

FAIR TRADE FOR WOMEN, AT LAST: USING A SANCTIONS FRAMEWORK TO ENFORCE GENDER EQUALITY RIGHTS IN MULTILATERAL TRADE AGREEMENTS

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ABSTRACT

The idea that international trade agreements should endeavor to enhance human rights principles, rather than to simply maximize economic efficiency, has recently been embraced by major world powers. During the 2017-2018 North American Free Trade Agreement renegotiations, the Canadian government championed the inclusion of a “gender chapter” in the revamped trilateral agreement—an extraordinary step that would commit the trade bloc to prioritizing gender equality in its long-term economic development goals. This proposal did not gain traction, with critics arguing that such commitments should be left to the realm of international human rights agreements. This siloed approach, however, ignores the reality that international trade has a direct and differential impact on gender.

This Note examines how international trade agreements can and should promote women’s equality. First, it discusses the role that women play in labor markets and the trade conditions that promote their economic development. Second, it provides an overview of the international law on gender discrimination, focusing on the obligations of World Trade Organization (WTO) and North American Free Trade Agreement (NAFTA) members, as well as the domestic obligations of NAFTA countries. It finds that, while countries and multilateral groups have continuously pledged to abide by gender-inclusive trade standards, there is little incentive for members to comply if there is no enforcement forum available for aggrieved parties.

This Note then posits that gender equality principles can be made enforceable within trade agreements. It proposes language that would commit members of multilateral trade organizations to promoting these principles. It then examines how the use of targeted sanctions can encourage compliance with gender provisions, using the Magnitsky Act as a frame of reference. It concludes that multilateral trade groups should work to promote inclusive economic growth in a way that provides recourse for egregious violations of recognized gender principles—at last, ensuring that women are not left behind in the economic world order.

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I. INTRODUCTION

Free trade as a concept has evolved under the axiom of Adam Smith's vision to maximize efficiency. In his infamous *Wealth of Nations*, he wrote, "[w]hat is prudence in the conduct of every private family can scarcely be folly in that of a great kingdom. If a foreign country can supply us with a commodity cheaper than we can make it, better buy it of[f] them"¹ In other words, efficiency should reign. In the 1800s, David Ricardo furthered Smith's vision by stating that in conditions of free trade, a state will produce more of a good for which it has a comparative advantage.² Through this vantage, international trade blossoms, with states naturally selecting exports and imports based on perfect conditions. Modern trade theorists continue to champion these ideals, pushing for states to procure goods from the most efficient producer, as well as sell goods to larger markets.³

1. ADAM SMITH, *THE WEALTH OF NATIONS* 241 (Capstone Publishing Ltd. 2010) (1776).

2. DAVID RICARDO, *ON THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION* 125 (3rd ed. 1817) ("Under a system of perfectly free commerce, each country naturally devotes its capital and labour to such employments as are most beneficial to each. This pursuit of individual advantage is admirably connected with the universal good of the whole.").

3. See generally Robert W. McGee, *The Moral Case for Free Trade*, 29 J. WORLD TRADE 69 (1995) (discussing how policies of free trade are morally superior to protectionist policies); Sylvia Nasar, A

These neatly wrapped ideas do not encompass the realities of modern industry. Free trade is ever more dependent on *fair trade*, the idea that trade can and should alleviate poverty.⁴ Fair traders see development as more than just a vehicle by which to acquire more goods and services, but also as a way to enhance individual freedom and capacity to lead a fulfilling life.⁵ Although tariffs have dramatically declined over the past four decades due to multilateral negotiations like the General Agreement on Tariffs and Trade (GATT), and regional trade agreements like the North American Free Trade Agreement (NAFTA), critics argue that gains from international trade and foreign investment continue to be stifled by, among other things, increased focus on labor and human rights standards.⁶ The argument is that these standards are not used to actualize human rights principles, but rather act as guises for domestic protectionism. Alan Greenspan, the Former Chair of the U.S. Federal Reserve, expressed these concerns, saying, “[w]hile these forms of protection have often been imposed under the label of promoting ‘fair trade,’ oftentimes they are just simple guises for inhibiting competition”⁷ Notions of state sovereignty, too, have stifled integration of human rights standards into trade agreements.⁸ International legal principles, including sovereign equality, political independence, and territorial integrity—and the legitimation of using force to defend those principles—further strengthen arguments that human rights measures intrude upon the fundamentals of international law.

On the other hand, fair traders worry that free traders, with their commitment to unconstrained liberal trading practices, are rendered equivalents of moral Philistines.⁹ Increasingly, fair traders’ viewpoints have filtered into trade agreements. World Trade Organization (WTO) members, who are all also member states of the United Nations (U.N.), have committed to abide by a set of core human rights standards, including the “freedom of association, no forced labour, no child labour, and no discrimination at work (including gender

Primer: Why Economists Favor Free-Trade Agreement, N.Y. TIMES (Sept. 17, 1993), <https://www.nytimes.com/1993/09/17/us/a-primer-why-economists-favor-free-trade-agreement.html> (emphasizing economists’ support for NAFTA based on free trade principles).

4. Int’l Fed’n for Alternative Trade, *Towards a Fairer World Trading System: The Cancun Ministerial—A Fair Trade Perspective, Position of the Int’l Fed’n for Alternative Trade (IFAT) regarding the 5th Ministerial Conf. of the WTO*, 1 WTO Doc. (Sep. 10-14, 2000).

5. U.N. Inter-Agency Network on Women and Gender Equality, Task Force on Gender and Trade, *Trade and Gender: Opportunities and Challenges for Developing Countries*, 299, U.N. Doc. UNCTAD/EDM/2004/2 (Anh-Nga Tran Nguyen et. al. eds., 2004).

6. Michael J. Trebilcock, *The Fair Trade-Free Trade Debate: Trade, Labour and The Environment*, 44 UNB.L.J. 311, 311 (1995).

7. Alan Greenspan, Chairman, Fed. Reserve, Address at the Alliance for the Commonwealth Conference on Intl. Bus. (Jun. 2, 1999) (transcript available at <https://www.federalreserve.gov/boarddocs/speeches/1999/19990602.htm>).

8. Matthew Schaefer, *Sovereignty, Influence, Realpolitik and the World Trade Organization*, 25 HASTINGS INT’L & COMP. L. REV. 341, 341–342 (2002).

9. Trebilcock, *supra* note 6, at 312.

discrimination).”¹⁰ Concerns around the negative consequences of globalization spurred the adoption of the Millennium Development Goals.¹¹ States pledged to develop an “open trading and financial system” (free trade-based), and also to address the “special needs” of developing countries (fair trade-based).¹²

One such special need is gender equality.¹³ The third Millennium Development Goal aims to “[p]romote gender equality and empower women,” which includes addressing economic gender disparity.¹⁴ The U.N. Inter-Agency Network on Women and Gender Equality has stressed that states and international trade institutions must evaluate trade rules and policies to determine whether they deepen or reduce existing gender inequalities.¹⁵ Although trade policy has long been considered “gender-neutral,” it is now recognized that international trade in goods and services has a differential impact on gender, particularly in developing countries.¹⁶ For example, female workers comprise a large portion of labor-intensive industries, serving as “cheap labour surplus in developing countries.”¹⁷ As compared to men, women are less likely to hold regular wage and salaried employment, are more likely to be employed in the informal economy, and are typically paid less in all parts of the world.¹⁸

International trade standards and practices that are gender-responsive can shift this reality: studies show there is a strong correlation between economic and social equality.¹⁹ As more states and organizations recognize these correlations, major change is inevitable. Whereas before, state actors only incorporated equality principles into international *human rights* agreements, like the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), now, major economic players like Canada are pushing to incorporate these principles into *trade* agreements, like NAFTA.²⁰

This note examines organizational and state approaches to gender equality in trade agreements, focusing on the benefits and challenges of promoting gender rights within international trade agreements. First, this note provides a snapshot of

10. World Trade Organization, *Labour standards: consensus, coherence and controversy*, https://www.wto.org/english/thewto_e/whatis_e/tif_e/bey5_e.htm (last visited Sept. 21, 2018).

11. Priscilla Schwartz, *Development in World Trade Law*, 4 J. INT’L COM. L. & TECH. 50, 51 (2009).

12. *Id.*

13. See U.N. Convention on the Elimination of All Forms of Discrimination against Women, 1249 U.N.T.S. 13 (Dec. 18, 1979); see also G.A. Res. 50/203, U.N. Beijing Declaration and Platform for Action (Dec. 22, 1995) (outlining recommendations from international government coalition to U.N. General Assembly to promote gender equality in educational and employment institutions).

