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Protectionism Online: Internet Censorship and International Trade Law

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ABSTRACT

INTERNET IS A global market place. The rapid development of the Internet, and especially of Internet-based commerce, has largely taken place outside the standard trade-regulatory frameworks that cover most other forms of cross-border commerce. As the size of the Internet markets has grown, and as their contribution to the overall economy has become more pronounced, more attention has been given to regulatory concerns, such as trade-restrictive measures, damaging the climate of trade and investment in the fields of e-commerce, information-based services and online transmissions. One such measure is the blockage of access to websites.

This paper suggests that many WTO member states are legally obliged to permit an unrestricted supply of cross-border Internet services. And as the option to selectively censor rather than entirely block services is available to at least some of the most developed censorship regimes (most notably China), there is a good chance that a panel might rule that permanent blocks on search engines, photo-sharing applications and other services are inconsistent with the GATS provisions, even given morals and security exceptions. Less resourceful countries, without means of filtering more selectively, and with a censorship based on moral and religious grounds, might be able to defend such bans in the WTO. But the exceptions do not offer a blanket cover for the arbitrary and disproportionate censorship that still occurs despite the availability to the censoring government of selective filtering.



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INTRODUCTION*

CENSORSHIP AND TRADE LAW

INTERNET IS A global market place. The rapid development of the Internet, and especially of Internet-based commerce, has largely taken place outside the standard trade-regulatory frameworks that cover most other forms of cross-border commerce. As the size of the Internet markets has grown, and as their contribution to the overall economy has become more pronounced, more attention has been given to regulatory concerns, such as trade-restrictive measures, damaging the climate of trade and investment in the fields of e-commerce, information-based services and online transmissions.

Recently, Many attempts to enforce such measures have been highlighted in media: In 2009, the Iranian elections were dubbed the ‘Twitter’ revolution after the online service which the authorities attempted to block; China originally planned to introduce a filtering software called the Green Dam Youth Escort on every PC sold in the country, and has also blocked popular search engines and video-streaming sites on several occasions. The Chinese government has announced a ban on the distribution of news by foreign news agencies in China, except the state-owned agency, Xinhua, forbidding Reuters, AP, Bloomberg, AFP, Kyodo, to sell content to Chinese media.

The problem arises from the simple fact that Internet does not respect national boundaries and online services provided at one point on the globe can, in principle, be accessed at any other point. Governments, who prefer that particular pieces of information of services should remain inaccessible from the population, are unable to act outside its jurisdiction using traditional means of enforcement: Anyone, with little or no means, to have an instant global reach without traditional market-entry barriers like physical investments, distributors, real estate, and infrastructure – and more importantly all the regulatory instruments (such as permits, licences and supervision) that are based upon them.

Censorship is a controversial subject, and rightly so. The context of this paper, however, is international trade law, so that its content is at the cooler end of the ideological spectrum. The aspect of censorship relevant to international trade law arises from the fact that the vast majority of Internet services are provided as commercial services and any disruption to online services has the direct commercial effect of reducing the revenue of such actors. Moreover, since censors and providers of services are often in different countries, this reduction in revenue is often forced upon a business in one country by the government of another: it has, in short, an international dimension. This raises the central question, addressed in this paper, of whether existing international trade law has any application to Internet censorship.

Before arriving at an answer to that question, the introduction of the paper expands on the impact of the Internet and the nature of Internet censorship. It provides an overview of the disciplines of the World Trade Organisation (WTO), especially those of the General Agreement on Trade in Services (GATS). This survey suggests that a good legal case can be made against disproportionate censorship: that is, censorship that disrupts commercial activities by more than is necessary to achieve the goals of the censoring government, and finally concluding by discussing possible routes for future action in the light of the preceding analysis.

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A 'NEW' ECONOMY AND NEW RULES

THE EVOLUTION OF the Internet over the past ten years has reshaped many aspects of human interaction, including commerce. The Internet is one of the definitive factors contributing to globalisation. It enables instant communication, and has created a truly global market place and a new range of services, overcoming barriers that impede other forms of commerce, such as geographic distance, national borders and technical standards. It has transformed the very nature of many goods. For instance, the biggest retailers in music no longer sell audiovisual products but offer downloading services.¹ It has also reinvented existing services, including retailing, telecommunications and information provision – some, indeed, even say that it has rendered their traditional forms obsolete – and created a demand for entirely new ones.

During the infancy of the Internet, the commercial viability of many Internet-based services was questionable. Today, firms providing Internet services are respectable blue chips: members of a new breed of multinational enterprise whose business models rise above national and economic borders in a way their offline predecessors seldom could. Their growth and global popularity have been driven by rapid expansion in the geographic coverage of the Internet and its underlying infrastructure, which has opened new markets and allowed the provision of complex services.

This is especially true of Asia. Since the turn of the millennium, vast numbers of people have gone online in East Asia. China, with 298 million people online, overtook US in number of Internet users in 2008.² Korea has turned itself into an important actor in development of Internet-related technologies and, relative to population, has the largest number of e-commerce customers and broadband connections in the world.³ India, with its 81 million computer literates, is on track towards its stated goal of reaching 100 million. It has also become a global resourcing partner for online application development.⁴ Asian economies are even turning their antiquated fixed-line infrastructure to their advantage – they are adopting mobile Internet faster than any other part of the world.

These new markets are lucrative for online businesses, whose growth depend on economies of scale, whether they rely on user-fees or advertising incomes. The revenue of these firms directly depends on the number of users and their users' value as audiences for marketers, so access to these populous economies has become a vital commercial interest.

For example, the turnover of Chinese online services has grown more than 60% year-to-year in the last three years to approximately 17bn RMB (€1.7bn) in advertising revenues alone.⁵ The search-engine business accounted for almost one-third of this figure despite being highly language-sensitive. Some research firms have even been projected the total value of Internet based commerce to grow to 1 trillion USD on a global basis. This figure corresponds to roughly half the total exchange (including trade, investment and foreign-affiliate sale) between the EU and the US. The Internet has moved beyond entertainment and niche phenomena to become an important factor in trade in services.

