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Women's Rights and the Public Morals Exception of GATT Article 20

Liane M. Jarvis
University of Michigan Law School

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STUDENT NOTE

WOMEN'S RIGHTS AND THE PUBLIC MORALS EXCEPTION OF GATT ARTICLE 20

*Liane M. Jarvis**

INTRODUCTION	219
I. UNITING TRADE LAW AND HUMAN RIGHTS LAW	221
II. PROTECTING WOMEN'S RIGHTS UNDER THE TEXT OF ARTICLE XX	229
III. MEASURES TO PROTECT WOMEN THAT SHOULD BE JUSTIFIED UNDER ARTICLE XX(a)	236
CONCLUSION	238

INTRODUCTION

The public morals exception in Article XX of the General Agreement on Tariffs and Trade (GATT) could and should be interpreted in accordance with evolving human rights law on women's rights.¹ This clause provides an exception to the general rule that members of the World Trade Organization (WTO) cannot take measures against other Members that would restrict trade. Under Article XX, WTO members may restrict trade for a variety of social reasons, including protecting the environment, preventing prison labor, and otherwise promoting "public morals."² This Note will argue in particular that a nation should be allowed to invoke the public morals exception in order to protect women's rights. In the *Turtles* case, the Appellate Body of the WTO stated that Article XX should be understood in light of evolving international law and, in particular to that case, with respect to evolving

* J.D., University of Michigan Law School, expected May 2001; A.B., Occidental College. I am grateful to Professor Robert Howse for his helpful comments. This Note has also benefited from comments by Christopher Evers, Kathleen Wadell, and Natalie Wheeler.

1. The public morals exception is contained in Article XX(a) of the GATT. *See* General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

2. *Id.* Although "public morals" are never defined in the GATT, the term is generally understood to mean that a country may protect its own public morals *or* the public morals of another country. The quintessential example in the academic literature is a nation protecting against the importation of pornography. *See* Steve Charnovitz, *The Moral Exception in Trade Policy*, 38 Va. J. Int'l L. 689, 716-17 (1998) [hereinafter Charnovitz, *Moral Exception*].

international environmental law.³ Although this reference in the *Turtles* case may amount to no more than dicta, there are feminist policy reasons for extending this analysis to the public morals exception.

Globalization harms women more than men.⁴ Increased globalization unites Western notions of patriarchy and economic efficiency with other countries' entrenched legal and social manifestations of patriarchy, perpetuating the dismal status of women within those countries. For example, gendered, racist, colonialist, and classist ideas are used to justify contingent employment arrangements in which women perform unskilled labor.⁵ Within these contingent arrangements, inhumane labor practices remain pervasive.⁶ Women are more likely to be targets of illegal labor practices, including low wages, resistance to unionization, pregnancy discrimination, sexual harassment, and/or rape in the workplace.⁷ Feminist scholars have increasingly called upon the international

3. See United States-Import Prohibition of Certain Shrimp and Shrimp Products, Report of the Appellate Body, Oct. 12, 1998, WT/DS58/AB/R, 38 I.L.M. 118 [hereinafter *Turtles*].

4. See, e.g., Lori J. Pennay, *The Disproportionate Effect of the Asian Economic Crisis on Women: the Filipina Experience*, 21 U. PA. J. INT'L ECON. L. 427 (2000) (detailing how the Asian Economic crisis in 1996 disproportionately affected women in Asia and how their governments' attempts to remedy the crisis have not alleviated their dire situations); Elizabeth Olson, *Free Markets Leave Women Worse Off, UNICEF Says*, N.Y. TIMES, Sep. 23, 1999, at A9 (discussing a UNICEF study of twenty-seven former-Soviet Eastern European nations in which unemployment, contingent work arrangements, and marginal wages among women have increased due to the transition to a market economy).

5. See Maria L. Ontiveros, *A Vision of Global Capitalism That Puts Women And People of Color at the Center*, 3 J. SMALL & EMERGING BUS. L. 27, 33-35 (1999). "Contingent work" is any work that is not permanent, full-time work and that usually offers low wages and does not provide health insurance, pension or retirement benefits. *Id.* at 29. Women are most often the ones laboring in contingent arrangements. *Id.* at 33. In Japan, for example, more women are contingent workers than men. The government's policies on contingent work arrangements help to perpetuate women's inferior status in the economy. Governmental rules limit temporary workers to one-year contracts and prevent companies from immediately rehiring them for the same job, while simultaneously using subsidies to encourage these same companies to keep permanent employees whose positions are no longer needed. Thus, the government keeps men in permanent positions but restricts women from entering the highly patriarchal Japanese corporate workforce as permanent employees. Howard W. French, *Economy's Ebb in Japan Spurs Temporary Jobs*, N.Y. TIMES, Aug. 12, 1999, at A1. Some Japanese corporations are trying to alleviate the plight of Japanese female workers. See *World Watch—Asia: Mazda to Raise Pay, Jobs for Women*, WALL ST. J., Aug. 5, 1999, at A14.

6. See Ontiveros *supra* note 5, at 31.

7. See *id.* at 34-36. See also Michelle Smith, *Potential Solutions to the Problems of Pregnancy Discrimination in Maquiladoras Operated by U.S. Employers in Mexico*, 12 BERKELEY WOMEN'S L.J. 195, 195 (1998); Elizabeth Spahn, *Shattered Jade, Broken Shoe: Foreign Economic Development and the Sexual Exploitation of Women in China*, 50 ME. L. REV. 255, 265-71 (1998); Somini Sengupta, *Squeezed by Debt and Time, Mothers Ship Babies to China*, N.Y. TIMES, Sep. 14, 1999 at A1 (reporting that, in New York, many female illegal immigrants from China have turned to sending their children to China because they

legal community to re-evaluate and restructure economic policies that perpetuate the poverty of and violence against women.⁸

This Note will demonstrate how human rights concerns for women should be addressed through the public morals exception of Article XX of the GATT. The first section will argue that there is a legal basis for uniting trade law and human rights law. The second section will show that there is a textual basis for interpreting the public morals exception in light of evolving international human rights law. The final section will provide examples of where the public morals exception could be invoked to protect women's rights.

