

Not Just Sea Turtles, Let's Protect Women Too: Invoking Public Morality Exception or Negotiating a New Gender Exception in Trade Agreements?

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Abstract

The most common provisions we find in almost all multilateral, regional and bilateral trade agreements are the exception clauses that allow countries to protect public morals, humans, animals or plant health and life and conserve exhaustible natural resources. If countries can allow trade-restrictive measures that aim to protect these non-economic interests, is it possible to negotiate a specific exception to justify measures that are aimed at protecting women's economic interests as well? Is the removal of barriers that impede women's participation in trade any less important than the conservation of exhaustible natural resources such as sea turtles or dolphins? In that context, this article prepares a case for the inclusion of a specific exception that can allow countries to leverage women's economic empowerment through international trade agreements. This is done after carrying out an objective assessment of whether a respondent could seek protection under the existing public morality exception to justify a measure that is taken to protect women's economic interests.

1 Introduction

The COVID-19 pandemic has exacerbated existing inequalities between women and men in almost all aspects of life. It has put women employees, women entrepreneurs and women consumers at the frontline of this struggle due to various reasons.¹ First, with 30 per cent of the female workforce employed in service-based industries, women are experiencing a serious loss

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¹ T. Alon *et al.*, 'The Impact of COVID-19 on Gender Equality', NBER Working Paper no. 26947 (2020); United Nations Population Fund, COVID-19: A Gender Lens, Technical Brief Protecting Sexual and Reproductive Health and Rights, and Promoting Gender Equality (2020), available at www.unfpa.org/resources/covid-19-gender-lens.

of employment in pandemic-inflicted service sectors such as tourism and hospitality.² Second, women working in informal sectors (such as street vendors, petty goods and services' traders, subsistence farmers, seasonal workers, domestic workers and so on) are either putting their lives at risk as they continue to venture out to work or they are losing their sources of revenue due to the lockdown restrictions.³ Third, the pandemic is disrupting the economic activities of women that own or work in small- and medium-sized enterprises (SMEs) as they are forced to close or scale down their operations.⁴ Fourth, the situation is further exacerbating the existing digital disparities between women and men.⁵ This implies that working remotely (in an online mode) is either not an option for some women with no access to laptops, smartphones and Internet or they have to face a steep learning curve and break the structural barriers to work online.⁶ This growing disparity also implies that women cannot take advantage of the booming digital trade transformation that provides new avenues for economic empowerment. Moreover, owing to fears of contagion and loss of income, this pandemic is reducing women's access to medical services that include family planning and maternity services.⁷ Other reasons why women are disproportionately affected may include a massive increase in household responsibilities⁸ and an increasing rate of domestic violence against women.⁹

The post-pandemic world will require multiple interventions at the domestic and international levels to repair this harm. International trade can form an important part of this

² J. Faus, *This Is How Coronavirus Could Affect the Travel and Tourism Industry* (2020), available at www.weforum.org/agenda/2020/03/world-travel-coronavirus-covid19-jobs-pandemic-tourism-aviation/; United Nations Educational, Scientific and Cultural Organization, COVID-19 Educational Disruption and Response (2020), available at <https://en.unesco.org/covid19/educationresponse>.

³ UN Women, *Women in Informal Economy* (accessed, 25 May 2021), available at www.unwomen.org/en/news/in-focus/csw61/women-in-informal-economy.

⁴ Ahmed *et al.*, 'Filling the Gap: How Technology Enables Access to Finance for Small- and Medium-Sized Enterprises' 10(3-4) *MIT Press Journal* (2015) 35, available at www.mitpressjournals.org/doi/pdf/10.1162/inov_a_00239; Organisation for Economic Co-operation and Development (OECD) Working Party on SMEs and Entrepreneurship, *SME Policy Responses* (2020), available at https://read.oecd-ilibrary.org/view/?ref=119_119680-di6h3qgi4x&title=Covid-19_SME_Policy_Responses (empirical research finds that, due to COVID-19, more than half of small- and medium-sized enterprises (SMEs) now already face severe losses in revenues, with many having only a few months' reserves to withstand the crisis).

⁵ P. Mlambo-Ngcuka and A.-B. Albrechtsen, 'Op-ed: We Cannot Allow COVID-19 to Reinforce the Digital Gender Divide' (2020), available at www.unwomen.org/en/news/stories/2020/5/op-ed-ed-phumzile-covid-19-and-the-digital-gender-divide.

⁶ World Trade Organization (WTO), *The Economic Impact of COVID-19 on Women in Vulnerable Sectors and Economies* (2020), available at www.wto.org/english/tratop_e/covid19_e/covid19_e.htm.

⁷ A. Peterman *et al.*, 'Pandemics and Violence against Women and Children', Center for Global Development, Working Paper no. 528, April 2020, available at www.cgdev.org/sites/default/files/pandemics-and-violence-against-women-and-girls.pdf.

⁸ Doepke and Kindermann, 'Bargaining over Babies: Theory, Evidence, and Policy Implications', 109(9) *American Economic Review* (2019) 3264, available at www.aeaweb.org/articles?id=10.1257/aer.20160328 (the authors observe that women provide the majority of childcare even if both spouses are working).

⁹ UN Women, *Infographic: The Shadow Pandemic – Violence against Women and Girls and COVID-19* (2020), available at www.unwomen.org/en/digital-library/multimedia/2020/4/infographic-covid19-violence-against-women-and-girls.

recovery. International trade law and policies can participate in this process as they can contribute to women's empowerment. 'Empowerment' is a contested concept. It can have different meanings depending upon different perspectives. In the context of gender equality, the term 'empowerment' or 'women's empowerment' refers to a 'socio-political concept that involves cognitive, psychological, economic and political dimensions'¹⁰. This article seeks to focus on measures that relate to, or may directly impact, the economic dimension, which entails women's access to economic opportunities that can increase their economic independence.¹¹

For the context of this study, the economic empowerment of women depends upon the non-existence of barriers that can directly impede women's access to productive resources and their overall participation in the economy. Such barriers relate to the denial of economic rights such as a lack of access to productive resources including property and finance.¹² In Bahrain, for instance, the law designates the husband as the head of the family and requires the wife to obtain permission from her husband for tasks such as opening a bank account or registering a business.¹³ In Chad, Guinea-Bissau and Niger, married women need their husband's permission to open a bank account.¹⁴ Without owning a bank account, women cannot engage in financial transactions. They also cannot build a track record of their credit worthiness. Without a track record of their credit worthiness, women cannot apply for capital. This barrier worsens for women in countries that still have in place men-favouring inheritance laws. According to

¹⁰ Stromquist, N. (1988) "Women's education in development: from welfare to empowerment." *Convergence*, 21(4): 5-17

¹¹ Addis Ababa, Gender Inequality and Women's Empowerment Ethiopian Society of Population Studies, In-depth Analysis of the Ethiopia Demographic and Health Survey (2009).

¹² As per the World Bank's report *Women, Business and the Law 2016*, available at <http://documents.worldbank.org/curated/en/455971467992805787/Women-business-and-the-law-2016-getting-to-equal>, 90 per cent of the 173 studied countries have at least one law impeding women's access to economic. Approximately 50 per cent of the women in the world do not have bank accounts or access to other financial services. The International Finance Corporation estimates that as many as 70 per cent of women-owned SMEs in developing countries do not have access to financial institutions and services. International surveys have shown that women-led businesses have a much lower probability of obtaining credit and are charged a higher interest rate for loans if they get approved. Muravyev, Talavera and Schäfer, 'Entrepreneurs' Gender and Financial Constraints: Evidence from International Data', 37(2) *Journal of Comparative Economics* (2009) 270. Several other barriers may also impede women's participation in economy, albeit indirectly, and they entail the denial of social, cultural or familial rights; these barriers may include lack of access to education or health facilities, domestic violence, disproportionate household responsibilities and the subordination of gender and disproportionate household responsibilities. The denial of social rights may not directly present an immediate threat to a woman's ability to be employed or start a business, but it may put women a few steps farther from attaining economic independence. For example, women can be psychologically scarred due to increased domestic violence and household responsibilities; this could jeopardize their confidence or psychological set-up to succeed or progress in their professional endeavours. For details on barriers, see International Trade Centre, *Unlocking Markets for Women to Trade* (2015); World Bank Group and WTO, *Women and Trade: The Role of Trade in Promoting Gender Equality* (2020).

¹³ World Bank Group, *Women, Business and the Law 2019: A Decade of Reform* (2019), available at <https://openknowledge.worldbank.org/bitstream/handle/10986/31327/WBL2019.pdf?sequence=4&isAllowed=y>.

¹⁴ World Bank, *Women's Financial Inclusion and the Law* (2018), available at <http://pubdocs.worldbank.org/en/610311522241094348/Financial-Inclusion.pdf>.

Women, Business and the Law report, 33 countries have laws that do not provide the same inheritance rights for sons and daughters.¹⁵ Unequal inheritance rights limit women's access to start-up capital and other productive resources, therefore denying them effective access to business opportunities.

Multilateral, bilateral and regional trade agreements can play an instrumental role in enhancing women's economic empowerment.¹⁶ There are two key ways to use trade agreements in this respect. The first way is to mainstream gender considerations by including in the agreement's text those legal commitments that seek to reduce barriers that impede women's empowerment.¹⁷ The second way is to negotiate a specific gender exception or use an existing exception to justify a measure that is aimed at enhancing women's empowerment even though it may otherwise be legally inconsistent with trade agreements. This article will explore the second route – that is, the route that requires leveraging exceptions.

Through the first route of gender mainstreaming in free trade agreements (FTAs), countries can encourage their trade partners to create laws and procedures that can support women's participation in trade and commerce.¹⁸ Let us consider a few examples in this respect. In multiple trade agreements, the European Union (EU), Canada, Chile and others have

¹⁵ World Bank Group, *supra* note 13.

¹⁶ Rules contained in the WTO Agreements and preferential trade agreements are regarded by the International Law Commission (ILC) as 'specialized and (relatively) autonomous rules or rule complexes'. Koskenniemi, 'Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law', 2(2) *ILC Yearbook* (2006), ch. XII, para. 243. One may ask how these preferential and multilateral rules are compatible. The WTO allows its members to engage in regional integration arrangements through which it can grant more favourable conditions to its trade under specific conditions. As provided in the General Agreement on Tariffs and Trade 1994 (GATT), 55 UNTS 194, Art. XXIV:5, 'the provision of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area'. Specific conditions are provided in paragraphs 4–10 of Art. XXIV of the GATT, the Enabling Clause (that is, the 1979 Decision on Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries) and the General Agreement on Trade in Services 1994 (GATS), 1869 UNTS 183, Art. V. For more details, see Boklan, 'Eurasian Economic Union and World Trade Organization: Interrelation of Legal Regimes', 2 *Law Journal of the Higher School of Economics* (2017) 223. This means that free trade agreement (FTA) members have the right to impose rules that may be stronger than the rules of the WTO, including an obligation to enhance women's empowerment, about which the WTO's accords are completely silent. Moreover, parties to FTAs do not need to rely on the WTO's exceptions if they have a more relevant exception included in their FTA. However, most FTAs either incorporate by reference GATT exceptions into their texts or reproduce in their texts the wordings and content of GATT exceptions.

¹⁷ Gender mainstreaming provides a tool to ensure that FTAs do not perpetuate gender inequalities but, rather, promote more equitable opportunities. Mainstreaming gender in FTAs entails the inclusion of gender considerations and concerns in the drafting and implementation of FTAs. For more details, see International Trade Centre (ITC), *Mainstreaming Gender in Free Trade Agreements* (2020), available at www.intracen.org/uploadedFiles/intracenorg/Content/Publications/ITC%20Mainstream%20Gender_FTA_20200707_web.pdf; Bahri, 'Measuring the Gender-Responsiveness of Free Trade Agreements: Using a Self-Evaluation Maturity Framework', 14(11–12) *Global Trade and Customs Journal* (2019) 517, available at <https://kluwerlawonline.com/journalarticle/Global+Trade+and+Customs+Journal/14.11/GTCJ2019064>.

