

# **Making the international trade regime work for gender equality**

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## **1. Introduction**

The question which this paper attempts to address is ‘whether the international trade regime<sup>1</sup> can be utilized to advance the objective of gender equality and if so, how?’ The discussion on gender and trade regulation would raise a number of questions. First, should there be a linkage between gender concerns and international trade regulation? What do the facts on the ground indicate? How do the underlying policy considerations in the two fields relate to one another? In order to analyze these questions the framework of linkage within the trade regime is to be employed.

## **2. Linkage and the international trade regime**

### 2.1 Practice of linkage in international trade regulation

A number of issues have been raised in connection with international trade regulation over the years. Among these, environment, labour and human rights issues top the list.<sup>2</sup> A practice through which these issues have been linked to the regulation of international trade has been developed. For instance, the EU has included human rights, environmental and gender considerations in its trade agreements with ACP states. Similarly, in the generalized system of preferences the US has linked human rights and labour concerns as part of its trading arrangements.

Linkages have also occurred in the multilateral trade regime of the WTO. A typical example is the introduction of the significant flexibilities in the TRIPS agreement. It was

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<sup>1</sup> By the international trade regime the main reference here is to the legal and institutional framework of the World Trade Organization (WTO).

<sup>2</sup> John H Jackson Reflections on the Possible Research Agenda for Exploring the Relationship between Human Rights Norms and International Trade Rules in Frederick M Abbott et al. (eds.) International Trade and Human Rights: Foundations and Conceptual Issues, 2005, 20-21.

considerations of the public health crisis associated with the HIV/AIDS pandemic that brought the health agenda to the WTO.<sup>3</sup>

Linkages in trade regulation come in different forms. An issue may be linked to trade regulation because it is substantively related to it. It may also occur to further other policies through the instrumentality of trade regulation. In this case, trade may be used as an incentive or alternatively as a sanction to bring about the desired change in other policies.

## 2.2 Conceptualizing linkage in the trade regime

In whatever form it may come, linkage ultimately becomes a question as to the proper boundaries of the trade regime.<sup>4</sup> Questions about the boundary of the trade regime came around the 1990s where the impacts of trade regulation on areas like environment and labour started to be articulated. With the expansion of subjects of trade regulation into trade in services and intellectual property rights under the Uruguay round, the boundary of the WTO became a major subject of analysis.

Arguments regarding the boundary typically took a certain form reflected in terms of a contest between different values namely trade and non-trade values.<sup>5</sup> The ‘trade and’ and/or linkage debate became the characterising vocabulary for the discussions surrounding the boundaries of the international trade regime.<sup>6</sup> However, international trade law scholars argue that understanding linkage as a contest of trade versus other policy issues is problematic.<sup>7</sup> This is because; the focus on the contest between the different values will move one value forward only at the expense of the other.<sup>8</sup> This

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<sup>3</sup> Jackson (note 2 above) 21.

<sup>4</sup> For a detailed analysis of the origins as well as history of the linkage debates see Andrew T.F. Lang Reflecting on ‘Linkage’: Cognitive and Institutional Change in The International Trading System 70 *Modern Law Review* 2007, 523-549. See also Deborah Cass *The Constitutionalization of the World Trade Organization: Legitimacy, Democracy and Community in International Trading System* 2005.

<sup>5</sup> Lang (note 4 above). See also Jackson (note 2 above).

<sup>6</sup> Lang (note 4 above) 525-532.

<sup>7</sup> See for instance Jackson (note 2 above). See also Lang (note 4 above).

<sup>8</sup> Jackson (note 2 above) 21.

inevitably brings us back to the starting point for determining which value should trump the other. Instead, Jackson argues, the focus should be on how to maximize the goals in the contested fields.<sup>9</sup> Similarly, Lang suggests that the focus should be on what the desired goals and purposes of the trade regime ought to be.<sup>10</sup> According to Jackson, this will require some kind of balancing which for instance in the case of the WTO has led to the recognition that the WTO can focus on values such as environmental protection.<sup>11</sup>

In this paper too, the linkage of gender concerns and the trade regime is viewed in the same light. Is gender equality a value which falls under the (*maximized*) goals and purposes of the trade regime? What kind of intricate balancing is required for gender concerns to be considered within the trade regime? And to what end? Before turning to this central question, let's see the different literature on gender and trade so as to examine the some of the observations on the interaction between the two fields.

### **3. Interactions between gender equality concerns and trade regulation: legal perspective**

In an attempt to establish the relationship between gender and trade, the legal analysis in this section looks into the interactions between the governing legal instruments in both fields. Accordingly, the points of inquiry in analyzing the interactions between gender and trade take the following form.

#### A) Direct conflict between trade rules and human rights of women<sup>12</sup>:

Do trade commitments conflict with a country's domestic and international commitments that are relevant to women? Do trade commitments in any way contribute to promoting

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<sup>9</sup> Jackson (note 2 above) 21-22.

<sup>10</sup> Lang (note 4 above) 525-540.

<sup>11</sup> See the *Shrimp-Turtle* case.

<sup>12</sup> These two frameworks of analysis have been widely employed for carrying out gender based trade impact review from a legal perspective. See Sarah Gammage et al. Trade Impact Review Women's Edge Coalition 2002 at

[http://www.womensedge.org/components/com\\_kb/attachments/tradeimpactreviewfinal.pdf](http://www.womensedge.org/components/com_kb/attachments/tradeimpactreviewfinal.pdf) 05/03/06.

the human rights of women embodied in international commitments as well as domestic laws of states?