I. UNITING TRADE LAW AND HUMAN RIGHTS LAW

The WTO is not the best forum in which to advance women's rights because it lacks feminist scholars. The WTO's Dispute Settlement Understanding (DSU) requires:

[Panelists must be] well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served as a representative of a Member or of a contracting party to GATT 1947 or as a representative to the Council or Committee of any covered agreement or its predecessor agreement, or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member.⁹

cannot afford to care for the children on their low wages and in such dismal living conditions); Marlise Simons, *Agadir Journal; After the Rape, a Lifetime of Shame. It's Morocco*, N.Y. TIMES, Feb. 1, 1999, at A3 (discussing the plight of unwed women in a fish cannery in Agadir, Morocco).

8. See, e.g., Ann D. Jordan, *Human Rights, Violence Against Women, and Economic Development (The People's Republic of China Experience)*, 5 COLUM. J. GENDER & L. 216, 243 (1996) (providing a thorough evaluation of how mainstream economic development policies perpetuate violence against women and, in particular, how such policies have harmed women in the People's Republic of China). Recently, the World Bank launched Gendernet, a website that which provides information on its gender research, policies, and programs. See World Bank Gendernet, <http://www.worldbank.org/gender/> (last modified Feb. 23, 2001); see also Jane Dwasi, *Kenya: a Study in International Labor Standards and Their Effect on Working Women in Developing Countries: the Case for Integration of Enforcement Issues in the World Bank's Policies*, 17 WIS. INT'L L.J. 347, 448 (1999) (noting that the World Bank has undertaken a number of "women in development" projects aimed at improving the status of women); see also JOSETTE L. MURPHY, GENDER ISSUES IN WORLD BANK LENDING 1, 23 (1995).

9. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Dispute Settlement Understanding, April 15, 1994, 33 I.L.M. 1125, art. 8(1) (1994) [hereinafter DSU].

In addition, the DSU stipulates that the Appellate Body shall be comprised of "persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally."¹⁰ The DSU further requires that members of the panels and the Appellate Body be of sufficiently diverse backgrounds and be broadly representative of the WTO membership.¹¹ Members of the current Appellate Body are all male: Yasuhei Taniguchi of Japan, G.M. Abi-Saab of Egypt, A.V. Ganesan of India, James Bacchus of the United States, Claus-Dieter Ehlermann of Germany, Florentino Feliciano of the Philippines, and Julio Lacarte-Muró of Uruguay.¹²

While all of these men are highly esteemed scholars and practitioners, none have produced any scholarship that suggests that they are the best candidates to address the resolution of trade disputes affecting women. While it would be hyperbole to state that the WTO is structurally gendered, it is fair to state that the WTO's highest body, which is the forum of last resort and which has exclusive and binding power over trade issues, has no member with a history of promoting feminist legal theory and women's issues. This dramatically reduces the WTO's legitimacy as a world body committed to sustainable development.

An international organization that excludes or marginalizes women's voices, whether with respect to women's issues or to the representation of women within the organization, cannot claim objectivity.¹³ As Professors Charlesworth, Chinkin, and Wright explain:

Long-term domination of all bodies wielding political power nationally and internationally means that issues traditionally of concern to men become seen as general human concerns, while "women's concerns" are relegated to a special, limited category. Because men generally are not the victims of sex discrimination, domestic violence, and sexual degradation and violence,

10. DSU, *supra* note 9, art. 17(3).

11. *See id.* arts. 8(2), 17(3).

12. For the backgrounds of the current members of the Appellate Body, see World Trade Organization, *WTO Press Release 32: WTO Announces Appointment to Appellate Body*, http://www.wto.org/english/news_e/pres95_e/pr032_e.htm (last modified Nov. 29, 1995); World Trade Organization, *WTO Press Release 179: WTO Completes Appointment of Appellate Body Members*, http://www.wto.org/english/news_e/pres00_e/pr179_e.htm (last modified May 25, 2000).

13. Hilary Charlesworth, *Feminist Methods in International Law*, 93 AM. J. INT'L L. 379, 392 (1999) (explaining how feminist methods seek to expose and question the limited bases of international law's claim to objectivity and impartiality and insisting on the importance of gender relations as a category of analysis).

for example, these matters can be consigned to a separate sphere and tend to be ignored.¹⁴

The WTO can increase its legitimacy and ability to respond to the particular situation of women in several ways. The WTO should employ feminist legal thinkers as panelists and members of the Appellate Body and reformulate the way in which it approaches trade issues affecting women. The WTO could do this by relinquishing jurisdiction over trade issues that involve women's rights to tribunals that more readily incorporate feminist viewpoints in their legal decisions. Realistically, however, member states of the WTO are unlikely to decrease the jurisdiction of the WTO because that would decrease the body's effectiveness.

An alternative approach would be for the WTO to become more deferential to international human rights law, both to interpretations by human rights tribunals and to the obligations and rules in these legal regimes. This deference would require a paradigm shift in the theoretical approach to the interaction of human rights law and trade law. Rather than separating human rights law and trade law into two equal, non-intersecting spheres of law, human rights law should at least provide the basis for decisions affecting human rights made by trade tribunals. Preferably, human rights law should supersede trade law.

