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## Connecting the Spheres of Trade and Gender: Creating a Gender-Conscious World Trade Organization

*“Women do two-thirds of the world’s work, receive 10% of the world’s income and own 1% of the means of production. Women comprise roughly 70% of the world’s poor. In 2002, women constituted 40% of the world’s total economically-active population and carried out about 70% of the informal work in developing countries. Unfortunately, women’s actual and potential economic capacity generally goes under- or unaccounted for in policy decisions. In this manner, women are considered as a means to an end in products of trade, rather than as ends in and of themselves.”<sup>1</sup>*

### I. INTRODUCTION

Globalization is an intricate economic, political, cultural, and geographic process during which the movement of resources, organizations, ideals, discourses, and peoples become progressively global or transnational.<sup>2</sup> Pure economic globalization theory recognizes the market as the sole, legitimate institution and the only logical path to growth and prosperity.<sup>3</sup> Women play a major economic role in driving globalization, mainly because they participate in worldwide agriculture, small and micro-enterprises, and export-processing industries.<sup>4</sup> Without including household labor and informal economic activity, women encompass 854 million workers of the global workforce.<sup>5</sup>

Human rights globalization has developed parallel to trade and economic globalization.<sup>6</sup> However, human rights and economic issues are constantly

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1. Megan Berry, *A Woman’s Worth: Accounting for Women in the Global Market*, 37 DENV. J. INT’L L. & POL’Y 465, 469-70 (2009) (footnotes omitted).

2. See VALENTINE M. MOGHADAM, GLOBALIZING WOMEN: TRANSNATIONAL FEMINIST NETWORKS 35 (2005) (discussing feminist analysis of globalization and international-economic theory). Scholars define globalization in different terms. See *id.* at 25 (listing words used interchangeably with globalization). A simple globalization definition “refers merely to the international spread of certain trends,” while a more complex globalization definition “refers to a systemic process of development and change, or a new process of social system building at the global level.” *Id.*

3. See *id.* at 36 (discussing neoliberal-economic ideology recognized by United States, Europe, World Bank, and International Monetary Fund).

4. See Rebecca Adams, *Violence Against Women and International Law: The Fundamental Right to State Protection from Domestic Violence*, 20 N.Y. INT’L L. REV. 57, 98-99 (2007) (arguing women comprise important part of population, whose work significantly contributes to society).

5. *Id.*

6. See Star M. Eneva, Note, *The European Union Gender Equality Laboratory: Its Effect on Eastern*

placed into two different spheres that require separate documents and political bodies to govern them.<sup>7</sup> Over time, policymakers recognized the relationship between humanitarian and economic issues, and acknowledged that sustainable development could not be achieved without investing in women and reducing gender inequality.<sup>8</sup> The UN Millennium Development Goals (MDGs)—an international plan to attain global development by 2015—recognized that promoting gender equality and empowering women are necessary steps toward economic, political, and social development.<sup>9</sup> The United Nations Conference on Trade and Development (UNCTD) acknowledges that trade can have significant implications on gender equality, and vice versa.<sup>10</sup>

Nevertheless, most discussions of international trade policy do not include gender concerns, and trade-agreement language continues to be gender

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*European Candidate Countries*, 15 S. CAL. REV. L & WOMEN'S STUD. 147, 154 (2005) (discussing relationship and interplay between trade and human rights globalization trends).

7. See Berry, *supra* note 1, at 475-76 (explaining relationship between international policies on human rights and economic unity). Following the end of World War II, the global community concurrently created two important international instruments: the General Agreement on Tariffs Trade (GATT) and the Universal Declaration of Human Rights (UDHR). See *id.* at 475 (explaining implementation and purposes of GATT and UDHR). See generally Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR] (declaring all beings born "equal in dignity and rights"); General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT] (agreeing to reduction of tariffs and other barriers to trade). The UDHR was the foundation for modern human rights, as well as the first formal recognition of women's equality as a fundamental human right. See UDHR, *supra*, art. 2 (establishing everyone, including women, entitled to same human rights without any exceptions); see also Berry, *supra* note 1, at 476 (explaining fundamental UDHR provisions). GATT was created to operate beside the World Bank and the International Monetary Fund, and to encourage countries to reduce tariffs, import quotas, and other trade barriers. See GATT, *supra*, arts. II-III, XI (mandating consistent tariff schedules, equal national treatment, and reduced quantitative restrictions); see also Berry, *supra* note 1, at 476 (explaining purpose of implementing GATT).

8. See AMARTYA SEN, DEVELOPMENT AS FREEDOM 202 (1999) (arguing women's empowerment remains central issue in many countries' development process); Berry, *supra* note 1, at 491 (analyzing World Trade Organization (WTO) preamble and claims about sustainable development); Barnali Choudhury, *The Facade of Neutrality: Uncovering Gender Silences in International Trade*, 15 WM. & MARY J. WOMEN & L. 113, 113 (2008) (arguing sustainable-development purpose of trade agreements, and therefore, agreements need to address gender inequality); Constance Z. Wagner, *Looking at Regional Trade Agreements Through the Lens of Gender*, 31 ST. LOUIS U. PUB. L. REV. 497, 507 (2012) (citing WTO preamble and claims about sustainable development in advocating for gender equality).

9. See United Nations Millennium Declaration, G.A. Res. 55/2, ¶¶ 20, 25, U.N. Doc. A/RES 55/2 (Sept. 18, 2000) (creating MDGs, which help ensure economic policies and decision-making processes benefit women); U.N. Secretary-General, *Road Map Towards the Implementation of the United Nations Millennium Declaration: Report of the Secretary General*, at 56-58, U.N. Doc. A/56/326 (Sept. 6, 2001) [hereinafter *Report of the Secretary General on MDGs*], available at <http://www.un.org/documents/ga/docs/56/a56326.pdf> (summarizing MDGs); see also G.A. Res. 65/1, ¶ 72, U.N. Doc. A/RES 65/1 (Oct. 19, 2010) (reaffirming UN's commitment to MDGs).

10. See *Trade, Gender and Development*, UNITED NATIONS CONF. ON TRADE & DEV., <http://unctad.org/en/Pages/DITC/Gender-and-Trade/Trade,-Gender-and-Development.aspx> (last visited Feb. 19, 2014) (acknowledging gender perspectives in economic policy "essential to pursuing inclusive and sustainable development"); see also Berry, *supra* note 1, at 466 (recognizing trade can have significant negative impact on gender equality).

neutral.<sup>11</sup> Trade's negative implications on gender equality undermine World Trade Organization (WTO) agreements, and the WTO's dedication to sustainable development.<sup>12</sup> The WTO ignores trade policies' detrimental effects on women, and allows WTO members to hide under a "veil of ignorance."<sup>13</sup>

This Note will analyze whether the WTO can become a gender-conscious trade organization and promote gender equality, specifically utilizing labor regulations and gender-conscious policies.<sup>14</sup> Part II.A will discuss international gender-equality initiatives, and gender equality's importance in international development.<sup>15</sup> Part II.B will discuss the European Union (EU) and the North American Free Trade Agreement (NAFTA), and how these trade agreements use economic incentives and gender-conscious trade language to promote gender equality.<sup>16</sup> Part II.C will discuss the WTO's history and structure, including its dispute-settlement system and various side agreements.<sup>17</sup> Part III will analyze the possibilities of incorporating gender mainstreaming into the WTO; establishing a trade and gender committee; expanding Article XX of the General Agreement on Tariffs and Trade (GATT) to recognize gender-equality measures as exceptions to following trade obligations; and creating a side labor agreement that promotes gender equality in labor.<sup>18</sup>

## II. HISTORY OF INTERNATIONAL GENDER-EQUALITY INITIATIVES AND INTERNATIONAL TRADE INSTITUTIONS

### A. *The International Commitment to Gender Equality*

#### 1. *The Gendered Impacts of Trade Liberalization*

Trade liberalization impacts women differently than men because women

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11. See Berry, *supra* note 1, at 491 (arguing WTO should expressly provide provisions specific to women); Choudhury, *supra* note 8, at 118 (discussing assumption of trade as gender neutral). Scholars consider trade agreements and their language to be gender neutral because gender and sex are never mentioned within the text of the agreements. See generally, e.g., Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement] (creating the WTO); Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS] (agreeing to promote and protect intellectual property rights; GATT, *supra* note 7 (agreeing to reduce tariffs, other barriers to trade, and discriminatory treatment in commerce)).

12. See Choudhury, *supra* note 8, at 159 (arguing WTO needs to acknowledge gender equality's importance to sustainable development); see also Marrakesh Agreement, *supra* note 11, pmbl. (establishing WTO's primary goals and objectives, all contributing to sustainable development).

13. See Berry, *supra* note 1, at 491 (positing lack of gender analysis in trade policies leads to negative effects on women).

14. See *infra* Part III.

15. See *infra* Part II.A.

16. See *infra* Part II.B.

17. See *infra* Part II.C.

18. See *infra* Part III.

have disparate control over economic resources.<sup>19</sup> Countries with a low-cost-labor comparative advantage experience increased labor demands resulting from international trade expansion, which may benefit the larger economy, but fails to reduce wage disparities among workers, especially women.<sup>20</sup> Although trade tends to increase formal work opportunities, numerous other factors, such as social norms in the home and at work, counteract these opportunities, resulting in women's diminished ability to fully benefit from trade expansion.<sup>21</sup> While trade liberalization does not cause gender inequality, increased trade can significantly change a country's economic conditions, intensifying existing gender-based inequalities.<sup>22</sup>

Increasing international trade and market liberalization has a unique effect on women, especially in the major sectors of trade: agriculture, manufacturing, and services.<sup>23</sup> Agricultural trade liberalization most directly harms women

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19. See Wagner, *supra* note 8, at 506 (explaining interaction between trade and gender using economic and feminist analysis). "Women, especially poor women, generally have limited or no access to basic services and utilities (e.g. water and energy), as well as to other services, such as financial, telecommunications and information technology, and business services." TASK FORCE ON GENDER & TRADE, UN INTER-AGENCY NETWORK ON WOMEN & GENDER EQUALITY, TRADE AND GENDER: OPPORTUNITIES AND CHALLENGES FOR DEVELOPING COUNTRIES, at 28, U.N. Doc. UNCTAD/EDM/2004/2 (2004) [hereinafter UN TRADE AND GENDER], available at [http://unctad.org/en/docs/edm20042\\_en.pdf](http://unctad.org/en/docs/edm20042_en.pdf). Women lack access to these resources either because of high costs, social norms, or both. See *id.* (analyzing relationship between trade, gender, and access to resources).

