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978-1-107-02656-8 - Public Services and International Trade Liberalization: Human Rights and Gender Implications

Barnali Choudhury

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Human rights and gendered implications of liberalization of public services

Introduction

Services pervade almost every aspect of our lives. They influence the water we drink, our methods of transport, the education we receive, how we communicate, the health care we enjoy, and many other activities that form a routine aspect of daily existence. Services play a myriad of roles – including social, cultural, environmental, and economic – making their availability, quality, and accessibility instrumental to fostering both economic growth and defining social well-being.

It is no wonder then that international trade in services is increasing.¹ World services exports increased 8 percent to just under USD 3.7 trillion in 2010² and in many countries, services have overtaken manufactured goods as the domestic economy's most prominent output.³ In fact, for the last fifteen years, services have been the fastest growing component of cross-border trade and investment activity.⁴

- 1 Juan A. Marchetti and Martin Roy, "Summary and Overview" in Juan A. Marchetti and Martin Roy (eds.), *Opening Markets for Trade in Services: Countries and Sectors in Bilateral and WTO Negotiations* (Cambridge University Press, 2009); World Bank, "Trade in Services: Using Openness to Grow" in *Global Economic Prospects and Developing Countries* (World Bank, 2002), 71; World Bank/WTO, *Market Access: Unfinished Business – Post Uruguay Round Inventory and Issues (Special Studies)* (World Bank/World Trade Organization, 2001), 6, 97.
- 2 WTO, "Trade growth to ease in 2011 but despite 2010 record surge, crisis hangover persists," WTO Press Release 628 (April 7, 2011). Moreover, conventional trade data does not traditionally include activities under GATS Mode 3 suggesting that this number may even be higher. See WTO Secretariat, "A review of statistics on trade flows in services – data compilation and availability," S/C/W/329 (December 22, 2010).
- 3 Sarah Sexton, "Trading Health Care Away? GATS, Public Services and Privatisation," *The Corner House Briefing 23: Trade and Health Care* (2001), 1.
- 4 OECD, *GATS: The Case for Open Services Markets* (OECD Publishing, 2002), 18; John Whalley, "Assessing the Benefits to Developing Countries of Liberalisation in Services Trade," *The World Economy*, 27(8) (2004), 1223, 1225.

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Services are also proliferating the substance of economies. In developed countries, the service sector accounts for approximately 72 percent of the gross domestic product (GDP). This number dips slightly for developing countries, for which the service sector accounts for 52 percent of GDP.⁵ OECD countries alone reported service exports of USD 2.8 trillion and imports of USD 2.4 trillion.⁶

As demand for services is highly income elastic, developing countries have not traditionally had as significant a role as developed nations in the trade of commercial services.⁷ This distinction is slowly fading, however, as developing countries progressively harness the power of trade in services. For example, in 2009 China and India were respectively the fifth and twelfth largest exporters of commercial services in the world.⁸ The world's top forty exporters of commercial services also included South Korea, Turkey, Thailand, Brazil, Malaysia, and Mexico.⁹ In part, the rise of trade in services globally is a recognition of the essential nature of services as tools for development and for improvements to human welfare.¹⁰ In fact, the availability of public services such as water, education, or health, can lead to higher productivity and earnings.¹¹

Trade in services is also outpacing the growth of trade in goods and continues to foster foreign direct investment (FDI).¹² In 2006, services represented just under two-thirds of global FDI stock.¹³ Furthermore, the many conduits facilitating trade in services emphasize their importance. Likely introduced in the Uruguay Round of negotiations at the multilateral level through the WTO's *General Agreement on Trade in Services* (GATS), trade in services now operates at the regional, bilateral, and preferential levels. In many instances, however, trade-enhancing mechanisms other than the GATS have achieved even deeper levels of service liberalization. To some extent, this is because these bilateral or preferential agreements

5 UNCTAD Series on International Investment Policies for Development, *International Investment Agreements in Services* (United Nations Publication, 2005), 8.

6 OECD, *OECD Statistics on International Trade in Services 2010*, (OECD Publishing, 2010), vol. I, 35.

7 OECD, *OECD Statistics*, 18.

8 WTO, *Leading Exporters and Importers in World Trade in Commercial Services – 2009* available at: www.wto.org/english/res_e/statis_e/its2010_e/its10_world_trade_dev_e.htm.

9 *Ibid.*

10 Juan A. Marchetti, "Developing Countries in the WTO Services Negotiations: Doing Enough?" in George Bermann and Petros Mavroidis (eds.), *WTO Law and Developing Countries* (Cambridge University Press, 2007), 84.

