

A HYPOTHETICAL ENGAGEMENT:  
GATT ARTICLE XX(A) AND INDONESIA'S *FATWA*  
AGAINST TRADE IN ENDANGERED SPECIES

*Lisa M. Meissner\**

*There is not an animal (that lives) on the earth, nor a being that flies on its wings, but (forms part of) communities like you. Nothing have We omitted from the Book, and they (all) shall be gathered to their Lord in the end.<sup>1</sup>*

INTRODUCTION

The greatest recognized threat facing biodiversity conservation today is habitat destruction.<sup>2</sup> Other threats include but are not limited to global climate change, encroachment, illegal wildlife trafficking, and overexploitation through intensive agricultural and commercial uses.<sup>3</sup> Although wildlife trafficking is not the main source of biodiversity loss, the pressures generated by the international demand for endangered species and their derivative products adversely affect not only individual species, but also entire ecosystems and rural livelihoods through the removal of flagship species from the environment.<sup>4</sup> In response to the growing threats

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\* J.D. Candidate, Notre Dame Law School, 2015; B.A. History, Political Science, and Spanish Language & Literature, Marquette University, 2011. I would like to thank the staff of the *Notre Dame Law Review* for their critical feedback and editing skills, and my family for their unending support and inspiration. All errors are my own.

<sup>1</sup> QUR'AN, sura Al-An'am 6:38, *translated in* THE HOLY QUR'AN: TEXT AND TRANSLATION 146 (Abdullah Yusuf Ali ed., 2009).

<sup>2</sup> See ROSALIND REEVE, POLICING INTERNATIONAL TRADE IN ENDANGERED SPECIES 8 (2002).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* The exploitation of wildlife at unsustainable levels through the activities of wildlife trafficking not only threatens biodiversity conservation but also results in harm to local communities because when the species disappear, the income they provide to rural populations also disappears. Melissa Geane Lewis, *CITES and Rural Livelihoods: The Role of CITES in Making Wildlife Conservation and Poverty Reduction Mutually Supportive*, 12

facing our shared natural world, environmental issues are now being incorporated into multilateral agreements and development bank operations.<sup>5</sup> Despite these positive advancements, however, international trade regimes remain a relatively underdeveloped arena for enforcing environmental controls.<sup>6</sup>

The slow sedimentation of environmental policy objectives within international trade regimes—specifically the World Trade Organization (WTO)—is compounded by the fact that nations continue to artificially separate trade and the environment, rather than uniting them as mutually reinforcing goals.<sup>7</sup> Nevertheless, international environmental policies increasingly rely on trade restrictions in order to implement and enforce their objectives in an attempt to reunite these fields on the international level. For example, on the one hand, environmentalists would use international trade law as a method of compliance enforcement within multilateral environmental agreements; free trade proponents, on the other hand, would perceive such measures as jeopardizing the current regime through cloaked protectionist motives.<sup>8</sup> The adverse nature of trade and

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J. INT'L WILDLIFE L. & POL'Y 248, 249–50 (2009). These negative effects have led interested parties to contend that, from an ethical standpoint, international trade law should be required to consider the livelihoods of local communities in the decision-making process as these individuals and groups rely on wildlife and natural resources not just as a source of income, but also for subsistence purposes and as elements of cultural or religious practice. *Id.* at 254 (noting the example of the Appendix I listing of leopards by the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), which “negatively impacted some African populations of this species by removing the animals’ financial value to local farmers,” who already “viewed leopards as pests that preyed upon livestock,” thus eliminating “any incentive the rural communities had *not* to eradicate those leopards in their vicinity” (emphasis added)).

<sup>5</sup> See generally WORLD BANK, MAKING DEVELOPMENT SUSTAINABLE (Ismail Serageldin et al. eds., 1994), available at <http://elibrary.worldbank.org/doi/pdf/10.1596/0-8213-3042-X> (collection of essays, curated by the World Bank, discussing key current environmental issues); *Early Warning System*, BANK ON HUMAN RIGHTS, <http://bankonhumanrights.org/ews/> (last visited Feb. 18, 2015) (a web-based tool identifying the international banks and finance institutions behind current development projects and the impacts such projects may have on local communities and ecosystems).

<sup>6</sup> See generally John H. Jackson, *World Trade Rules and Environmental Policies: Congruence or Conflict?*, 49 WASH. & LEE L. REV. 1227 (1992). The World Bank has modified its operations in response to this perceived weakness, including the establishment of a new vice-presidency of environmentally sustainable development and the provision of expert assistance in the preparation of national environmental action plans. *Id.* at 1227, 1256.

<sup>7</sup> Chris Wold, *Multilateral Environmental Agreements and the GATT: Conflict and Resolution?*, 26 ENVTL. L. 841, 843 (1996).

