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THE WORLD TRADE LAW OF CENSORSHIP AND INTERNET FILTERING

Tim Wu*

Consider the following events, all from the last five years:

- An American newsmagazine, Barron's, posts an unflattering profile of an Australian billionaire named Joseph Gutnick on its web site—the publisher, Dow Jones, Inc., is sued in Australia and forced to settle.
- Mexico's incumbent telephone company, Telmex, blocks Mexicans from reaching the web site of the Voice-over-IP firm Skype.
- The United States begins a major crackdown on web gambling services, causing serious economic damage to several small Caribbean economies.
- The Chinese government prevents its citizens from using various foreign Internet services, including foreign e-mail, and certain foreign news sources, and requires foreign search engines and blog sites to filter unwelcome content.
- France orders the American auction site Yahoo to take down its Nazi-glorifying paraphernalia.

These disputes are well-known to those who study the Internet's international controversies.¹ But not everyone realizes that these controversies are also forms of trade disputes, and, as such, no one yet fully understands how the law of the World Trade Organization ("WTO") might affect them. The purpose of this paper is to investigate that question.

* Professor, Columbia Law School. I am grateful for comments and suggestions from Petros Mavroidis and Simon Lestor. I benefited also from conversations with Irene Wu at the FCC, and individuals at the office of the United States Trade Representative.

¹ Each of these disputes is discussed in Jack Goldsmith and Tim Wu, *Who Controls the Internet?: Illusions of a Borderless World* (Oxford 2006), except for the Telmex incident, which is discussed *infra* in Section II.B.

In 1994, when most of the trading nations in the world agreed to create the WTO, they also agreed to try to liberalize trade in services. At the time, no one fully realized (and not all notice now) that the decision to liberalize trade in services put the WTO in the midst of Internet regulation in an interesting and unexpected way.² Much Internet content can be reached from anywhere, making nearly everyone on the Internet a potential importer or exporter of services (and sometimes goods). Hence, almost by accident, the WTO has put itself in an oversight position for most of the national laws and practices that regulate the Internet.

The hard question is when does Internet filtering violate world trade rules? Filtering often represents political censorship, and it is sometimes said that the neither the General Agreement on Tariffs and Trade (“GATT”)³ nor the General Agreement on Trade in Services (“GATS”)⁴ was meant to make censorship illegal—for the nations of the world do routinely censor, or block products at their borders generally without creating trade disputes.⁵ But it also cannot be right that any protection labeled censorship is exempt from the World Trade Law—the GATS itself suggests as much.⁶ Leaving censorship aside, it is also true that some Internet filtering, like the blocking of Internet-based telephony discussed within, seems to have little to do with political control and much more to do with the protection of domestic incumbents. Such measures seem destined for increased scrutiny over the coming decade.

² There is early literature, largely written by WTO and telecommunications law specialists, describing some of these problems. See, for example, the collected essays in Damien Geradin and David Luff, eds, *The WTO and Global Convergence in Telecommunications and Audio-Visual Services* (Cambridge 2004).

³ General Agreement on Tariffs and Trade, 61 Stat A-11, TIAS 1700, 55 UN Treaty Ser 194 (1947) (hereinafter GATT).

⁴ General Agreement on Trade in Services (1994), 33 ILM 1167 (1994) (hereinafter GATS).

⁵ The partial exception was the US–Canada disagreement over split-run magazines, which concerned a Canadian excise tax designed to help protect local content over foreign content. See World Trade Organization, Report of the Appellate Body, *Canada—Certain Measures Concerning Periodicals*, ¶ 24, WTO Doc No WT/DS31/AB/R (June 30, 1997), available at 1997 WL 398913.

⁶ As GATS footnote 5 notes, “The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.” GATS, art XIV n 5 (cited in note 4).

Such cases raise two particularly difficult questions. The first is the one alluded to above: what are the legal limits of censorship under the WTO system? In the main, the question has been avoided by a mutual sense among major trading nations that censorship falls outside of the WTO's concerns. Yet the WTO's Appellate Body has already displayed a taste for taking treaty interpretation beyond a strict examination of what the major drafting powers might have intended; in truth the textual support for the blanket claim that censorship is exempt from WTO scrutiny is not very strong. Second, the technological questions raise an important interpretative question for the WTO. It's a problem of interpretative "technological translation"—the application of legal texts to technologies not envisioned at the time of drafting. For example, do the terms like "online information retrieval, or "data processing services," drafted in the early 1990s, include search engines like Google or Yahoo? If so, some countries may have opened broader access to their markets by foreign web sites than anyone has realized.

This Article is meant for two audiences. For those within the trade law world, the Article should make it clear that Internet services have leapt beyond what was contemplated in GATS or the subsequent Agreement on Basic Telecommunications Services.⁷ The universalization of a network that is a platform for any type of service requires new thinking about how barriers may come about, and how a nation's commitments are interpreted. For those with a background in telecommunications or Internet law, this paper introduces the relevance of WTO law to national regulation of Internet services. One of the most interesting consequences of applying WTO law to Internet services regulations may be a tempering of what we might call the "Yahoo presumption"—the presumption that the burden lies with Internet companies to adapt to national

⁷ Fourth Protocol to the General Agreement on Trade in Services (1997), 36 ILM 354 (1997) (hereinafter Fourth Protocol).

legal systems. While this presumption is still generally true, the current tendency in WTO jurisprudence is to put the burden on national governments to justify Internet blocking.

In Section I of this Article, I provide an introduction to regulation and problems of trade in services and illustrate how the basic GATS framework extends to cover regulation of Internet services. Section II discusses two short studies that highlight these problems of trade in information services. China, one of the world's most comprehensive Internet regulators, makes for an interesting case because as a condition to accession to the WTO, it agreed to what have been called "radical" reforms of its service practices.⁸ Yet at the same time, China is among the world's more active filterers of Internet services. As we shall see, these two positions are in tension, and while WTO law leaves much room for exceptions, some of China's restrictions may have trouble being justified under the GATS.

The second study is of Voice-over Internet (VoIP) services. Companies like the well-known "Skype" offer free voice telephone services to anyone with an Internet connection. As a consequence, in many instances incumbent telephony carriers, often state-owned, have a strong competitive interest in preventing VoIP from reaching their citizens. These instances of Skype-blocking in several countries raise interesting trade in services issues.