20. See Choudhury, *supra* note 8, at 136-37 (arguing increased labor demand does not correspond with equal and fair wages); Juanita Elias, *International Labour Standards, Codes of Conduct and Gender Issues: A Review of Recent Debates and Controversies*, 3 NON-ST. ACTORS & INT'L L. 283, 300 (2003) (contending wages considered not worth protecting because part of country's comparative advantage in global market). As of 2012, various organizations estimate the global gender pay gap—the average difference between men's and women's wages for equal work—to be between sixteen and eighteen percent. K.G. TUDENS & M. VAN KLAVEREN, INT'L TRADE UNION CONFEDERATION, FROZEN IN TIME: GENDER PAY GAP UNCHANGED FOR 10 YEARS 4 (Mar. 2012), available at [http://www.ituc-csi.org/IMG/pdf/pay\\_gap\\_en\\_final.pdf](http://www.ituc-csi.org/IMG/pdf/pay_gap_en_final.pdf).

21. See Berry, *supra* note 1, at 470 (recognizing women face systematic discrimination leaving them at economic disadvantage); Thalia Kidder & Kate Raworth, 'Good Jobs' and Hidden Costs: *Women Workers Documenting the Price of Precarious Employment*, GENDER & DEV., July 2004, at 12, 12 (acknowledging trade offers opportunities for income, although often only in short-term contracts lacking benefits). Scholars suggest that "factors—such as discrimination, lower skills, and gender inequalities in access to resources—may impede women's ability to benefit from trade." Gurushri Swamy, *The Impact of International Trade on Gender Equality*, PREMNOTES, May 2004, available at <https://openknowledge.worldbank.org/bitstream/handle/10986/11271/302000premnote86.pdf?sequence=1>. Unskilled workers are often employed temporarily, and women's general lack of skills—compared to men—increase the probability that they are employed on a temporary basis, with minimal benefits. See *id.* (explaining how trade affects gender wage gaps). International trade and foreign investment often favor large companies, rather than small business and micro-entrepreneurs by which women are most often employed. See Berry, *supra* note 1, at 470 (arguing trade expansion does not usually benefit female-dominated sectors).

22. See Wagner, *supra* note 8, at 505-06 (explaining link between trade and gender relations). Generally, countries with low average incomes have a large pool of unskilled female workers, and intensified cost competition may further drive down their wages and working conditions. See UN TRADE AND GENDER, *supra* note 19, at 27 (analyzing trade effects on wage and employment discrimination).

23. See Berry, *supra* note 1, at 474 (discussing agricultural liberalization and negative effects on gender equality); Choudhury, *supra* note 8, at 136-38 (discussing manufacturing and service liberalization and their negative effects on gender equality); Wagner, *supra* note 8, at 514 (discussing negative effects of agriculture

because they often lack access to the resources necessary to produce export crops, namely credit, education, and enforceable property rights.<sup>24</sup> Agricultural trade liberalization has historically only benefited medium- and large-scale farms, rather than the small subsistence farms, which are the farms most women employed in agriculture work on.<sup>25</sup> Although manufacturing employers aim to hire female workers, these jobs do not provide women with secure, long-term employment because labor conditions encourage high turnover rates and the female workforce is considered expendable.<sup>26</sup> Manufacturing employment reinforces gender norms, because employers target women as ideal manufacturing workers due to “their docility, their manual dexterity, their disinclination to unionize, their acceptance of lower pay, and their willingness to tolerate monotonous and repetitive work.”<sup>27</sup> Service-oriented jobs create new employment opportunities; however, women are often segregated into lower-paying jobs (such as tourism, hospitality services, and social services) while only a small number are employed in higher paying, financial services jobs.<sup>28</sup> Service-oriented jobs are especially unstable because any wage increase or technological advancement could result in companies outsourcing the jobs.<sup>29</sup>

Across the world, many countries have adopted an export-led development strategy, which usually results in more opportunities for women in low-tech, labor-intensive industrial jobs.<sup>30</sup> The availability of paid jobs has allowed women to escape from the most extreme poverty conditions, but does not necessarily provide them with economic stability and prosperity.<sup>31</sup>

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and service trade liberalization on gender equality).

24. See THE WORLD BANK, AGRICULTURE AND RURAL DEVELOPMENT: GENDER IN AGRICULTURE SOURCEBOOK 2, 89 (2009) [hereinafter AGRICULTURE SOURCEBOOK], available at <http://siteresources.worldbank.org/INTGENAGRLIVSOUBOOK/Resources/CompleteBook.pdf> (discussing importance of gender equality in agriculture); Berry, *supra* note 1, at 474.

25. See Berry, *supra* note 1, at 474. As countries introduce export-driven agricultural policies, they jeopardize women’s ability to earn a living in subsistence agriculture. See Wagner, *supra* note 8, at 514 (explaining negative effects of trade liberalization on women in agriculture).

26. See Choudhury, *supra* note 8, at 136-37 (explaining expendability of women workers in manufacturing employment); Kidder & Raworth, *supra* note 21, at 12 (discussing women’s frequent short-term employment contracts and constant risk of sudden job loss). “Women are often viewed as a passive, flexible workforce that will accept low wages without demanding labour and human rights.” Elias, *supra* note 20, at 296.

27. Choudhury, *supra* note 8, at 136 (quoting Sherrie L. Russell-Brown, *Labor Rights as Human Rights: The Situation of Women Workers in Jamaica’s Export Free Zones*, 24 BERKELEY J. EMP. & LAB. L. 179, 184 (2003)) (internal quotation marks omitted). “Women are often viewed as a passive, flexible workforce that will accept low wages without demanding labour and human rights.” Elias, *supra* note 20, at 296.

28. See Choudhury, *supra* note 8, at 139 (identifying costs incurred with increased trade in services); Wagner, *supra* note 8, at 514 (suggesting women have disproportionately lower share of benefits resulting from liberalized service trade).

29. See Choudhury, *supra* note 8, at 139 (explaining insecurity of service jobs).

30. See Elias, *supra* note 20, at 295 (arguing export-led development strategies become essentially female-led development strategies).

31. See Nicole L. Grimm, Comment, *The North American Agreement on Labor Cooperation and Its Effects on Women Working in Mexican Maquiladoras*, 48 AM. U. L. REV. 179, 203-04 (1998) (reinforcing

Unfortunately, patriarchal social and economic norms continue to disadvantage women in the global society.<sup>32</sup>

## 2. *International Agreements: Recognizing the Importance of Gender Equality*

Gender equality is a fundamental global principle, and is articulated in numerous international agreements.<sup>33</sup> The Universal Declaration of Human Rights (UDHR) was the first formal recognition of women's equality as a fundamental human right.<sup>34</sup> The UDHR states "[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as . . . sex."<sup>35</sup> The rights and freedoms included in the UDHR consist of the right to equal pay for equal work, the right to education, and the right to own property.<sup>36</sup> The United Nations (UN) General Assembly adopted the UDHR in response to the general need for world unity and international collaboration following World War II.<sup>37</sup> Since World War II, human rights and gender equality concerns have remained important parts of international policy agendas.<sup>38</sup>

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importance of female employment for gender equality and reducing extreme poverty); *see also* Kidder & Raworth, *supra* note 21, at 12 (discussing instability of much of female employment opportunities). "The ability to earn money and support themselves is empowering for women because it frees them from their traditional financial dependence on men." Grimm, *supra*, at 203-04 (footnote omitted).

32. Wagner, *supra* note 8, at 505 (explaining women, more often than men, experience higher poverty rates and social discrimination).

33. *See, e.g.*, U.N. Charter art. 1, para. 3 ("To achieve international cooperation . . . in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to . . . sex . . ."); Convention on the Elimination of All Forms of Discrimination Against Women art. 3, *adopted* Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981) [hereinafter CEDAW] ("[T]o ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men."); International Covenant on Economic, Social and Cultural Rights art. 3, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR] ("The States Parties . . . undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth . . ."). As of late 2013, 128 of the 159 WTO members—about eighty percent—had also ratified the ICESCR, and 144 of the 159 WTO members—about ninety-one percent—had also ratified the CEDAW. *See Convention on the Elimination of All Forms of Discrimination Against Women*, UNITED NATIONS TREATY COLLECTION, <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-8.en.pdf> (last visited Mar. 1, 2014) (listing CEDAW participants and their ratification statuses); *International Covenant on Economic, Social and Cultural Rights*, UNITED NATIONS TREATY COLLECTION, <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-3.en.pdf> (last visited Mar. 1, 2014) (listing ICESCR participants and their ratification statuses); *Members and Observers*, WORLD TRADE ORG., [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (last visited Feb. 19, 2014) (listing WTO members).

34. *See* UDHR, *supra* note 7, art. 2 (asserting women and men entitled to all rights and freedoms in UDHR); *see also* Berry, *supra* note 1, at 475-76 (discussing UDHR affirmation of international fundamental human rights, including gender equality).

35. UDHR, *supra* note 7, art. 2.

36. *See id.* arts. 17, 23, 26.

37. *See* Berry, *supra* note 1, at 475-76 (examining common international concern for human rights after World War II); *see also supra* note 7 (explaining concurrent creation of UDHR and GATT to address international economic issues and human rights).

