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Gender Equality Rights and Trade Regimes: Coordinating Compliance

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Gender Equality Rights and Trade Regimes: **COORDINATING COMPLIANCE**



Edited by
Pitman B. Potter
& Heather Gibb
(with Erika Cedillo)



Gender Equality Rights and Trade Regimes: Coordinating Compliance

Editors

Pitman B. Potter
Heather Gibb
(with Erika Cedillo)

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Biography of the Authors

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Barbara Bailey, Professor of Gender and Education, retired as University Director of the Institute for Gender and Development Studies, University of the West Indies, Mona Kingston, Jamaica in July 2010 after serving in that position for fourteen years. During

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Gauri Sreenivasan was the Policy Coordinator and a senior analyst at the Canadian Council for International Co-operation (CCIC), where she worked from 1996 to 2011. While at CCIC, Ms. Sreenivasan's research focused on trade and investment policies as they relate to issues of poverty and human rights including food security, bio patenting, access to medicine, and democratisation issues. She authored CCIC's numerous briefs on the World Trade Organization (WTO) and the Doha Development Agenda, and coordinated and contributed to the brief, "Making a Bad Situation Worse: An analysis of the text of the Canada-Colombia Free Trade Agreement." She contributed a chapter reviewing Canadian trade policy in "The Harper Record," published by the Canadian Centre for Policy Alternatives in 2008. Before joining CCIC, Ms. Sreenivasan worked for CUSO as a policy analyst and before that as Coordinator for the Central America Monitoring Group, an NGO human rights advocacy coalition in Canada. She holds an M.A. in International Affairs from Carleton University. Currently, Ms. Sreenivasan is the Deputy Director, Parliamentary Affairs for the New Democratic Party of Canada.

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Biography of the Authors

Kyoko Ishida is an Associate Professor at Waseda Law School, Japan, where she started as an Assistant Professor in 2009 and was a Research Associate at Waseda University, Institute of Comparative Law. She holds a Ph.D. in Law and an LLM from the University of Washington, School of Law in the United States. Professor Kyoko acquired an M.A. at Tokyo Institute of Technology and a B.A. at the International Christian University of Japan. Her research interests include professional responsibility, gender law, and sociology of law. Recently she published “Ethics and Regulations of Legal Service Providers in Japan” with VDM Publishing in 2011.

Lesley A. Jacobs is a Professor of Law & Society and Political Science at York University in Toronto as well as Academic Director of the Canadian Forum on Civil Justice (CFCJ). He completed his B.A. and M.A. at the University of Western Ontario and his Ph.D. in Politics at Oxford University. He has held a range of distinguished visiting appointment at other universities including Harvard Law School, Oxford Centre for Socio-Legal Studies, Law Commission of Canada, the University of California, Berkeley, University of Toronto, University of British Columbia, Emory University, and Waseda Law School in Tokyo. His various books include *Rights and Deprivation* (Oxford University Press), *Pursuing Equal Opportunities* (Cambridge University Press), *The Democratic Vision of Politics* (Simon & Schuster), *Balancing Competing Human Rights in a Diverse Society* (Irwin Law), and *The Globalization of the Race Relations Policy Dialogue* (Canadian Race Relations Foundation). He currently is Project co-Director of the SSHRC CURA The Cost of Justice Project (2011-2016) housed at the CFCJ and Osgoode Hall Law School and the Canada Research Team Leader in the SSHRC MCRI Asia Pacific Dispute Resolution Project (2002-2016) housed at the Faculty of Law at the University of British Columbia.

Pitman B. Potter is the Project Director for the Asia Pacific Dispute Resolution Project at the University of British Columbia (UBC). He is also a Professor of Law at UBC Faculty of Law and HSBC Chair in Asian Research at UBC's Institute of Asian Research. Dr. Potter holds a B.A. in Chinese Studies (History) from George Washington University; a M.A. in Political Science, a J.D. and a Ph.D. with distinction from the University of Washington; and a M.Div. from the Vancouver School of Theology. Dr. Potter's teaching and research focus on the People's Republic of China and Taiwan law and policy in the areas of foreign trade and investment, dispute resolution, property law, contracts, business and financial regulation, and human rights. Dr. Potter has served on the Editorial Boards of *The China Quarterly*, *The Hong Kong Law Journal*, *China: An International Journal*, and *Pacific Affairs* (chair). He has published several books, including most recently *Globalization and Adaptation in International Trade Law* (with Ljiljana Biukovic) (UBC Press, 2011) and *Law Policy and Practice on China's Periphery: Selective Adaptation and Institutional Capacity* (Routledge, 2011). Dr. Potter has also published numerous articles for such journals as *Law & Social Inquiry*, *The China Quarterly*, *Columbia Journal of Asian Law*, *Hong Kong Law Journal*, and the *Canadian Business Law Journal*. In addition to his academic activities, Dr. Potter is admitted to the practice of law in British Columbia, Washington, and California (inactive), and serves as a consultant to the Canadian national law firm of Borden Ladner Gervais LLP. As a Chartered Arbitrator, Dr. Potter is engaged in international trade arbitration work involving China, where he is a member of the China International Economic and Trade Arbitration Commission (CIETAC) panel of international arbitrators. He has served on the Boards of Directors of several public institutions, including the Whistler Forum and the Asia

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Introduction

In April of 2009, the Institute of Asian Research (IAR) launched the second phase of the Asia Pacific Dispute Resolution Research Project (APDR), entitled “Understanding Coordinated Compliance with International Trade and Human Rights Standards in Comparative Perspectives.” Awarded by the Social Sciences and Humanities Research Council (SSHRC) of Canada under its Major Collaborative Research Initiative (MCRI) Program after a competition involving a wide field of applicants, the Coordinated Compliance program is the second APDR/MCRI project developed at IAR.

Whereas the initial MCRI project generated an explanatory model that enabled reliable forecasting of local compliance with international trade and human rights standards, the current Phase II project focuses on the relationships between trade and human rights compliance policies and practices in Canada and Asia. The current project supports research and analysis that will enable interdisciplinary scholars and policymakers in Canada and internationally to understand better the requirements for coordinating trade and human rights compliance. The project’s key activities support a fully integrated program of research, student training, knowledge transfer activities and publications, as well as policy seminars and a public lecture series.

As Project Director for the APDR project, I have been privileged to work with many outstanding scholars exploring various dimensions of coordinated compliance. This volume of papers emerges from one such collaboration - an international symposium on Gender Equality Rights and Trade Regimes, held through cooperation with The North-South Institute. The symposium drew upon the concepts of “Coordinated Compliance”

that is the central issue for our current Phase II MCRI project, as well as paradigms of “Selective Adaptation” and “Institutional Capacity” developed in our initial Phase I MCRI project.

The Dilemma of Coordinated Compliance¹

International trade regimes are centred on normative principles associated with liberalism in the European and North American tradition. Proceeding from tenets about human equality and natural law, the liberal tradition asserts that government should be an agency of popular will and should be restrained from active intervention in socio-economic relations.² As expressed in international trade standards associated with the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO), norms of liberalism are manifest in part through provisions on transparency (GATT Article 10: government responsibility to publish trade laws and regulations); national treatment and non-discrimination (GATT, Articles 3 and 13: responsibility to avoid protection of local industries); as well as the requirements on reducing and eliminating tariffs and trade

¹ Potter, P.B. (2009). Coordinating Corporate Governance and Corporate Social Responsibility. *Hong Kong University Law Journal*, 675-698. Reprinted (2011) in *Tsinghua Faxue (Tsinghua Law Journal)*, 1, 43-55 (in Chinese).

² Classic works include Kymlicka, W. (1991) *Liberalism, Community and Culture*. Oxford: Clarendon Press; Cotterrell, R. (1989). *The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy*. Philadelphia: University of Pennsylvania Press; Heller, A. (1988). On Formal Democracy. In J. Keane (Ed.), *Civil Society and the State: New European Perspectives*. London and New York: Verso; and Lindblom, C.E. (1977). *Politics and Markets: The World's Political-Economic Systems*. (New York: Basic Books, 1977).

subsidies.³ These derive from liberal principles accepting the theory of comparative advantage, which essentially relegates the role of government to promoting efficiency through maximizing the utility of a state's existing or acquired economic attributes, and limiting government actions aimed at inhibiting (through tactics such as mercantilism and protectionism) economic activities of other states.⁴

Whereas international trade regimes tend to focus on efficiency, international human rights standards reflect a normative orientation toward political and socio-economic justice, combining liberal norms with ideals associated with socialism. Human rights standards articulated in the Universal Declaration of Human Rights, as well as the International Covenant on Economic, Social, and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR),⁵ combine priorities of civil and political rights with protection of economic, social, and cultural rights. Despite efforts to present these as a unified and undifferentiated set of norms, political discourses over

³ See text of the General Agreement on Tariffs and Trade, in WTO. (2003). *GATT Basic Instruments and Selected Documents* (BISD). WTO. Among the many useful treatises on the GATT are Jackson, J.H. (1969). *World Trade and the Law of GATT*. Indianapolis: Bobbs-Merrill Co. Inc.; and Stone, F. (1987). *Canada, the GATT and the International Trade System*. Montreal: Institute for Research of Public Policy.

⁴ For a skeptical review, see generally Brown, B.S. (1994). Developing Countries in the International Trade Order. *Northern Illinois University Law Review*, 14, 347-406. For discussion of the role of governments in directing foreign trade policy, see Cohen, B.J. (1991). *Crossing Frontiers: Explorations in International Political Economy*. Boulder: Westview.

⁵ International Covenant on Civil and Political Rights. (1966). UN GA Resolution 2200A (XXI); International Covenant on Economic, Social, and Cultural Rights. (1966) UN GA Resolution 2200A (XXI).

rights enforcement reveal conflicts over priorities and timing.⁶ Yet underlying commonalities about political and socio-economic justice remain, even if complicated by questions about implementation.

Despite their apparent differences of normative priorities regarding efficiency and justice, international trade and human rights discourses have multiple related contexts and mutual influences. For example, trade liberalization rules restricting government assistance to nascent industries have potential impacts on human rights issues over labour standards in developing economies. As well, human rights imperatives on issues of health and environmental protection can affect multilateral efforts to entrench efficiency priorities in trade relations. Coordination also affects the policy-making context within which trade and human rights matters are considered and decided. Linkages between trade and human rights outcomes merit intensive research on conditions for coordinated compliance with international trade and human rights standards. Research-driven policy proposals on coordinated compliance with international trade and human rights standards can offer a range of best practices to facilitate international cooperation in a wide array of socio-economic and political relationships.

While there is an emerging recognition of the need to explore integration of international trade and human rights standards,⁷ empirical research and policy analysis are lacking on

⁶ Compare United Nations. (1993). *World Conference on Human Rights. Vienna Declaration and Program of Action (A/Conf/157/23)* with Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights (Bangkok Declaration) (1993). *Human Rights Law Journal*, 14, 370.

⁷ Abbot, F.M., Breining-Kaufmann, C., & Cottier, T. (Eds.). (2005). *International Trade and Human Rights: Foundations and Conceptual Issues*. xii

the possibilities of coordinating performance (as opposed to integrating content).⁸ One important reason for this is that the “interpretive communities”⁹ of officials, legal specialists, and business and political elites at the heart of local interpretation and implementation of international trade and human rights regimes are often comprised of very different groups of specialists and stakeholders who neither share conceptual perspectives nor interact organizationally.¹⁰ These entrenched institutional arrangements often inhibit development of alternative approaches that might support coordinated compliance. The lack of consensus over the meaning and purpose of trade and human rights goals has compromised local efforts at coordinated compliance.¹¹ For example, compliance with international trade standards on production tend to privilege consumption,¹² local business models,¹³ and reliance on financial and regulatory incentives for

Ann Arbor: University of Michigan Press; Cottier, T., Pauwelyn, J., & Burgi, E. (Eds.). (2005). *Human Rights and International Trade*. Oxford: Oxford University Press.

⁸ Jackson, J. (2006). Reflections on the Possible Research Agenda for Exploring the Relationship between Human Rights Norms and International Trade Rules. In F. M. Abbot, C. Breining-Kaufmann, & T. Cottier (Eds.), *International Trade and Human Rights: Foundations and Conceptual Issues* (pp. 19-28). Ann Arbor: University of Michigan Press.

⁹ Fish, S. (1980). *Is There a Text in This Class: The Authority of Interpretive Communities*. Cambridge MA: Harvard University Press.

¹⁰ Petersmann, E. (2007). Multilevel Judicial Governance of International Trade Requires a Common Conception of Rule of Law and Justice. *Journal of International Economic Law*, 10(3), 529-551.

¹¹ Steiner, H. J., & Alston, P. (2000). *International Human Rights Law in Context: Law, Politics, Morals*. Oxford: Oxford University Press. Section E16.

¹² Barber, J. (2003). Production, Consumption, and the World Summit on Sustainable Development. *Environment, Development and Sustainability*, 5, 63-93.

¹³ Barney, I. (2003). Business, community development and sustainable livelihoods approaches. *Community Development Journal*, 38(3), 255-265.

private behavior,¹⁴ but all too often are unconnected with local human rights conditions and policies. International discourses on private property and trade liberalization often work to limit the range of approaches available locally to promote human rights.¹⁵ Similarly, human rights discourses often tend to confront the norms and institutions of international trade as obstacles rather than potential contributors to human rights conditions.¹⁶

Better coordination of trade and human rights practices will support efforts to build more effective international institutions for coordinated implementation of trade and human rights standards, a critical need for international law reform.¹⁷ It is useful therefore to examine conditions for coordinated compliance with international trade and human rights standards with particular attention to underlying imperatives of efficiency and justice. Coordination in trade and human rights compliance can in turn facilitate stronger cooperation in trade and human rights relations more broadly, such that expanded trade connections can be demonstrated to contribute to improved human rights

¹⁴ Frame, B., & Taylor, R. (2005). Partnerships for Sustainability: Effective Practice? *Local Environment* 10 (3), 275-298; Kysar, D.A. (2005). Sustainable Development and Private Global Governance. *Texas Law Review*, 83, 2109-2166.

¹⁵ Petersmann, E. (2005). Human Rights and International Trade Law: Defining and Connecting the Two Fields. In T. Cottier, J. Pauwelyn, & E. Burgi (Eds.), *Human Rights and International Trade* (pp. 29-94). Oxford: Oxford University Press.

¹⁶ Mares, R. (Ed.). (2004). *Business and Human Rights: A Compilation of Documents*. The Hague: Martinus Nijhoff. Introduction; Steiner, H. J., & Alston, P. (2000). *International Human Rights Law in Context: Law, Politics, Morals*. Oxford: Oxford University Press. Chap. 16.

¹⁷ Fijalkowski, A. (Ed.). (2007). *International Institutional Reform*. The Hague: TMC Asser Press; Steiner, H. J., & Alston, P. (2000). *International Human Rights Law in Context: Law, Politics, Morals*. Oxford: Oxford University Press. Section C.

conditions and vice versa. Coordinated compliance also has implications for performance of international treaty standards in areas such as security, climate change, and resource and technology policy. Thus, building understanding about coordinated compliance with international trade and human rights standards has intrinsic value for its potential to prevent and avoid disputes over trade and human rights and thus reduce costs of international cooperation.

This approach has particular relevance in Asia, where conflicting commitments to trade liberalization and human rights performance raise questions about the conditions that can support coordinated compliance with international standards. By building better understanding of the potential for coordination of local trade and human rights standards in Asia, we can hope to strengthen understanding of a crucial policy challenge in a significant region of the world. Understanding the potential for unifying contending policy and political constituencies associated with trade and human rights in Asia can also help to overcome competition for influence and resources among these constituencies, which can be counterproductive to efforts to build common purposes and cooperation domestically and internationally. Such an approach would strengthen the ability of economies in Asia to respond to different kinds of trade and human rights compliance challenges and to encourage coordination of trade and human rights policies and practice.

Highlights from Conference Presentations

Following the useful introductory essays by Joseph K. Ingram and Heather Gibb of The North-South Institute, the papers and panel presentations at the NSI symposium were organized

according to three themes, poverty reduction, employment, and equality rights. In the first panel on poverty reduction, Barbara Bailey's paper, "Coordinating Compliance between Gender Rights and Trade: Issues and Opportunities - CEDAW and the Issue of Trade Policies," explored the relationships between trade policy and domestic labour markets. Adelle Blackett examined the ways in which local labour regulation affects the role of migrant women workers, in "Women, Migration and the Care Economy: What Regulating Domestic Work Teaches Us about the Relationship between Trade and Labour Law." These two papers helped further our understanding of the links between international trade policy and local labour markets.

Turning to issues of gender and labour relations, Arka Roy Chaudhuri's paper, "Trade Reforms and Gender Wage Differentials in India," examined the ways in which labour and wage rates in India are gendered by the discourses of international trade policy. Similarly, Sophia Woodman examined the local contexts in China for women workers, in "Market Logics, Gender Discrimination and Economic Liberalization in China." Kyoko Ishida's paper, "Promotion of Workplace Gender Equality and the Impact of the Free Market Principle in Japan," offered a combination of trenchant analysis and useful policy proposals. These local case studies on India, China, and Japan combined analysis of local knowledge with broader conceptual perspectives on coordinated compliance.

The final panel presented trade and gender equality questions in the context of broader themes of coordinated compliance. In my short presentation, "Remarks: Coordinating Compliance between Gender Equality Rights and Trade," I attempted to examine linkages between trade and gender issues and broader themes of coordinated compliance. Les Jacobs' piece

on “Gender, Trade Liberalization, and Tobacco Control in China” combined human rights analysis on health with policy treatment of regulation of dangerous substances. Heather Curran examined linkages between gender and the human right to water in “Coordinating Regimes: Integrating Gender and Human Rights in International Investment Arbitration.” Linkages between regulatory forms and human rights outcomes were addressed in Gauri Sreenivasan’s paper, “Trade Agreements and Gender Equality Rights: What Role for HRIA?” The linkages addressed in the final panel between gender equality rights and trade rules and broader conceptual and institutional themes offered important context for the symposium and helped point the way forward to effective policy and legal reform.

Taken together, the symposium papers and presentations revealed the rich diversity of perspectives and issues emerging from the discourse of Coordinated Compliance with regard to specific issues on gender equality and trade. The papers revealed a fundamental concern over human wellbeing along with an abiding commitment to scholarly rigor. I was privileged to participate in the symposium and to work with these outstanding scholars. I would like to thank especially Heather Gibb of The North-South Institute for collaborating on this volume. I would also like to thank Erika Cedillo for her editorial assistance, and Rozalia Mate for her steadfast administrative assistance and support.

Pitman B. Potter
Vancouver, BC
July 10, 2012

Coordinating Compliance between Gender Equality Rights and Trade Rules – Introduction to the edited conference proceedings

Joseph K. Ingram

President and CEO, The North-South Institute

The North-South Institute (NSI) was delighted to have the opportunity to collaborate with the University of British Columbia’s Asia Pacific Dispute Resolution Project, and with the University of Ottawa’s Human Rights Research and Education Centre and the School of International Development and Global Studies, to organize the conference, *Coordinating Compliance between Gender Equality Rights and Trade*. The conference built on NSI’s long-standing engagement on the interface between gender equality and international trade.¹

Few questions can be raised on the idea that trade is an important tool for economic growth and development. But tensions can exist between governments’ gender equality goals and trade policy objectives. Even at the World Trade Organization, there is growing recognition that not everyone is benefitting equally from more open trade rules: along with the economic growth that comes from global trade, there are often widening income gaps between rich and poor; and between women and

¹ See for example, Higgins, K. (2012). *Thinking Equal in Trade Facilitation: Mainstreaming Gender in Trade Facilitation and Logistics*. World Bank.; Gibb, H. (2008). *Gender and Regional Trade Agreements*. Paper prepared for the 13th Meeting of the APEC Women Leaders Network, Arequipa, Peru, May 12-14, 2008. Retrieved from http://www.nsi-ins.ca/english/pdf/Gender_RTAs.pdf; Gibb, H. (2007) *Gender Dimensions of IP and Traditional Medicinal Knowledge*. Colombo: UNDP Asia-Pacific Regional Centre.

men. This is not only morally unjustifiable, but ultimately is self-defeating.

Research shows that investing in the education of girls and women, facilitating their entry into the labour market, and ensuring their economic participation, yield results for the global economy. As the World Bank has re-emphasized in the 2012 World Development Report (Gender Equality and Development), gender equality is both a core development objective in its own right, and is smart economics. Women now represent 40 percent of the global labour force, 43 percent of the world's agricultural labour force, and more than half of the world's university students. So protecting and promoting human rights – more specifically, women's economic and social rights – makes good economic sense. Trade that advances inclusive development, trade that supports more and better jobs for women and men, is trade that can best achieve the global welfare benefits that many of these commercial agreements seek to bring about.

Under Canada's Charter of Rights and Freedoms, Canadian governments have made a commitment – indeed, an obligation – to realizing substantive equality rights. The conference *Coordinating Compliance between Gender Equality Rights and Trade*, presented an opportunity for trade policy and gender equality experts to discuss the interface between the complexity of women's and men's lives (gender differences) and trade policy, underscoring the need for trade policy to take a substantive and more holistic approach in its formulation. One suggestion – that could be taken up through WTO Aid for Trade initiatives – was for *ex ante* and *ex post* gender impact assessments of trade policies, that could help identify and address unintended discriminatory effects of a particular piece of trade policy. Diverse tools are already in use to assess ex-ante (and ex-post) impacts from a gender

perspective, including: sustainable impact assessments; gender trade impact assessments; and poverty and social impact assessments. Parties to some trade agreement can use institutional mechanisms, for example, working groups and committees established under the North America Free Trade Agreement. Another window could be through provisions in Canada's free trade agreements with Peru and/or Colombia, which recommend "collaborative activities" to examine gender issues, including discrimination (in Annex 1 of the labour side agreement). Stakeholder groups from different sectors and regions could be included in these assessments to ensure a broad range of perspectives and information.

Studies have demonstrated how measures associated with trade liberalization can extend far beyond the purview of trade and commerce ministries. These unintended impacts can have major implications for the potential of trade agreements to reduce poverty and inequality - the very aims many of these agreements hope to realize. The conference *Coordinating Compliance between Gender Equality Rights and Trade* represented a unique opportunity for academics, government officials, and civil society organizations to discuss opportunities and challenges for governments and international trade organizations in advancing compliance with both gender equality rights and trade rules.

Gender Equality and Trade: Coordinating Compliance between Regimes

Heather Gibb

Research Associate, The North-South Institute

The “governance gap,” between governments’ obligations under human rights regimes on the one hand, and their increasingly complex commitments under global, regional, and bilateral trade agreements on the other, has attracted increasing attention in both human rights and trade forums. The United Nation’s Special Rapporteur on the Right to Food, for example, has raised concerns about how some trade regimes can threaten basic human rights to food.¹ And in 2010, the Director General of the World Trade Organization talked of the need to increase coherence between the world of trade and the world of human rights.² A growing body of research on how trade rules can have different implications for the livelihoods and wellbeing of poor women and poor men has prompted some governments and donor organizations to advise gender analysis of trade commitments,

¹ See United Nations Human Rights Council. (2009). *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Report of the Special Rapporteur on the right to food, Olivier De Schutter, Addendum, Mission to the World Trade Organization* (UN Doc A/HRC/10/5Add.2); and United Nations Human Rights Council. (2011). *Report of the Special Rapporteur on the right to food, Olivier De Schutter, Addendum: Guiding principles on human rights impact assessments of trade and investment agreements* (UN Doc A/HRC/19/59/Add. 5).

² See World Trade Organization (WTO). (2010). WTO News: Speeches – DG Pascal Lamy: *Lamy calls for mind set change to align trade and human rights*, 13 January 2010. Retrieved from: http://www.wto.org/english/news_e/sppl_e/sppl146_e.htm

much as environmental impact assessments have become mandatory in some jurisdictions.³

The North-South Institute has undertaken research on the interface between trade and human rights regimes, including gender equality rights, and so was delighted to have the opportunity to collaborate with the Asia Pacific Dispute Resolution Project at the University of British Columbia, the Human Rights Research and Education Centre, and the School of International Development and Global Studies at the University of Ottawa, in organizing the conference “Coordinating Compliance between Gender Equality Rights and Trade.” The conference aimed to explore issues raised by the intersection of two multilateral regimes: the GATT and WTO trade rules, with human rights as elaborated in United Nations (UN) and International Labour Organization (ILO) agreements, in particular the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). The objective of the one day forum was to identify ways in which policymakers and trade officials, as well as donor agencies that provide trade-related assistance to developing countries, could better address human rights obligations, particularly gender equality rights, in trade commitments. The conference was honoured by the presence of The Right Honourable Beverley McLachlin, Chief Justice of Canada, whose keynote address elaborated Canadian jurisprudence on gender equality developed under the *Canadian Charter of Rights and Freedoms*.

³ United Nations Inter-Agency Network on Women and Gender Equality. (2011). *Gender Equality and Trade Policy Resource Paper*. Retrieved from: www.un.org/womenwatch/feature/trade/gender_equality_and_trade_policy.pdf.

As a backgrounder for the conference, The North-South Institute prepared a Policy Brief on Gender Equality and Trade.⁴ The following paper is based on that brief.

A belief in and commitment to promoting fundamental human rights, including equality between women and men, has formed the cornerstone of modern institutions for international cooperation, starting with the United Nations Charter. International and regional agreements on trade and investment, however, are somewhat opaque on the matter of equality of people and the implications of trade liberalization. The Marrakesh Agreement establishing the World Trade Organization (1994) only declares that “international trade and economic activities should be conducted in such a way as to improve livelihoods and living standards for all.” Widely viewed as a tool to promote economic growth, international trade agreements can, however, be a double-edged sword. While trade treaties generate economic winners and have the potential to greatly enhance incomes of those on the lower end of the economic scale, they also create losers – and a disproportionate number are women, 70 percent of the world’s poor.

When trade arrangements further marginalize women, who typically work in at-risk economic sectors or are less able to change jobs to adapt to new economic realities, everyone loses. It is only when everyone can participate actively in the economy that long lasting gains are possible. In simple terms, when more women are in the workforce, poverty is reduced. More broadly, taking human rights into account in trade agreements can in the

⁴ Gibb, H. (Fall 2010). *Gender Equality and Trade: Coordinating Compliance between Regimes*. The North-South Institute. Retrieved from: <http://www.nsi-ins.ca/images/documents/Gender%20Equality%20and%20Trade.pdf>

long run benefit more people and produce more sustainable growth.

The World Trade Organization (WTO) estimates that nearly 400 preferential trade agreements have been negotiated since the world's leading trading nations established its predecessor, the General Agreement on Tariffs and Trade (GATT), in 1948. While global trade talks have stalled, around the world, a rush of bilateral and regional trade negotiations has filled the void. The accelerated pace at which bilateral and regional trade agreements have been negotiated in recent years, as well as their sometimes broader coverage, highlight a glaring gap in global governance: trade rules too often clash with international human rights obligations, including gender equality rights. Not only do such inconsistencies challenge the advancement of human rights, they also undermine the global welfare benefits that many trade agreements seek to bring about. The challenge for policy-makers and governments is to make global trade rules and international human-rights obligations more mutually reinforcing.

Trade Liberalization and Poverty Reduction

A focus on the equal rights and gender dimensions of trade liberalization allows for a broader view of poverty reduction and sustainable economic growth. Currently, the WTO and related international financial organizations such as the International Monetary Fund, the World Bank and the Organization for Economic Co-operation and Development (OECD) view poverty as strictly an economic development issue. In contrast, international human rights bodies consider the root of poverty to be much more complex than a lack of income. They attribute it to inadequate and/or inequitable access to food, water, health,

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shelter, education, decent work and personal security – basic rights that are guaranteed under several international conventions. Following are some key human rights agreements to which most WTO members are signatory, whose provisions overlap with these governments’ trade commitments.

- **Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1979.**

The basic principle of the Convention is to guarantee equal outcomes, not just equal opportunities, for men and women. Under CEDAW, all state parties must “respect, protect, promote and fulfill” women’s rights. They must also ensure that private organizations, enterprises, and individuals do the same. UN members agreed in the Beijing Platform for Action (1995) to “seek to ensure their trade agreements do not have an adverse impact on women’s new and traditional economic activities.” Trade mechanisms, however, are not structured to address conflicts between trade rules and gender equality rights. What follows is a partial list of international agreements that affect both trade and gender equality rights.

