

Retaining Employment Equity Measures in Trade Agreements

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ACRONYMS

AGGI	Advisory Group on Gender Integration
AGP	Agreement on Government Procurement
AIT	Agreement on Internal Trade
APEC	Asia Pacific Economic Cooperation
AWID	Association for Women's Rights in Development
CAC	Consulting and Audit Canada
CAP	Collective Action Plan
CHRC	Canadian Human Rights Commission
CIDA	Canadian International Development Agency
CITT	Canadian International Trade Tribunal
CJE	Court of Justice of the European Communities
CLCA	Comprehensive Land Claims Agreements
CTS	Council on Trade in Services
DFAIT	Department of Foreign Affairs and International Trade Canada
EC	European Commission
ECOTECH	Economic and Technical Cooperation
EEA	Employment Equity Act
ESCAP	Economic and Social Commission for Asia and the Pacific
FCP	Federal Contractors Program
FTAA	Free Trade Area of the Americas
GBA	Gender-based analysis
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
HRDC	Human Resources and Development Canada, see: HRSDC
HRSDC	Human Resources and Skills Development Canada, formerly Human Resources and Development Canada (HRDC)
IAP	Individual Action Plan
ICC	International Chamber of Commerce
IDPM	Institute for Development Policy and Management
IDS	Institute of Development Studies
ILO	International Labour Organization
INAC	Indian and Northern Affairs Canada
IWGGT	Informal Working Group on Gender and Trade (WTO)
MFN	Most Favoured Nation
NAFTA	North American Free Trade Agreement
NGO	Non-Governmental Organization
PSAB	Procurement Strategy for Aboriginal Business
PWGSC	Public Works and Government Services Canada
SAGIT	Sectorial Advisory Group on International Trade
SCFAIT	Standing Committee on Foreign Affairs and International Trade
SCHRDSPD	Standing Committee on Human Resources Development and the Status of Persons with Disabilities
SIA	Sustainability Impact Assessment

SWC	Status of Women Canada
TB	Treasury Board of Canada
TPRM	Trade Policy Review Mechanism
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Program
UNIFEM	United Nations Development Fund for Women
WEDO	Women's Environment and Development Organization
WIDE	Network Women in Development Europe
WGTGP	Working Group on Transparency in Government Procurement
WPGR	Working Party on GATS Rules
WTO	World Trade Organization

PREFACE

Good public policy depends on good policy research. In recognition of this, Status of Women Canada instituted the Policy Research Fund in 1996. It supports independent policy research on issues linked to the public policy agenda and in need of gender-based analysis. Our objective is to enhance public debate on gender equality issues to enable individuals, organizations, policy makers and policy analysts to participate more effectively in the development of policy.

The focus of the research may be on long-term, emerging policy issues or short-term, urgent policy issues that require an analysis of their gender implications. Funding is awarded through an open, competitive call for proposals. A non-governmental, external committee plays a key role in identifying policy research priorities, selecting research proposals for funding and evaluating the final reports.

This policy research paper was proposed and developed under a call for proposals in August 2001, entitled *Trade Agreements and Women*. Research projects funded by Status of Women Canada on this theme examine issues such as gender implications of Canada's commitments on labour mobility in trade agreements; the effect of trade agreements on the provision of health care in Canada; the social, economic, cultural and environmental impacts of free trade agreements on Canadian Aboriginal women; building Canadian models of integrating gender perspective into trade agreements; the repercussions of the trade agreements on the proactive employment equity measures for women that are applicable to private-sector employers in Canada; and the effects of trade agreements on women with disabilities.

A complete list of the research projects funded under this call for proposals is included at the end of this report.

We thank all the researchers for their contribution to the public policy debate.

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The information in this research report was current as of June 1, 2004; access to Web site references was verified at that time.

EXECUTIVE SUMMARY

In Canada, employment equity measures are defined and perceived as necessary for promotion of the right to equality in the workplace for Canadian women and three other groups designated by the Act, namely members of visible minorities, persons with disabilities and aboriginal peoples. Although the *Employment Equity Act* was implemented nearly 20 years ago, recent assessments of the Act confirm that few stakeholders take the importance of these measures seriously. The same can be said of the Federal Contractors Program (FCP), which requires that, for certain government procurement contracts, Canadian contractors (or contractors established in Canada) implement employment equity plans in their business. In general, these programs must be improved if the desired objectives are to be attained.

The recent and explosive development of liberalization of commercial exchange, and trade agreements, has given rise to persistent criticism that they adversely affect the sovereign capacity of nations to regulate social spaces and the public interest, based on each nation's own values. Legislation, like trade, is becoming globalized. It also has been shown that the liberalization of commercial exchange and the opening of goods and services markets to international competition are phenomena that involve more than just good news with regard to the employment of women and the general quality of their living conditions. Thus, "globalization" was based heavily on the increased exploitation of female workers and labour, whether visible or invisible.

However, beyond these assertions and studies, it is rare to find research aimed in particular at exploring the effects of trade agreements on a specific regulatory measure intended to promote the right of Canadian women to equality. Our case study ventures to do so, analytically and without bias. Though it is intended to be taken primarily for what it reveals, it can also be received as methodological input regarding the effects of trade agreements on the capacity of nations to intervene in national social spaces.

This case study focuses solely on the federal model of employment equity, which is intended for employed women, among other people. The study excludes pay equity, examining it only as part of the application of the *Employment Equity Act* in the private sector, or as part of bidding on public procurement from the federal government. The study asks whether, in the particular case of employment equality, we can corroborate the assertion that the commitments made by Canada in accordance with various agreements would adversely affect the country's short-term or medium-term capacity to maintain national measures for promoting employment equality for Canadian women. For reasons explained herein, the study addresses this question by focusing on two World Trade Organization (WTO) agreements signed by Canada: the General Agreement on Trade in Services (GATS) and the Agreement on Government Procurement (AGP). It also pays particular attention to the North American Free Trade Agreement (NAFTA), in particular Chapter 11 (investments).

The study is divided into three parts. The first part takes stock of employment equity in Canada and the objective need to improve this model. The second part of the study focuses

on analysing the GATS and the AGP, in light of the following hypothesis: do these agreements prevent Canada from improving employment equity measures? Conclusions and recommendations, which are briefly outlined below, comprise the third part.

The main findings of the study are as follows. The trade agreements examined do not directly impair the Government of Canada's ability to maintain, improve or develop the scope of employment equity measures, whether legislated (businesses subject directly to the *Employment Equity Act*) or non-legislated (Federal Contractors Program). On the contrary, these agreements require an unequalled transparency and rigor from Canada in managing these programs, which, in their current state, present deficiencies in the standards that they establish. As long as the businesses involved are under foreign control, even though they are operating in Canada, we can assert that the GATS and the AGP have "raised the stakes." Thus, the increased transparency in employment equity measures that has been imposed on businesses operating in Canada indirectly constitutes an obstacle to Canada's capacity to take action in favour of employment equity.

The ensuing question is therefore twofold: First, to what point can the employment equity model, described as a complex model of gender equality, measure up in everyday use to the requirements of trade agreements, which guarantee foreign investor-employers near complete predictability of trade terms? Second, it remains to be determined whether the government is also willing to face this new challenge posed to domestic regulation by trade agreements or whether, as some claim, the government is incapable of doing so, struck as it is by "political" opposition to progress that dictates the atmosphere and ideology of the liberalization of exchange?

The question is difficult to answer because, to date, there has been an almost complete lack of dialogue between the parties concerned. This is why many of our recommendations relate vitally to the gender-based analysis of trade policies and the conditions for creating a useful dialogue between Canadian women and the state with regard to international trade and national mechanisms for establishing trade policies in Canada. On the one hand, the case study reveals an "everyday international trade" that requires Canadian women to become familiar with the technical requirements of this new reality. On the other hand, it reveals that the state's affirmative duty to work to promote human rights and women's equality rights means that it must ensure that Canadian women understand international trade and that its impact on their rights be assessed. Along these lines, it is also fitting to review the impact of the methodology of a gender-based analysis on international trade, because trade is not like other government competencies: it is cross-sectoral and does not involve merely a single department or agency.

Of course, our conclusions and recommendations also relate to the federal government itself. It must take every opportunity to assert before international trade institutions the legitimacy of Canadian employment equity measures, in order to retain them.

Lastly, our recommendations embrace the question of improvements from which legislated and non-legislated employment equity programs in Canada could quickly benefit. Never before has this issue been considered on the basis of the new parameters set out by Canada's

international trade commitments. At the very most, the mood of businesses that are subject to the *Employment Equity Act* has come into focus. But who are these businesses? Are they fully Canadian? Or are they foreign, though established in Canada? Do they hold special rights due to their investor status in Canada? What effect can such a status have on the conditions for dialogue between the institutions that are responsible for implementing employment equity in Canada and these businesses? Sooner or later, a distinction must be made between the desired changes to employment equity measures and the status of the various Canadian employers concerned. Does the government want this? Does it have a choice? How can the demand for employment equity be harmonized with the “rights” of foreign companies that hire in Canada? Our recommendations are intended to counter the presumed indifference of the decision-makers on this issue.

To conclude, we add here our own feedback on the experience of this case study. Canada has very few representative associations for women interested in the “technical” issue of the link between trade agreements ratified by Canada, the commitments made in this regard, and the integrity of national policies intended to promote the rights of Canadian women. This case study does not pass judgment on the larger issue of the negative impact of trade agreements on the human rights of women. However, we believe that it does show the representative associations for Canadian women should adapt their analysis of these policies to new parameters induced by the trade agreements that bind Canada in one way or another. To do so, they will need all the support (education, awareness, dialogue and gender-based analysis) that the Government of Canada can grant. Indeed, this is the government’s proactive responsibility under its international human rights commitments.

INTRODUCTION

The title of this research report empirically connects two areas that globalization tends to isolate from each other: human rights and international trade. Some claim that an increase in the number of trade agreements and the institutionalization of international trade, which are particular, but not exclusive, manifestations of globalization, subjugate human rights to trade. So, it would seem, human rights, and therefore women's rights—in particular women's right to equality—are threatened by these phenomena. This fear is illustrated by the many demands for the primacy of human rights over trade agreements. Again, in response to this fear, the women's movement often says NO to trade agreements that fail to take into account the human dimension of development, just as it criticizes the economic model that underlies such agreements.

Others claim that, in reality, the risk of conflict between international trade rules and human rights is fairly limited, and that trade agreements fall into a specialized area in which rules are intended primarily to regulate conflict between merchants, and more specifically still, conflicts between merchant nations. They add that bilateral, regional or international trade agreements do not dictate the conduct of nations in terms of human rights and, should nations violate commitments they have made in that regard, the appropriate international or regional authorities are intended to supervise and punish such conduct accordingly.

This important debate is far from over. It poses the question of whether an adverse effect of any kind by international trade obligations on fundamental human values, including dignity and equality, can be tolerated.

Yet, this context has produced “situated” women. That is, women occupy a political, economic and geographic space that is negatively altered by trade commitments contracted by their own nations, often quite undemocratically.

What does this mean for Canadian women who are employed or want to be employed? On the one hand, they benefit from a constitutional standard of equality that makes them the envy of the women in many other countries (section 15 of the *Canadian Charter of Rights and Freedoms*, and the many laws relating to human rights that the federal, provincial and territorial governments have adopted over the years). On the other hand, they are the victims of a reconfiguration of their relationship to work and to the poverty that impairs their right to equality. The employment of women is becoming fragmented and tenuous. It is increasingly said that women are “at the service of” globalization and pay the price, despite increased female employment.

Often, socio-economic studies that look at the effects of liberalized trade in Canada simply analyse the variations in employment volume and salaries. Women are just one more category of “workers.” Studies rarely focus on the specific effects of this liberalization on one particular mechanism that is intended to promote the equality of women in the workplace.

This shortage of studies is not limited to labour policy. In general, state regulation is rarely subjected to a systematic analysis of the impact of trade commitments on such regulation. Consider this: do trade agreements impair the government's ability to adopt and implement policies, mechanisms and standards that are intended to promote a legitimate social objective?

Some women's groups have not yet reaped the rewards of the employment equity strategy; for example, poor women, immigrants or women with little education. Yet, these very women are captive labour in the new job market. At a time when more vulnerable women should be able to count on employment equity strategies to attain equality, we have every reason to wonder whether the legitimacy and legality of regulations set out by trade agreements should be questioned.

Our confirmed interest in employment equity measures and our expertise in the background and scope of the *Employment Equity Act* prompted us to reformulate the broad question of whether "trade takes precedence over human rights." Thus, the empirical question of this study is as follows: When making trade agreements, can Canada protect its employment equity measures?

In point of fact, this research is a case study for which we have found no precedent. Its focus is a public policy that is framed by legislation (employment equity) and by a program (the federal program involving the contractual obligation of bidders on government procurement contracts to implement employment equity). Our study concerns the employment of women in the private sector only (employers with over one hundred employees). It examines only two trade agreements to which Canada is a signatory: the General Agreement on Trade in Services (GATS) and the WTO Agreement on Government Procurement (AGP), as well as the equivalent chapters of the North American Free Trade Agreement (NAFTA). These choices resulted from a conviction that arose during our research—the need for a case-by-case examination of the impact of one or several trade agreements on public policy. In other words, generalizations should not be made from the conclusions of this study, which are instead intended to prove that further such studies need to be conducted, and that the government has an obligation to do so.

A word about the choice of trade agreements examined: We could have broadened our scope and completed an overview of the main multilateral and plurilateral WTO agreements, extending even to and the equivalent NAFTA chapters, on the regulations essential to promoting women's right to equality in the workplace. Such an overview would have served an instructional purpose, but was not within the objectives of the study. For example, it would have been interesting to linger over the WTO Agreement on Subsidies and Countervailing Measures. This agreement concerns the Government of Canada's capacity to support certain activity sectors and, thus, the labour or entrepreneurship of women. However, reviewing such an agreement did not directly meet the needs of the case study. Furthermore, as in any other study, choices are always partly arbitrary and realistic. We preferred to limit our line of analysis and proceed accordingly with a thorough review

of the topic, hoping to provide a methodology that other studies could reproduce. The key concept governing our choice remains the need for in-depth analysis of the effects of a trade agreement on a given national regulatory assembly.

We drew a number of lessons from this case study. First, it is not enough to assert that trade agreements do not prevent Canada from adopting legislation and programs to promote “Canadian values” or the interests of Canadian men and women. Trade agreements indirectly shape Canadian social policies more than they preclude them. Thus, in the case of employment equity, our conclusions are paradoxical: trade agreements require more regulation, not less. In fact, the obligations of transparency and predictability in the trade conditions imposed by these agreements require a level of legislative refinement from developed countries that challenges certain human rights laws and their administration. We will explain how and why.

Second, trade agreements ratified by Canada explain only partly and very indirectly the “paralysis” of the legislator before a situation that clearly requires correction, as in the case of employment equity. Given the recent assessments of the *Employment Equity Act* and the Federal Contractors Program (FCP), we will explain the desired redress and how businesses subtly fight it.

Third, we gained the conviction that a link exists between the commercial ideology of *laissez-faire* and the legislator’s resistance to change in the matter of employment equity. These are distinct entities in appearance. Internal logic would explain why the *Employment Equity Act* will not be improved when, in fact, it would be the best safeguard, given the trade agreements. In reality, it seems clear that, when easing trade restrictions, the legislator is ill-inclined to strengthen legislative measures that would promote women’s employment equality rights. Will trade benefit by default? This would mean that, through opposition to change, Canadian women could once again be limited to what we know is a highly ineffective recourse of initiating complaints of discrimination that, we note, have no connection to the *Employment Equity Act*. Yet, would this model nonetheless be the universal lowest common denominator imposed indirectly by trade legislation?

Lastly, this study led to our observation that, in light of the trade problem, the methodology promoted by Status of Women Canada, which favours a gender-based analysis of federal government policies and programs, has still not received any serious attention. We shall see why, then propose a number of avenues and recommendations in that regard.

Case studies often present the disadvantage of being highly technical. Ours is certainly no exception to the rule. Rather than apologize, we suggest that such inaccessibility, which is specific to trade agreements, contributes to the “victory of the merchant over humankind.”

To conclude, we add here a word about the women’s associations for whom, among others, research sponsored by Status of Women Canada is intended. Despite our efforts, these associations, especially those in Quebec, showed little interest in our initiative. We feel that the lack of availability, and especially the lack of familiarity with the topic, largely explains this attitude. Moreover, our study raises a fundamental question for these associations: Should

the reaction to the phenomenon of trade agreements be outward (criticizing them) or inward (analysing them)? We believe that this study contributes to a desirable discussion: analysing the effects of trade agreements on Canadian public policies requires from women and their representative associations a vigilance that, in turn, requires the government to agree to a greater effort in “educating women about trade.” Constructive criticism and informed opinions do not arise spontaneously. The topic is arduous and, in appearance, far from the day-to-day experience of women, which is marked by increasingly difficult conditions.

This particular difficulty explains why it was impossible for us to submit the conclusions and recommendations of this study to certain representative women’s associations for validation. Yet, this was a commitment made when we submitted the research proposal to Status of Women Canada, and we accept full responsibility for being unable to follow through. We might instead have begun by assessing the need to establish Canadian and Quebec women’s groups on international trade. Failing to do so, our study aroused little interest at a time when attention within the women’s movement is directed toward finding a direct causal link between the impoverishment of women, the precariousness of their living conditions and trade agreements. Little by little, we discovered that this link is usually very difficult, if not impossible, to establish. Our study did not look at the standard macroeconomic trade indicators (volume of employment, average salary, etc.), but rather the legal effect of trade agreements ratified by Canada on the government’s particular capacity to regulate in areas that are essential to promoting and protecting women’s employment equality rights, including equity. Furthermore, several of our recommendations concern a department that is unfamiliar to the Canadian and Quebec women’s movement, at least in its trade component: the Department of Foreign Affairs and International Trade (DFAIT).¹ In this regard, the women’s movement is diametrically opposed to the business community, which is much more familiar with this department. We can conclude that the “Beijing effect” produces effects on such departments at a snail’s pace.

Study Methodology

This research was based on a classic legal methodology. It uses sources from international trade legislation, in other words, documents and legal interpretations of trade agreements, such as the GATS and AGP, as well as legal and administrative sources of employment equity in Canada (the Act, regulations, handbooks, doctrine). The three main stages of research can be described as follows.

- *Trade agreements*: Analysis of administrative sources (through trade authorities, including the WTO), legal sources (the text of the agreements: GATS, GATT, NAFTA, FTAA) and judicial sources (through WTO or NAFTA arbitration panels), all of which produce trade *concepts* that are likely to interact with Canadian public policy in matters of employment equity: for example, parity, non-economic requirements, trade discrimination, protection, emergency, public order, harmonization, transparency, and general and specific exceptions.
- *Employment equity*: Synthesis of methods for implementing employment equity (pay equity, employment equity, contractual obligation) in the private sector in Canada: for

example, What is required by the Act? By the jurisdictions responsible for implementation and for auditing businesses? By the technical application manuals and directives? Which elements are transparent and predictable for employers? Which are the grey areas?

- *Strategies for protecting employment equity measures:* (1) Through comparison and analysis, identify the wording of trade agreements, and arguments likely to draw the attention of negotiators to the importance of employment equity measures as public policies that should be protected from trade agreement requirements; (2) Through analysis of the synthesis of employment equity measures, propose improvements to procedures related to the implementation of employment equity measures in Canada, in order to strengthen their legitimacy within the implementation of trade agreements and increase their transparency; (3) Propose to women's groups places where intervention would be helpful (technical trade bodies, for example, or requiring systematic consultation by DFAIT in order to promote the need to ensure that employment equity policies are protected in Canada).

We also contacted, as needed, the government interlocutors concerned, in particular, the Canadian Human Rights Commission (CHRC), Human Resources and Skills Development Canada (HRSDC) and DFAIT. Once again, we thank them for their cooperation.

Report Structure

This report is divided into three main sections. The first section analyses the legislative and non-legislative (FCP) model of employment equity in Canada, taking account of the recent results available. This analysis was conducted independently of any considerations that result from trade agreements (GATS and AGP), so that we could illustrate which types of correction should be made to the Act and the FCP. Each component of the study (the Act and the FCP) raises questions that will be answered in subsequent sections. The second section of the study is dedicated to an analysis of the GATS and the AGP. In each case, these agreements were examined to determine (1) if they challenge the *Employment Equity Act* and the FCP, and (2) if they require changes to the Act and the Program. In this way, we answer questions raised in the first section of the study. The third and final section suggests, among other things, a series of recommendations intended to protect the Canadian employment equity model when striking trade agreements. This section also examines the issue of how to concretely develop in Canada a gender-based analysis of the effects of trade agreements on public social policies for the benefit of Canadian women.

PART 1: EMPLOYMENT EQUITY IN CANADA: ARE THE REQUIRED CORRECTIVE ACTIONS POSSIBLE?

This first section lays the groundwork for the case study. As seen in the introduction, Canadian policies for the promotion of employment equality for members of groups that are subject to discrimination are based, among other things, on two main strategies: employment equity and the contractual obligation tied to the awarding of government procurement contracts.

The first strategy involves acting on the distribution of job wealth for the benefit of members of designated groups. Although this classification has come under challenge, designated groups include women, visible minorities, persons with disabilities and aboriginal peoples. This strategy concerns all businesses operating and hiring in Canada that have over one hundred employees. By extension, employment equity has become a condition for the award of federal procurement contracts when bidders are businesses hiring at least one hundred employees in Canada, for contracts of \$200,000 or more. These businesses can be Canadian, although not exclusively. Due to the requirements of some trade agreements, government contracts are increasingly assigned to foreign bidders who, as long as they hire in Canada, are also subject to the terms and conditions for award of such contracts and, therefore, to the objectives of employment equity.

While it is commonly asserted that global liberalization of trade contributes to an increase in increasing women's economic vulnerability, women have clearly benefited from and will continue to benefit from the employment equity strategy established by the *Employment Equity Act* (or EEA) and the Federal Contractors Program (FCP). Despite the imperfections of the EEA, it is nonetheless essential to note its strengths within the context of globalization. For example, casual or part-time labour is taken into account in determining the desired objectives of establishing employment equity plans in businesses, a strategy that favours women, even though it is not set out specifically by the Act. The literature has increased our awareness of the negative relationship between being a woman in the workplace and those characteristics, other than gender, that constitute exclusion factors: race, for example. Though the Act is highly imperfect in this regard, it remains that the most vulnerable female workers do in fact benefit from employment equity. In short, the consensus is that employment equity is necessary so that women can continue to share in the benefits of job wealth in Canada.

The practices of Public Works and Government Services Canada (PWGSC) also should be considered, with regard to regional development and strategies to promote the employment of more vulnerable groups. In fact, after Canada ratified the WTO trade agreements and NAFTA, the government reviewed its procurement strategy and made the promotion of regional development and minority businesses a secondary objective related to a new central objective—to foster competition and appeal as much as possible to the private sector. However, one program was saved—the promotion of aboriginal businesses. Indirectly, this program could have favoured other minority business groups, as well as women-owned businesses. Yet, this is not the case.

The notion that national employment equity policies and legislation should comply with the requirements of trade agreements was raised by some countries in WTO forums, in particular within the Working Group on Transparency in Government Procurement (WGTGP) and the Working Party on GATS Rules (WPGR). Two trends became apparent in the WGTGP. In one, the requirement to respect the implementation of employment equity measures imposed on a contractor-employer by a state is no more or less important than other requirements, for example the employee work environment or employee safety. Therefore, such measures could constitute a prerequisite to obtaining a contract and would be legitimate (WTO, 1996). More recently, however, some member states stressed that these programs could perhaps be considered additional conditions, unrelated to the conditions objectively required (the contractor's technical and commercial capacity) to execute the government procurement contract (WTO, 2002). Some states have also tried to clarify their position during the Working Group proceedings. In this context, Switzerland, Australia and Canada reiterated the legitimacy of the requirement made of sub-contractors to respect the equality of men and women and, in the case of Canada, employment equity in particular (WTO, 2002). In the context of the Working Party on GATS Rules, New Zealand was more specific in mentioning that the special programs for women, children, persons with disabilities and minorities involve attaining national and, therefore, legitimate objectives (New Zealand, 1997). Regardless, the issue was not addressed systematically, and the WGTGP, which met in 2002, provisionally concluded that creating a single list of admissible practices in the context of the AGP was impossible (New Zealand, 1997). In all cases, our research revealed that reviewing the legitimacy of proactive employment equity measures, such as those in effect in Canada, did not receive undivided attention from the WTO working groups. Also, there was absolutely no discussion of NAFTA. Lastly, there was a consistent lack of any gender-based analysis or consideration whatsoever during these discussions.

Government procurement is a different issue. Setting aside contracts for minority businesses, with disregard for competition regulations, is a policy that runs counter to the principle of free competition recommended by trade agreements, in particular those related to government procurement. This is why Canada, in the wake of the United States, considered it appropriate to append to the ratification of the AGP a general note² recommending that, among other things, small and minority businesses be excluded from the application of the Agreement. In the case of chapter 10 of NAFTA, which addresses the easing of restrictions on government procurement, these same "contracts" were also excluded. This reservation resulted in the current policy that favours aboriginal businesses. Why not also set aside contracts to the benefit of businesses owned by other minority groups, such as women or persons with disabilities? We will return to this issue.

This could be acceptable if Canada did not have an urgent need to reform employment equity and to manage the discontent of some businesses that feel that the implementation of employment equity and its unpredictable aspects is so complex as to hinder "their right to trade." Furthermore, it is also necessary to explore the central government's ability to increase the effectiveness of using government procurement to more adequately promote the development of not only aboriginal businesses, but perhaps also of businesses owned by women.

The need to review employment equity measures and strategies came to light in 2002 when the parliamentary Standing Committee on Human Resources Development and the Status of Persons with Disabilities (SCHRDSPD) submitted its report. However, the Committee's work in no way alluded to the "new" limits that trade agreements might impose on this topic. In fact, Canada's commitment to trade agreements does not specifically protect these strategies. Therefore, we felt that it was appropriate to conduct a case study to assess the actual leeway that the government and federal parliament have in making possible, and certainly desirable, changes to employment equity strategies in Canada.

This part of the report addresses the first part of the equation in a technical and detailed manner. It poses the problem by identifying elements that should be considered in order to verify if and how Canada can improve employment equity and government procurement strategies to the advantage of Canadian women. This analysis does not exclude the possibility that, from a legal standpoint, Canadian sovereignty is perfectly intact and that relevant trade agreements do not limit the exercise thereof. However, it also does not exclude the contrary.

The section is divided into three sub-sections: First, an analysis of the *Employment Equity Act*; second, an analysis of contractual obligations and the FCP; and third, the introduction of the question of contracts that are set aside and excluded from the application of trade agreements and from certain other rules for awarding government procurement contracts to the benefit of more vulnerable groups, in other words, government contracts reserved for aboriginal businesses. Each development is followed by an outline summarizing the issues and highlighting the questions that we try to answer in part 2, as a function of Canada's commitments in accordance mainly with three trade agreements that are deemed particularly relevant—WTO agreements related to government procurement and trade in services (AGP and the GATS) and NAFTA (chapters related to government procurement (10) and investments (11)).

1. EMPLOYMENT EQUITY: THE HIGHS, THE LOWS... AND IMPROVEMENTS NEEDED

This sub-section aims to illustrate the developmental status of Canada's legislated employment equity model and why reinforcing the terms of the *Employment Equity Act* is long overdue. The Act recently underwent its first scheduled five-year review, which revealed that employers, in particular smaller employers, have levelled criticism at the complexity and unpredictability of certain aspects of the Act. In order to better explore how a business' "rights" can impair the legislator's ability to improve the employment equity model, this second part of our study will begin by indicating what the focus of such improvement could be. Questions that may conflict with the terms of relevant trade agreements to which Canada has made commitments are specified at the end of this sub-section.

Background: The Legal and Political Base for Employment Equity in Canada

The *Employment Equity Act*³ (hereinafter referred to as EEA or the Act) was adopted in 1986 and amended in 1996. Under the terms of section 2, its purpose is to achieve equality in the workplace and, to this end, to correct the disadvantages experienced by four groups that have historically been subject to job discrimination: members of visible minorities, women, persons with disabilities and aboriginal peoples. Achieving equality in the workplace indicates that no one should be refused job advantages or opportunities for reasons that are unconnected to ability. More recently, considerations related to the positive effects of employment equity on business profitability were added to the objective set out by the legislator in section 2 of the EEA. From that time, Human Resources and Skills Development Canada (HRSDC), which is responsible for implementation of the EEA, has deemed that the EEA should be seen not only as a means for promoting human rights, but also as a tool enabling businesses to aspire to increased profitability in managing their human resources (HRDC, 2001).

Section 2 of the Act also provides that employment equality must occur in compliance with the principle according to which employment *equity*, aside from treating people equally, requires *special measures* and *improvements* adapted to differences. In accordance with section 10 of the Act, employers achieve employment equality by adopting and implementing an employment equity plan. To develop these plans, employers must analyse their employment and remuneration systems by occupational category and the composition of their workforce in order to determine the objectives to be attained in the representation of the designated groups. They must also adopt a set of measures intended to remove obstacles to employment equality. The *Employment Equity Act* concerns federal businesses with over one hundred employees and a large number of Public Service of Canada sectors.⁴ Given the object of our research paper, only private sector businesses will be considered.

Why did the "employment equity" model appear in Canada? Madame Justice Abella was the first to use the expression "employment equity"⁵ when she chaired the Commission of Inquiry on Equality in Employment (Abella, 1984). The context being examined at the time

was the limitations of a form of justice that is desired from individual complaints about job discrimination. Members of groups that have historically been subject to discrimination ardently hoped for the *proactive* transformation of workplaces to make them more accessible. Noting the stasis in figures related to integrating members of groups subject to discrimination in Canadian society into the workforce, Justice Abella concluded that a *proactive* obligation needed to be imposed on businesses to implement programs for access to employment equality “before the fact,” that is, before complaints of discrimination occurred (Abella, 1984, pp. 202-203).

Justice Abella proposed that employment be seen as an asset made available by an employment system that is controlled by business. This employment system evidently includes various discriminatory components and barriers to employment, of which minority groups and women bear the brunt. These barriers are the result of a society that, in reality, sets aside employment resources for the dominant group, and determines the requirements and skills for access to employment based on the objective and subjective characteristics of that particular group. The legitimacy of the reasoning for comparing this real situation to discrimination was established by the Supreme Court of Canada in the decision *Action Travail des femmes v. Canadian National*.⁶

Thus, employment equity is associated with the employer’s obligation to implement plans proactively and in response to a legislative obligation. These plans include, among other things, target numbers to be attained in each job category in a business. This numerical determination is based on a correlation between the availability of minority groups and women in the workforce for a given type of job in a business’ geographic location, and their representation in the workforce in the short and medium term.

The proactive strategy for fighting job discrimination in Canada is based on the premise that changing the numeric representation of various groups in the workforce makes it possible to attain some parity, which constitutes a corrective response to systemic discrimination. This is the critical mass theory. The *Employment Equity Act* indisputably has contributed to increasing the numeric presence of women in the workforce, particularly in certain employment sectors and occupation categories. The Act also indisputably has limitations. It cannot independently resolve the precariousness of women’s employment (Johnson, 2001; HRDC, 2001) (part-time work, on-call work, work from home) any more than it can resolve the problem of the increasingly blurred link between women and employment status (independent or semi-independent work (Bernstein *et al.*, 2001), for example). HRSDC and the Canadian Human Rights Commission (CHRC) are aware of this problem. In its *Annual Report 2001*, the CHRC stressed that it would be erroneous to trust the numbers alone (CHRC, 2002a). In the transport sector, for example, the representation of women increased from 16% to 24.2% between 1987 and 2000. However, half of the women working in this specialized sector were employed, part-time positions (mainly school bus drivers) (CHRC, 2002a). In 2000, 22% of women in the private sector were employed in short-term positions, compared to 9% of men. This statistic peaks in the case of aboriginal women, of whom 25% hold short-term or part-time jobs. However, the attention that HRSDC pays to this problem is more difficult to determine. From a careful read of HRSDC’s 2001 to 2003 reports, it is apparent that, when the department presents the situation of women in the workforce, it refers only to global figures and makes no

distinction between part-time employment and full-time employment, or even between short-term employment and permanent employment (HRSDC, 2004a; HRDC, 2002, 2001).

