



**INTERNATIONAL  
LAWYERS ASSISTING  
WORKERS NETWORK**

**RECOGNISING THE ILO FUNDAMENTAL LABOUR RIGHTS AT THE WTO:  
A CALL FOR AN AUTHORITATIVE INTERPRETATION**

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INTERNATIONAL LAWYERS ASSISTING WORKERS NETWORK  
1130 CONNECTICUT AVE, NW 8TH FLOOR, WASHINGTON DC, 20036

## INTRODUCTION

This memorandum considers the legal foundation and procedure for WTO members to adopt an interpretive statement under Art IX:2 of the WTO Agreement which would affirm an interpretation of the ‘public morals’ exception in Article XX of GATT 1994 and Article XIV of GATS to be inclusive of ILO fundamental labour rights, would address potential limitations on the application of the exception found in the chapeau, and would outline the possible role of ILO determinations in any legal proceedings on the issue.

### ‘PUBLIC MORALS’ UNDER GATT AND GATS AND RESPECT FOR FUNDAMENTAL LABOUR RIGHTS

Article XX(a) of GATT and Article XIV(a) of GATS permit WTO members to adopt measures that are ‘necessary to protect public morals’. The WTO Panel in *US – Gambling* said, in a phrase that has now become canonical in WTO law, that the concept of ‘public morals’ covers ‘standards of right and wrong conduct maintained by or on behalf of a community or nation.’<sup>2</sup> Moreover, the Panel said, the content of this term ‘can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values’ and ‘Members should be given some scope to define and apply for themselves the concepts of “public morals” and “public order” in their respective territories, according to their own systems and scales of values.’<sup>3</sup> The WTO Panel in *EC – Seal Products* reiterated the point, saying that ‘WTO Members are afforded a certain degree of discretion in defining the scope of ‘public morals’ with respect to various values prevailing in their societies at a given time.’

It is abundantly clear that the meaning of ‘public morals’ is distinct for each WTO Member, even if different WTO Members may, for one reason or another, share those ‘public morals’. This development in the case law also disposes of the idea, advanced by some authors prior to *US – Gambling*, that the concept of ‘public morals’ has to be interpreted in a manner that was common to all WTO Members. That now redundant approach had led to discussion on whether ‘public morals’ should be limited to ‘core’ issues, such as pornography,<sup>4</sup> or whether, rather, the term should be updated in light of contemporary concerns.<sup>5</sup> But for fifteen years it has been clear that, to determine the scope of ‘public morals’ for any given WTO Member, one needs only to look at evidence from that WTO Member itself.

Two types of evidence have been considered admissible to this effect. First, there can be actual documentation of public concerns. In *EC – Seal Products*, the Panel accepted the following statement, from the European Commission Proposal on the legislation at issue (an explanatory memorandum) as evidence that the EU public was concerned about animal welfare aspects of killing and skinning seals and trade in products resulting from these practices:

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\* This memorandum was prepared on behalf of the ILAW Network by Dr. Tibisay Morgandi, Assistant Professor, School of Law, Queen Mary University of London (t.morgandi@qmul.ac.uk).

<sup>2</sup> Panel Report, *US – Gambling*, WT/DS285/R, adopted 20 April 2005, para 6.465. The phrase has been adopted and applied in numerous WTO disputes since then without any objection from any WTO Members.

<sup>3</sup> *Ibid*, para 6.461.

<sup>4</sup> Christoph Feddersen, ‘Focusing on Substantive Law in International Economic Relations: The Public Morals of GATT’s Article XX(a) and “Conventional” Rules of Interpretation’ (1998) 7 *Minnesota Journal of Global Trade* 75, at 115.

<sup>5</sup> Robert Howse, ‘The World Trade Organization and the Protection of Worker’s Rights’ (1999) 3 *Journal of Small and Emerging Business Law* 131, at 142-45.