14. U.N., *Goal 3: Promote gender equality and empower women: Fact Sheet, End Poverty Millennium Development Goals 2015*, Sept. 25, 2008, <http://www.un.org/millenniumgoals/2008highlevel/pdf/newsroom/Goal%203%20FINAL.pdf>.

15. U.N. Inter-Agency Network, *supra* note 5, at iii.

16. *Id.* at 294.

17. *Id.* at xii.

18. *Id.*, e.g., at 6.

19. See, e.g., U.N. Econ. Comm. for Latin America and the Caribbean, *Time for Equality: Closing gaps, opening trails*, U.N. Doc. LC/G.2432 (SES.33/3) at 41 (May 2010).

20. See *infra* Section III, A, a.

the role that women play in labor markets and discusses trade conditions that promote women's economic development. Second, it provides an overview of the international law on gender discrimination, focusing on the legal obligations of WTO and NAFTA members. Third, it analyzes state actor approaches to incorporating gender equality agreements in trade instruments. Finally, this note evaluates how the use or threat of targeted sanctions by multilateral trade groups can encourage compliance with gender provisions in trade agreements. It proposes sample language for such a framework, using the U.S. Magnitsky Act as a framework of analysis.

II. SETTING THE STAGE: WHERE DO WOMEN WORK AND HOW CAN CONDITIONS IMPROVE?

A. EMPLOYMENT SNAPSHOT

Overall, women are less likely to participate in the labor market. In 2018, the labor force participation rate for women was 48.5%—a rate that is 26.5% below that of men's.²¹ This gap has narrowed by two percent since 1990, but the rate of improvement is expected to halt and possibly reverse.²² Much of women's labor is focused on domestic and family work, which is often unpaid, and if paid, more likely to be part-time or temporary.²³ According to U.N. Women, the U.N. organization dedicated to accelerating and ensuring gender equality, women shoulder three times more unpaid work than men and spend about half as much time doing paid work.²⁴ Gender disparities also persist with regard to wages worldwide: on average, women earn twenty percent less than men.²⁵

The majority of employed women work in the services industry, which includes wholesale, retail trade, restaurant and hotel work, and financial intermediation.²⁶ The agriculture industry is the second most common, with women generally engaging in subsistence production to ensure food security.²⁷ These overall figures can vary vastly when broken down by region. As an example, in South

21. INT'L LABOUR ORG., WORLD EMPLOYMENT SOCIAL OUTLOOK: TRENDS FOR WOMEN 2018 – GLOBAL SNAPSHOT 6 (2018), https://www.ilo.org/wcmsp5/groups/public/-dgreports/-dcomm/-publ/documents/publication/wcms_619577.pdf. There are significant differences in women's access to labor markets in different areas of the world. In developed countries, this gender participation gap is the "lowest recorded since 1990." *Id.*

22. *Id.*

23. MARZIA FONTANA, SUSAN JOEKES & RACHEL MASIKA, INSTITUTE OF DEVELOPMENT STUDIES AT THE UNIVERSITY OF SUSSEX, GLOBAL TRADE EXPANSION AND LIBERALISATION: GENDER ISSUES AND IMPACTS 37–38 (1998). See also INT'L LABOUR ORG., WORLD EMPLOYMENT SOCIAL OUTLOOK: TRENDS FOR WOMEN 2017 8 (2017), https://www.ilo.org/wcmsp5/groups/public/-dgreports/-inst/documents/publication/wcms_557245.pdf.

24. *Seven Drivers and Recommendations*, U.N. SECRETARY-GENERAL'S HIGH-LEVEL PANEL ON WOMEN'S ECONOMIC EMPOWERMENT, <http://hlp-wee.unwomen.org/en/about/seven-drivers> (last visited Oct. 8, 2018).

25. INT'L LABOUR ORG., WORLD EMP'T, *supra* note 21, at 11.

26. U.N. Inter-Agency Network, *supra* note 5, at 8.

27. *Gender Equality & Trade Policy*, U.N. INTER-AGENCY NETWORK ON WOMEN & GENDER EQUALITY 5, 11 (2011), http://www.un.org/womenwatch/feature/trade/gender_equality_and_trade_policy.pdf.

Asia, sixty percent of all female employment is in the agricultural sector versus the average 37.1% worldwide.²⁸

B. TRADE CONDITIONS THAT PROMOTE WOMEN'S ECONOMIC DEVELOPMENT

Measures that improve workers' skills, employment stability, working conditions, and benefits advantage all workers by shielding them from exploitation.²⁹ Female-centered labor standards, like maternity benefits³⁰ and equal pay for work of equal value, also further these goals. Economic policy measures can accomplish similar aims. For example, tax incentives to women-owned enterprises, which have less access overall to "marketing networks, capital, credit, and technical knowledge," would encourage exports.³¹ A public pension scheme that is tax-financed would provide economic security to older women, who have had to contend with lower levels of work force participation, sizeable gender pay gaps, greater likelihood of interrupted employment careers, and greater representation in the informal sector.³² Economic measures like these should in turn be supplemented with other important policy aimed at improving access to education³³ and childcare.³⁴

III. THE INTERNATIONAL LAW AND ORGANIZATIONAL APPROACH TO GENDER DISCRIMINATION

As all WTO members are also member states of the U.N., they are bound to U.N. agreements that prohibit gender discrimination. This core principle is elucidated in the Preamble to the U.N. Charter: "We the Peoples of the United Nations Determined . . . to reaffirm . . . the equal rights of men and women and of nations large and small."³⁵ CEDAW was adopted by the U.N. General

28. *Id.* at 5.

29. U.N. Conference on Trade and Development, *Mainstreaming gender in trade policy*, U.N. Doc. TD/B/C.I/EM.2/2/Rev.1 (Mar. 19, 2009).

30. See Int'l Labour Org., *Maternity Protection Convention*, Feb. 7, 2002, ILO Doc. 183 (affirming commitment to promoting women's equality in the workplace by providing at least fourteen weeks maternity leave).

31. *Gender Equality & Trade Policy*, *supra* note 27, at 3-4.

32. INT'L LABOUR ORG., *WORLD EMPLOYMENT*, *supra* note 21, at 12.

33. Overall, women's educational attainment has increased; in many countries, women's postsecondary education enrollment is higher than men's. See Namita Datta & Apichoke Kotikula, *Fostering Quality of Employment for Women*, WTO 12, <http://documents.worldbank.org/curated/en/569891488778608236/pdf/113175-REVISED-Not-Just-More-but-Better-Fostering-Quality-of-Employment-for-Women.pdf>. Still, women remain unrepresented in STEM, and "tend to study in fields that lack job opportunities and provide limited earning potential." *Id.* at 15.

34. *Id.* at 25 (noting several options, such as providing public daycare and lengthening the school day).

35. U.N. Charter preamble. This principle is reiterated in the Universal Declaration of Human Rights, as well as in the International Covenant on Economic, Social and Cultural Rights and Civil and Political Rights. See U.N. Inter-Agency Network, *supra* note 5, at 296; U.N. Universal Declaration of Human Rights, Dec. 10, 1948, Art. 2 ("Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as . . . [sex]."; Article 7: "All are equal before the law and are entitled without any discrimination to equal protection of the law.").

Assembly in 1979 and has been acceded to or ratified by 186 member states, though not the United States (U.S.).³⁶ It prohibits discrimination against women, which it defines as:

[Any] distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, *economic*, social, cultural, civil or any other field.³⁷

There has long been an effort at the U.N. to link international labor standards that would benefit women with international trade regimes. As an example, the U.N. Conference on Trade and Employment drafted the Havana Charter in 1948, which included a social clause that would have “linked respect for workers’ rights and the maintenance of labor standards with global trade.”³⁸ Although this Charter was never adopted, labor and gender rights principles abound in international instruments—U.N. and regional agreements alike.³⁹ Examples of such regional agreements include the European Convention for the Protection of Human Rights and Fundamental Freedoms and the American Convention on Human Rights.⁴⁰

A. FOCUS ON WTO OBLIGATIONS

Human rights are not mentioned in WTO law, but the organization has embraced some fair trade values.⁴¹ For example, the Preamble of the Marrakesh Agreement, the document that established the WTO, includes “sustainable development” as an objective.⁴² Members also pledge to enter into reciprocal and

36. Ann M. Piccard, *U.S. Ratification of CEDAW: From Bad to Worse*, 28 LAW & INEQ. 119, 124–25 (2010). Although President Carter signed CEDAW in 1980, the Department of State warned at the time that the treaty presented conflicts with U.S. federalism and the domestic requirement for state action to exist in order for discrimination to be subject to regulation. See Ann Elizabeth Mayer, *Reflections on the Proposed United States Reservations to CEDAW: Should the Constitution Be an Obstacle to Human Rights*, 23 HASTINGS CONST. L.Q. 727, 797 (1996). Once President Reagan was elected, the White House took heed of these warnings and withdrew its support of CEDAW ratification. *Id.* U.S. women may not have effectively campaigned for CEDAW’s ratification, given the “demoralizing impact of the 1982 defeat of the [Equal Rights Amendment]” and the ongoing fight to preserve *Roe v. Wade*, decided in 1973. *Id.* at 798. For these reasons, CEDAW has never been sent to the full Senate for advice and consent to ratifying, even when voted out of Committee in 2002. See Jessica Sanchez, *Ratifying CEDAW: Is the United States Falling Behind on Women’s Rights?*, 17 PUB. INT. L. REP. 64, 65 (2011).