38. *See* United Nations Millennium Declaration, *supra* note 9, ¶¶ 20, 25 (establishing international

In response to widespread economic underdevelopment, the UN General Assembly created the MDGs as a global compact between rich and poor countries to end world poverty.<sup>39</sup> The MDGs recognize that countries cannot achieve sustainable development without investing in women and reducing the inequalities faced by women in both developed and developing nations.<sup>40</sup>

In addition to the general recognition of women's rights, the global community has identified the connection between gender equality and trade and labor relations.<sup>41</sup> For example, the Beijing Declaration directly states that "national policies related to international and regional trade agreements [should] not have an adverse impact on women's new and traditional economic activities."<sup>42</sup> The International Labor Organization (ILO) recognizes that gender equality is necessary to achieve the global aim of providing decent work for both men and women.<sup>43</sup> The ILO and Beijing Declaration further

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commitment to human rights and gender equality issues). When the UN General Assembly adopted the Millennium Declaration in 2000, it was especially progressive because it included gender empowerment as an essential aspect of sustainable development. See Christina T. Holder, Note, *A Feminist Human Rights Law Approach for Engendering the Millennium Development Goals*, 14 CARDOZO J.L. & GENDER 125, 144 (2007) (discussing progressiveness of UN Millennium Declaration).

39. See United Nations Millennium Declaration, *supra* note 9, ¶¶ 11-20 (declaring goal of eradicating extreme poverty); JEFFREY D. SACHS, THE END OF POVERTY: ECONOMIC POSSIBILITIES FOR OUR TIME 266 (2005) (advocating collaboration between rich and poor countries to implement poverty reduction strategy); Holder, *supra* note 38, at 125-26 (explaining MDGs and unprecedented international cooperation on global priorities). The MDGs are: to eradicate extreme poverty; to achieve universal primary education; to promote gender equality and empower women; to reduce child mortality; to improve maternal health; to combat HIV/AIDS, malaria, and other diseases; to ensure environmental sustainability; to develop a global partnership for development. See *Report of the Secretary General on MDGs*, *supra* note 9, at 56-58; see also G.A. Res. 65/1, *supra* note 9, ¶¶ 70-78 (reaffirming all eight MDGs objectives).

40. See *Report of the Secretary General on MDGs*, *supra* note 9, ¶¶ 209-13 (promoting gender equality); Berry, *supra* note 1, at 478 (arguing MDGs advance and promote gender equality); Ceri Hayes, *Out of the Margins: The MDGs Through a CEDAW Lens*, GENDER & DEV., Mar. 2005, at 67, 68 (identifying gender equality as one of MDGs and essential ingredient in global development).

41. See Fourth World Conference on Women, Beijing, China, Sept. 4-15, 1995, *Beijing Declaration and Platform for Action*, ¶ 165, U.N. Doc. A/CONF. 177/20/Rev.1, Annex II (1996) [hereinafter Beijing Declaration], available at <http://www.un.org/womenwatch/daw/beijing/pdf/BDPfA%20E.pdf> (addressing relationship between trade and gender); Discrimination (Employment and Occupation) Convention arts. 1-2, adopted June 25, 1958, 362 U.N.T.S. 31 [hereinafter ILO Discrimination Convention], available at [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---declaration/documents/publication/wcms\\_decl\\_fs\\_85\\_en.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_decl_fs_85_en.pdf) (articulating nations shall promote equality with respect to employment and occupation).

42. Beijing Declaration, *supra* note 41, ¶ 165(k). While not legally binding, the Beijing Declaration additionally suggests countries should "[u]se gender-impact analyses in the development of macro and micro-economic and social policies in order to monitor such impact and restructure policies in cases where harmful impact occurs." *Id.* ¶ 165(p); see Wagner, *supra* note 8, at 509 (indicating legality of Beijing Declaration).

43. See BUREAU FOR GEND. EQUAL. & INT'L LABOUR STANDARDS DEP'T, GENDER EQUALITY AND DECENT WORK: SELECTED ILO CONVENTIONS AND RECOMMENDATIONS PROMOTING GENDER EQUALITY iii (2006), available at <http://www.ilo.org/dyn/gender/docs/RES/309/F946263477/WEB%20Promoting%20Gender%20ANG.pdf> (identifying gender equality as fundamental ILO principle); *Gender Equality*, INT'L LAB. ORG., <http://www.ilo.org/global/topics/equality-and-discrimination/gender-equality/lang--en/index.htm> (last visited Feb. 19, 2014) (explaining ILO policy on gender equality). Nearly all WTO members are also ILO members. See *Alphabetical List of ILO Member Countries*, INT'L LAB. ORG., <http://www.ilo.org/public/english/standards/relm/country.htm> (last updated Nov. 26, 2013) (listing ILO members); *Members and Observers*,

emphasize that gender equality is an important international goal, and cannot be achieved without incorporating gender-mainstreaming ideals into trade policies.<sup>44</sup>

### 3. *Gender Mainstreaming: A Strategy for Gender-Conscious Policy Development*

Gender mainstreaming is a strategy that promotes gender equality by incorporating gender issues into policy development, research, advocacy, legislation, resource allocation, and program implementation and monitoring.<sup>45</sup> The UN, along with other international organizations and agencies, recognizes the importance of gender mainstreaming as an essential element of its commitment to gender equality.<sup>46</sup> Gender mainstreaming requires constant recognition and understanding of women's experiences.<sup>47</sup> Incorporating a gendered perspective into policy discussions means systematically examining and "mobilising all general policies and measures specifically for the purpose of achieving equality by actively and openly taking into account at the planning stage their possible effects on the respective situations of men and women."<sup>48</sup>

#### *B. Existence of Gender Mainstreaming in Trade: The EU and NAFTA*

Many regional trade bodies have incorporated gender mainstreaming into

*supra* note 33 (listing WTO members).

44. See Beijing Declaration, *supra* note 41, ¶ 165 (acknowledging relationship between trade and gender); ILO Discrimination Convention, *supra* note 41, art. 1 (requiring nations promote gender equality in employment and occupation); Irene van Staveren, *Monitoring Gender Impacts of Trade*, EUR. J. DEV. RES., June 2003, at 126, 127-28 (acknowledging gender equality cannot be achieved without antidiscrimination labor policies).

45. See *Gender Mainstreaming*, UNITED NATIONS ENTITY FOR GENDER EQUALITY & THE EMPOWERMENT OF WOMEN, <http://www.un.org/womenwatch/osagi/gendermainstreaming.htm> (last visited Feb. 19, 2014) (defining gender mainstreaming and use in UN policies). "[G]ender mainstreaming stands for the idea that gender issues have to be positioned at the center of political attention, no matter which sphere is tackled. Accordingly, the relations between the sexes have to be taken into account in every field of policy." Elisabeth Holzleithner, *Mainstreaming Equality: Dis/Entangling Grounds of Discrimination*, 14 TRANSNAT'L L. & CONTEMP. PROBS. 927, 932 (2005).

46. See *Gender Mainstreaming*, *supra* note 45 (detailing UN's commitment to gender mainstreaming and equality); see also UNITED NATIONS DEV. PROGRAMME, GENDER EQUALITY: EVALUATION OF GENDER MAINSTREAMING IN UNDP 5 (2006), available at [http://web.undp.org/evaluation/documents/EO\\_GenderMains](http://web.undp.org/evaluation/documents/EO_GenderMains) (acknowledging greater recognition of gender-equality issues among governments and public at large); Silke Roth, *Opportunities and Obstacles—Screening the EU Enlargement Process from a Gender Perspective*, 2 LOY. U. CHI. INT'L L. REV. 117, 120 (2005) (explaining EU approach to gender mainstreaming).

47. See Shelley Wright, *Women and the Global Economic Order: A Feminist Perspective*, 10 AM. U. J. INT'L L. & POL'Y 861, 872 (1995) (recognizing feminist perspective in international economic policy and law).

48. Commission of the European Communities, *Incorporating Equal Opportunities for Women and Men into All Community Policies and Activities*, at 2, COM (96) 67 final (Feb. 21, 1996); see also Holzleithner, *supra* note 45, at 932 (quoting European Commission approach to gender mainstreaming). Gender-mainstreaming policymakers structure programs and projects to benefit both men and women, rather than using earlier gender-equality strategies that helped women adapt to structures created to benefit men. See Roth, *supra* note 46, at 120 (contrasting earlier gender-equality strategies with gender-mainstreaming strategies).

their regimes and policies.<sup>49</sup> The EU and NAFTA are two regional trade organizations that exemplify trade agreements' unique potential to affect gender equality through trade relations.<sup>50</sup> Gender mainstreaming is embedded in the EU's and NAFTA's trade principles, especially concerning labor provisions.<sup>51</sup>

### 1. The EU

The EU's fundamental principles of human rights include "[e]quality between women and men . . . in all areas, including employment, work and pay."<sup>52</sup> The EU has evolved since its inception as a purely economic trade union into a more diplomatic organization promoting human rights, including gender equality.<sup>53</sup> The Treaty of Amsterdam amended the EU Treaty, and confirmed that the EU was "founded on the principles of liberty, democracy, [and] respect for human rights and fundamental freedoms."<sup>54</sup> It requires EU members to take positive actions to promote gender equality, rather than punishing a member's noncompliance with antidiscrimination legislation.<sup>55</sup> As

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49. See Eugenia McGill, *Trade and Gender*, in 2 THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC AND POLITICAL ANALYSIS 697, 705 (Patrick F. J. Macrory et al. eds., 2005) (explaining regional trade attention to relationship between trade liberalization and gender). The Southern Common Market, Asia-Pacific Economic Cooperation, Caribbean Community, and Southern African Development Community have also taken steps to mainstream gender concerns into their trade policies. See *id.*

50. See Kate E. Andrias, Note, *Gender, Work, and the NAFTA Labor Side Agreement*, 37 U.S.F. L. REV. 521, 523 (2003) (articulating NAFTA's side labor agreement as first trade agreement incorporating gender equality in workforce); Diane Hickey, Note, *The as Yet Unfulfilled Promise and Potential of European Union Human Rights Law*, 30 WOMEN'S RTS. L. REP. 647, 648 (2009) (noting EU's potential to regulate gender issues from regional trade perspective).

