

“The Future of Trade is Inclusive: Canada’s Approach to Globalised Free Trade”

By

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Abstract:

In response to people feeling left behind from experiencing trade-related gains, Canada has developed “inclusive” trade policies that attempt to redistribute trade-related opportunities to traditionally underrepresented groups like women, indigenous peoples, and small to medium sized enterprises (SMEs). While Canada has framed “inclusive” policies as being both socially and economically beneficial, the policies have been met with apprehension due to the impression that “inclusive” policies promote non-trade values. Despite the schism of “trade values” and “non-trade values”, the types of measures included in free trade agreements have expanded and adapted to societal and economic needs over time. Given the discontent surrounding globalized free trade, “inclusive” policies offer a path forward that could be both socially and economically more sustainable. This thesis endeavours to investigate if and how Canada’s inclusive trade policies have been adopted in the text of agreements, what impact the measures might have for expanding the categories of persons who benefit from globalized free trade, and whether inclusive policies create a tangible impact for the three target categories analysed: gender, Indigenous peoples and small to medium sized enterprises (SMEs). Specifically, this thesis examines inclusive measures within five recent trade agreements: the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP), Canada-European Comprehensive Economic and Trade Agreement (CETA), Canada-United States-Mexico Agreement (CUSMA), Canada-Chile Free Trade Agreement and Canada-Israel Free Trade Agreement. The overarching goal of this thesis is to offer a practical solution that may ameliorate the discontent surrounding globalized free trade in a socioeconomically sustainable method based on Canada’s approach to inclusive trade.

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Table of Abbreviations

CBAM	Carbon Border Adjustment Mechanism
CBTS	Cross-Border Trade in Services
CCFTA	Canada-Chile Free Trade Agreement
CIFTA	Canada-Israel Free Trade Agreement
CUSMA	Canada-United States-Mexico Agreement
CPTPP	Comprehensive and Progressive Trans-Pacific Partnership
FET	Fair and Equitable Treatment
FIPA	Foreign Investment Protection Agreement
FTA	Free Trade Agreement
GDP	Gross Domestic Product
ISDS	Investor State Dispute Settlement
LDC	Least Developed Country
LGBTQ2+	Lesbian, Gay, Bisexual, Transgender, Queer, Two Spirited
OECD	Organisation for Economic Co-operation and Development
PTA	Preferential trade agreements
SME	Small- to Medium Sized Enterprises

CHAPTER 1: INTRODUCTION

I. Background to Research

*This anxiety towards the economy and trade – the worry that our kids won't have access to the same jobs and opportunities that we have – can be addressed only if we ensure that trade is inclusive, and that everyone benefits.*¹

- Justin Trudeau, Prime Minister of Canada

The discontent surrounding inequitable outcomes associated with the distribution of gains from trade,² producing 'winners' and 'losers',³ has given rise to the question of whether we ought to rethink our priorities associated with advancing free trade. For instance, whether greater market efficiency is more important than the availability of dignified remunerative work.⁴ Whether free trade is a means to an end, or an end in and of itself.⁵ While the responses to these questions may vary, there is an undeniable phenomenon that by trading, we make certain trade-offs,⁶ making it increasingly apparent that free trade has a cost.

According to the late Clyde Summers, the social 'cost' of free trade is increased inequality within society,⁷ and shielding competitive advantages gained through

¹ Prime Minister of Canada, Address by Prime Minister Justin Trudeau to the European Parliament (Feb 16, 2017) Strasbourg, France (Available online here)

² Noriyuki Suzuki and Sabur Ghayur. "Making Globalisation Inclusive of People: A Trade Union Perspective" (2002) 41:4 The Pakistan Development Review 357-387 at p.359

³ Nicolas Lamp, "How Should We Think about the Winners and Losers from Globalization? Three Narratives and Their Implications for the Redesign of International Economic Agreements" (2019) 30 European Journal of International Law 1359–1397.

⁴ Robert E Lighthizer, "How to Make Trade Work for Workers" *Foreign Affairs* (August 2020) 78, online: <<https://www.proquest.com/docview/2415031647/abstract/C888868B40AD4F43PQ/1>>. At p.82

⁵ Dani Rodrik, "The Global Governance of Trade as if Development Really Mattered" United Nations Development Program (October 2001)

⁶ Frank J Garcia, "The Global Market and Human Rights: Trading Away the Human Rights Principle" (1999) 25 Brooklyn Journal of International Law 51, online: <<https://lawdigitalcommons.bc.edu/ljil/vol25/iss1/254>>. at p.82

⁷ Clyde Summers, "The Battle in Seattle: Free Trade, Labor Rights, and Societal Values" (2001) 22:1 University of Pennsylvania Journal of International Law 61, online: <<https://scholarship.law.upenn.edu/jil/vol22/iss1/2>>.at p.85

human rights abuses.⁸ Despite this cost, it is commonly agreed that removing barriers to trade and fostering sustainable economic development makes society better off as a whole.⁹ Over centuries, there have been numerous approaches to achieve these two objectives, however, some initiatives have had the opposite effect.¹⁰ Consequently, the fundamental problem of how to liberalize trade by removing barriers to trade and promote economic globalisation whilst simultaneously creating a system that supports sustainable development persists.

Under traditional trade values, “trade barriers” are normatively defined in economic terms as import bans, quantitative restrictions, prohibitively high tariffs, or restrictive technical requirements.¹¹ While this remains true, according to the contemporary Canadian approach, trade barriers could go beyond the likes of import quotas to potentially encompass socioeconomic barriers that disproportionately exclude or impede underrepresented groups, like women, Indigenous peoples and small to medium sized enterprises (SMEs) from parity in participation.¹²

⁸ *Ibid.* p.67

⁹ Lighthizer, *supra* note 4. At p.82; Lamp, *supra* note 3.at p.1361; Donald J Boudreaux, “Trade Has No Losers | AIER”, online: <<https://www.aier.org/article/trade-has-no-losers/>>; World Trade Organization, ‘Growth, jobs, development and better international relations: how trade and the multilateral trading system help’ Available at: <https://www.wto.org/english/thewto_e/minist_e/min99_e/english/book_e/stak_e_3.htm>; Garcia, *supra* note 6.

¹⁰ Kevin Danaher, *50 years is enough: the case against the World Bank and the International Monetary Fund* (Boston, Mass.: South End Press, 1994). at 18; Jong-Dae Park, “Assessing the Role of Foreign Aid, Donors and Recipients” in *Re-Invent Afr Dev* (Cham: Springer International Publishing, 2019) 37.at 84; Sarah Babb, *Behind the Development Banks: Washington Politics, World Poverty, and the Wealth of Nations* (Chicago, IL: University of Chicago Press, 2009). at 5

¹¹ “Agreement on Technical Barriers to Trade (‘TBT’), Article 2.2 Preparation, Adoption and Application of Technical Regulations by Central Government Bodies, online: <https://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm>.

¹² Patricia Goff, “Inclusive Trade: Justice, Innovation, or More of the Same?” (2021) 35 *Ethics Int Aff* 273–301. At p.281

Although conceiving of trade objectives in a manner that includes social values in addition to economic values has been construed as counter to the liberal trade project by scholars like Andrew Lang,¹³ 'non-trade values' are increasingly becoming integrated into trade agreements. This integration can be witnessed in numerous modern trade agreements that contain chapters featuring progressive 21st century style commitments such as those on digital trade,¹⁴ the environment,¹⁵ animal welfare,¹⁶ and gender.¹⁷ Some might perceive these modern commitments as running contrary to traditional trade values, meanwhile one could also argue that their existence is part of a natural evolution where trade agreements must reflect and take into account modern problems, especially those which have been exacerbated by or created as a consequence of inequitable economic globalisation.

¹³ Andrew T F Lang, "Reflecting on 'Linkage': Cognitive and Institutional Change in The International Trading System" (2007) 70:4 Mod Law Rev 523–549, online: <<https://onlinelibrary.wiley.com/doi/10.1111/j.1468-2230.2007.00651.x>>.at p.538

¹⁴ United Kingdom-Australia Free Trade Agreement (2021), Chapter 14 Digital Trade <<https://www.dfat.gov.au/trade/agreements/not-yet-in-force/aukfta/official-text/australia-uk-fta-chapter-14-digital-trade>>; Canada-United States-Mexico Agreement (2020), Chapter 19 Digital Trade <<https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/text-texte/19.aspx?lang=eng>> ;

¹⁵ United Kingdom-Australia Free Trade Agreement (2021), Chapter 22 Environment <<https://www.dfat.gov.au/trade/agreements/not-yet-in-force/aukfta/official-text/australia-uk-fta-chapter-22-environment>>; United Kingdom-New Zealand Free Trade Agreement (2022), Chapter 22 Environment <<https://www.mfat.govt.nz/assets/Trade-agreements/UK-NZ-FTA/Chapters/Chapter-22-Environment.pdf>> ; Canada-United States-Mexico Agreement (2020), Chapter 24 Environment <<https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/text-texte/24.aspx?lang=eng>> : Canada-Israel Free Trade Agreement (2019), Chapter 11 Trade and Environment

¹⁶ United Kingdom-Australia Free Trade Agreement (2021), Chapter 25 Animal Welfare and Anti-microbial Resistance <<https://www.dfat.gov.au/trade/agreements/not-yet-in-force/aukfta/official-text/australia-uk-fta-chapter-25-animal-welfare-and-antimicrobial-resistance>>; United Kingdom-New Zealand Free Trade Agreement (2022), Chapter 6 Animal Welfare <<https://www.mfat.govt.nz/assets/Trade-agreements/UK-NZ-FTA/Chapters/Chapter-6-Animal-Welfare.pdf>>

¹⁷ United Kingdom-Australia Free Trade Agreement (2021), Chapter 24 Trade and Gender Equality <<https://www.dfat.gov.au/trade/agreements/not-yet-in-force/aukfta/official-text/australia-uk-fta-chapter-24-trade-and-gender-equality>>; United Kingdom-New Zealand Free Trade Agreement (2022), Chapter 25 Trade and Gender Equality <<https://www.mfat.govt.nz/assets/Trade-agreements/UK-NZ-FTA/Chapters/Chapter-25-Trade-and-Gender-Equality.pdf>>

By featuring progressive commitments and measures reflecting traditionally non-trade values into free trade agreements, this integration attempts to reduce the ‘social cost’ of trade as described by Summers. This thesis examines the integration of non-trade values into binding trade agreements specifically within the context of Canada’s Inclusive approach to international trade and explores how the core tenants of Inclusive Trade could be proliferated into the multilateral order in a manner that is palatable for traditionalists and that counteracts the negative side effects of free trade.

II. Argument

The central argument within this thesis is how Inclusive Trade can be used to expand the categories of persons who benefit from globalised free trade. I advance this argument on the premise that despite the permanent nature of global inequalities, absolute poverty can still be reduced, and the overall quality of life for most of the global population can still be improved. Accomplishing this requires the re-evaluation of the central objectives of the global trading system: trade barriers and advancing economic development. Two objectives which underpin Canada’s approach to Inclusive Trade.

This will not be a debate about the merits and feasibility of ‘linkage’ in the hypothetical realm of expanding trade values at the World Trade Organisation (WTO). That debate has already been explored by Frank Garcia who illuminated several fundamental obstacles rooted in the philosophical values associated with free trade on the one hand adhering to utilitarianism, and human rights on the other hand

adhering to deontology.¹⁸ By contrast, I investigate how certain non-trade values are *already* being increasingly incorporated into trade agreements, why this is happening, and how it can continue but on a larger scale.

In furtherance of these investigative goals, I comparatively analyze Inclusive Trade measures within the text of five agreements to determine which agreements contain the most far-reaching manifestations of Inclusive Trade. Then, I argue that Inclusive Trade is aligned with the pre-existing objectives of free trade: reducing trade barriers and achieving economic development. The overarching purpose of this exercise is to create a foundation for advancing Inclusive Trade on a broader scale as a solution to the negative socioeconomic side-effects felt under or exacerbated by the current free trade regime.

The Inclusive approach acknowledges that certain groups of people have been excluded under the status quo. For Canadian policy makers the normative position has shifted to openly acknowledging socioeconomic barriers formed by racial or gendered bias against certain groups, to actively taking steps towards ameliorating the economic opportunities for members of these groups *vis-à-vis* Inclusive Trade. Specifically, there are three target groups or categories which are central to this thesis: gender, Indigenous peoples and small to medium sized enterprises (SMEs). I argue that the socioeconomic exclusion faced by the target groups impedes them from enjoying the benefits of international trade and investment in such a way that can be

¹⁸ Garcia, *supra* note 6. at p.67 and 82

likened to a barrier to trade within the meaning of the General Agreement on Tariffs and Trade 1947 (GATT) preamble.¹⁹

Additionally, I will illustrate the limitations in Canada's approach such as the lack of dispute settlement for Inclusive measures and inconsistent standards for implementing Inclusive policies domestically. Despite these potential drawbacks, I adhere to the belief that equity in globalisation ought to remain a priority for enabling future outcomes that ameliorate past mistakes. I endeavour to prove that the way to achieve this is through redefining "other barriers to trade" as not including solely economic factors, but also societally embedded barriers to participation.²⁰

While Canada's Inclusive approach has been analysed from a social-justice lens,²¹ and with a view towards avoiding "regulatory chill" in international investment,²² its serious broader implications as a possible solution to the complaint of economic globalization creating aggrieved "losers" has yet to be fully considered. I contend that this 'solution' can be extracted from the Inclusive approach through better understanding who is excluded from the *status quo* system, and whether such exclusion can be equated to having the effect of a barrier for the purposes of benefiting from or participating in international trade. This research topic is important for assessing how our globalised society can move forward without people being "left behind".²³

¹⁹ *General Agreement on Tariffs and Trade ("GATT") 1947.*

²⁰ *Ibid.*, preamble

²¹ Goff, *supra* note 12.

²² Caroline Henckels, "Protecting Regulatory Autonomy through Greater Precision in Investment Treaties: The TPP, CETA, and TTIP" (2016) 19:1 J Int Econ Law 27–50, online: <<https://academic.oup.com/jiel/article-lookup/doi/10.1093/jiel/jgw001>>. at p.31

²³ Global Affairs Canada, "Address by Minister Freeland on Canada's Foreign Policy Priorities" (June 6, 2017)

III. Overview

The following chapter, chapter two, delves into the origins and objectives of Inclusive Trade. First, it adopts a historical methodological approach to illustrate how Inclusive Trade stemmed from Canada's trade diversification strategy. This strategy is best characterized as Canada pursuing its ambition to become the most globally connected economy by concluding more bilateral and multilateral international economic agreements than any other trading nation in the world. New agreements that have spawned from this strategy feature Inclusive Trade. Next, chapter two uses the socio-legal method to explain the main objectives of Inclusive Trade, especially as they relate to the three target categories featured within this thesis: gender, Indigenous peoples, and SMEs. Lastly, chapter two invokes the doctrinal methodology to extract the Inclusive measures from Canada's Model Foreign Investment Protection Agreement (FIPA) to demonstrate how these measures manifest in an agreement.

Next, the structure of chapter three follows the three target categories of Inclusive Trade: gender, Indigenous peoples, and SMEs. Within each of the three sections, the text of five recent international economic agreements that Canada has concluded are analysed: The Comprehensive and Progressive Trans-Pacific Partnership (CPTPP), The Comprehensive Economic Trade Agreement (CETA), The Canada-United States-Mexico Agreement (CUSMA), the Canada-Chile Free Trade Agreement (CCFTA) and the Canada-Israel Free Trade Agreement (CIFTA). Chapter three takes on a doctrinal and comparative law methodology. It analyses the articles or chapters containing Inclusive Trade measures within each of the five agreements and compares them against one another to demonstrate how Inclusive Trade has

been included in multilateral and bilateral agreements. In some instances, different agreements will be nearly identical, and in others an agreement will omit measures pertaining to the target category altogether. Overall, there is not one agreement which fully encompasses Inclusive Trade; rather, each agreement has its strengths and weaknesses.

Chapter four examines how to mainstream Inclusive Trade. It does so in two ways, first it invokes the concept of “other barriers” to trade and demonstrates how the experiences of groups which are within the three target categories can be classified as such. While the term “other barrier” to trade is left undefined in practice, I invoke the *Vienna Convention*, the GATT and various WTO materials to explore what types of issues have been construed as “other barriers” to trade.²⁴ Through a socio-legal lens, chapter four demonstrates how the three target categories have similarly faced barriers to trade, except these barriers take the form of socioeconomic obstacles. Finally, chapter four demonstrates how the end objectives of Inclusive Trade and the end objectives of reducing trade barriers overlap in that they both aim to increase market access, further sustainable development, encourage economic growth and reduce poverty. Given these similarities, chapter four asserts that measures derived from Inclusive Trade should be categorised as endeavouring to dismantle “other barriers” to trade, and in turn will become more widely adopted. By proliferating Inclusive Trade, sustainable socioeconomic development is more likely to occur than under the *status quo* approach.

²⁴ *Vienna Convention on the Law of Treaties (VCLT)*, Article 31 (General Rule of Interpretation)

Chapter five is the final chapter; it concludes that Inclusive Trade offers a solution to ameliorate many of the negative side-effects of the globalised free trade system. In order for Inclusive Trade measures to become more mainstreamed, they should be framed in terms of the pre-existing and widely accepted goals such as those stated within the preamble of the GATT.