There are legitimate objections to uniting international human rights law and trade law. One argument is that the two bodies of law should be kept separate to avoid potential problems dealing with the conflict of laws and jurisdiction. The fear is that there might be a conflict of law between the WTO and "traditional" sources of and courts of human rights law.¹⁵

This concern can be eased if the Appellate Body defers to the jurisprudence of human rights courts and the International Court of Justice (I.C.J.) whenever a conflict arises. If the Appellate Body does not defer to these other sources of law either by refusing to address a human rights issue or by denying the existence of human rights, injured parties

14. Hilary Charlesworth, Christine Chinkin, & Shelley Wright, *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613, 625 (1991).

15. It is unclear whether the WTO has exclusive power in the realm of trade law. The International Court of Justice stated in dictum in the *Nicaragua* case that an explicit treaty on embargoes could trump customary law. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27, 1986). The WTO may have primary jurisdiction over WTO trade issues because of the existence of the GATT treaty but it is less clear whether the WTO has primary jurisdiction over trade issues that involve significant tangential non-trade issues.

should be allowed to vindicate their rights through other forums, such as the I.C.J.¹⁶

Another concern is that international human rights law might be diluted if trade bodies were allowed to interpret and apply it. At least one panel has been willing to grant itself considerable power to interpret issues considered “tangential” to trade measures. An example is the *India Quantitative Restrictions* case, in which the WTO panel declared that it was competent to review balance of payment measures even though there already existed a Balance of Payment Committee within the WTO.¹⁷ If human rights issues were litigated tangentially to trade issues before the WTO, a panel might determine that it has the competency to address the human rights issues. The panel might then unilaterally interpret human rights law in a manner that does not address nor represent the current trends in international human rights law. This fear can be mitigated if the WTO is constrained by an institutional practice of deference to the interpretations of human rights law in human rights courts and to obligations in other institutional spaces.¹⁸ In addition, this concern is alleviated because the WTO is restricted by the text of its own treaties.¹⁹

Human rights law must be united with trade law because trade law does not exist independently of the individuals whom it affects. Professor Nussbaum argues that economic, social, and legal institutions often treat women as a means to an end.²⁰ Women are treated as a means of generating the end products of trade, rather than as ends in their own rights.²¹

When a woman is regarded as a means to some end, her capabilities as a human being are not realized.²² Human capability is measured by

16. The author is not aware of any panel or Appellate Body reports under current WTO jurisprudence that advocate this procedure.

17. See *India—Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, Report of the Panel, WT/DS90/R, para. 5.114 (Apr. 6, 1999) [hereinafter *India Quantitative Restrictions Panel*]. But see *India-Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, Report of The Appellate Body, WT/DS90/AB/R, para. 18 (Aug. 23, 1999) (noting that the Panel did not conclude that the competence of panels to review balance-of-payments restrictions is “unlimited”).

18. See discussion *infra* text accompanying notes 33–38.

19. See discussion *infra* text accompanying notes 72–79.

20. See MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT* 5–6, 70–80 (2000).

21. See *id.* at 5–6 (paraphrasing language of Professor Nussbaum); Ontiveros, *supra* note 5, at 31 (explaining that in contingent employment arrangements the employer values only what the worker produces and places no emphasis on the individual’s contribution or connection to the enterprise).

22. NUSSBAUM, *supra* note 20, at 5–6, 70–86.

what a person is actually able to do and to be.²³ Certain functions are particularly central in human life, in the sense that their presence or absence is typically understood to be a mark of the presence or absence of human life.²⁴ To do these functions in a truly human way, and not in a merely animalistic way, is what it means to be human and to possess human dignity.²⁵ Professor Nussbaum argues that the ultimate political goal of a nation is the promotion of these capabilities above a certain threshold level for each and every person in the nation.²⁶

Human capabilities should be a priority in international human rights law.²⁷ Human capabilities should be promoted as “general principles.” In international law, “general principles” are derived from common principles in national legal systems.²⁸ Similarly, a list of human capabilities to be protected could be derived from national legal systems and agreed to by international consensus.²⁹ This list of human capabilities would then be juristically defined as general principles of international law. The WTO judicial bodies and the member states would then be able to invoke these general principles in addition to the GATT treaty and WTO jurisprudence.³⁰ Thus, a nation could justify

23. *Id.* at 5.

24. *See id.* at 71–72.

25. *See id.* at 72–73 (providing an example put forth by Marx: a starving individual does not eat food in a fully human way; rather, the individual grabs at the food like an animal does in order to survive).

26. *Id.* at 5, 74.

27. The traditional sources of international law are: international conventions or agreements, custom, general principles of law common to the major legal systems of the world, the judicial decisions and teachings of distinguished writers, and peremptory norms of international law (*jus cogens*). *See* Statute of the International Court of Justice, Oct. 24, 1945, 59 T.S. No. 933, 3 Bevens 1153, art. 38(c) (listing “general principles” as a primary source of international law). *But see* American Law Institute, *Restatement (Third) of Foreign Relations Law* § 102(2) (1987) (listing “general principles” as supplementary rules). This paper has chosen to follow Professor Nussbaum’s suggestion not to use the language of “rights” when discussing human rights under international law. Professor Nussbaum suggests not using the language of “rights” because people differ on the theoretical makeup of rights. Instead, rights can be understood as “combined capabilities.” A human right is a combination of the political right to do or to be something and the capability to realize that right. For example, a nation’s laws may guarantee the right of free speech, but a woman may not be able to exercise that right if she is threatened with violence every time she leaves her home. *See id.* at 96–101.

28. Historically, general principles have been characterized as “gap-fillers,” to be used only when there is no treaty- or custom-based law. *See* MARK W. JANIS, *AN INTRODUCTION TO INTERNATIONAL LAW* 55 (1993).

29. *See* NUSSBAUM, *supra* note 20, at 104.

30. Professor Nussbaum believes that “[w]here particularly egregious violations of human dignity and personhood are at issue, it seems appropriate for nations to use economic and other strategies to secure compliance [with general principles of human capabilities].” *Id.*

taking trade measures to protect women by referring to general principles of international law.