37. U.N. Convention on the Elimination of All Forms of Discrimination Against Women art. 1, Dec. 18, 1979, 1249 U.N.T.S. 13 (emphasis added).

38. Constance Z. Wagner, *Looking at Regional Trade Agreements Through the Lens of Gender*, 31 ST. LOUIS U. PUB. L. REV. 497, 522–23 (2012).

39. See U.N. Inter-Agency Network, *supra* note 5, at 297.

40. *Id.*

41. See *id.* at 303.

42. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154.

mutually advantageous arrangements “directed to the substantial reduction of . . . barriers to trade and to the elimination of discriminatory treatment in international trade relations.”⁴³

After its establishment, the WTO framework was immediately used as a medium for human rights protections.⁴⁴ One such example is the WTO Dispute Settlement Mechanism’s (DSM) interpretation of Article XX of the GATT in *U.S.–Import Prohibition of Certain Shrimp and Shrimp Products*.⁴⁵ Article XX lays out exemptions from GATT rules on environmental protection, one being when the measure constitutes unjustifiable discrimination between countries where the same conditions prevail.⁴⁶ The DSM held that Article XX must be considered *contextually*, and the notion of trade liberalization should not be applied without question.⁴⁷ Rather, many factors should be considered in determining discrimination between countries, including the impact on human rights.⁴⁸

Specific WTO agreements focus on the female-dominated agriculture and services sectors and implicate human rights policy. For example, the Agreement on Agriculture imposed regulations in three specific areas: domestic support, market access, and export subsidies.⁴⁹ These regulations did not go without criticism; the export subsidies agreement, which required developed countries to reduce export subsidies, was condemned for giving developed countries a leg up on exports.⁵⁰ Although these regulations required developed countries to reduce export subsidies by at least thirty-five percent between 1995 and 2000, they still allowed these countries to continue to subsidize farmers in a way that developing countries could not sustain.⁵¹

Addressing services, the General Agreement on Trade in Services (GATS) entered into force on January 1, 1995.⁵² Its purpose was to bring modern commerce within the ambit of the GATT, and it was the first concrete step that memorialized agreements on investment liberalization and protection.⁵³ During negotiations, developing countries feared they would be unable to compete against developed countries in the services sector, and that the agreement would

43. *Id.*

44. Lisa Yarwood, *Trade Law as a Form of Human Rights Protection*, 3 NUJS L. REV. 13, 32 (2010).

45. *Id.* at 30.

46. *WTO Rules and Environmental Policies: GATT Exceptions*, WTO, https://www.wto.org/english/tratop_e/envir_e/envt_rules_exceptions_e.htm (last visited Sept. 17, 2018). This does not apply if the measure is a disguised restriction on international trade. *Id.*

47. Appellate Body Report, *United States–Import Prohibition of Certain Shrimps and Shrimp Products* ¶ 129, WTO Doc. WT/DS58/23 (Nov. 26, 2001).

48. Yarwood, *supra* note 44, at 30.

49. *Id.* at 20.

50. *Id.*

51. *Id.*

52. *The General Agreement on Trade in Services (GATS): Objectives, Coverage and Disciplines*, WTO, https://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm#9 (last visited Sept. 17, 2018).

53. Ayesha Malik, *Why Trade in Financial Services – An Assessment of the Agreement on Trade in Financial Services under the GATS*, 1 J. WORLD INVESTMENT 357, N.9, 362 (2000).

retard development of industry and impede labor mobility.⁵⁴ GATS is now a “widely [criticized aspect] of the WTO framework from the perspective of the potential negative impact on human rights.”⁵⁵ For example, GATS lists “education” as a service sector, causing critics to worry that GATS will exaggerate social inequities in education because, as noted by the U.N. High Commissioner for Human Rights in 2002, the liberalization of trade in services, without adequate government regulation and proper assessment of its affects, can have undesirable effects. This is because “different service sectors require different policies and time frames for liberalization and some areas [like education] are better left under governmental authority”⁵⁶

There are no WTO agreements that specifically address gender discrimination, but recent WTO actions have taken a “gender-sensitive” approach. For example, the WTO founded an organization called the Standards and Trade Development Facility (STDF) that supports developing countries with capacity-building to implement international agricultural production standards. It promotes gender-specific initiatives and “[supports] women farmers, processors and traders to learn about good agricultural [practices] . . . by building [their skills] through targeted training support.”⁵⁷ As an example, STDF helped women flower workers in Uganda comply with established standards and enter the supply chain.⁵⁸ The WTO also established the Enhanced Integrated Framework, a multi-donor program that promotes economic growth and sustainable development by helping developing countries play a “more active role in the global trading system.”⁵⁹ It promotes gender balance by running trade capacity programs to support women’s empowerment in several countries, including Burkina Faso and Rwanda.⁶⁰

Gender-sensitive trade policies should be further integrated in WTO agreements and programs, given the WTO’s ability to enforce member obligations. Although the U.N. General Assembly could hypothetically pass gender equality resolutions that later inform customary international law, as with CEDAW, mechanisms for enforcement and compliance are weak. CEDAW, for example, only requires states parties to report to a Committee the measures it has taken to affect CEDAW provisions, and does not specify consequences or other

54. *Id.* at 359–60.

55. Yarwood, *supra* note 44, at 21.

56. Susan L. Robertson, *Globalisation, GATS and Trading in Education Services*, THE CENTRE FOR GLOBALISATION, EDUCATION AND SOCIETIES, UNIVERSITY OF BRISTOL (2006), <http://www.bris.ac.uk/education/people/academicStaff/edslr/publications/04slr>.

57. *Inclusive Trade Solutions: Women in SPS Capacity Building*, STANDARDS & TRADE DEVELOPMENT FACILITY, http://www.standardsfacility.org/sites/default/files/STDF_Briefing_note_13.pdf (last visited Nov. 2, 2018).

58. *Gender Aware Trade Policy: A Springboard for Women’s Economic Empowerment*, WTO (June 2017), https://www.wto.org/english/news_e/news17_e/dgra_21jun17_e.pdf.

59. *The Enhanced Integrated Framework: Supporting LDCs in Tackling Constraints to Trade*, U.N. CONFERENCE ON TRADE AND DEVELOPMENT, <https://unctad.org/en/Pages/ALDC/Technical%20Assistance/Integrated-Framework-for-Trade-related-Technical-Assistance-to-LDCs.aspx> (last visited Oct. 11, 2018).

60. See *Gender Aware Trade Policy supra* note 58, at 7.

enforcement mechanisms for inaction.⁶¹ Few consequences follow from defiance.⁶² In contrast, if a WTO member state does not comply with a WTO standard, the injured state can bring a case against the other for breach. Cases are heard before a dispute settlement panel, and judgments can be appealed to the WTO Appellate Body.⁶³ Following judgment, if parties cannot agree on satisfactory compensation, the complainant may ask the dispute settlement panel for permission to impose trade sanctions.⁶⁴ WTO members cannot back out of their commitments or negotiate different provisions by attaching reservations as conditions to acceptance, as with a U.N. treaty like CEDAW.⁶⁵ Rather, they must “accept the entire package of WTO rules or none at all.”⁶⁶

B. FOCUS ON NAFTA OBLIGATIONS⁶⁷

Unlike in the WTO, NAFTA members have adopted agreements that focus on gender discrimination. The North American Agreement on Labor Cooperation (NAALC) is the cardinal example. Signed in 1993, NAALC was the first instance where the U.S. negotiated an agreement on labor standards to supplement an international treaty.⁶⁸ Among other things, the NAALC discusses promoting gender equality in the workplace, eliminating employment discrimination on the basis of sex, and mandating equal pay for men and women.⁶⁹ The NAALC also established a Commission for Labor Cooperation, which is tasked with furthering cooperative goals between NAFTA members, including achieving the “equality

61. The Committee is charged with reporting findings to the U.N. General Assembly and may “make suggestions” based on state reports. CEDAW, Dec. 18, 1979, 1249 U.N. T.S. 13., art. 21 (“The Committee shall, through the Economic and Social Council, report annually to the General Assembly of the United Nations on its activities and may make suggestions and general recommendations based on the examination of reports and information received from the States Parties. Such suggestions and general recommendations shall be included in the report of the Committee together with comments, if any, from States Parties.”).