For several years, many members of the public have been concerned about the animal welfare aspects of the killing and skinning of seals and about trade occurring in products possibly derived from seals that have been killed and skinned with avoidable pain, distress and other forms of suffering, which seals, as sentient mammals, are capable of experiencing. Those concerns have therefore been expressed by members of the public out of ethical reasons. The Commission received during the last years a massive number of letters and petitions on the issue expressing citizens' deep indignation and repulsion regarding the trade in seal products in such conditions.<sup>6</sup>

Second, and more commonly, panels have accepted evidence of existing laws targeted at the relevant concerns. In *US – Tariff Measures*, for example, the panel accepted, as evidence of US 'public morals' concerns about theft, misappropriation and unfair competition,<sup>7</sup> a long list of domestic US laws that prohibited theft, extortion, cyber-enabled theft and cyber-hacking, economic espionage and the misappropriation of trade secrets, anti-competitive behaviour (in particular the prohibition and criminalization of monopolization), contracts, torts, patents and governmental takings of property.<sup>8</sup> But even this type of evidence is not always necessary. In *China – Publications and Audiovisual Products*, the United States did not contest China's claim that its censorship measures were directed at protecting its public morals, and the panel proceeded on the basis that they did, without seeking any evidence on the issue at all.<sup>9</sup>

In summary, WTO Members are afforded significant latitude in defining their own 'public morals', which they can evidence by reference to documentation of public concerns or domestic laws. It is therefore not surprising that there has not been any dispute to date in which a WTO Member has been unsuccessful in arguing that its measures are based on its 'public morals'. And the concerns that have been justified on these grounds are broad. In the most recent WTO dispute to have considered the meaning of 'public morals', *US – Tariff Measures*, the WTO Panel summarised the concerns that have been held to fall within the term 'public morals' to that date:

Prior WTO adjudicators have found the following policies as pertaining to public morals: prevention of underage gambling and the protection of pathological gamblers; restricting prohibited content in cultural goods, such as violence or pornographic content, as well as protection of Chinese culture and traditional values; protecting animal welfare; combatting money laundering; or bridging the digital divide within society and promoting social inclusion.<sup>10</sup>

Against this background, it is very difficult to imagine that a WTO Member would not be able to argue that a concern about violations of fundamental labour rights would not qualify as its 'public morals'. What would be needed is some evidence that the public or the state more generally is concerned about violations of fundamental labour rights. Such evidence could be in the form of opinion surveys, along the lines of the evidence in *EC – Seal Products*, or it could be in the form of laws that prohibit violations of fundamental labour rights. It should also be relevant, though to date it has not been relevant, whether the regulating WTO Member at issue is subject to international obligations with respect to fundamental rights, for example an international treaty in which it endorses fundamental labour rights. Such treaties could include ILO Conventions, but they can also include free trade agreements, many of which now include independent obligations to comply with ILO core labour standards. Concluding such a treaty is also strong evidence of the concerns of the party to that treaty.

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<sup>6</sup> Panel Report, *EC – Seal Products*, WT/DS400/R, adopted 18 June 2014, para 7.395.

<sup>7</sup> *ibid*, para 7.140.

<sup>8</sup> Panel Report, *US – Tariff Measures*, WT/DS543/R, circulated 15 September 2020, para 7.127.

<sup>9</sup> Panel Report, *China – Publications and Audiovisual Products*, WT/DS363/R, adopted 19 January 2010, para 7.7643.

<sup>10</sup> Panel Report, *US – Tariff Measures*, WT/DS543/R, circulated 15 September 2020, para 7.118 (references omitted).

It is perhaps conceivable that there might be a WTO Member for which it is not possible to obtain concrete evidence that the public is concerned with violations of fundamental labour rights, and that has avoided undertaking any such international obligations and refrained from adopting any domestic legislation on fundamental labour rights, and therefore which is unable to satisfy the very low bar that is now required to demonstrate that a particular concern qualifies as that Member's 'public morals'. But it is very difficult to imagine such a scenario in practice. Indeed, even egregious violators of fundamental labour rights themselves tend to forbid the practice domestically. It is consequently possible to state, with a very high degree of confidence, that for all WTO Members a law targeted at prohibiting fundamental labour rights violations would come within its definition of 'public morals'.

