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## LOOKING AT REGIONAL TRADE AGREEMENTS THROUGH THE LENS OF GENDER

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### INTRODUCTION

This Article focuses on an unresolved issue within international trade law and policy, namely whether there is a need to consider gender-differentiated impacts of trade agreements and if so, how such impacts should be addressed. The author argues in favor of a gender aware approach to trade, discussing this topic within the context of regional trade agreements (“RTAs”), which are being used increasingly as a route to economic integration and trade liberalization among nations.

Part I highlights the growing importance of RTAs as a means to facilitate international trade and includes a focus on recent developments in United States trade policy. It also discusses the reasons RTAs have become popular and some of the advantages of liberalizing trade through RTAs, in addition to working through the multilateral process in the World Trade Organization (“WTO”). Part II focuses on the development of gender-based critiques of international trade law and policy and the rationale for incorporating a gender perspective into international trade matters. It notes the absence of gender issues in the agenda of the WTO and the ways in which the failure to address gender issues in this context may adversely impact women. It also discusses some of the gender-based critiques of RTAs entered into by the United States in recent years. Part III examines two trends within RTAs that may prove helpful to women impacted by trade liberalization, namely the inclusion of clauses guaranteeing core labor standards (“labor rights clause”) in several recent RTAs to which the United States is a party and the use of gender analysis of trade relations by regional economic organizations, such as the Asia Pacific Economic Cooperation (“APEC”).

The Article concludes by suggesting that negotiations on regional economic integration may be more appropriate fora in which to address gender concerns than the ongoing multilateral trade negotiations within the WTO. While the inclusion of labor rights clauses and the use of gender analysis in the

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context of RTAs is a hopeful sign, there is still more work to be done to ensure that the impacts of trade liberalization on women are adequately identified and addressed.

### I. THE RISE OF REGIONAL TRADE AGREEMENTS

We live in a world where free trade is embraced by most nations, at least in principle. Free trade can be achieved through a number of different legal mechanisms in which governments agree to remove tariff and non-tariff barriers to trade. These mechanisms include the multilateral trade treaties of the WTO, including the General Agreement on Tariffs and Trade (“GATT”), RTAs, and unilateral action by national governments.<sup>1</sup>

RTAs have been around for centuries, but in recent years the pace at which countries have been entering into new RTAs has accelerated. The WTO Secretariat reported that, as of January 15, 2012, 511 RTAs have been notified to the GATT/WTO, of which 319 RTAs were in force on that date.<sup>2</sup> The WTO has noted this number is likely to increase due to the large number of RTAs currently under negotiation.<sup>3</sup>

There are several reasons for this rapid increase in RTAs, including dissatisfaction with the pace of ongoing negotiations within the WTO to further dismantle trade barriers that remained at the end of the Uruguay Round.<sup>4</sup> For those countries seeking to move further in the direction of trade liberalization and economic integration than the WTO system will permit, RTAs provide an alternative route to pursue those goals. Without having to work through a process involving some 150 plus Members of the WTO (“WTO Members”), negotiations become more streamlined and agreement on a wider range of issues is reached more quickly.<sup>5</sup>

The term RTA encompasses several different types of trading arrangements. These include free trade agreements (“FTAs”), such as the North American Free Trade Agreement (“NAFTA”), in which member countries have agreed to reduce or eliminate trade barriers among themselves, customs unions (“CU”), such as the European Union (“EU”), which is a deeper

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1. See Douglas A. Irwin, *Multilateral and Bilateral Trade Policies in the World Trading System: An Historical Perspective*, in NEW DIMENSIONS IN REGIONAL INTEGRATION 90, 90–91 (Jaime De Melo & Arvind Panagariya eds., 1993).

2. *Regional Trade Agreements*, WORLD TRADE ORG., [http://www.wto.org/english/tratop\\_e/region\\_e/region\\_e.htm](http://www.wto.org/english/tratop_e/region_e/region_e.htm) (last visited May 20, 2012); General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 188 [hereinafter GATT 1947].

3. *Regional Trade Agreements*, *supra* note 2.

4. See Shujiro Urata, *Globalization and the Growth in Free Trade Agreements*, ASIA-PAC. REV., May 2002, at 20, 26.

5. See WORLD TRADE ORG., WORLD TRADE REPORT 2011: THE WTO AND PREFERENTIAL TRADE AGREEMENTS: FROM CO-EXISTENCE TO COHERENCE 48 (2011), available at [http://www.wto.org/english/res\\_e/booksp\\_e/anrep\\_e/world\\_trade\\_report11\\_e.pdf](http://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report11_e.pdf).

form of economic integration in which member states also maintain common tariffs and trade policies with respect to the rest of the world, and interim arrangements that will lead to either an FTA or CU.<sup>6</sup> RTAs can be bilateral, like the U.S.-Chile FTA,<sup>7</sup> or plurilateral, like NAFTA.<sup>8</sup> According to the WTO, over 90% of the RTAs currently in existence are FTAs, and the rest are CUs.<sup>9</sup> Not all such arrangements are among countries in the same geographic region, with bilateral FTAs between the United States and Israel, Jordan and Singapore as examples.<sup>10</sup> The WTO estimates that such cross-regional agreements account for half of all RTAs currently in force.<sup>11</sup> For this reason, such arrangements are often referred to as preferential trade agreements, or PTAs.<sup>12</sup>

There is some friction between the WTO regime and RTAs since RTAs discriminate against countries outside the regional arrangement, and this is inconsistent with the most-favored nation principle (“MFN”), one of the conceptual pillars of the WTO and a primary reason that many nations seek WTO membership.<sup>13</sup> While the MFN clause of GATT requires that any trading advantage granted by a GATT contracting party to foreign goods must be immediately and unconditionally extended to like products from all other contracting parties, RTAs grant tariff preferences to their members that provide for better than MFN treatment.<sup>14</sup> In addition, while the economic effects of RTAs on global trade flows and growth, as well as their regional economic impacts, are not fully understood, it is standard economic theory that RTAs increase trade between member countries and reduce trade with third countries, leading to negative welfare effects for non-members.<sup>15</sup> In addition, the increase in the number of discriminatory trade blocs seems like a throwback to

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6. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 107 Stat. 2057, 32 I.L.M. 289 [hereinafter NAFTA]. The definitions of FTA and CU are set forth in GATT Article XXIV ¶ 8, and interim arrangements are recognized in GATT Article XXIV ¶ 5. Special Protocol Relating To Article XXIV of the General Agreement on Tariffs and Trade, art. XXIV, ¶¶ 5, 8, Mar. 24, 1948, 62 Stat. 2013, 62 U.N.T.S. 56 [hereinafter GATT art. XXIV].

7. Free Trade Agreement, U.S.-Chile, June 6, 2003, 42 I.L.M. 1026.

8. North American Free Trade Agreement, *supra* note 6.

9. *Regional Trade Agreements*, *supra* note 2.

10. *E.g.*, Free Trade Area Agreement, U.S.-Isr., Apr. 22, 1985, 24 I.L.M. 653; Agreement Between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area, U.S.-Jordan, Oct. 24, 2000, 41 I.L.M. 63; Free Trade Agreement, U.S.-Sing., May 6, 2003, 42 I.L.M. 1026.

11. WORLD TRADE ORG., *supra* note 5, at 6.

12. *See id.*

13. GATT 1947, *supra* note 2, art. I.

14. *See Regional Trade Agreements: Rules: The WTO's Rules*, WORLD TRADE ORG., [http://www.wto.org/english/tratop\\_e/region\\_e/regrul\\_e.htm](http://www.wto.org/english/tratop_e/region_e/regrul_e.htm) (last visited May 20, 2012).

15. WORLD TRADE ORG., *supra* note 5, at 9.

the pre-World War II era, when such blocs were common.<sup>16</sup> This appears inconsistent with the WTO's goal of increasing economic welfare through free trade and is at odds with the modern trend toward a more open and non-discriminatory trading system, evidenced by the signing of GATT in 1947 and the establishment of the WTO in 1995.

Nevertheless, the WTO rules permit the establishment of RTAs pursuant to a special exception in the GATT requiring that any proposed RTA cover substantially all of the trade among group members, that trade barriers to non-members are not raised, that such proposed RTA is formed within a reasonable period of time, and that the WTO receive notice.<sup>17</sup> RTAs are tolerated because they are perceived as complementary to the WTO's goal of promoting global economic welfare through trade liberalization.

Since 1996, RTAs have been subject to a higher level of scrutiny by the WTO to determine whether they are consistent with the WTO treaties and are serving as "building blocks" rather than "stumbling blocks" to achievement of the WTO's mission.<sup>18</sup> In 1996, the WTO General Council signaled its concern about the proliferation of RTAs by forming a Regional Trade Agreements Committee to assess the consistency of RTAs with WTO rules and to determine the relationship between regional and multilateral trade arrangements.<sup>19</sup> In addition, the WTO General Council adopted a new

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16. See KERRY A. CHASE, TRADING BLOCS: STATES, FIRMS, AND REGIONS IN THE WORLD ECONOMY 51–52 (2005).

17. GATT article XXIV sets forth conditions to the establishment of an FTA or CU, including not raising trade barriers, covering substantially all the trade among the RTA members, completing an FTA or CU within a reasonable period of time in the case of interim arrangements, and notifying GATT/WTO. GATT art. XXIV, *supra* note 6, 62 Stat. at 2014–15, 62 U.N.T.S. at 58–62. In addition, RTAs are permitted under the 1979 Decision on Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries ("Enabling Clause"), which permits preferential trade arrangements in trade in goods between developing country Members and Article V of the General Agreement on Trade in Services ("GATS"), which permits RTAs involving trade in services for both developed and developing countries. *Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries*, ¶ 1, L/4903 (Nov. 28, 1979), GATT B.I.S.D. (26th Supp.) at 203 (1980) [hereinafter *Enabling Clause*]; General Agreement on Trade in Services, Agreement Establishing the World Trade Organization, Annex 1B, art. V, ¶ 3(b), Apr. 15, 1994, 1869 U.N.T.S. 183 [hereinafter GATS].

18. However, GATT art. XXIV ¶ 5 states that the provisions of GATT shall not prevent the formation of a CU or FTA or interim arrangement meeting the specified conditions. GATT art. XXIV, *supra* note 6, 62 Stat. at 2014, 62 U.N.T.S. at 58–60. The Enabling Clause and GATS article V also create exceptions for RTAs meeting certain criteria. *Enabling Clause*, *supra* note 17, at 203–04; GATS, *supra* note 17, 1869 U.N.T.S. at 188. In fact, it is often difficult to determine whether the criteria for specific RTAs are being met and few RTAs have been challenged.

19. *Regionalism: Friends or Rivals?*, WORLD TRADE ORG., [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/bey1\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/bey1_e.htm) (last visited May 20, 2012).

Transparency Mechanism on RTAs in 2006, which established a formal process for early notification and assessment of the compatibility of the RTA with WTO rules.<sup>20</sup> The heightened level of scrutiny has not slowed the pace at which RTAs are being formed.

Regional trade agreements vary in their scope. Traditionally, the focus was on negotiating trade preferences to avoid high MFN tariff rates.<sup>21</sup> However, many modern RTAs concern a wide range of other matters as well, signifying a deeper form of integration among member countries. The WTO has classified these elements into WTO+ and WTO-X provisions.<sup>22</sup> So-called WTO+ provisions refer to deeper integration in areas covered by the WTO treaties, such as industrial and agricultural tariffs, technical barriers to trade, trade in services, intellectual property, and trade-related investment measures.<sup>23</sup> So-called WTO-X provisions commonly cover areas not included in the WTO treaties like competition policy, investment, and free movement of capital, and, less frequently, provisions on environmental protection, core labor standards, and visa and asylum matters.<sup>24</sup> As such, RTAs lead, rather than follow, the WTO on matters of economic integration, often incorporating binding commitments on matters before the WTO has reached those same issues.

Because RTAs reach so deeply into regulatory areas traditionally reserved to national governments, they have proven controversial in some instances. For example, during the debate in the United States over NAFTA in 1993, many members of Congress opposed the treaty, and it passed by only a thin margin.<sup>25</sup> Even after NAFTA's entry into force, the political controversy continued. A lawsuit was filed in a federal court challenging NAFTA on the grounds that the method of its passage was unconstitutional and asked that NAFTA be declared null, void and of no effect and that the President be directed to terminate the treaty.<sup>26</sup> Years later, during the presidential campaign of 2008, the debate over NAFTA was revived with some Democratic

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20. General Council Decision, *Transparency Mechanism for Regional Trade Agreements*, ¶¶ 3–4, WT/L/671 (Dec. 18, 2006).

21. *See Scope of RTAs*, WORLD TRADE ORG., [http://www.wto.org/english/tratop\\_e/region\\_e/scope\\_rta\\_e.htm](http://www.wto.org/english/tratop_e/region_e/scope_rta_e.htm) (last visited May 20, 2012).

22. WORLD TRADE ORG., *supra* note 5, at 11.

23. *Id.*

24. *Id.*

25. Constance Z. Wagner, *Another Attack on the Fast Track*, 44 ST. LOUIS U. L.J. 1047, 1048 (2000).

26. *Id.* This challenge ultimately failed. *See Made in the USA Found. v. United States*, 56 F. Supp. 2d 1226 (N.D. Ala. 1999), *vacated*, 242 F.3d 1300 (11th Cir. 2001).

candidates advocating it be renegotiated.<sup>27</sup> In the United States, political controversy continues to surround the negotiation and ratification of RTAs.