I. BACKGROUND ON THE LAW GOVERNING TRADE IN SERVICES AND PREDICTIONS FOR

APPLICATION OF GATS TO INTERNET SERVICES

A. REGULATION OF TRADE IN SERVICES

The classic—and long the dominant—conception of international trade is trade in goods, such as wheat and wine, physically shipped from one country (for example the United Kingdom)

⁸ See, for example, Aaditya Mattoo, *China's Accession to the WTO: The Services Dimension*, 6 J Intl Econ L 299, 299 (2003).

to another (for example Portugal).⁹ The legal concept of trade in *services* is a recent development. Yet as people who study trade know well, it can be useful to think of services as something that can be traded between nations. What else is happening when, say, a Japanese tourist stays in a New York hotel? Or when a Canadian lawyer flies to Indonesia to help litigate a case? The main reason to think about trade in services as analogous to international trade in goods is that the kinds of potential gains from trade that are found in goods markets ought to be found in services markets as well. When flying from New York to Los Angeles, for example, it might be nice to have a choice, not just between American carriers like American and United, but competing carriers like Cathay Pacific and British Airways.¹⁰

The WTO's founders were convinced of the similarity between trade in goods and trade in services and wrote an agreement to make services part of the trade world. However, the WTO's negotiators did not anticipate the giant leap in communications technologies—most important of all, the universalization of the Internet protocol—that would distinguish the 1990s. As we will see, when the WTO's founders wrote the GATS they had in mind a narrow category of “telecommunications services”—essentially, trade in telephone services, coupled with an additional category of “value-added” services, like “three-way calling,” or “voice-mail.” They had no idea that nearly every type of service under the GATS might eventually be offered over the TCP/IP protocol. In trade lingo, the framers thought of the Internet as a service sector, when, instead, it is usually a service mode.

This point bears greater explanation. The old way of thinking about telecommunications services conceived of distinct applications bundled with separate networks—cable services,

⁹ This is the classic model of trade used by David Ricardo to demonstrate the principle of comparative advantage. See David Ricardo, *Principles of Political Economy and Taxation* (Prometheus 1996).

¹⁰ Although domestic air travel is generally closed to competition, the example gives a sense of the potential benefits of open trade in services. See WTO Secretariat, *Guide to the GATS*, ch 4 (Geneva 2001).

telephone services, and so on. Today, however, most understand telecommunications as a platform for *other* services of almost unlimited variety. This, in fact, was the genius of the Internet—it severed transport functions from application, creating a general purpose network that could support virtually any kind of service.¹¹ As a consequence, while telecommunications-based services once encompassed a narrow range of services, today everything from travel and banking to therapy can be delivered via information networks.

As a consequence, almost by accident, many of the world’s citizens and firms have become what WTO law refers to as “exporters” and “importers” of information services. (They’re not the only ones—as one guide to the GATS says, “One of the particularities of the services trade is that many service exporters are not aware that they are in fact exporting.”¹²) The result is to make much national regulation of the Internet a matter of interest to international trade law. This suggests a future where WTO laws will become an important control on how countries regulate the Internet and information services within their countries. Yet to understand this point we need to understand how the GATS works—a subject very familiar to trade lawyers, but less familiar to others.

B. THE GATS FRAMEWORK FOR REGULATION OF TRADE IN SERVICES

The following introduction is very basic, and meant to both introduce the GATS and to identify particular points of difficulty with trade in Internet-based services.¹³ GATS is an international treaty that specifies how members of the WTO may or may not regulate services within their borders. Its approach is simple, yet the treaty is still largely untested and its full

¹¹ For a description of this feature of the Internet’s design, see, for example, Timothy Wu, *Application-Centered Internet Analysis*, 85 Va L Rev 1163, 1189–93 (1999); Uyles Black, *Data Networks: Concepts, Theory, and Practice* 269–88 (Prentice Hall 1989) .

¹² WTO Secretariat, *Business Guide to the General Agreement on Trade in Services* 3 (Geneva 2000).

¹³ More comprehensive introductions to GATS can be found elsewhere. See, for example, id; WTO Secretariat, *An Introduction to the GATS* (1999), available online at <http://www.wto.org/english/tratop_e/serv_e/gsintr_e.doc> (visited Feb 12, 2006); WTO Secretariat, *Guide to the GATS* (cited in note 10). The General Agreement on Tariffs and Trade (“GATT”) is also relevant to some Internet cases, but is not discussed in detail.

effects are yet to be felt. In particular, certain questions with respect to Internet services are still unanswered, as noted below. The most important features of the GATS can be put into three groups.

1. Services or Goods?

The first set of questions surround the differentiation of services from goods. When reading the UK-based Financial Times online in Canada, is one importing a good or service? This question actually has no good answer in the GATS itself. The only definition of “service” circles the issue by saying “‘service’ includes any service in any sector except services supplied in the exercise of governmental authority.”¹⁴ Hence in Internet-based service cases, whether the GATS or GATT (which governs WTO regulation of trade in goods) applies is a threshold question.

Trying to answer this question in the abstract is often fruitless. However, there is broad agreement on two positions: (1) that goods that happened to be ordered using the internet are still involve the movement of a good, and therefore implicate GATT – say, when you buy a physical book using Amazon, and (2) online services that don’t at all implicate downloaded or stored goods (like a search engine) are services. But severe disagreements persist on the status of a middle category: traditional goods that are downloaded, and kept in digital form, like newspapers, songs, software, audio and electronic books.¹⁵ While the WTO has yet to rule on the issues, or its members to agree, the better position is that the digital versions of goods remain goods subject to GATT. Holding otherwise creates a potential to evade bound tariffs for a good as it takes on a new form, which represents backsliding from the commitment to liberalize trade in that good. In addition, treatment under GATT prevents a kind of discrimination of some

¹⁴ GATS, art I, ¶ 3(b) (cited in note 4).

¹⁵ For a good overview of the debate, see Stewart Baker et al, E-Products and the WTO, 35 Int. Lawyer 5 (2001).

importance -- discrimination as between like products presented using media.¹⁶ This point can be made clear by imagining a country that tariffs CDs at 10% and bans electronic downloads of songs altogether. The obvious effect is to favor the physical version of the book; a second consequence is to put trade negotiations on music to pre-GATT levels. On the other hand, were the song-files subject to GATT treatment of some kind, the ban would be clearly illegal.