- **International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966.**

This covenant proclaims the “equal right of men and women to the enjoyment of all economic, social, and cultural rights” such as “fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work.” The ICESCR states that international donor states should ensure the policies and decisions of multilateral organizations, including the World Trade Organization (WTO), the International Monetary Fund, and the

World Bank, conform to the covenant. However, there are potential conflicts between the rights to an adequate standard of living, to food, and to the highest standard of health on the one hand, and trade agreements including the Agreement on Agriculture, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), and the General Agreement on Trade in Services (GATS) on the other. The UN Special Rapporteur on the Right to Health recommends that governments conduct right-to-health impact assessments if they engage in trade liberalization that affects this area.⁵

- **Convention on Biological Diversity (CBD), 1992.**

This convention recognizes “the need for the full participation of women at all levels of policy-making and implementation for biological diversity conservation.” In many nations, women and men have distinct and inter-related roles and responsibilities for natural resources and traditional knowledge, including medicine, but this is not reflected in world trade rules or processes. WTO trade ministers agreed in 2001 to find ways to interpret and implement trade agreements, notably TRIPs, in ways that are more supportive of the right to health, but progress has been slow. The mandates of WTO and CBD are also somewhat conflicting: the WTO addresses private investors’ rights, while the CDB provides for the sharing of benefits arising from resources.

- **International Labour Organization (ILO) Conventions.**

In the 1998 Declaration on Fundamental Principles and Rights at

⁵ United Nations Human Rights Council. (2011). *Report of the Special Rapporteur on the right to food, Olivier De Schutter, Addendum: Guiding principles on human rights impact assessments of trade and investment agreements* (UN Doc A/HRC/19/59/Add. 5).

Work, all ILO members reaffirmed their commitment to respect and promote core labour standards, which aim to eliminate all forms of forced or compulsory labour, effectively abolish child labour, eliminate gender discrimination in employment and occupation, and ensure freedom of association and the right to collective bargaining. While bilateral trade agreements increasingly include commitments to observe core labour standards, the standards themselves say little about gender-specific workplace concerns such as sexual harassment and the increase in employment vulnerability for women that can result from trade agreements (e.g., the resulting job losses for women in the garment sector that accompanied the phase out of the WTO's Agreement on Textiles and Clothing).

- **UN International Convention on the Protection of the Rights of All Migrant Workers and Their Families, 2003.**

Poverty, unemployment, and underemployment in developing countries are increasingly fuelling temporary labour migration from poor to less poor countries. This convention addresses the low wages, poor working conditions, sexism and lack of job protection and security for these migrants, approximately half of whom are women. While the WTO's General Agreement on Trade in Services (GATS) facilitates the movement of some categories of professionals (mainly in male-dominated professions such as engineering and architecture as well as business executives) across borders, it does not include mechanisms to govern and protect the movement of less-skilled workers, such as domestics, where women predominate.

When governments disagree on the interpretation of trade rules, the WTO and other trade agreements provide dispute resolution mechanisms to deliver legally binding solutions.

However, these dispute settlement mechanisms are narrowly defined and not concerned with international commitments to reduce poverty and gender inequalities. In other words, a trade dispute rarely provides an effective forum to address sometimes-conflicting governments' trade and human rights obligations.

Trade and Human Rights

The proposed 1948 Charter for the International Trade Organization that never came into being nevertheless included significant human rights language. For example, its Article 7 would have required signatories to "recognize that unfair labour conditions, particularly in production for export, create difficulties in international trade and, accordingly, each member shall take whatever action may be appropriate and feasible to eliminate such conditions within its territory." Neither the GATT, which emerged as the de facto trade organization after the charter effort failed, nor its 1995 successor, the WTO, said much about human rights. These trade bodies instead focused on relations between states rather than on the economic conditions of the people impacted by trade.

Still, WTO members recognized in the preamble of their agreement establishing the organization that "relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income . . ."

A basic doctrine of the WTO trading system today is the principle of "national treatment," whereby member states may not discriminate against imported goods or services in order to protect or promote local goods or services. However, in exceptional circumstances trading nations have acted in concert to restrict

trade. One prominent case was the UN-sanctioned trade boycott of apartheid South Africa in the name of human rights. But such an approach makes the support of human rights an exception to accepted trade rules rather than an integral part of a trading regime.

Furthermore, treating human rights as an exception does not provide much guidance for trade negotiators on how they might reconcile conflicting norms and interests. At the same time, there is a growing recognition that the commitments governments make in trade agreements can impact or constrain their ability to meet legal obligations to respect, protect, promote, and fulfill human rights and gender equality.

For example, WTO agreements permit national governments to establish free-trade zones where foreign investors may be exempted from national labour standards. While this has meant increased employment for women in some countries, studies have identified gender-related barriers in these zones including discrimination in hiring, wages, benefits and career development, as well as occupational health and safety concerns and a failure to accommodate women's needs with respect to pregnancy, maternity leave or childcare.⁶

Some new bilateral trade agreements include labour chapters in which the parties make legally binding commitments to observe ILO core labour standards. However, despite proclaiming non-discrimination principles, these standards lack teeth in addressing gender equality rights or women's workplace rights in areas such as sexual harassment and physical abuse. In

⁶ See International Labour Organization. (2003). *Employment and Social Policy with Respect to Export Processing Zones*. Retrieved from: http://www.ilo.org/global/publications/meeting-reports/WCMS_078851/lang--en/index.htm.

addition, they provide insufficient mechanisms to tackle the broader employment implications of trade liberalization (including women's increasing employment in the informal sector) on women's rights to livelihoods. Trade departments also tend to place less emphasis on implementing mechanisms to promote labour and gender equality rights than on intellectual property and other protections contained in trade agreements.

In trade agreements, "rights holders" are corporations, but it is their governments that face economic sanctions under the WTO Dispute Settlement Process. When trade rights conflict with human rights, trade usually prevails. For instance, again using a South African example, the country's post-apartheid constitution guarantees every citizen access to healthcare services. However, a prior commitment by the country's then apartheid-era government to open health services to commercial providers under the 1995 General Agreement on Trade in Services, has effectively restricted health care to those who can afford to pay for private services. In this way, trade obligations may make it harder for a government to fulfill its constitutional obligations to progressively improve access to healthcare.⁷

Conflicts between trade-agreement provisions and peoples' rights to a livelihood, health care and food have also been identified. For example, exports of cheap chicken parts from some developed countries have undercut poor local chicken producers in developing countries who are mainly women, putting them out of work. In Ghana, Honduras, and Indonesia, small-scale rice

⁷ See Gabela, Z. (2009). *Trade in Health-Care Related Services in the Global Economy: The Perspectives of South Africa and Canada* (LLM Thesis). Available from ProQuest Dissertations & Theses database. (UMI No. 758122917)

producers have been squeezed out by surges in rice imports from subsidized producers in the United States, Vietnam and Thailand.⁸

Human rights observers, civil society organizations, and researchers have identified other areas of conflict. For example, under the 1994 WTO Agreement on Trade-Related Intellectual Property Rights, governments are required to protect the intellectual property rights of corporations, including over medicinal and aromatic plants. In this way, governance of rights to knowledge resources, traditionally managed by rural and indigenous populations, is now subject to multilateral and regional trade agreements. In contrast, other multilateral agreements such as the 1993 Convention on Biological Diversity, acknowledge the different, often complementary roles of men and women in access to knowledge and use of traditional medicines.

Trade Rules and Gender Equality Rights

Under international human rights law, governments have duties to respect, protect, promote, and fulfill human rights. “Rights holders,” in this regime, are women and men. The widely accepted Universal Declaration of Human Rights along with the International Covenants on Political and Civil Rights and on Economic, Social and Cultural Rights provide support for these principles in their recognition of the equal rights of women and men.

⁸ See Windfuhr, M. (2010). The World Food Crisis and the Right to Adequate Food. In M. Gibney & S. Skogly (Eds.), *Universal Human Rights and Extraterritorial Obligations*. Philadelphia: University of Pennsylvania Press.

CEDAW goes one step further. It defines and elaborates on the general guarantees of non-discrimination in those equality conventions from a gender perspective.⁹ The basic CEDAW principles underpinning gender equality rights are the prohibition of discrimination against women and the active promotion of equality between the sexes. As signatories to the CEDAW, governments are obliged to ensure that their legal systems prohibit direct or indirect discrimination against women. Indirect discrimination may occur when laws, policies or programs are based on seemingly gender-neutral criteria that in reality have a detrimental impact on women.¹⁰ Studies have illustrated how seemingly neutral trade rules can have very different economic and social implications for different groups of people; changes in consumption patterns (related to changes in prices of goods and services), wages, and government revenues resulting from trade agreements can affect women and men differently.¹¹ Gender analyses of the North American Free Trade Agreement (NAFTA), for example, have highlighted how shifts in economic activities in the three partner countries disproportionately affected women's

⁹ See United Nations General Assembly. (1979). *Convention on the Elimination of All Forms of Discrimination Against Women*. Retrieved from: www.un.org/womenwatch/daw/cedaw.

¹⁰ See Committee on the Elimination of Discrimination against Women. (2004). General recommendation No. 25, on article 4, paragraph 1, of the *Convention on the Elimination of All Forms of Discrimination against Women*, on temporary special measures. Retrieved from: <http://www.un.org/womenwatch/daw/cedaw/recommendations/index.html>.

¹¹ United Nations Inter-Agency Network on Women and Gender Equality. (2011). *Gender Equality and Trade Policy Resource Paper*. Retrieved from:

www.un.org/womenwatch/feature/trade/gender_equality_and_trade_policy.pdf.

livelihoods, particularly in the manufacturing and agriculture sectors.¹²

Both trade and human rights regimes are dynamic. In each, signatories commit to make improvements over time, as capacities and resources permit. Trade policy makers need to carefully examine the relationship of trade agreements to a range of other rights, and the best time to consider these competing rights is at the negotiation stage.

There are some indications that this balancing act is beginning to happen. For example, recent Canadian bilateral free trade agreements include enforceable commitments to uphold core labour standards. The WTO-sponsored Aid for Trade Initiative also demonstrates a growing awareness of the gender implications of trade deals. The initiative is aimed at helping developing countries participate on a more equal footing in international trade by building their trade related skills and related infrastructure. In October 2010, the WTO's program to promote and monitor Aid for Trade examined the impact of trade-related development assistance on women, for the first time in its five-year history.

These examples point to the importance of concrete trade-related measures that will advance gender equality goals rather than exacerbate inequalities. Organizations such as the Commonwealth Secretariat, the United Nations Conference on Trade and Development, the International Trade Centre and others have suggested a number of strategies. One approach is boosting awareness at the trade negotiation stage, to ensure negotiators have capacity to assess the gender impacts of proposed

¹² See Spielloch, A. (2004). *Beijing +10 in light of the North American Free Trade Agreement: How Have Women Fared?* Center of Concern/U.S. Gender and Trade Network.

agreements. Others include review procedures for existing trade agreements and international trade regimes to ensure that they adhere to equal rights principles and adequate monitoring mechanisms that can track the impacts of agreements on women and other marginalized groups. Gender sensitive project identification, development, and evaluation mechanisms for the Aid for Trade Initiative are needed to ensure that both women's and men's trade interests are equally addressed.

The WTO could be the natural place to lead this process, given its expertise in global rulemaking on trade issues. Regardless of the source of leadership, however, closing the global governance gap requires recognition that the aims of trade rules and human rights obligations can be complementary instead of conflicting, reinforcing instead of incoherent. Taking action to address the different implications of global trade rules for women and men could enhance the potential of international trade to reduce poverty and inequality.

**PART 1 –
POVERTY REDUCTION, HUMAN RIGHTS AND
TRADE LAW: COORDINATING GOVERNANCE
REGIMES**

Coordinating Compliance between Gender Rights and Trade: Issues and Opportunities. CEDAW and the Issue of Trade Policies

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Abstract

The coordination of compliance between gender equality rights and trade policy is challenging to contemplate since, in many respects, as framed, implemented and monitored gender/women's rights are not only in diametric opposition to trade policies but it is now clearly established that women's rights are actually undermined by trade policies. In the paper, these issues are illuminated and opportunities to achieve a greater level of coordination in compliance between these two arenas are suggested.

The main elements of the international bill of rights for women (CEDAW) is briefly outlined and the obligation of States Parties to ensure the 'absence of a discriminatory legal framework and that policies are not discriminatory in effect' is highlighted. The impact of neo-liberal trade policies on the structure of political-economy at both international and national levels as well as the fact that invariably free trade policies produce 'winners' and 'losers' with women being disproportionately impacted, are discussed. Findings from a case study of corn production in Mexico under NAFTA and the impacts on women engaged in corn production is used to illustrate this claim.

The impacts on women in Mexico are analysed in relation to provisions under the CEDAW and State Party reports to CEDAW in 2002 and 2006, post-NAFTA. As well, concluding observations and recommendations made to the State Party by the CEDAW committee are

used to support a claim that the impacts of free-trade policies on the erosion of women's rights seem to be low on the agenda of both parties. Points of dissonance between women's rights and trade policies are presented. Strategies for achieving greater coordination between CEDAW and trade policies are suggested for consideration.

Introduction

I am pleased, in my capacity as a member of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) Committee, to participate in this significant dialogue on ways and means for coordinating compliance between gender rights and more specifically women's rights, and trade policies; and, express thanks to the organisers of this seminar for inviting me to be the voice of that group as we explore issues and opportunities in this regard. The coordination of compliance in these two arenas is, however, challenging to contemplate since in many respects as framed, implemented and monitored gender/women's rights are not only in diametric opposition to trade policies but it is now clearly established that women's rights are actually undermined by trade policies. In the following lines, my intention is to illuminate these issues and suggest opportunities to achieve a greater level of coordination in compliance between these two arenas.

CEDAW: The International Bill of Rights for Women

I am sure that you are all aware that the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) described as the international bill of rights for women,

is one of eight United Nations treaty-based conventions, with defining features that mark it off from other treaty-based and charter-based human rights instruments.

The Convention sets out, in 14 articles, an agenda for ensuring non-discrimination against women on the basis of their sex, with a focus on three dimensions of equality between women and men. The first dimension receives the broadest attention and includes provisions related to civil rights and political participation; the legal status of women irrespective of marital status; women's right to non-discrimination in education, employment and economic-social activities; and marriage and family relations.

The second dimension focuses on the reproductive rights of women and the need for co-responsibility in the family to allow women to combine family responsibilities with paid work and participation in public life.

The third dimension of the Convention acknowledges that the promotion of women's rights is influenced by culture and tradition which, in many respects, reflect patriarchal norms and give rise to legal, political and economic constraints restricting women's enjoyment of their fundamental rights and the overall advancement of women in society.

Although the Convention, as formulated, has remained unchanged since coming into force in September 1981, over time, the CEDAW Committee has formulated a number of general recommendations to States Parties which elaborate on specific issues related to the three dimensions of the Convention, address emerging issues, or address issues that were not explicit in the original formulation, such as violence against women. The

Convention is therefore a dynamic instrument, continuously building on measures to enhance effectiveness.

Once ratified, it is expected that States Parties will take “all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms, on a basis of equality with men” (CEDAW, 1979, Article 3). The General Recommendation adopted by the Committee in its 47th session highlights the fact that the main obligation of States Parties is to pursue a policy of eliminating discrimination against women through an evaluation of the situation at the time of ratification and the formulation and adoption of a comprehensive range of measures towards the Convention’s goals. It is underscored that such a policy must comprise constitutional and legislative guarantees, including an alignment with legal provisions at the domestic level and an amendment of conflicting legal provisions so that there is a strong focus on the primacy of the Convention in the jurisprudence of a State Party and the need for its integration in that system. The obligation of States, under CEDAW, is succinctly summed up by Balakrishnan and Elson (2008): “It is clear that CEDAW not only means the absence of a discriminatory legal framework, but also means that policies must not be discriminatory in effect” (p. 7).

Neo-Liberal Economic Policies

Trade policies govern trade between two or more countries and are formulated through intense negotiations which result in agreements which set out conditions of the trading relationship and have significant implications for economic, social and overall national development of the parties involved. Space does not

allow for a discussion of the myriad trade agreements that currently exist, but some of the principles that undergird these arrangements have implications for the promotion and protection of human rights and, in particular, women's rights will be highlighted.

The Association for Women's Rights in Development (AWID, 2002) asserts that:

Mainstream economic theory teaches that international trade is beneficial to all countries and their citizens. This belief is based on the idea of "comparative advantage" – each country should focus on what it does best and trade for other products in order to reach the most efficient allocation of resources in the global economy and the highest levels of output and growth in all countries. It is assumed that trade leads to growth which in turn promotes national development and reduces poverty. (p. 1)

Neo-classical economists therefore contend that the best trade/economic policies are those that maximize benefits and minimize costs, and that the greatest efficiency is achieved by promoting competitive market economies and neo-liberal economic policies which are assumed to operate without any government intervention. It is assumed that private ownership and market competitiveness are likely to be the best mechanisms for maximizing economic growth although, under this model, it is recognised that there will be 'winners' and 'losers'; but, it is also assumed that if some people are left behind or made worse-off then 'winners' can compensate 'losers' (Balakrishnan and Elson, 2008).

The structure of political-economy at both international and national levels, however, indicates that under neo-liberal policies “the process of production produces ‘winners’ who tend to resist any redistribution of their gains to those who are losers” (Balakrishnan and Elson, 2008, p. 3).

Solomon (2010) provides data that supports this hypothesis and confirms that under economic neo-liberalism there has been a sharp increase in global inequality. She states that “measured at the extremes, the gap between the world’s richest country and the world’s poorest increased from 3:1 in 1820 to 70:1 in 2001.” Further, “the ratio between the average income received by the richest 5% and the poorest 5% of the world is 165:1” (p. 1).

In today’s dialogue what is of particular interest is not only the income gap between the rich and the poor but more so the gap between men and women. In many (poor) developing countries the face of poverty is that of a woman – a phenomenon referred to as the feminisation of poverty occasioned as it is in many instances by neo-liberal policies that call for the privatisation of services, including education and health, formerly owned or provided by governments; thus, increasing the burden on women, shackled as they are with the burden of responsibility for reproductive work and the care of children and the elderly. This burden of care is further exacerbated by the increasing incidence of female-headed households where women are the primary economic provider. In the Caribbean, these households range from a high of 58.5% in Antigua and Barbuda to a low of 32.2% in Anguilla (Bailey & Ricketts, 2003).

In another paper (Bailey, 2009) I point out that:

...women in the south have been chief among those affected by hegemonic economic policies and

programmes orchestrated and managed by male economists and government bureaucrats in the north and south. (p. 47)

This observation is confirmed by Women Watch, a gateway for providing information and resources on the promotion of gender equality throughout the UN system, who indicate that the majority of the 1.5 billion people living on US \$1.00 per day or less are women and worldwide women earn, on average, slightly more than 50% of what men earn.

It is, therefore, now clearly established that neo-liberal trade and related economic policies disproportionately affect women. The effect is further heightened by the fact that, historically, women have been economically disadvantaged as a result of social and cultural discrimination which, in many developing countries, constrain access to education, technology, credit and land – all pre-requisites for engagement in meaningful productive enterprises.

Winners and Losers: the Case of NAFTA

The North American Free Trade Agreement (NAFTA) came into force in January 1994 creating a trilateral trading bloc with the governments of the USA, Canada, and Mexico. The goal was to eliminate barriers to trade and investment among these countries and particularly tariffs on imports; but, as mentioned earlier, in such arrangements there are both 'winners' and 'losers'. This then begs the question: who have been the winners and losers under NAFTA particularly given the involvement of a relatively small developing country with and agriculture-based economy in

an arrangement with two more highly developed industrialised countries?

Williams (2004) contends that too often discourses on NAFTA focus on the 'losers' in free trade and posits that there are 'winners' in all three countries. Using figures that illustrate the growth of two-way trade between the USA and Mexico as well as the shift from a trade deficit to a US \$37 billion trade surplus for Mexico under NAFTA, he argues that broadly speaking, as well may be the case, there have been distinct benefits derived from this agreement. Myles and Cahron (2004) cite a similar situation for the benefits that have accrued from bilateral trading between the USA and Canada.

But can the same claims be made for the impact on individuals in these countries? Is the picture as rosy where the tyre hits the ground and impacts are felt by individuals? Balakrishnan and Elson (2008) point out that you cannot separate production and distribution and posit that:

The process of production produces 'winners' who tend to resist any redistribution of their gains to those who are 'losers'. The way in which the pie is produced constrains the way in which it can be sliced. (p. 3)

The real test is therefore the extent to which the gains described above are equitably distributed particularly to meet the needs of vulnerable groups - the less powerful in the value chain - some women being a prime group in this regard. In fact, in many instances, the gains are realised at the expense of the exploitation of women's productive capacity in paid work as well as their unpaid role in social reproduction. A case study of corn production in Mexico under NAFTA reported by Gender and

Trade (Gender and Trade, n.d.), an initiative of the Commonwealth Secretariat, illustrates ways in which women are negatively impacted when the tyre hits the ground under such free trade agreements.

The following salient points are reported:

1. corn is one of the four major cereals that make up for more than half of the world's nutrition;
2. the US is the world's top producer and exporter of corn with 40% of global production;
3. Mexico has a strategic significance in world corn production for being the place of origin and domestication;
4. in Mesoamerican cultures, the relationship of peasant women with corn continues to be strong including planting, harvesting, storage, management, drying, shelling, grinding and making tortillas;
5. up until 1993, Mexico was self-sufficient in corn production but since NAFTA came into effect, national support structures have been gradually lifted and corn prices in Mexico have fallen due to competition from imports of US corn which compete in the market with low prices as a result of government-subsidised crop production in the US;
6. local production has fallen while corn imports have tripled;
7. many Mexican corn farmers who traditionally planted local genetically diverse species have been forced to leave their plots and look for other work.

The report identifies specific impacts of NAFTA on women engaged in corn production and describes these as distressing and destabilising:

- Poverty increased by five percent in female-headed households since the implementation of NAFTA.
- Women, more than men, benefitted from non-traditional agricultural jobs, gaining 83 percent of the new jobs created

in the sector. However, for the same job, women made 25 to 30 percent less than men explaining why women gained more jobs in this sector: they were a source of cheap labour.

- Of women farmers in Mexico, only three percent had more than 10 hectares of land, much less than men, and made up the poorest of farmers in Mexico.
- Additionally women were also burdened with the task of fetching, carrying and storing water needed for the harvest or for their families, for which they often needed to walk long distances. Additionally, the privatization of water turned the natural element into a commodity, limiting its use and submitting it to market rules, which affected the lower income sectors, especially women, who were marginalized from production processes and were further displaced from their control over natural resources. (p. 4)

The case study further reveals that post-NAFTA, women had to seek alternative employment and found this in four main areas with less than ideal conditions of work and remuneration than previously:

1. Women living on two or fewer hectares of land engaged in subsistence farming for domestic consumption and for sale, informally, at local markets.
2. Women also found some employment in the fruit sector with non-traditional agricultural exports (NTAEs). However, these jobs are highly sex segregated with women situated at the bottom of the value chain typically and disproportionately engaged in propagating, cleaning, sorting, quality control, and packaging. Men typically assumed the tasks of supervising, transporting, storing, and operating machinery; and women typically earn 25-30 percent less than men.

3. Women also gained employment in *maquila* factories where working conditions were often unsafe, tenuous and insecure. Almost 70 percent of the *maquila* workforce in Mexico is composed of women. Sixty-three percent of the jobs are without fringe benefits, and 17 percent offer less than minimum wage.
4. Women have also been the latest major entrants into the informal economy to supplement household income. Of the jobs created since NAFTA, close to 40 percent have been in the informal sector. These jobs are not counted in the formal economy and are unprotected by labour laws. Most women in this sector therefore work long hours and earn very little from their businesses. When unpaid household labour is included, in both the rural and urban areas, women work more hours per day than men with a typical working day being more than eighteen hours, exceeding that of men by as much as 43 percent.

NAFTA and CEDAW

Implementation of NAFTA agreements, therefore, reinforced the traditional subordination of women in the value chain which was already evident in pre-NAFTA corn production, but was further entrenched in new areas of work pursued by women post-NAFTA. Secondly, the direct impact on livelihoods no doubt created indirect impacts that further eroded women's capacity to realise their legal, political, economic and social rights. The following summary of the case confirms:

Mexico previously had programs in place to stabilize prices, support farmers and to ensure a certain level of national production. When Mexico liberalized its agricultural sector, the new policies devastated rural employment, increased poverty,

and increased dumping and migration. Prices have gone up drastically.

Women have had to deal with these shifts in a variety of ways. They have found some work as a result of liberalization, but their jobs tend to be precarious, low-paid and even dangerous in the case of the *maquiladoras*. There are a growing number of men and women migrating to the U.S., leading to an increase in female-headed households in Mexico. Finally, poor families in the rural sector are having difficulty making ends meet. Their growing challenge to provide healthcare and food for their families is exacerbating food insecurity. (p. 5)

An analysis of the case from a CEDAW perspective reveals that the trade liberalisation policies pursued by the Mexican government impacted women in relation to all three dimensions of the Convention. The following is self-evident:

1. traditional, stereotypical roles of men and women were reinforced especially in relation to work in both the public and private spheres (Article 5);
2. increased levels of poverty no doubt could have precipitated some, or all, of the following effects:
 - a) exploitation of prostitution of women occasioned by increased levels of poverty; heightened migration due to loss of traditional work in corn production (Article 6);
 - b) reduced income resulting in more limited access to: education for women and their children (Article 10); general and reproductive health services (Article 11); and decent employment (Article 12);
 - c) increased poverty among women especially those in rural areas and therefore limited or no access to

- economic benefits such as bank loans and mortgages (Article 13);
- d) limited access to social security and other benefits particularly for rural women and women in the informal sector engaged in both paid and unpaid work (Article 14);
 - e) limited access to legal services and the capacity to manage personal and family matters (Article 15).

In spite of the extreme impacts of these neo-liberal trade policies on Mexican women, it is instructive to note that the State's obligation under CEDAW to 'condemn discrimination against women in all its forms and to take steps by all appropriate means to pursue non-discriminatory policies,' including trade policies, seems to be low on the political agenda of Mexico. To date, the negative effects of free trade on women's rights also seem not to be highly visible on the CEDAW Committee's agenda. Evidence to support these claims is based on a review of Mexico's fifth and sixth periodic reports to the CEDAW Committee in 2002 and 2006, respectively, as well as the concluding observations and recommendations submitted to the State Party by the CEDAW Committee.

Although NAFTA came into force in 1994, there is only passing reference to its direct and indirect impacts in both the 5th and 6th periodic reports submitted by Mexico to the CEDAW Committee. The content of Mexico's 5th report (CEDAW, 2002) is totally devoid of any reference to free trade or the use of language that would suggest an appreciation of the impacts of neo-liberal trade/economic policies on women. This might be understandable, however, given that the language of the Convention is similarly silent on these matters which, at the time of formulation, were not as high on the international agenda. In

the concluding observations to that report (CEDAW, 2002), although the Committee draws attention to the adverse situation facing women working in the informal sector, particularly domestic workers and those in the *maquila* industry, no link is established between these forms of discrimination and impacts of agricultural liberalisation policies:

...The committee is especially concerned about women working in the informal sector, including domestic workers, and those employed in the *maquila* industry whose basic labour rights are not respected; in particular, the Committee is concerned about the pregnancy test demanded by employers which exposes women to the risk of being let go or fired in the event that it proves positive. (#441)

A similar omission is evident in the recommendation, which is equally devoid of any explicit reference to the discriminatory effect of these policies and focuses instead on discriminatory legislation and the need for legal reform to give effect to the labour rights of women:

The State Party speed up the adoption of the reforms that must be made in the Labour Act, including the prohibition of discrimination against women, in an effort to ensure their participation in the labour market on a footing of genuine equality with men. It also urges the State Party to give effect to the labour rights of women in all sectors. To that end, it recommends that the State Party strengthen and promote the role of INMUJERES in negotiating the Labour Act so as to give special attention to the needs of women workers and to implement the principle of equal pay for work of equal value and prohibit the requirement of a pregnancy test for *maquiladora* workers. (#442)

In focusing only on legislative measures to address these problems, the Committee fails to direct the State Party to the need to take 'all appropriate measures' including reform of discriminatory [neo-liberal] policies, to ensure the full development and advancement of women in the political, social, economic and cultural fields' (Article 3).

