [https://www.wto.org/english/tratop\\_e/womenandtrade\\_e/gender\\_responsive\\_trade\\_agreement\\_db\\_e.htm](https://www.wto.org/english/tratop_e/womenandtrade_e/gender_responsive_trade_agreement_db_e.htm) (accessed 10 Jul. 2024).

<sup>15</sup> WTO, *Database on Gender Provisions in RTAs*, [https://www.wto.org/english/tratop\\_e/womenandtrade\\_e/policy\\_tools\\_e.htm](https://www.wto.org/english/tratop_e/womenandtrade_e/policy_tools_e.htm) (accessed 10 Jul. 2024).

<sup>16</sup> See Korinek et al., *supra* n. 4.

<sup>17</sup> See OECD, *supra* n. 4; Rocha & Piermartini, *supra* n. 4; UNCTAD, *Assessing the Impact of Trade Agreements on Gender Equality: Canada-EU Comprehensive Economic and Trade Agreement* (8 May 2020), <https://unctad.org/publication/gender-and-trade> (accessed 10 Jul. 2024); World Bank and World Trade Organization, *Women and Trade: The Role of Trade in Promoting Gender Equality* (2020), [https://www.wto.org/english/res\\_e/publications\\_e/women\\_trade\\_pub2807\\_e.htm](https://www.wto.org/english/res_e/publications_e/women_trade_pub2807_e.htm) (accessed 10 Jul. 2024).

<sup>18</sup> Katrin Kuhlmann, *Mapping Inclusive Law and Regulation: A Comparative Agenda for Trade and Development*, *Afr. J. Int’l Econ. L.* (2d edn.) 1, 32 (2021), doi: 10.2139/ssrn.3912907.

<sup>19</sup> Amit Kumar Sinha & Pushkar Anand, *Feminist Overview of International Investment Law – A Preliminary Inquiry*, 24 (1) *J. Int’l Econ. L.* 99, 109 (2021), doi: 10.1093/jiel/jgab008.

<sup>20</sup> WTO, Informal Working Group on Trade and Gender, *Trade and Gender-Related Provisions in Regional Trade Agreements*, INF/TGE/COM/4/Rev.1 (5 Jan. 2023), at 6.

‘implicit’, as they primarily target at protecting and promoting human rights, sustainable development and vulnerable groups, which only deal with gender issues in an indirect manner.

Since around 2015, not only the number of gender provisions in ITAs has greatly increased, but provisions that directly and explicitly address gender issues have also emerged.<sup>21</sup> For instance, it has been observed that in 2018 alone, seventy-four RTAs in force and notified to the WTO included at least one gender provision.<sup>22</sup> Notably, Canada, Chile and Uruguay have proposed and advocated for a new paradigm that considers ITAs as a tool to promote women’s economic empowerment.<sup>23</sup> ITAs with a standalone chapter on gender issues have been concluded, such as Canada–Chile FTA,<sup>24</sup> Chile–Argentina FTA,<sup>25</sup> and Canada–Israel FTA.<sup>26</sup> Other states, especially European states and Member States of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) have also been increasingly active in exploring incorporating a gender chapter in their future ITAs.<sup>27</sup>

Incorporating gender provisions in ITAs significantly enhances the trade-gender alignment of ITAs. In general, ITAs are ‘economy-oriented’, as they aim primarily at promoting and facilitating international trade and investment.<sup>28</sup> It is thus not surprising that ITAs are designed to be ‘gender-neutral’ and are often silent on gender issues.<sup>29</sup> Therefore, though ITAs could help expand trade and investment to achieve economic growth, they are often insufficient in performing a constructive function in pursuing social goals and addressing the negative societal impacts of trade and investment.<sup>30</sup>

<sup>21</sup> Monteiro, *supra* n. 10, at 8.

<sup>22</sup> Lolita Laperle-Forget, *Gender-Responsiveness in Trade Agreements – How Does the AfCFTA Fare?* (2021), [https://www.tralac.org/blog/article/15141-gender-responsiveness-in-trade-agreements-how-does-the-afcfta-fare.html#\\_ftn2](https://www.tralac.org/blog/article/15141-gender-responsiveness-in-trade-agreements-how-does-the-afcfta-fare.html#_ftn2) (accessed 10 Jul. 2024).

<sup>23</sup> See Bahri, *supra* n. 4, at 517.

<sup>24</sup> Canada–Chile FTA, Ch. 14.

<sup>25</sup> Chile–Argentina FTA, Ch. 15.

<sup>26</sup> Canada–Israel FTA, Ch. 13.

<sup>27</sup> Monteiro, *supra* n. 10, at 44; Amrita Bahri, *Gender Mainstreaming in Free Trade Agreements: A Regional Analysis and Good Practice Examples* 21 and 35 (2021), [https://wtochairs.org/sites/default/files/7.%20Gender%20mainstreaming%20in%20FTAs\\_final%20%286%29\\_0.pdf](https://wtochairs.org/sites/default/files/7.%20Gender%20mainstreaming%20in%20FTAs_final%20%286%29_0.pdf) (accessed 10 Jul. 2024).

<sup>28</sup> See generally, Harlan Grant Cohen, *What is International Trade Law for?* 113(2) *Am. J. Int’l L.* 326 (2019), doi: 10.1017/ajil.2019.4; Erin Hannah, *NGOs and Global Trade: Non-State Voices in EU Trade Policymaking* (London: Routledge 2016); Silke Trommer, *Trade Policy Communities, Expert Language and the De-humanization of World Trade*, in *Expert Knowledge in Global Trade* 63–82 (Erin Hannah et al. eds, London: Routledge 2016).

<sup>29</sup> Sinha & Anand, *supra* n. 19, at 110.

<sup>30</sup> See e.g., Trommer, *supra* n. 28; Erin Hannah et al., *Gender in Global Trade: Transforming or Reproducing Trade Orthodoxy?* 29(4) *Rev. Int’l Pol. Econ.* 1368, 1377 (2022), doi: 10.1080/09692290.2021.1915846; Clair A. Gammage & Mariam Momodu, *The Economic Empowerment of Women in Africa: Regional Approaches to Gender-Sensitive Trade Policies*, 1 *Afr. J. Int’l Econ. L.* 10–13 (2020); Joost Pauwelyn, *Rational Design or Accidental Evolution? The Emergence of International Investment Law*, in *The Foundations of International Investment Law: Bringing Theory into Practice* 11–42 (Zachary Douglas et al. eds, Oxford: Oxford University Press 2014).