Domestic regulators and trade lawyers strived to keep up with the online world. Understandably, early ideas to define the nature of online commercial activities were as premature as many of the dotcom companies they were trying to govern, which included the idea of gather all electronic commerce under one international protocol, whether it entailed search engines or retailing of books; the members of the WTO, whose key role is to hamper tariffs on goods, also imposed a moratorium for tariffs (which is applied on physical goods) on e-commerce. The versatility of Internet technology was understood by few observers – and trade negotiators were not typically among those few.

INTERNET CENSORSHIP MOTIVATIONS FOR CENSORSHIP

AS CENSORSHIP AS a phenomenon is as old as civilisation itself, it is hardly surprising that the motivations and targets of online censorship are not markedly different from those that affect other media.

The political motivation, to curb critical ideas, opposition groups and regime criticism, is common. Internet traffic is rigorously monitored and critical sites based overseas blocked in many countries, including, among others, China, Iran, Maldives, Myanmar, North Korea, Syria, Tunisia, Turkey, Uzbekistan, Vietnam to mention a few.⁶ In Cuba, accessing the Internet is *per se* an illegal act, without the proper official permits. Subject for political censorship could also be ethnic or armed conflicts. In China for example, information relating to Falun Gong, Taiwan, Tiananmen Square or the Tibetan independence movement are blocked. Information about North Korea is routinely censored in South Korea. Law enforcement agencies in Russia and other CIS countries have been given powers to fully monitor all Internet activities following the experiences in Ukraine and Georgia, where the opposition successfully utilised modern communications to start popular revolts. Political figureheads are sensitive subjects too – popular services such as the streaming video service YouTube and blogging services have been shut down in Turkey for defaming Kemal Atatürk, the founding father of the republic.⁷ Similarly, criticism of the King, *lèse majesté*, is forbidden in Thailand online as well as offline (and is often used to prosecute the opposition). French and German laws against glorification of Nazism and holocaust denial are upheld online against sites hosted overseas, whereas enjoying sometimes constitutional protection in other countries.

Second motivation for censorship is for moral reasons, based on what societies perceive as immoral or illegal. Examples of such are numerous, and usually concern pornography, gambling or criminal activities. Blocking of foreign sites on these grounds is common in many Muslim countries, where adult content, gambling, substance abuse and discussion of many matters relating to faith are forbidden (which in Iran extends to discussion of women's rights). Moral censorship on more secular grounds also exists: in the United States, online gambling is illegal though the sites are not blocked. Sites involved in illegal file-sharing and downloading of copyrighted materials are blocked in some countries, including China and Denmark, but remain accessible in most others. Most countries (including those who do not practice censorship *per se*) block sites offering child pornography.

A third motive, albeit more rare, is for commercial purposes. The most prominent example is Mexico, where the former state-owned operator, Telmex, blocked Internet-based carriers such as Skype and Vonage, providing an inexpensive voice-over IP (VoIP) services.⁸ Mexico was already found by the WTO to discriminate against phone operators in the US by overcharging US operators for dispatching their calls into Mexico, so-called interconnectivity fees. There were also similar cases over VoIP, such as Deutsche Telekom in Germany and several companies of France and the UK. China practiced similar restrictions by only granting licenses to two domestic operators to run VoIP services. Commercial censorship might also be applied by a non-state actor: In China, Sanlu (a major local dairy producer) is said to have paid Baidu, the leading search engine in China, \$250,000 to block search results related to melamine contamination of Sanlu's milk products.⁹

CENSORSHIP THROUGH BLOCKING

THE UNIVERSAL AND most common method of limiting the access to the Internet is by blocking certain web pages originating from overseas. This can be implemented by either centralising all

exit points of Internet communications and subjecting them to official supervision and/or by forbidding ISPs (Internet services providers) in the country from allowing access to any site appearing on a list of officially-banned sites.

Internet censorship in China is one of the most pervasive and developed systems, so it provides a good illustration of different technologies that can be employed. China observed the development of Internet very closely, even before it became widely available, and censorship came into full force by the mid 90s when various Internet sites, bulletin boards and forums were successfully employed in campaigns by e.g. Falun Gong or pro-Tibetan NGOs. The Chinese central government blocked the sites of these organisations and popular foreign news media like BBC and the NewYorkTimes as well as all Taiwanese media. User-generated content sites like YouTube, Flickr (a popular photo-sharing site), and blogs like Blogger, Wordpress and LiveJournal are either entirely or repeatedly blocked. The Ministry of Industry and Information Technology (MIIT), State Information Office and Ministry of Public Security (MPS) are lead government agencies that maintain control over all cross-border Internet communication through a firewall, popularly known as “the Great Firewall of China” in the west but as “the Golden Shield” to the Chinese government. It blocks access to at least 18,000 foreign websites.¹⁰ MPS does not only monitor the Internet (including VoIP and various instant messaging protocols like MSN, Twitter and Yahoo) but also SMS/MMS traffic going in or out of the country. Domestic sites, on the other hand, are not blocked but are subject to local laws and enforcement: they can be shut down at source rather than blocked.