51. See Andrias, *supra* note 50, at 523 (discussing incorporation of gender equality into NAFTA); see also Roth, *supra* note 46, at 120 (explaining EU gender-mainstreaming regulations and implementation). See generally Charter of Fundamental Rights of the European Union, 2010 O.J. (C 83) 2 [hereinafter EU Charter]; North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA].

52. EU Charter, *supra* note 51, art. 23. The EU Charter also includes antidiscrimination provisions to prevent discrimination based on sex and measures "providing for specific advantages in favour of the under-represented sex." *Id.* art. 23; see *id.* art. 21 (prohibiting discrimination based on sex).

53. See Hickey, *supra* note 50, at 661 (detailing EU's position in relation to human rights and social policy). In 1957, the Treaty of Rome established the European Economic Community (EEC), and decades later in 1992, the Treaty of the European Union (EU Treaty) transformed the EEC into the EU, which created a complete economic union, as well as elements of a political union. See *EU Treaties*, EUR. UNION, [http://europa.eu/about-eu/basic-information/decision-making/treaties/index\\_en.htm](http://europa.eu/about-eu/basic-information/decision-making/treaties/index_en.htm) (last visited Feb. 19, 2014) (explaining evolution of EU).

54. Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts art. 1, Oct. 2, 1997, 1997 O.J. (C 340) 1 [hereinafter Treaty of Amsterdam].

55. See Treaty of Amsterdam, *supra* note 54, art. 2 (requiring EU members implement policies or activities promoting gender equality and social protections); Eneva, *supra* note 6, at 159 (explaining Treaty of Amsterdam's effect on gender discrimination and equality). Positive-action programs aim to promote greater public awareness of gender-equality issues throughout the EU—for example, programs focusing on domestic violence raise awareness about the issue, as well as offer financial and emotional support to affected women. See Eneva, *supra* note 6, at 159 (explaining EU's positive-action programs). Without positive-action programs,

an economic union, the EU has the unique ability to use economic incentives to ensure greater protection and compliance with gender-equality measures.<sup>56</sup>

EU member requirements for legal, social, and political integration of antidiscrimination policies give the EU the institutional capacity to effectively enforce gender-equality laws.<sup>57</sup> Article 141 of the Treaty Establishing the European Community (EC Treaty) ensures men and women receive equal pay for equal work, and is the only article that imposes a positive duty on EU members, which essentially promotes gender equality.<sup>58</sup> Article 141 is the basis for all EU legislation regarding employment equality between men and women.<sup>59</sup> The European Council—the EU’s chief political body—issued the Equal Pay Directive (EPD) and the Equal Treatment Directive (ETD) to protect Article 141 principles.<sup>60</sup> In response to uneven Article 141 application among EU members, the European Council promulgated the EPD, which defined equal pay as the same work, or work with equal value, and required EU members to enact equal-pay legislation.<sup>61</sup> The ETD expanded the EPD’s equal-pay principle by establishing an equal-treatment principle that prohibits gender

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the EU could only take action via sanctions on members for not following the Treaty of Amsterdam’s equality doctrine. *See id.* at 159-60 (explaining alternatives to positive-action programs). Positive-action programs enable the EU to comprehensively promote gender equality by establishing clinics and offices devoted to women’s education, health, and rehabilitation. *See id.* at 159.

56. *See Hickey, supra* note 50, at 667 (arguing EU system more empowered to require human rights protections than other international treaty systems).

57. *See Eneva, supra* note 6, at 155 (explaining candidate countries must implement and enforce equal-opportunity laws as EU requirement). The European Court of Justice (ECJ) is the highest appellate court on matters of EU law, and national courts are bound to apply the ECJ’s interpretations of EU directives. *See Troy A. Eid, The European Union: A Brief Introduction*, COLO. LAW., June 2002, at 9, 15 (explaining EU court system). The ECJ has been influential in developing gender equality through its progressive decisions in cases involving sex discrimination and labor-rights equality. *See Elizabeth F. Defeis, The Treaty of Amsterdam: The Next Step Towards Gender Equality?*, 23 B.C. INT’L & COMP. L. REV. 1, 6 (1999) (discussing importance of ECJ’s role in promoting gender equality in EU); *see also* Case 43/75, *Defrenne v. Societe Anonyme Belge de Navigation Aerienne Sabena*, 1976 E.C.R. 456, 473 (holding Treaty Establishing European Community (EC Treaty) aims to eliminate discrimination, direct or indirect, between men and women).

58. *See Consolidated Version of the Treaty Establishing the European Community* art. 141, Apr. 16, 2003, 2006 O.J. (C 321) 37 [hereinafter EC Treaty] (“Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.”); Defeis, *supra* note 57, at 5 (arguing Article 141 most powerful provision because incorporates both economic and social gender-equality goals). Economic concerns, rather than social concerns, led to the EC Treaty’s inclusion of Article 141. *See Defeis, supra* note 57, at 7 (explaining Article 141 required EU members to enact equal-pay legislation).

59. *See Defeis, supra* note 57, at 7 (explaining origins behind EPD and ETD).

60. *See Council Directive 76/207*, art. 3, 1976 O.J. (L 39) 40 (mandating EU members enact equal-treatment legislation abolishing all gender-based employment discrimination); *Council Directive 75/117*, arts. 2-3, 1975 O.J. (L 45) 19 (mandating EU members enact equal-pay legislation abolishing gender discrimination in employment compensation); *see also Defeis, supra* note 57, at 7-12 (detailing European Council’s measures protecting against workforce discrimination).

61. *See Council Directive 75/117*, arts. 2-3, 1975 O.J. (L 45) 19 (abolishing gender discrimination in employment compensation); Defeis, *supra* note 57, at 7 (explaining EPD provisions and definitions). Before the European Council issued the EPD, only some members had adopted equal-pay legislation. *See Defeis, supra* note 57, at 7. The EPD streamlined equal-pay legislation and clarified members’ obligations. *See id.*

discrimination in employment access, vocational training, and working conditions.<sup>62</sup>

Although many EU candidate countries—non-EU member States—have transitioning economic, political, and social markets, they are nevertheless required to socially, politically, and legally integrate antidiscrimination and gender-equality policies prior to becoming EU members.<sup>63</sup> Some scholars argue the EU accession requirements have created a discriminatory double-standard as between EU members and candidate countries, because EU policies were not originally developed to incorporate transitioning countries' concerns.<sup>64</sup> Additionally, scholars believe that because candidate countries may not realistically be able to integrate the required progressive social policies, the accession guidelines could potentially create a hierarchy within the EU that would violate its fundamental unity principles, presenting a major concern for EU policy development.<sup>65</sup>

## 2. NAFTA and the North American Agreement on Labor Cooperation

Unlike the EU, which is a complete economic union, NAFTA is a trade agreement between Canada, Mexico, and the United States that is only concerned with trade-barrier elimination, rather than full economic integration or political unity.<sup>66</sup> After NAFTA was signed in 1992, organized labor protests

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62. See Council Directive 76/207, art. 1, 1976 O.J. (L 39) 40 (abolishing all gender-based employment discrimination); Defeis, *supra* note 57, at 11 (articulating relationship between EPD and ETD, and effect on gender equality).

63. See Heather Grabbe, *Challenges of EU Enlargement*, in AMBIVALENT NEIGHBORS: THE EU, NATO, AND THE PRICE OF MEMBERSHIP 67, 71 (Anatol Lieven and Dmitri Trenin eds., 2003) (arguing EU accession much more difficult in twenty-first century than in 1970s); Eneva, *supra* note 6, at 155 (explaining compliance requirements for EU candidate countries). For candidate countries, legal integration—enacting, adopting, or amending legislation—will likely precede social and political integration. See Eneva, *supra* note 6, at 155. Therefore, the challenge for candidate countries is to adopt legal reforms that will also promote social and political integration. See *id.* (positing enforcement mechanisms and social programs will likely follow).

64. See Grabbe, *supra* note 63 (arguing EU accession requires candidate countries to reshape majority of their political institutions); Eneva, *supra* note 6, at 166-67 (describing EU membership process and implications for candidate countries). Many candidate countries were formerly Communist states, and EU accession standards require them to change almost every area of public policy. See Eneva, *supra* note 6, at 166-67 (“Thus, the complicated legislative structure required to meet EU standards for accession is not attuned to the complex needs of these rapidly evolving candidate countries.”).

65. See Eneva, *supra* note 6, at 167 (arguing EU standards could create “country-club” mentality by discriminating against candidate countries); see also Grabbe, *supra* note 63, at 71 (explaining EU accession standards for integration and harmonization). EU accession guidelines are subjective standards whereby EU member countries evaluate the progress of candidate countries based on vaguely defined criteria. See Eneva, *supra* note 6, at 168. EU accession criteria ranges widely, “from the creation of market regulators to civil service reform, from border controls to hygiene standards.” *Id.* at 167; see Grabbe, *supra* note 63, at 72-73 (explaining variety of EU accession requirements).