Nevertheless, it must not be overlooked that, in general, representation of women in the private sector grew from 40.1% in 1987 to 43.9% in 2000. This figure is close to the general rate of availability of women in the workforce, which was assessed as 46.4%. In addition, increases were recorded in occupations of a higher classification in some traditional pink ghetto sectors, including banking. In other words, the *Employment Equity Act* has contributed significantly to promoting the employment of women in Canada, despite the upheaval incurred by the transformation of salaried employment for women.

However, this progress is not the only product from the time that has elapsed since the initial Act was adopted in 1986. The study of employment equity reveals that the audit role assigned to the CHRC during the 1996 amendments is an important element in this success (CHRC, 2002a). The reasons will be explored below. Recall for the moment that the management of employment equity in Canada is based heavily on the many and mandatory interactions between businesses, HRSDC and the CHRC. One component of the Act requires that businesses file an annual report to HRSDC on their employment equity progress. The report must contain statistical data on the increase of groups designated by the Act, and a narrative report detailing the qualitative measures taken to improve the representation of these designated groups within the business.⁷ Businesses must also work to develop an employment equity plan, which will be audited by the CHRC.⁸ They cannot avoid this process once they are subject to the Act. We will now focus on this aspect of the Act and the employment equity model in Canada in general.

Which Businesses Are Subject to the *Employment Equity Act*?

According to section 3 of the *Employment Equity Act*, a “private sector employer” is defined as someone who employs one hundred or more employees within or in connection with a federal business as defined in section 2 of the *Canada Labour Code*, and includes any corporation established to perform any function or duty on behalf of the Government of Canada that employs one hundred or more employees. The definition of “federal business” is set out in Section 2 of the *Canada Labour Code*. These are businesses whose activities are not limited to activities exercised in a Canadian province, as well as certain other businesses whose activities are of a federal nature: banks, telecommunications, etc.

Thus a number of “foreign” businesses are businesses that were constituted to accomplish functions in the name of the Government of Canada. If these businesses hire in Canada, they are Canadian employers. Every business with a workforce exceeding one hundred employees is subject to the *Employment Equity Act*. Imposing the requirements of the *Employment Equity Act* on “foreign” businesses does not in itself constitute trade discrimination. In the context of globalization, states are constantly concerned with maintaining their comparative or competitive advantage, which takes into account the costs of complying with working conditions and social and environmental legislation. This is an economic reality. However, from a legal standpoint, the reality is different. Though states may want foreign businesses to set-up shop on their territory, this does not mean that these businesses can demand a right to more favourable production costs in the name of trade agreements ratified by the receiving

state. Investors do not have a “right” to downward levelling of social law and the national workforce. In other words, it is not trade agreements that determine the content of protections offered under national labour law, especially since they do not stipulate that signatory states reduce labour protections.

However, though the simple fact of being party to a trade agreement does not remove a state’s competencies in social and labour law, the obligation to comply with trade regulations imposes on each signatory to the trade agreement a certain “conduct” that has consequences on its own domestic law. This image of conduct means that close attention must be paid to the management of a law such as the *Employment Equity Act*: Is this management equitable? Transparent? Fair? Predictable? Applied in a non-discriminatory manner to all types of business (whether under foreign or domestic control)? These questions are examined in detail in the second part of this study. Until then, they should be kept in mind, in order to better understand the importance of current debate around the amendments required to the *Employment Equity Act* and its administration.

Monitoring the Implementation of Employment Equity in Canada: Who Is Involved? What Obligations Do Businesses Have?

The *Employment Equity Act* can be described as a second-generation law in terms of the protections provided to fight job discrimination. First-generation laws are of a kind with labour laws that have an objective standard: setting the length of working hours or establishing minimum wage, for example. First-generation laws against discrimination are designed to fight discrimination based on a set of prohibited grounds for discrimination. However, laws such as the *Employment Equity Act* are far more complex. Clearly, they depend on the articulation of a standard of conduct (businesses must adopt an employment equity plan that is designed to attain a result), but to attain the desired result, the Act subjects businesses to a series of obligations, each with a different response (which numeric objectives? which positive employment measures? which adaptive measures?). In addition, validation of the desired objective (the employment equity plan) is a process that is subject to frequent administrative (and even, in some cases, quasi-judicial) interaction, which some businesses feel makes the cost and procedure imposed on them unpredictable to some extent. The EEA is subject to very few judicial controls. To comply, businesses must therefore expect numerous interactions with specialized administrative agencies.

The EEA has two components. First, businesses must submit an annual report and second, they are subject to evaluation by the CHRC. We will return to this point. The purpose of this report for HRSDC is to convey information about a business’ workforce and its composition (designated groups), the comparative presence of members from designated groups and other workers by type of employment within the business, and compensation. A single form is available for this purpose.⁹ As the HRSDC Web site states,¹⁰ “*the purpose of this classification is to enable cross-business comparisons.*” The purpose is not to confirm that employment equity plans are in compliance with the Act. Over the years, HRSDC has developed a series of guidelines for the implementation of employment equity plans. Moreover, the *Employment Equity Compliance Reviews: Process and Reference Manual* adopted by the CHRC refers heavily to implementation, and businesses acknowledge the usefulness of these

directives (HRSDC, 2004b). Annual reports submitted by businesses to HRSDC can be consulted on-line, and HRSDC has developed an employment equity “advisor” function for businesses. Finally, the department can penalize businesses that fail to submit an annual report.¹¹ However, historically, HRSDC has always favoured conciliation. When the Act was revised, Neil Gavigan, former director of Labour Standards & Workplace Equity at HRSDC, explained that no business had been penalized to that date for failing to submit an annual report (SCHRDSPD, 2001). The recent five-year review of the Act¹² revealed the bias among businesses in favour of this annual monitoring process (HRDC, 2001). Annex I illustrates the business classification procedure adopted by HRSDC. This illustration is important because it represents an “objective” management model of the *Employment Equity Act*, an entirely valid management method that is, however, limited to the more formal aspects of equity.

It is very difficult to determine the importance of this classification for the businesses concerned. This has long been the only expression of a statutory obligation in this matter. What message this communicated to employers about the essentially numeric methodology supported by the questionnaire that HRSDC still monitors? Once again, the answer is not obvious, but an observation can be made. The only detrimental assessment criterion anticipated by the questionnaire is a tallying of negative fluctuations in the representation of members from designated groups (loss of sufficient presence in the workplace of members from designated groups by job category, and loss of sufficient presence in job categories and greater remuneration). Yet, as indicated by criticism in the early stages of adopting the amendments made to the Act in 1996, numbers are not the same as equality! Rather, the figures are objective and the method of determining business classification, without legal consequences by the way, is well-known. Therefore, it can be claimed that, with regard to this classification, all businesses with more than one hundred employees in Canada are treated identically, without ever being challenged as to how they are moving toward employment equity. However, this method did not produce the desired results until amendments were made to the Act in 1996.

When businesses were confronted with the requirements of the *Employment Equity Act* in 1996, they observed that the CHRC, henceforth in charge of enforcing the obligations of the Act under section 22, had its own interpretation of what constituted an employment equity plan. Indeed, the CHRC encountered a significant problem in communicating and conveying the objectives of verifying the Act when it first began the initial cycle of employment equity plans verification in 1998, as set out in the *Employment Equity Act*.¹³

The New Legal Framework and CHRC’s Authority in Terms of Employment Equity

Section 22 of the *Employment Equity Act* assigns CHRC the responsibility of monitoring employers’ implementation of their obligations as set out in sections 5, 9 to 15 and 17 of the Act. The CHRC shall, in discharging its responsibility under section 22(2), be guided by the policy that, wherever possible, cases of non-compliance be resolved through *persuasion and the negotiation of written undertakings* from the employer, who will take every corrective measure necessary in order to comply with its obligations. The spirit of the Act is clear. The CHRC must exhaust all means of negotiation to make it easier for a business to adopt an employment equity plan in accordance with the Act. Pursuant to section 22(2) of the Act,

the CHRC may make applications for orders (and subsequently to the Employment Equity Tribunal¹⁴) only as a last resort.

The legal and regulatory process for employment equity process is supported by an impressive array of administrative tools. In particular, we note the document framework for the *Employment Equity Act* compliance audit, which can be consulted on-line (CHRC, 2000c), and the *Employment Equity Compliance Reviews: Process and Reference Manual*, which is for auditors appointed under the *Employment Equity Act* (CHRC, 2000a). Therefore, each obligation imposed by the Act on businesses subject to it shall be interpreted legally and administratively based on a highly technical set of information that is likely to influence the result of the *negotiation* between the CHRC and employers for issuing audit certificates.

The Act, above all, provides a route for the employer to follow in adopting an employment equity plan, by adhering to each of the 12 steps established by the CHRC (and, so says the CHRC, by the Act, through businesses contest this assertion). These 12 steps include both procedural requirements (for example, consulting employees or the union) and substantive obligations (for example, analysing the employment system). Note that these 12 steps are not listed by name in the EEA, but follow from the CHRC's interpretation of the Act, hence certain objections. The compliance review process is based on the intervention of the audit or compliance officer, appointed by the Commission, and whose powers and responsibilities are set out in sections 22 and 24 of the Act. In compliance with the Act, this officer shall implement every possible means to obtain the negotiated undertakings from businesses subject to the Act, in the event that the employment equity process undertaken by the employer, and possibly the employment equity plan, itself do not, in the opinion of the officer, comply with the provisions of the *Employment Equity Act and Regulations*.¹⁵ The table in Annex II presents the 12 audit steps, but above all, it shows those steps in which the CHRC and its compliance officers can challenge the relevance and validity of a business' strategies for adopting and implementing an employment equity plan. In addition, this overview of the 12 employment equity audit steps is self-explanatory in its presentation of the qualitative and subjective elements used to assess the plan's validity.

It was a true revolution for businesses when the implementation process for employment equity plan compliance with the EEA was divided into 12 steps. When HRSDC monitored the initial Act, businesses had come to expect impersonal manipulations of figures. Our frequent communications with officials in the Employment Equity Division of the CHRC¹⁶ made it possible for us to summarize the main irritants that complicate interaction between businesses and the Commission as follows:

- The Commission's demand that Step I be redone in order to obtain more reliable data about the composition of the business workforce.
- Discussions about the removal of obstacles in order to obtain a policy on equitable hiring.

- Discussions about identifying the appropriate geographical and availability catchment areas for hiring, since businesses have not always identified the same recruitment zones as the CHRC.
- Determining the numeric hiring objectives to be met; a calculation of the numeric objectives was not part of the figures that businesses were required to submit in their annual reports to HRSDC; therefore, businesses were not familiar with the method presented by the CHRC.
- Identifying positive practices for ensuring an equitable representation of members of designated groups within business.
- The methods of communicating to the workforce the information on implementation of the employment equity plan.
- Contradictions between HRSDC requirements for submitting the annual report and CHRC requirements for the process of auditing the employment equity plan.¹⁷

Businesses claim that the Act does not clearly impose on them every single one of these audit steps and, as a result, CHRC auditors unduly delay the process. This criticism is particularly relevant with regard to the choice of positive practices that clearly benefit women in the workforce. This basic ambiguity in the CHRC's powers and its employment equity mandate explains the slight increase in the number of seizures by the CHRC of the Employment Equity Tribunal (CHRC, 2002a).

In actual fact, the culture of equality promoted by the *Employment Equity Act* requires that numbers be surpassed. However, the bicephalous management of employment equity in Canada (HRSDC and CHRC) causes confusion in this regard because businesses are still sending the same numbers to HRSDC in their annual reports.¹⁸ As a result, there is the confusion of the roles of HRSDC and the CHRC. HRSDC is responsible for the general implementation of the Act, and plays an advisory role with businesses regarding the preparation of audits submitted to the CHRC. The CHRC, which assumes more of a monitoring role, nevertheless has an advisory function that is difficult to reconcile with its main mandate. However, this advisory function is at the behest of businesses, which prefer to deal with the entity in charge should contradictory opinions arise with regard to the "coercive" component of the EEA.

Paradoxically, however, businesses prefer the collaboration of HRSDC and their clear and predictable obligation to submit an annual report to the CHRC audit officer. On the one hand, businesses feel that the outcome of the audit process is highly unpredictable (length, consequences, cost), and on the other hand they feel that, by interfering in the internal management of the employment equity plan, the CHRC is directly impeding the strategic management of business.

That the EEA business audit process is so slow is explained by its complexity. Consulting the annual reports related to employment equity, in particular the *2001 Annual Report*, revealed the following about audits: In total, of the 354 audits conducted since 1998,¹⁹ only 73 businesses (private and public) have attained full compliance, 127 businesses have undergone follow-up since the initial audit, which means that they have not yet attained full compliance. In this context, we can understand why the CHRC decided to devote the year 2000 to the initial auditing of businesses with more than 2,000 employees. From this information, it was estimated on December 31, 2001 that 77% of the private sector workforce had undergone at least an initial audit. Given the extent of the task, the CHRC obviously lacks resources.

Over the course of 2002, we requested and obtained 26 of the 73 audit reports completed by the CHRC, invoking the *Access to Information Act*²⁰ to obtain these documents. Approximately twenty businesses agreed to our request without reservation and, in these cases, the reports were sent to us in their entirety. We stress that, in the opinion of the CHRC, a report that has been made public is public for everyone except the party that obtained it through the *Access to Information Act*. In a few cases, the businesses concerned insisted on contacting us to explain their reluctance. They invoked the strategic nature of hiring decisions and information related to the organizational structure. In addition, they systematically cited the highly competitive nature of their employment sector (telecommunications and banking) and the protection of business decisions made under the employment equity plan.²¹ Some wanted to make sure that we were not acting on behalf of a union representing the business' workers. Except for one case, reports were subsequently sent to us in their entirety. Only the HSBC Bank of Canada maintained its objections.²²

This experience gave us a better understanding of the transactional nature that distinguishes the interaction between the CHRC and certain businesses. In some cases, and to accelerate the audit process, the CHRC immediately struck a "reasonable" agreement with the business concerned. This increases the susceptibility of businesses, which claim that intervention by the Commission is a distortion of, and an undue intrusion on, the management of their affairs.²³ Clearly, from the business' point of view, it is easier and less burdensome to submit an annual report to HRSDC than to undertake a process leading to a CHRC audit of the employment equity plan.²⁴ From the point of view of workers, however, experience has shown that it is the CHRC's role as "auditor" that has affected figures since 1996.²⁵

Results of the Recent Five-Year Review of the *Employment Equity Act*

In accordance with the provisions of the *Employment Equity Act*, Parliament recently conducted the first five-year review of the Act. HRSDC and the CHRC conducted consultations and subsequently submitted briefs to the SCHRDPD. The following observation was made: the Act received the general support of all parties.²⁶ Therefore, the Standing Committee could not question its legitimacy.²⁷

The Act is still young and the review process had to be approached cautiously. Nevertheless, the greatest apparent tension in the briefs arose from opposition to **conciliation** and **court action**, as a strategy for implementing employment equity. This comes back to finding greater coherence between the technical work accomplished by HRSDC and the follow-up work that

is the responsibility of the CHRC. Second, the need to make some clarifications toward greater transparency was supported in part by the SCHRDPD in its recommendations. Lastly, the Committee's attention was drawn to the need to relax and lighten the reporting requirements imposed on employers.

According to the Committee, the Labour Branch of Human Resources and Development Canada (HRDC, now HRSDC) should be considered the only source of technical support for public and private sector employers, and HRSDC should work in concert with the CHRC to that end.²⁸ Despite the CHRC's claims, the Committee has not yet acted on its proposal to recommend the amendment of section 22(2) of the Act, which stipulates that the CHRC may only turn to an order from the Employment Equity Tribunal "as a last resort," in other words after all possible negotiation of written undertakings between the CHRC and an employer have been exhausted. The recommendations of the Standing Committee also included slight modification of the conditions under which the CHRC could require the Employment Equity Tribunal to issue an order when an employer refuses to act on its request.²⁹ The Committee did not feel it suitable to recommend appropriate amendments to the Act so that the CHRC could turn to the Employment Equity Tribunal in cases in which an employer has clearly failed to make a reasonable effort to implement its employment equity plan.³⁰

Doubtless, the most eloquent series of recommendations in the report by the parliamentary Standing Committee's concerns the "transparency" of the process of implementing the employment equity plan in a business. Recommendations 12, 15, 19, 20 and 29 of the Standing Committee Report express such a concern. In particular, recommendation 12 reiterates the CHRC recommendation on special measures,³¹ but not recommendation 13, which proposes an amendment to the Act that is intended to clearly list the requirements of the 12 steps for implementing an employment equity plan.

Finally, continuing importance was granted by the Standing Committee to the issue of the reports that businesses must complete and the delays caused by the audit process, for which the CHRC is responsible.³² In the case of the reports, the Committee recommends reviewing a possible adjustment: A biennial, rather than annual, report with the addition of a qualitative dimension to the business reports. Clearly, this proposal is aimed at greater coherence insofar as the Committee also proposes the inclusion in the *Pay Equity Regulations* of requirements concerning special measures that are particular to the employment equity plan. While HRSDC is mandated to examine the feasibility of this improvement, the CHRC must, based on Committee recommendations, make do with fewer resources in managing an Act that, according to the Committee, does not warrant so many clarifications that are not recommended by the CHRC itself.

This quick overview shows the need for clarification to both the *Employment Equity Act* and the obligations of businesses under the Act. It is also important to clarify the mandates of HRSDC and the CHRC. The questions listed in Annex IV identify the issues for which trade commitments made by Canada could have a positive or negative impact on the required improvements.

2. FEDERAL CONTRACTORS PROGRAM

The Federal Contractors Program (FCP)³³ came into being in 1986 following an executive decision of the federal government. While the *Employment Equity Act* affects federally regulated employers, the FCP concerns all businesses, whether under federal jurisdiction or not, that receive goods and services contracts worth \$200,000 or more from the government. Obviously, these businesses must hire at least one hundred employees to be subject to the FCP. To tender a bid, they must attest, in writing, to their commitment to employment equity. The FCP is administered by HRSDC staff and by a network of employment equity officers across Canada. Contractors who refuse to fulfil their commitment to employment equity or who do not meet FCP criteria may lose the right to bid on other federal government contracts.³⁴

The FCP is a special feature of Canadian policy on government procurement. Government procurement contracting is a process by which the federal government and all federal public service agencies appeal to the private sector for the purpose of striking contracts to provide goods and services. To (1) distinguish the FCP from the *Employment Equity Act* and (2) explain how government procurement contracts are awarded in Canada, we split this part of our report into two sections: a review of the FCP, and a review of Canadian policy on government procurement contracts. We conclude the section with a focus on contracts set aside for aboriginal peoples who, although they are an interesting model, do not fit within the tradition of employment equity.

What Is the FCP?

The fate of businesses that are subject to the FCP is different from that of businesses that are subject to the *Employment Equity Act* (in this context, the legislated employment equity program). Under this program, contractors must aim for a positive and definitive audit and follow-up by the CHRC. However, under the FCP, simply their commitment to employment equity is enough, at first, to be issued a certificate³⁵ from HRSDC. Businesses subject to the FCP are under no obligation to submit annual or other types of report.

In early 2000, it was estimated that Canada had 845 businesses in the FCP. Since the program began in 1986, the total dollar amount of contracts granted to these businesses is estimated at \$40 billion. These businesses employ close to one million Canadians (HRDC, 2002). Approximately two-thirds of the businesses involved operate in Quebec and Ontario (HRDC, 2002). Furthermore, Quebec is the only Canadian province to have established a provincial program of contractual obligation (HRDC, 2002).

The assessment report requested by HRSDC in 2002 is quite clear: the FCP is deteriorating,³⁶ although no one disputes its pertinence and social utility.

Indeed it notes that the mechanisms for the audit and follow-up of program compliance are essential to the progress made in the workforce by members from the designated groups. Yet, it is precisely this follow-up that is sorely lacking from the program. In the opinion of the businesses interviewed during the evaluation study, few have a contract from HRSDC to

this end. This has been especially true since 1995, when the administrative decline of the program began.

Eleven criteria³⁷ are involved in implementing the FCP. Contractors are expected to meet these requirements to be compliant with the requirements of the FCP. Businesses that are subject to the FCP commit to a process that is different from that of businesses subject to the *Employment Equity Act*. Only businesses that are both subject to the *Employment Equity Act* and bid on government procurement contracts must adhere to the requirements of the Act. This difference in status has consequences for women, since several measures that ensure their true equality in the workforce depend on qualitative strategies that are subject to the CHRC evaluation process under the Act. In short, the link between the FCP and women in the workforce is highly tenuous. All of the benefits that women can gain from the award process for government contracts, from the standpoint of their status as workers, depend on this one federal program.

The evaluation study conducted by HRSDC in 2002 revealed interesting data. For example, the FCP had only a marginal impact on the increase in the representation of members from the “women” and “visible minority” designated groups, while this impact was positively negligible in the “aboriginal persons” and “persons with disabilities” groups (HRDC, 2002). Moreover, only 5% of contractors recently felt that the FCP had discouraged them in their pursuit of federal contracts. The evaluators themselves noted that the FCP has experienced significant difficulties since it was introduced, particularly from 1995 to 2001, which coincides exactly with the period during which businesses subject to the legislated employment equity obligation (the Act) were commanded to make major efforts. By contrast, data from the study reveal that businesses that were subject to the FCP were literally deserted by HRSDC in the period from 1996 to 1999.³⁸ To be sure, the evaluation report shows some uncontrollable factors that may at times have had an influence on the program’s poor effectiveness. For example, the increased movement of company mergers or divisions led to significant fluctuations in the total number of businesses subject to the FCP (over one hundred employees). In addition, the massive transformation of work modes in some sectors led to a decrease in the total number of salaried employees, by multiplying the status of self-employed or contract workers. According to the assessment of the FCP, however, these factors do not impair its social utility.

The findings of this study reveal that, aside from the limited importance and support that the federal government gave to the FCP, two trends put a strain not only on the quality and legitimacy of the program, but also on its transparency and equity, as businesses view it. First, it must be considered that there is poor follow-up of the certificate of commitment agreed to by a business that wants to bid on goods and services contracts with the federal government. Second, even on the assumption that an annual or biennial obligation to submit a report were introduced, this would only result in recreating the existing tension between HRSDC and the CHRC in the case of businesses that are under the legislated obligation of employment equity, just as it would leave the objective of managing compliance with the desired program unmet. Moreover, major differences, in particular in effectiveness, persist between the sole obligation to report and the CHRC’s audit process with businesses that are subject to the Act.

Even if businesses under the FCP were obliged to submit a report, major differences still exist between the methodology proposed by HRSDC and that imposed by the Act, such that the requirements are not equivalent. In this regard, we note the following points, as did the authors of the audit report ordered by HRSDC (HRDC, 2000):

- Unlike the *Employment Equity Act*, the FCP does not require a business to take into account the number of part-time workers when tallying the number of members from designated groups by employment category and setting the numeric objectives to be attained.
- Contrary to the CHRC's interpretation of the Act, the FCP does not require businesses to consult representative employee organizations in establishing the employment equity plan.
- The FCP includes no obligation to file a report.

This lack of equivalence between the two programs, as well as the major differences in their control and monitoring process, indicate that businesses under one or the other of these measures are subject to *separate treatment*. Still, this is not the case for all businesses; those that are subject to the *Employment Equity Act* and then entered into an agreement under the FCP must attain the objectives of the most restrictive standard, namely the *Employment Equity Act*.

Still, other comments were made concerning the opportunity to generally reduce the FCP threshold for contracts or to reduce the 100-employee requirement for the purpose of applying the FCP. Likewise, the need was mentioned to consider subjecting the sub-contractors of a main contractor to the program. However, various experiences have shown the practical impossibility of this proposal, particularly in Quebec.

Recommendation 7 of the June 2002 report by the Standing Committee on Human Resources Development and the Status of Persons with Disabilities (SCHRDPD, 2002a) was telling. The Committee recommended that the Minister of Labour review the FCP in order to restructure it, and to ensure that the employment equity obligations of federal contractors *are equivalent* to those of employers regulated by section 4 of the Act.³⁹ In its response to the Report submitted in November 2002, the federal government made a vague commitment to consider such reform.⁴⁰

We feel that such reform is urgent, not only because employment equity strategies must be reinforced in Canada, but also for specific reasons stemming from the nature of trade agreements ratified by Canada, including the AGP. This argument will be developed in part 2 of this study. For the moment, we will highlight the consequences of the separate treatment reserved for various groups of Canadian businesses.

For the sake of this discussion, all of the businesses in these groups employ at least one hundred employees. The first such group includes businesses that are under Canadian control and hire in Canada. Their activities fall under federal jurisdiction. These businesses

are subject to the Act (or legislated employment equity obligation). The second group includes businesses that are under Canadian control and hire in Canada, but whose activities do not fall under federal jurisdiction. This second group is exempt from legislated employment equity obligations and need only commit to implementing this strategy if they want to bid on federal contracts. When Canadian businesses from one of these groups tender such a bid, their employment equity obligations are treated separately. The situation is the same for foreign businesses who employ at least one hundred employees in Canada. For the purposes of the separate treatment argument, these businesses can be compared not only with each other, but also with Canadian businesses. Do they have specific rights under trade agreements, in particular the AGP? All these matters would be resolved if the government agreed to carry out section 42(2) of the *Employment Equity Act*, which sets out that equivalent requirements must be imposed on all private businesses.

There are two consequences to this disparity in the status of businesses with regard to employment equity strategy: first, it risks “pulling employment equity downwards” by enabling some businesses to invoke the benefit of the least restrictive standard in the name of their business rights set out in trade agreements; and second, it has impeded the evolution and progress of women in the workforce, and could continue to do so.

We find that these concerns are all the more important since the FCP is the only place where, indirectly, gender considerations coexist with the award strategy for granting federal goods and services contracts. No consideration of this type is imposed on small- and medium-sized enterprises, as if the problem did not exist in their field.

Government Procurement Contracts and Canada’s Goods and Services Procurement Policy

Principles

Within the federal public service, procurement is being increasingly decentralized, and departments and agencies are establishing their own policies for government procurement. However, Public Works and Government Services Canada (PWGSC) supervises all procurement.⁴¹ PWGSC decisions are made in light of Treasury Board (TB) policy on procurement and project management. The TB, as the overseeing department, establishes procurement policies. In other words, PWGSC oversees procurement made through government procurement contracting, while the TB supervises the main contractor.⁴²

According to the PWGSC Supply Manual, six main principles guide the Government of Canada in its procurement policy. The first and cardinal principle is governmental integrity. The five remaining principles stem therefrom: client service, national objectives,⁴³ competition,⁴⁴ equity, and responsibility. To better inform the buyer (from a department or agency) about the principles of federal government acquisitions and government procurement contracting, the government made available the manual of the client (the agency in this instance) and of the new buyer.⁴⁵ The buyer must also comply with the Standard Acquisition Clauses and Conditions (SACC).⁴⁶

The box below lists the exceptions to the principle of competition.

Exceptions to the principle of competition	
1. Emergency situations	
2. Expenses less than	\$25,000 for goods and services
	\$100,000 for hiring engineers or architects, or other services required for the planning, design, etc., of a project
	\$100,000 service contract for CIDA
3. It is not in the public interest to encourage competition	
4. A single contractor is able to complete the work	
5. Contract granted under the CLCA (aboriginal) ⁴⁷	
6. Contract granted under CORCAN (correctional services - inmates)	

Source: <http://contractscanada.gc.ca/en/chap1-e.htm#except>, accessed on June 1, 2004.

Against this backdrop exists a complex set of rules and commitments for implementing three principles that distinguish Canada's policy on government procurement, beginning with the make or buy program, whereby the federal government has chosen to reduce its basic mission to the duties it carries out itself.⁴⁸ Principle two involves respecting the rules of transparency and equity in awarding these contracts, and the final principle is to respect national socio-economic policies. The second principle, as we shall see below, is essential to compliance with the trade commitments that Canada made under the AGP or even NAFTA (chapter 10). The third principle, which promotes vulnerable groups and visible minorities, is based on two strategies: setting aside government procurement contracts, which we will examine below, and the FCP strategy (analysed above).

All of the government contracts awarded by the Government of Canada and by its agencies are subject to the bidder's obligation to demonstrate its commitment under the FCP, if the conditions apply: (1) the contract is worth over \$200,000 and (2) the bidder is a business that hires over one hundred employees.

Government Procurement Contracts and Trade Agreements

The tables in Annex V show the conditions under which rules from various trade agreements related to government procurement must be obeyed. These agreements ease restrictions on *certain government procurement contracts* in Canada, based on *certain thresholds*. In the case of agreements other than the Agreement on Internal Trade (AIT), this means that foreign bidders could be awarded contracts to provide goods or services offered by the federal government. However, only bidders who are businesses hiring over one hundred employees in Canada (which businesses could be under foreign control) must show their FCP certification if the contract awarded is worth at least \$200,000.

When awarding a government procurement contract is not subject to the trade agreements examined above, the contract is still subject, for the purposes of its delivery, to the priority principle of competition.

Calls for bids from the federal government are subject to a process that assures transparency and equity. This process is based on a certain number of rules that are uniform in accordance with all pertinent trade agreements, including:

- Proposed procurement must be announced publicly. Only urgent proposed procurement, with proper justification in writing, can be advertised for a shorter notice period in the context of NAFTA or the AGP.
- *Procurement requirements cannot be split up or underestimated* to avoid exceeding the thresholds. Agreements expressly prohibit this.
- Technical characteristics must be established based on yield, rather than on detailed design characteristics, and according to accepted international or national standards.
- An Advance Contract Award Notice (ACAN⁴⁹) must be issued for each contract that is subject to the provisions of NAFTA and the AGP.
- Client departments must provide justification when they use single sources or solicit limited bids in the context of an acquisition request.

In general, trade agreements require:

- that clear and detailed information be provided so that all bidders are aware of the requirements to be met;
- that the proposed procurement not discriminate with regard to bidders who are capable of fulfilling the contract;
- that all of the conditions be clear and provided at the time of the call for bids;
- that the terms and conditions of selection be applied uniformly for each bid submitted;
- that the mandatory technical requirements be made known.

Analysis of the principles that govern the granting of government procurement contracts in Canada, including those that are subject to the requirements of trade agreements, reveals a complete indifference to gender-based analysis. The government hides behind the FCP, although the growing importance of procurement contracts in Canada may “pull the employment equity strategy downward,” given this program’s poor performance. Additional consideration adds to this indifference in the case of contracts that are subject to the requirements that stem from trade agreements. Thus, in negotiating the thresholds and sectors subject to agreements, we did not feel it useful to examine *a priori* the possible consequences on the employment of women of awarding contracts to businesses that are not established in Canada and do not hire there.

The Government of Canada never intended to set aside contracts for women-owned businesses or businesses that favour female workers (such contracts would thus avoid the call for bids process and the requirements of trade agreements where applicable). This strategy was not considered from an historical viewpoint (the rules for awarding procurement contracts in

Canada preceded the striking of trade agreements) or a contemporary viewpoint (the partly reserivist principle of procurement contracts for women or women-owned businesses could have been preserved during the ratification of the AGP or NAFTA, for example). In this regard, Canada preferred to fall in behind the United States without considering the fact that, in the fight against discrimination, one trend distinguishes the two countries: in Canada, it was women who led the fight for equality, while in the United States, it was racial minorities (Lamarche, 1990, pp. 73 ff). This distinction explains the historical position of the United States in terms of setting aside. “Set aside” is a strategy in which a state declares that it will set aside part of the procurement contracts for businesses from minority groups (Lamarche, 1990, pp. 108 ff). In Canada, a highly restrictive vision of this strategy was retained because the only concrete application of the equivalent of “set aside” concerns aboriginal businesses. Yet, nothing in the trade agreements compels Canada to apply such limitations. As mentioned in the introduction, a ratification note in the AGP by Canada provided that Canada be able to set aside contracts for small businesses owned by minorities.

Procurement Strategy for Aboriginal Business

In 1973, the federal government adopted a policy intended to regulate aboriginal land claims. The government’s objective was to exchange claims to indeterminate aboriginal rights for a specific set of rights and advantages described in a settlement agreement (INAC, 2002a). This “exchange of rights” came to be guaranteed by a series of agreements, some particular, others signed in the context of the Comprehensive Land Claims Agreements (CLCA). In 1995, the Government of Canada adopted a new policy related to the inherent right to self-government and reviewed the methods of allocating land and resources for territories that are subject to the agreements. Under these agreements, the government is obligated to ensure that “claimant group enterprises have access to bid opportunities in the CLCSAs.”⁵⁰ The Contracting Policy Notice 1996-1997 adopted by the TB stipulates that all of the departments and agencies that have contract budgets of \$1 million or more must allow for an “aboriginal quota” in that regard.⁵¹ Developing the set aside in Canada essentially depends on economic agreements that result from lengthy and sometimes difficult negotiations between the Government of Canada and aboriginals. This explains in part why no other minority group has benefited from this exception to date.