CHAPTER 2: DEFINING “INCLUSIVE TRADE”

I. The Origins and Objectives of Inclusive Trade

Inclusive Trade is part of Canada’s overarching trade diversification strategy. Central to the diversification strategy is Canada’s ambition to become the most “globally connected economy in the world” by concluding more international trade and investment agreements with other countries.²⁵ Thus far, Canada is the only G7 country to have concluded a trade agreement with all other G7 countries. Moreover, Canada is connected to 51 countries through its current network of international trade and investment agreements.²⁶ Canada is currently negotiating new trade and investment agreements with the United Kingdom, Indonesia, India, ASEAN, MERCOSUR,²⁷ and will be re-opening trade negotiations with Ukraine to modernize the Canada-Ukraine FTA.²⁸

Ultimately, Canada seeks to increase its overseas exports by 50 per cent from 2018 to 2025.²⁹ Trade diversification is important for creating economic opportunities, maintaining global supply chains, and introducing redundancies or mechanisms that can withstand shocks. The largest supply chain shocks in recent years have been a

²⁵ Canada and the G20: Trade Diversification (November 2018) <https://www.international.gc.ca/world-monde/assets/pdfs/international_relations-relations_internationales/g20/G20-nov-2018-trade-diversification-commerce-en.pdf>

²⁶ *Ibid.*

²⁷ Government of Canada, Canada-Mercosur Free Trade Agreement <<https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/mercosur/index.aspx?lang=eng>>

²⁸ Government of Canada, Public Consultation: Possible Modernization of the Canada-Ukraine Free Trade Agreement <<https://www.international.gc.ca/trade-commerce/consultations/cufta-alecu/index.aspx?lang=eng>>

²⁹ “Canada : World Trade Organization releases report praising Canadas successful and forward-looking approaches to trade and investment” (2019) Mena Rep, online: <<https://go.gale.com/ps/i.do?p=AONE&sw=w&issn=22190112&v=2.1&it=r&id=GALE%7CA588924799&sid=googleScholar&linkaccess=abs>>.

consequence of the Russia-Ukraine conflict and the Covid-19 pandemic which caused unprecedented disruptions resulting in severe shortages of food and cross-border goods and services.³⁰ While the global shocks associated with the pandemic may have been unavoidable, supply chain disruptions that arise from strained bilateral relations might be mitigated through diversifying trade relations and not over-relying on one country. For example, Canada created an overreliance on China as a trading partner which has ultimately proved to be highly detrimental for the Canadian agricultural sector.³¹ When diplomatic ties between Canada and China soured in 2019, China unleashed import restrictions on certain Canadian products such as canola, soybeans and pork.³² As a result, result Canadian exports to China decreased by 16 per cent in 2019.³³ Until 2018, 46 per cent of Canada’s canola products were exported to China, with 4.8 million tonnes of Canadian canola products being exported to China in 2018 alone.³⁴ Without another trading partner to whom Canadian canola could be exported, the Canadian agricultural sector suffered massive losses when China introduced the import restrictions.³⁵ The presumption is that by diversifying its trade

³⁰ Jill E Hobbs, “Food supply chains during the COVID-19 pandemic” (2020) 68:2 *Can J Agric Econ Can Agroéconomie* 171–176, online: <<https://onlinelibrary.wiley.com/doi/10.1111/cjag.12237>>.

³¹ Ryan Cardwell & Derek G Brewin, “Blackleg or blackmail? Economics of the Canada–China canola trade dispute” (2019) 67:3 *Can J Agric Econ Can Agroéconomie* 251–260, online: <<https://onlinelibrary.wiley.com/doi/10.1111/cjag.12203>>.

³² *Ibid.* at 256

³³ Global Affairs Canada, “Canada’s State of Trade”, (15 January 2021), online: *GAC* <https://www.international.gc.ca/trade-commerce/economist-economiste/state_of_trade-commerce_international/index.aspx?lang=eng> Last Modified: 2022-06-21.

³⁴ The Canola industry contributed CA\$26 billion to the Canadian economy in 2017 and supported a quarter million jobs, making it a very important part of the Canadian agricultural sector; “Canola industry in Canada, from farm to global markets”, online: *Canola Council Can* <<https://www.canolacouncil.org/about-canola/industry/>>; Left Field Commodity Research, ‘Case Study - Impacts of the Chinese Trade Restrictions on the Canadian Canola Industry’ (Canola Council Canada, February 2021), online: <<https://www.canolacouncil.org/wp-content/uploads/2021/03/CCC-Market-Access-Impact-Report-China-Final.pdf>>; “Canola trade with China | Canola Council of Canada”, online: *Canola Council Can* <<https://www.canolacouncil.org/china-update/>>; Jacob Wells & Peter Slade, “The effect of the Canada–China canola trade dispute on canola prices” (2021) 69:1 *Can J Agric Econ Can Agroéconomie* 141–149, online: <<https://onlinelibrary.wiley.com/doi/10.1111/cjag.12258>>.

³⁵ Canola is one of the most profitable crops to grow in Canada, generating one quarter of all farming revenues.; Shaoyan Sun, “china’s ban on canadian canola.” (2020) (*University of Alberta China Institute*,

relationships through preferential bilateral or multilateral agreements, instances of over-reliance can be better avoided in the future, resulting in a more stable domestic economy and greater sovereignty for economic and diplomatic decision making.

Oftentimes Inclusive Trade measures can be found within the newer trade agreements that have come into existence through Canada’s trade diversification efforts. Inclusive Trade derives its namesake from the goal of creating international economic opportunities through trade and investment agreements for traditionally underrepresented groups; including groups that would otherwise be excluded. The rationale behind proliferating an inclusive approach to trade is to counteract the growing consensus that increased economic globalisation creates an undesirable outcome by unfairly benefiting some and excluding many.³⁶ Consequently, Inclusive Trade aims to allow these typically underrepresented groups to share in trade-related welfare gains by adopting targeted measures within trade and investment agreements. Not only will this benefit the targeted groups, but these policies are also believed to stimulate economic growth and innovation – ultimately benefiting the domestic economy as well as the individual who has access to new opportunities under a trade or investment agreement with Inclusive measures.³⁷

October 2020) <<https://www.ualberta.ca/china-institute/media-library/media-gallery/research/occasional-papers/canola2.pdf>>. at p. 9

³⁶ Report by Canada “Trade Policy Review” (April 17, 2019) World Trade Organisation WT/TPR/G/389 <http://www.sice.oas.org/ctyindex/can/WTO/ENGLISH/g389_e.pdf>.at 4; Summers, *supra* note 7. at 85; Lighthizer, *supra* note 4.

³⁷ Global Affairs Canada, “Helping business owners from diverse backgrounds benefit from trade”, (27 March 2022), online: GAC <<https://www.tradecommissioner.gc.ca/canadexport/0006737.aspx?lang=eng>> Last Modified: 2022-03-27.

Broadly, Inclusive Trade encompasses measures which apply to labour, the environment, LGBTQ2+ peoples, visible minorities, SMEs, women, young entrepreneurs, black Canadians, and Indigenous Canadians.³⁸ In practice, Inclusive Trade often manifests within trade agreements as five categories: environment, labour, gender, Indigenous peoples and SMEs. This thesis focuses on the latter three categories: gender, Indigenous Peoples and SMEs.

Canada adopts the stance that “incorporating gender perspectives into macroeconomic policy, including trade policy, is essential for pursuing inclusive and sustainable economic development and to achieve outcomes that are fairer and more beneficial for all”.³⁹ According to the International Monetary Fund and the World Bank, adopting gender-related measures into macroeconomic policy, such as trade agreements should not be construed as a social issue, but rather an issue of good economic policy.⁴⁰ A 2017 study by McKinsey found that CA\$150 billion in incremental GDP could be added to the Canadian economy by 2026 through advancing women’s equality domestically.⁴¹ Despite this massive possibility for economic growth being present, Canada is still one of the global leaders in women’s equality progress.⁴² Hence, for other countries whose track record of gender equality lags behind that of

³⁸ *Ibid.*

³⁹ note 36 at. 25

⁴⁰ Ana Revenga and Sudhir Shetty, Empowering Women is Smart Economics, International Monetary Fund (Finance and Development, March 2012) online: *Finance Dev FD* <<https://www.imf.org/external/pubs/ft/fandd/2012/03/revenga.htm>>..

⁴¹ “The power of parity: Advancing women’s equality in Canada | McKinsey”, online: <<https://www.mckinsey.com/featured-insights/gender-equality/the-power-of-parity-advancing-womens-equality-in-canada>>.

⁴² *Ibid.*

Canada's, adopting gender equality related measures represents an opportunity to tap into a resource that is highly likely to result in socioeconomic development.⁴³

Canada has four key objectives on trade and gender. First, to reaffirm the importance of incorporating a gender perspective into economic and trade issues.⁴⁴ Second, to reaffirm the commitment to international agreements on gender equality and women's rights.⁴⁵ Third, to provide a framework for parties to the agreement to undertake cooperation activities on issues related to trade and gender.⁴⁶ Fourth, to establish a dedicated trade and gender committee and other institutional provisions.⁴⁷

Meanwhile, SMEs have been heralded as playing an important role in the economy as a source of job creation and innovation.⁴⁸ The Organisation for Economic Co-operation and Development (OECD) has reported that SMEs employ between 60 to 70 per cent of workers in most countries.⁴⁹ Meanwhile, the World Bank has similarly reported that SMEs play a major role in the economies of developing countries, contributing up to 40 per cent of national income (GDP) and representing 70 per cent of all jobs in emerging economies.⁵⁰ Creating a framework that supports SMEs to participate in international trade and harness further economic opportunities would be

⁴³ note 40.

⁴⁴ Global Affairs Canada, "Trade and gender in free trade agreements: The Canadian approach", (8 January 2019), online: *GAC* <https://www.international.gc.ca/trade-commerce/gender_equality-egalite_genres/trade_gender_fta-ale-commerce_genre.aspx?lang=eng> Last Modified: 2022-05-03.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ Innovation Government of Canada, "Key Small Business Statistics — 2021 - SME research and statistics", online: <https://www.ic.gc.ca/eic/site/061.nsf/eng/h_03147.html#1.4> Last Modified: 2021-12-22.

⁴⁹ "Small and medium-sized enterprises and trade - OECD", online: <<https://www.oecd.org/trade/topics/small-and-medium-enterprises-and-trade/>>.

⁵⁰ "World Bank SME Finance: Development news, research, data", online: *World Bank* <<https://www.worldbank.org/en/topic/smefinance>>.

significant for accelerating economic growth, and in turn facilitate sustainable economic development.⁵¹

With regards to SME-related Inclusive measures in trade agreements, Canada has four key objectives. First, to reaffirm the importance of incorporating an SME perspective into economic and trade issues.⁵² Second, “to create a free, publicly accessible website containing information on the agreement that is useful to SMEs”.⁵³ Third, to create a framework that enables the contracting parties to co-operate and jointly participate on activities and issues related to SMEs and trade.⁵⁴ Fourth, “to establish a dedicated SME committee and other institutional provisions. It is advisable to keep these four objectives in mind whilst reading the section in chapter three below which comparatively analyzes the SME-related measures in CPTPP, CUSMA, CETA, CCFTA and CIFTA. If one were to use these four objectives as a metrics for measuring Canada’s ability to have its policy goals incorporated into the free trade agreements, one will find that many of the agreements fail to meet these metrics.

Lastly, Canada includes Indigenous peoples in Inclusive Trade to demonstrate the Canadian Government’s reconciliation commitment to them by increasing the economic opportunities available to Indigenous peoples and Indigenous-owned businesses.⁵⁵ Given the history and ongoing consequences of colonisation, the Indigenous peoples of Canada have not always seen economic globalisation as a

⁵¹ “Unlocking growth in small and medium enterprises | McKinsey”, online: <<https://www.mckinsey.com/industries/public-and-social-sector/our-insights/unlocking-growth-in-small-and-medium-size-enterprises>>.

⁵² Global Affairs Canada, “Small and medium-sized enterprises and free trade agreements: The Canadian approach”, (5 November 2019), online: GAC <https://www.international.gc.ca/trade-commerce/sme-pme/sme_chapters-chapitre_consacre_pme.aspx?lang=eng> Last Modified: 2020-07-30.

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ note 36 at. 26

positive force. In 2013, the Hupacasath First Nation brought a case against the Minister of Foreign Affairs, claiming that the Canada-China FIPA should not take effect because the Government neglected to consult with the First Nations before concluding the FIPA.⁵⁶ The Hupacasath were concerned that the land and resource rights of First Nations peoples were going to be negatively affected by the FIPA.⁵⁷ Ultimately, the case did not succeed. Since then, Canada has attempted to enhance Indigenous peoples' access to the "benefits and opportunities that flow from international trade and investment".⁵⁸ Canada has engaged in dialogue with Indigenous peoples to jointly create objectives for Indigenous Peoples and trade. So far, there are five main objectives: first, to acknowledge the importance of enhancing Indigenous peoples' ability benefit from opportunities created by international trade and investment.⁵⁹ Second, to reaffirm Indigenous-specific international instruments, such as the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).⁶⁰ Third, to recognise the importance of the environment for Indigenous peoples social, economic, and cultural well-being.⁶¹ Fourth, to facilitate co-operation between the Parties to share information on a dedicated website that will be accessible to Indigenous entrepreneurs and businesses.⁶² Fifth, to establish a mechanism under the agreement that

⁵⁶ "Hupacasath First Nation v. Canada (Minister of Foreign Affairs), 2013 FC 900 <<https://www.italaw.com/cases/3062>>.

⁵⁷ *Ibid.*

⁵⁸ Global Affairs Canada, "Canada endorses Indigenous Peoples Economic and Trade Cooperation Arrangement", (10 December 2021), online: <<https://www.canada.ca/en/global-affairs/news/2021/12/canada-endorses-Indigenous-peoples-economic-and-trade-cooperation-arrangement.html>> Last Modified: 2021-12-10.

⁵⁹ Global Affairs Canada, "International Trade Agreements and Indigenous Peoples: The Canadian Approach", (17 June 2020), online: GAC <https://www.international.gc.ca/trade-commerce/Indigenous_peoples-peoples_autochtones/approach-approche.aspx?lang=eng> Last Modified: 2020-11-17.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² *Ibid.*

determines and facilitates cooperative activities between the Parties with a goal of supporting the trade interests and objectives of Indigenous Peoples.⁶³

II. Canada's Model Foreign Investment Protection Agreement

While Canada does not yet have a model FTA, it does have a model FIPA.⁶⁴ By analysing and extracting the Inclusive measures from the model FIPA, one can observe how Inclusive policies may manifest within the text of an agreement. The Model FIPA is evaluated at the outset because it reflects Canada's inclusive policies in an unaltered form. While negotiating international economic agreements, not every desired policy is included in the final version of the agreement. Depending on a party's bargaining power, the provisions that are included in the final text of the agreement may differ substantially from the original objectives of the party preceding negotiations.

In the preamble, the Model FIPA stipulates that the intention is to encourage underrepresented groups, namely women, Indigenous peoples, and SMEs, to participate in activities related to investment promotion and to make these activities more accessible. It reaffirms the importance of promoting environmental protection, "gender equality, the rights of Indigenous peoples, Inclusive Trade, sustainable development and traditional knowledge".⁶⁵ Further, it reaffirms the rights of contracting parties to regulate on matters relating to environmental protection, addressing climate change, the rights of Indigenous peoples, and gender equality.⁶⁶ This comes as no

⁶³ *Ibid.*

⁶⁴ Global Affairs Canada, "2021 Model FIPA", (4 May 2021), online: GAC <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/2021_model_fipa-2021_modele_apie.aspx?lang=eng> Last Modified: 2021-05-12.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.* Article 3: Right to Regulate

surprise as intervening in another state's domestic regulatory sphere would likely be met with discontent. Meanwhile, these model clauses include strong signalling that the hypothetical parties are in support of taking an Inclusive approach.

The measures relating to gender in the Model FIPA are somewhat unremarkable and unambitious. For instance, the required treatment for investors is standard. The Model FIPA mandates the international law minimum standard of treatment which prohibits targeted discrimination in the grounds of gender, race or religious beliefs.⁶⁷ However, it proceeds to “encourage” enterprises when hiring senior management, boards of directors and entry level personnel to consider choosing candidates that would bring greater diversity to the enterprise.⁶⁸ This includes an encouragement to contemplate requiring the nomination women to management positions.⁶⁹ Interestingly, within the investment chapters of the bilateral and multilateral agreements analysed in chapter three of this thesis, gender-related measures seldom appear.

For investors, responsible business conduct is characterized as complying with “human rights, the rights of Indigenous peoples, gender equality, environmental protection and labour”.⁷⁰ This measure is coupled with a corresponding requirement for host states to encourage enterprises within their jurisdiction to uphold these standards in practice.