11 *Ibid.* 12 *Ibid.*

13 UNCTAD, *World Investment Report 2007* (United Nations Publication, 2007), 9.

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have embraced issues that have stalled or been ignored at the WTO level.¹⁴

Conversely, one particular service area that has received varying levels of commitments in trade agreements is public services. Thought of as essential services traditionally provided by the government to its citizens, public services – more specifically water, education, and health services – are often viewed, at least from an economic perspective, as public goods the market cannot be relied upon to deliver.¹⁵ Due to the intrinsic social nature of public services, commitments for trade in these services have traditionally been low.

At the same time, in many countries – particularly developing countries – government provision of public services has been poor in terms of quality, access, efficiency, and equity,¹⁶ due in part to political market imperfections,¹⁷ market failures, general inefficiencies, and difficulties in reducing the costs of services to meet equity goals.¹⁸ Likely because of the problems associated with government provision of public services, increases in commitments for these services are being observed more and more under bilateral or preferential trade agreements, suggesting that an overall increase in liberalization of public services may be expected.

However, many states fear that liberalization of public services poses certain risks. These risks can include the increasing importance of corporate and investor rights at the expense of social objectives, compromises on the democratic ability of states to regulate in the public interest, and threats to state power to maintain public services and to enforce regulatory standards – especially in relation to health and safety issues.¹⁹ Concerns have also been raised about the relationship between trade in services and

14 Marchetti and Roy, “Summary and Overview,” 11.

15 Jane Kelsey, *Serving Whose Interests? The Political Economy of Trade in Services Agreements* (Routledge-Cavendish, 2008), 120.

16 Parashar Kulkarni, “Impact of the GATS on Basic Social Services Redux,” *J. of World Trade* 43(2) (2009), 245, 255.

17 These political market imperfections include “lack of information among voters about politician performance; social fragmentation among voters manifested as identity-based voting; and lack of credibility of political promises to citizens.” See Kulkarni, *ibid.* at 256.

18 *Ibid.* at 267.

19 See, e.g., Kelsey, *Serving Whose Interests?*, 120, citing the arguments of civil society groups and the arguments received by the WTO against the liberalization of public services. See also the concerns of the UN High Commissioner for Human Rights expressed in UN Econ. and Soc. Council [ECOSOC], Sub-Comm. on the Promotion and Prot. of Human Rights, Report of the High Commissioner, *Liberalization of Trade in Services and Human Rights*, U.N. Doc. E/CN.4/Sub.2/2002/9, (June 25, 2002).

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human rights. More specifically, the United Nations High Commissioner for Human Rights has observed that liberalization of trade in public services may affect the enjoyment of human rights, including the right to water²⁰, the right to education, and the right to health.²¹ In this regard, the High Commissioner has noted that although states are free to liberalize public services as they see fit, a state's human rights obligations require it to: "guarantee the availability, accessibility, acceptability and adaptability/quality of essential services, including their supply, especially to the poor, vulnerable and marginalized . . ." ²². In effect, the High Commissioner has mandated that states' human rights obligations should not be subordinated to trade in services rules and that states should not be sanctioned for taking actions that ensure that human rights objectives are protected alongside their economic obligations.²³

Despite these words of caution, liberalization of water, education, and health services can pose an imminent risk to a state's ability to progressively realize its human rights obligations. Because of the close relationship between the provision of a public service and its corresponding human right, unregulated liberalization can easily translate into human rights compromises. In part, these human rights intrusions result from the commodification of public services – which is generally a necessary precondition for entry into international trade – and the removal of the non-market dimensions of the service in order to redefine it within a market framework.²⁴ Education services, for example, may no longer be viewed as conduits for the greater accumulation of knowledge, but as business models which can generate high profits by targeting amenable segments of the population.²⁵ In this way, the social value of a public service can be substituted for a market price.²⁶

20 See Ch. 4 for a discussion on the right to water.

21 *Ibid.* at para. 28. Note that the High Commissioner does not specifically recognize the *Right to Water*, but instead notes that liberalization of environmental services (which traditionally include water and sanitation services) can affect the right to development.

22 *Ibid.* at para. 45.

23 *Ibid.* at para. 58.

24 D. Hill, "Education Services Liberalization" in Ellen Roskamp (ed.), *Winners or Losers? – Liberalizing Public Services* (International Labour Office, 2006), 4; Kelsey, *Serving Whose Interests?*, 13–14. See also Stephen Gill, *Power and Resistance in the New World Order* (Palgrave-Macmillan, 2003), 117.