In Mexico's sixth periodic report there is a single benign reference to NAFTA in terms of the role played by Mexico as a member of the Organisation of American States (OAS) in initiatives and resolutions developed by that body on a number of issues including 'Gender and Consumption in Free Trade Processes' - indicative of a lack of appreciation on the part of the State Party of the dissonance between targeted outcomes of neo-liberal policies and CEDAW's mandate to promote *de facto* substantive equality between men and women. In its follow-up concluding observations (CEDAW, 2006) the Committee therefore makes explicit reference to NAFTA and expresses regret that:

...insufficient information was provided about the gender-specific impact on women of macroeconomic policies, in particular about the effects of regional trade agreements such as the Puebla Panama Plan and the North American Free Trade Agreement. (#20)

In the ensuing recommendation the State Party is urged to:

...put in place an effective strategy for mainstreaming gender perspectives into all national plans and to strengthen the linkages between the national plans for development and poverty eradication and the National Programme for Equality of Opportunities and Non-Discrimination against Women with a view to ensuring the effective implementation of all the provisions of the

Convention. The Committee requests the State Party to include information about the effects of macroeconomic policies, including the regional trade agreements, on women, particularly on women living in rural areas and employed in agricultural activities, in its next periodic report. (#21)

In this instance, a more integrated approach is adopted by the Committee and the State is asked to ensure that all national plans, programmes and policies are non-discriminatory; this is highlighted, as well as the need to understand the linkages between such development initiatives and poverty eradication. The State Party is also directed to examine the specific impacts of macroeconomic policies, including trade policies, on women, particularly rural women.

CEDAW and Trade Policies: Points of Dissonance

The foregoing discussion points to the fact that there are several points of disconnect, at both international and national levels, between neo-liberal trade policies and international human rights treaties. The following issues are pertinent to the concerns of this volume.

The most critical disconnect is the socio-political ideology undergirding neo-liberal policies which de-emphasizes positive government intervention in the economy, focusing instead on achieving progress by encouraging free-market methods and less restricted business operations. Supporters argue that the net gains for all, under free trade and capitalism, will outweigh the costs in all, or almost all, cases (Neo-liberalism, n.d.). The capitalist

economic system is, to a large extent, dependent on a compliant and skilled workforce to enhance and maximize production.

The socio-political ideology undergirding sex-based discrimination is patriarchy, which is defined as a set of social relations among men that produce male solidarity and female subordination and have a material base, namely control of women's labour, in both the private and public spheres (Hartmann, 1976). Under this system, women are regarded as secondary wage earners and are primarily relegated to the private domain for social reproduction of the skilled workforce, primarily male, required to maximize production, and as demonstrated in the Mexico case study, when engaged in paid work in the public domain, are exploited to maximize gains.

Neo-liberal, capitalist economic models therefore flourish where patriarchal structures and norms, which dictate the subordination of women and the undervaluing of their paid labour, prevail, illustrating the inter-locking nature of these two systems and the way in which they are mutually reinforcing. Neo-liberal trade policies, therefore, not only undermine the achievement of women's human rights, but also through both direct and indirect effects, exacerbate sex-based discrimination and erode the rights enshrined under all dimensions of CEDAW. For this reason Hartmann (1976) opines that the 'mutual accommodation between patriarchy and capitalism has created a vicious circle for women' (p. 139).

Given this disconnect, it follows that the concepts and language of the discourse that relates to free trade and human rights stand in opposition and could even be described as being antagonistic. In the case of neo-liberal trade policies, the frame of reference is macroeconomic principles: accumulation of capital, profit and loss, free market, competition, privatisation and winners

and losers. At the other end of the spectrum, the human rights discourse draws on a framework of philosophy and ethics, and deals with much broader issues related to equality, equity, fairness, vulnerability, and social, political and economic justice.

Further, a stark contrast is evident in the legal regime governing trade agreements and human rights treaties such as CEDAW. In the former case, States must accept the entire package of WTO rules or none at all (AWID, 2002). In the latter case, article 28 of the CEDAW (1979) allows for States to make reservations at the time ratification or accession although #28.2 cautions that '*A reservation incompatible with the object and purpose of the present Convention shall not be permitted*'.

By becoming Parties to international trade and human rights agreements and treaties, under international law, States assume the responsibility to transpose related obligations into domestic legislation and measures compatible with obligations under these instruments. Trade agreements and human rights treaties, once adopted, become public international law, but, in both instances, the onus is on the State to develop national implementing legislation to operationalise the applicability of the agreements and achieve full incorporation of obligations into the domestic legal system as well as the policy arena. Another disconnect between these two domains is an apparent difference in the gravity placed on this commitment by governments.

Regrettably, in the case of CEDAW, the translation of commitments into the domestic legal and policy frameworks does not readily take place so that, in many instances, States have to be pressed to account for their actions in this regard during the interactive dialogue between the State Party and the Committee and in follow-up recommendations set out in concluding observations. For the most part, there are no imposed

consequences for States that do not comply. Under the newly constituted follow-up procedure (CEDAW, 2010a) it is possible, however, where a follow-up recommendation is 'not implemented' by a state, for various actions to be taken, and where the situation warrants, for the Committee to launch an inquiry; but, to date, no precedent has been set.

On the other hand, where States Parties do not comply with trade-panel rulings, another country can bring a case against them in a dispute-settlement panel and, if found guilty of a violation, have to comply or face sanctions. Such a country could risk substantial economic loss from withdrawal of trade concessions. The system is therefore not one of negotiation, as occurs in the CEDAW Committee, but is a litigation based enforcement system (AWID, 2002). Compliance with human rights obligations would, therefore, no doubt be viewed by governments as being less binding than trade agreements, resulting in less political will and commitment to a human rights agenda. For this reason, White (2004) opines that:

Multilateral, regional and bilateral trade rules now have significantly sharper 'teeth' than other international commitments, a fact which gives States Parties a strong incentive to adjust their laws and policies to conform to trade-panel decisions, even at the expense of other international commitments or other compelling domestic policies. (p. 45)

There is strong evidence in support of this observation. Firstly, there are a number of countries who have ratified the CEDAW that to date have not submitted an initial report on implementation of the Convention. Added to this, several countries also fail to submit periodic reports as required every four years. As at May 2010, there were nineteen countries that had not

submitted initial reports and many more had overdue periodic reports (CEDAW, 2010b). Secondly, at the national level, the positioning and resourcing of the machinery responsible for implementation of trade agreements are very differently positioned and resourced within government structures, while women's machineries are frequently marginalized and under-resourced in terms of both financial and human capacity.

Coordinating CEDAW and Trade Policies

Given the dissonance between trade policies and human rights treaties, and more specifically the CEDAW, outlined in the preceding section, actions, informed by these issues, would need to be adopted, at both international and national levels, if a greater level of congruence and coordination is to be achieved in the implementation and monitoring of obligations under these agreements. The following are proposed for consideration:

1. Structures and processes need to be created to facilitate an interface between the international bodies responsible for developing and monitoring trade policy and human rights; but, for there to be meaningful dialogue among mandate-holders in the two arenas as well as between mandate-holders and States Parties in either arena, they would need to be familiar with the concepts and the language of the discourse in both domains. The UN High Commissioner has, in fact, already produced a number of reports on trade and investment clarifying that international trade and investment agreements must be consistent with the human rights obligations of States (Balakrishnan & Elson, 2008, p. 4), indicative of a move in this direction. Such an interface could be operationalised through cross-representation of

mandate-holders on monitoring bodies at the national and international levels.

2. The under-resourcing of human rights agendas could be alleviated by economic growth accruing from free trade and the availability of increased resources for supporting the promotion and enjoyment of human rights. However, given the 'natural' tendency for the objects and outcomes of these arenas to be counter-discursive and counter-effective, this linkage would not be automatic and would need to be deliberately manipulated through a deliberate policy decision backed by the political will to move in that direction.
3. Added to this, it is suggested that in trade agreements a human rights perspective places an obligation of conduct on governments to introduce safeguards or compensatory measures to protect discriminated groups from losses or the worsening of the situation of such groups after trade liberalization. Further, this obligation also extends to powerful trading partners if they also did not include safeguards in the agreement or limited access to markets in ways which minimized gains from trade (Balakrishnan & Elson, 2008, p. 17). In cases where women are disproportionately affected, the CEDAW Committee should hold States Parties responsible for answering to and addressing such negative impacts hence the need for competencies in the treaty body to analyse and speak to these issues.
4. Governments should be required to monitor the potential and real impacts of trade rules and policies on the

enjoyment of human rights by individuals and groups - in particular the vulnerable, marginalized and socially excluded - through the use of human rights impact assessments to guide trade rule and policy making so that the progressive liberalization of trade promotes the progressive realization of human rights (Office of the High Commissioner for Human Rights, OHCHR).

5. Human rights bodies, and CEDAW in particular, should, in turn, consider the inclusion of 'free trade and investment' as a cross cutting theme to be addressed in country reports in relation to the range of women's rights that can, potentially, be negatively impacted by such policies as well as an issue to be raised in concluding observations.

Summary

The overall aim of coordination between gender rights and trade is to promote a human rights-based approach to trade. In the Office of the High Commissioner for Human Rights website (OHCHR) this is described as:

...a conceptual framework for the processes of trade reform that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights.

It is further stated that (OHCHR):

Human rights law is neutral with regard to trade liberalization or trade protectionism. Instead, a human rights approach to trade focuses on processes and outcomes - how trade affects the

enjoyment of human rights - and places the promotion and protection of human rights among the objectives of trade reform. In short, adopting a human rights approach to trade brings individuals and communities squarely into the processes of negotiating and implementing trade law.

I would, however, proffer that adopting a human rights approach to trade has to be a two-way stream. It cannot be enough to pursue a strategy 'to place the promotion and protection of human rights among the objectives of trade reform' (OHCHR, n.d.). The fact is that human rights bodies have themselves not given adequate attention to the impacts of such policies on the promotion and protection of the rights for which they have oversight. To create a synergy for change, reform is required on both sides.

In relation to CEDAW, I would suggest that this would best be achieved through the development of a General Recommendation that systematically examines the impacts of trade policies on women in both the North and the South and, based on this analysis, make recommendations that States Parties can pursue in an effort to ameliorate the negative and disproportionate impacts on women. I use this opportunity to make this suggestion for further consideration and possible support of such an initiative.

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Women, Migration and the Care Economy: What Regulating Domestic Work Teaches Us about the Relationship between Trade and Labour Law

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Abstract

This presentation explores the intersection between gender, migration and care, offering an analysis from a trade policy perspective. It considers the traditional focus of trade multilateralism on the productive economy, and the impact of the shift both toward services and subsidies. In respect of the productive economy, it considers how the principle of equal pay for work of equal value guided a normative line drawing exercise in the construction of the European Economic Community. In respect of social reproduction, it considers the contemporary transnational movement of domestic workers to deliver market-enabling care services. It identifies the interface between trade and care as a contested site for the mediation of the social in the economic.

Introduction

The following presentation focuses on intersections between gender, migration and care, analyzing them from a trade perspective. My focus is on trade policy – as reflected in existing regulatory frameworks – rather than on a technical analysis of trade law. My goal is to develop an analysis of what trade policy includes and excludes. The paper considers the multilateral trading system on its founding as the General Agreement on Tariffs and Trade (GATT), and its evolution on the conclusion of

the Uruguay Round into the World Trade Organization (WTO). It reflects on what is considered to be a legitimate trade issue and what is considered to fall outside trade's boundaries. It is concerned to identify distributive impacts, including gender impacts.

Trade policy has focused on the productive economy. During the life of the GATT, the multilateral system emphasized the terms under which commodities were exchanged across national borders, moving away from the 'discrimination' of extractive colonial preference (Gardner, 1947). The multilateral system disciplined the exchanges according to non-discrimination principles of national treatment, most favoured nation status, increasing transparency, the elimination of quotas through progressive tariffication, and the reduction of tariff levels. The focus on the production of goods was to the exclusion of 'non-productive' or reproductive labour. One would have expected no less. The exclusion is consistent with the broader economic landscape and concerns. Both Adam Smith and Karl Marx considered that while socially valuable and even noble, reproductive labour and social reproduction fall outside of the productive economy linked to consumption (Marx, 1887, p. 447-8; Smith, 1910, p. 294-5).

Since the conclusion of the Uruguay Round, the scope of multilateral trade policy has expanded beyond traditional understandings and beyond a focus on production and trade in goods, to embrace the regulation of the valuable trade in services. It includes a recognition in Mode 4 of the GATS that the movement of persons to provide services falls within the boundaries of multilateral trade. The scope also includes a deepened attempt to characterize the notion of a subsidy and to apply that more broadly to the way that governments make

choices within their borders that may advantage particular sectors or particular industries. The breadth and depth of the current agreements of the WTO are at the heart of core global governance challenges. So too are persisting exclusions.

The Trans-border Trade in Care Work

It might at first seem surprising that migrant women domestic workers should be relied upon to highlight the persisting exclusions. Consider, however, that 50% of all migrant workers are women, and 80% of all female migrants are domestic workers (Department of Economic and Social Affairs, 2010). In other words, at least 40% of all workers who cross national borders engage in paid reproductive labour.¹ In the contemporary landscape, many domestic workers are highly educated women, qualified as nurses and teachers, who travel across national borders to provide what is under-valued but certainly not unskilled, and “subsidized” care in private households. They travel from lower-income to higher-income regions in the same country, and countries in the same region, or from economically underdeveloped to economically emerging regions of the global South. Increasingly they travel from South to North, leaving their own families behind, in what is referred to as ‘global care chains,’ to underscore the parallel global production chains for goods (Yeates, 2009).

Domestic workers do not travel as do judges, academics and policy makers, under conditions of relative privilege. They relocate due to macro-economic processes of ‘care work extraction’

¹ It is important to recall that men also engage in domestic work, including migrant domestic work (McGregor, 2007). Moreover, this total does not include other forms of paid care work, notably the migration of nursing personnel, which is also heavily gendered (Yeates, 2010).

linked to the 'exhaustion of state care resources by structural adjustment policies that mandate the servicing of the foreign debt and ... the depletion of the labour supply of care workers from the global south as they move to the global north' (Salazar Parreñas, 2005, p. 14). They face multiple forms of structural disadvantage associated with restrictive immigration controls (Quebec Human Rights and Youth Rights Commission, 2011). They may leave paid, skilled formal economy employment in their home country. Global wage inequality underpins the decision to accept occupational segmentation into precarious, low-status work abroad in which there may be a labour 'scarcity,' to send remittance resources back home. Moreover, even the contribution of remittances to development requires greater scrutiny when the impact of social dimensions - notably care deficits - is considered. For example, data suggesting that children from high migration areas are likely to migrate themselves before finishing school, despite the existence of the remittances paying for that schooling, require research and policy attention (Levitt & Lamba-Nieves, 2010). But my main point is that their disadvantage is systemic, and structured in part by the world trade system's exclusions.

In liberal trade theory, as opposed to the current world trade system, the liberalization of factors of production would include the movement of persons (Unger, 2007). The current world trade system takes the 'birthright lottery' (Schachar, 2009) as a given in a world constructed around state sovereignty and political possibility. Immigration law is anchored outside of trade, although '[f]rom a trade standpoint, limits on immigration, where immigration is necessary to cross-border trade in services, are barriers to that trade' (Trachtman, 2009, p. 241). Despite limited, temporary movement of essentially (but not necessarily) "skilled" natural persons as an aspect of the trade in services under the General Agreement on Trade in Services (GATS), Mode 4 is linked

to and compensates developing countries for Mode 3's liberalization of commercial presence (investment) (Trachtman, 2009, p. 63). Mode 4's approach to national treatment and market access is dependent on positive disciplines entered into by states through a scheduling of commitments. The GATS provides the legal construction of a regime that confirms the predominant exclusion of the movement of persons from the world trading system. It is less the ideal of free trade from a liberal perspective and more the *real politik* of a sovereignty-based international order. But beyond invisibility in trade law, global migration across (inevitably) porous international borders stands as a stark reminder of the challenge to the legal and political ideal of sovereignty in an era of deep global interdependence. People move; they move regularly through restrictive immigration schemes or irregularly and perilously to cross state borders. Increasingly the literature that looks at this informality recognizes the extent to which market economies of the North depend on labour market informality to service those industries, such as agriculture, that are in direct competition in terms of trade with the South. Migrant domestic work spotlights the growing dependence on the market-enabling, care work transborder trade in care (Blackett, 2011a).

Human Rights in Trade: Normative Lines in the Sand

I am committed to the project of finding ways to make trade law and policy compatible with human rights protections. Some of the most challenging work on this interface offers an internal critique that pushes trade policy to be consistent with itself – including on the movement of persons (Unger, 2007). But, let me step back and talk a little bit about embedded liberalism

and an understanding of why we do not have a fully liberal trade system, but rather a system that reflects particular bargains established over time and the kind of compromises on which those negotiating the GATT in 1947 were able to commit. A report was prepared, interestingly, by the International Labour Organization (ILO) for what was soon to be constructed as the European Economic Communities, the Group of Experts on the “Social Aspects of European Economic Co-operation,” presided by the Swedish Nobel Laureate, trade economist Bertil Ohlin (Ohlin Report, 1956). The Ohlin Report was broader in scope than social Europe, in that it considered ‘global’ trade and employment and some of the “problems” arising generally out of the liberalization of trade. The Ohlin Report looked cautiously at the notion of unfair competition through low wages, and despite its prudent approach, highlighted the potential of one unjustified inter-industrial wage difference, which was the gender wage differential. That differential was said to arise on the basis of a failure to apply principles of equal pay for work of equal value. France at the time had legislation that recognized the notion of comparable worth and the ILO had recently adopted the Equal Remuneration Convention, 1951 (No. 100). The Ohlin Report recommended that an instrument enshrining the principles in Convention No. 100 should be adopted; that ultimately resulted in the negotiated Article 119 of the Treaty of Rome. And, what is so interesting about that example is that there was no magic line-drawing exercise that dictated that this particular principle, from amongst all others, needed to be accentuated. Yes, there were women in low wage sectors, textiles in particular; yes, there was concern between France and Italy; and yes, it could be established that there would be an impact. However, the shift took place because a normative line in the sand had already been drawn, internationally and nationally. In other words, France had already

acknowledged that there was a regulatory problem - a gender differential pre-trade if you will - and was prepared to act on that to root out the differential in domestic law, consonant with international law. And, it became important in entering into a new economic community to think about the application of the labour principle to other members (Blackett, 2012).

Care Work and Public Policy

The Ohlin Report's recommendation contemplated women working in the productive economy, producing textiles and clothing, although Article 119 was most famously applied by a flight attendant in respect of the provision of services in the airline industry. But let us consider the insight in relation to the market for care work. Many social democratic economies have assumed that the need for paid domestic work in modern households would basically be eliminated, that with more egalitarian (and public institution based) care policies alongside time saving technological innovations in domestic consumer goods - the vacuum cleaner, the washing machine... - societies emerging from modern welfare states would become more egalitarian, and would eliminate the need for somebody to come into the home to provide care. The contemporary story has not ended in greater leisure and greater egalitarianism. Rather, some studies find that with the pressures of regional integration, the direction has been toward an increased, or resurgent, supply as well as demand for personalized care by dual income households (Calleman, 2011). Privatized, individualized, indeed transnationally 'subsidized' care is not an egalitarian social policy but it coincides with a more complex policy mix linked to demographic change, aging of populations, and claims of identity, autonomy and dignity associated with

receiving care in the home by persons living with disabilities. The rise of these demographic factors at very least coincides with the dismantling of the social welfare state, and with a growing commoditization of – and transnational trade in – care services.

Much of the literature that focuses upon migrant domestic workers' working conditions suggests that their actual responsibilities in many contexts approximate nursing care or formal teaching. In Canada, those responsibilities may match the domestic workers' formal training in their home country, as well as their former work experience; indeed, there is an 'educational' requirement of successful completion of the equivalent to a 12 year high school degree plus at least six months of training in a classroom setting in areas such as early childhood education, geriatric care, pediatric nursing or first aid. Continuous work experience of one year (including at least six months with the same employer) is a potential alternative to the six months of training (Citizenship and Immigration Canada (CIC), 2011). Yet it is fair to state from the conditions surrounding the Canadian domestic workers' scheme that specialized training is hardly compensated in the remuneration, which is at best the standard minimum wage, assuming the unlikely condition that domestic workers are only required to work 'normal' weekly working hours² (ILO, 2009). Moreover, the Canadian live-in caregiver program requires foreign domestic workers to live in their employer's house. The requirement fosters much of domestic workers' labour market disadvantage, confining them to the 'boundarilessness' of long hours and isolation. That same live-in requirement – one that few Canadians and permanent residents of Canada would accept – is

² See Regional Wages (2012), *Working Conditions and Advertisement Requirements for the Live-In Caregiver Program (LCP)*, available at http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/advertReq/wageadreq.shtml#tphp.

framed as the justification for the 'positive labour market opinion' necessary to establish that there is a need for a foreign worker to fill the position (CIC, 2011).

Consider, moreover, that most countries in the industrialized North do not actually have formalized schemes for domestic workers; migrant domestic workers generally navigate labour market irregularity and informality in the global North and in the global South (Chen, 2011). Abject, systematic neglect of labour law enforcement – when the laws do and can apply – may contribute to forced labour conditions, (ILO, 2009) and contemporary forms of slavery and servitude (UN Special Rapporteur, 2010).

The global phenomenon of migrant domestic workers providing care services across national borders enables and sustains 'citizens' (labour) force participation. Migrant domestic workers contribute to the economy while also providing the social reproductive labour (care, education) necessary for the next generation of market actors. How can we think about those persons who move across borders at their peril, in the absence of any recognition within the WTO framework of what some have referred to as a "generalizable" principle of reasonable labour market access (Lee, 2006)?

Trade and Care: Mediating the Social in the Economic through Distributive Justice

I increasingly consider that in the field of migration, we need to think carefully about how to craft an alternative mediation of the social in the economic, which includes social reproduction through the delivery of care services. Under Europe's post-War

embedded liberal bargain, the trade-production nexus was a basis upon which domestic social policy distributions were built. That embedded liberal bargain was ultimately unstable in the face of liberalized financialization and weak labour harmonization (Giubonni, 2006). It is suggested that the transnational 'human rights' line-drawing underscored in the Ohlin Report offers a hint at the necessary rethinking of global distributive justice, particularly as it relates to migration, development, and international solidarity. That rethinking must frame the conditions under which people move to provide services, including to provide care.

For example, historic standard-setting at the ILO level has led in June 2011 to the adoption of a new binding treaty (Convention Concerning Decent Work for Domestic Workers, 2011) and a non-binding supplementary recommendation (Recommendation Concerning Decent Work for Domestic Workers, 2011). The standard setting seeks to establish a distinct, human rights-based framework for asserting equal treatment via specific labour regulation for domestic workers. It normalizes working hours, calls into question the reliance on a live-in requirement, establishes the need for equal treatment, reinforces the freedom of association, and offers specific guidance on adapting labour regulatory frameworks to the specific circumstances of domestic workers while preserving their right to equal treatment. It promotes clarity and fairness in contracts; foresees social protection, occupational safety and health mechanisms; emphasizes meaningful enforcement; and foresees multilevel governance approaches and international cooperation. It also seeks to regulate against the abuses of employment agencies. Crucially, and unlike other UN and ILO instruments relating to migrant workers, the new Convention and

Recommendation apply equally to all domestic workers (Blackett, 2011b).

To conclude, standard-setting offers one discrete starting point through which to understand compliance. I take the call for reasonable labour market access to be linked to providing decent work standards and creating a space for a range of international organizations, including the ILO, to work collaboratively to think about both the relationship between sectoral liberalization of movements and ensuring that labour conditions are respected across the board.

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**PART 2 –
TRADE AND EMPLOYMENT**

Trade Reforms and Gender Wage Differentials in India

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Abstract

The paper analyses the evolution of the gender wage differentials in India from 1987 till 2005 and how it was affected by trade reforms undertaken during this period. Exploiting the variation in pre-industrial composition of district and the variation in the quantum of tariff rate reduction across industries, the paper analyses how district tariffs, constructed as employment weighted average of tariff rates of industries located within a district, affects male and female wages differentially. The estimates reveal that tariff rate reductions led to a 1.7 percent drop in mean male wages with no effect on mean female wages. These results imply that tariff reductions led to a 7.2 percent drop in the average gender wage gap. Further analysis using unconditional quantile regressions show that most of these effects were driven by changes at the lower end of the wage distribution where tariff reductions led to an increase in female wages and decrease in male wages.

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Introduction

Women form one of the most disadvantaged socio-economic groups in India. Although there is a general feeling in India that there has been an improvement in the material and social conditions of women over the past two decades, the empirical evidence so far has been mixed and scanty. Hence, there is a need for rigorous economic analyses of gender discrimination so as to explain the current trends of such discrimination, the factors behind it and possible ways to overcome the menace of discrimination. One important manifestation of gender-based discrimination is the gender pay gap in the labour market. In this paper I study the changing nature of the gender pay gap in the wake of the process of market reforms started in the early 1990s in India.

The 1990s were a crucial period in the history of India. In 1991, the first wave of market reforms (some reforms on a much smaller scale had been introduced in the 80s) were introduced and subsequent waves of reforms have been pursued thereafter. The reforms did away with the License Raj (investment, industrial and import licensing), ended many public monopolies, lowered tariffs on imports and opened up most sectors of the economy to private and foreign investment. These reforms were instrumental in unshackling the Indian economy - India recorded an average growth rate of around 9% in the last five years compared to the Hindu Growth Rate¹ it experienced in the pre-reforms era. The decade also saw a rise in caste and gender movements with disadvantaged castes slowly asserting themselves in the political arena. The gender equality movement also picked up in this

¹ The Hindu Growth Rate refers to the low levels of growth that India experienced in the time period 1950-1990 (an average of 3.5%).

period; seats were reserved in the *Panchayats* (village councils) for women and a movement was launched to reserve seats for women in the Union Parliament.

In his seminal work, Becker (1957) argued that discrimination unrelated to workers' productivity is costly and may not be sustainable in a competitive market. Applying Becker's theory to the gender pay gap framework, since discriminating employers would not hire the profit-maximizing level of female employees, they cannot, in the long run, survive in a competitive market against non-discriminating employers. Non-discriminating firms should expand and discriminating firms contract, until the wage gap between men and women with the same skills is eliminated.

Tariff reforms might be one such channel through which discrimination might decrease. As the government reduces tariffs across traded industries, it leads to an increase in the competitiveness of the traded sectors, which might translate into a reduction of the gender wage gap (Black & Brainerd, 2004).

However, other empirical work has challenged this notion that discrimination might reduce in the face of competition from increased trade (Berik, Rodgers, & Zveglic, 2004; Menon & Rodgers, 2009). As liberalization makes the market more competitive, economically weaker groups, such as women, will lose in the wage bargaining process. Hence, female workers might find themselves at a disadvantage in a period of creative destruction, essentially entailed by a process like economic liberalization (Kotwal, Ramaswami, & Wadhwa, 2011). Also, if

trade is skill biased in nature and if women have lower levels of skills than men, we might see an increase in the gender wage gap.²

In this paper, I study how the trade reforms in India in the 1990s affected the gender wage gap in India. Following Topalova (2005), I calculate the district level tariffs as employment weighted average of the tariffs faced by industries located within a district. Then, I examine the effect of these district tariffs on wages by running regressions of log wages on this measure of district tariffs and an interaction of a female dummy and the district tariff variable. Since my district tariff variable is an employment (1987 levels of employment) weighted average of tariff rates of industries located within a district, I am able to exploit the variation in the pre-reform industrial composition across districts in India and the quantum of tariff rate liberalization across industries to identify the effects of tariff reforms on wages. The results suggest that the trade reforms had a significant impact on the gender wage gap and in fact it accounted for about 14 percent of the change in the gender wage gap that occurred during the period 1987-2005. Unconditional quantile regressions (Firpo, Fortin, & Lemmiuex, 2009) estimates show that the above effects are mainly driven by changes at the lower quantiles of the wage distribution. There is modest empirical literature that looks at the effect of trade on the gender wage gap. Artecona & Cunningham (2002), Berik, Rodgers & Zvelich (2004), and Black & Brainerd (2004) all use the same strategy of comparing the effects of trade on the residual gender wage gap in concentrated industries with the effects in competitive industries. However, these studies have different findings regarding the effects of trade on the gender pay gap according to the countries they study.

² See Epifani & Gancia (2008) for evidence on skill bias of international trade.