⁶⁷ *Ibid.* Article 8(1)(d): Minimum Standard of Treatment

⁶⁸ *Ibid.* Article 13(3): Senior Management, Boards of Directors and Entry of Personnel

⁶⁹ *Ibid.*

⁷⁰ *Ibid.* Article 16(1)

The two final measures within the Model FIPA that address gender pertain to the investor-state and state-state dispute settlement process. In these circumstances, the disputing parties are “encouraged to consider” appointing arbitrators that reflect greater diversity, including selecting women.⁷¹

When addressing Indigenous related issues, the Model FIPA carves out Indigenous governments as distinct when conducting direct or indirect expropriations for a “public purpose”.⁷² This reflects the *sui generis* nature of Indigenous land management systems in Canada and their right to self-governance. As a result, this provision appears to separate Indigenous governments from obligations relating to expropriations under the FIPA from being construed as acting as an organ or arm of the Canadian Government as a host state.⁷³ Further, the FIPA also mandates transparency surrounding any law, regulation, procedure, administrative ruling, or consultation process that affects Indigenous rights. Lastly, the Model FIPA also specifically mentions allowing for the appointment of experts in the rights of Indigenous peoples for the purposes of arbitration.⁷⁴

The benefits accorded to SMEs are rather limited and pertain to consultations and dispute settlement. The first measure allows for video conferencing in lieu of in-person consultations as a way of being sympathetic to the restraints of micro, small or medium sized enterprises.⁷⁵ The second measure allows for respondents to give

⁷¹ *Ibid.* Article 30: Arbitrators and Article 54: Disputes Between Parties

⁷² *Ibid.* Article 9(1)(a) footnote 3

⁷³ “Responsibility of States for Internationally Wrongful Acts” in *Int Doc Environ Liabil* (Dordrecht: Springer Netherlands, 2008) 323., Article 4: Conduct of organs of a State, Article 5: Conduct of persons or entities exercising elements of governmental authority

⁷⁴ Model FIPA, *supra* note 64. Article 38 Expert Reports

⁷⁵ *Ibid.* Article 25(3) Request for Consultations

sympathetic considerations to SME investors resulting in a singular member of a Tribunal hearing their claim due to the expected claim for damages to be relatively low.⁷⁶

⁷⁶ *Ibid.* Article 27(9) Submission of a claim to Arbitration

CHAPTER 3: CANADA'S INCLUSIVE MEASURES IN ACTION

This chapter has three sections, each of which focuses on one of the three target categories of Inclusive Trade: gender, Indigenous peoples, and SMEs. Within these three sections, each analyzes how its respective target category manifests within the text of five trade agreements: CPTPP, CETA, CUSMA, CCFTA and CIFTA. By doing so, this chapter seeks to establish how Inclusive Trade manifests within the text of international economic agreements and to determine which agreement contains the most far-reaching version of measures that address some or all of the target categories. To accomplish this, the comparative law and doctrinal legal methodologies are used. As such, specific articles and chapters within the agreements are extracted and evaluated with a view towards highlighting their respective strengths and weaknesses. Notably, the two main weaknesses that Inclusive measures face are the lack of enforceability through state-state dispute settlement or investor-state dispute settlement, and the inconsistency in implementation at the domestic level.

Additionally, this chapter has two further purposes: ascertaining whether the measure constitutes “nice rhetoric or sound policy” and extracting the underlying objective of the Inclusive measure. *Nice rhetoric* often takes the form of recognition statements or signalling, whereas *sound policy* is a binding commitment made on behalf of a contracting Party. The *underlying objective* is often an outcome which is linked to the Inclusive measure. For example, gender-related measures are often linked with *sustainable socioeconomic development* and SME-related measures are often linked with *economic growth* or *innovation*. While chapter three locates these underlying objectives, chapter four builds on the importance of this interconnectedness.

III. Trade and Gender

a. Comprehensive and Progressive Trans-Pacific Partnership

The CPTPP integrates gender equality into several provisions. First, the Labour Chapter indicates that areas of cooperation *may* include addressing the challenges and opportunities women face in the course of employment such as discrimination and the promotion of equality.⁷⁷ However, this measure falls short of instilling an actionable commitment due to using the word “may”, instead of the more-binding word choice of “shall”. Next, the promotion of gender equality can also be found within the Cooperation and Capacity Building Chapter.⁷⁸ However, once again this measure indicates that the Parties “may” undertake such activities. Consequently, both measures appear to reflect nice rhetoric over sound policy and do not create any binding commitments.

Article 23.4 of the Development Chapter in the CPTPP directly addresses the correlation between empowering women as economic actors and economic growth.⁷⁹ Yet once again, the measures therein lack binding commitments. Rather, it consists of the parties “recognizing” and “considering” to undertake activities aimed at ameliorating women’s ability as workers and business owners to access trade-related opportunities that stem from the CPTPP. Despite providing some examples of how this can be achieved, such as developing women’s leadership networks, the measure

⁷⁷ Measure found within the TPP, incorporated by reference into the CPTPP. See Trans-Pacific Partnership (October 6 2015) Chapter 19: Labour, Article 19.10 (6)(n)(ii) Cooperation, online <<https://www.dfat.gov.au/sites/default/files/19-labour.pdf>>

⁷⁸ *Ibid* Chapter 21, Article 21.2(2)(b)

⁷⁹ CPTPP Chapter 23, Article 23.4(2)(a)-(c) online <<https://www.dfat.gov.au/sites/default/files/23-development.pdf>>

appears to fall short of producing a tangible impact.⁸⁰ However, considering how recently the CPTPP entered into force, it is possible that the full effects of this agreement have yet to be realized.⁸¹

Finally, the impact of these measures can be witnessed in the Dispute Settlement Chapter which excludes any of the prior chapters that contain references to women's economic empowerment or gender equality from being subject to dispute settlement.⁸² Considering the phrasing of these measures as non-binding recognition statements or co-operative undertakings, this omission does not come as a surprise because such measures would be challenging to enforce. It is worth noting that the lack of enforceability or concrete trade-related obligations to achieve greater gender equality means that the CPTPP's gender-related measures are relatively weak. Despite the lack of enforceability, many aspects of Inclusive Trade are meant to be undertaken in a co-operative spirit, hence why certain commitments are framed in terms of being co-operative activities or areas of co-operation between the Contracting Parties. It would run contrary to the co-operative spirit to make such measures subject to dispute settlement.

b. Comprehensive Economic Trade Agreement

⁸⁰ *Ibid.*

⁸¹ The CPTPP entered into force for Canada on December 30, 2018.; Government of Canada "About the Comprehensive and Progressive Agreement for Trans-Pacific Partnership" (July 16, 2019) Available at https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/backgroundunder-document_information.aspx?lang=eng (Accessed December 9, 2021)

⁸² CPTPP Chapter 28, Article 28.3(1)(c) Available at <https://www.dfat.gov.au/sites/default/files/28-dispute-settlement.pdf>

The sole reference to gender equality under CETA is contained in Article 8.10 which pertains to the treatment of foreign investors and covered investments.⁸³ This measure prohibits “targeted discrimination on manifestly wrongful grounds, such as gender” to maintain the international law standard of fair and equitable treatment (FET) for investors. Despite the narrow scope of this measure, it is possible to expand it through filing a recommendation to the CETA Joint Committee.⁸⁴ Although CETA lacks any further references to gender-related issues, Annex 19-1 contains a plethora of references to “central government entities” that conduct procurement and are charged with endeavours related to gender equality objectives.⁸⁵

Article 8.18 allows for Article 8.10 to be enforceable through investor-state dispute settlement (ISDS) in circumstances where the investor has suffered loss or damage resulting from gender-based discrimination.⁸⁶ After the claim has been raised, the parties have recourse to consultations,⁸⁷ or mediation which allow the parties an attempt to settle a dispute amicably.⁸⁸ If the dispute is not resolved in consultations or mediation, then the investor can submit their claim to the Tribunal.⁸⁹ Consequently, the sole gender-related provision within CETA is enforceable, whereas those found in the CPTPP are not. Nevertheless, Article 8.10 in CETA reflects a standard purpose of upholding FET for investors and does not amount to a progressive shift. This lack of

⁸³ *Comprehensive Economic and Trade Agreement (CETA) Between Canada, of the one part, and the European Union [and its Member States]*. Chapter 8: Investment: Section C, Article 8.10(d) <https://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf>

⁸⁴ *Ibid.* CETA, Chapter 8, Article 8.44 (3)(d)

⁸⁵ *Ibid.* CETA, Market Access Schedule of the European Union, Annex 19-1

⁸⁶ *Ibid.* CETA, Section F, Article 8.18(1)(b)

⁸⁷ *Ibid.* CETA, Article 8.19 Consultations

⁸⁸ *Ibid.* CETA, Article 8.20 Mediation

⁸⁹ *Ibid.* CETA, Article 8.22 Procedural and other requirements for the submission of a claim to the tribunal; Article 8.23 Submission of a claim to the Tribunal; Article 8.23(1) stipulates that a claim can only be submitted by an investor or on behalf of the investor.

distinctly inclusive measures is most likely because CETA entered into force in 2017 and was negotiated in the preceding years. During the period in which CETA was negotiated, Inclusive Trade in its final form had not yet come to fruition. For these reasons, I find that CETA does not reflect inclusive gender-related trade and investment policies. However, that is likely due to when the agreement was negotiated, rather than European opposition in the negotiating room.

c. Canada-United States-Mexico Agreement

Unlike the CPTPP and CETA, CUSMA contains a reference to “women’s and men’s equal[ity]” in the preamble.⁹⁰ It declares that CUSMA seeks to facilitate men’s and women’s equal “access to and ability to benefit from opportunities created by this agreement”.⁹¹ At the outset, CUSMA better reflects Canada’s progressive policy objectives compared to CETA or the CPTPP. It proceeds to stipulate that the parties will “support the condition of women’s full participation in domestic, regional, and international trade and investment”.⁹² By choosing to use the word “will”, this phrasing indicates a solid commitment to pursue these objectives. Additionally, mentioning the separate issues of gender equality and providing additional support for women implicitly acknowledges that women have been precluded from participating fully in opportunities stemming from international trade and investment, thus garnering the need for additional support.

⁹⁰ Global Affairs Canada, “Canada-United States-Mexico Agreement (CUSMA)”, (27 July 2020), online: GAC <<https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/text-texte/toc-tdm.aspx?lang=eng>> Last Modified: 2020-11-26., Preamble, online: GAC <<https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/text-texte/00.aspx?lang=eng>>

⁹¹ *Ibid.*, CUSMA

⁹² *Ibid.*, CUSMA

Within the Investment Chapter of CUSMA, Corporate Social Responsibility obligations indicate that the Parties reaffirm the importance of enterprises operating within the shared territories or jurisdiction to voluntarily incorporate into their internal policies international law minimum standards such as gender equality, human rights Indigenous and Aboriginal peoples rights among others.⁹³ Similar to CETA, this measure falls under the Investment Chapter and references acceptable internationally recognized standards of practice.

Within the Labour Chapter of CUSMA, there are two measures which address gender-related issues.⁹⁴ First, Article 23.9, addresses discrimination in the workplace by affirming that “the Parties recognize the goal of eliminating discrimination in employment...and support the goal of promoting equality of women in the workplace”.⁹⁵ In furtherance of this ambition, it mandates that the Parties “shall” implement policies to achieve this goal of protecting workers from sex-based discrimination.⁹⁶ Here, using the word “shall”, demonstrates that CUSMA provides a higher-level protection on this matter compared to the CPTPP. Moreover, the higher-level of protection contained in this measure is evidenced by how it lists several categories of sex-based discrimination that employers expressly ought to refrain from committing against employees including those experiencing caregiving

⁹³ *Ibid.*, CUSMA, Chapter 14: Investment, Article 14.17: Corporate Social Responsibility, online: GAC <<https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/text-texte/14.aspx?lang=eng>>

⁹⁴ *Ibid.*, CUSMA, Chapter 23: Labor online: GAC <<https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/text-texte/23.aspx?lang=eng>>

⁹⁵ *Ibid.*, CUSMA Article 23.9: Discrimination in the Workplace

⁹⁶ *Ibid.* CUSMA

responsibilities, pregnancy, not providing employees with leave for a birth or adoption, and sex-based wage discrimination.⁹⁷

Formerly, instances of discrimination based on pregnancy or caregiving responsibilities have fallen disproportionately on women, as opposed to men.⁹⁸ This measure reflects a progressive shift by according both men and women the right to job-protected leave for adoption or birth, and caregiving responsibilities: a right that men are often denied. By affording men and women equal treatment for job protected leave for caretaking responsibilities, both genders inherently benefit. This is because policies that protect caregivers, including both parents, are both social protection policies and gender equality policies that ultimately affect work and home life.⁹⁹

Article 23.12 of the Labour Chapter contains the second measure addressing gender-related issues.¹⁰⁰ This measure broadly provides that the “Parties may develop co-operative activities in... addressing gender-related issues in the field of labor and employment”; it lists five methods in which the parties’ may cooperatively pursue this.¹⁰¹ The first of which is the “elimination of discrimination on the basis of sex in respect of employment, occupation and wages”.¹⁰² The second method is closely linked with the first by providing for the development of “analytical and enforcement tools related to equal pay for equal work or work of equal value”.¹⁰³ The third method

⁹⁷ *Ibid.* CUSMA

⁹⁸ Andrea Doucet et al, “Redesign parental leave system to enhance gender equality”, online: *Policy Options* <<https://policyoptions.irpp.org/magazines/october-2020/redesign-parental-leave-system-to-enhance-gender-equality/>>.

⁹⁹ *Ibid.*

¹⁰⁰ CUSMA, *supra* note 90. Chapter 23: Labor, Article 23.12 Cooperation

¹⁰¹ *Ibid.* CUSMA, Chapter 23: Labor, Article 23.12(5)(j)(i)-(v)

¹⁰² *Ibid.* CUSMA, Chapter 23: Labor, Article 23.12(5)(j)(i)

¹⁰³ *Ibid.* CUSMA, Chapter 23: Labor, Article 23.12(5)(j)(ii)

promotes “labour practices that integrate and retain women in the job market...building [women’s] capacity and skills”.¹⁰⁴

In today’s circumstances, this third method bears particular importance as aftermath of the Covid-19 pandemic unfolds, revealing that the pandemic has disproportionately impacted women and mothers. The pandemic has caused women to exit the work force and take on greater care-taking responsibilities, a phenomenon coined the “she-cession”.¹⁰⁵ This *en masse* exit from the workforce has not been a wholly voluntary movement. Rather, the *she-cession* occurred because of economic pressures placed on people in familial care-taker roles who lack sufficient support (i.e. financial support, support from a spouse or other) to carry on in both their professional capacity and in their care-taker capacity. The primary example of these competing pressures was when schools were legally required to close during the pandemic and parents had to look after their children at home throughout the work week, many parents were confronted with the need to make professional sacrifices to manage these additional care-taking responsibilities. The parent which disproportionately took on this caretaking role was the mother.¹⁰⁶ Consequently, the she-cession serves to illustrate how economic and social pressures interplay to impede women’s progression as economic actors more so than men.

¹⁰⁴ *Ibid.*, CUSMA, Chapter 23: Labor, Article 23.12(5)(j)(ii)

¹⁰⁵ “Tiffany Burns *et al.*, “Women in the Workplace”, McKinsey” (2021), online: <<https://www.mckinsey.com/featured-insights/diversity-and-inclusion/women-in-the-workplace>>; Anon, “Seven Charts that Show COVID-19’s Impact on Women’s employment” McKinsey & Company (March 8, 2021) Available at <https://www.mckinsey.com/featured-insights/diversity-and-inclusion/seven-charts-that-show-covid-19s-impact-on-womens-employment> (Accessed December 9, 2021) ; Prime Minister of Canada “Roadmap for a Renewed U.S.-Canada Partnership” Government of Canada (February 23, 2021) Available at <https://pm.gc.ca/en/news/statements/2021/02/23/roadmap-renewed-us-canada-partnership> (Accessed October 31, 2021)

¹⁰⁶ *Ibid.*

The mitigating factors for the she-cession are somewhat addressed by the fourth measure within Article 23.12 which is the “consideration of gender issues related...workplace practices, including advancement of childcare, nursing mothers, and related policies and programs”.¹⁰⁷ These types of considerations help to dismantle socially constructed obstacles and impediments encountered by women.

How this measure has been implemented with respect to the advancement of childcare in an equitable manner across the US, Canada and Mexico varies greatly. For example, in the US the federal *Family and Medical Leave Act 1993* allows eligible employees (gender neutral) to take up to twelve weeks of unpaid job-protected leave after giving birth in any twelve-month period.¹⁰⁸ However, the scope of eligibility is limited, making this job-security unavailable for many people.¹⁰⁹ For instance, small employers, with less than 50 employees in a 75 mile radius, are not required to provide job-protected parental leave.¹¹⁰

By comparison, in Canada all employees regardless of gender are entitled to be granted paid parental leave to take care of their new-born or newly adopted child.¹¹¹ This includes 15 weeks of paid maternity leave with 55 per cent of weekly insurable salary of up to CA\$595 in addition to parental benefits. The latter are available to both

¹⁰⁷ CUSMA, *supra* note 90., Chapter 23: Labor, Article 23.12(5)(j)(iv)

¹⁰⁸ “The Family and Medical Leave Act of 1993 (“FMLA”), Section 102 online:
<<https://www.dol.gov/agencies/whd/laws-and-regulations/laws/fmla>>.

¹⁰⁹ United States Code Title 2, Chapter 24, Subchapter II, Part A §1312(a)(2)(B): the term “eligible employee” as used in the Family and Medical Leave Act of 1993 means a covered employee who has been employed in any employing office for 12 months and for at least 1,250 hours of employment during the previous 12 months.
<<https://www.govinfo.gov/content/pkg/USCODE-2011-title2/html/USCODE-2011-title2.htm>>

¹¹⁰ *Supra* note 109., *FMLA*, s.101(2)(B)

¹¹¹ Canada Labour Code (RSC 1985, c. L-2), Part III, Section 206.1

mothers and fathers. Parental benefits can either be up to 69 weeks with a lower weekly payment of 33 per cent of weekly insurable wage or up to CA\$357.

In Mexico, pregnant employees are entitled to take six weeks of paid maternity leave before and after their estimated due date for a total of 12 weeks.¹¹² By contrast, fathers in Mexico are entitled just five days of paid paternity leave.¹¹³ Evidently, the standards of parental leave vary significantly across Canada, the United States and Mexico as no minimum threshold of “advancement of child care” has been established in relation to caring for a newborn. Hence, while CUSMA contains the most far reaching and progressive gender equality related measures in the multilateral agreements, how adherence is measured remains a grey area in some respects.

d. Canada-Chile Free Trade Agreement

The CCFTA has been recognized for being the first trade agreement concluded by Canada which contains a stand-alone chapter on “Trade and Gender”.¹¹⁴ The CCFTA’s Trade and Gender Chapter did not appear in the first version of the FTA which entered into force in 1997. The Trade and Gender Chapter was added to the CCFTA when the agreement was modernized in 2017.¹¹⁵ By adding the topic of

¹¹² Globalization Partners, “Mexico PEO - Employer of Record”, online: *Globalization Partners* <<https://www.globalization-partners.com/globalpedia/mexico-employer-of-record/>>.

