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PROMOTING DISTRIBUTIONAL EQUALITY FOR WOMEN: SOME THOUGHTS ON GENDER AND GLOBAL CORPORATE CITIZENSHIP IN FOREIGN DIRECT INVESTMENT

Rachel J. Anderson*

I. INTRODUCTION

This essay applies a legal theory of global corporate citizenship to the question of women's distributional equality in foreign direct investment ("FDI").¹ It proposes ways that a legal theory of mandatory global corporate citizenship can expand the ways we think about regulating transnational corporations and promoting gender equality.

Gender inequality is a global problem for girls and women.² Seventy percent of the children in the world who do not attend school regularly are girls, while over 100 million girls are employed as child laborers.³ Girls employed as child laborers are often employed in domestic labor or in farm

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¹ FDI describes the legal relationship between an entity in one country (the home country) and an entity in another country (the host country). There are multiple definitions of foreign direct investment. Alfred Escher, *Current Developments, Legal Challenges and Definition of FDI*, in LEGAL ASPECTS OF FOREIGN DIRECT INVESTMENT 3 (Daniel D. Bradlow & Alfred Escher eds., 1999). The intended duration of the relationship over time and the level of control over the management of the entity characterize this relationship. ORG. FOR ECON. CO-OPERATION & DEV., BENCHMARK DEFINITION OF FOREIGN DIRECT INVESTMENT 7-8 (3d ed., 1999), available at <http://www.oecd.org/dataoecd/10/16/2090148.pdf>; Press Release, World Trade Org., Trade and Foreign Direct Investment (Oct. 9, 1996), http://www.wto.org/english/news_e/pres96_e/pr057_e.htm.

² See RICARDO HAUSMANN, LAURA D. TYSON, & SAADIA ZAHIDI, THE GLOBAL GENDER GAP REPORT 39 (2009) (citations omitted), available at <http://www.weforum.org/pdf/gendergap/report2009.pdf>.

³ *Id.* (citations omitted).

work.⁴ In contrast, when the girls become women, their access to paid employment decreases.⁵ Although women make up a majority of the world's population, they only make up forty percent of the global labor force.⁶

Governments, as regulators, and transnational corporations, as employers, exert social, political, economic, and legal influence on distributional equality.⁷ Governments have the power to determine the scope and enforcement of regulation. Transnational corporations have the power to shape their employment practices in their overseas operations within the boundaries set by law as well as by influencing lawmaking.⁸ Although women's rights and equality are addressed in international human rights documents and domestic laws, these often do not apply directly to transnational corporations.⁹ In addition, since foreign direct investment is often viewed as gender neutral, research on FDI law often neglects the gendered effects of FDI.¹⁰

⁴ *Id.*

⁵ See INT'L LABOUR ORG., GLOBAL EMPLOYMENT TRENDS FOR WOMEN 2 (2008), available at http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_091225.pdf [hereinafter ILO, GLOBAL EMPLOYMENT TRENDS].

⁶ *Id.* In some cases this may be attributed to choice if it is socially acceptable for women to work in a specific country. *Id.* However, in many regions of the world, remaining outside the labor market is not a socially acceptable choice for women. *Id.* It is likely that many more women would join the outside labor force if presented with a real choice. *Id.*

⁷ Rachel J. Anderson, *Reimagining Human Rights Law: Toward Global Regulation of Transnational Corporations*, 88 DENV. U. L. REV. 183, 204 (2010) [hereinafter Anderson, *Reimagining Human Rights Law*], available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1729427 ("Transnational corporations have achieved vast wealth and immense influence. They exercise economic, political, and legal influence in home countries, the country of incorporation, and host countries—the country in which assets or operations are located.") (citations omitted). A transnational corporation is "an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries-whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively." UNITED NATIONS, ECON. & SOC. COUNCIL, COMM. ON HUMAN RIGHTS, NORMS ON THE RESPONSIBILITIES OF TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES WITH REGARD TO HUMAN RIGHTS, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003) [hereinafter UN, NORMS].

⁸ See Anderson, *Reimagining Human Rights Law*, *supra* note 7, at 209 (discussing stabilization clauses) and *Special 301 Review Public Hearing: Hearing Before the Special 301 Subcomm. of the Office of the U.S. Trade Representative* 104 (2010) (statement of Emi MacLean, Doctors Without Borders), available at http://www.ustr.gov/webfm_send/1726 (discussing efforts by U.S. companies to "invent restrictions that do not exist within international law and to compel developing countries to accept them through U.S. trade pressures.").

⁹ Anderson, *Reimagining Human Rights Law*, *supra* note 7, at 183 ("Transnational corporations are generally excluded from direct responsibility under international human rights law."); see also Iris Halpern, *Tracing the Contours of Transnational Corporations' Human Rights Obligations in the Twenty-First Century*, 14 BUFF. HUM. RTS. L. REV. 129, 131 (2008) (arguing that the omission of transnational corporations is "a product of the systemic separation between international economic development, human rights enforcement, and the regulation of private players").

¹⁰ See, e.g., Ramya M. Vijaya & Linda Kaltani, *Foreign Direct Investment and Wages: A Bargaining Power Approach*, XIII J. WORLD SYS. RES. 83, 85 (2007), available at http://jwsr.ucr.edu/archive/vol13/Vijaya_Kaltani-vol13n1.pdf. "[A]ll the studies assume that there will be a positive or at best a neutral impact of FDI on wages due to the potential productivity increase that

Global corporate citizenship offers one lens through which distributional inequalities in FDI can be addressed. Global corporate citizenship emerged in business and management literature in the late 1990s and has since become the subject of a substantial body of literature.¹¹ Under a legal theory of global corporate citizenship, governments should enact laws requiring corporations to engage in socially responsible conduct.¹² In the context of gender and FDI, this could mean avoiding the perpetuation of gender inequality through FDI and, instead, affirmatively taking steps to improve gender equality through FDI.

This essay is part of a larger project. It builds on two of my previous articles.¹³ The first, *Toward Global Corporate Citizenship: Reframing Foreign Direct Investment Law*, proposes developing a legal framework for global corporate citizenship as part of a comprehensive reform of FDI law.¹⁴ The second, *Reimagining Human Rights Law: Toward Global Regulation of Transnational Corporations*, argues for dedicated global regulation of transnational corporations informed by theories of global corporate citizenship.¹⁵ This essay identifies opportunities to improve the gender distribution of benefits that can be achieved through FDI.

This essay argues that gender-conscious lawmaking informed by global corporate citizenship can create incentives for transnational corporations to promote distributional equality for women. Section II sets out some of the reasons for the existence of distributional inequalities. Section III discusses the gendered effects of FDI in three sectors: agriculture, subcontracting, and export-oriented textile production. Section IV suggests directions for gender-differentiated data collection and gender-conscious lawmaking.

II. ON DISTRIBUTIONAL INEQUALITY

Gender inequality and its direct and distributional effects are well-known and perennial issues.¹⁶ Gender inequality has been a subject of the

FDI brings about.” *Id.* (discussing “[t]he few empirical studies on FDI and income in the economics literature”). See also ELISSA BRAUNSTEIN, GENDER, FDI AND WOMEN’S AUTONOMY: A RESEARCH NOTE ON EMPIRICAL ANALYSIS 4 (2002), available at http://www.peri.umass.edu/fileadmin/pdf/gls_conf/glw_braunstein.pdf (“Research on gender and FDI in developing countries is extremely limited, confined for the most part to small-scale studies that take an anthropological approach to women’s employment by MNCs.”) (citation omitted).

¹¹ See Anderson, *Reimagining Human Rights Law*, *supra* note 7, at 225.

¹² *Id.*

¹³ Rachel J. Anderson, *Toward Global Corporate Citizenship: Reframing Foreign Direct Investment Law*, 18 MICH. J. INT’L L. 1 (2009) [hereinafter Anderson, *Toward Global Corporate Citizenship*]; Anderson, *Reimagining Human Rights Law*, *supra* note 7.

¹⁴ See generally Anderson, *Toward Global Corporate Citizenship*, *supra* note 13.

¹⁵ See generally Anderson, *Reimagining Human Rights Law*, *supra* note 7.

¹⁶ See generally Saba Gul Khattak, *Subcontracted Work and Gender Relations: The Case of Pakistan*, in THE HIDDEN ASSEMBLY LINE: GENDER DYNAMICS OF SUBCONTRACTED WORK IN A GLOBAL ECONOMY 35 (Radhika Balakrishnan ed., 2002). Gender inequality may result from direct or indirect discrimination. Gender inequality means that opportunities, rights, and responsibilities are dependent on one’s gender. United Nations Dep’t of Econ. & Soc. Affairs, Statistics Div., The World’s

international human rights discourse since at least World War II.¹⁷ Economists and other scholars have also addressed the issue of gender inequality in international trade and FDI. For example, international trade scholar Jane Korinek has written about how “newly created jobs tend to go to men.”¹⁸ The most extensive analyses of gendered effects of FDI have been in the areas of labor and employment.¹⁹ However, knowledge of how FDI affects distributional inequality remains limited.²⁰ This is due, in part, to data collection practices that do not require disaggregation of data by gender.²¹

Despite the existence of some data, mostly through case studies, current data and data collection on gender inequality are unsatisfactory.²² There is

Women 2005: Progress in Statistics 1, U.N. Doc. ST/ESA/STAT/SER.K/17 (2005) [hereinafter UNDESA, World's Women]. Direct discrimination harms or benefits individuals because of their gender classification. See INT'L LABOUR ORG., EQUALITY AT WORK: TACKLING THE CHALLENGES 9 (2007), available at http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---webdev/documents/publication/wcms_082607.pdf. Indirect discrimination is when facially neutral policies and practices have gendered effects. See *id.* “Structural discrimination is inherent or institutionalized in social patterns, institutional structures and legal constructs.” *Id.* It can be found in employment and labor practices of transnational corporations. For example, shift work that requires employees to travel to or from work late at night can effectively exclude women, for whom it is extremely unsafe to travel alone at night. For a discussion of the “disappearances” of women for whom travel to and from work is often very dangerous, see Elvia R. Arriola's work on maquiladoras. Elvia R. Arriola, *Accountability for Murder in the Maquiladoras: Linking Corporate Indifference to Gender Violence at the U.S.-Mexico Border*, 5 SEATTLE J. FOR SOC. JUST. 603 (2007).