¹⁸ The expression 'free trade agreements' or 'FTAs' in this chapter is used to refer to all international trade agreements (except the WTO multilateral agreements) and may include regional trade agreements, plurilateral agreements, bilateral agreements, preferential agreements, economic partnership agreements and such others.

undertaken commitments to cooperate on increasing women's access to health services,¹⁹ education,²⁰ digital know-how²¹ and skill development.²² In the Canada-Israel trade agreement, parties seek to increase women's access to finance and other productive resources and encourage conditions for women-owned businesses to flourish by supporting the creation of business networks and improved infrastructure in relevant sectors and industries.²³ In United States-Mexico-Canada Agreement (USMCA), parties have provided for waivers and reservations to protect women employees and employers in selected industries.²⁴ These developments show that the lure of market access to important markets can be used to enhance gender equality through FTAs. However, almost no FTA so far contemplates how gender-related commitments could be implemented or enforced, and most of the gender equality considerations included in the existing agreements are drafted with non-mandatory verbs and 'soft' permissive grammatical constructions.²⁵

As of today, even the most advanced FTAs in respect of gender equality concerns such as the ones signed between Canada and Chile or by Canada and Israel do not clarify precise procedures for implementation of gender-related commitments, nor do they identify channels to finance these activities.²⁶ Moreover, almost all FTAs have explicitly and unambiguously excluded gender-related provisions and gender chapters from the application of their dispute settlement machineries. In the absence of applicable dispute settlement procedures, the enforcement of gender-related commitments remains a distant reality. This implies that a country's failure to comply with these obligations, commitments or affirmations has no direct consequence. The only exception is the Canada-Israel FTA, which provides (for the very first

¹⁹ Agreement Establishing an Association between the European Union and Its Member States, on the One Hand, and Central America on the Other 2013, OJ 2012 L 346, Art. 44. In Art. 44, parties seek to improve maternal health and address health priority areas such as sexual and reproductive health and the care for, and prevention of, sexually transmitted diseases and unwanted pregnancies.

²⁰ Modernized Canada-Chile Free Trade Agreement 1997 (signed 5 December 1996, entry into force 5 July 1997), ch. N-bis (contains commitments on improving educational or skill development opportunities in fields that can translate to high-paid job opportunities for women).

²¹ *Ibid.*

²² *Ibid.*; Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) 2018 (signed 8 March 2018, entry into force 30 December 2018), Art. 23.4.

²³ Modernized Canada-Israel Free Trade Agreement (Canada-Israel FTA) 1997 (signed 31 July 1996, entry into force 1 January 1997), ch. 13.

²⁴ United States-Mexico-Canada Agreement (USMCA) 2020 (signed 30 November 2018, entry into force 1 July 2020), Art. 32.5 (Reservation for Indigenous women (cross-border service) and the protection of women employees).

²⁵ Bhala and Wood, 'Two Dimensional Hard-Soft Law Theory and the Advancement of Women's and LGBTQ+ Rights through Free Trade Agreements', 47(2) *Georgia Journal of International and Comparative Law* (2019) 299, at 306 (authors points that most gender-related commitments in the USMCA, *supra* note 23, and the CPTPP, *supra* note 21, are aspirational and non-binding, and, hence, non-enforceable, and that they are sometimes drafted with vagueness and ambiguity, and so they are susceptible to myriad interpretations).

²⁶ As per the authors' calculations, using the ITC's maturity toolkit. ITC, *supra* note 16.

time) a binding dispute settlement procedure that is applicable to its chapter on trade and gender.²⁷ Unfortunately, this also seems to be a cosmetic attempt to provide for an enforcement mechanism as the parties have subjected the binding jurisdiction of this mechanism to their consent, making its jurisdiction non-compulsory in nature.²⁸ Hence, there is a half-opened door in FTAs that countries need to push upon further by finding different ways of implementing or enforcing their gender-related commitments.

The second route provides for an alternate way, wherein parties can escape the liability of violating their trade obligations under an existing or a particularly designed exception. Using this route, countries can employ gender-responsive measures that may otherwise contravene their obligations under trade agreements to which they are parties. These measures may especially become crucial or even indispensable during or in the post-pandemic world to revive and support certain industries that can have a considerable impact on women employees, entrepreneurs and consumers. This second route provides two alternate options. The first option for the countries that are keen to implement such measures is to justify these measures under Article XX(a) of the 1994 General Agreement on Tariffs and Trade (GATT); the second option is to craft a specific gender exception.²⁹ Under Article XX exceptions, World Trade Organization (WTO) members can restrict trade for a number of reasons, including for the protection of ‘public morals’. The public morals exception operates as a ‘catch-all’ exception for measures that do not squarely fit under any of the other exceptions.³⁰ This catch-all exception is found not only in the WTO’s agreements but also in nearly all FTAs.³¹ Hence, a country may invoke this exception in a multilateral, bilateral or regional trade dispute to argue that the imposition of a measure or a trade restriction to protect women’s economic interests amounts to the protection of the country’s moral interests. However, this is an ambitious interpretation of the morality exception, and such an expansive view of this exception comes with various associated challenges and risks.

Countries can face multiple challenges in relying on this exception to protect gender-related concerns; these challenges could include, but may not be limited to, meeting the requirements of chapeau and necessity and addressing the extraterritorial jurisdictional challenge and the absence of universally accepted definitions for ‘public morality’ or ‘women’s

²⁷ Canada-Israel FTA, *supra* note 22, ch. 13, 19

²⁸ *Ibid.*, Art. 13.6.

²⁹ GATT, *supra* note 15; GATS, *supra* note 15.

³⁰ Jarvis, ‘Women’s Rights and the Public Morals Exception of GATT Article 20’, 22(1) *Michigan Journal of International Law (MJIL)* (2000) 219.

³¹ Authors’ calculations; country-wise reports on record with the authors.

empowerment'. Moreover, a gender-considerate interpretation of the morality exception might allow countries to interfere in the domestic internal affairs of other countries and place limits on their ability to deal with matters relating to their social, political, economic, cultural and even religious affairs.³² This approach may be seen as an attempt to engage in 'cultural imperialism', as Article XX(a) could be used as a protectionist weapon to allow countries to impede foreign trade whenever they are able to find subjective reasons to raise moral objections. These moral objections can be raised in respect of a broad range of issues including a country's domestic legal system relating to labour rights, education system, anti-discrimination standards, health care provisions and so on. Using such a wide-ranging interpretation of this exception, some countries can take advantage of their unequal market power or use these concerns in an indirect way to diminish other countries' comparative advantage by exporting their own social or cultural model to countries that may have a different set of values and concerns.³³

In this context, the authors of this article have carried out a detailed assessment of whether a respondent could invoke the existing public morality exception to justify a measure that is taken to enhance women's economic empowerment and the challenges and risks associated with such an invocation. This analysis helps the authors to prepare a case for the inclusion of a specific gender exception in future trade agreements. No such exception exists to date in the current multilateral and preferential trade agreements. Moreover, countries may hesitate to invoke GATT's Article XX(a) for this purpose or craft a new gender exception as it may further open the floodgates of litigation. Countries can argue that a specific gender exception could allow defending countries to justify anything as the definition and scope of gender equality considerations are as wide (and vague) as the scope of public morality exception, ushering in a new generation of protectionist measures against selected countries.³⁴ However, if countries can accept trade-restrictive practices and laws to protect public morals, or animal health or life, or even plant health or life, is it fair to oppose an exception that can reduce gender inequality and include half of humankind's population in the journey towards economic growth? Is the removal of the barriers that women face any less important than the conservation of exhaustible natural resources (such as sea turtles)? This article does not engage with these questions, as their answer seems to be an unequivocal 'no'. Based on the presumption that this

³² 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (Annex) states as follows: 'No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law.'

³³ These concerns are discussed later in this article.

³⁴ The article does not deal with these hesitations and invites future researchers to discuss and critique this idea.

answer is universally accepted, the article explores how countries can use the existing morality exception, or negotiate a new gender exception, to empower women and ‘build back better’ in the post-COVID-19 world.

2 What Measures Are We Talking About?

A new gender exception or the existing public moral’s exception may allow a country to take a measure that might otherwise be inconsistent with its obligations under a trade agreement. So, what kind of measures can be justified under the public morality exception or a specific gender exception? According to Steve Charnovitz, trade measures are of two kinds: those that are ‘outwardly directed’ and those that are ‘inwardly directed’.³⁵ Outwardly directed trade measures are those that are aimed at protecting the societal interests of people in a foreign country, while inwardly directed trade measures are those that protect the societal interests of people in one’s own country.

Outwardly directed trade measures can be taken against a particular country to oppose a practice in which it might be engaged. For example, bans or restrictions on exports and imports of goods or services to and from a particular country can be seen as outwardly directed if they are taken to oppose the poor observance or violation of obligations that a country has assumed under the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).³⁶ In other words, such a measure could be taken to oppose practices such as men-favouring inheritance laws, unequal wages for equal work, resistance to unionization, sexual discrimination in hiring and sexual harassment in the workplace. Another example of an outwardly directed measure could be the deployment of discriminatory taxes against a particular industry in a targeted country if that industry is engaged in the exploitation of female labour force through discriminatory wages and poor working conditions. The aim of these measures could be to protect foreign female workers, as they can be invoked to deny market access benefits to a nation that, for instance, continues to support or maintain gender-based discriminatory or abusive laws or practices that discourage women from engaging in economic activities.

Inwardly directed measures can be taken to protect or empower women in the jurisdiction of the country invoking the measure. During and as a response to the COVID-19 pandemic,

³⁵ Charnovitz, ‘The Moral Exception in Trade Policy’, 38 *Virginia Journal of International Law (VJIL)* (1998) 689, at 695, 716–17.

³⁶ Convention on the Elimination of All Forms of Discrimination against Women 1979, 1249 UNTS 13.

governments may consider offering various support schemes to small businesses in their respective countries that particularly impact women employees and entrepreneurs. These schemes could take the shape of state-aid, government bailouts, loans or subsidies. For a temporary period of time during or after this pandemic, several countries may also consider crafting women-favouring government procurement measures. According to the International Trade Centre, only 1 per cent of the global government procurement market is currently offered to women-owned businesses.³⁷ The adoption of gender-responsive government procurement initiatives may help in increasing the participation of women-owned enterprises in the bidding process, which in turn could help to revive the women-owned SMEs that might have had to scale down or face closures during the pandemic.³⁸ In addition, countries may consider mandating or encouraging industries to employ supplier diversity programs.³⁹ Through these programs, they can obligate or somehow incentivize multinational companies to ensure that a certain percentage of their purchases are sourced directly from marginalized vendors such as women entrepreneurs. As can be seen, these measures aim to empower women in the territory of the country that is employing such measures.

Some of the ‘outwardly directed’ and ‘inwardly directed’ measures can violate the commitments that countries may have taken under multilateral, regional and bilateral trade agreements. Let us take the case of WTO law, for instance. When a WTO member employs a trade-restrictive measure that may violate a legal provision, another member may bring a challenge against the measure that may potentially be WTO inconsistent.⁴⁰ WTO members can challenge both outwardly directed and inwardly directed measures if they purportedly violate the treaty obligations. An example of such a measure could be a trade ban. If country A (a WTO member) imposes a ban on the import of goods from country B (also a WTO member) as a protest against country B’s domestic legislation that continues to encourage employment discrimination against women in the workforce or that country B’s domestic laws do not provide

³⁷ A. Gonzalez, *Public Procurement, a Tool to Boost Women’s Economic Empowerment*, 10 November 2017, available at www.intracen.org/news/Public-Procurement-a-Tool-to-Boost-Womens-Economic-Empowerment/.

³⁸ Members may need to assess this proposal’s compatibility with the WTO Agreement on Government Procurement 1994, 1869 UNTS 508, if they are party to this plurilateral agreement.

³⁹ Supplier diversity programs can allow multinational companies to make a percentage amount of their purchases from marginalized vendors such as women entrepreneurs. For an example of Walmart US and the supplier diversity initiative it has employed, see D. Abrams Kaplan, *Walmart’s Sourcing from Women-Owned Suppliers Drives Business*, 8 March 2018, available at www.supplychaindive.com/news/sourcing-procurement-women-diverse-business/518624/.