To a large extent, ‘gender-neutral’ ITAs do not conform to the present need of the international community. As social goals, such as promoting gender equality and advancing human rights receive growing attention in international trade governance,<sup>31</sup> conventional emphasis of ITAs on economic growth need to be shifted or expanded.<sup>32</sup> After all, ‘gender equality should not be regarded as less significant than issues of natural resource depletion, or religious protection’ in trade rulemaking.<sup>33</sup> In other words, ITAs should be made gender-responsive, which essentially requires trade rules to be formulated also from a social development perspective, where social goals, including but not limited to gender equality, are accorded equal priority as economic growth.<sup>34</sup>

Nowadays, the European Union (EU) plays a leading and exemplary role in making gender-responsive ITAs. In 2015, the European Commission has decided that EU ITAs should be aligned with sustainable development.<sup>35</sup> Following this direction, the European Parliament adopted a resolution entitled ‘Gender Equality in EU Trade Agreements’ in 2018, holding that future EU ITAs must encompass a chapter about gender.<sup>36</sup> This position is confirmed by the EU in ‘Gender Equality Strategy 2020–2025’,<sup>37</sup> and ‘Gender Action Plan III’.<sup>38</sup> According to the latter document, the EU will apply a ‘gender mainstreaming approach’ to all of its external policies and actions, and create a gender priority policy framework that guarantees that eighty-five percent of new actions across EU external relations will contribute to gender equality and women’s empowerment by 2025.<sup>39</sup>

These documents clearly signify that enhancing trade-gender alignment of ITAs has become an inevitable ITA-making and external relations-building paradigm for the EU. Despite some criticisms of this treaty paradigm, it has been observed that through utilizing its economic strength and international standing to

<sup>31</sup> See e.g., OECD and Sahel and West Africa Club, *Women and Trade Networks in West Africa* (Paris: OECD Publishing 2019).

<sup>32</sup> Hannah et al., *supra* n. 28, at 1372; Barnali Choudhury, *The Facade of Neutrality: Uncovering Gender Silences in International Trade*, 15 Wm. & Mary J. Women & L. 113 (2009).

<sup>33</sup> Bahri, *supra* n. 4, at 568.

<sup>34</sup> See generally, Naomi Klein, *This Changes Everything: Capitalism vs. the Climate* (New York: Simon and Schuster 2015).

<sup>35</sup> European Commission, *Trade for All: Towards a more responsible trade and investment policy*, COM(2015) 497 final (19 Nov. 2015), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52015DC0497> (accessed 10 Jul. 2024).

<sup>36</sup> European Parliament, *European Parliament Resolution of 13 March 2018 on Gender Equality in EU Trade Agreements*, 2017/2015(INI) (13 Mar. 2018), [https://www.europarl.europa.eu/doceo/document/TA-8-2018-0066\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-8-2018-0066_EN.html) (accessed 10 Jul. 2024).

<sup>37</sup> European Commission, *Gender Equality Strategy*, [https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/gender-equality/gender-equality-strategy\\_en#gender-equality-strategy-2020-2025](https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/gender-equality/gender-equality-strategy_en#gender-equality-strategy-2020-2025) (accessed 10 Jul. 2024).

<sup>38</sup> European Commission, *Gender Action Plan III: An Ambitious Agenda for Gender Equality and Women’s Empowerment in EU External Relations* (25 Nov. 2020), [https://international-partnerships.ec.europa.eu/system/files/2021-01/join-2020-17-final\\_en.pdf](https://international-partnerships.ec.europa.eu/system/files/2021-01/join-2020-17-final_en.pdf) (accessed 10 Jul. 2024).

<sup>39</sup> *Ibid.*, at 3.



‘persuade’ its trade partners to shoulder the responsibility for sustainable development, the EU has successfully leveraged the normative power of its trade policy to disseminate its values globally.<sup>40</sup> Up to the present, the EU has concluded about two dozen ITAs with a standalone chapter on gender equality, or a standalone chapter on sustainable development that include gender provisions.<sup>41</sup>

Understandably, not all states share the EU’s view and treaty making strategy that prioritizes trade-gender alignment in ITA-making. Gender commitments in ITAs are sometimes questioned as constituting ‘disguised protectionism’.<sup>42</sup> Especially, some developing states refuse to accept rules that do not align with their development interests, but seek to exert greater international influence by formulating new rules.<sup>43</sup> India, for example, has refused to support WTO statements advocating for gender equality in trade, finding that gender is unrelated to trade,<sup>44</sup> and that these forward-looking gender policies could be used by developed states to discourage exports from less developed states.<sup>45</sup>

To sum up, while it is not novel for states to take gender issues into account in international trade rulemaking, trade-gender alignment of ITAs has only become a trend in ITA-making until recently. While the international community shares the view that ITAs should be made more gender-responsive, existing ITA-making

<sup>40</sup> See generally, Aleydis Nissen, *Not That Assertive: The EU’s Take on Enforcement of Labor Obligations in Its Free Trade Agreement with South Korea*, 33(2) Eur. J. Int’l Econ. L. 607 (2022), doi: 10.1093/ejil/chac037; Ian Manners, *Normative Power Europe: A Contradiction in Terms?* 40 J. Common Mkt. Stud. 235 (2002), doi: 10.1111/1468-5965.00353; Ian Manners, *The Social Dimension of EU Trade Policies: Reflections from a Normative Power Perspective*, 14 Eur. Foreign Aff. Rev. 785 (2009), doi: 10.54648/EERR2009053; Jan Orbie et al., *EU Trade Policy and a Social Clause: A Question of Competences?* 3 *Politique Européenne* 159, 168 (2005), doi: 10.3917/poeu.017.0159.

<sup>41</sup> See e.g., CETA, Chs 22, 23 and 24; EU–Chile Advanced Framework Agreement, Ch. 27; EU–New Zealand FTA, Ch. 19; EU–United Kingdom Trade and Cooperation Agreement, Chs 6, 7 and 8; EU–South Korea FTA, Ch. 13.

<sup>42</sup> Maria Garcia & Annick Masselot, *EU-Asia Free Trade Agreements as Tools for Social Norm/Legislation Transfer*, 13 *Asia Eur. J.* 241, 246 (2015), doi: 10.1007/s10308-015-0423-0; Katrin Kuhlmann, *Gender Approaches in Regional Trade Agreements and a Possible Gender Protocol under the African Continental Free Trade Area: A Comparative Assessment*, in *Trade Policy and Gender Equality 227* (Amrita Bahri et al. eds, Cambridge: Cambridge University Press 2023); Ole Elgström, *Outsiders’ Perceptions of the European Union in International Trade Negotiations*, 45(4) J. Common Mkt. Stud. 949, 959 (2007), doi: 10.1111/j.1468-5965.2007.00755.x.

<sup>43</sup> Garcia & Masselot, *supra* n. 42, at 242 and 247; Aleydis Nissen, *Can WTO Member States Rely on Citizen Concerns to Prevent Corporations from Importing Goods Made from Child Labor?*, 14(2) *Utrecht L. Rev.* 70, 74 (2018), doi: 10.18352/ulr.436; Sangeeta Khorana & Maria Garcia, *European Union–India Trade Negotiations: One step Forward, One Back?*, 51(4) J. Common Mkt. Stud. 581 (2013), doi: 10.1111/jcms.12024; Mark Langan, *Normative Power Europe and the Moral Economy of Africa–EU Ties: A Conceptual Reorientation of ‘Normative Power’*, 17(3) *New Pol. Econ.* 243 (2012), doi: 10.1080/13563467.2011.562975.

