

## Mainstreaming Gender in Investment Treaties and Its Prevailing Trends

*The Actions of MNEs in the Americas*

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### ABSTRACT

Foreign direct investment (FDI) inflows can lead to more opportunities for women in the job market but may also exacerbate gender disparities. While gender mainstreaming in trade agreements has been extensively discussed over the past few years, demonstrating the need for reform, the discussion on gender mainstreaming in investment treaties is incipient, although extremely interesting. The inclusion of gender provisions in investment treaties is one of the pillars for a successful strategy to overcome gender inequality. It needs to be addressed along with gender policies by multinational enterprises (MNEs) leading the foreign investment process. This chapter aims to address the role of women as levers of change and the opportunity for MNEs to be the drivers of this change. To this end, it reviews the recent evolution of gender provisions in investment agreements and demonstrates how FDI can foment much-needed change by providing examples of actions and policies by MNEs in the Americas towards promoting more opportunities for women.

### 9.1 INTRODUCTION

The impacts that foreign direct investment (FDI) can have on gender issues are increasingly drawing the attention of policymakers and are gradually occupying more space in the decision-making processes of companies. As we are going to demonstrate in this chapter, particularly when investing in developing countries – such as the ones in Latin America and the Caribbean (LAC) – the lack of meaningful gender policies by multinational enterprises

that guarantee participation by women may lead the MNEs to miss out on the tremendous impact they could have on gender equality.<sup>1</sup>

Gender mainstreaming is defined as ‘the process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in all areas and at all levels’.<sup>2</sup> Gender provisions can be found in regional trade agreements as far back as 1957, and their inclusion has steadily increased over the years.<sup>3</sup> Governments seeking to foster equality between men and women can also include gender considerations and concerns in the drafting and implementation of investment agreements. Similarly, corporations can include gender perspectives in the design, implementation, and assessment of their policies and programmes to ensure that they benefit men and women equally.

The World Economic Forum’s (WEF) Global Gender Gap Report 2021 predicts that it will take another 136 years to achieve gender equality based on the current rate of progress.<sup>4</sup> The estimate is more pessimistic than the one cited in the 2019 report,<sup>5</sup> mainly due to the disproportionate effect the COVID-19 pandemic crisis has had on women. However, the timeline is substantially smaller for the Americas, where it is estimated that gender gaps could be closed in 60–70 years. North America comes in second to Europe with regard to progress towards gender parity, followed by Latin America and the Caribbean coming in at third place. This gives multinational enterprises in the region an opportunity to contribute to the local economy and society in general, by implementing policies that advance gender equality.

This chapter unfolds as follows. In Section 9.2, we demonstrate why women are levers of change and the opportunities MNEs have in promoting women’s empowerment within their organizations and the communities where they operate. Then, in Section 9.3, we discuss the urgency of gender provisions in investment agreements in light of the evolution observed in recent years, particularly in bilateral investment treaties (BITs). Finally, in Section 9.4, we address forms in which FDI can be the driver of necessary

<sup>1</sup> UNCTAD, ‘Multinational Enterprises and the International Transmission of Gender Policies and Practices’, UNCTAD/DIAE/INF/2021/1 (8 March 2021).

<sup>2</sup> UN, ‘Report of the Fourth World Conference on Women, Beijing, 4–15 September 1995’, A/CONF.177/20/REV.1 (1996) Chap. I, Resolution 1, Annex II.

<sup>3</sup> José-Antonio Monteiro, ‘Gender-Related Provisions in Regional Trade Agreements’ (2018) WTO Economic Research and Statistics Division Staff Working Paper ERSD-2018-15 <[www.wto.org/english/res\\_e/reser\\_e/ersd201815\\_e.pdf](http://www.wto.org/english/res_e/reser_e/ersd201815_e.pdf)> accessed 8 May 2022.

<sup>4</sup> World Economic Forum, ‘Global Gender Gap Report’ (March 2021) <[www3.weforum.org/docs/WEF\\_GGGR\\_2021.pdf](http://www3.weforum.org/docs/WEF_GGGR_2021.pdf)> accessed 8 May 2022.

<sup>5</sup> *Ibid.*

changes, and how public, private, domestic, and international investment policies are of fundamental importance to further women's economic empowerment. Section 9.5 concludes.

## 9.2 WOMEN AS LEVERS OF CHANGE: THE OPPORTUNITY FOR MNES

Gender equality is a crucial factor for economic development.<sup>6</sup> It can contribute to poverty reduction and higher levels of human capital for future generations.<sup>7</sup> Companies with gender diversity in emerging markets had a 13 per cent rise in their internal rate of return.<sup>8</sup>

### 9.2.1 *Current State*

Many reasons support the need to address gender inequality issues in the workforce. Although participation of women in the labour market has been on the rise, it remains a challenge along with the vast gender pay gaps across all occupations.<sup>9</sup> A study carried out among 278 Canadian firms found that international firms are less likely to have women in management roles.<sup>10</sup> The authors believe that this may be based on gender bias at the time of hiring for international positions, as women may be considered less capable of entering business networks due to their restrictive schedules or to negative stereotypes in the countries where they would work.<sup>11</sup>

Social stereotypes deem women less capable than men of holding positions of leadership or working in certain fields, such as those requiring degrees in science, technology, engineering, and mathematics (STEM). Additionally, women are more likely to face microaggressions that undermine them professionally, such as being interrupted or spoken over, having their judgement questioned in their area of expertise, or having others comment on their

<sup>6</sup> IADB, 'Una olimpiada desigual: La equidad de género en las empresas latinoamericanas y del Caribe' (August 2021) BID Nota Técnica No. IDB-TN-2255 <<https://publications.iadb.org/publications/spanish/document/Una-olimpiada-desigual-la-equidad-de-genero-en-las-empresas-latinoamericanas-y-del-Caribe.pdf>> accessed 8 May 2022.