This notwithstanding, there is still value in obtaining agreement within the WTO that this is the case. This is not only because such an agreement would settle the matter conclusively, for any WTO members who might be sceptical of this caselaw, but also because it could soften certain other conditions on the application of the public morals defence to measures targeting violations of fundamental labour rights. In particular, WTO Members should be able to agree that measures that are adopted pursuant to ILO recommendations are *ipso facto* justified under the GATT and GATS public morals exceptions without any need to demonstrate that such measures are necessary to the protection of public morals, and without any need to demonstrate that such measures do not constitute arbitrary or unjustifiable discrimination between countries where the same conditions prevail.

There are several instruments that could be adopted for this purpose, including an amendment to the GATT 1994 or GATS specific to violations of fundamental labour rights, or even a waiver of WTO obligations in such cases. The most appropriate instrument, however, is likely to be an authoritative interpretation under Article IX:2 of the WTO Agreement. The reason that this is appropriate is that, unlike a waiver or an amendment, an authoritative interpretation does not imply that, in the absence of that interpretation, the law would be any different. In contrast, a failed attempt to obtain a waiver could result in the impression that the law in the absence of that waiver prevents what the waiver was designed to allow. Moreover, authoritative interpretations can, in theory at least, be adopted with a 75 per cent majority of WTO members. This makes it technically feasible to obtain agreement to adopt an authoritative interpretation even in the face of opposition from that small proportion of WTO members who might be reluctant to agree.

## AUTHORITATIVE INTERPRETATIONS

Article IX:2 of the WTO Agreement states as follows:

The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements. In the case of an interpretation of a Multilateral Trade Agreement in Annex 1, they shall exercise their authority on the basis of a recommendation by the Council overseeing the functioning of that Agreement. The decision to adopt an interpretation shall be taken by a three-fourths majority of the Members. This paragraph shall not be used in a manner that would undermine the amendment provisions in Article X.

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## LEGAL STATUS

Authoritative interpretations have a fundamental legal status within the WTO legal system. In particular, they govern the interpretations of WTO law made by WTO dispute settlement organs. Article 3.9 of the WTO Dispute Settlement Understanding (DSU) states that '[t]he provisions of this Understanding are without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision-

making under the WTO Agreement.’ Second, authoritative interpretations are binding on all WTO Members,<sup>11</sup> in contrast to WTO panel and Appellate Body reports which, once adopted, are only binding on the parties to the dispute (even though these reports are generally followed by subsequent panels, absent cogent reasons to the contrary).

There is also a question whether an authoritative interpretation under Article IX:2 of the WTO Agreement is able to modify WTO law. The better view, it is submitted, is that it cannot, on two grounds: interpretation is traditionally distinguished from amendment, and Article IX:2 specifies that authoritative interpretation cannot be used to undermine the amendment procedure set out in Article X.<sup>12</sup> Authoritative interpretations are therefore limited to decisions about the *meaning* of a legal provision, rather than introduction, deletion or disabling of a legal provision.

What is more difficult to know is whether authoritative interpretations have a retroactive effect. The orthodox position in international law is that all interpretations of the law *ipso facto* have retroactive effect.<sup>13</sup> This was explained by the Permanent Court of International Justice (the precursor to the International Court of Justice) in 1931, when it said that ‘the interpretation given by the Court to the terms of the Convention has retrospective effect—in the sense that the terms of the Convention must be held to have always borne the meaning placed upon them by this interpretation.’<sup>14</sup> However, retroactive authoritative interpretations can be problematic in certain circumstances, for example if they override previous jurisprudence, or when they are adopted in the context of pending proceedings.<sup>15</sup> Within the WTO, the United States took the position that an authoritative interpretation should never have any retroactive effect, and in particular for pending disputes:

[A]ny ‘authoritative interpretation’ of the WTO must apply only with respect to disputes initiated after the interpretation takes effect, that is, disputes for which a request for consultations is made on or after the adoption of that interpretation. It is unacceptable to change the rules of procedure during the pendency of a dispute without the agreement of the parties to the dispute.<sup>16</sup>

On the other hand, the US does not seem to be convinced of the merit of this position. Only two years later it asserted in an investment arbitration that ‘the general rule is that interpretations of a treaty provision – whether

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<sup>11</sup> WTO Appellate Body Report, *US – Tax Treatment for ‘Foreign Sale Corporations’*, WTDS108/AB/R, adopted 20 March 2000, para 112; WTO Appellate Body Report, *US – Clove Cigarettes*, WT/DS406/AB/R, 24 April 2012, para 250.