Ideally, human capabilities should be characterized and promoted as peremptory norms. Peremptory norms are obligations from which derogation is not permitted. Peremptory norms can invalidate any other source of international law and can only be invalidated themselves by a subsequent peremptory norm.³¹ Peremptory norms give rise to obligations *erga omnes* in which states are held to have a legal interest in the protection of obligations to the international community as a whole.³² If the protection of a human capability attains the status of a peremptory norm, international law would not permit the WTO and Member States to derogate from that norm.

In addition, the WTO should defer to interpretations of human rights law by other tribunals. The WTO Appellate Body has shown a willingness to be deferential to interpretations of other tribunals. In the *Bananas* case, the Appellate Body agreed with the panel that the WTO should give deference, albeit limited, to the Lome Convention.³³ The Appellate Body determined that because the Contracting Parties to the GATT had incorporated a reference to the Lome Convention and the Lome Waiver, the WTO should examine the provisions of the Lome Convention independently of the European Communities insofar as it is necessary to interpret the Lome Waiver.³⁴ In other words, the Appellate Body declined to accept the European Communities' interpretation of the Lome Convention and the Lome Waiver but agreed that it must nevertheless interpret and defer to the text of the Convention and Waiver. Although this Appellate Body report suggests that the WTO does not need to be deferential to interpretations by other institutional spaces, such as the European Communities, it is important to note that the Appellate Body does not specifically address whether the WTO should be deferential to interpretations by other tribunals.³⁵

31. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 53, U.N. Doc. A/CONF.39/27, *reprinted in* 63 AM. J. INT'L L. 875 (1969).

32. Case Concerning the Barcelona Traction, Light and Power Co., Ltd. (Belgium v. Spain), 1970 I.C.J. 4, paras. 33–34 (Feb. 5, 1970).

33. See European Communities-Regime for the Importation, Sale and Distribution of Bananas, Report of the Appellate Body, Sep. 9, 1997, WT/DS27/AB/R [hereinafter *Bananas*]. The Lome Convention is a European Union agreement setting up a preferential trading arrangement for developing countries. See Fourth Lome Convention, African, Caribbean, and Pacific States—European Community, Dec. 15, 1989, art. 4, 29 I.L.M. 783; Raj Bhala, *The Bananas War*, 31 MCGEORGE L. REV. 839, 849 (2000).

34. See *Bananas*, para. 167 (quoting language from the panel report).

35. At least one panel has been willing to defer to interpretations by other institutional spaces. See United States—Section 110(5) of the U.S. Copyright Act, Report of the Panel, WT/DS160/R, paras. 6.47–6.55, 6.60–6.66 (June 15, 2000) (deferring to the state practice of and the interpretation by members of the Berne Convention when evaluating whether the

Moreover, in *Bananas*, the Appellate Body seemed to imply that the WTO could be deferential to the rules in other international law regimes insofar as the rules are somehow incorporated in the GATT itself and do not conflict with the object and purposes of the GATT. In particular, the Appellate Body declined to debate the existence of two separate regimes for regulating tariffs, emphasizing that the actual issue before it was whether the European Communities were permitted to use the other alleged regime in order to escape the non-discrimination requirements of the GATT.³⁶ The Appellate Body reasoned that “[i]f, by choosing a different legal basis for imposing import restrictions, or by applying different tariff rates, a Member could avoid the application of non-discrimination provisions to the imports of like products from different Members, the object and purpose of the non-discrimination provisions would be defeated.”³⁷

Where other institutions are more sensitive to gender issues than the WTO, the WTO should be deferential to other institutions’ less gendered interpretations. While it is not the purpose of this Note to determine which institutions are more responsive to women’s issues, regimes to whom the WTO could defer include the International Labour Organization (ILO) and the North American Agreement on Labor Cooperation (NAALC), a side agreement of the North American Free Trade Agreement (NAFTA). The ILO in particular continues to champion its original mandate of improving workers’ conditions, including women workers, and of advocating domestic adoption of the principle of equal remuneration for equal work.³⁸ The NAALC requires Member States to NAFTA to enforce their domestic labor laws.³⁹ Implicit in this

Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) incorporates the implied exceptions in the Convention).

36. See *id.* paras. 189–90.

37. *Id.* para. 190.

38. See generally Adelle Blackett, *Whither Social Clause? Human Rights, Trade Theory and Treaty Interpretation*, 31 COLUM. HUM. RTS. L. REV. 1, 65–66, nn. 266–67 (1999); International Labour Organization, *Bureau for Gender Equality*, <http://www.ilo.org/public/english/bureau/gender> (last modified Dec. 5, 2000); International Labour Organization, *Gender Promotion Programme*, <http://www.ilo.org/public/english/employment/gems/> (last modified Nov. 28, 2000). Since the ILO has from its inception championed the cause of workers generally, including the plight of women workers, it could be argued that the ILO possesses greater specialization and, consequently, competency and legitimacy in addressing issues relating to women workers. See generally Steve Chamovitz, *Trade, Employment and Labour Standards: The OECD Study and Recent Developments in the Trade and Labour Standards Debate*, 11 TEMP. INT’L & COMP. L. J. 131, 158–63 (1997) (arguing that the ILO is a better forum than the WTO to address issues of labor rights because the ILO is specialized and competent).

39. See North American Agreement on Labor Cooperation, Sept. 14, 1993, Can.-Mex.-U.S., art. 11(1)(m), 32 I.L.M. 1499 (1993).

requirement is that Member States are obligated to enforce their laws on gender discrimination and sexual harassment in the workplace.