<sup>7</sup> Ibid.

<sup>8</sup> Onu Mujeres, 'Catalizando la Igualdad' (2021) <<https://lac.unwomen.org/es/digiteca/publicaciones/2021/07/catalizando-la-igualdad>> accessed 8 May 2022.

<sup>9</sup> Magdalena Barafani and Angeles Barral Verna, 'Género y comercio: Una relación a distintas velocidades' (2020) IBD Note Técnica No. IDB-NT-2006 <<https://publications.iadb.org/es/genero-y-comercio-una-relacion-distintas-velocidades>> accessed 8 May 2022.

<sup>10</sup> Eddy S. Ng and Greg J. Sears, 'The Glass Ceiling in Context: The Influence of CEO Gender, Recruitment Practices and Firm Internationalisation on the Representation of Women in Management' (2017) 27(1) *Human Resource Management Journal* 133–151.

<sup>11</sup> Ibid.

emotional state.<sup>12</sup> Notably, the percentage of women reporting microaggressions in the United States is higher for women in leadership as well as women of colour.<sup>13</sup>

Women tend to be considered responsible for unpaid labour such as home-making and childcare, leaving them with little time to dedicate to professional development. In the United States, women are responsible for almost twice as much unpaid care and domestic work as men.<sup>14</sup> While 54 per cent of women report shouldering all or most of the household responsibilities, only 22 per cent of the men have this additional work.<sup>15</sup> On a daily basis, almost half of the Latina workforce in the United States spend five or more hours on housework and caregiving.<sup>16</sup> In many cases, these women are responsible for the care of children as well as adults in the family, such as an elderly family member.<sup>17</sup> This unequal share was exacerbated during the COVID-19 pandemic, which resulted in an average increase of over five hours on the time women around the world spend just on childcare in one week.<sup>18</sup> In 2021, 42 per cent of female employees in the United States said they were consistently burned out and 33 per cent reported having considered leaving the workforce or downshifting their careers due to them being overburdened with household work.<sup>19</sup>

In recent years, there has been a rise in the number of female board members worldwide. However, Latin America stands out as lagging in the number of women in boardrooms.<sup>20</sup> In fact, different from the global trend,<sup>21</sup> there are no known quotas to increase the number of women on corporate

<sup>12</sup> McKinsey & Company & LeanIn.Org, 'Women in the Workplace' (2021) <[www.mckinsey.com/featured-insights/diversity-and-inclusion/women-in-the-workplace](http://www.mckinsey.com/featured-insights/diversity-and-inclusion/women-in-the-workplace)> accessed 8 May 2022.

<sup>13</sup> Ibid.

<sup>14</sup> McKinsey & Company, 'The Power of Parity: Advancing Women's Equality in the United States' (2016) <[www.mckinsey.com/featured-insights/employment-and-growth/the-power-of-parity-advancing-womens-equality-in-the-united-states](http://www.mckinsey.com/featured-insights/employment-and-growth/the-power-of-parity-advancing-womens-equality-in-the-united-states)> accessed 8 May 2022.

<sup>15</sup> Ibid.

<sup>16</sup> McKinsey & Company & LeanIn.Org, 'Women in the Workplace' (n 12).

<sup>17</sup> Ibid.

<sup>18</sup> Gary Barker, Aapta Garg, Brian Heilman, Nikki van der Gaag, and Rachel Mehaffey, 'State of the World's Fathers: Structural Solutions to Achieve Equality in Care Work' (MenCare 2021) <[https://men-care.org/wp-content/uploads/2021/06/210610\\_BLS21042\\_PRO\\_SOWF.vo8.pdf](https://men-care.org/wp-content/uploads/2021/06/210610_BLS21042_PRO_SOWF.vo8.pdf)> accessed 8 May 2022.

<sup>19</sup> McKinsey & Company & LeanIn.Org, 'Women in the Workplace' (n 12).

<sup>20</sup> Marie Froehlicher, Lotte Knuckles Griek, Azadeh Nematzadeh, Lindsey Hall, and Nathan Stoval, 'Gender Equality in the Workplace: Going beyond Women on the Board' (S&P Global 5 February 2021) <[www.spglobal.com/esg/csa/yearbook/articles/gender-equality-workplace-going-beyond-women-on-the-board](http://www.spglobal.com/esg/csa/yearbook/articles/gender-equality-workplace-going-beyond-women-on-the-board)> accessed 8 May 2022.

<sup>21</sup> Ibid. Countries that have legislated boardroom quotas – whether the quotas are binding or non-binding – perform better in terms of board gender composition. Following a European

boards in Latin America and the Caribbean. In the United States, the representation of women in the workforce drops at every level of the corporate ladder.<sup>22</sup> While 48 per cent of employees at entry-level positions are female, women account for only 24 per cent of C-suite leaders.<sup>23</sup> The figure is even more staggering when it comes to women of colour, who only represent 4 per cent of the C-suite.<sup>24</sup> The state of California has taken the lead in this regard, seeking to reap the benefits of gender diversity. In 2018, it introduced Women on Boards, a law that requires all publicly held domestic or foreign corporations headquartered in the state of California to have at least one woman on the board.<sup>25</sup> Depending on the size of the company, the law may require two or more female board members. The enactment of the law has resulted in a 10 per cent increase in the number of women on boards over a four-year period.<sup>26</sup>

Gender inequality in Latin America and the Caribbean can be due to a variety of factors. Stereotypes hold women responsible for most unpaid work at home and makes it difficult for them to access new labour opportunities.<sup>27</sup> Labour segregation also places women in low-quality jobs that limit their professional development.<sup>28</sup> This results in a large number of women working in the informal sector of the economy.<sup>29</sup> Additionally, women are faced with regulatory and cultural biases and limited access to capital and information that hinder their development as entrepreneurs.<sup>30</sup>

Union directive proposal to improve gender balance on corporate boards, six member states adopted binding quotas for gender board diversity, and nine others introduced non-binding quotas. Norway's gender quota, adopted in 2003, was the first in the world to require that at least 40 per cent of the board be female; France and Iceland later took a similar approach. Belgium, Italy, Portugal, Germany, Austria, and France have binding quotas; Denmark, Ireland, Spain, Luxembourg, the Netherlands, Poland, Finland, Slovenia, and Sweden have non-binding quotas. India, Pakistan, and Israel require that boards have at least one female director, while Malaysia has a 30 per cent binding quota.