<sup>44</sup> India Department of Commerce, *Address by the Minister for Commerce and Industry, Shri Suresh Prabhu at Plenary Session of the 11th Ministerial Conference of the WTO in Buenos Aires, Argentina*, <https://commerce.gov.in/press-releases/address-by-the-minister-for-commerce-and-industry-shri-suresh-prabhu-at-plenary-session-of-the-11th-ministerial-conference-of-the-wto-in-buenos-aires-argentina/> (accessed 10 Jul. 2024).

<sup>45</sup> Ananya Singh, *Explained: India’s Refusal to Back WTO Declaration on Gender Equality in Trade*, *Qrius* (15 Dec. 2017), <https://qrius.com/explained-india-refusal-gender-equality-trade/>.

practice seems to suggest that states hold different views on how to achieve this goal. So far, compared with developing states and least developed states, developed states seem to have been the major promoter and advocator of enhancing trade-gender alignment of ITAs.

### 3. CATEGORIZATION AND ANALYSIS OF GENDER PROVISIONS IN ITAS

As mentioned, an increasing number of gender provisions have been incorporated in ITAs, especially recent ones. To a large extent, these provisions form the normative foundation of trade-gender alignment of ITAs. For the purpose of this paper, there is no compelling need to analyse each and all gender provisions in ITAs in detail, as almost all these provisions are available in the WTO database on gender provisions in RTAs.<sup>46</sup> Based on an almost exhaustive study of the gender provisions in the above-mentioned database, this article categorizes existing gender provisions in ITAs into four major types, namely declarative, aspirational, obligatory and exceptive, and briefly analyses their respective features, merits and shortcomings.

#### 3.1 DECLARATIVE GENDER PROVISIONS

Declarative gender provisions are essentially statement or confirmation that a state shall promote or adopt measures in favour of gender equality or the interests of women in accordance with national and international law. While such provisions normally do not create affirmative rights and obligations, they encompass a broad range of areas where gender concerns could be addressed, such as treatment of foreign investment and government procurement. In ITAs, such provisions are mainly found in the preamble, and are of two main subtypes.

One subtype is explicit acknowledgement of the significance and commitment of promoting gender equality. For example, the preamble of the Agreement Establishing the African Continental Free Trade Area of 2018 (AfCFTA) states that 'recognising the importance of [...] gender equality [...] for the development of international trade and economic cooperation'.<sup>47</sup> In addition, AfCFTA also explicitly states that achieving gender equality is one of the treaty objectives.<sup>48</sup> Similar gender provisions could also be found in many other ITAs, such as

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<sup>46</sup> WTO, *supra* n. 15.

<sup>47</sup> AfCFTA, Preamble.

<sup>48</sup> AfCFTA, Art. 3(e).



CPTPP,<sup>49</sup> the United States–Mexico–Canada Agreement (USMCA),<sup>50</sup> and the Netherlands Model Investment Agreement of 2019 (Netherlands MIA).<sup>51</sup>

Another subtype underscores states' commitment to gender equality via reference to gender-related declarations and political commitments. A typical example of such ITA is the Comprehensive Economic and Trade Agreement (CETA), which reaffirms the contracting parties' several international commitments, including the 2030 Agenda for Sustainable Development, the SDGs and the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) to underscore the parties' dedication to gender equality in the framework of CETA.<sup>52</sup>

Generally, declaratory gender provisions have weak normativity, making them difficult to be enforced in practice. Yet, their potential role in promoting gender equality in the ITA framework should not be ignored. According to Article 31 (1) of the Vienna Convention on the Law of Treaties (VCLT), declarative gender provisions in treaty preambles could be helpful for ascertaining the purpose and objective of the underlying ITAs in treaty interpretation. Thus, these provisions could help ascertain binding gender obligations of states. In addition, under Article 18 and Article 60 of VCLT, breaching treaty provisions that are essential to achieving the treaty's purpose may lead to termination or suspension of the treaty and incur liability on the breaching state. Thus, these provisions could also play a helpful role in establishing treaty breach and legal liability of states.

### 3.2 ASPIRATIONAL GENDER PROVISIONS

Aspirational gender provisions usually refer to those that embody non-binding or non-mandatory commitments regarding gender equality. These provisions aim at promoting gender equality through ITAs while preserving necessary flexibility and space for states to develop and implement gender equality policies.

A distinct feature of aspirational gender provisions lies in their best-effort nature, as they typically use such terms as 'strive to', 'where possible' or 'best endeavour' in formulating gender commitments. For instance, Chile–Uruguay FTA, the first FTA to include a standalone gender chapter, provides that contracting states shall 'make all possible efforts' through dialogue, consultations and cooperation to resolve matters relating to the interpretation and application of the Chapter.<sup>53</sup> Similar wordings are also used in some other FTAs with a gender chapter, such as Chile–Argentina FTA, Canada–Chile FTA and Canada–Israel

<sup>49</sup> CPTPP, Art. 23.4.

<sup>50</sup> USMCA, Preamble.

<sup>51</sup> Netherlands MIA, Preamble.

<sup>52</sup> CETA, Recommendation of the CETA Joint Committee on Trade and Gender.

<sup>53</sup> Chile–Uruguay FTA, Art. 14.5.

FTA.<sup>54</sup> Due to their best-effort nature, aspirational gender provisions are often weak in enforceability, and the enforcement thereof relies heavily on a ‘due diligence’ obligation of states, without a guarantee for fulfilment.<sup>55</sup>

Another main feature of aspirational gender provisions is the vagueness in content, as they often cover a broad range of gender commitments without clearly mentioning precise implementation instruments and desired outcomes.<sup>56</sup> For instance, Article 6.3 of the Netherlands MIA recognizes ‘the important contribution of women to economic growth’, and affirms the willingness to cooperate in promoting ‘equal opportunities and participation of women and men in the economy’.<sup>57</sup> Similarly, Canada–Chile FTA also commits to ‘developing programs to encourage women’s participation ... advancing leadership and developing women’s networks, sharing methods and procedures for the collection of sex-disaggregated data’.<sup>58</sup> As can be seen, while these provisions clearly demonstrate the contracting states’ willingness to promote gender equality, they appear general in language and rarely provide implementation arrangements or evaluation standards for gender commitments. While such vagueness allows states broad discretion in implementing gender provisions, it greatly contributes to the weak enforceability of these provisions.

### 3.3 OBLIGATORY GENDER PROVISIONS

Different from the above two types of gender provisions, obligatory gender provisions impose specific legal obligations on states in relation to gender equality. Typical such provisions could be found in some recent ITAs. For instance, in AfCFTA Protocol on the Free Movement of Persons, Right of Residence and Right of Establishment (AfCFTA Protocol), it is explicitly provided that Member States ‘shall not discriminate against nationals of another Member State entering, residing or established in their territory, on the basis of their ... sex ... as provided by Article 2 of the African Charter of Human and Peoples Rights’.<sup>59</sup> Given such affirmative ban on gender discrimination, it has been hailed that ‘this legally binding undertaking stands out since no other trade agreement or side-agreement

<sup>54</sup> Chile–Argentina FTA, Ch. 15; Canada–Chile FTA, Arts N bis-01 and bis-02, and Canada–Israel FTA, Ch. 13; Maya Sophie Cohen, *The Pink Trojan Horse: Inserting Gender Issues into free Trade Agreements*, 52(2) Int’l & Pub. Aff. 75, 86 (2021), doi: 10.11648/j.ipa.20210502.15.