Two types of contract are set aside for aboriginals: mandatory set-aside contracts that concern all contracts worth \$5,000 or more in goods and services, and voluntary set-aside contracts, when their value is lower than \$5,000. Indian and Northern Affairs Canada (INAC, 2002b) feels that the Procurement Strategy for Aboriginal Business (PSAB) is a socio-economic tool used to respect the guidelines set out in the Government of Canada’s contracting-related policies. The objective of the government’s contracting activities is to procure goods and services, as well as construction services, in a way that will withstand public scrutiny of equity, openness and transparency, and will make it possible to obtain a better quality-price ratio to the benefit of Canadians. While respecting the primacy of operational needs, the Government of Canada pursues its socio-economic objectives through procurement activities. These socio-economic objectives include long-term industrial and regional development, as well as important national objectives, such as aboriginal economic development.

The PSAB applies *outside* of land claim areas, when the contract is “mainly” intended for an aboriginal population.⁵² When goods or services are not intended for a targeted area (CLCA), the decision lies with the procurement “team”. In some cases (Canadian Heritage, for example), the team decided to favour the development of new business sectors for aboriginal businesses and chose the contracts as a result. Moreover, the TB assigns each department a “quota” objective that varies from year to year, based on the department’s procurement policies. In accordance with the 2000 PSAB performance report, the participation rate of departments in this program did not exceed 34%.⁵³

The impact of the PSAB is generally limited because more than half of the contracts made by the government involve services that aboriginal businesses do not offer.⁵⁴ In total, between 1997 and 2000, 32,158 contracts were granted, for a total of \$378,271,000. Fewer than 10% of the contracts amounted to 80% of the total value of contracts awarded. However, the performance objectives increased for the same period (from \$78 million to \$135 million).⁵⁵

Among the identified obstacles that may explain the PSAB’s poor performance, the program assessment completed in 2002 revealed the following weaknesses: knowledge of methods for marketing to the government (67%, positive response from respondents); limited knowledge of contracting procedures (67%); awareness of the markets related to federal procurement (65%); government bureaucracy and decision-making process (81%); obtaining financial investment (65%); and security requirements associated with bid tenders and contracts (62%).

Once again assessment of the PSAB revealed a total lack of consideration for aboriginal businesses run by one or more women or that hire women. Of course, this does not mean that they in no way benefit from the PSAB. But how can we be sure? This question is particularly striking when we consider that the PSAB is the only “set aside” government procurement policy that is operational in Canada.

In our view, management of the FCP and set aside government procurement contracts raise questions about increasing their effectiveness. These policies are important when they involve increasing employment of more vulnerable groups in Canada who are victims of discrimination, whether directly (the FCP) or indirectly (aboriginal businesses and aboriginal employment). The importance of such measures for women and the interests of women contractors must not be overlooked in favour of set aside contracts. For this reason, in the next section we analyse desirable improvements to these programs as a function of trade agreement requirements.

The FCP Subject to Trade Agreements: Issues for Government Procurement Policy

Treatment of businesses that benefit from Canadian procurement contracts and contractual obligation (FCP):

- Canada currently promotes a dual employment equity policy: sometimes bidders are subject to the legislated employment equity obligation, and sometimes they are simply subject to the commitment set out in the FCP. Does this dual system constitute trade discrimination? Does it meet all the transparency obligations set out in government procurement trade agreements?

Contracts excluded (set aside) from the application of trade agreements and the definition of minority group businesses:

- Currently, only aboriginal businesses currently benefit from set aside contracts, in other words, procurement contracts that are excluded from the application of trade agreements related to procurement contracts in sectors subject to these agreements. Can Canada, in fulfilling its trade commitments, broaden the definition of “minority groups” to make it compatible with the definition of designated groups set out in the *Employment Equity Act*, in particular to include women?

The need for an FCP *equivalent* to the obligations set out in the *Employment Equity Act*:

- Given Canada’s trade commitments, can it impose on all foreign businesses that hire in Canada the obligations of the *Employment Equity Act* for the purpose of granting government procurement contracts?

3. CONCLUSION TO PART 1

As we mentioned at the beginning of this part, the shortcomings of legislated and non-legislated employment equity strategies in Canada impair women's employment equality rights. These shortcomings can be rectified. We have tried to identify the corrections required. However, given the new complexities introduced by the rules of some trade agreements, can Canada act upon these expectations without impairing its international commitments? We have also tried to approach the question of corrective action required from the angle of possible restrictions that could stem from certain trade agreements. The following part explores the issue from the opposite standpoint, by examining the pertinent trade agreements from the outset in order to answer the questions raised in this first part.

PART 2: EMPLOYMENT EQUITY POLICIES IN CANADA AND THE REQUIREMENTS THAT ARISE FROM TRADE AGREEMENTS: FOR BETTER OR FOR WORSE?

The first part of this study focused exclusively on examining the Canadian employment equity model, as if employment equity policies had not also developed in an environment affected by international trade. Specifically, we took the standpoint of Canadian decision-makers who proceeded in 2002 with an assessment of the various aspects of these policies without considering the reality and requirements posed by trade agreements. In other words, we respected the principle of reality and drew some conclusions about the need to improve the EEA and FCP, based exclusively on the Canadian reality. Employment equity policies include specific aspects with regard to the employment of women, which we attempted to highlight. Therefore, at this point in our approach, we feel that we have identified measures that would increase the effectiveness of these public policies to the benefit of Canadian women.

Using the diagnosis set out in the previous chapter, this second part of the study aims to explore the problem of the potential impact of trade agreements on “one” Canadian public policy, namely the policy related to employment equity measures. The purpose of this chapter is to go beyond the usual assertions that tend to trivialize or demonize the impact of trade agreements on women’s employment equality rights. Some claim that, insofar as Canadian social and labour policies and legislation are the same for all businesses, there is no cause for concern. Canada would not lose an “ounce of sovereignty” from state trade commitments. At the other extreme, the women’s movement often tends to globally denounce Canada’s participation in the WTO and NAFTA, stating that this institutionalization of international trade leads to a loss of sovereignty, for Canada, and therefore, a loss of means for determining the best public policies to promote women’s equality in general, and more specifically in the workforce.

This part is exclusively a case study. It does not aim to address all of the aspects that, at the time of globalization, increase the *commodification* of the employment of women and the precariousness of their living conditions. Rather, it reformulates this problem in limited legal terms. Can employment equity measures be protected, even improved, when trade agreements are made?

Despite the common grounds and principles of trade agreements, each case is particular and it is difficult to make a general conclusion about the fate of public policies for the promotion of women’s right to equality without exploring the particularities of each policy.

In the case of employment equity measures and policies, we found that certain agreements to which Canada is party should receive particular attention. Thus, rather than address the general effect of principles of international economic law principles on Canadian employment equity measures, we isolated two agreements that we felt were more relevant—the General Agreement on Trade in Services (GATS) and the WTO Agreement on Government Procurement (AGP). In each case, legal questions directly tied to the

permanence of legislative and administrative employment equity measures in Canada are involved. The same applies to the corresponding chapters of NAFTA. In other words, we used certain agreements that have a direct potential effect on the domestic regulations related to attaining women's employment equality. Agreements such as the WTO Agreement on Subsidies and Countervailing Measures were excluded. This agreement concerns the Government of Canada's ability to support certain activity sectors and, thus, the labour or entrepreneurship of women. It aims to eliminate subsidies that are related to the export or use of national products (section 3) and *specific* subsidies (sections 1.2 and 2) to the exclusion of those for which the granting and amount are defined by "objective criteria or conditions", "clearly spelled out in the law" and "strictly adhered to" (section 2.1(b)).

Next, we chose to isolate the matter of investments and chapter 11 of NAFTA. Acknowledgment of the fact that a Canadian employer can be an investor within the meaning of the provisions of chapter 11 of NAFTA was surprising. However, these investors have rights, and recent developments in investment rights led us to believe that they conceal formidable issues when it involves protecting the Government of Canada's competence and capacity to adopt and change public policies.

Lastly, we decided to focus on the issue of public order and trade agreements to clearly illustrate that the Government of Canada cannot break the requirements of Canadian employment equity measures and policies on those grounds. Therefore, we believe that we are facing a "public order" conflict, insofar as gender equality unquestionably expresses a value and a right that fall within Canadian public order.

Our findings are quite paradoxical. We became convinced that the requirements of the AGP, the GATS and chapter 11 of NAFTA in no way question the legitimacy of Canadian employment equity policies. The situation is quite different for the content of these policies, which must be improved in order to fulfill the requirements of these agreements. The paradox is this: while there is no indication of the Government of Canada's firm resolve to improve the EEA and the FCP according to its own "internal" political agenda, Canada's participation in the WTO and NAFTA created specific and positive demands that these programs be improved, clarified and made more transparent. Therefore, it is in some way in the name of trade agreements that the EEA, for example, should be amended.

This is the purely legal conclusion. Now, it remains to be seen whether Canada will prefer to abandon policies that are too lax, in order to meet trade agreement requirements, or improve them to retain them. Will the Government of Canada choose more or less interventionism in this regard? One thing is certain: Canada's commitment to trade agreements prohibits it from "sitting on the fence," which is a fairly good description of the current state of employment equity policies in Canada.

How can concepts such as the transparency of the public right of action be interpreted in contexts as sophisticated as Canada's, in which the right of Canadian women to equality, among other things, is not based solely on constitutional guarantees, but also on an endless

number of administrative and public mechanisms intended to promote this right? Do trade agreements create a cooling or even a paralysing effect in this regard? Methodologically, we were unable to answer this question. However, we did find answers to the previous questions. Trade agreements require that Canada make legislative changes and reform relevant public policy in order to maintain legislation and measures intended to promote employment equity. This observation technically conveys what the women's movement intuitively describes!

This part is divided into four sub-sections. The first three examine a particular trade agreement each: 1) the AGP and chapter 10 of NAFTA; 2) the GATS and chapter 12 of NAFTA; and 3) chapter 11 of NAFTA. The last section addresses the issue of public order exception and protecting employment equity measures. In each case, we relied on the diagnostic elements set out in the first chapter, and concluded that a strange coincidence existed between the "internal" finding of the need to reform employment equity measures in Canada and the "external" requirements imposed by the trade agreements that were examined. At the end of each sub-section, under the heading "What have we learned?", we grouped these findings and others, from the absence of a gender-based analysis on the impact of trade agreements on Canadian public policy.

4. TRADE AGREEMENTS RELATED TO GOVERNMENT PROCUREMENT CONTRACTS, AND RETENTION OF CANADIAN EMPLOYMENT EQUITY MEASURES

The first part of this study left unanswered some questions about the validity of employment equity measures in Canada, in particular that of the FCP, given the requirements resulting from trade agreements related to government procurement. Now, this section shows that 1) it is legitimate for a state to introduce social considerations into government procurement contracts for foreign businesses; 2) these requirements must, however, be part of the contract and concern legislation that sets out clear obligations for the businesses concerned; 3) it is therefore necessary to proceed with improving the FCP and the EEA in order to fulfill Canada's trade commitments with regard to agreements involving government procurement contracts; 4) Canada ratified government procurement contract agreements without assessing the impact of this decision on women, who benefit indirectly from jobs created when these contracts are awarded; and, lastly, 5) these agreements in no way prohibit reviewing the issue of the entrepreneurship of women and the interest of setting aside a portion of government procurement contracts and intended exclusively for them.

Government Procurement of Goods and Services and Social Considerations

Every day, governments purchase goods and services and get their supplies in various manners from the private sector. On the basis of this reality, redistributive practices intended to support minority businesses and job development for members from these groups developed with the help of government procurement contracts, particularly in North America, due to pressure from minority groups. These programs peaked in the 1970s, especially in the United States. They express national social and economic policy choices. Since government procurement contracts are major contracts, they have come under constant pressure aimed at liberalization ever since the GATT was established.

On one hand, the government and its entities see market openness as an opportunity to obtain "the best goods for the best price." On the other, bidders see government procurement trade agreements as an opportunity to benefit from contracts that are subject to more equitable and transparent tendering processes. Transparency and competition are the key to easing restrictions on government procurement. The first sub-section aims to explain why the liberalization of government procurement does not necessarily mean that states abandon the need and benefit to maintain certain national contracts for social reasons. However, easing restrictions on government procurement is progressing slowly because these contracts are at the heart of many national, security and social strategies.

Government Procurement Contracts as Part of the GATT

The AGP is a plurilateral agreement.⁵⁶ In other words, the WTO member states are not obliged to sign it. In effect, countries linked by the AGP constitute a "club" of countries that have chosen to increase the access of foreign businesses to their government procurement contracts and, to that end, lead negotiations based on a "give-and-take policy".⁵⁷ Canada is in this club, as is our neighbour, the United States. Government contracts are an important

aspect of a state's everyday life. Unlike other trade agreements, in agreements related to government procurement, the government and its entities are directly involved in a commercial transaction.

It is estimated that government procurement represents 10% to 15% of a country's GNP (Belley, 1995). In this case, government means central governments and sub-governmental or sub-central entities, such as provinces, municipalities or government agencies.⁵⁸ Of course, easing restrictions on government procurement is a very sensitive issue for a country with high export potential (Low *et al.*, 1996; Jackson, 1989). This is the situation in Canada's case. To our knowledge, a study to assess the role of jobs created indirectly and that fall to Canadian women has never been conducted in Canada.

A GATT negotiation sub-group was formed in the 1970s, and the *Agreement on Government Procurement*⁵⁹ (better known as the Tokyo Code [Reich, 1998; Blank and Marceau, 1997]), signed in April 1979, came into effect on January 1, 1981.

The Tokyo Code⁶⁰ concerned only government procurement of goods. It allowed for using dispute settlement panels (according to standard GATT procedure), but not national mechanisms for contesting procedures and the award of offers, as in the case of the agreements that followed. In Canada, the *Canadian International Trade Tribunal* (CITT) is responsible for dealing with complaints from local and foreign contractors that concern the signing and awarding of government procurement contracts. The CITT can hear complaints from the AGP and from NAFTA.⁶¹

Government Procurement Contracting in North America

NAFTA also contains a chapter on government procurement contracting. According to Muggenberg (1993), NAFTA is different from prior agreements because it is the first to include government procurement of services. In fact, NAFTA requires that the entities concerned subject procurement of service contracts worth more than the determined thresholds to the requirements set out in chapter 10 of the Agreement. To this end, the Parties use a negative list method. All services are included, except those that are explicitly excluded in the annex referred to in 1001.1b-2 of NAFTA.

Quantitatively, NAFTA has quadrupled the value of American government procurement contracts accessible to Canadians or Mexicans. However, in 1994, when the Agreement came into effect, the total value of these contracts represented only 10% of the total value of government procurement (Hart *et al.*, 1997). Once again, and to our knowledge, the impact of NAFTA's government procurement provisions on the employment of Canadian women has not undergone any particular review.

During preparatory meetings in the Uruguay Round, it was decided that new negotiations on government procurement contracting would be added to the agenda (Stewart, 1999). Negotiations were not held formally in the Uruguay Round, but rather in the context of the club of member countries of the Tokyo Code (Stewart, 1999). This specificity largely explains why most developed countries are members of the AGP.

Agreement on Government Procurement

The content of the Agreement on Government Procurement (AGP) places it between the Tokyo Code and NAFTA.⁶² First, the *AGP* covers services and construction services. However, this extension is counterbalanced by the fact that Members can resort to the positive list method to determine the entities concerned. That is, they are not subject to the creation of a negative list allowing for the exclusion of certain entities, as in the case of NAFTA. All Parties, except the United States, had recourse to the positive list, which decreased the quantity of services subject to the rules of the AGP and the scope of the Agreement. Moreover, financial thresholds for contracts that are subject to the rules of the AGP are much higher than in the case of NAFTA.⁶³ Recall also that, in the case of both NAFTA and the AGP, certain services are excluded from the application of agreements on the liberalization of public procurement including health services, social services and public services, for example.

To our knowledge, no study has been conducted, since NAFTA or the AGP were concluded, to determine the effect of the thresholds of contracts subject to agreements or the effect of exclusions (NAFTA) on the employment of women in Canada. This study could have addressed both the volume of jobs and the type of employment for women put at risk by liberalizing trade on certain types of goods and services procured by government entities.

We could have expected that an analysis of the effects of the liberalization of government procurement contracting on the employment of women might have been of concern to decision-makers. This omission is all the more surprising since government procurement contracting, particularly since the 1970s, has been linked to national and regional development policies, and with some social policies, including employment equity.

The Historical Function of Government Procurement Contracting

As McCrudden and Arrowsmith (1998) note, government procurement contracting has long been perceived as an effective tool to promote national economic and social policies. The setting aside of government procurement contracts for the local market was claimed to promote various social and economic objectives. These policies include decreasing the rate of accidental or structural unemployment in given regions, promoting access to employment for members of minority groups, gender equality in the workforce and, lastly, promoting local businesses and those belonging to members of minority groups (McCrudden *et al.*, 1998).

Yet, there seems to be a conflict between the objective of liberalizing government contracts (openness to foreign businesses in order to determine the best offer and best price) and promoting regional development and national and local social policies. In the doctrine, this problem was identified as “secondary policies” related to government contracts. In other words, it is not essential to respect these policies in order to perform the contract for which an invitation to tender was issued by a government entity. The expression “secondary policies” is questionable because, although “social” considerations can be secondary to contract requirements, they most certainly are not secondary to the merits of strategies determined by the state and that vitally concern a country’s social and economic

development. This is why we prefer to use the expression “social considerations” instead of “secondary policies.”

Furthermore, the problem of social considerations must be distinguished from that of exceptions established by a Member State of the Agreement. Reasons of national security, public policy or “philanthropic” promotion enable a state to shield some contracts from the application of agreements.⁶⁴ “Social considerations” must also be distinguished from the choice of certain states to reserve the right to award government procurement contracts that otherwise would be subject to agreements, in order to offer them to more vulnerable groups in society. The expression for this is *set aside*. Here, a note is attached to the ratification of the Agreement indicating the states’ intention to set aside such contracts. To that end, the state completely excludes the application of the Agreement to such contract offers rather than submit them to the requirements of national social considerations. This is the case of PSAB in Canada.

By definition, contracts set aside contravene the spirit of agreements to liberalize government contracts. Not only do they deprive contractors of market shares, but they also evolve in a highly volatile political and economic environment that frustrates these contractors from the standpoint of their reasonable hopes. They also destabilize exchanges between Agreement partners. Resorting to this strategy peaked with the United States.⁶⁵

Canada has a fairly bleak attitude toward the set aside, given the protectionist attitudes of the United States. Ideally, it hoped that the American set aside rules would be lifted. Insofar as this is highly improbable, Canada reacted by refusing to expand its commitments, and by very timidly using the set aside on its own market. We will return⁶⁶ to this point because this attitude could have consequences on the entrepreneurship of women and on the employment of women in Canada.

The Case of the United States

For a better understanding of Canada’s “market” position, we must briefly recount the complexity of the situation in the United States, which in the opinion of several authors, is far from respecting the terms and spirit of effort to liberalize government procurement. Two government contracting regimes govern the American federal entities. The first regime applies to countries with which the United States has signed a free trade agreement (including Canada, Mexico and Israel), to countries that are Parties to the AGP, to member countries of the Caribbean Basin Initiative and to developing countries designated by the president of the United States. In these cases, the *Trade Agreement Act* provides for the non-application of the *Buy American Act*. However, there is one exception in the case of the *Small Business Act*. In the case of all other countries, government procurement contracting is subject to the provisions of the *Buy American Act*.

The *Small Business Act*⁶⁷ tries to promote the interests of small enterprises, of certain disadvantaged groups, and of disfavoured zones in the United States. Among its many measures, we highlight the following three:

- In government procurement worth between \$2,500 and \$100,000, and when two or more businesses have submitted a tender, the contract is automatically set aside for a small enterprise. Depending on the sector, small enterprises hire between 500 and 1,000 employees; this definition of “small enterprise” clearly distinguishes the Canadian economy from the United States economy.
- Small enterprises owned by certain disadvantaged groups (veterans, blacks, hispanics, aboriginals, women) can obtain assistance from the state when they receive a subcontract that derives from the award of a government procurement contract.
- Lastly, some historically disadvantaged development zones (HUB zones or Historically Underutilized Business Zones) are also entitled to some considerable advantages. In fact, an entity can conclude a contract with a business operating in one of these zones by using the set aside or designated contract procedure (without an invitation to tender) for purchases of up to \$5 million in the case of industrial goods, and up to \$3 million for other types of procurement.

More recently, literature has emerged that is devoted to analysing the FASA reform (*Federal Acquisition Streamlining Act* of 1994) introduced by the Clinton government. Designed to simplify the complex and rather nebulous award procedure for government procurement contracts in the United States and to increase speed and transparency, FASA makes it possible to sidestep government procurement attribution rules by using the strategy of creating main agencies that manage and conclude “subcontracts” (Schooner *et al.*, 2003; Schwartz, 2002), based on a set rate.

The “deviant” reputation of its American neighbour justifies Canada’s caution in the openness of “its” government procurement contracts, particularly when NAFTA rules are concerned.⁶⁸ Thus, we note the existence of historic tension between the social aspect and the trade aspect in government procurement contracting. Moreover, no one would be tempted to liken this tension to the usual debate surrounding the protectionist nature of certain national economic policies. However, the scope of these government procurement agreements remains limited (combined effect of exclusions, contract thresholds, exceptions and set aside), certainly in Canada’s case.

From the standpoint of Canadian women’s interest in benefiting from the social aspects of government procurement, particularly the effects of employment equity, the acknowledgement of the limited scope of these agreements is somewhat reassuring because the negotiation surrounding the scope of the AGP and chapter 10 of NAFTA in Canada did not take into account the impact of government procurement on the entrepreneurship and employment of women. To understand why it would be helpful to conduct a gender-based analysis of the impact of opening Canadian government procurement contracting on the specific social policy that is employment equity, obviously a closer look at the content of these agreements is necessary.

A Review of the Regulations for Easing Restrictions on Government Procurement: AGP and NAFTA

The doctrine (McCrudden, 1999) generally presents agreements that allow for regulations related to the award of government procurement contracts as a function of the desired objectives of such agreements. Despite the many restrictions on liberalizing government procurement contracting maintained by states, these rules are aimed mainly at transparency and equality in selecting and awarding government procurement contracts when domestic and foreign businesses bid competitively. The purpose of this sub-section is to present these rules in a highly schematic fashion by referring as necessary to the provisions of the AGP and chapter 10 of NAFTA. Understanding this reference material is essential to a better understanding of how these agreements attempt to liberalize government procurement by prohibiting practices that would produce discriminatory effects between the two business groups. These regulations concern procedures for selecting and awarding government procurement contracts.

Technical Specifications

Pursuant to articles VI of the AGP and 1007 of NAFTA, an entity that announces a bid must limit the specificity of this bid to the technical dimensions of the desired product or goods. In other words, the AGP and NAFTA prohibit invitations that contain aspects or information that is hidden, that is incomprehensible to foreign businesses or superfluous for performance of the contract offered. Such practices could impair the principle of competition between bidders and constitute an obstacle to trade.

Discrimination-Free Tendering Procedures

Under article VII of the AGP and article 1008 of NAFTA, government procurement tendering procedures must be discrimination-free (between domestic and foreign contractors) AND compliant with Agreement requirements. These requirements are set out in sections VIII to XIII of the AGP. They concern the qualification of contractors, procedures for inviting bidders, selection procedures, presentation techniques for submitting bids, providing bid-related documentation and, lastly, awarding the bid. Specifications related to the qualification of contractors and to awarding contracts are important for our purposes.

Contractor Qualification

Section VIII(b) of the AGP⁶⁹ stipulates that bidding procedure qualifications be limited to those that are indispensable for ensuring that the business is capable of executing the contract in question. Participation conditions imposed on contractors are not less favourable for contractors from other Parties than for domestic contractors and do not discriminate among contractors from other Parties. This return to trade agreement principles (domestic treatment and the benefit of advantages offered to most favoured third-party nations) indicates to expert writers that this document is much too specific to subject the right to tender to conditions other than those needed to execute a contract (obtaining an employment equity certificate, for example). The text of article VIII of the AGP (and sections 1007 to 1015 of NAFTA) provides no clear indication of the possibility for a state to impose, at the bidding or selection stage, foreign or secondary conditions on the quality of contractors for the purpose of executing the contract. In Canada, this raises the question of the legitimacy of requiring the bidder, a business operating in Canada, to provide proof that it has obtained an

employment equity certificate issued by HRSDC. Another aspect of the AGP creates a similar controversy.

Government Procurement Contracting and the “Purity” Principle

Section XIII(4)(b) of the AGP⁷⁰ provides that the entity shall make the award to the tenderer who has been determined to be fully capable of undertaking the contract and whose tender, whether for domestic products or services, or products or services of other Parties, is either the lowest tender or the tender which in terms of the specific evaluation criteria set forth in the notices or tender documentation determined to be the most advantageous. McCrudden (1999) suggested that an honest review of this clause would not lead to the conclusion that the recommended model is based on the economic purity principle, in other words, the principle according to which only the best financial proposal must be accepted. However, he adds, the tenderer’s capacity to undertake the contract, just as the evaluation by the entity of the most advantageous tender, may include public policy considerations, in the matter of environment, for example (McCrudden, 1999). According to McCrudden (1999), the AGP includes no presumption that social requirements attached to government procurement contracts are inadmissible or invalid. Arrowsmith (2003) is much more reserved in this regard.

From this very brief presentation of AGP regulations, the following points are important for our discussion: 1) there are indications that conditions imposed by an entity at the time of tender must be distinguished from those imposed by the entity when determining the terms of the government procurement contract; 2) the AGP text, like chapter 10 of NAFTA, is unclear with regard to imposing “social” conditions on a bidder on government procurement contracts; 3) one thing is certain, the AGP does not exclude the possibility that, when an entity awards a government procurement contract, considerations other than those based on the contract price and technical competence of the contractor can be involved.

The Case of the Agreement on Internal Trade

In this context, it is interesting to compare the content of the AGP to the content of the Agreement on Internal Trade (AIT).⁷¹ Article 500 of the AIT, the first provision of the chapter reserved for internal government procurement, sets out the application of these contracts in article 404. According to this provision of the AIT, a reasonable restriction on the rules for liberalizing procurement contracts is legitimate if it is based on a government objective that is also legitimate. Article 200 of the AIT provides that affirmative action programs for disadvantaged groups (200 g) constitute such measures.

The specific inclusion of this exception advantageously distinguishes the AIT from the AGP or from NAFTA by explicitly setting out that affirmative action programs are acceptable grounds for discrimination in awarding procurement contracts in Canada, unless their use is deemed abusive or discriminatory.

We have presented the content and context of Canada’s commitments to liberalizing government procurement, and now return to the topic of our case study—reviewing the Canadian employment equity model. We are not claiming that employment equity requirements have been the target of any formal complaints from contractors in Canada likely to benefit from the rights to which they are entitled in this regard under the AGP

and NAFTA. The reason for this is quite simple: the current FCP is not a threatening or demanding program. However, we and others believe that this program must be strengthened. Does the AGP allow such improvements? If so, does the AGP impose conditions on the development of the FCP? If so, what impact would these requirements imposed *externally* have on Canadian women? There is argument that the issue is theoretical, but it can only be theoretical because Canada does not engage in systematic analysis of the impact of trade policies on national policies that favour women.

We begin by concentrating on the Canadian “social policy” that the FCP constitutes, because this is a program imposed on government entity contractors. Then, we thoroughly review the scope of the set aside that Canada recorded as an exception in ratifying the AGP and NAFTA. In the first case, we will examine whether Canada can, as recent assessments of this program have suggested, strengthen the FCP without impairing its international trade commitments. In the second case, we will look at which strategies Canada can consider in order to examine a broadening of the impact of the set aside, from the standpoint of women. Lastly, we try to determine how Canadian women can avoid missing the next international meeting in which Canada will be asked to review or determine the limitations of liberalizing government procurement contracting.

The purpose of this study is much more specific than certain issues addressed by the literature and that mainly address the question of whether an entity can impose social requirements extraterritorially on subcontractors (for example, complying with occupational health and safety rules in the country from which the “imported” good or service originates for the government procurement contract). The case study is based on findings shared by all—the Canadian employment equity model is useful and necessary, but must be strengthened, in particular in the case of the FCP. This model is also necessary for promoting the employment of women. The situation is different for set aside contracts. We must determine whether Canada’s trade commitments in relation to government procurement prevent Canada from promoting the entrepreneurship of women in Canada by awarding contracts set aside for a group that is deemed to be socio-economically disadvantaged.

Government Procurement and Canadian Employment Equity Policies

Canada seems to have been cautious about the requirements posed by government procurement trade agreements, first, by specifying which entities are excluded from the rules related to government procurement in the AGP and NAFTA, and second, by exempting those businesses that submit bids and provide goods and services to Canadian entities from a territorial point outside of Canada from the requirement of obtaining an employment equity certificate issued by HRSDC. In doing so, Canada seems to have gotten in line behind Arrowsmith (2003), who pleads in favour of such a strategy.

The liberalization of government procurement contracting has consequences on the number of businesses that are subject to employment equity requirements, because it leads to the possibility that a growing number of government procurement contracts will be granted to contractors operating abroad. Note once again the absence of any analysis on the impact of these decisions to ease restrictions on the true effect of Canadian employment equity

programs. As the number of foreign contractors for Canadian entities increases, the impact of the FCP lessens. Further, the choice of not imposing the employment equity certificate requirement on contractor businesses located abroad does not completely resolve the issue of the dual regime⁷² to which Canadian businesses and Canadian businesses “under foreign control” are subject. We are moving toward an examination of the consequences and potential of this asymmetry.

However, before addressing this more technical issue, we would like to delve further into the matter of social policies as a requirement stemming from government procurement contracts. We will see that the spirit and letter of government procurement agreements pose conditions that, ironically, impose on the Government of Canada the obligation of acting on the most recent recommendations made by various Canadian institutions that recommend improving the FCP. Canadian women can only benefit from such improvement.

Employment Equity Measures and the Legitimacy of Social Considerations in Government Procurement Contracting

Since the authors are interested in the issue of integrating social policy requirements into government procurement contracts and the legitimacy of these requirements in the context of trade agreements related to government procurement contracting, they conclude that the answer is not definitive. One fact remains: they are all guided in their thinking by the European model. Still, even European directives on government procurement contracts do not address the issue directly. The first European directives regulating government procurement contract procedures emerged in the early 1970s.⁷³ While they go further than the AGP in liberalizing these contracts, they nonetheless remain subject to the principles set out in the Treaty Establishing the European Community, which integrated broad swaths of social policy with the signing of the Treaty of Amsterdam.⁷⁴

Provisions in favour of promoting women professionally in government procurement contracts are not prohibited by the rules of the Community and affirmative action measures are even encouraged by various articles of the Treaty of Amsterdam (Tobler, 2000). For example, since the 1997 Amsterdam review, article 141(4) of the new Treaty establishing the European Community has set out that “with a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.” We also cite the second Directive on Equal Treatment,⁷⁵ and more particularly article 2(4) of that Directive: “This Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women’s opportunities in the areas referred to in article 1(1).⁷⁶ As in the case of Canadian law, affirmative or proactive employment equity measures are legitimate in European Community law.

Situations in which national legislative measures required contractors of public entities to employ local labour, material, goods or equipment⁷⁷ were initially deemed by the Court of Justice of the European Communities (CJEC) to be non-compliant with European law and with European trade agreements related to government procurement. In the case of Italy, the

CJE rejected the claim that these considerations could be included in the exceptions of “public policy, public security and public health,” set out in articles 56 and 66 of the European Community Treaty.⁷⁸

There arose the issue of determining whether the government procurement contract selection and awarding process and the related criteria should be based only on the requirements explicitly set out in the Directives (qualification of the contractor or technical capacities, for example). Some authors, including Tobler (2000), felt that the directives allowed entities some leeway. That is, they are not exhaustive regarding the criteria that may be taken into account to determine the most economically advantageous offer.⁷⁹

In fact, community law is not clear on this point, particularly because the issue of social requirements in government procurement contracts is not explained in the Directives related to awarding these contracts. The CJE has nevertheless expressed a favourable opinion on the introduction of these “social clauses” into government procurement contracts, as in the *Beentjes* affair,⁸⁰ among others. In *Beentjes*, the CJE validated the contractual conditions that are not set out in the European Directives on government contracts. This stipulation states that the contractor should hire at least 70% of long-term unemployed individuals, using national placement services.