66. See RALPH H. FOLSOM, NAFTA AND FREE TRADE IN THE AMERICAS: IN A NUTSHELL 1 (2012) (differentiating between EU economic integration and NAFTA trade-barrier elimination). Prior to NAFTA, North American economic integration began with the 1988 Canada-United States Free Trade Agreement (CUSFTA). See *id.* at 19. See generally Canada-United States Free Trade Agreement, U.S.-Can., Jan. 2, 1988,

initiated the creation of a side labor agreement—the North American Agreement on Labor Cooperation (NAALC)—which was signed in 1993.<sup>67</sup> NAALC sets forth eleven labor principles, including equal pay for men and women, and requires each signatory government to enforce its own labor laws.<sup>68</sup>

NAALC provides guiding labor principles, rather than minimum domestic-law standards, and therefore, the agreement does not require Canada, Mexico, or the United States to enact new legislation or amend existing legislation to comply with NAALC principles.<sup>69</sup> Although NAALC has a dispute-settlement system that governs all labor disputes, it is mainly administrative and lacks effective enforcement mechanisms.<sup>70</sup> NAFTA's dispute-settlement system is a more formal, adversarial process, but it does not apply to NAALC because it is

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27 I.L.M. 281. Building on CUSFTA principles, NAFTA negotiations began in 1991 and expanded North American economic integration to include Mexico. *See* FOLSOM, *supra*, at 68-69. Although NAFTA did not repeal CUSFTA, the United States and Canada have officially suspended the agreement. *See id.* at 19. In 1993, Canada, Mexico, and the United States ratified NAFTA. *See id.* at 70-71. NAFTA's objectives are to eliminate barriers to trade, promote conditions of fair competition, increase investment opportunities, provide adequate intellectual property enforcement, create effective procedures to implement the agreement, and establish a framework for further regional trade and cooperation. *See* NAFTA, *supra* note 51, art. 102; FOLSOM, *supra*, at 71. NAFTA's text does not recognize gender-equality or labor standards, rights, and regulations. *Cf.* FOLSOM, *supra*, at 234.

67. *See* North American Agreement on Labor Cooperation, U.S.-Can.-Mex., art. 1, Sept. 14, 1993, 32 I.L.M. 1499 [hereinafter NAALC] (enumerating NAALC objectives to improve working conditions and living standards); Andrias, *supra* note 50, at 523 (explaining how labor protests encouraged advent of NAALC); *see also* Grimm, *supra* note 31, at 181 (describing NAALC as supplemental agreement expanding free trade to include labor protection). NAFTA's omission of labor issues became a significant issue during the 1992 U.S. presidential election. *See* FOLSOM, *supra* note 66, at 234. Mexico's labor issues inspired the negotiations that resulted in NAALC. *See id.* at 234-35. Although Mexico had labor laws and protections, they were rarely enforced, and many customary labor practices directly violated Mexican labor laws. *See id.* NAALC focused on enforcement of existing national labor laws in the three signatory countries. *See id.* at 236.

68. *See* NAALC, *supra* note 67, Annex 1 (listing NAALC labor principles). NAALC's labor principles include: freedom of association and protection of the right to organize, right to bargain collectively, right to strike, prohibition of forced labor, labor protections for children and young people, minimum employment standards, elimination of employment discrimination, equal pay for women and men, prevention of occupational injuries and illnesses, compensation in cases of occupational injuries and illnesses, and protection of migrant workers. *See id.*

69. *See* Andrias, *supra* note 50, at 550 (recognizing NAALC does not create minimum legal standards that signatory countries must meet).

70. *See id.* at 552-53 (highlighting NAALC enforcement problems; for example, NAALC procedures most likely cannot result in sanctions). NAALC's enforcement mechanisms primarily operate through National Administrative Offices' (NAO) actions. *See* NAALC, *supra* note 67, arts. 15-16 (articulating NAOs' structures and functions). Each signatory country has a NAO, which is responsible for representing and defending its own country in NAALC labor disputes. *See* FOLSOM, *supra* note 66, at 237-38 (explaining NAO's duties and procedures for labor complaints). In most cases—employment discrimination, equal pay, and minimum employment standards—the disputes can only end in solution recommendations, without monetary sanctions or trade-benefit suspensions. *See id.* at 239 (explaining use of Expert Reports). Monetary sanctions and trade-benefit suspensions are only applicable to disputes concerning child labor and occupational safety. *See id.* at 239-40 (explaining use of arbitration panel). Unlike the EU's ECJ, NAOs are merely administrative agencies that attempt to interpret another country's domestic law. *See* Andrias, *supra* note 50, at 551 (detailing NAO processes).

a side agreement.<sup>71</sup> Some scholars argue that if NAALC were a part of NAFTA and the labor principles established minimum domestic standards, labor-law violations could result in benefit suspension and effective enforcement.<sup>72</sup>

### C. History of the WTO

The WTO is an international trade organization that both regulates trade in goods, services, and intellectual property, and provides a dispute-settlement system to resolve trade violations.<sup>73</sup> The WTO is ruled by several major trade agreements, including GATT, the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS), the Agreement on Technical Barriers to Trade (TBT), and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).<sup>74</sup> The agreement establishing the WTO states “relations in the field of trade and economic endeavour[s] should be conducted with a view to raising standards of living . . . while allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development.”<sup>75</sup> Although gender equality, antidiscrimination, and general labor rights are not explicitly recognized in the WTO agreement or its side agreements, noneconomic concerns, such as the environment, have occasionally been recognized and protected.<sup>76</sup>

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71. See FOLSOM, *supra* note 66, at 201 (explaining NAFTA’s dispute-settlement system). As established in Chapter 19 of NAFTA, binational panels substitute national judicial review of trade disputes. See NAFTA, *supra* note 51, art. 1904 (requiring binational panel review); see also FOLSOM, *supra* note 66, at 202 (explaining role of binational panels in NAFTA’s dispute-settlement system). After a panel’s review of a trade dispute, a special committee may convene to determine whether trade benefits will be suspended against the offending member. See NAFTA, *supra* note 51, art. 1905 (explaining special committees’ role in NAFTA’s dispute-settlement system).

72. See Marisa Anne Pagnattaro, *The “Helping Hand” in Trade Agreements: An Analysis of and Proposal for Labor Provisions in U.S. Free Trade Agreements*, 16 FLA. J. INT’L L. 845, 877-78 (2004) (explaining issues with NAALC’s disciplinary system); Wagner, *supra* note 8, at 527 (acknowledging subsequent U.S. trade agreements include labor standards in main agreement, rather than side agreement). Additionally, NAALC could have been more effective with a proper dispute-settlement system that could enforce trade sanctions, similar to the WTO or NAFTA. See Wagner, *supra* note 8, at 527 (arguing NAALC needs more formal, adversarial dispute-settlement system to have more effective enforcement).

73. See WORLD TRADE ORG., UNDERSTANDING THE WTO 9-10, 55 (5th ed. 2011), available at [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/understanding\\_e.pdf](http://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_e.pdf) (describing creation and major purposes of WTO). Since 1948, GATT provided the fundamental international-trade regulations, and remains the WTO’s main rules for trade in goods. See *id.* at 10 (describing birth of WTO out of GATT). GATT’s trade system evolved through years of negotiation, until the WTO and the WTO’s side agreements were established. See *id.*

74. See Marrakesh Agreement, *supra* note 11, Annexes 1-2 (listing multilateral agreements and dispute-settlement agreement).

75. *Id.* pmbl. (stating WTO objectives).

76. See, e.g., Agreement on the Application of Sanitary and Phytosanitary Measures art. 2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 493 [hereinafter SPS] (protecting right to take necessary sanitary and health measures); TRIPS, *supra* note 11, art. 1 (requiring

### 1. *The WTO's Dispute-Settlement System*

The DSU established the WTO's dispute-settlement system, which is the "central pillar of the multilateral trading system" and the WTO's distinctive contribution to global economic stability.<sup>77</sup> The DSU is essential to the enforcement of WTO agreements and principles, and provides "security and predictability to the multilateral trading system."<sup>78</sup> The DSU allows the Dispute Settlement Body (DSB) to sanction members violating WTO principles by requiring adequate compensation or suspending trade concessions if they do not quickly and sufficiently correct the violation.<sup>79</sup>

### 2. *Article XX's Scope and Procedure*

Article XX of GATT enables members to take measures to address certain public-policy concerns, even though they will likely violate their WTO obligations.<sup>80</sup> The core WTO obligations are: the most-favored-nation (MFN) principle, binding tariff schedules, the national-treatment principle, elimination

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members to pass legislation protecting intellectual property rights); GATT, *supra* note 7, art. XX (allowing trade restrictions for noneconomic issues: public morals, human or animal health, and natural resources); *see also* WORLD TRADE ORG., *supra* note 73, at 74-75 (explaining conflicting arguments over whether WTO should deal with issues such as labor standards). In 1994, the WTO developers created the Trade and Environment Committee (TEC), which studies the relationship between trade and the environment to make recommendations for possible changes to the trade agreements. *See* WORLD TRADE ORG., *supra* note 73, at 65 (explaining responsibility of TEC). The TEC's recommendations must continue to uphold WTO principles and rules, and recognize that the WTO is hesitant on intervening in national or international environmental policies, or setting environmental standards. *See id.*

77. *See* Understanding on Rules and Procedures Governing the Settlement of Disputes art. 1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU] (explaining relationship between DSU and WTO); WORLD TRADE ORG., *supra* note 73, at 55 (introducing principles of WTO dispute-settlement system). The DSU established the Dispute Settlement Body (DSB), which has the sole authority to establish trade-expert panels that decide whether the responding country committed the violation alleged by the complaining country. *See* DSU, *supra*, art. 2 (establishing DSB to administer rules and procedures within agreement). The DSU also created the Appellate Body, which reviews trade-dispute panels' decisions and can either uphold, modify, or reverse the holding. *See id.* art. 17 (creating Appellate Body to hear appeals from trade disputes).

78. DSU, *supra* note 77, art. 3.

79. *See id.* art. 22 (allowing compensation and suspension of trade concessions if rulings not implemented within reasonable time period); *see also* WORLD TRADE ORG., *supra* note 73, at 58 (explaining WTO sanctions as compensation or suspension of trade concessions). The DSB monitors how rulings are implemented and oversees outstanding cases until the issues are resolved. *See* DSU, *supra* note 77, art. 21 (mandating DSB oversees compliance and implementation of recommendations and rulings).