<sup>55</sup> Virginie Barral, *Sustainable Development In International Law: Nature and Operation of Evolutive Legal Norm*, 23(2) Eur. J. Int’l. L. 377, 390 (2012), doi: 10.1093/ejil/chs016.

<sup>56</sup> WTO, *supra* n. 20, at 3.

<sup>57</sup> Netherlands MIA, Art. 6.3.

<sup>58</sup> Canada–Chile FTA, Art. N bis-03.

<sup>59</sup> AfCFTA Protocol, Art. 4.

prohibits discrimination based on sex for the free movement of persons in such explicit terms'.<sup>60</sup>

A major portion of existing obligatory gender provisions are found in IIAs. They aim at establishing linkage between states' gender commitments to the core obligations of investment protection. In some EU IIAs, for example, gender-based discrimination could amount to a breach of fair and equitable treatment (FET) and consequently incur state responsibility. In this connection, the investment chapter of CETA explicitly states that 'a Party breaches the obligation of FET if a measure ... constitutes targeted discrimination on ... gender'.<sup>61</sup> This approach is also adopted in some other IIAs, such as EU-Vietnam IIA,<sup>62</sup> and the Netherlands MIA.<sup>63</sup> As an FET clause is contained in almost all IIAs and is frequently invoked in ISDS, treating breach of gender provisions as violation of FET potentially enhances the enforceability of gender provisions through ISDS.

India seems to take a slightly different approach. Without mentioning in the FET clause, the 2015 Indian Model Bilateral Investment Treaty (BIT) provides that gender-based discrimination violates customary international law.<sup>64</sup> Similar wording may also be found in some other Indian IIAs, such as Brazil-India Investment Cooperation and Facilitation Treaty,<sup>65</sup> India-Belarus BIT,<sup>66</sup> and India-Kyrgyzstan BIT.<sup>67</sup> It has been opined that such wording amounts to introducing the minimum treatment standard (MTS) and clarifying its normative content without a reference to FET, since MTS is deemed as a customary international law rule for investment protection.<sup>68</sup>

Up to the present, ITAs incorporating obligatory gender provisions remain limited in number, and there has been no reported dispute in which these gender provisions have been successfully invoked and applied by the adjudicators. Thus, it remains to be observed whether and how such provisions could play a helpful role in achieving their designed objective of defending gender equality.

<sup>60</sup> Laperle-Forget, *supra* n. 22.

<sup>61</sup> CETA, Art. 8.10, para. 2.

<sup>62</sup> EU-VietNam IIA, Art. 2.5(2)(d).

<sup>63</sup> Netherlands MIA, Art. 9(2).

<sup>64</sup> India Model BIT 2015, Art. 3.1.

<sup>65</sup> Brazil-India ICFT, Art. 4.1(c).

<sup>66</sup> India-Belarus IIA, Art. 3.1(iii).

<sup>67</sup> India-Kyrgyzstan IIA, Art. 3.1(iii).

<sup>68</sup> Prabhash Ranjan & Pushkar Anand, *The 2016 Model Bilateral Investment Treaty: A Critical Deconstruction*, 38(1) Nw. J. Int'l L. & Bus. 1, 1 (2017).

### 3.4 EXCEPTIVE GENDER PROVISIONS

Exceptive gender provisions, or gender exception, similar to other types of exceptions in ITAs, allow the contracting states to take regulatory measures for defending or achieving gender equality that are otherwise inconsistent with their treaty obligations under the ITAs.<sup>69</sup>

In general, exceptive gender provisions could take the form of reservation and exception. Reservations refer to the situation of ‘non-application of provisions’, where the contracting states of an ITA are exempted from the obligations under certain ITA provisions; whereas exceptions refer to the situation of ‘non-liable for violation’, where the contracting states of an ITA are exempted from the liability for taking measures that are otherwise in violation of the ITA. Despite their subtle difference, the two terms are often used without clear distinction in ITAs.<sup>70</sup>

Many ITAs contain reservations that allow non-application of specific obligations. In a sense, incorporation of a gender reservation in FTAs seems to have become a routine practice of US treaty making, and such reservation could be found in a number of US FTAs, especially those concluded with Latin American states, such as US-Colombia FTA,<sup>71</sup> US-Dominican Republic and Central America FTA,<sup>72</sup> US-Panama FTA,<sup>73</sup> US-Peru FTA,<sup>74</sup> and US-Morocco FTA.<sup>75</sup> For instance, according to the gender reservation in US-Chile FTA, the government procurement chapter of this FTA ‘shall not apply to preferences or restrictions associated with programs administered by entities that promote the development of distressed areas and businesses owned by minorities, disabled veterans, and women’.<sup>76</sup>

In addition to explicit gender reservations as mentioned above, many ITAs include reservations related to non-conforming measures that target indigenous peoples, minorities, vulnerable groups, or those of social or economic disadvantages. As women are often considered part of these groups, such reservations indirectly cover gender commitments.<sup>77</sup> For example, in Japan-Argentina BIT, Japan reserves the right to ‘adopt or maintain any measure relating to investment ... in social services’ with respect to national treatment and most-favoured-

<sup>69</sup> Manjiao Chi, *Sustainable Development Provisions in Investment Treaties* 25 (2018), <https://www.unescap.org/sites/default/files/Sustainable%20Development%20Provisions%20in%20Investment%20Treaties.pdf> (accessed 10 Jul. 2024).

<sup>70</sup> See e.g., CETA, Art. 8.15.

<sup>71</sup> US-Colombia FTA, Annex 9.1, at 9–29.

<sup>72</sup> US-Dominican Republic and Central America FTA, Annex 9.1.2(b)(i), at Annex 9.1.2(b)(i)-30.

<sup>73</sup> US-Panama FTA, Annex 9.1, at Annex 9.1–12.

<sup>74</sup> US-Peru FTA, Annex 9.1, at 9–29.

<sup>75</sup> US-Morocco FTA, Annex 9-A-1, at 9–33.

<sup>76</sup> US-Chile FTA, Annex 9.1, at 9–30.