Search engines were a particular problem for the Chinese censors. They do not contain any content *per se* but use automated algorithms that index and search all retrievable content on the Internet and return an aggregated list of links where the requested information can be found. Since they are the natural starting point for Internet users, search engines are of high interest to censors, but cannot sensibly be held responsible – much less to be able to control – the billions of pages of which the Internet consists. Local search engines, like the market leader Baidu.cn, have adopted black lists of forbidden sites and excluded these sites from their search results, but this course is difficult to pursue with regard to actors outside China. Many online services provide their services from servers at a single location (more often than not from the San Francisco region), regardless of which geographic market or language they serve. They are therefore outside the reach of legal sanctions. Initially, popular search engines like Yahoo, Google, Microsoft Bing/Live Search, resisted fiercely Chinese attempts to tamper with their product, taking into account the popular opinion in the rest of the world – but also partially fuelled by fears that American businesses co-operating with ‘authoritarian foreign governments’ would be penalised by the US Congress through a proposed “Global Online Freedom Act”.¹¹

China-based search engines like Baidu.cn complied with the censorship and escaped blocking of their services while foreign search engines were shut down on several occasions. In 2002, the URL and the IP-address (the numerical address of each server on the Internet) of Google were even re-routed to Baidu – when users in China entered Google.com, they would end up on Baidu.cn, who benefited from Google’s marketing and name recognition. In financial terms, the consequences of such actions for non-domestic actors are dire: in 2002, Google held 24 per cent of the Chinese market and Baidu only 3 percent. Six years later (at the end of 2008), Baidu accounts for 65 per cent of the market¹² and has expanded its operations to other countries and other languages, including Japan, raising also concerns about censorship or political editorialising on Baidu’s services abroad. Meanwhile, Google’s market share has dwindled to less than 19% in China.¹³ A comparison with Japan (with similar linguistic entry barriers) reveals the economic damage suffered by foreign search engines: the market share of foreign-owned search engines in

China is less than one third of their market share in Japan where they have more than 90% of the market. The gap is worth 2,8 bn RMB (€280 million) on today's Chinese search engine advertising market.¹⁴

As noted, an online business has few operational assets but still accrues costs; if a web site is taken out of service for seven days, it will have an impact on revenue equivalent to 2% of total annual turnover. In a developing, low-margin market, a couple of weeks of blockage are enough to eradicate the entire annual profit. Given this risk, various foreign search engines started to yield to self-censorship and signed the "Public Pledge on Self Discipline for the Chinese Internet Industry",¹⁵ through which they agreed to actively filter search results based on lists of forbidden themes provided by the Chinese government. Several major Internet services signed on to the voluntary pledge.¹⁶ Same commitment to "self-discipline" is also required to apply for an Internet Content Provider license, which is required for obtaining a .cn domain.

Online services with little or no control of their content bears many similarities to sites with user-generated content like streaming video (YouTube and some minor actors), photo-sharing (Flickr, Picasa) and social networking sites or forums, all of whom have experienced various degree of disruption to their services, often following incidents when critical content has been uploaded by a user. Even online retailers, like Apple iTunes (the world's largest vendor of music today) faced a complete blockage of its services during the Beijing Olympics when 40 athletes deliberately purchased a pro-Tibet charity album despite promising relaxed censorship to the International Olympics Committee.¹⁷

SELECTIVE CENSORSHIP AND FILTERING

DEVELOPING ECONOMIES ASPIRING to ascend the industrial value chain, are aware of the importance of the Internet for all aspects of research and knowledge transfer. China spends more time online than any other nation, and the authorities seem to be aware of its importance. To selectively filter web sites based on their content, rather than ban the site entirely, is a means to accommodate both public interests with censorship – for instance, Thailand censors some web addresses (URLs) to book titles available on the e-commerce site Amazon while the rest of the site is still available.

Selective filtering can also occur based on keywords input from the user: in China and Iran, searching for certain words on different search engines will yield no results as required by local regulations and agreements, such as aforementioned "Public Pledge on Self Discipline". Today, selective filtering can be applied in such way that only individual pages or sections of web sites are censored, if deemed necessary, even without the collaboration of service providers themselves. In this context, user-generated content such as videos or blogs represent a particular challenge for censors. Users can immediately replace censored content and cat-and-mouse games occasionally take place between activists and censors – and descriptions with alternative spelling and code words to escape the censors' attention are also commonplace. Also, China and many other countries are particularly cautious about blogs: there are estimates that more than 70 million blogs exist in China today,¹⁸ but they are mainly published through domestic services while many foreign blog-publishing tools remain blocked.

Therefore, blocking of foreign web sites is still commonplace, even though selective filtering is available. Given the popularity of user-generated content, China, Vietnam and some other countries put more emphasis on self-censorship where the role of policing and monitoring the web has transferred to the online services and ISPs against the threat of being blocked. In China,

the signatories of the “Public Pledge on Self Discipline” are instructed through lists of forbidden themes and topics besides individual web sites, which has given rise to significant differences on what is censored or accepted depending on web site and ISP.

OTHER MEANS OF TRADE-RESTRICTIVE MEASURES

MOST COUNTRIES SHY away from applying their laws abroad, but some do not. France brought a case against the online portal Yahoo.¹⁹ When Nazi memorabilia (which are illegal in France) was found on sale on the auction section of the site. French courts declared their competence on the grounds that Yahoo was aware of French residents using its auction services (ads in French were running on the site) although the goods were not necessarily sold from France or aimed at French users specifically. Yahoo chose not to contest the ruling in France but took the matter to US Federal court, claiming freedom of speech under the First Amendment. In 2006, however, the US court upheld French jurisdiction on the ground that Yahoo’s service was purposefully made available in France and that exercise of jurisdiction by France was reasonable.²⁰ This seems to entail an admission of foreign jurisdiction over US online services, at least for certain degrees of adaptation to local/language specific content. Similarly, blockages of streamed video in Thailand or Turkey were preceded by court orders and legal assessments of grounds for sanction regardless of the fact that YouTube is an overseas entity.