National governments enter into RTAs for both economic and political reasons, in order to increase trade and investment opportunities across national borders but also to strengthen political ties with allies. One of the primary reasons for entering into such agreements in the past has been to get around high MFN tariff rates. This traditional goal is no longer of paramount importance since world-wide tariff rates have fallen dramatically since the GATT and WTO have come into existence.<sup>28</sup> Instead, the emphasis in negotiating RTAs has now shifted to covering new areas of trade and to dismantling non-tariff barriers to trade, the so-called WTO+ and WTO-X areas.<sup>29</sup> In some cases, the WTO-X areas have gone beyond purely economic issues and have touched on sensitive social issues impacting government policy, most notably environmental protection and labor rights. For example, NAFTA includes provisions on both of these topics, in two separate side agreements, namely the North American Agreement on Labor Cooperation (“NAALC”) and the North American Agreement on Environmental Cooperation (“NAAEC”).<sup>30</sup> The formation of political alliances is also a motivating factor in the creation of RTAs, sometimes overshadowing the economic gains that are anticipated.<sup>31</sup>

The twin goals of fostering both stronger economic and political ties with allies are evident in recent United States trade policy. Although the United States was a leader in the multilateral trade negotiations under the GATT that eventually led to the establishment of the WTO, United States trade policy is increasingly being dominated by bilateral and regional FTAs.<sup>32</sup> The FTAs currently in force to which the United States is a party include NAFTA, the Dominican Republic-Central America Free Trade Agreement (“DR-CAFTA”), and bilateral FTAs with Israel, Jordan, Singapore, Chile, Australia, Morocco, Oman, Bahrain, and Peru.<sup>33</sup> Bilateral FTAs have also been concluded with

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27. Katharine Q. Seelye, *Clinton Says She Raised ‘Yellow Caution Flag’ on Nafta*, CAUCUS (Apr. 1, 2008, 3:48 PM), [thecaucus.blogs.nytimes.com/2008/04/01/Clinton-says-she-raised-yellow-caution-flag-on-nafta/](http://thecaucus.blogs.nytimes.com/2008/04/01/Clinton-says-she-raised-yellow-caution-flag-on-nafta/).

28. WORLD TRADE ORG., *supra* note 5, at 11 (noting that WTO estimated that the average applied tariff across all products and countries had fallen to 4% by 2009).

29. *See id.*

30. North American Agreement on Labor Cooperation, U.S.-Can.-Mex., Sept. 14, 1993, 32 I.L.M. 1499 [hereinafter NAALC]; North American Agreement on Environmental Cooperation, U.S.-Can.-Mex., Sept. 14, 1993, 32 I.L.M. 1480 [hereinafter NAAEC].

31. David A. Gantz, *The “Bipartisan Trade Deal,” Trade Promotion Authority and the Future of U.S. Free Trade Agreements*, 28 ST. LOUIS U. PUB. L. REV. 115, 127 (2008).

32. *Id.* at 116–17.

33. NAFTA, *supra* note 6; Dominican Republic-Central America-United States Free Trade Agreement, Aug. 5, 2004 [hereinafter DR-CAFTA], available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text>; Free

Colombia, Panama and Korea, and after much delay due to political opposition in Congress, were finally approved by Congress on October 12, 2011.<sup>34</sup> The U.S.-Colombia FTA became effective on May 15, 2012.<sup>35</sup>

Most FTAs entered into by the United States prior to 2007, as well as the entry of the United States into the WTO, were made possible through a special legislative procedure known as Trade Promotion Authority (“TPA”).<sup>36</sup> More commonly known as fast track negotiating authority, TPA was an expedited procedure for negotiating international trade agreements and implementing them into U.S. law that was first used in the Trade Act of 1974, and was

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Trade Area Agreement, U.S.-Isr. *supra* note 10; Agreement Between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area, U.S.-Jordan, *supra* note 10; Free Trade Agreement, U.S.-Sing., *supra* note 10; Free Trade Agreement, U.S.-Chile, *supra* note 7; United States-Australia Free Trade Agreement, U.S.-Austl., May 18, 2004, 43 I.L.M. 1248; United States-Morocco Free Trade Agreement, U.S.-Morocco, June 15, 2004, 44 I.L.M. 544; United States-Oman Free Trade Agreement, U.S.-Oman, Jan. 18, 2006, *available at* <http://www.ustr.gov/trade-agreements/free-trade-agreements/oman-fta/final-text>; United States-Bahrain Free Trade Agreement, U.S.-Bahr., Sept. 14, 2004, 44 I.L.M. 544; United States-Peru Trade Promotion Agreement, U.S.-Peru, Apr. 12, 2006, *available at* <http://www.ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text>. Other negotiations have been undertaken but have either failed or are currently dormant, including the effort to establish a Free Trade Area of the Americas and to conclude bilateral agreements with Malaysia, Thailand, the Southern African Customs Union, and the United Arab Emirates. *See, e.g., No Trade Deal at Americas Summit*, BBC NEWS (Nov. 6, 2005), <http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/2/hi/americas/4410190.stm>; *Malaysia Free Trade Agreement*, OFF. U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/trade-agreements/other-agreements/malaysia-fta> (last visited May 20, 2012); *Thailand*, OFF. U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/countries-regions/southeast-asia-pacific/thailand> (last visited May 20, 2012); *Southern African Customs Union (SACU)*, OFF. U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/countries-regions/africa/regional-economic-communities-rec/southern-african-customs-union-sacu> (last visited May 20, 2012); Issac John, *Blow to UAE-US FTA Hopes*, KHALEEJ TIMES ONLINE (July 1, 2007), [http://www.khaleejtimes.com/DisplayArticle.asp?xfile=data/business/2007/July/business\\_July20.xml&section=business](http://www.khaleejtimes.com/DisplayArticle.asp?xfile=data/business/2007/July/business_July20.xml&section=business).

34. United States-Colombia Free Trade Agreement, U.S.-Colom., Nov. 22, 2006, *available at* <http://www.ustr.gov/trade-agreements/free-trade-agreements/colombia-fta/final-text>; United States-Panama Trade Promotion Agreement, U.S.-Pan., June 28, 2007, *available at* <http://www.ustr.gov/trade-agreements/free-trade-agreements/panama-tpa/final-text>; United States-Korea Free Trade Agreement, U.S.-Kor., June 30, 2007, *available at* <http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text>; *see* Binyamin Appelbaum & Jennifer Steinhauer, *Trade Deals Pass Congress, Ending 5-Year Standoff*, N.Y. TIMES, Oct. 13, 2011, at A1.

35. Press Release, Office of the U.S. Trade Representative, United States, Columbia Set Date for Entry into Force of U.S.-Columbia Trade Agreement (Apr. 15, 2012), *available at* <http://www.ustr.gov/about-us/press-office/press-releases/2012/april/united-states-colombia-set-date-entry-force-us-colom>.

36. *See* J.F. HORNBECK & WILLIAM H. COOPER, CONG. RESEARCH SERV., RL33743, TRADE PROMOTION AUTHORITY (TPA) AND THE ROLE OF CONGRESS IN TRADE POLICY I (2011).



renewed by Congress on successive occasions, but has not been renewed since it last expired in 2007.<sup>37</sup> Under TPA, Congress granted the President authority to negotiate the terms of a trade agreement with a foreign government, but required the President to notify, consult, and submit the agreement, along with proposed implementing legislation, to Congress for final approval.<sup>38</sup> Congress was permitted to either approve or veto the proposed deal through an up or down vote within prescribed time limits, but could not alter the terms of the agreement as negotiated.<sup>39</sup> TPA proved to be a potent tool to facilitate the free trade agenda of successive administrations in Washington, since it limited the ability of Congress to renegotiate the terms of trade deals the President had already concluded.

However, beginning in 2007, and reflecting the biases of the new Democratic majority, Congress amended the terms of the President's negotiating authority for trade agreements by authorizing a new form of such authority in the form of the Bipartisan Trade Deal ("BTD").<sup>40</sup> The BTD required that new trade agreements entered into by the United States address the issues of labor rights, environmental protection, intellectual property protection, protection of foreign investors and investment, and security.<sup>41</sup> The most significant of these changes was the requirement to include labor rights and environmental protection, and the U.S.-Peru, U.S.-Colombia, U.S.-Panama and U.S.-Korea FTAs incorporate such provisions. Part III will discuss the relevance of the labor rights clauses of such FTAs to gender issues in trade law and policy.

## II. GENDER-BASED CRITIQUES OF INTERNATIONAL TRADE LAW AND POLICY AND THEIR RELEVANCE TO RTAS

This section will argue that gender issues, specifically the gender-differentiated impacts of trade liberalization, should be taken into consideration in RTA negotiations. Historically, gender issues have not been part of the international trade agenda. One reason is that, until recently and as noted in Part I, trade agreements have been focused exclusively on economic issues, namely dismantling trade barriers to facilitate increased trade. They have not focused on addressing social issues associated with trade liberalization. Although some trade agreements, such as the recent FTAs entered into by the United States, now incorporate social issues, namely

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37. Wagner, *supra* note 25, at 1054–55.

38. HORNBECK & COOPER, *supra* note 36, at 9.

39. *Id.* at 5.

40. Gantz, *supra* note 31, at 138–39.

41. OFFICE OF THE U.S. TRADE REPRESENTATIVE, TRADE FACTS: BIPARTISAN AGREEMENT ON TRADE POLICY (2007), available at [http://www.ustr.gov/sites/default/files/uploads/factsheets/2007/asset\\_upload\\_file127\\_11319.pdf](http://www.ustr.gov/sites/default/files/uploads/factsheets/2007/asset_upload_file127_11319.pdf).

environmental protection and labor rights provisions,<sup>42</sup> many social issues related to trade are not addressed, including human rights issues such as gender equality.

Another reason for the omission is that international trade agreements are often thought to be gender neutral. This is because on their face, trade treaties do not appear to treat women differently than men or to disadvantage them in any way. However, a developing body of academic literature on the feminist economics of trade challenges this viewpoint.<sup>43</sup> Motivated by a concern to reduce gender inequality and, in particular, to increase the welfare of poor women in poor countries, these economists seek to demonstrate that women are impacted differently than men by trade liberalization, and this may exacerbate existing gender-based inequalities.<sup>44</sup>

Concern over women's inequality is at the core of this approach to trade. There is abundant evidence that women around the world are disadvantaged when it comes to the distribution of wealth, employment opportunities, wage equality, property ownership, access to economic resources such as land, credit and business services, access to basic social services such as health and education, and the right to participate in decision making.<sup>45</sup> Women are more likely than men to be poor and to experience discrimination in their economic and social lives.<sup>46</sup> The World Bank estimates there are over 1.4 billion people living in abject poverty in the world today, roughly one-quarter of the population of developing countries.<sup>47</sup> The vast majority of those living in poverty, around seventy percent, are women and their children.<sup>48</sup>

The source of these inequalities are social and cultural norms that place women in subservient positions by confining them to traditional roles within the family as homemakers and caregivers and limiting their ability to participate fully in economic life on an equal basis with men.<sup>49</sup> While trade liberalization is not the cause of such inequalities, an increase in trade can

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42. WORLD TRADE ORG., *supra* note 5, at 11.

43. See, e.g., Diane Elson et al., *Introduction: Why a Feminist Economics of Trade?*, in *THE FEMINIST ECONOMICS OF TRADE* 1, 1 (Irene van Staveren et al. eds., 2007).

44. *Id.*

45. Anh-Nga Tran-Nguyen, *The Economics of Gender Equality, Trade and Development*, in *TRADE AND GENDER: OPPORTUNITIES AND CHALLENGES FOR DEVELOPING COUNTRIES* 1, 3–4 (Anh-Nga Tran-Nguyen & Americo Bevigilia Zampetti eds., 2004).

46. *Gender Equality: Empowering Women*, UNITED NATIONS POPULATION FUND, <http://www.unfpa.org/gender/empowerment.htm> (last visited May 20, 2012).

47. THE WORLD BANK, 2008 WORLD DEVELOPMENT INDICATORS: POVERTY DATA 1 (2008), available at <http://siteresources.worldbank.org/DATASTATISTICS/Resources/WDI08supplement1216.pdf>.

48. *Women, Poverty and Economics*, UN WOMEN, [http://www.unifem.org/gender\\_issues/women\\_poverty\\_economics](http://www.unifem.org/gender_issues/women_poverty_economics) (last visited May 20, 2012).

49. Tran-Nguyen, *supra* note 45, at 2–3.

significantly change economic conditions within countries, leading to an increase in existing gender-based inequalities.<sup>50</sup>

Feminist trade economists combine gender analysis with the tools of economic analysis to study the interaction of trade relations with gender relations. Through theoretical and empirical work, as well as policy analysis, such economists explore what is in fact a complex, two-way interaction.<sup>51</sup> Not only does trade impact gender relations, but gender relations in turn impact trade. One of the primary proponents of this viewpoint is the economist Nilüfer Çağatay, who has noted that this type of analysis leads one to the following conclusions about trade policy.<sup>52</sup> First, men and women are impacted differently by trade liberalization because of their different positions and command over economic resources.<sup>53</sup> Second, 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.<sup>54</sup> Third, gender analysis should be incorporated in trade policy discussions to take account of these factors and to ensure that gender equality and the development goals of trade policy are not undermined.<sup>55</sup>

Çağatay has advocated examining whether trade liberalization and its impacts on patterns of trade “perpetuate, accentuate or erode existing gender inequalities.”<sup>56</sup> Such impacts are not uniform and may differ depending on the trade sector and type of economy involved. The differing impacts of trade liberalization on gender inequalities, both positive and negative, is illustrated by recent economic case studies on shifts in women’s paid employment associated with opening of global markets.<sup>57</sup> Çağatay has noted that export-oriented manufacturing in developing countries, in sectors such as textile and apparel, is associated with increased employment of women, while in industrialized countries, the result is the loss of jobs in those same sectors, where women workers are overrepresented, due to increased imports from developing countries.<sup>58</sup> The situation is different with agricultural economies in the developing world, where trade liberalization often disadvantages women or leads to lesser benefits for them than men.<sup>59</sup> This is because women in such countries tend to be small subsistence farmers and are often not able to benefit

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50. *Id.* at 33.

51. NILÜFER ÇAĞATAY, UNITED NATIONS DEV. PROGRAMME, TRADE, GENDER AND POVERTY 4 (2001).

52. *Id.* at 5.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 19–20.

57. See ÇAĞATAY, *supra* note 51, at 20.

58. *Id.*

59. *Id.* at 20–21.

from new market opportunities due to lack of access to economic resources or their ability to produce food for their families is disrupted by new patterns of agricultural production for export.