<sup>22</sup> McKinsey & Company & LeanIn.Org, 'Women in the Workplace' (n 12).

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

<sup>25</sup> An act to add Sections 301.3 and 2115.5 to the Corporations Code, relating to corporations, Cal. Sen. B. 826, Chapter 954 (State of California, USA 2018) <[https://leginfo.ca.gov/faces/billTextClient.xhtml?bill\\_id=201720180SB826](https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB826)> accessed 8 May 2022.

<sup>26</sup> Marina Gertsberg, Johanna Mollerstrom, and Michaela Pagel, 'Gender Quotas and Support for Women in Board Elections' (2021) National Bureau of Economic Research Working Paper 28463 <[www.nber.org/papers/w28463](http://www.nber.org/papers/w28463)> accessed 8 May 2022.

<sup>27</sup> IADB, 'Una olimpiada desigual' (n 6) 25.

<sup>28</sup> Ibid 3.

<sup>29</sup> Ibid 25.

<sup>30</sup> Ibid 3.

The region of Latin America and the Caribbean provides a unique opportunity for investors to finance the recovery of the region through women.<sup>31</sup> Women hold only 15 per cent of management positions, own only 14 per cent of companies in the region,<sup>32</sup> and hold the top manager position in only 11 per cent of the companies.<sup>33</sup> At the same time, a higher proportion of women are in lower positions (36 per cent) while only 25 per cent are in higher positions.<sup>34</sup>

Participation by women predominates in areas that are usually lower-paid – or ‘soft’ (those that do not require STEM skills), according to the report.<sup>35</sup> For example, women make up 64 per cent of the workforce in human resources, and 63 per cent in communications and public relations.<sup>36</sup> In other areas, such as foreign trade, women represent less than 35 per cent of the employees.<sup>37</sup> Studies have found that throughout the Americas, women make up less than half of the workforce with STEM degrees.<sup>38</sup> However, women with the same qualifications as men find it hard to get hired, likely due to social stereotypes and discrimination.<sup>39</sup> In the United States, women with STEM degrees are more likely to work in health and education while men tend to hold positions in technology, engineering, business, and management.<sup>40</sup>

More data on the LAC region indicates that women represent only 35 per cent of the workforce that uses advanced technologies.<sup>41</sup> This could be due to a lack of demand, discrimination, or the erroneous idea that women are less capable of handling technology.<sup>42</sup> Another reason could be the lack of women with the required skills in the labour market.<sup>43</sup> Interestingly, women-led businesses were found to be more likely to employ women in positions that use technology.<sup>44</sup>

Finally, six out of ten companies do not provide any type of maternity leave beyond what is determined by law and only 15 per cent of companies analyse

<sup>31</sup> Ibid 4.

<sup>32</sup> Ibid 8.

<sup>33</sup> Ibid 34.

<sup>34</sup> Ibid 5.

<sup>35</sup> Ibid 5.

<sup>36</sup> Ibid 26.

<sup>37</sup> Ibid 61.

<sup>38</sup> Ibid 22.

<sup>39</sup> Ibid 15.

<sup>40</sup> Shulamit Kahn and Donna Ginther, ‘Women and STEM’ (2017) NBER Working Paper No. w23525 <<https://ssrn.com/abstract=2988746>> accessed 8 May 2022.

<sup>41</sup> IADB, ‘Una olimpiada desigual’ (n 6) 27.

<sup>42</sup> Ibid.

<sup>43</sup> Ibid.

<sup>44</sup> Ibid.

the existence of salary gaps within their organization;<sup>45</sup> 28 per cent of firms reported giving lower salaries to women compared to men with the same qualifications. In this regard, women-led companies stand out again, being more equitable when it comes to employee salaries.<sup>46</sup> However, only a third of companies surveyed in LAC have boards with at least 30 per cent of women.<sup>47</sup>

### 9.2.2 *What Women Offer: The Business Case for Gender Equality*

Companies that integrate gender equality into their business model can expect benefits in terms of profitability and success as well as social impact.<sup>48</sup> According to an International Labour Organization (ILO) analysis of data from 186 countries over a twenty-six-year period, there is a positive correlation between an increase in female employment and Gross Domestic Product (GDP) growth.<sup>49</sup> McKinsey & Company estimates that the global annual GDP could increase by USD 12 trillion by 2025 if gender inequality is addressed around the world.<sup>50</sup> The report goes further and imagines a best-case scenario, where women attain full gender parity around the world, resulting in a USD 28 trillion addition to the global GDP within the same timeframe.

Women generally have characteristics that are considered ‘soft skills’, such as effective communication, empathy, and self-awareness. In a survey carried out among Fortune’s 100 Best Companies to Work for, Chief Executive Officers (CEOs) cited these skills as the most desirable attributes in employees.<sup>51</sup> Additionally, women tend to perform better than men in emotional intelligence competencies correlated with effective leadership, such as con-

<sup>45</sup> Ibid 5–6.

<sup>46</sup> ILO and UN Women, ‘Win–Win: Gender Equality Means Good Business’ (August 2017) <<https://ganarganar.lim.ilo.org/en/>> accessed 8 May 2022.