Despite the strength of these arguments, the arguments for treating downloaded goods as services come from the desire to make sure governments do not lose their power to regulate television and television content. In particular, Europe's Television without Frontiers Directive requires EU broadcasters to reserve a majority of their transmission time for "European works."¹⁷ The argument is that fashioning some kind of similar rule for internet content might be difficult if downloaded content is subject to the GATT. But what this really reflects is a different problem: GATT's lack of a clear exception for reasonable culture-protecting rules. It's a mistake to suggest, for this reason alone, to suggest all internet content should be considered a service.

Nonetheless, for much of the filtering considered in this paper, GATS is unavoidable. GATS itself does not try to answer the abstract question of what a service "is," and instead takes the approach of dividing services into four "modes" of delivery. The four modes are: (1) Crossborder, or "from the territory of one Member into the territory of any other Member"; (2) Consumption abroad, or "in the territory of one Member to the service consumer of any other Member"; (3) Commercial presence, or "by a service supplier of one Member, through commercial presence in the territory of any other Member"; and (4) Movement of natural persons, or "by a service supplier of one Member, through the presence of natural persons in the

¹⁶ Compare Marc Bacchetta, et al, *Electronic Commerce and the Role of the WTO* 50–52 (Geneva 1998) (discussing the goods/services problem) with Arvind Panagariya, *E-Commerce, WTO and Developing Countries*, 23 *World Economy* 959, 960–64 (2000) (arguing that all Internet-based products be treated as services).

¹⁷ See Council Directive 89/552/EEC, art. 4, 1989 O.J. (L 298) 23, amended by Parliament and Council Directive 97/36/EC, 1997 O.J. (L 202) 60.

territory of any other Member.”¹⁸ The relevance of creating these divisions is that countries may differentially commit to liberalization of trade depending on the mode in question.¹⁹

2. GATS’s Market Access Rules

The second group of features, and the teeth of the GATS, are its anti-discrimination and market access rules. As in other areas of trade law, the GATS focuses on two types of discrimination against foreign exports: (1) Discrimination as between exporting countries; and (2) Discrimination as between local and imported products. The idea here, as in other areas of trade law, is to prevent distorting local markets either in favor of one country over another, or in favor of local producers.

In addition to the usual bans on discrimination, the GATS creates a framework for “market access” commitments—commitments to letting service providers reach the domestic market. As Article XVI tries to make clear, the relevant restrictions on market access in this situation include various forms of quantitative limits placed on foreign suppliers, like limits on the “number of service suppliers,” the “total value of service transactions,” or limits on the percentage of foreign ownership.²⁰

The market access rule leads to several interesting problems. For example, say a country has a law banning a given Internet-based service altogether, such as a law that bans Internet gambling in any form. From a national treatment perspective, such a law is not discriminatory because it bans foreign and domestic providers equally. But is it a violation of a market access

¹⁸ GATS, art I, ¶ 2 (cited in note 4).

¹⁹ There is some debate over whether Internet-based services are better considered Mode 1 or 2. Is the service provider crossing a border to reach the customer, or is the customer crossing a border to reach the service provider? This question is also unanswerable in the abstract, yet most commentators seem to assume that Mode 1 is the better description. One reason is that if Mode 1 does not include Internet-based services, it may be close to an empty category.

²⁰ See GATS, art XVI, ¶ 2 (cited in note 4).

commitment?²¹ The WTO faced exactly this question in the *Measures Affecting The Cross-Border Supply Of Gambling and Betting Services* (“*Gambling Services*”) dispute discussed in depth below, and it gave the answer that even a non-discriminatory ban—a “zero-quota”—can violate a market access commitment.²² In that dispute, the United States made the argument that Article XVI, when it made it a violation to limit the number of providers, did not mean to cover total bans. Both the panel and appellate body had little difficulty concluding that a ban was simply a limit of zero, and therefore a violation of a full market access commitment.²³

What distinguishes the GATS’s anti-discrimination rules from their cousins in other areas of trade law is the fact that many of its obligations are sector-specific, and designed to expand through negotiation. In most cases, by signing the GATS, countries commit generally to Most Favored Nation obligations, and then agree to national treatment and market access obligations on an ongoing, sector-by-sector and mode-by-mode basis. For example, a country might agree to liberalize some modes of delivering banking services—such as allowing its customers to reach foreign banks via Internet (Mode 1²⁴)—while refusing to allow banks to open up locally (Mode

²¹ This is a subset of the more general understanding of how GATS Articles XVI (market access) and XVII (national treatment) interact. See Aaditya Mattoo, *National Treatment in the GATS—Corner-Stone or Pandora’s Box?*, 31 J of World Trade 107 (1997). It is important to note that under the GATT a similar question with respect to bans comes out the opposite way. Say you have a domestic ban on milk—is that permissible as a domestic law, violating the no national treatment rule, or is it a border measure and thus an illegal quota? The prefaces to Articles III and XI make it clear that the former applies only to domestic laws, and the latter to measures that affect imports or exports. Close questions are further dealt with by the Note Ad Article III:

Any internal tax or other internal charge, or any law, regulation or requirement of the kind referred to in paragraph 1 which applies to an imported product and to the like domestic product and is collected or enforced in the case of the imported product at the time or point of importation, is nevertheless to be regarded as an internal tax or other internal charge, or a law, regulation or requirement of the kind referred to in paragraph 1, and is accordingly subject to the provisions of Article III.

GATT Note, Annex I, Ad Article III (cited in note 3).

²² World Trade Organization, Report of the Appellate Body, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc No WT/DS285/AB/R (Apr 7, 2005) (hereinafter *Gambling Services*, Report of the Appellate Body). See discussion in Section I.D.

²³ *Id.* at ¶¶ 213–65.

²⁴ Mode 1 involves cross border delivery “from the territory of one Member into the territory of any other Member.” See text accompanying note 19.

3²⁵). It similarly might liberalize trade in banking services, but not legal services. In other words, the actual commitments made to liberalize trade services amount to a complex, country and sector-specific pattern.

The sector approach creates a recurrent interpretative problem with particular importance for Internet-based services. It can be termed a problem of technological translation, and is an iteration of the general question of how a law should be interpreted in circumstances unimagined to its drafters.²⁶ Here, as in other areas of law, we can distinguish between an “originalist” and “dynamic” approach to the problem.