<sup>8</sup> See Charles R. Fletcher, *Greening World Trade: Reconciling GATT and Multilateral Environmental Agreements Within the Existing World Trade Regime*, 5 J. TRANSNAT'L L. & POL'Y 341, 349–50 (1996).

environmental conversation thus poses significant challenges to the international community.<sup>9</sup> Within this framework, the top clerical body of the nation-state of Indonesia has taken the progressive step of uniting these two factors through the issuance of a *fatwa* against all hunting and trade in endangered species.<sup>10</sup> Should Indonesia seek to enforce this *fatwa* as national policy, however, it is unclear whether such action would endure WTO scrutiny under an Article XX(a) public morals analysis.

Part I will introduce the World Trade Organization's framework for liberalizing trade, including the exceptions available under Article XX that enable Member States to legislate on matters critical to their domestic constituencies despite trade obligations to the contrary. Part II then broadens the scope of the discussion to consider the association between Islamic Shari'a law and international trade law, and the challenges facing these two regimes in the arena of wildlife trafficking. Lastly, Part III delves into an analysis of a hypothetical situation in which Indonesia adopts, as a matter of national policy, an official *fatwa* against all trade in endangered species, evaluating the components of the public morals exception of the General Agreement on Tariffs and Trade (GATT) as they apply in light of prevailing WTO jurisprudence.

#### I. GATT ARTICLE XX EXCEPTIONS UNDER THE WTO FRAMEWORK

The World Trade Organization was established January 1, 1995 with the primary aim of liberalizing trade within the international community.<sup>11</sup> To reach this goal, the WTO requires all member countries to "ensure the conformity of its laws, regulations and administrative procedures with its

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<sup>9</sup> *Id.*

<sup>10</sup> Bryan Christy, *First Ever Fatwa Issued Against Wildlife Trafficking: Invoking the Koran, Indonesia's Top Clerical Body Declares Wildlife Trafficking to Be Forbidden*, NAT'L GEOGRAPHIC (Mar. 4, 2014), <http://news.nationalgeographic.com/news/2014/03/140304-fatwa-indonesia-wildlife-trafficking-koran-world/>.

<sup>11</sup> Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter WTO Agreement]. The Agreement marked the conclusion of more than seven years of extensive negotiations in the Uruguay Round on the General Agreement on Tariffs and Trade (GATT) and incorporated the GATT and all other related treaties into the new WTO framework. The primary objectives of the WTO, as recognized in the United States' enactment of the WTO Agreements are "to obtain: (1) more open, equitable, and reciprocal market access; (2) the reduction or elimination of barriers and other trade-distorting policies and practices; and (3) a more effective system of international trading disciplines and procedures." 19 U.S.C. § 2901(a) (2012). For an authoritative discussion of these negotiations, including the heated debate concerning the treatment of culture under the GATT, see JOHN CROOME, *RESHAPING THE WORLD TRADING SYSTEM: A HISTORY OF THE URUGUAY ROUND* (2d ed. 1999).

[WTO] obligations.”<sup>12</sup> At the heart of this system are four essential governing principles: (1) most-favored nation;<sup>13</sup> (2) national treatment;<sup>14</sup> (3) non-discrimination;<sup>15</sup> and (4) reciprocity.<sup>16</sup> A member country alleged to be in violation of one or more of these obligations must either amend its noncomplying activities or be subject to WTO-authorized sanctions under the organization’s Dispute Settlement Understanding.<sup>17</sup> Alleged violations are evaluated by WTO-appointed Dispute Settlement Bodies, which are authorized to assign penalties and suspend concessions or other obligations under WTO Agreements.<sup>18</sup> As of June 26, 2014, 160 nations are members of the WTO, whose related agreements are estimated to govern ninety percent of global trade.<sup>19</sup>

In order to be accepted by an international community of vastly different histories, cultures, and levels of development, the WTO recognized that there can be compelling reasons for a nation to breach its core membership obligations.<sup>20</sup> Article XX of GATT 1994 thus describes “measures that are recognized as *exceptions to substantive obligations* . . . because the domestic policies embodied in such measures have been

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12 WTO Agreement, *supra* note 11, art. XVI, para. 4; see Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, 33 I.L.M. 9 (1994). See generally *Understanding the WTO: Overview*, WTO, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm1\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm1_e.htm) (last visited Feb. 18, 2015) (providing a general overview of the WTO’s purpose and operations).

13 General Agreement on Tariffs and Trade art. I, Oct. 30, 1947, 55 U.N.T.S. 194 [hereinafter GATT] (requiring members to extend the trade treatment offered to any one nation in order to avoid discriminatory effects in trade).