McCrudden⁸¹ concluded that the European directives related to government contracts should not be considered a complete code. The directives are intended to form the basis of the technical and procedural requirements that address certain aspects of the bidding procedure, but these directives leave all discretion to the entities regarding the bids they accept and the conditions they impose on contractors. Bids could therefore be rejected for an anticipated failure to fulfill a particular objective specified by the entity, including a social objective. Tobler (2000) concluded that a “category of additional specific conditions” was possible, that affect neither the contractor’s personality nor its technical capacities, but that may be involved in awarding a government procurement contract, yet without favouring or discriminating against certain contractor categories.

This is the position that the European Commission adopted in 2001 when, following the 1998 Commission Communication entitled “Public Procurement in the European Union,” it published an Interpretative Communication on the Community Law Applicable to Public Procurement and the Possibilities for Integrating Social Considerations into Public Procurement (EC, 2001).

Contractual conditions with a “social objective” can therefore appear in government procurement contracts as long as they 1) do not limit the candidate selection stage to the benefit of “national” contractors, and 2) do not discriminatorily deprive businesses of other Parties from having access to the contract. Thus, once the contract is awarded and the social provisions revealed, proceedings could be instituted against contractors that, do not consider this “social” condition in performing the contract. The Commission seems to favour introducing contractual conditions when contracts are awarded under the criteria of the “most economically advantageous” contractor.

Given the general ambiguity of the texts, this position seems possible. As a consequence, policies that are secondary to fulfilling a government procurement contract should be imposed only on businesses located in the jurisdiction of the offering entity and be included as a condition in the contract.

The Canadian Employment Equity Program and Foreign Businesses

Very often, documentation related to government procurement contracts compares contracts awarded outside of the country to those awarded and fulfilled in the state of which the offering public entity is a national. We have already noted that Canada had adopted a cautious attitude in this regard. Employment equity measures (under the EEA or pursuant to the FCP) concern only businesses established in Canada that hire in Canada when they bid on government contracts. In response, some have said that there is nothing more to consider and that these businesses operating in Canada and governed by Canadian law must simply be treated as Canadian businesses, which would exclude any comparison between “domestic” Canadian businesses and other businesses “under foreign control.” However, the misleading aspect of trade agreements complicates things. For example, article III of the AGP⁸² extends the benefit of non-discrimination in government contract awarding to the contractor established on the entity’s territory, independent of the degree of foreign control or participation in this business.

In the first part of the study, we described the fate of the entities, services and thresholds of government procurement contracts excluded from the application of the AGP and NAFTA.⁸³ In the case of this type of call for tenders, bidding businesses cannot claim any specific right from government procurement trade agreements. In other words, employment equity, in any form, cannot be a factor of trade discrimination in the case of these businesses when they submit bids on goods or services contracts offered by entities that are excluded from the application of the agreements, or when they submit service contracts that are excluded due to their nature (health and social services, for example) or due to the amount of the contract offered. For a large part of government procurement contracts, Canada’s competence to tighten legislative or administrative employment equity and government procurement requirements is therefore fully intact.

Let us now focus on these “Canadian businesses under foreign control” that, although they are subject to Canadian policies, including those related to employment equity, nonetheless have rights under the AGP and NAFTA. Approximately 800 various Canadian businesses are in the HRSDC, which is designed to attest to the presence of an employment equity commitment certificate. Approximately 400 of these businesses are governed by federal law because they exercise activities under federal jurisdiction. It would have been tedious, but possible, to determine exactly how many of these businesses are Canadian businesses “under foreign control.” Would this have been helpful? We prefer to say that there are approximately 800 businesses in Canada that are likely to submit bids on government contracts and that, from the standpoint of employment equity social policy, these businesses are not all equally situated. Their common ground is status as a Canadian employer hiring more than one hundred employees. This makes them significant entities from the standpoint of the employment of women.

We are not trying to claim that, as things stand, businesses that are not subject to the EEA would have some reason to complain. We have shown that their obligations are both formal and minimal. We have also shown the urgent need to rectify the obligations tied to the FCP. It is within this spirit of reform that certain questions can be posed with regard to the AGP and NAFTA. Can additional obligations be imposed on Canadian businesses “under foreign control” when they submit bids for government contracts and are not subject to the EEA?

Businesses “under foreign control” that are not under federal jurisdiction must prove that they have obtained an employment equity commitment certificate to have access to Canadian government procurement contracts. This certificate is issued by HRSDC without further formality or condition of progress in fulfilling the objectives of employment equity. Recently, the possibility was raised of subjecting at least these businesses to the obligation of reporting on their progress (SCHRDSPD, 2002a). In this scenario, failure to report would result in suspension of the commitment certificate. In actual fact, this certificate gives businesses (whether under foreign control or not) access to the government procurement bidding process. Thus, suspension of such a certificate would deprive businesses established in Canada, but under foreign control, of their right to an AGP-compliant process. This procedure infringes upon the spirit of the AGP. It amounts to a qualification condition for contractors to participate in the bidding process, and does not concern their technical capacity to submit bids.

In developing proposals to strengthen the FCP, the SCHRDSPD never considered the fact that some Canadian businesses are also “Canadian businesses under foreign control” and that they therefore have specific rights, including not being dismissed as a contractor for social considerations, based on the type of government contract involved. Trade requirements from Canadian trade commitments did not “trickle down,” nor were their effects anticipated when they were established.

The EEA states that businesses governed by the EEA and those subject to the FCP should have the same employment equity obligations.⁸⁴ The EEA recommends, in part, an answer to the above problem. The origin of section 42(2) of the EEA has nothing to do with the AGP. Developing it involved finding a maximum use of the contractual obligation model imposed on bidding companies. Discussions on this measure in no way took into account the problem of businesses under foreign control. During trade agreements, however, the reasons why the government should act on section 42(2) of the EEA are no longer strictly local. Therefore, this is a case in which requirements stemming from trade agreements indirectly favour women, who would only benefit from a strengthening of the FCP.

The combined effect of the AGP and requirements from the Canadian employment equity program is simple. All of the businesses submitting bids for federal entities must expect to be contractually obligated to comply with the EEA. Insofar as all of the bidding businesses would have the same obligations, Canada would be recognizing the use of social policies in government contracts, and favouring Canadian women in the workforce. However, the recent assessment of the EEA and the FCP reveals that all of the businesses are reticent to use such a solution. They increasingly describe employment equity as an onerous, costly, lengthy and unpredictable process (HRDC, 2002). Therefore, the issue of social policies

attached to government procurement contracts is not simple, whether from a political or economic point of view. Given their rights, to what intensity of obligation is the federal government willing to subject bidding businesses that are Canadian, but under foreign control?

If the laxness with which the FCP has been managed to date is any indicator of the future, this program could succumb to the requirements of the AGP or NAFTA, not because such measures are prohibited, but rather because these agreements increase pressure on second generation programs (proactive measures) designed to promote employment equality, in particular the equality of women in the workforce. Needless to say, broadening the list of government entities subject to these agreements in any way would only exacerbate the problem. This problem also draws on another phenomenon raised from reviewing NAFTA chapter 11 related to investments. This phenomenon is the “chilling regulatory effect” of trade agreements, which is always a struggle to demonstrate (Appel Molot, 2002). The Government of Canada chose to exempt from the FCP foreign businesses (located abroad) who bid on government contracts. It did not have to consider the other part of the equation because the FCP is not, to this day, a restrictive program and businesses are largely satisfied with it. If we suppose that the population still requires that this social program be strengthened, the question shifts, because “the international restrains the national” to very specific procedures in this regard.

Another aspect of the problem must also be considered. McCrudden suggests that to retain social policies such as EEA in the context of government procurement contracts, the contracts themselves must explicitly set out the commitment of bidders to comply with certain laws. So the transparency of the government contract awarding process is not impaired, the author proposes the stipulated contractual conditions be limited to direct legislation as opposed to secondary legislation, such as EEA. Direct legislation means legislation that imposes objective obligations on employers, such as respecting minimum wage and set working hours, and prohibiting discrimination. Canada forms part of this group of countries that can pride itself on having gone past the stage of first generation equality legislation. However, proactive employment equity legislation, which is one example, is not direct legislation in regard of the AGP. Not only does proactive legislation require a high degree of involvement from a business, but it entails intense negotiation between the business and the agency responsible for compliance with legislation, to verify that the desired objectives of the EEA are being met. If, in terms of employment equity, the Act provides for development, the response has not been uniformly good. Canadian employers are already complaining about the ambiguities and complexities of this Act. Pressure placed on this type of legislation would only be increased by the requirements stemming from trade agreements that highlight transparent trade procedures. Therefore, to protect employment equity policies in Canada and to meet the requirement for transparency that distinguishes the AGP and chapter 10 of NAFTA, the content of the EEA regarding businesses’ obligations must be clarified so employment equity obligations are made explicit and more objective.

The Set Aside

We have seen that the AGP and NAFTA contain specific exemptions that countries have inserted. Canada has set out that these agreements will not apply to contracts set aside for

small enterprises and businesses owned by minorities.⁸⁵ We have also seen in the first part of this study that only aboriginal businesses currently benefit from this exemption policy (PSAB) in Canada. Lastly, we noted that this policy was recently revised. The findings confirmed the legitimacy and usefulness of this program and revealed that a number of efforts should be approved to increase its visibility and scope. According to DFAIT, the scope of the set aside has never been assessed since NAFTA came into force. In this context, DFAIT representatives have mentioned the lack of interest from small non-aboriginal businesses to be governed by this kind of exemption program. However, it is not known whether the problem of small and very small businesses owned by women was considered.

In all cases, DFAIT maintained that the wording of the exemption from Canada would not prohibit such developments if programs for women were designed with meticulous care, which is no doubt what distinguishes the PSAB. It determines specifically what constitutes an aboriginal business, how federal departments and agencies can choose to set aside a contract for these businesses, how businesses are informed, how they can submit a bid and how the contract is awarded.⁸⁶ Consider also that a good number of government contracts in Canada are not subject to trade agreements, and businesses belonging to women could benefit from them. In the case of the United States, the *Small Business Act* firmly sides in favour of businesses owned not only by minority racial groups, but also by women. This *a fortiori* includes small businesses owned by women from racial minorities. The exemption noted by Canada does not exclude this assumption (small businesses and businesses owned by minorities).

What Have We Learned?

Canada and the Negotiation of Government Procurement Trade Agreements

Canada does not have a mechanism for inter-departmental, inter-governmental or joint (government-businesses-civil society) consultation to grasp the impact (neutral, positive or negative) of international trade commitments on Canadian social policy. Thus, HRSDC has not been approached in this regard, nor has it deemed acting of its own accord necessary. The same situation applies for the CHRC. The Government of Canada's concern seems to be limited to considering the economic impact of these trade commitments.

The Absence of Gender-Based Analysis

In the overall logic of opening government contracts, the general impact on the volume of jobs in Canada has been considered. However, these considerations have not been broken down. Thus, the complex issue of interactions between 1) the inclusion/exclusion of entities subject to such agreements; 2) the bid thresholds for government contracts in the agreements; 3) the nature of government procurement contracts; 4) the relationships between contractors and sub-contractors; and 5) the ratios between national entrepreneurs and those "under foreign control" has an impact not only on the total volume of employment of women in Canada, but also on the nature of these jobs and the protections from which they benefit. Which Canadian businesses "under foreign control" benefit from rights under the AGP or NAFTA? How many employees do they employ? Are they sectors of primarily female employment? Non-traditional sectors? Sectors in which the CHRC hopes to establish employment equity requirements more firmly? In short, for which "issues related to the employment of women"

are employers that submit bids on government procurement contracts and are under foreign control in Canada responsible?

The Applicability of the Set Aside to Businesses Controlled by Women

Since NAFTA was concluded, the issue of the set aside strategy in favour of Canadian businesses controlled by women has not been considered. Only the general issue of using the set aside intended for small Canadian businesses has been examined to date, with the conclusion that these businesses are not interested in such contracts. As in the case of the PSAB for aboriginal businesses, it is not impossible, or prohibited, to consider implementing such a strategy targeting businesses run by women, on the condition of course that its limitations and access conditions be clearly defined. We believe that the Government of Canada should examine the issue to the extent that the volume of government contracts awarded to foreign businesses or businesses under foreign control is expected to increase in the medium term.

Improving the FCP

We have explained why, in its current form, the FCP and its management do not meet the requirements of the AGP and NAFTA with regard to businesses and entities that are subject to government procurement contracts or those that benefit from rights under these agreements. We noted that this “local” consideration did not receive sufficient attention when the FCP was reviewed in 2002, in particular because the “trade” and “social” spheres did not benefit from the mechanisms for dialogue that are required for a review of Canadian social policy for compliance with the requirements that stem from international trade commitments. This lack of interface leads to negative consequences for women, as a group designated by employment equity measures.

Amendments to the Employment Equity Act

Amendments of the EEA are required to clarify the obligations of Canadian businesses that are subject to it and to validate, by direct reference to the EEA obligations, the commitments of businesses under foreign control that employ in Canada and benefit from government contracts. To answer the questions posed in the first table in the first part of this study, we note that nothing in government procurement agreements limits the federal government’s ability to proceed with such amendments. *A contrario*, failure to make the required clarifications to the Act regarding business obligations could impair the government’s capacity to compel businesses under foreign control to implement employment equity by using supplementary conditions taken directly from the Act and integrated into the contract. In the case of Canadian employment equity measures, we should avoid having those who are involved succumb to regulatory paralysis failing to improve the Act or the FCP.

And the Free Trade Area of the Americas?

Nothing indicates that any aspect of the above analysis was changed during Canadian proposals related to the Free Trade Area of the Americas (FTAA). In this last case, however, the government could remedy the absence of gender-based analysis by asking the departments, institutions and agencies involved to explore the possible impact of these proposals on employment equity policies that favour Canadian women. This task would primarily concern HRSDC and the CHRC.

5. THE GATS AND EMPLOYMENT EQUITY MEASURES IN CANADA

When a state is party to an agreement to liberalize trade, this does not mean *a priori* that it is stripped of its social, economic or environmental competences. This myth can only be deconstructed by case studies that must go beyond figures that relate to the total volume of jobs created or lost.

The object of our study concerns solely Canadian businesses and foreign businesses that have a trade presence in Canada and are therefore subject to Canadian legislation. The issue could be approached by asserting that WTO trade agreements do not affect the application of the EEA in any way, insofar as it is applied in the same way for all of these businesses. Yet this assertion would, once again, overlook the fact that these same agreements assume that states behave in a certain way in the administration of national legislation and policy. This behaviour is guided by the obligation to not maintain standards and practices that would create discrimination between Canadian and foreign businesses. This first requirement will guide our examination of compliance, not only with the EEA, but also its administration in trade agreements, in particular the General Agreement on Trade in Services (GATS⁸⁷). A closer look at the issues raised by this initial question reveals that it must be refined, since it is rarely the case that all of the sectors, goods or services produced, imported to or exported from Canada are fully subject to the ground rules of WTO agreements.

Therefore, each issue must be considered on the basis of this variable. For example, it is not the total volume of jobs for women that is concerned by liberalizing services. In fact, the complex, but very interesting, structure of the WTO GATS provides the Government of Canada with crucial leeway in this regard.⁸⁸

This sub-section concerns the GATS. Why?⁸⁹ First, because the GATS is a symbolic WTO agreement. The GATS is the WTO trade agreement through which rules for liberalizing services were introduced to international economic law. The link between the employment of women and the service sector no longer needs to be demonstrated. Moreover, not only is the volume of jobs in Canada increasing in these sectors, but so is the volume of jobs for women. The precariousness of the employment of women is also increasing in this sector. Second, the GATS is a complex and, to some extent, exceptional agreement. We will see that the specific commitments to which a country agrees, if stated in great detail, can make it possible to resolve issues related to national policy and values, and to the requirements of liberalizing the exchange of services. Third, the concept of trade discrimination against businesses on which the GATS confers rights is subtle. It concerns “measures” taken by states that affect trade in services. Last, the complex nature of the GATS serves as a useful example in favour of arguments to introduce gender-based analysis into Canadian policy, to determine the impact of trade agreements on national policy and on Canadian women.

Recall for the moment that the Government of Canada, when establishing its Schedule of specific GATS commitments, took for granted that the GATS would in no way affect the “universality” of the labour regulations, legislation and policies that apply to all businesses operating on Canadian soil. How can this universality be assumed *a priori* when the

GATS confers rights on foreign businesses operating in Canada, particularly with regard to the non-prejudicial nature of these measures affecting trade? How can we assume that this requirement does not include specific consequences in the case of vulnerable groups and women? Our case study enables us to address such questions in practice. This does not mean that the conclusions will be negative, but more simply that a rule of caution must be introduced in this regard. The unpredictable effect of trade agreements is particular to them. In some way, they are “larger than life.”

Canada’s social and labour law is extremely sophisticated. Moreover, it has entered a proactive phase from which Canadian women benefit. In the case of the EEA, as one example only, we can ask whether businesses that are not accustomed to such practices and requirements find cause to complain. Employment equity and the EEA cause much gnashing of teeth (HRDC, 2002). Simply because formal complaints did not take shape does not mean that the question is purely theoretical; on the contrary, institutions responsible for administering the EEA hear this discontent and suffer the consequences of it daily.

Having reviewed the GATS rules and trade discrimination, we considered above the consequences of these rules on the EEA, in particular its administration, in order to support the proposals in the final chapter of this study.

The GATS: Trade in Services and Methods of Service Delivery

Trade in Services and Measures that Affect This Trade

Article I of the GATS states that this Agreement “applies to measures by Members affecting trade in services.”⁹⁰ In other words, this agreement does not apply to services, but rather to the measures that affect services.⁹¹ This formulation is important because it was used to broaden the scope of the Agreement.

As a result, imported goods that are also accompanied by delivery and distribution services, or the importation of which concerns primarily goods and not services, benefit from the GATS rules regarding the services that these operations involve. In other words, no measure is excluded *a priori* from the GATS. Keeping in mind the EEA and its application, we note that the CHRC to date has been unable to identify, among the businesses subject to this Act, how many of them are Canadian or foreign businesses that provide, distribute or import services, whether primarily or incidentally. However, and as an example, in the CHRC’s division of businesses under its jurisdiction, the transport and telecommunications sectors comprise a major proportion.

Methods of Service Delivery

Under article I:2 of the GATS, and for the purposes of that Agreement, trade in services is defined as being, among other things, the provision of a service by a service contractor of one Member, *through commercial presence, in the territory of any other Member*, or by a service contractor of one Member, *through the presence of natural persons of a Member in the territory of any other Member*.⁹²

Modes of supply c) and d) (modes 3 and 4) suppose the presence of the contractor in the territory of the country that import the service. Mode 3, in particular, supposes, at the least,

a trade investment and, at the most, employer status. In effect, the GATS considers that a service contractor means “any person that supplies a service.”⁹³ This article is accompanied by a note that stipulates: “Where the service is not supplied directly by a juridical person but through other forms of commercial presence such as a branch or a representative office, the service supplier (i.e. the juridical person) shall, nonetheless, through such presence be accorded the treatment provided for service suppliers under the Agreement.”⁹⁴

Sinclair (2000) maintains that the GATS was devised to attain “modal neutrality,” in other words it aims to require Parties to offer non-discriminatory treatment to contractors, regardless of the mode of supply used. Thus, the mode 3 contractor who employs in Canada is considered a Canadian employer. However, the contractor’s status as a Canadian employer must not be allowed to conceal the fact that this foreign *employer-contractor* is granted rights under the GATS.

Who Are the Contractors?

The GATS is intended to protect contractors from other Members. This contractor can be a natural person or a juridical person, or a juridical person controlled by a physical or juridical person of a Member.⁹⁵ The ownership or level of control are defined in article XXVIII (n) of the GATS.

Insofar as a service provider that operates on the territory of another Member country is held, controlled or affiliated significantly by national entities of another Member, it must therefore be considered as a contractor of another Member. Thus, to some extent, the GATS becomes a much more important investment agreement than originally imagined. Lang (2000) noted that negotiations on services henceforth involve two essential points, namely domestic regulation and investments. For the moment, we will focus on the fate of domestic regulation, while a subsequent sub-section is dedicated to the status of the investor.

How the GATS Works⁹⁶

When the Final Act of the Uruguay Round was signed on 15 April 1994, 95 schedules of specific commitments in services and 61 lists of derogations of the most-favoured-nation (MFN) principle had been submitted and accepted. It is only by reference to a country’s schedule, and its MFN exemption list, that we see to which service sectors and under what conditions the basic principles of the GATS (market access, national treatment and MFN treatment) apply within that country’s jurisdiction.⁹⁷ These schedules contain complex economic arrangements that illustrate the “step-by-step” nature of liberalizing trade in services. Canada recently submitted an Initial Conditional Offer on Services, within the second round of negotiations for easing restrictions on trade in services.⁹⁸ Differentiation must be made between the general effect on the employment of Canadian women and the particular effect on the general domestic regulation of commitments made by Canada under the GATS. Service providers “covered” by the Canadian Schedule have rights under the GATS that are likely to influence the Canadian regulation to which they are subject. For a better understanding, the general obligations and disciplines set out in the GATS must be distinguished from the specific commitments.

The general obligations and disciplines are obligations that govern the measures taken toward *all liberalized service sectors*. The most important rules concern the treatment of the most-favoured nation (art. II), transparency (art. III) and domestic regulation (art. VI). Articles III and VI will hold our attention here. In addition to the general obligations, each state under the GATS must provide a list of commitments that concern the sectors and sub-sectors that it intends to fully or partially liberalize. This schedule is created based on four main parameters, which control and determine the extent of liberalization.

- **Modes of supply:** Commitments and limitations of the schedule are determined in all cases on the basis of the modes of supply set out in article 1:2 of the GATS. Each liberalized sector need not be liberalized in all the modes of supply set out in article I of the GATS.
- **Horizontal commitments:** Horizontal commitments are the limitations applicable to all sectors covered under the schedule; this is often aimed at a particular mode of supply, in particular the trade presence and presence of natural persons. These limitations concern mainly access to markets and the benefit of national treatment. Indications related to horizontal commitments must be considered in order to assess sector-specific commitments. For example, in its recent Conditional Offer, Canada set out certain conditions for acquisition by a Non-Canadian of a Canadian business in the anticipated trade presence of this Non-Canadian. This Non-Canadian must be approved based on the rules set out in Canadian law, which take into account the investment effect, in particular on employment.⁹⁹ This rule applies to all sectors that are liberalized by Canada, and constitutes a limitation in access to contracts. Some other horizontal limitations concern the preferential fiscal treatment or limitation of the participation of businesses ceded to Non-Canadians. These limitations benefit national treatment.
- **Sector-specific commitments:** Sectors are determined as a function of the GATT classification and numbered as a function of the United Nations Central Product Classification system. Limitations to market access may be expected under the terms of article XVI :2 of the GATS. Limitations may also be expected in the advantage of national treatment. Lastly, a Member can make additional positive commitments, which it must make public.¹⁰⁰
- **List of exemptions from article II:** MFN treatment is a general obligation that applies to all measures affecting trade in services and the specific commitments must respect it. In cases in which commitments are signed, the effect of an exemption from MFN treatment would therefore only grant the country to which the exemption applies more favourable treatment than what is granted to all other Members. However, in cases in which no commitments exist, an exemption from MFN treatment can also make it possible to grant less favourable treatment. For example, the offer recently submitted by Canada provides that, in the case of film co-production, differential treatment is given to works in which the co-producers are from states with which Canada has struck co-production agreements. This “positive” exemption is to promote cultural policy.¹⁰¹

The obligations of transparency and domestic regulation dominate horizontal and sector-specific commitments regarding liberalized sectors. Thus, each and every business that has status as a provider of services liberalized by the Canadian Schedule is entitled to expect the domestic law in this regard be accessible and clear. Moreover, it must be applied in a reasonable, objective and impartial manner. In the first part of this study, we raised some doubts about the administration of the EEA; we will return to this point at the end of this sub-section. For the moment, we must address another matter that requires some clarification, namely the universal application of domestic law on foreign businesses that are subject to Canadian legislation.

The Rules: Prohibiting Trade Discrimination, and the Benefit of National Treatment

In terms of its rules, the evolution of international trade is based on the constant quest for access to other contracts under the same conditions as those offered to and imposed on national businesses. A state that breaks this rule has engaged in trade discrimination. Article XVII :1 of the GATS sets out that “[according to the Schedule] each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, *treatment no less favourable* than that it accords to its own like services and service suppliers” [emphasis ours].

The domestic treatment rule generally requires that state parties to a trade agreement grant to the foreign products, services or investments that are concerned by the liberalizing agreement treatment that is no less favourable than that granted to national products, services or investments that are *similar*¹⁰² for which a foreign product can be substituted directly. Thus, a state may not implement a law, regulation or any other measure that would have different effects or that would impose different requirements on a product, service or investment from another state or produced by a foreign business established in the state of destination. The rule of similar treatment results from a comparative exercise between foreign businesses and national businesses, and between national products and foreign products. Insofar as 1) the rules are the same for all businesses; 2) the products and services are similar; and 3) the rules are not applied arbitrarily or discriminatorily to foreign businesses, the national treatment rule shall be obeyed. However, both the articulation of the rule and its administration must be predictable, transparent and non-arbitrary.

Moreover, under the national treatment rule, not only must the stated and known rule be the same for everyone, but the rule must also produce the same effects. The national treatment rule must ensure the effective equality of competitors; in other words, it must defend competitive interaction between all parties. It also serves to “create the conditions of predictability needed to plan future exchanges.” Parties that complain about violation of the national treatment need not show the protectionist intention of the state of destination. Rather a party must allege that the rule is discriminatory and show that the rule is imposing an exclusive disadvantage in comparison to a domestic business (special permit, costs of exclusive operating permits, and so on). Thus, it is not enough for the state of destination to offer treatment that is non-discriminatory in appearance and in accordance with the terms of the legislation or the policy (*de jure* discrimination), yet would in fact have a discriminatory effect (*de facto* discrimination).¹⁰³

The fundamental aspect of discrimination concerns *competition* between the various goods, services or contractors.¹⁰⁴ When this involves trade in services, the state is under the obligation to ensure that the competitive interaction between contractors be maintained.

From the above, we can conclude that:

- imposing compliance with the EEA on a business under foreign control is not an attack on the national treatment rule within the meaning of the GATS;
- the fact that not all foreign contractors of liberalized services are subject to the EEA (because they are not under federal jurisdiction or because they employ fewer than one hundred employees) does not deprive the foreign contractor subject to it from the benefit of national treatment;
- imposing the EEA on foreign businesses that are subject to it and that provide “liberalized” services, and on Canadian businesses, does not impair the competition principle.

However, these conclusions are supported by a somewhat unstable premise: the transparency and predictability of the legal norm of the EEA. Since these findings have not yet stood the test of time, we must wonder whether some foreign businesses that are employers in Canada might not claim the benefit of the obligations of transparency (article III) and objectivity in domestic regulation (article IV) that are required of member states of the GATS.

Another provision of the GATS also touches very accidentally on the issue of whether the Canadian legislator can influence the gender, race or global composition of the workforce of a foreign contractor who is an employer in Canada. With regard to sectors for which specific contract access commitments were made, article XVI :2(d) of the GATS prohibits Members from adopting measures that limit the number of natural persons likely to be employed in a particular sector.

The development below aims to highlight, once again, the need to make the EEA fully compliant with the GATS. It illustrates the same paradox as in the review of the AGP, namely that, because Canada is not exempt from trade agreement requirements, it must ensure that its domestic legislation be adjusted. While civil society has often claimed that such adjustment transaction can only pull Canadian social protections downwards, it has been discovered that, case-by-case, transparency obligations imposed in general by trade agreements could have the opposite effect.

GATS Obligations for Transparency and Objectivity

According to article III of the GATS, each Member must publish and make available the latest version of all laws, regulations and directives “pertaining to or affecting trade in services” by submitting them to the Council on Trade in Services (CTS). It must also make available as soon as possible any information of this type should another Member request it. Moreover, article VI of the GATS imposes on Members an objective and impartial administration of general measures affecting trade. However, these measures concern mainly

the accessibility and impartiality of legal and administrative mechanisms intended to facilitate the flow of services and the adjudication of disputes.

The first part of this study showed that, after the GATS came into effect, certain Members felt the need to specify that measures for gender equality at work and employment equity measures had not been affected by the obligations created by the GATS (New Zealand, 1997). This concern involved retaining “legitimate” social and national measures, without, however, specifying how they could be challenged. In many cases, there was a tendency to liken EEA-type legislation to other, more objective, employment legislation, such as working hours, minimum wage and occupational health and safety rules. However, it has become apparent that the EEA is much more complex, which does not mean that it is more onerous for businesses than “direct” legislation, such as laws related to occupational health and safety. The EEA, which is derived from a legislative model that is more familiar to the Commonwealth countries, in effect submits the employment equity plan to the approval of an administrative tribunal without allowing businesses the opportunity to contest the refusal of this tribunal to approve the plan. Therefore, it is not so much the obligation made to businesses to adopt an employment equity plan, as the way in which provisions are made for this plan to be approved and the methodology leading to the plan’s approval, that pose a problem in the transparency of the legislative measure.

As we highlighted in the first part of this study, the EEA suffers from a lack of precision. This shortage appears in the following points:

- the Act does not define the audit steps that a possible employment equity plan must undergo;
- the Act does not define the “special measures” intended for members of designated groups that the plan must include;
- the Act does not define the monitoring objectives that the CHRC must carry out on an audited plan;
- the Act does not define the nature of measures that will be considered special or qualitative measures helpful in the promotion of members of designated groups in a business, nor does HRSDC have the analytical tools for assessing such measures should they be present in a business.

Moreover, the mechanisms for adopting and auditing an employment equity plan have been the object of “administrative” criticisms supported by businesses, in particular slowness, unpredictability and contradictory orders from HRSDC and the CHRC (SCHRDSPD, 2002a).

In the first part of the study, we briefly noted our experience in obtaining verified reports of businesses that had submitted equity plans compliant with the EEA.¹⁰⁵ At the time of the request, 26 business had completed this stage.¹⁰⁶ Twenty of them submitted the report without further ado, and 6 insisted on contacting us. In each case, they expressed reluctance to submit the report, based on the highly competitive nature of the information it contains. This information concerns not so much figures related to the representation of members

from designated groups by job category, as a disclosure of the business' organizational structure. In every instance, it was maintained that the EEA has repercussions on the organization of the business in a highly competitive climate. Confidentiality is the order of the day. For all that, can it be claimed that the EEA affects trade in services as set out in article III of the GATS? Businesses are instead led to confirm that it affects trade... in general. This claim can only come from foreign businesses that provide liberalized services set out by the Canadian Schedule.

The sociology of the legal standard requires that we analyse the climate in which a law develops. Beyond the letter of the law, a political or economic context can impede the standard, and even distort the objective. This was our struggle in the case of the EEA. According to the CHRC, resistance to implementing employment equity plans is growing in businesses, as are their complaints.

Limitations on Hiring and Specific Commitments

Annex III contains an insert showing the "censored" employment equity audit report that HSBC Bank of Canada finally agreed to make public after negotiations with the CHRC, under the terms of the *Access to Information Act*. This report, or at least its parts, is now public and can be obtained from the CHRC. In the insert, we note an obvious difficulty at first sight of the censored report: this business refused to disclose the determination of geographic zones from which it established its numeric recruitment objectives for women. Assuming the risks of our analysis, because it is only a hypothesis or logical deduction, we believe that this business refuses to recruit a sufficient number of women to senior positions, especially if these positions are not filled by Canadians.

This poses an interesting and unpredictable problem under the GATS. With regard to sectors for which specific contract access commitments were made, article XVI :2(d) of the GATS prohibits Members from adopting measures limiting the number of natural persons likely to be employed in a particular sector. *A contrario*, can the Member impose gender- or race-based recruitment of these persons, or even under national legislation, impose a gender- or race-based percentage of persons likely to be employed? Or could a Member even impose on the contractor the obligation of recruiting in Canada, members from designated groups? To do so, should not a Member be required to set out limitations on its horizontal commitments under the GATS?