In the Indian context, Menon & Rodgers (2009) and Dutta & Reilly (2005) look at the effect of trade reforms on the gender wage gap. Menon & Rodgers (2009) find that increased trade liberalization is associated with larger wage gaps in India's concentrated manufacturing industries. Dutta & Reilly (2005), using import/export shares and tariff rates as measures of international trade, find that trade-related measures are not important determinants of the industry-level gender pay gap and "appear to have exerted a relatively benign influence on the evolution of the industry gender pay gap in India over the last two decades." However, a key shortcoming of all these papers is that they concentrate only on the manufacturing sector. By doing so, they ignore the agricultural and mining sectors which might be an important omission in the case of India since, unlike other developing countries, India also pushed for trade reforms in the agricultural sector and because agriculture occupies an important place in India's economy. Moreover, by only looking at traded industries and conducting regressions at the industry level, the studies might be missing important spillover effects across industries on individuals working in other traded and non-traded industries. This is precisely the gap in the literature that I address and thus hopefully give a more comprehensive account of the effect of trade on female wages relative to male wages.

This paper is also related to the broader empirical literature that looks at different developmental effects of India's trade reforms. Topalova (2005) finds that in rural India, districts where industries were more exposed to trade reforms experienced lesser reductions in poverty than districts where industries were less exposed to trade reforms. Edmonds, Pavcnik, & Topalova (2009) suggest that, although there were substantial increases in school attendance and decreases in child labour in urban India between 1987 and 2000, yet among urban areas these benefits were

attenuated in those with employment concentrated in industries losing tariff protection with India's 1991 tariff reforms. This paper contributes to the debate about globalization's effects on developing countries like India by analyzing how wage differentials by gender were affected by the tariff reforms in India in the last two decades.

The rest of the paper is organized as follows: In Section II, I present a brief review of the Indian trade reforms. Section III discusses the empirical methodology employed in the paper, while Section IV describes the data used in the study. Section V presents the main results of the paper, and finally Section VI provides some concluding remarks.

The Indian Trade Reforms

After gaining independence in 1947, India embarked on a path of central planning. The first three decades of central planning were marked by very low rates of growth, averaging around 3.6 percent annually. Topolova (2005) characterizes India's trade regime as "amongst the most restrictive in Asia, with high nominal tariffs and non-tariff barriers, including a complex import licensing system, an 'actual user' policy that restricted imports by intermediaries, restrictions of certain exports and imports to the public sector ('canalization'), phased manufacturing programs that mandated progressive import substitution, and government purchase preferences for domestic producers."

It was during the 1980s under the leadership of Prime Minister Rajiv Gandhi that certain reforms³ began in India's

³ The discussion on India's reforms that follows draws mostly from Tendulkar (2007), Joshi and Little (1996), and Panagriya (2004).

economy. Import licensing restrictions were eased, quantitative restrictions were converted into tariffs, and by 1990 industrial licensing requirements were also eased and 31 sectors were exempted from industrial licensing. These trade liberalization measures accompanied by expansionary fiscal policy raised the growth rate in India from the “Hindu” rate of approximately 3.5 percent during 1950-1980 to 5.6 percent during 1981-1991. However India’s trade regime was still quite restrictive. In 1990-1991, the highest tariff rate stood at 355 percent, the simple average of all tariff rates was at 113 percent, and the import-weighted average of tariff rates at 87 percent. Also, only 30 percent of total imports could be imported under an open general license (Panagriya, 2004).

However, India was soon hit by a balance of payments crisis in 1991. In the previous few years, India had tried to cope with its increasing fiscal deficit by resorting to commercial borrowing in the international capital market and by attracting deposits from non-resident Indians (NRI) by offering them more attractive terms. These sources of financing were not only more costly in terms of debt-servicing obligations, but also more volatile as these were subjected to expectations about foreign exchange risks. The disintegration of the Soviet Union and the Eastern Bloc in general also affected India adversely as these countries were important trading partners of India.

The looming crisis was precipitated by two exogenous shocks to the economy. The first was a political crisis. After the 1989 national elections, India experienced a period of political instability marked by the falling of two non-Congress⁴

⁴ The Indian National Congress is one of the main national political parties of India and has been in power at the central government for about 52 years out of the 65 years that India has been independent.

governments in quick succession, leading to a mid-term election in May 1991 (Tendulkar, 2007). On top of these events, Rajiv Gandhi was assassinated during the election campaign of the 1991 elections. These events of political instability severely undermined investor confidence in India. The other exogenous shock to the economy was the Gulf War, which led to a spike in oil prices. This resulted in the doubling of the oil import bill from US\$ 3 billion in 1988-1989 to US\$ 6 billion in 1990-1991, which amounted to a jump from a quarter of export earnings to one third. The Gulf War also led to a serious dip in the remittances sent by Indians working in the Gulf. These exogenous events led to heavy pre-redemption withdrawals of NRI deposits and a reduction in the availability of commercial borrowings as expectations of an imminent devaluation of the rupee gained ground. In the face of this capital outflow, the government increasingly resorted to short-term borrowings. However, even this became difficult to obtain when international credit rating agencies in the USA and Japan downgraded India's credit rating.

To overcome this crisis, the Indian government requested a stand-by arrangement from the International Monetary Fund (IMF). The IMF support was conditional on a program of macroeconomic stabilization and structural reforms. Thus, in June 1991 India announced a comprehensive set of fiscal, industrial and trade reforms. These reforms included reductions in subsidies, disinvestments in Public Sector Units and the dismantling of the industrial licensing system.

Concurrent with the above reforms, sweeping trade reforms were also carried out. The share of products subject to quantitative restrictions decreased from 87 percent in 1987-1988 to 45 percent in 1994-1995. In April 1992, all 26 import-licensing lists were eliminated and a "negative" list was established (from which

most intermediate and capital goods were excluded), the items in such list could not be imported. Average nominal tariffs fell from more than 80 percent in 1991 to 30 percent in 1997, and standard deviation also fell by around 50 percent during this time period (Figures 1 and 2). Figures 1 and 2 also reflect the two main guiding principles of the tariff reforms which were outlined in the Chelliah Report of The Tax Reform Commission constituted in 1991⁵ – i.e. reductions in the average level and in the dispersion of tariff rates.

Since my empirical strategy exploits the variation in the pre-reform industrial composition of a district and the variation in tariff rates across industries, *exogeneity of the tariff reforms* is a key requirement of my empirical strategy. Thus, my empirical strategy would fail to identify the causal impact of the trade reforms on the gender wage gap if, for example, the decrease in tariffs were just a continuation of a secular trend or if there were any unobservable factors (economic, political and social factors) which are correlated both with the degree of protection enjoyed by an industry and wage differential across gender. Thus, it would be difficult to prove a causal effect of tariff reforms if unobserved time varying factors that are correlated with overall wages or gender wage differentials affected the quantum of tariff reduction.

However, the nature of the 1991 trade reforms done in India suggests that the reforms were carried out primarily due to exogenous reasons, namely external pressure from international lending agencies (Goyal, 1996). As mentioned earlier, the guiding

⁵ The main recommendations of the Chelliah Report were: a) reduction of the general level of tariffs; b) reduction of the spread or dispersion of tariff rates; c) simplification of the tariff system; d) rationalization of the tariff rates along with the abolition of numerous exemptions and concessions; and e) abolition of the practice in making changes in effective rates through notifications.

principles behind tariff reforms were reductions in the average level and standard dispersion in tariffs, and these were ultimately implemented. Across the board, tariff reforms were carried out and there is no evidence which suggests that particular industries were targeted for tariff reductions. Topalova (2005) examines this issue in great detail. Her paper shows that there was uniform movement in tariffs across industries, there is no correlation between future tariffs and current productivity, and that changes in industry tariffs appear uncorrelated with important characteristics of the industry that might indicate political protection such as employment, output, average wage, concentration and share of skilled workers. All these results give further credence to my empirical strategy of exploiting the variation in the pre-reforms industrial composition of a district and the variation in tariff rates across industries.

Empirical Strategy

As mentioned earlier, my empirical strategy exploits the exogenous nature of the Indian trade reforms. To test if tariff reforms have affected wage differentials by gender, I run regressions of the following type:

$$Y_{idt} = \alpha + \mu_t + \theta_d + \pi \text{Female} + \beta \text{Tariff}_{d,t} * \text{Female} + \delta \text{Tariff}_{d,t} + \gamma X_{it} + \varepsilon_{idt}$$

In this formula, i indexes individuals, d indexes district and t indexes time periods. Y_{idt} is the log wages of individual i in district d in the time period t , while μ_t and θ_d are time fixed effects and district fixed effects, respectively. Female is a female dummy, $\text{Tariff}_{d,t}$ is the district level tariff measure, and $\text{Tariff}_{d,t} * \text{Female}$ is the interaction term of the female dummy and the district level

tariff measure. X_{it} is a vector of individual controls, which includes a marital status dummy, three religion variables, a quadratic in potential experience, total children in the family, a caste dummy and four education variables. The parameter β on the interaction term of the tariff measure and female dummy is the main parameter of interest – this captures the differential effect that tariffs had on female wages relative to male wages. In this specification, identification of the policy parameter comes from variation in the pre-reform industrial composition of districts and the variation in tariff rates across industries. Thus, I essentially compare individuals in districts with industries which were more exposed to tariff reforms to districts with industries that were less exposed to tariff reduction to get the effect of tariff reform. As this comparison is also done across gender, I get the effect that district tariffs had on female wages in comparison to male wages.

Following Topalova (2005), I construct the level of tariffs that a district faces as follows:

$$\text{Scaled Tariff}_{d,t} = \sum_i \text{Workers}_{d,i,1991} * \text{Tariff}_{i,t} / \text{Total Workers}_{d,1991}$$

In constructing the tariff measure, I assign zero tariffs to all industries in the non-traded sector – i.e. services, retail and wholesale trade, and construction.

The important thing to note is that the above methodology does not tell us the effects of tariff reforms on the gender wage gap *per se*. Rather, it tells us how districts which had industries more exposed to tariff reforms fared in terms of the wage differential across gender to districts whose industries remained protected or less exposed to tariff reforms. The other important aspect of this methodology is that, since the tariff measure is calculated as an average for all workers in the district, it captures the effect of trade

reforms not only on workers in the traded sectors (agriculture, mining and manufacturing) but also on all other workers in the non-traded sectors within a district; thus, it captures any spillover effects of tariff reforms.

One important concern with the above tariff measure is that it is influenced mechanically by the size of the non-traded sector, which might bias our estimates. For example, if workers in non-traded industries are on a differential growth path than those in traded industries, my tariff measure might capture this differential growth rather than the effect of trade reforms. Hence, I also use the following as my district tariff variable to ascertain if the above is indeed a concern:

$$\text{Traded Tariff}_{d,t} = \sum_i \text{Workers}_{d,i,1991} * \text{Tariff}_{i,t} / \text{Total Traded Workers}_{d,1991}$$

Traded Tariff_{d,t} only depends on workers in the traded sectors; thus, there will be no mechanical effect of the non-traded sector in a district on this measure. When I use the traded tariff variable in my regressions, I restrict my sample to workers only in the traded sectors.

I also estimate equation (1) at different quantiles of the wage distribution using unconditional quantile regressions pioneered by Firpo, Fortin, & Lemmiuex (2009). These regressions help us to estimate the effect of an independent variable on various quantiles of the unconditional distribution of the dependent variable.⁶ Looking at the effects of tariff reforms on the gender wage gap at different quantiles of the wage distribution is important because there might be important differences in the effects of tariff reforms at various points in the wage distribution

⁶ Unconditional quantile regressions are explained in greater detail in the Appendix.

that we fail to capture by only looking at mean effects. Standard wage decompositions by the Oaxaca-Blinder method (Oaxaca, 1973; Blinder, 1973) using unconditional quantile regression estimates, show that the total gender wage gap decreases as one moves up the wage distribution in both time periods (1987-1988 and 2004-2005). The other interesting fact is that the wage structure effect (the unexplained part) of the gender wage gap had increased over time and more so at the upper quantiles.⁷ These are some of the interesting facts that I want to capture in my quantile analysis to determine if trade reforms are responsible for these kinds of effects.

Data

In this study, I use household survey data and tariff data. The household survey data is provided by the National Sample Survey Organization (NSSO), India's governmental data collection agency. The data used corresponds to the Employment-Unemployment Schedule of the 43rd and the 61st rounds of the NSS surveys conducted during 1987-1988 and 2004-2005, respectively. These are the quinquennial rounds, which have employment information on more than 100,000 households covering the whole of India, constituting a nationally representative sample survey. These surveys have detailed information on employment characteristics and demographic characteristics of individuals. I use only the urban section⁸ of these surveys for my analysis. I include only individuals who are in the

⁷ These results are from an earlier work of mine. See Roy Chaudhuri (2010).

⁸ I only use the urban samples because there are problems with the wage data in the rural sample of the 43rd round. Specifically, a lot of wages are missing or reported as zero.

working age category – i.e. in the age group 16-65. I also include only those individuals who are characterized as working for regular wages during the reference period of the sample. Thus, I exclude self-employed individuals, unemployed individuals, students and retirees from the sample. As I am comparing the gender pay gap across time, I use the consumer price index for urban industrial workers⁹ to deflate 2004-2005 relative to that of 1987-1988 wages.

I have annual tariff data at the six-digit level of the Indian Trade Classification Harmonized System (HS) code for 1987-2001 and 2004-2005. Petia Topalova (2005) collected the data for 1987-2001 from various publications by the Ministry of Finance. I extracted the tariff data for 2004-2005 from the UNCTAD-TRAINS database. I then matched more than 5000 product lines of the HS code to the 3-digit National Industrial Classification (NIC)-87 code using the concordance of Debroy and Santhanam (1993). Industry tariffs were then calculated as the simple average of all products matched to that industry.

Since district names and boundaries have changed in quite a few places over the period 1987-2005, I used Census Atlases to match districts across time periods. I also used the concordances supplied by the NSSO to consistently map the industrial classifications across time since the 1987-1988 survey had used the NIC-70 codes, while the 2004-2005 survey had used the NIC-98 codes.

⁹ These figures are taken from the website of Reserve Bank of India, the Central Bank of India.

Results

Descriptive Statistics

Tables 1 and 2 (*See Tables and Figures section*) contain the descriptive statistics of log wages and individual worker characteristics, while Table 3 contains the descriptive statistics of the district tariff measures. Looking across Tables 1 and 2, we see that there has been an increase in real wages for both men and women over time with a simultaneous increase in dispersion for both male and female wages. The descriptive statistics of the demographic variables suggest that there has not been any major change in the nature of the work force over time.

If we look at the numbers in Table 3, they confirm the nature of the tariff reforms suggested by the figures 1 and 2 that we described earlier. There has been a large change in the means of both district tariff measures, accompanied by even larger changes in the dispersion of these tariff measures over the time period 1987-2005. Since the measure 'Traded Tariff_{d,t}' is weighted only by traded workers, it is much larger in magnitude than scaled tariffs which are weighted by all the workers in a district.

Regression Estimates

Table 4 contains the results of estimation of equation (1). Columns (1) and (3) contain estimates for the entire sample using scaled tariffs as the relevant tariff measure, while columns (2) and (4) are based on regressions which have as its sample only workers in traded industries, with traded tariff being the relevant tariff measure in these columns. For the sake of brevity, the table contains estimates of coefficients of only the district tariffs variable and the interaction term of the female dummy and district tariffs. In the regressions in columns (3) and (4), I also include a set of one-

digit occupation dummies. All of the regressions are weighted using sample weights and clustered at the district level.

All the estimates in Table 4 are significant except the estimate for district tariffs in column (3). In all of the specifications, the district tariff variable is estimated to have a positive sign, while the interaction between the tariff measure and the female dummy has a negative sign. This means that, while the tariff reductions had led to a reduction in male wages, females fared better – the negative sign on the interaction term means that in comparison to male wages, decreases in tariff rates had a beneficial effect on female wages.

To understand the economic significance of these estimates, I performed the following calculations: since my dependent variable is log wages, the estimates of the coefficients can be interpreted as percent changes in the dependent variable given a unit change in the independent variable. The average district faced an 8.72 point drop in scaled tariff rates in the period under study. Thus, the estimates in column (1) suggest that district tariffs had led to a 1.7 percent drop in mean male wages, whereas overall there was more than a 35 percent increase in mean male wages in the same period. Given that district tariffs had no effect on mean female wages ($-0.002+0.002=0$), this drop in male wages implies that tariff reductions led to a 7.2 percent drop in the average gender wage gap.¹⁰ Thus, the estimates suggest that tariff rate reforms are responsible for a significant decrease in the gender wage differential.

Turning to the unconditional quantile regression estimates in Table 5, we see that the estimates for district tariffs are

¹⁰ Percent change in the gender wage gap = $8.72 * 0.002 * (y_m / y_m - y_f) * 100$ where $y_m = 36.93$, $y_f = 27.93$.

significant only at the 10th quantile while estimates for the interaction term are significant at the 10th and 90th quantiles. These results suggest that the effects of the district tariffs at the mean that we saw in Table 1 are mostly driven by the effects at the lower quantiles of the wage distribution. The magnitude of the coefficients is also large at the lower quantile in comparison to the estimates at the upper quantiles and the estimates at the mean in Table 1. Summing up the two estimates in column (1), they suggest that at the 10th quantile of the wage distribution, tariff rate reduction not only reduced the gender wage gap by adversely affecting male wages but it also led to an increase in overall female wages ($-0.009+0.003= -0.006$). Thus, while males suffered an absolute decrease in their wages at this lower quantile of the wage distribution, females actually experienced an absolute increase in their wages due to the reduction in tariff rates.

Discussion of Results

The estimates in the two tables together suggest that although reductions in tariff rates had a negative impact on male wages, it actually decreased the gender wage gap and in fact increased female wages, particularly at the lower quantile of the wage distribution. One of the reasons why we saw such a reduction in the gender wage gap could be because tariff reforms led to a decrease in the level of discrimination faced by female employees by increasing competition in the spirit of Becker's theory of taste-based discrimination. Inability of firms to discriminate in a competitive environment fostered by tariff reforms would lead to a rise in female wages and possibly a reduction in male wages if it was true that male workers were previously earning rents which are now being captured by female workers. Although direct evidence to prove that tariff reforms led to a reduction in discrimination of female employees is hard to

establish, quite a few studies examining the U.S. labour market have shown that increased competition does lead to a reduction in the gender wage gap (Ashenfelter & Hannan, 1986; Hellerstein, Neumark, & Troske, 2002).

Ashenfelter and Hannan (1986) did one of the earliest studies in the literature where they analyzed gender discrimination in the banking industry. Using firm-specific data, the authors found a negative and statistically significant relationship between market concentration (assumed to proxy product market competition) and relative employment of women. Black and Strahan (2001) also studied the banking industry; they found that deregulation reduced rents enjoyed by banks and significantly improved the relative wages of women. This suggests that the ability to discriminate in sharing rents with different groups of workers was affected by deregulation as rents declined. *The improvement in female relative wages occurred both because women's occupational status improved after deregulation and because male workers' wages fell more than female wages.* Hellerstein, Neumark, and Troske (2002) found that among plants with high levels of product market power, those employing more women were more profitable, with no such relationship existing for plants with low levels of market power; these results are consistent with sex discrimination in wages in the short run in markets where plants have product market power.

The reduction in male wages following tariff rate cuts, particularly at the lower quantile of the wage distribution, can be due to the process of creative destruction that happened during this period of trade reforms when old jobs were lost and new jobs were created. Kotwal, Ramaswami, and Wadhwa (2011) discuss how employment in the organized sector was reduced after 1997, while that in the unorganized sector rose. According to the

authors, one of the plausible reasons behind this phenomenon is that “competition had intensified in India’s manufacturing sector by the late [1990s] as a result of easier entry and declining tariffs through the decade. Firms looked for ways to cut costs and given the rigid labour laws, sub-contracting and use of contract labour afforded firms lower labour costs and greater flexibility.” The authors point out the high turnover rates during 1999-2004 and go on to show that among large firms in the organized manufacturing sector, the only type of labour that saw an increase was contract labour. Thus, if it is true that the loss of permanent jobs moved people into contract labour, there might be a wage reduction for these workers; if this process occurred more for males, then we would see a reduction in male wages.

Kumar and Mishra (2008) use variation in industry wage premiums and trade policy across industries and over time to estimate a negative and robust relationship between changes in trade policy and changes in industry wage premiums over time. The authors also find that trade liberalization has led to decreased wage inequality between skilled and unskilled workers in India since the reduction in tariffs within an industry is associated with an increased wage premium for unskilled workers, but a reduced wage premium for skilled workers. If women have lower levels of skills than men, particularly at the lower end of the wage distribution, then these results suggest a decrease in the gender wage gap caused by an increase in female wages and decrease in male wages, results which are consistent with the ones found in this paper. Although I control for education and potential experience in the regressions, there are other components of skill that I might be missing, such as actual labour market experience or soft skills. It has been shown that both potential labour market experience and soft skills are important determinants of labour market status of individuals.

Conclusion

This paper establishes that in urban India among male wage earners, individuals living in districts which had industries more exposed to tariff reforms experienced a reduction in wages compared to individuals living in districts which had industries less exposed to tariff reforms in the period between 1987 and 2005. Over this same period, gender wage differentials also decreased in response to tariff reforms. The other interesting fact that emerges from this analysis is that these effects are mostly driven by the effects at the lower quantiles of the wage distribution.

Although the above analysis has been successful in establishing the effect of the trade reforms in India in the last two decades, questions remain about the exact channels through which these effects were seen. A sectoral analysis, as well as analyzing the changes in the gender wage differentials in a supply-demand framework, might shed light on the exact channel through which tariff reforms affected the gender wage gap; this area remains on the agenda for future research.

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Tables and Figures

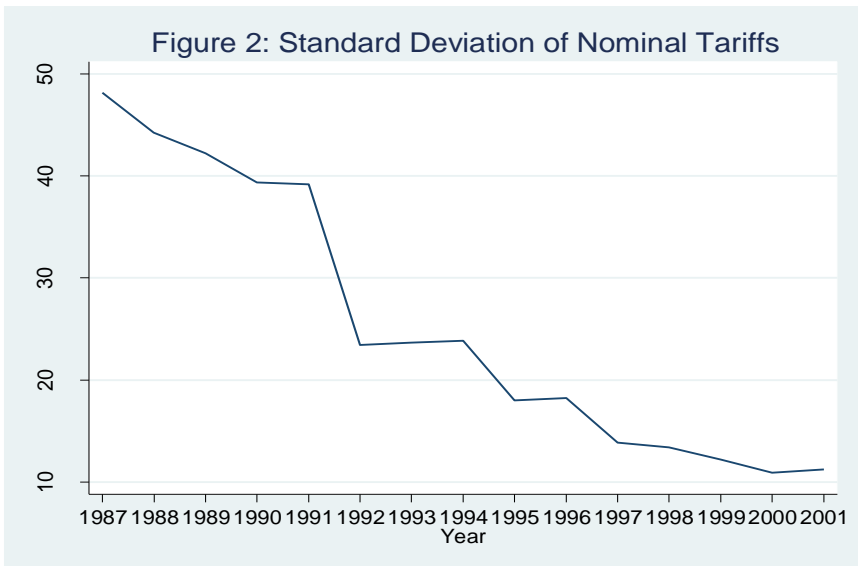
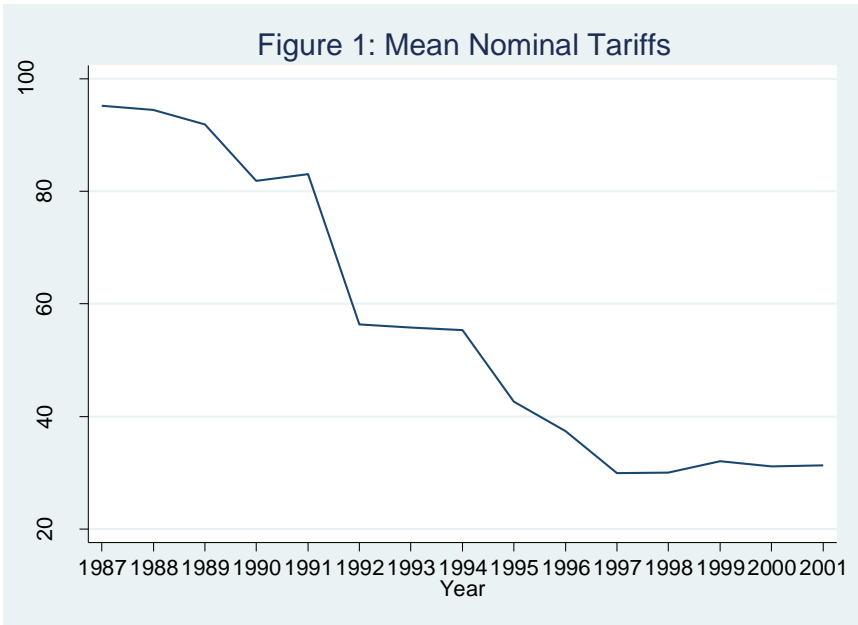


Table 1: Descriptive Statistics (1987-88)

	Male		Female		Difference in Means
	Mean	SD	Mean	SD	
Log wages	3.285	0.780	2.632	1.002	0.653
Married	0.780	0.414	0.606	0.489	0.174
Children	1.810	1.656	1.709	1.586	0.101
Potential experience	20.883	11.583	21.323	12.535	-0.440
Muslim	0.118	0.323	0.079	0.270	0.039
Christian	0.029	0.166	0.067	0.250	-0.038
Other religions	0.031	0.174	0.028	0.166	0.003
Low Caste	0.170	0.375	0.239	0.427	-0.070
Illiterate	0.179	0.383	0.470	0.499	-0.291
Just Literate	0.114	0.318	0.073	0.261	0.041
Primary	0.320	0.466	0.128	0.334	0.192
Secondary	0.239	0.427	0.166	0.373	0.073
College	0.149	0.356	0.162	0.368	-0.013

Table 2: Descriptive Statistics (2004-05)

	Male		Female		Difference in Means
	Mean	SD	Mean	SD	
Log wages	3.526	0.847	2.997	1.057	0.529
Married	0.729	0.444	0.608	0.488	0.121
Children	1.312	1.439	1.265	1.378	0.047
Potential experience	19.923	11.486	21.468	12.697	-1.545
Muslim	0.118	0.323	0.064	0.245	0.054
Christian	0.027	0.161	0.056	0.230	-0.029
Other religions	0.032	0.175	0.042	0.201	-0.011
Low Caste	0.208	0.406	0.269	0.443	-0.061
Illiterate	0.116	0.320	0.322	0.467	-0.206
Just Literate	0.082	0.275	0.074	0.261	0.009
Primary	0.330	0.470	0.183	0.387	0.147
Secondary	0.276	0.447	0.182	0.386	0.093
College	0.196	0.397	0.238	0.426	-0.043

Table 3: District Tariffs

	1987-88		2004-05	
	Mean	SD	Mean	SD
Scaled Tariffs	17.18	16.14	8.46	6.66
Traded Tariffs	69.21	32.27	33.05	7.29

Table 4: Effect of District Tariffs on Female and Male Wages

	Scaled Tariffs	Traded Tariffs	Scaled Tariffs	Traded Tariffs
	(1)	(2)	(3)	(4)
Female*tariff	-0.00172* (0.001)	-0.001* (0.001)	-0.00166* (0.001)	-0.001** (0.001)
Tariff	0.00179** (0.0009)	0.002*** (0.001)	0.00138* (0.0008)	0.001* (0.001)
Female	-0.423*** (0.024)		0.435*** (0.024)	
Occupation Dummies	No	No	Yes	Yes
R-sq	0.545	0.587	0.580	0.617
N	68420	19121	68420	19121

Note: Standard errors are in parentheses. The dependent variable in all the regressions is log of daily wages. While the regressions in columns one and three are estimated for the entire sample using scaled tariffs as the relevant tariff measure whereas the regressions in columns two and four are restricted to only those workers in the traded sectors and thus I use the traded tariffs as the relevant tariff measure. In addition to the above regressors, all regressions include a female dummy, a marital status dummy, three religion variables, a quadratic in potential experience, total children, a caste dummy, four education variables, state, district, state-time and time dummies. The regressions in columns three and four also include a set of one-digit occupation dummies. All regressions are weighted by sample weights. Standard errors are clustered at the district level.