<sup>47</sup> Ibid.

<sup>48</sup> Acumen, ‘Women and Social Enterprises: How Gender Integration can Boost Entrepreneurial Solutions to Poverty’ (2015) <[https://acumen.org/wp-content/uploads/2017/09/Women\\_And\\_Social\\_Enterprises\\_Report\\_Acumen\\_ICRW\\_2015.pdf](https://acumen.org/wp-content/uploads/2017/09/Women_And_Social_Enterprises_Report_Acumen_ICRW_2015.pdf)> accessed 8 May 2022.

<sup>49</sup> ILO, ‘Women in Business and Management: The Business Case for Change’ (2019) <[www.ilo.org/global/publications/books/WCMS\\_700953/lang-en/index.htm](http://www.ilo.org/global/publications/books/WCMS_700953/lang-en/index.htm)> accessed 8 May 2022.

<sup>50</sup> McKinsey & Company, ‘How Advancing Women’s Equality Can Add \$12 Trillion to Global Growth’ (2015) <[www.mckinsey.com/featured-insights/employment-and-growth/how-advancing-womens-equality-can-add-12-trillion-to-global-growth](http://www.mckinsey.com/featured-insights/employment-and-growth/how-advancing-womens-equality-can-add-12-trillion-to-global-growth)> accessed 8 May 2022.

<sup>51</sup> Laura Entis, ‘This Is the No. 1 Thing These CEOs Look For in Job Candidates’ (Fortune 26 March 2017) <<https://fortune.com/2017/03/26/ceos-ideal-job-candidates/>> accessed 8 May 2022.

flict management, adaptability, and teamwork.<sup>52</sup> These traits place women at a competitive advantage in the workforce and should incentivize companies to promote a gender-diverse workplace, to take advantage of the best qualities of both genders.

**PROFITABILITY** Companies with higher levels of gender diversity are more profitable, particularly companies with women in leadership roles.<sup>53</sup> In a survey conducted among 13,000 companies around the world, almost 60 per cent of the respondents reported that gender-diversity initiatives improved business outcomes.<sup>54</sup> In LAC, almost 75 per cent of companies surveyed saw profit increases between 5 and 20 per cent as a result of improving gender diversity in the workplace.<sup>55</sup> Research has shown that companies with women in leadership roles have better sales figures and equity value.<sup>56</sup> A 2016 study carried out by Credit Suisse Research Institute analysed the impact of diversity in the boardroom and the executive suite at over 3,000 companies around the world.<sup>57</sup> The study showed that having more women on both levels results in higher returns without taking more risks.<sup>58</sup> Additionally, among the sample of companies, share price performance was higher for companies with at least one woman on the board as well as for companies with more women in senior management – particularly for companies with more than 50 per cent women in senior management.<sup>59</sup>

Women in leadership roles provide an important perspective, leading to significant returns on investment. The evidence shows that companies with more women on boards and in leadership positions have significantly better

<sup>52</sup> Korn Ferry, 'Women Outperform Men in 11 of 12 Key Emotional Intelligence Competencies' (2016) <[www.kornferry.com/about-us/press/new-research-shows-women-are-better-at-using-soft-skills-crucial-for-effective-leadership](http://www.kornferry.com/about-us/press/new-research-shows-women-are-better-at-using-soft-skills-crucial-for-effective-leadership)> accessed 8 May 2022.

<sup>53</sup> McKinsey & Company, 'Diversity Wins: How Inclusion Matters' (2020) <[www.mckinsey.com/featured-insights/diversity-and-inclusion/diversity-wins-how-inclusion-matters](http://www.mckinsey.com/featured-insights/diversity-and-inclusion/diversity-wins-how-inclusion-matters)> accessed 8 May 2022.

<sup>54</sup> ILO, 'Women in Business and Management' (n 49).

<sup>55</sup> ILO and UN Women, 'Win-Win' (n 46).

<sup>56</sup> Yasmina Zaidan, 'Five Reasons Social Enterprises Are Applying a Gender Lens to their Businesses' (*Acumen* 24 May 2016) <<https://acumen.org/blog/five-reasons-social-enterprises-are-applying-a-gender-lens-to-their-businesses/>> accessed 8 May 2022.

<sup>57</sup> Credit Suisse Research Institute, 'The CS Gender 3000: Reward for Change' (2016) <[https://evolveetfs.com/wp-content/uploads/2017/08/Credit-Suisse-Reward-for-Change\\_1495660293279\\_2.pdf](https://evolveetfs.com/wp-content/uploads/2017/08/Credit-Suisse-Reward-for-Change_1495660293279_2.pdf)> accessed 8 May 2022.

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.*



financial performance.<sup>60</sup> A 2020 McKinsey report highlighted that the most gender-diverse companies are 28 per cent more likely to perform better financially.<sup>61</sup> A rise in female board members is correlated with less excessive risk-taking and a reduction in aggressive tax strategies.<sup>62</sup> Importantly, a balance between the number of men and women in leadership and board positions also has a positive effect on financial performance.<sup>63</sup> The goal should not be all-women boards or only women leaders but diversity across all hierarchical levels of the company. Research has shown that there need to be at least three women on corporate boards for gender diversity to contribute to the financial performance of the company.<sup>64</sup> Gender balance in boardrooms could also motivate women to aspire to positions of power and diminish negative stereotypes around women's capabilities in the workplace.