The WTO should further defer to the jurisprudence of human rights courts that are sensitive to gender issues. The WTO Appellate Body has shown that it is willing to be deferential to rules in other regimes. In the *E.C. Hormones* decision, the WTO Appellate Body declined to determine if the “precautionary principle”⁴⁰ had crystallized into customary international law.⁴¹ In particular, the Appellate Body noted that prominent international legal scholars had not yet reached consensus on the issue.⁴² In addition, the Appellate Body declared in dictum that the precautionary principle “finds reflection” in Article 5.7 of the Agreement on the Application and of Sanitary and Phytosanitary Measures (“SPS”), but that it is not directly written into the SPS as a ground for justifying a measure that otherwise violates the SPS. However, the Appellate Body noted, also in dictum, that this provision does not exhaust the relevance of the precautionary principle for the SPS.⁴³

Thus, the Appellate Body is willing to acknowledge that customary international law or general principles of law may be relevant provided there is a textual reference to the custom or principle in a trade agreement. In *E.C. Hormones*, the Appellate Body implied that textual words in the SPS that embody or allude to the precautionary principle were not enough to justify exemption from the requirements of the SPS. As the panel in *India Quantitative Restrictions* noted, “a precautionary principle cannot be introduced into a treaty provision on the ground that it is a customary principle of international law in the absence of a clear textual directive to

40. The “precautionary principle” in international environmental law refers to when governments take measures to protect against a potential environmental harm even if the scientific evidence linking a substance or activity to the harm in question is inconclusive or uncertain. For an excellent discussion of the WTO’s treatment of the “precautionary principle,” see Steve Charnovitz, *The Supervision of Health and Biosafety Regulation by World Trade Rules*, 13 TUL. ENVTL. L. J. 271, 288–90 (2000) [hereinafter Charnovitz, *Health and Biosafety*]. See also Kathleen A. Ambrose, *Science and the WTO*, 31 LAW & POL’Y INT’L BUS. 861, 861–68 (2000) (arguing that the precautionary principle operates as a trade barrier); Craig Thorn & Marinn Carlson, *The Agreement on the Application of Sanitary and Phytosanitary Measures and the Agreement on Technical Barriers to Trade*, 31 LAW & POL’Y INT’L BUS. 841, 841–54 (2000); J. Martin Wagner, *The WTO’s Interpretation of the SPS Agreement has Undermined the Right of Governments to Establish Appropriate Levels of Protection Against Risk*, 31 LAW & POL’Y INT’L BUS. 855, 858–59 (2000) (condemning the WTO’s treatment of the precautionary principle in *E.C. Hormones* and advocating that governments should be allowed to invoke the precautionary principle as a defense).

41. See *E.C. Measures Concerning Meat and Meat Products (Hormones)*, Report of the Appellate Body, WT/DS26/AB/R para.123 (Jan. 16, 1998) [hereinafter *E.C. Hormones*].

42. See *id.*

43. See *id.* para. 124; Charnovitz, *Health and Biosafety*, *supra* note 40, at 288–90.

do so.”⁴⁴ Nevertheless, the Appellate Body in *E.C. Hormones* was willing to acknowledge that the precautionary principle may already be in the process of becoming customary international law or a general principle of international law. By negative inference, the Appellate Body seemed to be saying that if a rule or principle had acquired a sufficiently high status it could even trump treaty law.⁴⁵

What is unclear is what level of status would a rule or principle need to attain in order to trump treaty law. In a footnote in *E.C. Hormones*, the Appellate Body noted that, in a case between Czechoslovakia and Hungary, the I.C.J. had also recognized that new norms and standards have been developed in the field of environmental protection.⁴⁶ The Appellate Body further noted that the I.C.J. did not identify the precautionary principle as one of those recently developed norms and that it also declined to declare that such a principle could override the obligations of the treaty between Czechoslovakia and Hungary.⁴⁷ Although under international law, custom and general principles cannot trump the GATT because it is a treaty, the WTO should still defer to custom and general principles and must defer to peremptory norms in its application and evaluation of the public morals exception.

II. PROTECTING WOMEN’S RIGHTS UNDER THE TEXT OF ARTICLE XX

Article XX lists several particular circumstances in which a contracting party to the GATT may implement trade restrictions.⁴⁸ Member countries may take trade measures for specific reasons, such as refusing to trade in products made from slave labor. Measures can also be taken for more general reasons, such as refusing to trade in products that contravene public morals. A nation may apply trade measures to protect its nationals or to protect the nationals of the nation against whom the trade measure is directed. The chapeau (preamble) of Article XX limits use of such trade measures, forbidding member countries from applying Article XX in a manner that constitutes a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. As interpreted by Feddersen, Article XX creates a two part test, in which an

44. *India Quantitative Restrictions Panel*, *supra* note 17, art. 3.189. For similar language, see *Japan—Measures Affecting Agricultural Products*, Report of the Appellate Body, WT/DS76/AB/R (Feb. 22, 1999).

45. I owe this insight to Professor Robert Howse.

46. See *E.C. Hormones*, *supra* note 41, at n.93.

47. See *id.*

48. GATT, *supra* note 1, art. XX(a)–(j).

action taken by a contracting party must first be a measure under one of subparagraphs (a)–(j) and then meet the additional requirements of the chapeau.⁴⁹

Trade measures designed to protect women can be justified by the text of Article XX under two approaches. First, measures taken to protect women can be justified under the more specific categories in Article XX, such as the exception for environmental protection in Article XX(g). Second, measures to protect women can be justified under the public morals exception in Article XX(a). In particular, the public morals exception in Article XX(a) should be interpreted in light of evolving international law on women's rights and rights related to gender. Protecting women under the public morals exception will not open a floodgate of claims under the exception; claims under this exception are limited by the specific language of Article XX(a) and by the chapeau in Article XX.