B) Trade norms undermining the effectiveness of norms on women: Trade and state capacity:

There are different ways whereby one set of norms undermine the effectiveness of another. In the context of trade, what is often invoked in empirical research is the impact of trade rules on state capacity to implement its obligations in economic and social life of its people. Capacity is looked at both from the perspective of economic capacity of a state and its policy space. So, the questions in relation to gender and trade are - do trade agreements diminish the capacity of a state to protect, promote and fulfil the human rights of women? For instance affecting financial or economic capacity of the state? Do trade agreements capacitate the state either by creating policy space or by financially enabling the state to adopt and implement policies aimed at advancing the human rights of women?

Two trade agreements; the Agreement on Agriculture (AOA) and the General Agreement on Trade in Services (GATS) were selected for the purpose of analyzing the relationship between the governing legal instruments of the two fields. The findings of the analysis indicate the following.

### 3.1 AOA

In relation to the AOA, the interactions between the two legal norms show the potential of the AOA to undermine a state's capacity and therefore a state's commitments to progressively fulfil the conditions necessary for the realization of the right to food. This mainly emanates from the inadequate attention given to some of the important non-trade objectives like food security in the implementation and enforcement mechanisms of the agreement. The indeterminate status of the non-trade objectives in the AOA implies that states may not successfully invoke them to implement policies that may clash with their

existing obligations under the AOA. In effect state policy making space is adversely affected. States' financial capacity may also be affected in situations where states cannot implement policies designed to raise revenue for ensuring food security. It may thus be argued that the AOA may undermine the right to food contained in the various human rights instruments. The logical conclusion with respect to the human rights of women, in this particular case, the right to food and food security is this agreement poses as an obstacle to promoting the human rights women.

### 3.2 GATS

Important human rights considerations raised in relation to GATS include access to essential services such as health care services, energy and education. These relate to a whole range of socio-economic rights of women.

It is argued that GATS does not clearly carve out those services which are immune from the scrutiny of the agreement thereby affecting the access to essential services for the poor of which women constitute the majority. The opposing argument is that the mere fact that essential services are not carved out as supplied in the exercise of governmental authority may not be problematic per se.<sup>13</sup> The argument further goes on to assert that the consequences that flow from opening such services to commercial competition can be managed through appropriate government regulation. This holds true in principle. It even goes in line with government obligations to ensure equitable access to essential services to its people. The problem arises when one examines the consequent obligations that arise when the service in question is not carved out as one that is supplied in the exercise of governmental authority. This relates to the second issue raised in relation to the interactions of GATS and human rights of women.

The second claim against GATS is that it restricts the available policy instruments that can potentially be employed by states to promote social justice and thereby contribute to

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<sup>13</sup> Dorothy I. Riddle A Gender Based Analysis of International Trade in Services: The Experiences of Developing Countries in Anh-Nga Tran-Nguyen and Americo Beviglia Zampetti *Trade and Gender: Opportunities and Challenges for Developing Countries* UNCTAD 2004, 175.

gender equality. Related to this is the nature of GATS obligations and negotiating structure. The negotiating structure or mechanism coupled with the structure of the agreement itself is inherently in tension with the progressive realization of socio-economic rights which dominate the services sector. There are specific obligations that come into effect when a member country makes a specific commitment with regard to a particular service sector in its schedule. These include the important obligations of market access and national treatment.<sup>14</sup> These specific commitments or obligations contained in members schedules are significant in that they determine the implications, both positive and adverse, flowing from GATS.

When a member makes specific commitments on market access or national treatment for specific service sector, it is entitled to subject the commitments to certain conditions and qualifications which are sometimes referred to as limitations. It can do so by specifying these conditions and qualifications in its schedule of commitments. Therefore, the obligations of a member on market access and national treatment with regard to a particular service sector very much depend on the contents of the specific commitments found in its schedule. A state can also introduce limitations at a later stage. However there are certain conditions that the state should fulfil. The most controversial of such conditions is the introduction of new conditions in terms of laws or regulations should be accompanied by compensation for trading partners which may be affected by these introductions.<sup>15</sup> This stems from the unique approach or methodology employed in GATS which “locks in” sector specific commitments with a built in penalty for any “roll back” on commitments.<sup>16</sup>

From this one can conclude that there appears to be an inherent tension between the general principle of progressive realization of socio-economic rights on the one hand and

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<sup>14</sup> Articles 16 and 17 of GATS.

<sup>15</sup> Article 21(2,b) of GATS. See also Americo Beviglia Zampetti *The Impact of WTO Rules on the Pursuit of Gender Equality in Anh-Nga Tran-Nguyen and Americo Beviglia Zampetti Trade and Gender: Opportunities and Challenges for Developing Countries* UNCTAD 313.

<sup>16</sup> Article 21 of GATS as elaborated in Zampetti (note 15 above). See also Gammage (note 12 above).

the approach of locking in commitments with an in built penalty for modification.<sup>17</sup> The problem is further compounded by the built in agenda of progressive liberalization.<sup>18</sup>

The International Covenant on Economic, Social and Cultural Rights obliges states to take steps with a view to achieving progressively the full realization of the rights recognized therein. The requirement of progressive realization affords states the possibility of realizing these rights over time. This requirement must however be understood and read in the light of the overall objective of the covenant – to establish clear obligations for state parties in respect of the full realization of the rights.<sup>19</sup>

The obligations towards fulfilling these rights take the form of respect, protection and fulfilment.<sup>20</sup> Overall, through progressive realization the aim is to ensure incremental realization of socio-economic rights to citizens of a state. This may be achieved through for instance the right to protect; measures such freedom of action, protection from more powerful economic interests.<sup>21</sup> State legislation giving preference to women owned services suppliers may possibly qualify as an example of protection from powerful economic interests. It can also be achieved through the obligation to fulfil. This is particularly important for the vulnerable and poor sections of society where no other possibility exists for the realization of socio-economic rights. The obligation to fulfil may be carried out either by way of facilitation or by of direct provision. Direct provision for example could consist in making available what is required to satisfy basic needs.<sup>22</sup> Such progressive actions may be associated with improvements in available resources of the state. A government with improved financial capacity for instance may replace the private supply of for example essential services like energy or water services with public provision. However, this sort of measure may constitute a quantitative restriction on market access. In conclusion, while progressive realization aims to ensure incremental realization of socio-economic rights to citizens of a state, progressive liberalization in

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<sup>17</sup> See Zampetie (note 15 above) and Gammage (note 12 above).