¹⁷ See, e.g., Barbara Stark, *Women's Rights*, in ENCYCLOPEDIA OF HUMAN RIGHTS 341, 344-49 (David P. Forsythe ed., 2009) (tracing women's rights back at least as far as the European Enlightenment).

¹⁸ Jane Korinek, *Trade and Gender: Issues and Interactions* 13 (Org. for Econ. Cooperation & Dev., Working Paper No. 24, 2005), available at <http://www.oecd.org/dataoecd/38/50/35770606.pdf>. Historically, trade theories assumed that international trade was gender neutral. See Barnali Choudhury, *The Façade of Neutrality: Uncovering Gender Silences in International Trade*, 15 WM. & MARY J. WOMEN & L. 113, 116 (2008) (citation omitted). The literature on trade and gender is mixed. Korinek, *supra* note 18, at 11 (“Some analyses support the hypothesis that trade reduces gender wage discrimination while others suggest that trade liberalisation [sic] increases the gender gap.”). However, Korinek's article is part of a small but growing body of literature on the intersection of gender and international trade. See generally, e.g., BERTA ESPERANZA HERNÁNDEZ-TRUYOL & STEPHEN J. POWELL, JUST TRADE: A NEW COVENANT LINKING TRADE AND HUMAN RIGHTS (2009).

¹⁹ See U.N. Research Inst. For Soc. Dev., *Foreign Direct Investment, Development and Gender Equity: A Review of Research and Policy* 5-6, Occasional Paper No. 12 (2006) (by Elissa Braunstein), available at [http://www.unrisd.org/80256B3C005BCCF9/\(httpAuxPages\)/5159E5733338C836C12571390033F5E2/\\$file/OP12-web.pdf](http://www.unrisd.org/80256B3C005BCCF9/(httpAuxPages)/5159E5733338C836C12571390033F5E2/$file/OP12-web.pdf).

²⁰ *Id.* at iv (“[V]ery little is understood about the dynamic impact of FDI.”). Recent literature suggests that increased FDI has a negative effect on wages. See Vijaya & Kaltani, *supra* note 10, at 93 (discussing “[t]he finding of a significant negative association between wages and the flow of FDI”).

²¹ See Marva Corley, Yves Perardel & Kalina Popova, *Wage Inequality by Gender and Occupation: A Cross-Country Analysis* 3-4 (2005), available at http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_elm/documents/publication/wcms_114026.pdf (discussing the paucity of “empirical studies comparing wages and earnings across countries in different regions” due to the lack of “comparable information and methodological data”).

²² See generally *id.* (empirical study on rising inequality in wages and earnings).

some data collection at the international level.²³ However, analyses of the success or failure of FDI tend to focus on effects at the country level.²⁴ Most data collection is at the country level and relies on three main sources: population and housing censuses, administrative record systems, and sample surveys.²⁵ However, data is not generally collected on informal sector subcontract work at the national level, much less women's role in this work.²⁶ Further, national data generally does not include data about "links with international structures and the demands of international capital."²⁷

The lack of disaggregated data collection can contribute to the assumption that women and men benefit equally from FDI.²⁸ Scholarship on FDI and gender often focuses on how gender inequality affects economic growth and development rather than on how FDI affects gender inequality.²⁹ This literature focuses on how gender inequality has a negative effect on economic growth rather than FDI's role in distributional inequality.³⁰

Several factors contribute to the perpetuation of gender inequality in the context of FDI. Gender disparities often are entrenched prior to the operations of transnational corporations in both home and host countries.³¹ In addition, international agencies and local governments often assume that women are less vulnerable than men to economic insecurity and, therefore,

²³ See, e.g., UNDESA, *World's Women*, *supra* note 16; see also WORLD BANK, *ENGENDERING DEVELOPMENT: THROUGH GENDER EQUALITY IN RIGHTS, RESOURCES, AND VOICE* (2001).

²⁴ See, e.g., Richard J. Hunter, Jr., Robert E. Shapiro & Leo V. Ryan, *Legal Considerations in Foreign Direct Investment*, 28 OKLA. CITY U. L. REV. 851, 862-63 (2003).

²⁵ UNDESA, *World's Women*, *supra* note 16, at 3-4.

²⁶ Khattak, *supra* note 16, at 35.

²⁷ *Id.*

²⁸ Corley, Perardel & Popova, *supra* note 21, at 3-4. This approach inhibits a differentiated analysis of the way FDI affects men and women. As a result, the differing effects of FDI on men and women are often overlooked in domestic and international lawmaking.

²⁹ However, "there does seem to be an emerging consensus . . . on the importance of the economic and policy context for FDI in determining its eventual impact." U.N. Research Inst. For Soc. Dev., *supra* note 19, at iv. Scholarship on FDI law understandably tends to focus on regulation that governs core issues at the national level related to these economic goals. These core issues include "entry, treatment, expropriation and dissolution of foreign investments." See Alfred Escher, *Legal Issues for Foreign Investors*, in *LEGAL ASPECTS OF FOREIGN DIRECT INVESTMENT* 35, 55 (Daniel D. Bradlow & Alfred Escher eds., 1999) (discussing core rules of foreign direct investment law). However, the primarily economic focus of FDI law and scholarship creates pressure towards a theoretical structure in which the social, political, and legal influence of private actors is not the primary subject of research and theory.

³⁰ Korinek, *supra* note 18, at 7.

³¹ See Anne Tallontire, Catherine Dolan, Sally Smith & Stephanie Ware Barrientos, *Reaching the Marginalized?: Gender Value Chains and Ethical Trade in African Horticulture*, in *DEVELOPMENT AND THE PRIVATE SECTOR: CONSUMING INTERESTS* 247, 260 (Deborah Eade & John Sayer eds., 2006) (contrasting gender legislation in Kenya, Zambia, and South Africa).

require less regulatory protections.³² Ironically, the assumption that women are less vulnerable than men due to economic insecurity is used to justify the segregation of women into vulnerable working conditions as informal workers.³³ Women in developing countries make up the majority of workers engaged in vulnerable employment - own account workers and unpaid contributing family workers.³⁴

Women are also assumed to have a primary source of financial support in the form of a father or a husband.³⁵ The money that women earn is, therefore, categorized as “extra” money and, thus, deserving of less protection through contracts and other forms of security.³⁶ In addition, women earn less than men for the same work in every country in the world.³⁷

Further, women are excluded from obtaining certain jobs because they are deemed gender specific.³⁸ The categorization of jobs by gender results in “occupational segregation.”³⁹ For example, jobs that require the use of tools that can be used as weapons are considered men’s work, while producing textiles, specifically sewing, is considered women’s work.⁴⁰

³² *Id.*; CYNTHIA ENLOE, BANANAS, BEACHES AND BASES: MAKING FEMINIST SENSE OF INTERNATIONAL POLITICS 162-63 (2000) (The presumption “that men – as fathers and husbands – are the ‘breadwinners’ . . . prevails not just in popular thinking but in the statistical reports of bodies such as the national census bureau, the World Bank, and development agencies.”); *see also* DOUGLAS M. BRANSON, NO SEAT AT THE TABLE: HOW CORPORATE GOVERNANCE AND LAW KEEP WOMEN OUT OF THE BOARDROOM 14-15 (2007) (discussing the effect of the ways that women are stereotyped on women’s wages). For a more comprehensive discussion of vulnerability, *see generally* Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1 (2008); Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. (forthcoming 2011), available at <http://ssrn.com/abstract=1694740>.

³³ Tallontire, Dolan, Smith & Barrientos, *supra* note 31, at 254.

³⁴ ILO, GLOBAL EMPLOYMENT TRENDS, *supra* note 5, at 6; *see also* United Nations Conference on Trade and Development, Gender and Trade: A Conceptual Note 4 (July 15, 2003), http://www.unctad.org/sections/wcmu/docs/EDM_UNCTAD_XI_0003_en.pdf [hereinafter UNCTAD, Gender and Trade]; INT’L LABOUR ORG., GENDER EQUALITY AT THE HEART OF DECENT WORK 111 (2009), available at http://www.ilo.org/wcmsp5/groups/public/—ed_norm/—relconf/documents/meetingdocument/wcms_105119.pdf [hereinafter ILO, DECENT WORK] (“The less developed the region, the greater the likelihood that women are among the ranks of the contributing family workers or own-account workers who together make up the newly defined ‘vulnerable employment’ group.”). For a discussion of the gender gap in vulnerable employment, *see id.* at 111-13.

³⁵ *See* Tallontire, Dolan, Smith & Barrientos, *supra* note 31, at 254; *see also* ENLOE, *supra* note 32, at 162-63.

³⁶ ENLOE, *supra* note 32, at 162-64.

³⁷ UNCTAD, *Gender and Trade*, *supra* note 34, at 3 (“Wage inequality between men and women is still persistent in all countries.”); *see also* ILO, DECENT WORK, *supra* note 34, at 119-22 (discussing wage inequality between men and women).