Article XX should be interpreted broadly. In the *Turtles* decision, the Appellate Body seemed receptive to a broad interpretation of Article XX. The *Turtles* case involved complaints lodged against an attempt by the United States to protect sea turtles. The United States sought to protect the sea turtles by prohibiting the importation of certain shrimp and shrimp products under Section 609 of the Public Law 101–162.⁵⁰ India, Pakistan, and Thailand argued that sea turtles did not constitute an “exhaustible natural resource” under Article XX(g).⁵¹ These nations argued that a “reasonable interpretation” of “exhaustible” is that the term refers to finite resources such as minerals, rather than biological or renewable resources.⁵² They also noted that, in the drafting history of Article XX(g), some delegations had referred specifically to minerals as scarce natural resources.⁵³ The Panel first evaluated the trade measure under the chapeau and thus did not determine whether sea turtles constitute an exhaustible natural resource under paragraph (g).⁵⁴

The Appellate Body rejected the Panel's “chapeau-down” approach, and determined that the United States' actions served a legitimate, environmental objective under XX(g).⁵⁵ In doing so, the Appellate Body noted that modern science has shown that living creatures can be

49. Christoph T. Feddersen, *Focusing on Substantive Law in International Economic Relations: The Public Morals of GATT's Article XX(a) and “Conventional” Rules of Interpretation*, 7 MINN. GLOBAL TRADE 75, 92 (1998). This Note applies Feddersen's approach.

50. See generally *Turtles*, *supra* note 3.

51. See *id.* para. 127.

52. See *id.*

53. See *id.*

54. See *id.*

55. See *id.* paras. 127, 186.

“exhaustible resources.”⁵⁶ Most importantly, the Appellate Body held that the meaning of Article XX(g) (“conservation of exhaustible natural resources”) could be interpreted in light of developments in international environmental law.⁵⁷ The Appellate Body observed that “[t]he words of Article XX(g), ‘exhaustible natural resources,’ were actually crafted more than 50 years ago . . . [and] must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment.”⁵⁸

The Appellate Body concluded that the signatories to the GATT recognized the legitimacy of environmental protection because the preamble to the 1994 WTO Agreement explicitly refers to the objective of “sustainable development.”⁵⁹ The preamble states:

[R]elations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding production of and trade in goods and services, while allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development. . . .⁶⁰

The Appellate Body determined that the reference to “natural resources” in Article XX(g) is “evolutionary,” not “static,” and should be read in light of recent international law.⁶¹ Since many modern international conventions and declarations refer to natural resources as embracing both living and non-living resources, the Appellate Body determined that it is “too late in the day” to suppose that Article XX(g) may be read as referring only to the conservation of exhaustible mineral or non-living natural resources.⁶²

However, after concluding that sea turtles are “exhaustible natural resources” and that the U.S.’s measure falls under the ambit of Article XX(g), the Appellate Body determined that the measure violated the requirements of the chapeau of Article XX.⁶³ Specifically, the Appellate

56. *See id.* para. 128.

57. *See id.* para. 129.

58. *Id.*

59. *See id.*

60. *Id.*

61. *See id.* para. 130.

62. *See id.* paras. 130–31.

63. *See id.* para. 186.

Body determined that the measure had been applied in a manner that constituted arbitrary and unjustifiable discrimination.⁶⁴

If the protection of women is part of the evolving international law on the protection of the environment, a WTO member might be able to justify measures taken to protect women under Article XX(g). The United Nations' Beijing Declaration suggests that the eradication of poverty and its particular burden on women should be based not only on sustainable development but also on environmental protection.⁶⁵ Thus, if the WTO were to follow its commitment in *Turtles* to interpret Article XX(g) in light of evolving environmental law, a trade measure to protect women might be justified under this paragraph.

If the WTO is unwilling to "stretch" international environmental law to protect women or if the WTO believes that such a connection has not yet crystallized into hard international law, a member might be able to justify such measures under the public morals exception in Article XX(a). To do so, the public morals exception should be interpreted broadly to include evolving international law on women's rights and rights related to gender.⁶⁶

The public morals exception operates as a catch-all for measures that do not squarely fit under any of the other exceptions in Article XX. For example, Article XX(e) pertains only to products of prison labor. According to the negotiating history of the GATT, the prison labor exception was intended to be specific and was not meant to include other forms of "prohibited" labor.⁶⁷ In other words, the drafters of the GATT

64. See *id.*

65. See John Lee, *The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law*, 25 COLUM. J. ENVTL. L. 283, 329-31 (2000) (arguing that environmental concerns are linked to women's rights through the effects of poverty on women and that such a linkage has been recognized through several conferences and declarations of the United Nations, including the Beijing Declaration and Platform for Action, the Rio Declaration and Agenda 21, and the Vienna Declaration); see also *Beijing Declaration and Platform for Action*, Fourth World Conference on Women, 16th Sess., U.N. Doc. A/CONF.177/20 (1995), U.N. Doc. A/CONF.177/20.Add.1 (1995), reprinted in 35 I.L.M. 401 (addressing how women will be incorporated into the goals of sustainable development) [hereinafter *Beijing Declaration*].

66. See Robert Howse, *The World Trade Organization and the Protection of Workers' Rights*, 3 J. SMALL & EMERGING BUS. L. 131, 142-45 (1999) (arguing that an interpretation of the public morals exception as including labor rights might be based on evidence of international law's evolving concern with the social dimensions of trade) [hereinafter *Howse, Workers' Rights*].

67. See Steve Charnovitz, *The Influence of International Labour Standards on the World Trading Regime: A Historical Overview*, 126 INT'L LAB. R. 565, 570-71 (1987). In 1927, a League of Nations conference agreed to exempt import prohibitions applying to prison-made goods. In 1947, this exemption was then included in Article XX(e) of the GATT. The United States tried unsuccessfully on three occasions to expand the prohibition on prison labor to include express limitation on "involuntary" forms of labor. *Id.* See also

included the prison labor exception in order to emphasize that members could take measures against others who engaged in the particular evil of prison labor. Perhaps, the drafters felt that other practices, such as slave labor, were so universally prohibited that there would be so few or no incidents of members engaging in such practices.⁶⁸ This prohibition on the products of prison labor can be viewed as a “carve out” from the general prohibition on goods made in contravention to public morals.