<sup>18</sup> See Zamepetie (note 15 above) and Gammage (note 12 above).

<sup>19</sup> Asbjorn Eide, Catarina Krause and Allan Rosas (eds.) *Economic, Social and Cultural Rights: A Text Book* 1995, 20-25.

<sup>20</sup> Eide et al. (note 19 above) 23.

<sup>21</sup> Eide et al. (note 19 above) 24.

<sup>22</sup> Eide et al. (note 19 above) 24.

GATS and its approach aim to incrementally lock in limitations to market access and national treatment.

This approach of locking in commitments imposes significant burden on governments to make sure that they list every conceivable limitations from the outset. However, some limitations may prove necessary after sometime. Similarly, limitations or conditions may be dictated by new developments including economic developments in the state in question. This approach of GATT may thus possibly discourage states from taking new measures lest such measures may be followed by demands for some form of compensation.<sup>23</sup> Most importantly, this approach has the potential to limit the policy space available to states to implement various policy objectives including gender equality. Consequently, it undermines the human rights of women in particular the socio-economic rights of women.

In conclusion, it can be said that the legal analysis briefly carried out shows that trade agreements may have the potential to undermine state capacity to advance the human rights of women thereby undermining the effectiveness of the human rights framework. This is particularly evident in relation to the agreement on agriculture as well as the agreement on trade in services. Having established as to how the legal norms governing the two fields interact, the next step is to examine how the underlying principles in the two fields relate to one another.

#### **4. Underlying principles of international trade law and gender equality: theoretical perspective**

Feminist theorizing provides the bases for analyzing the underlying principles of gender equality. Accordingly, this section focuses on examining international trade law from feminist perspectives. The relationship between feminist theories and international

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<sup>23</sup> Gammage (note 12 above) 61.

economic law<sup>24</sup> is a relatively an unexplored area.<sup>25</sup> According to Childs, one reason for this is the fact that “both subjects are relatively youthful bodies of legal knowledge and debate.”<sup>26</sup> Another explanation is that trade impact review has not focused so much on the social impacts of trade. Thirdly, the rather late engagement of the feminist legal critique of international law in general provides additional explanation.<sup>27</sup> This however does not detract from the need for feminist examination which is both important and timely.

Any discussion on feminist perspectives in international trade law deals with quite a number of lines of thought on the relationship between these two fields. This is inevitably so due to the variety in feminist theories themselves. There are certain categories of analysis that are employed to explain the various forms of power imbalance that shape gender relations in societies. The most common analytical frameworks include, gender/sex, race, class, and geographical location. The question is what sort of analytical framework/s can adequately address the relationship or interactions between the everyday life of women on the ground and the macro level international trade regime?

The empirical studies on the effect of trade on gender relations so far may shade some light on the categories of analysis that can possibly be employed to carry out a feminist analysis of international trade law. Often times, these studies indicate that it is poor women located mostly in developing and less developed countries that shoulder the brunt of the dislodging effects of trade liberalization.<sup>28</sup> In the developed economies where liberalization has resulted in adverse impacts, it is in the majority of cases poor women concentrated in low paying jobs that are dislocated from their livelihood. And often these are women of colour and immigrants.<sup>29</sup> From the empirical evidence, it may possible to

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<sup>24</sup> The few writings on this topic are a feminist critique of international economic law. International trade law as used in this study refers mainly to the laws of the WTO which constitutes a major part of international economic law.

<sup>25</sup> Mary Childs Feminist Perspectives on International Economic Law in Asif H Qureshi (ed.) Perspectives in International Economic Law 2002, 163.

<sup>26</sup> Childs (note 25 above) 162.

<sup>27</sup> Childs (note 25 above) 162.

<sup>28</sup> Chandra Talpade Mohanty “Under Western Eyes” Revisited: Feminist Solidarity through Anticapitalist Struggles 28 *Signs: Journal of Women in Culture and Society* 2003, 510-22.

<sup>29</sup> Mohanty (note 28 above) 510-22.

discern gender/sex, class, race and geographical location as some of the analytical frameworks that may be used to do a feminist analysis of the trade regime. Let's briefly examine these frameworks in light of the rules, principles and the institutional framework of the WTO.

#### 4.1 Absence of gender concerns in the WTO

Gender as a category of analysis which is used in liberal as well radical feminist theories can be useful to engage in a feminist analysis of international trade law. Two issues that arise while using gender as a framework are the absence of gender concerns in the legal framework of the WTO agreements and the absence of women in the public sphere in particular in the institutional structure of the WTO.

##### 4.1.1 Absence of gender in WTO legal framework

One theme, which perhaps may be characterized as a common thread in many feminist theories, is a critique of the normative presumption of the neutrality and objectivity of the law.<sup>30</sup> Neutrality and objectivity are also established claims even more in international trade law. The presumed neutrality and objectivity of international trade law and the consequences that follow from such an assumption are reflected at least at two different levels. These are at the level of rule making and at the level of rule enforcement.