25 In fact, Leys argues that there are four prerequisites necessary for the successful creation of markets in public services: the reconfiguration of services into commodities, the creation of a demand for the commodities, the conversion of the public servants concerned into profit-oriented workforces and the underwriting of risks. See Colin Leys, *Market Driven Politics – Neoliberal Democracy and the Public Interest* (Verso Books, 2003), 214.

26 Kelsey, *Serving Whose Interests?*, 121.

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Ultimately, however, liberalization of public services need not necessarily result in a compromise of human rights. Accompanied by effective governmental controls, regulatory systems, and complementary policies, service liberalization can play an important role in economic development without compromising issues of equity.²⁷ Constructed properly, public service liberalization should result in both efficiency and equity gains.

Given the incentives for public service liberalization and the human rights considerations liberalization raises, the purpose of this project is: to identify the benefits, both economic and social, of public service liberalization while also considering the equity costs of liberalization. In particular, this project examines the implications of liberalizing public services on issues of human rights generally and, more specifically, considers the gendered implications of liberalizing these services.

Taking a human rights and gendered approach to liberalized public services

The UN High Commissioner found that liberalized public services can affect human rights. Similarly, in exploring the links between international economic policies and human rights, the International Law Association concluded that states' human rights obligations – including those found in the UN Charter, various UN resolutions, and decisions of international courts – provided the “relevant context” for the interpretation of international economic policies.²⁸ Accordingly, examining the relationship between trade in services and human rights begins from the premise that these two areas are linked and, consequently, that adversities arising from liberalization can restrict a state's ability to progressively realize its human rights obligations.

Despite the recognition of the links between trade in services and human rights, there has been less recognition of the relationship between trade in services and gender. Yet, as with human rights, there is a direct

27 Marchetti and Roy, “Summary and Overview,” 3 (services play an essential role in economic development and growth insofar as modern economies have become more services-intensive. Services also have a significant productivity-enhancing role).

28 International Law Association, “International Trade Law – Eighth Report of the Committee, Rio de Janeiro Conference,” 2008, 13, 17. The ILA found that respect for universal human rights obligations is warranted by the members to the WTO by the preamble of the Vienna Convention on the Law of Treaties as well as Art. 1 of the UN Charter and that disputes in this regard should be settled in conformity with the principles of justice and international law including respect for and observance of human rights and fundamental freedoms for all. *Ibid.* at 17.

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relationship between liberalization of trade in services and gender rights in that liberalization policies can directly help or hinder attempts to achieve gender parity.²⁹ Moreover, the relationship between liberalization policies and gender can be heightened because of pre-existing inequalities between men and women in most parts of the world.³⁰ Thus, if liberalization of public services policies results in losses for women or requires them to bear heavier costs of adjustment, the policies can exacerbate increases in gender inequality and consequently have a disproportionate impact on women.³¹

Use of a human rights and gender perspective to examine the implications of liberalizing public services is especially cogent as trade in public services increasingly broadens its reach into areas that can affect both the enjoyment of human rights and gender equity goals. In particular, because trade in service agreements have focused primarily on the economic dimensions of liberalized public services, adopting a human rights and gender perspective provides a paradigm through which the social nature of these services can be brought back into focus. In effect, considering trade in public services through a human rights and gender lens replaces the neoliberalist³² approach dominant in these trade in services agreements with complementary alternatives.

Moving away from neoliberalism

Trade in services, similar to trade in goods, is premised on neoliberal ideals. Neoliberalism, a political economic theory, advocates that human well-being is best served by “liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong

29 Note that whereas human rights concern those rights that fundamentally belong to all persons, gender rights typically concern rights that belong to one sex, in this case, women.

30 Canadian International Development Agency, *Gender Equality and Trade Related Capacity Building: A Resource Tool for Practitioners* (Canadian International Development Agency, 2003), 2.

31 *Ibid.* (The Report also notes that if women are excluded from the benefits of trade liberalization, this imposes costs on women, on poverty reduction, and on achieving pro-poor impacts from trade liberalization.)

32 Neoliberalism proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets, and free trade and that the role of the state is to create and preserve an institutional framework appropriate to such practices. See David Harvey, *A Brief History of Neoliberalism* (Oxford University Press, 2005), 2.

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private property rights, free markets, and free trade.”³³ It emphasizes market transactions and aims at bringing all human action into the domain of the market.³⁴ In addition, it suggests that free-market and free trade rules are necessary and sufficient for creating wealth and therefore for improving the well-being of the population at large.³⁵ A neoliberalist approach to trade in services thus focuses only on the economic and market aspects of trade in services and tends to negate or ignore the non-economic and non-market aspects of services.