¹¹³ *Ibid.*

¹¹⁴ Canada-Chile Free Trade Agreement (CCFTA), online: *GAC* <<https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/chile-chili/fta-ale/index.aspx?lang=en>> Last Modified: 2017-06-05>. Appendix II – Chapter N *bis* – Trade and Gender, online: <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/chile-chili/fta-ale/2017_Amend_Modif-App2-Chap-N.aspx?lang=eng&_ga=2.5147507.1146502642.1639431433-539313305.1638722927>

¹¹⁵ *Ibid.*

gender to the CCFTA as a ‘modernization’, this move reflects the evolving concerns in the realm of economic globalisation and free trade as being capable of expanding to previously unchartered territories to respond to contemporary issues. The CCFTA recognizes trade and gender-related issues in a more far-reaching manner than compared to CUSMA, CPTPP and CETA. The drafter’s motivations for this adding trade and gender are also provided internally.

The primary motivation for including a Trade and Gender Chapter is to meet the United Nations Sustainable Development Goal Five,¹¹⁶ which is to “achieve gender equality and empower all women and girls”.¹¹⁷ The second motivation is to facilitate “inclusive economic growth” and “sustainable socioeconomic development”.¹¹⁸ By achieving gender equality, a social outcome, women and girls will also become empowered as economic actors, which in turn stimulates economic growth; a more typical trade value.¹¹⁹ To consider this approach through the lens of Kantian ethics, the Parties see achieving gender equality as both a means to end, and an end by itself. Achieving gender equality is an “end” because the United Nations Sustainable Development Goal Five would be fulfilled. It is a “means” because achieving gender equality and empowering women and girls, a group that constitutes half the global population, is a tool for unlocking new consumers, potential entrepreneurs, and autonomous economic actors. In turn, this will facilitate economic growth and

¹¹⁶ “United Nations Sustainable Development Goals: Goal 5 | Department of Economic and Social Affairs”, online: <<https://sdgs.un.org/goals/goal5>>.

¹¹⁷ CCFTA, *supra* note 114. Appendix II – Chapter N *bis* – Trade and Gender, Article N *bis*-01(2)

¹¹⁸ *Ibid.*, CCFTA (2019), Article N *bis*-01: General Provisions

¹¹⁹ Studies have proven that gender equality and economic growth are linked; Arjan De Haan, “The Win-Win Case for Women’s Economic Empowerment and Growth: Review of the Literature” (2017) Institute for the Study of International Development (ISID) Grow Working Paper Series, online: <<http://grow.research.mcgill.ca/publications/working-papers/gwp-2017-03.pdf>>..

innovation. When maintained in a stable manner, this will further result in sustainable socioeconomic development.¹²⁰ By making this causal link, the CCFTA shows how the issue of gender, a social concept that seems unrelated to trade, may have significant economic opportunities and should not be so readily overlooked.

The “elimination of gender discrimination” is a common theme across the CPTPP, CUSMA, CETA and indeed the CCFTA.¹²¹ However, unlike the multilateral agreements CCFTA goes further by establishing a “Trade and Gender Committee”.¹²² The Committee is responsible for facilitating cooperation between the Chilean and Canadian government institutions for:¹²³ “developing better practices to promote gender equality within enterprises”,¹²⁴ “advancing care policies and programs with a gender and shared social responsibility perspective”,¹²⁵ “conducting gender-based analysis”,¹²⁶ and collecting sex-disaggregated data on gender-focused trade related issues.¹²⁷ Overall, the Committee established by the CCFTA engrains actionable research methods into its mandate with a view towards eliminating future incidents of gender-based discrimination.

¹²⁰ Ann Linde. “The feminist approach to Inclusive Trade and policymaking: Sweden has proven that equal opportunities for women and men is good for job creation and good for economic growth” (2018) International Trade Centre UNCTAD/GATT; note 36.; *Ibid.* at p.25; De Haan, *supra*. note 119.

¹²¹ CCFTA, *supra* note 114. Appendix II – Chapter N *bis* – Trade and Gender, Article N *bis*-01(3)

¹²² *Ibid.* CCFTA (2019), Appendix II – Chapter N *bis* – Trade and Gender, Article N *bis*-04: Trade and Gender Committee

¹²³ *Ibid.* CCFTA (2019), Appendix II – Chapter N *bis* – Trade and Gender, Article N *bis*-04(2): Trade and Gender Committee.

¹²⁴ *Ibid.* CCFTA (2019), Appendix II – Chapter N *bis* – Trade and Gender, Article N *bis*-03 Cooperation Activities

¹²⁵ *Ibid.* CCFTA (2019) Article N *bis*-03 (4)(e)

¹²⁶ *Ibid.* CCFTA (2019) Article N *bis*-03 (4)(i)

¹²⁷ *Ibid.* CCFTA (2019) Article N *bis*-03 (4)(j)

It is especially notable that the CCFTA contains the most far-reaching gender related measures compared to the other agreements that Canada has concluded with western liberal democracies because the Chilean women's rights movement commenced far later than in Canada. For example, Chile legalised divorce in 2004,¹²⁸ whereas Canada legalised divorce in 1968.¹²⁹ Further, Chile enforced a strict ban on abortions until 2017, when some limited forms of abortion became legalised.¹³⁰ In 2022, Chile amended its constitution to solidify an individual's reproductive right to voluntarily interrupt a pregnancy through undergoing a therapeutic abortion.¹³¹ By contrast, Canada legalised abortions in limited circumstances in 1969, then further expanded abortion access by recognizing it as a constitutional right in 1988.¹³² Given the recency of these gender equality affirming legal developments in Chile, it is remarkable that the Chilean Government has extended these ambitions to international economic agreements as well.

Chile has made major strides on advancing the issue gender equality since 2006, when Michelle Bachelet was elected president. Despite the differing pace in women's empowerment between Canada and Chile, both countries currently maintain gender-based quotas in their Parliaments and Governments that require a minimum

¹²⁸ Kim Thelwell, "6 Facts About Women's Rights in Chile", (3 November 2020), online: *Borgen Proj* <<https://borgenproject.org/womens-rights-in-chile/>>.

¹²⁹ "Acts of Divorce, 1841-1968 - Library and Archives Canada", online: <<https://www.bac-lac.gc.ca/eng/discover/vital-statistics-births-marriages-deaths/divorce-1841-1968/Pages/acts-divorce-1841-1968.aspx>>.

¹³⁰ Fabian Cambero, "Chile lawmakers take 'first step' towards easing abortion rules" | Reuters, online: <<https://www.reuters.com/world/americas/chile-lawmakers-take-first-step-towards-easing-abortion-rules-2021-09-28/>>.

¹³¹ Hannah Elliott Hannah began at the OWP as a correspondent intern in December 2021 Hannah believes empathy et al, "New Chilean Constitution Includes Reproductive Right To Abortion", (31 March 2022), online: *Organ World Peace* <<https://theowp.org/new-chilean-constitution-includes-reproductive-right-to-abortion/>>.

¹³² "History of Abortion in Canada", online: *National Abortion Federation Canada* <<https://nafcanada.org/history-abortion-canada/>>.

number of positions to be held by women.¹³³ I raise these points to show that Canada does not need to have a similar historical timeline for the development of societal values with a contracting Party in order to come to consensus on a liberal policy issue such as using trade agreements to advance gender equality, or including gender related measures into international agreements generally.

Despite the “historic achievement” of the CCFTA including a stand-alone Trade and Gender Chapter,¹³⁴ the contents of the chapter remain unenforceable. This is because the chapter is expressly exempt from dispute settlement.¹³⁵ However, if an issue arises regarding the application or interpretation of the Trade and Gender Chapter, then the “Parties shall make all possible efforts, through open dialogue, consultations or cooperation” to reach a resolution, including referring the matter to the Trade and Gender Committee.¹³⁶ Thus, the Parties may request that the Trade and Gender Committee resolve an issue of interpretation or application, however, once rendered the committee’s decision ultimately lacks authority or enforceability.¹³⁷ When contemplating the potential impact of this a chapter, one might legitimately

¹³³ “Chile endorses women’s leadership in politics and aims for women to direct 40 per cent of public enterprises by 2018”, online: *UN Women – Hqrs* <<https://www.unwomen.org/en/get-involved/step-it-up/commitments/chile>>; Stéphanie Fillion, “Justin Trudeau Adds New Faces In Top Roles For Gender-Equal Cabinet”, online: *Forbes* <<https://www.forbes.com/sites/stephaniefillion/2021/10/26/justin-trudeau-adds-new-faces-in-top-roles-for-gender-equal-cabinet/>>.

¹³⁴ Report by Canada, *supra* note 36. at p.12

¹³⁵ CCFTA, *supra* note 114. (2019), Appendix II – Chapter N *bis* – Trade and Gender, Article N *bis*-06: Non-application of Dispute Resolution

¹³⁶ *Ibid.* Article N *bis*-05: Consultations

¹³⁷ *Ibid.* Article N *bis*-04(h): Trade and Gender Committee

question whether it constitutes “nice rhetoric or sound policy” in the absence of any enforceable measures;¹³⁸ according to Valerie Hughes, it is both.¹³⁹

e. Canada-Israel Free Trade Agreement

The CIFTA has several parallels with the CCFTA. First, both agreements seek to achieve the United Nations Sustainable Development Goal Five:¹⁴⁰ to “achieve gender equality and empower all women and girls”.¹⁴¹ Second, both agreements entered into force in 1997, and underwent modernisations in 2019. Third, these modernisations resulted in both agreements containing a stand-alone chapter on trade and gender.¹⁴²

Further, the measures within CIFTA closely echo Canada’s foreign policy stance. For example, Article 13.1 of CIFTA’s Trade and Gender Chapter begins by recognising the “importance of a gender perspective into the promotion of inclusive economic growth”.¹⁴³ This phraseology resonates with the Canadian feminist foreign policy objectives which promotes “incorporating gender perspectives” in areas that are

¹³⁸ Valerie Hughes, “Gender Chapters in Trade Agreements: Nice Rhetoric or Sound Policy?”, online: *Cent Int Gov Innov* <<https://www.cigionline.org/articles/gender-chapters-trade-agreements-nice-rhetoric-or-sound-policy/>>.

¹³⁹ *Ibid.*

¹⁴⁰ De Haan, *supra*. note 119.

¹⁴¹ Canada-Israel Free Trade Agreement (CIFTA) 2019, online: *GAC* <<https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/israel/fta-ale/text-texte/toc-tdm.aspx?lang=eng>> Last Modified: 2019-09-13.> Article 13.1(2) online: <<https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/israel/fta-ale/text-texte/13.aspx?lang=eng>>

¹⁴² Protocol Amending the Free Trade Agreement between the Government of Canada and the Government of the State of Israel (Treaty Series 2019/23), Chapter 13: Trade and Gender

¹⁴³ CIFTA, *supra* note 141. Article 13.1(1)

similarly perceived as distinct from the issue of gender.¹⁴⁴ CIFTA indicates that the Parties intend to encourage “equitable opportunities for men and women in business, industry, and the labour market”.¹⁴⁵

A fourth similarity between the CCFTA and CIFTA is that both agreements establish a Trade and Gender Committee.¹⁴⁶ Moreover, the CIFTA committee is responsible for conducting nearly identical cooperative activities that the CCFTA committee undertakes including: the promotion of financial inclusion and access to financing for women,¹⁴⁷ the advancement of women’s leadership in business,¹⁴⁸ the advancement of female entrepreneurship especially in international trade,¹⁴⁹ “fostering women’s participation in decision-making positions” or positions of authority,¹⁵⁰ to encourage women’s capacity building and enhance professional skills,¹⁵¹ to develop “better practices to promote gender equality”,¹⁵² to collect sex-disaggregated data for conducting gender-based analysis and develop gender focused statistics,¹⁵³ and lastly any “other issues decided by the Parties”.¹⁵⁴ However, the Trade and Gender Committee in CIFTA has two fewer undertakings than its counterpart in CCFTA. The further undertakings of the CCFTA committee are the advancement of “care policies

¹⁴⁴ Global Affairs Canada, “Canada’s Feminist International Assistance Policy”, (21 February 2017), online: GAC <https://www.international.gc.ca/world-monde/issues_development-enjeux_developpement/priorities-priorites/policy-politique.aspx?lang=eng> Last Modified: 2021-08-24. at p.32

¹⁴⁵ CIFTA, *supra* note 141., Article 13.1(1)

¹⁴⁶ *Ibid.* CIFTA Article 13.4: Trade and Gender Committee

¹⁴⁷ *Ibid.* CIFTA, Article 13.3(4)(b); CCFTA, *supra* note 114., Article N *bis*-03(4)(c)

¹⁴⁸ CIFTA, *supra* note 141. Article 13.3(4)(a); CCFTA, *supra* note 114. Article N *bis*-03(4)(d)

¹⁴⁹ CIFTA *supra* note 141. Article 13.3(4)(f); CCFTA, *supra* note 114. Article N *bis*-03(4)(g)

¹⁵⁰ CIFTA *supra* note 141. Article 13.3(4)(e); CCFTA, *supra* note 114. Article N *bis*-03(4)(f)

¹⁵¹ CIFTA *supra* note 141. Article 13.3(4)(a); CCFTA, *supra* note 114. Article N *bis*-03(4)(a)

¹⁵² CIFTA *supra* note 141. Article 13.3(4)(d); CCFTA, *supra* note 114. Article N *bis*-03(4)(e)

¹⁵³ CIFTA *supra* note 141. Article 13.3(4)(h)&(g); CCFTA, *supra* note 114. Article N *bis*-03(4)(j)&(i)

¹⁵⁴ CIFTA *supra* note 141. Article 13.3(4)(i); CCFTA, *supra* note 114. Article N *bis*-03(4)(k)

and programs with a gender and shared social responsibility perspective¹⁵⁵ and improving women's access, participation and leadership in the science and technology sector.¹⁵⁶

The Trade and Gender Committee established by CIFTA determines, organises, and facilitates cooperation between Canada and Israel on all matters within the Trade and Gender Chapter, such as:¹⁵⁷ creating and reporting recommendations on gender-related matters to the Commission;¹⁵⁸ facilitating discussion on issues of common interest to support trade and gender policies or initiatives;¹⁵⁹ considering the implementation and operation of the Trade and Gender Chapter,¹⁶⁰ and finally, carrying out other duties as determined by the Parties.¹⁶¹ The CCFTA Trade and Gender Committee also performs analogous functions.

CIFTA recognizes gender-responsive policies as playing a crucial role in attaining sustainable economic development.¹⁶² By comparison, CCFTA frames the same policies as being essential for contributing to sustainable *socioeconomic develop*.¹⁶³ This minor semantic difference demonstrates how the issues of gender and women's economic empowerment as they relate to public policy initiatives, have evolved and become recognized as creating a broader positive impact, socially and economically. The previously unrelated concepts of trade and gender have been

¹⁵⁵ CCFTA, *supra* note 114. Article N *bis*-03(4)(h)

¹⁵⁶ *Ibid.* CCFTA (2019), Article N *bis*-03(4)(b)

¹⁵⁷ CIFTA *supra* note 141. Article 13:4(2)(a)

¹⁵⁸ *Ibid.* Article 13:4(2)(b)

¹⁵⁹ *Ibid.* Article 13:4(2)(c)

¹⁶⁰ *Ibid.* Article 13:4(2)(d)

¹⁶¹ *Ibid.* Article 13:4(2)(e)

¹⁶² *Ibid.* Article 13:4(1)

¹⁶³ CCFTA, *supra* note 114.

reconceptualized as interconnected and valuable policies that can work together to achieve both social and economic outcomes

By reconceptualising gender-related issues as also carrying economic importance, one could argue that gender-related issues are more likely to be featured in future international economic agreements.¹⁶⁴ By highlighting the economic consequences of gender-related measures, policy makers package the measures in a way that is more acceptable to those who believe trade agreements should remain strictly economic agreements. Further, Article 13 of CIFTA states that “inclusive economic growth aims to distribute benefits among the entire population by providing equitable opportunities for participation of women and men in business, industry and the labour market.”¹⁶⁵ By adopting this phrasing, CIFTA appears to acknowledge the rise in discontent surrounding increased international trade and economic globalisation and attempts to indicate that a better future could be attained through Inclusive Trade practices. Consequently, this measure offers a solution to the complaints encompassing trade and globalisation; that solution is firmly rooted in inclusive policies. Instead of trade and globalisation being the source of the problems, by using Inclusive Trade policies – trade and globalisation can be remodeled in such a way that solves many of the grievances it has created.

Another common theme that runs across CIFTA and the four trade agreements discussed above is that they each mainstream anti-gender-discrimination by weaving measures thematically across various chapters.¹⁶⁶ Mainstreaming anti-gender-

¹⁶⁴ Lang, *supra* note 13. at p.532

¹⁶⁵ CIFTA, *supra* note 141.

¹⁶⁶ *Ibid.*

discrimination is intrinsically linked with achieving the United Nation's Sustainable Development Goal Five. These measures are also expressed as promoting equal rights,¹⁶⁷ including in private sectors, and eliminating "all forms of discrimination against women".¹⁶⁸

Unlike the previously analysed trade agreements above, the Trade and Gender Chapter from CIFTA is subject to dispute settlement.¹⁶⁹ This is a substantial divergence from CPTPP, CETA, CUSMA and CCFTA and reflects the significance that Canada and Israel afford to the issue of trade and gender. If a dispute were to arise under the CIFTA Trade and Gender Chapter, the parties shall first "make all possible efforts, through dialogue, consultations and cooperation, to resolve any matter that may arise".¹⁷⁰ If a resolution is not reached, and both parties consent, then the matter may be submitted to dispute settlement.¹⁷¹ Consequently, CIFTA has created an unprecedented standard of commitment by allowing the Trade and Gender Chapter to be enforceable through dispute settlement.