In the view of feminist trade economists like Çağatay, trade policy should move past an exclusive focus on the social impact of trade, namely the predictions for increased growth and improved market access associated with standard economic theory, and start looking at social content, namely the social relations across and within nations based on factors such as gender, class and race that provide the context for trade policy formation.<sup>60</sup> Feminist trade economists assert that the failure of mainstream economists to consider gender is “perpetuating gender bias in the actual working of economies.”<sup>61</sup> Feminist trade economists do not accept the argument that trade policies are gender neutral because they do not specifically target either men or women.<sup>62</sup> Since the stated goal of feminist trade economists is to reduce gender inequality,<sup>63</sup> even trade policies that are not discriminatory on their face are subject to scrutiny if they fail to take into account gender differences in economic relations, since such policies may exacerbate existing gender inequalities. In this sense, such facially neutral policies may be deemed biased on the basis of gender.<sup>64</sup>

There are at least two arguments that may be advanced to support the gender aware approach advocated by feminist trade economists. The first is an economic argument. The goal of trade liberalization is to facilitate economic growth and promote economic development and prosperity among nations. The preamble to the treaty that created the WTO, namely the Agreement Establishing the World Trade Organization, makes this clear when it states that trade relations shall be conducted “with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services . . . in accordance with the objective of sustainable development.”<sup>65</sup> This goal is undermined by gender inequality. Almost all published research indicates that gender inequality, as measured by the difference in educational attainments or opportunities, or by the wage differentials between women and men, inhibits long-term growth.<sup>66</sup> Conversely, there is evidence that gender equality, measured by increased

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60. *Id.* at 12.

61. *Id.* at 19.

62. *See id.* at 18–19.

63. *See* ÇAĞATAY, *supra* note 51, at 4.

64. Elson et al., *supra* note 43, at 1.

65. Agreement Establishing the World Trade Organization, pmbl., Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144.

66. Jane Korinek, *Trade and Gender: Issues and Interactions* 7–8 (OECD, Working Paper No. 24, 2005), available at <http://www.oecd.org/dataoecd/38/50/35770606.pdf>.

educational attainments, facilitates economic growth.<sup>67</sup> Adherence to the stated WTO goal of economic growth would seem to argue against a trade liberalization policy that increased rather than reduced gender inequality.

The second argument in favor of the gender aware approach advocated by feminist trade economists is a human rights argument. Gender equality in all aspects of life is a human right that has been recognized by the world community in a number of multilateral conventions and declarations entered into under the auspices of the United Nations (“UN”) and its agencies. The most important of these is the Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”), the so-called Women’s Convention.<sup>68</sup> Prior to the entry into force of CEDAW in 1981, there were already several UN human rights instruments in force that guaranteed women equal rights with men, including the UN Charter and the International Bill of Human Rights, consisting of the Universal Declaration of Human Rights; the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights and two optional protocols.<sup>69</sup> However, these earlier documents were considered ineffective in promoting women’s human rights, so CEDAW was adopted.<sup>70</sup> CEDAW particularized the human rights of women and the meaning of gender equality. Although there is no specific reference to trade relations, the language of CEDAW is sweeping, and the definition of discrimination is broad enough to cover all aspects of life, including economic aspects, such as trade relations.<sup>71</sup>

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67. Tran-Nguyen, *supra* note 45, at 10.

68. Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. Doc. A/RES/34/180 (Dec. 18, 1979)33 [hereinafter CEDAW]. For a brief history of CEDAW, see *Short History of CEDAW Convention*, DIVISION FOR ADVANCEMENT OF WOMEN, <http://www.un.org/womenwatch/daw/cedaw/history.htm> (last visited May 20, 2012).

69. The UN Charter lists “equal rights of men and women” as one of the goals of the organization in the Preamble, U.N. Charter pmb., and Article 1 guarantees human rights and fundamental freedoms to all without regard to race, sex, language or religion, U.N. Charter art. 1, para. 3. The Universal Declaration of Human Rights echoes the language of the UN Charter setting forth the principle of equality and enjoyment of human rights without discrimination based on sex or any other factor. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, pmb., U.N. Doc. A/RES/217(III) (Dec. 10, 1948). Both International Covenants state that the rights they guarantee are available to all persons on a non-discriminatory basis, including on the basis of sex, and obligate state parties to undertake that such rights are available equally to women and men. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI) A, art. 2, para. 2, U.N. Doc. A/RES/2200(XXI) (Dec. 16, 1966); International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI) C, art. 2, paras. 1–2, U.N. Doc. A/RES/2200(XXI) (Dec. 16, 1966).

70. See U.N. Charter, *supra* note 69; CEDAW, *supra* note 68.

71. Elizabeth Evatt, *Finding a Voice for Women’s Rights: The Early Days of CEDAW*, 34 GEO. WASH. INT’L L. REV. 515, 517 (2002).

CEDAW was followed up fourteen years later, when in 1995, the UN adopted the Beijing Declaration and Platform for Action (“Beijing Declaration”),<sup>72</sup> which further articulated the human rights of women and specific steps that needed to be taken to achieve the goal of gender equality. While not legally binding, the Beijing Declaration addresses the issue of gender and trade directly, providing that national governments should ensure their policies on international and regional trade agreements “do not have an adverse impact on women’s new and traditional economic activities.”<sup>73</sup> Further, in the section on institutional arrangements, the document encourages the UN General Assembly to invite the WTO to cooperate in implementing the Platform for Action contained in the Beijing Declaration.<sup>74</sup> The UN General Assembly subsequently resolved that the WTO, as well as the Bretton Woods institutions, the UN institutions, and other international and regional intergovernmental bodies should support government efforts and develop their own programs in order to implement the Beijing Declaration.<sup>75</sup> All of this adds up to a strong endorsement by the international community of the principle of gender equality, including in the area of economic and trade activity. This supports the notion that a gender aware approach to trade policy should be adopted.

Moreover, this approach is consistent with the notion of human development, associated with the economist Amartya Sen in his seminal work, *Development as Freedom*.<sup>76</sup> The human development paradigm is now widely accepted in the economic development community, and some commentators think it should be imported into the area of trade policy.<sup>77</sup> The human development paradigm rejects the notion that poverty should be defined in absolute terms as a shortfall in private consumption or income. Instead, poverty is defined as both physical and social deprivation, including powerlessness, lack of dignity and lack of freedom to realize one’s human potential.<sup>78</sup> On this view, development policy should not focus exclusively on growth and economic efficiency, but should focus on the quality of people’s lives, including the freedom to be healthy, to be educated and to enjoy a decent standard of living, as well as to enjoy political freedoms and other basic human

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72. Fourth World Conference on Women, Sept. 4–15, 1995, *Beijing Declaration and Platform for Action*, U.N. Doc. A/CONF.177/20 (Oct. 17, 1995) [hereinafter *Beijing Declaration*].

73. *Id.* ¶ 165(k).

74. *Id.* ¶ 343.

75. G.A. Res. S-23/3, ¶ 49, U.N. Doc. A/RES/S-23/3 (Nov. 16, 2000).

76. AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (1999).

77. ÇAĞATAY, *supra* note 51, at 13.

78. *Id.*

rights.<sup>79</sup> Gender inequality is inconsistent with the human development paradigm since it interferes with the realization of human potential. Importing the human development paradigm into the trade arena would support the argument that trade policies tending to exacerbate existing gender inequalities should be rejected as inconsistent with the trade policy goal of improved human welfare.

A number of intergovernmental organizations (“IGOs”) focused on trade, development and women’s issues have taken note of the conclusions reached by feminist trade economists on the interaction between gender and trade, and have initiated their own studies analyzing the impacts of trade liberalization on women.<sup>80</sup> They have taken steps to incorporate gender considerations into their work in a process referred to as gender mainstreaming.<sup>81</sup> Some of these IGOs have recommended that trade agreements should be analyzed *ex ante* for gender disparate impacts by using the techniques of gender analysis developed by social scientists, that economic data should be compiled on a sex-disaggregated basis to facilitate such analysis, that special provisions should be included in trade agreements to address gender disparate impacts, and that national governments should implement policies and programs to mitigate the negative impacts on women that may be caused by trade liberalization.<sup>82</sup>

The IGOs focused on economic development within the UN system have been active in promoting gender equality and women’s empowerment, which is one of the UN’s Millennium Development Goals, adopted in 2000 as a roadmap for accelerating the global development process.<sup>83</sup> The IGOs that have been most engaged on issues of gender and trade are the UN Development Fund for Women (“UNIFEM”), which is now part of UN Women, and the UN Conference on Trade and Development (“UNCTAD”).<sup>84</sup>

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79. UNITED NATIONS DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 2010: THE REAL WEALTH OF NATIONS: PATHWAYS TO HUMAN DEVELOPMENT 2 (2010), available at [http://hdr.undp.org/en/media/HDR\\_2010\\_EN\\_Complete\\_reprint.pdf](http://hdr.undp.org/en/media/HDR_2010_EN_Complete_reprint.pdf).

80. See UNITED NATIONS INTER-AGENCY NETWORK ON WOMEN & GEND. EQUAL., GENDER EQUALITY & TRADE POLICY (2011), available at <http://www.un.org/womenwatch/feature/trade/index.html>.

81. See *id.* at 16.

82. See *id.* at 14–16.

83. United Nations Millennium Declaration, G.A. Res. 55/2, U.N. Doc. A/RES/55/2 (Sept. 18, 2000).

84. Until July 2010, UNIFEM was the women’s fund at the UN, with a mandate to provide financial and technical assistance, including sharing its expertise on gender mainstreaming and women’s empowerment, to programs and strategies that promote women’s human rights, political participation and economic security, including development activities. See *About UNIFEM*, UN WOMEN, <http://www.unifem.org/about> (last visited May 20, 2012); see also Joanne Sandler, UNICEF Meeting of Gend. Focal Points, UNIFEM’s Experiences in Mainstreaming for Gender Equality (May 5–9, 1997). In July 2010, the UN General Assembly dissolved UNIFEM and incorporated its functions into a new entity called UN Women, the United Nations Entity for

UNIFEM has examined the gender-differentiated impacts of trade policies in various regions, including a study of the impact of NAFTA on female workers in the agricultural, garment, textile, and maquiladora factories in Mexico.<sup>85</sup> UNIFEM's strategy has emphasized capacity building on the gender implications of trade policies, agreements, and institutions, building a solid knowledge base on such gender impacts, and supporting advocacy efforts for gender mainstreaming in trade.<sup>86</sup>

UNCTAD, the focal point within the UN system for trade and development issues,<sup>87</sup> has convened meetings of experts on several occasions to study the linkage among trade, development, and gender issues.<sup>88</sup> As a result of such meetings, UNCTAD made recommendations on mainstreaming gender within the trade area that are addressed to national governments, the international community, and UNCTAD itself.

In 2003, UNCTAD was appointed head of the UN Inter-Agency Network on Women and Gender Equality Task Force on Gender and Trade ("IANWGE Gender and Trade Task Force"), which was charged with coordinating research, capacity building and advocacy activities on these issues within the UN system.<sup>89</sup> The IANWGE Gender and Trade Task Force studied the linkage

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Gender Equality and the Empowerment of Women. *About UN Women*, UN WOMEN, <http://www.unwomen.org/about-us/about-un-women/> (last visited May 20, 2012). The purpose of this reform was to facilitate the UN's agenda on gender equality and the empowerment of women. Other UN entities consolidated to form UN Women were The Division for the Advancement of Women ("DAW"), the International Research and Training Institute for the Advancement of Women ("INSTRAW"), and the Office of the Special Adviser on Gender Issues and Advancement of Women ("OSAGI").

85. Sandler, *supra* note 84; MARTHA CHEN ET AL., UNIFEM, PROGRESS OF THE WORLD'S WOMEN 2005, WOMEN WORK & POVERTY 8 (2005), available at <http://www.ucm.es/cont/descargas/document6327.pdf>.

86. United Nations Conference on Trade and Development, Geneva, Switz., July 17–18, 2003, *Report on the First Meeting of the Interagency Task Force on Gender and Trade*, at 3–4, [http://archive.unctad.org/sections/wcmu/docs/EDM\\_UNCTAD\\_XI\\_0002\\_en.pdf](http://archive.unctad.org/sections/wcmu/docs/EDM_UNCTAD_XI_0002_en.pdf).

87. *Main Activities*, UNCTAD, <http://www.unctad.org/Templates/Page.asp?intItemID=3359&lang=1> (last visited May 20, 2012).

88. See United Nations Conference on Trade and Development, Geneva, Switz., July 12–13, 1999, *Report on the Pre-UNCTAD X Expert Workshop on Trade, Sustainable Development and Gender*, ¶ 8, U.N. Doc. TD(X)/PC/2 (Aug. 18, 1999); United Nations Conference on Trade and Development, Geneva, Switz., Nov. 14–16, 2001, *Report of the Expert Meeting on Mainstreaming Gender in Order to Promote Opportunities*, ¶¶ 1–32, U.N. Doc. TD/B/COM.3/40, TD/B/COM.3/EM.14/3 (Dec. 6, 2001). United Nations Conference on Trade and Development, Geneva, Switz., Feb. 18–21, 2001, *Mainstreaming Gender in Order to Promote Opportunities*, ¶ 14(a), U.N. Doc. TD/B/COM.3/L.22 (Feb. 25, 2002).