<sup>77</sup> Monteiro, *supra* n. 10, at 31.

nation treatment<sup>78</sup>; Argentina reserves the right to ‘adopt or maintain any measure to grant rights or preference to indigenous peoples, minorities, vulnerable groups or groups at a social or economic disadvantage’ with respect to national treatment.<sup>79</sup>

It should be noted that there exists a close link between exceptive provisions in ITAs and Article XX of the General Agreement on Trade and Tariffs (GATT), namely the clause of general exceptions. Some ITAs explicitly incorporate GATT Article XX as a part of treaty text. For example, CETA provides that ‘Article XX of the GATT 1994 is incorporated into and made part of this Agreement’.<sup>80</sup> Some ITAs contain an exceptive provision that is textually and structurally similar to GATT Article XX, which is often entitled as ‘general exceptions’ as well, such as USMCA,<sup>81</sup> and the Regional Comprehensive Economic Partnership (RCEP).<sup>82</sup> GATT-style exceptive provisions do not explicitly address gender issues, but their broad subject matter coverage leaves space for treaty interpretation to encompass gender considerations.<sup>83</sup>

Exceptive gender provisions are binding on states, and can often be enforced through dispute settlement proceedings,<sup>84</sup> thus having strong enforceability compared with other types of gender provisions in ITAs. However, it should also be noted these provisions have limits as well. First, these provisions serve primarily as a balancing paradigm between states’ right to regulate and obligation to promote gender equality. They normally do not create affirmative gender obligations on states, but are ‘defensive’ in nature, as they can only be invoked by states as a defence for justifying their ITA-inconsistent measures for promoting and defending gender equality, rather than as a basis for proactive gender measures.<sup>85</sup> Second, these provisions could constitute a form of trade protective measures if misused.<sup>86</sup> Indeed, it has been observed that states are cautious about invoking GATT Article XX exceptions, because these provisions could be used to enact rules and regulations that obstruct trade and investment.<sup>87</sup> Third, as these provisions operate in a similar way to GATT Article XX, they also have a high threshold to be

<sup>78</sup> Japan–Argentina BIT, the Schedule of Japan, Clause 10.

<sup>79</sup> Japan–Argentina BIT, the Schedule of the Argentine Republic, Clause 4.

<sup>80</sup> CETA, Art. 28.3.

<sup>81</sup> USMCA, Art. 32.1.

<sup>82</sup> RCEP, Art. 17.12.

<sup>83</sup> International Trade Centre, *Mainstreaming Gender in Free Trade Agreements*, SIVC–20–31.E 8 (Jul. 2020), <https://intracen.org/file/itcmainstreamgenderfta20200707webpdf> (accessed 10 Jul. 2024).

<sup>84</sup> Chi, *supra* n. 69, at 25.

<sup>85</sup> Suzanne A. Spears, *The Quest for Policy Space in a New Generation of International Investment Agreements*, 13(4) J. Int’l Econ. L. 1037, 1059 (2010), doi: 10.1093/jiel/jgq048.

<sup>86</sup> Amrita Bahri & Daria Boklan, *Not Just Sea Turtles, Let’s Protect Women Too: Invoking Public Morality Exception or Negotiating a New Gender Exception in Trade Agreements?*, 33(1) Eur. J. Int’l. L. 243, 273 (2022), doi: 10.1093/ejil/chac003.

<sup>87</sup> *Ibid.*

successfully invoked.<sup>88</sup> In light of this, states should not be surprised if they encounter difficulty when invoking these provisions. Up to the present, there is no reported trade and investment disputes in which exceptive gender provisions in ITAs have been invoked and applied.

#### 4 RECOMMENDATIONS FOR ENHANCING GENDER-RESPONSIVENESS OF ITAs

As discussed, while incorporation of gender provisions in ITAs help make ITAs gender-responsive, these provisions could only play a limited role in effectively addressing gender concerns in international trade governance due to their respective insufficiencies. For such reason, it has been argued that some gender provisions in ITAs are ‘just about being nice to women’,<sup>89</sup> and that women’s disadvantage in economic activity may persist under the guise of sustainable development.<sup>90</sup> Thus, though gender provisions in ITAs keep increasing, it remains needed to enhance trade-gender alignment of ITAs, so that ITAs could be more effective in playing the dual roles of achieving gender equality and facilitating international trade. Essentially, enhancement of trade-gender alignment of ITAs signals a departure from the traditional ‘gender-neutral paradigm’ of ITAs.<sup>91</sup> Such a paradigm shift could be quite challenging to many states in ITA-making and trade rulemaking in a broader sense. In this Part, a few policy recommendations are proposed to enhance gender-responsiveness of ITAs.

##### 4.1 STRENGTHENING THE NORMATIVITY OF GENDER PROVISIONS IN ITAs

As mentioned, a main feature of gender provisions in ITAs is that they appear general and vague, and lack sufficient normativity. Thus, strengthening the normativity of gender provisions in ITAs is needed. Generally speaking, clearly defined provisions with specific and affirmative gender obligations could provide operable guidance for states in ascertaining gender commitments and assessing the consequence of the breach of these commitments. This helps states in identifying a suitable way for implementing gender provisions in ITAs.

<sup>88</sup> See e.g., Manjiao Chi, ‘Exhaustible Natural Resource’ in *WTO Law: GATT Article XX (g) Disputes and Their Implications*, 48(5) *J. World Trade* 939, 963 (2014), doi: 10.54648/TRAD2014032.

<sup>89</sup> Valerie Hughes, *Gender Chapters in Trade Agreements: Nice Rhetoric or Sound Policy? Mainstreaming Gender in Trade Agreements*, Centre for International Governance Innovation (9 Oct. 2019), <https://www.cigionline.org/articles/gender-chapters-trade-agreements-nice-rhetoric-or-sound-policy/> (accessed 10 Jul. 2024).

<sup>90</sup> Kuhlmann, *supra* n. 18; Gammage & Momodu, *supra* n. 30.

<sup>91</sup> Bahri, *supra* n. 4, at 517–527.

One possible way to enhance the normativity of gender provisions in ITAs is to make gender commitments embodied in these provisions more specific in content and more affirmative in the nature. For instance, since many existing exceptive provisions in ITAs only implicitly touch upon gender issues, it is advisable for states to consider designing and incorporating gender-specific exceptions in ITAs. States may also consider incorporating corporate social responsibility (CSR) provisions in ITAs, since CSR provisions explicitly promote gender equality and obligate foreign investors to comply with the host state's domestic gender regulations.<sup>92</sup>

Another possible way is for ITAs to explicitly refer to one or more gender-related international instruments that contain concrete gender commitments. For example, rather than merely expressing the importance of gender equality and elimination of discrimination against women, ITAs could refer to relevant international treaties and recommendations of international organizations to establish broader and more specific gender standards. In this respect, Chile-Argentina FTA refers to the conventions of the International Labour Organization (ILO) to provide benchmarks for key terms relating to gender commitments, such as 'equal remuneration', 'equal opportunities and treatment' and 'workers with family responsibility'.<sup>93</sup> Such reference is helpful for states in importing external standards and ascertaining gender obligations that are entailed by the FTA gender provisions. Similarly, in Canada-Chile FTA, the contracting states also make the process of achieving gender equality more measurable by invoking SDG5 and CEDAW.<sup>94</sup>

In a sense, establishing affirmative social obligations in ITAs through referring to external standards or benchmarks has become a useful ITA-making technique. Given the sensitivity of aligning gender equality and other social goals with trade, states sometimes are reluctant to negotiate ITAs that carry affirmative social obligations. It could particularly be the case in states where negotiating trade agreements and treaties on social goals, such as human rights treaties and environmental treaties are strictly mandated to different government departments. In such a situation, it is difficult to negotiate ITAs with obligatory social provisions if top-level coordination among different government departments is insufficient, whereas it could be more practical to negotiate ITAs that link with external sources of social obligations, especially those that are recognized as a part of customary international law or which states have already subscribed to under other treaties.