Table 5: Effect of District Tariffs on Female and Male Wages: Unconditional Quantile Regression Estimates

	10 th quantile	50 th quantile	90 th quantile
Female*tariff	-0.009** (0.004)	-0.0007 (0.001)	-0.002* (0.001)
Tariff	0.003* (0.002)	-0.001 (0.002)	0.001 (0.002)
R-sq	0.23	0.40	0.28
N	68420	68420	68420

Note: These regressions are estimated using Unconditional Quantile Regressions (Firpo, Fortin, & Lemmiuex, Unconditional Quantile Regressions, 2009). Standard errors are in parentheses. The dependent variable in all the regressions is log of daily wages. The tariff measure used is scaled tariffs. In addition to the above regressors, all regressions include a female dummy, a marital status dummy, three religion variables, a quadratic in potential experience, total children, a caste dummy, four education variables, district and time dummies. All regressions are weighted by sample weights. Standard errors are clustered at the district level.

Appendix

Unconditional Quantile Regressions (Firpo, Fortin, & Lemmiuex, 2009)

In this study, I am interested in the effects of the different covariates on the quantiles, denoted q_τ , of the marginal (unconditional) distribution, $F_Y(y)$ of log wages.¹¹ As an example, suppose I would like to estimate the effect $dq_\tau(p) / dp$ of being married, $p = \Pr[X = 1]$, on the τ^{th} quantile of the distribution of wages, where $X = 1$ if the worker is married, and $X = 0$ otherwise, and Y represents wages. In the case of the mean μ , the coefficient β of an OLS regression of Y on X is a measure of the effect of being married on the mean wage, $d\mu(p) / dp$. Also, the same coefficient β can be interpreted as an impact on the conditional mean due to the nature of the expectation function. However, the coefficient β_τ from a single conditional quantile regression, (Koenker & Bassett, 1978; Koenker, 2005), $\beta_\tau = F^{-1}_Y(\tau | X = 1) - F^{-1}_Y(\tau | X = 0)$, is usually different from $dq_\tau(p) / dp = (\Pr[Y > q_\tau | X = 1] - \Pr[Y > q_\tau | X = 0]) / f_Y(q_\tau)$, the effect of being married on the τ^{th} quantile of the unconditional distribution of Y . Hence, we need to use a different method to estimate unconditional quantile regression coefficients.

Firpo, Fortin and Lemieux (2009) use the concept of the influence function to estimate unconditional quantile regressions. The influence function $IF(Y; v, F_Y)$ of a distributional statistic, $v(F_Y)$, represents the effect of an individual observation on that distributional statistic. Adding back the statistic $v(F_Y)$ to the influence function yields the Recentered Influence Function (RIF). For the Recentered Influence Function, the expectation is equal to

¹¹ In the discussion that follows, I draw heavily from Firpo, Fortin, & Lemmiuex (2009).

$v(F_Y)$. For the τ^{th} quantile, the influence function $IF(Y; q_\tau, F_Y)$ is equal to $(\tau - I\{Y \leq q_\tau\}) / f_Y(q_\tau)$. As a result, $RIF(Y; q_\tau, F_Y)$ is equal to $q_\tau + IF(Y; q_\tau, F_Y)$. When the distributional statistic is a quantile, the conditional expectation of the $RIF(Y; q_\tau, F_Y)$ modeled as a function of the explanatory variables $E[RIF(Y; q_\tau, F_Y) | X] = m_\tau(X)$ can be viewed as an unconditional quantile regression. Firpo, Fortin and Lemieux (2009) show that the average derivative of the unconditional quantile regression, $E[m'_\tau(X)]$, corresponds to the marginal effect on the unconditional quantile of a small location shift in the distribution of covariates, holding everything else constant. The above method can be easily implemented as an OLS regression. The dependent variable in a quantile regression is $RIF(Y; q_\tau, F_Y) = q_\tau + (\tau - I\{Y \leq q_\tau\}) / f_Y(q_\tau)$. This can be computed by estimating the sample quantile, q_τ , estimating the density $f_Y(q_\tau)$ at that point q_τ using kernel methods, and forming a dummy variable, $I\{Y \leq q_\tau\}$, indicating whether the value of the outcome variable is below q_τ . Then, if we run an OLS regression of this new dependent variable on the covariates, we get the unconditional quantile regression coefficients.

Market Logics, Gender Discrimination and Economic Liberalization in China

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Abstract

China's state project of economic liberalization has embraced markets as a disciplinary force in a search for efficiency. A key element of the resulting restructuring has been eliminating supports for reproductive labour from productive institutions, dividing the sphere of work from that of welfare. In the Mao era, collective institutions combined these activities in one multipurpose "small society." From a vantage point in the successors to these collectives, the residents' and villagers' committees, this chapter explores the effects of the division on welfare work and subsistence occupations from a gender perspective. It shows that while women face marginalization in the formal labour force and the globalized economy, at the same time, their public obligations are being extended as they provide the caring labour in their own families and in "society" to fill the substantial gaps in social provision caused by the liberalization project. Women may be seen as surplus labour, but without their diligent and mostly invisible efforts, the impacts of the social dislocations attendant on economic restructuring would likely have become intolerable. Despite its ratification of the CEDAW, China's current legal framework does not provide adequate mechanisms for addressing the pervasive discrimination women face due to their association with the "unproductive" field of care and welfare.

Introduction

The state project of economic liberalization that was launched under the banner of “opening and reform” by Deng Xiaoping in the late 1970s embraced markets as a disciplinary force in a search for efficiency. Among the aims of the liberalization project has been purging support for reproductive labour from productive institutions, creating new divisions of labour and space. The attendant changes have reshaped the gender order in ways that have disadvantaged women due to their association with the “non-productive” activities of care and welfare. This chapter presents some examples of how these market logics have played out on the ground in urban and rural Tianjin, China.

Shedding Welfare “Burdens”

In the pre-reform period, welfare functions were not seen as a separate sphere of activity, but incorporated into collective institutions. Although the rural and urban state and collective production units in pre-reform China were very different—some scholars have gone so far as to claim that there were “two societies” (Whyte, 2010)—they shared some key common features.¹ While focused on production, they were multipurpose institutions, expected to cover all the needs of their members, regardless of their individual capacity to contribute to the productive

¹ For the few people in urban areas outside work units, collectives attempted to provide similar levels of security and incorporation, although with fewer resources. In 1978 on the eve of reform, of a nationwide urban workforce of 100.44 million, 74.2% belonged to state owned work units, while 20.4% were in collective and “other” work units (Bray, 2005, p. 144).

endeavours that were their principal *raison d'être*. Although the term "small society" is generally used to describe the "work units" (*danwei*) to which most urbanites belonged by the end of the Mao era, in many ways both rural and urban entities aspired to such a comprehensive purpose. Welfare functions – conceived broadly as both provision of services and benefits and accommodations accorded to family care-givers – were thus an integral part of these institutions. Incorporating each citizen into a designated state-mandated institution that was responsible for them, politically, socially and economically, was another common purpose. Once so allocated, "workers" or "peasants" generally had security of tenure, and distribution within each unit was highly egalitarian. There was thus no separation between "work" and "welfare." Of course, these attributes represent an ideal, rather than a reality for everyone in all urban and rural units, where differing resources and status made their actual achievement variable (Hassard, et al, 2006; Li & Li, 2010).

The post-Mao project of economic liberalization under the "four modernizations" involved a restructuring of these arrangements. It led to the dissolution of the communes in the countryside in the early 1980s and a massive restructuring of state-owned industry in urban areas in the 1990s. Large numbers of people were laid off from jobs in state-owned enterprises, with women being disproportionately affected (Liu, 2007). Employment under contract was introduced to replace the life-time employment of the "iron rice bowl" (Hassard, et al, 2006). A return to family economy in the countryside meant a retreat from collective endeavours, including equitable distribution among collective members.

So what are the gendered contours of the new regime(s) for welfare and livelihood emerging from these changes? I explore

this question from a perspective, based on research in four different communities in Tianjin Municipality. The study is based on ten months of ethnographic fieldwork in two urban residents committees (RCs) and two rural villager committees (VCs) in 2008 and 2009; as well as analysis of relevant documents and regulatory regimes. I observed the daily work of these “basic level organizations” of the Chinese state² with a particular focus on how they dealt with the livelihood and welfare needs of people disadvantaged by lack of income or employment, by disability or ill-health, or a combination of these, and how these activities were shaped by the institutional character of the RCs and VCs. Given their role as the frontline organizations in the provision of welfare, RCs and VCs were a key site for the production and circulation of norms about gender, age and appropriate employment for differently situated people (Woodman, 2011).

Gendered Implications

In the past, gender distinctions relating to employment and public engagement operated mainly *within* these collective institutions (Liu, 2007), but also typed certain occupations as feminine and masculine, as was the case across the socialist bloc (Verdery, 1996). Although they were certainly not equally valued, production and reproduction were enveloped in the socialist project and in its institutional frameworks (Barlow, 2004). In the work unit system, care responsibilities (largely by women) were

² These two types of institutions are parallel entities in the 1982 Constitution. While RCs have existed since the 1950s, providing employment and services for the small minority of urbanites left outside the work unit system, VCs were first set up after the dissolution of the communes, but replaced pre-existing entities called production brigades that were the lowest level of accounting in the commune system.

informally accommodated, and so collectives subsidized care indirectly, by continuing to pay wages to people who were spending a lot of their time and energy providing care (Liu, 2007). This was also true of rural collectives.

By contrast, in the reform era, economic liberalization has constituted public and private care and welfare as “burdens” to be systematically expelled from “productive” organizations. Increasingly such functions are now situated in institutions separate from the productive sphere, off-loaded onto families, or provided through the market, thus involving both privatizing and socializing reproductive work. This has also meant the drawing of new boundary lines between “work” and “welfare,” separating “economy” from “society.”

The effects of this separation have been distinctly gendered but also vary by class, location and occupational sector. In terms of gender, a circular process can be observed in which the privatization (or familialization) of care labour contributes to increasing discrimination against women in the labour market while the expanded burdens of care this places on them, both at home and in their communities, further justify discriminatory attitudes and practices. While placing a greater burden of *public* care on women, at the same time they have greater entitlement to miserly welfare benefits due to their disadvantaged labour market position, which in turn is partly attributable to their perceived care burdens.

The legacy of the incorporation of care into productive institutions means that there is little or no infrastructure for public care, apart from within residential “social welfare institutions” that are aimed at the “orphaned” – those with no family members to care for them, including disabled and elderly adults and children. These institutions are seen as a last resort, not necessarily because

of stigma, but because conditions are presumed to be poor and a person who is separated from their social network cannot call on any obligation of others to care for them.

In the context of post-Mao China, the idea of “society” is being consciously revived and “constructed” as a strategy for making up for deficits in welfare spending. This aspect of the liberalization project has been affected under the rubric of “socializing welfare,” with the objective of discouraging welfare dependence on the state (Wong, 1998, p. 71). It is society that is supposed to absorb the “burdens” sloughed off to make Chinese firms competitive in the global economy, and thus this project— as conceptualized both in official discourse and scholarly prescriptions— compares practice in China to an imagined ideal of Western capitalist “efficient” practice. The statistical rationality that has become hegemonic in the post-Mao era assumes that the economy and society are subject to general laws, which become the “regulating rules of history and society,” and measures China against an “advanced” Western other (Liu, 2009, p. 52, 58).

The care deficit attendant on these shifts is recognized implicitly in the exhortatory discourses about promoting care and volunteering in “society,” and envisaging RCs and VCs as “a big family.” These discourses were apparent in both RCs and VCs. They were routinely enacted through projects of gift giving and visits around holidays and major life events, as well as in norms of neighborliness and mutual aid that were part of the stated aims of these institutions. These norms created gendered expectations that fell largely on the shoulders of women, particularly the middle-aged and older. During my fieldwork, the RCs were counting all “volunteers” and there was talk in the media that they should all be “registered,” indicating how the state seeks to mobilize female citizenship in this fashion. For the VCs, care burdens were

centered squarely in a traditional gendered division of labour in the family.

Socializing Welfare

In this “socialization” of welfare, the RCs and VCs have taken on an increased importance. The RCs provided some job opportunities themselves, and were the lowest level of operation of the urban labour departments, providing re-employment services to the local unemployed.

The effects of these processes may be observed through the experience of the RC workers themselves. All of the paid staff in the RCs I studied were female,³ as were the overwhelming majority of RC workers and volunteer activists I met. Based on limited data, this picture seems to reflect national trends.⁴ The RC workers were hired into what they called “government purchased positions,” mostly after being laid off, while labour officials called them “public interest positions.” Previously, RC positions had been unpaid, and the hiring of these workers was an aspect of the local state’s response to the mass layoffs of the late 1990s. All the workers in the RCs I studied had been hired under programs of what might be called welfare jobs. But these positions were not workfare jobs: they required specific skills and involved a competitive hiring process including passing written and oral

³ In both places there were additional RC members who were not actually employed, but participated in their work on a volunteer basis (all retired people), or ex officio (for example, in one place, the local community police officer). There were a few retired men in this category.

⁴ In 2000, 90 percent of RC workers nationwide were women (Read, 2000, p. 806-820), while a 2002-2003 survey of such workers in Shanghai and Shenyang found, respectively, 86 percent and 92 percent female workforces (Lu & Li, 2008, p. 181-192).

exams, and more recently, computer skills. One woman who came to the Progress office to ask about a recruitment notice she had seen for such positions was asked if she knew how to use a computer. No, she said. Well then, she was told, you might as well not bother to apply.

Currently, the municipal government sees increasing the number of these “welfare jobs” as a solution to persistent unemployment among certain groups. In Tianjin, these groups include people in the “40/50 age group,”⁵ women between 30 and 50 with heavy family responsibilities and, starting in 2009 in the wake of the world financial crisis, college graduates without work experience. But since there are only a few posts in each neighbourhood, each new set of candidates displaces those in previous categories of need.

Regardless of how long they had been on the job—some for 10 years—RC workers were paid at minimum wage (820 *yuan*⁶ gross per month in Tianjin at the time of my fieldwork, with about 100 *yuan* more for party cadres) with only basic social insurance coverage. The subsistence wages clearly signalled the low status of the work. Identification with their past privileged status as work unit members combined with a common disregard for their current jobs meant most of the RC workers continued to speak of themselves as “laid-off workers.” When I asked Sister⁷ Wu at Progress why she still called herself that, she said, “Well, this isn’t a real job; it’s only minimum wage.”

⁵ This group is comprised of women over 40 and under 50, and men over 50 and under 60. The distinction is related to the different retirement ages for men and women, discussed below.

⁶ About \$120 CDN; \$1 = 6.8 *yuan* at the time of my fieldwork.

⁷ “Sister” is a common term of address for adult women in China.

The inadequacy of middle-aged women as workers was a common theme of discussions around retirement and employment. Although all the RC workers I encountered had graduated from high school or junior college, their generation's "lack of education and skills" was often cited as a reason for their need for work-as-welfare. Government policies aimed at helping the "40/50 people" conceptualized women over 40 as difficult to employ, confirming employers' preferences for younger workers as logical and natural. As a labour official put it, "the bodies of these 40/50 people are beginning to weaken, and they can't keep up with the pace of the market economy. They are getting old." Government policies relating to retirement also contribute to such views: for women in the category of "worker," the retirement age is currently 50, while for men it is 55 (Wang, 2003).

For working class women, the "common sense" of the market reflected in these policies had severe effects. Starting in early middle age—even in their 30s—women were deemed unsuitable for "productive" work and thus relegated to spheres of care and support. This was widely internalized, with women in their 40s talking about how their bodies and minds were decaying in ways that made them unable to keep up with the market's pace or learn new technological means of participating in its activities. These divisions implicitly categorize certain types of labour as more challenging and more valuable, and certain bodies as more appropriate for the marketplace. Women are then made available to provide cheap or low-cost labour that fills the gaps created by very low levels of state spending on welfare.

However, younger women, too, are subject to discrimination on the basis of their caring roles. Although the overwhelming majority of urban women will only have one child (and have abundant family childcare due to underemployment

among their mothers' generation) some employers refuse to hire even highly qualified young women because they will have to pay for maternity leave (currently only three months, and partly paid through social insurance in most major cities) (Tatlow, 2010). Legal scholars and women activists in China have pointed to how the emphasis in the law on "protecting" women has been used as an excuse not to hire them in the first place (de Silva de Alwis, 2010; Ogletree and de Silva de Alwis 2002).

Minimal Social Safety Net

While their association with care work disadvantages them in the labour market, in the sphere of welfare benefits, this association increases their eligibility to the miserly welfare benefits that are available to people without employment. Most notable is the "minimum livelihood guarantee," a cash benefit that is provided to people whose income is below a certain minimum level. The eligibility criteria for this benefit are distinctly gendered, and also reflect the divide between "productive" and "non-productive" labour.

While the national regulations on this benefit and the Tianjin implementing rules on the minimum guarantee establish an unqualified right to assistance for those whose income falls below a certain level—set at 400 *yuan* per urban person, and 200 *yuan* per rural person in Tianjin at the time of my field work—they later go on to qualify this.⁸ In Article 7 of the Tianjin Measures for

⁸ Art. 2 of the State Council's *Regulations on Minimum Livelihood Guarantee for City Residents*, effective Oct. 1, 1999, reads: "All those urban residents who are holders of non-agricultural *hukou* [household registration] for whom the per capita average income of all family members living together is below the standard for the city residents minimum livelihood

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the Minimum Livelihood Guarantee, eligible recipients are defined in terms of three negatives: of income, of ability to labour and of family or other obligated support. In practice, the determining factor establishing eligibility was not income or need, but the designation that a person had “lost the ability to labour.”

This designation defines “labour” as wage labour or other productive work, thus implicitly making reproductive labour into a form of non-work. People’s ability to generate income through the market thus becomes an objective measure of their relative labour value, and the conditions for receiving assistance a matter of a person’s status, rather than a result of social or economic conditions. Individuals are defined in terms of relative “lack,” in a fashion comparable to the way lack is measured in Chinese terms such as “civility” and “quality” (Yan, 2003; Anagnost, 2004).

Though inherently devaluing, the urban discourses of lack were generally not stigmatizing in the sense of excluding people from community membership or resulting in social exclusion of other kinds. Crucially, these determinations did not imply a judgment of *moral* lack—in contrast to the way the poor are seen as “contractual malfeasants” in the context of US market fundamentalism (Somers, 2008)—but a measurable deficiency of the body and mind. Contrary to what is generally claimed about welfare benefits being stigmatizing in China (Wong, 1998; Saich, 2008), people did not speak negatively about those who received them.

guarantee have the right to receive basic material support for their livelihood from their local government.” Art. 2 of *Tianjin Measures for the Minimum Livelihood Guarantee*, July 6, 2001, repeats this text, but specifies that all “residents and villagers who are holders of permanent *hukou*” in the city have this right.

While there is significant continuity from both traditional and pre-reform ideas in targeting welfare to those seen as lacking, previously the lack was familial (Wong, 1998, p. 138, 166). Now the condition is individualized and calculable, relating to combinations of age, disability and gender, and having varying degrees. It is clearly associated with certain types of bodies. People over the government-set retirement ages are deemed *a priori* to have lost the ability to labour. Thus in practice, women below 40 and men below 50 were excluded from minimum livelihood guarantee eligibility, unless serious illness or disability made them unable to work.

Unequal Economic Activities

With its focus on global competitiveness, the liberalization project's opposition between work and welfare also prioritizes certain types of economic activity, and marginalizes others, notably those most closely associated with the gendered space of the social: subsistence and service work.

The post-Mao period has involved the (re)formation of markets in goods, labour and services, which were almost completely eliminated during certain periods of the Mao era. Official, expert and popular ideas about the appropriate scope and function of markets have been central to changes in the shape of productive institutions, as well as in the reform of systems of welfare provision. Marketization has also been the arena for a constant struggle between popular efforts to engage in new or previously-forbidden income-generating endeavours and activities of state officials and agencies, local and national, to regulate, patrol, contain and sometimes ban them. Markets are shaped by contestation over regulatory powers and the appropriate use of

different kinds of spaces. The character of local markets, whether for labour, goods, or services, is especially important for the many people who have been separated from the security of collective production units.

Social policy texts and some academics in China and beyond insist that the work unit is dead, but in the everyday imaginary, reflected in daily conversations at my field sites, it remains a central concept defining the desirable life. Its actual demise has been overstated; the most prestigious, favoured employment involves permanent attachment to a work unit which provides many of the same benefits as in the past. The most sought after positions are in the civil service, large government-owned companies and universities and research institutes.⁹ In Tianjin, a significant minority still work within such units: approximately 31 percent of urban employed people and 65 percent of rural employees.¹⁰

But the number of people whose work is separated from collective units has clearly been on the rise: recent figures put rates of “informal sector” employment (including self-employment) in

⁹ During my fieldwork, all the university teachers I met told me that the top choice of occupation for their graduating students was civil service jobs. A second choice was often continuing study and hoping for better luck in the next round of civil service exams, or a career in academia.

¹⁰ In Tianjin Municipality, 5.031 million urban and rural people counted as “employed” in 2008, out of totals of 9.08 million and 2.68 million respectively. Of the 3.094 million urban employed, 875,000 were working in the state-owned sector, and 79,000 in the collective sector, while 2.172 million were working for private firms (I added the state-owned and collective to get the total in work units). For rural Tianjin, the number of total employees was 1.864 million, while the number in township and village enterprises was 1.21 million, with only 76,000 in private firms. Rural people working in agriculture would not be counted as “employees” (State Statistical Bureau, 2009, p. 91, 112-113).

China above 50 percent, with women making up the majority according to some studies (Huang, 2009; Cook, 2008).¹¹ While most of these informal sector workers are rural-to-urban migrants, this type of work has been the solution to problems of livelihood for many, if not most, urban laid-off workers. Women make up 65 percent of those in the field of “community services” – essentially, small, local businesses in urban neighbourhoods (Cooke, 2006).

Despite some official recognition of the importance of smaller and less formal businesses in providing opportunities for income-generation, these mainly exist in a marginalized space.¹² The feminized domestication of subsistence activities, such as small-scale agricultural production or local businesses that provide community services, is analogous to what Sassen terms the “feminization of survival” (2000).

Policies of local and national governments that shape markets can also contribute to restricting women’s choices when they have to find ways of making a living through the informal economy. Official visions of markets privilege formal over informal economic activities; sectors with large capital inputs over small-scale, independent businesses; and “modern” endeavours over agricultural work or traditional occupations. These distinctions are replicated at the local level in the policies of local governments and VCs. Increasingly, small-scale traditional agriculture is seen as the province of women and old people, thus part of the sphere of the home and domesticity and associated with women.

¹¹ Huang (2009) uses the ILO definition of informality: workers who do not have job security, few or no benefits and are not protected by labour laws fall into this category.

¹² As Hanser (2008) notes, the State Statistical Bureau even stopped collecting statistics on private businesses with less than 60 employees in 1999, so this sector is statistically invisible.

Discrimination and the Law

Advocates for the rights of women in China are very active in NGOs, semi-governmental organizations, legal aid, academia and government. They have succeeded in preventing the complete rollback of gender equality as a central plank of state policy, for example, arguing against calls in the 1980s for women to leave the job market altogether and return home (Wang, 2003). They have also been able to push the government to incorporate promises of gender equality and efforts to combat gender discrimination into a number of laws and policies (for a recent overview, see de Silva de Alwis, 2010). China was one of the first states to ratify the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1981 and has enacted various laws aimed at protecting women from discrimination, notably the Law on the Protection of Women's Rights and Interests (LPWRI) from 1992, revised 2005. In the same year the LPWRI was revised, China ratified the International Labour Organization (ILO) Convention No. 111 (Discrimination [Employment and Occupation] Convention).

However, as noted above, the "protection" framing of women's rights often actually serves as a rationale for discriminating against them. Laws such as the LPWRI do not allow for individuals or groups to challenge discriminatory practices through legal action. Incorporating such a mechanism for redress was a major demand of women's groups in China when the LPWRI was being revised in 2005, but their suggestions were not accepted. Also, these laws do not recognize indirect discrimination, so, for example, outcomes would not be sufficient proof of discrimination. The CEDAW Committee has repeatedly called on China to incorporate the Convention definition of

discrimination into Chinese law, but the National People's Congress failed to do this when it last revised the law (de Silva de Alwis, 2010). In addition, Chinese authorities often do not collect sufficient sex disaggregated data, and the data that do exist are not made available in exercises such as the review of China's compliance with CEDAW, despite repeated requests from the CEDAW Committee for such information.

Canada and other states concerned about gender discrimination in China can use the CEDAW Committee's concluding comments as benchmarks for advocating for change. In particular, the collection of sex disaggregated statistics, the incorporation of a definition of discrimination consistent with that in CEDAW, and amending laws to provide for legal remedies for individuals and groups experiencing discrimination can be put on the agenda during bilateral talks and trade negotiations with China.

Conclusion

This essay has shown how, in multiple ways, women's association with the work of care and welfare, and the way these activities are perceived as an inherent drag on the productive economy, means that women are seen as contributing less to the project of developing China's economy. While women face marginalization in both the formal labour force and the globalized economy, at the same time, their public obligations are being extended, as they provide the caring labour in their own families and in "society" to fill the substantial gaps in social provision caused by the liberalization project. Women, particularly older, lower class women, may be seen as surplus labour but they are certainly not surplus to requirements. Without their diligent and

mostly invisible efforts, the impacts of the social dislocations attendant on economic restructuring would likely have become intolerable.

In many respects, the distinctions described here reflect global trends. The “feminization of subsistence” apparent in China parallels the global shift towards a “feminization of survival” (Sassen, 2000, p. 503), while the oppositions outlined here echo emerging divisions in the globalized economy and reflect its competitive logics (Ling, 1999; Zimmerman, Litt, & Bose, 2006; Elias, 2008). At the same time as women’s invisible work of paid and unpaid care is increasingly in demand, it is devalued and distinguished from the prestigious occupations associated with global circuits of capital (Sassen, 2006).

In the breakneck pace of social change in China, these emerging divides are far from uncontested, and they do not map simply onto divisions of labour of differently-situated men and women. Even within the limited territory of Tianjin, distinct practices and logics can be discerned. But a consistent theme across the divergent practices is devaluing of space and labour that is marked as feminine.

Persuading people to accept new divisions of space and labour has required a great deal of “thought work,” a socialist form of governance put into service of forming a citizenry appropriate for a capitalist economy. New logics of activism in the form of “volunteering” press women into service for the needs of the state’s goal of maintaining “stability.” The calculus of deficiency involved in assessing welfare eligibility as well as marginalizing certain types of economic activities individualizes the reasons for people’s disadvantage, rather than viewing this as the result of a series of policy choices. Such assessments exclude a complex and situational picture of need, in particular making the

interdependence of people and different spaces and types of labour less visible. These state strategies make efforts to combat discriminatory policies and practices more difficult, but as women activists in China have shown, internationalization has also brought in new logics that help them mount challenges to such trends (de Silva de Alwis, 2010).

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Promotion of Workplace Gender Equality and the Impact of Free Market Principles in Japan

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Abstract

This paper discusses whether promotion of workplace gender equality in accordance with the United Nations Convention on Elimination of All Forms of Discrimination against Women (CEDAW) and promotion of free trade competition are compatible in Japan. CEDAW is one of the conventions on fundamental international human rights, whereas free trade competition is a fundamental principle of international economic law. While it is undisputable that both are important international norms, can we truly comply with these norms simultaneously in the same depth? In order to answer this question, this paper explores the issue from the viewpoint of CEDAW. I review how CEDAW has been implemented domestically; how the Japanese labour market has been liberalized reflecting the principle of free trade, and how this liberalization of labour market has given the impact of workplace gender equality. The year of 1985, when Japanese government ratified CEDAW, was the first step for Japanese female workers to achieve equal working conditions with male workers. The government implemented "the Equal Employment Opportunity Act" for the first time, and discrimination against women in private employment was prohibited. While laws and regulations to promote female workers' status have increased since 1985,

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the stream of deregulation at the labour market seems to have a significant impact on employment of female workers. As a tentative conclusion for this paper, I argue that there is a gap between aspiration and reality: while compliance with CEDAW in the workplace and promotion of free trade are theoretically compatible, in reality promotion of free trade has had a negative impact on the promotion of workplace gender equality in Japan.

Introduction

In this paper I discuss whether promotion of workplace gender equality in accordance with the United Nations (UN) Convention on Elimination of All Forms of Discrimination against Women (CEDAW) and promotion of free trade competition are compatible in Japan. CEDAW is one of the conventions on fundamental international human rights, whereas free trade competition is a fundamental principle of international economic law. While it is undisputable that both are important international norms, can we truly comply with these norms simultaneously in the same depth?