Many of the GATS sectoral commitments were agreed upon before the invention of new service types, raising the question of whether the liberalization was intended to apply to the new technological instantiation. Under the GATS, most countries (except the United States) use the Central Products Classification (“CPC”) system of the United Nations, whose definitions can vary in their technological neutrality. And to make matters even more confusing, the CPC definitions themselves have evolved since 1994, when GATS was signed. The current version of the CPC is called CPC 1.1, whereas the CPC in place at the time GATS was signed was the “provisional CPC.”

As an example of the problem, consider the contrasting examples in the CPC of “travel agency services” and “leasing and rental concerning video tapes.” The former is defined under the Provisional CPC as: “Services rendered for passenger travel by travel agencies tour operators, and similar services”²⁷ The latter is defined as “Renting or hiring services

²⁵ Mode 3 involves commercial presence “by a service supplier of one Member, through commercial presence in the territory of any other Member.” See text accompanying note 19.

²⁶ Compare William N. Eskridge, *Dynamic Statutory Interpretation* (Harvard 1994) with Antonin Scalia, *A Matter of Interpretation* (Princeton 1997).

²⁷ See Provisional CPC 74710, available at <http://unstats.un.org/unsd/cr/registry/regcs.asp?Cl=9&Lg=1&Co=74710>

concerning pre-recorded video cassettes for use in home entertainment equipment, predominantly for home entertainment.”²⁸ In the former case, the text is far more technology-neutral, and interpreting it to cover an online service like the firm “Expedia” looks simple. In the latter, the translation question is more difficult. Can “video cassettes” be interpreted to mean DVDs when video rental services hardly exist any longer? It seems a stretch.

Interpreting texts in light of changing circumstances and technologies is a familiar problem for domestic law. The classic example is the US constitutional question of whether wiretaps are a “search” under the US Fourth Amendment, given the fact that there were no wires to tap when the Bill of Rights was drafted in the 18th century.²⁹ To generalize, a strict originalist says “no.” Those who take a pragmatic or evolving view of the Constitution might try to capture the purpose of a search and seizure law in an era of wire-tapping and suggest the answer will often sometimes be “yes.”

Such questions have hardly been faced in the WTO context. The WTO’s typical approach is to look to Article 31 of the Vienna Convention, which gives common-sense advice: look to the text and various supplemental materials as needed. The problem is that Article 31 doesn’t give much of an idea as to what to do when the meaning of a word changes owing to technological or social change.

What to do? The case for originalism in the WTO context might be thought fairly strong, given the youth of the treaties and the existence of ongoing trade negotiations (a problem with changes in meaning might be fixed in negotiations). However the Appellate Body has *de facto* adopted an evolutionary approach. In the *Shrimp-Turtle* dispute, for example, the Appellate Body concluded that the term “exhaustible natural resources” in GATT XX(g) includes sea-

²⁸ Provisional CPC 83202, available at <http://unstats.un.org/unsd/cr/registry/regcs.asp?Cl=9&Lg=1&Co=83202>.

²⁹ See *Olmstead v United States*, 277 US 438 (1928), overruled by *Katz v United States*, 389 US 347 (1967).

turtles, despite drafting history that suggested an original intent to refer to resources in finite supply, like minerals, not animals.³⁰ The Appellate Body noted that the teachings of “modern biological sciences” showed that animals species may also be depleted or exhausted, and concluded with ease that sea-turtles are therefore “exhaustible.” In doing so, it said, “The words of Article XX(g), “exhaustible natural resources”, were actually crafted more than 50 years ago. They must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment.”³¹

Similarly, in the *Gambling Services* dispute, discussed below, the WTO Appellate Body showed little hesitation in applying a neutral text, “recreational services,” to new technologies not in existence at the time of drafting – namely, online gambling. In both cases the WTO has implicitly endorsed a dynamic approach to treaty interpretation in the face of technological change.³² The relevance of these dynamic methods for future internet cases cannot be overstated.

Moving away from these core discrimination rules, the GATS also includes a number of general commitments whose long-term relevance is not yet well understood. For example, Article IX contains the beginnings of an antitrust or competition law commitment. It says that “Members recognize that certain business practices of service suppliers, other than those falling under Article VIII, may restrain competition and thereby restrict trade in services.”³³ However, this requires only that members are obliged to enter into consultations with respect to such problems, and does not commit members to eliminating all anti-competitive practices. Despite this, in one instance members have gone further.

³⁰ Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, adopted 6 November 1998, paras 127-131.

³¹ *Id.*, para 129.

³² *Gambling Services*, Report of the Appellate Body (cited in note 22).

³³ GATS, art IX (cited in note 4).

This one instance was the Agreement on Basic Telecommunications Services signed by sixty-nine members in 1997.³⁴ The important commitments created by the Agreement are found in a short Reference Paper.³⁵ These commitments went further than those required under the GATS in two ways. First, the Reference Paper creates a commitment to preventing a series of anti-competitive practices—in other words, creating an explicit competition law obligation. Second, the Reference paper requires countries to force their telephone companies to interconnect with other phone companies.³⁶ The commitments in the Reference Paper are of particular importance to Voice-over-IP services because of the promise to prevent telephone incumbents from engaging in anti-competitive practices—as the case study, below, explores in greater detail.

3. Exceptions to the GATS Framework

The third and last group of features in the GATS is a set of exceptions that describe what countries may and may not do notwithstanding the rules of the GATS. These exceptions largely mirror what is found in the GATT agreement. Most important for trade in information services are several “general exceptions.” They include exceptions for measures: (1) “necessary to protect public morals or to maintain public order”; (2) “necessary to protect human, animal or plant life

³⁴ The Agreement on Basic Telecommunications Services is the Fourth Protocol to the GATS. What makes matters confusing is that as a protocol to the GATS, the Agreement on Basic Telecommunications Services is part of the treaty and all members of the WTO are technically parties to it. However, the Fourth Protocol is structured so that it has no effects unless specific commitments are made. The sixty-nine parties who signed “on to” the Agreement on Basic Telecommunications are those who agreed in 1997 both to make commitments to telecommunications reform and to the reference paper. Fourth Protocol (cited in note 7).

³⁵ WTO, *Telecommunication Services: Reference Paper*, available online at <http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm> (visited Feb 12, 2006).