14 *Id.* art. III (prohibiting discrimination between domestic and foreign goods in domestic regulation).

15 *Id.* art. I, III (substantiating the basic trade rules of the nondiscrimination principle with the prohibition on quantitative restrictions).

16 WTO Agreement, *supra* note 11, pmbl. (“*Being desirous* of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations”).

17 See generally *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401.

18 Larry A. DiMatteo et al., *The Doha Declaration and Beyond: Giving a Voice to Non-Trade Concerns Within the WTO Trade Regime*, 36 VAND. J. TRANSNAT’L L. 95, 98 n.10 (2003).

19 *Understanding the WTO: Members and Observers*, WTO, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (last visited Feb. 18, 2015); see also RAJ BHALA, INTERNATIONAL TRADE LAW 85 (1996) (describing the institutional foundations of GATT-WTO and NAFTA).

20 TANIA VOON, CULTURAL PRODUCTS AND THE WORLD TRADE ORGANIZATION 10 (2007).

recognized as important and legitimate in character.”<sup>21</sup> Article XX(b), for instance, exempts measures “necessary to protect human, animal or plant life or health,” while Article XX(g) exempts those “relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption,” and Article XX(a) exempts those actions “necessary to protect public morals.”<sup>22</sup> These exemptions are subsequently subject to the preamble (or “Chapeau”) of Article XX, which requires that restrictions not “constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.”<sup>23</sup> Securing international adherence to multilateral trade agreements like the WTO therefore requires assurances—or perhaps *insurance*—to nations that they will maintain their legislative jurisdiction over matters critical to their domestic governance, notwithstanding trade obligations to the contrary.<sup>24</sup> In predominately Muslim nations like Indonesia, the WTO’s flexibility accommodates the provision of Shari’a law over areas of domestic concern, such as wildlife trafficking.

## II. SHARI’A LAW AND THE INTERNATIONAL TRADE IN ENDANGERED SPECIES

Shari’a is an all-encompassing Islamic code of conduct that is fundamentally and inseparably social, political, and religious in nature.<sup>25</sup> In the realm of international trade, Shari’a law is crucial because financial

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21 Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 121, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *Shrimp-Turtle*] (complaint by India, Malaysia, Pakistan, and Thailand).

22 GATT, *supra* note 13, art. XX, para. I(a), I(b), I(g). To come within the strictures of these exceptions, certain thresholds must be met. An Article XX(b) measure, for example, must be shown to be “necessary” to further legitimate health goals, which both panel and Appellate Bodies interpreted to signify either the: (a) “least GATT-inconsistent” means of realizing the stated environmental goal; or (b) “least trade-restrictive” and most reasonably available means to achieve the stated objective. DANIEL C. ESTY, *GREENING THE GATT: TRADE, ENVIRONMENT, AND THE FUTURE* 48–49 & n.15 (1994); *cf.* Appellate Body Report, *Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes*, ¶¶ 72, 74, DS10/R-37S/200 (Oct. 5, 1990).

23 GATT, *supra* note 13, art. XX, pmb1.

24 See VOON, *supra* note 20, at 10.

25 Noel James Coulson, *Muslim Custom and Case-Law*, 6 INT’L J. FOR STUDY MOD. ISLAM 13, 13 (1959). Positive Shari’a law derives from four essential sources: (1) the Quran (Muslim Holy Book); (2) the *sunna* (the traditions and practices of the Prophet Muhammad); (3) the *ijma* (consensus of learned scholars); and (4) *qiyas* (method of analogical deduction). Together these sources govern the whole of Islam and the lives of believers—from social interactions to methods of prayer to international financial transactions. *Id.*

transactions engage the whole of society—from the individual to the nation—in the business of earning a living.<sup>26</sup> Relevant Islamic teachings in this area hold that social stability is furthered by a commercial society in which all benefit from earning a living in a wholesome and lawful manner.<sup>27</sup> Accordingly, at the heart of Islamic finance are the religious standards governing that which is lawful and good (*halal*), and that which is unlawful or forbidden (*haram*).<sup>28</sup>

Shari'a law carries within it numerous mechanisms for bringing economic transactions into conformity with the principles of Islam.<sup>29</sup> These materialize in practice in the form of *fatwas*, authoritative statements on unresolved legal questions by recognized Islamic scholars.<sup>30</sup> *Fatwas* materialize in practice as prohibitions, restrictions, obligations, and religious duties.<sup>31</sup> For example, throughout Shari'a law, prohibitions against the activities of “middlemen” are prevalent.<sup>32</sup> These are based on the belief that such activities result in unearned profits or violate the principle of harmlessness, i.e., that one should refrain from harming others to the greatest extent possible and avoid waste in all forms (including waste of natural resources).<sup>33</sup>

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26 Shaykh Yusuf Talal DeLorenzo, *Shari'ah Compliance Risk*, 7 CHI. J. INT'L L. 397, 407 (2007).