All previous measures have concerned restrictions for cross-border supply, i.e. transmission of goods or services from abroad. However, censorship can be applied through prohibiting or restricting foreign equity ownership in businesses. It could also severely limit distribution of foreign-owned services by not granting necessary trading rights, or by not letting distribution partners handle its products or services – especially if such distributors are state-owned enterprises. Such rights are crucial if a commercial presence in the country is required for technical reasons, e.g. access to mobile networks or geographically determined IP rights, such as copyright. This was the matter for dispute in a recent panel decision at the WTO over trading rights and distribution for publications and audiovisual services, which included electronic publications and distribution forms.²¹

Other forms of trade-restrictive measures online could potentially evolve, which also tangents privacy issues: There are some examples of censorship based on modification of the users computers rather than central blocking, like the aforementioned Green Dam Youth Escort, which was an applet that was originally planned as a mandatory standard on every computers sold in China. A similar issue concerns wireless network apparatus retailed there, which only allow government-sanctioned encryption methods (to which they hold the key) rather than the secure protocols used in the rest of the world. In trade terms, these forms of restrictions are technical barrier to trade (TBT) issues. Another form of censorship is relatively unique for South Korea, where anonymous uploading or posting is forbidden. The authorities enforce a strict identity check through national identity numbers, which must be entered before a post is allowed on any site, which means any service made available there must apply same standards. Some regulations like the FRA law in Sweden also entitle the authorities to pry on online communication passing through its territory (which may be against service provider’s own privacy agreements with its customers), or require service providers to store certain traffic data for later analysis and decryption, such as the measures under the EU data retention directive.²²

CENSORSHIP AND THE MULTILATERAL TRADING SYSTEM THE WORLD TRADE ORGANIZATION

THE WORLD TRADE Organization (WTO), established in 1994, is the key institution of the multilateral trading system. It is built on principles derived from its predecessor, the General Agreement on Tariffs and Trade (GATT) from 1947, most notably the most favoured nation (MFN) principle, so that rights given by one member to another are automatically conferred on all other members; The second important principle is non-discrimination and national treatment, so that foreign goods and services receive treatment at least equal to that given to domestic equivalents. The creation of the WTO extended these principles to a wider range of products, including services, intellectual property, and in certain extent, also investments. Its membership is now nearly universal, with nearly all countries either having acceded to the WTO or seeking accession.

GATS rules could apply in principle to all commercial services, but in contrast to GATT where all goods are assumed to be included unless explicitly exempt, the rules on services work through a positive list of commitments that each individual member state makes in its Schedule of Specific Commitments, which forms an integral part of the agreement. Thus, members can specify the level of market access commitment in different categories according to four modes of delivery; (1) cross-border supply, (2) consumption abroad, (3) commercial presence in the country through a branch or similar arrangement and (4) through presence of a natural person providing the service while present in the foreign country. By default, members remain unbound (meaning no commitments are made) unless concessions are negotiated and explicitly defined in the countries' schedule of commitments. Furthermore, there are many generally applied (so-called 'horizontal') exceptions. GATS also provides for most-favoured-nation treatment, market access, and national treatment in a similar way to trade in goods.

Another important feature of the WTO system is its dispute-settlement mechanism, which becomes operational through its "courts" – the Panel and the Appellate Body. Although not courts in the traditional sense, they have developed many important principles for legal interpretation and quasi-jurisprudence over the years. Only other WTO members (i.e. states) can bring a case against another member; and when a complaint is found justified, non-compliance with the ruling of the court carries a penalty of authorised retaliation by other members. Such authorised retaliation could be viewed as the price that a country pays to maintain measures found to be inconsistent with its WTO obligations.

CENSORSHIP – A MARKET-ACCESS RESTRICTION

AS ONSET, IT has not been clearly determined by the WTO that all commercial activities on the Internet are services. Despite having an arbitration court capable of making legal assessments, WTO is mainly a member-driven organisation, where fundamental principles are established in negotiations between the member states unanimously. There is still no consensus amongst WTO members regards to computer related services (CRS) remain: for instance, one key yet unsolved question is whether software supplied through online downloads are goods or services and consequently dealt under GATT or GATS.²³ Meanwhile, the case of Green Dam Youth Escort and similar imposed standards on consumer hardware or infrastructure equipment is quite clear: While government and non-government bodies may enforce technical regulations given no products are treated less favourably according to the GATT and the Agreement on Technical Barriers to Trade.

However, the remaining question is whether the various trade restrictive regulations can be posed on services that are supplied through Internet. When one assesses online censorship in WTO

terms, it is easy to think of it as a means to restrict the supply of a certain service. As a general rule, a quantitative restriction may not be enforced on sectors where a WTO member state has market-access commitments (Art XVI of GATS).

The first question is therefore whether censorship can be regarded as such restriction – given the WTO member has commitments in a sector relevant to online services. To answer the first question, WTO has established an important principle through its first case involving interpretation of GATS, in a dispute concerning Measures Affecting The Cross-Border Supply Of Gambling and Betting Services (*Online Gambling*).²⁴ A US federal ban on unlicensed, online gambling of any origin (domestic or foreign) was contested by the island nation of Antigua & Barbuda who had rapidly developed the local economy on becoming an offshore haven for such services – until the US ban eventually took effect and the bubble burst for the local economy.

The Panel established in *Online Gambling* the so-called zero-quota principle, which states that a total legal ban on a service that affects equally both domestic and foreign providers is still a quota restriction (albeit set at zero), which is against a binding commitment for market access that a country has made in that category,²⁵ effectively letting a binding commitment take precedence over a non-discriminatory ban applied equally over domestic and foreign services. It should be noted that the measures at issue (three US federal laws, namely Wire Act, the Travel Act and the Illegal Gambling Business Act, and eight state laws) were merely of legal nature, thus not even enforced technically through blocking or filtering. It is thereby established that censorship is a quantitative restriction of cross-border supply in the eyes of GATS – given there are relevant sectoral market-access commitments by the country.

While *Online Gambling* concerns mode 1 (cross border supply), we have taken note of some cases of service-exports that require physical presence in the country. Restrictions could be applied through foreign equity limitations (or outright prohibitions) or joint-venture requirement with local firms. This is common practice in key technology sectors where Internet is involved (such as electronic distribution of cultural products), often as a part of country's industrial or innovation policy.

Discriminating foreign commercial presence through subsidiary or branch (mode 3) is inconsistent with WTO agreements. Either if the member has committed to mode 3 in that category or to national treatment, if local firms are allowed to establish businesses. This follows the Panel's interpretation of GATS (Article XVII for market-access) in *Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* (noted herein as *Audiovisuals-case*)²⁶. This case concerned Chinese censorship exercised through state trading rights and *de facto* mono- or duopolies on audiovisual home entertainment products, sound recordings and publications (including electronic publications and distribution of sound recordings).²⁷

CLASSIFICATION OF NEW TECHNOLOGY.