IV. Indigenous Peoples and Trade

*Helping enable Indigenous communities and businesses to take advantage of the opportunities that come from international trade, investments, and supply chains is a component of supporting a strong and expanding Indigenous economy.*¹⁷²

- Patty Hajdu, Minister of Indigenous Services

¹⁶⁷ CIFTA, *supra* note 141., Article 13.1(2) & (6) and Article 13.2(2) and Article 13.3(4)(d)

¹⁶⁸ *Ibid.* CIFTA, Article 13.1(2)

¹⁶⁹ *Ibid.* CIFTA, Article 13.6 Dispute Settlement

¹⁷⁰ *Ibid.* CIFTA, Article 13.6(1)

¹⁷¹ *Ibid.* CIFTA, Article 13.6(2)

¹⁷² Global Affairs Canada, "Canada endorses Indigenous Peoples Economic and Trade Cooperation Arrangement", (10 December 2021), online: <<https://www.canada.ca/en/global-affairs/news/2021/12/canada-endorses-Indigenous-peoples-economic-and-trade-cooperation-arrangement.html>> Last Modified: 2021-12-10.

When it comes to incorporating measures pertaining to Indigenous peoples and trade, each agreement takes a different approach and appears to address this issue from differing perspectives. For instance, CPTPP links Indigenous people's issues with environmental issues whereas CETA distinguishes Indigenous cultural practices from environmental law as separate and distinct. CETA also contains carve outs that exempt areas of the agreement from applying to Indigenous peoples and protects domestic initiatives that promote Indigenous entrepreneurs and businesses to advance economically. Next, CUSMA takes an approach that protects *sui generis* Indigenous rights in Canada and promotes Indigenous-owned businesses' competitiveness in the North American economy. Lastly, CIFTA and the CCFTA contain no Inclusive measures that address Indigenous peoples.

a. Comprehensive and Progressive Trans-Pacific Partnership

The CPTPP contains only three references to Indigenous peoples. First, the preamble reaffirms the importance of Indigenous rights, Inclusive Trade, traditional knowledge, and preserving the Parties' right to regulate in the public interest on these matters.¹⁷³ The scope of regulation *in the public interest* is left open to interpretation.¹⁷⁴ For a country like Canada with self-governing Indigenous nations, the regulatory scope is likely to be different than for another signatory country like Japan or Vietnam

¹⁷³ Global Affairs Canada, "Consolidated TPP Text – Table of Contents", (10 February 2017), online: GAC <<https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/tpp-tppt/text-texte/toc-tdm.aspx?lang=eng>> Last Modified: 2016-12-20.; *Comprehensive and Progressive Trans-Pacific Partnership (CPTPP)*, Preamble <<https://www.enterprisesg.gov.sg/-/media/ESG/Files/Non-Financial-Assistance/For-Companies/Free-Trade-Agreements/CPTPP/Chapters/00ComprehensiveandProgressiveAgreementforTransPacificPartnershipCPTPP.pdf>>

¹⁷⁴ *Ibid.* CPTPP

which lacks any sort of legally recognised or distinguished Indigenous population similar to Canada's.

The second measure within the CPTPP that addresses the rights of Indigenous peoples relates to intellectual property and applies solely to New Zealand.¹⁷⁵ It enables New Zealand to uphold its obligations under the Treaty of Waitangi (New Zealand's founding document) to protect Indigenous plant species – but does not mention protecting the rights or interests of Indigenous *peoples*.¹⁷⁶

The third measure pertaining to Indigenous peoples in the CPTPP is found in the Environment Chapter which provides that the Parties recognise the “importance of respecting, preserving, and maintaining knowledge and practices of Indigenous and local communities embodying traditional lifestyles that contribute to the conservation and sustainable use of biological diversity”.¹⁷⁷ By linking the role of Indigenous communities with protecting and conserving bio-diversity, this measure aligns with the Canadian Government's domestic support of Indigenous-led environmental conservation efforts. In 2021, the Canadian Government dedicated CA\$340 million to support Indigenous peoples as guardians and protectors of nature.¹⁷⁸ These funds are being used both for conservation and for the promotion of Indigenous knowledge and

¹⁷⁵ *Ibid.* CPTPP, Chapter 18 Intellectual Property <<https://www.enterprisesg.gov.sg/-/media/ESG/Files/Non-Financial-Assistance/For-Companies/Free-Trade-Agreements/CPTPP/Chapters/18IntellectualProperty.pdf>>

¹⁷⁶ NZ History, The Treaty of Waitangi: The Treaty in Brief (17 May 2017) <<https://nzhistory.govt.nz/politics/treaty/the-treaty-in-brief>>; *Ibid.*, CPTPP, Chapter 18 Intellectual Property, Annex 18-A, Annex to Article 18.7.2 <<https://www.enterprisesg.gov.sg/-/media/ESG/Files/Non-Financial-Assistance/For-Companies/Free-Trade-Agreements/CPTPP/Chapters/18IntellectualProperty.pdf>>

¹⁷⁷ *Ibid.*, CPTPP, Chapter 20 Environment, Article 20.13(3): Trade and Biodiversity

¹⁷⁸ Environment and Climate Change Canada, “Government of Canada announces \$340 million to support Indigenous-led conservation”, (12 August 2021), online: <<https://www.canada.ca/en/environment-climate-change/news/2021/08/government-of-canada-announces-340-million-to-support-Indigenous-led-conservation.html>> Last Modified: 2021-08-12.

leadership. Hence, this recognition statement within the Environment Chapter seems to reflect the spirit that Canada takes domestically towards promoting Indigenous-led environmental initiatives.

However, what the CPTPP lacks is any sort of carve out for protecting Indigenous rights such as those conferred by section 35 of the *Constitution Act 1982* or preferential treatment for promoting Indigenous people's participation in international trade and investment.¹⁷⁹ Instead, mentions of indigeneity are intrinsically linked with environmental issues. In this respect the CPTPP does not "include" Indigenous peoples' economic interests, rather it harkens to the cultural importance of environmental preservation. While the CPTPP reaffirms the importance of Inclusive Trade in the preamble, it ultimately lacks any inclusive measures that advance the economic interests of Indigenous peoples.

b. Comprehensive Economic and Trade Agreement

Unlike the CPTPP, CETA uses the term "aboriginal" in lieu of "Indigenous"; this section uses these terms interchangeably. While the CPTPP links Indigenous peoples and environmental issues, CETA takes an opposite approach and distinguishes the two. CETA addresses aboriginal peoples in the definition of "environmental law" in the Trade and Environment Chapter.¹⁸⁰ In this definition environmental law includes the conservation and protection of wild flora and fauna, but excludes traditional aboriginal

¹⁷⁹ THE CONSTITUTION ACTS, 1867 to 1982, online: <<https://laws-lois.justice.gc.ca/eng/const/page-13.html#h-53>> Last Modified: 2020-08-07>. Section 35 Recognition of Existing Aboriginal and Treaty Rights

¹⁸⁰ CETA, *supra*. note 83., Chapter 24, Article 24.1

management, subsistence or harvesting of natural resources.¹⁸¹ This separation reflects how Canada maintains a framework of rules aimed at facilitating Indigenous cultural practices involving the environment and conservation of biodiversity. For example, Canada has a ban on whaling, however the Inuit still have a right to hunt whales for cultural and subsistence reasons.¹⁸² Another example of a different environmental rules for Indigenous peoples is the *First Nations Land Management Act*.¹⁸³ This act uniquely applies to Indigenous groups, enabling them to create their own land management regimes and legally enforceable land codes.¹⁸⁴ It promotes self-governance and self-determination of Indigenous nations. Consequently, by exempting Aboriginal land management and cultural practices from the scope of the definition of “environmental law”, CETA minimizes potential conflicts that could arise with regards to government procurement, natural resources, environmental law, and Indigenous rights.

CETA also goes beyond the CPTPP by providing economic benefits for Indigenous peoples. Canada’s market access schedule within the Government Procurement Chapter of CETA specifically precludes the chapter from applying to Aboriginal peoples, set asides for Aboriginal businesses, existing Aboriginal treaty rights and constitutional rights recognized under section 35 of the *Constitution Act 1982*.¹⁸⁵ The broad nature of this exemption makes it more likely for non-treaty Indigenous groups to also benefit from domestic schemes that otherwise could be viewed as creating

¹⁸¹ *Ibid.*

¹⁸² Nancy C Doubleday, “Aboriginal Subsistence Whaling: The Right of Inuit to Hunt Whales and Implications for International Environmental Law” 17 23.

¹⁸³ First Nations Land Management Act (S.C. 1999, c. 24) <<https://laws-lois.justice.gc.ca/eng/acts/F-11.8/>>

¹⁸⁴ *Ibid.* Section 15 Coming into Fore of Land Code, Section 16 Power to Manage

¹⁸⁵ CETA, *supra*. note 83. Chapter 19 Government Procurement, Annex 19-7 – General Notes (2)(a)

more-favourable circumstances for Aboriginal entrepreneurs or businesses to compete economically. This exemption is necessary to maintain the Indigenous business and federal procurement initiative that promotes Indigenous business development.¹⁸⁶ Under this scheme, Indigenous Services Canada advocates for Indigenous-owned businesses to promote their competitiveness while bidding for federal government contracts, working on major Crown projects and offering support through providing advice and guidance on incorporating Indigenous businesses into the procurement process.¹⁸⁷ The Canadian Government also runs a Strategic Partnership Initiative that has a fund of over CA\$300 million and primarily recruits Indigenous businesses, organisations, communities and local governments to participate.¹⁸⁸ The goal of this initiative is to overcome the financial barriers that Indigenous communities face when endeavouring to participate in complex economic opportunities.

Potentially the most significant measure within CETA is in the Schedule of Canada Reservations. *Reservation II-C-1* allows Canada to reserve the right to adopt or maintain any measure that denies investors from the “European Union and their investments or service suppliers of the European Union, rights or preferences provided to aboriginal peoples.”¹⁸⁹ This is significant because without this reservation, Canada could be required under the National Treatment obligation to provide

¹⁸⁶ Government of Canada; Indigenous Services Canada, “Indigenous business and federal procurement”, (3 November 2008), online: <<https://www.isc-sac.gc.ca/eng/1100100032802/1610723869356>> Last Modified: 2022-04-21.

¹⁸⁷ *Ibid.*

¹⁸⁸ Government of Canada; Indigenous Services Canada, “Strategic Partnerships Initiative”, (23 February 2012), online: <<https://www.isc-sac.gc.ca/eng/1330016561558/1594122175203>> Last Modified: 2022-04-25.

¹⁸⁹ CETA, *supra*. note 83. Schedule of Canada, Reservation II-C-1

European Investors and service providers with the same opportunities and benefits conferred to Indigenous businesses such as those described above.¹⁹⁰

The measures within CETA can be largely characterized as protecting negative rights as opposed to creating positive rights for Indigenous peoples. The measures often take the form of exemptions of application, instead of creating new rights or affirmative action opportunities. This approach enables Canada to maintain the domestic programs that specifically target Indigenous peoples, groups, and businesses. Instead of hoisting obligations onto the EU to create affirmative action type opportunities for Indigenous groups, Canada can maintain and promote its domestic initiatives without infringing on National Treatment obligations. On the other hand, creating positive rights might be seen as more “inclusive” and ambitious. However, the latter type of positive approach could be more difficult to negotiate into a trade agreement compared to an exemption.

c. Canada-United States-Mexico Agreement

Compared to the CPTPP and CETA, CUSMA contains the most measures pertaining to Indigenous peoples. Like the CPTPP, the preamble of CUSMA mentions Indigenous peoples.¹⁹¹ Unlike the CPTPP, CUSMA recognizes the “importance of increased engagement by Indigenous peoples with international trade and investment”.¹⁹² This wording is more closely reflective of Inclusive Trade because it

¹⁹⁰ *Ibid.* CETA, Chapter 8 – Investment, Article 8.6 – National Treatment

¹⁹¹ CUSMA, *supra* note 90. Preamble <<https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/text-texte/00.aspx?lang=eng>>

¹⁹² *Ibid.*

expressly unites the target group, Indigenous peoples, with international trade and investment. CUSMA goes beyond the measures seen in the other multilateral agreements because it creates positive benefits and rights for Indigenous peoples who seek to engage in trade and investment under the agreement. For instance, Indigenous handmade textile and apparel goods are eligible for duty-free treatment.¹⁹³ There are also specific concessions for Mexico's Indigenous peoples to engage in cross border trade in services (CBTS).¹⁹⁴ These concessions aim to support Mexico's Indigenous peoples and to preserve and develop their "languages, culture, knowledge, traditions, identity".¹⁹⁵ Hence, CUSMA adopts measure which aim to positively affect indigenous peoples culturally and economically.

Another such measure which protects Indigenous people's culture can be found in the Environment Chapter. While the Environment Chapter does not contain any measures that create obligations relating to the promotion of Indigenous peoples economic interests in trade, it does however recognize that the environment plays an "important role in the economic, social, and cultural well-being of Indigenous peoples".¹⁹⁶ On this basis, the Parties acknowledge the importance of engaging with Indigenous groups in "the long-term conservation of the environment".¹⁹⁷ The Parties to CUSMA further acknowledge their major consumption of forest products and the importance of providing job opportunities for Indigenous peoples in this sector.¹⁹⁸ For many Canadian Indigenous communities, the forestry industry is a significant

¹⁹³ *Ibid.* CUSMA, Chapter 6: Textile and apparel goods, Article 6.2: Handmade, Traditional Folkloric or Indigenous Handicraft goods.

¹⁹⁴ *Ibid.* CUSMA, Chapter 15: Cross-Border Trade in Services, Annex 15-E: Mexico's cultural exceptions

¹⁹⁵ *Ibid.*

¹⁹⁶ *Ibid.* CUSMA, Chapter 24: Environment, Article 24.2(4):Scope and Objectives

¹⁹⁷ *Ibid.*

¹⁹⁸ *Ibid.* CUSMA, Chapter 24: Environment, Article 24.23(1): Sustainable Forest Management and Trade

generator of economic development.¹⁹⁹ In this industry, a lack of informational resources and job recruitment tools have been recognized as substantial barriers to workforce development.²⁰⁰ To counteract this, the Canadian Government has funded the British Columbia First Nations Forestry Council with CA\$959,000 to support Indigenous forestry skills development and job recruitment.²⁰¹ In the United States, the Biden-Harris administration has also committed to supporting the development of “tribal nations” (Indigenous groups) and respecting their land sovereignty.²⁰²

The most notable aspect of CUSMA is that it expressly includes Indigenous peoples in opportunities that arise from economic globalisation. The SME Chapter of CUSMA aims to increase trade and investment opportunities for SMEs owned by under-represented groups, like Indigenous peoples, by strengthening collaboration with other parties.²⁰³ CUSMA also establishes a competitiveness committee that gives advice and provides recommendations to Indigenous-owned businesses on how they can enhance their competitiveness in the North American economy.²⁰⁴

CUSMA includes three measures that create exceptions and reservations in favour of Indigenous peoples. Under the Exceptions and General Provisions Chapter,

¹⁹⁹ Western Economic Diversification Canada, “Government of Canada supports Indigenous jobs in forestry sector”, (29 July 2021), online: <<https://www.canada.ca/en/western-economic-diversification/news/2021/07/government-of-canada-supports-indigenous-jobs-in-forestry-sector.html>> Last Modified: 2021-07-29.

²⁰⁰ Canada, *supra* note 178.; Western Economic Diversification Canada, “Government of Canada supports Indigenous jobs in forestry sector”, (29 July 2021), online: <<https://www.canada.ca/en/western-economic-diversification/news/2021/07/government-of-canada-supports-Indigenous-jobs-in-forestry-sector.html>> Last Modified: 2021-07-29.

²⁰¹ *Ibid.*

²⁰² “Biden-Harris Plan for Tribal Nations”, online: *Joe Biden Pres Off Campaign Website* <<https://joebiden.com/tribalnations/>>.

²⁰³ CUSMA, *supra* note 90. Chapter 25 Small and Medium Sized Enterprises, Article 25.2: Cooperation to Increase Trade and Investment Opportunities for SMEs

²⁰⁴ *Ibid.*, CUSMA, Chapter 26 Competitiveness, Article 26:1 North American Competitiveness Committee

CUSMA allows for preferential treatment to be accorded to Indigenous peoples so long as it is not used as a disguised means of arbitrary or unjustified discrimination against persons from the other Party.²⁰⁵ This exception allows the Parties to continue providing affirmative action programs and *sui generis* rights to Indigenous peoples without a foreign investor or exporter claiming that such measures or programs breach Canada's National Treatment obligations.²⁰⁶

Like CETA, CUSMA also contains a reservation in the Schedule of Canada which allows Canada to reserve the "right to adopt or maintain measures conferring rights or preferences to aboriginal peoples" such as those related to or recognised under section 35 of the *Constitution Act 1982*, or those contained in self-governance agreements between Indigenous groups and regional governments.²⁰⁷

Lastly, Annex IV also allows for entities to accord "more favourable treatment to Aboriginal persons and organisations in the purchase of a good or service without being considered discriminatory treatment under commercial considerations."²⁰⁸

Overall, CUSMA has the most far-reaching Inclusive measures compared to the other agreements when it comes to protecting the rights and promoting the interests of Indigenous peoples. CUSMA ensures that domestic methods for Indigenous economic empowerment are protected and simultaneously creates avenues for

²⁰⁵ *Ibid.*, CUSMA, Chapter 32 Exceptions and General Provisions, Article 32.5 Indigenous Peoples Rights

²⁰⁶ *Ibid.*, CUSMA, Chapter 1 National Treatment and Market Access for Goods, Article 2.3

²⁰⁷ *Ibid.*, CUSMA, Annex II – Schedule of Canada, Reservation II-C-1

²⁰⁸ *Ibid.*, CUSMA, Annex IV – Non-Conforming Activities, Scope of Non-conforming Activities

Indigenous peoples to become more involved in the integrated North American economy through cross border trade and investment.

d. Canada-Chile Free Trade Agreement and Canada-Israel Free Trade Agreement

The CCFTA and CIFTA barely touch on Indigenous issues. In CCFTA, the only measures that addresses Indigenous peoples can be found in the Schedules of Canada and Chile which allows both parties to reserve the rights to adopt or maintain any measure that denies foreign investors their investments or service providers any rights or preferences that are provided to Indigenous peoples.²⁰⁹ Considering that both Canada and Chile were former European colonies that historically subjugated the Indigenous populations, it is surprising that the FTA does not contain more measures that promote Indigenous economic empowerment through trade or investment.