89. United Nations Conference on Trade and Development, Geneva, Switz., July 17–18, 2003, *Interagency Task Force on Gender and Trade, Terms of Reference*, at 2–3, [http://archive.unctad.org/sections/wcmu/docs/EDM\\_UNCTAD\\_XI\\_0001\\_en.pdf](http://archive.unctad.org/sections/wcmu/docs/EDM_UNCTAD_XI_0001_en.pdf). The task force's objectives are to sensitize policy makers at the national and international level to critical trade issues linked to gender equality, to assist countries in integrating a gender perspective in their trade policies, to



between gender and trade in developing countries and published its findings.<sup>90</sup> It recommended to governments that they take a series of actions to address gender inequality in the context of international trade, including that governments conduct *ex ante* analyses of trade policies on women prior to granting concessions in trade negotiations.<sup>91</sup> It also identified areas in which trade policies adversely affected women in developing countries, including developed country subsidies and market access restrictions regarding gender-sensitive products in both the agricultural and non-agricultural sectors, barriers to trade in services, including the movement of service providers, and increases in product standards.<sup>92</sup> The IANWGE Gender and Trade Task Force resolved to continue its own *ex ante* analysis of the gender impacts of trade expansion and prospective changes in trade policy and to develop a methodology for such analysis.<sup>93</sup>

At a recent meeting of experts convened by UNCTAD in 2009, further recommendations were made on addressing gender issues within trade policy. The wording of these recommendations suggests that the IANWGE Gender and Trade Task Force remains focused on the preliminary task of studying and analyzing the linkage of gender and trade and has not yet formulated a complete work program on this topic.<sup>94</sup>

The work on gender and trade carried out by UNIFEM and UNCTAD has been influential in the development community, but appears to have had little impact on trade relations conducted at the multilateral level. The WTO, the most important multilateral IGO devoted to trade and the one best positioned to address these issues, has not incorporated gender issues into its agenda.<sup>95</sup> To date, the WTO's formal involvement in gender issues is limited to

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promote gender and development considerations in trade agreements, to coordinate national and international policies relating to trade, development and gender, and to improve technical cooperation and capacity building related to these issues. *Id.* at 1.

90. *Introduction to TRADE AND GENDER: OPPORTUNITIES AND CHALLENGES FOR DEVELOPING COUNTRIES*, *supra* note 45, at x, xi.

91. United Nations Conference on Trade and Development Secretariat, Geneva, Switz., July 17–18, 2003, *Gender and Trade: A Conceptual Note*, at 4–5 (July 15, 2003), [http://archive.unctad.org/sections/wemu/docs/EDM\\_UNCTAD\\_XI\\_0003\\_en.pdf](http://archive.unctad.org/sections/wemu/docs/EDM_UNCTAD_XI_0003_en.pdf); United Nations Conference on Trade and Development, São Paulo, Braz., June 13–18, 2004, *Round Table on Trade and Gender*, U.N. Doc. TD/L.378 (Jun 16, 2004).

92. *Gender and Trade: A Conceptual Note*, *supra* note 91, at 4–5.

93. *Round Table on Trade and Gender*, *supra* note 91, ¶ 5.

94. United Nations Conference on Trade and Development, Geneva, Switz., Mar. 10–11, 2009, *Report of the Expert Meeting on Mainstreaming Gender in Trade Policy*, ¶ 53, U.N. Doc. TD/B/C.I/EM.2/4 (Mar. 31, 2009).

95. *See supra* notes 89–94 and accompanying text. Some attention has also been paid to trade and gender issues at WTO public symposia. *See* Ambassador Yolande Biké et al., WTO Symposium: Challenges Ahead on the Road to Cancun, Women as Economic Players in Sustainable Development (June 16, 2004).

participation in the IANWGE Gender and Trade Task Force. More progress has been made at the level of regional economic organizations, where a number of IGOs, including APEC, the Caribbean Community (“CARICOM”), and the Commonwealth Secretariat, among others, have taken steps to mainstream gender issues in their policy-making.<sup>96</sup>

Several non-governmental organizations (“NGOs”) and other civil society groups have supported efforts to mainstream gender in trade institutions through their work. Groups such as the Informal Working Group on Gender and Trade, the International Gender and Trade Network (“IGTN”), Women in Development (“WIDE”) and BRIDGE<sup>97</sup> have engaged in research and advocacy efforts related to gender and trade in both multilateral and regional trade agreements.<sup>98</sup> One of the main talking points of such organizations has been the need to conduct *ex ante* gender impact assessments of trade policies, and some organizations have developed frameworks for such gender analysis.<sup>99</sup> These efforts have had some impact at the regional level, using the gender assessment framework developed by APEC as an important example, and one that will be further discussed in Part III.<sup>100</sup>

The close scrutiny of trade agreements for gender-differentiated impacts by IGOs and NGOs has highlighted some important areas of concern relating to substantive provisions of the treaties that may negatively impact women and to the governance structure of trade organizations that make it difficult for gender issues to be recognized and addressed. Much of this criticism has been

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96. MARIAMA WILLIAMS, GENDER MAINSTREAMING IN THE MULTILATERAL TRADING SYSTEM: A HANDBOOK FOR POLICY-MAKERS AND OTHER STAKEHOLDERS 218 app. 3 (2003).

97. WIDE Consultation Report, Brussels, Belg., Nov. 22, 2007, *EU Bilateral and Regional Free Trade Agreements: Bringing Women to the Centre of the Debate* (2007), available at <http://62.149.193.10/wide/download/WIDEEUBILATERAL.pdf?id=594>.

98. See ZO RANDRIAMARO, BRIDGE, GENDER & TRADE: OVERVIEW REPORT 36–49 (2006), available at [www.bridge.ids.ac.uk/reports/CEP-Trade-OR.pdf](http://www.bridge.ids.ac.uk/reports/CEP-Trade-OR.pdf); see also *Briefing Statement on Gender and Trade*, INT’L CONFEDERATION OF FREE TRADE UNIONS, <http://www.icftu.org/www/english/equality/eeqgenderandtrade.html> (last visited May 20, 2012) (relaying information prepared by the Informal Working Group on Gender & Trade); *Specific Thematics, Gender and Trade*, INT’L GENDER & TRADE NETWORK, [http://web.igttn.org/home/index.php?option=com\\_content&view=article&id=18&Itemid=13](http://web.igttn.org/home/index.php?option=com_content&view=article&id=18&Itemid=13) (last visited May 20, 2012).

99. *Tools and Frameworks*, ELDIS, <http://www.eldis.org/index.cfm?objectId=770163AC-0048-09CB-CA5E5B6754858538> (last visited May 20, 2012) (offering a brief discussion of such frameworks).

100. ASIA-PAC. ECON. COOPERATION, FRAMEWORK FOR INTEGRATION OF WOMEN IN APEC (1999) [hereinafter APEC 1999], available at [http://www.apec.org/en/About-Us/AboutAPEC/~media/Files/AboutUs/About%20APEC/History/02\\_aggi\\_framework.ashx](http://www.apec.org/en/About-Us/AboutAPEC/~media/Files/AboutUs/About%20APEC/History/02_aggi_framework.ashx); ASIA-PAC. ECON. COOPERATION, APEC GUIDELINES FOR FRAMEWORK FOR INTEGRATION OF WOMEN IN APEC (2002) [hereinafter APEC 2002], available at [http://www.apec.org/Groups/SOM-Steering-Committee-on-Economic-and-Technical-Cooperation/Task-Groups/~media/Files/Groups/GFPN/02\\_aggi\\_guides.ashx](http://www.apec.org/Groups/SOM-Steering-Committee-on-Economic-and-Technical-Cooperation/Task-Groups/~media/Files/Groups/GFPN/02_aggi_guides.ashx) (offering an update from 2002).

directed toward the WTO, although some attention has also been paid to RTAs.

Focusing first on the WTO, concerns have been raised about the negative impacts on women of multilateral trade liberalization and the failure of the WTO and the WTO Members to address such impacts, including in the areas of agriculture, services, investment, intellectual property rights, and labor rights.<sup>101</sup>

*Agriculture:* Although they produce half of the world's food on a global basis and between sixty and eighty percent in many developing countries, women farmers often have little access to land and other resources needed for such work and are vulnerable due to economic dislocations brought about by increased trade.<sup>102</sup> The ability of women farmers in developing countries to earn a living in subsistence agriculture has been jeopardized by the advent of cheap agricultural imports and by developing countries introducing export-driven agricultural policies.<sup>103</sup> Such liberalization also poses a threat to household food security since such women farmers are often primarily responsible for household food production.<sup>104</sup>

*Services:* While employment opportunities for women have increased in the services sector due to growth of the sector as a result of trade liberalization, women have tended to be segregated into lower paying jobs in tourism, hospitality services, and social services, with only a small percentage employed in higher paying jobs in financial services.<sup>105</sup> This suggests that women on the whole may not be realizing their proportionate share of the gains projected to result from liberalized services trade. The broad reach of the GATS and its impact on sectors of particular interest to women, such as health care and education, are additional concerns.<sup>106</sup> To take but one example, women are often the caretakers of families and communities and have a high stake in health care services, both as consumers and providers.<sup>107</sup> If increased competition resulting from liberalized trade in health care services creates a tiered system of health care in which the poor receive fewer or lower quality

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101. Constance Wagner, *Gender Mainstreaming in International Trade: Catalyst for Economic Development and Political Stability*, in *TRADE AS GUARANTOR OF PEACE, LIBERTY AND SECURITY? CRITICAL, EMPIRICAL AND HISTORICAL PERSPECTIVES*, 208, 216–18 (Padideh Ala'i et al. eds., 2006). For a more expansive discussion of the impacts of trade, see WILLIAMS, *supra* note 96, and see also RANDRIAMARO, *supra* note 96, at 1, 16–29.

102. WILLIAMS, *supra* note 96, at 62.

103. *TRADE AND GENDER: OPPORTUNITIES AND CHALLENGES FOR DEVELOPING COUNTRIES*, *supra* note 45, at 108.

104. *Id.* at 85.

105. Eugenia McGill, *Trade and Gender*, in 2 *THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC AND POLITICAL ANALYSIS* 697, 726 (Patrick F.J. Macrory et al. eds., 2005).

106. GATS, *supra* note 17, 1869 U.N.T.S. at 185–86.

107. WILLIAMS, *supra* note 96, at 91.

services than the wealthy, women may be adversely affected since they are the majority of the world's poor.<sup>108</sup>

*Investment:* Increases in foreign direct investment often accompany trade liberalization, and this may lead to the creation of new jobs for women, but these new employment opportunities may not provide optimal wages, working conditions, and contribution to knowledge and skills upgrading for women.<sup>109</sup> Foreign direct investment may also have negative impacts on the nature, size and growth potential of women-owned and women-operated small and medium-sized firms in host countries through effects on production pathways, resource allocation, and competition.<sup>110</sup>

*Intellectual property rights:* The Uruguay Round Agreement on Trade-Related Aspects of Intellectual Property ("TRIPs Agreement") strengthens intellectual property protection within the trade context.<sup>111</sup> This may negatively impact women, because of the lack of access of women to essential medicines protected by patents, especially those used to treat HIV/AIDS, and there is also concern about the lack of protection of women's traditional knowledge regarding plant species under the TRIPs Agreement.<sup>112</sup> Half of the world's population infected with HIV/AIDS consists of women, and young women consistently have higher rates of infection than men.<sup>113</sup> Women are particularly vulnerable to price increases of patented drugs used to treat the disease, and some commentators believe they should have preferential access to those drugs.<sup>114</sup> The WTO Declaration on the TRIPs Agreement and Public Health, dealing with compulsory licenses by developing countries and the exemption for such countries from providing pharmaceutical drug patent protection, mitigates this problem to some extent.<sup>115</sup> Concerning the protection of traditional knowledge of plant species, women are often the majority of small farmers in developing countries and are responsible for selection, improvement and adaptation of plant varieties.<sup>116</sup> Women's store of

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108. *Id.* at 98.

109. *Id.* at 128–29.

110. *Id.* at 130–31.

111. Agreement on Trade-Related Aspects of Intellectual Property Rights, Agreement Establishing the World Trade Organization, Annex 1C, art. 2, Apr. 15, 1994, 1869 U.N.T.S. 299 [hereinafter TRIPs].

112. TRADE AND GENDER: OPPORTUNITIES AND CHALLENGES FOR DEVELOPING COUNTRIES, *supra* note 45, at 256.

113. *Id.* at 264.

114. *Id.*

115. World Trade Organization Ministerial Conference, Doha, Qatar, Nov. 9–14, 2001, *Declaration on the TRIPs Agreement and Public Health*, WT/MIN(01)/DEC/2 (Nov. 20, 2001).

116. WILLIAMS, *supra* note 96, at 140, 144–145.

indigenous knowledge is key to food security and health care in such countries, and yet the TRIPs Agreement does not protect such knowledge.<sup>117</sup>

*Labor rights:* While empirical evidence shows that trade liberalization may increase employment opportunities for women, it has also been documented that the newly-created jobs may offer only low wages, few benefits, and little job security, such as in the garment, hospitality, and maquiladora industries.<sup>118</sup> Women may also experience health and safety problems in these newly created jobs, as well as discrimination and sexual harassment.<sup>119</sup> Core labor standards, which provide a minimum level of legal protections to workers, including women, are not included in the WTO treaties.<sup>120</sup>

In addition to these critiques, the WTO has been faulted for its governance structure, since it does not have a mechanism for analyzing gender issues nor any process by which such issues could be raised.<sup>121</sup> Commentators have proposed changing the WTO infrastructure and processes by:

- 1) establishing a committee on gender and trade;<sup>122</sup>
- 2) requiring a gender impact review of new and existing WTO Agreements by the WTO Secretariat;<sup>123</sup>
- 3) increasing the representation of women in policy-making positions at the WTO, on WTO dispute panels, and in national ministries charged with formulating trade policy and negotiating trade agreements;<sup>124</sup>
- 4) building expertise on gender and trade issues within the WTO Secretariat and Dispute Settlement Body, as well as within national

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117. *TRIPS: Reviews, Article 17.3(B) and Related Issues: Background and the Current Situation*, WORLD TRADE ORG., [http://www.wto.org/english/tratop\\_e/trips\\_e/art27\\_3b\\_background\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/art27_3b_background_e.htm) (last updated Nov. 2008).

118. McGill, *supra* note 105, at 734.

119. WILLIAMS, *supra* note 96, at 35, 130.

120. *See infra* Part III.

121. Wagner, *supra* note 101, at 218–19; *see* Julie Steinkopf Rice, *Free Trade, Fair Trade, and Gender Inequality in Less Developed Countries*, 18 SUSTAINABLE DEV. 42, 44 (2010) (writing that the WTO ignores gender inequality in trade because it sees gender equality as a social issue and not a trade issue).

122. WILLIAMS, *supra* note 96, at 37–38, 176–77.

123. *Id.* at 176.