62. ASSOCIATION FOR WOMEN’S RIGHTS IN DEVELOPMENT, *Women’s Rights, and the World Trade Organization and International Trade Policy*, 4 WOMEN’S RIGHTS AND ECONOMIC CHANGE 1, 3 (Aug. 2002), https://www.awid.org/sites/default/files/atoms/files/womens_rights_the_world_trade_organisation_and_the_world_trade_order.pdf.

63. *Id.*

64. This is authorized by Article 22.2 of the Uruguay Round Agreement, titled “Compensation and the Suspension of Concessions”: “[If] no satisfactory compensation has been agreed within 20 days after the date of expiry of the reasonable period of time, any party having invoked the dispute settlement procedures may request authorization from the DSB [Dispute Settlement Body] to suspend the application to the Member concerned of concessions or other obligations under the covered agreements.” WORLD TRADE ORGANIZATION, *Understanding on Rules and Procedures Governing the Settlement of Disputes*, https://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm#22.

65. See ASSOCIATION FOR WOMEN’S RIGHTS IN DEVELOPMENT, *supra* note 62, at 4.

66. *Id.*

67. At the time of publication, NAFTA was still in force, although the U.S. had agreed to replace it with a free trade agreement called the “United States-Mexico-Canada Agreement” or USMCA. This will replace NAFTA if and when it is ratified by its members. See *infra* Section IV.”

68. BUREAU OF INT’L LABOR AFFAIRS, U.S. DEP’T OF LABOR, *North American Agreement on Labor Cooperation: A Guide* (Oct. 2005), <https://www.dol.gov/ilab/trade/agreements/naalcdg.htm>.

69. See *id.*

of men and women in the workplace.”⁷⁰ Regrettably, the Commission’s activities have thus far been limited, and it has not publicly pressured governments to expand women’s rights.⁷¹

At least in theory, the NAALC offers women ways to challenge ineffective enforcement of gender discrimination or labor laws that violate the above principles.⁷² This is evident upon examination of the text: Article 3 allows state parties to initiate proceedings to “seek appropriate sanctions or remedies for violations of [its domestic] labor law,” and Article 4 gives private parties with a “legally recognized interest under its law” a private right of action to seek redress for violation of its domestic labor laws.⁷³ But even textually, the NAALC falters—Article 3 is undercut by Article 49, which exempts a party from effectively enforcing its labor laws if the actions resulted from “a reasonable exercise of the agency’s or the official’s discretion” or if the alleged violation occurred because the party allocated enforcement resources to labor matters of higher-priority.⁷⁴ Article 4 falters because it does not provide for any mechanisms by which to enforce the private right of action.⁷⁵

An example of the NAALC’s practical ability to serve as a remedial tool to police labor and gender rights can be seen in the *Auto Trim/Breed Case*.⁷⁶ Mexican workers filed a complaint with the U.S. National Administrative Office (NAO), alleging that Mexico failed to enforce its own occupational health and safety laws.⁷⁷ The NAO agreed with the workers, concluding that the Mexican government’s actions were inconsistent with its obligations to enforce its health and safety laws, causing serious illness to workers.⁷⁸ Despite this decision, “no improvements in working conditions have occurred and no sanctions have been issued.”⁷⁹ Further, the NAALC does

70. Kate E. Andrias, *Gender, Work, and the NAFTA Labor Side Agreement*, 37 U.S.F. L. REV. 521, 546 (2003).

71. *See id.*

72. *See id.* at 548.

73. North American Agreement on Labor Cooperation, Can.-Mex.-U.S., art. 3, 4, Sept. 14, 1993, 32 I.L.M. 1499 [hereinafter NAALC].

74. *Id.* at art. 49.

75. John P. Isa, *Testing the NAALC’s Dispute Resolution System: A Case Study*, 6 AM. U.J. GENDER & L. 179, 192 (1998).

76. The Case of Auto Trim de Mexico, S.A. de C.V., Matamoros, Tamaulipas, Mexico, and Custom Trimibreed Mexicana, S.A. de C.V., Valle Hermoso, Tamaulipas, Mexico, Submission to the U.S. National Administrative Office (NAO) Under the North American Agreement on Labor Cooperation (NAALC), Public Submission 2000-01 (June 30, 2000).

77. The NAALC establishes NAOs in each of the countries. The offices are in charge of implementing the Agreement and serving as points of contact between national governments. *See* U.S. DEP’T OF LABOR, *Submissions under the North American Agreement on Labor Cooperation (NAALC)*, <https://www.dol.gov/ilab/trade/agreements/naalc.htm>.

78. Monica Schurtman, *Los Jonkeados and the NAALC: The Autotrim/Customtrim Case and Its Implications for Submissions under the NAFTA Labor Side Agreement*, 22 ARIZ. J. INT’L & COMP. L. 291, 293 (2005); Andrias, *supra* note 70, at 550.

79. Andrias, *supra* note 70, at 550.

not provide for remedies like back wages, reinstatement, or punitive damages.⁸⁰

The NAALC was never a piece of legislation enacted or ratified by Congress; between NAFTA members, it serves as a “memorandum of understanding.”⁸¹ Nonetheless, scholars were hopeful that it could become binding international law—particularly important given that this would bind the U.S., which has not ratified CEDAW.⁸²

1. *Canada’s Push to Include a Gender Chapter*

During the 2017-18 NAFTA renegotiations, the Canadian government advocated for the inclusion of a “gender chapter” to reinforce the organization’s commitment to prioritizing gender equality in its long-term economic development agreements.⁸³ Canada’s Foreign Affairs Minister, Chrystia Freeland, outlined the Canadian government’s goals to “guarantee that the modernized Nafta [sic] will not only be an exemplary *free-trade* deal, it will also be a *fair trade* deal.”⁸⁴ In October 2017, the Mexican government lent its support to Canada’s proposed gender chapter.⁸⁵ As of the time of this publication, the text of the proposed chapter had not been released to the public, but is thought to be modeled after the Canadian-Chilean free trade deal’s gender chapter.⁸⁶ That agreement was amended to include a gender chapter in June 2017, though it has not yet entered into force.⁸⁷ The chapter begins by reaffirming the importance of gender-sensitive trade policy, saying:

The Parties acknowledge the importance of incorporating a gender perspective into the promotion of inclusive economic growth, and the key role that gender-responsive policies can play in achieving sustainable socioeconomic development. Inclusive economic growth aims to distribute benefits among the entire population by providing equitable opportunities for the participation of women and men in business, industry and the labour market.⁸⁸

80. *Id.* at 552.

81. Leonard Bierman & Rafeal Gely, *The North American Agreement on Labor Cooperation: A New Frontier in North American Labor Relations*, 10 CONN. J. INT’L L. 533, 561 (1995).

82. *Id.* at 549.

83. Catherine Porter, *Canada Wants a New Nafta to Include Gender and Indigenous Rights*, N.Y. TIMES (Aug. 14, 2017), <https://www.nytimes.com/2017/08/14/world/americas/canada-wants-a-new-nafta-to-include-gender-and-indigenous-rights.html>.

84. *Id.* (emphasis added).

85. *Trudeau: Mexico backing Canadian proposal for NAFTA gender chapter*, INSIDE U.S. TRADE’S WORLD TRADE ONLINE (Oct. 14, 2017), <https://insidetrade.com/trade/trudeau-mexico-backing-canadian-proposal-nafta-gender-chapter>.

86. Joanna Smith, *U.S. Unlikely to Accept NAFTA Gender Chapter with Teeth: Trade Experts*, CBC NEWS (Sep. 23, 2017), <http://www.cbc.ca/news/politics/nafta-gender-chapter-experts-1.4304197>.

87. Agreement to Amend the Free Trade Agreement Between the Government of Canada and the Government of the Republic of Chile, Can.-Chile, June 5, 2017 (not yet in force).