In this regard, China could be an example. Despite that China has a tradition of opposing linking trade with human rights and seeing human rights as a sovereign

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<sup>92</sup> UNCTAD, *World Investment Report 2015: Reforming International Investment Governance*, Doc. No. UNCTAD/WIR/2015, 163 [https://unctad.org/system/files/official-document/wir2015\\_en.pdf](https://unctad.org/system/files/official-document/wir2015_en.pdf) (accessed 10 Jul. 2024).

<sup>93</sup> Chile-Argentina FTA, Art. 15.2.

<sup>94</sup> Canada-Chile FTA, Arts N bis-01 and bis-02.



issue and internal affair,<sup>95</sup> China and the EU agreed to incorporate a standalone chapter on investment and sustainable development in the text of the historical Comprehensive Agreement on Investment (CAI).<sup>96</sup> Notably, this chapter not only incorporates a clause on CSR,<sup>97</sup> but it also explicitly refers to the obligatory labour standards enshrined in the fundamental ILO Conventions, providing that both parties ‘shall respect, promote and realize ... the principles concerning the fundamental rights which are the subject of the fundamental ILO Conventions’.<sup>98</sup> Furthermore, China has even ratified two more fundamental ILO Conventions on forced labour after the conclusion of the negotiation of CAI text,<sup>99</sup> which is believed by some as an attempt to speed up the signing of this historical agreement with the EU.<sup>100</sup> On the part of China, the conclusion of CAI text is unprecedented. It is not only the very first ITA of China that contains a standalone chapter on sustainable development covering a wide range of social obligations, but more importantly, it could also signal the beginning of a new era of ITA-making for China, as China’s future ITAs might be ‘modernized’ through incorporating (external) obligatory social provisions, including those on gender equality.

#### 4.2 ESTABLISHING A COMPLIANCE MECHANISM FOR GENDER PROVISIONS IN ITAs

Nowadays, it is common for states to establish an ITA-based compliance mechanism for the implementation and enforcement of various types of social provisions contained in the ITA, such a labour provisions and environment provisions. For instance, a recent study on the evolution of labour provisions in ITAs shows that an growing number of ITAs, especially those concluded by developed states, have incorporated a compliance mechanism to oversee and ensure the implementation of the labour provisions in the ITAs.<sup>101</sup>

For the same reason, it is advisable to consider setting up an ITA-based compliance mechanism for gender provisions in ITAs, so that the full potential of these provisions could be realized. Such a mechanism could be particularly

<sup>95</sup> See Daniel Chow, *China and Human Rights in International Trade*, 9(1) S. Carolina J. Int’l L. & Bus. 13, 31 (2012).

<sup>96</sup> China-EU CAI, Ch. IV.

<sup>97</sup> China-EU CAI, Art. 4, subs. 3, Ch. IV.

<sup>98</sup> China-EU CAI, Art. 2, subs. 1, Ch. IV.

<sup>99</sup> Permanent Representative of the People’s Republic of China to the United Nations Office at Geneva and other International Organizations in Switzerland, *China Deposits the Instruments of Ratification of Two ILO Forced Labor Conventions* (12 Aug. 2022), [http://geneva.china-mission.gov.cn/eng/dbtyw/lgsww/202208/t20220812\\_10742543.htm](http://geneva.china-mission.gov.cn/eng/dbtyw/lgsww/202208/t20220812_10742543.htm) (accessed 10 Jul. 2024).

<sup>100</sup> See Caixin, *China’s Pledge on Forced Labor Saved Investment Deal: EU Envoy* (20 Jan. 2021), <https://asia.nikkei.com/Spotlight/Caixin/China-s-pledge-on-forced-labor-saved-investment-deal-EU-envoy> (accessed 10 Jul. 2024).

<sup>101</sup> See generally, Gabrielle Marceau, Rebecca Walker & Andreas Oeschger, *The Evolution of Labor Provisions in Regional Trade Agreements*, 57(3) J. World Trade 361, at 361–410 (2023), doi: 10.54648/TRAD2023015.

needed as many gender provisions in ITAs are vague in content and that states have very different views on and approaches to gender issues in domestic policy and law. It has been argued that absent such a mechanism, no direct consequence or liability will be incurred if a state fails in fulfilling its gender commitments in ITAs.<sup>102</sup> Given the sensibility of gender issues to many states, such a compliance mechanism should be understood in the broad sense, meaning that it could take different forms with the states' social, economic, cultural and legal situation being taken in to account, and that it does not have to be compulsory in nature or necessitate external adjudicators other than the representatives from the ITA contracting states. Here, a few suggestions are made.

First, it is advisable to establish an ITA-based supervisory mechanism to oversee the implementation of gender commitments in ITAs. In this respect, the Trade and Gender Committee under Canada-Chile FTA could be an example. This Committee is composed of representatives from each party who are responsible for trade and gender matters, and aims at promoting the implementation of gender commitments under the FTA. Its responsibilities mainly include facilitating the exchange of information, organizing cooperation activities and reviewing the implementation of commitments.<sup>103</sup> In addition, to secure adequate financial resources for the effective functioning of such a mechanism, it has also been suggested that a financial support mechanism should also be set up.<sup>104</sup>

An ITA-based supervisory mechanism could play a conducive role in effectively and promptly addressing common concerns of the contracting states, which could cover gender concerns or other types of social concerns. In this respect, the Interagency Labour Committee for Monitoring and Enforcement (Labour Committee) under USMCA could be an example. Though the Labour Committee is not designed for addressing gender concerns, it could serve as a helpful reference to states, since both gender issues and labour issues fall under the category of social and/or sustainable development provision or chapter in many ITAs, and both appear quite sensitive and challenging to states in international trade governance. The Labour Committee is established by the contracting states according to the USMCA Implementation Act.<sup>105</sup> Its major purposes include, inter alia, monitoring the implementation and maintenance of USMCA labour obligations and Mexico's historic labour reforms.<sup>106</sup> Notably, it has the authority of coordinating various actors' activities in monitoring implementation of and

<sup>102</sup> Bahri, *supra* n. 4, at 575.

<sup>103</sup> See e.g., Canada-Chile FTA, Art. N bis-04; EU-Chile FTA, Art. 27.2; EU-New Zealand FTA, Art. 19.4.5.

<sup>104</sup> International Trade Centre, *supra* n. 83, at 19.

<sup>105</sup> See USMCA Implementation Act, s. 711.

<sup>106</sup> US Department of Labor, *Labor Rights and the United States-Mexico-Canada Agreement (USMCA)*, <https://www.dol.gov/agencies/ilab/our-work/trade/labor-rights-usmca> (accessed 10 Jul. 2024).

compliance with labour obligations and assessing Mexico's compliance to its obligations.<sup>107</sup> While there is not much publicly available information with regard to how the Labour Committee actually carries out its 'monitoring' and 'assessing' work, it may well be imagined that the pressure brought by the Labour Committee could be a driving force to encourage Mexico in effectively implementing its labour obligations under USMCA.