⁴⁰ Art. XVI:4 of the WTO Agreement makes clear that WTO members must ensure the conformity of their laws, regulations and administrative procedures with their obligations under the WTO Agreement and its annexes. Accordingly, members frequently invoke the dispute settlement system against a law or a policy as such, irrespective of, or without waiting for, the actual application of that law. Agreement Establishing the World Trade Agreement (WTO Agreement) 1994, 1867 UNTS 154.

sufficient protection to women migrant workers against violence and harassment, country B could challenge this measure on the ground that it violates the most-favoured-nation (MFN) treatment obligation.⁴¹ A MFN clause requires every WTO member to provide any concessions, privileges or immunities granted to one nation in a trade agreement to all other WTO members. Hence, the ban imposed by country A would mean that country A is denying country B of the advantage of being able to export its products to country A's market even though country A is granting that advantage to all other WTO members.

Another hypothetical example could be a measure employed by country A to waive the payment of sales tax for domestically produced goods by women-owned small businesses. This measure could be taken to support, in particular, those businesses that are most severely hit by the pandemic of COVID-19 and to help them sustain or revive their operations.⁴² However, country B may challenge this measure as it could be in violation of country A's national treatment (NT) obligation.⁴³ The NT clause prohibits discrimination between imported and domestically produced like products with respect to internal taxation or other government regulation. A relief measure in this form may violate the NT obligation if it grants less favourable treatment to like imported goods that may have to continue discharging their sales tax obligations in country A, thereby disturbing the conditions of competition between like domestic and imported products to the disadvantage of the imported products in that given market.

MFN and NT commitments are *raisons d'être* of the multilateral trading system. Yet a regulating country may still be able to justify a discriminatory measure as long as it satisfies the requirements of one of the GATT's Article XX exceptions. Countries can justify their WTO-inconsistent measures taken to oppose an abusive practice against women or support women's interests by invoking the exception of public morality that is found in almost every trade agreement or by negotiating a new gender exception in future trade negotiations. The invocation of the existing morality exception could plausibly be considered as an existing option to justify measures taken as a response to the current pandemic. However, there are no easy solutions as WTO members can employ multiple arguments against such an interpretation. Furthermore, such a wide-ranging interpretation comes with inherently potential risks of encouraging protectionist

⁴¹ GATT, *supra* note 15, Art. I.

⁴² The USA's Alabama Department of Revenue has extended relief to small retail businesses that are unable to pay their sales tax liabilities. This includes tax exemption, late payment penalty waivers and the extension of deadlines. Alabama Department of Revenue, Coronavirus (COVID-19) Updates, available at <https://revenue.alabama.gov/coronavirus-covid-19-updates/>.

⁴³ GATT, *supra* note 15, Art. III.

actions that might be taken under the garb of protecting any value or interest as long as it can be linked remotely to a country's moral values (as discussed in sections 3.A and 5 of this article).

3 Can the 'Public Morality' Exception Accommodate 'Gender Equality' Concerns?

Under Article XX(a) of the GATT, a measure is justifiable if it is considered necessary to protect public morals.⁴⁴ The introduction of this exception in the GATT 1947 seems to have influenced a number of multilateral trade agreements.⁴⁵ Moreover, almost all bilateral or regional trade agreements have included this exception to protect those societal concerns that may be qualified as public morality concerns. However, this widespread use of the morality concept has been made in trade instruments without much clarity on its content and scope. This ambiguity provides room for creative argumentation, which this section seeks to engage in as it explores and evaluates arguments from both sides of the table. This section is divided into two subsections. The first subsection provides four arguments in favour of treating gender considerations as part of moral considerations. The second subsection provides four arguments against such an interpretation.

A The 'Public Morality' Exception Can Accommodate 'Gender Equality' Concerns

1 Interpretation Matters! A Look at the WTO Agreement's Preamble and Customary Rules of Interpretation of Public International Law

The preamble is a vital part of any international instrument or agreement, as it can be instrumental in determining the intentions of the negotiators or drafters of an agreement at the time when it was concluded.⁴⁶ In disputes arising out of a given agreement, adjudicators can consider the wording used in the preamble to identify the parties' objectives and the intentions

⁴⁴ The panel in *China – Audiovisual Products*, para 7.759, specifically noted that since the GATT, *supra* note 15, Art. XX(a), uses the same concept as the GATS, *supra* note 15, Art. XIV(a), there is no reason to depart from the interpretation of 'public morals' developed by the panel in *US – Gambling* and adopted the same interpretation for purposes of its analysis. Panel Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R and Corr.1, adopted 19 January 2010, as modified by Appellate Body Report WT/DS363/AB/R, DSR 2010:II, p. 261; WTO, *United States – Measures Affecting the Cross-Border Supply of (US – Gambling, Panel Report) and Betting Services – Report of the Panel*, 20 April 2005, WT/DS285/R.

⁴⁵ Babu, 'WTO and the Protection of Public Morals', 13(2) *Asian Journal of WTO and International Health Law and Policy* (2018) 333, at 335; Mark, 'Free Trade and the Protection of Public Morals: An Analysis of the Newly Emerging Public Morals Clause Doctrine', 33(1) *Yale Journal of International Law* (2008) 221.

⁴⁶ Vienna Convention on the Law of Treaties (VCLT) 1969, 1155 UNTS 331, Art. 31 requires that an agreement must be interpreted in light of its context, object and purpose.

underlying the agreement. Article XX (a) of the GATT can be interpreted in light of the preamble of the WTO Agreement.⁴⁷ While there is no explicit mention of women's rights in the preamble, it makes a clear reference to the goal of 'sustainable development'. Inclusive growth is the cornerstone for sustainable development.⁴⁸ The United Nations (UN) 2030 Sustainable Development Goals (SDGs) address the need to achieve full and effective participation of women for furthering economic growth and sustainable development.⁴⁹ Hence, a purposive interpretation of the GATT's Article XX(a) may allow a responding country to invoke the public morality exception to justify a measure taken to protect women's economic interests. According to this approach, each of the covered agreements must be interpreted in light of the purpose of the text and in a way that would give 'effect to all the terms of the treaty'.⁵⁰

In addition, Article 3.2 of the WTO's Dispute Settlement Understanding (DSU) provides that the dispute settlement system serves to clarify the existing provisions of the WTO Agreements in accordance with the customary rules of interpretation of public international law.⁵¹ In other words, the WTO Agreements are not to be read in clinical isolation from public international law.⁵² Dispute resolution panels and the Appellate Body have the obligation to interpret WTO provisions by taking into account the relevant rules of international law that are applicable to relations among WTO members.⁵³ It is therefore possible to argue that human capabilities, including the work capabilities of women, can be considered part of the 'general principles of international law'.⁵⁴ In line with this argument, a nation could justify taking trade measures to protect women's capacity to engage in trade by referring to the general principles of international law. In this manner, non-WTO rules may offer a valid defence against claims of a WTO breach; they may allow WTO adjudicators to use universally accepted moral values (such as gender equality) to ascribe meaning to the vague public morality exception.⁵⁵ However, this

⁴⁷ WTO Agreement, *supra* note 39.

⁴⁸ Alesina and Rodrick, 'Distributive Politics and Economic Growth', 109(2) *Quarterly Journal of Economics* (1994) 465.

⁴⁹ *Transforming Our World: The 2030 Agenda for Sustainable Development*, Doc. A/Res/70/1, 25 September 2015, Goal 5.

⁵⁰ WTO, *United States – Standards for Reformulated and Conventional Gasoline – Report of the Appellate Body (US – Gasoline, Appellate Report)*, 29 April 1996, WT/DS2/AB/R, at 21; WTO, *Japan – Taxes on Alcoholic Beverages – Report of the Panel*, 1 November 1996, WT/DS8/R, WT/DS10/R, WT/DS11/R, as modified by the *Report of the Appellate Body*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R.

⁵¹ Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) 1994, 1869 UNTS 401.

⁵² *US – Gasoline, Appellate Report, supra* note 49, para. 17.

⁵³ Marceau, 'Conflicts of Norms of Jurisdictions: The Relationship between the WTO Agreement and MEAs and Other Treaties', 35(6) *Journal of World Trade* (2001) 1081, at 1129.

⁵⁴ M.C. Nussbaum, *Women and Human Development* (2000), at 5-6, 70-80; M.W. Janis, *An Introduction to International Law* (1993), at 55.

⁵⁵ J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (2003), at 491.

course of argument has its loopholes. Interests relating to women's empowerment may not be recognized as general principles of law in all kinds of legal relations and by all States since they are applied in different ways in different parts of the world.⁵⁶ This may especially be the case when a party to a dispute is a State that has formally or informally opposed or persistently objected to the protection of a social norm (such as the advancement of women's economic interests) that is otherwise widely accepted by other WTO members or has refused to accommodate gender-related concerns within its trade policy context.⁵⁷

2 Foreign Trade and Women Empowerment Are Intertwined

Encouraging women's participation in trade and commerce has a two-fold benefit. On the one hand, increased participation of the female workforce can lead to a faster post-pandemic economic recovery for the world; on the other hand, it could help minimize the extent of economic and social harm that women might have suffered during this pandemic.⁵⁸ Multiple interventions are required to undo the harm, and international trade could arguably be one of the essential tools in this respect. Women's economic empowerment and international trade share an intricate and complex relationship as the former could be enhanced through an effective regulation of the latter.⁵⁹

One of the first acknowledgements of the interrelationship between gender and commerce can be traced back to the Treaty on the Functioning of the European Union.⁶⁰ Moreover, the Addis Ababa Agenda of Action⁶¹ and the UN's 2030 Agenda for Sustainable Development recognize foreign trade as an important instrument to reach development

⁵⁶ OECD, *The Impact of Legal Framework on Women's Economic Empowerment around the World: Challenges and Good Practices*, 7 March 2018, at 7–9, available at www.oecd.org/mena/competitiveness/2107-March-on-Gender-Legal-Framework-Highlights.pdf.

⁵⁷ Gibb, 'Gender Equality and Trade: Coordinating Compliance between Regimes', in P.B. Potter and H. Gibb, with E. Cedillo (eds), *Gender Equality Rights and Trade Regimes: Coordinating Compliance* (2012) 23, at 27–41 (author discusses the conflicts between provisions of trade agreements and other conventions that uphold non-trade rights such as human rights, rights to a livelihood, health care and food, and shows how it can be a challenging task to balance these rights if parties to a dispute do not give preference to similar interests).

⁵⁸ A recent study has found that if women play an equal role in labour markets to that of men, the global gross domestic product will increase by 26 per cent in 2025. See J. Woetzel *et al.*, *The Power of Parity: How Advancing Women's Equality can Add \$12 Trillion*, September 2015, available at www.mckinsey.com/~media/McKinsey/Featured%20Insights/Employment%20and%20Growth/How%20advancing%20womens%20equality%20can%20add%2012%20trillion%20to%20global%20growth/MGI%20Power%20of%20parity_Full%20report_September%202015.ashx.

⁵⁹ Hutchens, 'Empowering Women through Fair Trade? Lessons from Asia', 31(3) *Third World Quarterly* (2010) 449.

⁶⁰ Treaty on the Functioning of the European Union, OJ 2016 C 202/47, at 47–390.

⁶¹ United Nations (UN), Third International Conference on Financing for Development (Ffd3), 13–16 July 2015, available at www.un.org/esa/ffd/ffd3/conference.html.

objectives including gender equality. The Addis Ababa Agenda of Action builds a clear nexus between international trade and gender. It reads as follows: ‘Recognizing the critical role of women as producers and traders, we will address their specific challenges in order to facilitate women’s equal and active participation in domestic, regional and international trade.’⁶² The SDGs also directly address the need to achieve full and effective participation of women for furthering economic growth and sustainable development.⁶³ The most recent multilateral instrument that reinforces this view is the WTO’s Joint Declaration on Trade and Women’s Economic Empowerment (Joint Declaration). The declaration, signed in December 2017 in Buenos Aires by almost 70 per cent of the WTO’s membership, reaffirms that ‘international trade and investment are engines of economic growth for both developing and developed countries, and that improving women’s access to opportunities and removing barriers to their participation in national and international economies contributes to sustainable economic development’.⁶⁴

These developments reinforce the view that the interrelation between trade regulation and gender equality may be considered as the ‘context’ of WTO law for the interpretation of the term ‘public morals’. As per Article 31 of the Vienna Convention on the Law of the Treaties (VCLT), a treaty should be interpreted in the ‘context’ of its terms.⁶⁵ The word ‘context’ in this provision is designed to link different elements of interpretation.⁶⁶ ‘Any relevant rules of international law applicable in the relations between the parties’ are among such elements of interpretation and can be considered to be elements that are extrinsic to the ‘context’ of the WTO Agreement.⁶⁷ Hence, a gender-related measure implicating trade obligations could be justified under the morality exception through the ‘contextual approach’ – that is to say, that the public morality exception can be interpreted and applied through the context of various international instruments to which most WTO members are party. These instruments may include, but are not limited to, the CEDAW, the Universal Declaration of Human Rights,⁶⁸ the International Covenant on Civil

⁶² UN, Addis Ababa Action Agenda (2015), para. 90, available at <https://sustainabledevelopment.un.org/index.php?page=view&type=400&nr=2051&menu=35>.