88. *Id.*

The agreement specifically mentions Goal Five of the United Nations' 2030 Agenda for Sustainable Development—to “achieve gender equality and empower all women and girls”—and CEDAW.⁸⁹ It acknowledges that international trade and investment can improve women's access to economic opportunity and can contribute to sustained economic development.⁹⁰ The agreement also commits the parties to developing programs to encourage this access and growth, and establishes a “Trade and Gender Committee” to facilitate cooperation activities and information-exchange.⁹¹

The gender provisions are notably *exempt* from the Canada-Chile agreement's dispute resolution mechanism,⁹² meaning parties do not have recourse to seek enforcement for perceived violations of gender equity laws and policies through the treaty mechanism. Because of this, a senior economist with the Canadian Labour Congress, Angella MacEwan, remarked that the chapter is “weak,” and merely symbolic.⁹³ The Canadian Minister of International Trade, Francois-Phillippe Champagne, cautioned not to discount the symbolic effect of the chapter.⁹⁴ He noted that the fact that “gender rights are on the table at all—and codified in the Canada-Chile deal” is an important step forward.⁹⁵ And indeed, as Canadian Prime Minister Justin Trudeau pointed out at the Women in the World Canada Summit in September 2017, the Canada-Chile agreement represents the first time a Group of Seven country agreed to include a gender chapter in a trade deal.⁹⁶

In July 2017, the U.S. Trade Representative, Robert Lighthizer, released a list of the Trump Administration's NAFTA negotiating objectives.⁹⁷ The list did not include any explicit mention of gender, although it did reference strengthening existing labor obligations in NAFTA side agreements.⁹⁸ Specifically, Lighthizer wrote he hopes to “[r]equire NAFTA to adopt and maintain in their laws and practices the internationally recognized core labor standards as recognized in the ILO [International Labor Organization] Declaration, including . . . [e]limination

89. *Id.*

90. *Id.*

91. *Id.*

92. *See id.* (“a Party shall not avail itself of the dispute resolution mechanism provided for in Chapter N . . . with respect to any matter arising under this Chapter.”).

93. Smith, *supra* note 86.

94. *Id.*

95. *Id.*

96. Brett Fortnam, *Trudeau: Most Opposition to NAFTA Gender Chapter Emanates from Canada*, INSIDE U.S. TRADE (Sept. 15, 2017), <https://insidetrade.com/daily-news/trudeau-most-opposition-nafta-gender-chapter-coming-within-canada>. The Group of Seven is an informal coalition of industrialized democracies that includes Canada, France, Germany, Italy, Japan, the United Kingdom, and the U.S. *See* Zachary Laub & James McBride, *The Group of Seven (G7)*, COUNCIL ON FOREIGN RELATIONS (May 30, 2017), <https://www.cfr.org/backgrounder/group-seven-g7>.

97. Press Release, Office of the U.S. Trade Representative, USTR Releases NAFTA Negotiating Objectives (July 2017) (on file at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/july/ustr-releases-nafta-negotiating#>).

98. *Id.*

of discrimination in respect of employment and occupation.”⁹⁹ Notably, he listed as an objective, “[ensuring] that these labor obligations are subject to the same dispute settlement mechanism that applies to other enforceable obligations of the Agreement.”¹⁰⁰ Hypothetically, if the parties adopted a gender chapter alongside such a dispute settlement mechanism, it would go further in protecting female workers than even the Canada-Chile agreement contemplates.¹⁰¹

IV. STATE ACTOR APPROACHES TO GENDER DISCRIMINATION

Future incorporation of gender discrimination provisions depends entirely on state actors’ interests. After all, international cooperation exists only to the extent that states are willing to cede their sovereign rights. The U.N. makes this principle clear in its founding Charter: “The Organization is based on the principle of the sovereign equality of all its Members.”¹⁰² Accordingly, domestic state approaches to incorporating gender provisions into binding domestic and international instruments must be examined to predict future patterns.

A. THE UNITED STATES

The Charters of Freedom—the founding American documents—make no mention of gender equality, except to say that all “men” are created equal.¹⁰³ The Fourteenth Amendment also does not contain gendered language,¹⁰⁴

99. OFFICE OF THE U.S. TRADE REPRESENTATIVE, *Summary of Objectives for the NAFTA Renegotiation* (July 2017), <https://ustr.gov/sites/default/files/files/Press/Releases/NAFTAOBJECTIVES.pdf>.

100. *Id.*

101. In its draft form, USMCA does not include a gender chapter. However, it does include a provision requiring the parties to protect workers against discrimination on the basis of sex, including sexual orientation and gender identity. *See* United States-Mexico-Canada Agreement art. Chapter 23.9, Can.-Mex.-U.S., Agreement to Amend the Free Trade Agreement Between the Government of Canada and the Government of the Republic of Chile, Can.-Chile, Sept. 30, 2018 (not yet in force) (“The Parties recognize the goal of eliminating sex-based discrimination in employment and occupation, and support the goal of promoting equality of women in the workplace. Accordingly, each Party shall implement policies that protect workers against employment discrimination on the basis of sex, including with regard to pregnancy, sexual harassment, sexual orientation, gender identity, and caregiving responsibilities, provide job-protected leave for birth or adoption of a child and care of family members, and protect against wage discrimination.”). It is unclear how disputes under Article 23 will be settled in practice, but the language implies that dispute settlement can be used as an option of last-resort—the chapter merely says that “[n]o Party shall have recourse to dispute settlement . . . without first seeking to resolve the matter in accordance with this Article.” *Id.* at art. 23.17.

102. U.N. Charter art. 2, ¶ 1.

103. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). In writing the Declaration of Independence, Thomas Jefferson intended for this phrase to apply to men *only*. On women, he said, “Were our state a pure democracy, there would still be excluded from our deliberations . . . women, who, to prevent deprivation of morals and ambiguity of issues, should not mix promiscuously in gatherings of men.” Ruth Bader Ginsburg, *Sex Equality and the Constitution*, 52 TUL. L. REV. 451, 451 (1977-1978).

104. *See* U.S. CONST. amend. XIV, § 1 (“[No] State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws . . .”). Although the Fourteenth Amendment only mentions

but has been used as a source of protections against gender-based classifications.¹⁰⁵

Although the U.S. may be reticent to incorporate a gender chapter into NAFTA, it has set out gender equality as a priority in other bilateral and regional trade agreements, which increasingly dominate U.S. trade policy.¹⁰⁶ For example, the Dominican Republic-Central America-U.S. Free Trade Agreement's Labor Cooperation and Capacity Building Mechanism says that parties may initiate bilateral or regional cooperative activities on "gender issues, including the elimination of discrimination in respect of employment and occupation."¹⁰⁷

The U.S. enters into most of these free trade agreements (FTAs) through a procedure called Trade Promotion Authority (TPA). The TPA, also known as "fast-track" negotiating authority, allows the Executive branch to negotiate FTAs, "subject only to an up-or-down vote of approval by Congress, without opportunity for amendments," which makes it a potent tool for facilitating free trade agreements.¹⁰⁸ In May 2007, Congress amended the TPA with the Bipartisan Agreement on Trade Policy to require that new U.S. trade agreements address the issues of "labor rights, environmental protection, intellectual property protection, protection of foreign investors and investment, and security."¹⁰⁹ Ambassador Susan C. Schwab remarked that this agreement would "help guarantee that the benefits of trade extend to *all* people."¹¹⁰ This is because these standards particularly impact women, who are frequently among the most vulnerable and impacted by dislocations in employment due to trade liberalization.¹¹¹

TPA expired in July 2007, and was renewed in 2015 by the Bipartisan Congressional Trade Priorities and Accountability Act (BCTP).¹¹² Section 2 of the BCTP sets forth objectives, policies, and priorities of the U.S. in negotiating trade agreements. One such objective is the promotion of respect for workers' rights consistent with core labor standards, which include "the *elimination of discrimination* in respect of employment and occupation."¹¹³

"citizens," the Court held in *Minor v. Happersett* that the term applied to both men and women. 88 U.S. 162, 165 (1874).

105. See *United States v. Virginia*, 518 U.S. 515, 515 (1996) (holding that the Fourteenth Amendment's equal protection clause required parties defending gender-based government action to demonstrate an "exceedingly persuasive justification" for the classification).

106. Wagner, *supra* note 38, at 502.

107. The Dominican Republic-Central America FTA, Chapter 16 (available at https://ustr.gov/sites/default/files/uploads/agreements/cafta/asset_upload_file320_3936.pdf).

108. TIMOTHY BRIGHTBILL, CASES AND MATERIALS, INTERNATIONAL TRADE LAW & REGULATION 20 (2017).

109. Wagner, *supra* note 38, at 504.

110. OFFICE OF THE U.S. TRADE REPRESENTATIVE, BIPARTISAN TRADE DEAL: TRADE FACTS 1 (May 2007), https://ustr.gov/sites/default/files/uploads/factsheets/2007/asset_upload_file127_11319.pdf (emphasis added).