27 *Id.* The principle of equality, for example, prohibits extreme inequalities in the distribution of goods, while the principle of fairness holds that economic gains must be earned by the individual. See Timur Kuran, *On the Notion of Economic Justice in Contemporary Islamic Thought*, 21 INT'L J. MIDDLE EAST STUD. 171, 172 (1989). Thus, in a very small nutshell, Islamic economic justice requires the commercial system to treat “similar economic contributions similarly, and different contributions differently.” *Id.*

28 DeLorenzo, *supra* note 26, at 407.

29 See Kuran, *supra* note 27, at 173. In modern Islamic finance, a *fatwa* is a formal certification of a financial product or service by a qualified Shari'a expert, or a group of such experts (also called a Shari'a Supervisory Board). See DeLorenzo, *supra* note 26, at 399–402. Certification therefore signifies to the Muslim consumer that a product complies not only with jurisdictional regulations, but that it has also been subjected to scrutiny by an authority on Islamic transactional law and is therefore consistent with Shari'a rules and standards. *Id.* at 400. Of course, the presence of a *fatwa* is insufficient in itself to guarantee complete market compliance: “*fatwa* risk” has to do with the possibility that the *fatwa* is ambiguous and will not be understood by any but those with specialized knowledge. *Id.* at 400, 402–04.

30 *What is a Fatwa?*, ISLAMIC SUPREME COUNCIL OF AM., <http://www.islamicsupremecouncil.org/understanding-islam/legal-rulings/44-what-is-a-fatwa.html> (last visited Feb. 20, 2015).

31 Kuran, *supra* note 27, at 173.

32 *Id.* at 175.

33 *Id.*; see also BAKER AHMAD ALSERHAN, *THE PRINCIPLES OF ISLAMIC MARKETING* 7–8 (2011).

Illegal wildlife trafficking, an insidious and lucrative business,<sup>34</sup> violates both of these fundamental principles of Islam. In terms of “unearned gains,” profits are invariably concentrated at the level of the middlemen and above, where a product’s value typically increases from twenty-five to fifty percent from the point of capture.<sup>35</sup> An African gray parrot exported from the Ivory Coast, for example, increases from \$20 at capture to \$100 at the point of export, to \$600 for the importer at the consumer state, and to \$1,100 for the specialist retailer.<sup>36</sup> Thus, harm is done not only to the frequently impoverished communities engaged in the dangerous and ill-paying activity of capturing the animals in the wild, but also to the species themselves. In Brazil, for instance, approximately thirty-eight million animals are illegally captured annually; of these, up to ninety percent die in the process of capture and movement through the supply chains.<sup>37</sup>

In March 2014, the Indonesian Council of Ulama,<sup>38</sup> the nation’s top Islamic clerical body, responded to the growing environmental and social crises caused by wildlife trafficking in Indonesia<sup>39</sup> by issuing a *fatwa*

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34 The World Wildlife Fund estimates that wildlife smuggling follows only drug and arms trafficking in terms of illicit profits, with approximately \$15–25 billion generated annually. See DONALD R. LIDDICK, *CRIMES AGAINST NATURE* 41 (2011).

35 *Id.* at 43.

36 *Id.*; see also JACQUELINE L. SCHNEIDER, *SOLD INTO EXTINCTION* 5–6 (Graeme R. Newman ed., 2012); cf. REEVE, *supra* note 2, at 12–13. An argument often used to support the trade is the economic benefit accruing to range states and in particular to rural communities. But the reality is that those who benefit most from the wildlife trade are the middlemen and kingpins at the head of the chain, while the trappers and poachers at the bottom often put their lives at risk, but receive a relative pittance in return. *Id.* at 13.

37 Liddick, *supra* note 34, at 42. Such startling and tragic percentages precipitate an even greater harvesting of stressed and endangered species in order to meet the basic economic principle of supply and demand. See SCHNEIDER, *supra* note 36, at 12–13.