Gender diversity in the boardroom also has been shown to result in better decision-making, likely due to the greater diversity in background, experience, and perspective.<sup>65</sup> Diverse teams are less prone to groupthink, allowing them to evaluate different options more carefully. In a study of 108 technology companies, Morgan Stanley also found that those that have gender-inclusive policies had better returns on equity and lower volatility.<sup>66</sup> Gender-diverse companies also have less regulatory and operational risks.<sup>67</sup> Finally, a more diverse workforce has been positively associated with higher-quality work, greater team satisfaction, and more equality.<sup>68</sup>

<sup>60</sup> Calvert Impact Capital, 'Just Good Investing: Why Gender Matters to Your Portfolio and What You Can Do about It' (2018) <<https://assets.ctfassets.net/40aw9man1yeu/2X1gLdNURUPFhRAJbAXp1q/205876bdd2d7e076fce05d5771183dfe/calvert-impact-capital-gender-report.pdf>> accessed 8 May 2022.

<sup>61</sup> McKinsey & Company, 'Diversity Wins' (n 53).

<sup>62</sup> Froehlicher et al., 'Gender Equality in the Workplace' (n 20).

<sup>63</sup> Calvert Impact Capital, 'Just Good Investing' (n 60).

<sup>64</sup> Cynthia Soledad, Karoline Vinsrygg, Ashley Summerfield, and Jennifer Reingold, 2018 *Global Board Diversity Tracker: Who's Really on Board?* (Egon Zehnder 2018) 11.

<sup>65</sup> Bob Zukis, 'How Women Will Save the Future, One Corporate Board at a Time' (*Forbes* 30 June 2020) <[www.forbes.com/sites/bobzukis/2020/06/30/how-women-will-save-the-future-one-corporate-board-at-a-time/?sh=44915c207bc9](http://www.forbes.com/sites/bobzukis/2020/06/30/how-women-will-save-the-future-one-corporate-board-at-a-time/?sh=44915c207bc9)> accessed 8 May 2022.

<sup>66</sup> Morgan Stanley, 'Gender Diversity Is a Competitive Advantage' (2016) <[www.morganstanley.com/pub/content/dam/msdotcom/ideas/gender-diversity-toolkit/Gender-Diversity-Investing-Primer.pdf](http://www.morganstanley.com/pub/content/dam/msdotcom/ideas/gender-diversity-toolkit/Gender-Diversity-Investing-Primer.pdf)> accessed 8 May 2022.

<sup>67</sup> Froehlicher et al., 'Gender Equality in the Workplace' (n 20).

<sup>68</sup> Robin J. Ely and David A. Thomas, 'Getting Serious about Diversity: Enough Already with the Business Case' (*Harvard Business Review* November–December 2010) <<https://hbr.org/2020/11/getting-serious-about-diversity-enough-already-with-the-business-case>> accessed 8 May 2022.

## 9.2.2.1 Market Expansion and Productivity

A focus on female consumers leads to significant market expansion. Women are usually responsible for household purchases<sup>69</sup> and they account for 85 per cent of consumer purchases,<sup>70</sup> making them an important consumer base. Companies need to understand how to market their goods and services to female consumers, including convenient times and locations according to their lifestyles.<sup>71</sup> Alignment with female customers' challenges and preferences can lead to a rise in their loyalty and an increase in sales.<sup>72</sup> Women involved in the design and production process of goods and services take the female perspective into account, providing insights that amplify profitability for the company.<sup>73</sup> Finally, gender integration in companies' business models can lead to increased perception of value by consumers, and therefore increased use and adoption of the goods and services offered.<sup>74</sup>

A rise in female employment increases productivity throughout value chains.<sup>75</sup> Giving women access to jobs usually reserved for men can increase the companies' productivity.<sup>76</sup> Companies with male and female employees can take full advantage of the different capabilities of both genders.<sup>77</sup> Employment of women in sales and distribution teams can lead to increased trust by female consumers, resulting in an expansion in customer base and increased customer retention and brand reputation.<sup>78</sup> According to a report by the ILO, gender-diverse companies report improvements in creativity, innovation, openness, and enhanced reputation.<sup>79</sup> Finally, research has shown that gender-diverse teams are more likely to produce radical innovation.<sup>80</sup>

<sup>69</sup> Millennium Challenge Corporation, 'Gender Equality: A Smart Proposition for Business' (2015) <[www.mcc.gov/resources/story/story-kin-apr-2015-gender-equality-a-smart-business-proposition/#ref-4-a](http://www.mcc.gov/resources/story/story-kin-apr-2015-gender-equality-a-smart-business-proposition/#ref-4-a)> accessed 8 May 2022.

<sup>70</sup> She-economy, 'Marketing to Women Quick Facts' <<http://she-economy.com/report/marketing-to-women-quick-facts>> accessed 8 May 2022.

<sup>71</sup> Acumen, 'Women and Social Enterprises' (n 48) 11.

<sup>72</sup> Ibid 12.

<sup>73</sup> Ibid 46.

<sup>74</sup> Ibid 11.

<sup>75</sup> Ibid 46.

<sup>76</sup> Ibid 39.

<sup>77</sup> Ibid.

<sup>78</sup> Ibid 12.

<sup>79</sup> ILO, 'Women in Business and Management' (n 49).

<sup>80</sup> Cristina Díaz-García, Angela González-Moreno, and Francisco Jose Sáez-Martínez, 'Gender Diversity within R&D Teams: Its Impact on Radicalness of Innovation' (2012) 15(2) *Innovation* 149–160.

Companies should strive to have gender balance in the research and development teams, to take advantage of what both men and women have to offer.