What Have We Learned?

Canada and Negotiation of the GATS

The Government of Canada's concern seems to be limited to considering the economic impact of its trade commitments. This economic impact may include considerations that are tied to the variations in volume of jobs in general or the employment of women in particular. We have found no specific studies of the GATS.

A fortiori, groups of women are not being counted in. In the specific case of the EEA, such consultation would have made it possible to integrate the above concerns into the five-year assessment of the Act of 2002, if necessary. Representations also could have prompted

Canadian negotiators to clarify the question of the legitimacy of proactive employment equity measures, if not in the Agreement text, at least in the Schedule of its commitments. This Schedule can be re-opened only under penalty of possible sanctions. According to article XXI of the GATS, a Member must maintain a general level of commitments equivalent to what existed before modification. However, it is not obvious that the desirable modification (namely clarification of horizontal commitments because Canada interprets the GATS as enabling it to impose the EEA completely on mode 3 contractors that hire enough employees in Canada) is an actual modification; at the most this is an interpretive note or a general note that could find its place in specific horizontal commitments.

Implementation of the GATS and the Recent Filing of Canada's Conditional Offer

As mentioned, Canada submitted an initial Conditional Offer to liberalize services on March 31, 2003. Although the content of the GATS is henceforth definitive, it seems, the same remarks apply as in the case of the submission of the original Offer. Moreover, we note that, once again, groups of Canadian women did not react to this process, nor did they ask to be formally consulted. Their concerns are wider-ranging than the simple issue of protecting or improving the EEA. Their silence speaks volumes.

The Absence of Gendered Analysis

At this stage of the analysis, we have one question in this regard: who is responsible for such an initiative, namely reviewing the gendered analysis of the impact that trade policies have on national social policies? It is difficult to accept imposing this responsibility solely on DFAIT. How can it be presumed that DFAIT is an expert in the EEA and its difficulties? Should it not be considered that the "gender and trade" variables must be integrated into each gendered analysis strategy, as a function of the departments and agencies responsible for implementing an act, a policy or a national strategy? In the case of the EEA, certain paths demand attention: HRSDC and the CHRC should be under the obligation to examine these issues, while DFAIT should have to inform them of relevant developments. This poses the question of natural partners for DFAIT. During a meeting,¹⁰⁷ DFAIT representatives posed this question of natural, not to mention historic, partners: Industry Canada, Agriculture Canada and Health Canada were named, although it was stressed that this circle would grow. Yet should the circle not instead become systematized? Each policy can be influenced by the conclusion and implementation of a trade agreement that imposes on Canada adjustments internal to domestic regulation. Further, each accountable entity must complete a gendered or gender-based analysis of its policies. Should the entity not also consider "gender and trade" variables in this exercise?

The GATS and the EEA

We believe we have shown that the GATS exercises positive pressure on the EEA, at least from the standpoint of the members of designated groups. Yet, the recommendations of the SCHRDPD (2002a) suggest another reality. The "trade" variable has never been considered by the Committee's work, nor has it been mentioned by associations and individuals appearing before the Committee.

Rather, the Committee's recommendations tend to refer the stakeholders to voluntary collaboration with HRSDC. Not only has this very Canadian model¹⁰⁸ been questioned by

the CHRC, but it must also be in order to avoid escalation that would be induced by trade agreements, in particular the GATS. In the case of the *status quo*, it must be concluded that the Government of Canada, lacking a global strategy for systematic analysis of the impact of trade agreements on national social legislation, prefers to place legislation such as the EEA at risk.

This situation illustrates an act of omission by the government, which instead tends toward reactive behaviours in international trade when it involves social policy. It cannot seriously be imagined that another Member would question the application of the EEA to its nationals before a WTO arbitration panel. Other much more important issues exist. However, our work enables us to state that the failure to raise the EEA to the transparency requirements of the GATS, in particular, leads to diversion and growing administrative difficulties. The CHRC is encountering an increasing amount of resistance. If the liberalization movement continues, it will also be called upon more and more to negotiate with businesses whose culture is unfamiliar with employment equity requirements. This sociological problem risks considerably slowing down the progress of members from designated groups, including women, in Canadian businesses or businesses that operate in Canada, but are under foreign control.

The GATS, the EEA and the employment of women

Needless to say, any improvement to the EEA will contribute to promoting women's right to equality in the workforce. Should this pressure emanate from the requirements posed by the GATS, among other things? Of course not. However, the recent report submitted by the SCHRDSPD enables the reader to detect a certain disinterest toward women as a designated group. To be sure, their representation percentage in certain categories is acceptable, even superior. Still, this may only be an illusion. The employment of women, which is precarious, results in confusion between their presence in the workforce and the quality of the jobs they hold. Likewise, the methodology for identifying members from designated groups set out in the EEA does not make it possible to grasp the reality of women who are victims of double, or even triple discrimination (gender/race/handicap). The Standing Committee made recommendations to remedy this deficiency (SCHRDSPD, 2002a). Lastly, the demands of the CHRC concerning amendments to the EEA, to specify which are special measures that must contain an employment equity plan, are intended to enrich the set of qualitative measures that women can and have the right to benefit from in the workplace (reconciliation of work/family, flexibility of work-hours, and so on). In short, women do and will continue to need the EEA, and strengthening it can only work to their advantage. Although the demographic changes that transform the composition of the Canadian population can promote the employment of members from minority groups, it will take more than this in the case of women from racialized groups.

All of these considerations can be stated independently from the analysis of the impact of trade agreements, in particular the GATS, on the EEA, but only to a certain point. We believe we have shown that proactive employment equity legislation includes particularities that are challenged by the transparency requirements set out in trade agreements and stated in various national policies. This "secondary" legislation must be more specific than has been the case so far. The CHRC itself has noted the need to clarify certain aspects of the EEA.¹⁰⁹ The desired

objectives, and the methodology provided to promote employment equality, must be clearly understood by foreign businesses that hire in Canada. If all businesses must accept the fact that the employment equity plan is not a project that can be postponed indefinitely, only foreign businesses are in a position to claim that the “uncertainties” surrounding their obligations could adversely affect their trade interests.

6. INVESTOR RIGHTS, CHAPTER 11 OF NAFTA AND EMPLOYMENT EQUITY IN CANADA

The movement to institutionalize and internationalize trade, in particular the increase in investment-related trade agreements, has shaken up the structures of the work world. Now, a new element must be added to the traditional elements of the power relationship that determines the links between a business and its employees—the entrepreneur has become an investor. This investor status and the related rights granted by some trade agreements, including chapter 11 of NAFTA, are the subject of considerable apprehension in Canada, both in the federal government and within the business world, unions and community groups. We have already stated the notion that trade agreements are “larger than life,” in other words, that in some cases they have an effect that is as difficult to comprehend as it is to manage. NAFTA chapter 11, which relates to investments, has in fact exceeded the initial intention of the Member states in its effects, to the point that Canada, Mexico and the United States, who met within the NAFTA Free Trade Commission, felt it helpful to adopt a memorandum of interpretation in July 2001 to interpret certain aspects of the scope of chapter 11.¹¹⁰

NAFTA’s investment-related provisions confer on investors not only rights, but also the privilege of pursuing directly, as a civil party, the government of destination of an investment, at the risk of challenging certain local and national laws, regulations and policies that they see as likely to have an adverse effect on their rights. Indeed, it is the effect of this privilege that experts are trying to define: What does it mean when a foreign investor asks a panel of experts that is not a court to dispose of issues related to the validity of domestic regulation?

Although no one has answered this question, there have been highly refined analyses of the decisions rendered by arbitration panels appointed pursuant to chapter 11 of NAFTA.¹¹¹ We do not intend to continue this analysis apart from focusing on the empirical question at the root of this case study: what is the result of retaining Canadian employment equity policy under the rules of chapter 11 of NAFTA? The employer/investor intersection has not yet been explored in relation to this topic.

To explore this question (though not to answer it), we will address the following aspects of chapter 11 of NAFTA, in this order: 1) What is an investment? 2) What are an investor’s rights? and 3) How can these rights disrupt the legitimacy of domestic acts, regulations and policies in various fields that have historically been described as social fields in Canada, for example the environment, health, and human rights.

For the purposes of this examination, it is presumed that Canadian women are part of the groups that benefit from employment equity measures and that, even though they would not be the only victims of a disrupted measure, they nonetheless would be seriously prejudiced by the possibility that an investor could challenge the programs and the Canadian employment equity model.

Investors and Investments

Under article 1139 of chapter 11 of NAFTA, *the investor* (who can therefore claim protection of an investment in the state of destination) is someone who has an investment in a business, is a business, or is a branch office.¹¹² The *investment* is an investment, debt obligation, a loan from an affiliated firm, shareholders' equity, real estate or other interests. Article 1139 lists a dozen or so investment situations that are so broad that, for all practical purposes, all imaginable entities can be considered "investors" for the purposes of the Agreement (Adair, 1999).

As Mann and Moltke (1999) observed in the case of service providers, the implementing legislation of the United States concerning articles 1202 (National Treatment) and 1203 (Most-Favoured-Nation Treatment) clearly explains the significance in NAFTA of non-discrimination rules (Dally, 1994; Mann and Moltke, 1999). They: "prohibit the imposition of laws and regulations designed to skew the terms of competition in favor of local firms: they do not bar legitimate regulatory distinctions between such firms and foreign service providers" (United States, 1993). Mann and Moltke observed correctly that the term "foreign service provider" could be replaced by "foreign investors" and the same results would be obtained. This analogy between chapter 12 on services and chapter 11 on investment is possible because the chapters share common terms.

According to article 1101(4) of NAFTA, the commitments made by a state under chapter 11 do not prevent it from providing services or exercising functions, for example, in terms of correctional services, income security or guarantee, social security or insurance, social welfare, public education, public training, health services and child care services *if these services are provided in compliance with the provisions of chapter 11*.

Moreover, states can exempt some sectors from obligations that relate to national treatment, to the implementation of a ban on imposing an obligation for results, or even to limiting the physical presence of investor representatives in the host territory, provided the measures were indicated in the annex at the time of ratification. Canada noted such reservations about granting a national treatment benefit in the social services sector. In Canada, therefore "social" government investments are exempt from complying with the national treatment rule under the rules related to easing restrictions on investments. In anticipation of the immensity of the rights that were granted to investors under chapter 11 of NAFTA, the Parties also agreed to explicitly state that this chapter is not intended to prevent states from applying measures necessary to environmental protection¹¹³ on their territory. In addition, as a preventative measure, Members ensured that they could resort to consultation if one Member felt that investment measures were used by another Member to the detriment of national measures concerning the protection of the environment, health or security (Ganguly, 1999).

The negotiators and the authors of chapter 11 of NAFTA were therefore not insensitive to the risks that would have been represented by an Agreement that did not allow for possible conflict situations between the rights of investors and environmental and public health issues. However, this is where the expressed concerns end, as chapter 11 is silent on the issues of protecting social rights and the risk of conflict between these rights and the rights

of investors. All the same, this silence must be noted, despite the existence of NAFTA side agreements concerning the environment and labour cooperation.¹¹⁴ It is true that, if the investment can directly impair the environment and public health by triggering a race toward the lowest standards, their damage to fundamental social and human rights, such as the right to equality, are rather indirect in nature. They pass through a potentially weakened power relationship between the parties to the labour contract. Moreover, it is customary to say that investors are subject to domestic labour law as long as it is not discriminatory or unreasonable in its effects. However, this overly simplified vision of the relationship between local social rules, their universal application and the investors tends to neglect the complex nature of certain social legislation, including laws related to employment equity.

In our view, then the question is quite plain: Is EEA-type proactive legislation sheltered from investor demands that stem from their rights under chapter 11 of NAFTA, and from certain other agreements to which Canada is party?

Investor Rights

The expression “investor rights” refers to the provisions of articles 1102 to 1110 of NAFTA, which involve the right to not be a victim of trade discrimination, to benefit from a minimum standard of treatment, to not be subject to performance requirements and, lastly, to not being a victim of any measure that is *equivalent* to expropriation. Some of these rights are still highly ambiguous and give rise to debates in Canada about, among other things, whether the Government of Canada and sub-central entities (provinces and municipalities) can still regulate freely.

Prohibiting Discrimination

Articles 1102, 1103 and 1104 of NAFTA provide that investors and their investments be protected on the host territory from the effects of measures that are adopted by the Parties under analogous circumstances,¹¹⁵ but are likely to negate their right to benefit from national and MFN treatment.

It has been established that a difference in treatment can result from an apparent distinction (in the text of an act, for example) between local and foreign investors or from a distinction that is in effect discriminatory.¹¹⁶ Other reasons can also justify different treatment. As an example, VanDuzer (2002) proposed the case of environmental techniques to which local investors/producers would be better accustomed than foreign investors, which would however in no way give foreign investors the right to claim denial of the benefit of national treatment.

Performance Requirements

According to article 1106 of NAFTA, Parties cannot impose performance requirements on the establishment, procurement, expansion, management, direction or operation of an investment (for example, imposing a national content percentage in an investor’s goods, assets or debts). However, in some cases,¹¹⁷ it is possible for a Party to maintain measures, particularly when this involves preserving the environment, the health of people and plants, or natural resources. Quite clearly, these measures cannot be restrictions disguised as investment.

The Minimum Standard for Treatment

Article 1105 of NAFTA has been the topic of intense debate. The question is this: are guarantees related to just and equitable treatment and to the integral protection and security of investments different from those provided by international law under NAFTA?

Been and Beauvais (2003) conducted an extensive analysis of the state of international law and concluded that the topic was uncertain (Lavieć, 1985). In fact, as much as it is possible to claim that guarantees related to just and integral treatment stem from an intention to control expropriations that are fraudulent and disrespectful of natural justice principles or are based on unacceptable political motives, it is also possible to claim that investment law has exceeded this standard by providing the right to investment security. What will be the limits of investor right with respect to local regulations? Given the shared opinions of the arbitrators, it is impossible to know, for example, if “the right to investment security” would enable an investor to claim that any legislative or regulatory modification changes the initial climate in which the investment was made. Which behaviour of the local decision-maker puts the foreign investment at risk? The question remains open.

According to the Memorandum of Interpretation adopted by the Free Trade Commission,¹¹⁸ the concepts of “just and equitable treatment” do not provide for additional or better treatment than what is required by the minimum treatment standard in compliance with customary international law toward foreigners. Moreover, the finding that another NAFTA provision or a distinct international agreement was violated does not prove that article 1105(1) was violated. Beyond the debates surrounding the legal scope of such a Memorandum, it is clear that NAFTA partners are willing to avoid excess in the customary international law that would confirm not only the investor’s right to be treated fairly in the host territory, but also the right to challenge a national standard that they would find inequitable for reasons of their own.

Regulation of Expropriations

Ideological debates on the issue of expropriation and nationalization are as follows: must nationalization or expropriation necessarily involve *taking possession* of the assets of the investment owner? As Romero Jimenez (2001) explains, there are two types of expropriation in international law: direct expropriation, in which the government takes possession for public purposes, and indirect expropriations, which result from measures that are equivalent to an expropriation. Direct expropriation assumes a transfer of the property title in question to the state of destination. Indirect expropriation, on the other hand, is more difficult to identify because there is no transfer as such of an investor’s property to the state of destination. Here, it is the outcome of an interference with the property that is equivalent to a captation of the investor’s property (Jimenez, 2001).

Article 1110(1), on expropriation and compensation, provides that no *Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment.*¹¹⁹ In practical terms, this definition (and particularly the expressions “directly or indirectly” and “measure tantamount”) means that, just because a measure by one Party does

not allow a transfer of property from the investor to the state, does not necessarily mean that it cannot be considered expropriation.¹²⁰

The decision of the NAFTA arbitral panel in the *Metalclad* case is famous. In this decision, the Panel suggested a very broad interpretation of expropriation. Under NAFTA, expropriation not only includes open, deliberate and known taking of property, such as illegal, formal or mandatory title transfers in favour of the state of destination, but also covers *accidental interference in the use of property* with the effect of depriving the owner of all or a *significant* part of the use of the property or the reasonable hope of receiving profits from it, even if the act does not directly benefit the state of destination.¹²¹ As Dhooge noted (2001): “The only interests identified by the tribunal [in the *Metalclad* case] were those of the investor. According to the tribunal, the primary interests of the investor were its reasonable expectations for its investment. The company claimed that government action would have constituted an expropriation because of the predictable impact of such an action on the investment.” Interference with private property, even if it is accidental (*Metalclad*) and non-discriminatory (Pope and Talbot¹²²) is therefore likely to constitute an expropriation under the terms of article 1110 of NAFTA. However, a threshold (Pope and Talbot) must be attained during this interference and a *significant* part of the use of the property must have been lost (*Metalclad*).

As underscored by Mann and Soloway (2002), this reasoning, which is still incomplete and being developed by NAFTA arbitration panels, offers no criteria for distinction between the measures for protecting the public well-being and other measures that would have a destructive effect in the more classic sense of international law. The only criterion used to determine the presence of measures tantamount to an expropriation therefore remains the degree of interference involving considerable repercussions for the investor. This uncertainty persists despite the fact that the arbitration panel in the *S.D. Myers*¹²³ case was somewhat more reassuring. It made a helpful distinction between the concepts of “expropriation” and “regulation,” the latter meaning lesser intervention by the government authority. The distinction between the two would make it possible to “reduce the risk that government would become the object of proceedings related to the administration of public affairs.”¹²⁴

The debate surrounding NAFTA’s mysterious article 1110 therefore focuses on the extent to which investors use the NAFTA provisions that relate to expropriation in order to obtain damages for regulatory and legislative measures promulgated in good faith to protect the public well being. Clearly, this does involve debate because, to date, analysis of arbitration decisions has not made it possible to clearly establish the concerns surrounding this provision. The issue is important because it deals with the very essence of government activities— legislate and regulate in the public interest. Once again, as Mann and Soloway (2002) have stated, if article 1110 can be used to require governments to indemnify investors for adopting measures in good faith, this could have *paralysing repercussions* on the capacity of governments to regulate, thus compromising protection of the environment, human health, etc. Although the issue of the right to equality and the right of women to equality is not mentioned in this context, it must be understood that resorting extensively to regulations in the matter of employment equity fits into the debate surrounding the right of investors to be indemnified for measures tantamount to expropriation. Is there a moment in which the

otherwise valid use of regulatory powers becomes an expropriation measure due to the extent of the repercussions on an investor? (Mann *et al.*, 2002).

The “Paralysing Effect” of Chapter 11 of NAFTA

Maureen Appel Molot (2002) raised the interesting question of the paralysing effect of NAFTA chapter 11 in her contribution to the Conference organized by the Centre for Trade Policy and Law of Carleton University. Although Professor Appel Molot acknowledged that no serious study had yet been conducted on this topic, she suggested that the government’s *behaviour* before the “threat” of NAFTA chapter 11 be examined more seriously. Is it possible that, anticipating a negative, even vindictive, reaction from investors, government action to protect national interests is slowing down?

Investors/employers subject to the EEA have been offered many informal and non-legal opportunities to express their dissatisfaction with EEA requirements. It is the CHRC, which is in no way accustomed to the exercise imposed by article 1110 of NAFTA, that receives these notices of dissatisfaction and, above all, must handle them. This management is part of a transaction-driven process between the businesses and the CHRC for verifying the employment equity plans of businesses. To what point can the CHRC control the arrogance of investors without compromising the EEA objectives? Many indicators suggest the conclusion that businesses are dissatisfied and that, even if they have the political wisdom not to question the employment equity model, they will denounce its complexity and unpredictability in some respects. The difficult position of the CHRC is made all the more complex because the EEA requires that every effort possible be made to obtain a negotiated employment equity plan.¹²⁵ Clearly, the EEA was not written with investor rights in mind. Nevertheless, these rights are likely to alter the relationships between the CHRC and businesses subject to the EEA that have investor rights. This grey area of negotiating desired outcomes, which is specific to proactive legislation and probably beneficial in a national context, must be clarified. Does the failure to better articulate on the one hand the obligations of businesses that are subject to the EEA and, on the other hand, the powers of the CHRC correspond, even unconsciously, to the paralysing effect raised by Appel Molot? It is impossible to know at present because the CHRC does not extend EEA analysis to the impact of trade agreements. *A fortiori*, the extent to which this paralysing effect may entail negative consequences on Canadian women is even more unclear.

What Have We Learned?

Negotiation of Chapter 11 of NAFTA and Womens’s Right to Equality

The NAFTA partners expected that chapter 11, on investments, would not be used to prevent them from applying on their territory measures that are necessary for protecting the environment. Likewise, as a preventative measure, Members ensured that they could resort to consultation if one Member felt that investment measures had been used by another Member to the detriment of national measures concerning the protection of *the environment, health or security*. What about human rights and measures likely to promote women’s right to equality in the workforce, including employment equity measures? These were relegated to cooperation under the terms set out in the NAFTA side agreement concerning labour cooperation.¹²⁶ Why? Very likely because the Members felt *a priori* that, despite the

amplitude of the terms related to protecting investor rights, chapter 11 of NAFTA could not adversely affect national regulation in that it did not result in discrimination against foreign investors. At present, we are unable to determine if they are right.

This situation reveals an incomprehension of the scope and meaning of equality guarantees in Canada. That is, the fact of prohibiting gender discrimination is not enough to attain equality. Women need legislation, programs and measures designed especially for them. This is the case of legislative and administrative measures for employment equity. The uncertainty surrounding the limits of investor rights and the definition of measures that are tantamount to expropriation puts an entire segment of Canadian regulation at risk in terms of whether such measures now exceed the degree of acceptable interference in foreign investments. This question is entirely “outside” the legitimacy of employment equity measures and is therefore imposed by the agenda of easing restrictions on investments. For Canada, this involves taking a position on whether or not we are in the presence of interference banned by the provisions of chapter 11 of NAFTA, with regard to the management of employment equity in Canada.

The Paralyzing Effect of Chapter 11 of NAFTA

We are particularly sensitive to the question raised by Professor Appel Molot, who speculated whether the greatest victory of chapter 11 of NAFTA was to paralyze, “by anticipation,” investor complaints regarding government “regulatory action.” We believe that this issue must be examined by the CHRC and HRSDC. An approach that combines the variables of “women”, “commerce” and “employment equity” would be an asset and would also benefit other groups designated by the Act.

The Environment and Human Rights, Including Women’s Equality Rights

As in the case of the environment, the protection and promotion of women’s right to equality depends on active intervention by the state, its actions to monitor and its sanctioning power. The Government of Canada must embark on a major undertaking to identify the pertinent employment equality regulations in order to put them to the “test” of investor rights. This undertaking should require the involvement not only of DFAIT, but also of those government entities involved with the issue of women’s right to employment equality, in particular HRSDC and the CHRC.

7. PUBLIC ORDER IN TRADE AGREEMENTS AND EMPLOYMENT EQUITY POLICY

In the name of public policy, partner states of trade agreements can exceptionally break their commitments as long as doing so does not have the effect of discriminating against foreign businesses or favouring the domestic market to their disadvantage. All WTO agreements include various statements related to the public order exception. The GATT makes provision only for the case of protection of “public morals.”¹²⁷ The GATS adds measures “necessary to protect public morals or to maintain public order.”¹²⁸ In this last case, an asterisk refers us to the meaning of “public order”: “the public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.” The AGP acknowledges the legitimacy of the measures imposed and established to protect “public morals, order or safety,”¹²⁹ with no further comment. The vagueness of the definition of public order increases when we take into account the wording of the exception contained in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS¹³⁰) in which public order is written in French in the English text, thus referring to the French concept of “ordre public” (public order), a concept that closely affects a state’s sovereignty. These exceptions are generally headed by a provision that specifies “that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.”¹³¹

Paragraph e) of article XX of the GATT provides that the GATT (1947) cannot be interpreted as preventing the adoption or application by any contracting party of measures concerning items made in prisons. A state could therefore block access to its market of such products under the guise of respecting the widely accepted ban on forced labour. However, in general, the alignment between the trade sphere and human rights sphere is preserved in the very wording of trade agreements.¹³² Given the asymmetry of the possibilities offered to states to disregard a trade prescription in good faith in the name of public health or morals, but not in the name of promoting human rights, we felt it was appropriate to explore the limits of the “public order exception” to address the question of whether this new international trade public policy includes human rights and, thus, women’s right to equality.

A vast literature (Jarvis, 2000; Charnovitz, 1998; Dommen, 2002; Bal, 2001; Bhala, 1998-1999) has recommended the public order exception as a recourse to 1) legitimize national policies designed to promote and protect human rights, or 2) to legitimize a state’s decision to impede the free circulation of a good or product when its manufacture results from labour conditions that violate basic human rights (child labour, forced labour, *de jure* discrimination, and so on). However, this literature tends to limit the analysis to the violation of human rights, the *jus cogens* character is recognized (in other words, those rights that are basic and essential to human dignity are shared by the international community and by state practice¹³³). Moreover, the American tradition of foreign trade policy focuses its efforts on a specific scenario—the scenario in which the domestic market could refuse access to a good because

its manufacture would have violated certain fundamental human rights. This implies a public policy on human rights that transcends the requirements of trade agreements and cannot be breached.

This literature has been inspired largely by advances in the field of the environment, although in this last case, the content of trade agreements is generally more generous and more explicit about possibilities for derogation. In short, the recognition of environmental considerations in trade decisions fares better than that of human rights requirements. Moreover, in this last case, the literature related to human rights is limited to the analysis of basic human rights, including gender equality, of course, but without necessarily considering the fate of proactive legislation adopted by developed states, especially in the Anglophone world.

The very idea of using the public order exception to protect proactive employment equity measures in Canada, as an expression of the right to employment equality, is fairly depressing in a way. It supposes 1) a possible incompatibility between trade agreements and human rights; 2) a weakening of state powers in relation to their affirmative obligation in human rights; 3) a “commercial” competence to provide for public order exceptions based on human rights requirements; and 4) a shared understanding of what constitutes the field of human rights, which we know is not the case in the international community, beyond the rights and freedoms that are deemed fundamental. However, above all, the public order exception understood as a “positive” exception, as an exception to protect human rights policy and legislation in trade remains an exception. It anticipates that there are cases in which trade rules must give way to human rights. In the specific case of employment equity measures, it anticipates that distortions to trade could result from requirements imposed by employment equity measures, and that they could prevail “as an exception.”

The public order exception is often combined with other public concerns, such as the need to protect life, health, safety, privacy and even, in the case of the GATS, legislation designed to control contract fraud. In the context of exceptions to respecting trade rules, public order is therefore reduced to “ordinary” status insofar as it is admitted that certain trade rules can sometimes and exceptionally give way to greater national concerns. However, proactive employment equity measures, as a form of expression of the right to equality and women’s right to equality, are not comparable to such concerns.

In the Canadian context, the basic values promoted by the *Canadian Charter of Rights and Freedoms* (and the equality standard) are associated with public order. The complex problem is therefore reduced to a simple question: is it conceivable that the Canadian employment equity model can benefit from protection in the name of the public order exception, in the event that it disregards the trade agreement requirements? The answer is no, and our findings are twofold. On the one hand, proactive employment equity measures do not belong to a group of basic standards, compliance with which is imposed for public policy in national legislation. On the other, the national conception of public policy is increasingly giving way to the international conception of public policy, in which merchant rights dominate.

The Concept of Public Policy Within a Comparative Perspective

In French law, Jean-François Romain (1995) places the concept of public policy in two categories, depending on the mode of application. First, he suggests “basic public order,” which includes the protection of fundamental human rights and freedoms and includes morals, principles that prevail over the action of individuals and the state. This first category of public order traditionally arises in defence of fundamental rights against the repressive action of the state. The second category addresses “essential public order.” It embodies the principles that tend to protect “the general interest realized in the legal, economic and social public order of the state.” On one hand, liberty and basic human rights are the purpose of public order, and on the other, the common interest is sought. The entire ambiguity of this legal concept is summarized in Planiol’s definition: “A provision of the public order whenever it is inspired by a general interest consideration that would be compromised if the individuals were free from hindering the application of the act [translation ours].”¹³⁴

In Quebec law, the notion of public order is set out in the Quebec Charter, from which Professor François Chevrette (1989) has drawn the following definition: public order constitutes “a concept that unquestionably is very wide ranging, and very likely includes [the concepts of national security, public safety, public health and morality] as well as the proper functioning of the legal system, crime prevention and protection of the rights and freedoms of others [translation ours].” Anglo-Saxon acceptance of public order is much more restrictive than its use in French law.¹³⁵ Considerations of *public order* above all concern the prevention of a public order disturbance. The terms *public policy* and *public order* are also used indistinctly at times.¹³⁶ However, the expression *public policy* could also include the principles of natural justice. Jean-Gabriel Castel uses the expression *public policy* (Castel, 1975).

A fairly broad definition of the public order exception must be regarded in light of Canadian legal culture and the international context. Canada rarely wishes to find itself in an awkward position in relation to its international commitments, particularly with regard to human rights. However, it is rare in Canada for a doctrine to address the particular place of public order, whether in Canadian or even Quebec law.¹³⁷

Basic justice, public safety and the respect of human rights draw on public order in Canadian and Quebec law. Insofar as women’s right to equality is a basic right, it follows that proactive measures to promote it should assume the same basic character. Yet, this vision is not shared by all national laws, far from it. Can this acceptance of Canadian public order, developed from a rich precedent in human rights, survive the emergence of international public order, the contours of which outlines are not determined by Canadian tribunals? European Community law has developed a regional public order that is concerned with respecting human rights. However, it deviates for reasons particular to international trends.

J. Dollinger (2000) has noted an increasingly strong tendency to consider a truly international public order that exceeds the limits of private international law (management of conflict between laws). The appearance of a European public order illustrates this assertion. Article 30

of the new Treaty of Rome makes it possible to override the only rule that prohibits quantitative restrictions on trade between member states, for reasons of public morality, public order and public security. These derogations must not be used to impose arbitrary discrimination disguised as trade. This provision and a restriction set out in similar terms are found in the GATT.¹³⁸ The public order exception is also set out in article 39(2) of the new Treaty of Rome (restrictions on freedom of movement), in article 46 (the special provision for foreigners in terms of freedom of establishment), and in article 55 (the freedom to provide services). Lastly, article 58.1(b) “enables states to take all indispensable measures to oppose breaches of their laws and regulations (...) or to take measures justified by public order or public safety” (Castillo *et al.*, 2001). The Treaty of Rome seems to leave considerable leeway for member states of the European Union to exercise their sovereignty through these general exceptions to the terms of the treaty. However, Castillo and Chemain (2001) claim that the legal system based on the common market tends to weaken states’ discretionary power, even though they do not anticipate the eventual disappearance of recourse to the public order exception.

Community law thus refers to national conceptions of public order. According to the Court of Justice of the European Communities (CJEU), the addition of the concept of “public safety” and “public health” locates public order and makes it possible to avoid having states abuse derogations to community rules. For the Court, public order exceptions must be understood strictly.¹³⁹ The application of a uniform community law justifies the control of exceptions exercised by European institutions. This trend is gradually giving rise to a truly communitarian, or European, public order in a community that gathers in one interdependent system for economic liberalization, social order, and legal order.

The concept of “European public order” appeared in European jurisprudence with the judgement in *Loizidou v. Turkey*, in which the European Court of Human Rights¹⁴⁰ ruled that it must “take account of the particular nature of the Convention of Rome, instrument of European public order for the protection of human beings.”¹⁴¹ In the *Soering* case, the Court even gave priority to the *Convention for the Protection of Human Rights and Fundamental Freedoms* to avoid the application of another international convention related to extradition.¹⁴² Clearly, European public order increasingly dominates domestic public order. However, the situation is different at the international and transnational levels. Economic public order tends to dominate a public order that is concerned with human rights. Thus, and despite national traditions, including the Canadian and Quebec tradition, we must wonder whether a resolutely economic international public order will have the last word on human rights.

Public Order: Transnational or International?

International economic law is assuming such a scope that there has been mention of a unified *lex mercatoria* and the birth of a true legal system in its own right. Because trade agreements are one source of this *lex mercatoria*, other sources of which need to be sought in international arbitral practice, and since the concept of transnational public order first appeared in arbitration by the International Chamber of Commerce (ICC), it is relevant to proceed by analogy with international private law to reveal the meaning to give to public order exception as included in WTO agreements. In fact, although trade agreements fall under the category of international public law (linking states to one another), an analogy

can be drawn from private international law since the desired objectives of trade agreements are to favour international trade through “the interplay of international private agents.”¹⁴³

International trade arbitration experienced sudden growth in the 20th century by granting ever greater freedom to parties and institutions, leaving the national judge before a sentence based on the exogenic rules of national law, but straining it nonetheless (Racine, 1999). The last defence of the sovereign state is the public order exception. However, it is not certain that it would be given a great deal of weight in international arbitration.