THE GROUNDS FOR the case on *Online Gambling* is on the basis that the United States had committed to unrestricted access for cross-border supply of gambling, entering no restriction under the heading "Other recreational services (except Sporting)" in its schedules of specific commitments. The panel even went so far as to acknowledge that the US lacked any intention of opening up its market for online gambling – but neither lack of intent nor lack of foresight were, in the view of the panel, grounds for exemption. Under GATS, a market access obligation is paramount, taking precedence over domestic bans (though it may be justified by the exceptions provided in the WTO agreements). In fact, US had based its specific commitments on Services Sectoral Classification

List, commonly referred to as “W/120”, a guideline circulated by GATT secretariat (the predecessor to WTO), which in turn was based around a classification system, the UN Provisional Central Product Classification (CPC).²⁸ In this document, gambling is contained under a category where US had made commitments with no exemptions, and US offers in the negotiations always wore indications that it was based on the document W/120.

The category coverage was established from the references to that document and the principles of Vienna Convention on Law of Treaties for supplementary means of interpretation. Simply put, gambling was deemed to be a part of “other recreational services” and understood as the common intentions of the signatories of GATS.

Online Gambling bears upon censorship. The first and the most important determinant of whether censorship is compatible with a country’s undertakings under the WTO is whether the censoring country has made any commitments under relevant categories in its services schedule. Online gambling did not even exist at the time most WTO members made their commitments during the conclusion of the Uruguay Round in 1994.

The CPC classification system provides the basic structure of most countries’ specific commitments. But Internet and its new generation of online services raises the question of what the relevant categories are under their commitments; there is little guidance for interpretation, and new services often lack equivalent offline predecessors. Some scholars, most notably Wu (2006) have in detail described the problem and attempted to bring forward several hypotheses for interpretation.²⁹ Search engines are one such example: one possible habitat is the category group “data/online processing services” (equivalent to CPC 843) where for example China has no restrictions for either mode 1 and 3, Thailand maintaining only restrictions on local presence (mode 3) and Turkey has made reservations for public monopolies. Were search engines to be regarded as “database services” (CPC 844), all three countries are unbound (meaning they remain uncommitted) with regard to both market access and national treatment and any trade-restrictive measures, including discriminatory bans would be compatible with their WTO obligations.

It should be noted that it is the entire wording and description, including any explicit references to any classification categories, that defines a members commitments. However, the assessment becomes somewhat more clear-cut for, services that have offline equivalent, such as a downloading service for music/video: they could belong to either category above suggested for online processing services, or audiovisual services (CPC 832); or even radio and television cable services (753) for streamed video, or even motion picture, radio and television services (961). In both *Online Gambling* and *Audiovisuals-case*,³⁰ the bodies of WTO dispute settlement have adopted the principle of technological neutrality (while not necessary depend on it for all of its conclusions),³¹ stating that a member’s commitment covers the sub-categories and includes all means of delivery regardless of media, unless otherwise specified in a member’s schedule. In particular in *Audiovisuals*, it was acknowledged that the definition “sound recording distribution services” cover non-physical medium, such as the Internet.³²

SPECIFIC COMMITMENTS AND CLASSIFICATION

ALTHOUGH MANY ENTREPRENEURS would argue that online services are of a new *sui generis* category, the least far-fetched assessment of many services should be that they are simply online processing services. Semantically, definition entails an online service which processes data or information with no output, type of content prejudged. And there is no legal or systematic support for a view that new services must be added to existing systems: rather, there must be an assump-

tion of the opposite, i.e. classification systems must be assumed to be exhaustive.

WTO members themselves would hardly arrive to an agreement over the question of where within the CPC system these new online services belong, although fourteen member states of WTO (including Hong Kong China (but not China itself), the EU, Japan, Korea and the US) have agreed that all computer-related services ought to be defined somewhere within the chapter for telecom services. This statement is far from being universally acknowledged and the chapter still contains several of the above-mentioned categories under which many countries like China remain unbound.³³

However, other circumstances points most online services, and in particular search engines, to “online processing services” (CPC843) under which China et al, would be bound. The CPC classification system existed only in a draft, provisional version at the time of drafting of GATS or of the first accessions to the WTO, and members are only *encouraged* to align their national classifications with the international reference ones – there are no obligations or legal agreements forcing members of the UN or even the WTO as an organisation to do so, in the way it is mandatory to define commitments in trade in goods under the Harmonized System (HS). The US employs its own classification system, the North American Industry Classification System (NAICS) for services, under which their specific commitments are defined, grouped and categorised in accordance with the W/120-paper. Consequently, under *Online Gambling*, the US was committed to gambling through W/120, which happen to point to a CPC category that happened to have a subset named “gambling and wagering services”.

The CPC system has also evolved through two subsequent updates (the latest one released in January 2009)³⁴ under which all online services – including search engines, streamed video, online books and periodicals, audio, video, software and news streaming – are confined under subcategories of online content (CPC 843). For example, search engines have been assigned to a class under that group named “web search portal content” (843.94) and streamed video has been assigned to 843.32 – Both falling under a category where China is granting unrestricted market access. Although the Panel (the lower instance of the WTO dispute settlement mechanism) has found later updates of the classification system as irrelevant argument in the particular case of *Audiovisuals*, it was not necessary rejected by principles. Ironically, it was the defendant, China, who claimed to be unbound for sound recording services based on the fact that later revision of the CPC placed it elsewhere³⁵. It is still unclear whether the Panel would come to another conclusion the idea would come to test for search engines, or when the *Audiovisuals* case will be raised at the Appellate Body.