#### 9.2.2.2 Social Impact

Women in higher positions foster greater gender equality within their companies, promoting the implementation of diversity policies for the well-being of women within the firm.<sup>81</sup> Firms with a female general manager employ more women than those led by a man, and are committed to help them grow professionally through mentoring, offering equal opportunities to those given to men, and eliminating bias in employment and pay.<sup>82</sup> Additionally, women managers have been shown to provide more support to their teams, in terms of well-being and workload, than their male counterparts.<sup>83</sup> Women in leadership positions may be more committed to gender equality than men, having been exposed to inequality throughout their professional careers and personal lives.<sup>84</sup> Furthermore, they are more in tune with the difficulties faced by women and therefore can allow more flexibility in the workplace. Companies with women board members tend to have more remote work options and flexible working arrangements.<sup>85</sup> An increase in the number of women in leadership positions results in a broader candidate pool, leading to more qualified women available for board nominations. Finally, companies with a female CEO tend to have a higher percentage of women in managerial positions.<sup>86</sup>

### 9.3 EMERGENCE OF GENDER PROVISIONS IN INVESTMENT AGREEMENTS

FDI is a main feature of economic globalization, and it indicates long-term commitment and economic ties, with different levels of impact on the social, economic, cultural, and gender structures of the region receiving the investment. FDI is, for the most part, regulated by international investment treaties (IIAs) signed between governments – the government of the country receiving the investment and the government of the home of the investor.

<sup>81</sup> IADB, 'Una olimpiada desigual' (n 6).

<sup>82</sup> Ibid.

<sup>83</sup> ILO and UN Women, 'Win-Win' (n 46).

<sup>84</sup> Ibid.

<sup>85</sup> Froehlicher et al., 'Gender Equality in the Workplace' (n 20).

<sup>86</sup> Ng and Sears, 'The Glass Ceiling in Context' (n 10).

IAs are categorized in two types: (i) bilateral investment treaties and (ii) treaties with investment provisions. A BIT is an agreement between two countries regarding the promotion and protection of investments made by parties from the respective countries in each other's territory. They are international agreements establishing the terms and conditions for private investment by natural and legal persons of one state in another state. The great majority of IAs are BITs,<sup>87</sup> and this section will focus on those, and in particular on model BITs proposed by governments, as those are the types of international investment agreements where relevant gender provisions are currently being developed.

There are clear linkages through which trade and investment policies and agreements can affect gender dynamics. Negotiators of international trade agreements have progressively included the discussions on gender provisions or gender chapters in free trade agreements (FTAs). Both individual provisions and chapters mostly cover issues ranging from cooperation activities to institutional arrangements, including the establishment of a trade and gender committee and consultation procedures. Other gender-related provisions can be found spread throughout the text of an FTA – in the preamble, in chapters on labour, on investment, on cooperation, on sustainable development, or on small and medium-sized enterprises (SMEs).<sup>88</sup> Although mostly welcome and in continuous development, so far the commitments that address gender through those instruments are mostly aspirational. It is worth noting that a few FTAs contain binding and enforceable gender-related provisions, with the US–Mexico–Canada agreement (USMCA) being the most recent one, notably in Chapter 23 – Labor.<sup>89</sup>

On the other hand, in the realm of international investment agreements, very few model BITs currently include gender provisions. Even when they do, these provisions do not impose binding obligations on corporations. Out of eighty-four model agreements published online by the United Nations Conference on Trade and Development's (UNCTAD) Investment Policy

<sup>87</sup> UNCTAD, 'Investment Policy Hub' <<https://investmentpolicy.unctad.org/international-investment-agreements/model-agreements>> accessed 8 May 2022.

<sup>88</sup> See for example the United States–Mexico–Canada (USMCA), that includes gender provisions in the Labor Chapter and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) that addresses gender concerns in the Development Chapter.

<sup>89</sup> United States–Mexico–Canada Agreement Implementation Act, H.R. 5430, Public Law 116–113, Chapter 23, <<https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/23%20Labor.pdf>> accessed 8 May 2022.

Hub,<sup>90</sup> only seven explicitly address gender, albeit through broad provisions that refer to ‘fair and equitable treatment’ between men and women.<sup>91</sup>

Among the few examples of countries that have submitted model BITs containing gender provisions are the Netherlands (model revised in 2019)<sup>92</sup> and Canada (model revised in 2021).<sup>93</sup> Amid the interesting changes introduced by the Netherlands, the 2019 model agreement includes a commitment to promote equal opportunities and participation for women and men in the economy. The preamble recognizes the importance of gender equality in international trade and investment policies, and Article 6, paragraph 3 of the model agreement underscores ‘the importance of incorporating a gender perspective into the promotion of inclusive economic growth’ and that ‘Contracting Parties commit to promote equal opportunities and participation for women and men in the economy’.

More recently, in May 2021, the Government of Canada introduced its model BIT with several provisions addressing gender issues. Among the main changes included in this model, Canada highlights provisions on gender equality, including ‘a number of new provisions that aim to help women and other groups benefit more from the agreements, and to ensure that investment protections do not impede policies promoting gender equality’.<sup>94</sup> Special attention in that regard should be paid to Article 3 (Right to Regulate), Article 8 (Minimum Standard of Treatment), and Article 16 (Responsible Business Conduct).

The Dutch and the Canadian model BITs are relevant because they set the scene for a new generation of IIAs, as they highlight the importance of incorporating a gender perspective in the promotion of inclusive growth and equal opportunities between men and women. Previously, when investment agreements mentioned gender, they mostly focused on gender equality in arbitral dispute resolution and the gender division among arbitrators. This

<sup>90</sup> UNCTAD, ‘Investment Policy Hub’ (n 87).

<sup>91</sup> The Model BITs that mention gender were signed by Morocco, Belgium-Luxemburg, Netherlands, Slovakia, India, and Serbia.

<sup>92</sup> Kingdom of the Netherlands, ‘Model Investment Agreement’ (2019) <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download>> accessed 8 May 2022.

<sup>93</sup> Government of Canada, ‘2021 Model FIPA’ <[www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/2021\\_model\\_fipa-2021\\_modele\\_apie.aspx?lang=eng](http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/2021_model_fipa-2021_modele_apie.aspx?lang=eng)> accessed 8 May 2022.