When Article XX was drafted, the plight of women in the international economic order had not yet been recognized and thus, no specific provision for the protection of women was included. However, just as other prohibited labor practices (e.g., indentured child labor)⁶⁹ fall under the catch-all of the public morals exception,⁷⁰ so should prohibited labor practices concerning women.

Moreover, Article XX(a) should be interpreted in light of the preamble of the WTO Agreement. While there is no explicit reference to women’s rights in the WTO preamble, there is a reference to achieving the goal of “sustainable development.” The goal of “sustainable development” includes the betterment of women.⁷¹ Assuming sustainable development is a goal worth protecting, measures taken to protect women’s development can be justified under the public morals exception as being in line with the preamble’s goal of sustainable development. What is unclear is whether measures taken to protect women in order to achieve the goal of sustainable development should be limited only to economic development.

Using the public morals exception would not open a floodgate of sanctions. Article XX(a) uses the words “necessary to” when describing the protection of public morals. Other exceptions in Article XX use the words “relating to,” “in pursuance of,” “essential,” “for the protection

Steve Charnovitz, *Fair Labor Standards and International Trade*, 20 J. WORLD TRADE 61, 62–67 (1986) (providing a historical overview of American policies linking international fair labor standards with trade).

68. See Charnovitz, *Moral Exception*, *supra* note 2, at 705–10 (providing references to numerous anti-slavery treaties prohibiting trade for moral reasons, which pre-dated the negotiating history of the GATT).

69. Diller and Levy propose that well-established rules of international law compel the harmonization of international trade rules with international labor and human rights norms that prohibit the most exploitative, or extreme, forms of child labor. In particular, the authors argue that obligations under the multilateral trade regime can be interpreted and implemented in light of either higher values, represented by peremptory norms of customary international law, or common commitments, where parties to international trade obligations are also bound by international human rights and labor law. Janelle M. Diller and David A. Levy, *Note and Comment: Child Labor, Trade and Investment: Toward the Harmonization of International Law* 91 AM. J. INT’L L. 663 (1997).

70. See Charnovitz, *Moral Exception*, *supra* note 2, at 696–97.

71. See *Beijing Declaration*, *supra* note 65, at 401.

of,” or “involving.” As the Appellate Body noted in the *Reformulated Gasoline* decision, the drafters of Article XX probably did not intend to require, in respect to each and every category, the same kind or degree of connection between the measure under appraisal and the state interest or policy sought to be promoted or realized.⁷² Most likely, the exception categories using the words “necessary to” require that the measure taken be tailored for a particular issue.

In contrast, the words “relating to” suggest that the measure taken may be in conjunction with other measures taken. Thus, broader measures would be more easily justified if they were to fall under an exception with the language “relating to” than with the language “necessary to.” Consequently, a nation invoking the public morals exception would still need to show that the trade measure taken was more than related to some aim but that it was perhaps the only effective manner in which to achieve that aim. This would prevent a flood of claims under the public morals exception because the claims would need to be more narrowly tailored than claims under other exceptions.

In addition, the chapeau of Article XX will prevent a flood of measures taken under the public morals exception. As previously discussed, after a measure has been classified as one of the enumerated exceptions under Article XX, it must satisfy the requirements of the chapeau of Article XX. The chapeau states that the application of any measure justified under Article XX must not constitute “a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.”⁷³

In the *Turtles* decision, the Appellate Body explained “unjustifiable discrimination” as relating to the even-handedness with which measures are applied, taking into account the conditions existing in different nations.⁷⁴ The Appellate Body then explained that “arbitrary discrimination” occurs when sanctions are applied in a manner that does not respect due process and transparency requirements.⁷⁵ While the Appellate Body has not yet addressed the meaning of “a disguised restriction on international trade,” Professor Howse suggests that it is “an amplification of some dimensions of the prohibition of ‘arbitrary discrimination,’ particularly the concern for transparent and rules-based application of measures.”⁷⁶

72. See United States-Standards for Reformulated and Conventional Gasoline, Report of the Appellate Body, WT/DS2/AB/R (Apr. 29, 1996) [hereinafter *Reformulated Gasoline*].

73. GATT, *supra* note 1, art. XX.

74. See *Turtles*, *supra* note 3, para. 161–76; Howse, *Workers’ Rights*, *supra* note 66, at 145.

75. See *Turtles*, *supra* note 3, para. 161–76; Howse, *Workers’ Rights*, *supra* note 66 at 145.

76. Howse, *Workers’ Rights*, *supra* note 66, at 145.

Thus, a nation invoking the public morals exception would still need to prove that the measures in question do not amount to unjustifiable or arbitrary discrimination or a disguised restriction on international trade.

Professor Howse has argued that in the labor context, a measure might be considered “unjustified discrimination” not only if the measure were not applied equally to all countries with similar labor rights compliance problems, but also if the measure did not take into consideration the relevant special circumstances of certain countries.⁷⁷ For example, in the child labor context, an application of sanctions might be deemed as “unjustified discrimination” if directed at the traditional, non-exploitive use of underage workers in small, family-based agriculture.⁷⁸

In the context of the situation of female labor, it could be argued that a sanction might be considered “unjustified discrimination” if it were aimed at the “non-exploitative” use of women’s labor. For example, it might be “unjustified discrimination” to target a nation which provides government-run programs to encourage women, and only women, to become nurses. While nursing in America is deemed an underpaid “women’s profession,” such an educational program might be considered progressive in a nation that generally lacks female workers in the medical profession.