111. Wagner, *supra* note 38, at 520.

112. Susan Davis, *Congress renews 'fast track' trade authority*, USA TODAY (Jun. 24, 2015), <https://www.usatoday.com/story/news/politics/2015/06/24/congress-renews-fast-track/29226629/>.

113. S. 995, 114th Cong. §11(7)(e) (2015).

Regardless, the U.S. government is still not required to undertake gender assessments of proposed TPAs and gender remains unaddressed in many recent FTAs.¹¹⁴

B. CANADA

Gender equality is enshrined as a principle in the Canadian Constitution. Canada's Charter of Rights and Freedom includes an "Equality Rights" section which says, "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on [sex]."¹¹⁵

Canada has long pushed for human rights provisions in trade agreements. For example, the 2011 Canada-Colombia Free Trade Agreement requires an annual report to be issued on the "human rights effects of the trade agreement in both Canada and Colombia," which can include gendered gains and losses.¹¹⁶ The agreement also recommends collaborative activities to examine gender issues.¹¹⁷ Traditionally, labor provisions, which almost always also impact gender issues, have not been included in Canadian trade agreements themselves, but rather appear in side agreements, as with the NAALC.¹¹⁸

Canadian women's groups first became involved with shaping trade agreements in the 1980s.¹¹⁹ When NAFTA negotiations began, Canadian women's groups were strong opponents of the labor rights provisions, which they viewed as weak.¹²⁰ In fact, these groups more effectively mobilized to protest the NAFTA talks than their American counterparts, perhaps spurred to do so after experiencing massive economic dislocation in the 1980s.¹²¹ Canadian feminist scholar Marjorie Griffin Cohen suggests that the Liberal Party's electoral loss before the NAFTA negotiations might have made feminists more willing to criticize government action.¹²² Another theory proposes that the loose coalition structure of Canadian women's groups, as opposed to the more centralized, national advocacy group model of U.S. groups, enabled greater numbers of working-class women to voice dissent.¹²³ Regardless, Canadian groups saw women's issues as economic at a time of greater trade

114. Wagner, *supra* note 38, at 504–05, 518.

115. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

116. Pitman B. Potter et al., *Trade Agreements and Gender Equality Rights: What Role for HRIA?*, THE NORTH-SOUTH INSTITUTE, 186 (2012), https://commons.allard.ubc.ca/cgi/viewcontent.cgi?article=1264&context=fac_pubs.

117. *Id.* at xxi.

118. Franz C. Ebert & Anne Posthuma, *Labour Provisions In Trade Arrangements: Current Trends and Perspectives*, THE INTERNATIONAL INSTITUTE FOR LABOUR STUDIES, 11 (2011), http://www.ilo.org/wcmsp5/groups/public/—dgreports/—inst/documents/publication/wcms_192807.pdf.

119. Andrias, *supra* note 70, at 534.

120. *Id.* at 533–35.

121. *Id.* at 533 n.56.

122. *Id.*

123. *Id.*

liberalization, preceding the Uruguay Round negotiations that would create the WTO.¹²⁴ Leaders of the National Action Committee, a coalition of Canadian women's groups, explained: “[ultimately] all of the issues we were fighting for are related to the way society is constructed . . . [we] could not ignore the larger agenda of economic restructuring and the government's design for Canada, since they would affect virtually every issue on women's agenda for action.”¹²⁵

Although Canada's 2017 NAFTA negotiating priorities included incorporating a gender chapter, much of the opposition to the proposal came from Canada's minority party, the Conservatives.¹²⁶ The party leader, Andrew Scheer, criticized Trudeau's Liberal Party for using the NAFTA negotiations to address social issues, saying they should be handled domestically and not in trade negotiations at all.¹²⁷ Parliament members who supported the Chapter questioned the feasibility of its enactment, given the U.S.'s reticence to accept—or even acknowledge—other progressive measures, like climate change protections.¹²⁸

C. MEXICO

On paper, Mexico has some of the most progressive trade protections for workers in the world. The Mexican Constitution sets out that men and women are equal before the law, and that “every person . . . shall enjoy the guarantees granted by this Constitution.”¹²⁹ Article 123 directly discusses labor and social security, and in particular, mandates equal pay for equal work, maternal “rest” and leave, and overtime work restrictions for “women of any age.”¹³⁰ Although these laws were designed to afford Mexican workers, including pregnant

124. Brightbill, *supra* note 109, at 8–9.

125. Andrias, *supra* note 70, at 534.

126. Fortnam, *supra* note 96 (“The pushback we're getting is actually not from south of the border,” Trudeau said. ‘The pushback we're getting is from Canadian conservatives who said, ‘Oh no, this is about economics. It's about jobs, renegotiating NAFTA. It's not about rhetorical flourishes of being good on environment or being good on gender.’”).

127. *Canadian Conservative leader wants 'social issues' left out of NAFTA*, INSIDE U.S. TRADE'S WORLD TRADE ONLINE (Sept. 06, 2017), <https://insidetrade.com/trade/canadian-conservative-leader-wants-social-issues-left-out-nafta> (“Using a trade deal to try to advocate for non-trade-related types of issues in a sovereign country, in some cases right down to the state level, to me is jeopardizing a very important trade deal,” Scheer said. ‘To think of the literally hundreds of thousands of jobs that are directly linked to NAFTA, to put them in jeopardy for the Prime Minister to engage in other issues, to me is completely inappropriate.’”).

128. Porter, *supra* note 83. After the draft text of USMCA was released, a Canadian official remarked that Canada “succeeded at getting gender discrimination, more broadly, included in the deal . . . It's a win for [Canada].” Doug Palmer & Alexander Panetta, *New U.S.-Canada-Mexico Trade Pact Promises to Strengthen LGBTQ Rights*, POLITICO (Oct. 23, 2018, 4:21 PM), <https://www.politico.com/story/2018/10/23/new-nafta-lgbtq-rights-874004>.

129. Constitución Política de los Estados Unidos Mexicanos, CP, Diario Oficial de la Federación [DOF] 05-02-1917, Title I, últimas reformas DOF 10-02-2014 (Mex.), *translated in Constitution of Mexico*, ORGANIZATION OF AMERICAN STATES, https://www.oas.org/juridico/mla/en/mex/en_mex-int-text-const.pdf.

130. *Id.* at Title VI.

women, equal bargaining positions with their employers, they are “seldomly enforced.”¹³¹ Mexican employers continue to pay workers below the minimum wage, ignore unsafe working environments, and prevent union activity.¹³²

Pregnant women are particularly disadvantaged by these lax enforcement standards. As an example, Human Rights Watch found that pregnant women face discrimination during the “maquiladoras” or “industrial park” hiring processes, where they are often asked to disclose whether they are pregnant or sexually active.¹³³ This discrimination continues into employment, where women can be required to take periodic pregnancy tests and forced to resign if pregnant.¹³⁴ Human rights groups brought these issues before a U.S. NAO in 1997 under the framework of the NAALC.¹³⁵ The NAO was asked to evaluate whether Mexico failed to enforce its domestic non-discrimination laws by turning a blind eye to pervasive pregnancy-based discrimination in export-processing factories in northern Mexico in violation of the NAALC.¹³⁶ Mexico denied the violations to its labor laws, and the U.S. ultimately decided not to interpret Mexican law.¹³⁷ Thus, the progressive NAALC framework relies on Mexico’s ability—or willingness—to enforce its domestic laws, providing no real international mechanism for enforcement.

Mexico’s lax enforcement of labor laws was a topic of controversy in the 2017-2018 NAFTA talks. Canada’s biggest private sector union, UNIFOR, said that NAFTA should be abandoned if Mexico would not agree to better labor standards.¹³⁸ It posited that Mexico’s lax labor standards enabled the country to generate profits at the expense of Canadian and U.S. workers.¹³⁹ For example, after taking into consideration high inflation rates, wages in Mexico are lower now in real terms than when NAFTA took effect.¹⁴⁰ Mexico has drawn in investments by capitalizing on these low wages and on weak union rules.¹⁴¹ However, Mexican business leaders maintained that labor laws are domestic matters that should be resolved internally. The head of the National Agricultural Council, a Mexican farmworkers lobby, said that “more trade, not intervention in labor markets, [is] the best way for the region to grow economically.”¹⁴²

131. John P. Isa, *Testing the NAALC’s Dispute Resolution System: A Case Study*, 7 AM. U.J. GENDER SOC. POL. & L. 179, 187 (1998).

132. *Id.*

133. *Id.* at 187–890.8.

134. *Id.*

135. *See Pregnancy Testing Case*, U.S. NAO 970 (1997) (submitted by the Human Rights Watch, the International Labor Rights Fund, and the National Association of Democratic Lawyers of Mexico).