For context, less than five per cent of Canada's population self-identifies as Indigenous.²¹⁰ Meanwhile, 12.8 per cent of Chile's population is Indigenous, and 30.8 per cent of the Chilean Indigenous population lives in poverty. Despite having a much larger Indigenous population, Chile's domestic framework does not allow for a similar level of economic or self-governance opportunities for their Indigenous peoples.²¹¹

²⁰⁹ CCFTA, *supra* note 114., Annex II, Schedule of Chile and Schedule of Canada

²¹⁰ "Annual Report to Parliament 2020", online: <<https://www.sac-isc.gc.ca/eng/1602010609492/1602010631711>>.

²¹¹ "Chile - IWGIA - International Work Group for Indigenous Affairs", online: <<https://www.iwgia.org/en/chile.html>>.

CIFTA only contains one reference to Indigenous peoples, and it is found in the definition of environmental law. This definition closely mirrors that which is found in CETA, and it excludes Indigenous subsistence and harvesting practices of natural resources the definition of “environmental law”.²¹²

CIFTA and CCFTA contain the least amount of Inclusive measures that address Indigenous peoples and trade or investment. This departs from the findings in the prior section which concluded that CIFTA and the CCFTA were the most progressive and far reaching on their inclusive gender measures.

V. Small to Medium Sized Enterprises and Trade

Unlike the other categories within Inclusive Trade, measures pertaining to SMEs are not found within all five of the agreements. Rather, only the CPTPP, CUSMA and CIFTA address SMEs, but not CETA or CCFTA. However, in recent years the CETA Joint Committee adopted Recommendation 00/2018 which recognised the importance of including SMEs in Canada-EU bilateral trade relations and enhancing SME’s ability to benefit from opportunities under the agreement.²¹³

The CPTPP, CUSMA and CIFTA each have a standalone chapter dedicated to SMEs. Outside of the SME chapter, the CPTPP and CUSMA adopt similar approaches by weaving SME-related obligations and recognition statements throughout their texts.

²¹² CIFTA, *supra* note 141., Chapter 11 Trade and Environment, Article 11.21 Definitions

²¹³ Global Affairs Canada, “Recommendation 003/2018 of 26 September 2018 of the CETA Joint Committee on Small- and Medium-sized Enterprises (SMEs)”, (26 September 2018), online: GAC <<https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/rec-003.aspx?lang=eng>> Last Modified: 2018-09-26.

Even so, CUSMA contains more SME-related measures than CIFTA or the CPTPP. There are some SME provisions within these agreements which are largely identical, especially within the SME chapters. However, there are other SME-related measures which are unique to each agreement and lack an equivalent counterpart in the other agreements. For these reasons, this section takes a different approach than the prior sections on gender and Indigenous peoples. This section will analyse SME-related provisions by commitment theme or measure, not by agreement. As such, the analysis below is divided into two parts, it begins by addressing the overlapping commitments that can be found across agreements. Then, it considers the differences and provisions which are found solely in one agreement.

a. Overlapping Areas and Shared Commitments

Preamble

In its preamble, the CPTPP states that members “support the growth and development of micro, small and medium sized enterprises by enhancing their ability to participate in and benefit from the opportunities created” by the agreement. Likewise, CUSMA’s preamble contains a recognition statement that the parties will support the growth of SMEs and micro-sized enterprises because they significantly contribute to “economic growth, employment, community development, youth engagement and innovation”.²¹⁴ Here, the most notable commonalities between CPTPP and CUSMA are that the preambles of both agreements acknowledge that SMEs require some assistance to participate in international economic opportunities

²¹⁴ CPTPP, *supra* note 173. Preamble; CUSMA, *supra* note 90. Preamble

and that by giving SMEs that support, further underlying objectives will be achieved. CIFTA does not contain any mention of SMEs in its preamble.

General Principles

CUSMA and CIFTA lay out the general principles that underpin their SME chapters with near identical phrasing. Both agreements state that the Parties recognize the “fundamental role of SMEs in maintaining dynamism and enhancing” domestic economic competition. Under both agreements, the Parties “shall foster close cooperation between SMEs of the Parties and cooperate in [promoting jobs or creating jobs] and growth in SMEs”.²¹⁵

Information Sharing

The CPTPP, CUSMA and CIFTA contain nearly identical measures on information sharing.²¹⁶ Each provides that the Parties “shall establish or maintain” their own “publicly accessible website containing information regarding this agreement” which is intended to help SMEs access “opportunities provided by [the] agreement”.²¹⁷ This website “shall include” links to other websites from government agencies and appropriate entities that provide useful information “to any person interested in trading, investing, or doing business in that Party’s territory”.²¹⁸ The “useful information”

²¹⁵ CUSMA, *supra* note 90. Chapter 25 – Small to Medium Sized Enterprises, Article 25.1(1) General Principles; CIFTA, *supra* note 141. Chapter 14 - Small to Medium Sized Enterprises, Article 14.1(1) General principles.

²¹⁶ CUSMA, *supra* note 90. Chapter 25 – Small to Medium Sized Enterprises, Article 25.3 Information Sharing; CIFTA, *supra* note 141. Chapter 14 - Small to Medium Sized Enterprises, Article 14.2 Information Sharing; CPTPP, *supra* note 173. Chapter 24 – Small to Medium Sized Enterprises, Article 24.1 Information Sharing

²¹⁷ CUSMA, *supra* note 90. Chapter 25 – Small to Medium Sized Enterprises, Article 25.3(1) Information Sharing; CIFTA, *supra* note 141. Chapter 14 - Small to Medium Sized Enterprises, Article 14.2(1) Information Sharing; CPTPP, *supra* note 173. Chapter 24 – Small to Medium Sized Enterprises, Article 24.1(1) Information Sharing

²¹⁸ CUSMA, *supra* note 90. CUSMA Chapter 25 – Small to Medium Sized Enterprises, Article 25.3(2) Information Sharing; CIFTA, *supra* note 141. Chapter 14 - Small to Medium Sized Enterprises, Article 14.2(2) Information

contained in the website may include: descriptions of customs regulations, procedures, enquiry points, regulations and procedures concerning intellectual property rights, technical regulations, investment regulations, trade promotion programs, government procurement opportunities and SME financing programs.²¹⁹ On this feat, CUSMA goes further by stipulating that information related to temporary entry of business persons should also be included.²²⁰ The Parties are obliged to regularly review the information and links on the website to ensure their currency and accuracy.²²¹ Overall, by creating a transparent and accessible system for sharing information with SMEs, the Parties believe that this will support them to engage further with economic opportunities that arise under the agreement.

Committee on SMEs

The CPTPP, CUSMA and CIFTA each establish a committee on SME issues composed of representatives from each Party.²²² The CPTPP and CUSMA committees actively “develop and promote seminars, workshops, webinars or other activities to inform SMEs of the benefits available to them under [the] agreement”.²²³

Sharing; CPTPP, *supra* note 173. Chapter 24 – Small to Medium Sized Enterprises, Article 24.1(2) Information Sharing

²¹⁹ f Chapter 25 – Small to Medium Sized Enterprises, Article 25.3(3) Information Sharing; CIFTA, *supra* note 141. Chapter 14 - Small to Medium Sized Enterprises, Article 14.2(3) Information Sharing; CPTPP, *supra* note 173. Chapter 24 – Small to Medium Sized Enterprises, Article 24.1(3) Information Sharing

²²⁰ CUSMA, *supra* note 90. Chapter 25 – Small to Medium Sized Enterprises, Article 25.3(3)(l) Information Sharing

²²¹ *Ibid.* CUSMA Chapter 25 – Small to Medium Sized Enterprises, Article 25.3(4) Information Sharing; CIFTA, *supra* note 141. Chapter 14 - Small to Medium Sized Enterprises, Article 14.2(4) Information Sharing; CPTPP, *supra* note 173. Chapter 24 – Small to Medium Sized Enterprises, Article 24.1(5) Information Sharing

²²² CUSMA, *supra* note 90. Chapter 25 – Small to Medium Sized Enterprises, Article 25.4 Committee on SME Issues; CPTPP, *supra* note 173. Chapter 14 - Small to Medium Sized Enterprises, Article 24.2 Committee on SMEs; CIFTA, *supra* note 141. Chapter 14 – Small to Medium Sized Enterprises, Article 14.3 Committee on SMEs

²²³ CUSMA, *supra* note 90. Chapter 25 – Small to Medium Sized Enterprises, Article 25.4(2)(d) Committee on SME Issues; CPTPP, *supra* note 173. Chapter 14 - Small to Medium Sized Enterprises, Article 24.2(2)(c) Committee on SMEs

The committee established by CIFTA undertakes a similar role but instead supports and assists SMEs through training programs and trade education to identify commercial partners in other Parties and establish “good business credentials”.²²⁴ Hence, the committees established under all three agreements are intended to take an active role in facilitating the dispersion of information to SMEs and encourage their involvement in international trade and investment opportunities under the applicable agreement. Each of these functions can be identified and used as indicators for critics to assess whether the committees have been fulfilling their prescribed role.

Identical aspects of the SME committees across the three agreements include: identifying ways to assist SMEs in the Parties’ territory to take advantage of the commercial opportunities under the agreement, creating an open dialogue to exchange each Party’s experiences and best practices in supporting and assisting SME exporters, review and coordinate the Committee’s work program with those of other committees (i.e., the Trade and Gender Committee) established under the agreement.²²⁵

While largely similar in substance, the roles of the SME committee established within CUSMA vary from those established under the CPTPP and CIFTA in several respects. The CUSMA committee has four further roles than the other SME

²²⁴ CPTPP, *supra* note 173. Chapter 14 - Small to Medium Sized Enterprises, Article 24.2(2)(b) Committee on SMEs

²²⁵ CUSMA, *supra* note 90. Chapter 25 – Small to Medium Sized Enterprises, Article 25.4(2)(a)-(g) Committee on SME Issues; CPTPP, *supra* note 173. Chapter 14 - Small to Medium Sized Enterprises, Article 24.2(2)(a)-(g) Committee on SMEs; CIFTA, *supra* note 141. Chapter 14 – Small to Medium Sized Enterprises, Article 14.3(2)(a)-(g) Committee on SMEs

committees.²²⁶ Among these additional commitments is the undertaking to “promote the participation of SMEs in digital trade”, “facilitate the exchange of information on entrepreneurship education programs for youth and under-represented groups”, annually submit a report of the committees activities and make recommendations to the Commission, and lastly, consider any other matter pertaining to SMEs as the SME committee may decide.”²²⁷ Hence, not only does the CUSMA SME committee undertake the same duties as the other SME committees established under CPTPP and CIFTA, but it goes further and expressly targets other under-represented groups to increase their participation in the opportunities under the agreement as well.

The CUSMA SME committee also goes further than its counterparts where the agreement stipulates that the “SME Committee shall convene” a multilateral dialogue between the Parties of the agreement. This “SME dialogue may include private sector, employees, non-government organizations, academic experts, SMEs owned by diverse and under-represented groups and other stakeholders from each Party”. The purpose of this multilateral dialogue is to facilitate further modernizations of CUSMA with respect to SMEs.²²⁸ CUSMA also explicitly lists obligations within the agreement that benefit SMEs.²²⁹ This measure reflects the overarching theme of increasing transparency for potential users of the agreement by helping them to easily locate provisions that target SMEs.

²²⁶ CUSMA, *supra* note 90. Chapter 25 – Small to Medium Sized Enterprises, Article 25.4(2)(k)-(n) Committee on SME Issues

²²⁷ *Ibid.* CUSMA Chapter 25 – Small to Medium Sized Enterprises, Article 25.4(2)(k)-(n) Committee on SME Issues

²²⁸ *Ibid.* CUSMA Chapter 25 – Small to Medium Sized Enterprises, Article 25.5 SME Dialogue

²²⁹ *Ibid.* CUSMA Chapter 25 – Small to Medium Sized Enterprises, Article 25.6 Obligations in the Agreement that Benefit SMEs

Non-Application of Dispute Settlement

The final aspect of the Chapter on SMEs which is identical across CUSMA, CPTPP and CIFTA is the non-application of dispute settlement.²³⁰ The spirit of the SME chapter is meant to be collaborative and co-operative in nature, rather than combative. Hence, the lack of dispute settlement is to be expected. Nonetheless, without enforceability it is difficult to ascertain how adherence to some measures is ensured in practice.

Other Committees

In addition to the SME Committee, CUSMA and CPTPP establish two further committees that effect SME's economic opportunities: the competitiveness committee and the government procurement committee. In the CPTPP, the former committee is called the "committee on competitiveness and business facilitation".²³¹ This committee is tasked with providing recommendations aimed at enhancing the participation of SMEs in regional supply chains.²³² Like the SME committee, the CPTPP's competitiveness committee "shall develop" and "promote seminars, workshops and other capacity building activities to assist SME's to participate in supply chains within the free trade area."²³³ In CUSMA, the competitiveness Committee has a very similar mandate, it is tasked with providing advice and recommendations on ways to further enhance the competitiveness and participation of SMEs in the North American

²³⁰ *Ibid.* CUSMA Chapter 25 – Small to Medium Sized Enterprises, Article 25.7 Non-application of Dispute Settlement

²³¹ CPTPP, *supra* note 173. Chapter 22 Competitiveness and Business Facilitation, Article 22.2 Committee on Competitiveness and Business Facilitation

²³² *Ibid.* CPTPP Chapter 22 Competitiveness and Business Facilitation, Article 22.2 (3)(c) Committee on Competitiveness and Business Facilitation

²³³ *Ibid.* CPTPP Chapter 22 Competitiveness and business facilitation, Article 22.3(2) Supply Chains

economy.²³⁴ In addition to supporting SMEs, the committee is also tasked with supporting other enterprises owned by under-represented groups including women, Indigenous peoples, youth, and minorities.²³⁵ Hence, CUSMA's competitiveness committee reflects more aspects of Inclusive Trade.

The latter Committees on Government Procurement established within CUSMA and the CPTPP are both comprised of government representatives and meet once a year to address matters in relation to government procurement.²³⁶ Most notably, these committees are both tasked with facilitating the participation of SMEs in government procurement sectors covered by the agreements respectively.²³⁷

CUSMA and the CPTPP have several other identical measures that promote SMEs including the improvement of SMEs participation in private society,²³⁸ cooperation on improving labour productivity,²³⁹ and facilitating the participation of SMEs in economic growth through conferring on them preferential treatment for government procurement.²⁴⁰

²³⁴ CUSMA, *supra* note 90., Chapter 26 Competitiveness, Article 26:1(5)(c) North American Competitiveness Committee

²³⁵ *Ibid.*

²³⁶ CUSMA, *supra* note 90. Chapter 13 Government Procurement, Article 13.21 Committee on Government Procurement; CPTPP, *supra* note 173. Chapter 15 Government Procurement, Article 15.23 Committee on Government Procurement

²³⁷ CUSMA, *supra* note 90. Chapter 13 Government Procurement, Article 13.21(1)(a) Committee on Government Procurement; CPTPP, *supra* note 173. Chapter 15 Government Procurement, Article 15.23(b) Committee on Government Procurement

²³⁸ CUSMA, *supra* note 90. Chapter 27 Anticorruption, Article 27.5 Participation of Private Sector and Society; CPTPP, *supra* note 173. Chapter 26 Transparency and anti-corruption, Article 26.10 Participation of Private Sector and Society

²³⁹ CUSMA, *supra* note 90. Chapter 23 Labour, Article 23.12 cooperation; CPTPP, *supra* note 173. Chapter 19 Labour, Article 19.10 Cooperation

²⁴⁰ CUSMA, *supra* note 90., Chapter 13 Government Procurement, Article 13.20 Facilitation of Participation by SMEs; CPTPP, *supra* note 173. Chapter 15 Government Procurement, Article 15.21 Facilitation of Participation by SMEs

The text of CPTPP and CUSMA are most alike, often featuring identical wording on SME-related provisions. Unlike with other types of inclusive measures, such as measures related to gender or Indigenous peoples, the promotion of SMEs is not linked with ‘sustainability’ or ‘socioeconomic development’. Instead, SME-related measures are often linked with promoting “economic growth”. Occasionally, as mentioned above, CUSMA goes beyond the measures contained in the CPTPP and couples the economic promotion of SMEs with the simultaneous promotion of other underrepresented groups such as Indigenous groups and women. Hence, CUSMA contains stronger inclusive signalling by maintaining this tripartite approach within its text.

b. Unique Provisions

Measures that are subject to dispute settlement

Despite the many similar measures across CUSMA, CPTPP and CIFTA, there are also some measures which are found solely within one agreement and not in the others. These unique SME-related measures are interspersed throughout other chapters within the agreements such as CBTS, digital trade, regulatory coherence, cooperation and capacity building, development, and supply chains.