124. Although women are well-represented on the professional staff of the WTO Secretariat (40% of positions in 2009), few are in senior policy-making positions. Committee on Budget, Finance and Administration, *Report on Diversity in the WTO Secretariat*, WT/BFA/W/195 (Mar. 1, 2010). Similarly, there are few women trade policy experts in the WTO dispute panel roster and women are also poorly represented in national trade missions at the WTO. Nadia Johnson, *Women in the Global Economy: Issues, Rules, and Advocacy*, in WOMEN CHALLENGING GLOBALIZATION 20, 24, 26, 28 (2002), available at [http://www.wedo.org/wp-content/uploads/ffd-report\\_eng.pdf](http://www.wedo.org/wp-content/uploads/ffd-report_eng.pdf).

ministries charged with formulating trade policy and negotiating trade agreements;<sup>125</sup> and

- 5) using the trade policy review mechanism (“TPRM”) as a forum for examining gender issues relating to national trade policies.<sup>126</sup>

With respect to RTAs, there has been some attention paid to their gender-differentiated impacts. In the United States, criticism has been leveled against NAFTA for its negative impacts on women, echoing some of the gender-based critiques of the WTO.<sup>127</sup> When the United States government commenced negotiations on more recent FTAs, it encountered opposition from various quarters, including members of Congress, labor organizations and civil society groups concerned about the possible loss of jobs in the United States and perceived problems in other treaty member countries, including low labor standards, the non-enforcement of existing labor laws, human rights violations and the perpetuation of gender inequality, among other issues. Regarding gender issues, a number of NGOs expressed their views in opposition to the proposed FTAs in press releases and in letters addressed to Congress. For example, prior to the United States entry into DR-CAFTA, the IGTN and the Center of Concern (“COC”) sent to Democratic members of Congress a packet of materials entitled “U.S. Women Say ‘No’ to U.S.- DR-CAFTA.”<sup>128</sup> The packet contained letters from various civil society groups worried about the potential for negative impacts on women of DR-CAFTA and echoed many of the same concerns that had been expressed about trade liberalization through the WTO and NAFTA.<sup>129</sup> The primary areas highlighted related to poor working conditions for women, privatization of essential public goods and

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125. McGill, *supra* note 105, at 738. Because the WTO Secretariat does not include gender specialists, it has little capacity to conduct gender analysis. *Id.*

126. WILLIAMS, *supra* note 96, at 172–74. The TPRM currently has a narrow focus on the direction of trade policies rather than on trade policy impacts, and excludes questions of gender inequality or bias. However, the TPRM authorizes consideration “to the extent relevant . . . of the wider economic and developmental needs, policies and objectives of the Member concerned, as well as of its external environment.” *Trade Policy Review Mechanism*, ¶ (A)(ii), WORLD TRADE ORG., [http://www.wto.org/english/res\\_e/booksp\\_e/analytic\\_index\\_e/tpm\\_01\\_e.htm](http://www.wto.org/english/res_e/booksp_e/analytic_index_e/tpm_01_e.htm) (last visited May 20, 2012).

127. Alexandra Spielloch, *NAFTA, Through a Gender Lens: What “Free Trade” Pacts Mean for Women*, INT’L GEN. & TRADE NETWORK (Dec. 30, 2004), [http://web.igtn.org/home/index.php?option=com\\_docman&task=doc\\_download&gid=357&Itemid=6](http://web.igtn.org/home/index.php?option=com_docman&task=doc_download&gid=357&Itemid=6).

128. Letter from U.S. Gen. & Trade Network to Democratic members of the U.S. House of Representatives, *U.S. Women Say “No” to U.S.- DR-CAFTA* (Sept. 22, 2004) [hereinafter IGTN Letter], available at <https://www.coc.org/files/CAFTA%20and%20Gender%20Hill%20Drop.pdf>.

129. See *supra* notes 101–20 and accompanying text; ALEXANDRA SPIELLOCH, CTR. OF CONCERN, *TRADE IN THE AMERICAS: WOMEN CENTRAL TO THE DEBATE* (2006), available at [http://web.igtn.org/home/index.php?option=com\\_docman&task=doc\\_details&gid=458&&Itemid=6](http://web.igtn.org/home/index.php?option=com_docman&task=doc_details&gid=458&&Itemid=6).

services, and interference with food security due to changes in agricultural production.<sup>130</sup>

Many of these critiques of RTAs faulted the governments of the treaty parties, including the United States, for failing to undertake an analysis of gender-differentiated impacts of such trade agreements.<sup>131</sup> Currently, the United States government is not required to, and does not, undertake any gender assessment of proposed trade agreements. The Trade Act of 2002 does require the International Trade Commission (“ITC”), an independent federal agency charged with broad investigative powers on trade matters,<sup>132</sup> to report on the likely effects of trade agreements on the United States economy as a whole and on specific industry sectors, using available economic assessments regarding the agreement.<sup>133</sup> The ITC has completed such reports on the most recently concluded FTAs, including the U.S.-Peru, U.S.-Colombia, U.S.-Panama, and U.S.-Korea FTAs.<sup>134</sup> These reports cover more than purely economic matters, including the labor and environmental provisions required by the BTDA.<sup>135</sup> However, these reports do not discuss the impact of these agreements on women to any significant degree.

Although the United States government does not currently conduct *ex ante* gender impact assessments of its trade agreements, some civil society groups have in fact conducted such reviews. For example, Women Thrive Worldwide, formerly Women’s Edge, an NGO located in the United States that advocates for change in international trade policies on behalf of women and other poor people in order to reduce poverty, used a gender impact assessment tool it had developed called the Trade Impact Review (“TIR”) to assess the impact of trade liberalization on Jamaica’s poor and to forecast the potential

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130. IGTN Letter, *supra* note 128.

131. *Id.*

132. *What the USITC IS . . . and ISN’T*, U.S. INT’L TRADE COMMISSION, [http://www.usitc.gov/press\\_room/gen\\_info.htm](http://www.usitc.gov/press_room/gen_info.htm) (last visited May 20, 2012).

133. 19 U.S.C. §§ 3804(f)(2)–(3) (2006).

134. U.S. INT’L TRADE COMM’N, U.S.-PERU TRADE PROMOTION AGREEMENT: POTENTIAL ECONOMY-WIDE AND SELECTED SECTORAL EFFECTS, Inv. No. TA-2014-20 (2006), *available at* <http://www.usitc.gov/publications/docs/pubs/2104f/pub3855.pdf>; U.S. INT’L TRADE COMM’N, U.S.-COLOMBIA TRADE PROMOTION AGREEMENT: POTENTIAL ECONOMY-WIDE AND SELECTED SECTORAL EFFECTS, Inv. No. TA-2104-023 (2006), *available at* <http://www.usitc.gov/publications/332/pub3896.pdf>; U.S. INT’L TRADE COMM’N, U.S.-PANAMA TRADE PROMOTION AGREEMENT: POTENTIAL ECONOMY-WIDE AND SELECTED SECTORAL EFFECTS, Inv. No. TA-2104-025 (2007), *available at* <http://www.usitc.gov/publications/332/pub3948.pdf>; U.S. INT’L TRADE COMM’N, U.S.-KOREA TRADE PROMOTION AGREEMENT: POTENTIAL ECONOMY-WIDE AND SELECTED SECTORAL EFFECTS, Inv. No. TA-2104-024 (2007), *available at* <http://www.usitc.gov/publications/pub3949.pdf>.

135. *See supra* notes 40–41 and accompanying text.

effects of the proposed Free Trade Area of the Americas (“FTAA”)<sup>136</sup> on such persons, particularly women.<sup>137</sup> After conducting the assessment, the authors of this study concluded that there were in fact gender-differentiated impacts of trade liberalization.<sup>138</sup> Women lost jobs while men gained jobs.<sup>139</sup> While trade liberalization had some positive impacts in Jamaica, namely that many low-income Jamaicans benefited from trade liberalization when inflation fell and caused the cost of food to drop,<sup>140</sup> there were also negative impacts since few well-paid jobs were created for women with low levels of skill and education. Many jobs for low-skilled women were lost when trade liberalization prompted multinational businesses to relocate from the free trade zones in Jamaica to Mexican free trade zones.<sup>141</sup> The authors recommended that the United States Trade Representative (“USTR”), the executive agency responsible for negotiating trade agreements on behalf of the United States government, conduct a TIR for new agreements as part of the United States’ investment in trade relations with developing countries.<sup>142</sup> The USTR has not followed this recommendation.

Other countries and some regional economic organizations have been more receptive than the United States to conducting gender impact assessments relating to trade agreements. The Canadian International Development Agency is an example of a national governmental entity that has developed tools for understanding the gender-differentiated impacts of trade on women and men.<sup>143</sup> APEC conducts gender impact assessments of its trade and development programs.<sup>144</sup> The EU conducts Trade Sustainability Impact Assessments (“Trade SIAs”) of all its major trade agreements in order to

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136. The FTAA, which would have linked thirty-three nations in the Western Hemisphere with the United States, was met with strong opposition. See Larry Rohter & Elisabeth Bumiller, *Hemisphere Meeting Ends Without Trade Consensus*, N.Y. TIMES, Nov. 6, 2005, at 8. The negotiations are currently dormant and are unlikely to be revived in the near future. See *Free Trade Area of the Americas*, PUB. CITIZEN, <http://www.citizen.org/trade/ftaa/> (last visited May 20, 2012).

137. BRENDA WYSS & MARCELINE WHITE, WOMEN’S EDGE FUND., THE EFFECTS OF TRADE LIBERALIZATION ON JAMAICA’S POOR: AN ANALYSIS OF AGRICULTURE AND SERVICES 3, available at [http://www.igtn.org/pdfs//294\\_Jamaica%20Case%20Study.pdf](http://www.igtn.org/pdfs//294_Jamaica%20Case%20Study.pdf). Women’s Edge is now called Women Thrive Worldwide; see also *Women Thrive Worldwide*, IDEALIST, <http://www.idealists.org/view/org/325X54DZjczh4/> (last visited May 20, 2012).

138. WYSS & WHITE, *supra* note 137, at 48–49.

139. *Id.* at 48.

140. *Id.* at 2.

141. *Id.*

142. *Id.* at 6–7.

143. CAN. INT’L DEV. AGENCY, GENDER EQUALITY AND TRADE-RELATED CAPACITY BUILDING: A RESOURCE TOOL FOR PRACTITIONERS, available at [http://www.acdi-cida.gc.ca/inet/images.nsf/vLUIImages/Policy/\\$file/Trade-Related%20Capacity%20Building.pdf](http://www.acdi-cida.gc.ca/inet/images.nsf/vLUIImages/Policy/$file/Trade-Related%20Capacity%20Building.pdf).

144. APEC 1999, *supra* note 100, at 1–3; APEC 2002, *supra* note 100, § I.



identify their potential economic, social and environmental impacts, and the Trade SIAs include gender equality as one dimension of social impact.<sup>145</sup> Part III will discuss gender impact assessments of RTAs in more detail.

### III. MECHANISMS RELATING TO RTAS THAT MAY BENEFIT WOMEN IMPACTED BY TRADE LIBERALIZATION

This section will analyze two developments relating to RTAs that may have a positive effect on women, namely the labor rights clauses of recent FTAs entered into by the United States and the use of gender analysis and gender impact assessments in the trade context by some regional organizations, including APEC. Both of these mechanisms likely will prove helpful to women, and they should continue to be utilized in connection with RTAs. It is important to note at the outset, however, that these measures fall short of a comprehensive program focused on mitigating the negative impacts of trade liberalization on women.

#### A. *Labor Rights Clauses in Recent United States FTAs*

Several recent United States FTAs incorporate core labor standards, namely a set of internationally recognized labor rights, which serve to protect workers' interests. These include the most recent FTAs entered into by the United States, namely the U.S.-Peru FTA, U.S.-Colombia FTA, the U.S.-Panama FTA and the U.S.-Korea FTA, among others.<sup>146</sup> Although these provisions were not directed specifically at women adversely impacted by trade liberalization, they may ameliorate some of the common workplace problems encountered by such women.

This development is significant because women are often among the most vulnerable when it comes to dislocations in employment caused by trade liberalization.<sup>147</sup> Although the movement to free trade may open up new employment opportunities to women, it may also disrupt local markets and change local economic conditions, resulting in a loss of jobs in traditional sectors of the economy.<sup>148</sup> In addition, the new jobs that are created as a result of trade liberalization may not be particularly desirable, because they are not secure jobs, may not offer benefits or the opportunity for skills training and may involve unsafe or unpleasant working conditions.<sup>149</sup>

The UN has assessed the social and economic status of women every five years since 1995, and its most recent report in 2010 confirmed that, while

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145. EUROPEAN COMM'N, HANDBOOK FOR TRADE SUSTAINABILITY IMPACT ASSESSMENT 52–56 (2006), available at <http://trade.ec.europa.eu/doclib/html/127974.htm>.

146. See *supra* notes 33–34 and accompanying text.

147. ÇAĞATAY, *supra* note 51, at 6.

148. *Id.* at 6–8.

149. *Id.*

women have made progress in some areas, gender inequality is still the rule.<sup>150</sup> In the area of labor and employment, the UN has reported that women's rate of participation in the labor force has increased, and while there has been a narrowing of the gap in participation rates between men and women, it is still considered significant.<sup>151</sup> Notwithstanding such progress, there are still significant problems regarding women's employment because the type of work, conditions of work and opportunities for advancement place them in a disadvantaged position compared to men.<sup>152</sup> Women are less likely than men to hold regular wage and salaried employment and are more likely to work in agriculture in developing countries or in the services sector than men.<sup>153</sup> They are more likely than men to be employed in the informal sector, outside of government regulation and without the social protections offered in jobs in the formal economy, or in part-time work without job security, where they may be exposed to unsafe working conditions and sexual harassment.<sup>154</sup> Women in all countries are typically paid less than men and comprise a higher share of the working poor.<sup>155</sup> This is due in part to the fact that women often are segregated into a small set of occupations in most countries, which offer lower pay, status, decision-making authority and career opportunity.<sup>156</sup> Also, women are responsible for the home and for child care, in addition to their responsibilities as employees, and therefore, they work longer hours than men and have less leisure time.<sup>157</sup> These statistics suggest that women's employment status is a factor that should be considered in trade negotiations.