<sup>12</sup> Tarcisio Gazzini, ‘Can Authoritative Interpretation Under Article IX:2 of the Agreement Establishing the WTO Modify the Rights and Obligations of Members?’ (2008) 57 *International and Comparative Law Quarterly* 169. Contra, Claus-Dieter Ehlermann and Lothar Ehring, ‘The Authoritative Interpretation under Article IX:2 of the Agreement Establishing the World Trade Organization (2005) 8 *Journal of International Economic Law* 803, 808-812, mainly on the grounds that such a restriction would render an authoritative interpretation subject to review in dispute settlement proceedings.

<sup>13</sup> Anthea Roberts, ‘Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States’ (2010) 104 *American Journal of International Law* 179, 201.

<sup>14</sup> *Access to German Minority Schools in Upper Silesia* [1931] PCIJ Rep Series A/B No 40, 19. The EU Court of Justice has said the same: Case C-262/12 *Vent de colère*, EU:C:2013:851, para 39.

<sup>15</sup> Gazzini, above at n 12, 178, denies retroactivity for concluded disputes, but allows retroactivity for pending disputes.

<sup>16</sup> WTO General Council, *Procedures for Amendment and Interpretation of the Dispute Settlement Understanding – Communication from the United States*, WT/GC/W/144, 5 Feb 1999, 4.

by the treaty parties or by an international tribunal – are retroactive in effect, since an interpretation does not change the content of a provision, it merely clarifies what the provision always meant.<sup>17</sup> This, moreover, was in precisely the same circumstances that, in the WTO, the US had called ‘unacceptable’, namely a changing of the law without the agreement of the parties to the dispute (in that case, an investor and the US as respondent).

Overall, then, the traditional position is likely to be correct, namely that authoritative interpretations have retroactive effect, unless of course the treaty parties specify otherwise.

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## DECISION-MAKING PROCEDURE

Both the GATT 1994 and the GATS are multilateral trade agreements in Annex 1 of the WTO Agreement. Hence, a vote on a decision to adopt an authoritative interpretation of Article XX of GATT 1994 and of Article XIV of GATS would need to be taken on the basis of a recommendation of the Council for Trade in Goods and the Council for Trade in Services respectively. This is a non-negotiable condition.<sup>18</sup>

Article IX:2 states a requirement for a 75 per cent vote in favour of a decision to adopt an authoritative interpretation. There are currently 164 WTO Members, though, according to Article IX:1 of the WTO Agreement (and footnote 2 to Article IX:1), the EU and its Member States together are to have no more votes than the number of EU Member States that are also WTO Member States. In short, this means that there are 163 voting WTO Members, so a 75 per cent vote means at least 123 WTO Members, or 96 WTO Members plus the 27 EU Members’ votes.

In practice, however, there has never been a vote on any matter in the WTO, except for some decisions taken just after the WTO was established, essentially due to procedural errors. Every decision has been taken on the basis of ‘consensus’, in accordance with Article IX:1 of the WTO Agreement, which is defined in footnote 1 to mean that no WTO Member present at a meeting where a decision is taken objects to that decision. This has been the case even though Article IX:1 also provides for the possibility of voting by majority on most matters when consensus cannot be reached.

If a vote were to be taken on an authoritative interpretation, in practice, as Article IX:2 requires a 75 per cent majority of all WTO Members, there would need at least to be 123 WTO Members at the General Council or Ministerial Conference meeting at which the decision is taken. There are usually around twenty WTO Members who, for capacity reasons, do not routinely attend General Council meetings, although the institution of hybrid meetings during the COVID pandemic has meant that they would more easily be able to attend, should they so choose.