Nevertheless, there are some strong indications that at least China would be bound by its commitments. First, there is a logical, *prima facie* assumption that search engines and most Internet services are simply *online processing services*. Given the outcome of *Audiovisuals case*, there are no relevant restrictions for online video and audio services based on the principle of technological neutrality. Second, in support of the previous argument, the Technical Subgroup on Classifications Statistics Division of the UN published a conclusion on 30 June 2000 that the classification of web-search portals (i.e. search engines even when they are bundled with other services like news, auctions and email) should be CPC 843.³⁶ A guiding technical interpretation (by an international body where China is a member) existed by the time of Chinese accession to the WTO in 2001. Third, online services, such as search engines, existed and were commonly known by then. It is clear that other online services were by no means technically impossible or unknown, unlike how Internet gambling was a novelty for the US (whose GATS schedules came into effect in 1994). It is self-evident that Chinese trade negotiators were aware of their existence – and China was

perfectly free to make any exclusion of such services from its specific commitments.³⁷ To summarise, there are three significant indications against China's case in addition the circumstances surrounding the *Online Gambling* case.

ADVERTISING OR END-USER WEB SITES?

AN ALTERNATE VIEW of categorising services, rather by end-user perception, is by how they generate revenues. Practically none of the online services discussed above incur fees from users (except retailers who are vendors of music and physical copy of books). Many of the services discussed, for example, search engines, blogs, photo-sharing applications, are integral parts and subsidiaries of search engine companies. Yahoo owns the immensely popular photo-sharing site Flickr, and the price-comparison site Kelkoo, besides news, auctions, financial information, web hosting, forums and mail services under its own brand and domain name. Google owns the video-streaming giant YouTube, Picasa (a competitor to Flickr), Blogger (the most popular blog-publishing tool today, formerly known as Blogspot) and also a portfolio of services under its own name, including the controversial Google Books that contains a fully digitized and searchable archive of more than 7 million books.

Earnings made on these sites arise more or less exclusively from advertising that is sold and administered jointly for all sites through web-based ad-placement structures (called Yahoo Advertising and Google Adwords/AdSense respectively) where advertisers can selectively buy media space for people who enter certain search terms or view any pages containing same words. For instance, when a user in Switzerland search for the words "used cars" or visits an affiliated discussion forum on the topic, it sets off an automated auction where the highest bidders of the search terms aimed at Swiss users will have their ads prominently placed on the page. These systems also sell ads on behalf of many non-Google or Yahoo-owned sites (including media houses of respectable size) that use them as brokers. It could be reasoned that the service being provided, therefore, is advertising rather than an online service for the end-user – at least for the ad-placement structures.

In early 2000, the UN Statistics Division specifically advised its members against interpretation to determine search engines and web portals as advertising on the grounds that it would dilute the definition of traditional media, i.e. print and broadcasting media.³⁸ That opinion, however, was formulated before online advertising became an integral part of the media landscape. Today, vendors of market research, advertising intermediaries, creative and advisory services work with the Internet as with any other media. Advertising is essential for these companies to make earnings. Most countries, however, remain unbound with respect to advertising; and therefore would not breach their WTO commitments if they implemented restrictions on advertising that discriminated against foreign suppliers. By this means, countries would not limit market access for websites, but would effectively strangle their revenue stream. They would therefore significantly reduce their country's attractiveness as a target market for online media, so leaving their national online market entirely to domestic actors or others who comply fully with the censorship.

CONCLUSION: IS CHINA BOUND BY ITS COMMITMENTS?

WHILE CHINA HAS already been found to apply ownership-restrictions inconsistently with the principles of national treatment, their practice of blocking online services remain yet untested. In summary, it would be difficult to argue that China is unbound by its commitments under GATS, given the principles established under the *Online Gambling* and *Audiovisuals* cases. For many services, it is also difficult to find any another relevant classification than data/online process-

ing services, especially given the proposition of “common intention”: the members of the WTO should be able to look at China’s schedules of specific commitments and take them at face value. The interpretation that many online services are in fact advertising services would only cripple the “back offices” and their commercial viability, not the end-user applications or the shop front of the services. Likewise, such argument would make no sense if the online services in question are based around subscription or fee-based revenues.

OTHER FEATURES OF WTO AGREEMENTS EXCEPTIONS FOR PUBLIC MORALS

As WTO AGREEMENTS are basically a product of long and quite intensive negotiations and compromises, it contains checks and balances between interests for market-access and national sensitivities. Even if a country is found to be bound by its commitments under GATT and GATS – let say by blocking a type of online service of a type they had agreed to market access – there are still general exceptions and let-outs.

Most relevant rules for censorship are contained in Article XX of GATT and Article XIV of GATS. They are constructed in a similar fashion, by a *chapeau* restricting enforcement of arbitrary and unjustifiable discrimination (given like conditions) or disguised trade restriction, then followed by a catalogue of conditions under which a member may be exempt from its commitments, most notably under para. (a) for measures “necessary for protecting public morals” (for both goods and services) and “maintain public order” (only for services). The conditions under which these provisions can be applied tend to be quite strictly applied. GATS art XIV is even annotated by a footnote stating that the paragraph may only be invoked where a “genuine and sufficiently serious threat is posed” to a “fundamental interest” of society.

Even if it is the discretion of a WTO member to determine the level of public morals they would like to maintain domestically, a defendant must prove the importance of the values protected, the extent to which the challenged measure contributes to the realisation of the end and the effects of the measure on trade. While the market value of the online economy is fairly easy to assess but the value of non-economic rights, such as free speech or the risks of civil unrest, is more difficult – the exception is by no means a *carte blanche* for any type of restrictive measure. In this regard, Appellate Body introduced a two-tier test by demanding that a country:³⁹

1. Shows that the measures are necessary for public morals and order or for national security and;
2. Pursues a less trade-restrictive measure to obtain its objectives if one is reasonably available, taking into account the interest being pursued and the desired level of protection.