136. Andrias, *supra* note 70, at 549, 551.

137. *Id.* at 552.

138. Dave Graham & Sharay Angulo, *Sharp differences over labor surface at NAFTA talks in Mexico*, REUTERS (Sep. 3, 2017), <https://www.reuters.com/article/us-trade-nafta-labor/sharp-differences-over-labor-surface-at-nafta-talks-in-mexico-idUSKCN1BF00H>.

139. *Id.*

140. *See id.*

141. *See id.*

142. *Id.*

The tide may be turning. In late September 2018, Canada, Mexico, and the U.S. agreed to replace NAFTA with a free trade agreement called the “United States-Mexico-Canada Agreement” or USMCA.¹⁴³ USMCA includes stronger labor provisions, including one that requires forty percent of a car to be made in a plant where workers make sixteen U.S. dollars per hour—a fivefold increase to the average Mexican autoworker’s wage.¹⁴⁴ Other requirements include protections for labor unions and stricter anti-corruption laws.¹⁴⁵ For tougher provisions to have teeth, however, the NAALC’s example demonstrates that an enforcement mechanism must not rely upon a state to interpret its own domestic statutes.

V. SUGGESTED LEGAL PROVISIONS: MODEL LANGUAGE AND ENFORCEMENT MECHANISMS

Most countries have, in one way or another, committed themselves to gender equality, whether through their U.N. membership, bilateral or regional trade agreements that buffer labor or gender equality, or domestic legal frameworks. Yet, trade agreements continue to exacerbate gender inequality, and existing agreements do not offer realistic forums in which working women can seek relief for even the most egregious violations. This note will now discuss model gender equality trade provisions and how trade sanctions, penalties imposed by one state or group against another state, can incentivize compliance. More specifically, it will explore how targeted sanctions imposed by a multilateral state organization like the WTO, or through a trade pact like NAFTA, may operate as nonviolent enforcement mechanisms for human rights norms, using the Sergei Magnitsky Rule of Law Accountability Act of 2012 as a model framework.¹⁴⁶

A. TARGETED VERSUS COMPREHENSIVE SANCTIONS

Comprehensive trade sanctions are directed at states as whole entities and affect entire populations. They may include trade restrictions, embargoes, and travel restrictions, and are generally disfavored by free trade-promoting organizations like the WTO. The WTO instead favors “removal of trade barriers found to be inconsistent with covered agreements rather than imposition of a second trade barrier in retaliation,” and pushes members to alternatively use WTO institutional

143. See Heather Long, *U.S., Canada and Mexico Just Reached a New NAFTA Deal. Here’s What’s In It.*, WASH. POST (Oct. 1, 2018), https://www.washingtonpost.com/business/2018/10/01/us-canada-mexico-just-reached-sweeping-new-nafta-deal-heres-whats-it/?utm_term=.273765d9b028https://www.washingtonpost.com/business/2018/10/01/us-canada-mexico-just-reached-sweeping-new-nafta-deal-heres-whats-it/?utm_term=.273765d9b028. At the time of this writing, the U.S. Congress had not approved USMCA, though confirmation appears likely. *Id.*

144. See Carrie Kahn, *Will NAFTA 2.0 Really Boost Mexican Wages?*, NPR (Oct. 17, 2018, 9:05 AM), <https://www.npr.org/2018/10/17/657806248/will-nafta-2-0-really-boost-mexican-wages>.

145. *Id.*

146. Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012, Pub. L. No. 112–208, 126 Stat. 1496 (2012) [hereinafter Magnitsky Act].

dispute settlement mechanisms to resolve these issues.¹⁴⁷ The WTO's dispute settlement procedures allow members to file complaints to a Dispute Settlement Board (DSB) and request consultations with the country that has purportedly taken action contrary to its obligations as a WTO member.¹⁴⁸ If parties to the action cannot agree to a resolution within sixty days, the DSB gathers a panel of experts, which then issues a deciding report.¹⁴⁹ Should the losing party refuse to implement changes to come into compliance with WTO standards within a reasonable timeframe, parties may agree to interim compensation pending full implementation; if these negotiations fail, only then may a member retaliate with economic sanctions.¹⁵⁰

However, trade sanctions have generally gained popularity since the 1990s, becoming the "tool of choice" for the U.N. Security Council in addressing threats or breaches of international peace.¹⁵¹ Before 1990, the Security Council imposed sanctions against only two states. Since the end of the Cold War, sanctions have been used over twenty times, "most often targeting parties to an intrastate conflict, as in Somalia, Liberia, and Yugoslavia in the 1990s."¹⁵² Recently, the Security Council passed a resolution imposing trade sanctions on North Korea in response to its sixth and largest nuclear weapons test.¹⁵³ The adopted measures "cap North Korea's oil imports, ban textile exports, end additional overseas laborer contracts, suppress smuggling efforts, stop joint ventures with other nations and sanction designated North Korean government entities."¹⁵⁴ The Security Council hoped these stronger sanctions would cause North Korea to alter its behavior and come in line with the will of the international community.¹⁵⁵

Some drawbacks of comprehensive sanctions include concerns over their effectiveness, detrimental humanitarian effects, and retaliation. In the case of North Korea, some experts are concerned the new measures will "only be effective if paired with a pragmatic strategy of engagement."¹⁵⁶ Daryl G. Kimball, the Director of the Arms Control Association, warned that no sanctions-only strategy would bring the country in compliance with nuclear nonproliferation standards.¹⁵⁷

147. Elizabeth Clark Hersey, *No Universal Target: Distinguishing between Terrorism and Human Rights Violations in Targeted Sanctions Regimes*, 38 BROOK. J. INT'L L. 1231, 1233–34 n.15 (2013).

148. Brightbill, *supra* note 109, at 39.

149. *Id.* at 41.

150. *Id.*

151. *Id.* at 1233.

152. Jonathan Masters, *What Are Economic Sanctions?*, COUNCIL ON FOREIGN RELATIONS (Aug. 7, 2017), <https://www.cfr.org/backgrounder/what-are-economic-sanctions>.

153. Zachary Cohen & Richard Roth, *UN passes fresh sanctions on North Korea*, CNN POLITICS (Sept. 12, 2017, 9:31 AM), <http://www.cnn.com/2017/09/11/politics/north-korea-un-security-council-vote/index.html>.

154. *Id.*

155. *See id.*

156. Somni Sengupta, *After U.S. Compromise, Security Council Strengthens North Korea Sanctions*, N.Y. TIMES (Sept. 11, 2017), <https://www.nytimes.com/2017/09/11/world/asia/us-security-council-north-korea.html>.

157. *Id.*

Past sanctions against the country have prevented humanitarian groups like Save the Children, Welthungerhilfe, and Concern Worldwide from transferring money to fund aid projects, many of which assist malnourished children.¹⁵⁸ During this round of sanctions talks, British officials worried that if the Security Council accepted the original American-proposed sanctions bill, “North Koreans would be showing photographs of freezing children, and portraying the West as architects of a genocide.”¹⁵⁹ Throughout the sanctions talks, North Korea warned that it would inflict the “greatest pain and suffering” on the U.S. should tougher international sanctions pass.¹⁶⁰

Targeted sanctions, or “smart” sanctions, are directed at individuals.¹⁶¹ They aim to minimize civilian suffering and can include asset freezes, arms embargoes, foreign aid reductions, and capital restraints.¹⁶² Both individual states and multilateral groups, like the U.N., can impose targeted or comprehensive sanctions. For example, in 2001, the Security Council imposed targeted sanctions against the Taliban authorities in Afghanistan and specified that member states shall freeze funds and financial assets of specific individuals, including Osama bin Laden.¹⁶³ Traditionally, targeted economic sanctions have been used to retaliate against terrorism, but recently have expanded to counteract human rights violations—presenting a means through which to retaliate against violations of gender equality agreements.¹⁶⁴

B. THE U.S. MAGNITSKY ACT AS AN EXAMPLE

The U.S. Congress passed the Magnitsky Act in 2012 (Act), with the hope that it would express support for the Russian people in realizing their “full economic potential.”¹⁶⁵ Congress also intended for the Act to denounce human rights abuses in Russia—specifically the arrest, torture, and subsequent death of an anti-corruption lawyer, Sergei Magnitsky—and to serve as a tool to promote these rights.¹⁶⁶ The Act enabled the U.S. President to determine that individual Russian citizens had violated international human rights laws and subsequently place

158. Emma Batha, *North Korea Sanctions Threaten Humanitarian Aid: Group*, REUTERS (May 22, 2013), <https://www.reuters.com/article/us-korea-north-aid/north-korea-sanctions-threaten-humanitarian-aid-group-dUSBRE94L0XO20130522>.