38 Mark E. Cammack & R. Michael Feener, *The Islamic Legal System in Indonesia*, 21 PAC. RIM. L. & POL’Y J. 13, 33 (2012). The Council has “no formal authority or institutional capacity for the enforcement of Islamic doctrine in Indonesia,” nor has it been cited directly in Indonesian court cases. *Id.* at 34. Despite these formalities, the pronouncements of the Council nevertheless carry considerable weight as the councilors of approximately 205 million Muslims, roughly thirteen percent of the world’s Muslim population. See *Muslim Population of Indonesia*, PEW RESEARCH CENTER (Nov. 4, 2010), <http://www.pewforum.org/2010/11/04/muslim-population-of-indonesia/> (noting that approximately eighty-eight percent of Indonesia’s population is Muslim). For a critical examination of the normative and legally pluralistic practices that have emerged in contemporary Indonesia, see John R. Bowen, *Normative Pluralism in Indonesia: Regions, Religions, and Ethnicities*, in *MULTICULTURALISM IN ASIA* 152–69 (Will Kymlicka & Baogang He eds., 2005).

39 The *fatwa* was issued during a period of unprecedented transnational wildlife crime, with disproportionate burdens on countries such as Indonesia that stand as one of the last bastions of natural biodiversity. See Christy, *supra* note 10. For a general analysis of

against all hunting of, and trade in, endangered species.<sup>40</sup> The Council's secretary in charge of fatwas, Asrorun Ni'am Sholeh, explained to the Associated Free Press: "All activities resulting in wildlife extinction without justifiable religious grounds or legal provisions are *haram*. . . . These include illegal hunting and trading of endangered animals."<sup>41</sup> It is difficult to anticipate what, if any, regulatory changes the *fatwa* could put into motion at the national-level.<sup>42</sup> For the purposes of this Essay, assume *arguendo* that the Indonesian government has adopted the ban on all trade in endangered species as a matter of national policy.

### III. HYPOTHETICAL *FATWA* ANALYSIS UNDER THE ARTICLE XX(A) PUBLIC MORALS EXCEPTION

Presuming the Indonesian government adopted its *fatwa* against all hunting of, and trade in, endangered species as national policy, the key issue becomes how the WTO might respond under an Article XX(a) exception based on the protection of public morals.<sup>43</sup> Notwithstanding the presence of Article XX(a) as an established element of international trade law, it is only recently that the WTO has begun applying the exception within the framework of its Dispute Settlement Body.<sup>44</sup> Panels have since

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the biodiversity crisis in Indonesia, see *Indonesian Biodiversity and Action Plan (2003-2020)*, CENTER FOR BIOLOGICAL DIVERSITY, INDONESIA NATIONAL PLANNING AGENCY, AND U.N. GLOBAL ENVIRONMENT FACILITY (2003), available at <http://www.bas.ynu.ac.jp/data2011/strategy/indonesia2.pdf>.

40 For the full English-language text of the resolution, see FATWA COMM'N, INDONESIA COUNCIL OF ULAMA, PROTECTION OF ENDANGERED SPECIES TO MAINTAIN THE BALANCED ECOSYSTEMS (2014) [hereinafter FATWA TEXT], available at <http://www.arcworld.org/downloads/Fatwa-MUI-English-Jun-2014.pdf> (citing Quranic verses, hadiths of the Prophet, principles of Islamic jurisprudence, and national legislation in support of the ban on all hunting and trade in endangered species).

41 J.T. Quigley, *Divine Intervention? Indonesian Clerics Issue Fatwa to Protect Endangered Species*, THE DIPLOMAT (Mar. 8, 2014), <http://thediplomat.com/2014/03/divine-intervention-indonesian-clerics-issue-fatwa-to-protect-endangered-species/> (emphasis added) (internal quotation marks omitted). Sholeh went on to explain: "Whoever takes away a life, kills a generation. This is not restricted to humans, but also includes God's other living creatures, especially if they die in vain." *Id.*

42 See Cammack & Feener, *supra* note 38, at 34–35.

43 GATT, *supra* note 13, art. XX, para. I(a) ("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 contracting party of measures . . . necessary to protect public morals . . .").

44 Tamara S. Nachmani, *To Each His Own: The Case for Unilateral Determination of Public Morality Under Article XX(a) of the GATT*, 71 U. TORONTO FAC. L. REV. 31, 33 (2013). Recent cases under the WTO Dispute Settlement System addressing invocations of



held that “public morals” should be interpreted progressively as “the content of these concepts for Members can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values.”<sup>45</sup> Public morals were additionally found to embody “standards of right and wrong conduct maintained by or on behalf of a community or nation.”<sup>46</sup> The bifurcated designation of a “community or nation” suggests an Article XX(a) exception may apply even if only a single nation, such as Indonesia, adopts the moral perspective in question.<sup>47</sup> Analyzing the elements of the public morals assists in determining whether a WTO Dispute Settlement Body would affirm Indonesia’s Article XX(a) assertion.

