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International Trade and Internet Freedom

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Proponents of human rights have often found themselves at odds with free traders. The desire to liberalize the flow of goods across borders in service of efficient production has at times been insufficiently attentive to the rights of workers and the health of the environment. Cyberspace, however, may offer a context in which the desire for free trade and the wish to promote political freedom go hand-in-hand. By liberalizing trade in cyberspace, international trade law can bolster the circulation of information that authoritarian regimes would repress. In this essay, I want to sketch a hopeful possibility: how the Internet under the governance of international trade law might bolster political freedom around the world. Unexpectedly, the General Agreement on Trade in Services[1] might emerge as a human rights document.

The new bugaboos of repressive governments are search engines, electronic bulletin boards, blogs and YouTube. These are technologies that allow ordinary individuals to communicate outside the mainstream media channels that often prove subservient to governments.[2] This feature, of course, also represents the original nature of the World Wide Web itself, as it eschewed any central intermediating authority in information circulation. If international trade law can help protect the free circulation of information in cyberspace, it can serve the cause of political freedom around the world.

The Intersection of International Trade and Human Rights

Human rights law has typically sought to regulate the production of goods in order to avoid the exploitation of labor (or relatedly, the environment). But with respect to trade in services delivered over the Internet, the nature of the work and the presence of an often highly-educated workforce significantly reduce fears of worker exploitation. This does not

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[1] General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, Legal Instruments–Results of the Uruguay Round, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994) [hereinafter GATS].

[2] Anupam Chander, *Whose Republic?*,69 U. Chi. L. Rev. 1479 (2002).

mean that labor rights are no longer of concern with respect to trade in services,[3] but those concerns are less with sweatshops, below living wage, child labor or perilous working conditions than with the right to organize and the right to privacy. In trade mediated via cyberspace, human rights law comes to bear in a largely novel fashion: to help further the right of individuals to share and receive information. Trade in services shifts the locus of human rights attention from the production process to its delivery and consumption. Thus, cyberspace offers new and fertile opportunity for human rights law.

Human rights law requires that nations not only provide their citizens with free speech rights within their nation, but also the right to impart information ''regardless of frontiers.'' This formulation is repeated in both the Universal Declaration of Human Rights and in the International Covenant on Civil and Political Rights as well.[4] The Declaration describes the right to ''impart information and ideas through any media regardless of frontiers,'' and the Covenant subsequently reiterated the ''freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers.'' While the legal status of the Universal Declaration is open to question, it nonetheless offers ''the primary source of global human rights standards.''[5] Because of its nature as an international treaty, the Covenant carries more binding force than the Declaration.[6]

The Covenant makes clear that one country's inhabitants have the right both to send and to receive information from another country, and thus imposes obligations on both countries to allow the information exchange. Of course, information regulation is a central business of governments, and governments and courts are unlikely to interpret the human rights principles as putting them out of this business when it comes to domestic or foreign information. Like the freedom of speech guaranteed by the Constitution, the international free speech norm tolerates regulation within appropriate bounds. Indeed, it contemplates it, permitting limitations set forth by law and necessary to support public order.[7]

As history's best medium for transmitting information worldwide, the Internet will test the limits of such regulation of crossborder information flows.

International trade law puts pressure on state repression of information through two principal mechanisms. First, the transparency obligations of GATS require what is often absent in authoritarian states—a set of public rules that governs both citizens and governmental authorities. WTO member states must publish regulations governing services and establish inquiry points where foreign service providers can obtain information about such regulations.[8] A publication requirement written for the benefit of foreigners may prove useful for local citizens, who will be given the opportunity to understand the rules that bind them—and the opportunity therefore to challenge those rules or their interpretation.

[3] Julian Dibbell, The Life of the Chinese Gold Farmer, N.Y. Times Mag., June 17, 2007, available at <http://www.nytimes. com/2007/06/17/magazine/17lootfarmerst.html?ex=1339732800&en=1676d344608cb590&ei= 5090 &partner= rssuserland&emc=rss> (describing Chinese workers who earn a livelihood by gathering gold in a virtual world). The video of the workplace and dormitory space accompanying the New York Times Magazine story is especially revealing.

[4] International Covenant on Civil and Political Rights art. 19(2), Mar. 23, 1976, 999 U.N.T.S. 171 (hereinafter ICCPR).

[5] Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 Ga. J. Int'l & Comp. L. 287, 290 (1995/96); *see also* Louis Henkin, *The Universal Declaration at 50 and the Challenge of Global Markets*,25 Brook. J. Int'l L. 17 (1999).

[6] Sosa v. Alvarez-Machain, 542 U.S. 692, 735 (2004) ("[A]lthough the Covenant does bind the United States as a matter of international law, the United States ratified the Covenant on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts.").

[7] ICCPR, art. 19(3).

[8] GATS, Art. III.