80. *See* GATT, *supra* note 7, art. XX (enumerating ten specific exceptions); KEVIN C. KENNEDY, INTERNATIONAL TRADE REGULATION: READINGS, CASES, NOTES, AND PROBLEMS 269-70 (2009) (introducing Article XX exceptions). The most common exceptions WTO members invoke are measures necessary to protect human, animal, or plant life or health; necessary to secure compliance with laws or regulations; and those relating to conservation of exhaustible natural resources. *See* KENNEDY, *supra*, at 269, 271 (focusing on Article XX(b), (d), and (g) of GATT as main exceptions utilized). The measures member countries take to protect public-policy concerns under Article XX usually violate their WTO obligations because they impose additional restrictions on trade. *See id.* at 269 (explaining members allowed to derogate from obligations of GATT in limited circumstances).

of quantitative restrictions, and transparency.<sup>81</sup> The MFN principle requires that members treat imports from another member on an equal, nondiscriminatory basis, when compared with the treatment of all other members' imports.<sup>82</sup> WTO tariff bindings require that members set certain tariff rates, and cannot subsequently raise those rates unless compensation is paid to adversely affected members.<sup>83</sup> The national-treatment principle obligates members to treat imports and similar domestic products the same with regard to internal laws, regulations, and taxation.<sup>84</sup> The WTO requires members to eliminate import and export quantitative restrictions because this allows the market to determine the price of goods, rather than an artificial short supply created by a quantitative restriction.<sup>85</sup> The WTO transparency principle requires member's trade laws, regulations, and measures to be transparent within the multilateral trading system, which fosters a liberalized trading environment.<sup>86</sup>

Article XX does not accommodate public-policy concerns based on broad social or economic considerations because members' justifications for the measure must relate to an exception specifically listed in Article XX.<sup>87</sup> Members attempting to enact trade-restrictive measures under an Article XX exception must first show that the adopted measure falls within one of the general exceptions, then, show that the adopted measure is necessary to accomplish the public-policy concern, and, finally, show that the measure conforms to nondiscriminatory trade policies.<sup>88</sup> For example, in the *United*

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81. See KENNEDY, *supra* note 80, at 87.

82. See GATT, *supra* note 7, art. I (establishing MFN principle applicable to all WTO members); KENNEDY, *supra* note 80, at 87. The rationale of the MFN is that "discrimination can lead to wasteful trade diversion." KENNEDY, *supra* note 80, at 87.

83. See GATT, *supra* note 7, art. II (requiring tariff schedules for all WTO members); KENNEDY, *supra* note 80, at 87-88 (explaining WTO tariff bindings).

84. See GATT, *supra* note 7, art. III (establishing national-treatment principle applicable to all WTO members); KENNEDY, *supra* note 80, at 88 (explaining national-treatment principle).

85. See GATT, *supra* note 7, art. XI (prohibiting quantitative restrictions); KENNEDY, *supra* note 80, at 88 (explaining problems with quantitative restrictions).

86. See KENNEDY, *supra* note 80, at 239-40 (explaining WTO's transparency principle implicit throughout GATT).

87. See Salman Bal, *International Free Trade Agreements and Human Rights: Reinterpreting Article XX of the GATT*, 10 MINN. J. GLOBAL TRADE 62, 69 (2001) (discussing scope of Article XX); see also GATT, *supra* note 7, art. XX (listing specific public-policy exceptions). The *Tuna-Dolphin* Panel interpreted Article XX as "a limited and conditional exception from obligations under other provisions of the [GATT], and not a positive rule establishing obligations in itself." Report of the Panel, *United States—Restrictions on Imports of Tuna*, ¶ 5.22, DS21/R (Sept. 3, 1991), GATT B.I.S.D. (39th Supp.) at 155 (1993).

88. See GATT, *supra* note 7, art. XX (outlining elements of Article XX justification); Bal, *supra* note 87, at 71 (explaining Article XX procedure). The Appellate Body has defined a necessary measure under Article XX as a measure with no reasonable alternatives that could reasonably be expected to achieve the underlying policy objective. See Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, ¶ 150, WT/DS332/AB/R (Dec. 3, 2007) [hereinafter *Brazil Tyres*] (holding ban necessary because only way to limit number of tires going into landfills); Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, ¶¶ 174-75, WT/DS135/AB/R (Mar. 12, 2001) [hereinafter *EC*

*States—Import Prohibition of Certain Shrimp and Shrimp Products* dispute, the United States invoked Article XX(g) to justify the requirement that shrimp trawlers use turtle excluder devices (TEDs).<sup>89</sup> Most Article XX disputes focus on the strength of the invoking-member's arguments as to why the measure is within the enumerated exception, and whether it is applied and enforced equally among all trading partners.<sup>90</sup>

### 3. *The WTO's Side Agreements: The Use of International Standards*

The WTO's formation included adoption of multiple side agreements, which created many new rights enforceable under the DSU.<sup>91</sup> The WTO developers enacted the SPS and the TBT because they saw a need to set standards for members' product regulations, and were concerned with reducing unfair trade practices.<sup>92</sup> The SPS and the TBT utilize international standards to define acceptable product-standard regulations that WTO members may implement.<sup>93</sup>

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*Asbestos*] (holding asbestos products ban necessary because only way to protect against carcinogenic effects); Appellate Body Report, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, ¶¶ 244-45, WT/DS26/AB/R (Jan. 16, 1998) [hereinafter *Beef Hormones*] (holding Korean beef-sale system unnecessary because sufficient alternative measures). The Appellate Body strictly interpreted the Article XX Chapeau, which provides that the measure cannot be a disguised trade restriction, and, therefore, many countries cannot successfully defend their Article XX measures. See *Brazil Tyres*, *supra*, ¶¶ 248-52 (holding ban violated Article XX Chapeau because of inconsistent enforcement); Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶¶ 184, 186, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *Shrimp-Turtle*] (holding ban violated Article XX Chapeau because of arbitrary enforcement measures and exemptions).

89. See *Shrimp-Turtle*, *supra* note 88, ¶ 125 (introducing United States' Article XX(g) invocation). The United States first had to prove that sea turtles were an exhaustible natural resource for the measure to fall under the Article XX(g) exception. See *id.* ¶ 127. The United States also had to establish that requiring use of TEDs related to the conservation of sea turtles. See *id.* ¶ 135. Finally, the United States had to prove that the policy was not an arbitrary or discriminatory trade restriction. See *id.* ¶¶ 148-49. The Appellate Body held that although sea turtles were an exhaustible natural resource, and the measure was sufficiently related to their conservation, the policy ultimately violated Article XX because it was an arbitrary and discriminatory trade measure. See *id.* *supra*, ¶¶ 184-86.

90. See *Brazil Tyres*, *supra* note 88, ¶¶ 249-51 (holding measure appropriate under exception, but violated Article XX because of inconsistent enforcement); *Shrimp-Turtle*, *supra* note 88, ¶ 186 (holding measure appropriate under exception, but violated Article XX because of arbitrary enforcement).

91. See Darren M. Springer, Note, *Reimagining the WTO: Applications of the New Deal as a Means of Remediating Emerging Global Issues*, 29 VT. L. REV. 1067, 1089-90 (2005) (explaining WTO side agreements changed old GATT system). The new side-agreement provisions were intended to prevail in the event of a conflict with GATT provisions. See *id.* All WTO members are bound by the requirements in the side agreements, and therefore, it can be difficult to gain support among members to adopt new ones. See *id.* at 1090 (comparing WTO and GATT side agreements).

92. See WORLD TRADE ORG., *supra* note 73, at 30 (explaining rationale for and requirements of SPS and TBT). See generally Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 120 [hereinafter TBT]; SPS, *supra* note 76.

93. See SPS, *supra* note 76, art. 3, ¶ 1 ("Members shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations. . . ."); TBT, *supra* note 92, art. 2, ¶ 4 ("Where technical regulations are required and relevant international standards exist . . . Members shall use them . . . as a basis for their technical regulations except when such international standards . . . would be an ineffective or

Although the SPS and the TBT do not set minimum product standards, the cited international standards provide members with guidelines in an attempt to streamline international product standards so trade is not substantially affected.<sup>94</sup>

The only WTO agreement that sets minimum standards and requires enforcement is TRIPS.<sup>95</sup> TRIPS establishes the minimum intellectual-property rights members must maintain, such as patent requirements and conditions, and requires legal enforcement of those rights.<sup>96</sup> TRIPS forces members to adopt positive obligations—enactment and enforcement of intellectual-property rights—and it is the closest the WTO comes to legislating like a governing body.<sup>97</sup>

### III. CONNECTING THE SPHERES OF TRADE AND GENDER WITHIN THE WTO

Gender equality is a fundamental global principle and an important aspect of numerous international and regional trade agreements.<sup>98</sup> By adding these provisions, these international agreements indicate that incorporating gender issues into mainstream development discussions is no longer an option; it is a necessity.<sup>99</sup> Like other regional trade agreements, the EU's and NAFTA's use

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inappropriate means for the fulfillment of the legitimate objectives pursued . . .”).

94. See SPS, *supra* note 76, art. 3; TBT, *supra* note 92, art. 2. The SPS specifically recognizes the Codex Alimentarius Commission, the International Office of Epizootics, and the International Plant Protection Convention, as relevant international standards that members should refer to when creating their product regulations. See SPS, *supra* note 76, art. 3 (requiring use of existing international product standards). The TBT requires that members use relevant international standards if they exist, and therefore, TBT disputes may center around whether there is a relevant international standard. See TBT, *supra* note 92, art. 2, ¶ 4 (requiring use of international technical standards); Appellate Body Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, ¶ 348, WT/DS381/AB/R (May 16, 2012) [hereinafter *Tuna-Dolphin*] (asserting members required to use relevant international standards as basis for technical regulations). The *Tuna-Dolphin* Appellate Body held that the Agreement on the International Dolphin Conservation Program was not a relevant international standard, and therefore, the United States was not required to consider it. See *Tuna-Dolphin*, *supra*, ¶ 401.