Trade policy making takes into account the overall flows at the macro level emphasising on the overall and the long term. This macro level economic analysis views the household and the domestic outside of the market.<sup>31</sup> Feminist methodology on the other hand starts its analysis with women's livelihoods and experiences. In relation to the outcomes of trade processes, this essentially implies an emphasis on the micro level.<sup>32</sup> If

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<sup>30</sup> Hillary Charlesworth *The Hidden Gender of International Law* 16 *Temple Int. & Comp. L.J.* 2002 93-102, 96.

<sup>31</sup> Catherin Hoskyns *Linking Gender and International Trade Policy: Is Interaction Possible?* Centre for the Study of Globalization and Regionalization 2007,7-8 at <http://www2.warwick.ac.uk/fac/soc/csgr/research/abstracts/217> 09/11/07.

<sup>32</sup> Hoskyns (note 31 above) 7-8.

as feminist economists have convincingly showed trade indeed has differential impacts on women and men and therefore is not gender-neutral,<sup>33</sup> a gender-blind rule making which focuses on the macro level is potentially problematic for the interests of women. This is because international trade law may not take into account the lived experiences of women vis-à-vis their relation with international trade. As a result, the law is often designed without regard to the socio-structural disadvantages that bar some women from making use of the opportunities it creates as well as equal participation in trade. The potential effect of this is that not only the law operates to the detriment of efforts that aim at affording equal socio-economic opportunities for women but it may also further perpetuate inequality.

Similar to rule making, at the level of rule enforcement, neutrality is attributed to the WTO Dispute Settlement Body (DSB). The DSB is said to be a rules-based system.<sup>34</sup> It replaced the power-oriented dispute settlement structure under the GATT.<sup>35</sup> It is claimed that a rules-based system entails neutrality in the interpretation, scope and application of the norms of international trade law.<sup>36</sup> This conclusion logically draws from the objectivity of the law and legal methods. According to feminist critique of law however, the law is itself value-laden. Hence, the decisions and findings of the rules based DSB will inevitably involve choices which may be value-laden.<sup>37</sup> From the perspective of the WTO framework addressing the interests of women, this means no consideration of women's experiences and the differential impact of trade on women and men. This eventually may have the potential to perpetuate inequality and frustrate the measures that can be taken to address the socio-economic problems that women suffer.

#### 4.1.2 Absence of women in WTO structures

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<sup>33</sup> For an extensive discussion of the various considerations and issues in gender policy making see Isable Coche et al. *Gender Issues in Trade Policy Making* 2006 at [http://www.sice.oas.org/Genderandtrade/GenderIssuesinTP\\_e.asp#II](http://www.sice.oas.org/Genderandtrade/GenderIssuesinTP_e.asp#II) 25/07/07.

<sup>34</sup> See Cass (note 4 above).

<sup>35</sup> See Cass (note 4 above).

<sup>36</sup> Fiona Beveridge *Further Feminist Readings on International Economic Law* in Asif H. Qureshi (ed.) *Perspectives in International Economic Law* 2002, 179.

<sup>37</sup> Beveridge (note 36 above) 179.

Similar to the absence of gender in the legal framework, there is gender imbalance in the institutional structures of the WTO.<sup>38</sup> Although gender imbalance is rather a common feature in most international institutions, the extent of the imbalance is more so when it comes to the WTO.<sup>39</sup> At the beginning, all seven members of the Appellate Body were men.<sup>40</sup> Except for the introduction of one female member of the DSB, this figure has remained unchanged.<sup>41</sup> Similarly, women are appointed only infrequently as members of WTO panels.<sup>42</sup>

It has been pointed out repeatedly that the mere presence of women does not guarantee bringing gender perspectives to the work of any international institution including the WTO.<sup>43</sup> Despite this, the absence of women on its own also has some undesirable consequences. For instance, male dominance in the structures of the WTO may make it far less likely that the WTO will be presented with women's diverse experiences.<sup>44</sup> It is also in this context that Childs makes a case for more representation of women arguing additionally that international bodies have a professional development and training role for their employees and therefore it is critical that these bodies strive to ensure equitable access to such opportunities.<sup>45</sup>

#### 4.2 Feminization of labour and trade liberalization

Class is another analytical category in feminist theorizing. But defining economic class as an analytical category as it relates to women is a difficult task. The commonalities in women's gendered work in productive as well as the reproductive sphere lead to the

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<sup>38</sup> Childs (note 25 above) 167.

<sup>39</sup> Childs (note 25 above) 167.

<sup>40</sup> Childs (note 25 above) 168.

<sup>41</sup> See [http://www.wto.org/english/tratop\\_e/dispu\\_e/ab\\_members\\_descrp\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm) describing the current members of the DSB of the WTO and how they are appointed. 09/11/07.

<sup>42</sup> Jan Linehan Women and Public International Litigation Background Paper prepared for the Project on International Courts and Tribunals 2002 at [http://www.pict-pcti.org/publications/PICT\\_articles/Women1.pdf](http://www.pict-pcti.org/publications/PICT_articles/Women1.pdf) 09/11/07.

<sup>43</sup> Childs (note 25 above) 168.

<sup>44</sup> WEDO Premier: Women and Trade A Gender Agenda for the World Trade Organization 1999 at [http://www.wedo.org/files/genderagendaWTO\\_primer.htm](http://www.wedo.org/files/genderagendaWTO_primer.htm) 09/11/07.