In the CBTS chapter within CUSMA, Article 15.10 specifically addresses SMEs in the services sector. Under this measure, the Parties seek to enhance commercial opportunities for SMEs in the service sector by endeavouring to support SME development, business models and direct selling. Like the Chapter on SMEs, this measure invokes the co-operative spirit of creating opportunities for otherwise disadvantaged businesses. While at first instance, this commitment may not appear

significant beyond the Parties signalling, in practice it could be more significant than most measures within the SME chapter. This is because the CBTS chapter in CUSMA is subject to dispute settlement while the SME chapter is not.²⁴¹

Consequently, “when a Party considers that a benefit it could reasonably have expected to accrue to it under” the CBTS chapter “is being nullified or impaired as a result of the application of a measure of another Party that is not inconsistent with” CUSMA, then the Party may make use of the dispute settlement chapter.²⁴² As a result, SME’s in the services sector might be able to make use of this enforcement mechanism.

Cooperation and Recognition Statements

The CPTPP contains further measures pertaining to SMEs interspersed throughout the agreement, but only in chapters that are not subject to dispute settlement. This includes measures such as those which deem “good regulatory practice” as considering the potential impact of the regulation on SMEs,²⁴³ or when cooperating on electronic commerce, the parties shall “work together to assist SMEs to overcome obstacles to” using electronic commerce mechanisms.²⁴⁴ Overall, these types of SME-related measures are cooperative in nature and often take the form of recognition statements. The parties acknowledge that “SMEs may require assistance in participating in global markets”.²⁴⁵

²⁴¹ CUSMA, *supra* note 90. Chapter 31 Dispute Settlement, Article 31.2 Scope

²⁴² *Ibid.* CUSMA, Chapter 31 Dispute Settlement, Article 31.2(c) Scope

²⁴³ CPTPP, *supra* note 173. Chapter 25 Regulatory Coherence, Article 25.5(3) Implementation of Core Good Regulatory Practices

²⁴⁴ *Ibid.* CPTPP Chapter 14 Electronic Commerce, Article 14.15(a) Cooperation

²⁴⁵ *Ibid.* CPTPP Chapter 21 Cooperation and Capacity Building, Article 21.1(3) General Provisions

The CPTPP's development chapter includes several references to SMEs.²⁴⁶ Underpinning this chapter is the shared ideal that SMEs are drivers of economic growth.²⁴⁷ As such, "the Parties may enhance broad-based economic growth" that take advantage of investment or trade opportunities under CPTPP to contribute to sustainable development and poverty reduction.²⁴⁸ These policies may take the form of promoting "market-based approaches aimed at improving trading conditions and access to finance for vulnerable areas or populations, and SMEs".²⁴⁹

Overall, CUSMA and the CPTPP have the most far-reaching measures that pertain to SMEs. CIFTA contains far fewer references to SMEs, however it still vastly outpaces CETA or the CCFTA which omit SME-related measures altogether.

²⁴⁶ *Ibid.* CPTPP Chapter 23 Development <<https://www.enterprisesg.gov.sg/-/media/ESG/Files/Non-Financial-Assistance/For-Companies/Free-Trade-Agreements/CPTPP/Chapters/23Development.pdf>>

²⁴⁷ *Ibid.* CPTPP Chapter 23 Development, Articles 23.1(2)-(4) General Provisions, Article 23.3 Broad-Based Economic Growth, Article 23.4: Women and Economic Growth, Article 23.5: Education, Science and Technology, Research and Innovation

²⁴⁸ *Ibid.* CPTPP Chapter 23 Development, Article 23.3 Broad-Based Economic Growth

²⁴⁹ *Ibid.* CPTPP Chapter 23 Development, Article 23.3(4) Broad-Based Economic Growth

CHAPTER 4: MAINSTREAMING INCLUSIVE TRADE

This chapter explores how Inclusive Trade can be mainstreamed and proliferated by framing it in terms of “other barriers” to trade. The existence of “other barriers” to trade is widely accepted, yet undefined concept and is derived from the preamble of the GATT 1947. To demonstrate that the obstacles and experiences of the target groups of Inclusive Trade could be categorised as “other barriers”, I will use a three-pronged approach: first, I illustrate how the target groups of Inclusive Trade face socioeconomic barriers that exclude these groups from participating in international trade and investment opportunities. Second, I offer various WTO-consistent interpretations of “other barriers” that exhibit the breadth and malleability of the concept. Third, I demonstrate how the goals of Inclusive Trade and the goals of reducing trade barriers are largely the same, Inclusive Trade simply presents a new method of achieving those goals. By uniting the concepts of “Inclusive Trade” and “other barriers” to trade, the former could be framed in a way that a broader array of WTO Members could feasibly envision adopting. Through highlighting the similarities of these concepts, the intention is to demonstrate that Inclusive Trade should not be seen as revolutionary nor even as a socially progressive policy agenda. Instead, Inclusive Trade should be seen as providing a framework and set of tools that can help Member States to achieve goals that they have already been committed to since becoming signatories to the GATT: poverty reduction and economic development.

I. Socioeconomic Exclusion as a Trade Barrier

The discontent engulfing globalisation is largely caused by the inequitable distribution of benefits and opportunities arising from international trade, excluding

certain groups from sharing in the gains.²⁵⁰ Canada's inclusive approach analogizes socio-economic exclusion as an obstacle to accessing trade-related opportunities and unlocking sustainable socioeconomic development. Central to the inclusive approach are policies that address gender related issues, protection for Indigenous people's rights and interests as well as providing greater support for SMEs.²⁵¹ The rationale behind these policy objectives stem from the emerging consensus that increased globalisation and trade does not always improve welfare evenly.²⁵² As such, compensatory measures are required to include those who have been left behind from accessing the potential benefits from trade. The fact that there are excluded groups is not contentious, but what is contentious is if and how a state should respond to this socioeconomic exclusion. Moreover, these identified groups tend to be heavily impacted by trade but are often on the fringes of trade-policy making.²⁵³ Hence, for this to change, external pressure to take affirmative action would most likely be required.

a. Trade and Gender

Canada's foreign policy identifies a "variety of barriers" to women's economic mobility such as limited support for girls' education, societal expectations surrounding domestic duties, child rearing, early marriage, gender-based violence and inadequate infrastructure.²⁵⁴ Where these sorts of barriers to participation are embedded in a country's societal framework, they tend to be coupled with legal impediments that

²⁵⁰ Nina Pavcnik, "The Winners and Losers from International Trade" (2019) 61:2 *Surviv Lond* 97–100.

²⁵¹ Report by Canada, *supra*. note 36. at p.6

²⁵² Summers, *supra* note 7. at p.85; Report by Canada, *supra*. note 36. at p.4

²⁵³ Goff, *supra* note 12. at p.275

²⁵⁴ Canada, *supra* note 144.

hinder women and girl's economic freedom.²⁵⁵ These legal impediments result in the types of gender-based barriers which Canada's inclusive approach attempts to overcome by including gender-related measures in trade agreements.

I acknowledge that some critics might adopt the position that the issue of 'gender' should remain outside of economic agreements, or that 'gender' should not be considered as a barrier. While historically that position would have lacked opposition, that does not mean it is an optimal or economically rationale position to adopt. For many women who wish to be autonomous economic actors, gender constitutes the ultimate obstacle.

Presently, women face legal discrimination in over 150 countries.²⁵⁶ Of these countries, 100 prevent women from pursuing careers due to their gender, and some of which also prevent women from registering businesses, inheriting property, and owning land.²⁵⁷ Each of these factors creates insurmountable barriers for women to participate meaningfully in the economy or be recognised as vessels of economic potential.

Obstructing or eliminating the economic freedom of fifty per cent of a countries' adult population from participating in the economy, and by extension international trade, renders that country severely inefficient at attaining sustainable economic growth.

²⁵⁵ *Ibid.*

²⁵⁶ World Bank, *Women, Business and the Law 2016: Getting to Equal* (The World Bank, 2015).

²⁵⁷ Human Development Report Office, "2016 Human Development Report", online: <<https://s3.amazonaws.com/hdr2016test/>>.

A second criticism could be that using economic pressure in the form of trade agreements to induce a developing country to change its gender-related policies would be overreach. In response to this, I point to when the International Monetary Fund and World Bank attempted to ‘help’ developing countries achieve economic growth through the structural readjustment programs in the 1980s and 1990s.²⁵⁸ These endeavours aimed to overhaul the financial and fiscal frameworks of developing countries to reflect western models. These efforts have since been recognised as colossal failures, leaving the recipient countries worse off than they otherwise would have been. I invoke this example to raise the issue that achieving economic growth is not necessarily a matter of monetary and fiscal policies, but also about cultural dynamics that must be present to facilitate change. For instance, unlocking the capacities of the *whole* adult population to be full economic participants, rather than merely half.

By coupling the issue of gender with achieving economic growth and enabling sustainable socioeconomic development, Canada has managed to have Trade and Gender chapters included in two bilateral trade agreements, and provisions referencing gender related issues in three multilateral trade agreements.

This is not an argument in favour of women’s rights or social justice. Rather, this thesis asserts that effective gender-related measures can be part of the solution for ameliorating the negative side effects of international trade. That solution could be adopting an Inclusive approach to trade as a means to extending the categories of persons who benefit from trade to ultimately facilitate sustainable socioeconomic growth, regardless of societal predispositions. Presently, Canada attempts to

²⁵⁸ Park, *supra* note 10.

accomplish this by negotiating into trade agreements measures which require equal treatment of persons at work, regardless of gender, and the overall reduction of gender-based discrimination in areas affected by trade, and creating new affirmative action-style opportunities for women to enjoy the benefits of international trade and investment.

b. Protecting Indigenous Rights

The second category of people that benefit under Canada's inclusive approach are Indigenous peoples. This category also refers to Aboriginal peoples and includes First Nations, "Indian, Inuit and Métis peoples".²⁵⁹ Canada's inclusive approach aims to enliven trade-related opportunities for Indigenous peoples by providing export funding, affirmative action supplier-diversity programs for Indigenous owned businesses, preferential loans, and special protection for Indigenous rights.²⁶⁰

Indigenous peoples face economic and social barriers because of systemic oppression, leaving them as some of the most economically disadvantaged groups. In Canada, 45 per cent of Indigenous peoples live in urban areas, of those people on average one quarter of them live below the poverty line.²⁶¹ Yet, the 40 per cent of Indigenous peoples who live on-reserve face even higher rates of poverty.²⁶² The OECD has indicated that these poverty rates amongst Indigenous peoples are likely

²⁵⁹ *Supra* note 179. The Constitution Act 1867, Section 35(2)

²⁶⁰ Global Affairs Canada, "Trade and Indigenous Peoples", (17 June 2020), online: GAC <https://www.international.gc.ca/trade-commerce/Indigenous_peoples-peuples_autochtones/index.aspx?lang=eng> Last Modified: 2022-06-22.

²⁶¹ Statistics Canada Government of Canada, "Indigenous people in urban areas: Vulnerabilities to the socioeconomic impacts of COVID-19", (26 May 2020), online: <<https://www150.statcan.gc.ca/n1/pub/45-28-0001/2020001/article/00023-eng.htm>> Last Modified: 2020-05-26.; Annual Report to Parliament, *supra* note 210.

²⁶² "Profile of Indigenous Canada: Trends and data needs | Linking Indigenous Communities with Regional Development in Canada | OECD iLibrary", online: <<https://www.oecd-ilibrary.org/sites/e6cc8722-en/index.html?itemId=/content/component/e6cc8722-en>>.

due to “lack of access to markets and capital.”²⁶³ This lack of market access and capital stands as a substantial obstacle to Indigenous entrepreneur’s success. Furthermore, one can trace this problem back to Canada’s unique land management and ownership system that exclusively governs Indigenous peoples. Under the *Indian Act*, a federal statute, Indigenous peoples are excluded from full economic freedom by being prevented from owning land or their home when living on reserve. Consequently, the *Indian Act* prevents Indigenous peoples from earning equity on their homes, selling the property they live on, or bequeathing their property to their children. This is because property ownership on “Indian reserves” still lies with the government.²⁶⁴ These legal obstacles to property ownership problematic for accruing wealth individually and intergenerationally.

These types of legally sanctioned barriers for Indigenous people’s economic development are not unique to Canada. An Australian government inquiry found that aboriginal Australians are the most economically deprived group in the entire country.²⁶⁵ The devastating consequences are that many Aboriginal and Indigenous peoples live in absolute poverty.²⁶⁶

Although more can be done at the domestic level to improve these circumstances, that discussion remains outside of the parameters of this thesis which examines whether the Inclusive approach to trade improves the target groups’ trade and

²⁶³ *Ibid.*

²⁶⁴ Indian Act RSC 1985 cI-5, section 18 and section 20; “BLOG: Property rights for all Canadians: the First Nations issue forgotten by all federal political parties”, (8 October 2015), online: *Fraser Inst* <<https://www.fraserinstitute.org/blogs/property-rights-for-all-canadians-the-first-nations-issue-forgotten-by-all-federal-political-parties>>.

²⁶⁵ Parliament of Australia; address=Parliament House, “Chapter 13 - Indigenous Australians”, online: <https://www.aph.gov.au/parliamentary_business/committees/senate/community_affairs/completed_inquiries/2002-04/poverty/report/c13> Last Modified: 2013-04-14publisher: corporateName=Commonwealth Parliament; address=Parliament House, Canberra, ACT, 2600; contact=+61 2 6277 7111.

²⁶⁶ *Ibid.*

investment related opportunities in a way that can foster sustainable socioeconomic development.

Much like the issue of trade and gender, the policies in question do not aim to rewrite domestic laws, instead, they aim to protect Indigenous rights and create affirmative action programs that improves the targeted groups' economic capacity through international trade where otherwise little or no opportunities would exist. As one of the most economically deprived demographics, Indigenous entrepreneurs and business have the most to gain.

c. Small- to Medium-Sized Enterprises

The third group that the inclusive approach benefits are SMEs. As juridical persons, SME's face different types of obstacles compared to the two other target groups. In the global economy, SMEs often lack economies of scale to compete with larger companies in the same industry. As a result, when an economy opens up to free trade SMEs struggle to survive as their prices can be undercut by larger corporations. Moreover, SMEs face non-tariff barriers stemming from a lack of expertise or capacity to participate in international ventures. For example, understanding the regulatory framework of food-standards and undergoing the necessary steps to be compliant with the regulatory system of a foreign country may be too complicated and too expensive for a small enterprise to attempt.

SMEs represent the majority of Canadian business with 97.9 per cent of all Canadian companies being "small", with less than 99 employees, and 1.9 per cent being medium sized with 100 to 499 employees. Ultimately, SMEs represent 90

percent of the private-sector workforce.²⁶⁷ The central motivation for promoting SMEs' interests is to foster innovation and job creation, ensuring that SMEs are more resilient to market shocks and can sustain their higher growth rates.²⁶⁸ Including measures in trade agreements which offer preferential market access for SMEs to overseas markets helps ensure that they benefit from market liberalisation, rather than losing-out.²⁶⁹

SMEs are given preferential trade-related opportunities through stand-alone chapters or mainstreamed measures in CPTPP, CUSMA and CIFTA that relate to: government procurement, origin procedures, trade facilitation, transparent intellectual property rules, simplified international investment dispute settlement access, tools relating to e-commerce and digital trade and avoiding overly cumbersome regulatory practices.²⁷⁰ These elements largely fall into the category of non-tariff trade barriers because they are aspects which would dissuade SMEs from venturing into the new territories associated with FTAs. Consequently, Canada's inclusive approach draws SMEs into the category of entities that ordinarily would face substantial impediments to participating in international trade and has devised this approach to ensure their success.

²⁶⁷ Global Affairs Canada, "Trade and small and medium-sized enterprises", (5 November 2019), online: GAC <<https://www.international.gc.ca/trade-commerce/sme-pme/sme-roles-pme.aspx?lang=eng>> Last Modified: 2019-11-06.

²⁶⁸ *Ibid.*

²⁶⁹ World Bank, *supra* note 50.

²⁷⁰ *Ibid.*

II. Defining “Other Barriers” to Trade

The WTO has played a fundamental role in shaping what is classified as a trade barrier. This is evident when exploring how to conceptualize trade barriers in a way that will receive popular consensus within a diverse multilateral forum. This section will first explore the meaning (or lack thereof) of “other barriers” found within the GATT. While the GATT recognizes the reduction of barriers to trade in the preamble as an important endeavour, it omits to define the term. Consequently, what may qualify as a “trade barrier” is arguably left open to interpretation.

When the rules-based multilateral trading order came into existence under the GATT 1947 it had three primary objectives as articulated in the third part of the preamble. These objectives include: “reducing tariffs and other barriers to trade and the elimination of discriminatory treatment in international commerce”.²⁷¹

This tripartite purpose of “reducing tariffs and other barriers to trade and the elimination of discriminatory treatment in international commerce” was carried forward into the GATT 1994 and remains central to the regime.²⁷² As stakeholders in the globalised regime, WTO Members are obliged to accord a “high priority to the reduction or elimination of barriers” to trade.²⁷³ Meanwhile the GATT offers no concise definition of “barriers” what these barriers might be. So, how can the tripartite purpose of the GATT be understood?

²⁷¹ *General Agreement on Tariff and Tariffs (GATT) 1947.*, preamble
<https://www.wto.org/english/docs_e/legal_e/gatt47.pdf>

²⁷² *General Agreement on Trade and Tariffs (GATT) (1994)*, Article XXXVII:1 Commitments

²⁷³ *Ibid.* Article XXXVII:1(a); Article XXXVI:8 Principles and Objectives

Velut, Siles-Brügge and Dalingwater describe explicitly discriminatory measures as including tariffs and quotas.²⁷⁴ While it is affirmed that tariffs and quotas are both a type of barrier to trade *and* in some instances constitute a form of discrimination under Article I and Article III of the GATT 1994; a measure can be discriminatory or constitute a barrier without using tariffs or quotas. For example, non-tariff barriers include import licensing, rules of origin and certain investment measures.