In the past 20 years, the concept of a “truly” international public order has appeared in several ICC decisions. This involves a public order the existence of which is based on the rules of international law that are aimed at ensuring order, safety and stability in international relations. The arbitrators considered that reprehensible acts were detrimental to truly international public order, from the point of view not only of positive mores, but also of economic morals.

Some would even say that the *lex mercatoria* could impose its public order by influencing arbitration decisions and by replacing a state’s own laws.¹⁴⁴ Moreover, the growing importance of public order to protect the harmony of international economic relations from the sovereigntist wishful thinking of states no longer tends to be limited to private economic international law, but covers various jurisdictions of law and international relations (Dollinger, 2000).

Several authors (Dollinger, 2000; Oppetit, 1993) see the concept of transnational public order going beyond the simple field of international trade arbitration, to incorporate international public law. Thus, trade practices that run counter to common public morals (corruption or influence peddling) are prohibited and succumb to several international arbitration decisions in the name of transnational public order. Some ethics are also considered, excluding lawful trade in products that are contrary to public morality. Thus, trade in narcotics or counterfeit money is excluded from trade agreements. In addition, cultural goods are subject to various conventions aimed at ensuring their protection from pillaging and theft.¹⁴⁵ The values that “obtain a fairly broad consensus” are justice and security, but also “the value of life, the value of property, the value of competition and the control of economic activity, in the name of the public interest [translation ours].”¹⁴⁶

The universally acknowledged values are thus limited and do not refer to all of the rights protected by the instruments of human rights. Values related to economic activity tend to predominate, and are the only values at present to be accepted in the name of a transnational public order. This is why many voices have pleaded for the inclusion of internationally recognized human rights in the public order and public morality exclusion from trade agreements.

However, should this theory triumph, despite the terms of trade agreements and the trend to distinguish between trade and human rights, it must still be acknowledged that such exceptions would be subject to the principle that they must be “necessary” and constitute an alternative measure that limits trade as little as possible (WTO, 2003).

In conclusion, the evolution of the notion of public order in Canadian and Quebec law makes it possible to affirm that the human rights guaranteed by the Canadian and Quebec charters must be considered as part of this public order. As in the case of French law, and in compliance with the evolution of instruments of international human rights, Canadian and Quebec public order protects the functions of the state (security, morality), but also the citizens against abusive intrusions or omissions of the state that are detrimental to the population and to the promotion of their rights. Obviously, the spirit and letter of charters mean that women's equality rights, and the proactive mechanisms to promote this right in the workforce, can be protected in the name of the public order. It is accepted that the government must intervene in the working sphere to promote the right of women to full equality at work.

The question is different when faced with the reality of trade agreements. If those who hold rights under trade agreements challenge, for reasons we have explored, the Canadian employment equity model that is imposed on those of them that are Canadian employers, then could Canada claim that public order allows it to derogate its trade commitments? Nothing is less certain. And even more so, nothing is less desirable! There is no advantage to conceptualizing human rights as derogations to trade rules.

Therefore, superimposing national law and international economic law creates a "public order" conflict. However, in the event that trade arbitration draws its source from a trade agreement and the principles of international economic law, it goes without saying that the merchant public order would dominate the public order that is intended for protecting persons, even if the source of the derogation was to respect women's equality rights. Some have tried to resolve this conflict by invoking *jus cogens* or the general legal principles that characterize human rights, which would dominate international economic law and trade agreements. This theory is disputed by those who assert that the risk of conflict is rare and that, in any case, the WTO or NAFTA rules are *lex specialis* and concern only trade (Marceau, 2002). In short, the issue remains open to debate.

In all cases, and assuming that the primacy of human rights over trade is recognized, it remains to be determined which rights are being discussed. In this regard, the most serious indication is provided by the *ILO Declaration on fundamental principles and rights at work* adopted by the International Labour Conference in 1998:¹⁴⁷ freedom of association and effective recognition of the right to collective negotiation; elimination of all forms of forced or mandatory labour; effective abolition of child labour; and elimination of employment and occupational discrimination all express the fundamental rights, the legal value of which is not contested by any ILO member state. Employment equity measures are an extension of the value of equality and its corollary, the prohibition of discrimination, but this extension or this proactive mode of implementing the prohibition of discrimination is not necessarily included in the universalistic vision of prohibiting discrimination in employment.¹⁴⁸

In short, Canadian policies designed to promote women's right to employment equality (via employment equity), should they conflict with merchant rights in Canada, cannot be protected by resorting to the public order exception in the sense evoked by trade agreements or intended by international economic law. This finding provides additional support to our

main argument, which recommends that Canadian employment equity measures be strengthened “in respect of Canada’s trade commitments and the agreements that it has ratified.”

CONCLUSION TO PART 2

In conclusion, we can distance ourselves somewhat from the legal ground, in order to ask more political questions. These questions mainly express some concerns about the women's movement in Canada and Quebec when trade agreements are struck. Our analysis revealed that the Government of Canada can, without undue effort and if it so desires, take the corrective action necessary for employment equity measures¹⁴⁹ to protect them in the context of its international trade commitments. It is appropriate to speak of corrective action because trade agreements do not invalidate national public policies related to the employment equality of women. However, they do increase the requirements for the transparency of the standard, program administration, and the expectations of foreign businesses. Does the Government of Canada desire such reinforcements? This choice would go against the ideology of "less state" and the deregulation movement begun by the Canadian state. Yet, it is not the legal consequence of trade agreements; rather it is the source and ideological consequence thereof.

The opinion of investors, contractors and foreign producers who hire in Canada must also be taken into consideration. While it was common to receive criticism from businesses about employment equity in a totally "domestic" context, the arguments against employment equity that arise from concerns about competitiveness, productivity, even quite simply the costs created by the implementation of employment equity plans in businesses, take on another shape when placed in an international context. In fact, in some respects, this criticism is no longer simply criticism. It is also the veiled expression of grievances based on the "rights of foreign businesses" that hire in Canada. The employment equity decision-makers feel this new resistance. Does Canada have the political means for its public policies? This question has a specific impact on the rights of Canadian women.

It is difficult to say, because there is no methodology in Canada designed for the systematic and preventive review of the effect of trade on national policy designed to promote the right of Canadian women to employment equality. However, these questions can be considered only on a case-by-case basis, depending on the trade agreements involved. In the case of employment equity measures, we have reached the conclusion that trade agreement ratification by Canada means that more trade also requires "more state." Is this politically viable?

The last part of this study looks specifically into the issue of the need for gendered or gender-based analysis of international trade and national public policies. It does not reinvent the wheel, as many studies and models are devoted to the matter. Rather, it submits these models to the specific requirements of the topic under analysis (public policies designed for women) in the context of developed societies where state apparatus is sophisticated, as are the modes of implementing women's right to equality. Here, employment equity measures serve as a benchmark.

PART 3: THE IMPACT OF TRADE AGREEMENTS ON CANADIAN REGULATION OF EMPLOYMENT EQUITY: CONCLUSIONS AND RECOMMENDATIONS DRAWN FROM THE CASE STUDY

9. GENDER-BASED ANALYSIS AND THE IMPACT OF TRADE AGREEMENTS: AN EMERGING ISSUE

GBA and Development

Gender-based or gendered analysis (GBA) emerged from debates in the 1970s surrounding the complicated intersections between Marxism, feminism and development. Today, new realities are at play, including the reality of international trade. Nothing currently contests the fact that seemingly neutral policies have different effects on women and men. GBA expresses the need to develop “measuring” tools designed to determine this impact. In accordance with the theory of gender equality, there are many situations in which identifying the detrimental effects of a policy specific to women leads to the need to implement suitable solutions to correct the disadvantages experienced.

The first GBA tools were designed to analyse developmental policies (Overholt *et al.*, 1984; Moser, 1993), an area in which divergent approaches clashed. Overholt *et al.* (1984) suggested a model centred on identifying development solutions based on women’s needs. This model disassociated itself from the issue of organizing power relationships to favour the design of development policies that were adapted to women. Moser (1993) developed a model for taking into account women’s needs that went beyond simply correcting inequality. According to Moser, who contributed to the work of the World Bank, the main objective of development policies that take into account the aspect of gender is to restore women’s autonomy of decision making while contributing to fighting poverty and inequality in development.¹⁵⁰

Recently, Hlupelik Longwe (2001) and Kabeer (1994) inquired further into the integration of social concerns, the need for women to have more political and economic power, and the recognition of women’s right to participate in managing primary resources. The work of Hlupelike Longwe made it possible to spread the model of the Women’s Empowerment Framework. The author describes *empowerment*¹⁵¹ as a “process by which a person, or a social group, gains control over the means that make it possible to become personally aware, strengthen one’s potential and transform oneself from the perspective of developing and improving one’s living conditions and environment [translation ours].” Hlupelike Longwe’s method of analysis proposes markers¹⁵² to identify the level of empowerment of a measure, program or policy.

The ideal measure is one that emanates from the women concerned by this measure, enabling their control over its implementation and execution (Hlupelike Longwe, 2001). Hlupelike Longwe refers to the “cycle” of empowerment (Hlupelike Longwe, 2001). The Women’s Empowerment Framework has a more political connotation than other methods of analysis. However, it does not take account of the interdependence of economic and social measures.

This process of interdependence between norms and behaviour is at the heart of the discrimination to which women are subject. Kabeer (1994) has proposed examining the regulation processes as global processes for putting the human development of women at risk. Production is included in the broadest sense of all human activities that target well-being and poverty, as the consequence of unequal resource distribution, which Kabeer describes as being “the inequality of social relationships.” Here, gender relations are perceived as one facet of social relationships. For Kabeer, the source of gender equality gaps must be determined.

International trade and the institutionalization of trade entail many local, national and international regulations, the effects of which are not neutral for women. In particular, trade agreements influence women’s living conditions and rights, and this impact is distinct from that of which men bear the brunt (Brambilla, 2001; Joeques *et al.*, 1994; Haxton *et al.*, 1999). In this capacity, several studies have explored the effects of trade on women in developing countries (Allaert *et al.*, 2001; Allaert, 1997). Few studies or gender analysis models are suited to the needs and realities of women in developed countries, particularly with regard to the impact of trade agreements.

Trade Agreements and GBA

Gender-based analysis of trade policies was proposed by the United Nations (UN) and the International Labour Organization (ILO), among others, as a tool for preventing damage that could result from the blind application of standards that are not adapted to the specific needs of certain target populations. We note in this regard the efforts of various agencies, such as the United Nations Conference on Trade and Development (UNCTAD), to raise the WTO’s awareness of the need to take an interest in the impact of trade agreements on vulnerable populations. For example, UNCTAD, in collaboration with the United Nations Development Program (UNDP) and the Economic and Social Commission for Asia and the Pacific (ESCAP), submitted a document addressing the importance of a perspective based on gender-based analysis (UN, 1996) to the WTO Ministerial Review Conference in Jakarta in 1996.

Aside from these institutions, several women-based Non-Governmental Organizations (NGO) have featured the use of a gender-based analysis. This is the case of the Women’s Environment and Development Organization (WEDO), which recommended the implementation of gendered analysis on its site (WEDO, 2002). We also note the work of the Women in Development Europe (WIDE) Network, an umbrella agency that groups various NGOs,¹⁵³ and the work of the Association for Women’s Rights in Development (AWID).¹⁵⁴ In terms of research, some more recent work has analysed the impact of trade agreements and trade rules on the capacity of public and private agents to adopt rules that are designed to promote women’s equality. Note the work of Evers (1999) (IDS, 1998), for example. In effect, it is necessary to distinguish those efforts that are designed to integrate gendered analysis into international and regional trade institutions from those that more specifically try to promote the duty of states to analyse the impact of trade policies on their own capacity to adopt national policies for women. Moreover, Hassalani has stressed that the efforts of women who want to be heard in forums of the WTO and the future FTAA

have had few repercussions so far, despite the emergence of lobbies, such as the Informal Working Group on Gender and Trade (IWGGT), which attempts to make itself heard by the WTO. According to Hassalani, these groups have experienced some success with forums parallel to the WTO, such as the United Nations or the ILO (Hassalani, 2000). However, certain other breakthroughs should be noted.

The Asia-Pacific Economic Cooperation¹⁵⁵ (APEC) is the organization that has made the most serious efforts in integrating a gender perspective and analysis in trade and development. This effort is obvious, not only from an institutional point of view, but also because a large amount of data concerning women and trade were made available. The case of the ratio of women doing unpaid work is a good example of this. APEC also distributed data concerning women managing businesses and statistics on the types of job held by women, including salary brackets. The creation of the SOM Ad Hoc Task Force on the Integration of Women and the Ad Hoc Advisory Group on Gender Integration (AGGI) generated work studies that made it possible to adopt a Joint Statement on women, development and trade¹⁵⁶ during the 2002 APEC Ministerial Meeting on women. In 2001, the APEC AGGI prepared a guide for assessing the role of women in APEC projects and the impact of its projects on women. However, all of this effort is not necessarily reflected in the Collective Action Plans (CAPs) or Individual Action Plans (IAPs),¹⁵⁷ which are the annual reports related to the global economic policies of APEC and its member states. Nothing in these reports indicates a gender-based analysis of the impact of these policies (Gibb, 2000).

The European Commission is developing tools for measuring the social impact of trade agreements on entire populations, for both industrialized and developing nations. This is the Sustainability Impact Assessment (SIA) project (IDPM, 2003b). In addition, in 1995 the Commonwealth Secretariat adopted a Plan of Action for Development that incorporates the notion of gender. Gender-based analysis of policies was developed under this Plan (Sen, 1999).

The SIA is a vast project that focuses on the economic and social impact of WTO trade negotiations on both developed and developing countries. This project was ordered by the European Commission. It is directed by the Institute for Development Policy and Management (IDPM) of the University of Manchester, in the United Kingdom. The final report was submitted in 2003 (IDPM, 2003b). The project involves an estimate of the long-term impact of trade. These impacts are assessed in various liberalized trade sectors.¹⁵⁸ The novelty of the model rests on the fact that economic, environmental and social impacts were all assessed at the same time. To proceed with the evaluation, researchers used various types of markers, related to employment, gender equality, or equity.

The first objective of research was to advise European Union negotiators in rounds of negotiations with the WTO and to provide them with tools to assess the impact of measures recommended during negotiations. However, at this time, the published reports focus on certain aspects of employment equity that concern a generic group other than women—consumers. For example, the long-term impact of liberalization to increase the competitiveness of businesses on developed countries comes down to two things: the evaluation of the positive impact on the choice of commodities available to consumers and the positive impact on access to health services (IDPM, 2003a). The studies only touch on

the issue of the possible negative impact of liberalization of European trade on labour standards in developed countries (Kirkpatrick *et al.*, 1999). Thus, we had few preconceived notions when we ventured down the unknown path of the gender-based analysis of the impact of trade policies, and analysis of the capacity of states to maintain or adopt national regulations destined for women. This in large part justifies our use of a case study. Nor was the Canadian GBA model a great help, despite its virtues and successes.

Canada, GBA and National Policies

The method of gendered or gender-based analysis put forward by Status of Women Canada (1998) is broken down into eight steps. It is structured so that it reproduces the steps generally followed by government authorities who develop policies. The analysis, which is detailed in annex VI, aims mainly to clarify the issues raised by the measure (step 1), to define the desired results (step 2), to conduct research (step 4) and to assess the quality of the approach (step 8). This method explores the *source* of the regulation, in other words the standard that produces the equity or inequality. GBA has been successful, as shown in the case of Health Canada (2002) and the Canadian International Development Agency (CIDA) (1999).

Health Canada designated 12 determinants of health that include considerations related to gender-based analysis and to gender relations. These determinants are income and social status; employment; education; social environments; physical environments; healthy child development; personal health practices and coping skills; health services; social support networks; biology and genetic endowment; gender and culture. In 1993, Health Canada also created the Women's Health Bureau. This Bureau is not a program or a funding agency, but is generally concerned with policies. It works with the other divisions and branches of the department to promote the policies and programs that adequately meet women's health needs, to improve the understanding of gender as a determinant of health. The Bureau maintains relations with other federal departments, provincial governments and national and international agencies. Despite the great progress made in this regard, it seems that the impact of trade agreements on women's health (in terms of access to medication or the quality of medication, for example) has not been considered directly, nor does it seem that relations maintained by the Women's Health Bureau extend to DFAIT.

The case of CIDA also speaks for itself. For CIDA, gender equality ranges from women's access to decisions in the sustainable development process, to resources, to respecting fundamental rights, and to sharing and controlling the benefits of development (CIDA, 1999). The recognition guide for gender equality requirements encompasses several considerations: the environment, deforestation, access to basic services, etc., but not trade.

The GBA methodology intended for government decision-makers, includes a low potential for transversality when the effects of trade on women are concerned. By proposing the implementation of this methodology to each department, it is obvious that the inclusion of gender relations in policy development becomes disciplinary to some extent—health, for example. Of course, this facilitates imputability. Yet, trade itself is not monodisciplinary in nature. Decisions related to liberalizing trade traverse all government jurisdiction. A systemic application of GBA methodology would mean that DFAIT should assume all of

the analyses related to all trade policies that are likely to affect one or another field of jurisdiction of another department or organization, and this because international trade is within its jurisdiction. The problem is that, with the exception of foreign affairs, international trade is DFAIT's only jurisdiction! So, how can multidimensional aspects be considered, and particularly, how can this be integrated with considerations related to women and gender relations? DFAIT acknowledges that the issue is difficult and that it requires further consideration. Its representatives also acknowledge that it is difficult to broaden the "natural" circle of DFAIT partners (Industry, Trade and Commerce, Agriculture, and now HRSDC) and that, despite recent interaction, communication is neither clear nor sustained between DFAIT and Status of Women Canada, for example.¹⁵⁹ However, just as DFAIT's main jurisdiction is international trade, nor does Status of Women Canada hold universal jurisdiction within the federal government.

This brief overview of the situation indicates that, between recognizing the need for gender-based analysis of national and international policies, and the implementation of GBA strategies within the administrations of developing countries, some important links are still missing. Among others, the issue of subjecting trade policies to mandatory GBA clearly illustrates

the limitations of a "department-by-department" approach and the challenge that opening up this approach would entail. Ideally, a trade policy project, but more particularly a trade sector liberalization project with Canadian commitment, should be submitted to all departments concerned for opinions and advice. Not only is this not the case, but it must also be concluded that models still need to be created. In fact, in the specific case of trade agreements and commercial institutions, everything indicates that pressure from the women's movement toward inclusion of gender relations in developing and implementing such agreements is developing more quickly internationally than nationally. This situation is fairly anachronistic, insofar as it denies the day-to-day reality of women who are geographically and politically "situated".

The next section delves further into this issue, within the Canadian context. Drawing on the completed case study, it leads to recommendations that are designed to promote useful dialogue at the national level between women and DFAIT, and to a consideration of gender-based analysis of the impact of Canadian decisions on international trade.¹⁶⁰

10. THE ABSENCE OF CONSULTATION MECHANISMS AND A FAILURE TO CONSIDER THE IMPACT OF TRADE ON CANADIAN WOMEN

To support this proposal, we decided to focus our analysis on two aspects: DFAIT's own consultation mechanisms, and the recent work by the parliamentary Standing Committee on Foreign Affairs and International Trade (SCFAIT), which held important hearings in 1999 and 2001 on the impact of trade on Canadians.

DFAIT

When trade policies need to be developed, DFAIT has recourse to several advisory agencies. In 2000, Hassalani drew up an inventory of these advisory agencies, yet SCFAIT remains by far the broadest forum for consultation. Obviously, it does not fall under DFAIT. Consultations organized by the SCFAIT are made on an *ad hoc* basis, and not on an institutional or permanent basis (Hassalani, 2000).

DFAIT regularly conducts federal-provincial-territorial consultations, often under cover of discretion. Business representatives are sometimes invited (Hassalani, 2000). Consultative mechanisms include Sectorial Advisory Groups on International Trade (SAGIT). Though unions were once involved in the work of these groups, this is no longer the case, and women are clearly under-represented. To satisfy our curiosity, we requested and received from DFAIT the list (2002) of the members of three of these sectorial groups: Health and medical services, Services and Environment. The "Health and medical services" Group included three women (out of 19 members). They represented the pharmaceutical and hospital sectors. The "Services" Group had four women (out of 20 members) and no members represented the unions, much less consumer protection groups. The "Environment" Group included two women, including one representative from the Sierra Club of Canada. Of course, the claim is that these groups are of interest mainly to the business community. However, considering their influence on trade policies, should this impression not be reviewed and the SAGIT opened to other representatives, including women?

DFAIT also maintains a dialogue with two advisory groups that come directly under the Office of the Minister of Foreign Affairs: the Team Canada Inc. Advisory Board, composed of 20 industry spokespersons,¹⁶¹ and the Academic Advisory Council on Canadian Trade Policy, which is composed of specialists in free trade. This group is the reflection of the list of experts surveyed by DFAIT in its studies on academic research into free trade. According to a survey (Mugga, 2002), only 5% of research and opinions solicited concern the social arena in the broad sense. Moreover, note that these first two groups do not appear on the DFAIT site and, that therefore, their existence cannot easily be known to the general public.¹⁶²

Major Consultations

Since 1999, the Canadian Parliament has held three major public consultations devoted to the impact of international and regional trade on the lives of Canadians (Parliament, 1999a,

1999b, 2002). We felt it appropriate to verify whether issues related to considering the point of view of Canadian women on trade, and issues related to the gender-based analysis of the impact of trade, had been addressed in any way in the course of this work.

The 1999 consultation on the WTO and the Program for the Millennium gave rise to several recommendations, which echoed to the general dissatisfaction with the secret and non-democratic nature of trade negotiations. This was also at the peak of debates on the inclusion of a social clause in WTO agreements.¹⁶³ Several recommendations dealt with these concerns. Recommendations 1, 4, 5 set the tone on the subject of consultation. However, none of the recommendations include an explicit or particular commitment involving women, their general rights or their right to consultation and information. Of the four women's groups that participated in the debates, none made a recommendation in this regard, nor statements to promote GBA in trade agreements or even in determining trade policy in Canada. However, environmentalists were better at making themselves heard. Thus, the Government of Canada created a place of examination and a mechanism related to the environmental assessment of trade negotiations under way within the WTO.¹⁶⁴

Should it be a surprise that no women's groups appearing before the SCFAIT in 1999 attended Committee hearings in 2002 on the new WTO round? Recommendations from the most recent round of consultations placed greater importance on the lack of transparency in the trade agreement negotiation process:

That the Government of Canada actively and with renewed urgency continue its efforts to achieve WTO consensus on the establishment of a permanent WTO parliamentary mechanism to provide closer association of Members of Parliaments and elected officials with the work of the WTO, and in connecting the WTO with citizens and the global public. Issues to be addressed in designing such a mechanism include: how to structure and finance the organization; how to determine representation; and how to define its institutional links with the WTO (Parliament, 2002, recommendation 26).

However, once again, the gains are greater for the environment:

That the federal government propose to WTO Members that the International Labour Organization and the United Nations Environment Programme be allowed to contribute their specialized expertise to the negotiating process (Parliament, 2002, recommendation 28).

SCFAIT hearings held in 1999 on establishing the FTAA reported even smaller gains from the standpoint of including the interests and rights of women. Only the National Action Committee appeared at that time. In the context of these hearings, SCFAIT decided to promote the respect of basic labour standards in trade agreements, without even exploring the issue of the relationship of women in trade and labour, or even the pertinence of the 1998 ILO Statement on the fundamental rights of workers¹⁶⁵ from the standpoint of women (Parliament, 1999b, recommendation 10).

In conclusion, we believe that it is not an exaggeration to state that relations between Canadian women, DFAIT and Parliament are at an impasse regarding trade, with the exception of the case of women entrepreneurs.¹⁶⁶ Why? A few explanations are plausible:

- DFAIT is not a department that has shown a particular commitment toward GBA;
- the GBA methodology developed in Canada gives preference to a thematic and sector-based approach that is not favourable to the gender-based analysis of trade policies and the impact of trade agreements;
- DFAIT did not consider developing a proactive and educational approach designed to interest women and their representative associations in the realities of trade agreements and the processes and procedures of ad hoc or regular consultations that go with them;
- research designed to promote the gender-based analysis of the impact of trade agreements on national and infra-national regulations is a long time in coming in developed countries;
- women and their representative associations are neither in a position to take an interest nor interested in this issue.

This last theory requires some commentary.

Women and Trade

In the past year, we have unsuccessfully tried to interest certain women's groups in our work, particularly in Quebec. This strange quest led us to the discovery that, aside from the significant opposition of women to the politically legitimate integrating effect of trade agreements, the technical knowledge of what a trade agreement is, and what rules they promote, is widely lacking. Perhaps we can make an exception here with regard to chapter 11 of NAFTA on investments, and around which large sections of Canadian civil society are organized. Representative associations of women are more "naturally" inclined to think "outside the box" than inside, despite the reality of economic integration. Consider this concrete example: For all practical purposes, it was impossible to organize a workshop or consultation dealing directly with the actual mechanism of the "lists" of the GATS, as the WTO agreement was still firmly established, rightly or wrongly, in the role of "fox in the henhouse of the common good." However, the involvement of women and their representative associations in preparing the Initial Conditional Offer that Canada submitted in March 2003¹⁶⁷ to the WTO could have been a training hotbed. Only a very small group was aware of this approach while, on the other hand, the business community was mobilized. This proves that the DFAIT strategy designed to consult Canadian women on-line has some obvious limitations. However, the ground rules are clear: in order to be consulted effectively, it is necessary to be well informed.

In such a context, it is understood that the main question raised by our case study, namely the gendered analysis of the impact of trade agreements on Canadian regulation promoting the equality of women, is premature for consultation purposes. Some researchers suspect that one of the victories of trade agreements is to contribute to creating a paralysing effect

on domestic regulation (Appel Molot, 2002), despite the content of these agreements. If they are right, the deficiency in Canadian women's knowledge would be even more dramatic.

With the help of *Services aux collectivités de l'UQAM*, the institution to which the author of this report belongs, it was agreed to organize an initial community training session for groups of women that would address the content and general rules of trade agreements. This is a start. There are four objectives to this: 1) to publicize the basic rules of international trade and trade agreements, which are multiplying endlessly; 2) to identify the places and moments in the life of trade agreements of which Canadian women may need to be consulted and effectively heard in order to set forth a gender perspective in trade policy in Canada; 3) to encourage the development of a basic methodology that would make it possible to create ties between local regulations that are favourable to women and the impact of rules and trade agreements on them; and, lastly, 4) to generally demystify trade agreements. We feel these objectives are prerequisites to the claim for effective and systematic consultation in developing trade policies that respect the right of Canadian women to equality and dignity. As we see it, the question is this: what is the true role in the impoverishment and exclusion of Canadian women, of international trade rules (Lamarche *et al.*, 2003)?

11. SOME RECOMMENDATIONS

1. Broaden the scope of GBA to include Canada's trade policies and commitments, as a function of the importance of domestic regulations for the equality of women.

Trade must be removed from DFAIT and the scope of GBA must be broadened. A department or organization that is not a "natural partner" of DFAIT (Industry Canada, for example) will likely not be informed in due time of the progress of international trade negotiations or the requirements that stem from Canada's trade commitments and may influence regulation, for the supervision, compliance and implementation of which it is responsible. This same department or organization, in conducting a gender-based analysis of the impact of its policies and programs, is not very likely to check whether existing or planned policies that would favour the equality of women and gender equity comply with Canada's trade commitments, particularly in accordance with trade agreements, except when so alerted by civil society.

We recommend that, in the GBA methodology recommended by Status of Women Canada, the requirement be explicitly set out to assess the stakes of a domestic policy, program or regulation by the yardstick of Canada's trade commitments, and this in order to evaluate the impact of these commitments on the capacity of a department or organization to retain such programs that are likely to directly or indirectly improve the fate of Canadian women.

This requirement could include a suitable mechanism of departmental accountability.

2. Promote conditions for active dialogue between DFAIT, Canadian women and their representative associations.

DFAIT has useful networking groups with the public and the business community, including Sectorial Advisory Groups on International Trade.

DFAIT, which is currently cut off from associations that represent women in Canada, could consider regular and statutory participation in these associations on the work of SAGIT, in particular through the intervention of unions, committees dealing with the status of women, and professional associations with a significant percentage of female employees.

3. Oblige the Government of Canada and DFAIT to proactively train and inform Canadian women.

In its most recent Global report under the follow-up to the ILO declaration on fundamental principles and rights at work titled *Time for equality at work* (ILO, 2004), the International Labour Office (ILO) reserved a section of the report for an integrating of gender issues and for an audit. It notes that the integration of concerns tied to gender relations and gender equality are not limited to the prohibition of discrimination. As an example, the ILO acknowledges the low concern for women's interests within the World Commission on

the Social Dimension of Globalization (World Commission, 2004), created recently. Furthermore, organizations that control human rights instruments assert more and more clearly the proactive obligation of states regarding gender equality.

When this involves international trade and Canada's trade commitments, Canadian women are deprived of useful information that would enable them to grasp the impact of trade agreements on their living conditions and on the regulation that promotes their right to equality.

It is essential and urgent that the Government of Canada, through the intervention of Status of Women Canada, facilitate the deployment of "training" measures designed to increase Canadian women's participation in and attention to the trade commitments signed by Canada.

4. Intensify the participation of Canadian women in SCFAIT's work.

The participation of Canadian women in SCFAIT's work must be intensified. The recent SCFAIT hearings on international trade and the interests of Canadians were poorly attended by associations representing women. From 1999 to 2001, this participation, already poor, actually decreased. As a result, none of the recommendations of the Committee or Sub-committee on trade, trade disputes and international investments specifically concerned the interests of Canadian women or the issue of Canadian women's right to equality or gender equity in international trade.

SCFAIT must work to garner the well-informed participation of women, and the associations that represent them, in their future activities.

5. Conduct research on gender at DFAIT.

DFAIT must broaden its field of analysis in order to include the social dimensions of international trade. To our knowledge, no study has been conducted concerning the gender-based analysis of the impact of the trade policies and agreements that bind Canada. Nor do any research programs aimed at such objectives exist.

DFAIT must identify those areas of national regulation that contribute to gender equality and submit them to an independent analysis as a function of trade agreement requirements. Employment equity policies, health policies, child care policies and education policies should be deemed a priority due to the daily impact they have on the life of Canadian women. This research should be widely publicized.

It seems to us that these are the minimum recommendations that would prevent us from noting once again, as we were called upon to do, the complete *disconnection* between trade policies, Canadian women and the national mechanisms designed to promote the equality of women.

The next and final section of this study is set aside for recommendations that are specifically designed to retain the Canadian employment equity model, given the trade agreements to which Canada is party and the commitments it has signed under these agreements. In many cases, these recommendations are technical in nature and concern certain particular WTO and NAFTA agreements. They follow directly from the analysis in the previous sections. Although we are not proposing an “all purpose” model, we believe that the recommendations would provide a context from which other Canadian policies likely to promote Canadian women’s right to equality could also be analysed. The recommendations propose downward and upward slopes for trade policies, although with regard to the case study, we can only react *a posteriori* and note that no previous review has been conducted on the impact of trade policies on the mechanisms that are designed to protect and promote the labour rights of Canadian women.

12. PATHS FOR RETAINING THE CANADIAN EMPLOYMENT EQUITY MODEL WHEN STRIKING TRADE AGREEMENTS

The recommendations set out in this sub-section are organized by four topics: 1) the negotiation dynamic and the negotiation of trade agreements; 2) strengthening the FCP; 3) the need to strengthen (and, thus, amend) the *Employment Equity Act*; and lastly, 4) the need to increase collaboration between HRSDC and the CHRC. These recommendations take into account the most recent assessments conducted on the topic. More particularly, we note the report of the Standing Committee on Human Resources Development and the Status of Persons with Disabilities (SCHRDP, 2002a), which was a result of the first five-year review of the Act; the HRSDC report on the assessment of the FCP (HRSDC, 2002); and, lastly, the independent audit report conducted on behalf of the CHRC and dealing with the Employment Equity Division.¹⁶⁸ None of these studies has taken into account the “trade” aspect of employment equity measures from the standpoint of their compliance. Yet, this is precisely what matters! The recommendations that follow suppose that the alignment that distinguishes the analysis of so-called “domestic” and trade policies in Canada is no longer viable in the current context. Likewise, the application of the GBA model to “domestic” policies does not enable better consideration of the effects of trade on women, because it, too, isolates the “domestic” policies from one another and it does not integrate the “trade” variable into each of these analyses.