<sup>45</sup> Childs (note 25 above) 168.

conceptualization of women's economic class.<sup>46</sup> These commonalities are reflected among other things in terms of segregation of women's work, low pay and the unpaid labour in the reproductive sector. The main claim is that women's crucial roles in production and reproduction are regarded as key to undermining women's social status and power. From the perspective of international trade, this analytical category becomes important in the face of the increasing feminization of the work force around the world.

The competition brought about by increasing integration of economies has led to the growth of export-oriented production such as textile, electronics, horticulture etc in parts of the world which formerly relied on agriculture and import substitution industries.<sup>47</sup> The combination of these factors has brought about changes in the labour force. One important face of this change is the feminisation of labour. The search for cheap and flexible labour in the era of trade liberalization has led to the feminization of the work force.<sup>48</sup> Thus, one interesting consequence of trade liberalization is the increase in the percentage of women entering in to the work force. In addition to many women entering the workforce, feminists argue that restructuring is also bringing about changes in women's work.

This is seen in terms of the kind of work women do, the hours put in, the conditions of work and pay. Women are getting more and more into the productive economy where they get paid jobs. The hours required of women are increasing. Part time work and informalization of work is becoming a growing trend. There is an increase in female workers in the sexual, domestic as well as the service industries.<sup>49</sup> Thus, trade liberalization is creating a new working class constituting women.

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<sup>46</sup> \_\_\_\_ Race, Gender and Class: The Identity Politics of Post-modernity or the Socialist Project? At <http://leo.oise.utoronto.ca/~rroth/Raceclassgender.htm> 12/01/08.

<sup>47</sup> Naila Kabeer Marriage, Motherhood and Masculinity in the Global Economy: Reconfigurations of Personal and Economic Life Institute of Development working paper 2007, 11 at <http://www.ids.ac.uk/ids/bookshop/wp/wp290.pdf> 12/01/08.

<sup>48</sup> Laura McDonald Trade with a Female Face in Annie Taylor and Caroline Thomas (eds.) Global Trade and Global Issues 1999, 56.

<sup>49</sup> Mohanty (note 28 above) 526.

Just as the productive sector of the economy has seen changes in women's work, similar changes are starting to appear in the reproductive sectors as well. Trade liberalization and economic restructuring are blamed for the re-privatization of women's labour through policies which advocate for less state in the provisioning of services and redistribution of resources in the economy. The staunch support for minimal state shifts the responsibilities for social welfare from the hands of the state to the household and the women therein.<sup>50</sup> This has added the burden on women as household managers and nurturers.<sup>51</sup>

Feminists argue that the rise in the number of women entering the workforce is not mere coincidence. The argument goes, it is in fact the particular nature or type of labour that the current global economic system requires that makes female labour the preferred form of labour. Informal, flexible, cheap and abundant labour characterise the ideal nature of labour demand in the market today.<sup>52</sup> These features, due to the intersection of various societal and structural factors, characterise female labour. It is thus no by coincidence that the changing demand in labour in the global economy is shaped in its current form. On the basis of this, it is possible to argue that the trade regime is not a neutral system rather it is a gendered and classed system and is affected by geographic location.

It is important here to note that the feminization of labour can be analyzed from the perspective of liberal feminism and a completely different feminist perspective on the trade regime may be adopted. For liberal feminists the feminization of labour at least in the productive sector is viewed as a positive outcome of the operations of trade.<sup>53</sup> They claim that the increase in world trade has opened opportunities for women to be incorporated into paid labour force. For liberal feminists, paid work is believed to increase the status of women.<sup>54</sup> It is believed to give women greater autonomy within the household. However, this strand of feminist theory also acknowledges the adverse impacts of trade on women in general and women in the labour in force in particular.

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<sup>50</sup> Mohanty (note 28 above) 526.

<sup>51</sup> Mohanty (note 28 above) 526.

<sup>52</sup> Kabeer (note 47 above) 12.

<sup>53</sup> McDonald (note 48 above) 54-56.

<sup>54</sup> McDonald (note 48 above) 55.

Harsh working conditions, low pay and job insecurity are among the important negative effects that these feminists point out. There is a call among liberal feminists to advocate for women's rights within the trade arena<sup>55</sup> not only to address these adverse impacts but also to maximize the positive spill over from trade.

#### 4.3 Poverty, inequality and trade

Location is another analytical framework that is used in feminist analysis. This category is important in post-modern and post-colonial feminist theorizing. One theme that emerges from postcolonial theorizing which is quite relevant for analysing the international trade regime is the examination of the currently discriminatory aspects of international action vis-à-vis third world states. This theme can accordingly be adapted to analyse the trade regime from a feminist perspective. The focus of analysis from a postcolonial feminist perspective would be the discriminatory aspects of international trade law vis-à-vis third world developing and least developed states and the possible effect on gender equality.

There are two features of the trade regime that epitomize the phenomenon of discriminatory practice of the regime against third world states. These are the underlying principle of non-discrimination and the requirement of single undertaking practiced in the WTO.

The principle of non-discrimination relates to the discriminatory aspects of international trade law vis-à-vis developing and least developed third world states. Non-discrimination in international trade law has two components. These are the Most Favoured Nation (MFN) and the National Treatment (NT) rules. These rules seek to enforce an important legal principle – equality before the law.<sup>56</sup> While the MFN rule guarantees equal treatment to products from different countries, NT assures equal treatment for foreign products in relation to national products. These two rules create equal conditions of

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<sup>55</sup> McDonald (note 48 above) 55.