Workers' rights, namely the right to safe and secure employment, is addressed at the international level primarily by the International Labor Organization ("ILO"), an IGO that has the status of a specialized agency within the UN system.<sup>158</sup> Since its founding in 1919 and continuing up through the present day, the ILO has facilitated the development of international labor standards through numerous conventions and declarations among its member states, establishing workers' rights "to obtain decent and

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150. U.N. Secretary-General, *The World's Women 2010: Trends and Statistics*, 75, U.N. Doc. ST/ESA/STAT/SER.K/19 (2010). The UN published the first such report in 1991 and, pursuant to the mandate of the Beijing Platform for Action adopted at the 1995 Fourth World Conference on Women, has issued updated editions every five years since that date. *Id.* at iii.

151. *Id.* at 75–76.

152. *Id.* at 75.

153. TRADE AND GENDER: OPPORTUNITIES AND CHALLENGES FOR DEVELOPING COUNTRIES, *supra* note 45, at 6.

154. *Id.*

155. *Id.* at 6–7.

156. *Id.* at 7.

157. *The World's Women 2010: Trends and Statistics*, *supra* note 150, at ix–x.

158. *Structure and Organization*, UNITED NATIONS, <http://www.un.org/en/aboutun/structure/> (last visited May 20, 2012).

productive work, in conditions of freedom, equity, security, and dignity.”<sup>159</sup> ILO member states are not required to sign all of the ILO conventions, nor have they done so. In the 1998 Declaration on Fundamental Principles and Rights at Work (“Declaration”), the ILO identified a key subset of such rights as constituting core labor standards, namely freedom of association, the effective recognition of the right to collective bargaining, the elimination of all forms of forced or compulsory labor, the effective abolition of child labor and a prohibition on the worst forms of child labor, and the elimination of discrimination in respect of employment and occupation.<sup>160</sup> The Declaration stated that ILO member states have an obligation to uphold such core labor standards by virtue of their membership in the ILO, even if they have not ratified the particular ILO Conventions that cover such standards.<sup>161</sup>

The effort to link international labor standards with international trade regimes has a long history. As far back as the Havana Charter of 1948 that was intended to establish a multilateral trade organization called the International Trade Organization (“ITO”), a “social clause” was proposed that would have linked respect for workers’ rights and the maintenance of labor standards with global trade.<sup>162</sup> However, the Havana Charter was never

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159. *Introduction to International Labour Standards*, INT’L LABOUR ORG., <http://www.ilo.org/global/standards/introduction-to-international-labour-standards/lang--en/index.htm> (last visited May 20, 2012); *About the ILO*, INT’L LABOUR ORG., <http://www.ilo.org/global/about-the-ilo/lang--en/index.htm> (last visited May 20, 2012); *Database of International Labour Standards*, ILOLEX, <http://www.ilo.org/ilolex/english/convdisp1.htm> (last visited May 20, 2012); *ILO Declarations*, INT’L LABOUR ORG., <http://www.ilo.org/public/english/bureau/leg/declarations.htm> (last visited May 20, 2012). The mission of the ILO is “to promote rights at work, encourage decent employment opportunities, enhance social protection and strengthen dialogue on work-related issues.” *Mission and Objectives*, INT’L LABOUR ORG., <http://www.ilo.org/global/about-the-ilo/mission-and-objectives/lang--en/index.htm> (last visited May 20, 2012). The ILO has developed close to 200 such conventions since its founding, the most significant being ILO Convention No. 87 on freedom of association and protection of the right to organize and ILO Convention No. 98 on the right to organize and collective bargaining. See *Database of International Labour Standards*, *supra*. Some of the Conventions have been abandoned and are no longer active. See *id.*

160. *The Declaration on Fundamental Principles and Rights at Work*, ¶ 2, INT’L LABOUR ORG., <http://www.ilo.org/declaration/thedeclaration/lang--en/index.htm> (last visited May 20, 2012).

161. *Id.*

162. The social clause contained in the Havana Charter provided:

The Members recognize that measures relating to employment must take fully into account the rights of workers under intergovernmental declarations, conventions and agreements. They recognize that all countries have a common interest in the achievement and maintenance of fair labour standards related to productivity, and thus in the improvement of wages and working conditions as productivity may permit. The Members recognize that unfair labour conditions, particularly in production for export, create difficulties in international trade, and, accordingly, each Member shall take

adopted, and the ITO never came into existence. Instead, the GATT treaty was adopted as the mechanism for regulating international trade. The social clause was never incorporated into the GATT.<sup>163</sup> During the Uruguay Round of GATT negotiations that culminated in the creation of the WTO, unsuccessful attempts were made to include a linkage between trade and labor in the form of a social clause that would have required WTO Members to uphold core labor standards.<sup>164</sup> The rationale behind incorporating such a social clause was to mitigate the negative social impacts of globalization on workers, which impacts have been linked to increased trade and foreign investment by multinational corporations.<sup>165</sup> The mechanism for doing so would consist of conditioning market access and receipt of trade benefits on upholding core labor standards through the language of the social clause.

Currently, the WTO treaties do not incorporate core labor standards, and there is no working group on labor issues within the WTO's organizational structure that would consider reviving the notion of a social clause.<sup>166</sup> WTO Members addressed the topic of core labor standards at the 1996 Singapore

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whatever action may be appropriate and feasible to eliminate such conditions within its territory.

United Nations Conference on Trade and Employment, Havana, Cuba, Nov. 21, 1947–Mar. 24, 1948, *Havana Charter for an International Trade Organization*, Art. 7, U.N. Doc. E/CONF.2/78 (Apr. 1948).

163. The only labor topic dealt with in the GATT is the provision that allows contracting parties to adopt non-conforming measures relating to the product of prison labor. GATT, *supra* note 2, art. XX.

164. SIMON LESTER & BRYAN MERCURIO, *WORLD TRADE LAW: TEXT, MATERIALS AND COMMENTARY* 836–45 (2008).

165. This viewpoint was expressed in a resolution by the International Confederation of Free Trade Unions (“ICFTU”), an international trade union, at its 2000 World Congress, where it was stated that:

Trade and investment continue to hold the potential for contributing to higher growth, employment and living standards and fighting world poverty. However, the WTO must incorporate far-reaching improvements in its mechanisms so that trade and investment can serve social development and help lead to the improvement, not the denial, of working peoples' fundamental human rights. . . .

. . . [W]hat is urgently needed is a series of practical steps to incorporate enforceable core labour standards into concrete actions by the WTO to reinforce rather than undermine universal International Labour (ILO) standards.

17th World Congress of the ICFTU, Durban, S. Afr., April 3-7, 2000, *Final Congress Statement on International Labour Standards and Trade: Workers' Rights in the World Trading System*, ¶¶ 3–4 (Apr. 5, 2000), available at [http://www.icftu.org/www/english/congress2000/econres2000\\_XI.pdf](http://www.icftu.org/www/english/congress2000/econres2000_XI.pdf). The ICFTU merged with the World Confederation of Labour on November 1, 2006, forming the International Trade Union Confederation, the world's largest trade union federation. See *About Us*, INT'L TRADE UNION CONFERENCE, <http://www.ituc-csi.org/about-us.html> (last visited May 20, 2012).

166. *Labour Standards: Consensus, Coherence and Controversy*, WORLD TRADE ORG., [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/bey5\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/bey5_e.htm) (last visited May 20, 2012).

Ministerial Conference, by stating that they renewed their “commitment to the observance of internationally recognized core labour standards.”<sup>167</sup> However, the WTO Members declined to take on the task of incorporating core labor standards within the treaty regime, stating instead that “[t]he International Labour Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them.”<sup>168</sup> The WTO Secretariat maintains a working relationship with the ILO Secretariat on technical issues related to what it calls “‘coherence’ in global economic policy-making,” but that is the extent of the WTO’s involvement in trade-related labor issues.<sup>169</sup>

The WTO as an institution has continued to oppose the inclusion of a social clause in the WTO treaties, citing a number of grounds. First, there is the potential of such a clause to operate as a protectionist measure that would interfere with free trade.<sup>170</sup> Second, there is the concern expressed by developing country Members that they will lose their comparative advantage in trade matters and the proposed labor standards could be too high for them to meet at their level of development.<sup>171</sup> Third, there is the lack of consensus among countries surrounding this issue and the inability of WTO Members to resolve such issues within the context of trade negotiations.<sup>172</sup> Finally, there is the argument that the so-called “Christmas tree” approach of hanging too many ornaments on the tree will ultimately cause the whole system to collapse under its own weight.<sup>173</sup> In other words, by trying to address too many social issues that have been linked to trade, including labor standards, human rights, and environmental protection within the WTO, the whole system will become so riddled with exceptions that the fundamental principles of non-discrimination that bind the WTO Members together will be undermined.<sup>174</sup>

While the attempt to include labor standards via a social clause within the WTO treaties has reached an impasse and is unlikely to progress further in the near term, efforts to achieve the same result within the context of RTAs have met with success in a number of instances. For example, the United States has

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167. World Trade Organization, Singapore Ministerial Declaration of 18 Dec. 1996, ¶ 4, WT/MIN(96)/DEC., 36 I.L.M. 218 (2007).

168. *Id.*

169. *Labour Standards: Consensus, Coherence and Controversy*, *supra* note 156.

170. *Id.*

171. *Id.*

172. *Id.*

173. Arthur Dunkel et al., *Joint Statement on the Multilateral Trading System*, WORLD TRADE ORG. (Feb. 1, 2001), [http://www.wto.org/english/news\\_e/news01\\_e/jointstatdavos\\_jan01\\_e.htm](http://www.wto.org/english/news_e/news01_e/jointstatdavos_jan01_e.htm) (“The WTO cannot be used as a Christmas tree on which to hang any and every good cause that might be secured by exercising trade power.”).

174. *Id.*

incorporated labor rights clauses in several recent FTAs entered into with its trading partners.<sup>175</sup>

The first time that the United States incorporated labor standards in an international trade agreement was when it entered into the NAALC in 1993.<sup>176</sup> NAALC is a side agreement under NAFTA that was negotiated and concluded one year after the NAFTA was signed by U.S. President George H.W. Bush, Mexican President Carlos Salinas and Canadian Prime Minister Brian Mulroney.<sup>177</sup> A companion side agreement dealing with environmental issues, the NAAEC, was entered into at the same time.<sup>178</sup> The reason for separate stand-alone agreements on labor and the environment was due to political pressure from labor, environmental and human rights groups on then presidential candidate Bill Clinton in 1992 to repudiate NAFTA, which such groups considered adverse to the interests they represented.<sup>179</sup> In order to appease those groups while at the same time maintaining the support of business groups favoring NAFTA that helped fund his campaign, President Clinton reopened negotiations on labor and the environment with Mexico and Canada after his inauguration, and NAALC and NAAEC were the result.<sup>180</sup>

In the words of the U.S. Department of Labor, the NAALC was designed “to improve working conditions and living standards in the United States, Mexico, and Canada as the North American Free Trade Agreement (NAFTA) promotes more trade and closer economic ties among the three countries.”<sup>181</sup> The approach taken in the document was to foster cooperation among the three NAALC signatories (each a “Party” and collectively, the “Parties”), through information exchange, technical assistance and consultations.<sup>182</sup> An oversight mechanism was also implemented to ensure the enforcement of labor laws, along with a provision for imposition of trade sanctions if a Party did not

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175. *See supra* note 34.

176. NAALC, *supra* note 30.

177. *Frequently Asked Questions*, U.S. DEP’T OF LAB., <http://www.dol.gov/ILAB/faqs.htm#8> (last visited May 20, 2012).

178. NAAEC, *supra* note 30.

179. JAMES ATLESON ET AL., INTERNATIONAL LABOR LAW: CASES AND MATERIALS ON WORKERS’ RIGHTS IN THE GLOBAL ECONOMY 277 (2008). Labor unions opposed NAFTA because they believed U.S. firms would move their manufacturing facilities to Mexico in order to take advantage of the lower wage scale and lower standards for working conditions there and would use the threat of relocation to extract wage concessions from U.S. unions, leading to a loss of jobs and lower wages. *Id.* at 277–78. A similar argument was made regarding environmental standards. *See id.* at 277.

180. *Id.*

181. U.S. DEP’T OF LABOR, BUREAU OF INT’L LABOR AFFAIRS, NORTH AMERICAN AGREEMENT ON LABOR COOPERATION: A GUIDE (2005) [hereinafter NAALC: A Guide], available at <http://www.dol.gov/ilab/media/reports/nao/naalcgd.htm>.

182. NAALC, *supra* note 30, 32 I.L.M. at 1505.

enforce its labor laws.<sup>183</sup> This oversight mechanism has been used by the NAFTA parties to investigate alleged labor law violations, including the issue of pregnancy testing in Mexican maquiladoras, although no sanctions were imposed in that case.<sup>184</sup> In order to achieve these goals, the NAALC mandated the creation of national institutions, namely National Administrative Offices in each country and national or governmental advisory committees, as well as an international institution called the Commission for Labor Cooperation, consisting of a Council and a Secretariat.<sup>185</sup>

Under the NAALC, Parties must ensure that their labor laws provide for high standards that are transparent, that they continue to improve those standards and that they enforce them through government mechanisms that are accessible to persons with legally cognizable interests and that those proceedings are fair, equitable and transparent.<sup>186</sup> The labor laws covered by NAALC are broadly defined and cover not only the core labor standards identified by the ILO (freedom of association, the right to bargain collectively, prohibition of forced labor, abolition of child labor and the elimination of employment discrimination) but also other matters, including laws relating to equal pay for women and men.<sup>187</sup> In addition, the Parties mandated that the cooperative work required by NAALC relate to a wide variety of labor and employment issues, including “the equality of women and men in the workplace.”<sup>188</sup> In fact, this cooperative work mechanism has been deployed to study the issue of women’s employment in North America, as well as national laws on workplace discrimination and equal pay.<sup>189</sup>

The reviews of NAALC have been mixed. NAALC has been criticized as a weak treaty, reflecting the lack of consensus among the NAFTA parties about the advisability of incorporating core labor standards in trade

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183. *Id.* at 1508, 1512–13.