⁶³ *Transforming Our World*, *supra* note 48, Goal 5.

⁶⁴ WTO, Buenos Aires Joint Declaration on Trade and Women’s Economic Empowerment 2017 – Declaration on the occasion of the WTO Ministerial Conference (Joint Declaration), December 2017.

⁶⁵ VCLT, *supra* note 45.

⁶⁶ International Law Commission (ILC), ‘Draft Articles on the Law of Treaties with Commentaries’, 2(2) *ILC Yearbook* (1966) 220, paras. 8, 16 (the ILC underlines that the relevance of rules of international law for the interpretation of treaties in any given case is dependent on the intentions of the parties and may evolve over time).

⁶⁷ VCLT, *supra* note 45, Art. 31.2 (c).

⁶⁸ Universal Declaration of Human Rights, GA Res. 217A (III), 10 December 1948 (points to the importance of equal rights of men and women, women’s right to marry and equal rights as to its dissolution).

and Political Rights,⁶⁹ the International Covenant on Economic, Social, and Cultural Rights,⁷⁰ the Beijing Declaration and the Platform for Action,⁷¹ the WTO's Joint Declaration⁷² and the 2030 UN SDGs. These instruments reflect the international community's interest in protecting different aspects of women's rights.

3 Current WTO Jurisprudence Also Provides Some Help

There is no direct jurisprudence that supports the proposed interpretation; yet creating symmetry between trade and non-trade values in international trade is not without precedent. In *US – Gambling*,⁷³ the panel found that the term 'public morality' denotes standards of good and bad conduct on the part of, or on behalf of, a community or nation, and that the meaning of this concept for members may vary over time and space, depending on various factors including prevailing social, cultural, ethical and religious values.⁷⁴ Moreover, the Appellate Body in this case affirmed that the state has the right to determine the appropriate level of protection for its public morals. As per this analysis, discriminatory practices against women can be considered contrary to many countries' public morals.

In *EC – Seals*,⁷⁵ the Appellate Body found that the term 'to protect', when used in relation to 'public morals', does not require a panel to identify the existence of a risk to the EU's public moral concerns regarding seal welfare.⁷⁶ A panel has recently reinforced this view in *United States – Tariff Measures on Certain Goods from China*, as it reiterates that the members must be given a certain degree of policy space to define their own public moral objectives as each member may have its own concept of morality.⁷⁷ In light of these interpretations, irrespective of whether there is any evidence to show an imminent risk to women's work capabilities or their access to business opportunities, a country could invoke women-favouring

⁶⁹ International Covenant on Civil and Political Rights 1966, 999 UNTS 171, Art. 3 (mentions women's right to equality).

⁷⁰ International Covenant on Economic, Social and Cultural Rights, 1966, 993 UNTS 3, Arts 3, 7 (mentions women's right to equality and women's right to a fair wage).

⁷¹ The Beijing Declaration and the Platform for Action: Fourth World Conference on Women, Doc. A/CONF. 177/20, 15 September 1995 (contains a progressive blueprint for advancing women's empowerment).

⁷² Joint Declaration, *supra* note 63.

⁷³ *US – Gambling, Panel Report, supra* note 43, as modified by the *Report of the Appellate Body*, WT/DS285/AB/R, DSR 2005:XII, at 5797.

⁷⁴ *US – Gambling, Panel Report, supra* note 43, para. 6.461.

⁷⁵ WTO, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products – Report by the Appellate Body (EC – Seal Products, Appellate Report)*, 18 June 2014, WT/DS400/AB/R / WT/DS401/AB/R, at 7.

⁷⁶ *Ibid.*, para. 5.167, 5.199–201.

⁷⁷ WTO, *United States – Tariff Measures on Certain Goods from China – Report of the Panel (US – Tariff Measures, Panel Report)*, 15 September 2020, WT/DS543, para. 7.130

measures. Countries could argue that the protection of women's business and employment prospects in a particular industry affected by the COVID-19 pandemic is a public moral concern. They could argue that this concern amidst the pandemic amounts to a clear legitimate objective, provided the 'design, architecture, and revealing structure' of the measure reflects a genuine public moral concern in this respect.⁷⁸

4 Gender Equality Concerns Are Public Morality Concerns

The GATT's provisions stipulating general exceptions have been criticized over the years for being too narrow and outdated.⁷⁹ Scholars have observed that the restrictions of 1947 are neither sensitive nor applicable to today's cultural norms.⁸⁰ Moreover, the emergence of new technologies that do not neatly fall into the originalists' 1947 categories, subsequently prompting the emergence of new legal issues, makes originalism unworkable.⁸¹ There remains serious doubt as to whether only 10 exceptions, drafted around six decades ago, are able to cover all types of legitimate regulatory objectives that a modern government should be permitted to pursue.⁸² Gender equality is one such legitimate regulatory objective, and a measure taken to promote gender equality could therefore be regarded as necessary to pursue this objective. Hence, in theory, it may be possible to apply the public morals exception to justify a measure that seeks to uphold gender equality interests (as long as the chapeau is met, as discussed later in this article).

Public morals range from views related to religion,⁸³ human rights,⁸⁴ consumption of alcohol,⁸⁵ drug trafficking and corruption,⁸⁶ gambling,⁸⁷ consumer protection⁸⁸ and the protection

⁷⁸ *EC – Seal Products, Appellate Report, supra* note 74, para. 5.302.

⁷⁹ Du, 'How to Define "Public Morals" in WTO Law? A Critique of the Brazil: Taxation and Charges Panel Report', 13(2) *Global Trade and Customs Journal* (2018) 69.

⁸⁰ Wu, *supra* note 45.

⁸¹ Originalist's perspective is a restrictive approach to the understanding of public morals, according to which public morals should be understood as a public moral at the time of signing of the GATT in 1947. Smith, 'Much Needed Reform in the Realm of Public Morals: A Proposed Addition to the GATT Article XX(A) Public Morals Framework, Resulting from China-Audiovisual', 19 *Cardozo Journal of International and Comparative Law* (2011) 760.

⁸² Du, *supra* note 79.

⁸³ Israel restricted importation of non-Kosher meat products. See WTO Secretariat, Report of the WTO Secretariat on the Trade Policy Review of Israel, 13 Aug 1999, available at www.wto.org/english/tratop_e/tpr_e/tp476_e.htm.

⁸⁴ The USA restricted importation of products made by indentured child labour. See Treasury and General Government Appropriations Act of 1998, Pub. L. 105-61, § 634, 111 Stat. 1272, 1316 (1997).

⁸⁵ Indonesia restricted importation of alcohol for moral reasons. See WTO Secretariat, Report on the Trade Policy Review of Indonesia, 23 May 2007, available at www.wto.org/english/tratop_e/tpr_e/tp378_e.htm.

⁸⁶ WTO, *Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear – Report of the Panel*, 22 June 2016, WT/DS461/R.

of animals.⁸⁹ Literature suggests that a stringent approach to the application of the public morals exception may infringe a country's legitimate interests and sovereign rights to protect the values that its society regards as important.⁹⁰ Certain moral interests are shared more commonly than others, which may be more country specific.⁹¹ Gender equality is one such interest, as it is recognized as a fundamental moral norm by a majority of the WTO members in multiple international conventions and treaties.

If interpreted in light of these arguments, the public morals exception could make some room under the realm of the WTO rules to protect women against multiple unequal practices such as labour discrimination, low wages, workplace harassment or physical extortion at international borders.⁹² However, there are no easy solutions since, by allowing the protection of concerns not included in the exhaustive list of the general exceptions, the adjudicators may run the risk of trespassing on the authority conferred to them under Articles 3.2 and 19.2 of the WTO's DSU.⁹³ Moreover, there are several other reasonable counterarguments against this position. The following subsection outlines four such counterarguments.

B 'Public Morality' Exception Cannot Accommodate 'Gender Equality' Concerns

1 Gender Equality May Fall Out of Moral Concern

Gender equality is not merely a moral, but also a market, concern. This argument can be understood in two respects. On the one hand, some argue that trade policies and instruments can exacerbate existing gender inequalities.⁹⁴ It can put the livelihoods and employment of women in

⁸⁷ WTO, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Communication from Antigua and Barbuda*, 25 April 2013, WT/DS285/26.

⁸⁸ WTO, *Brazil – Certain Measures Concerning Taxation and Charges – Report of the Panel*, 30 August 2017, WT/DS472/R.

⁸⁹ *EC – Seal Products, Appellate Report*, *supra* note 74. See Diebold, 'The Morals and Order Exceptions in WTO Law: Balancing the Toothless Tiger and Undermining Mole', 11(1) *Journal of International Economic Law* (2007) 43, at 49–50.

⁹⁰ Diebold, *supra* note 88, at 44.

⁹¹ Wu, *supra* note 45, at 240.

⁹² Serpin, 'The Public Morals Exception after the WTO Seal Products Dispute: Has the Exception Swallowed the Rules?', 2016(1) *Columbia Business Law Review* (2016) 219; Simo, 'Trade and Morality: Balancing between the Pursuit of Non-Trade Concerns and the Fear of Opening the Floodgates', 51(3) *George Washington International Law Review* (2019) 407, at 441; Jarvis, *supra* note 30, at 220, 229.

⁹³ DSU, *supra* note 50, Arts 3.2, 19.2 mandate WTO adjudicating bodies to limit their task to interpreting WTO law and to abstain from law-making.

⁹⁴ Levinsohn, 'Employment Responses to International Liberalization in Chile', 47(2) *Journal of International Economics* (1999) 321; M. Fontana, *Gender Justice in Trade Policy: The Gender Effects of Economic Partnership Agreements* (2009), available at www.oecd.org/social/gender-development/47566754.pdf.

certain industries at risk.⁹⁵ Trade liberalization can disrupt economic sectors and industries where women are most active, thereby depriving them of employment and business opportunities.⁹⁶ It can increase gender wage gaps and create poorer working conditions for women in developing countries.⁹⁷ The scholarship, on the other hand, observes that trade and industrial policies can translate into more job opportunities and enhanced market access for women.⁹⁸ Mainstream economics literature notes that there is a positive correlation between the increase in production for exports in developing countries and the increase in levels of female employment in various sectors including manufacturing.⁹⁹ These findings contradict each other, yet they show that a measure aimed at increasing women's participation in the markets may be regarded as part of a country's industrial policy.

Petros Mavroidis provides an argument that helps clarify this point further. Analysing the measure at issue in *EC – Seals*, Mavroidis argues that, regardless of the fact that the EU invoked the morality exception, it considered this measure (or at least part of this measure) to be part of its industrial policy measure.¹⁰⁰ Mavroidis underlines that, in the case that the measure is for all practical purposes an industrial policy measure, the term 'public morals' cannot and should not encompass similar measures. If we were to understand 'public morals' as encompassing industrial policy, then the whole GATT edifice would collapse.¹⁰¹ The GATT's Article XX contains a list of important societal interests, and this list does not extend to industrial policy concerns.¹⁰² Hence, a measure imposed for increasing women's participation in given markets or

⁹⁵ E. Gamberoni and J. Guilherme Reis, *Gender-Informing Aid for Trade: Entry Points and Initial Lessons Learned from the World Bank*, July 2011, at 62, available at <https://documents.worldbank.org/en/publication/documents-reports/documentdetail/303321468160525093/gender-informing-aid-for-trade-entry-points-and-initial-lessons-learned-from-the-world-bank>; M. Fontana and C. Paciello, *Gender Dimensions of Agricultural and Rural Employment: Differentiated Pathways out of Poverty* (2010), available at www.fao.org/3/i1638e/i1638e.pdf.