<sup>56</sup> Thomas Cottier From Progressive Liberalization to Progressive Regulation 2006 J of Int. Economic L 795.

competition<sup>57</sup> for all products in the market. The logical conclusion is that, these rules create equal pressures to reform and adjustment<sup>58</sup> for all the participants in the market - nationals and non-nationals.<sup>59</sup> This is irrespective of the respective positions of the participants in the market as well as the relative positions of beneficiaries from the market. Some may be poor others may be rich. Unequal's', namely developing and less developed countries on the one hand and developed countries on the other may thus end up getting equal treatment.

Another manifestation of the discriminatory aspect of trade law vis-à-vis southern states is the practice of single undertaking. This is something that lies somewhere between the very rules and the institutional structure of the WTO. The practice of single undertaking compels all members of the WTO to sign into all the WTO agreements at once.<sup>60</sup> Single undertaking replaced the doctrine of variable geometry which allowed members of GATT to decide for themselves whether to sign up for the complementary agreements negotiated in the different trade rounds.<sup>61</sup> With the formation of the WTO in the Uruguay round, the concept of single undertaking came into the picture.

A question has arisen as to whether single undertaking is indeed an appropriate mechanism to integrate countries into the trading regime. It is claimed that single undertaking disregards the broad range of conflicting economic and development interests which different members pursue within their respective trade policies.<sup>62</sup> It will force developing and least developed countries to agree to agreements that will place them in unfair competition with the developed countries.<sup>63</sup> Some countries may not have the capacity to implement some of the agreements. The agreement on intellectual

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<sup>57</sup> Cottier (note 56) above 796.

<sup>58</sup> Cottier (note 56 above) 796.

<sup>59</sup> Simon Walker Human Rights, Gender and Trade in Trade and Gender Opportunities and Challenges for Developing Countries Anh-Nga Tran-Nguyen and Amreico Beviglia Zampetii, 2004, 322-329.

<sup>60</sup> This excludes what are referred to as plurilateral agreements, which are reserved to consenting members only. These are very few and not that significant from the perspective of the development needs of the developing and least developed members.

<sup>61</sup> Cottier (note 56 above) 792.

<sup>62</sup> Cottier (note 56 above) 793.

<sup>63</sup> Liepolle L Pheko Interlocking Features of Gender, Trade and Poverty Gender and Trade Network Africa (GENTA) 2006,2 at [http://www.igt.org/pdfs//457\\_GENTA%20-%20Interlocking%20features%20of%20Trade,%20Gender%20and%20Poverty.pdf](http://www.igt.org/pdfs//457_GENTA%20-%20Interlocking%20features%20of%20Trade,%20Gender%20and%20Poverty.pdf) 09/11/2007.

property rights is a good example. It may also be the case that the implementation of some of the agreements may be detrimental to national interests and development properties. Accordingly, single undertaking not only retards national development and redistribution efforts<sup>64</sup> but also perpetuates poverty and inequity.<sup>65</sup>

Evidence suggests that some developing countries are accessing global markets for global markets, technology and goods which in turn is propelling their growth. On the other hand a greater number of developing countries are being left behind.<sup>66</sup> In addition growing inequality in cross-country and in-country income distribution has been witnessed.<sup>67</sup> Interestingly, this inequality is correlated with the deepening of market integration and openness that is propelling global growth.<sup>68</sup> This is where trade rules like non-discrimination and single undertaking may be implicated in the growing inequality and consequently poverty in many developing and less developed countries.

This outcome significantly victimizes women. This is because women are more vulnerable to poverty due to of the operations of different layers or axes of power that result in gender inequality.<sup>69</sup> Access to resources is conditioned upon established gender hierarchies in societies. As is evidenced by different studies women lack access and control over productive resources and property. Similar gendered hierarchies have placed the burden of reproductive functions on women. This has wide reaching implications.

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<sup>64</sup> Pheko (note 63 above) 2.

<sup>65</sup> Intellectual property protection is a good example here where it serves to secure net transfer of millions of dollars from developing countries to developed countries.

<sup>66</sup> Kemal Dervis Growth, inequality and global development: Who is being left behind? at <http://www.ideas4development.org/growth-inequality-and-global-development-who-is-being-left-behind/en/23/05/08>.

<sup>67</sup> Dervis (note 66 above).

<sup>68</sup> Dervis (note 66 above). Dervis acknowledges that correlation may not be the same as causation but he is quick to point out that it nonetheless affects perceptions.

<sup>69</sup> Valentine M. Mogahadam The Feminization of Poverty and Women's Human Rights SHS papers on women's studies/gender research 2005, 6 at [http://portal.unesco.org/shs/en/files/8282/11313736811Feminization\\_of\\_Poverty.pdf/Feminization%2Bof%2BPoverty.pdf](http://portal.unesco.org/shs/en/files/8282/11313736811Feminization_of_Poverty.pdf/Feminization%2Bof%2BPoverty.pdf) 09/12/07.

Location also says a lot about who may be further marginalized by this outcome. Among the world's poor women, the majority are found within the developing and less developed world – third world/southern states.

There are thus a number of factors such as gender division of labour, gendered access to resources, location based difference in extent of poverty, which result in a differential impact of poverty on women. These factors deepen the extent to which poverty is experienced by women. Accordingly, if trade is correlated to the deepening inequality and poverty, those that are more vulnerable will further sink into the poverty trap. Hence, the combination of these factors imply that equal pressure for reform and equal adjustment to trade as predicted upon the non-discrimination principle of the WTO may be a fallacy.