<sup>94</sup> Government of Canada, ‘2021 FIPA Model – Summary of Main Changes’ <[www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/2021\\_model\\_fipa\\_summary-2021\\_modele\\_apie\\_resume.aspx?lang=eng](http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/2021_model_fipa_summary-2021_modele_apie_resume.aspx?lang=eng)> accessed 8 May 2022.

seems to be changing in light of the recent model BITs, but the impact of investment treaties and foreign direct investment on gender equality are notions that need to have more concrete ground in international investment treaties.

It is worth noting that having gender provisions in government model BITs is not a precondition for signatories to include gender provisions in the BITs they negotiate and sign. In fact, a quick overview in the most recently signed BITs in force<sup>95</sup> shows that there is little correlation between countries that addressed gender in their model BITs and countries that signed BITs addressing gender. For example, whereas Brazil stood out as one of the few countries whose recent model investment agreement did not address gender, the government addresses the issue in most of its recently signed investment cooperation and facilitation treaties.<sup>96</sup> Conversely, whereas Morocco's 2019 model BIT<sup>97</sup> addressed gender, its most recent BIT – signed with Japan in August 2020<sup>98</sup> – does not.

#### 9.4 FDI CAN BE THE DRIVER OF NECESSARY CHANGES

The private sector can have a very active role in promoting gender equality, and investment policies by MNEs can be conducive to creating more employment opportunities for women.<sup>99</sup> FDI inflows can lead to more opportunities for women in the job market but may also exacerbate disparities. In fact, according to Blanton and Blanton, 'traditional arguments about the linkages between socio-political factors and FDI – particularly in developing

<sup>95</sup> According to the UNCTAD Investment Policy Hub, currently there are 2,270 BITs in force <<https://investmentpolicy.unctad.org/international-investment-agreements>>.

<sup>96</sup> See for example the Cooperation and Facilitation Investment Agreement between Brazil and the United Arab Emirates <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5855/download>> accessed 8 May 2022; For more information, see Ana Sarmento, 'The Scope of New Brazilian Investment Protections: Intellectual Property and the Limits of an Alternate Approach', (2021) 52(2) *University of Miami Inter-American Law Review* n.p.

<sup>97</sup> Kingdom of Morocco, 'Model Investment Treaty' (June 2019) <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5895/download>> accessed 8 May 2022.

<sup>98</sup> UNCTAD, 'Agreement between the Kingdom of Morocco and Japan for the Promotion and Protection of Investment' <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5908/download>> accessed 8 May 2022.

<sup>99</sup> Renata Vargas Amaral and Lillyana Daza Jaller, 'The Role of Regulations and MNEs in Ensuring Equal Opportunities for Women' (2020) 27(3) *UNCTAD Transnational Corporations Journal* 183–202.

countries – anticipate an inverse relationship between the rights and welfare of women and foreign investment'.<sup>100</sup>

FDI can be the driver of necessary changes and although it would be natural to believe that a rise of trade and investment in the economy would lead to more opportunities for women, studies consistently show that trade and investment policies are not gender-neutral. While the current trade and investment paradigms are supposed to increase growth, decrease inequalities and promote employment, evidence shows (especially in developing countries such as those in Latin America and the Caribbean) that a more globalized economy and a boost of foreign direct investment by MNEs may increase inequalities, 'especially across sectors, income, gender and social groups'.<sup>101</sup>

When planning and implementing investments in a foreign country, MNEs can set the tone and go beyond the gender provisions where they exist in domestic legislation and IIAs. In fact, corporations' gender policies have in many ways led the efforts to raise awareness around the inequality with which women are treated in the workforce in all regions of the world.

#### 9.4.1 *What Women Need*

Implementing employment policies that create an enabling environment for men and women can improve companies' access to talent as well as employee retention.<sup>102</sup> Offering flexible work arrangements and using governmental programmes to promote gender equality within the organization are strong contributing factors to improve the working environment for women and to create more opportunities for them.<sup>103</sup>

Access to training, mentorship, and professional development can help women rise, enhancing their leadership and decision-making skills.<sup>104</sup> Increased purchasing power for women leads to more women purchasing from and investing in companies that take their social impact into account.<sup>105</sup> Furthermore, companies whose workforce uses advanced technologies tend to

<sup>100</sup> Robert Blanton and Shannon Lindsey Blanton, 'Is Foreign Direct Investment Gender Blind? Women's Rights as a Determination of US FDI' (2015) 21(4) *Feminist Economics* 61–88.

<sup>101</sup> Ranja Sengupta, 'The Gender Dynamics of Trade and Investment and the Post-2015 Development Agenda: A Developing-Country Perspective' (2013) Third World Network Briefing Paper 68 <[www.twn.my/title2/briefing\\_papers/No68.pdf](http://www.twn.my/title2/briefing_papers/No68.pdf)> accessed 8 May 2022.

<sup>102</sup> Acumen, 'Women and Social Enterprises' (n 48).

<sup>103</sup> IADB, 'Una olimpiada desigual' (n 6).

<sup>104</sup> Acumen, 'Women and Social Enterprises' (n 48).

<sup>105</sup> Ibid.

be more equitable in terms of gender.<sup>106</sup> In a study carried out in Mexico, the introduction of computer technology helped ease the physical effort required by women in blue-collar jobs.<sup>107</sup> This led to a higher female participation rate and higher relative salaries.