⁹⁶ Melanson, 'An Examination of the Gendered Effects of Trade Liberalisation', 12(1) *Policy Perspectives* (2005) 10 (explains how trade liberalization can lead to decrease in care work).

⁹⁷ Oostendorp, 'Globalization and the Gender Wage Gap', 23(1) *World Bank Economic Review* (2009) 141; for the case of North America, see Sauv e and Zoabi, 'International Trade, the Gender Wage Gap and Female Labor Force Participation', 111 *Journal of Development Economics* (2014) 17.

⁹⁸ For example, following the implementation of the North American Free Trade Agreement 1992, 32 ILM 289, 309 (1993), women in Mexico experienced increased wage rate, work autonomy and professional capacity through enhanced infrastructure and skill development. J. Klugman and E. Gamberoni, *Gender and Trade: A Fresh Look at the Evidence*, July 2012, available at www.tradeforum.org/Gender-and-trade-A-fresh-look-at-the-evidence. Increased employment for women in Pakistan discussed in Hyder and Behrman, 'International Trade Openness and Gender Gaps in Pakistani Labor Force Participation Rates over 57 Years', 17(3) *Journal of the Asia Pacific Economy* (2012) 367. Contrary evidence discussed in Quintero-Ram rez, 'The North American Free Trade Agreement and Women', 4(2) *International Feminist Journal of Politics* (2002) 240.

⁹⁹ Wood, 'North-South Trade and Female Labour in Manufacturing: An Asymmetry', 27(2) *Journal of Development Studies* (1991) 168; Ramtohul, 'Trade Liberalisation and the Feminisation of Poverty: The Mauritian Scenario', 22 *Agenda: Empowering Women for Gender Equity* (2008) 55.

¹⁰⁰ Mavroidis, 'Sealed with Doubt: EU, Seals, and the WTO', 6(3) *European Journal of Risk Regulation* (2015) 388.

¹⁰¹ *Ibid.*, at 391.

¹⁰² *Ibid.*, at 393.

selected industries may be regarded as part of a country's industrial policy and not its moral concern.

2 Meeting the Requirements of 'Necessity' and 'Chapeau'

The WTO's jurisprudence clearly reveals that no measure seeking defence under the public moral's exception so far has survived the strictures of the necessity and the chapeau tests. The assessment of defence under the GATT's Article XX involves a two-tiered analysis in which a measure must first be provisionally justified under one of the subparagraphs before it is examined under the chapeau.¹⁰³ Such provisional justification requires that the challenged measure must 'address the particular interest specified in that paragraph' and that there must 'be a sufficient nexus between the measure and the interest protected'.¹⁰⁴ In the context of Article XX(a), this means that a member wishing to justify a measure must demonstrate that it has adopted or enforced a measure 'to protect public morals' and that the measure is 'necessary' to protect such public morals.¹⁰⁵ The WTO members so far have not only faced the tough standard of the chapeau, but the overwhelming majority of respondents have also failed to prove that the trade-restricting measure was necessary to achieve the goal for which it was designed. This was particularly the case for measures sought to be justified under subparagraphs (a), (b), and (d) of Article XX, where the requirement of necessity is the controlling variable.¹⁰⁶ For the time being, none of the measures found to be WTO incompatible has passed the examination of Article XX(a) of the GATT, albeit for diverse reasons.¹⁰⁷

In the following two subsections, the article assesses if a gender-related hypothetical defence can satisfy the necessity and chapeau requirements.

2.1 Necessity Test

'Necessity' is determined by 'weighing and balancing' the following factors: (i) the importance of the objective; (ii) the contribution of the measure to that objective; (iii) the trade

¹⁰³ WTO, *United States – Importation of Certain Shrimp and Shrimp Products – Report by the Panel*, 15 May 1998, WT/DS58/23, at 119, 120.

¹⁰⁴ WTO, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Report of the Appellate Body (US – Gambling, Appellate Report)*, 20 April 2005, WT/DS285/AB/R, para. 292.

¹⁰⁵ *US – Gambling, Panel Report*, *supra* note 43, para. 6.455.

¹⁰⁶ Regis, *supra* note 92, at 416.

¹⁰⁷ For list of cases in which morality exception was invoked, see note 128 below.

restrictiveness of the measure and (iv) the availability of reasonable alternatives.¹⁰⁸ Let us analyse these guiding factors in light of a hypothetical defence that seeks to protect women's economic interests.

(a) Importance of the objective

At first sight, it is likely that the importance of the objective of protecting women's economic interests to further gender equality may not be questioned by the WTO members. Women's unfettered access to economic opportunities, besides being a fundamental human right or a moral concern, is essential to economic development.¹⁰⁹ However, not all WTO members assign significant or similar importance to gender equality concerns. The assessment of the importance given to an objective may therefore depend upon whether gender equality is considered as a constitutional imperative or otherwise frontloaded in hierarchically important laws or whether such concerns are solely accommodated in laws or regulations that may be hierarchically of lesser value in a given country's domestic legal system.¹¹⁰ The importance of such an objective may not be that high or persuasive if a country's domestic legal system does not carve out a significant space for these interests.

While a record 143 countries have guaranteed equality between men and women in their constitutions by 2014, another 52 countries have not taken this step.¹¹¹ Multiple legal and regulatory barriers continue to impede women's access to productive resources, and, hence, deep legislative changes are needed to protect women's rights around the world. More than 60 WTO members are not signatories to CEDAW. Moreover, the WTO's Joint Declaration has only been signed by just over 70 per cent of the WTO's membership. This declaration is completely non-binding in nature. Neither does it impose any obligations on signing members to undertake actions, and it does not confer any right on any member to justify an otherwise WTO-inconsistent measure. It has no enforcement or implementation mechanism, and, hence, it is completely left to the goodwill intentions and best endeavours of the signatory members. Yet close to one-third of the WTO membership has refused to join this endeavour. This divergence

¹⁰⁸ WTO, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef – Report of the Appellate Body (Korea – Beef, Appellate Report)*, 11 December 2000, WT/DS161/AB/R, para. 164; *US – Gambling – Appellate Report, supra* note 102, para. 307 (referring to *Korea – Beef, Appellate Report, ibid.*, para. 166). See also WTO, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Report of the Appellate Body*, 14 December 2018, WT/DS381/AB/RW/USA, para 321 (referring to *US – Gambling, Appellate Report, supra* note 102, para. 307).

¹⁰⁹ UN, Gender Equality, (accessed, 21 July 2021), available at www.un.org/en/global-issues/gender-equality.

¹¹⁰ *Korea – Beef, Appellate Report, supra* note 107, at 162–164, 176, 180–181.

¹¹¹ UN, *supra* note 109.

of views amongst the WTO membership shows that the importance of this objective differs significantly from one member to the other, and, hence, a defence based on gender equality concerns may be staunchly opposed by other WTO members.

(b) Trade restrictiveness, a measure's contribution to the objective and less trade-restrictive alternatives

In terms of trade restrictiveness, an assessment will depend heavily on the specific kind of measure invoked to protect or empower women. If a measure produces restrictive effects on international trade as severe as those resulting from an import ban, it would be difficult for a panel to find the measure 'necessary' unless the measure makes a material contribution to the achievement of its objective.¹¹² If the challenged measure is not as trade restrictive as a ban or an embargo, a panel may more readily accept such a measure as necessary to achieve its objective. For a finding that a measure is 'necessary', it must also be shown that the contribution made by the 'measure' to the identified objective is 'material'. Material contribution exists when there is a 'genuine relationship of ends and means between the objective pursued and the measure at issue'.¹¹³

It may be difficult in the short term to separate the contribution of 'one specific measure from those attributable to the other measures that are part of the same comprehensive policy'.¹¹⁴ Moreover, the results obtained from certain preventive actions to reduce gender inequality can only be evaluated with the benefit of time.¹¹⁵ Even though the existence of a contribution may become visible only after some time, the measure at issue must be a part of a broader policy scheme. Hence, the burden is on the respondent to show that (i) there is a broad national policy aimed at promoting gender equality and (ii) that the measure at issue is part of this policy.

The necessity analysis also entails an assessment of whether a WTO-consistent alternative measure that the member concerned could 'reasonably be expected to employ' is available or whether a less WTO-inconsistent measure is 'reasonably available'.¹¹⁶ There would almost always be a wide range of less trade-restrictive alternative measures that may contribute to the protection of various moral concerns, such as restrictions on foreign aid and investment,

¹¹² WTO, *Brazil – Measures Affecting Imports of Retreaded Tyres – Report of the Appellate Body (Brazil – Tyres, Appellate Report)*, 3 December 2007, WT/DS332/AB/R, paras 150, 151.

¹¹³ *Ibid.*, paras 145–157.

¹¹⁶ *Korea – Beef, Appellate Report, supra* note 107, para. 166.

multilateral efforts to negotiate an acceptable standard and the use of other diplomatic tools.¹¹⁷ These alternatives may be considered to be reasonable alternatives to a measure employed, for example, to enhance women's access to finance and other resources.

2.2 *Chapeau*

The chapeau requires that the measures shall not be 'applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade'.¹¹⁸ The function of the chapeau is to prevent the abuse of general exceptions.¹¹⁹ The examination of whether a measure is applied in a manner that would constitute a means of 'arbitrary or unjustifiable discrimination between countries where the same conditions prevail' necessitates an assessment of whether the 'conditions' prevailing in the countries between which the measure allegedly discriminates are 'the same'. For this assessment, only 'conditions' that are relevant for establishing arbitrary or unjustifiable discrimination in light of the measure's specific character should be considered. The question therefore is whether the 'conditions' relating to a particular policy objective under the applicable subparagraph are 'the same'.¹²⁰ Therefore, a respondent invoking the morality exception to justify a gender-related measure has to show that conditions with regard to women's economic empowerment or gender equality in general are different in the relevant countries.

The kind of conditions that may be taken into account in such an assessment may include gender gap ratings, gender balance in domestic laws, cultural perspectives, religious norms and sex-disaggregated labour force distribution. In the context of labour rights, a measure's application might be considered as 'unjustified discrimination' not only if the measure was not applied equally to all countries with similar labour rights conditions and problems but also if the application of that measure did not take into consideration the relevant special circumstances of certain countries affected by the measure.¹²¹ For example, in the context of female labour participation, a measure's application might be considered to be 'unjustified discrimination' if it targets a nation that provides government-run programs to encourage women, and only women, to become nurses, teachers, farmers and knitters. While these professions may be considered to

¹¹⁷ Harris and Moon, 'GATT Article XX and Human Rights: What Do We Know from the First 20 Years?', 16 *Melbourne Journal of International Law* (2015) 432, at 468.

¹¹⁸ *EC – Seal Products, Appellate Report, supra* note 74, para. 5.296.

¹¹⁹ *US – Gasoline, Appellate Report, supra* note 49, at 20-21.

¹²⁰ *EC – Seal Products, Appellate Report, supra* note 74, para. 5.299.

¹²¹ Robert Howse, 'The World Trade Organization and the Protection of Workers' Rights', 3 *Journal of Small and Emerging Business Law* (1999) 131, at 142–145.

be low paid in a developed country, they can provide a viable source of employment and livelihood in developing countries.¹²²

Another important factor in the assessment of arbitrary or unjustifiable discrimination is the question of whether the discrimination can be reconciled with, or is rationally related to, the argued policy objective at hand.¹²³ As the Appellate Body stated in *Brazil – Retreaded Tyres*, ‘[t]he assessment of these factors ... was part of an analysis that was directed at the cause, or the rationale, of the discrimination’.¹²⁴ In *US – Shrimp*, the Appellate Body clarified the meaning of ‘arbitrary’ or ‘unjustifiable’ discrimination.¹²⁵ It viewed the US measure as arbitrary since it was a ‘rigid and unbending requirement’ that countries exporting shrimp into the USA must adopt a regulatory programme that is essentially the same as the US programme.¹²⁶ It determined that the application of the measure amounted to unjustified discrimination because, while the USA negotiated the exportation of shrimp into its territory seriously with some WTO members for concluding international agreements for the conservation of sea turtles, it did not do so with other WTO members.¹²⁷

It is very likely that measures aimed at enhancing women’s participation in economic activities will face the same difficulties that the US measure faced in *US – Shrimp*. First, the respondent might be accused of forcing other WTO members to adopt gender equality standards that are essentially the same or very similar to its own standards. Second, other WTO members might show that they already have measures in place to promote women’s economic interests. Third, it would be burdensome (and perhaps impractical in the current nationalistic and protectionist environment) for the respondent to multilaterally negotiate with WTO members an agreement or understanding in this respect. Taking into account all these requirements, and the fact that the chapeau was not successfully pleaded in all seven cases¹²⁸ that invoked the public

¹²² Jarvis, *supra* note 30, at 234.