Negotiate and Re-negotiate the Content of Trade Commitments by Taking into Account Domestic Employment Equity Regulations

It seems that three aspects of the issue of a gender-based review of the impact of trade agreements should be noted here: consultation with women’s groups; a break-down of data on the employment of women as a function of trade commitments made by Canada; and, third, the very content of international or regional trade commitments and agreements.

Consultation

Our study confirmed the need to develop, before and after trade agreements and trade commitments are concluded by Canada, an inter-departmental, inter-agency and inter-governmental methodology designed for the consultation and evaluation of the impact of these agreements and commitments on domestic control and regulation likely to promote women’s right to equality. We include employment equity measures (legislative or otherwise) in this category. In terms of employment equity, we conclude that, paradoxically, trade agreements that bind Canada require the reform or abandonment of such measures. These measures are not illicit, but rather imperfect given the requirements that stem from the agreements examined. Communication with the CHRC¹⁶⁹ confirmed that this new challenge has never been addressed, systematically or accidentally, between CHRC and DFAIT, and this is only to speak of the policy that concerns us.

6. **DFAIT must develop a consultation system with the other federal departments and agencies and with other levels of government to assess the impact of a given commitment on Canadian policies and regulations that contribute to promoting women's right to equality, BEFORE Canada ratifies that trade agreement.**
7. **This consultation must not be directed *a priori* toward DFAIT, but rather be accessible to all government stakeholders in order to promote a cross-sectoral approach for analysing the impact of trade agreements on women and on domestic regulation, on which the promotion of equality depends.**
8. **Following ratification of a trade agreement, DFAIT must encourage each organization and level of government to assess the need to reform and adapt legislation, policies and programs likely to concern women, as a function of the trade commitments made.**
9. **In every case, particular attention shall be paid to the legislation and programs that are directly linked to human rights and the implementation of women's fundamental right to equality. Such is the case of the *Employment Equity Act* and the FCP, the implementation of which depends primarily on HRSDC and the CHRC.**
10. **Rather than make DFAIT the only authority for considering the gendered effects of trade agreements, the government must establish that DFAIT's role is being that of a "watchdog," for which each organization and department would also be responsible.**
11. **This specific responsibility of DFAIT could be described as one of the specific applications of the GBA method recommended by Status of Women Canada to DFAIT.**

In our view, this innovative use of the gender-based analysis of trade agreements is the best guarantee against the risk of regulatory inertia that is presumed to result from trade agreements. In this way, the particular nature of Canadian policies for the promotion of women's employment equity rights would be protected from challenge "by default."

The Breakdown of Data Related to the Employment of Women and Trade Agreements

The Canadian employment equity model depends on certain realities that are to the structure of businesses, including their size (one hundred employees or more) and their activity sector (federal jurisdiction). The new economic situation has already adversely affected the premises of this model; businesses break apart and the employment of women manifests itself based on the location and type of employment (homebound, part-time or independent employment). This brings consequences with regard to women's capacity to obtain their proper share of the job wealth and jobs of equivalent quality to those that were historically allocated to them through employment equity measures. Moreover, recent data indicates that the "new" employment of women is growing in some specific sectors, including the services sector, of course.

Trade agreements to which Canada is party assume Canada's determination (in an international "give-and-take" relationship, needless to say) of specific parameters, the function of which is to define trade sectors and sub-sectors that may or may not be subject to new rules of ratified agreements. Sectors may be liberalized gradually or kept apart from the desired liberalization. This negotiation is not stopped once and for all, but is instead continuous. There are rounds of negotiations. Government research tends to presume that liberalization is necessarily good for the employment of women because it promotes economic growth and, in some cases, the growth of employment in absolute terms. However, nothing leads us to believe that in following upon this assertion, particular attention was paid to the link between the type and sectors of business present in Canada (which were affected by this liberalization movement) and access by female workers to the benefit of employment equity measures. Jobs can be created, but it is less obvious to create quality jobs in businesses and sectors that are subject to employment equity measures. Likewise, the employment of women can be promoted, but what effect does liberalization have on sectors and the size of businesses that are likely to employ women?

In the case of the AGP, the liberalization movement, still greatly moderated, tends to enable foreign businesses operating abroad to obtain government contracts for providing goods or services. In this context, Canada can choose government entities and the nature of the contracts that will be subject to this liberalization. Based on these choices, the employment of women in a bidding business and the quality of jobs thus created in Canada will vary. The more open government contracts are to foreign businesses, the less effective the FCP is. In fact, it concerns only businesses operating in Canada and hiring more than one hundred employees.

A third point must be raised here. In Canada, there is a program that sets aside certain government contracts for aboriginals. The first part of this case study discussed the PSAB. It is hoped that this program benefits aboriginal women directly (women entrepreneurs) or indirectly (women employed by aboriginal businesses), but this data is not available. In any case, we were surprised to note that the federal government, more particularly DFAIT, is not considering extending this program to women entrepreneurs in general. As we have mentioned, nothing in the Memorandum addressing Canada's ratification of the AGP or NAFTA would indicate such a consideration. Moreover, the PSAB offers enough guarantees of transparency and equity so that a claim cannot be made that such a program for women in general contravenes the rules of the AGP or NAFTA. In this regard, it is a moot point because, it seems, owners of small businesses prefer the benefits of liberalization and of the rules set by the AGP. But what about women?

There are no answers for any of the scenarios above. Of course, the federal government has general data on employment, but it has not analysed the data to determine how liberalization in industry sectors increases or decreases the access of female workers to employment equity measures, as a domestic regulation that contributes to promoting women's right to equality.

12. In all cases in which the federal government and DFAIT set consultation and negotiation processes in motion to establish or increase the Canadian industry sectors and sub-sectors subject to liberalization, an analysis should be conducted to

determine the impact of planned liberalization on the scope of the *Employment Equity Act* and the FCP. As an organization accountable for checking businesses' employment equity plans, the CHRC could give DFAIT relevant advice in this regard. As a department accountable for the *Employment Equity Act*, the same can be said for HRSDC.

- 13. The eventual increase in the number of governmental or sub-governmental entities that are subject to the rules of the AGP, and the revision of the types of goods and services procured by entities that are excluded from this agreement, should be subject to the same review.**
- 14. The federal government and DFAIT should consider initiating a consultation that assesses interest, within the community of women who own small and very small businesses in Canada, in benefiting from Canada's position in the AGP and NAFTA which could provide that these agreements would not apply to contracts set aside for small businesses and businesses owned by minorities.**

Choosing to Influence the Interpretation of the GATS, the AGP and NAFTA

In this study, we have stressed that environmental issues receive more attention than human rights issues in the content of trade agreements. Likely the most eloquent example is article 1114(1) of NAFTA, which sets out the possibility for member states to legitimately adopt protection measures that are likely to contravene NAFTA content related to public health and safety or the environment. So, how can employment equity measures in Canada be protected in a context of silence? Some vehicles set out by the trade agreements we have examined might contribute to making the legitimacy of such measures more obvious and conclusive, in following upon the interpretation of trade agreements. Nothing prevents Canada from contributing to the development of a certain "state practice" designed to assert such legitimacy.

NAFTA member states have used such methods (the Memorandum of Interpretation) when they felt that chapter 11 could threaten the legitimacy of internal regulations with which investors had been unhappy. Using the customary standards of international law, they indirectly confirmed that the development of standards does not mean that the regulatory action exercised in good faith by a state is the same as a direct or indirect expropriation of foreign investors.¹⁷⁰

In the context of the WTO, some participants "beat around the bush" following the ratification of multilateral agreements, such as the GATS. Discussion ensued to fully ensure that it was understood that proactive employment equity measures in no way contravene the GATS rules. There was discontent.

It seems to us that Canada, and the other states that promote the proactive practices and measures of employment equity designed for women, among others, should bring its national gains to the international scene to avoid unanticipated blunders. The country has some access to certain such methods to this end. Moreover, the Canadian practice

of employment equity, as with other programs designed for the social promotion of disadvantaged groups, has received the support of provincial and territorial governments, which did not hesitate to confirm in the AIT that such programs express legitimate objectives justifying non-discriminatory derogations of the rules set out by the Agreement.¹⁷¹

- 15. In all of the institutional forums available, particularly within the NAFTA Free Trade Commission, Canada should take every opportunity to assert that Canadian employment equity programs, and all of the programs designed for the social promotion of disadvantaged groups, are a reasonable and legitimate exercise of Canada's right to implement the fundamental right to employment equality (for all its citizens).**
- 16. In terms of the WTO, Canada could consider taking the opportunity to submit periodic reports to the Trade Policy Review Mechanism (TPRM)¹⁷² in order to reiterate the legitimacy of Canadian employment equity measures.**
- 17. In terms of the WTO, Canada could consider submitting to the Working Party on GATS Rules the need to confirm that such measures are legitimate and that the rules of the GATS do not contravene a state's capacity to reinforce them.¹⁷³**
- 18. Finally, if the opportunity arises, Canada could consider improving the initial Conditional Offer pursuant to the GATS that it submitted in March 2003, and which is not a final document. On the issue of the horizontal commitments that accompany the sub-sectors' offer of liberalization, this improvement could involve a clarification to the effect that the benefit of national treatment will be possible only when foreign businesses hiring in Canada comply with employment equity regulation.**

Strengthening the Federal Contractors Program

As we stated in the first part of this study, the FCP is a program that is disliked and, to some extent, left to its own devices. HRSDC acknowledges¹⁷⁴ its marginal impact on the employment of groups designated under the *Employment Equity Act*. The last thing that businesses that bid on government contracts and are not subject to the *Employment Equity Act* want is compliance with the Act itself! In fact, article 42(2) of the Act provides that it is the responsibility of the department accountable for the Act to ensure that the obligations of businesses that bid on government contracts or contracts under federal jurisdiction, are *equivalent* when they employ at least one hundred employees. At present, there is no equivalence between the obligations of these two groups. Bidders are bound to only a vague commitment to demonstrate employment equity, while businesses that are subject to the Act must undergo the entire audit process, resulting in the receipt of an audit certificate from the CHRC. Businesses bidding on government procurement contracts are not the ones who will complain about the current state of matters. Even less likely are the businesses under foreign control, which, even though they benefit from advantages set out by the AGP, cannot reasonably conclude that the FCP is some form of obstacle to their conducting their affairs.

For reasons of effectiveness and equity strictly related to the program, the department must therefore implement the provisions of section 42(2) of the *Employment Equity Act*. This goes without saying.

What occurs under the FCP? The answer is this: the government is becoming apathetic. Is this a sign of the paralysing effect referred to by Appel Molot¹⁷⁵ and which describes the general effect of regulatory inertia in an era when trade agreements are being struck in developed countries? The answer is not so simple. In its recent assessment of the FCP (HRDC, 2002), as in its assessment of the SCHRDSPD (2002a), HRSDC concluded that the implementation of section 42(2) of the Act and the creation of *equivalent* obligations for all businesses concerned by employment equity programs, must be encouraged. These conclusions are in no way inspired by a consideration of AGP requirements, but more simply by national findings. However, businesses, especially those that were not in the first wave of employment equity programs, including Canadian banks, resist. The group of resisters includes newcomers, but also very small businesses. As the CHRC has often noted, this latter group changes more quickly in a liberalized economy. It is also more unfamiliar with the culture of employment equity in business, and accepts the pertinence thereof less readily.

One thing is certain, such complaints from businesses influence the decision-makers. This explains the extreme reserve of the Government of Canada's response following the review of the *Employment Equity Act*.¹⁷⁶ For all practical purposes, this response did not include any significant commitment.

One of two things is true: either the FCP will remain an insignificant program in Canada or, to follow on the logic of Canada's international trade commitments, in particular with regard to the AGP, serious consideration will need to be given to strengthening it. To this end, and to ensure compliance of the FCP with the AGP, two recommendations are essential:

19. The Minister of Labour must give effect to the provisions of section 42(2) of the *Employment Equity Act*, which sets out its obligation to ensure that equivalent obligations are imposed on businesses that are subject to the Act and those that are only subject to the requirements of the FCP.

20. *Government procurement contracts* must set out the contractual obligation of bidding businesses to which government contracts are awarded to (1) implement employment equity programs compliant with those set out by the *Employment Equity Act* or (2) comply with the Act itself.

Revision of the *Employment Equity Act*

In part 2 of this study, we showed that trade agreements, in particular the GATS, generally impose a previously unequalled standard of transparency on national regulation. We also asserted and showed that the GATS does not challenge legislation, such as that of employment equity. However, it puts particular pressure on the Canadian model regarding transparency in legislation management. Contrary to what is often stated, Canada is not beyond criticism in this regard. Obviously, the more complex the legislative models, which is the case of the

Employment Equity Act, the more criticism is voiced regarding compliance with trade agreements.

The five-year review of the *Employment Equity Act*, from which stemmed the report from the parliamentary Standing Committee on Human Resources Development and the Status of Persons with Disabilities in June 2002, included several recommendations designed to ensure this transparency. Clearly, these recommendations were not based on an analysis of trade agreements and their requirements, but they do focus on these requirements. In our view, the following recommendations are the changes necessary to make the *Employment Equity Act* compliant with, among other things, the obligations for transparency of domestic regulation set out by the GATS.

- 21. The 12-step methodology¹⁷⁷ designed for the implementation and verification of the Employment Equity Plan promoted by the CHRC must be clarified and defined in the Act. Several businesses claim that this requirement exceeds the CHRC's jurisdiction.**
- 22. Article 11 of the *Employment Equity Act*, which stipulates that the employer must ensure reasonable progress as a function of the employment equity plan approved by the CHRC, must be amended to specify that the employer is under obligation to make reasonable progress.**
- 23. Article 10(1)(a) of the *Employment Equity Act* provides that the employer must set out, in the employment equity plan, positive uses of recruiting, training, promotion and maintenance as a function of members of designated groups, in order to make long-term corrections to under-representation. The expression "positive use" must be specified in order to clearly indicate the employer's obligation to add special qualitative measures designed for each group designated by the Act, including women, to the numeric objectives of an employment equity plan.**
- 24. Sections 25 to 28 of the Act must be amended to clarify the jurisdiction of the Employment Equity Tribunal and to enable the CHRC to refer to the Tribunal as soon as possible whenever a business refuses to negotiate, in good faith, the employment equity plan or its monitoring conditions, or whenever an employer does not act in good faith upon an order issued by the Commission. The conditions for referral to the Employment Equity Tribunal should also be stated.**

According to the CHRC, relations with businesses are often difficult once the audit process of the employment equity plan begins. The main irritants are:

- The Commission's demand that self-identification of members from designated groups be completed again to obtain more reliable data on the composition of a business' workforce;
- Discussions about removing obstacles in order to obtain a policy on equitable hiring;

- Discussions about identifying appropriate geographical and availability catchment areas for recruitment purposes;
- Determining the numeric recruitment objectives to be attained;
- Identifying positive practices for ensuring an equitable representation of members of designated groups within a business;
- Methods for submitting to the workforce information on the implementation of the employment equity plan.

Businesses do not take part in employment equity happily, and it would be unacceptable to encourage this debate by transposing it into the arena of trade agreements. Moreover, these difficulties delay the turnaround time for an audit certificate (approximately two years according to Commission's annual reports). The recent audit conducted through the CHRC's Employment Equity Division by external auditors revealed that businesses are unhappy with the ambiguities in the Commission's jurisdictions.¹⁷⁸ Ambiguity and delays are not the best guarantees for the longevity of a social policy when trade agreements are struck!

Though they are designed to improve the situation of all designated groups, our recommendations have particular meaning in the case of women. In fact, women have made significant progress in the workforce, thanks to employment equity measures. Moreover, certain practices currently unfolding in business are designed mainly for them: flexible hours, reconciliation of work and family life, etc.

However, many people are inclined to think that the *Employment Equity Act* has outlived its usefulness, now that large-scale organizations have received certification of the initial employment equity plan. This optimistic vision, at best, leaves important issues in abeyance: What about the follow-up of these plans? What will happen to the qualitative measures intended for women, among others? How will control be exercised over attaining the numeric objectives set out in the employment equity plan?

Our research adds yet another question to these uncertainties: Is there a link, even an indirect one, between the absence of political will to strengthen the *Employment Equity Act* and the arrival of trade agreements? In our opinion, there is at least an ideological link between the two. With the onset of the liberalizing of trade comes the self-regulation of business. Analysis of the recent audit report and the external audit of the CHRC's Employment Equity Division reveal important factors in this regard. The chronic lack of resources with which the CHRC and HRSDC are faced, combined with pressure from promoting a conciliatory approach, limit the leeway that these two entities have with businesses. Meanwhile, experience from the years 1986-1996 has shown the limits of such an approach.

25. The Act entrusts to the CHRC a mandate to monitor employment equity plans. The CHRC must keep this mandate intact. Annual reports submitted to HRSDC by businesses that are subject to the Act are no substitute.

13. CONCLUSION

Amid these intertwined considerations lies a common thread, one that indicates that there is a link between the requirements that stem from trade agreements, and human rights and women's rights. While employers seem willing to agree to prohibiting discrimination on the general principle of the right and rule of law, they are showing increasing dissatisfaction with proactive, second-generation models. The legislator's silence speaks volumes. Will the legislator leave employment equity to languish in Canada? Rather than strengthen national and international legitimacy, this suggests an objective pursued "by default." Yet, the recommendations we propose here are in no way revolutionary. Recommendations that concern the *Employment Equity Act* or the FCP directly would probably have been deemed desirable in 1995, when the current EEA came into effect. This is no longer so certain today. Why?

Where will the silence of the legislator and decision-makers lead? What is the nature of this silence? We cannot deny that we were intrigued by the question posed by professor Appel Molot¹⁷⁹ at the symposium at Carleton, on NAFTA and chapter 11: Do trade agreements create regulatory paralysis at the national level? To conclude, we are tempted to say that they probably do.

Trade agreements change the state of mind of businesses and decision-makers. From an ideological point of view, they lead businesses to believe, consciously or unconsciously, that they have "new rights." However, the right to escape from or shirk national regulation does not exist. Still, when a careful look is given to the work of institutions, such as the CHRC, that must interact daily with businesses as an authority figure, it appears that this ideology of "new rights" is making headway. The obstruction exercised by businesses increases... and the legitimacy of institutions decreases. This subdued drama plays out far from antiglobalist forums. Indeed, it is difficult to grasp it if situations are not reviewed on a case-by-case basis.

These are the questions to which women's associations should pay closer attention. We hope that this study will encourage them to do so.

In concluding, we also hope to have given representative associations of Canadian women and women from Quebec the desire to undertake other case studies that will empirically reveal the specific nature of the risks run by the domestic policies and regulations that are necessary for the protection and promotion of women's equality rights. We are aware that this initial study is far from perfect. This only leaves us wanting more. Still, we hope we have in some way contributed to the arrival of a new generation of studies on women and trade agreements. Given how our questions were sometimes received, we must accept that a certain uneasiness remains to be dispelled.

ANNEX I: HRSDC CLASSIFICATION OF BUSINESSES TARGETED BY THE *EMPLOYMENT EQUITY ACT*

The six indicators are based on numeric data submitted annually by employers in the context of their interaction with HRSDC. Points are given to various indicators for a maximum total of 16. The result is then transferred in complete literal notation that represents the business' performance against all of the indicators.

Indicator 1: Representation

Compare the representation of designated groups in the business to their outside availability.

Indicator 2: Concentration

Determine the representation of designated groups in the various employment categories to see whether there is an over-representation (concentration) in certain employment categories.

Indicator 3: Wage gap

Assess the distribution of designated groups on a business' salary scale.

Indicator 4: Recruitment

Compare the recruitment of members of designated groups and their availability in the job market.

Indicator 5: Promotion

Rate whether designated groups receive an equitable share of promotions pursuant to their representation in the business.

Indicator 6: Termination

Make a comparison between the percentage of termination of members from designated groups and their overall representation in the business and the percentage of termination for the entire workforce.

Good Practices Index (GPI)

Since the 2001 calendar year (HRSDC, 2001), an assessment of the narrative report has been added to the assessment conducted from statistics submitted in the annual report.

The GPI is graded out of five. The employer obtains an initial point if the report is submitted on time, three more points if it reports back on measures taken, results obtained and consultations made. Lastly, the employer obtains one last point if an attempt is made to explain abnormal gaps in the statistical results or if the results tally with the results from previous years. Note that, based on information from the department itself, it is not HRSDC that checks the content of reports sent by employers, but the CHRC.

ANNEX II: THE 12 STEPS TAKEN BY THE CHRC TO AUDIT COMPLIANCE WITH THE PROCESS FOR ADOPTING AND IMPLEMENTING THE EMPLOYMENT EQUITY PLAN

STEP 1: *investigation of the workforce and data collection*

Section 18(4) of the Act provides for the administration of a *voluntary* self-identification questionnaire related to membership in a group designated by the Act. Pursuant to this step, it is not impossible that the employer must repeat, at the request of the audit agent, the self-identification exercise in cases in which the response rate within the business is too low.

STEP 2: *analysis of the workforce*

For each occupational category, the employer must compare the share of termination and promotion of members of designated groups with the internal representation. The purpose of this exercise is numerical and is not differentiated, *a priori*, from the annual survey conducted by the HRSDC. However, monitoring equity plans would make it possible, should under-representation occur by termination in a given occupational category, to introduce elements to extract the causes of these terminations.

STEP 3: *the study of employment systems*

Although the *Employment Equity Regulations* do not specify it, the employment system means, according to the framework document adopted by the CHRC, all of the policies and practices concerning recruitment, selection, hiring, training, development, promotion, retention, termination and adjustment measures. In compliance with section 9(1)(d) and (e) of the Regulation, the auditor can order specific assessments of fluctuations in termination, if they exceed the internal representation in general.

STEP 4: *suppression of obstacles to attaining employment equity*

STEP 5: *adjustment measures*

Adjustment measures should be aimed at accessibility and the entire staffing process. When this requirement is discussed with the employer, the agent must ensure that the employer understands that the adjustment obligation concerns all employees and all candidates with special needs.

STEP 6: *positive policies and practices*

This step is crucial. The agent is under mandate to require the employer, where appropriate, to assess the relevance and timeliness of policies and practices deemed useful in attaining equitable representation. It is not the audit agent's responsibility to establish these practices and policies, but rather to require proof of their relevance and usefulness. The certificate of compliance with the Act, the ultimate step in the audit process, can therefore be subject to qualitative requirements.

These policies and practices have a universal reach, rather than being targeted and designed for the entire workforce. However, consultation of the Employment Equity Compliance Reviews: Process and Reference Manual reveals a strong incentive among audit agents so

that they insist on the importance of policies related to reconciliation of work and family life and flexible hours.

STEP 7: *recruitment and promotion objectives*

STEP 8: *representation objectives*

STEP 9: *follow-up, assessment and review of the Plan*

STEP 10: *information to be provided to the workforce*

STEP 11: *consultation*

STEP 12: *records maintenance*

ANNEX III: THE HSBC BANK OF CANADA AUDIT REPORT, PREPARED BY THE CHRC

Three types of information were taken from the report:

- **the review of employment systems:** this section contains the reasons given by the employer to explain the under-representation of the target groups. It also contains the analysis from the CHRC agent of the reasons given by the employer and the agent's own conclusions about this under-representation;
- **numeric data on under-representation:** this data is presented in a table. The table contains the following information for each group: 1. occupational groups, 2. the total number of employees by group, 3. the representation of women in number and percentage for each group, 4. the overall availability of women for this group based on a target zone, in number and percentage, 5. the levels of representation. In the censored version of the table that we obtained, columns 4 and 5 had been removed for all of the target groups;
- **the objectives of promotion and hiring:** these objectives were set from the under-representation of the target groups.

In order to suppress some information in the report sent, HSBC Bank of Canada had to show that this information was exclusive in nature and impossible to obtain otherwise. This could not be the case of the data regarding the number of employees by occupational group or the overall data on the availability of the target groups. All of this data is posted on the HRSDC Web site. This could not be the case either for other elements in the report dealing with the measures to eliminate barriers, measures of compromise and positive practices, elements made public previously in general by the narrative report in the annual reports sent to HRSDC. Therefore, what is left? The delimitation of target zones!

To calculate the rate of availability of members of target groups in a given employment category, the business must determine a geographic area in which it intends to recruit. This area is chosen **exclusively** by the business, subject to corrections made by the CHRC auditors. Without this information, it is impossible for a third party to calculate the rate of availability with certainty because it varies from region to region in Canada. For example, the rate of availability of women for senior positions is 21.2% in Toronto and 17.5% in Montreal. Of course, it is clearly impossible to know exactly when the business recruits its executives. Assuming that the information concerning the choice of target zones was not in the public domain, that this information had a "value" to the Bank and that it was always treated confidentially, which seems to be the case, all of the data obtained from this choice could therefore become confidential in turn. Hence, the absence of data on under-representation, the calculation of which depends on the rate of availability. Hiring objectives could also be excluded because they are based on under-representation.

At the risk of making a purely speculative interpretation, we believe that this business' situation reveals a deep-seated discomfort from the objectives desired by the *Employment Equity Act*. Obviously, HSBC Bank of Canada chose to protect its strategy for recruiting executives, if not

reveal that this strategic recruitment operates independently from the *Employment Equity Act* requirements, including those concerning the presence of women in management positions. Recruitment “abroad” of male executives is part of our theories.

ANNEX IV: REVIEW OF THE EMPLOYMENT EQUITY ACT UNDER THE REQUIREMENTS OF TRADE AGREEMENTS: QUESTIONS

The five-year review that the Standing Committee on Human Resources Development and the Status of Persons with Disabilities recently completed revealed the weakness of means used by the CHRC to complete an audit compliant with the objectives of the Act, the insufficiency of its resources in that regard and the negative effects of the confusion of mandates entrusted to HRSDC and the CHRC. This review also revealed the preference of businesses for the report procedure with HRSDC. Lastly, businesses politely denounced the unpredictability (to use their terms) of the steps in the audit process conducted by the CHRC under the mandate entrusted to it by the *Employment Equity Act*. Along with this unpredictability comes frustration over the slowness of the audit process, the costs involved for the business and uncertainty about the transaction (over the identification of workforce recruitment areas, for example) concluded in some cases between the business and the CHRC to issue the audit certificate. However, no stakeholder in this process questioned the relevance of the Act or even the Canadian employment equity model. Obviously, this confirmation of the need for the *Employment Equity Act* is good news for women, but particularly women from visible minority groups or disabled women, who suffer from double discrimination (gender-disability/gender-race) in employment.

Due to commitments made by the Government of Canada regarding trade agreements, businesses (under foreign control, but also Canadian in some cases) can claim, new expectations in the course of their affairs. In particular, and in general, they are entitled to benefit from a trade environment that is non-discriminatory, transparent, predictable and free from obstacles and requirements that are foreign to trade. In this context, which risks for the *Employment Equity Act* were made in the recent diagnosis by the Standing Committee?

More particularly:

Legislative precision:

- Would the mandate entrusted to the CHRC for monitoring the implementation of the employment equity plan in making reasonable progress be more certain if this concept was defined in the *Employment Equity Act*?
- Would the CHRC's requirement of including special measures designed for members of designated groups and women in the employment equity plan be more certain if the concept of "special measures" was defined by the *Employment Equity Act* or Regulations?
- Moreover, must the 12 steps for auditing an employment equity plan be set out explicitly in the Act or Regulations?

Timelines:

Is the slowness of the employment equity plan audit process an obstacle to trade that the government must remedy to comply with the commitments set out by some trade agreements?

Reports:

Is the requirement of qualitative data in the annual report that businesses must submit to HRSDC an undue intrusion in the right of businesses to trade in Canada?

Remedies:

Ultimately, the CHRC can turn to the Employment Equity Tribunal to request an order for a business that is not complying with its obligation to establish an employment equity plan in accordance with the CHRC directives. Does the hypothesis that the CHRC could request such an order more quickly contravene the “rights of businesses” under the trade agreements that Canada has ratified?

In general:

Is the double obligation of businesses to report and have their employment equity plan audited viable when trade agreements are made? Is exceeding numeric objectives of representation of members from designated groups in business a valid government objective in this same context?

ANNEX V: SPECIFICATIONS RELATED TO GOVERNMENT PROCUREMENT IN CANADA

Agreement on Internal Trade (AIT)

Definition: The AIT is global in nature and aims to decrease trade barriers in Canada. It came into force on July 1, 1995, and was signed by the federal government and by all of the provinces and territories. Chapter 5 of the AIT focuses on government procurement contracts and aims to be a framework for granting equal access to contracts to all Canadian contractors.

Thresholds: The AIT is aimed at all contracts on goods that have a value greater than or equal to \$25,000 and contracts on services and construction work that have a value greater than or equal to \$100,000.

Exclusions: Health and social services, among other things, are excluded from the application of the AIT. Moreover, the AIT does not apply to contracts related to cultural businesses, to the aboriginal culture or national security.

Scope: The AIT applies to all federal departments and agencies, except the House of Commons, the Canadian Space Agency and the Senate.

Agreement on Government Procurement (AGP)

Definition: The WTO AGP is a multilateral agreement aimed at increasing international competition for government procurement contracts. The AGP enriches the GATT and its application is intended for construction services and work.

Thresholds: Goods: \$255,800 CAD; services: \$255,800 CAD; construction work: \$9,800,000 CAD.

Scope: All federal departments and agencies under the AGP.

Exceptions: the House of Commons, the Prime Minister's Office, the Canadian Space Agency, the National Film Board and the Canadian Security Intelligence Service. Moreover, the Canadian International Development Agency's grant programs for developing countries are not subject to the WTO-AGP. Crown corporations are not subject to this agreement.

Excluded goods and services: See NAFTA.

North American Free Trade Agreement (NAFTA)

Definition: Chapter 10 of this agreement deals with government procurement contracts. According to this chapter, Canada, the United States and Mexico agree to treat businesses from contracting states the same as their own businesses and not favour them in awarding government procurement contracts set out by NAFTA.

Thresholds: In the case of departments: Goods: \$38,000 (Canada/US), \$89,000 (Canada/Mexico); services: \$89,000 CAD; construction work: \$11,500,000 CAD. In the case of Crown corporations: Goods/services: \$445,000 CAD; construction work: \$14,200,000 CAD.¹⁸⁰

Scope: NAFTA is intended for the some 100 departments and agencies of the federal government. Moreover, 10 Crown corporations are subject to this agreement, including Via Rail Canada.

Agencies excluded: The House of Commons, the Prime Minister's Office, the Canadian Space Agency, the National Film Board, the Canadian Security Intelligence Service and the Canadian International Development Agency's grant programs for developing countries.

Services excluded: aside from some general exceptions, for example contracts dealing with national security, products made by disabled persons, philanthropic institutions or prison labour, as well as the measures necessary for protecting public morals, order and security, the five following groups of service contract are fully excluded from the application of NAFTA or the AGP or both: research and development; health and social services; financial and related services; public services; and communication, photography, cartography, printing and publishing services.¹⁸¹

ANNEX VI: GENDER-BASED ANALYSIS IN EIGHT STEPS (STATUS OF WOMEN CANADA)

Step 1: **Identifying, defining and refining the issue:** the guide encourages men and women to participate in identifying the issues of the policy analysed.

Step 2: **Defining desired/anticipated outcomes:** the fact that a policy will not necessarily have the same impact on men and women must be considered.

Step 3: **Defining the information and consultation inputs:** ensure that the data gathered is broken down by gender and that women's groups participate in this regard.

Step 4: **Conducting research:** consider the fact that certain methods of analysis do not take into account the specificity of women.

Step 5: **Developing and analysing options:** determine the negative or positive impact of the situation of women.

Step 6: **Making recommendations/Decision-seeking:** acknowledge the importance of gender equity and make recommendations that take this into account.

Step 7: **Communicating policy.**

Step 8: **Assessing the quality of analysis:** make recommendations so that the policy supports gender equity in a credible and concrete manner.

ANNEX VII: LEGISLATION, JURISPRUDENCE, DECISIONS AND AGREEMENTS

i. International Treaties

Canada-United States Free Trade Agreement, December 27, 1987 and January 2, 1988, [1989] Can. T.S. No. 3 (in force January 1, 1989).