184. U.S. DEP’T OF LABOR, BUREAU OF INT’L LABOR AFFAIRS, PUBLIC REPORT OF REVIEW OF NAO SUBMISSION NO. 9701 (1998), available at <http://www.dol.gov/ilab/media/reports/nao/pubrep9701.htm#ivb>; U.S. DEP’T OF LABOR, BUREAU OF INT’L LABOR AFFAIRS, MINISTERIAL CONSULTATIONS IMPLEMENTATION AGREEMENT, U.S. NAO SUBMISSION NO. 9701 (1998), available at <http://www.dol.gov/ilab/media/reports/nao/mcia.htm>.

185. NAALC, *supra* note 30, 32 I.L.M. at 1504, 1506–07.

186. NAALC: A Guide, *supra* note 181; NAALC, *supra* note 30, 32 I.L.M. at 1504.

187. NAALC, *supra* note 30, 32 I.L.M. at 1513–14. Other labor laws that are covered include those dealing with minimum employment standards such as minimum wages and overtime pay, as well as prevention of and compensation for occupational injuries and illnesses. *Id.*

188. *Id.* at 1505.

189. *The Employment of Women in North America*, SECRETARIAT OF THE COMM’N FOR LAB. COOPERATION, [http://new.naalc.org/publications/reportsandstudies/the\\_employment\\_of\\_women\\_in\\_north\\_america.htm](http://new.naalc.org/publications/reportsandstudies/the_employment_of_women_in_north_america.htm) (last visited May 20, 2012); *Workplace Anti-Discrimination and Equal Pay Laws in the U.S.*, SECRETARIAT OF THE COMM’N FOR LAB. COOPERATION, [http://new.naalc.org/UserFiles/File/NEW-antidiscrimination\\_full\\_eng.pdf](http://new.naalc.org/UserFiles/File/NEW-antidiscrimination_full_eng.pdf) (last visited May 20, 2012).

agreements.<sup>190</sup> Although the treaty gives a nod in the direction of incorporating core labor standards, it lacks strong enforcement mechanisms, using a negotiation rather than an adjudication model, without any provision for a permanent adjudication tribunal.<sup>191</sup> Rather than requiring the Parties to uphold international labor standards developed through the ILO, NAALC requires the signatories to enforce their national laws, without setting minimum standards for the content of such laws.<sup>192</sup> Finally, NAALC does not provide for strong trade sanctions against signatories engaged in systemic violations nor does it penalize employers whose conduct resulted in such systemic violations.<sup>193</sup> This stands in sharp contrast to the NAFTA dispute settlement provisions for commercial disputes, which provide for a formal adjudication process and effective enforcement mechanisms.<sup>194</sup>

Subsequent FTAs entered into by the United States have incorporated labor rights clauses that remedy some of the deficiencies identified in the NAALC. These include adding international norms for labor standards, rather than relying on national standards, incorporating such standards as part of the main body of the agreement, rather than in a side agreement like NAALC, giving dispute settlement for labor standards the same status as commercial disputes, and expanding the use of trade sanctions for violations.<sup>195</sup> For example, the 2001 U.S.-Jordan FTA, which at the time of its passage was referred to as “the high-water mark for the inclusion of strong workers’ rights provisions in free trade agreements,” incorporates all of these improvements.<sup>196</sup>

Since 2007, U.S. negotiations over FTAs have been subject to the terms of the BTDA, which requires that new trade agreements address certain issues of particular concern to Congress, namely labor standards, environmental

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190. 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, 299 (2005).

191. Marley S. Weiss, *Two Steps Forward, One Step Back—Or Vice Versa: Labor Rights Under Free Trade Agreements from NAFTA, Through Jordan, via Chile, to Latin America, and Beyond*, 37 U.S.F. L. REV. 689, 698 (2003).

192. *Id.* at 705, 711, 745.

193. *Id.* at 698.

194. David A. Gantz, *Dispute Settlement Under the NAFTA and the WTO: Choice of Forum Opportunities and Risks for the NAFTA Parties*, 14 AM. U. INT’L REV. 1025, 1031 (1999). NAFTA provides for several different types of dispute settlement involving commercial matters, including Chapter 11 (investments), Chapter 14 (financial services), Chapter 19 (unfair trade actions) and Chapter 20 (interpretation and application of NAFTA generally). *Id.* at 1030.

195. Weiss, *supra* note 191, at 697.

196. Carol J. Pier, *Workers’ Rights Provisions in Fast Track Authority, 1974-2007: An Historical Perspective and Current Analysis*, 13 IND. J. GLOBAL LEGAL STUD. 77, 88 (2006). Notwithstanding these improvements, the U.S.-Jordan FTA has been criticized as not being strong enough since it lacks a monitoring and enforcement agency and a permanent, impartial tribunal. Weiss, *supra* note 191, at 700.



protection, intellectual property protection, protection of foreign investors and investment, and security.<sup>197</sup> Regarding labor standards, the BTDA mandates that U.S. trade agreements include an “enforceable reciprocal obligation for the countries to adopt and maintain in their laws and practice the five basic internationally-recognized labor principles, as stated in the ILO Declaration on Fundamental Principles and Rights at Work.”<sup>198</sup> Among the other requirements set forth in the BTDA, the matter in dispute must relate to trade or investment, be the product of a sustained or recurring course of action and relate to a federal law.<sup>199</sup> Only national governments may be parties to disputes involving alleged labor violations, which are adjudicated under the same mechanisms as commercial disputes and subject to imposition of both fines and trade sanctions, depending on the extent of the trade injury.<sup>200</sup>

Several recent trade agreements entered into by the United States pursuant to the BTDA follow this pattern, including the U.S.-Peru, U.S.-Colombia, U.S.-Panama and U.S.-Korea FTAs.<sup>201</sup> This means that both parties will be held accountable for failure to adopt and enforce laws that incorporate the core labor standards and a defaulting party will be required to consult with the other party over any dispute related to this obligation.<sup>202</sup> Failure to resolve the matter through such consultations may result in the initiation of formal proceedings under a general dispute settlement procedure developed for resolution of all types of matters related to interpretation and application of the FTA.<sup>203</sup> Use of strict timelines, rules of procedure and enforcement mechanisms guarantee that there will be effective recourse for a party if core labor standards are not adopted and enforced.<sup>204</sup> While such provisions may help to promote worker’s rights, at least one commentator has suggested such provisions are unlikely to lead to widespread improvements in labor standards.<sup>205</sup>

These provisions in recent United States FTAs may prove helpful to women, although the labor rights clauses in such agreements were not adopted

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197. Gantz, *supra* note 31, at 139.

198. OFFICE OF THE U.S. TRADE REPRESENTATIVE, *supra* note 41, at 1.

199. *Id.*

200. *Id.* at 2.

201. United States-Peru Trade Promotion Agreement, U.S.-Peru, *supra* note 33, ch. 17; United States-Colombia Free Trade Agreement, U.S.-Colom., *supra* note 34, ch. 17; United States-Panama Trade Promotion Agreement, U.S.-Pan., *supra* note 34, ch. 16; United States-Korea Free Trade Agreement, U.S.-Kor., *supra* note 34, ch. 19.

202. For an illustrative example from one of these recent trade agreements, see United States-Colombia Free Trade Agreement, U.S.-Colom., *supra* note 34, arts. 17.2, 17.3, 17.7.

203. *Id.* ch. 21.

204. *Id.*

205. Kevin Banks, *Trade, Labor and International Governance: An Inquiry into the Potential Effectiveness of the New International Labor Law*, 32 BERKELEY J. EMP. & LAB. L. 45, 136–37 (2011).

specifically to address the problems encountered by women as a result of trade liberalization. This is because many of the negative impacts of trade liberalization on women relate to employment matters. For example, the language requiring the parties to enact labor laws that guarantee core labor standards includes the obligation to “eliminate discrimination in respect of employment and occupation.”<sup>206</sup> In addition, the parties to these FTAs have agreed to cooperate on labor matters and to build capacity on labor issues, including the core labor standard of employment discrimination, as well as gender issues more generally, along with working conditions, such as hours and wages and occupational safety and health standards.<sup>207</sup>

It is important to point out that not all commentators agree that incorporating a social clause in trade agreements will result in benefits to women.<sup>208</sup> For example, it has been noted that women’s interests have generally not been well-represented in trade negotiations and as a result, such clauses have overlooked issues of significance for women.<sup>209</sup> Such clauses generally relate only to the formal sector of employment and ignore the informal sector where many women are employed, including the self-employed and homeworkers.<sup>210</sup> As a consequence, some critics have questioned the value of social clauses in achieving gender equality goals.<sup>211</sup>

On the other hand, social clauses may be helpful for the large number of women employed in labor intensive industries producing traded goods in many countries. Such women are often preferred over men as employees since they may be willing to work for lower wages and under conditions of part-time or temporary employment without many employment rights, for example in maquiladoras in Mexico.<sup>212</sup> Given the low standard of working conditions for women in such employment sectors, even social clauses in their present form might provide a basis for improvements to be made. It would be more helpful, however, if such clauses were expanded to become “gender clauses” that specifically targeted additional issues of importance to women, such as equal pay and maternity benefits.

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206. United States-Colombia Free Trade Agreement, U.S.-Colom., *supra* note 34, art. 17.2.

207. *Id.* art. 17.6, annex 17.6.

208. MARZIA FONTANA, SUSAN JOEKES & RACHEL MASIKA, BRIDGE, GLOBAL TRADE EXPANSION AND LIBERALISATION: GENDER ISSUES AND IMPACTS, 37, 37–40 (1998).

209. *Id.* at 37.

210. *Id.*

211. *Id.*

212. *Id.* at 38; see Maria Elena Cardero, *The Impact of NAFTA on Female Employment in Mexico*, in WOMEN’S EMPOWERMENT AND ECONOMIC JUSTICE: REFLECTING ON EXPERIENCE IN LATIN AMERICA AND THE CARIBBEAN, 38, 48–50 (Liliana de Pauli ed., 2000).

### B. Use of Gender Analysis in Regional Economic Organizations

Another mechanism that may benefit women is the use of gender analysis by a number of regional economic organizations, including APEC. Underlying its use is the insight of some economists that macroeconomic and trade policies affect women and men differently due to differences in access to resources, work patterns, and household responsibilities.<sup>213</sup> For these reasons, it is important to analyze the differential impacts on women and men of changes in trade policy before they are implemented.<sup>214</sup>

Gender analysis, first developed for use in the social sciences, is now a widely accepted tool in the area of development policy and program planning.<sup>215</sup> Focusing on a core set of issues, including women's and men's roles, factors shaping gender roles and the gender division of work, access and control over resources, opportunities and their systems of distribution, access to and participation in decision-making processes, and men's and women's practical and strategic needs and interests,<sup>216</sup> the results of such analysis are used to establish gender objectives and indicators in line with international objectives, attainment of which is monitored through gender impact studies.<sup>217</sup> Aligning resources with objectives and ensuring equal representation of women and men are other elements of such analysis.<sup>218</sup>

A similar approach might be applied to trade matters by conducting *ex ante* gender impact assessments during the negotiation of new trade agreements or upon implementing changes in trade policy. Since gender analysis is a much newer concept in the area of trade, fewer models have been developed for its use, and there is limited experience with application of such models to trade law and policy.<sup>219</sup> Several examples will be noted here, including a number of frameworks that have been developed and applied on a regional level. One example is the TIR instrument developed by Women Thrive Worldwide, formerly Women's Edge, which was discussed in Part II.<sup>220</sup> Designed to assess the impact of trade liberalization on groups living in poverty, especially

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213. Lourdes Benería & Amy Lind, *Engendering International Trade: Concepts, Policy, and Action*, § 3.0 (GSD Working Paper Series, Paper No. 5, 1995), available at <http://www.iiav.nl/publications/1995/engenderinginternationaltrade.pdf>; see also ÇAĞATAY, *supra* note 51, at 19–26.

214. Wagner, *supra* note 101, at 214.

215. UNESCO, UNESCO'S GENDER MAINSTREAMING IMPLEMENTATION FRAMEWORK (GMIF) FOR 2002-2007, at 10 (2003), available at <http://unesdoc.unesco.org/images/0013/001318/131854e.pdf>.

216. *Id.*

217. *Id.* at 10, 12.

218. *Id.*

219. See *supra* note 95.

220. SARAH GAMMAGE ET AL., TRADE IMPACT REVIEW iv (2002), available at <http://www.womenthrive.org/images/tradeimpactreviewfinal.pdf>.

women, the TIR identifies the direct and indirect economic effects of a change in trade or investment policy on such persons, as well as the legal and regulatory changes or conflicts that may arise as a result of such policy.<sup>221</sup>

There are two levels of analysis under the TIR framework—economic and legal. The economic analysis consists of measuring trade agreement impacts on women with reference to five indicators: relative prices, employment, relative wages, consumption, and institutions and regulation.<sup>222</sup> The legal analysis consists of two steps: the first examines the language of the trade agreement itself, as well as its implementation and enforcement mechanisms, and the second studies potential conflicts with national laws or international obligations relevant to women.<sup>223</sup> The purpose of the first step is to identify overt gender bias in the treaty language or disparate impact of treaty language that seems gender neutral on its face.<sup>224</sup> In considering gender bias in the related implementation and enforcement mechanisms under the first step, the gender composition and gender awareness of the agencies involved would be considered.<sup>225</sup> The second step involves identifying possible conflicts with laws and other obligations, and would include an analysis of: international commitments relevant to women; the constitution; laws granting special benefits to women, such as equal treatment and affirmative action laws; gender-neutral laws, such as those pertaining to fair wages, food labeling, and health and safety; gaps in the coverage or enforcement of laws benefitting women, such as labor laws; and religious, traditional or customary laws and practices affecting women, especially those relating to land and other assets.<sup>226</sup>

The purpose of developing the TIR instrument was to inform the United States government of the negative impacts of trade and investment agreements prior to its entry into such legally binding commitments, to encourage the United States to address such negative consequences, and to build upon positive effects for people affected by trade liberalization.<sup>227</sup> As discussed in Part II, the drafters of the TIR framework recommended that the USTR assess gender and other social impacts, both within the United States and in developing countries, of new trade and investment commitments on a multilateral, regional, or bilateral basis, as well as for built-in and new negotiations under existing agreements,<sup>228</sup> but the United States government has not done so.