³⁶ For a discussion of the Telecommunications Agreement, see, for example, Marco C.E.J. Bronckers and Pierre Larouche, *Telecommunications Services and the World Trade Organization*, 31 *J of World Trade* 5–48 (1997); William A.J. Drake and Eli M. Noam, *The WTO Deal on Basic Telecommunications: Big Bang or Little Whimper?*, 21 *Telecommunications Policy* 799–818 (1997); Markus Fredebeul-Krein and Andreas Freytag, *Telecommunications and WTO Discipline: An Assessment of the WTO Agreement on Telecommunications Services*, 21 *Telecommunications Policy* 477–91 (1997); Lee Tuthill, *The GATS and New Rules for Regulators*, 21 *Telecommunications Policy* 783–98 (1997).

or health”; and (3) “necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement.”³⁷

As otherwise in trade, such exceptions are likely to be among the most contentious areas in WTO disputes. To help the appellate body decide such cases, the GATS, like GATT, has a “chapeau” that limits the use of the exceptions to situations where the laws in question “are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services.”³⁸ As we shall see, these exceptions have already proved important.

C. BARRIERS TO TRADE IN INTERNET-BASED SERVICES

1. What is an Internet-Based Service?

The GATS was written with a pre-Internet concept of “telecommunications services.” The WTO schedule recognizes fourteen different types of telecommunications services. The first seven (a–g) are considered “basic,” and the next seven “value-added.”

As explained earlier, the entire point of the Internet was not to create a “service” in and of itself, but rather to create a platform on which other services can be based. That does not mean the category of telecommunications services, or the commitments made to liberate basic services in the 1998 Telecommunications Agreement, are irrelevant to regulation of Internet services. Consider the facts of the *Mexico–Measures Affecting Telecommunications Services* dispute. Here, the Mexican incumbent phone company, Telmex, subjected competing domestic carriers and foreign carriers to various abuses—in the US case, charging American carriers high fees for long-distance calls originating in the United States. While the facts are complex, the United

³⁷ GATS, art XIV (cited in note 4).

³⁸ *Id.*

States successfully convinced the WTO that Mexico had violated the terms of the 1998 Reference Paper.³⁹

However, for Internet services, much of the importance of the GATS Telecommunications commitments as applied to the Internet is through Mode 1—cross border provision of services. Whether or not intended by the drafters, this delivery mode formulation is nearly synonymous with “Internet-based.” Thus, the analysis of the GATS and services is better understood as an analysis of the commitments to Mode 1 service liberalization.

2. What Makes for a Barrier in Trade to Internet-Based Services?

Based on this broader understanding of Internet services, what “counts” as a barrier to trade in information services? The question arises in an environment where nation-states have begun to impose more expansive controls of the Internet both at their borders and domestically. Several examples of barriers to trade in information services follow.

One type of barrier is filtering of or bans on forbidden content. Many countries require Internet service providers to either filter or refuse to host service-providers that supply various kinds of forbidden content. Similarly, nations may maintain laws that expose information providers to liability for certain content, and therefore may potentially make the entire service illegal to operate. Examples of such laws are those banning Nazi materials or hate speech, libel laws, or those banning topics like criticism of the ruling party.

Another barrier is the blocking of specific applications. Countries or state telecommunications providers have occasionally blocked given applications, like Voice-over-IP services. There are more and less sophisticated ways of doing this. For example, as discussed below, a host of countries have routinely blocked their citizens from reaching the web sites of

³⁹ World Trade Organization, Report of the Panel, *Mexico–Measures Affecting Telecommunications Services*, WTO Doc No WT/DS204/R (Apr 2, 2004).

Voice-over-IP companies like Skype. In another example, Google’s web site has, in the past, been “hijacked” by the Chinese government, and its IP address given to a different site. During the hijacked period, Chinese users were unable to reach any of the usual Google.com content, and were sent to domestic sites instead.

Finally, some nations ban specific modes of service delivery, such as online delivery. The United States, for example, generally bans the “wire” delivery of gambling services, which is understood to include both telephone and Internet-based gambling. Other means of delivering gambling services (namely, casinos) are allowed.

As discussed in the next section, only the third of these three types of barriers to Internet-based services has been the subject of WTO attention.

D. WHEN DOES FILTERING VIOLATE THE GATS?

The hard question is when the filtering discussed above might or will violate the GATS. Interestingly, the central question returns to one of the oldest questions in Internet law—is there anything special about Internet-based services? This question arises when countries block or make it difficult to deliver foreign Internet services to local citizens in the ways described above. The WTO has recently supplied an initial answer to many of these GATS Internet-based services questions in the *Gambling Services* decisions.⁴⁰

The dispute centered on web gambling business situated on the twin-island nation of Antigua and Barbuda.⁴¹ The weather, an agreeable government, and good connections to the US have made Antigua a favored destination for online casinos. At its height in the early 2000s the local Internet gambling industry employed 5,000 people, or nearly 7.5 percent of the islands’

⁴⁰ World Trade Organization, Report of the Panel, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc No WT/DS285/R (Oct 11, 2004) (hereinafter *Gambling Services*, Report of the Panel); *Gambling Services*, Report of the Appellate Body (cited in note 22).

⁴¹ Frances Williams, *Minnow Bets on Beating US at Internet Gambling*, *Fin Times* 9 (June 25, 2003).

population. But led by New York's Eliot Spitzer in 2002, federal and state governments began to exert heavy pressure on online gambling—in particular through targeting intermediaries, like Citibank, PayPal and other companies whose services are necessary to a gambling service.⁴² This crackdown took its toll, putting more than half of the nation's operations out of business, leaving behind only five hundred employees.⁴³ As Sir Ronald Sanders, an Antiguan official, complained, "The effect of the US enforcement of its laws is to hurt the small economy of Antigua and Barbuda, which is struggling to survive in a world of intense competition in the trade of goods and services."⁴⁴

The United States maintains several federal laws, including the Wire Act and the Travel Act, which make it illegal to operate a "wire"-based gambling service.⁴⁵ For example, the Wire Act says:

Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers shall be fined under this title or imprisoned not more than two years, or both.⁴⁶

Antigua may be small, but it is a nation-state nonetheless and since 1995 a full-fledged member of the WTO. In June 2003, Antigua filed a WTO complaint against the United States, arguing that the various US actions and enforcements were a violation of the GATS. Both a WTO panel and the Appellate Body reached the same interesting conclusion: that the American laws in question were in violation of the "market access" commitments found in Article XVI of the

⁴² New York Dept of Law, Press Release, June 14, 2002, *Financial Giant Joins Fight Against Online Gambling*, available at <http://www.oag.state.ny.us/press/2002/jun/jun14a_02.html> (visited Apr 16, 2006).