However, there are actions that a nation takes that cannot be justified as cultural relativism. For example, slavery is universally understood in international law to be prohibited; the prohibition on slavery is a peremptory norm or *jus cogens*. Although slavery is not enumerated as an exception in Article XX, it falls under the public morals exception. Assuming a trade measure taken falls squarely under Article XX, the targeted nation might still argue that the initiating nation has unjustifiably discriminated against it. The targeted nation might argue that, due to a severe drought, it has to “force” people to work so as not to throw the nation into an economic depression. The targeted nation might further argue that even if such forced work constitutes slavery, it is nevertheless allowable in this situation; and, thus, any trade measure taken against the nation because of its policy of forced labor would constitute unjustifiable discrimination.

Yet, even if targeting this nation constitutes discrimination, the discrimination would be justified because the nation has violated a peremptory norm. If a nation violates a peremptory norm, that nation’s particular circumstances do not need to be taken into consideration. In addition, if the trade measure were taken to protect a peremptory norm,

77. *See id.*

78. *Id.*

the initiating nation would not be subject to the chapeau requirement that the trade measure not be “unjustified.”

Thus, the text of Article XX and, in particular, the public morals exception, can be used to justify trade measures to protect women.

III. MEASURES TO PROTECT WOMEN THAT SHOULD BE JUSTIFIED UNDER ARTICLE XX(a)

This Note attempts to show that issues concerning women can and should be incorporated into the WTO regime and that trade measures to protect women can be justified under the public morals exception. Before providing examples of how to use the public morals exception to protect women’s rights, it is necessary to distinguish between the different types of trade measures.

Charnovitz has divided trade measures into those that are “outwardly-directed” and those that are “inwardly-directed.”⁷⁹ Outwardly-directed trade measures are used to protect the morals of foreigners residing outside one’s own country, while inwardly-directed trade measures are used to protect the morals of people in one’s own nation.⁸⁰ Outwardly-directed trade measures can be aimed at a particular practice within the targeted nation or enacted for general human rights reasons.⁸¹ Depending on the circumstances, export and import bans can be categorized as outwardly-directed, inwardly-directed, or a combination thereof.⁸²

A number of trade measures can be justified under the public morals exception that are not justified under any other exception in Article XX. One outwardly-directed moral purpose of trade measures is to protect foreign workers.⁸³ A nation could justify restrictive trade measures aimed at protecting female workers in foreign countries. Given that the Article XX(e) exception is restricted to prison labor, labor practices which adversely affect women, but do not fall under this exception,

79. See Charnovitz, *Moral Exception*, *supra* note 2, at 695 (providing specific examples of “outwardly-directed” and “inwardly-directed” trade measures).

80. *Id.* Terms that have been employed to describe laws which seek to promote values in foreign nations are “extrajurisdictional” and “extraterritorial.” *Id.*

81. See *id.* at 694–99.

82. See *id.* at 695–96.

83. For example, in 1997, the U.S. Congress passed a law forbidding the importation of products made by forced or indentured children labor. As discussed above, this trade measure is not covered by Article XX(e) because that exception applies only to the products of prison labor. See *id.* at 696; see also Treasury and General Government Appropriations Act, 1998, Pub. L. No. 105-61, § 634, 111 Stat. 1272, 1316 (1997); Diller & Levy, *supra* note 69, at 682, 688–89.

could be covered under the public morals exception. In particular, the United States could use the public morals exception to justify a policy of restricting imports from a nation engaging in the specific practices of unequal wages for equal work, resistance to unionization, pregnancy discrimination, sexual discrimination in hiring, sexual harassment, and/or rape in the workplace.

In addition, the United States could use the public morals exception to justify enacting trade measures for general human rights reasons, such as preventing the importation of goods from a nation that engages in human rights abuses of women. Trade measures could be employed to object to domestic violence, female genital mutilation, bride-burning, forced abortions or sterilization, forced marriages, female infanticide, prostitution, and trafficking in women.

While some human rights abuses may fall under Article XX(b) (“necessary to protect human, animal, or plant life or health”), it is not readily apparent that all human rights abuses against women would fall under this exception. For example, the denial of women’s property rights may be more appropriately addressed under the public morals exception. The denial of property rights does not present an immediate threat to human life or health but it does affect the ability of women to exercise other human capabilities. As Kurshan has explained,

Inequality in property rights is a major hindrance to correcting internationally recognized problems women face such as generally inferior economic status, domestic violence, and female genital mutilation. Without property rights, it is difficult for women to be individual economic actors. In order to survive, people who are not economic actors must attach themselves to people who are. In that situation, it is difficult, if not impossible, for a woman to exercise any right in a way that risks estranging her from that economic actor. This reality keeps women in an inferior position within marriages, families, and society.⁸⁴

Moreover, the denial of women’s property rights violates international conventions, such as the Inter-American Convention on Human Rights, which covers nations in the Organization of American States

84. Leslie Kurshan, *Rethinking Property Rights as Human Rights: Acquiring Equal Property Rights for Women Using International Human Rights Treaties*, 8 AM. U. J. GENDER SOC. POL’Y & L. 353, 357–58 (2000) (describing discriminatory practices and provisions in nations of the Organization of American States which deprive women of their property rights but which could be challenged by women under international human rights law).

("OAS").⁸⁵ For example, in many countries within the OAS, women do not have equal property rights in law or in practice.⁸⁶ Thus, if the United States believes that a nation within the OAS is not improving its female citizens' access to equal property rights, the United States could justifiably pressure that nation into improving access by enacting restrictive trade measures against it under the public morals exception.

CONCLUSION

In conclusion, WTO member nations are legally allowed under the public morals exception to take restrictive trade measures against nations that violate women's rights. Most importantly, given the poverty, discrimination, and violence that women currently face, WTO members should take restrictive trade measures against nations that violate women's rights.

85. See *id.* at 358; American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123, arts. 1-2, 21, 24, 25. The following nations are parties to this Convention: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Surinam, Trinidad and Tobago, Uruguay, and Venezuela.

86. See Kurshan, *supra* note 84, at 358.