Second, the market access and national treatment commitments[9] provide opportunities for foreign information service providers to disseminate information that local information service providers might eschew. Censorship by itself may not necessarily constitute either a market access or a national treatment violation. But consider three scenarios: what if a country (1) declared foreign blogging sites off-limits, or (2) required foreign information service providers to route their offerings through special traffic cops, or (3) required local Internet service providers to deny access to certain foreign services in toto?[10] In cases like these, the censorship measures would likely run afoul of a country's market access and national treatment obligations.[11]

But that does not end the inquiry. GATS permits derogation for measures ''necessary to protect public morals or to maintain public order.''[12] A tricky question for trade law over the coming years will be whether states will be able to derogate from the above responsibilities in ways that sustain the repression of political information. In order to avoid the exception swallowing the trade liberalization obligation, GATS limits permissible derogations through two general requirements: (1) they must be ''necessary'' for the public morals or public order goal; and (2) there must be no ''reasonably available alternative'' to the trade restrictive measure. The necessity requirement is stated directly in GATS article XIV. The second requirement rests in the Appellate Body's review of its first Internet dispute. In that dispute, the United States defended its right to derogate from its free trade agreements with respect to online gambling, asserting the following public order and public morality grounds: ''(1) organized crime; (2) money laundering; (3) fraud; (4) risks to youth, including underage gambling; and (5) public health.''[13] The Appellate Body largely upheld the U.S. derogation, but only after concluding that no reasonably available alternatives had been presented to the challenged trade-restrictive measure. The Appellate Body elaborated that a ''reasonably available alternative'' is one that ''preserve[s] for the responding Member its right to achieve its desired level of protection with respect to'' its public order or public morality objectives.[14]

If one considers the array of recent efforts to censor material mediated by the Internet, it seems clear that many of them would fall afoul of the ''reasonably available alternative'' requirement. That is, many of the stated public order or public morality goals could have been achieved at the desired level of protection by less trade-restrictive means. Consider, for example, the shuttering of Blogger because of one or two offending blogs, or the disabling of YouTube because of one objectionable video, or shutting off of access to Wikipedia presumably because of a few politically charged entries.[15]

Furthermore, there is a substantial question as to whether the repression of political speech that promotes peaceful challenges to the existing government constitutes a cognizable public order or public morality goal under the World Trade Organization system.

[9] GATS, Art. XVI (market access), XVII (national treatment).

[10] *See Tim Wu, The World Trade Law of Censorship and Internet Filtering, 7 Chi. J. Int'l L. 263, 281-4 (2006).*

[11] Indeed, a market access commitment might be violated by a decree that barred all blogging sites, both foreign and domestic. A blanket prohibition of all online gambling, whether foreign or domestic, was the basis for a market access commitment in the Antigua-United States dispute discussed below.

[12] GATS, Art. XIV (a).

[13] Appellate Body Report, United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services, ¶¶ 283, 323-27, WT/DS285/AB/R (Apr. 7, 2005).

[14] *Id. at ¶ 308.*

[15] Somini Sengupta, You Won't Read It Here First: India Curtails Access to Blogs, N.Y. Times, July 19, 2006, at A6; Brad Stone, Pakistan Cuts Access to YouTube Worldwide, N.Y. Times, Feb. 26, 2008, at C3; Wikipedia Blocking of Wikipedia in Mainland China. http://en.wikipedia.org/wiki/Blocking_of_Wikipedia_in_mainland _China (last visited June 17, 2008). Pakistan's rerouting of requests for YouTube to an Internet black hole had extraterritorial impact, causing the temporary outage of YouTube for many in the region.

The Role of Corporations

Cyberspace can promote political freedoms, however, only to the extent that the private parties that provide its basic infrastructure—the search engines, the web browser developers, the Internet service providers, the webhosts, the video hosts—do not capitulate readily to demands to censor, surveil and identify dissidents. If these entities are ready and willing to abet repression, then the Internet might become the tool of repressive regimes, one with vastly greater surveillance capacity than humanity has ever known. A purely profit-driven enterprise may well be willing to surveil, censor, and finger dissidents as directed by a repressive regime (at least until that enterprise's consumers elsewhere begin to boycott it for its ethical deficiencies).

Private groups have begun to craft private codes of conduct for companies offering information services to authoritarian states. A bill before Congress would go so far as to bar American corporations from locating computer servers in repressive countries and would require these corporations to report their censorship activities to the U.S. government.[16] Legal constraints on the corporations of one country, however, are likely to prove somewhat ineffectual if the host nations of alternative service suppliers lack similar provisions; the retreat of American corporations will only be met by the advance of others, eager to fill the void. This fact suggests that multilateral compacts, whether private or state centered, may prove more successful than individual national legislative efforts.[17]

Conclusion

These issues will soon come to a head in two disputes currently before the World Trade Organization, one challenging Chinese regulation of audiovisual services and the other challenging that country's regulation of financial information services.[18] These disputes hold the tantalizing possibility of leveraging trade liberalization in the service of political liberalization.

[16] Global Online Freedom Act of 2007, H.R. 275, 110th Cong., 1st Sess. (2007).

[17] Anti-corruption conventions offer one model. Lori Ann Wanlin, The *Gap between Promise and Practice in the Global Fight Against Corruption*, 6 Asper Rev. Int'l Bus. & Trade L. 209 (2006).

[18] China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, WT/DS363/1, Apr. 16, 2007; China – Measures Affecting Financial Information Services and Foreign Financial Information Suppliers, WT/DS373/1, Mar. 5, 2008 (U.S. request for consultations); China – Measures Affecting Financial Information Services and Foreign Financial Information Suppliers, WT/DS372/1, Mar. 5, 2008 (E.U. request for consultations).