In order to answer this question, this paper explores the issue from the viewpoint of CEDAW. I conducted six pilot interviews with a government agency, the corporate personnel of commercial firms, a non-governmental organization (NGO) working on improvement of the status of women, and a journalist working on this issue; as well as a literature review. In the conclusions offered to this complex question in this piece, I argue that there is a gap between aspiration and reality: while compliance with CEDAW in the workplace and promotion of free trade are theoretically compatible, in reality promotion of free

trade has had a negative impact on promotion of workplace gender equality in Japan.

Domestic Implementation of CEDAW

Ratification of CEDAW by the Japanese Government and its Implementation in the Workplace from 1985-1999.

The UN General Assembly adopted the CEDAW in 1979 for the purpose of promoting the equality of rights for women, which is a basic principle of the United Nations (UNDPI, 1999). Upon ratification by twenty Member States, the Convention entered into force in 1981. Japan ratified the CEDAW in 1985 without reservations. As a State Party to CEDAW, Japan is legally obliged to “condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake ... (f) to take all appropriate measures to eliminate discrimination against women *by any person, organization or enterprise*” (CEDAW, 1979, art. 2, emphasis added). Namely, the Convention obliges state parties to eliminate discrimination against women not only by public agencies but also by private individuals, such as corporate employers.

In order to implement CEDAW domestically, the Japanese government took various measures. In particular, with respect to promotion of gender equality in the workplace, the government took several legislative actions between 1985 and 1999 (Gender Equality Bureau, 2011a, p. 58). In 1985, the government enacted the Equal Employment Opportunity Act (EEOA) (*Koyō no bun'ya ni okeru danjo no kintō na kikai oyobi taigū no kakuhotō ni kansuru hōritsu*) to remedy the discrimination against women in private

employment. This Act was the first Japanese law to prohibit sexual discrimination in private employment. EEOA allowed women to compete with men for career track positions with opportunities for promotion. EEOA also prohibited employers from posting help-wanted advertisements segregated into male and female categories, except when such advertisements did not limit the employment opportunities of women. However, EEOA was not so effective in remedying workplace discrimination against women in reality for the following reasons: (1) EEOA did not provide any sanctions and relied on employers' voluntary efforts; (2) different treatment of men and women in employment such as "women only" was not prohibited on the ground that it did not limit the employment opportunity of women; and (3) an employer's consent was required to initiate mediation to solve labour disputes under the scheme of EEOA.

Later, in 1997, EEOA was largely reformed to strengthen prohibitions on discrimination against women mainly by making the following revisions: (1) different treatment of women itself became illegal discrimination; (2) equal treatment of women and men in employment and promotion became mandatory as opposed to voluntary; (3) employees were given the ability to initiate labour dispute mediation under the scheme of EEOA without the consent of the employer; (4) the government had the power to disclose the names of vicious employers as a sanction; (5) the government began supporting employers who adopted positive actions to improve the status of women; and (6) the revised EEOA imposed a new obligation on employers to pay due consideration to prevent sexual harassment at the workplace (Aizawa, 2005, p. 68).

In 1991, the government enacted the Child Care Leave Act (*Ikuji kyūgyōtō ni kansuru hōritsu*), triggered by the so-called "1.57

shock” – the average birthrate in Japan reported in 1990. This Act granted employees who had a child under one year old the legal right to take childcare leave. It also obliged employers to take necessary measures to enable their employees to take care of their children without leaving the workplace, such as a system of shorter working hours. The Act was reformed and renamed the Act on the Welfare of Workers Who Take Care of Children or Other Family Members Including Child Care and Family Care Leave (*Ikuji kyūgyō, kaigo kyūgyōtō ikuji mataha kazokukaigo o okonau rōdōsha no fukushi ni kansuru hōritsu*) in 1995 to grant employees the right to take leave when the employee has to take care of one of his or her family members (not necessarily a child under one year old).

The government also adopted the “New National Action Plan for the Year 2000” (*seireki 2000 nen ni mukete no shin kokunai kōdō keikaku*) in 1987 for the first time and revised it in 1991, aiming to achieve a “gender-equal society.” In the next year, the government appointed a Minister of Women Problems (*fujin mondai tantō daijin*) for the first time, and the Office for Gender Equality and the Headquarters for the Promotion of Gender Equality were established in 1994. In 1997, the Council for Gender Equality was legally established in the General Administration Office of the Cabinet and, based on its deliberations, the Basic Act for Gender-Equal Society (*danjo kyōdō sankaku kihonhō*) (hereinafter Basic Act) was finally enacted in 1999.

The Basic Act is a “basic law (*kihon hō*)¹” to declare the basic policy to promote a gender-equal society. Article 1 provides the purpose of this Act as follows:

¹ This type of laws regulates the major important fields of national policy. Its characteristic is that these laws are recognized as merely a program of

In consideration of the urgency of realizing an affluent and dynamic society in which the human rights of both women and men are respected and which can respond to changes in socioeconomic circumstances, the purpose of this law is to comprehensively and systematically promote formation of a Gender-equal Society by laying out the basic principles in regard to formation of such a society, clarifying the responsibilities of the State and local governments and citizens, and also stipulating provisions to form the basis of policies related to promotion of formation of a Gender-equal Society.

The Basic Act stipulates five basic principles in building a gender-equal society (Articles 3-7): (1) respect for human rights of men and women; (2) due consideration for gender neutrality in the social system and customs; (3) equal participation of men and women in policy making and political decisions; (4) balancing of family life and other activities; and (5) international cooperation.

From the review of the legislative and administrative activity from 1985 to 1999 stated above, enactment of the Basic Act was one substantial achievement for realizing a gender-equal society, which Japan undertook, to achieve by ratifying CEDAW. The fifth principle of the Basic Act - international cooperation - means that formation of a gender-equal society in Japan should be promoted in a harmonized manner with international efforts including CEDAW. Article 19 of the Basic Act also states that, "to promote formation of a Gender-equal Society based on international cooperation, the State shall make efforts to take necessary measures for exchanges of information with foreign

the policy and thereafter several independent laws are issued in order to implement the policy showed in the basic law.

governments and international institutions, and the smooth promotion of international mutual cooperation related to formation of a Gender-equal Society.” Accordingly, the Basic Act strengthens a concrete legal ground for the government to take necessary measures to implement various policies to comply with CEDAW.

As part of its obligation under CEDAW, Japan must submit periodic reports to the Committee on Elimination of Discrimination Against Women (hereinafter “Committee”) every four years. The Committee reviews Japan’s periodic reports and publishes observations on them. Under Article 19 of the Basic Act, the Japanese government has an obligation to take account of the observations the Committee publishes and adopt the necessary measures to follow recommendations given by the Commission. In August 2009, the Committee published the concluding observations on the sixth periodic report submitted by Japan, which is discussed in section III.

Current Scheme to Promote Gender Equality

In 2000, the government approved by Cabinet decision the “Basic Plan for Gender Equality” (*danjyo kyōdō sankaku kihon keikaku*) (hereinafter “Basic Plan”) (Gender Equality Room, 2000), the first plan based on the Basic Act. The Basic Plan is composed of three parts: Part 1 states basic principles in promoting a gender-equal society, Part 2 states basic policy directions and concrete policies to be implemented, and Part 3 explains how to execute the Basic Plan. In Part 2, the Basic Plan refers to “securement of equal opportunity and treatment of men and women in the area of employment.” It states as follows:

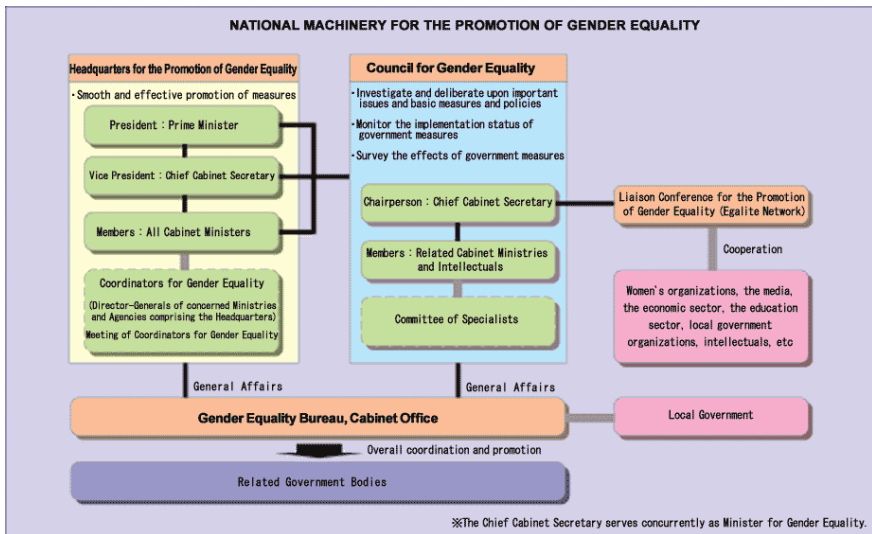
“In the present conditions of advanced globalization and intensive international

competition, it is necessary to advance policies to secure fair competition. This also results in promoting social participation of women because these policies help individuals to bring out their abilities regardless of gender. However, upon change of economic structure, we are concerned that employment becomes temporarily unstable, which may have a negative impact on women. Therefore, we should advance policies to establish a safety net and to prevent a situation where women are differently treated on the basis of gender.”

The Basic Plan proposes four concrete policies to promote gender equality in the area of employment: (1) promotion of policies to secure equal opportunities and treatment of men and women in the area of employment; (2) promotion of policies for health management of mothers; (3) support women so that they can manifest their aptitude; and (4) adjustment of labour environments reflecting various working styles.

Up to December 2010, the Basic Plan has been revised three times. The Third Basic Plan (Gender Equality Bureau, 2010a), approved on December 17, 2010 and also composed of three parts, has the same short title (“securement of equal opportunity and treatment of men and women in the area of employment”) in Part 2. This time the Basic Plan includes concrete target numbers such as ratios of female managers in private corporations and ratios of female labourers in the market, which is discussed in section III.

The following figure shows the current national machinery to promote a gender-equal society, which means that the mechanism shown below is a system to check and promote compliance of CEDAW as well.



Source: Gender Equality Bureau. (2011b). National machinery for the promotion of gender equality. Retrieved from http://www.gender.go.jp/english_contents/category/prom/index.html.

Current Status of Women and the Impact of Labour Market Deregulation on Women

Reality of Workplace Gender Equality in Japan

The framework to secure compliance with CEDAW, which is stated in Part II, seems to have been well established and organized, and the environment to secure workplace gender equality seems to have been put into place. However, the reality of female labour surprisingly lags behind even today (Gender Equality Bureau, 2010b, p. 26)². Although 41.9% of the labour force in Japan consisted of women in 2009, the average wage level of full-time female employees was only 69.8% of that of male employees. While only 22.3% of men earn less than 3 million yen

² Summary of the White Paper is also available in English (Gender Equality Bureau, 2010c).

among those who have continued to work for a year, 66.4% of women fit in this category. Not many women hold “leadership positions” in corporations: only 4.9% of department managers, 7.2% of section managers, and 13.8% of sub-section chiefs are women. Further, about 70% of full-time female workers leave their workplaces permanently after their first childbirth, even though 24.2% of them answered that they “wanted to continue to work.”

The above data is also reflected in an international assessment of gender equality of the state. The United Nations Development Programme (UNDP) annually publishes an index called the HDI (Human Development Index), which indicates the level of human development in each country, and the GEM (Gender Empowerment Measure), which indicates the level of female participation in politics and economy. According to the 2009 figures published by the UNDP, while Japan’s HDI ranked 10th among 182 countries, its GEM ranked 57th among 109 countries (UNDP, 2009, p. 186).

Based on this situation, the government’s Third Basic Plan of 2010 puts target numbers to promote gender equality at workplace: (1) the ratio of women who hold a department manager or higher position in private sectors should be raised from 6.5% in 2009 to around 10% in 2015; (2) the ratio of private sectors that introduce any positive action to promote workplace gender equality should be raised from 30.2% in 2009 to over 40% by 2014; (3) the employment rate of women between age 25 and 44 should be raised from 66% in 2005 to 73% by 2020; (4) the ratio of women who continue to work after having the first child should be raised from 38% in 2005 to 55% by 2020, and so on (Gender Equality Bureau, 2010a).

Concluding Observations by the CEDAW in 2009

The Concluding Observations of the CEDAW: Japan (CEDAW, 2009) also point out slow progress on Japan's female employment situation. It first criticizes that some concerns expressed by the Committee in previous concluding observations in 2003 have been "insufficiently addressed," and it notes that the situation of women in the labour market is one of the fields that have not been addressed in particular (CEDAW, 2009, para. 15).³ In addition, the CEDAW (2009, para. 27) states that it "notes with regret that no temporary special measures are in place to accelerate de facto equality between men and women or to improve the enjoyment by women of their rights in the State Party, in particular with regard to women in the workplace and the participation of women in political and public life," and "the Committee urges the State Party to adopt... temporary special measures, with an emphasis on the areas of employment of women and participation of women in political and public life, including women in academia, and with numerical goals and timetables to increase representation of women in decision-making positions at all levels" (CEDAW, 2009, para. 28, emphasis added). Now, the Japanese government has been asked to provide "detailed written information on the implementation of the recommendations" as to what kind of temporary special measures are to be taken within two years (CEDAW, 2009, para. 59).

³ Even in its previous observations in 2003, the Committee stated that it "urges the State party to amend its guidelines to the Equal Employment Opportunity Law and to increase its efforts towards accelerating the achievement of de facto equal opportunities for women and men in the labour market through, inter alia, the use of temporary special measures in accordance with article 4, paragraph 1, of the Convention." (CEDAW, 2003, para. 370).

The Concluding Observations by the CEDAW Committee in 2009 clearly point out that in the workplace, Japan does not sufficiently comply with the Convention regardless of the existence of seemingly well-established national machinery. In order to explore the reasons for this, the discussion below deals with the labour policy shift and its impact on the labour market.

Impact of Deregulation of the Labour Market

The deregulation of the labour market has been a global trend since the 1990s (Araki, 2007) and the Japanese labour market is no exception. In the case of Japan, deregulation policy (*kisei kanwa seisaku*) in general was strongly promoted during the 1990s as a national policy, which also accelerated deregulation of the labour market. In particular, the Koizumi Cabinet (2001-2005) aggressively promoted deregulation with the slogan of “the reform without sanctuary” and labour market regulation was also a target area for deregulation.

In May 2001, the Koizumi Cabinet adopted the Cabinet decision “Three Year Plan for Promoting Deregulation Reform” (*Kisei kaikaku suishin sankanen keikaku*) (Cabinet, 2001). In this plan, one of the fundamental purposes for the reform is stated as “realizing an internationally open economic society.” The basic policies for the reform are, among others, “economic regulation should be free in general and social regulation should be kept to the minimum,” and “regulation should be based on international harmonization.” The basic direction of the Koizumi Cabinet was to eliminate regulations that impeded competition, which was called “New Liberalism” and was also a global trend for a few decades (Drabek & Laird, 1998).

Under the Three Year Plan, the field of employment and labour relations was also listed as a target field which should be

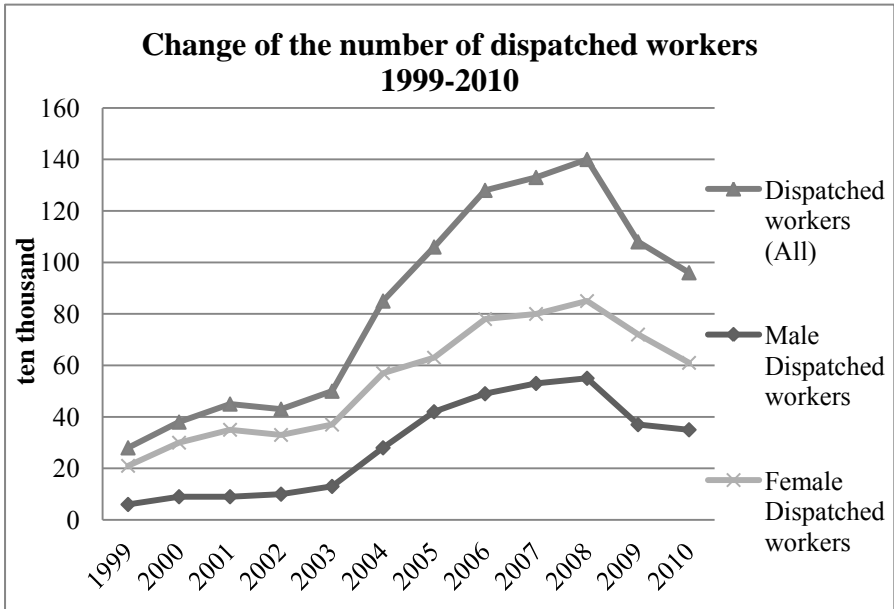
deregulated (Araki, 2007). The Comprehensive Deregulatory Commission submitted the first report on promotion of deregulation in July 2001. The report proposed to review the regulation of dispatching workers as a regulatory reform so that the reform enabled smooth labour movement in the market. Accordingly, the Act for Securing the Proper Operation of Worker Dispatching Undertakings and Improved Working Conditions for Dispatched Workers (ADW) (*Rodosha hakenhō*) was revised in 2004 to largely eliminate the regulations on dispatching workers. The ADW was originally established in 1986 to legalize worker-dispatching services in sixteen designated areas of services that were stipulated in the law (Takanashi, 2007, p. 26-48). Since its enactment, the ADW was revised four times before the 2004 reform to relax regulation step by step. The most significant reform before 2004 was the revision of 1999, by which the ADW adopted the “negative-list system” meaning that worker-dispatching services could be used for all kinds of occupations as a basic rule except for the areas of services that were listed in the law. The reform of 2004 further accelerated this tendency to liberalize the worker-dispatching market. The revised ADW legalized dispatching services for manufacturing industries that were in the area of services that predicted a great demand of temporary workers, and expanded the period of accepting dispatching workers from one year to up to three years.⁴ As stated, this reform was conducted in order to strengthen the competing power of private sectors located in Japan and to contribute to the promotion of free competition among corporations, as well as to meet the needs of diverse working styles of workers.

After the reform of the ADW in 2004, the number of dispatched workers was dramatically increased from 500,000 in

⁴ The 2004 revision also clarified rights and duties of both dispatching and dispatched entities.

2003 to 850,000 in 2004 (Statistics Bureau, 2011). The total number of dispatched workers continued to increase until the Lehman Shock⁵ happened in 2008. As a natural result, corporations shifted to decrease the number of regular employees that were much more expensive than non-regular employees. In 2007, one third of total employees (excluding directors) became irregular employees in Japanese private sectors (Statistics Bureau, 2011). However, women served as an adjusting valve to an appreciable extent: 68.7% of irregular employees (temporary workers, part-time workers, contract employees, etc.) were women. The ratio of regular employees to non-regular employees for men was 81.7% to 18.3% in 2007, whereas that ratio for women was 46.5% to 53.5%. The graph below shows how the demand for dispatching workers has been largely filled by female employees.

⁵ On September 15, 2008, the US investment bank Lehman Brothers collapsed, which had a significant impact even on Japanese economy and unemployment rate raised due to this event.



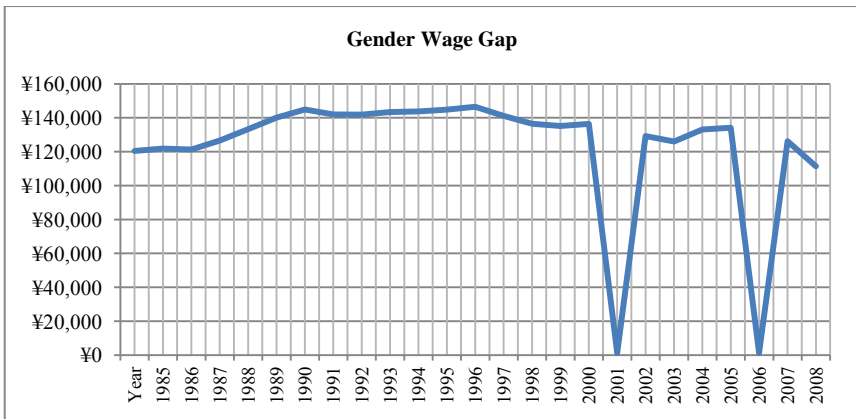
Source: Statistics Bureau. (2010). Labour Force Survey. Historical data 10 - Employee by age group and type of employment - Whole Japan. Retrieved April 30, 2011, from <http://www.stat.go.jp/data/roudou/longtime/03roudou.htm>

The graph shows that, at least in the workplace, the government's policy to promote free competition resulted in an increase of female workers who are employed on an irregular basis and used as an adjusting valve. In the end, this imposed the large number of female employees, as a group, to stay in the lower status for their full employment life.

Discussion: Gap between Aspiration and Reality

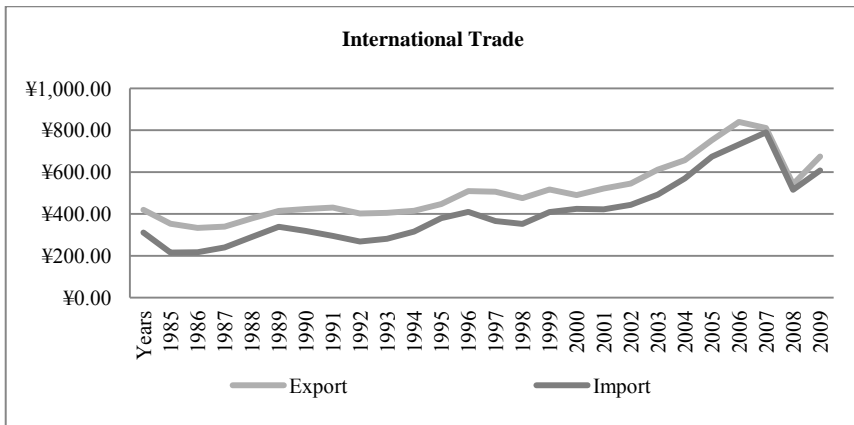
While the Becker (1971) model of discrimination argues that increased market competition will reduce discrimination in the long run, deregulation of the labour market does not seem to

promote a gender-equal workplace in Japan (Yamamoto, 2007)⁶. Japan has certainly globalized in terms of international trade since 1985, when it ratified the CEDAW. However, the wage gap between male and female workers has been kept considerably large, even expanding from 1985 to 1997, as can be seen in the graphs below. Do these data and the above discussion show that globalization impedes promotion of gender equality in the workplace in Japan, meaning that CEDAW and promotion of free trade are incompatible in Japan?



Source (available only in Japanese): Ministry of Health, Labour and Welfare. (2010). Basic Survey on Wage System (*Chingin kōzō kihon tōkei chōsa*). Retrieved April 30, 2011, from http://stat.jil.go.jp/jil63/plsql/JTK0400?P_TYOUSU=R1&P_HYOUJI=C0050&P_KITYOU=0

⁶ Yamamoto (2007) also argues, based on empirical data, that increased international competition is positively associated with wage discrimination against women in all industries.



Source (available only in Japanese): Ministry of Finance. (2010). Change of the total amount of import and export (Yushutsunyu sōgaku no suii). Retrieved April 30, 2011, from <http://www.customs.go.jp/toukei/suii/html/nenbet.htm>.

Promoters of a gender-equal society, however, have a different view. One NGO official expects positive impacts of globalization on workplace gender equality:

Only those corporations that have diversity in workplace can survive global competition this century because those corporations that can catch up with the rapid change of society can survive, and diversity including existence of women at workplace can definitely help the corporation to flexibly catch up with the global trend.⁷

The leaflet of the Gender Equality Bureau also states, “female participation in decision-making in the workplace raises productivity of corporations” (Gender Equality Bureau, 2010a, p. 6), and thus contributes to survive global competition. Indeed, as Becker’s (1971) theory indicates, gender discrimination costs the corporation the loss of competitive power in various aspects. The

⁷ Interview with the official of Japan Women’s Innovative Network, in Tokyo (December 6, 2011).

corporation loses highly talented female employees, and has to bear the cost of finding competitive male employees and the cost of recruiting advertisement. In that sense, free trade competition should promote gender equality in the workplace based on reasonable behaviour of private sectors.

However, there is a gap between these promoters' comments and reality. While these statements take workplace gender equality as a measure to survive global competition, the real society sacrifices gender equality for global competition. What makes this gap between the aspiration and the reality? How can we implement the aspiration into practice? In order to explore the answer, further research is necessary on the viewpoint of free trade, case studies of successful corporations, and gender-issue awareness of Japanese workers in general.

Conclusion

In this working paper, I discussed whether compliance with CEDAW in the workplace and promotion of free trade are compatible. As a tentative conclusion, theoretically both norms are compatible, but in reality discussion shows that promotion of free trade has had a negative impact on promotion of gender equality in the workplace in Japan. In order to explore the way to implement the aspirational theory into practice, further research is necessary.

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**PART 3 –
PANEL DISCUSSION – COORDINATING
COMPLIANCE BETWEEN TRADE AND GENDER
EQUALITY RIGHTS: THE WAY FORWARD**

**Remarks:
Coordinating Compliance between Gender
Equality Rights and Trade**

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Abstract

As Principal Investigator for the “Coordinated Compliance APDR/MCRI” project at UBC, Pitman Potter offers a range of conceptual perspectives about the project and its application to this conference on gender equality and trade. Dr. Potter notes that coordination of international trade and human rights compliance faces a number of conceptual, organizational, and political challenges. These are evident in the relationship between gender equality rights and international trade policy. Dr. Potter suggests that the paradigms of “Selective Adaptation” and “Institutional Capacity” can further understanding of local normative and organizational contexts in which international standards on trade and human rights are interpreted. He presents a series of examples where trade standards and human rights protection may find commonality, and encourages the conference to consider ways to encourage international trade and human rights communities to attend to similar opportunities for coordination in the area of gender equality and trade policy.

I appreciate the opportunity to share with you some thoughts about the coordinated compliance project that we are implementing under the Major Collaborative Research Initiatives program at SSHRC. This is the program that brings us here today. I hope the theme of our program – coordinating compliance with international trade and human rights standards on gender equality – will resonate with you. We have heard a number of comments today that suggest we need to start thinking more carefully about how to coordinate trade and human rights compliance in the area of gender rights as well as other areas. We have been working together to consider the permeability of boundaries between trade relationships and human rights relationships, and we need to start a process of integration.

Challenges to Coordination

As many have noted this morning, the coordination we seek is unfortunately quite challenging, for conceptual, organizational, and political reasons. First of all, there are many conceptual differences and assumed trade-offs between the international trade and human rights regimes. All too often, human rights standards in areas such as labour, health, and housing are seen as inconsistent with trade goals of efficiency, economic growth and private property rights. Conversely, trade policy in areas such as transparency, the rule of law, subsidies and dumping, and IPR are sometimes seen as threatened by human rights advocacy and criticism. Efforts could be made to address this issue through interdisciplinary research and analysis that builds confidence and awareness about coordinated compliance.

As well, coordinated compliance has been elusive because the officials and specialists who manage interpretation and implementation of trade and human rights standards operate in different organizational worlds. Certainly there are efforts, in academia in particular, to build interdisciplinarity generally, and more specifically to build knowledge about relationships between trade and human rights. But once we get into trade ministries and trade policy think tanks, for example, there is precious little organizational and individual interchange with those handling the human rights brief, either within government or outside. And be mindful that when we talk about trade, as we said this morning, the trade-in-goods focus of the GATT has been expanded under the WTO into services and IPR and investment, trade-related investment and so on. So when I use the term trade, it is a big animal. Conversely, specialists in human rights organizations have little time and, to be frank, limited interest in making time to master the details of trade policy and practice. Responses to this challenge might include expanding the role of human rights assessments of trade policy initiatives and trade impact assessments of human rights initiatives, so as to encourage better exchanges of perspective between the two sectors.

The effectiveness of research and monitoring, however, depends in part on the resolution of the third reason for non-coordination of trade and human rights compliance, namely the political economy. The dominance of neo-liberal economic perspectives, and of the firms and organizations that endorse and support them, has tended to relegate human rights to secondary status. Privileging the imperative of market-based efficiencies in economic exchange has meant generally that human rights are considered to be a hopeful, perhaps even encouraged, but nonetheless secondary outcome from economic prosperity. Simply put, the efficiencies of trade policy are seen to contribute to the

generation of surpluses that then can support public goods like human rights. The difficulty here is that the policies necessary to generate trade efficiencies may also undermine protection of human rights. It seems to me that if we attempt to address trade and human rights issues separately, the current political economy of privilege and power is going to diminish attention to the human rights side and privilege attention to the trade side. As several have noted already at this conference, we have already seen examples of this dynamic of incomplete and distorted enforcement. We are invited to consider instead that human rights are sufficiently fundamental and that they should not be relegated to secondary status dependent on the success of trade policy. We are invited, therefore, to consider that human rights protection should be a primary imperative, not to displace trade, but as a necessary complement.