#### 9.4.2 *Initiatives by Corporations in the Americas*

MNEs can go beyond the requirements imposed on them by domestic legislation and IIAs. For example, by imposing their own quotas for women's representation at senior managerial levels, their investment practices will be aligned with UN Sustainable Development Goal 5 on gender equality.<sup>108</sup> As a result of the COVID-19 pandemic, several corporations have implemented measures to address the struggle employees were facing due to the increase in their domestic responsibilities. As an example, Microsoft introduced different parental leave programmes for parents with children at home due to school closures and online learning.<sup>109</sup>

Some may claim that corporations are opportunistic, using human rights rhetoric, including that of gender equality, as part of their marketing strategy.<sup>110</sup> However, regardless of the intentions behind the actions of corporations, these initiatives have positive business outcomes for the company as well as social outcomes, including raising awareness about these issues. By prioritizing a diverse and inclusive work environment, MNEs can have a positive impact on the lives of women employees as well as women in the communities where the MNEs operate. Finally, these transformative actions can benefit society as a whole by driving the development of local communities and national economies.<sup>111</sup>

An example of an MNE that is implementing interesting projects in Latin America and the Caribbean is United Parcel Service (UPS). In 2021, UPS launched its Women Exporter programme in fifteen countries in Latin America, including Mexico, Chile, and Barbados.<sup>112</sup> The corporation has

<sup>106</sup> IADB, 'Una olimpiada desigual' (n 6).

<sup>107</sup> Ibid.

<sup>108</sup> Froehlicher et al., 'Gender Equality in the Workplace' (n 20).

<sup>109</sup> Holly Corbett, 'How Companies Are Supporting Working Parents in the COVID Economy' (Forbes 30 July 2020) <[www.forbes.com/sites/hollycorbett/2020/07/30/how-companies-are-supporting-working-parents-in-the-covid-economy/?sh=52bbb64e328f](http://www.forbes.com/sites/hollycorbett/2020/07/30/how-companies-are-supporting-working-parents-in-the-covid-economy/?sh=52bbb64e328f)> accessed 8 May 2022.

<sup>110</sup> Marianna Leite, 'Pluralizing Discourses: Multinationals and Gender Equality' (2019) 20(3) *Journal of International Women's Studies* 116–138.

<sup>111</sup> ILO and UN Women, 'Win-Win' (n 46).

<sup>112</sup> UPS, 'Women Exporters Program' <[www.ups.com/ba/en/services/small-business/women-exporters-program.page](http://www.ups.com/ba/en/services/small-business/women-exporters-program.page)> accessed 8 May 2022.



committed its resources and industry know-how to empower women through the programme, assisting small or medium-sized enterprises with international trade and e-commerce. Another example is ExxonMobil, which works with Vital Voices, to support advanced training for women business owners in LAC and other regions. Since 2005, the corporation has had global gender policies to help women around the world invest in themselves and their communities.<sup>113</sup>

Unilever has had a strong presence in the region and beyond, adopting internal gender policies – it supports and works with United Nations (UN) Women in Latin America. In 2021, the corporation celebrated the fact that Unilever Colombia achieved gender balance on its board of directors, with 50 per cent of the positions held by women. Unilever also closed the gender gap in managerial roles, with 53 per cent of managerial positions covered by female talent. This is the largest representation of women in leadership positions in the history of the company in Colombia.<sup>114</sup> Moreover, the corporation intends to generate better living conditions for women in its extended chain in Colombia through programmes such as Shakti – an inclusive micro-distribution project through which the company offers training and additional income opportunities. This initiative has already benefited more than 10,000 Colombian women – most of them heads of household – in 463 rural localities around the country.<sup>115</sup>

## 9.5 CONCLUDING REMARKS

The future of the international economic order is contingent on the ability of governments and the private sector to distribute the benefits of economic growth equally to all.<sup>116</sup> Maximizing the benefits for women in terms of FDI by MNEs requires action from both the public and private sectors, at the national and the international levels. The mere existence of gender provisions (and maybe chapters) in IIAs does not guarantee that gender concerns will be

<sup>113</sup> ExxonMobil, 'Community Engagement: Women's Economic Opportunity' <<https://corporate.exxonmobil.com/Sustainability/Community-engagement/Womens-economic-opportunity>> accessed 8 May 2022.

<sup>114</sup> Unilever, 'Promoting Gender Equality throughout our Value Chain in Colombia' <[www.unilever-southlatam.com/news/comunicados-de-prensa/2021/promoting-gender-equality-throughout-our-value-chain-in-colombia.html](http://www.unilever-southlatam.com/news/comunicados-de-prensa/2021/promoting-gender-equality-throughout-our-value-chain-in-colombia.html)> accessed 8 May 2022.

<sup>115</sup> Ibid.

<sup>116</sup> Padideh Alai and Renata Amaral, 'The Importance (and Complexity) of Mainstreaming Gender in Trade Agreements' (CIGI October 2019) <[www.cigionline.org/articles/importance-and-complexity-mainstreaming-gender-trade-agreements/](http://www.cigionline.org/articles/importance-and-complexity-mainstreaming-gender-trade-agreements/)> accessed 8 May 2022.

implemented and enforced at the firm level, the policy level or through domestic legislation.

Public, private, domestic, and international investment policies are of fundamental importance to further women's economic empowerment, creating opportunities for employment, entrepreneurship, and inclusive growth. Domestically, legal reform and enforcement of gender policies by local governments in the countries where an MNE operates is crucial. As discussed previously in scholarship,<sup>117</sup> legal frameworks around the world have vastly improved in terms of the rights granted to women, but there is still much room for growth. Research shows that focused domestic legal reform leads to smaller gender gaps and higher investments, together with societal and economic benefits.

MNEs in the private sector have been leading this change around the globe in many respects. With gender policies focused on the composition of boards, for example, corporations have been changing the decision-making landscape for the past years. However, especially when talking about foreign investments in different countries, many initiatives are still needed in the private sector to create an enabling environment for women as well as opportunities to attract, train, retain, and promote women.

<sup>117</sup> Amaral and Daza Jaller, 'The Role of Regulations and MNEs' (n 99).