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NOTES

¹ Note that the Department of Foreign Affairs and International Trade (DFAIT), as it existed when this report was prepared, has since split into two separate departments, namely Foreign Affairs Canada (FAC) and International Trade Canada (ITCan).

² WTO Agreement on Government Procurement, Appendix I, Annex 6, Canada.

³ *An Act Respecting Employment Equity*, (S.C. 1986, c. 31), R.S.C. c. E-5.4. Repealed and replaced by the *Employment Equity Act*, (S.C. 1995, c. 44).

⁴ Section 4. According to the *2001 Report on Employment Equity*, submitted by the Canadian Human Rights Commission in compliance with the *Employment Equity Act*, 397 private sector businesses were under audit on December 31, 2000. See CHRC (2002a), table 3, Total number of employers and employees by sector subject to the *Employment Equity Act* and under audit. On-line at: http://www.chrc-ccdp.ca/publications/employment_equity-en.asp?lang_update=1, consulted on June 1, 2004.

⁵ Although the Commission chaired by Justice Abella was called the Commission of Inquiry on Equality of Employment, documentation acknowledged that introducing the concept of *employment equity* fulfilled a specific contextual strategy: fight resistance to the implementation of a proactive model, which stemmed from the American experience with *Affirmative Action*. See Chabursky (1992) and Black (1985).

⁶ *Action Travail des femmes v. Canadian National Railway Company* [1987] 1 S.C.R. 1114.

⁷ Section 18(1), *Employment Equity Act*.

⁸ See section 22 and on of the EEA.

⁹ See Employment Equity Computerized Reporting System (EECRS), on-line at: <http://www19.hrdc-drhc.gc.ca/~eeisadmin/cgi-bin/INTRO.cgi>, consulted on June 1, 2004.

¹⁰ See on-line:
http://www.hrsdc.gc.ca/asp/gateway.asp?hr=/en/lp/lo/lswc/we/ee_tools/reports/annual/methodology.shtml&hs=wzp, consulted on June 1, 2004.

¹¹ Section 36 of the *Employment Equity Act*.

¹² Pursuant to section 44 of the *Employment Equity Act*.

¹³ “As shown in Table 1, the Commission has begun initial audits of 215 employers, out of the 476 employers subject to the Act, since the program started in 1998. However, in most cases, at least one follow-up audit was required before these employers could be declared in compliance with the Act. As a result, the Commission has started a total of 354 audits. The Commission originally estimated that, at the end of the audit program’s fourth year, it

would have conducted about 320 audits.” (CHRC, 2002a). Only 8 businesses have been deemed compliant with the Act since the initial audit. However, these businesses had submitted a number of annual reports to HRSDC.

¹⁴ Id., about twenty employers had received an order to comply by December 31, 2000.

¹⁵ Section 25 of the Act.

¹⁶ Communications 2001, 2002 and 2003. This information was provided by Benoît Fortin, Senior Officer, and Rhys Phillips, Director, Policy and Legislation of the CHRC Employment Equity Branch. We would like to thank them for their kind collaboration.

¹⁷ The Canadian Human Rights Commission gave us access to an external audit report in May 2003. This report, titled *Evaluation of the Employment Equity Program - Final Audit*, was completed by Consulting and Audit Canada. It is dated June 2002. It shows the important problem of coherence that simultaneous interaction of the CHRC and HRSDC with businesses causes and the ensuing frustration for businesses, which show an obvious bias for HRSDC work processes. On May 28, 2003, Benoît Fortin of the CHRC informed us of the work under way between the CHRC and HRSDC, the purpose of which was to develop protocols designed to fix this situation.

¹⁸ Businesses also report on their qualitative employment equity practices. However, this brief addition to the report is not very detailed in most cases. For 2002, HRSDC conducted such a survey (but not its analysis). See HRSDC (2004c).

¹⁹ On March 31, 2002, the Act applied to 397 private sector employers under federal regulation. CHRC, 2002a, on-line at: http://www.tbs-sct.gc.ca/rma/dpr/01-02/CHRC/chrc01-02dpr01_e.asp, consulted on June 1, 2004.

²⁰ *Access to Information Act*. R.S.C 1985, c. A-1.

²¹ Subject to section 20(1(b)) of the *Access to Information Act* “[...] the head of a government institution shall refuse to disclose any record requested under this Act that contains [...] financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party.” In 1993, the Treasury Board Secretariat (TB) published a series of directives regarding how to interpret the *Access to Information Act*. Some of them concern section 20 in particular (*Chapter 2-8 – Specific Exemptions*). The information protected by section 20(1(b)) “must be financial, commercial, scientific or technical **and** confidential.” The concept of information was interpreted generously by the TB, which extended it to all information “which is of value to the possessor of the information and which has been entrusted to another person in circumstances which create an obligation on that person to maintain the information in confidence.” (p. 19). The information need not be capable of industrial or commercial application or use. The only requirement is that it not be in the public domain and is not available for the asking. Lastly, the information must have been supplied by a third party and not the government. The

institution or third party claiming the exemption must demonstrate “that the information is confidential in nature and that the third party has consistently treated this information as confidential” (p. 20).

²² See annex III for details about the information to which we were denied access with regard to the HSBC Bank of Canada audit report.

²³ See note 17. *Evaluation of the Employment Equity Program - Final Audit*. Response rate obtained: 30% of businesses interviewed. The authors of this report feel that this is a significant percentage.

²⁴ Many are employers who admitted that they had difficulty in accepting the role of the CHRC and the length of the audit process. Some believed that the CHRC officers did not know what they wanted and changed the criteria in the middle of the process. Others questioned the effectiveness of the audits with regard to employment equity. The lack of uniformity in the CHRC’s application of the Act was also considered a problem. Some implied that the CHRC and HRSDC should realize that employment equity is not an exact science (HRDC, 2001, point 7.14).

²⁵ “Other than some major employers, many employers continue to wait for the Commission to commence an audit before responding substantively to the *Act*’s requirements,” (CHRC, 2002b, point 3.222 “Initial and Follow-up Auditing of Employers,” on-line at: http://www.tbs-sct.gc.ca/rma/dpr/01-02/CHRC/chrc01-02dpr_e.asp, consulted on June 1, 2004.

²⁶ The CHRC, Report and recommendations presented to the Committee, April 2002, refers to the consultation conducted by the CHRC in 2002 [cited Recommendations 2002]. On-line at: <http://www.chrc-ccdp.ca/publications/discussion-en.asp>, consulted on June 1, 2004. See also HRDC (2001), point 7.1.

²⁷ See SCHRDSPD (2002) on-line at: <http://www.parl.gc.ca/InfoComDoc/37/1/HUMA/Studies/Reports/HUMARP9-e.htm>, consulted on June 1, 2004.

²⁸ *Id.*, recommendations 3 and 29.

²⁹ *Id.*, recommendation 23.

³⁰ *Id.*, recommendation 3.

³¹ “The Commission continues to support the need to clearly articulate the requirement for special measures as part of the employment equity plan. The requirement should include the standard that the employment equity plan must have sufficient positive policies and special measures to ensure a reasonable expectation that short-term hiring and promotion goals will be achieved.

[...]

The Commission also continues to support an amendment to the Regulations to specify that a required part of positive policies and practices will be employment equity and harassment policies (or employer guidelines) that must be communicated to managers and employees.” See Report of the CHRC, note 25.

³² Among other things, this concern refers to the issue of employment equity implementation costs: *I was making the point, though, that if compliance for each employer, say, required two full-time equivalents—and I’m talking about reporting compliance only—then we’re talking about a fair amount of money. [...] The way I see it is that we’re looking at about \$8 annually per taxpayer for report writing.* See hearings from February 7, 2002 (SCHRDPD, 2002b), evidence from F. Poschmann, CD Howe Institute, in his own name. <http://www.parl.gc.ca/InfoComDoc/37/1/HUMA/Meetings/Evidence/HUMAEV48-E.HTM#Int-126132>, consulted on June 1, 2004.

³³ For general information, consult (HRSDC 2004d).

³⁴ Extremely rare since the program began.

³⁵ See Note 33.

³⁶ *Compliance reviews are sporadic and unplanned. From the perspective of the University of Saskatchewan and other employers they consulted, the process and expectations are not defined and therefore are confusing. There is a lack of direction in what the review is intended to accomplish and virtually no follow-up on completion of the review. There is no ongoing communication with representatives of the Federal Contractors Program.* (Kathy Gray, Director of Employee Services, University of Saskatchewan.) See SCHRDPD (2002c).

³⁷ 1. Communication of employment equity to employees; 2. Assignment of senior official to employment equity; 3. Collection of workforce information; 4. Workforce analysis; 5. Employment systems review; 6. Establishment of goals; 7. Development of an employment equity plan; 8. Adoption of positive policies and reasonable accommodation; 9. Establishment of a positive work environment; 10. Adoption of monitoring processes; 11. Authorization to enter premises. For more information, consult: <http://www.rhdcc.gc.ca/asp/gateway.asp?hr=en/lp/lo/lsw/we/programs/fcp/criteria/index-we.shtml&hs=wzp>, consulted on June 1, 2004.

³⁸ Approximately 57 audits per year, with an unbiased meaning of the term “audit” (HRDC, 2000).

³⁹ *Employment Equity Act*, section 4. (1) “This Act applies to: a) private sector employers.” See also section 42 (2): “The Minister is responsible for the administration of the Federal Contractors Program for Employment Equity and shall, in discharging that responsibility, ensure that the requirements of that Program with respect to the implementation of employment equity by contractors to whom the Program applies are equivalent to the requirements with respect to the implementation of employment equity by an employer under this Act.”

⁴⁰ See *Review of the Employment Equity Act*, the response from the Government of Canada at the 9th Report of the Standing Committee on Human Resources Development and the Status of Persons with Disabilities: *Promoting Equality in the Federal Jurisdiction: Review of the Employment Equity Act*, November 2002, <http://www.parl.gc.ca/committee/CommitteePublication.aspx?SourceId=37258>, consulted on June 1, 2004.

⁴¹ “The Supply Operations Service Branch provides common services for acquiring goods and services on behalf of the departments and agencies of the Government of Canada. It manages the supply process by assisting client departments with requirements definition, undertaking bid solicitation, evaluation and selection, and contract negotiation and administration.” See PWGSC (2004a) Four acts and policies support this process: *Financial Administration Act* (R.S. 1985, c. F-11), *Department of Public Works and Government Services Act* (1996, c. 16); *Defence Production Act* (R.S. 1985, c. D-1); and *Comprehensive Claims Policy and Status of Claims*, March 2002, Indian and Northern Affairs Canada, http://www.ainc-inac.gc.ca/ps/clm/brief_e.pdf, consulted on June 1, 2004.

⁴² For TB policies, see TB 2003.

⁴³ PWGSC supply activities will advance established government national socio-economic policies, *within the limits imposed by international trade obligations*. See PWGSC (2004b):

⁴⁴ PWGSC procurement occurs under competitive conditions, except in particular cases. *Id.*, chapter 5.

⁴⁵ See *Contracts Canada* (2004) and PWGSC (2004c).

⁴⁶ See *Standard Acquisition Clauses and Conditions* (PWGSC, 2004d).

⁴⁷ See *Infra*, “Procurement Strategy for Aboriginal Business.”

⁴⁸ See TB (1995). Also, an interview with Daniel Pilon, Senior Contracts Administration Officer, Canadian Nuclear Safety Commission, Administration Section, September 5, 2002.

⁴⁹ An Advance Contract Award Notice (ACAN) allows departments and agencies to post a notice, for no less than fifteen calendar days, indicating to the supplier community that it intends to award a good, service or construction contract to a pre-identified contractor. If no other supplier submits, on or before the closing date, a statement of capabilities that meets the requirements set out in the ACAN, the competitive requirements of the government’s contracting policy have been met. A pre-identified supplier is a supplier registered on the supplier list and can meet the specific technical requirements of the contract.

⁵⁰ *Supply Manual*, cited, note 41, para. 4.003.

⁵¹ *Contracting Policy Notice 1997-6* (Treasury Board Secretariat). See also *Contracting Policy Notice 1997-6*, Procurement Strategy for Aboriginal Business: Guidelines for Buyers/Government Officials, August 1997, points 2.6 and 2.7.

⁵² Communication with Robert Cadieux, Procurement/Senior Contracting Officer, Canadian Heritage, Material Management and Contracting Services, October 28, 2002.

⁵³ PSAB Performance Report 2000, (INAC, 2002c).

⁵⁴ See TB (1994), and telephone interview with the Treasury Board Secretariat Procurement and Project Management Policy Directorate, November 7, 2002.

⁵⁵ See INAC (2002b).

⁵⁶ *Agreement on Government Procurement*, annex 4 b) *Final Act* of the Uruguay Round, April 15, 1994 (effective January 1, 1996).

⁵⁷ 37 countries are currently Parties to the AGP: Canada, European Communities, South Korea, United States, Hong Kong, China, Ireland, Israel, Japan, Liechtenstein, Norway, Netherlands with respect to Aruba, Singapore and Switzerland. List available on-line: http://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm, consulted on June 1, 2004.

⁵⁸ See annexes I, II and III that, when completed by the states adhering to the AGP are part of it. These annexes provide for each state the listing of central government entities and other sub-central entities that will be linked by the Agreement. In Canada, the AGP only links central government entities at present.

⁵⁹ *Agreement on Government Procurement*, April 12, 1979, 1981 Can. T.S. 39 (came into effect on January 1, 1981) [hereinafter referred to as the Tokyo Code].

⁶⁰ The Tokyo Code has mainly a symbolic influence, concerning at most 10% of government procurement, according to Stewart's estimation. In Canada, the value of government contracts concerned was \$648 million in 1988, or 8.6% of the total value of government contracts and less than 1% of the total goods and services procured by the various government levels for that year (Reich, 1991).

⁶¹ Stuhec and Lemieux indicated that less than 5% of complaints were from foreign contractors (Lemieux *et al.*, 1999).

⁶² For a full comparison of the two agreements, see Blank *et al.* (1997).

⁶³ See tables 2 and 3 of annex V. They show, in a comparative but not exhaustive manner, the various financial thresholds established based on government procurement contracts subject to different trade agreements.

⁶⁴ See the AGP, art. XXIII (1) and (2) and NAFTA, art. 1018 (1) and (2).

⁶⁵ For a detailed analysis, see Corr *et al.* (1999).

⁶⁶ Meeting with the Department of Foreign Affairs and International Trade, April 9, 2003.

⁶⁷ Concerning the *Small Business Act*, see ECLAC in particular (2002).

⁶⁸ For example, Canada has not yet presented lists of provincial or municipal entities that would be linked by the AGP or NAFTA rules and will not do so until the United States is more open about their own contracts. Meeting, note 66.

⁶⁹ As well as article 1009 (2)(b) of NAFTA.

⁷⁰ And article 1015(4)(c) of NAFTA.

⁷¹ Agreement on Internal Trade, May 3, 1997, G.O.Q. 1997. I. 413.

⁷² Some are subject to the EEA, while others are subject only to the requirements of the FCP.

⁷³ Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works and Council Directive 77/62/EEC of 21 December 1976 coordinating procedures for the award of public supply contracts, which were followed by a new wave of Directives in the 1990s: Council Directive relating to the coordination for the award of public service contracts (92/50/EEC of 18 June 1992), (93/36/EEC and 93/37/EEC of 14 June 1993) modified by Directive 97/52/EC of 13 October 1997.

⁷⁴ Treaty establishing the European Community (Amsterdam consolidated version), *Journal officiel n° C 340 of 10/11/1997 p. 0306*.

⁷⁵ Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, *Journal officiel n° L 039 of 14/02/1976, p. 0040 - 0042*.

⁷⁶ This article was interpreted strictly by the Kalanke decision (Case C-450/93, Kalanke v. Freie und Hansestadt Bremen [1995] E.C.R. I-3051.) of the Court of Justice of the European Communities (CJE), then reviewed more flexibly in the decisions of Marschall (Case C-409/95, Marschall v. Land Nordrhein-Westfalen [1997] E.C.R. I-6363) and Badeck (Case C-158/97 Badeck *et al.* v. Hessischer Ministerpräsident und Landesanwalt beim Staatsgerichtshof des Landes Hessen [2000], E.C.R. I-01875).

⁷⁷ Offsets. See AGP, art. XVI (1) and NAFTA, art. 1006. Case C-360/89, *Commission of the European Communities v. Italian Republic* [1992] E.C.R. I-3401 [Commission city v. Italy] and Case C-243/89 *Commission of the European Communities v. Kingdom of Denmark* [1993] E.C.R. I-03353.

⁷⁸ *Commission v. Italy*. See also McCrudden (1999).

⁷⁹ For example, see: Joined cases 27 to 29/86, SA Constructions et entreprises industrielles (CEI) a. O. v. Société coopérative « Association intercommunale pour les autoroutes des Ardennes » [1987] E.C.R. 3347.

⁸⁰ Case 31/87, Gebroeders Beentjes BV v. State of the Netherlands, [1988] E.C.R. 04635.

⁸¹ McCrudden (1998) quotes an appeal started by the European Commission against the Land of North Westphalia for the implementation of equal treatment measures in its government procurement contracts. The case would not be resolved before the tribunals.

⁸² And article 1003(2)(a) of NAFTA.

⁸³ See 63. See also: “most parties have excluded from their lists a range of service sectors. [...]” The empirical significance of these exclusions is not clear. Finally, there is a range of sectoral non-application and reciprocity provisions contained in the Annexes listing the services. The most general reciprocity provisions are of the form: “a service listed in Annex 4 is covered with respect to a particular party only to the extent that such party has included that service in Annex 4” (Low *et al.*, 1996).

⁸⁴ See notes 27 and 40.

⁸⁵ AGP, Appendix I, General Notes of Canada, art. i d); NAFTA, Annex 1001.2b, Schedule of Canada, art. 1 d).

⁸⁶ Information on the PSAB site, http://www.ainc-inac.gc.ca/saea-psab/index_e.html, consulted on June 1, 2004.

⁸⁷ *General Agreement on Trade in Services*, annex 1B of the *Final act of the Uruguay Round*, 15 April 1994, 33 I.L.M. 46, [hereinafter: GATS].

⁸⁸ For example, the Government of Canada does not stop to recall that health and education sectors are excluded from the GATS. It must be understood that this means that the rules of liberalizing the services sector would not change access (economic, for example) to these services. This includes the many Canadian women, who are in an economically vulnerable situation. However, the exclusion of certain service sectors from the GATS also means that, for these excluded sectors, the Government of Canada is exempted from certain other obligations related to the absence of discriminatory effects from its domestic policies toward foreign businesses. We feel that the standards and policies related to employment equity belong to this group of policies. The division between services targeted by Canadian commitments under the GATS and excluded services could therefore cover the consequences in that regard.

⁸⁹ For the purposes of this sub-section, no reference is made to NAFTA chapter 12 on trade in services. Helpful distinctions between the GATS and NAFTA concerning the status of the investor and the definition of the investment are analysed in the following sub-section.

⁹⁰ Article 1 :3 (b) sets out the exclusion from the Agreement those services supplied in the exercise of governmental authority, on a non-commercial basis.. This exclusion, far from being straightforward, was examined by Krajewski (2001).

⁹¹ See Steward (1999). See also *Appellate Body Report, European Communities – Regime for the Importation, Sale and Distribution of Bananas*, adopted 9 September 1997, (WT/DS27/AB/R), §220. For a good summary of the “banana war,” see Bhala (2000).

⁹² Paragraphs c) and d). Our italics.

⁹³ GATS, art. XXVIII(g).

⁹⁴ Id.

⁹⁵ GATS, art. XXVIII (j).

⁹⁶ For a general presentation of the lists of commitments signed by the states with regard to the GATS, see WTO (2004a).

⁹⁷ See WTO (2004b).

⁹⁸ See Industry Canada, 2003, also cited “Conditional Offer”.

⁹⁹ See Conditional Offer, p. 3.

¹⁰⁰ See Conditional Offer, p. 28.

¹⁰¹ See Conditional Offer, p. 132.

¹⁰² This similarity must be analysed case by case. Analysis criteria, such as the end use of consumers, the property, nature and quality of a product or service can be derived from certain decisions from agencies appointed to resolve disputes, as in the case of the GATT/WTO.

¹⁰³ See for example, *Panel Report on United States – Section 337 of the Tariff Act of 1930*, 7 November 1989 (L/6439 – 36S/386), §5.11 and *Appellate Body Report, European Communities – Regime for the Importation, Sale and Distribution of Bananas*, par. 233.

¹⁰⁴ The idea that the obligation of granting “treatment no less favourable,” set out in article III:4 [of the GATT] is the public powers’ obligation to ensure effective equality of competition possibilities between national products and imported products, and with the principle that it is not necessary to show the effects on trade to establish the presence of a breach of this obligation. *Panel Report: Canada—Certain Measures Affecting the Automotive Industry*, February 11, 2000 (WT/DS139/R) (WT/DS142/R), §10.84.

¹⁰⁵ See note 20 and on.

¹⁰⁶ These reports can now be obtained by contacting the CHRC.

¹⁰⁷ Meeting with DFAIT on April 9, 2003.

¹⁰⁸ Since the publication of the Abella Report in 1984, the Government of Canada has always avoided the coercive dimension or court action in the employment equity model. In accordance with this choice, it was noted that minor progress was made during changes to the Act in 1996. The slight means granted to the CHRC to accelerate this progress can still correspond to the concerns of some stakeholders (businesses in particular). However, this does not take into account the transparency requirements imposed by trade agreements, including the GATS.

¹⁰⁹ See note 26.

¹¹⁰ See the Memorandum of interpretation of certain provisions of Chapter 11, (International Trade Canada, 2001).

¹¹¹ Among others, see: “NAFTA Chapter 11 Conference,” organized by the Centre for Trade Policy and Law, Carleton University, January 18, 2002, in collaboration with DFAIT. The documents are available on-line at: <http://www.carleton.ca/ctpl/conferences.htm>, consulted on June 1, 2004.

¹¹² Article 1101 (3) of NAFTA stipulates that “this Chapter does not apply to measures adopted or maintained by a Party to the extent that they are covered by Chapter Fourteen (Financial Services).” Chapter 14, however, does not entirely exclude the application of chapter 11.

¹¹³ Article 1114 (1) of NAFTA.

¹¹⁴ North American Agreement on Environmental Cooperation and North American Agreement on Labour Cooperation, September 13, 1993, reprinted in English in NAFTA Text – Including Supplemental Agreements, CCH, 1994, pp. 747-773 and pp. 775-801.

¹¹⁵ Article 201 of NAFTA provides that a measure means any legislation, regulation, procedure, provision or practice.

¹¹⁶ *Pope & Talbot v. the Government of Canada, Award on the Merits* (2001), on-line at the Department of Foreign Affairs and International Trade: http://www.dfait-maeci.gc.ca/tna-nac/disp/pope_archive-en.asp, consulted on June 1, 2004.

¹¹⁷ See article 1106 (6) of NAFTA.

¹¹⁸ See note 110.

¹¹⁹ Except for public interest reasons, on a non-discriminatory basis and in compliance with the regular application of the Act and paragraph 1105 (1), everything is in return for the payment of compensation in compliance with paragraphs 2 to 6.

¹²⁰ NAFTA, article 1110 (1).

¹²¹ *Metalclad v. United States of Mexico*, Final Award (Case CIRDI No ARB(AF)/97/1), (2000) par. 103.

¹²² *Pope & Talbot v. Canada*, interim award (2000), aforementioned, note 116.

¹²³ *S.D. Myers v. the Government of Canada (partial award)* (2000), on-line: Department of Foreign Affairs and International Trade Canada: http://www.dfait-maeci.gc.ca/tna-nac/documents/myersvcanadapartialaward_final_13-11-00.pdf, (arbitrators: B.P. Schwartz, E.C. Chiasson, J.M. Hunter), consulted on June 1, 2004.

¹²⁴ *Id.*

¹²⁵ Employment Equity Act, S.C. 1995, c. 44.

¹²⁶ See note 114.

¹²⁷ GATT, article XX(a).

¹²⁸ GATS, article XIV(a).

¹²⁹ AGP, article XXIII(2).

¹³⁰ Agreement on Trade-Related Aspects of Intellectual Property Rights [TRIPs], Annex 1C of the Final Act, 15 April 1994, 33 I.L.M. 1197, art. 27 (2).

¹³¹ For example, see article XXIII of the AGP.

¹³² It was due to this alignment referred to in Singapore in 1996 that the ILO felt it necessary to adopt in 1998 the “ILO Declaration on fundamental principles and rights at work,” June 1998, adopted at the 86th session, on-line: <http://www.ilo.org/public/english/standards/relm/ilc/ilc86/com-dtxt.htm>, consulted on June 1, 2004.

¹³³ Recognition of these principles is based on articles 53 and 64 of the Vienna Convention on the Law of Treaties, 23 May 1969; 115 R.T.N.U. 331; 8 I.L.M. 679 (effective 27 January 1980). See Romain (1995).

¹³⁴ Definition reprinted by Ghestin, *Traité de Droit Civil*, t. 2, spéc. P. 85, n° 93 and réf. 41, cited in J.-F. Romain, *ibid.*, p. 29.

¹³⁵ Kleven (2002), 69, note 1: “Under U.S. law the term ‘general welfare,’ which is used in the UDHR, has a very broad meaning that might allow the freedom to leave to be restricted for a wide variety of reasons pursuant to a rational basis test according it no special protection. Perhaps for this reason a general welfare exception was expressly rejected

in drafting the ICCPR, the operative law, in favor of the ‘public order/ordre public’ terminology, which has somewhat narrower overtones in English (akin perhaps to prevention of disorder) than in French where it invokes not only the welfare of the public but also the protection of individual human rights that ‘cannot be lightly sacrificed even for the good of the majority or the common good of all.’”

¹³⁶ For example, see Tetley (1994): the author uses the double expression “public policy/order” to refer to public order exception.

¹³⁷ Goldstein’s work (1992) is the most complete.

¹³⁸ GATT, article XX.

¹³⁹ *Sami Hainonen*, case 394/97, 15 June 1999, att. 43.

¹⁴⁰ Jurisdictions of the European Court of Human Rights, art. 32 of the *de la Convention for the Protection of Human Rights and Fundamental Freedoms*.

¹⁴¹ ECHR, *Loizidou/Turkey*, 23 March 1995, series A, No. 310, § 93; see also paragraph 75 of the above case, in which the Court stated that the Convention plays a “role as a constitutional European public order.” See also Sudre (1995).

¹⁴² *Soering*, 7 July 1989, A.161 G A N° 33.

¹⁴³ Expression used by Lalive (1986).

¹⁴⁴ Goldman (1979), cited by Racine (1999).

¹⁴⁵ Dollinger, 2000; Oppetit, 1998. See the Preliminary Draft UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, approved by the UNIDROIT Study Group in its third session, 26 January 1990.

¹⁴⁶ *Ibid*, p. 309. See also Racine (1999). To immoral acts, Racine adds boycotting for racial reasons, providing as an example the boycott of Arab countries against Israel.

¹⁴⁷ ILO declaration on fundamental principles and rights at work, note 132.

¹⁴⁸ International Labour Conference, Report IB, International Labour Conference, 91st session, June 2003, Global report under the follow-up to the ILO declaration on fundamental principles and rights at work titled Time for equality at work, on-line at: <http://www-ilo-mirror.cornell.edu/public/english/standards/relm/ilc/ilc92/reports.htm>, consulted on June 1, 2004.

¹⁴⁹ We will return to this in the last part of the study.

¹⁵⁰ See Tornqvist *et al.* (1999, 2002). The World Bank's approach involves identifying within its structure the elements essential to implementing a global GBA strategy: responsibility of its executives, staff trained on GBA, budget allocated specifically for this implementation and greater collaboration with civil society and "donor" countries.

¹⁵¹ The definition for "autonomisation" is provided in French in *Le grand dictionnaire terminologique*, on-line: http://w3.granddictionnaire.com/btml/fra/r_motclef/index1024_1.asp, consulted on June 1, 2004. [Tr. – For the definition of the English equivalent "empowerment," please see: <http://www.m-w.com/cgi-bin/dictionary?book=Dictionary&va=empowerment>, checked on November 12, 2004.]

¹⁵² Level 1: Material well-being: Measures making it possible to improve the material well-being of women; Level 2: Access: Measures allowing women access to the resource so that they can see to their well-being themselves; Level 3: Awareness-raising: Measures making women aware of the erroneous beliefs gained socially and that make women feel inferior. This measure is not easily quantifiable, but aims to determine whether women consider themselves equal to men; Level 4: Mobilization: Completion of common actions by women who are mobilized to improve their living conditions; Level 5: Control: Participation of women in the decision-making process. Women can thus have true access to resources, which enables them to improve their well-being.

¹⁵³ See WIDE (2004).

¹⁵⁴ See UNCCD (2004).

¹⁵⁵ See APEC (2004a).

¹⁵⁶ See APEC Second Ministerial Meeting on Women at: http://www.apecsec.org.sg/apec/ministerial_statements/sectoral_ministerial/women/2002_women.html, consulted on June 1, 2004, in particular para. 23 of the Declaration.

¹⁵⁷ See APEC (2004b).

¹⁵⁸ See SIA (2004).

¹⁵⁹ Meeting with DFAIT on April 9, 2003.

¹⁶⁰ For work on removal, see the North-South Institute (2001). For a theoretical proposal as a reference point, see also, Blacklock (2000).

¹⁶¹ See Team Canada Inc (2004). The list of members from the industry was not available.

¹⁶² See for example Team Canada Inc (2004).

¹⁶³ See recommendation No. 35 in particular.

¹⁶⁴ See http://www.dfait-maeci.gc.ca/tna-nac/wto_opinion-en.asp, consulted on June 1, 2004.

¹⁶⁵ See *ILO Declaration on fundamental principles and rights at work* (ILO, 1998).

¹⁶⁶ See Task Force on Women Entrepreneurs: The Task Force will then provide advice to the federal government on broad issues in women's entrepreneurship. To this end, the Task Force will make suggestions for specific initiatives that the government should consider, such as research and trade. On-line at: <http://www.liberal.parl.gc.ca/entrepreneur/about.asp?lang=en>, consulted on June 1, 2004.

¹⁶⁷ See *Canada's Initial Offer*, note 98.

¹⁶⁸ See *Evaluation of the Employment Equity Program - Final Audit*, note 17.

¹⁶⁹ Telephone conversation with Sébastien Sigouin of the CHRC, April 24, 2003.

¹⁷⁰ See note 110.

¹⁷¹ See note 71.

¹⁷² The purpose of the WTO Trade Policy Review Mechanism (TPRM) is to contribute so that all Members comply further with the rules, disciplines and commitments set out in multilateral trade agreements and, if necessary, plurilateral trade agreements, and therefore facilitate the operation of the multilateral trade system, by enabling increased transparency and a better understanding of Members' trade policies and practices. However, it is not designed to serve as a basis to ensure the respect of specific obligations stemming from agreements. The TPRM was instituted to review trade policies and the trade policies and practices of all Members will be reviewed periodically.

¹⁷³ In compliance with the objectives of the GATS as set out in the preamble and article IV, and as set out in article XIX, negotiations are conducted on the basis of progressive liberalization [...] and by acknowledging the right of Members to regulate the provision of services and to introduce new regulations in that regard. See *Guidelines and procedures for the negotiations on trade in services adopted 28 March 2001 by the WTO Council on Trade in Services at a special session*; on-line: http://www.wto.org/english/news_e/pres01_e/pr217_e.htm, consulted on June 1, 2004.

¹⁷⁴ See note 36.

¹⁷⁵ See note 111.

¹⁷⁶ See *Review of the Employment Equity Act Government of Canada Response to the 9th Report of the Standing Committee on Human Resources Development and the Status of Persons with Disabilities*, note 40.

¹⁷⁷ See annex II.

¹⁷⁸ See note 17.

¹⁷⁹ See note 111.

¹⁸⁰ These thresholds are in effect until December 31, 2004.

¹⁸¹ Also excluded from the application of NAFTA and/or the WTO-AGP are contracts on the following goods and services: (a) ship construction and repair; (b) the elements, hardware, iron, steel and equipment related to land transport and rail transport in urban areas; (c) transport services that are integrally or incidentally part of a procurement contract; (d) communication and detecting equipment and radiation consistent equipment included in category 58 of the Federal Supply Classification (FSC); (e) procurement of petroleum meeting the imperatives of strategic reserves; (f) procurement to protect nuclear materials; (g) dredging operations.

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