In part, the neoliberalist ideology that characterizes modern trade in services agreements is a reflection of the imperialist nature of international law.³⁶ Anghie argues that the universality of international law is in reality a reflection of rules created by the colonizer to tame its colonies.³⁷ International law thus comprises laws and rules created by a small group of powerful states that reflect only their interests.³⁸ However, these laws and rules are then imposed on less powerful states – the former colony states – and because the rules do not reflect the latter’s interests, the effect of international law is to subordinate and disempower these states.

To some extent, the imperialist nature of international law is newly reflected in trade in services agreements. The agreements’ reflection of primarily the interests of the most powerful states is now legitimized through “a new discourse based on economics.”³⁹ As a commentator observes, “the political hierarchy of imperial powers and former colonies became redefined as abstract contractual relations between the multi-lateral lending institutions and their state clients and among contracting

33 *Ibid.* 34 *Ibid.* at 3.

35 *Ibid.* at 7. See also Manfred B. Steger and Ravi K. Roy, *Neoliberalism: A Very Short Introduction* (Oxford University Press, 2010); Paul Bowles, *International Trade and Neoliberal Globalism: Towards Re-Peripheralisation in Australia, Canada and Mexico?* (Routledge, 2008).

36 See generally, Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2004).

37 *Ibid.*

38 *Ibid.* See also Gayatri Chakravorty Spivak, *A Critique of Postcolonial Reason: Toward a History of the Vanishing Present* (Harvard University Press, 1999), 203 (arguing “The colonizer constructs himself as he constructs the colony”); Michael J. Trebilcock and Robert Howse, *The Regulation of International Trade*, 3rd edn (Routledge, 2005), 367 et seq. (observing that trade liberalization in areas of interest to developing countries has not kept pace with the general trend of liberalization since, for example, liberalization of services outpaces liberalization of agriculture and textiles, and that liberalization of services has not addressed those modes of supply and sectors that would be of benefit to developing countries).

39 Kelsey, *Serving Whose Interests?*, 19.

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parties to the GATT.”⁴⁰ In fact, this hegemony of imperial powers in services agreements is particularly emphasized by the single undertaking approach to the World Trade Organization (WTO) Agreements in which reluctant third world states were required to accept the GATS in order to be part of the other WTO Agreements.⁴¹

The consequences of the imperialist nature of trade in services agreements are that an economic approach dominates these agreements to the detriment of social issues, and that Western interests are given precedence over those of developing countries. Liberalization of services thus requires that services be reconceptualized as commodities, stripped of their social interests, while domestic regulations that protect the social issues that many of these services reflect are assessed against their impact on trade impairment.⁴² Dominance is then reflected by the power of economic issues versus non-economic issues and Western (corporate) interests versus developing countries’ (non-corporate) interests.

However, services, and particularly public services are, at their core, characterized by their social nature.⁴³ To ignore or negate the social aspects of service agreements risks compromising the social values and ideals that embody the very nature of the services. In addition, because trade openness and economic growth do not automatically translate into increased economic equity – some individuals and groups will gain, but others will lose – moving away from a neoliberalist approach requires that economic development not proceed separately from, but rather concurrently with, social development.⁴⁴

40 *Ibid.*

41 John H. Barton et al., *The Evolution of the Trade Regime: Politics, Law, and Economics of the GATT and the WTO* (Princeton University Press, 2008), 65–6 (arguing the Uruguay Round agreements resulted in “highly asymmetrical consequences” for developed and developing countries. In particular, due to the single undertaking of the WTO agreements, developing countries assumed obligations under the GATS even though they had long opposed it.)

42 William J. Drake and Kalypso Nicolaidis, “Ideas, Interests, and Institutionalization: ‘Trade in Services’ and the Uruguay Round,” *International Organization* 46(1) (1992), 37, 63.

43 As Fine notes: Capital is embroiled in social relations, social structures in social reproduction involving social power and conflict and is attached to definite economic and social tendencies. See Ben Fine, *Social Capital versus Social Theory: Political Economy and Social Science at the Turn of the Millennium* (Routledge, 2001), 33.