¹²³ WTO, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Report of the Appellate Body (US – Shrimp, Appellate Report)*, 12 October 1998, WT/DS58/AB/R, para. 165; *Brazil – Tyres, Appellate Report*, *supra* note 111, paras 227, 228, 232.

¹²⁴ *Brazil – Tyres, Appellate Report*, *supra* note 111, para. 225 (referring to *US – Shrimp, Appellate Report*, *supra* note 122, paras. 163-166, 172, and 177)

¹²⁵ *Brazil – Tyres, Appellate Report*, *supra* note 111, para. 225 (‘[i]n *US – Shrimp*, the Appellate Body relied on a number of factors in finding that the measure at issue resulted in arbitrary or unjustifiable discrimination’).

¹²⁶ *US – Shrimp, Appellate Report*, *supra* note 122, para. 177.

¹²⁷ *Ibid.*, paras 166, 172.

¹²⁸ *US – Gambling, Appellate Report*, *supra* note 102; WTO, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products – Report by the Panel*, 19 January 2010, WT/DS363; WTO, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products – Report of the Panel*, 18 June 2014, WT/DS401; WTO, *Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear – Report of the Appellate Body and Panel*, 22 June 2016, WT/DS461/R, WT/DS461/R/AB; WTO, *Indonesia – Importation of Horticultural Products, Animals and Animal Products – Report of the Appellate Body and Panel*, 22 November 2017, WT/DS477/R, WT/DS477/R/AB; WTO,

morals exception, it is very unlikely that a respondent invoking gender equality concerns to justify a WTO-inconsistent measure would be able to satisfy successfully the requirements of the chapeau.

3 *Jurisdictional Issues: Extraterritoriality of a Gender-responsive Defence*

There are two contradictory approaches concerning extraterritorial application of the morality exception. According to the first approach, the public morals exception does not provide any guidance on the issue of ‘whose’ morals can be protected.¹²⁹ If the EU’s citizens could have legitimate moral concerns about how Norwegians and Canadians hunt seals in Norway and Canada, can the US government claim that US citizens have legitimate moral concerns about women’s fettered access to economic opportunities in Saudi Arabia, human rights violations in Myanmar and rainforest utilization concerns in South America? In this sense, extraterritoriality should not prevent a country from using a public morals exception as a vehicle for upholding women’s rights, labour standards and many other issues that relate to international trade.¹³⁰ If we employ this approach, then a country could justify an outwardly directed trade measure aimed at protecting female workers or immigrant workers in foreign countries.¹³¹

According to the second approach, if the Appellate Body is to go down the road of extraterritorial application of the morality exception, it could open the Pandora’s box and put the very legitimacy and credibility of the international trading system at grave risk.¹³² Extraterritorial application was possible in the *US – Shrimp* case as the conservation of the ‘highly migratory species of sea turtles demands concerted and cooperative efforts on the part of the many countries whose waters are traversed in the course of recurrent sea turtle migrations’. Hence, in this case, there was a sufficient nexus between the ends and the means – that is, the objective and the measure.¹³³ It may not be similarly straightforward to show such a nexus for a country that has imposed an outwardly directed trade measure in the interest of foreign women employees or

Brazil – Certain Measures Concerning Taxation and Charges – Report of the Appellate Body and Panel, 11 January 2019, WT/DS472/R, WT/DS472/R/AB; *US – Tariff Measures, Panel Report*, *supra* note 76 (the panel report issued on 15 September 2020 in *United States – Tariff Measures on Certain Goods from China* reinforces this difficulty as the USA unsuccessfully justified its tariffs imposed against Chinese goods on the grounds of morality. The panel found that the USA could not establish the requirement of necessity and nexus in this case and hence failed to even preliminarily justify its measure under this exception).

¹²⁹ See Diebold, *supra* note 89, at 69.

¹³⁰ Du, ‘Permitting Moral Imperialism? The Public Morals Exception to Free Trade at the Bar of the World Trade Organization’, 50(4) *Journal of World Trade* (2016) 675.

¹³¹ Jarvis, *supra* note 30, at 236.

¹³² Bhagwati, ‘Afterword, The Question of Linkage’, 96(1) *American Journal of International Law (AJIL)* (2002) 126.

¹³³ *US – Shrimp, Appellate Report*, *supra* note 122, para. 133.

businesswomen. Public morals cannot migrate as freely from one country to another. Moreover, scholars have observed that a successful justification based on moral grounds requires the respondent to show that the measure at issue is primarily aimed at the protection of the responding country's own morals.¹³⁴ There is also some evidence to show that the clause was understood during its framing process as purely domestic in nature, without the intention of conferring upon it any element of extraterritoriality.¹³⁵

4 Absence of Clear and Universal Interpretation of 'Public Morals'

According to Article 31 of the VCLT, a treaty shall be interpreted in accordance with the ordinary meaning of its terms and in light of the treaty's objective and purpose. However, the 'ordinary meaning' of public morals varies from one state to another, which explains why an interpretation limited to the 'ordinary meaning' will always fail to provide a satisfactory and meaningful result in the context of this exception.¹³⁶ According to Article 32 of the VCLT, recourse may be had to supplementary means of interpretation such as a treaty's preparatory work if the literal interpretation leaves the meaning ambiguous or obscure or leads to a result that is manifestly absurd or unreasonable. But the legislative history concerning Article XX(a) is scarce,¹³⁷ and the *travaux préparatoires* for GATT's Article XX(a) reveal very little about its meaning and scope.¹³⁸ No single entity can claim to be the guardian of morals in the world, and the WTO is least equipped to achieve that goal.¹³⁹ The WTO is a universal institution with varied members that have very different versions of moral values, and it is therefore not viable for the WTO to have any mechanism for the normative evaluation of public morals.¹⁴⁰ This situation means that the exception can only be interpreted in a subjective manner.¹⁴¹ State authorities are, in principle, better positioned than international judges to decide on their notions of good and bad.¹⁴² In other words, a respondent could theoretically invoke any policy objective, arguing that,

¹³⁴ Diebold, *supra* note 89, at 69.

¹³⁵ Regis, *supra* note 92, at 409; Diebold, *supra* note 89, at 59.

¹³⁶ Diebold, *supra* note 89, at 50.

¹³⁷ Charnovitz, *supra* note 35, at 689, 704.

¹³⁸ Du, *supra* note 130.

¹³⁹ Usoro, 'In Defence of Pluralism: The World Trade Organization and Public Morals', 25(4) *International Trade Law and Regulation* (2019) 258.

¹⁴⁰ *Ibid.*

¹⁴¹ Babu, *supra* note 45, at 336.

¹⁴² ECtHR, *Handyside v. United Kingdom*, Appl. no. 5493/72, Judgment of 7 December 1976.

according to its own systems and scales of values, this objective falls within the interests of public morals.¹⁴³

That being said, it would be methodologically erroneous to interpret an international treaty in a completely subjective manner.¹⁴⁴ The interpretation of this exception therefore becomes a challenging task, as even though it is important for judges to leave some discretion in the hands of the sovereign members, it is equally pertinent to not overstretch this exception.¹⁴⁵ Opening the gates of the public morality exception to issues not falling otherwise under Article XX's exhaustive list of interests may be seen as an act of judicial activism; it may therefore increase the existing scrutiny and criticism against the WTO's judicial wing.¹⁴⁶

Many legal scholars argue that, because it is an exception to the GATT's general rules, Article XX should be interpreted restrictively.¹⁴⁷ Both common and civil law systems contain the principle that exceptions are to be narrowly construed. Moreover, some scholars have argued that the WTO is not the appropriate regime for enforcing human rights law.¹⁴⁸ For example, Tamara Nachmani argues that a state can only rely on the public morals exception to implement a trade-restrictive measure aimed at protecting a human right if similarly situated countries can also be shown to support the human right at stake.¹⁴⁹ In this connection, Ming Du observes that the addition of new exceptions to Article XX itself is better than expanding the scope of existing exceptions to address social issues not already included under the provision.¹⁵⁰

4 Crafting a New Gender Exception?

The discussions so far outline the difficulties that a responding country invoking the morality exception could face in justifying its measures taken to support women empowerment. These difficulties seem insurmountable in the current environment of rising protectionism.¹⁵¹ The COVID-19 outbreak has aggravated the sentiments of anti-globalism, protectionism and economic nationalism worldwide. It has upended the world economy, creating unparalleled

¹⁴³ Diebold, *supra* note 89, at 51; *US – Gambling, Panel Report, supra* note 43, para. 6.461.

¹⁴⁴ Feddersen, 'Focusing on Substantive Law in International Economic Relations: The Public Morals of GATT's Article XX(a) and "Conventional" Rules of Treaty Interpretation', 7 *Minnesota Journal of Global Trade* (1998) 75.

¹⁴⁵ Du, *supra* note 130, at 74.

¹⁴⁶ Regis, *supra* note 92, at 458.

¹⁴⁷ Feddersen, *supra* note 144.

¹⁴⁸ Eres, 'The Limits of GATT Article XX: A Back Door for Human Rights?', 35(3) *Georgetown Journal of International Law* (2004) 597.

¹⁴⁹ Nachmani, 'To Each His Own: The Case for Unilateral Determination of Public Morality under Article XX(A) of the GATT', 71(1) *University of Toronto Faculty of Law Review* (2013) 31.

¹⁵⁰ Du, *supra* note 130.

¹⁵¹ For recent discussions, see R. Baldwin and S. Evenett (eds), *COVID-19 and Trade Policy: Why Turning Inward Won't Work* (2020).

disruptions to global trade and international supply chains. Countries have responded with heavy trade restrictions¹⁵² and a wide array of inwardly directed fiscal and monetary measures¹⁵³ such as subsidies, state aid, bailouts and favourable industrial policies. These measures have been taken to support certain domestic industries, small businesses and, in some cases, the female workforce and women-owned businesses.¹⁵⁴ These support measures can have an enduring impact on international trade, as some of them may not be compatible with existing multilateral and bilateral trade agreements.¹⁵⁵ Therefore, this may arguably be the right time to trigger a discussion on the need to craft a new exception – an exception that can allow countries to employ measures that can help them minimize the disproportionate harm women employees and employers are facing in the pandemic-disrupted industries.

Article XX(e) allows WTO members to invoke trade measures for refusing to trade in products made from prison labour. A nation may also apply trade measures to protect the labour rights of its nationals or to protect the labour rights of the nationals of the nation against whom the trade measure is directed.¹⁵⁶ Article XX(e) relates only to products made by prison labour. The drafters of the GATT included the prison labour exception in order to emphasize that members could take measures against countries that engage in the particular evil of prison labour. This prohibition on the products from prison labour can be viewed as a ‘carve out’ from the general prohibition on goods made in contravention to public morals. A similar ‘carve out’ is required to prohibit trade practices that can injure women’s economic interests or to encourage trade practices that can protect and uphold these interests. When Article XX was drafted, the plight of women in the international economic order had not yet been widely recognized; to some extent, this continues to be the case even today, particularly if we look at the current WTO jurisprudence.

¹⁵² For list of measures notified to the WTO, see www.wto.org/english/tratop_e/covid19_e/notifications_e.htm.

¹⁵³ Baldwin and Evenett, *supra* note 151, at 179. According to the International Monetary Fund, countries around the world had approved more than \$4.5 trillion worth of emergency measures. J. Guthrie, ‘Get Ready for the \$4.5tn Takeover’, *Financial Times* (24 March 2020), available at www.ft.com/content/1447d50a-6ded-11ea-89df-41bea055720b.