⁴³ US General Accounting Office, Report to Congressional Requesters, *Internet Gambling: An Overview of the Issues* (Dec 2002), available online at <<http://www.gao.gov/new.items/d0389.pdf>> (visited Apr 16, 2006).

⁴⁴ Williams, *Minnow Bets on Beating US* (cited in note 41).

⁴⁵ Federal Interstate Wire Act, 18 USC §1084(a) (2006); The Interstate and Foreign Travel or Transportation in Aid of Racketeering Enterprising Act, 18 USC §1952 (2006).

⁴⁶ 18 USC §1084(a) (cited in note 45).

GATS.⁴⁷ Both bodies took Article XVI to say that once a party has agreed to liberate a given mode of service supply, the country simply may not continue to maintain a ban on a certain mode of supplying a service to the market.⁴⁸

As presented, the case raised an interesting interpretative problem of technological translation, albeit one which the Appellate Body largely side-stepped. When the United States committed to the liberalization of sector 10.D—“Other Recreational Services (except sporting)”⁴⁹—did it really mean to commit to open trade in online gambling? In 1993, of course, online gambling did not exist in the form it does today, and American negotiators could not possibly have imagined that they were making that specific commitment. On the other hand, the plain text of the treaty can be read to cover Internet gambling—what else is online gambling if not the “cross-border” provisioning of a “recreational service?”

While the Appellate Body spent substantial time on the interpretation of the meaning of “Recreational Services,” it did not face the translation question head on. Instead, it simply decided that the American commitment to liberalize “Other Recreational Services (except sporting)” included a commitment to liberalize “gambling and wagering” services in general.⁵⁰ In other words, the Appellate Body (and not for the first time) adopted a view of treaty language that allows evolution to fit current circumstances. The assumption, then, was that the Internet-based service is a “real” or competitive version of the service within that sector, and that a ban is

⁴⁷ GATS, art XVI cited in note 4); World Trade Organization, Report of the Panel, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc No WT/DS285/R (Oct 11, 2004) (hereinafter *Gambling Services*, Report of the Panel); *Gambling Services*, Report of the Appellate Body (cited in note 22).

⁴⁸ See *Gambling Services*, Report of the Panel (cited in note 47); *Gambling Services*, Report of the Appellate Body (cited in note 22). This “zero-quota” theory of Article XVI remains contested, but is not the focus of this paper. See Joost Pauwelyn, *Rien ne Va Plus? Distinguishing Domestic Regulation from Market Access in GATT and GATS*, 4 World Trade Review 2, (2005).

⁴⁹ See *Gambling Services*, Report of the Appellate Body at ¶¶ 14–20 (cited in note 22).

⁵⁰ *Gambling Services*, Report of the Appellate Body at ¶¶ 162–213 (cited in note 22). Reaching that decision required a lengthy discussion of whether the United States, which does not use CPC codes, can nonetheless be thought to have intended to liberalize sectors that are sub-sectors to the general CPC sector referred to. In this case, “gambling and wagering services” (CPC 96492) were listed as a subset of “Other Recreational Services” (CPC 964). For a list of CPC codes, see <<http://unstats.un.org/unsd/cr/registry/regcst.asp?Cl=16>> (visited Apr 11, 2006).

a violation of a Mode 1 commitment. The potential consequences of this assumption are important. It suggests that if a country blocks an Internet service in a service sector that it has agreed to liberalize, it will need to find a rationale for that blocking in the exceptions to the GATS.

Which it might. In the web-gambling dispute, the United States argued that its bans on gambling were, as the GATS puts it, “necessary to protect public morals or to maintain public order.” And to make this argument, the United States brought up everything that makes online gambling different from real gambling. Its briefing stressed four characteristics: (i) “the volume, speed and international reach of remote gambling transactions”⁵¹; (ii) the “virtual anonymity of such transactions”⁵²; (iii) “low barriers to entry in the context of the remote supply of gambling and betting services”⁵³; and the (iv) “isolated and anonymous environment in which such gambling takes place”.⁵⁴ In short, the United States was arguing that the differences between web gambling and real gambling were sufficient to justify differential regulation of the two forms of gambling.

The panel decision rejected American reliance on the exceptions. Its reasoning, among other things, would have required the United States to negotiate in good faith with Antigua before asserting its gambling ban, a finding that might have put into question many of the world’s bans on cross-border gambling services. However, the Appellate Body reversed and agreed with the United States. It conceded that the American laws like the Wire Act were “necessary” to deal with the particular challenges to the public order created by online gambling

⁵¹ *Gambling Services*, Report of the Panel at ¶ 6.505 (cited in note 40).

⁵² *Id.*

⁵³ *Id.* at ¶ 6.507.

⁵⁴ *Id.* at ¶ 6.514.

services. As the word “necessary” has been construed by *Korean Beef*⁵⁵ and related cases, it creates a kind of less restrictive means test—the question is “whether a less WTO-inconsistent measure is ‘reasonably available’” to maintain the public order or protect public morals.⁵⁶ Antigua made the argument, drawing on the condemnation of unilateralism in the *Shrimp-Turtle* dispute,⁵⁷ that international negotiations would be a less restrictive means of dealing with the problem of Internet gambling. That was convincing to the panel, but the Appellate Body would have none of it. At stake in *Shrimp-Turtle* was the conservation of sea-turtles, and in that case requiring the United States to deal multilaterally with a multilateral problem had a certain logic to it.⁵⁸ But the Appellate Body in *Gambling Services* evidently was unwilling to create a duty to negotiate over what are, essentially, domestic, non-extraterritorial laws. It was also obvious that the right to negotiate with an eye toward implementing an anti-gambling law would not be of even roughly comparable effectiveness to already existing federal law already prohibiting online gambling.

The only issue, then, was whether the laws were administered in a discriminatory way—or, in the words of the chapeau, “applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services.”⁵⁹ Here the panel and Appellate Body also parted company. Antigua argued that the US law was a ban in name only—that in practice, American casinos were allowed to carry on their business without harassment. Such evidence was enough

⁵⁵ World Trade Organization, Report of the Appellate Body, *Korea–Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 162, WTO Doc No WT/DS169/AB/R (Dec 11, 2000) (hereinafter *Korean Beef*). See also, World Trade Organization, Report of the Appellate Body, *European Community–Measures Affecting Asbestos and Asbestos-Containing Products*, ¶¶ 172–74, WTO Doc No WT/DS135/AB/R (Mar 12, 2001).