95. See TRIPS, *supra* note 11, art. 1 (requiring members to enact and enforce intellectual property legislation conforming to specified standards); see also KENNEDY, *supra* note 80, at 872-73 (explaining purpose and elements of TRIPS); WORLD TRADE ORG., *supra* note 73, at 39-43 (describing minimum intellectual-property protections required by TRIPS).

96. See TRIPS, *supra* note 11, arts. 27-34 (detailing patent laws and legal requirements). TRIPS also covers copyright law, trademarks, geographical indications, industrial designs, and trade secrets. See generally TRIPS, *supra* note 11, arts. 9-26, 35-39.

97. See Springer, *supra* note 91, at 1091 (arguing TRIPS necessary to remedy inadequate global standards for intellectual-property right protection and enforcement). TRIPS does not prevent members from establishing higher intellectual-property standards, but it requires that they provide foreign nationals at least the same standards as they do for their own citizens. See *id.*

98. See *supra* notes 33-43 and accompanying text (articulating gender equality in international agreements, including UDHR, UN MDGs, and ILO); see also EU Charter, *supra* note 51, art. 23 (requiring equality between women and men in all areas); NAALC, *supra* note 67, Annex 1, no. 8. (requiring equal pay for men and women).

99. See SEN, *supra* note 8, at 202 (observing women's empowerment as central issue for developing countries); Berry, *supra* note 1, at 478 (recognizing gender discrimination contributes to “endemic poverty, low

of gender-mainstreaming principles are models for incorporating such principles on a global trade level.<sup>100</sup> In order to effectively promote and enforce gender equality on an international scale, the WTO must incorporate gender-mainstreaming principles into its structure, mechanisms, and side agreements.<sup>101</sup> Similar to the EU and NAFTA, the WTO is in a unique position to use economic incentives to promote gender equality throughout the world.<sup>102</sup>

Many WTO members clearly support gender equality and gender-mainstreaming ideals by ratifying international agreements such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR).<sup>103</sup> Gender mainstreaming recognizes that economic, political, and social changes are imperative to achieving gender equality, but are undermined by the assumption that women will benefit equally from gender-neutral trade policies.<sup>104</sup> Gender mainstreaming ensures that WTO-policy discussions predict gendered outcomes and avoid undermining trade policies' sustainable-development goals.<sup>105</sup> In order to effectively incorporate gender-mainstreaming principles, the WTO should establish a trade and gender

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economic growth, and poor governance"). Women's agency is a major factor of economic and social change, and these changes can positively alter both women's and men's lives. See SEN, *supra* note 8, at 189 (noting shift of focus from women's well being to women's agency).

100. See Andrias, *supra* note 50, at 523-24 (explaining NAFTA's side labor agreement and its possible global significance); Hickey, *supra* note 50 (elucidating EU's evolution as purely economic organization to organization also concerned with gender equality); see also *supra* note 49 (citing other regional trade agreements' gender-equality measures and policies). Although both the EU and NAFTA-NAALC are possible models for gender mainstreaming in the WTO, the EU's accession-guideline issues and NAALC's enforcement inefficacies present possible problems for the WTO. See *supra* notes 49-51 and accompanying text (arguing EU and NAFTA elements necessary models for WTO gender mainstreaming); *supra* notes 63-65 and accompanying text (explaining EU accession problems); *supra* notes 69-72 and accompanying text (explaining NAALC enforcement issues).

101. See Choudhury, *supra* note 8, at 158-59 (discussing importance of changing trade liberalization policies to influence gender equality on global scale). Gender mainstreaming is needed to combat the gendered effects of trade policies and practices. See Berry, *supra* note 1, at 489 (recommending gender mainstreaming as strategy to change trade policies' gendered effects). Similar to the EU, the WTO must evolve to become more conscientious of gender equality and sustainable-development issues. See *supra* notes 53-56 and accompanying text (explaining EU's evolution and incorporation of gendered perspective).

102. See *supra* note 56 and accompanying text (discussing EU's strategy of using economic incentives to promote human rights); *supra* note 66 and accompanying text (explaining NAFTA's incorporation of gender equality through side agreements); see also *supra* note 79 and accompanying text (discussing WTO sanctions and suspension of benefits under DSU).

103. See *supra* note 33 (citing percentage of CEDAW- and ICESCR-ratifying WTO members).

104. See *Gender Mainstreaming*, *supra* note 45 (explaining gender-mainstreaming strategy ensures gender-equality perspectives central to all activities); see also Berry, *supra* note 1, at 489 (quoting JAN VANDEMOORTELE, ASTER ZAOUDE, & DASA SILOVIC, U.N. DEV. PROGRAMME, GENDER EQUALITY: PRACTICE NOTE iv (Nov. 2002), available at [http://www.americalatinagenera.org/es/index.php?option=com\\_docman&task=doc\\_download&gid=1419&Itemid=](http://www.americalatinagenera.org/es/index.php?option=com_docman&task=doc_download&gid=1419&Itemid=)) (arguing gender mainstreaming deliberately gives visibility and support to women's issues, concerns, and contributions).

105. See Wagner, *supra* note 8, at 506 (arguing gender analysis must be incorporated into trade-policy discussions). "Gender-based inequalities may impact trade policy outcomes differently, depending on the national economy and sector involved, leading to results that were not predicted by standard trade theory." *Id.*

committee, reinterpret the GATT Article XX exceptions, create a side labor agreement promoting gender equality in the workforce, and use the DSU to enforce the new gender-equality strategies.<sup>106</sup>

#### A. A Trade and Gender Committee

Similar to the WTO's Trade and Environment Committee (TEC), a WTO trade and gender committee would be responsible for studying the relationship between trade and gender equality, as well as making recommendations for necessary changes to WTO agreements.<sup>107</sup> The trade and gender committee's investigations and analysis of the relationship between trade and gender would enable the WTO to reaffirm and promote its commitment to sustainable development, which has been defined to include gender equality.<sup>108</sup> A WTO trade and gender committee would employ gender mainstreaming to incorporate a gendered perspective and analysis into the WTO's rules, activities, and DSU interpretations.<sup>109</sup> A WTO trade and gender committee is an important step needed to bring gender-equality and sustainable-development issues into the WTO's mainstream work.<sup>110</sup>

#### B. Reinterpreting GATT Article XX

Gender-equality concerns have never explicitly been incorporated into Article XX of GATT.<sup>111</sup> Although Article XX allows for public-policy measures such as those "necessary to protect public morals," "necessary to protect human . . . life or health," and "necessary to secure compliance with [national] laws or regulations," the Appellate Body has interpreted these

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106. See *infra* Part III.A-D (proposing changes WTO should take to promote gender equality).

107. See WORLD TRADE ORG., *supra* note 73, at 65 (discussing TEC's duties and responsibilities).

108. See *supra* note 9 and accompanying text (recognizing international organizations believe sustainable development includes gender equality); see also WORLD TRADE ORG., *supra* note 73, at 65 (explaining TEC brings sustainable development issues into WTO work).

109. See *supra* Part II.A.3 (explaining gender-mainstreaming strategies and incorporation into policy discussions).

110. See WORLD TRADE ORG., *supra* note 73, at 65 (explaining TEC work bringing environmental and sustainable development issues to WTO); Berry, *supra* note 1, at 491 (arguing human and women's rights should be incorporated into trade-policy decisions). A trade and gender committee would begin to fuse the spheres of human rights and trade that have been separated throughout history. See Berry, *supra* note 1, at 491 (discussing gender mainstreaming and policy decisions); see also *supra* note 7 and accompanying text (explaining development of human rights and trade as separate concerns with separate governing institutions).

111. See GATT, *supra* note 7, art. XX (using no language referencing gender); Choudhury, *supra* note 8, at 147 (acknowledging nontrade issues, such as women's rights, rarely tested under GATT exceptions). The WTO creates a hierarchy between trade and nontrade issues, which is evident in the agreement's language addressing the separate issues. See Choudhury, *supra* note 8, at 147. For example, the trade issues are characterized as obligations, whereas the nontrade issues are characterized as exceptions. See *id.* Compare GATT, *supra* note 7, arts. I-III, XI (characterizing MFN, tariff bindings, national treatment, and quantitative restrictions as obligations), with GATT, *supra* note 7, art. XX (characterizing public morals, human health, conservation of resources, and compliance with national regulations as exceptions).

exceptions extremely narrowly.<sup>112</sup> Incorporating gender mainstreaming into the WTO will enable and require the Appellate Body to interpret gender-equality measures as either promoting public morals, protecting human life and health, or securing compliance with national gender-equality legislation.<sup>113</sup>

Gender-equality measures can be interpreted as promoting public morals because the international community has largely agreed gender equality is an important and necessary part of society.<sup>114</sup> Because women's equality has been linked to economic development and poverty reduction, which eventually leads to a higher quality of living and a healthier population, measures promoting gender equality are necessary to promote human life and health.<sup>115</sup> Members who have legislation mandating equality between men and women could then argue that trade-restrictive measures are necessary to uphold their national laws.<sup>116</sup>

### C. A Side Labor Agreement

Although trade liberalization encourages economic growth, it also creates a world-wide "race to the bottom" of labor standards and conditions.<sup>117</sup> Women

112. GATT, *supra* note 7, art. XX(a)-(b), (d); *see supra* note 87 (explaining limited interpretations of GATT Article XX). Article XX of GATT does not allow for public-policy measures to be justified by general social consideration. *See* Bal, *supra* note 87, at 69. The Appellate Body requires the defending country to use an explicitly enumerated exception. *See id.* at 70 (interpreting Article XX and Appellate Body decisions).