159. Sengupta, *supra* note 161.

160. *Id.*

161. *See* Masters, *supra* note 157; Hersey, *supra* note 152, at 1234.

162. Masters, *supra* note 157.

163. Press Release, U.N. Security Council, Security Council Imposes Wide New Measures Against Taliban Authorities in Afghanistan, Demands Action on Terrorism, U.N. Press Release SC/6979 (Dec. 19, 2000) (on file at <https://www.un.org/press/en/2000/sc6979.doc.htm>).

164. Hersey, *supra* note 152, at 1235.

165. Magnitsky Act, § 402.

166. Kim Van der Borcht, *From Jackson-Vanik to Magnitsky: Continuing a Tradition of Ineffective Human Rights Bolt Ons to Trade Bills*, 7 HUM. RTS. & INT’L LEGAL DISCOURSE 237, 252 (2013). After passage of the U.S. Magnitsky Act, six additional countries, including the United Kingdom and Canada passed their own versions of the Act. *See* Bill Browder, *I’m Bill Browder. Here’s the Biggest Mistake Putin Made When Trying to Get Access to Me Through Trump*, TIME (July 17, 2018), <http://time.com/5340545/bill-browder-vladimir-putin-magnitsky-act-donald-trump/>. Eight other countries are also considering similar legislation. *Id.*

such individuals on a blacklist that would prevent them from entering the U.S. and would freeze their U.S. assets.¹⁶⁷ Eighteen Russians were placed on the list in 2013.¹⁶⁸ The Russians responded with Yakovlev's Law, a sanctions bill mirroring much of the same content in the Act, but going further by prohibiting U.S. non-profit organizations from operating in Russia and preventing U.S. citizens from adopting Russian children.¹⁶⁹

The Act was criticized by the international community, seen by many to violate international law principles of sovereignty and due process rights.¹⁷⁰ It did not allow individuals to contest their inclusion on the blacklist, and did not originally explain what "credible evidence" the President used to reach such decisions.¹⁷¹ Although the 2012 Act targeted human rights abusers in Russia only, the 2016 Global Magnitsky Human Rights Accountability Act broadened the original Act's regional focus to target human right abusers globally.¹⁷²

C. MODEL LANGUAGE

Although gender equality violations may not shock the conscience in the same way as the death of Sergei Magnitsky, the Act serves as an example of how targeted economic sanctions can be used to respond to human rights violations. Should such sanctions emanate from a multilateral trade agreement coalition like the WTO or NAFTA, which already work to set the legal ground rules for international commerce, they are less likely to be circumvented or provoke retaliation, and more likely to produce their intended goals than unilateral sanctions, "where targets have more alternative providers of the goods the sender is restricting."¹⁷³ With this hypothetical system, a member state would petition the multilateral trade bloc to impose sanctions for gender equality rights violations, and the determination would bind *all member states*. This is akin to the U.N. Security Council sanctions regime, which requires all member states to comply with decisions.¹⁷⁴

The Canada-Chile trade deal can inform the general provisions of such a model agreement, which should emphasize that committed parties intend to contribute to sustainable development by "incorporating a gender perspective into the promotion of inclusive economic growth."¹⁷⁵ The model agreement should then go further than the Canada-Chile deal by outlining a sanctions enforcement

167. Hersey, *supra* note 152, at 1231–32.

168. Sanctions, Export Controls, and Certain Other Restrictions, 2013 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW, ch. 16, §A(5) at 505.

169. Hersey, *supra* note 152, at 1246–47.

170. *Id.* at 1235.

171. *Id.* at 1246.

172. Global Magnitsky Human Rights Accountability Act, Pub. L. No. 114–328, 130 Stat. 2000 (2016) [hereinafter Global Magnitsky Act].

173. Hersey, *supra* note 152, at 1262–63.

174. *The Security Council*, UNITED NATIONS SECURITY COUNCIL, <http://www.un.org/en/sc/> (last visited Nov. 2, 2018).

175. Agreement to Amend the Free Trade Agreement Between the Government of Canada and the Government of the Republic of Chile, *supra* note 87.

mechanism. This could be modeled on the Global Magnitsky Act, and could target the most egregious gender rights violations.

The key language in the Global Magnitsky Act is as follows:

The President may impose the sanctions [including inadmissibility to the U.S. and blocking of property] with respect to any foreign person the President determines, based on *credible evidence*- (1) is responsible for . . . *gross violations of internationally recognized human rights* committed against individuals in any foreign country . . . (2) acted as an agent of or on behalf of a foreign person in a matter relating to an activity described in paragraph (1); (3) is a government official, or a senior associate of such an official, that is responsible for, or complicit in, ordering, controlling, or otherwise directing, *acts of significant corruption* . . . or (4) has materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services in support of, an activity described in paragraph (3).¹⁷⁶

Similarly, economic sanctions could be imposed for violations of gender equality agreements:

The [NAFTA or WTO members] may impose the sanctions . . . with respect to any foreign person [within a member state] the [NAFTA or WTO] determines, based on *credible evidence*- (1) is responsible for [*gross violations of internationally and domestically recognized gender equality rights*] committed against individuals in any country . . . (2) acted as an agent of or on behalf of a foreign person in a matter relating to an activity described in paragraph (1); (3) is a government official, or a senior associate of such an official, that is responsible for, or complicit in, ordering, controlling, or otherwise directing, *acts of significant corruption [relating to the furtherance of gender inequality]* . . . or (4) has materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services in support of, an activity described in paragraph (3).¹⁷⁷

Before imposing sanctions under the Global Magnitsky Act, the U.S. President must consider “credible evidence” provided by congressional committees, other countries, and nongovernmental organizations that monitor violations of human rights.¹⁷⁸ The Department of State can also identify and submit names of

176. Global Magnitsky Act, § 1263. “Gross violations of internationally recognized human rights” was defined the same way as in the Foreign Assistance Act of 1961. *Id.* at § 1262. It includes “torture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges and trial, causing the disappearance of persons by the abduction and clandestine detention of those persons, and other flagrant denial of the right to life, liberty, or the security of person.” 22 U.S.C. § 2304 (d)(1).

177. *Id.*

178. Global Magnitsky Act, § 1263(c).

sanctionable foreign persons who it believes meet the criteria of the Global Magnitsky Act.¹⁷⁹ Similarly, after a member state identifies an individual deserving of sanction in this proposed system, information gathered by multilateral groups like U.N. Women, the ILO, domestic government intelligence and human rights agencies, and nongovernmental organizations, could aid in gathering sufficient evidence of that individual's commission of gross acts of gender inequality. Activity that economically disadvantages women could be classified as a "gross [violation] of internationally and domestically recognized gender equality rights" if it is intentional, pervasive or systemic, and egregious in effect. In order to prevent misuse, evidentiary standards, and procedures dictating how the organization would elect to impose targeted sanctions would need to be fully established.

Establishing this kind of sanctions framework for violations of gender equality agreements would be monumental—at last, it would make obligations enforceable and egregious violations punishable. Overall, by targeting sanctions to affect individual violators, hardship is less likely to befall workers.¹⁸⁰ For example, unlike where U.S. NAO was able to determine that Mexico turned a blind eye to pervasive occupational health and safety law violations, but could not compel the state of Mexico to enforce domestic laws that protected women workers, under this proposed framework, a challenging state could compel enforcement through a multilateral trade organization's threat or actual imposition of *targeted* sanctions—not on Mexico, but rather upon the Mexican company heads perpetuating these violations.¹⁸¹

VI. CONCLUSION

Gender inequality continues to persist in many forms today and is often amplified by free trade agreements. However, numerous gender-responsive policies, including maternity benefits, equal pay, and tax incentives, can work to correct unintended side effects of trade liberalization. International law and state actors recognize the importance of protecting and promoting gender equality, whether through U.N. instruments like CEDAW, bilateral agreements like the Canada-Chile agreement, or domestic laws like Mexico's Article 123.

Existing agreements fail to protect women by not providing a means to punish violators of gender equality agreements. Here, the U.S. Magnitsky Act, which imposes targeted economic sanctions against human rights abusers, can be used as a model for trade agreements that condemn similar gender equality violations. International trade groups, such as the WTO and members of NAFTA, can draft comprehensive gender equality trade agreements by drawing upon the goals dictated in the Canada-Chile agreement and the enforcement mechanisms of the Magnitsky Act. Together, multilateral groups can work toward common free trade goals, but check each other to ensure that fair trade goals are not left behind.

179. Global Magnitsky Act, § 1263(i).

180. See Hersey, *supra* note 152, at 1264.

181. Andrias, *supra* note 70, at 549, 551.