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221. *Id.* at vi.

222. *Id.* at 13–23.

223. *Id.* at 23.

224. *Id.* at 24.

225. *Id.* at 17–18.

226. GAMMAGE ET AL., *supra* note 220, at 24.

227. *Id.* at iv–vi.

228. *Id.* at xi.

Another framework for gender analysis has been developed by the Commonwealth Secretariat<sup>229</sup> in its work on ensuring gender equity among its member states, which include both developing and developed countries, and stems from concerns about “the negative impact of globalization and trade liberalization, particularly on weak and vulnerable economies and especially on women and children.”<sup>230</sup> This framework for analysis of gender, trade policy and trade liberalization is based on the recognition that women’s and men’s traditional roles in society restrain their ability to respond to changing opportunities in the trade environment; access to and ownership of assets and productive resources is dependent on gender; and the nature of production in different sectors of the economy is dependent on gender roles.<sup>231</sup> Given these realities, the framework suggests the following three steps in gender analysis. First, identify the situation of women and men at the point of introduction of trade liberalization or change in trade policies and determine what mechanisms or measures are incorporated into the policy changes to account for these differences.<sup>232</sup> Second, identify the expected results of such changes and determine whether such results were generated.<sup>233</sup> Third, determine what additional mechanisms or measures must be incorporated to return to the expected trajectory.<sup>234</sup>

This framework was developed to guide policy makers in Commonwealth member states, IGOs and NGOs seeking to better understand the impact of trade liberalization on gender equality.<sup>235</sup> The goal was to encourage such stakeholders to “take steps to create gender-sensitive trade rules, as well as to develop complementary mechanisms to offset the negative effects and set in place policies, programmes and projects that will promote improvement in the lives of women and men in society,” and the Commonwealth Secretariat has continued to promote gender mainstreaming in trade policy in its member states.<sup>236</sup>

A noteworthy example of a regional economic organization that uses gender analysis in its work is APEC. While APEC does not have the status of

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229. The Commonwealth Secretariat is the central body of the Commonwealth of Nations, an association comprised of the United Kingdom, its dependencies and its former colonies (now sovereign states). *Who We Are*, COMMONWEALTH SECRETARIAT, <http://www.thecommonwealth.org/subhomepage/191086/> (last visited May 20, 2012).

230. WILLIAMS, *supra* note 96, at xi.

231. *Id.* at 42.

232. *Id.* at 42–45.

233. *Id.*

234. *Id.*

235. *Id.* at xiv–xv.

236. WILLIAMS, *supra* note 96, at xiv–xv; *What We Do, Gender Project Examples*, COMMONWEALTH SECRETARIAT, [http://www.thecommonwealth.org/Internal/190957/what\\_we\\_do/](http://www.thecommonwealth.org/Internal/190957/what_we_do/) (last visited May 20, 2012).

an RTA under the GATT, it serves as a forum to discuss trade and economic issues among the twenty-one member nations, including the United States.<sup>237</sup> APEC has gone further than most other regional economic organizations in its use of gender analysis.<sup>238</sup>

APEC's use of gender analysis stems from a recommendation of the organization's 1998 Ministerial Meeting on Women to develop a framework for the integration of women.<sup>239</sup> Subsequently, a Framework for Integration of Women was developed in 1999 ("1999 APEC Framework") and revised in 2002 ("2002 APEC Guidelines").<sup>240</sup> The 1999 APEC Framework emphasizes three main points, namely the use of gender analysis for policies, programs and projects, the collection of sex-disaggregated data for use in gender analysis, and promotion of involvement of women in APEC, especially in decision-making.<sup>241</sup> The 2002 APEC Guidelines set forth the steps to be used in applying the 1999 APEC Framework at both the policy-making and program design and implementation levels.

Gender analysis addressing specific gender questions and criteria is required for all projects approved by APEC.<sup>242</sup> The 1999 APEC Framework and 2002 APEC Guidelines have been implemented in a wide variety of trade and investment projects undertaken by APEC members.<sup>243</sup> Examples of projects related to trade and investment developed through various APEC sector-specific working groups include a study by the APEC Group on Services on the transnational movement of women and men in the business services trade, which identified some discriminatory practices of firms and then suggested ways business could address those disparities, as well as a project by the APEC Committee on Trade and Investment that identified

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237. *Member Economies*, ASIA-PAC. ECON. COOPERATION, <http://www.apec.org/About-Us/About-APEC/Member-Economies.aspx> (last visited May 20, 2012).

238. For a more expansive discussion of the development of the APEC gender mainstreaming initiative, see Jacqui True, *Gender Mainstreaming and Regional Trade Governance in Asia-Pacific Economic Cooperation (APEC)*, in *GLOBAL GOVERNANCE: FEMINIST PERSPECTIVES* 129, 129–53 (Shirin M. Rai & Georgina Waylen eds., 2008).

239. APEC Ministerial Meeting on Women, Makati, Phil., Oct. 15–16, 1998, *Joint Ministerial Statement 6* (1998), available at [http://www.apec.org/Meeting-Papers/Ministerial-Statements/Women/~media/Files/MinisterialStatements/Women/98\\_wmm\\_jms.ashx](http://www.apec.org/Meeting-Papers/Ministerial-Statements/Women/~media/Files/MinisterialStatements/Women/98_wmm_jms.ashx).

240. APEC 1999, *supra* note 100; APEC 2002, *supra* note 100.

241. APEC 1999, *supra* note 100, at 3–6.

242. True, *supra* note 238, at 139.

243. See, e.g., HEATHER GIBB, *GENDER MAINSTREAMING: GOOD PRACTICES FROM THE ASIA PACIFIC REGION* (2001), available at [http://www.apec.org/Groups/SOM-Steering-Committee-on-Economic-and-Technical-Cooperation/Working-Groups/~media/Files/Groups/GFPN/01\\_aggi\\_mainstreaming.ashx](http://www.apec.org/Groups/SOM-Steering-Committee-on-Economic-and-Technical-Cooperation/Working-Groups/~media/Files/Groups/GFPN/01_aggi_mainstreaming.ashx) (offering an assessment of the results of such gender analysis); see also True, *supra* note 238, at 139–41.

potential barriers to participation by women exporters in several APEC economies.<sup>244</sup>

One commentator has noted that APEC's use of gender analysis is pathbreaking for a regional economic organization and that APEC has been "comparatively successful" in this endeavor, measured by criteria for assessing effectiveness in terms of procedural outcomes, namely putting in place criteria and checklists for gender integration.<sup>245</sup> Such commentator has noted, however, that APEC has done little to evaluate whether the 1999 APEC Framework or 2002 APEC Guidelines have actually caused a change in behavior as measured by a policy shift or policy outcome based on the use of gender analysis, sex-disaggregated data or the increased involvement of women.<sup>246</sup> Notwithstanding this shortcoming, the APEC model may provide helpful guidance for other regional economic organizations seeking to integrate a gender perspective into their work.

Another regional development involving gender analysis of trade agreements is the EU's use of a gender dimension in its Trade SIAs. A Trade SIA is an evaluation of the potential economic, social and environmental impacts of a trade agreement that is undertaken during the negotiation process.<sup>247</sup> The results of these Trade SIAs are integrated into EU policy by the European Commission, which uses the results to identify concrete steps needed to enhance the positive impacts of trade liberalization or to mitigate negative effects.<sup>248</sup> The EU began conducting Trade SIAs for all of its major trade negotiations, starting with the WTO Doha Round negotiations, and has continued to apply such analysis to more recent regional and bilateral negotiations involving Chile, the Southern Common Market (Mercosur), the African, Caribbean and Pacific Group of States ("ACP"), and the Cooperation Council for the Arab States of the Gulf.<sup>249</sup> Gender equality is one of the indicators used in the Trade SIA, with a focus on eliminating gender-based employment discrimination and eliminating gender disparities in education at the primary and secondary levels.<sup>250</sup> Trade SIAs become public documents and are available on the website of the European Commission.<sup>251</sup> For example, there are Trade SIAs for FTA negotiations involving the Association of Southeast Asian Nations ("ASEAN"), India, Korea and Ukraine, among others, which often reference the impact of trade liberalization on women's

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244. True, *supra* note 238, at 140.

245. *Id.* at 146.

246. *Id.* at 147.

247. EUROPEAN COMM'N, *supra* note 145, at 1, 7.

248. *Id.* at 11–13.

249. *Id.*

250. *Id.* at 53–54.

251. *Sustainability Impact Assessments*, EUROPEAN COMM'N (last updated Feb. 7, 2012), [http://ec.europa.eu/trade/analysis/sustainability-impact-assessments/assessments/#\\_geographical](http://ec.europa.eu/trade/analysis/sustainability-impact-assessments/assessments/#_geographical).

employment and educational opportunities.<sup>252</sup> In an even more recent development relating to the EU, the ACP-EU Joint Parliamentary Assembly called upon the ACP states to conduct sustainability studies related to their negotiation of economic partnership agreements with the EU that would address the impact of trade arrangements on women in the ACP states as one dimension of the analysis and called upon the European Commission and the EU states to finance such studies.<sup>253</sup>

These developments signal recognition by the EU of the importance of identifying the gender-differentiated impacts of trade agreements. In this respect, the EU seems far ahead of other trade actors. Even though the Trade SIA process does not highlight gender dimensions to a significant extent, it does include gender as one aspect of the social impacts of RTAs. As discussed previously, the United States does conduct trade impact assessments of its RTAs pursuant to the Trade Act of 2002 but does not consider the impacts on women.<sup>254</sup> Ideally, in the future, nations will conduct *ex ante* gender assessments of trade agreements in the same manner that they currently conduct economic or environmental assessments.

#### CONCLUSION

In recent years, RTAs have proven to be powerful drivers of economic integration among nations. While the global community is still committed to the multilateral process of trade liberalization conducted through the WTO, nations have turned increasingly to such regional arrangements as a means of furthering their economic policy and political agendas. There are good reasons for the development of this dual track. The failure of the WTO Members to achieve consensus on contentious issues in recent years, particularly those that emerged as a result of the Doha Development Agenda relating to market access and subsidies in the agricultural sector, have led some to believe that further progress in negotiating important issues through the WTO may be stalled. The institutional structure of the WTO, which requires decision making by consensus, as well as the difficulty of negotiating with 150 plus WTO Members with widely disparate agendas, may be partial causes of this impasse.

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252. *Id.*

253. *Report of the Expert Meeting on Mainstreaming Gender in Trade Policy*, *supra* note 94. The ACP states are parties to the Cotonou Agreement with the EU, which provides the framework for the EU's relationship with that group of 79 nations. THE COTONOU AGREEMENT, EUROPEAN COMM'N (revised 2010), available at [http://ec.europa.eu/europeaid/where/acp/overview/cotonou-agreement/index\\_en.htm](http://ec.europa.eu/europeaid/where/acp/overview/cotonou-agreement/index_en.htm). The ACP-EU Joint Parliamentary Assembly is the forum for discussions among government representatives of ACP and EU member states. *Why a Joint Parliamentary Assembly?*, ACP-EU JOINT PARLIAMENTARY ASSEMBLY, [http://www.europarl.europa.eu/intcoop/acp/20\\_01/default\\_en.htm](http://www.europarl.europa.eu/intcoop/acp/20_01/default_en.htm) (last visited May 20, 2012).

254. *See supra* notes 131–35 and accompanying text.



In contrast, the more streamlined process associated with RTA negotiations, as well as the benefit of negotiating with close trading partners with mutually reinforcing economic policy and political goals, has led to success in achieving a deeper form of integration by further dismantling trade barriers below the level achieved through WTO negotiations. Another feature is that such regional arrangements have embarked on a wider form of economic integration by incorporating new areas that the WTO has not yet touched. One important aspect has been the introduction of social issues, namely labor and environmental matters, in some instances. The inclusion of these topics in recent FTAs entered into by the United States and its trading partners, starting with NAFTA, is an example of this development.

Gender equality is a critical social issue that should be addressed by trade law and policy. The need to mitigate the negative impacts on women brought about by trade liberalization is a concept that has been explored by feminist trade economists, IGOs and NGOs for the past twenty years, with much of the analysis focusing on the WTO process. And yet, no progress has been made on advancing this issue at the multilateral level of the WTO.

The story at the regional level is different. There have been some developments that may have a positive impact on women, such as the incorporation of labor rights clauses in several recently concluded FTAs between the United States and its trading partners, as well as the use of gender analysis and *ex ante* gender impact assessments of trade arrangements by some regional economic organizations, such as APEC. These developments suggest that the most fruitful route for advancing gender equality through trade negotiations is at the regional, rather than the multilateral, level. This may be yet another opportunity for regional organizations to demonstrate that they lead, rather than follow, multilateral organizations in matters of economic integration.

And yet in spite of these hopeful developments, they fall short of a comprehensive work program that would advance women's equality in a truly meaningful way. Such a work program would consist of a number of elements, including mandated use of *ex ante* gender analysis of trade agreements, use of sex-disaggregated data to facilitate such analysis, adoption of government policy measures and treaty provisions to address negative impacts on women identified as a result of such analysis, inclusion of women in the process of trade policy formation and the negotiation of trade agreements so that women's concerns could be voiced, provisions for inclusion of women in institutional structures within regional economic organizations, including trade dispute resolution panels and trade commissions, and inclusion of a labor rights clause specifically directed at the concerns of women, a "gender clause" if you will. Such points should remain on the agendas of the trade ministries of national governments, as well as IGOs and NGOs engaged in international trade law matters at the regional and multilateral levels.

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Tomorrow is another day, and perhaps more progress will be made on these issues in the future.