Second, an ITA-based consultation or communication mechanism is also advisable, which could help engage all gender stakeholders in addition to the contracting states in designing and implementing gender provisions in the ITA. A helpful example of such mechanism is the civil society forum for dialogues between gender stakeholders and states established under some recent EU ITAs.<sup>108</sup> This mechanism, through engaging both states and non-state stakeholders of gender issues, is expected to help enhance the gender inclusiveness of ITAs.

Third, an ITA-based mechanism for settling trade-related gender disputes may also be considered. As some gender provisions in ITAs impose affirmative obligations on states, they may possess sufficient normativity and can be enforced through a dispute settlement mechanism. Two major models have been adopted by states so far, which could serve as references.

The first model is consensual dispute settlement mechanism for gender disputes. Admittedly, from an international law perspective, states can almost always choose to submit any dispute to an external adjudicative mechanism or institution for settlement, as far as they have mutual consent. That said, however, it still makes sense to consider setting up an ITA-based consensual dispute settlement mechanism through clear treaty language, as this could show that the contracting states have specifically contemplated and prepared for settling gender disputes through such a mechanism. AfCFTA Protocol is one of the few such ITAs. Under this ITA, gender disputes shall first be settled 'by mutual consent between states concerned'; and in the event of failure of such settlement, the disputes may be submitted to an arbitration panel for settlement 'by mutual consent', or be referred to the African Court of Justice, Human Rights and Peoples' Rights.<sup>109</sup>

The second model, in contrast, is compulsory dispute settlement mechanism, which could be further divided into two subtypes, namely 'specialized' and 'common' mechanisms. On the one hand, a specialized mechanism refers to one that caters exclusively for settling gender disputes between ITA contracting states. While no such specialized mechanism has been established in ITAs up to the present, the Labour Committee under USMCA and the trade and sustainable

<sup>107</sup> USMCA Implementation Act, ss 711–719.

<sup>108</sup> See e.g., EU-Singapore FTA, Art. 12.15 (4); EU-Korea FTA, Art. 13.13; EU-Vietnam FTA, Art. 12.5 (4); EU-Japan FTA, Art. 16.16.

<sup>109</sup> AfCFTA Protocol, Art. 31.

development expert panel mechanism (TSD mechanism) under some EU ITAs could shed helpful lights to the design of such a specialized mechanism.

In addition to the supervisory function, the Labour Committee under USMCA also has the authority to receive and review petitions under Labour Chapter and Rapid Response Labour Mechanism, and provides recommendations for dispute settlement and enforcement actions to the Trade Representative.<sup>110</sup> Similarly, the TSD mechanism under EU ITAs is designed to cater exclusively for trade disputes relating to sustainable development.<sup>111</sup> Notably, both mechanisms have compulsory jurisdiction over covered disputes, and both mechanisms have been ‘tested’ in practice. Up to the present, the Labour Committee has dealt with seventeen disputes,<sup>112</sup> while the TSD mechanism has been resorted to in the case concerning Korea labour commitments.<sup>113</sup> In 2018, the EU submitted a dispute concerning against Korea to the TSD mechanism in accordance with EU-Korea FTA, and the expert panel made a decision in 2021.<sup>114</sup> The expert panel found that Korea had acted inconsistency with several FTA standards and made several recommendations to Korea for bringing its national laws into conformity with the FTA standards.<sup>115</sup> The EU seemed satisfied with the TSD mechanism, as EU Commissioner for Trade has announced that ‘the panel of experts process led to concrete actions by Korea’.<sup>116</sup>

It is true that the Labour Committee and the TSD mechanism are respectively tailored for labour issues and the broader sustainable development issues, but not for gender issues. However, these two mechanisms could shed valuable lights to the design of a specialized ITA-based compulsory dispute settlement mechanism for gender issues. First, these two mechanisms are helpful reference and inspiration for states. In light of the successful operation of the Labour Committee and the TSD mechanism, one has reason to expect that a similarly constructed mechanism for gender issues may also be helpful and functional. Second, these two

<sup>110</sup> See Chad P. Bown & Kathleen Claussen, *The Rapid Response Labor Mechanism of the US-Mexico-Canada Agreement*, PIIE Working Paper 23–29, at 14 (2023), <https://www.piie.com/publications/working-papers/rapid-response-labor-mechanism-us-mexico-canada-agreement> (accessed 10 Jul. 2024).

<sup>111</sup> European Commission, *Opinion of the European Economic and Social Committee on Trade and sustainable development chapters (TSD) in EU Free Trade Agreements (FTA)*, 2018/C 227/04 (28 Jun. 2018), <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1531384687288&uri=CELEX%3A52017IE5323> (accessed 10 Jul. 2024).

<sup>112</sup> US Department of Labor, *USMCA Cases*, <https://www.dol.gov/agencies/ilab/our-work/trade/labor-rights-usmca-cases> (accessed 10 Jul. 2024).

<sup>113</sup> European Commission, *Korea Labor Commitments*, [https://policy.trade.ec.europa.eu/enforcement-and-protection/dispute-settlement/bilateral-disputes/korea-labour-commitments\\_en](https://policy.trade.ec.europa.eu/enforcement-and-protection/dispute-settlement/bilateral-disputes/korea-labour-commitments_en) (accessed 10 Jul. 2024).

<sup>114</sup> European Commission, *Panel of Experts Confirms the Republic of Korea is in Breach of Labor Commitments under Our Trade Agreement* (25 Jan. 2021), [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_21\\_203](https://ec.europa.eu/commission/presscorner/detail/en/ip_21_203) (accessed 10 Jul. 2024).

<sup>115</sup> European Commission, *Report of the Panel of Experts*, at 78–79 [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_21\\_203](https://ec.europa.eu/commission/presscorner/detail/en/ip_21_203) (accessed 10 Jul. 2024).

<sup>116</sup> European Commission, *supra* n. 113.

mechanisms may actually have jurisdiction for settling at least some gender disputes given that, as discussed, gender issues may overlap with labour issues, such as equal pay for men and women, and that gender issues may fall under the category of sustainable development under EU ITAs.

On the other hand, a common mechanism essentially refers to one that deals with all or several types of trade disputes covered by an ITA, without drawing a clear line between 'conventional' trade disputes, such as those relating to subsidies or tariffs, and 'specialized' trade disputes, such as those relating to gender equality, labour rights and sustainable development. This model is mainly adopted in some US ITAs.<sup>117</sup> For instance, under CPTPP, whose predecessor has been substantively shaped by the US, labour disputes should first be solved through 'labor consultations'; if unsuccessful, the disputes may be submitted to the 'common' dispute settlement mechanism under CPTPP and subject to Chapter 28 (Dispute Settlement).<sup>118</sup> According to Chapter 28, sanctions such as compensation, suspension of benefits, and payment of fines may be used as temporary measures until the settlement of the dispute.<sup>119</sup> As can be seen, compared with the specialized TSD mechanism under EU ITAs, such a common mechanism enjoys much broader authority in settling gender disputes and competence for issuing sanctions due to its compulsory jurisdiction. This also implies that settling gender disputes through a common mechanism could produce profound spillover effects on the contracting states.