#### A. Biodiversity Conservation: An Issue of Morality

The first factor for a WTO panel to consider would be whether the measure in question covers an area of moral concern. Over the course of the WTO’s history, trade regulations based on human and animal welfare and religious interests have qualified as valid grounds for raising an Article XX(a) exception.<sup>48</sup> In light of these diverse and subsequently substantiated concerns, Indonesia’s *fatwa* against the hunting in and trade of endangered species should be entitled to a defense under Article XX(a). Biodiversity conservation is a pressing moral subject in Indonesia and much of the modern world. The *fatwa* supports domestic legislation previously implemented to protect citizens and species from environmental

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Article XX(a) include: *Shrimp-Turtle*, *supra* note 21; Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (Apr. 7, 2005) [hereinafter Appellate Body Report, *U.S.-Gambling*]; Panel Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R (Aug. 12, 2009) [hereinafter *China-Audiovisual*]; and Panel Report, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/R (Nov. 25, 2013) [hereinafter *Seal Products*].

<sup>45</sup> Panel Report, *U.S.-Gambling Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 6.461, WT/DS285/R (Nov. 10, 2004) [hereinafter *U.S.-Gambling Measures*].

<sup>46</sup> *Id.* ¶ 6.465 (emphasis added).

<sup>47</sup> Nachmani, *supra* note 44, at 46.

<sup>48</sup> See, e.g., *Seal Products*, *supra* note 44, ¶ 8 (banning the import of seal products from Canada based in part on preserving public morality); OFFICE OF CHIEF ECONOMIST, SAMBA FIN. GRP., SAUDI ARABIA AND THE WTO 42 (2006), available at <http://jeg.org.sa/data/modules/contents/uploads/infopdf/38.pdf> (citing the WTO’s “religious or cultural grounds” exception in support of the assertion that Saudi Arabia’s WTO membership would not require it to import alcohol or pork); WTO Secretariat, *Israel—Trade Policy Review*, 57, WT/TPR/S/272 (Sept. 25, 2012) (stating that Israel continues to ban the import of non-kosher meats).

degradation, and the ban is seen as the only way to protect morality by filling the gap between national law and illegal trafficking activities.<sup>49</sup> As a result, these circumstances support the fundamental moral nature of the *fatwa* in question.

### B. “Necessary” to Protect Public Morals

Though it would appear that the *fatwa* in furtherance of endangered species preservation would likely satisfy the base-level test of Article XX(a)—the presence of a moral concern—it is more contestable whether the complete ban is “necessary.” Article XX necessity requirements are generally understood as adopting the “minimum derogation principle,” which evaluates whether “alternative measures [are] reasonably available that would be as effective as the one adopted” and, if WTO inconsistent, “less trade restrictive than the measure which was actually adopted.”<sup>50</sup> Accordingly, in determining whether a regulation is necessary, a WTO panel considers two factors: (1) the nexus between the regulated product and the regulating country;<sup>51</sup> and (2) whether there are less trade-restrictive measures available to achieve the same goal.<sup>52</sup>

#### 1. The Nexus Requirement

In *Shrimp-Turtle*, the Appellate Body indicated that Article XX requires a significant “nexus” between the restrictive trade measure and the goals of the regulating country.<sup>53</sup> This requirement is arguably satisfied in the case of Indonesia, as a *fatwa* against the endangered species trade aims to protect the public morality of the country’s own citizenry, rather than

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49 See FATWA TEXT, *supra* note 40, at 19–20 (noting national legislation and initiatives on the conservation of biodiversity already in print, including, *inter alia*, “The Law of the Republic of Indonesia (RI) Number 5/1990 on Conservation of Natural Resources and Its Ecosystem;” “Government Regulation No. 7/1999 on the Preservations of Plant and Wildlife Species;” and the World Wildlife Fund of Indonesia and the Tiger Conservation Forum’s study entitled, “Protecting Tigers and Other Endangered Species with Islamic Wisdom”); see also Christy, *supra* note 10.

50 Christopher Doyle, Note, *Gimme Shelter: The “Necessary” Element of GATT Article XX in the Context of the China-Audiovisual Products Case*, 29 B.U. INT’L L.J. 143, 152 (2011) (citing KEVIN C. KENNEDY, INTERNATIONAL TRADE REGULATION 270 (Vicki Been et al. eds., 2009)).

51 See, e.g., *Shrimp-Turtle*, *supra* note 21, ¶ 133.

52 See, e.g., Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 165, WT/DS161/ABR (Dec. 11, 2000) [hereinafter *Korea-Beef*] (citing Panel Report, *United States—Section 337 of the Tariff Act of 1930*, ¶ 5.26, L/6439-36S/345 (Nov. 7, 1989) [hereinafter *U.S.-Section 337*]).