NECESSITY CRITERIA

WHILE THE FIRST tier of the test states that a measure must be necessary to protect public morals, the objective for such protection is accepted for something so relatively widespread as gambling – in fact, the Appellate Body upheld most of US anti-gambling laws on this ground, unless they violated the *chapeau* of Article XIV and discriminated foreign suppliers; hence, most motivations for censorship such as pornography, gambling and faith-based objections must be considered acceptable grounds – given, of course, it is proportionate. In *Audiovisuals*, China has claimed that control of cultural content is a matter of fundamental importance, which was recognised by the Panel.⁴⁰

But it is still unclear how this relates to the footnote under Art XIV that indicates the article can only be invoked to protect a member against a genuine and sufficiently serious threat to one of the fundamental interests of society. This will be an extremely difficult question for a panel once faced with those questions – how imminent and fundamental are the threats on society from blogs or songs on a webpage, which could be removed within a few days, if not hours? How would it relate to cases where the reputation of nation’s first president or the infallible and divine nature of a monarch is at stake?

PROPORTIONALITY

THE SECOND TIER, whether a reasonable alternative exists, takes the burdens of such alternatives and the capabilities of state into consideration - what is a ‘reasonable, available measure must be assessed in the light of the economic and administrative realities facing the Member concerned’⁴¹ or must be a “genuine alternative”⁴² for the desired level of protection—and the burden of proof is on the complainant to prove such measure actually exists.

It is self-evident that active filtering of search results is less trade restrictive than a total, permanent ban of the site since the latter course would at least preserve the economic rights of the foreign undertaking. The mere existence of selective filtering strongly argues that arbitrary and entire blockages or permanent bans on sites based on search-and-retrieve functionality (such as video/photo-sharing sites, e-retailers and search engines where the user navigates through keyword inputs) ought to be considered as disproportionate – at least for countries who have or are able to employ such selective filtering into practice themselves, or indirectly through network providers. Needless to say, there is always an option to directly request the web site in question to just remove a link or content deemed offensive. Furthermore, since the country of origin of a web site visitor can be identified and it would be even be possible to make individual pages and content inaccessible for visitors from certain countries, so-called geographic blocking.

There are also other dimensions of proportionality. For instance, censors tend to use disproportionate blockage of entire web sites universally for foreign web sites in situations where a domestic site may have been notified to remove the individual pages in question. Although this could have practical reasons, such as overall assessment difficulties, linguistic skills of the censors or lack of channels of communication; but such practice should nevertheless incompatible with the national treatment commitments under GATS.

More urgent questions is a permanent and entire ban on an endless number of foreign news media (who publish hundreds of new pages per day) and blogs collected under their publishing sites (which mostly contain personal introspections rather than cries for western style democracy) or social networking sites is proportionate: the majority of their contents are completely unrelated to the censored subjects. But here, the censoring states (with the burden of proof to justify their actions) could possibly prove that applying selective filtering (or possibly reviewing all news media manually) is an insurmountable burden. In *Online Gambling* for instance, Antigua argued that the US could have negotiated over the unsolicited cross-border supply rather than unilaterally banning it. The Appellate Body rejected the argument on the grounds of administrative burden: it would have forced the US to negotiate with a very large number of countries over the issue and a successful outcome was simply unlikely. In the particular case of China, it is clear from the fact that the Golden Shield/Great Firewall of China already exists – a technical infrastructure of massive scale with several thousands of government employees – makes administrative burden of filtering a relatively weak argument.

CONCLUSIONS ON EXCEPTIONS

TO CONCLUDE, IT would be difficult to argue that public moral/order requisite is made and interpreted to fit most motivation for online censorship. Second part of the question is contextual – based on capacity versus ambitions of the member. At least in the case of Chinese censorship, it appears like it is been proven that there are many reasonable several available to arbitrary and complete blocks.

LACK OF JUDICIAL REVIEW: THE REAL LEAST OF TWO EVILS?

CHINA APPLIES TWO different layers of censorship, one for domestic sites and the other for foreign sites. All internal communication within China, i.e. the domestic layer, is regulated through a liability of website owners to administer, supervise and moderate its content. In legal terms, this responsibility is strict, with few exceptions for liability.⁴³ It is partially upheld by the criminal code, and can call on any of the enforcement proceedings available under that code. Web sites outside the Great Firewall of China, on the other hand, are simply censored without official notice or any possibility of taking the matter to domestic courts. This is not to say, however, that the domestic news media are in an enviable position: online media operators in countries like China and Vietnam must face crackdowns, expropriations and jail sentences. Even Chinese nationals have tried to bring censorship against overseas-based web sites to court (albeit unsuccessfully) by suing their ISPs for not living up to their obligation to provide full access to the Internet.⁴⁴ This is a lead to get an admission within the legal system that censorship is clearly outside the control of the operators, and that there must be some official procedural accountability on the part of the Ministry of Public Security: there are unconfirmed rumours of 30,000 employees (or even more) administering the Great Firewall of China, but there are no official means of appeal for access to foreign web sites.

The GATS does, however, stipulate that some form of access to judicial review and proceedings must be available to citizens of other WTO members, be it judicial or administrative.⁴⁵ However, no requirement of fairness is imposed, and the Article even states specifically that no member shall be required to institute tribunals or proceedings that are ‘inconsistent with its constitutional or the nature of its legal system’. The appeal procedure mandated by the GATS does not require an independent court, and may even be conducted by the government agency whose conduct is the source of the complaint as long as the proceedings are ‘administered in a reasonable, objective and impartial manner’: a condition that implies some constraint on the authorities, but that falls far short of mandating what elsewhere would be thought fair and proper.

While French courts did not shy away from extraterritorial application of their laws, an extension of Chinese jurisdiction over (mainly) US-based businesses and extraterritorial application of Chinese laws could have other implications: Chinese online censorship blocks many more sites than the French and the publicity effect of court orders arriving on the doorsteps of 18,000 foreign site owners⁴⁶ would trigger reactions in both China and the US that would be unlikely to facilitate further liberalisation of trade, and might in fact reverse progress made.