#### 4.4 Minimum/weak state

The main reference here is the weakening of the state which is underscored by the strengthening of trade regulation through the WTO.<sup>70</sup> It emanates from the different rules and principles of international trade laws such as non-discrimination, liberalization of services, strengthening of intellectual property rights. The adverse effect of these norms is that they de-legitimize any form of state interventions<sup>71</sup> such as redistribution, helping or transforming the economically weak sections of society.<sup>72</sup>

Empirical research findings suggest that the global market has generated imbalances, inequalities as well as maldistribution of resources within and among countries.<sup>73</sup> These studies paint a gloomy picture from a gender perspective. Global trade has in many cases increased the vulnerability of women.<sup>74</sup> In the face of such consequences, state interventions become crucial for dealing with inequalities. Non-intervention will only perpetuate inequality and further may create new inequalities.

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<sup>70</sup> Sandra Fredman Human Rights Transformed: Positive Rights and Positive Duties 2008, 47.

<sup>71</sup> Beveridge (note 36 above) 190-191.

<sup>72</sup> Lourdes Beneria Globalization, Gender and the Davos Man 5 Feminist Economist 1999, 69.

<sup>73</sup> Beneria (note 72 above) 75.

<sup>74</sup> Beneria (note 72 above) 69-75.

Similarly, the push for minimal state appears to give centrality to efficiency rather than people and social goals. This leads to the domination of economic interests over all aspects of political and social life.<sup>75</sup> According to Beveridge, it “positions social interest as somehow opposed to market interest.”<sup>76</sup> The prioritization of economic or market interests over other aspects of social and political life will disproportionately affect women. This is due to the value given to women’s work in an economy.

A larger proportion of populations in the world engage in an unpaid production.<sup>77</sup> Around the world women are disproportionately represented in the unpaid work force. The unpaid production is only indirectly linked to the market.<sup>78</sup> As a result, this form of economic activity is not elevated to economic or market interests. The needs and interests of the majority of women will only come secondary to the demands of economic efficiency - the market. This implies that women’s interests will be advanced provided that they do not come in the way of the parameters of market efficiency. This becomes very problematic when the market itself is producing undesirable distributive consequences in the social life of people. A very good illustration of this outcome is the decline in the provision of social services. This is dictated by the market either through reducing government revenue or through shrinking policy space of nation states. Women heavily rely on social service provisions in order to properly carry out their reproductive functions.

#### 4.5 Conclusion

To conclude, the gender issues that may be raised in relation to international trade regulation are the following. First, there is stark absence of gender concerns in the legal framework of the WTO agreements and absence of women in the public sphere in particular in the institutional structure of the WTO as a result of the interests of women

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<sup>75</sup> Beneria (note 72 above) 75.

<sup>76</sup> Beveridge (note 36 above). 191.

<sup>77</sup> Beneria (note 72 above) 69.

<sup>78</sup> Beneria (note 72 above) 69.

may not be adequately represented. Second, trade liberalization has significantly contributed to the feminization of labour especially in developing countries and it has brought about changes in the nature and burden of women's work. While gainful employment is viewed positively, conditions of work and increasing burden on women's reproductive work may make the gains questionable. Third, the growing inequality among and within countries which is correlated with the deepening of market integration and openness that is propelling global growth may disproportionately victimize women. Similarly, the weakening of the state due to strengthening regulation of international trade would again have disproportionate adverse impact on women.

### **5. Understanding gender equality in the connection with trade regulation**

In the previous two sections, attempt has been made to examine the relationship between gender equality issues and the operations of the trade regime. This exercise which was carried out both from theoretical and legal perspectives has shown certain patterns of interaction between the two fields. Based on these interactions, one can identify the dimensions of gender equality having direct relevance to the operations of the international trade regime.

The dimensions mainly relate to socio-economic rights of women. This is because the effects of trade are disadvantageous to poor women and secondly it is in their reproductive role that women experience the adverse impacts of trade liberalization. These in turn relate to the material conditions of women in their day to day lives which directly correspond to the pool of socio-economic rights.

Based on this gender equality for the purpose of this discussion can be understood to refer to the fulfilment of socio-economic rights of women. This directly resonates with substantive equality which is defined in terms of the promotion of substantive rights that is rights to the material preconditions necessary to live a decent and dignified life with

meaningful choices.<sup>79</sup> Accordingly, one measure of the possible role of the trade regime in promoting gender equality will therefore be its contribution towards the fulfilment of the socio-economic rights of women.

If one can frame the issue of gender in/equality that arise in connection with trade regulation as adverse effects on socio-economic rights, then what are the necessary conditions that should be fulfilled to realize the socio-economic rights of women in and through trade regulation? Two of the most determinant factors for the realization of socio-economic rights are equitable distribution of resources and proper regulation. One can derive these factors from the nature of the obligations that socio-economic rights entail. The obligations for fulfilling these rights are very much linked to ‘available resources’. Further, these rights require positive actions for their realization through among other things, regulation.

The logical question that follows is can the trade regime – the institutional and legal framework of the WTO - contribute positively towards the realization of socio-economic rights of women through equitable distribution of resources and proper regulation to this end? Can one locate these as part of the goals and purposes of the trade regime? What are the legal bases for this? What are the measures that can be taken? These questions are to be addressed in the next section.

## **6. Is gender equality part of a maximized goal of trade regime**

### 6.1 Understanding the goals of the trade regime

How is the purpose of the trade regime to be established? What are the possible references? The purposes of the trade regime are to be determined by reference to power or competence allocations, objectives of the WTO as enshrined in the legal instruments

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<sup>79</sup> Stephanie Seguino *The Road to Gender Equality: Global Trends and the Way Forward* in Zammit Berik and Rodgers Y (eds.) *Macroeconomic Orthodoxy and Globalization: What’s In It for Women?* 2007, 8-12.

and thirdly the legitimacy of the trade regime. These points of reference seek to re-examine and re-question the goals and purposes of the trade regime.