³⁸ Radhika Balakrishnan & Asad Sayeed, *Subcontracting, The Push-Pull Factor*, in THE HIDDEN ASSEMBLY LINE: GENDER DYNAMICS OF SUBCONTRACTED WORK IN A GLOBAL ECONOMY 15, 15 (Radhika Balakrishnan ed., 2002) (“the global distribution of labor is gendered”).

³⁹ UNCTAD, *Gender and Trade*, *supra* note 34, at 4.

⁴⁰ *See* ENLOE, *supra* note 32, at 134, 162. For a more comprehensive discussion of women’s work, *see, e.g.*, Darren Rosenblum, *Feminizing Capital: A Corporate Imperative*, 6 BERKELEY BUS. L.J. 55, 74-80 (2009).

Approximately half of the world's population works in occupations "in which at least 80 percent of workers are of the same sex."⁴¹

Work-related issues are often analyzed from the perspective of men's rather than women's needs as a result of the factors discussed above.⁴² In other words, women often are not perceived as key stakeholders in FDI. Other factors that contribute to gender inequalities include "social, historical, and cultural factors;" "lack of access to education, training and new technologies;" and "lack of access to credit or other financial resources and other support services."⁴³

The provision of housing, childcare, reproductive rights, parental leave, transportation, and other services influence working conditions for both men and women. However, since women are considered to be less vulnerable to economic insecurity, fewer efforts are made to take women's needs into consideration when arranging work-related issues.⁴⁴ To be clear, it is not that work-related issues are ignored by transnational corporations altogether, but rather, it is often only the model of a male worker that is taken into consideration. For example, transnational corporations engaged in the production of bananas envisioned women's role in their employment model as providers of support and services to men.⁴⁵ However, although the corporations operating banana plantations in Africa, the Caribbean, Central America, Latin America, and the Philippines made brothels available to male workers, they neglected to make other services such as childcare available to female workers.⁴⁶

⁴¹ UN MILLENNIUM PROJECT, TAKING ACTION: ACHIEVING GENDER EQUALITY AND EMPOWERING WOMEN 93 (2005), available at <http://www.unmillenniumproject.org/documents/Gender-complete.pdf>.

⁴² See BRANSON, *supra* note 32, at 55-74 (describing how women are perceived in the workplace).

⁴³ UNCTAD, *Gender and Trade*, *supra* note 34, at 4.

⁴⁴ See Tallontire, Dolan, Smith & Barrientos, *supra* note 31, at 254.

⁴⁵ ENLOE, *supra* note 32, at 128 ("To clear the land and harvest the bananas they decided they needed a male workforce, sustained at a distance by women as prostitutes, mothers and wives.").

⁴⁶ *Id.* at 141.

Efforts to address distributional inequality have had limited success.⁴⁷ There are multiple explanations for why existing initiatives have not achieved more success.⁴⁸ Entrenched beliefs about gender roles and family

⁴⁷ International human rights law requires states to act or refrain from acting in certain ways to protect the rights of individuals and groups including women. *See, e.g.*, U.N. Charter art. 1, para. 2. International human rights law has played a significant role in advancing women's rights and gender equality. The Universal Declaration of Human Rights ("Declaration"), the International Covenant on Economic, Social and Cultural Rights ("CESCR"), and the Convention on the Elimination of all Forms of Discrimination against Women ("CEDAW") all recognize employment rights for women. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter Declaration]; International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess. Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter CESCR]; Convention on the Elimination of all Forms of Discrimination against Women, G.A. Res. 34/180, U.N. Doc. A/34/46 (Dec. 18, 1979) [hereinafter CEDAW].

These include rights to work under "just and favorable conditions," favorable remuneration, "equal pay for equal work," reasonable working hours, and the right to form and join trade unions. Declaration, *supra* note 47, at art. 23; CESCR, *supra* note 47, at arts. 7 & 8. Under the CESCR, employees should also have the right to strike. CESCR, *supra* note 47, at art. 8. In addition, the CESCR recognizes rights to holiday pay, equal opportunities for advancement, and explicitly calls for equality for women in the workplace. *Id.* at art. 7. Further, the CESCR includes several other rights that are relevant to achieving gender equality, such as rights to "an adequate standard of living" and "continuous improvement of living conditions," freedom from hunger, "the highest attainable standard of physical and mental health," education, and the ability "[t]o enjoy the benefits of scientific progress and its applications." *Id.* at arts. 11, 12, 13, 15. Together, these documents constitute an International Bill of Rights that reconfirm the principle of nondiscrimination, a core tenant of international human rights since 1948. Stark, *supra* note 17, at 341. These three international human rights documents enumerate rights and state responsibilities in several areas, including education and training, employment, wages and benefits, health and safety, property rights, and social structures. However, they do not set out duties and obligations for transnational corporations or even guidelines for legislation regulating transnational corporations, except in the most general of terms. These requirements create an obligation for states to enact laws and regulations that address the gender-negative effects of FDI. FDI and human rights are two key areas of law that can influence the gendered effects of FDI and promote ways to reduce gender inequality.

⁴⁸ Anderson, *Reimagining Human Rights Law*, *supra* note 7, at 234. Human rights law protects and promotes gender equality as it relates to state action. However, because human rights law governs state action, it does not automatically extend to acts by private actors such as transnational corporations. FDI law is necessarily shaped by the fact that FDI is a form of private international financing that is driven by a profit motive. *See* Escher, *supra* note 1, at 20 (discussing forms of private international financing). Thus, it does not automatically extend to the protection and promotion of gender equality. In part, the economic focus of FDI law and theory and the state-centered focus of international human rights law and theory help explain why the gendered effects of FDI have received limited attention in legal scholarship. These are responsibilities that attach to both home and host state signatories of these and related international human rights documents. International human rights documents enumerate women's rights and related state responsibilities. Declaration, *supra* note 47; CESCR, *supra* note 47; CEDAW, *supra* note 47, at arts. 10(h), 12(1), 12(2) & 14(2). The CEDAW entered into force in 1981 and sets out an agenda for gender equality and measures that state parties shall take to achieve these goals. CEDAW, *supra* note 47, at arts. 2, 3. As of April 4, 2011, there were 98 signatories and 186 parties to CEDAW. *Status of: Convention on the Elimination of All Forms of Discrimination Against Women*, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en (last visited Feb. 18, 2011). In addition, the Declaration sets out aspirational goals. *See* Declaration, *supra* note 47, at arts. 2, 7. The 1948 Declaration sets out a "common standard of achievement" for the signatories. Declaration, *supra* note 47, at Preamble. The Declaration sets out a range of aspirational rights that are relevant to the intersection of gender and FDI. *Id.* The CESCR, which entered into force

models are one explanation. Another factor is the competition between developing countries to attract foreign capital.⁴⁹ This competition creates conflicting regulatory incentives.⁵⁰ At first blush, it would seem that the regulatory framework in developing countries might benefit from FDI. Investors are believed to prefer host countries that are stable and that have laws to protect their investments.⁵¹ However, this does not mean that such laws will be equally beneficial to individuals and communities in developing countries. In practice, developing countries may inhibit the development of labor laws to seem more attractive as a host country for the operations of transnational corporations.⁵²

III. EXAMPLES OF DISTRIBUTIONAL INEQUALITY IN THREE SECTORS

Women in developing countries are often excluded from many of the benefits of FDI and continue to work in lower-paid and less-prestigious jobs with fewer benefits and less job security than men.⁵³ These inequities persist despite laws requiring equal treatment for men and women.⁵⁴

in 1976, echoes many of the rights enumerated in the Declaration and goes further to set out additional rights. CESCR, *supra* note 47. As of April 4, 2011, there were 69 signatories and 160 parties to the CESCR. *Status of: International Covenant on Economic, Social and Cultural Rights*, UNITED NATIONS TREATY COLLECTION http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-3&chapter=4&lang=en (last visited Feb. 18, 2011). Although it makes sense to look to international law to address distributional inequalities in FDI, political efforts at the state level to achieve an international agreement regulating the human rights effects of FDI by transnational corporations have been unsuccessful. For a discussion of the gaps in international and domestic regulation of foreign direct investment, *see generally*, Anderson, *Toward Global Corporate Citizenship*, *supra* note 13.

⁴⁹ See Padma Mallampally & Karl P. Sauvant, *Foreign Direct Investment in Developing Countries*, FIN. & DEV. 34, 35-36 (1999), available at <http://www.imf.org/external/pubs/ft/fandd/1999/03/pdf/mallampa.pdf>.

⁵⁰ *See id.* at 36-37.

⁵¹ *See id.*

⁵² Anderson, *Toward Global Corporate Citizenship*, *supra* note 13, at 12 (“Competition for foreign capital creates an incentive for governments of developing countries to prefer laws that attracted foreign direct investment. From a purely economic perspective, such laws are often most attractive if they do not hinder the activities of transnational corporations with protections for the environment or human rights.”).

⁵³ Women continue to be paid less than men in every country. UNCTAD, *Gender and Trade*, *supra* note 34, at 3 (discussing data that suggests that this may be due, in part, to widespread gender discrimination).

⁵⁴ There are also international initiatives that, while they do not have the force of law, are aimed at influencing the behavior of transnational corporations, *inter alia*, in the area of human rights. Examples include the *OECD Guidelines for Multinational Enterprise*, *United Nations’ Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises*, and the United Nations Global Compact. *See* ORG. FOR ECON. CO-OPERATION AND DEV., *OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES* (2008), <http://www.oecd.org/dataoecd/56/36/1922428.pdf> [hereinafter *OECD, GUIDELINES*]; UN, *NORMS*, *supra* note 7; UNITED NATIONS GLOBAL COMPACT, <http://www.unglobalcompact.org/> (last visited Feb. 18, 2011). The *OECD Guidelines for Multinational Enterprises* are “voluntary principles and standards for responsible business conduct in a variety of areas including employment and industrial relations, human rights, environment, information disclosure, combating bribery, consumer interests, science and technology, competition, and taxation.” *Intergovernmental Co-operation*, ORG. FOR ECON. CO-OPERATION AND DEV.,

Although domestic laws and international agreements govern FDI, existing law does not do enough to ensure that women in developing countries benefit from FDI as men do.⁵⁵

Generally, FDI is believed to create jobs and contribute to prosperity and economic development among other things. However, the effects of FDI are often gendered in terms of income and benefits, educational achievements, life expectancy, and social status.⁵⁶ The differing effects of FDI depend on a variety of factors, including the type of economy, the sector, and the groups of stakeholders who are affected.