Compared with supervisory and consultation mechanisms, dispute settlement mechanism, particularly a compulsory one, could be a sensitive approach for enforcing ITA gender provisions. Aside from the potential spillover effects, compulsory dispute settlement mechanism may be seen as a top-down approach to reversing social change, while the fundamental solution to gender inequality lies in changing local laws, cultures, moral beliefs and stereotypes.<sup>120</sup> Besides, the functioning of such a mechanism relies on external adjudicators that are often supposed to be neutral from ITA contracting states. Clearly, as enforcement of gender commitments could lead to profound social change and necessitate long-term cooperation among different stakeholders, it is highly necessary for states to take into account their social, economic, cultural and legal situation when designing and operating such a mechanism.

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<sup>117</sup> See e.g., US-Korean FTA, Arts 19.7 and 22.13; US-Chile FTA, Arts 17.7 a and 21.16; USMCA, Arts 23.17, 31.18 and 31.19.

<sup>118</sup> CPTPP, Art. 19.15 (12).

<sup>119</sup> CPTPP, Art. 28.20 (1)(2)(7) and (15).

<sup>120</sup> International Trade Centre, *supra* n. 83, at 19.

#### 4.3 HARMONIZING ITA GENDER PROVISIONS AND NATIONAL GENDER LAWS

While ITAs operate on a dualistic basis, tending to affect states rather than private actors directly,<sup>121</sup> private actors, such as individuals and companies in international trade and investment activities often find their responsibility to promote gender equality coming more from the global value chain or national laws of the host states, rather than from ITAs.<sup>122</sup> Such a situation implies that both states and private actors should be engaged for achieving gender equality, which impliedly calls for harmonization of ITA gender provisions and national gender laws to create positive synergies.

Typically, ITA-domestic law harmonization could be achieved via incorporating a provision in ITAs that require states to ensure their domestic gender laws to conform to international gender principles and standards.<sup>123</sup> For instance, EU-Chile FTA, in its standalone chapter on gender equality, not only includes a provision of ‘not lowering standard’ that requires the contracting parties not to encourage trade and investment by waiving or derogating from gender laws or by deliberately failing to effectively enforce such laws,<sup>124</sup> but also obligates the contracting parties to ‘strive to improve domestic law and policies’ in relation to gender equality.<sup>125</sup> Though this provision is best-effort in nature, it could, if properly implemented, serve as both an obligation and an incentive for the contracting parties in ensuring a certain level of gender equality in their domestic jurisdiction.

ITA-domestic law harmonization could also be achieved through requiring states to uphold and advance SDGs and implement gender laws, regulations, policies and best practices. For instance, EU-Chile FTA calls on both contracting parties to ‘strive to ensure that its relevant law and policy ... in accordance with their international commitments’.<sup>126</sup> This provision is only best-effort in nature, but it creates an ‘ITA-domestic law-international law synergy’ that could help improve gender equality: it not only explicitly aligns domestic laws and policies with international law standards, but more importantly, since it does not strictly define the term ‘international commitments’, it is possible for this term to be interpreted to ‘import’ gender obligations under other international legal instruments.

<sup>121</sup> Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89(4) Am. J. Int’l L. 695, 705 and 721 (1995), doi: 10.2307/2203933; Gaetano Arangio-Ruiz, *International Law and Interindividual Law*, in *New Perspectives On The Divide between National and International Law* 15–51 (Janne E. Nijman & André Nollkaemper eds, Oxford: Oxford University Press 2007).

<sup>122</sup> Mirela Barbu et al., *The Trade-Labor Nexus: Global Value Chains and Labor Provisions in European Union Free Trade Agreements*, 9(3) Glob. Lab. J. 258, 280 (2018), doi: 10.15173/glj.v9i3.3354.

<sup>123</sup> See Marco Bronckers & Giovanni Gruni, *Retooling the Sustainability Standards in EU Free Trade Agreements*, 24(1) J. Int’l Econ. L. 25, 35 (2021), doi: 10.1093/jiel/jgab007.

<sup>124</sup> EU-Chile FTA, Arts 27.3.7 and 27.3.9.

<sup>125</sup> EU-Chile FTA, Art. 27.3.2.

<sup>126</sup> EU-Chile FTA, Art. 27.3.1.

It should be noted that harmonization of ITA-domestic law could be a delicate and complicated legal and policy issue. Because states with different historical and cultural backgrounds often have different views and approaches to gender issues,<sup>127</sup> they may have different national gender laws and policies and subscribe to different international gender obligations. Therefore, the achievement of such harmonization calls for not only contextually tailored gender provisions in ITAs and collaborated enforcement of domestic gender laws, but also sufficient attention paid to the unique domestic contexts and legal systems of the contracting states.<sup>128</sup>

## 5 CONCLUSION

Gender equality has emerged as a major objective for international trade governance. Strengthening trade-gender alignment of ITAs is an important way to make gender-responsive ITAs, and in the broader sense, to achieve inclusive trade. A systematic analysis of the four major types of gender provisions in ITAs mainly from a normative perspective shows that, despite the incorporation of an increasing number of gender provisions, ITAs remain insufficiently gender-responsive in general.

Admittedly, given the sensitivity and complexity of gender issues, it would be unrealistic and undesirable to transform ITAs into a major discourse for addressing gender concerns. However, as ITAs play a central role in international trade governance, it remains necessary to make ITAs more gender-responsive through enhancing trade-gender alignment. Such a need is especially outstanding in light of the growing consensus that international trade should not only aim at generating economic benefits, but more importantly, it is also expected to play a promotive role in advancing and achieving gender equality and, more broadly, sustainable development.

Given the sensitivity and complexity of gender issues, states have diverse policy goals and approaches to gender issues. While recognizing that there is no fixed way to make gender-responsive ITAs and no fixed standard to assess these ITAs, it remains a sensible option for states to pay more attention to gender equality in ITA-making. States should consider incorporating more gender provisions in ITAs, enhancing their normativity by using more explicit treaty language or referring to external international law standards, strengthening their enforceability via establishing a suitable compliance mechanism, and harmonizing national gender laws and ITA gender provisions to create synergies for pursuing gender equality in international trade governance.

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<sup>127</sup> See Cohen, *supra* n. 54; Gammage & Momodu, *supra* n. 30, at 31–39; African Trade Policy Centre, *Advancing Gender-Equitable Outcomes in African Continental Free Trade Area (AfCFTA) Implementation*, White Paper of United Nations Economic Commission for Africa (May 2021), [https://www.uneca.org/sites/default/files/keymessageanddocuments/22May\\_Final\\_WhitePaper\\_Advancing\\_gender\\_equitable\\_outcomes.pdf](https://www.uneca.org/sites/default/files/keymessageanddocuments/22May_Final_WhitePaper_Advancing_gender_equitable_outcomes.pdf) (accessed 10 Jul. 2024).

<sup>128</sup> Cohen, *supra* n. 54.