Building Coordination: Looking at Norms and Structures

We continue to develop and refine the paradigms of “Selective Adaptation” and “Institutional Capacity,” which enable us to understand better the local normative and organizational contexts in which international standards on trade and human rights are interpreted. In the normative analysis of “Selective Adaptation,” we focus on what Stanley Fish termed, “interpretive communities,” inquiring how they are grounded in local cultural environments, and examining the ways that these local cultural environments colour the interpretation and implementation of non-local standards in the areas of trade and human rights. Throughout this morning’s discussion, we have seen and heard an appreciation of that contextualization. In the area of gender dimensions especially, the ideology of patriarchy remains critical

and generates political-economical relationships and practices locally that pose fundamental challenges to the ways that international standards on trade and human rights grounded on liberal norms are going to be interpreted locally.

As I have indicated elsewhere (Potter & Biukovic, 2011), Selective Adaptation operates in contrast to expectations about convergence that suggest development toward a globally unified system of institutional practices and values; Selective Adaptation explains variations in local reception of non-local standards by reference to the extent of normative consensus.¹ Selective Adaptation suggests that local implementation of non-local standards depends on the extent to which their underlying norms are received by local interpretive communities (Fish, 1980). Interpretive communities comprised of government officials, socio-economic and professional elites, and other privileged groups exercise authority of political and/or professional position, specialized knowledge, and/or socio-economic status to interpret non-local standards for application locally.² In the course of this process, interpretive communities selectively adapt non-local standards for local application in light of their own normative outlooks.

The process of Selective Adaptation involves dynamics of perception, complementarity, and legitimacy. *Perception* of the content and operation of international law standards determines the ways that interpretive communities will interpret and apply them (Kennedy, 1994). Perception may involve relatively simple elements of translation of international trade and human rights

¹ For discussion of the intersection of norms with identity and community, see Unger, 1975 and Etzioni, 2000.

² In the China context, see Miller & Liu, 2001 and Fewsmith & Rosen, 2001.

standards, or reveal more complex factors of cognition, ranging from diversity of understanding to cognitive dissonance and denial. *Complementarity* describes how apparently contradictory phenomena are combined in ways that preserve essential characteristics of each component, and yet may allow them to operate together in a mutually reinforcing and effective manner (Bohr, 1963; Seliktar, 1986). Complementarity between international and local practices and values informs the dynamics of local accommodation and resistance to international standards. *Legitimacy* concerns the extent to which members of local communities accept the purposes and consequences of selective adaptation (Weber, 1978; Scharpf, 2000; Turner & Factor, 1994). Legitimacy may involve factors ranging from personal preferences born of individual circumstances and interests to broader social perspectives of idealism, nationalism, and identity that inform responses to procedural or substantive dimensions of international standards.

Turning to the issue of “Institutional Capacity,” we encounter questions that are familiar for many here today. However, in the locations that we have been looking at, particularly China, but also Japan, Indonesia, and India, the institutional capacity brief also has to be contextualized to local conditions. Mindful that governance institutions are often transplanted in form – whether we look at the Chinese legal system; the Indonesian *reichstadt*; or India’s professional civil service – the transplanting of foreign administrative forms does not necessarily bring with it the same sort of cultural attitudes, internal dynamics and behavioural conditions that are attached to those institutions in the places from which they emerged. So, you have an institutional capacity issue too, and this can help us address this whole question of coordinating the trade and human rights regimes, and this is what our project is really about. We are

looking at Indonesia, India, China, Japan, and Canada with local case studies and so on. Some of the work you have heard of this morning is supported by that project, and you will hear some more in a few minutes.

Exploring Intersections of Trade and Human Rights

In our coordinated compliance program, we work to identify specific pairings (we refer to them as “dyads”) in which trade disciplines and human rights disciplines may find commonality. This effort to identify opportunities for coordinated compliance has more than conceptual significance. Coordination of compliance invites consideration of practical approaches to questions around implementation. As we can all appreciate, it is not enough simply to check off a box on a project review or an audit form that says you have dealt with gender, or to check off a box to say that you have dealt with human rights. We also need mechanisms that render that box-checking meaningful for people whose lives are affected. But first, we need to explore specific aspects of international trade and human rights standards to determine where potential for coordination might be found.

One useful example involves transparency. As many in the trade policy area know, transparency under Article X of the General Agreement on Tariffs and Trade requires publication of laws and regulations. Transparency also involves participation in rule making. Accompanying provisions on the rule of law in GATT Article X provide for review of administrative action. While the application of these standards is focused on matters related to imports and exports, this qualification is extremely broad and might well entail engagement with a wide range of human rights relationships that emerge in the course of the production value

chain. For example labour relations - especially in export-oriented factories - would appear to fall within the ambit of trade-related matters and thus may well be an appropriate subject area for the application of transparency standards. To the extent that publication of relevant laws and regulations supports greater awareness and enforcement of labour standards, the enforcement of trade standards around transparency might well support protection of human rights in labour relations. Similarly, to the extent that rule of law provisions on review permit to appeal against administrative decisions affecting customs matters (and potentially other matters affecting imports and exports), this may potentially allow organizations supporting, for example, women's labour rights opportunities to further their cause through the courts. And, as we consider trade compliance under the GATT/WTO umbrella, let us also think about human rights compliance under ILO umbrella. As we examine processes for implementing GATT Article X disciplines on transparency and the rule of law, let us also include in our assessment the impacts on labour rights and the rights of women.

The example of intellectual property rights is similar. IPR issues were addressed this morning - examining tensions between strict IPR enforcement on the one hand, and providing affordable medical care for the rural poor on the other. In this case, the perspective of coordinated compliance may serve as cautionary principle focusing attention on potential obstacles to human rights protection stemming from trade policy standards. Coordinated compliance may also point the way to productive avenues by which IPR protection may work to support broader public access to health care, such as compulsory licensing of technology for limited application to urgent public need. If our analysis of IPR enforcement from a trade policy perspective takes specific account of its impact on access to health care, we are able to consider more

directly then whether intellectual property rights are being protected in an appropriate way.

A similar dyad deals with corporate governance and corporate social responsibility, the blending of internal and external accountability systems for firms. The relationship between financial reform and micro-credit is another example, which examines the ways in which a supervision of large financial institutions affects the availability of micro-credits to facilitate local economic wellbeing. Human rights issues like environmental protection or housing rights may also be paired with specific trade policy disciplines such as national treatment or anti-subsidy standards. There are no doubt many others of these dyads, but what we are trying to do here is identify a specific operational mechanism by which we can look at trade agreements and say, what are the human rights impacts, and actually start folding the expectations about those impacts into the assessments of the trade agreements. Similarly, we could do the same with human rights agreements, so that when we look at issues on gender equality, we look at its impact on trade or international economic relations.

In our approach, to coordinated compliance, we are inspired by the solution reached some years back concerning Fermat's last theorem, which proposed a proof for a variant on the Pythagorean theorem ($x^n + y^n = z^n$). But the proof was lost and its rediscovery had long been a challenge for mathematicians. Andrew Wiles and Richard Taylor resolved the mystery through what was basically a process of elimination involving elliptical curves that in essence excluded all other possible outcomes except the outcome that proved the theorem (Singh, 1997). In a way, that is what we do with coordinated compliance, because once we identify the ways where enforcement of GATT disciplines and enforcement of human rights standards is complementary and

mutually sustaining, then that allows us to start carving out more intentionally the areas where trade-offs have to occur. It may very well be the case that trade-offs do have to occur and that trade disciplines need to be adjusted in order to specifically accommodate human rights standards. That may happen, and likely will happen, but we need to triangulate well enough to be able to identify precisely the opportunities where that occurs. This comparative project on coordinated compliance is one way to do that. So, the project is about much more than simply theory, although we certainly have developed a fairly detailed theoretical paradigm with formulae and the rest. Equally importantly, however, it is providing us specific practical ways to coordinate compliance and performance with international trade and human rights standards through this dyad process that I suggested. Understanding the dyads, I think, allows for concrete operationalization of the international trade-human rights coordination process and thus provides us details for the human rights assessments that we have been hearing about today.

I think I just have a couple minutes and I have not gotten the hook yet so I will say a few words on lessons learned. Certainly the relationship between trade and human rights and the challenge of coordinating it better are really issues of organization, issues of staffing and resources. For example, might we consider the possibility that trade ministries around the world establish, at the deputy minister level, a human rights coordination office? This might work positively to facilitate lateral communication about human rights coordination within the boundaries of trade agencies. Conversely, human rights NGOs might well be encouraged to establish trade policy departments, for facilitating appreciation of the role of coordination. The paradigm of "Institutional Capacity" may assist in building understanding on these organizational issues.

As well there are issues around sharing of knowledge and values. As I have said, trade specialists and human rights specialists have mastered different discourses. They have studied out of different books. Building bridges across this divide would be helpful. There are also issues of ideology, and I think the point that was made this morning so eloquently was that ideologies of patriarchy support ideologies of capitalism. Perhaps we can use coordinated compliance to find alternative approaches such that dynamics of liberation can support practices of economic justice. Coordinated compliance on international trade and human rights standards may offer ways of dealing with those ideological issues. At the root of this process may lie the dynamics of normative interchange. We need to understand the normative worlds that inform both the WTO and the human rights treaties including those centered on gender as well as the more general discourses of conventions of civil and political, and economic, social, and cultural rights. The normative world in which these discourses on trade and human rights exist is not necessarily the normative world of implementing economies. We need to understand the relationship between international standards and local norms, and understand how local norms mediate reception of those international standards. Our dynamic of "Selective Adaptation" can assist with this.

As we build understanding, so too do we build the capacity to act, analyze, and perhaps suggest ways that are relevant to resolving issues of coordinated compliance. And so we can find ways to encourage the international trade community to look at potential coordination with human rights protection, and for human rights advocates to look for opportunities to coordinate with international trade policy. I have already mentioned a few examples on the gender side that I think might be a way to do this. For example, use of GATT/WTO transparency rules to encourage

publication of international standards on women's rights locally – and with regard to CEDAW. This may also extend to gender issues in labour, health, and environment, contributing to building local norms supporting better protection of women's rights. Local enforcement of GATT/WTO rule of law standards regarding issues such as judicial review of government decisions can potentially be applied to judicial review of government decisions affecting women, therefore expanding the horizons of the trade brief, and having some impact on protection of women's rights. As well, re-examination of GATT/WTO trade subsidies rules – the Subsidies Code in particular – might allow us to provide government support for women's equality through subsidies for women's health costs as well as for protection of living wage standards. Reconsideration of immigration policy to balance the trade imperatives of competitive labour costs with the human rights needs of migrants and society might also support certain kinds of home-care needed by women and families working in export-oriented firms – essentially providing a benefit to the cost of export production.

We are not there yet, but I think it would be useful to examine the application of coordinated compliance to a range of gender and trade issues. On these and many, many other questions, coordinated compliance discourse can support human rights protection even while supporting international trade standards.

Thank you very much.

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Gender, Trade Liberalization, and Tobacco Control in China

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Abstract

Rights-based health initiatives have, in recent years, become an important pillar of the global health agenda. A major theme among advocates of these rights-based health initiatives is that the human rights toolkit has the potential to be a powerful and effective constraint on the pressures towards trade liberalization in international organizations like the World Trade Organization. The paper describes the important role gender plays in the global effort to develop tobacco control measures based on international law; measures that reflect the fact that the tobacco industry is centred around a small set of transnational cigarette companies that benefit from trade liberalization. The specific focus is on the World Health Organization's (WHO) Framework Convention on Tobacco Control (FCTC), which came into effect in 2005. The WHO enacted this international law using its treaty creating capacity for the first time. Its purposes include the regulation of trade liberalization in tobacco products. The regulations are grounded on the right of all persons to the highest standard of health. My point is that an international human rights approach to global health has been effective in strengthening gender-specific provisions of the new tobacco control regime. The implementation of the FCTC in China provides a concrete illustration of this argument.

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Introduction

Rights-based health initiatives have, in recent years, become an important pillar of the global health agenda. A major theme among advocates of these rights-based health initiatives is that the human rights toolkit has the potential to be a powerful and effective constraint on the pressures towards trade liberalization in international organizations like the World Trade Organization (See Hunt, 2004; Forman, 2008). But skeptics question whether a rights-based approach to global health genuinely has this promise. Reubi (2011, p. 626) argues, for example, “the international human rights framework’s poor record at protecting people and its numerous inherent problems should... make us cautious about embracing it as the solution to the ill effects of market fundamentalism.” This skepticism suggests to me that there is an onus on advocates in the health and human rights field to make more transparent how human rights frameworks can be effective at constraining trade liberalization.

In this paper, I explore how concerns about gender and health from a human rights perspective play a role in the global initiatives focused on tobacco control. Few doubt that human rights-based approaches to global health have helped to draw attention to gender as an important factor for consideration (Merry, 2006). Within the international human rights community, it has long been recognized that rights violations are rarely gender neutral. As Paul Farmer (2005, p. 231) has long observed “human rights can and should be declared universal, but the risk of having one’s rights violated is not universal.” The rights-based initiatives in global health where attention to gender has gained the most traction are AIDS/HIV, reproductive health, violence against women, and discriminatory practices in access to health care. The

role of gender in rights-based global health initiatives to combat chronic diseases is less familiar. The paper describes the important role gender plays in the global effort to develop tobacco control measures based on international law, measures that reflect the fact that the tobacco industry is centred around a small set of transnational cigarette companies that benefit from trade liberalization. The specific focus is on the World Health Organization's (WHO) Framework Convention on Tobacco Control (FCTC), which came into effect in 2005. The WHO enacted this international law using its treaty creating capacity for the first time. Its purposes include the regulation of trade liberalization in tobacco products. The regulations are grounded on the right of all persons to the highest standard of health. My point is that an international human rights approach to global health has been effective in strengthening gender-specific provisions of the new tobacco control regime. The implementation of the FCTC in China provides a concrete illustration of this argument.

Trade Liberalization and the Tobacco Industry

Tobacco use is globally the single biggest cause of chronic disease, in particular, cancer, stroke, and heart diseases. Worldwide, tobacco use causes more than 5 million deaths annually and those numbers are expected to rise to 8 million in the next fifteen years (Centers for Disease Control and Prevention (CDC), n.d.). Although historically many countries had their own domestic cigarette companies, over the past three decades the tobacco industry has become increasingly concentrated in the hands of six transnational companies. Four of these companies – Philip Morris International, British American Tobacco, Imperial Tobacco, Indian Tobacco Company – are privately owned and

publicly traded. One company, Japan Tobacco, is 50% owned by the Japanese Government. The other one, China National Tobacco, is owned entirely by the Chinese Government. The concentration of the tobacco industry in these six companies makes clear why it now makes sense to characterize the market for cigarettes as a global one.

Tobacco usage is not, however, uniform across nations. In advanced industrial societies, cigarette users have been on a steady decline. In Canada, for example, tobacco use among adults has declined from 25% of the population in 1999 to 17% of the population in 2010 (Health Canada, 2010). Similarly, in the United States, smoking declined from 24.1% of the population in 1998 to 20.6% in 2008 (CDC, 2009). This contrasts to smoking trends in developing countries, which saw a dramatic increase in smokers from 1971 until 2001, followed by a levelling off. There are at present about 1.2 billion smokers, approximately 800 million live in developing countries. Chart I represents the estimated number of smokers worldwide and their distribution.

Chart I

Countries	Smokers			Smoking Prevalence	
	Males	Females	Total	Males	Females
Developed	275 million	150	425 million	35%	22%
Developing	700 million	100	800 million	50%	9%
World	975 million	250	1125 million	47%	12%

Source: Action on smoking and health (ash). (2007). *Ash Research Report - Tobacco: Global Trends*. Retrieved March 22, 2012, from http://www.ash.org.uk/files/documents/ASH_562.pdf

Global cigarette production has continued to grow each year. Over the past decade, the increase has been 16.5%, which means on average 800 billion more cigarettes per year (The Tobacco Atlas, n.d.). In other words, the expanding global market has been in developing countries and this is where the money is (Joey, 2008). Access to these markets through trade liberalization is fundamental for transnational cigarette companies.

Global Tobacco Control through International Treaty Law

In the mid 1990s, the World Health Organization began to expand its traditional focus on infectious diseases to include chronic diseases. And it is in this context that the WHO concentrated much of its efforts on tobacco control. In 1999, the new Director-General of the WHO Gro Harlem Brundtland (1999) explained both why tobacco control has urgency and why a transnational organization like the WHO should be in a leadership role:

Tobacco-related diseases are spreading like an epidemic and are likely to be killing 10 million people a year around 2020. Into the next century, tobacco will climb the ladder to be the leading cause of disease and premature death worldwide... we have the evidence. We know what works. Tightening legislation against advertising, increasing tobacco taxes and controlling the marketing of cigarettes will make a difference for the health of future generations worldwide... this is not a challenge confined to independent States. It is a global challenge. (para. 37)

What was unusual for the WHO was how Brundtland proposed to meet the global challenge of tobacco control.

The World Health Assembly, the legislative assembly of the WHO, has had the power to create international treaty law since its inception in 1946, but had for fifty years never exercised that power. This changed when the WHO decided that an effective way to meet the global challenge of tobacco control is through the development of international law. In 2004, the WHO enacted the Framework Convention on Tobacco Control (FCTC) and it entered into force on 27 February 2005. The WHO FCTC creates an obligation for parties to "reduce continually and substantially the prevalence of tobacco use and exposure to tobacco smoke" by adopting and implementing "effective legislative, executive, administrative and/or other measures" (WHO, 2003, p. 5-6). There are now 176 countries that are parties to the convention, and 10 more such as the United States have signed the convention but not yet ratified it. This makes the FCTC one of the most successful international treaties in history. Several countries in the Asia Pacific region, most notably Japan and China, have been early strong supporters of the FCTC.

From a human rights perspective, the FCTC is significant because the preamble states clearly that the foundation for the legislation is the right to health, citing both the WHO Preamble and the International Covenant on Economic, Social and Cultural Rights (ICESCR) statement of the right to the highest attainable standard of health provision. Tobacco control is presented, in other words, as a human rights issue. As the Forward states, "The FCTC is an evidence-based treaty that reaffirms the right of all people to the highest standard of health" (WHO, 2003, p. v).

What is the relevant evidence when it comes to global tobacco control? From the perspective of the WHO, cigarette companies have thrived in the neoliberal era of trade liberalization

and the global movement of capital and goods. The treaty (WHO, 2003) states,

The FCTC was developed in response to the globalization of the tobacco epidemic. The spread of the tobacco epidemic is facilitated through a variety of complex factors with cross-border effects, including trade liberalization and direct foreign investment. Other factors such as global marketing, transnational tobacco advertising, promotion and sponsorship, and the international movement of contraband and counterfeit cigarettes have also contributed to the explosive increase in tobacco use. (p. v)

The significance of a rights-based approach to the global health epidemic created by the tobacco industry is that its available toolkit includes international treaty law, which is seen by the WHO as an instrument to regulate trade liberalization and foreign investment.

The FCTC is designed to reflect precisely the themes Director General Brundtland identified in 1998. It includes provisions on tobacco advertising, health warnings on cigarette packages, higher taxation, prohibitions against sales to minors, regulations on illicit trade, as well as some commitments to supporting smoke cessation. What these provisions reflect is the viewpoint that global tobacco control should include a focus on international trade liberalization and that the regulation of this trade is grounded in a human rights concern.

It is important from an international law perspective that the FCTC is only a framework convention, not a fully entrenched international convention – this means that it is a work in progress, with what are being called Protocols in particular aspects of the

convention. Since 2005, the Secretariat of the FCTC has slowly been filling out the substantial content of the convention and the obligations of states that have ratified it. In practice, much of this work has been carried out with support from the Framework Convention Alliance on Tobacco Control (FCA), the major international non-governmental organization working on the development and implementation of the WHO FCTC. Indeed, the head of Japan's leading tobacco control organization once commented to me that it is the FCA, not the FCTC per se, that has had a dramatic impact on the evolution of tobacco control in Japan and he suspects elsewhere in Asia since 2005.

The Linkages between Human Rights and Gender-Specific Health Provisions

Global health policy has in recent years, as I noted above, become increasingly shaped by human rights concerns, in particular, the right to health. What is distinctive about the role of human rights in global health policy is the emphasis on non-discrimination and equality as regulative norms in its development and implementation (Gruskin & Tarantola, 2005, p.11). The impact of this emphasis on non-discrimination is most visible in the global response to HIV/AIDS but its reach is also evident in, for example, the coordinated efforts by major charitable organizations such as the Bill & Melinda Gates Foundation to combat neglected infectious diseases. Human rights norms are applicable in these instances because of the overwhelming evidence that health policies and programs in many countries risk discriminating against, for example, persons with AIDS. China's response to the prevalence of AIDS among its rural population is often held up as a case in point (Jacobs & Pitman, 2006).

Combating gender discrimination has been one of the principal targets of the international human rights framework since the post WWII period. This commitment runs through the entire series of the United Nations treaties that constitute the core of the framework, including the 1980 Convention on the Elimination of All Forms of Discrimination against Women. In practice, human rights concerns with gender discrimination have been expressed in two types of measures (Jacobs, 2004, chs. 7-8). On the one hand, the concern has been with measures that challenge overt barriers for women that arbitrarily limit their freedom and opportunities. On the other hand, the concern has been with measures that dismantle systemic barriers for women. Concerns about systemic barriers often underlie measures that are designed to target women in a beneficial or affirmative manner.

In the context of health policy and practice, both types of measures – challenges to overt barriers, targeted benefit programs – are readily evident for example in how the United Nations currently interprets the right to health in the international human rights framework. The right to the highest attainable standard of health has been interpreted by the United Nations as involving two distinct components, on the one hand, freedoms, and on the other hand, entitlements (UN Economic and Social Council (ECOSOC), 2000, para. 8.). The essential freedoms at stake are the right to make one's own decisions about health and body, including consensual medical treatment and the right to be free from interference and discrimination. Entitlements are held against an individual's state or government. These entitlements do not include good health because that cannot be ensured by a state. Thus, observes the UN Economic and Social Committee, "the right to health must be understood as a right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realization of the highest attainable standard of health"

(ECOSOC, 2000, para. 9). The right to health is seen, on this interpretation, as providing grounds to protect women from infringements on their basic freedom to make choices about medical treatment and care. But it is also interpreted as providing grounds for special provisions that give priority to women's health issues such as reproductive health care, given the unfair treatment and neglect of women's health issues in the past. By gender-specific health provisions, I mean both of these types of measures.

Gender and Tobacco Control in the FCTC

From a health risk perspective, smoking affects men and women in many ways that are similar, for example, in terms of heart disease, lung cancer, bronchial and digestive tract cancers, stroke, vascular diseases, bronchitis and emphysema. Men who smoke also risk distinctive sexual and fertility problems. Women risk increases in cervical and breast cancer, cardiovascular disease, infertility, pre-mature labour, low weight births, early menopause and bone fractures.

The most important differences have to do, not so much with the effects of smoking, but with the prevalence of smoking among men and women. As Chart 1 above indicates, in the developed world, 35% of men smoke compared to 22% of women. The gap is steadily narrowing. Trends suggest that in advanced industrial countries like the United States, United Kingdom, Germany and France socio-economic class is emerging as the most important variable identifying who continues to smoke (Feldman & Bayer, 2011). The dramatic difference, however, is in the developing world where on average men smoke at more than five times the rate of women. China currently has more smokers than any other country in the world and it is estimated that at least one

million deaths a year are caused by smoking. There, the gap between smoking men and women is especially pronounced. In the Global Adult Tobacco Survey for 2010, it was found that smoking rates for men in China was 52.9%, but only 2.4% for women (WHO, 2011). What is disturbing is that deaths caused by smoking do not correspond to this gender gap in smoking, as the deaths caused by second-hand smoke are significantly higher in women (WHO Representative Office in China, n.d.).

What follows from these differences in smoking rates in developing countries like China? There are two important implications for tobacco control pertaining to women. The first is that it suggests that the overwhelming harm done to women in China regarding tobacco usage at present is a consequence of second hand smoke. The second important implication is that from a marketing perspective there is a huge potential for the tobacco industry to expand their customer base by encouraging the increase of smoking among Chinese women. There are also important implications pertaining to men and tobacco control. The first is that smoke cessation efforts in China are predominately about ending tobacco addiction among men. Likewise, curtailing smoking behaviour in China means in effect changing when and where men smoke.

From a human rights perspective, it would be wrong to ignore the differences between men and women when developing tobacco control law and policy. Fair treatment of men and women demands sensitivity to differences in their situations regarding tobacco usage and exposure of its health risks. Gender-neutral tobacco control measures may not, in other words, always be consistent with the core values of non-discrimination and equality.

The FCTC provides a clear expression of this sort of reasoning. It identifies women as especially vulnerable to the

harmful effects of globalization and trade liberalization in the tobacco industry. Member States are said to be “alarmed by the increase in smoking and other forms of tobacco consumption by women and young girls worldwide” (WHO, 2003, p. 1). In response to this “alarm,” the huge differences in smoking prevalence among men and women, and the gender differences between how tobacco usage causes harm, the WHO FCTC embraces as a matter of guiding principles, “the need to take measures to address gender-specific risks when developing tobacco control strategies” (WHO, 2003, p. 6).

It remains an open question whether or not a global convention on tobacco control would have embraced gender-specific risks if it was not grounded in the international human rights framework. The reality is, however, that the very idea of using international treaty law to address the global tobacco epidemic only came into view when the WHO began to take seriously human rights and health linkages. And I believe that it is doubtful that there would now be anything like the FCTC if this paradigm shift did not take place.

Gender-Specific Tobacco Control in China

How has this embrace of gender-specific tobacco control measures in the FCTC affected China? From an international human rights perspective, international non-governmental human rights organizations like Amnesty International and Human Rights Watch have a long history of pressuring countries, including China, to improve their human rights performance through

naming, blaming, shaming and praising exercises.¹ The WHO in China appears in my view to have learned from these human rights organizations and is pursuing similar strategies to improve China's public health performance on global health issues. This is already clearly evident in the WHO's treatment of China in the context of emerging infectious diseases (Jacobs, 2011). Likewise, I think the WHO has effectively pursued the same strategy to improve China's tobacco control performance. A clear example of the praise strategy came on July 18, 2012, when the WHO awarded Professor Chen Zhu, Minister of Health of the People's Republic of China, with a Director-General's Special Recognition Certificate for his commitment to tobacco control (WHO Representative Office in China, 2012). Presumably, this praise is viewed by the WHO leadership as an effective way to ensure China's embrace of measures like the two described below.

Gender-specific tobacco control measures provide two concrete illustrations of the WHO's strategy. For example, in May 2010, the WHO Representative Office in China released a special initiative titled *Protect Women from Tobacco Marketing and Smoke*. The initiative is linked to China's obligations under the FCTC's provision for gender-specific tobacco control measures and has a two-fold focus, a comprehensive ban on tobacco advertising and smoking in public places. The rationale for the first ban is explained in the following way: "Advertisements falsely link tobacco use with female beauty, empowerment and health. In fact, addiction to tobacco enslaves and disfigures women" (WHO Representative Office in China, n.d.). The rationale for the ban on smoking in public places has a similar tone: "the bigger threat to women is from exposure to the smoke of others, particularly men... in China more than 97% of smokers are men. Yet more than half of

¹ In the case of China, of course, this approach has not always been effective. See Jacobs & Potter, 2006.

Chinese women of reproductive age are regularly exposed to second-hand smoke, which puts themselves and their unborn babies at risk” (WHO Representative Office in China, n.d.).

From a different angle, the WHO in China is also focusing on smoke cessation among men. The challenge, explains Douglas Bettcher, Director of WHO’s Tobacco Free Initiative, is that “among men [in China], there is enormous social pressure to smoke, and this is facilitated by the policy environment” (WHO Representative Office in China, 2010). This pressure comes in the form of business practices as well as socializing with friends. Bettcher’s point is that tobacco control requires at some level addressing the social pressure on men to smoke and changing the business and social culture for men in China. The WHO in China holds that this change can come with the sort of tobacco control measures mandated in the FCTC, but these should be implemented with a particular view to changing male norms around tobacco usage, in effect, gender-specific measures. The long-term health benefits of this WHO gender-specific tobacco control initiative, as well as the one targeting women, remain to be seen.