Transnational corporations engage in FDI via operations, subsidiaries, or suppliers in developing countries.⁵⁷ Transnational corporations, their

http://www.oecd.org/document/32/0,3746,en_39048427_39049437_42246816_1_1_1_1,00.html (last visited Feb. 18, 2011); *see also* OECD, GUIDELINES, *supra* note 54. The United Nations' *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises* was "a first attempt to establish an international framework for mandatory standards on Corporate Social Responsibility." Sune Skadegaard Thorsen & Annemarie Meisling, *Perspectives on the UN Draft Norms*, OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, <http://www2.ohchr.org/english/issues/globalization/business/docs/lawhouse2.doc> (last visited Feb. 18, 2011); *see also* UN, NORMS, *supra* note 7. The United Nations Global Compact is a voluntary public/private initiative that promotes values-based markets via "responsible global corporate citizenship." *See* UNITED NATIONS GLOBAL COMPACT, GLOBAL COMPACT GOVERNANCE 1 (2008), available at http://www.unglobalcompact.org/docs/about_the_gc/governance_update2008.pdf; *see also* UNITED NATIONS GLOBAL COMPACT, *supra* note 54.

⁵⁵ Relevant types of domestic law include "corporate law, including accounting and reporting regulations; incentives for, and restrictions on, FDI; [f]orms of establishment; mergers and acquisitions; securities; taxation (mainly corporate and individual income tax); transfer of technology; industrial/intellectual property;" foreign exchange; and customs. *National Framework*, UNITED NATIONS CONFERENCE ON TRADE & DEV., <http://www.unctad.org/templates/Page.asp?intItemID=3161&lang=1> (last visited Feb. 19, 2011). Relevant international agreements include (1) multilateral: International Investment Agreements; World Trade Organization Agreements (Agreement on Trade Related Investment Measures (TRIMs), General Agreement on Trade in Services (GATS), Agreement on Subsidies and Countervailing Measures (SCM), Agreement on Agriculture, Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), Agreement on Government Procurement (AGP)); and (2) bilateral: Bilateral Investment Treaties (BITs); Double Taxation Treaties (DTTs); Agreement on Trade-Related Investment Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 186; General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183; Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 14; Agreement on Agriculture, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 410; Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299; Agreement on Government Procurement, Jan. 1, 1996, Marrakesh Agreement Establishing the World Trade Organization, Annex 4(b), 189 U.N.T.S. 508.

⁵⁶ The effects of foreign direct investment are often unexpected. For example, between 1989 and 1992 in Papua New Guinea, increased income was linked to increased consumption, which was linked to increased rates of polygamy. *See* Glenn Banks, *Globalization, Poverty and, Hyperdevelopment in Papua New Guinea's Mining Sector*, 46 FOCAAL-EUR. J. OF ANTHROPOLOGY 128, 135 (2005).

⁵⁷ In 2008, there were approximately 82,000 transnational corporations around the world. United Nations Conference on Trade and Development, *World Investment Report 2010: Investing in a Low-*

subsidiaries, or their suppliers employ many women in developing countries, which puts them in a position to significantly affect distributional equality for women.⁵⁸ They often contribute to maintaining and sometimes exacerbating local gender inequalities. For example, employment practices of transnational corporations can directly determine whether men and women receive equal pay and benefits for equal work.

There are various factors that are used to indicate levels of gender equality or inequality.⁵⁹ These include wages, access to jobs, access to education, educational achievements, working conditions, benefits, job prestige, job turnover, and opportunities for professional growth and development.⁶⁰ Gender inequality is a problem not because FDI is often beneficial to men, but because it is often harmful to women.

Levels and types of gender inequality vary by sector.⁶¹ However, the data and analyses of differential effects on groups at a sub-national level are limited. Much of the research on gender inequality in FDI relies on case studies to fill the gaps in country-level information.⁶² The information that can be gleaned from these case studies is limited because they do not use uniform definitions and methodologies.⁶³

Women are more highly represented in certain sectors and have higher hurdles to access jobs in other sectors.⁶⁴ Not surprisingly, FDI has substantial potential to influence gender equality in these sectors.⁶⁵ One of the benefits of FDI is job creation in host countries because it is there that foreign investors often establish new operations. However, the benefits of job creation vary over time. Although data shows that women often benefit

Carbon Economy xviii (2010), available at www.unctad.org/en/docs/wir2010_en.pdf [hereinafter UNCTAD, *World Investment 2010*].

⁵⁸ The majority of the largest transnational corporations are located in more developed countries. UNCTAD, *The Universe of the Largest Transnational Corporations*, U.N. Doc. UNCTAD/ITE/IIA/2007/2 4 (2007), available at http://www.unctad.org/en/docs/iteiia20072_en.pdf [hereinafter UNCTAD, *Largest TNCs*]. In 2004, the European Union, Japan, and the United States were the home countries for eighty-five percent of the top one hundred transnational corporations. *Id.* The number of transnational corporations incorporated in less developed economies is growing, but only a handful have entered the ranks of the world's largest. *See id.* at 15. In 2009, transnational corporations employed approximately 80 million foreign workers. UNCTAD, *World Investment 2010*, *supra* note 57, at xviii. This essay focuses on women in and foreign direct investment into developing countries. Foreign direct investment by transnational corporations incorporated in more industrialized countries into developing countries makes up a significant part of global foreign direct investment.

⁵⁹ *See* CEDAW, *supra* note 47, at arts. 10(h), 12(1), 12(2) & 14(2).

⁶⁰ *Id.*

⁶¹ U.N. Research Inst. For Soc. Dev., *supra* note 19, at 15.

⁶² *See, e.g.*, Banks, *supra* note 56, at 128; *see generally*, THE HIDDEN ASSEMBLY LINE: GENDER DYNAMICS OF SUBCONTRACTED WORK IN A GLOBAL ECONOMY (Radhika Balakrishnan ed., 2002). In fact, the proposals in this essay also respond to case studies due to the lack of comprehensive data.

⁶³ Khattak, *supra* note 16, at 35.

⁶⁴ *See* U.N. Research Inst. For Soc. Dev., *supra* note 19, at 14-20.

⁶⁵ *Id.* at 14-16.

from job creation in the short term, this does not automatically translate into long-term benefits.⁶⁶

Some scholars argue that FDI benefits women by creating jobs and believe that “over time [women’s] wages and working conditions will improve.”⁶⁷ However, job creation does not automatically result in higher wages or better working conditions.⁶⁸ The more technology required for the production of textiles and clothes, the more men begin to dominate the industry.⁶⁹ Further, more jobs do not automatically result in an equal distribution of jobs between men and women. Women may gain employment when new industries begin operation; however, they often lose out as higher levels of education are required or subcontractors become increasingly responsible for structuring certain areas of employment.⁷⁰ Men often receive skills training that is not provided to women, which inhibits women’s mobility into higher paid jobs requiring an elevated level of skills.⁷¹

A. Subcontracting

Jobs created by FDI, for example in the subcontracting sector, in which many women are employed, are often exploitative.⁷² For example, subcontractors often do not have the advantages of written contracts, full-time work, or permanent status.⁷³ This is also true of workers in the agriculture and export-oriented textile manufacturing sectors, in which a high-percentage of women are employed.⁷⁴ The lack of security from these and other benefits from which they are excluded puts women in a vulnerable position and limits their bargaining power.⁷⁵

⁶⁶ See Korinek, *supra* note 18, at 13-14.

⁶⁷ See Balakrishnan & Sayeed, *supra* note 38, at 16 (citation omitted).

⁶⁸ Korinek, *supra* note 18, at 15.

⁶⁹ See *id.* at 11. Cf. ENLOE, *supra* note 32, at 134 (“Plantation managers who once relied heavily on male workers may decide to bring in more women if the men become too costly [and] . . . if new technology allows some physically demanding tasks to be done by workers with less strength.”).

⁷⁰ Korinek, *supra* note 18, at 12.

⁷¹ See Balakrishnan & Sayeed, *supra* note 38, at 17 (citation omitted).

⁷² See *id.* at 16 (citation omitted). It is possible that roots of subcontracting in colonial practices helped shape the exploitative nature of subcontracting. For example, labor subcontracting in the Korean construction industry has its roots in Japanese colonial rule during the early twentieth century. Aelim Yun, *Regulating Multi-Layer Subcontracting to Improve Labour Protection* INT’L LABOUR ORG., 3, <http://www.ilo.org/legacy/english/protection/travail/pdf/rdwpaper17b.pdf>.

⁷³ Naila Kabeer & Simeen Mahmud, *Rags, Riches and Women Workers: Export-oriented Garment Manufacturing in Bangladesh*, in CHAINS OF FORTUNE: LINKING WOMEN PRODUCERS AND WORKERS WITH GLOBAL MARKETS 133, 133 (Marilyn Carr ed., 2004); U.N. RESEARCH INST. FOR SOC. DEV., *VISIBLE HANDS: TAKING RESPONSIBILITY FOR SOCIAL DEVELOPMENT* 133 (2000).