113. *See* Choudhury, *supra* note 8, at 151-52 (arguing gender equality and measures protecting women's interests may be justified under three exceptions); *see also* GATT, *supra* note 7, art. XX(a)-(b), (d). "For example, measures that restrict goods made with female indentured labor or by young girls could fall under [the public morals] exception". Choudhury, *supra* note 8, at 151-52. A measure protecting women's health and life could be exempted under the human life and health exception. *See id.* at 152. Gender-equality measures may also be exempted as measures necessary to comply with national laws, and could "include government incentives granted to companies actively promoting gender equality in order to secure compliance with domestic equality legislation." *Id.*

114. *See, e.g.*, U.N. Charter art. 1, para. 3 ("To achieve international cooperation . . . in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to . . . sex . . ."); UN Millennium Declaration, *supra* note 9, ¶ 20 ("To promote gender equality and the empowerment of women as effective ways to combat poverty, hunger and disease and to stimulate development that is truly sustainable."); CEDAW, *supra* note 33, at 195 ("To ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on basis of equality with men.").

115. *See* SEN, *supra* note 8, at 191 (arguing discrimination and systematic inequality of women affect women's health and well-being); *see also supra* note 40 and accompanying text (recognizing importance of investing in women's equality). Women's well-being and health are strongly influenced by women's ability to earn an independent income, find employment in the formal sector, and have property-ownership rights. *See* SEN, *supra* note 8, at 191.

116. *See* Bal, *supra* note 87, at 94-95 (arguing Article XX(d) of GATT should include protection of fundamental human rights, such as gender equality).

117. Elias, *supra* note 20, at 283-84. The race-to-the-bottom argument posits that global competition, in which economic growth is based on expansion of low-wage production, positions countries to where they no longer have the ability or willingness to effectively enforce labor regulations. *See id.* at 284. Less developed countries have a comparative advantage in low-cost labor, which is an advantage when competing in globally liberalized trade. *See id.* at 300; Wagner, *supra* note 8, at 524 (explaining WTO reluctance to include social

potentially have the most to gain from improved labor standards and regulations.<sup>118</sup> The WTO should create a side labor agreement that sets minimum labor regulations and standards, and is based on the ILO's internationally accepted standards, which would be enforceable under the DSU.<sup>119</sup>

The WTO side labor agreement could follow the structures of the SPS and TBT, which would allow members to make labor regulations “based on relevant international standards, guidelines or recommendations,” such as the ILO standards.<sup>120</sup> However, this structure would create similar enforcement issues to NAALC because members are not required to set basic labor standards.<sup>121</sup> Rather, the WTO labor agreement should use TRIPS's structure, which would enable the WTO to set minimum labor standards that members would be required to enact and enforce.<sup>122</sup>

Having a TRIPS-structured side labor agreement would force members to adopt positive obligations—minimum labor standards—that would effectively harmonize and raise labor standards worldwide.<sup>123</sup> With minimum, enforceable labor standards, incentives to invite business investment using relaxed labor regulations—the race-to-the-bottom argument—would disappear.<sup>124</sup> Gender-conscious labor standards, such as equal pay and treatment for both men and women, would ensure that the WTO promotes gender equality in furtherance of its sustainable-development goal.<sup>125</sup>

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clause into treaties).

118. See Elias, *supra* note 20, at 295 (arguing women often work in industries lacking labor standards). Because women are often viewed as a subordinate workforce that will accept unfair labor conditions, they are over-represented in low-paying, unstable, temporary, and informal-sector employment. See *id.* at 296-97. Female-dominated industries also have low rates of unionization, which is a reflection of trade-union repression in government policies. See *id.* at 298.

119. See *infra* text accompanying notes 120-125.

120. SPS, *supra* note 76, art. 3, ¶ 3; see TBT, *supra* note 92, art. 2, ¶ 4 (requiring use of relevant international standards when creating technical regulations); *supra* note 43 and accompanying text (identifying promotion of gender equality through labor regulations in ILO).

121. See *supra* notes 69-71 and accompanying text (explaining NAALC enforcement issues).

122. Compare TRIPS, *supra* note 11, art. 1 (requiring WTO members enact intellectual-property legislation), and TRIPS, *supra* note 11, art. 41 (requiring WTO members enforce intellectual-property rights), with SPS, *supra* note 76, art. 2, ¶ 1 (giving WTO members right to enact sanitary and phytosanitary measures, but not requiring them). The labor standards would reflect ILO labor standards, because nearly all WTO members and prospective WTO members are also ILO members. See *Alphabetical List of ILO Member Countries*, *supra* note 43 (listing ILO members); *Members and Observers*, *supra* note 33 (listing WTO members). The WTO labor agreement could also include a provision that allows for developing countries to have a ten-year transition period to accommodate for their economic, financial, and administrative constraints. See TRIPS, *supra* note 11, art. 66 (allowing developing countries ten years to enact and enforce intellectual-property rights).

123. See Springer, *supra* note 91, at 1091 (arguing TRIPS's structure ideal for side agreements concerning labor standards); see also *supra* notes 95-97 and accompanying text (explaining TRIPS's structure).

124. See Springer, *supra* note 91, at 1100 (contending result of business costs including labor costs would be more fair and equal competition).

125. See *supra* note 75 and accompanying text (discussing WTO's purposes and goals stated in preamble

There are several arguments against including labor provisions in the WTO: it would be a protectionist measure that would interfere with free trade, developing countries would lose their comparative advantage, and there would be a lack of consensus among member countries surrounding labor and gender issues.<sup>126</sup> However, these critiques ignore the fact that WTO developers designed the WTO to promote sustainable development, of which gender equality is a necessary element.<sup>127</sup> Although a labor agreement has the potential to interfere with free trade, the WTO has allowed trade-restrictive environmental and public-health measures under certain circumstances and limitations.<sup>128</sup> Greater opportunities for both men and women to attain decent employment will help developing countries attain sustainable economic, political, and social growth.<sup>129</sup>

#### D. *Efficacy of Gender-Equality Initiatives Under the DSU*

The WTO structure is ideal for promoting gender equality using economic incentives because the DSU effectively enforces the WTO's requirements, including those in its side agreements.<sup>130</sup> Unlike NAALC, which cannot use NAFTA's dispute system or sanctions to enforce the labor principles, the DSU hears disputes involving all of the WTO's side agreements.<sup>131</sup> The DSU's formal, adversarial system enables dispute panels and the Appellate Body to recommend suspension of trade benefits and application of trade sanctions when the offending country does not take appropriate remedial actions.<sup>132</sup> The

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of Marrakesh Agreement); *see also supra* Part II.A.1 (explaining impact of trade liberalization on women's labor and working conditions).

126. *See Wagner, supra* note 8, at 524 (discussing arguments against adding labor provisions to WTO). These critics argue that if the WTO attempts to address too many social issues, including labor, human rights, and environmental protections, the exceptions will undermine the WTO's fundamental nondiscrimination trade principles. *See id.*; *see also* GATT, *supra* note 7, arts. I-III, XI (establishing WTO nondiscrimination principles); *supra* note 80 (explaining WTO principles and member obligations).

127. *See* Marrakesh Agreement, *supra* note 11, pmb1. (stating WTO's commitment to sustainable development); *supra* note 40 and accompanying text (discussing gender equality as integral aspect of sustainable development).

128. *See, e.g.,* SPS, *supra* note 76, art. 2 (allowing members to enact sanitary measures necessary for protection of human, animal, or plant life); TBT, *supra* note 92, art. 2 (allowing members to enact technical regulations where necessary and applied indiscriminately); GATT, *supra* note 7, art. XX (allowing WTO members to enact trade restrictive public-policy measures); *see also Shrimp-Turtle, supra* note 88 (allowing United States to take conservation measures as long as not arbitrarily applying to countries).

129. *See Gender Equality, supra* note 43 (arguing gender equality in labor promotes development). Most developing countries, including WTO-member developing countries, are ILO members and, as such, have committed to promoting gender equality in labor. *See Alphabetical List of ILO Member Countries, supra* note 43 (listing ILO members); *Members and Observers, supra* note 33 (listing WTO members).

130. *See* DSU, *supra* note 77, art. 1 (mandating DSU applies to all disputes under WTO side agreements); Springer, *supra* note 91, at 1101 (explaining all side agreements and rights within them enforceable through WTO dispute-settlement system).

131. *See supra* note 71 and accompanying text (reiterating NAALC dispute-settlement problems and enforcement issues); *supra* text accompanying note 121 (describing function of DSU).

132. *See* WORLD TRADE ORG., *supra* note 73, at 56-58 (explaining WTO dispute-settlement processes,

panels and Appellate Body also take into account the recommendations of WTO committees, like the TEC or the trade and gender committee suggested above in Part III.A, when hearing and deciding trade disputes.<sup>133</sup> Therefore, the WTO could effectively enforce gender-equality standards established through a trade and gender committee, a reinterpreted GATT Article XX, or a side labor agreement, by employing the DSU system.<sup>134</sup>

#### IV. CONCLUSION

There is an undeniable relationship between gender equality and trade liberalization. Although trade liberalization does not cause gender inequality, it exacerbates existing inequalities by both changing the economic conditions and encouraging a race-to-the-bottom labor market. Patriarchal social, political, and economic institutions continually disadvantage women in the global society, despite numerous international agreements articulating gender equality as a fundamental human right.

Regional trade agreements and economic unions have been successful in incorporating gender-mainstreaming policies. The WTO, as the international-trade regulator, has the unique ability to promote and enforce gender-equality measures through economic incentives. As the international community focuses on sustainable development, it is time to expand the regional gender-mainstreaming model to the WTO.

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procedures, and possible sanctions). The DSB decides whether to implement the trade sanctions or suspend trade benefits. *See id.* at 58.

133. *See id.* at 65, 67 (explaining TEC's involvement and role in environmental disputes); *supra* Part III.A (arguing for trade and gender committee in WTO).

134. *See supra* Part III.A-C (arguing for trade and gender committee, reinterpreted Article XX of GATT, and side labor agreement).