#### 6.1.1. Power allocation and objectives of the trade regime

Power or competence allocation is directly related to the relationship between the WTO and its member states. The WTO is an intergovernmental organization with nation states as the main right holders and duty bearers. The birth of intergovernmental organizations brings about rearrangements in the power relations between the centre – the organization and the constituting entities – the states. States transfer some of their competencies to the new organization. The question is thus, what are the policy areas or competencies that states reserved for themselves and transferred to the new organization, in this case the WTO? This question determines what the purposes of the regime are. What is outside is what states have reserved for themselves, while what is with in is whatever states have transferred to the new entity, WTO.

#### 6.1.2. Objectives of the trade regime

The purposes of the trade regime can be construed from the perspective of the objectives that the trade regime is meant to advance. The WTO system consists of multilaterally agreed rules and regulations. Rules and regulations perform the task of providing a mechanism for reconciling the behaviour of separately motivated actors so as to generate outcomes that are tolerable to all involved.<sup>80</sup> Rules and regulations achieve this through pressuring, guiding, controlling or changing the behaviour of actors to constrain economic, social and political behaviour.<sup>81</sup> The rules and regulations of the WTO system serve similar functions. The rules play significant role in deciding on the objectives that are to be advanced by the trade regime. These objectives get their expression mainly in the economic and social behaviours of states. Accordingly, a question on the boundary of the WTO is in part a question as to the emphasis on the constraints that the rules place on

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<sup>80</sup> Cass (note 4 above) 32.

<sup>81</sup> Cass (note 4 above) 31-2.

the different behaviours of states for example, emphasis on social over economic objectives or economic over social objectives etc.

### 6.1.3. Legitimacy of the trade regime

The third point is the legitimacy of the trade regime. Legitimacy is understood to refer to different but at the same time related concepts in various contexts. In this study when legitimacy is relied upon as one focus to determine the purposes of the trade regime, the reference is to an assessment of the contributions of the trade regime to contemporary social, economic and political conditions of the world. In this context, questions regarding the purposes of the trade regime in part attempt to respond to challenges to the authority of the regime. The challenge emanates from what is expected of the regime in contemporary social, economic and political conditions of the world. This directly probes into the purpose of the trade regime vis-à-vis socio-economic conditions of the world on the ground.<sup>82</sup>

### 6.2 Locating gender equality as part of the goals of trade

Earlier it has been established that one can frame the issue of gender in/equality that arise in connection with trade regulation as adverse effects on socio-economic rights of women. Further, equitable distributions of resources and proper regulation have been identified as the most determinant factors for the realization of socio-economic rights of women. Now the questions is do the trade regime have rules and objectives geared towards redistribution and regulation? Do these rules and objectives allow for redistribution of resources both at the global and national levels? Do the objectives and rules of the trade regime grant adequate space for global as well as national level regulation aimed at promoting socio-economic rights of people?

The WTO charter recognizes important objectives which have strong distributive dimensions. These include, the objective of sustainable development, raising of standards

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<sup>82</sup> Lang (note 4 above) 529-530.

of living for all, recognition of the needs for positive efforts to ensure that developing and least developed countries secure a share in the growth of in international trade commensurate with the needs of their economic development. Re/distribution is quite imperative for the fulfilment of these objectives. These objectives can be implemented through different redistributive mechanisms. One such mechanism involves revisiting the single undertaking principle. Another mechanism is the newly adopted ‘aid for trade’ initiative. This initiative attempts to take into account distributive consequences of trade on different sections of society thereby broadening the reach of trade regulation.

Some of the rules of the WTO play important role in re/distribution and regulation. The provisions on special and differential treatment, flexibilities such the one introduced in TRIPS also serve similar purposes. They provide for transfer of resources from developed countries to the developing and least developed countries. They also open the room for adequate regulation at the national level.

From a gender perspective, what more is required to ensure that redistribution and regulation in and through the trade regime will have positive impact on improving the socio-economic rights of women? Gender mainstreaming assesses the implications of all policies and measures on the respective situations of women and men at the planning, implementation, monitoring and evaluation stages.<sup>83</sup> Policies and measures in all political, social and economic spheres are made subjects of analysis. From this understanding, it becomes evident that gender mainstreaming from the outset recognizes that there are gender differences and inequalities.<sup>84</sup> It then proceeds to examine how these differences and inequalities are relevant to the particular subject under discussion.<sup>85</sup> Finally, it attempts to identify opportunities through which these inequalities can be narrowed.<sup>86</sup> Mainstreaming is the ideal instrument to add a gender element to the redistribution and regulation goals which are crucial for addressing socio-economic rights. Gender mainstreaming goes beyond adding a gender equality agenda; it also

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<sup>83</sup> UNDP Gender Mainstreaming: an overview at <http://www.un.org/womenwatch/osagi/pdf/e65237.pdf> 09/11/07.

<sup>84</sup> UNDP (note 83 above) 2.

<sup>85</sup> UNDP (note 83 above) 2-3.

<sup>86</sup> UNDP (note 83 above) 2-3.

involves the need to introduce changes. This change may include the re-examination of general policies and measures at the negotiating, drafting and implementation stages by taking in to account their particular effect on women and men.

## **7. Conclusions**

At first glance, although gender equality concerns appear to be far removed from the regulation of international trade, trade regulation may significantly affect gender equality both in positive and negative terms. Gender equality seen in terms of the advancement of the socio-economic rights of women may well be a value that the trade regime can help promote. One can gather this from a closer examination of the stated goals and purposes of the trade regime.