⁷⁴ Kabeer & Mahmud, *supra* note 73, at 133; U.N. RESEARCH INST. FOR SOC. DEV., *supra* note 73, at 133.

⁷⁵ ILO, *DECENT WORK*, *supra* note 34, at 119 (“The market is itself gender-biased: women’s skills and jobs have historically been undervalued and there are differences in collective bargaining power.”).

The informal labor sector and specifically, subcontracting, is growing and at the same time efforts to reduce labor costs and avoid compliance with labor laws are expanding.⁷⁶ For example, in Pakistan, labor laws generally are structured to benefit investment, including FDI, which leads to a lack of legal protections for workers.⁷⁷ Some scholars have suggested that “Pakistan governments have circumvented labor laws to encourage the marked increase in labor-intensive exports.”⁷⁸ Limiting the application of labor laws to employment contexts that include at least ten employees leads to the exclusion of subcontracted workers from legal protection.⁷⁹ Subcontractors are often categorized as self-employed or independent contractors rather than employees and, therefore, may also be excluded from the protection of labor laws because of their employment status.⁸⁰

B. Agriculture

FDI has the potential to influence gender inequality and discrimination in the agricultural sector.⁸¹ Women are an important part of the agricultural

⁷⁶ Khattak, *supra* note 16, at 35. Cf. Steven Greenhouse, *Factory Defies Sweatshop Label, but Can It Thrive?*, N.Y. TIMES, July 18, 2010, at BU1, available at http://www.nytimes.com/2010/07/18/business/global/18shirt.html?_r=2 (discussing Knights Apparel, a clothing company with manufacturing operations in the Dominican Republic that sells college-logo apparel to American universities, that is inspired by corporate social responsibility and pays a living wage and allows workers to unionize).

⁷⁷ Khattak, *supra* note 16, at 36 (citation omitted).

⁷⁸ *Id.* (citation omitted).

⁷⁹ *Id.*

⁸⁰ Under the ILO Resolutions Concerning International Classification of Status in Employment, employment status is classified into six categories. Int’l Labour Org. [ILO], *Resolution Concerning the International Classification of Status in Employment (ICSE)*, at para. 4 (Jan. 1993), available at http://www.ilo.org/wcmsp5/groups/public/@dgreports/@integration/@stat/documents/normativeinstrument/wcms_087562.pdf. Within these categories, workers are classified into “paid employment” jobs and “self-employment” jobs. *Id.* at para. 5. Categorization is dependent on “one or more aspects of the economic risk and/or the type of authority which the explicit or implicit employment contract gives the incumbents or to which it subjects them.” *Id.* Paid employment jobs “are typically remunerated by wages and salaries, but may be paid by commission from sales, by piece-rates, bonuses or in-kind payments such as food, housing or training.” *Id.* at para. 6. Self-employment jobs, which would include independent contractors, “are those jobs where the remuneration is directly dependent upon the profits (or the potential for profits) derived from the goods and services produced (where own consumption is considered to be part of profits).” *Id.* at para. 7. See also ILO, DECENT WORK, *supra* note 34, at 118 (“Guidance on determining whether a person is a dependent homemaker or an independent own-account worker operating from her or his own home (with subcontractor or industrial outsourcing status) is given in the Employment Relationship Recommendation, 2006 (No. 198). The Home Work Convention, 1996 (No. 177), and Recommendation, 1996 (No. 184), address the specific characteristics of home work.”).

⁸¹ United Nations Conference on Trade and Development, *World Investment Report: Transnational Corporations and Agricultural Production and Development* 157 (2009) [hereinafter UNCTAD, *World Investment* 2009], available at http://unctad.org/en/docs/wir2009_en.pdf (discussing the gendered effect of foreign direct investment on income distribution in the agricultural sector).

labor force.⁸² In many developing countries, over forty percent of jobs are located in the agricultural sector.⁸³ However, the operations of transnational corporations often do not contribute to greater gender equality in the agricultural sector and may even contribute to exacerbating existing inequalities.⁸⁴ Agricultural work is often divided by gender;⁸⁵ for example, “[w]eeding and cleaning are quintessential ‘women’s’ jobs in agriculture.”⁸⁶ As a second example, as a result of illegal treatment of casual or temporary workers, many Kenyan women working in the flower cutting industry lose rights, bargaining power, income, and other benefits.⁸⁷

C. Export-Oriented Textile Production

A high percentage of women are employed in the export-oriented textile and clothing production sector, which typically does not require a high level of technological training.⁸⁸ For example, from 1991 to 2002, women made up approximately eighty-five percent of the workers in the Bangladeshi ready-made garment industry, the most significant manufacturing and export industry in the country.⁸⁹ FDI in textile manufacturing can create jobs to which women have access.⁹⁰ Producing

⁸² See *id.* at 102. For a discussion of the role of women in rural economies, see, e.g., Lisa R. Pruitt, *Migration, Development, and the Promise of CEDAW for Rural Women*, 30 MICH. J. INT’L L. 707 (2009).

⁸³ For example, “Bangladesh, Cambodia, Cameroon, China, Indonesia, Ethiopia, Madagascar, Mali, Mongolia, Nicaragua, Nepal, Pakistan, Papua New Guinea, Sierra Leone, the United Republic of Tanzania, Thailand, Uganda, Viet Nam, and Zambia.” UNCTAD, *World Investment 2009*, *supra* note 81, at 102 & 131 n.8.

⁸⁴ *Id.* at 158 (discussing how commercialization driven by foreign direct investment may do nothing to change social and cultural restrictions on women to exclude them from income generating jobs) (citation omitted).

⁸⁵ ENLOE, *supra* note 32, at 134 (“Generally, crops that call for the use of machetes – tools that can also be used as weapons are produced with large inputs of male labor: bananas, sugar, palm oil. Producers of crops that require a lot of weeding, tapping and picking hire large numbers of women, sometimes comprising a majority of workers: tea, coffee, rubber.”).

⁸⁶ *Id.* at 137 (citation omitted).

⁸⁷ UNCTAD, *World Investment 2009*, *supra* note 81, at 158 (citation omitted). For example, the Kenyan Employment Act of 2007 grants certain legal protections such as termination rights to casual or temporary employees who work for a continuous period that is equal to or greater than three months. The Employment Act, 2007, (2007) KENYA GAZETTE SUPPLEMENT No. 107 §§ 35(1), 37(1). The Act applies “to all employees employed by an employer under a contract of service” whereby an employee is “a person employed for wages or a salary and includes an apprentice and indentured learner.” *Id.* at §§ 2, 3(1).

⁸⁸ Korinek, *supra* note 18, at 15-16; Balakrishnan & Sayeed, *supra* note 38, at 17 (“Evidence has shown that in the export processing zones, particularly in Asia, women were drawn into the labor force primarily in low-skilled work for short periods of time.”) (internal citation omitted).

⁸⁹ Kabeer & Mahmud, *supra* note 73, at 137-38; Mohammed Ziaul Haider, *Competitiveness of the Bangladesh Ready-made Garment Industry in Major International Markets*, 3 ASIA-PAC. TRADE & INVESTMENT REV. 3, 6 (2007), available at http://www.unescap.org/tid/publication/aptir2456_haider.pdf.

⁹⁰ UNCTAD, *World Investment 2009*, *supra* note 81, at 158.

textiles is traditionally thought of as “women’s work.”⁹¹ In addition, women’s work and men’s work are often separated, and workplace sex segregation is still common in many countries.⁹² However, existing gender inequalities may attract FDI into this sector because of the large supply of inexpensive labor.⁹³

There is also overlap between the subcontracting and textile manufacturing sectors. A significant number of jobs in textile manufacturing are located in the subcontracting sector.⁹⁴ Instead of producing goods in one central plant, manufacturers make arrangements for the work to be done by numerous suppliers, including women doing home-based work.⁹⁵ Subcontracting has begun to play an important role in FDI because it creates more flexibility in the supply chain and reduces the costs of production.⁹⁶ For example, subcontracting is often associated with textile manufacturing.⁹⁷ Although subcontracting has created jobs for women who were previously not part of the paid-labor economy,⁹⁸ women are generally paid less than men as they are “relegated to the low-skilled or semi-skilled positions.”⁹⁹

IV. GENDER AND GLOBAL CORPORATE CITIZENSHIP IN FDI

This section proposes gender-differentiated data collection and gender-conscious lawmaking drawing on the examples of agriculture, textile production, and subcontracted work.¹⁰⁰ Improved data collection will

⁹¹ ENLOE, *supra* note 32, at 162 (discussing the categorization of sewing as something that women are inherently able to do by virtue of their gender).

⁹² For a discussion of workplace sex segregation, see, e.g., Barbara Reskin, *Sex Segregation in the Workplace*, 19 ANN. REV. SOC. 241, 248-65 (1993). See also Vicki Schultz, *Sex and Work*, 18 YALE J.L. & FEMINISM 223, 227-28 (2006) (discussing how “sex segregation both facilitates and justifies the undervaluation of the women’s work and the degradation of their working conditions”); Vicki Schultz, *Understanding Sexual Harassment Law in Action: What Has Gone Wrong and What We Can Do About It*, 29 T. JEFFERSON L. REV. 1, 2 (discussing “the sex-segregation of jobs (and accompanying sex-based disparities in pay, responsibilities, and promotional opportunities)”).

⁹³ Kabeer & Mahmud, *supra* note 73, at 134.

⁹⁴ Subcontracting is “a process whereby the manufacturer externalizes many of the costs associated with the labor process.” Balakrishnan & Sayeed, *supra* note 38, at 16 (citing Richard P. Appelbaum & Gary Gereffi, *Power and Profits in the Apparel Commodity Chain*, in GLOBAL PRODUCTION: THE APPAREL INDUSTRY IN THE PACIFIC RIM, 42, 45 (Edna Bonacich et al. eds. 1994)).