⁵⁶ *Korean Beef* at ¶ 166 (cited in note 55).

⁵⁷ World Trade Organization, Report of the Appellate Body, *United States–Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc No WT/DS58/AB/R (Oct 12, 1998) (hereinafter *Shrimp-Turtle*).

⁵⁸ See *id.*

⁵⁹ GATS, art XIV (cited in note 4).

for the panel, which said that “the United States has not demonstrated that it applies its prohibition on the remote supply of these services in a *consistent manner* as between those supplied domestically and those that are supplied from other Members.”⁶⁰ The Appellate Body, however, felt the evidence—which contained only a few examples of non-enforcement—was entirely too spotty to find a treaty violation. Obvious is the Appellate Body’s instinct that going beyond the text of a law to review a nation’s enforcement patterns is no trivial matter—but the Appellate Body was careful to leave itself room to do so in the future. In this case, the Appellate Body played it safe and focused instead on the fact that most of the laws are worded in a neutral fashion, and was thereby able to uphold the bulk of American anti-Internet gambling laws as protection of American morality and public order.⁶¹

Thus, *Gambling Services* upheld most of the American anti-gambling laws. But what is most significant about the report is not its result, but its method. Through its Appellate Body, the WTO’s method suggests that when a nation opens a given sector under the GATS, foreign Internet-based services may presumptively demand access to its markets. Filters, bans and other burdens on Internet businesses will have to be justified, if they can be, on clear state interests—allowed as exceptions to the GATS commitments. And, if countries draw a line between Internet and “regular” services, the difference will have to be justified based on something special about the Internet-based services.

The *Gambling Services* dispute also shows that it isn’t exactly impossible to advance such justifications. But the upshot is to put the burden on the filtering nation—to force it to explain what its justifications for filtering are, and to show that it filters in a non-discriminatory

⁶⁰ *Gambling Services*, Report of the Panel at ¶ 6.607 (cited in note 40) (emphasis added).

⁶¹ The Appellate Body did uphold the panel’s finding that the Interstate Horseracing Act, 15 USC § 3005 (2000) violates US GATS commitments, because it is facially discriminatory.

fashion. The Appellate Body wasn't quite as radical as it could have been, but it nonetheless put the WTO in an oversight role for much Internet filtering.

II. CASE STUDIES

A. CHINA

China presents an interesting case study, for its services policy presents an apparent contradiction. On the one hand, China agreed to strong commitments to liberalize its service sectors to foreign trade, including broad liberalization of cross-border service supply. At the same time, China remains committed, within its borders, to among the world's most comprehensive regulations of the Internet.⁶² The tension between these two positions has not been worked out, to say the least.

Many scholars have offered surveys of various Chinese rules and restrictions, and what I say here will make little contribution to that discussion.⁶³ The question addressed here is, instead, how consistent China's rules are with its commitments to the GATT and GATS.

1. China's Commitments

As discussed above, China has committed itself to substantial liberalization of its service market. By some measures, China has committed itself to even more services liberalization than the median developed or high-income country.⁶⁴

⁶² See, for example, *Internet Filtering in China in 2004–2005: A Country Study*, available online at <<http://www.opennetinitiative.net/studies/china/>> (visited Apr 11, 2006).

⁶³ The Congressional Executive Commission on China authors an annual study which describes China's practices in great detail. See <<http://www.cecc.gov/pages/annualRpt/annualRpt05/CECCannRpt2005.pdf>> [Tim: Is this link correct? LVB] (visited Apr 16, 2006). In addition, an organization known as the Open Net Initiative offers occasional surveys of Chinese filtering. See *Internet Filtering in China in 2004–2005* (cited in note 62).

⁶⁴ See Aaditya Mattoo, *China's Accession to the WTO: The Services Dimension*, 6 J of Intl Econ L 299, 300 (2003).

In general, China's approach is to agree to partial commitments in service liberalization.⁶⁵ For example, while China has agreed to eventually allow Mode 3 service competition across an enormous number of sectors, nearly all such competition is conditioned on entering into a joint venture with a local firm. Yet the somewhat surprising exceptions to these rules are cross-border, or Internet services.⁶⁶ China has agreed to fairly extensive, full liberalization of Mode 1 services, including the following: legal services; accounting, auditing and bookkeeping services; integrated engineering services; data processing services; audiovisual services like videos, including entertainment software and distribution; sound recording distribution services; translation and interpretation services; wholesale or retail trade services away from a fixed location and travel agency services.⁶⁷

From the study of China's sectoral commitments, three questions emerge. The first is simply the scope of China's current commitments, and the extent to which they will be read dynamically to include Internet-based services. To take one interesting example, China agreed to the "open" supply of "data processing services" through Mode 1, the Internet, and also some liberalization of "online information and database retrieval services."⁶⁸ Among the most important of what might arguably be called data-processing or data-base services offered online today are search engines like Google, MSN and the like.⁶⁹ China has previously blocked foreign search-engines outright—for example, by briefly seizing the Google.com domain name in 2002,

⁶⁵ The discussion which follows relies on an analysis of China's Sectoral Commitments, as provided to the WTO, available online at http://tsdb.wto.org/wto/Public.nsf/FSetReportPredifinedAffich?OpenFrameSet&Frame=F_PredefinedReport&Src=_05trn8rpfalqm4r39ccn6ssr65ssmcp9l6kp3cdhhcgoj2p9g74om6c9i6kr3gohg60o3co9n69j3abpm6ks66ohicoom6cj46lgmaphiccoj4d9mcpm2c1g6so3geb3cgvkap39eh26uorldlimst00_> (visited Apr 16, 2006) (hereinafter China's Sectoral Commitments).

⁶⁶ China's Sectoral Commitments (cited in note 65).

⁶⁷ China's Sectoral Commitments (cited in note 65).

⁶⁸ China's Sectoral Commitments (cited in note 65).

⁶⁹ The United Nations has proposed adding search engines as a sub-category of data processing services. The question, however, of how a revised CPC might affect prior commitments remains an unanswered question.

redirecting traffic to a local search engine.⁷⁰ It has also demanded the filtration of search results based on an implicit threat of blocking.