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## AUTHORITATIVE INTERPRETATIONS IN PRACTICE

There has also never been an authoritative interpretation of a WTO Agreement, and there has only been one request for an authoritative interpretation. This was a request from the EU in 1999 and concerned the

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<sup>17</sup> Post-Hearing Submission of Respondent, *Methanex v US*, 20 July 2001, 5.

<sup>18</sup> WTO Appellate Body Report, *US – Clove Cigarettes*, above at n 11, paras 253–254.

interpretation of a procedural issue in the WTO Dispute Settlement Understanding.<sup>19</sup> The United States objected to this request on the grounds that, in reality, it amounted to an amendment of the WTO Agreement,<sup>20</sup> and after a lengthy discussion, in which WTO Members expressed a range of views, the Chairman of the General Council suggested that the matter be dealt with by the WTO Dispute Settlement Body, which is the WTO organ that administers the WTO Dispute Settlement Understanding.<sup>21</sup> In fact, the matter was never resolved by the DSB and is currently dealt with by means of bilateral agreements between disputing parties.

This non-adoption of authoritative interpretations can be contrasted with the frequent practice of adopting other instruments in the WTO, which are also, in practice, adopted by consensus. There are, for example, many waivers of WTO obligations under Article IX:3 of the WTO Agreement. One reason for the difference in practice between authoritative interpretations and waivers might be that waivers are time limited and need to be regularly renewed, whereas authoritative interpretations are permanent.<sup>22</sup> But WTO Members have also adopted several permanent amendments to the WTO agreements, including amendments to TRIPS, the Government Procurement Agreement, and the adoption of a new Trade Facilitation Agreement. WTO Members have also adopted a number of Ministerial Declarations which clarify WTO law, including a Declaration on TRIPS and Public Health (a precursor to the TRIPS waiver), and these have permanent effects.<sup>23</sup> The reason underlying the reluctance of WTO Members to adopt authoritative interpretations must remain a mystery. Perhaps it has something to do with a memory of the US objection to the retroactivity of the authoritative interpretation proposed by the EU in the *Bananas* dispute.

## SUBSTANCE

The present question concerns an authoritative interpretation that would state that the term ‘public morals’, in Article XX of GATT 1994 and Article XIV of GATS, includes ILO fundamental labour rights, would address potential limitations on the application of the exception found in the chapeau, and would outline the possible role of ILO determinations in any legal proceedings on the issue.

It is without any doubt that an authoritative interpretation could state that ‘public morals’ includes ILO fundamental labour rights. That is a straightforward question of interpretation. Whether it is necessary to say this is another question. All WTO Members that are also ILO Member States can easily justify such position for themselves, based on the fact that they are bound by the ILO Declaration on Fundamental Labour Principles and Rights at Work. But an authoritative interpretation stating that this is the case would obviate the need to demonstrate the point by means of evidence.

There are also other terms in Article XX of GATT 1994 and Article XIV of GATS that could be clarified by an authoritative interpretation. As discussed in a previous note, the ‘public morals’ exception in these provisions is

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<sup>19</sup> WTO General Council, Request for an Authoritative Interpretation Pursuant to Article IX:2 of the Marrakesh Agreement Establishing the World Trade Organization – Communication from the European Communities, WT/GC/W/133, 25 January 1999.

<sup>20</sup> WTO General Council, Communication from the United States, WT/GC/W/144, above at n 16.

<sup>21</sup> WTO General Council, Minutes of Meeting held on 15 and 16 February 1999, WT/GC/W/143, 13-32.

<sup>22</sup> Ehlermann and Ehring, above at n 12, 818.

<sup>23</sup> In WTO Appellate Body Report, *US – Clove Cigarettes*, above at n 11, para 260, the Appellate Body considered such declarations to have the status of subsequent agreements between the parties to the WTO Agreement, and hence to be taken into account in the interpretation of relevant WTO obligations pursuant to Article 31(2)(a) of the Vienna Convention on the Law of Treaties.

conditioned by two necessity tests. First, a measure with the purpose of protecting public morals must also be 'necessary' to protect public morals. This will be the case if there is no alternative measure, reasonably available to that party, that achieves the same objective to the same degree but in a *less trade restrictive* manner. Second, while such a measure may be discriminatory, any such *discrimination* must also be *no more than necessary* to achieve a legitimate objective.