IMPLICATIONS OF A WTO CASE ON CENSORSHIP PRAGMATISM OF INTERNATIONAL TRADE LAW

THE CONSIDERATIONS DISCUSSED above suggest that many WTO member states are legally obliged to permit an unrestricted supply of cross-border Internet services. And as the option to selectively censor rather than entirely block services is available to at least some of the most developed

copyright regimes (most notably China), there is a good chance that a panel might rule that permanent blocks on search engines, photo-sharing applications and other services are inconsistent with the GATS provisions, even given morals and security exceptions. Less resourceful countries, without means of filtering more selectively, and with a censorship based on moral and religious grounds, might be able to defend such bans in the WTO. But the exceptions do not offer a blanket cover for the arbitrary and disproportionate censorship that still occurs despite the availability to the censoring government of selective filtering.

Furthermore, making an appeal process universally available offers no pragmatic solutions. This dilemma leads to a point of ‘equilibrium’ between censorship and trade interests - total and arbitrary blocks (which could be contested at the WTO) would be avoided in many countries if foreign web sites would submit to voluntary filtering.

In terms of policy, this is a double-edged sword of shifting the responsibility to private actors in return for trade liberalisation. Several indicators suggest that a silent consensus is building around this approach. Besides the aforementioned “Public Pledge on Self Discipline” for the Chinese Internet industry, several sites (including Flickr) apply user agreements that differ for different languages or countries, and that make different functionality available (especially in regards to “SafeSearch” which controls what type of materials can be viewed).⁴⁷

A case brought before the WTO over censorship would be very likely to give rise to a debate about sovereignty and the ever-expanding scope of trade-related issues under the WTO. However, such a case would mark an important borderline against disproportionate and arbitrary censorship when a partial blockage would be sufficient to achieve the aims of the censors. It would also be economically significant. Censorship is the most important non-tariff barrier to the provision of online services, and a case might clarify the circumstances in which different forms of censorship are WTO consistent. Such clarification would reduce legal uncertainty for online businesses.

Not all WTO rulings, however, result in actual compliance – as mentioned, the member found to be employing WTO-inconsistent measures might decide to continue to use them and accept the consequent retaliation. Even before the ruling in *Online Gambling*, the US Trade Representative implied that the offending Federal law could not be changed, and that the only way to correct the “drafting error” was to withdraw from its commitments on “other recreational services”,⁴⁸ which it is free to do with three months notice under GATS Article XXI. In following this course, however, the US was required to compensate countries injured by its withdrawal from the commitment, i.e. to make a deal that not only satisfied Antigua and Barbuda, but all countries who make a claim of having interests against the US in the dispute settlement. In *Online Gambling*, Australia, Costa Rica, India, Macau, Canada, Japan and the EU joined in with costly demands for compensation. A defendant in a case over censorship who was found to have behaved inconsistently with its WTO obligations, but refused to lift the censorship or correct its form, would therefore have to either accept authorised retaliation against it or withdrawal from the relevant obligation through compensation.

THE WAY AHEAD

WEAKNESS OF UNILATERAL ACTION

THE ISSUE OF online censorship can be approached through various different routes under international trade law. Each route has its own limitations, opportunities and political consequences. A regulation, like the once-proposed US Global Online Freedom Act, would discourage investment and market access. Proposals for such types of legislation have been greeted with scepti-

cism, whether the proposal is to be put into effect by the EU, the US, or both together. This route has the disadvantage that it damages the companies seeking to export its services by prohibiting businesses from making certain types of investment abroad, and further penalising those who are already limited in their trade through subjection to a censorship regime. Simply put, it taxes the competitiveness of the actors own companies commercially or limits the room for manoeuvre. Furthermore, past experiences from other embargoes show that they are seldom effective towards economies that represent significant commercial market potentials.

There is also a question of equal treatment between various sectors of industry, in this case the manufacturers versus services. The routers and servers that make up the Great Firewall/ Golden Shield of China were provided by IT firms in EU and US – with the consent of their governments. and in some case, these manufacturers even provide training to the personnel in the ministries that administer the censorship. The question of liability, with potential effects (or lack thereof) makes it a dangerous route.

POSSIBLE ACTION THROUGH THE WTO

THE WTO PROVIDES principles of proportionality and can impose sanctions on breaches by its members of their WTO obligations; although it has difficulty in ensuring that members found to have acted inconsistently with the WTO restore WTO consistency rather than treating the sanctions as the price of maintaining the inconsistent policy. It is also true that a WTO member found to have violated its WTO obligations could withdraw from the obligation (as the US did after *Online Gambling*).

These are not cheap options, however. Maintaining a policy that has been found to be WTO inconsistent or withdrawing from a commitment is likely to be expensive in terms of losses of trade or direct compensation, and may also be costly in terms of reductions in terms of capital inflows, investment and know-how and losses of service trade. Creating a great fuss in order to maintain censorship, moreover, might be embarrassing, both in terms of attention drawn to the censorship and of the air of desperation that would attach to policy shifts for the purpose of maintaining censorship. The WTO route is weak given it is unlikely to be able to abolish censorship as such. It may, however, have the potential to discipline the clumsier manifestations of censorship: outright blockages by a government that is capable of enforcing selective filtering for example, and will persuade governments to use more selective and less trade-disruptive means. Another drawback of the WTO route is that an online industry wishing to use WTO dispute-settlement cannot do so on its own account, but must convince its government to take action. Also, some countries that might be targets of such action are not members of the WTO (for example, Russia, Iran and North Korea).

As final note, although the dispute settlement mechanism of neither the WTO nor other trade instruments could be used to *eliminate* Internet censorship, they might limit the use of its more commercially damaging forms. For businesses, trade with countries ruled by authoritarian regimes, or with countries where the concept of the rule of law is still under development, will always be difficult – if not outright dangerous. Contesting arbitrary and disproportionate blocks on access to such markets will incrementally help to reduce legal uncertainty and therefore contribute in the long run to a regulatory environment where the risks and costs of market participation are foreseeable.

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