44 Canadian International Development Agency, “CIDA’s Strategic Approach to Trade-related Capacity Building (TRCB)” in Canadian International Development Agency, *Gender Equality and Trade Capacity* (2003), 1. For more on international economic agreements not in and of themselves fostering economic equity, see Steve Charnovitz, “The Labor Dimension of the Emerging Free Trade Area of the Americas” in Philip Alston (ed.),

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The taming of neoliberalism in trade in services

The intrinsic social nature of services, particularly public services, demands an alternative to the neoliberalist approach to trade in services to ensure that social values are protected alongside economic values. In short, the traditionally wild and unregulated approach to markets dictated by neoliberalism must be tamed.

One way to counter the neoliberal approach to trade in services is by moving towards an embedded liberalism approach. Coined by Ruggie and referring to the grand post-war trade “bargain” that guaranteed states’ ability to engage in regulatory intervention as a means of maintaining their power to liberalize,⁴⁵ an embedded liberalism approach to trade in services advocates the integration of economic goals and policies into the social order. Consequently, an embedded liberalism approach dictates that measures to liberalize trade in services be accompanied by measures that strive to minimize any socially disruptive domestic adjustment costs, with collective welfare being measured not only by economic gains, but rather by the extent to which both economic and social objectives are achieved.⁴⁶

The embedded liberalism theory borrows, in part, from Karl Polanyi’s analysis of the double movement, which found that unregulated market forces could result in social disorder due to the “disembedding” of the markets from society.⁴⁷ Polanyi concluded that the separation of markets

Labour Rights as Human Rights (Oxford University Press, 2005), 143. (arguing “Contemporary FTAs seem designed to assist global corporations and devote little attention to those without power or wealth. If governments were to get serious about helping [the] vulnerable . . . , then such action could help to humanize trade agreements and lead to more widely shared prosperity.”); Joel R. Paul, “Do International Trade Institutions Contribute to Economic Growth and Development?,” *Virginia Journal of International Law* 44 (2003), 285 (arguing “to the extent that international trade institutions have promoted economic growth, they have often contributed to a growing disparity of wealth”).

- 45 For a discussion of embedded liberalism within the WTO see Joel P. Trachtman, “Legal Aspects of a Poverty Agenda at the WTO: Trade Law and Global Apartheid,” *Journal of International Economic Law* 6 (2003), 3, 8–9; Andrew T.F. Lang, “Reconstructing embedded liberalism: John Gerard Ruggie and constructivist approaches to the study of the international trade regime,” *Journal of International Economic Law* 9 (2006), 81, 85–9; Jeffrey L. Dunoff, “Rethinking international trade,” *University of Pennsylvania Journal of International Economic Law* 19 (2006), 347, 370–3.
- 46 John Ruggie, “International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order,” *International Organization* 36 (1982), 379, 399.
- 47 See generally Karl Polanyi, *The Great Transformation: The Political and Economic Origins of our Time* (Beacon Press, 1957). Polanyi argued that market societies are constituted by two opposing movements – the laissez-faire movement to expand the scope of the market and the counter-movement that resists the disembedding of the market.

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from society required a counter-movement that would bring markets under societal control. As a commentator to Polanyi's work observed, "disembedding the market is similar to stretching a giant elastic band. Efforts to bring about greater autonomy of the market increase the tension level. With further stretching, either the band will snap – representing social disintegration – or the economy will revert to a more embedded position."⁴⁸ Accordingly, an embedded liberalism approach to trade in services suggests that liberalization of trade in services policies be reoriented into the broader framework of societal policies and that complementary measures that counter laissez-faire liberalization policies accompany trade in services agreements to protect social order. This creates sufficient regulatory and ideological space for states to both prioritize human rights and gender rights and privilege the public good over trade commitments as may be required.

An embedded liberalism approach may also work towards countering the dominance found in trade liberalization policies resulting from the imperialist nature of international law, which tends to subordinate the interests of less powerful states – read, developing countries. As mentioned above, the dominance of Western interests can lead to a privileging of economic interests over social interests, which can be particularly problematic for developing countries that may already be struggling to meet domestic equity goals. In addition, liberalization policies can also hinder the dominance of men over women. MacKinnon characterizes this form of dominance as a power structure embedded in gender concepts, which can lead to male supremacy and female subordination.⁴⁹ In effect, an embedded liberalism approach that requires refocusing the economic goals of liberalization policies within the broader context of societal concerns should work towards countering the dominance of interests protected by the neoliberalist approach and the subordination of female interests more generally.

The structure of this project

This project is broadly divided into three parts. Part I examines the foundational bases for the issues in the project, Part II explores the human

48 Fred Block, "Introduction" in Polanyi, *The Great Transformation*, xxv.

49 Catharine A. MacKinnon, "Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence," *Signs* 8(4) (1983), 635; Catharine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press, 1987), 40.