It is far from impossible for a measure restricting trade from a country that has violated fundamental labour rights to satisfy these two necessity tests, but to do so is arduous and it might not always be possible to show that a measure is perfectly calibrated to the risk of a fundamental labour rights violation in another country.

The first of these two necessity tests could be softened by means of an authoritative interpretation stating that a measure will be 'necessary' to the protection of public morals when it achieves that objective to a sufficient degree, without also requiring that there be no other measure that could achieve that objective in a less trade restrictive manner. Something similar was done, albeit in a different context, by the European Court of Justice when it said:

Whilst it is true that it is for a Member State which invokes an imperative requirement as justification for the hindrance to free movement of goods to demonstrate that its rules are appropriate and necessary to attain the legitimate objective being pursued, that burden of proof cannot be so extensive as to require the Member State to prove, positively, that no other conceivable measure could enable that objective to be attained under the same conditions.<sup>24</sup>

In order to confine the scope of such a softened necessity test to violations of fundamental labour rights, reference could be made to ILO determinations.

As to the second necessity test, applicable to discrimination, the question is more complex, because non-discrimination is such a core WTO norm. One possible way to treat this situation is to outsource the question of discrimination to the International Labour Organization, which has oversight of the labour practices of all WTO Members. Thus, if the ILO determines that a given WTO Member is violating fundamental labour rights, it will not be discriminatory to act on that basis even if there might be other WTO Members with equivalent practices against which the ILO has not taken any action.

Putting these considerations together, a decision for an authoritative interpretation could state as follows:

It is understood that a measure will be necessary for the protection of public morals and will not constitute arbitrary or unjustifiable discrimination if it relates to the observations or conclusions of the bodies of the International Labour Organisation's supervisory system (including the Committee of Experts, the Committee on Freedom of Association, a Commission of Inquiry or the Conference of the International Labour Organization).

A decision to adopt such an authoritative interpretation would need to be recommended to the General Council (which meets monthly) or the Ministerial Conference (which meets biennially) by the Council for Trade in Goods and the Council for Trade in Services respectively under Article IX:2 of the WTO Agreement for a vote by at least 3/4 of WTO Members.

## CONCLUSION

On the current state of the law, it is already the case that WTO Members would be able to rely upon the 'public morals' exception in Article XX(a) of the GATT 1994 and Article XIV of GATS to adopt trade restrictive measures

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<sup>24</sup> ECJ, Case C-110/05, *Commission v Italy (Trailers)* [2009] ECR I-519, para 66.



in response to labour rights violations in other countries. These conditions could, in principle, be clarified by means of an authoritative interpretation under Article IX:2 of the WTO Agreement. For the reasons mentioned, such an authoritative interpretation is most likely to be adopted if it is based on a prior finding by the ILO, which has primary competence in this area. Thus, as suggested in the previous section, such an authoritative interpretation could be in the following form:

It is understood that a measure will be necessary for the protection of public morals and will not constitute arbitrary or unjustifiable discrimination if it relates to a recommendation made by a Commission of Inquiry or the Conference of the International Labour Organization.

There are still political obstacles to the adoption of such an authoritative interpretation. Notably, no authoritative interpretation has ever been adopted since the WTO was established in 1995, albeit the reason for this is not clear, as other equally significant instruments have been adopted in that time. More significantly, even though WTO decisions are able to be adopted by majority (or supermajority) voting, in practice all WTO decisions have been adopted by consensus. In short, the objection of even one WTO Member is almost certain to stymie any proposal to adopt an authoritative interpretation. Drafting a proposed authoritative interpretation that commands consensus is therefore critical to its success.

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1130 CONNECTICUT AVE, NW 8TH FLOOR  
WASHINGTON DC, 20036