⁹⁵ Balakrishnan & Sayeed, *supra* note 38, at 16, 18.

⁹⁶ *Id.* at 16.

⁹⁷ *Id.* at 17.

⁹⁸ *Id.* at 30.

⁹⁹ *Id.* at 17 (citing Guy Standing, *Global Feminization Through Flexible Labor*, 17 WORLD DEV. 7 (1989)).

¹⁰⁰ There have been numerous efforts to develop and institutionalize gender-conscious laws and policies in the workplace at the international and national levels. See, e.g., WORLD BANK, INTEGRATING GENDER INTO THE WORLD BANK’S WORK: A STRATEGY FOR ACTION (2002), available at <http://siteresources.worldbank.org/INTGENDER/Resources/strategypaper.pdf>; SUZANNA DENNIS & ELAINE ZUCKERMAN, GENDER GUIDE TO WORLD BANK AND IMF POLICY-BASED LENDING (2006), available at

facilitate policymaking and lawmaking that takes account of actual facts and trends. Gender-conscious policymaking and lawmaking are likely to have a significant effect on gender equality in these sectors because these are sectors employing large numbers of women.¹⁰¹ Improving working conditions is an opportunity to significantly advance the promotion of distributional equality for women.¹⁰²

A. Gender-Differentiated Data Collection

The gendered effects of FDI are complex and more data is necessary to develop nuanced proposals for legislation.¹⁰³ However, the lack of data is

<http://www.genderaction.org/images/GA%20Gender%20Guide%20to%20World%20Bank%20and%20IMF%20FINAL.pdf>. For example, gender mainstreaming is an approach that has gained traction as a “strategy for institutionalizing and integrating gender concerns into the mainstream.” REBECCA TIESSEN, *EVERYWHERE/NOWHERE: GENDER MAINSTREAMING IN DEVELOPMENT AGENCIES* 12 (2007). Gender mainstreaming entered the international discourse at conferences such as the 1975 First World Conference on Women in Mexico and the 1985 Third World Conference on Women in Nairobi. *Id.* at 13. See also UNITED NATIONS, *GENDER MAINSTREAMING: AN OVERVIEW* (2002) (discussing gender mainstreaming within the United Nations). For discussions of regional and sector specific applications of gender mainstreaming, see, e.g., ORG. FOR SOC. SCI. RESEARCH IN E. & S. AFR., *GENDER MAINSTREAMING EXPERIENCES FROM EASTERN AND SOUTHERN AFRICA* (2010); ELIZABETH MCGREGOR & FABIOLA BAZO, *GENDER MAINSTREAMING IN SCIENCE AND TECHNOLOGY: A REFERENCE MANUAL FOR GOVERNMENTS AND OTHER STAKEHOLDERS* (2001). Governments, international agencies, and development organizations apply gender mainstreaming to address gender inequalities in development activities. TIESSEN, *supra* note 100, at 13-14.

Scholars have suggested various ways to address gender inequalities and protect women’s human rights. There is a small but growing body of literature on the intersection of gender and economic development in developing countries. See, e.g., Banks, *supra* note 56, at 137. Political science scholars Shannon Lindsey Blanton and Robert G. Blanton have examined human rights as a socio-legal factor that influences FDI as well as the relationship between FDI and workers’ rights. See generally Shannon Lindsey Blanton & Robert G. Blanton, *Human Rights and Foreign Direct Investment: A Two-Stage Analysis*, 45 BUS. & SOC’Y 464 (2006) (analyzing the effects of human rights conditions on foreign direct investment); Jerome I. Levinson, *Worker Rights and Foreign Direct Investment*, in LEGAL ASPECTS OF FOREIGN DIRECT INVESTMENT 137 (Daniel D. Bradlow & Alfred Escher eds., 1999) (discussing the effects of competition for foreign direct investment on protections for workers’ rights). Development studies scholar Glenn Banks, for example, has suggested that an intersectional analysis, including “geography, hierarchy, gender, and residential status,” is required to develop a nuanced understanding of inequality in developing countries. Banks, *supra* note 56, at 136 (citation omitted).

¹⁰¹ These are also sectors in which women are often employed outside of the formal economy. Kabeer & Mahmud, *supra* note 73, at 133. In light of the substantial influence FDI has on working conditions, it should be used as a factor to evaluate macroeconomic policy. Balakrishnan & Sayeed, *supra* note 38, at 31 (“Advocacy that promotes workers’ rights needs to enhance the bargaining capacity of workers at the local level, to address macroeconomic policies that may threaten their employment opportunities at the national level, and, at the international level, to prevent countries from using cheap labor as their comparative advantage to attract foreign investment.”).

¹⁰² Decent work can be defined as “opportunities for women and men to obtain productive employment in conditions of freedom, equity, security and human dignity.” UNCTAD, *World Investment 2009*, *supra* note 81, at 164 n.26 (quoting INT’L LABOUR OFFICE GENEVA, *PROMOTION OF RURAL EMPLOYMENT FOR POVERTY REDUCTION* (2008), available at http://www.ilo.org/wcmsp5/groups/public/—ed_norm/—relconf/documents/meetingdocument/wcms_091721.pdf).

¹⁰³ U.N. Research Inst. For Soc. Dev., *supra* note 19, at iv (“[V]ery little is understood about the dynamic impact of FDI.”); see also Balakrishnan & Sayeed, *supra* note 38, at 31.

neither a new issue nor one that is unknown.¹⁰⁴ More research is needed for the development of more comprehensive proposals for regulating the intersection of gender and FDI in domestic and international law. Nonetheless, this should not prohibit affirmative steps toward this goal, though the timing of lawmaking should take into account the need for relevant data.

There are many models for gender-related data collection.¹⁰⁵ In the United States, for example, the collection of gender statistics is mandated under Section 1071 of the Dodd-Frank Wall Street Reform and Consumer Protection Act,¹⁰⁶ the National Center for Education Statistics,¹⁰⁷ and the EEOC Recordkeeping and Reporting Requirements under Title VII, the Americans with Disabilities Act, and the Genetic Information Nondiscrimination Act.¹⁰⁸ In the United Kingdom, the collection of gender statistics is mandated by, for example, the Higher Education Statistics Agency.¹⁰⁹ There are also international data collection and reporting initiatives such as the Global Reporting Initiative.¹¹⁰

¹⁰⁴ See Stark, *supra* note 17, at 349; UNDESA, World's Women, *supra* note 16, at 91. The persisting lack of gender-differentiated data may be due, in part, to the gender-neutral assumptions of traditional FDI analysis.

¹⁰⁵ One important role for future research is to determine what data may be needed. Then this data will need to be collected. In some cases, the data may already have been collected for other purposes by domestic and international institutions. However, in other cases, this research will call for the collection of new types of data. In those cases, a determination will need to be made as to which institutions are the appropriate ones to collect specific data and the likelihood that these institutions are willing and able to do so. One option would be to have corporations collect certain data.

¹⁰⁶ See, e.g., Pub. L. No. 111-203 § 1071, 124 Stat. 1376, 2056-59 (codified as amended at 15 U.S.C. § 1691o-2 (2010)). "In the case of any application to a financial institution for credit for women-owned, minority-owned, or small business, the financial institution shall . . . compile[] and maintain[] . . . a record of . . . the race, sex, and ethnicity of the principal owners of the business." *Id.*

¹⁰⁷ See, e.g., 20 U.S.C.A. § 9543(a)(3) (2011). The Statistics Center shall collect, report, analyze, and disseminate statistical data related to education in the United States and in other nations, including . . . (3) collecting, analyzing, cross-tabulating, and reporting, to the extent feasible, information by gender, race, ethnicity, socioeconomic status, limited English proficiency, mobility, disability, urban, rural, suburban districts, and other population characteristics, when such disaggregated information will facilitate educational and policy decisionmaking. *Id.*

¹⁰⁸ See, e.g., 42 U.S.C.A. § 2000e-8. The bases for the reporting requirements are (i) 42 USC 2000e-8(c) and (ii) 29 CFR § 1602.1 (2011).

Employers in the private sector with 100 or more employees and some federal contractors with 50 or more employees have been required to submit EEO-1 reports annually since 1966 . . . EEO-1 data is used by EEOC to investigate charges of employment discrimination against employers in private industry and to provide information about the employment status of minorities and women. The data is shared with the Office of Federal Contract Compliance Programs (OFCCP), U.S. Department of Labor, and several other federal agencies.

Agency Information Collection Activities: Existing Collection; Emergency Extension, 75 Fed. Reg. 63,180 (Oct. 14, 2010).

¹⁰⁹ See *Overview*, HIGHER ED. STATS. AGENCY, <http://www.hesa.ac.uk/index.php/content/view/4/54/> (last visited Feb. 21, 2011).

The Higher Education Statistics Agency (HESA) is the official agency for the collection, analysis and dissemination of quantitative information about higher education [in the United Kingdom] . . . HESA is a private limited company, which has formal agreements with government departments to

B. Gender-Differentiated Lawmaking

Since women's labor is intentionally kept "cheap" through ongoing acts, affirmative changes will be necessary to alter the status quo.¹¹¹ For lawmaking to govern the activities of transnational corporations most effectively, it should take place simultaneously at both the domestic and global levels. This includes both domestic lawmaking and international lawmaking, for example, in the form of bilateral investment treaties. The proposals below are directed toward domestic lawmaking but could also be incorporated into bilateral investment treaties.

As I proposed in greater detail in *Reimagining Human Rights Law*, a legal theory of global corporate citizenship could have four primary principles: *Minimize Harm*, *Ensure Accountability and Responsibility to Stakeholders*, *Maximize Benefit*, and *Achieve a Competitive Return*.¹¹² The following three subsections use the first three principles as a framework for developing gender-conscious lawmaking. The fourth principle, *Achieving a Competitive Return*, requires balancing financial goals against the first three principles. Appropriate legislation should give transnational corporations an incentive to balance economic goals with socio-political goals.