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Coordinating Regimes – Integrating Gender and Human Rights in International Investment Arbitration

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Abstract

*The human rights and gender impacts of international investment treaties are often not taken into consideration when these treaties are negotiated and ratified. Moreover, international investment tribunals often do not consider the impact of their decision on human and women's rights in the global South. Likewise, the defending state often does not raise these issues in its defense. The focus of international investment tribunals is usually only on whether there has been a violation of the investment treaty. International investment tribunals lack transparency, accountability and independence, and undermine democratic processes that are important for the realization of human and women's rights. This paper examines the international investment case *Suez, Sociedad General de Aguas de Barcelona and Vivendi Universal v. Argentina* from a human and women's rights perspective. In particular, this paper discusses how the *Aguas Argentinas* case involved the human right to water and impacted the lives of women.*

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Introduction

The human rights and gender impacts of international investment treaties are often not taken into consideration when these treaties are negotiated and ratified. Moreover, international investment tribunals often do not consider the impact of their decision on human and women's rights in the global South. Likewise, the defending state often does not raise these issues in its defense. The focus of international investment tribunals is usually only on whether there has been a violation of the investment treaty. The unforeseen consequences of international investment law on human rights and women's rights include public protests and civil unrest, security and police force brutality against the public and greater economic inequality, particularly between men and women in the global South. International investment tribunals lack transparency, accountability and independence, and undermine democratic processes that are important to the realization of human and women's rights (Choudhury, 2008; Choudhury, 2009; Odumosu, 2007; Sornarajah, 2008a; Sornarajah, 2008b; Van Harten, 2005; Van Harten, 2007, Schneiderman, 2008). This essay examines the impact of an international investment decision involving the privatization of a municipal water and sanitation system on the lives of women and the right to water in Argentina. This case of *Suez, Sociedad General de Aguas de Barcelona and Vivendi Universal v. Argentina* (2010) – hereinafter referred to as the *Aguas Argentinas* Case - demonstrates the need for integrating principles that respect gender and human rights in international investment arbitration. The investment arbitration regime must integrate basic human rights into its decision-making process and become more transparent, independent and accountable in order to adequately address issues that affect the daily lives of women in the global South.

Dilemmas of International Investment Arbitration

Investment tribunals and investment treaties have often been criticized for not taking into account the public interest and focusing solely on the investor's interests. For example, Gus Van Harten (2007, p. 5) explains that arbitrators and adjudicators are biased towards the foreign investor because the system only allows a foreign investor to bring a claim. Sornarajah (2008a, p. 51) calls this scheme 'arbitration without privity' referring to the fact that the consent of the state to arbitration is general (through ratification of the investment agreement) rather than being required for the initiation of arbitration in each case. In effect, as Van Harten (2007 p. 5) points out, arbitrators and adjudicators rely financially on foreign investors to bring international investment claims against States. Therefore, "arbitrators may reasonably be perceived as having a financial stake in interpreting investment treaties so as to expand the system's compensatory promise for investors" (Van Harten, 2007, p. 5). Another investment rule that potentially contributes to a lack of impartiality in the international investment regime is the dual function of investment lawyers as both advocate and arbitrator in investment disputes (Van Harten, 2007, p.5). Luke Eric Peterson (2004, p. 24) states where "practicing counsel for investors may serve as arbitrators in other investment treaty disputes, thereby having a first-hand influence in fleshing out key treaty obligations." The dual function of investment lawyers as both arbitrator and advocate arguably contributes to a lack of impartiality in international investment arbitration.

The lack of transparency and public participation in the investment arbitration process is also a concern for many academics. Investment tribunals are not required to make proceedings transparent or accept *amicus curiae* submissions.

Tribunals have become increasingly open to the public in recent years, however, none of these advances in transparency apply uniformly and the acceptance of *amicus curiae* submissions is at the discretion of the investment tribunal (VanDuzer, 2007, p. 706). Moreover, the increasing inclusion of non-disputing parties to investment proceedings remains largely closed to marginalized groups in the global South (Odumosu, 2007c). Odumosu (2007c) explains that this is because grass-roots social movements in the global South often do not have the resources or specialized knowledge of the investment regime to participate in the investment arbitral process. More often, grass-roots movements take the form of public protest. However, the investment arbitration regime does not acknowledge the relevance or legitimacy of public protests and does not take them into consideration during the resolution of investment disputes. Therefore, many women in the global South who are affected by the decisions of international investment tribunals are voiceless within the investment tribunal's decision-making process.

Scholars argue that international investment arbitration contributes to the power imbalance between foreign investors and citizens in the global South because international investment arbitration undermines core principles of public international law and democracy (Choudhury, 2008; Choudhury, 2009; Schneiderman, 2008; Sornarajah, 2008). International investment arbitration is rooted in private commercial arbitration between corporations and therefore is an unsuitable institution for the resolution of disputes that involve regulations in public interest, including for the protection of basic human rights. Van Harten (2007, p. 4) states that "the system's unique use of private arbitration in the regulatory sphere conflicts with cherished principles of judicial accountability and independence in democratic societies; in effect, it taints the integrity of the legal

system by contracting out the judicial function in public law.” The state's democratic functions and obligations to protect human rights conflict with the private commercial nature of investment arbitration. David Schneiderman (2008, p.4) argues that international investment agreements are constitution-like treaties that protect the interests of foreign investors from the democratic authority and laws of the state. “More than 2,000 international investment agreements exist, yet their purpose remains singularly limited to protecting foreign investors while ignoring many other critical aspects of the relationships surrounding FDI [foreign direct investment]” (Mann & von Moltke, 2005, p. 3).

Many scholars argue that the substantive provisions in investment agreements also contribute to an unwillingness or inability of states to implement human rights and environmental regulations (Mann, 2008; Mayeda, 2007; Seck, 2010; Sornarajah, 2008a; Suda, 2006; Waelde & Kolo, 2001). Foreign investors are able to bring a state to international arbitration for implementing regulations protecting the environment or human rights. For example, the foreign investors in the *Aguas Argentinas* Case (2010) had a concession agreement for the management of the water supply of Buenos Aires and the surrounding area.¹ The foreign investors brought Argentina to international arbitration for allegedly violating the fair and equitable treatment, expropriation and full protection and security provisions of Argentina's international investment agreements with France, Spain and the United Kingdom. The foreign investors argued that Argentina violated these investment provisions by de-pegging the peso from the US dollar, denying the company's request to raise the water

¹ This case is significant because international investment tribunals rarely comment directly on the human rights obligations of states although this is becoming more common because Argentina is increasingly raising human rights arguments in its defense.

tariff and forcing a renegotiation of the concession agreement (*Aguas Argentinas Case*, 2010, para 232-248). However, Argentina asserted that these measures were required to protect its citizens right to water in light of its economic crisis from 2001 to 2003 (para 252). Arguably, the outcome of the *Aguas Argentinas Case* influences the lives of women, particularly poor women, in Argentina.

Women, Water and the *Aguas Argentinas Case*

There is a deep connection between the right to water and the lives of women. Globally, the majority of water collection is done by women (UNDP, 2006, p. 23). General Comment 15 on the Right to Water, written by the Committee on Economic, Social and Cultural Rights, describes the right to water saying water must be available, be of healthy quality, be accessible without discrimination, be physically proximate, and be affordable (UNCESCR, 2002).² Unfortunately, these principles are often not achieved. According to the United Nations Development Programme (UNDP), it is estimated that women in the global South often spend up to four hours a day collecting water; they are also usually responsible for taking care of family members that get sick from water-borne diseases (UNDP, 2006, p. 23). These situations contribute to inequality between the sexes because women in poorer communities have less time for participating in wealth-generating activities, education and decision-making processes including water management (UNDP, 2006, p. 7). The

² General Comment 15 says that the right to water, while not expressly written in the ICESCR, is protected under Article 11 on the right to an adequate standard of living and Article 12 on the right to health. The Committee says that these rights in the Covenant cannot be fully attained without including water as a human right in the Covenant as well.

more powerful groups in society are better able to protect their water-related interests, especially transnational corporations.

Unfortunately, in the *Aguas Argentinas* Case, the tribunal rejected Argentina's claim that its actions were protecting the right to water stating, "Argentina and the *amicus curiae* submissions received by the Tribunal suggest that Argentina's human rights obligations to assure its population the right to water somehow trumps its obligations... and that the existence of the human right to water also implicitly gives Argentina the authority to take actions in disregard of its... obligations... Argentina's human rights obligations and its investment treaty obligations are not inconsistent, contradictory, or mutually exclusive... Argentina could have respected both types of obligations" (*Aguas Argentinas* case, 2010, para 262). The analysis of this tribunal is troubling from a human rights perspective because it essentially ruled that the fair and equitable treatment of foreign investors cannot be compromised for the purpose of protecting human rights even during an economic crisis. The tribunal also ruled that Argentina's defense of necessity for the purpose of protecting the right to water in light of its economic crisis is invalid because Argentina contributed to the creation of the economic crisis and because less invasive means of protecting the right to water were available to Argentina at the time. This ruling is in direct opposition to the decision of the tribunal in *LG & E v. Argentina* (2006) that upheld Argentina's defense of necessity for its acts during the same economic crisis discussed in the *Aguas Argentinas* Case.³

The tribunal came to the conclusion that, while Argentina did not violate the expropriation or full protection and security

³ The contradictory opinions of different investment tribunals are another cause for the perceived lack of legitimacy of international investment arbitration (Suda, 2006, p. 159; Choudhury, 2009, p. 988).

provision, it violated the fair and equitable treatment provision of the investment agreement (*Aguas Argentinas Case*, 2010, para 247). The tribunal interpreted the fair and equitable treatment provision as requiring the state to protect the legitimate expectations of the foreign investor. The tribunal for the *Aguas Argentinas Case* (2010, para. 237) stated that “the Claimants, as participants in any regulated industry, had the legitimate expectation that the Argentine authorities would exercise that regulatory authority and discretion within the rules of the detailed legal framework that Argentina had established for the Concession.” The finding of a violation of the fair and equitable treatment provision on the grounds that it violated the investor’s legitimate expectations is a rather expansive interpretation of this provision. The full protection and security provision, the fair and equitable treatment provision and the expropriation provision are derived from international law on the minimum standard of treatment of aliens (Sornarajah, 2010, p. 346). Sornarajah (2010) states that the content of the minimum standard of treatment of aliens in international law is not clearly defined and that it is unclear whether this standard even exists in customary international law regarding foreign investment. Nonetheless, investment arbitral tribunals are charged with the task of applying the minimum standard of treatment to the context of protection for foreign investment with the understanding that this standard evolves over time and depends on the context of a case.

Mayeda (2007, p. 288) disagrees with the tribunal’s decision and argues that the fair and equitable treatment provision should not be interpreted as a requirement to meet the investor’s expectations of predictability and stability. Mayeda states that international investment tribunals are not equipped to assess the appropriateness of the host state’s laws in this manner, especially in light of an economic crisis. These are highly subjective

standards and could cause states to refrain from protecting human rights or implementing regulations that could be deemed to have violated the 'legitimate expectations of foreign investors' by an investment tribunal. Instead, Mayeda (2007, p. 286) argues that the fair and equitable treatment provision should be interpreted as the protection against procedural unfairness. This entails an inquiry into whether the state acted in good faith, with due process, transparency, in accordance with its democratic norms and in light of the economic crisis that Argentina faced (Mayeda, 2007). This assessment is less subjective and does not evaluate the actual decisions of the state, rather, the way that the state made these decisions. Therefore, the state's right to regulate is respected. The fair and equitable treatment provision is the most relied upon provision and most successful basis for a claim against a host state in international investment arbitration (Malik, 2009, p. 12).

The *Aguas Argentinas* Case illustrates the major concern of many academics and international lawyers regarding a bias in international investment law against the host state. The decision of the tribunal in the above case reflects the overall purpose of international investment agreements to protect the investor's interests from host state actions (Schneiderman, 2008). Most international investment agreements contain numerous vaguely worded provisions that protect the foreign investor but very few or no provisions that assert the right of the host state to implement legitimate social or environmental regulations in the public interest including in the interest of protecting human rights (Mann, 2008). As mentioned above, General Comment 15 on the Right to Water describes the right to water, saying water must be available, be of healthy quality, be accessible without discrimination, be physically proximate, and be affordable (UN-CESCR, 2002). According to a report by Rights and Democracy, *Aguas Argentinas* violated the right to water by: unequally

expanding the water and sewage system by as much as 70% in richer neighbourhoods and as little as 10% in poorer ones, overflowing septic tanks and long line-ups for communal water taps in poor neighbourhoods, insufficient quantity of water, and not informing the public of high levels of nitrates affecting the health of the population (Argentina, 2007, p. 7, 11, 14, 17). Recognition by the investment tribunal of these alleged human rights violations by *Aguas Argentinas* in light of the economic crisis in Argentina may have created a different outcome in this case.

Summary

As illustrated by the *Aguas Argentinas* Case, states arguably become increasingly unable or unwilling to implement human rights and environmental regulations due to international investment agreements and international investment arbitration. The legal uncertainty surrounding the interpretation of investment agreement provisions by investment tribunals, combined with the exorbitant amount of compensation for foreign investors is a heavy burden for many countries, especially in the global South. Argentina's government alleges that the amount of compensation it is required to pay if it loses every investment case caused by its economic crisis from 2001 to 2003 would amount to 17 billion dollars which is more than its annual budget (Shan, 2008, p. 285).

Investment tribunals often do not consider the impacts of foreign direct investment relationship on the protection of human rights and gender equality in the global South. The provision of water and sewage treatment services by private entities is a prime example of this. As illustrated above, the decisions of investment tribunals inevitably affect the lives of women, particularly in the global South, because women are usually the most involved in the

activities that require water including household activities, agriculture and child-raising. Consideration of the human rights impacts of foreign investments by international investment tribunals would greatly improve the lives of women because they would be more able to raise their concerns and participate in decisions that affect their lives. Investment tribunals should also take into consideration circumstances including public protests, riots and economic crises that threaten basic human rights in their decisions. International investment arbitration requires more transparency and arbitrator expertise in public international law and human rights law so these tribunals appear as more legitimate forums for assessing human rights and gender issues.

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Trade Agreements and Gender Equality Rights: What Role for HRIA?

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Abstract

Human rights impacts assessments (HRIAs) could be an important tool to illuminate the challenges and potential for trade agreements to contribute to gender equality, if part of a genuine commitment to address human rights in economic and human development. There is a growing interest in HRIAs and new guiding principles in the United Nations human rights system are now available to support efforts on the part of States or civil society organizations. HRIAs can also become a check box exercise with limited value. More practice and experience with actual HRIA exercises are needed.

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Introduction

The potential contribution of human rights impacts assessments (HRIAs) to help ensure trade and investment agreements support gender equality rights must be understood in the context of the need for a sharp return to rights-based approaches to development. This paper explores current trends in development discourse, and then turns to the question of HRIAs. The paper reviews what HRIAs are and why there is a growing interest in this tool, including summarizing the recent conclusions of an international experts' seminar on this topic. The paper ends with a discussion of the application of HRIA for illuminating the requirements and achievement of gender equality objectives in trade policy work, including trade and investment agreements.

Women, Girls and the New Development Discourse

A major trend in current development discourse is a focus on investing in women and girls as “smart economics” or “good for growth” (World Bank, 2006; Plan, 2009). In 2006 the World Bank's gender unit coined the slogan: “Gender equality is smart economics.” Rosalind Eyben at the Institute of Development Studies has tracked this trend. Eyben (2008) notes it represents a kind of throw back to a 1980s focus on growth as the goal of development, and market dynamics as the driver.

In April 2008, World Bank president Robert Zoellick said: “Young girls should have the exact same opportunities that boys do to lead full and productive lives... studies show that investments in women yield large social and economic returns.” An accompanying promotional video presents a graph

showing the positive econometric correlation between increasing a mother's income and increasing her child's height.

The Bank is not alone in this discourse. Other major donors and development non-governmental organizations (NGOs) also emphasize this approach, which directs investments and energy into building women's capacity for undertaking economic activity as an end in itself, or as a means to achieve ends for others, such as reaching development targets for children. It's an approach which, perhaps overly crudely characterized here, instrumentalizes women's economic power/potential, and side steps the issue of enabling women to transform their lives for themselves as well as others. In particular, it seems to sidestep the need to address the terms of women's participation in the economy or the interventions that would allow women and men to help transform the economic structures and relationships that perpetuate their poverty and the poverty of their families, communities and countries.

This is not to say that women do not play an enormous role in economic development or that their productive potential should not be understood and recognized. But the global economy is problematic for women mainly because women are not participating in it enough and because of how power and profit is controlled and distributed in it.

We need to put human rights as a framework for *transformation* back at the centre of strategies for gender equality. This means investing in women and girls not for their contribution to economic output, or to ensure they merely have employment in the global economy, but to support their ability as citizens and actors in social movements to, among other things:

- organize and challenge the conditions, remuneration rates and precariousness of work in global supply chains;
- press for State regulation of corporate actors whose practices of repatriating or hiding profits bleed public budgets of needed resources for health and education;
- argue for new trade and investment regimes that do not leave their economies exposed to price volatility and unable to withstand the shocks that undermine their livelihoods, and force them into migrant labour.

This is the terrain of challenge that human rights approaches should bring to policy discussions on trade and investment. It is in this context that it is important to talk about the modest tool of human rights impact assessments (HRIAs). Not because HRIAs are a means to get around or neutralize powerful interests that are the determining factors in trade deals. They are not a means for this. But HRIAs can be a tool to democratize debate and open discussion about how human rights and gender equality goals are addressed, or not, in different policy options.

Human Rights Impact Assessments for Trade and Investment Agreements

There have been increasing calls from the United Nations (UN) system and from civil society organizations for States to prepare HRIAs for trade and investment agreements. What are such assessments? A human rights impact assessment of a trade agreement seeks to assess the impact of a trade/investment agreement on the enjoyment of the human rights of people in the States concerned, based on an explicit evaluation of how the trade law obligations of the agreement affect the capacity of people to

enjoy their rights, and how these affect the legal and moral human rights obligations of duty-bearers. The latter are mainly States, but the private sector and international organizations also have obligations with respect to human rights.

There are at least three key purposes or objectives in undertaking such an assessment:

1. *To help avoid human rights violations from happening in first place through poorly thought out commitments in the agreement.*

This as an obvious good in itself, but it bears repeating since the power differential between the human rights and trade regimes is greatly weighted against human rights. Once conflict is apparent, human rights obligations always risk being set aside because of the stronger enforcement mechanisms in trade and investment regimes. This underscores the need to identify and head off potential conflicts upstream.

2. *To maximize the contribution of trade and investment to the fulfillment of human rights.*

It is important to underscore that a HRIA exercise does not assume there is only conflict between trade and rights. HRIAs are a tool to ensure that trade and investment can stimulate the kind of economic development that enables the fulfillment of human rights – to livelihood, to food etc.

3. *To democratize and shift the terms of the debate on trade.*

A human rights approach brings a different emphasis and set of concerns or questions to those that traditionally dominate trade negotiations. For example, a human rights approach shifts

the policy maker's perspective from aggregate values –the benefits of trade for the country as a whole – to distributional issues, and the impacts of trade on the most vulnerable and insecure.

a) **The value added of a human rights impact assessment**

The specificity and value added of human rights impact assessments, as distinct from social impact assessments or sustainability impact assessments, is that they must be based explicitly on the human rights obligations of the States in question. All states have obligations to respect (not violate), protect (against the actions of other actors) and fulfill (create an enabling environment for) human rights including, political civil, economic, social and cultural rights. These obligations relate to States' own populations and also include obligations relating to populations beyond their borders –including the obligation to avoid causing harm to human rights enjoyment through actions, omissions, or international agreements.

Importantly, human rights standards are not neutral. They have normative content, which would drive the approach taken in a HRIA. For example, key human rights principles such as *non-discrimination, non-retrogression, transparency, and participation* would inform the assessment of impacts.

Consider the core issue of trade-offs in economic policy. Trade and investment agreements typically will benefit certain groups and make others more vulnerable. Difficult choices have to be made about the priorities of States. Human rights impact assessments seek to clarify the nature of such choices and inform the democratic process.

For example as laid out in recent draft UN *Guidelines on Human Rights Impact Assessments of Trade and Investment Agreements*, “the principle of equality and non-discrimination rules out any trade-offs which would result in or exacerbate unequal and discriminatory outcomes, e.g., giving priority to providing health and education services to the more affluent parts of society, rather than to the most disadvantaged and marginalized groups, particularly women.” Also, “...any trade-off that results in a retrogressive level in the protection of a human right would be treated as highly suspect” (Guiding Principles, 2011, p.8).

Thus HRIAs may limit the extent to which trade-offs can be acceptable by setting a minimum social protection floor that trade policies must respect (Walker, 2009). The HRIA approach refuses to accept “losers” as inevitable. It may force the issue of compensatory measures, or identify ‘no go’ or ‘not yet’ zones until enabling conditions for empowerment are in place.

b) A growing interest in human rights impact assessments

There is a growing interest in HRIAs for trade and investment agreements. This includes not just calls by UN Specialized bodies and civil society organizations, but governments, including in developing countries. Countries as diverse as Thailand, Brazil, Vanuatu, Argentina and Bolivia are using human rights obligations as a defensive strategy to minimize commitments in the implementation or negotiation of investment and trade agreements, particularly those marked by asymmetrical power relations. Whether to resist application of certain intellectual property measures (in the case of Thailand-US FTA), reject compensation payments to foreign investors (in the case of Argentina), Southern governments have been structuring their

arguments against the implementation of certain trade and investment measures and obligations with reference to the higher legal and moral obligation of their human rights commitments. Consequently HRIAs are increasingly seen as a possible process to crystallize and validate the growing concerns about the human costs of trade agreements.

New thinking and standards for HRIAs for trade and investment agreements

In response to this growing interest, in June 2010, a special expert seminar on HRIAs and trade and investment agreements was held in Geneva with about 40 participants from North and South. The seminar was convened under the auspices of the Special Rapporteur on the Right to Food, Olivier De Schutter, and organized by the Berne Declaration, the Canadian Council for International Co-operation, Misereor, the South Centre, 3D, FIAN, the Heinrich Boll Foundation and others.

The seminar explored the potential and role of HRIA for trade and investment agreements as well as the risks of the process, drawing on lessons from past experiences and other assessment approaches. The seminar reviewed and developed further ideas for methodologies for such HRIAs related to the challenges of assessing the impacts on specific human rights and the challenges of assessing impacts of various aspects of trade and investment agreements, including the negotiation process.

Some of the key messages of the seminar include:

- **HRIAs are an essential step of due diligence for States in discharging human rights obligations.** For example, the International Covenant on Civil and Political Rights requires

States to enable every citizen to take part in the conduct of public affairs. No trade or investment agreement should thus be concluded in the absence of a public debate, which human rights impact assessments serve to inform. Also, States are prohibited from concluding any agreements that would impose on them conflicting obligations. Therefore, there is a duty to identify potential conflict, and to refrain from entering into such agreements where conflicts are found to exist. HRIAs can be an important tool to address this obligation. The Maastricht guidelines on extra territorial rights, footnoted earlier, also clearly spell out an obligation on States to undertake HRIAs for trade and investment agreements in its Principle 14.

- **States need directions and guidelines on how to undertake such assessments.** The UN Special Rapporteur on the Right to Food has recently tabled draft Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements (2010) in UN special bodies. In doing so, the Rapporteur highlighted that once information on the methodologies for such assessments is known, there can be a clearer focus on the need for creating the political will to undertake them.
- **HRIAs should address the process and provisions of trade agreements.** How does the process of trade negotiations respect human rights principles? In other words, how transparent, consultative and participatory is the process? How do the substantive provisions and commitments contemplated affect the enjoyment of rights (positive and negative impacts)?
- **A practice of both *ex ante* and *ex post* HRIAs is needed.** Given the obligations for States to maximize the fulfillment of rights and avoid conflicts, HRIAs must be conducted PRIOR to termination of negotiations (*ex ante*). However, because not all the impacts of an agreement can be anticipated, *ex post* HRIAs have undertaken following implementation, when impacts can be more empirically measured. Ultimately, HRIAs should be

conceived of as an iterative, cyclical process, taking place on a regular basis to inform policy decisions.

Further information on the methodologies and challenges of undertaken HRIAs for trade and investment agreements is available in the Seminar's report. But by way of quick overview, the Seminar spoke to key standards / international benchmarks for what constitutes a credible HRIA process. These include:

- i. Independence: the HRIA must be prepared by a body or group of experts that is independent from the Executive who is negotiating the trade or investment agreement.
- ii. A fair and transparent process: the HRIA should be based on sources of information that are made public; work on the basis of a clear methodology defined in advance. And it should be open to receiving submissions, in order to ensure that its information basis will be as broad as possible. The final HRIA report should also be made public.
- iii. Relevant expertise: The HRIA team must contain or commission inter disciplinary and relevant expertise for the countries in question, including in human rights, economics and trade law, linked to the particular areas of concern, as well as social science expertise particularly in participatory methodologies.
- iv. Adequate financing: The HRIA must have adequate financing that includes allowing for meaningful participation of civil society organizations and of the most affected rights-holders.
- v. A channel to feed recommendations into official processes: The HRIA must have recommendations,

which must feed into the decision-making process that leads to the conclusion and approval of the treaty concerned.

HRIAs as a tool for gender equality goals: potential and pitfalls.

The actual undertaking of HRIAs for trade and investment agreements is still quite limited in practice. If they were to be taken up in a more consistent manner, how might such HRIAs help ensure trade and investment agreements support gender equality rights?

Human rights impact assessments could be used by States or civil society organizations (CSOs) for a range of human rights objectives including:

- to expose empirically whether growth generated by trade and investment flows is changing women's equality and substantive enjoyment of human rights in practice; which women, and how deep the gains or losses are;
- to consider the impact of specific trade provisions such as liberalization measures, or intellectual property rights;
- to consider whether the safeguards and side accords that are often nominally built into bilateral agreements have been effective or adequate;
- as a mobilization tool for women's organizations and CSOs, to participate in trade policy debates.

There are also significant challenges and pitfalls with HRIAs as a tool for gender equality that must be considered.

- The potential illumination role of HRIAs' empirical work relies on gender-disaggregated data, which is limited. In particular, there is a chronic lack of data in economic spheres where women's work is concentrated, including in the informal sector and the care economy.
- More in-depth HRIA work will also require some consensus on the human rights indicators for measuring gender equality, though some good work on indicators has been started by the Office of the High Commission for Human Rights (OHCHR, n.d.).
- There is a risk that the work of HRIAs will be captured by experts alone. This would be a mistake. Strategies for expanding the use of HRIAs must intentionally link such processes to support the active role of women's groups and social movements. As a part of this, HRIA processes must display a commitment to human rights principles through participatory methodologies.
- There is a danger of HRIAs falling victim to a check box mentality, which, rather than opening the discussion on the human rights obligations of States in trade agreements, could close the space for such discussion once a HRIA has been perfunctorily undertaken. Such assessments can also be an instrument for the rationalization of existing agreements rather than a means to substantively change them. Some experiences with environmental impact assessment (EIA) have led to this outcome (including the Canadian government's EIA process for trade agreements).

In Canada, there is a new precedent setting provision for a human rights assessment as part of the Canada-Colombia Free Trade Agreement, which came into effect in August of 2011. The new treaty requirement is for an annual report on the human rights effects of the trade agreement in both Canada and Colombia, to be prepared by both governments and tabled in their

respective parliaments. The first report is due in May of 2012. Will the report be a tool for a more open debate on the human rights impacts of the trade agreement, including the gendered dimensions of gains and losses? Or will it be a report and process that pays lip service to the goals of human rights impact assessments? As an annual event, the report could also be a dynamic tool, which improves in its capacity to support human rights goals over time. The first report will be an important indication of whether the process warrants greater or less investment by human rights defenders in Canada or Colombia.

Ultimately HRIAs, whether undertaken by civil society organizations or governments, will be a tool for greater human rights accountability, when driven by actors who are motivated to improve human rights outcomes, including boosting the capacity of citizens to claim rights and the capacity of States to fulfill their obligations.

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