¹⁵⁴ For details on COVID-19 support measures for women, see United Nations Development Programme, COVID-19 Global Gender Response Tracker, available at <https://data.undp.org/gendertracker/>. As relief for small businesses, the USA’s Paycheck Protection Program dedicates more than \$650 billion to business loans, which do not have to be repaid if firms maintain staffing levels and spend the majority on wages within two months. P. Temple-West and K. Shubber, ‘SEC Targets Fuel Company in Bailout Aid Investigation’, *Financial Times* (19 June 2020), available at www.ft.com/content/725e9731-4154-407f-b8db-7d9f69fb04a8.

¹⁵⁵ For example, bans or explicit limits on the quantity of a good that may be exported or imported are quantitative restrictions and hence may be inconsistent with the GATT, *supra* note 15, Art. XI, as it prohibits such measures.

¹⁵⁶ Howse, *supra* note 121, at 131, 142–145 (arguing that an interpretation of the public morals exception as including labour rights might be based on evidence of international law’s evolving concern with the social dimensions of trade).

The invocation of the existing morality exception or a newly crafted gender exception would entail reliance on the dispute settlement machinery of the WTO or of an FTA. If dispute settlement panellists or Appellate Body members (in the case of the WTO and assuming its Appellate Body is restored) are asked to incorporate gender equality considerations as they interpret provisions to resolve disputes, this would transfer the power of realigning trade and non-trade priorities to those international trade adjudicators who may not be knowledgeable about, or trained in, gender issues. Put differently, exclusive reliance on exceptions to justify violations of trade obligations to protect gender equality interests would mean that international adjudicators would determine which trade-offs between trade and gender values should and should not be made.¹⁵⁷

The WTO jurisprudence so far has been completely silent on gender equality issues, and this silence shows that women's rights are perhaps an undervalued and ignored concern in WTO jurisprudence.¹⁵⁸ Hence, if WTO panellists and Appellate Body members are to decide on whether a women-supporting policy (that otherwise contradicts a WTO provision) can be justified under an exception, certain changes in the composition and training of these adjudicators are quite fundamental.¹⁵⁹ The first change should be increasing the representation of women experts in the WTO's dispute settlement body, as panellists and as Appellate Body members. Moreover, training on the interrelation between trade and gender should be provided to the WTO members' representatives, the WTO Secretariat, representatives from state trade ministries and adjudicators of trade disputes. These changes seem achievable, especially with the appointment of the first female director general at the WTO and the creation of a gender focal point and an informal group to work on issues of trade and gender.¹⁶⁰ Perhaps the informal group

¹⁵⁷ Trachtman, 'The Constitutions of the WTO', 17(3) *European Journal of International Law* (2006) 623.

¹⁵⁸ A mere browse through the panel or Appellate Body reports shows that none of them so far have been vocal about gender concerns. Moreover, in some instances, these interests were to some extent sidelined. For instance, in the case of *EC – Hormones* dispute, the European Commission (EC) banned the sale of meat from animals that had been treated with certain hormones. Canada and the USA argued that the EC's ban was contrary to provisions of the Agreement on Sanitary and Phytosanitary Measures 1994, 1867 UNTS 493. The EC gave evidence on how hormone ingestion in the meat had a connection with cancer and, in particular, to breast cancer when the hormone was used as a growth promoter. 'The Appellate Body ruled that even if this evidence was correct, only 371 women in the European Union would become afflicted with cancer from ingesting hormone-treated meat. Thus, it concluded that the potential risk to only 371 women was not sufficient to justify the EC's ban on hormone-treated meat, principally because this conclusion was not based on scientific studies personally conducted or supervised by the testifying expert.' WTO, *European Communities – Measures Concerning Meat and Meat Products – Report of the Appellate Body*, 16 January 1998, WT/DS26/ AB/R, WT/DS48/ABIR, paras 2, 17, 198, 199–201. See Choudhury, 'The Facade of Neutrality: Uncovering Gender Silences in International Trade', 15(1) *William and Mary Journal of Women and the Law* (2008) 113, at 133.

¹⁵⁹ Choudhury, *supra* note 158.

¹⁶⁰ Ngozi Okonjo-Iweala is the seventh director-general of the WTO and the first woman and the first African to serve as director-general. For information on Informal Working Group on Trade and Gender, see the WTO's website Women and Trade, available at

can constitute an expert body that panellists and Appellate Body members can consult if such matters happen to arise in the future.

Given the current circumstances, together with the challenges in which the WTO is engulfed, it might be easier to find a ‘needle in a haystack’ than for WTO members to arrive at a consensus on including a brand new gender exception in the WTO rulebook. The partial acceptance of the WTO’s Joint Declaration is a strong signal reflecting the unpreparedness of the WTO for explicitly embracing gender concerns. If WTO members could not achieve consensus on a completely non-binding declaration loaded with various best endeavour promises, it is inconceivable or rather impractical to expect the members to agree on an explicit inclusion of gender language in the WTO texts. Hence, bilateral and regional trade agreements may be more appropriate to experiment with this new exception. Countries that are renegotiating their existing agreements or negotiating new ones may consider negotiating a new gender exception that they could invoke during public health crises (such as pandemics) or other exceptional circumstances. They may draft this exception in a manner that best suits their domestic conditions, requirements and political willingness.

Drafting such an exception may not necessarily entail reinventing the wheel.¹⁶¹ Countries can take guidance from the drafting styles employed in the existing exceptions. For example, countries that would prefer to craft this clause with stringent and onerous requirements could employ the drafting style and expressions used in Article XX(a) of the GATT 1994. Countries with a larger political appetite for this issue may consider a drafting style similar to the ones employed in Articles XX(g) or XXI of the GATT 1994. Let us have a look at three possible drafting options.

Option 1: Adapted from Article XX(a) of the GATT 1994

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any party of measures:

www.wto.org/english/tratop_e/womenandtrade_e/iwg_trade_gender_e.htm#:~:text=The%20Informal%20Working%20Group%20on,women's%20participation%20in%20global%20commerce.&text=Participation%20in%20this%20Informal%20Working,chaired%20by%20Botswana%20and%20Iceland.

¹⁶¹ The idea was initially proposed by one of the authors in ITC, *supra* note 16.

Forthcoming, *European Journal of International Law* (2022)

- (a) Necessary to reduce or eliminate barriers that impede women's participation in economic activities, or to enhance women's access to economic opportunities
- (b) ...
- (c) ...

Option 2: Adapted from Article XX (g) of the GATT 1994

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any party of measures:

- (a) Relate to the objective of reducing or eliminating barriers that impede women's participation in economic activities, or enhancing women's access to economic opportunities,
- (b) ...
- (c) ...

Option 3: Adapted from Article XXI of the GATT 1994

Nothing in this Agreement shall be construed

- (a) To prevent any party from taking any action which it considers necessary for the reduction or elimination of barriers that impede women's participation in economic activities, or for the enhancement of women's access to economic opportunities in its territory.

Option 1 will be difficult to satisfy, as the country invoking it will have to meet the requirements of necessity and the chapeau, which, as discussed above, may become the main hurdles to cross for a respondent in this respect. Option 2 will be easier to satisfy than Option 1 because the current jurisprudence clarifies that the 'relating to' test has a much lower threshold than the 'necessary to' test. The 'relating to' test was established and developed in several cases where Article XX(g) of the GATT was invoked.¹⁶² The term 'relating to' is defined as 'having some

¹⁶² GATT, *supra* note 15, Art. XX (g) concerns measures relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

connection with, being connected to'.¹⁶³ The Appellate Body has found that, to determine this connection, the relationship between the general structure and design of the measure at stake must be examined.¹⁶⁴ The 'relating to' criterion must be considered by looking at the challenged measure 'in light of its policy and regulatory context and not in isolation'.¹⁶⁵ There must be a close and genuine relationship between the ends and the means.¹⁶⁶ However, such an assessment would not require an evaluation of the actual impact of the concerned measure.¹⁶⁷ Article XX(g) does not prescribe an empirical effects test, given the well-known problems associated with determining causation.¹⁶⁸ Therefore, unlike the 'necessity' test, the assessment of 'relating to' does not require the respondent to establish the contribution of the measure to its objective. Instead, the panel looks at the nature of the challenged measure to determine whether, as a matter of design, aim and architecture, they assist, support or further the goal.¹⁶⁹ Also, unlike the 'necessity' test, there is no need to assess the trade restrictiveness of the measure. The words 'relating to' in the second option suggest that the measure may be taken in conjunction with other measures employed by the responding country. Thus, measures would be more easily justified if they were to fall under an exception with the expression 'relating to' than with the expression 'necessary to'.

Option 3 is perhaps the easiest to satisfy, especially if it is interpreted as a self-judging and non-justiciable exception due to the inclusion of the phrase 'which it considers necessary'. A provision is self-judging when the members can decide whether and how this exception can be applied to the measure in question. It is non-justiciable when the issue cannot be subject to the findings of a WTO panel or any adjudicative system. This would be the case if the phrases 'it considers' and 'necessary' are read together. The provision will be considered justiciable if the phrases 'it considers' and 'necessary' are not read together.¹⁷⁰ If Option 3 is employed to draft a gender exception, then a judicial assessment of whether an otherwise inconsistent measure may be justified under this exception may be reduced to a mere technical exercise as it may take place

¹⁶³ WTO, *China – Measures Related to Exportation of Various Raw Materials – Report of the Appellate Body*, 30 January 2012, WT/DS395/20. See W.R. Trumble and A. Stevenson (eds), *Shorter Oxford English Dictionary* (6th edn, 2007), at 2519.

¹⁶⁴ *US – Shrimp, Appellate Report*, *supra* note 122, para 136.

¹⁶⁵ WTO, *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum – Report of the Panel (China – Rare Earth, Panel Report)*, 29 August 2014, WT/DS431/17, at 7.289.

¹⁶⁶ *US – Shrimp, Appellate Report*, *supra* note 122, para 136.

¹⁶⁷ WTO, *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum – Report of the Appellate Body*, 29 August 2014, WT/DS431/AB/R, WT/DS432/AB/R, WT/DS433/AB/R, para. 5.147.

¹⁶⁸ *Ibid.*, at 5.112.

¹⁶⁹ *China – Rare Earth, Panel Report*, *supra* note 164, para. 7.379.

¹⁷⁰ WTO, *Russian Federation – Measures Concerning Traffic in Transit – Report of the Panel*, 5 April 2019, WT/DS512/R. See Boklan and Bahri, 'The First WTO's Ruling on National Security Exception: Balancing Interests or Opening Pandora's Box?', 19(1) *World Trade Review* (2020) 123, at 136.

without reliance on any predetermined legal standard or test. However, the ambiguous drafting of this exception may mean that it may also be construed in a purely objective manner.¹⁷¹ This creates ample room for creative argumentation. Members may more readily accept this ambiguous drafting style as they could argue or contest its interpretation either way. However, the use of this exception – whose interpretation could be a subject of a dispute in itself – could leave a large escape window wide open, and, once opened, it could allow members to escape the obligations they have undertaken as a WTO member or under a regional trade agreement for reasons that may only remotely relate to gender equality considerations.¹⁷²

5 Cultural Imperialism versus Market Access Inducements: A Tightrope to Walk

Scholars have raised concerns about the overbroad nature of the public morality exception that could provide a cloak for protectionism.¹⁷³ Charnovitz observes that ‘[v]irtually anything can be characterized as a moral issue’,¹⁷⁴ and the same can be said for gender equality as it lacks a universally accepted definition. The broad and undefined scope of ‘public morality’ and ‘gender equality’ can result in a shift towards unilateralism and may allow countries to disguise an illegal protectionist measure as a policy objective. A new gender exception or a gender-considerate interpretation of the morality exception could impose on nations a significant cost in terms of sovereignty, as it can allow countries to interfere in the domestic affairs of other countries and place limits on their ability to deal with matters relating to their social, political, economic, cultural and even religious affairs.¹⁷⁵ However, this cost could vary due to a number of factors,

¹⁷¹ Hahn, ‘Vital Interests and the Law of GATT: An Analysis of GATT’s Security Exception’, 12(3) *MJIL* (1991) 584; Akande and Williams, ‘International Adjudication on National Security Issues: What Role for the WTO?’, 43 *VJIL* (2003) 365; Schloemann and Ohlhoff, ‘Constitutionalization and Dispute Settlement in the WTO: National Security as an Issue of Competence’ 93(2) *AJIL* (1999) 424

¹⁷² Alford, ‘The Self-Judging WTO Security Exception’, 3 *Utah Law Review* (2011) 697.