53 *Shrimp-Turtle*, *supra* note 21, ¶ 133 (noting a “sufficient nexus” between the object being regulated and the state imposing the trade restriction).

that of the international community or neighboring nations.<sup>54</sup> The endangered products and derivatives are imported and exported from Indonesia. Consequently, the country has direct contact with the products affronting public morals that are therefore subject to the national ban.<sup>55</sup> The nexus requirement of Article XX's Chapeau would hence be satisfied, since morality, not arbitrary discrimination or disguised restrictions, forms the locus of the *fatwa*'s objectives.

## 2. Least Restrictive Means

The second factor under Article XX's "necessary" test is whether the regulating nation adopted the least restrictive means available to obtain its goal.<sup>56</sup> According to the Appellate Body in *Korea-Beef*, "a contracting party cannot justify a measure inconsistent with another GATT provision as 'necessary' . . . if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it."<sup>57</sup> However, the panel in *Brazil-Tyres* nonetheless recognized that "there may be circumstances in which a highly restrictive measure is necessary, if no other less trade-restrictive alternative is reasonably available to the Member concerned to achieve its objective."<sup>58</sup> In such cases, it is possible to "successfully defend[] an import ban on importation under Article XX," despite the continued perspective on import bans as draconian, last-resort measures under international trade law.<sup>59</sup>

Given that Indonesia's trade restriction would plainly encompass a ban on certain products, i.e., endangered species, the question thus remains whether it is the least restrictive means available for achieving the goal of protecting public morals in this area. The WTO has acknowledged that answering this question requires a skilled balancing of interests.<sup>60</sup> In

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54 See Robert Galantucci, *Compassionate Consumerism Within the GATT Regime: Can Belgium's Ban on Seal Product Imports Be Justified Under Article XX?*, 39 CAL. W. INT'L L.J. 281, 294 (2009) (discussing this principle with regard to Belgium's seal product import ban).

55 *Id.* Moreover, Indonesia would not be arguing for a more limited or even more appropriate trade in endangered species. Rather, the complete ban is concerned with preserving Indonesia's public morals from associating with what Shari'a law considers to be an immoral or *haram* trade. See Notification, *Comment on Technical Barriers to Trade*, ¶ 7, G/TBT/N/BEL/39 (Mar. 8, 2006).

56 *Korea-Beef*, *supra* note 52, ¶ 165.

57 *Id.* (citing *U.S.-Section 337*, *supra* note 52, ¶ 5.26).

58 Panel Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, ¶ 7.211, WT/DS332/R (June 12, 2007) [hereinafter *Brazil-Tyres*].

59 *Id.* ¶ 7.211 n.1377.

60 See Galantucci, *supra* note 54, at 296.

*Korea-Beef*, the WTO held that “[t]he more vital or important [the] common interests or values are, the easier it would be to accept as ‘necessary’ a measure designed [to achieve those goals].”<sup>61</sup> Subsequently, a country invoking an Article XX exception must consider four factors in its determination of whether a proposed trade regulation is the least restrictive means available: (1) the importance of the stated objective; (2) the restrictive nature of the regulation; (3) the nexus of the regulation to the stated objective; and (4) the availability of alternative measures in place of that being proposed.<sup>62</sup>

First, a country must evaluate the importance of its stated objective as embodied by the proposed trade restriction. Indonesia’s interest in protecting public morals is of the “highest degree” as it relates to “protecting human health and life.”<sup>63</sup> Previous disputes before the WTO considered goals of an arguably lesser degree—including money laundering, fraud, and underage gambling—and held these to be legitimate objectives of restrictive trade policies.<sup>64</sup> As such, the first factor will most likely be satisfied in the instant case because wildlife trafficking activities endanger both animal and human health and serve as grounds for national, and international, moral concern.

Next, the regulating country must consider the degree of coverage proposed by the restriction.<sup>65</sup> Indonesia’s *fatwa* represents a complete ban on the hunting of, and trade in, endangered species. It is based on the inherent nature of the products themselves, and not on a particular process or method of production.<sup>66</sup> This is in contrast to the *Shrimp-Turtle* case, wherein the Appellate Body permitted processing standards to be imposed before importation of a product when there was not an outright ban.<sup>67</sup> Indonesia’s law, in contrast, provides that absolutely no trade in endangered species and products is allowed regardless of the required standards (or rather lack thereof) under which the products were handled. Although the comprehensive nature of the prohibition furthers Indonesia’s policy goals of protecting public morals by closing any potential loopholes around the *fatwa*, the total ban may consequently fail the second factor

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61 *Korea-Beef*, *supra* note 52, ¶ 162. The Appellate Body later reaffirmed this principle. See Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 172, WT/DS135/AB/R (Mar. 12, 2001).