1. Minimize Harm: Responding to Gender in and Around the Workplace

The principle of *Minimizing Harm* requires transnational corporations to minimize negative effects on all categories of stakeholders and all

provide the data which they require, and it is funded by subscription from all of the universities and higher education colleges throughout the United Kingdom.

Id.

For a discussion of gender reporting in the United Kingdom, see, e.g., Kate Grosser & Jeremy Moon, *Gender Mainstreaming and Corporate Social Responsibility: Reporting Workplace Issues*, 62 J. BUS. ETHICS: EUR. REV. 327 (2005); Kate Grosser, *Corporate Social Responsibility and Gender Equality: Women as Stakeholders and the European Union Sustainability Strategy*, 18 BUS. ETHICS 290 (2009); Kate Grosser & Jeremy Moon, *Developments in Company Reporting on Workplace Gender Equality? A Corporate Social Responsibility Perspective*, 32 ACCT. F. 179, 192 (2008) ("Many interviewees noted that although UK government agencies (e.g. EOC, DTI) engage companies about gender equality workplace issues and policy, there is no legal obligation to report on this issue. They contrasted this with their USA divisions which report more because they are legally required to report data on women (their ethnicity and grade) to government.").

¹¹⁰ See generally GLOBAL REPORTING INITIATIVE, *EMBEDDING GENDER IN SUSTAINABILITY REPORTING: A PRACTITIONER'S GUIDE* (2009).

¹¹¹ ENLOE, *supra* note 32, at 166 ("Thus keeping women's labor cheap requires vigilance and daily effort. That effort is an integral part of what is called 'international political economy'. Factory managers alone cannot keep women's labor cheap; it takes a combination of allies and ideas – about skills, marriage, feminine respectability, fashion. The politics of the international garment industry are sustained by relationships inside the home, in the community, in and between governments, as well as on the factory floor."); see also Rosenblum, *supra* note 40, at 85-86. See, e.g., Barbara Ibrahim, *Policies Affecting Women's Employment in the Formal Sector: Strategies for Change*, 17 WORLD DEV. 1097, 1102 (1989) (discussing labor legislation affecting women's working conditions).

¹¹² See Anderson, *Reimagining Human Rights Law*, *supra* note 7, at 227; see also, Anderson, *Toward Global Corporate Citizenship*, *supra* note 13, at 29.

applicable standards from the environment to labor and employment laws. Global corporate citizenship builds on the corporate social responsibility literature.¹¹³ However, the nature of transnational corporate operations requires a comprehensive framework to be effective.¹¹⁴ Subcontracting can reinforce existing gender inequalities by locating women's labor in the home without offering traditional protections and benefits of outside employment.¹¹⁵ Addressing the inequalities in this sector could include measures such as expanding the definition of employees, equal pay for equal work, and increased access to jobs in outside employment.

Laws to minimize harm to women through subcontracting could require expanding the definition of "employee" in domestic labor laws to include workers in the informal sector, particularly those engaged in home-based work or employed as independent contractors.¹¹⁶ This can mitigate women's lack of bargaining power when entering into agreements for subcontracted work, help secure medical benefits and social security rights for women, and would make it harder for transnational corporations to circumvent labor laws through subcontracting.¹¹⁷ Further, such laws could require employers to provide all employees, and in particular home-based workers, with information about relevant labor laws verbally and in writing because subcontracted employees often have no knowledge of these laws.¹¹⁸

¹¹³ See generally Cynthia A. Williams, *Corporations Theory and Corporate Governance Law: Corporate Social Responsibility in an Era of Economic Globalization*, 35 U.C. DAVIS L. REV. 705 (2002) (discussing corporate social responsibility in a global context). See also John M. Conley & Cynthia A. Williams, *Engage, Embed, and Embellish: Theory Versus Practice in the Corporate Social Responsibility Movement*, 31 IOWA J. CORP. L. 1 (2005) (discussing the corporate social responsibility movement); Cynthia A. Williams & John M. Conley, *Is There an Emerging Fiduciary Duty to Consider Human Rights?*, 74 U. CIN. L. REV. 75 (2005).

¹¹⁴ Minimizing the negative effects of FDI on women in the subcontracting and export-oriented textile and clothing production sectors, for example, is a challenge that requires simultaneous analysis of the gendered allocation of family responsibilities and gender stratification in the workplace. See generally Elvia R. Arriola, *Voices from the Barbed Wires of Despair: Women in the Maquiladoras, Latina Critical Theory, and Gender at the U.S.-Mexico Border*, 49 DEPAUL L. REV. 729 (2000) (discussing gender and feminization in unique category of workplace).

¹¹⁵ Balakrishnan & Sayeed, *supra* note 38, at 31.

¹¹⁶ *Id.* Of course, changing the behavior of transnational corporations via regulations in the countries in which the parent countries are incorporated would also be effective since eighty-five percent of the top one hundred transnational corporations are located in the European Union, Japan, and the United States. UNCTAD, *Largest TNCs*, *supra* note 58, at 3-4 (compiling a list of the 100 largest non-financial transnational corporations and the top fifty transnational corporations from developing countries). However, "[i]t is unlikely that the protection of the rights and interests of non-citizens will be given a higher priority than the protection of a state's own citizens and economic interests in foreign direct investment law." Anderson, *Reimagining Human Rights Law*, *supra* note 7, at 225. Therefore, this essay focuses on measures that can be implemented in countries receiving FDI inflows.

¹¹⁷ Khattak, *supra* note 16, at 40-41 (discussing the results of a study of subcontracted women workers in Pakistan and stating that subcontracted employees working from home often "have no medical benefits or social security rights"). Collective bargaining and pay equity are positively correlated. ILO, *DECENT WORK*, *supra* note 34, at 132 (citation omitted).

¹¹⁸ Khattak, *supra* note 16, at 40.

As discussed above, women often do not receive equal pay for equal work.¹¹⁹ Paying women less is justified based on the assumption that women are secondary wage earners, which is based on inaccurate assumptions about family and marriage.¹²⁰ Transnational corporations continue this practice when they combine low wages for women with a shift from hiring more men to hiring more women to reduce costs, while simultaneously taking advantage of existing gender inequalities in the host country.¹²¹ Laws requiring equal pay for equal work can reduce the extent to which transnational corporations reinforce existing inequalities between men and women.¹²²

Another way to minimize harm is to pass and enforce laws that require transnational corporations to be equal opportunity employers and hire both men and women for jobs that have traditionally been segregated by gender. The hiring of primarily male workers, for example, on banana plantations, requires a family division in which the women take over subsistence agriculture at home.¹²³ This problem can be exacerbated by pressures on national governments to open up more land to plantation companies to address international debt.¹²⁴ Ensuring that women have equal access to higher paying jobs reduces the likelihood that FDI will force women into

¹¹⁹ See UNCTAD, *Gender and Trade*, *supra* note 34, at 3.

¹²⁰ ENLOE, *supra* note 32, at 162-63.

¹²¹ *Id.* at 134.

¹²² Examples of laws requiring equal pay for equal work and prohibiting wage discrimination on the basis of gender can be found, for example, in the ILO Equal Remuneration Convention (number 100) of 1951, the United States Equal Pay Act of 1963, and the European Union Equal Pay Directive. Equal Remuneration Convention art. 3, June 29, 1951, 165 U.N.T.S. 303 (entered into force May 23, 1953); 29 U.S.C. § 206(d) (1983); Council Directive 75/117/EEC, art. 1, 1975 O.J. (L 45). The ILO Equal Remuneration Convention has been ratified by 168 countries around the world (although not by the United States). *Convention No. 100*, ILOLEX, <http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C100> (last visited on Feb. 22, 2011). However, legislation alone will not be sufficient to reduce the wage gap. "Empirical evidence of the impact of such legislation on women's employment and relative wages is mixed for developed countries and scant for developing countries." UN MILLENNIUM PROJECT, *supra* note 41, at 100. The evidence suggests that the effect of such legislation is dependent on the level of enforcement and penalties associated with such laws. *Id.* For more on equal opportunity or antidiscrimination legislation targeting women, see generally Yana van der Meulen Rodgers, *Protecting Women and Promoting Equality in the Labor Market: Theory and Evidence* (Policy Research Report on Gen. & Dev., Working Paper Series, No. 6, 1999), available at <http://siteresources.worldbank.org/INTGENDER/Resources/laborrodgers.pdf>.

¹²³ ENLOE, *supra* note 32, at 136-37 ("The 'feminization of agriculture' – that is, leaving small-scale farming to women, typically without giving them training, equipment or extra finance – has always been part and parcel of the masculinization of mining and banana plantations. The male labor force has to make private arrangements with wives, mothers or sisters to assure them of a place to return to when their contracts expire, when they get fed up with supervisors' contemptuous treatment or when they are laid off because world prices have plummeted.") (citation omitted).

¹²⁴ *Id.* at 137 ("International agencies such as the International Monetary Fund scarcely give a thought to women as wives and subsistence farmers when they press indebted governments to open up more land to plantation companies in order to correct their trade imbalances and pay off foreign bankers.").

unpaid work in subsistence agriculture while men are employed in higher-paid, higher-prestige work outside the home.

*2. Ensure Accountability and Responsiveness to Stakeholders:
Women as Stakeholders*

Ensuring Accountability and Responsiveness to Stakeholders requires standards and transparency. This builds on the corporate social accountability literature.¹²⁵ This principle assumes that transnational corporations have duties and obligations to society as a whole as well as to specific groups of stakeholders.¹²⁶ The stakeholders to whom transnational corporations should be held accountable should be expanded to include women. This could give women employed in subsistence agriculture a voice in agricultural FDI. At the very least, transnational corporations would have increased responsibilities to consider the effects of their acts on women stakeholders in the agricultural sector.