¹⁷³ Serpin, *supra* note 92 (author observes how this protectionist tool can undermine the progress made towards trade liberalization and agreements over the past few decades). The *US – Gambling, Appellate Report*, for instance, has left open the fundamental issue of what values or interests qualify as public morals and whether a state can unilaterally define its own public morals. *US – Gambling, Appellate Report, supra* note 102, at 231–232.

¹⁷⁴ Charnovitz, *supra* note 35, at 731.

¹⁷⁵ Sovereignty cost refers to the amount of power or authority a sovereign country would otherwise have but needs to surrender it when it joins an international treaty that place limits on and encourages interference in its domestic affairs. Sikkink, ‘Human Rights, Principled Issue-Networks, and Sovereignty in Latin America’, 47(3) *International Organization (IO)* (1993) 411 (noting that the ‘doctrine of internationally protected human rights offer[s] one of the most powerful critiques of sovereignty as currently constituted’). Abbott and Snidal note that the ‘sovereignty costs’ is low when states ‘simply make international commitments that limit their behavior in particular circumstances,’ but that these costs are higher when ‘states accept external authority over significant decisions.’ Abbot and Snidal, ‘Hard and Soft Law in International Governance’, 54(3) *IO* (2000) 421. For a contrary view, see Reus-Smit, ‘Human Rights and the Social Construction of Sovereignty’, 27(4) *Review of International Studies* (2001) 519 (author observes that sovereignty and human rights are interrelated and should be seen as two contradictory values).

including a given country's gender gap rating, according to the World Economic Forum's (WEF) *Global Gender Gap Reports*¹⁷⁶ or the World Bank's *Women, Business and the Law Reports*.¹⁷⁷

The further a country's practices and policies discourage gender inequality and adhere to universally accepted gender equality norms, the more likely it is that the country will accept such an exception or interpretation. The countries with practices and policies that do not discourage gender inequality and do not adhere to commonly accepted norms (such as the elimination of discrimination based on sex) and hence are ranked poorly in gender-related indexes might be less likely to accept such an exception or interpretation.¹⁷⁸ Together with this cost of compliance, another deterrent could be the uncertainty as to the inconvenience that countries might face with such exceptions, as countries can invoke these exceptions to justify a value that may either only be remotely related to gender equality or a value that is not shared or observed by other countries.

The principal concern is the extent to which such an interpretation can allow countries to stretch the already stretched public morality exception. If country A justifies a measure that bans or restricts trade with country B because country B ranks poorly on the WEF's *Global Gender Gap Reports* or because it does not adhere to its commitments under the International Labour Organization's conventions, country B can see this as country A's attempt to impose its own cultural standards on country B. An actual WTO case demonstrates this problem. The WTO's ruling in *EC – Seals* may be seen as legitimizing moral imperialism that was inherent in the EU's seal regime, as it could be seen as an attempt by the EU to impose its moral values onto foreign jurisdictions without any consideration for their moral interests.¹⁷⁹ This imposition in a sense also contradicted the traditions and cultural practices related to seal hunting in Canada and Norway. In other words, by giving legitimacy to animal welfare concerns as a public moral concern, both the WTO panel and the Appellate Body subordinated the moral concerns of the Indigenous sealing communities in other countries to those of the EU's animal welfare concerns. This is a classic example that reflects how justifying a trade measure under the morality exception (or a new gender exception) may allow the responding country to effectively define the moral concerns of foreign jurisdictions without any regard for their morals or even

¹⁷⁶ World Economic Forum, *Closing the Gender Gap Accelerators* (accessed, 31 July 2021), available at www.weforum.org/projects/closing-the-gender-gap-accelerators.

¹⁷⁷ World Bank Group, *Women, Business and the Law 2021* (2021), available at <https://wbl.worldbank.org/en/wbl>.

¹⁷⁸ Hathaway, "The Cost of Commitment", 55(5) *Stanford Law Review* (2003) 1821 (the author has referred to this as 'sovereignty view', wherein countries take into account the cost of such a commitment to their national sovereignty).

¹⁷⁹ Whitsitt, 'A Comment on the Public Morals Exception in International Trade and the EC – Seal Products Case: Moral Imperialism and Other Concerns', 3(4) *Cambridge Journal of International and Comparative Law* (2014) 1376, at 1390.

sometimes at the cost of destroying their comparative advantage in a particular product or industry.¹⁸⁰

An attempt to address gender equality concerns may be seen as an attempt to engage in ‘cultural imperialism’ and may therefore be used as a protectionist weapon wherein countries could take advantage of unequal market power or use these concerns in an indirect way to diminish other countries’ comparative advantage by exporting their own social or cultural model to those that have a different set of values and concerns. But, then, the inclusion of stringent labour standards in the USMCA to minimize the exploitation of workers and improve their wages and working conditions in Mexico could also be seen as the USA’s strategy of imposing its own labour standards not merely to help Mexican workers but also to reduce Mexico’s comparative advantage in manufacturing automobiles due to its low cost of labour and the labour-intensive nature of its automobile industry. This example shows that trade policy instruments have developed an appetite for labour standards, partly because they are trade-germane interests and directly impact countries’ economic interests, but this may not be the case for other supposedly non-trade-germane concerns such as gender equality.¹⁸¹

The fears of cultural imperialism and the use of gender standards for protection of domestic industries are in fact the main concerns that several countries have voiced when they have resisted or opposed any development in respect of trade and gender, such as the signing of the WTO’s Joint Declaration or even for joining the recently formed WTO informal group to discuss these matters.¹⁸² Hence, if WTO members cannot achieve a consensus for the signing of a completely non-binding declaration or for joining an informal group to exchange best practices, proposing the inclusion of a new gender exception in the WTO Agreements is like trying to boil the ocean. This problem may seem insurmountable in a multilateral context but not so much in a bilateral or regional context as countries can induce their trade partners into negotiating trade agreements with a gender exception.

The more important the market of the country extending such an inducement, the more prominent or attractive that inducement will be. Andrew Moravcsik observes that countries’ willingness to ‘tolerate sovereignty costs increases insofar as the costs are outweighed by the

¹⁸⁰ *Ibid.*

¹⁸¹ LeClercq, ‘The Disparate Treatment of Rights in U.S. Trade’, 90 *Fordham Law Review* (forthcoming) (author notes that this appetite depends largely on whether the non-trade concerns are related to trade and whether they impact production or trade costs).

¹⁸² R. Bissio, ‘Is “Gender” a Trojan Horse to Introduce New Issues at WTO?’, *Third World Network*, 11 December 2017, available at <https://twnetwork.org/wto/%E2%80%9Cgender%E2%80%9D-trojan-horse-introduce-new-issues-wto>; A. Singh, ‘Explained: India’s Refusal to Back WTO Declaration on Gender Equality in Trade’, *Qrius*, 15 December 2017, available at <https://qrius.com/explained-india-refusal-gender-equality-trade/>.

benefits of reducing domestic political uncertainty’.¹⁸³ Rationalist scholars have asserted that material interests are likely to dominate other interests and concerns. However, countries’ willingness and appetite for such inducements rely on their domestic conditions since countries may not be willing to be a part of agreements that contain obligations with which they cannot comply.¹⁸⁴ Hence, countries may not usually engage in cooperation efforts that require departure from their domestic policies and practices or the ones that require countries to act differently than they would otherwise act. Hence, the cost of complying along with the probability of complying are both fundamental to a country’s decision to join an agreement that may require that the country change the status quo in respect of its laws, policies and practices.

However, the normative view attacks this argument and advocates that countries might still be willing to assume such commitments if they are committed to achieving gender equality and changing their domestic conditions using international policy instruments.¹⁸⁵ Martha Finnemore, for instance, defends this view about ‘norm emergence’ and argues that the negotiation and ratification of international policy instruments can encourage the emergence of new norms or policies that may impact or even change a country’s behaviour.¹⁸⁶ In addition, governments may have legitimate interests in the well-being of foreign citizens for various reasons that include the promotion of international stability, the minimization of wars and disorders and the furtherance of global economic growth.¹⁸⁷

These observations show that FTAs can be more viable forums to experiment with the inclusion of a new gender exception as they are a rapidly growing class of policy instruments that govern market access between countries. Free or preferential trade agreements can accordingly assume the task of changing countries’ outlook towards the inclusion of gender

¹⁸³ Moravcsik, ‘The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe’, 54(2) *IO* (2000) 217, at 228.

¹⁸⁴ Downs, Rocke and Barsoom, ‘Is the Good News About Compliance Good News About Cooperation?’, 50(3) *IO* (1996) 379; see also Murdoch and Sandler, ‘The Voluntary Provision of a Pure Public Good: The Case of Reduced CFC Emissions and the Montreal Protocol’, 63(3) *Journal of Public Economics* (1997) 331; contrary view in Simmons, ‘International Law and State Behavior: Commitment and Compliance in International Monetary Affairs’, 94(4) *American Political Science Review* (2000) 819 (as authors observe that ‘international legal rules do alter governments’ interests in compliant behavior’).

¹⁸⁵ M. Finnemore, *National Interests in International Society* (1996), at 87 (noting that states preferences can change during international dialogues and negotiations, and international systems can change state action by changing their preferences).

¹⁸⁶ Finnemore and Sikkink, ‘International Norm Dynamics and Political Change’, 52(4) *IO* (1998) 887, at 900 (observing that the creation and adoption of international agreements and treaties can change a country’s preference and shape its norms and domestic behavior); Hafner-Burton, ‘Trading Human Rights: How Preferential Trade Agreements Influence Government Repression’, 59(3) *IO* (2005) 593 (observes how international treaties are designed to regulate sovereign governments’ behaviours towards individuals).

¹⁸⁷ J.L. Goldsmith and E.A. Posner, *The Limits of International Law* (2005), at 109–110 (observes that although countries are mainly interested in the well-being of their own citizens, they have some interest in the well-being of others).

equality concerns within their trade policy agenda. The most recently negotiated trade agreements (such as the USMCA, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership and the African Continental Free Trade Agreement) have shown that trade agreements have significant advantages in advancing non-trade concerns including labour standards, human rights and gender equality.¹⁸⁸

6 Conclusion

The disruptions in international trade, changing supply and demand patterns and the social distancing policies during the COVID-19 crisis are jeopardizing jobs and business opportunities for many. Women are positioned to bear a disproportionate burden of this pandemic in terms of health, employment, business, consumption and social protection. International trade policies may play an important role in minimizing these losses, as gender-responsive international trade policies can provide the architecture for inclusive economic growth.

Inclusion of a new gender exception or a gender-sensitive interpretation of the existing public morality exception can increase the gender responsiveness of international trade agreements. It can enable countries to employ various measures to support women-owned businesses and jobs without having to worry about whether such a measure could invite a legal challenge. The legal requirements of the existing general exceptions can help strike a balance in members' rights to uphold their societal interests *vis-à-vis* their rights to enjoy unfettered market access. Members can also negotiate the inclusion of a specific gender exception in their future FTAs, and they could employ any of the proposed three options in accordance with their political willingness, domestic conditions and nature of the agreement. The proposed options, along with model provisions, provide three different ways of balancing countries' right to enforce their right to trade *vis-à-vis* their inclination to further gender equality.

The proposed interpretation of the public morality exception calls for a gender-responsive judicial response. The negotiation of a new gender exception calls for a policy response. This much needed judicial or policy response will play an important role in determining the pace and nature of economic recovery amidst the COVID-19 pandemic. However, as shown in this article, there are multiple downsides of the proposed new exception or in extending the scope of the existing morality exception to cover concerns about women empowerment, and these downsides

¹⁸⁸ CPTPP, *supra* note 21; African Continental Free Trade Agreement (enforced, 30 May 2019)

may be overplayed by certain countries, especially in the current conditions as the present world is witnessing declining trends of globalization and an upsurge in nationalism.