62 *Brazil-Tyres*, *supra* note 58, ¶¶ 7.108, 7.113, 7.115, 7.149.

63 *Id.* ¶ 7.151 (holding that protection of human health and life “is both vital and important in the highest degree”).

64 See *U.S.-Gambling Measures*, *supra* note 45, ¶ 6.533.

65 See Galantucci, *supra* note 54, at 298.

66 *Shrimp-Turtle*, *supra* note 21, ¶ 141 (discussing the permissibility of a U.S. import restriction based on the process by which shrimp are harvested).

67 *Id.*

under the WTO's least restrictive means analysis due to its very nature—a sweeping prohibition tolerating no derogation in coverage.

Third, the country in question must gauge the connection between the actual trade measure and its stated purpose. The *fatwa* here most likely satisfies this nexus requirement as it applies equally to all endangered trade within Indonesia's borders and is consistent with Indonesia's policy priorities.<sup>68</sup>

Finally, under the fourth consideration, a country must demonstrate why its adopted measure is necessary even if alternative measures may be available.<sup>69</sup> While it is true that a ban is the most restrictive option to affect a product's movement within the realm of international trade, such restrictions are not per se prohibited and have been recently upheld by WTO panels.<sup>70</sup> Indonesia could convincingly argue that its objectives represent a categorical opposition to the exploitation of certain species. As a result, only a measure designed to completely eliminate the market for such activities and products would be able to meet this important domestic goal.<sup>71</sup> Although the *fatwa* is trade-restrictive, it should still be considered the least-restrictive measure available within the context of international wildlife trafficking.<sup>72</sup>

### C. The “Chapeau” of Article XX

As Appellate Bodies have emphasized throughout the course of the WTO's dispute settlement history, compliance with the Chapeau of Article XX constitutes a separate requirement that must be satisfied when invoking an Article XX exception.<sup>73</sup> In essence, the Chapeau requires that a country imposing trade restrictive measures act in good faith.<sup>74</sup> Such a requirement ensures the proper balancing of rights between the consulting Member States, i.e., between the substantive right to liberalized trade in the international arena and the sovereign right of nations to legislate regarding

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68 See *FATWA TEXT*, *supra* note 40, at 19–20 (outlining the various national policies and programs the Indonesian government has adopted in furtherance of biodiversity conservation objectives).

69 Appellate Body Report, *U.S.-Gambling*, *supra* note 44, ¶ 311.

70 See generally *Brazil-Tyres*, *supra* note 58; *Seal Products*, *supra* note 44.

71 Galantucci, *supra* note 54, at 299.

72 See generally Vanda Felbab-Brown, *Indonesia Field Report IV: The Last Twitch? Wildlife Trafficking, Illegal Fishing, and Lessons from Anti-Piracy Efforts*, BROOKINGS INSTITUTE (Mar. 26, 2013), <http://www.brookings.edu/research/reports/2013/03/25-indonesia-wildlife-trafficking-felbabbrown> (reviewing the impacts of wildlife trafficking on, *inter alia*, global security, human health and livelihoods, and revenue streams).

73 *Shrimp-Turtle*, *supra* note 21, ¶¶ 156–57.

74 *Id.* ¶ 158 (“The chapeau of Article XX is, in fact, but one expression of the principle of good faith.”).

areas of domestic concern.<sup>75</sup> In the instant case, Indonesia appears to be acting in good faith as it is neither protecting a domestic industry from foreign competition nor discriminating between the exports of different countries. Consequently, the nation is not engaging in actions that “would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.”<sup>76</sup>

#### CONCLUSION

In light of the above analysis, it seems likely that the hypothetical situation in which Indonesia adopts as national policy a *fatwa* against all trade in endangered species would survive a challenge before a WTO Dispute Settlement Body. WTO jurisprudence accentuates the continually evolving nature of public morals within the sphere of international trade. However, stemming from this jurisprudential precedent is the equally compelling principle that states must have the authority—and flexibility—to construe their own domestic understanding and protection of public morals. In the instant case, biodiversity conservation emerges as a legitimate moral concern as a result of overexploitation of natural resources and wildlife trafficking activities. Indonesia’s *fatwa* supplements already-in-place domestic legislation directed at protecting citizens and species from the negative influences of *haram* trading practices. As a result of the environmental, social, and religious crises that the overharvesting of species generates through wildlife trafficking, Indonesia had no viable alternative besides the issuance of a complete ban on the trade in order to meet its domestic objective of protecting public morals. Ultimately, these factors coalesce into a strong case for the validity of Indonesia’s trade restriction, and indicate a hopeful (if only hypothetical) trend in future WTO jurisprudence.

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75 *Id.* ¶ 159.

76 GATT, *supra* note 13, art. XX.