Achieving accountability requires setting standards for ethical business operations.¹²⁷ These standards may be formal or informal and can be achieved through a variety of ways, including “producing social reports assured by third parties [and] operating according to a code of conduct.”¹²⁸ For example, one option may be to encourage gender impact assessments in the same way that we require environmental impact assessments.¹²⁹

*3. Maximize Benefit:
Valuing Women’s Work and Taking a Long-Term Perspective*

Maximizing the benefits of FDI for women requires affirmative steps on the part of transnational corporations to contribute to their social and economic well-being. One way to maximize the benefits of FDI is for transnational corporations to exert positive influence over, for example,

¹²⁵ See generally S. Prakash Sethi, *Defining the Concept of Good Corporate Citizenship in the Context of Globalization: A Paradigm Shift from Corporate Social Responsibility to Corporate Social Accountability*, in HANDBOOK OF RESEARCH ON GLOBAL CORPORATE CITIZENSHIP 74 (Andreas Georg Scherer & Guido Palazzo eds., 2008). See also Li-Wen Lin, *Corporate Social Accountability Standards in the Global Supply Chain: Resistance, Reconsideration, and Resolution in China*, 15 CARDOZO J. INT’L & COMP. L. 321 (2007).

¹²⁶ See Anderson, *Reimagining Human Rights Law*, *supra* note 7, at 229.

¹²⁷ *Id.*

¹²⁸ *Id.* at 228.

¹²⁹ See generally INT’L ASS’N FOR IMPACT ASSESSMENT, PRINCIPLES OF ENVIRONMENTAL IMPACT ASSESSMENT BEST PRACTICE (1999), available at http://www.iaia.org/publicdocuments/special-publications/Principles%20of%20IA_web.pdf. The ILO has developed participatory gender audits to “enhance[] the collective capacity of [an] organization to examine its activities from a gender perspective and identify strengths and weaknesses in promoting gender equality issues.” *ILO Participatory Gender Audit: A Tool for Organizational Change*, INT’L LABOUR ORG., 1 (2008), available at http://www.ilo.org/wcmsp5/groups/public/—dgreports/—gender/documents/publication/wcms_101030.pdf.

water sanitation,¹³⁰ property rights,¹³¹ public transportation,¹³² education,¹³³ and entrepreneurial skills¹³⁴ and capabilities. Governments could provide incentives that encourage transnational corporations to create opportunities for professional development and advancement. The declining benefits of job creation through FDI could be countered by requiring transnational corporations to offer equally advantageous training opportunities to men and women and to do so in a way that makes those opportunities equally accessible by men and women.¹³⁵

As discussed in Section III, women are heavily represented in the agriculture, textile, and subcontracting sectors where they are at a disadvantage because they often do not have written contracts, full-time work, or permanent status.¹³⁶ This puts them in a vulnerable position that is exacerbated by incorrect assumptions by international agencies and local governments that women are less vulnerable than men to economic insecurity.¹³⁷ Laws requiring employers to provide employees in these sectors with written contracts, equal pay acts, job training, and changing the definition of employees would help to reduce women's economic vulnerability.¹³⁸

In addition, though increased access to the outside labor force has created job opportunities for women, they are often paid less than men for

¹³⁰ See United Nations Conference on Trade and Development, *World Investment Report 2008: Transnational Corporations and The Infrastructure Challenge* 140 (2008), available at http://www.unctad.org/en/docs/wir2008_en.pdf (discussing the effects of the lack of water and sanitation on child mortality, maternal health, and gender equality).

¹³¹ Leslie Kurshan, Note, *Rethinking Property Rights as Human Rights: Acquiring Equal Property Rights for Women Using International Human Rights Treaties*, 8 AM. U. J. GENDER SOC. POL'Y & L. 353 (2000).

¹³² See, e.g., Ibrahim, *supra* note 111, at 1102 ("Investments in public transportation, for example, would enable women to work outside their own neighborhood. Provision of roads to isolated areas may open up new possibilities for employment of rural women."). Additionally, "[i]n the case of night work, some legislation requires employers to provide transportation or otherwise assure the safety of women working night shifts." *Id.*

¹³³ See, e.g., Shannon Murphy, Wivinia Belmonte & Jane Nelson, *Investing in Girls' Education: An Opportunity for Corporate Leadership* (2009), available at http://www.hks.harvard.edu/mrcbg/CSRI/publications/report_40_investing_in_girls.pdf (discussing opportunities and benefits of corporate investment in girls' education).

¹³⁴ See, e.g., BRAUNSTEIN, *supra* note 10, at 1 (discussing "the 'neoliberal vision' which treats FDI as a way for spreading capital, technology and management skills internationally").

¹³⁵ See, e.g., MCGREGOR & BAZO, *supra* note 100, at 11 (discussing the need for employers to "[p]romote women's careers in science while adhering to the merit principle" to promote women pursuing careers in science and technology). For example, in the United States, unions entered into agreements with corporations to ensure training programs for black employees to remedy historical discrimination. See generally *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979).

¹³⁶ Kabeer & Mahmud, *supra* note 73, at 133; U.N. RESEARCH INST. FOR SOC. DEV., *supra* note 73, at 133.

¹³⁷ See Tallontire, Dolan, Smith & Barrientos, *supra* note 31, at 254; see also ENLOE, *supra* note 32, at 162-63.

¹³⁸ Equal pay acts are discussed in greater detail in note 122.

the same work.¹³⁹ They also are often predominately employed in lower-paying job categories.¹⁴⁰ Laws requiring equal pay for equal work would force transnational corporations to stop practices that pay men and women different wages based solely on their gender.

Another way women's wages remain lower is through the reservation of certain "skilled" jobs for men;¹⁴¹ these male employees often benefit from higher wages.¹⁴² Employees in sectors that are viewed as low- or semi-skilled often receive lower wages through subcontracting agreements; it is often women who are primarily employed in these sectors.¹⁴³ Laws prohibiting the restriction of certain jobs to men solely based on their gender will help to allow women to access better-paying jobs.

Women continue to bear the majority of the responsibilities for the home and childcare. Consequently, women make up a large segment of the population that takes flexible schedules or work that can be done at home, which is often subcontracted work.¹⁴⁴ One way to address this issue is to create incentives or require employers to offer flexible hours, locations, and other options like job sharing for both men and women.¹⁴⁵ Such laws and incentives could also encourage transnational corporations to offer parental leaves that do not hinder career advancement.¹⁴⁶ Laws requiring transnational corporations to provide equally valuable services for men and women would enable more women to take jobs outside of the home. For example, transnational corporations that provide special services for male employees, such as a brothel, could be required to also provide services for female employees, such as childcare.¹⁴⁷

A proposal that is likely to be more controversial is a requirement that transnational corporations provide workers with safe and efficient transportation or contribute a percentage of their profits to the development

¹³⁹ UNCTAD, *Gender and Trade*, *supra* note 34, at 3.

¹⁴⁰ *Id.*

¹⁴¹ ENLOE, *supra* note 32, at 162 ("[A] women's [sic] labor can be kept cheap if those jobs which even the factory managers acknowledge are 'skilled' can be reserved for men.").

¹⁴² Balakrishnan & Sayeed, *supra* note 38, at 17.

¹⁴³ *Id.*

¹⁴⁴ Korinek, *supra* note 18, at 12 (discussing the "shift back to home-based work as . . . a strategy for lowering labour costs").

¹⁴⁵ See, e.g., MCGREGOR & BAZO, *supra* note 100, at 11 (discussing the need for employers to "[p]rovide alternative work arrangements such as flexible hours, flexible locations, and job-sharing opportunities" to promote women pursuing careers in science and technology). See also JOAN C. WILLIAMS, *RESHAPING THE WORK-FAMILY DEBATE: WHY MEN AND CLASS MATTER*, chs. 2 & 3 (2010).

¹⁴⁶ See, e.g., MCGREGOR & BAZO, *supra* note 100, at 11 (discussing the need for employers to "[h]ave maternity and paternity leave policies" and "[p]ut into place hiring and promotion criteria to allow for family responsibilities so that maternity, paternity and parental leaves do not jeopardise (sic) career progression" to promote women pursuing careers in science and technology). However, the effectiveness of such laws may be limited by informal and other pressures that cause workers not to take advantage of the benefits of laws designed to protect them.

¹⁴⁷ See, e.g., *id.* (discussing the need for employers to "[e]nsure on-site childcare facilities" to promote women pursuing careers in science and technology).

of transportation infrastructure. This would help address the lack of efficient and safe public transportation, one factor that drives women to accept subcontracted work.¹⁴⁸ Of course, this will only be successful if the funds go to transportation that meets the needs of women employees seeking work outside the home.

V. CONCLUSION

Gender inequality continues to be a problem around the world. Although FDI is often thought of as gender neutral, women do not always experience the same benefits as men and in some cases FDI even exacerbates gender inequalities. This essay argued that gender-differentiated data collection and data gender-conscious lawmaking can help promote distributional equality for women. It applied a legal theory of global corporate citizenship to categorize potential lawmaking according to three principles: *Minimize Harm, Ensure Accountability and Responsibility to Stakeholders, Maximize Benefit*. It proposed measures such as expanding the definition of employee to include workers engaged in home-based work, requiring written contracts for all employees, and third-party gender impact assessments. It also identified avenues for future research based on existing models for gender-related data collection and options for gender-differentiated lawmaking in domestic and international law.

¹⁴⁸ See Khattak, *supra* note 16, at 38.