Under the United Kingdom's conception brought forward by Baroness Dean (United Kingdom trade representative) at the *Doha Round*, "lack of transparency in investment and competition rules...[and] cumbersome customs procedures" were all classified as non-tariff barriers that require dismantling.²⁷⁵ Each of these identified elements that have the effect of complicating efforts to engage in international trade or investment, ultimately decreasing the likelihood of an individual or juridical person to engage in cross-border economic opportunities. As a result, the presence of procedurally difficult circumstances and cumbrously opaque bureaucracies are equated to trade barriers.

Trade barriers can also include physical impediments such as hard borders between countries. In its plain meaning, "barrier" is defined as a *problem, rule, or situation that prevents someone from doing something, or that makes something*

²⁷⁴ Velut, Jean-Baptiste, Gabriel Siles-Brügge & Louise Dalingwater, "Rethinking the Dynamics of Inclusion and Exclusion in Trade Politics" (2021) *New political economy* 1–6. at p.3

²⁷⁵ World Trade Organization, Ministerial Conference 4th session (Doha) (2001) WT/MIN(01)/ST/14 statement by H.E. Baroness Liz Symons of Vernham Dean Minister of State for Trade and Industry Available at https://www.wto.org/english/thewto_e/minist_e/min01_e/statements_e/st14.pdf

impossible, such as a physical object that prevents one from progressing forward.²⁷⁶ Under this interpretation, the ultimate trade barrier is a hard border between countries. Customs unions and free trade areas are designed to remove hard borders in a WTO compliant manner. In the case of the European Union, hard borders have been removed entirely to in order to facilitate the free movement of goods, services, and people.²⁷⁷

Despite this harmonious economic integration, in our post-Brexit world the ongoing question of how to resolve the island of Ireland's land border with the United Kingdom persists.²⁷⁸ Erecting a hard border between Northern Ireland and the Republic of Ireland stands out as problematic not just for hindering trade, but also for culturally and politically significant reasons, such as breaching *The Belfast Agreement* (1998).²⁷⁹ This agreement is heralded for resolving three decades of conflict and signifies a commitment of furthering peace and prosperity between the British and Irish.²⁸⁰ Hence, imposing a hard border would have both social and economic impacts. This serves as an example for the far-reaching social, economic, and political impacts that diminishing or erecting trade barriers can have.

²⁷⁶ "barrier noun - Definition, pictures, pronunciation and usage notes | Oxford Advanced American Dictionary at OxfordLearnersDictionaries.com", online:

<https://www.oxfordlearnersdictionaries.com/definition/american_english/barrier>.

²⁷⁷ *Treaty on the Functioning of the European Union (TFEU)*, Article 26(2) Available at <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12012E/TXT:en:PDF>

²⁷⁸ Lars Karlsson, "Smart Border 2.0 Avoiding a hard border on the island of Ireland for Customs control and the free movement of persons" 48. Online:

<[https://www.europarl.europa.eu/RegData/etudes/STUD/2017/596828/IPOL_STU\(2017\)596828_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2017/596828/IPOL_STU(2017)596828_EN.pdf)>

²⁷⁹ "The Belfast Agreement", online: *GOVUK* <<https://www.gov.uk/government/publications/the-belfast-agreement>>.

²⁸⁰ *Ibid.*

The next conception of trade barriers under the WTO are technical barriers to trade as conceived of under the *Uruguay Round Agreement*.²⁸¹ This includes technical regulations and standards imposed at the domestic level that can have the effect of creating obstacles to trade because a foreign exporter may lack the technological capacity to satisfy the domestic regulatory standards of the importing country. For example, this is a central concern for WTO Members that are contemplating enacting carbon border adjustment mechanisms (CBAM).²⁸² Exporters from developing countries are least likely to be capable of satisfying the complex technical requirements associated with these types of measures. As a result, the *de facto* effect of such a measure could have the result of being discriminatory by creating a barrier to trade for least developed countries.²⁸³

The above WTO sanctioned conceptions of trade barriers are non-exhaustive, and cumulative rather than mutually exclusive. As one can see, the concept of trade barriers is flexible because it covers a variety of situations in which trade can be impeded. Moreover, interpreting the concept by invoking the plain meaning of the term “barrier” illuminates how certain issues that are not expressly labeled as trade barriers can nonetheless be exactly that. Moreover, the general rule for interpreting treaties under the *Vienna Convention* Article 31 provides that the “ordinary meaning” is to be given to the term in question, in good faith.²⁸⁴ Because the WTO does not define “other

²⁸¹ Agreement on Technical Barriers to Trade, online <https://www.wto.org/english/docs_e/legal_e/17-tbt.pdf>

²⁸² Andrew Prag, “The Climate Challenge and Trade: Would border carbon adjustments accelerate or hinder climate action?” Background Paper for the 39th Round Table on Sustainable Development (OECD) 2020.

²⁸³ Joint Statement Issued at the conclusion of the 30th BASIC Ministerial Meeting on Climate Change Hosted by India on April 8, 2021, Government of South Africa. online <<https://www.gov.za/nr/speeches/joint-statement-issued-conclusion-30th-basic-ministerial-meeting-climate-change-hosted>>

²⁸⁴ VCLT, *supra* note 24. Article 31

barrier”, perhaps the term could be reasonably understood in accordance with its plain meaning: *anything material or immaterial that stops advance hostile or friendly*.²⁸⁵

This malleability is essential for allowing the rules-based system to evolve in line with our contemporary technological capacities without rewriting the rules. Even without a strict definition, this principle of removing trade barriers still manages to underpin the central pillars and principles of the multilateral trading of the WTO. Given the above interpretations, the next consideration is the possible effect that one seeks to obtain through eliminating trade barriers.

III. Overlapping Goals: Dismantling Trade Barriers and Advancing Inclusive Trade

*Trade and open global markets have also helped lift over a billion people out of poverty in recent decades. But many poor people in rich countries, as well as poor countries, have not shared fully in the gains.*²⁸⁶

– Ngozi Okonjo-Iweala (Director General of the WTO)

a. Furthering Development, Economic Growth and Poverty Reduction

Reducing trade barriers and increasing market access enables development and poverty reduction.²⁸⁷ According to the United Nations Secretary General Kofi Annan at the WTO Ministerial in Cancún, “barriers” are measures which effectively “stunt,

²⁸⁵ “Definition of BARRIER”, Meriam Webster Dictionary, online: <<https://www.merriam-webster.com/dictionary/barrier>>; “barrier noun - Definition, pictures, pronunciation and usage notes | Oxford Advanced American Dictionary at OxfordLearnersDictionaries.com”, online: <https://www.oxfordlearnersdictionaries.com/definition/american_english/barrier>.

²⁸⁶ “DG Okonjo-Iweala: Climate-related trade policies must focus on needs of most vulnerable”, online: <https://www.wto.org/english/news_e/spno_e/spno22_e.htm>.

²⁸⁷ “The Role of Trade in Ending Poverty”, online: *World Bank* <<https://www.worldbank.org/en/topic/trade/publication/the-role-of-trade-in-ending-poverty>>.

stifle and starve”.²⁸⁸ Under Wolfensohn’s account, the former President of the World Bank, reducing non-tariff trade barriers has the effect of giving “developing countries a better chance in world markets”.²⁸⁹ If managed well, then the “international trading system can lift millions out of poverty”.²⁹⁰ Simultaneously, if it is “managed badly, it will leave whole economies even more marginalised”.²⁹¹

In an effort to manage the system well, WTO Members grant preferential conditions of market access to least developed countries, providing them with “expanding resources for their economic development” and contributing to steady growth.²⁹² These ambitions are binding commitments that further the goals set out in the preamble of the GATT: “to raise the standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand”.²⁹³ These three aspirations are essentially measurable indicators of poverty reduction which (supposedly) can be attained through liberalising trade.

According to the US trade representative at the Doha Round, eliminating trade barriers “would lift 300 million people out of poverty”.²⁹⁴ Meanwhile, the UK’s trade representative followed a similar line of argumentation when it comes to identifying the

²⁸⁸ “WTO | Ministerial conferences - Cancún 5th Ministerial”, online: <https://www.wto.org/english/thewto_e/minist_e/min03_e/min03_e.htm>.

²⁸⁹ ‘Responding to the Challenges of Globalization’, Remarks to the G-20 Finance Ministers and Central Bank Governors by James D. Wolfensohn, President, World Bank Group, Ottawa, 17 November 2001, at <www.worldbank.org/html/extdr/extme/jdwp111701.htm>

²⁹⁰ Kevin Watkins, “RIGGED RULES AND DOUBLE STANDARDS trade, globalisation, and the fight against poverty” 276. At p.258

²⁹¹ *Ibid.*

²⁹² *General Agreement on Tariffs and Trade (GATT) 1947.*, Article XXXVI(4)

²⁹³ *Ibid.*, Preamble

²⁹⁴ *World Trade Organization*, Ministerial Conference 4th Session, (DOHA) (2001), Statement by United States Trade Representative, online: <https://www.wto.org/english/thewto_e/minist_e/min01_e/statements_e/st3.pdf>

desired effects of eliminating trade barriers: “if all WTO Members were to cut all trade barriers in half the world could benefit to the tune of some US\$400 billion a year, around 1.4 per cent of global GDP. Of this around US\$150 billion would accrue to developing countries”.²⁹⁵ This effect is multi-pronged, it includes liberalising trade, creating overall economic net gains, and benefiting developing countries. By generating income for developing countries, this desired effect also relates to reduction of poverty and furthering development therein, whether it is successful in achieving this is a different issue. Ultimately, these desired effects of liberalising trade stem from the objectives stated in the GATT preamble, to raise the “standards of living” by facilitating “large and steadily growing volume of real income”.²⁹⁶ In other words, these individual goals fall within the ambit of achieving *sustainable socioeconomic development*.

b. Increasing Market Access

Reducing trade barriers has the intended effect of opening global markets to international competition and consumers. Likewise, Inclusive Trade and investment aims to enable the target groups to become part of this accessible market as business owners, entrepreneurs, and consumers. Increased market access is typically characterized as international trade that is duty-free, quota-free, and in the most optimally integrated of markets – the frictionless movement of goods and services.²⁹⁷ Providing effective market access to all Members is a crucial commitment that has

²⁹⁵ World Trade Organization, Ministerial Conference 4th session (Doha) (2001) WT/MIN(01)/ST/14 statement by H.E. Baroness Liz Symons of Vernham Dean Minister of State for Trade and Industry

Available at https://www.wto.org/english/thewto_e/minist_e/min01_e/statements_e/st14.pdf

²⁹⁶ *General Agreement on Tariffs and Trade 1994 (“GATT 1994”)*; GATT 1947, *supra* note 19. Preamble

²⁹⁷ “WTO | Doha 4th Ministerial - Ministerial declaration”, online:

<https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm#marketaccess>. at 42

been reiterated during the *Doha* and *Cancún Ministerial Conferences*.²⁹⁸ However, without sufficiently capable economic actors within the market, the benefits that increasing market access can render will be limited.

Refraining from implementing barriers to market access is a commitment shared by all WTO Members.²⁹⁹ Under a neoliberal perspective, increasing market access facilitates efficient distribution of resources and helps to maintain peace through fostering interdependence of global markets.³⁰⁰ Hence, increased market access realizes economic growth and political stability. During the *Doha Round*, enabling meaningful market access for least developed countries was praised as a beneficial method to facilitate capacity building.

Another side effect of increased market access through a common multilateral rules-based system, like the WTO, has resulted in the creation of “global value chains”. An integrated framework of comparative advantages that sees not just trade in goods and services, but also trade in tasks has come to fruition, especially in the automotive and technology manufacturing sectors.³⁰¹

Part and parcel to contemporary global value chains is the reduction of cost-related barriers associated with transportation and communication, enabling unprecedented

²⁹⁸ “WTO | Ministerial conferences - Cancún 5th Ministerial, 2003 - Draft Cancún Ministerial Text”, online: <https://www.wto.org/english/thewto_e/minist_e/min03_e/draft_decl_e.htm>; WTO, *supra* note 295.

²⁹⁹ “GATT 1994, Annex 1B General Agreement on Trade in Services (‘GATS’”, online: <https://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm>., Article XVI:2(a)-(f) Market Access

³⁰⁰ Anthea Roberts, Henrique Choer Moraes & Victor Ferguson, “Toward a Geoeconomic Order in International Trade and Investment” (2019) 22:4 *Journal of International Economic Law* 655–676 at p.661, online: <<https://academic.oup.com/jiel/article/22/4/655/5637576>>; Lighthizer, *supra* note 4. at p.79

³⁰¹ Ari Van Assche and Todd Evans, “Global Value Chains and Canada’s Trade Policy”, online: *IRPP* <<https://irpp.org/research-studies/global-value-chains-and-canadas-trade-policy/>>.

levels of access to foreign markets.³⁰² This means that raw materials can be sourced in one country, manufactured in a second country, and finally assembled in a third country. An empirical study by the WTO found that countries which participate in trade in tasks are more likely to form preferential trade agreements (PTAs) with provisions that result in deeper integration.³⁰³ As a result non-traditional disciplines like movement of capital, intellectual property, competition policy, investment, trade in services and technical barriers to trade are being increasingly included in PTAs.³⁰⁴ What can or should be included in modern PTAs has evolved to go beyond traditional market access issues to achieve the ancillary goal of maintaining global value chains of deeply integrated international production networks.³⁰⁵ Hence, this serves to illustrate how trade values have already been reconceptualised to fit contemporary problems and needs. Inclusive Trade is another such way that the system can improve and evolve in response to the contemporary problems and needs that have been widely identified.

³⁰² *Ibid.*

³⁰³ Gianluca Orefice & Nadia Rocha, "Deep integration and production networks: an empirical analysis" 35. (2011)

³⁰⁴ *Ibid.* at p.2

³⁰⁵ *Ibid.*

CHAPTER 5: CONCLUSION

As it currently exists, the globalised free trade regime has fulfilled its promise of improving net welfare, yet the net welfare gains have largely been distributed upwards, leaving typically under-represented groups behind. As a result, there is a sense of dissatisfaction both in the developed and developing worlds that the current free trade system has room for improvement. Instead of focusing solely on net gains or maximising efficiency, consideration ought to be given to the casualties of the system and the detrimental side-effects that are perpetuated under the current approach.

In addition to globalised free trade promising net welfare gains, the WTO has maintained as its goals to “raise the standards of living, ensure full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world”.³⁰⁶ While these objectives have been realised for a lucky few, they remain unattainable for most of the global population as long as the current approach to economic globalisation persists.

Inclusive Trade adopts a progressive approach to reforming the types of measures that are featured in international economic agreements. It aims to achieve sustainable socioeconomic development and economic growth; goals that are already central to the free trade regime. However, Inclusive Trade approaches these objectives from a different angle. Rather than focusing strictly on efficiency and net gains, Inclusive Trade aims to expand the categories of persons who benefit from

³⁰⁶ GATT 1947. preamble

economic globalisation by specifically targeting under-represented groups which typically lose out under the current system. By supporting under-represented groups to access opportunities that arise under trade and investment agreements, both the target groups and the domestic economy benefit.

Adopting Inclusive-style measures accomplishes two things: the primary goal and the underlying objective. For gender-related measures, the primary goal is to improve gender equality and fulfill the United Nations Sustainable Development Goal Five, but the underlying objective is to achieve sustainable socioeconomic development. For measures that pertain to Indigenous peoples, the primary goal is to advance reconciliation, but the underlying objective is to provide greater economic opportunities to a group that is often severely economically disadvantaged. For SME related measures, the primary goal is to increase transparency and access to cross-border opportunities, meanwhile the underlying objective is to promote economic growth and support SMEs as drivers of innovation.

While Inclusive Trade has yet to be mainstreamed by other trading nations at the same scale as Canada, Inclusive measures can be found within the CPTPP, CUSMA, CETA, CCFTA and CIFTA. Each of these agreements reflect Inclusive Trade to different extents. CIFTA and CCFTA contain the most extensive gender related measures, CUSMA contains the most far-reaching measures on Indigenous peoples. CPTPP and CUSMA contain the most extensive (and nearly identical) measures on SMEs. Hence, while one sole agreement does not encompass an idealised version of what an Inclusive agreement would look like, by taking the gender related measures

from CIFTA, the Indigenous and SME related measures from CUSMA – one could create the ideal model agreement for Inclusive Trade.

However, the approach that Inclusive Trade adopts could easily be characterised as attempting to incorporate non-trade values, or social values into trade agreements. As such, shifting the *status quo* so that more trading nations and WTO Members embrace Inclusive measures in their future bilateral or multilateral agreements would require evincing the connection between the underlying objectives and the primary goals and framing Inclusive-style measures in terms of the pre-existing and widely accepted trading framework.

This thesis argued that the best way to proliferate Inclusive Trade, is to frame it terms of fulfilling the purposes of the GATT 1947 as elucidated in the preamble and categorizing Inclusive measures as those which reduce “other barriers” to trade. WTO discourse has proven that the concept of trade “barriers” is broad and malleable. Consequently, socioeconomic barriers that prevent under-represented groups from participating in international trade and investment or accessing trade-related opportunities could reasonably be characterised as “other barriers” to trade that ought to be dismantled in order to realistically “raise the standards of living, ensure full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world” without repeating the same mistakes.³⁰⁷

³⁰⁷ GATT, *supra* note 19. Preamble

In conclusion, Inclusive Trade offers a solution to ameliorate many of the negative side-effects of the globalised free trade system. Inclusive Trade adopts a progressive approach to solving 21st century problems without overhauling the multilateral trading system. Indeed, Inclusive Trade can and should be framed in terms of pre-existing rules and widely accepted goals to become adopted and mainstreamed on a wider scale. By doing so, sustainable socioeconomic development is more likely to be achieved than adhering to the *status quo*.

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