When the GATS first entered into force in 1994, search engines were not the industry they are today, and the Centralized Products Classification definition of data processing from 1994 (the provisional CPC) looks nothing like a search engine.⁷¹ Yet China joined the WTO in 2001, and the CPC changed between 1994 and 2001, leaving category 843 as “online information provision services,” which does look more like a search engine.⁷² (Indeed, in 2000 the United Nations so held in a short ruling.⁷³) On the other hand, there is evidence to suggest that in 2001, China viewed its commitments in terms of the Provisional CPC in place in 1994.⁷⁴ It also explicitly placed some conditions on the category “online information and database retrieval services.”

Might a panel nonetheless hold the data-processing commitment to include search engines or other Internet applications, based on the evolution of the CPC itself? The data-processing problem has some similarities to the *Gambling Services* dispute described above. Certainly the GATS drafters weren’t thinking about search engines in 1994. When China (re)joined the WTO in late-2001, search engines were an established, if new, service industry. The question is whether a panel would think China might fairly be said to have known from the

⁷⁰ Sumner Lemon, *China Hijacks Google’s Domain Name*, IDG News Service (Sept 10, 2002), available online at <<http://www.pcworld.com/news/article/0,aid,104813,00.asp>> (visited Feb 18, 2006).

⁷¹ See Provisional CPC 843, available online at <<http://unstats.un.org/unsd/cr/registry/regcs.asp?Cl=9&Lg=1&Co=843>> (visited Apr 16, 2006).

⁷² See CPC Ver 1.1 84300, available online at <<http://unstats.un.org/unsd/cr/registry/regcs.asp?Cl=16&Lg=1&Co=84300>> (visited Apr 11, 2006).

⁷³ For the ruling of the United Nations Technical Subgroup on Classifications, see <http://unstats.un.org/unsd/cr/registry/regri.asp?Rid=946>.

⁷⁴ A note in China’s protocol of accession states: “CPC classification is added to the service sectors subject to state pricing in this Annex in accordance with the GATT document MTN.GNS/W/120, 10 July 1991, which provided services sectoral classification for the purpose of services negotiations during the Uruguay Round.” See World Trade Organization, *Accession of the People’s Republic of China*, WT/L/432, 67, available online at <<http://docsonline.wto.org/imrd/directdoc.asp?DDFDocuments/t/WT/L/432.doc>> (visited Apr 11, 2006).

plain language of the term “data processing” that it was agreeing to potential future meanings of that word, such as search engines, that might turn up the evolution of the CPC itself.

Alternatively, it might be that search engines are a form of “online information and database services,” a form of “value-added” telecommunications service. Yet here China’s commitment is less clear. China’s cross-border schedule simply contains a cross reference to Mode 3. Mode 3, meanwhile, specifies that the sector is open to joint ventures in a limited number of cities with limits on the percentage of foreign ownership allowed. Does this mean that cross-border supply of search-engines must be accomplished through a joint venture? The meaning of the commitment, as economist Aaditya Mattoo points out, “is not clear.”⁷⁵

An different example of an open-ended commitment is China’s promise to liberalize trade in “wholesale or retail trade services away from a fixed location,” including cross-border supply of such services.⁷⁶ This has been understood to refer to direct sales methods like the well-known Avon model.⁷⁷ Yet it might conceivably be read to include sales methods like eBay online auctions. eBay, of course, has a Chinese domestic operation. The question is what would happen were China to try to block eBay’s American-based services (as France once demanded of Yahoo). Similar points can be made about the liberalization of travel services, audio-visual services, and so on.

Larger and more general question arises for uses of the internet that deliver a product (or frankly, for offline delivery of the same products). If China blocks, say, downloading of software, music, films, or a magazine like Sports Illustrated, while continuing to allow domestic

⁷⁵ See Mattoo, 6 J of Intl Econ L at 300 (cited in note 64).

⁷⁶ See China’s Sectoral Commitments (cited in note 65).

⁷⁷ T.K. Chang, *Foreign Investment in the Retail, Wholesale, Distribution and Trading Sectors in the People’s Republic of China* §8.07 (2002), available online at <http://www.angelfire.com/stars/tkchang/China_Retail_Market.htm> (visited Apr 11, 2006).

equivalents, the main implications may be under GATT. If it is assumed that downloaded music is a good, for example, blocking downloads of music is an obvious violation of GATT Art. XI.⁷⁸

If China can be found to be filtering at least some Internet services which it has committed to liberalize, or placing a zero-quota on a good, the question is whether this creates a GATS or GATT violation. In the case of a block—like China’s one-time complete block of Google.com described above—it seems clear under the “zero-quota” theory of *Gambling Services* that a violation of the Article XVII market access commitment has occurred (assuming, for purposes of argument, that search engines are considered a “data processing” service). [Tim: Can we briefly refresh the reader’s memory as to what Article XVII is, perhaps in a footnote?] However, it is less clear whether required filtering of the service—as required of many Chinese information services—constitutes a market access issue. The types of limits banned in Article XVII pertain to matters like number of outlets, number of employees, and so on, but do not suggest that a country cannot limit what the service does pursuant to local laws. Meanwhile, as stated above, assuming that internet delivery of a digital product is still considered delivery of a “good” under GATT, blocks are a clear violation of Art. XI.

Assuming that some violation of GATS or GATT, the question turns to the exceptions, where matters become more difficult to predict. As discussed previously, it is a common dictum in the trade world that censorship was not meant to be considered a trade barrier under GATT or GATS. While an untested theory, the apparent authority for the statement is Art XX(a) of GATT and Art XIV(a) of GATS, which provide exceptions for measures “necessary to protect public morals,” and “necessary to protect public morals or to maintain public order” respectively.

⁷⁸ GATT Art. XI bans quotas, including zero-quotas (or bans): “No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted....”

But what if national security and public order are raised to defend what in truth looks to be a protectionist measure? The limits on use of the public order exception are suggested in footnote 5 of the GATS, which says “The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.”⁷⁹ In light of that language, WTO panels and Appellate Bodies face the unappetizing prospect of trying to decide when a given part of China’s system of information control represents a measure that combats “a genuine and sufficiently serious threat” that affects “one of the fundamental interests of society.” That’s a hard question when the content blocked may be more of a threat either to the Party or to a favored local company.

Third, and finally, there are areas where the commitment to liberalize online, cross-border supply may conflict with China’s plans for a more gradual liberalization. For example, China has committed itself to open trade in online travel services, while allowing limited roll out of Mode 3 services. This suggests that some providers may seek to offer cross-border travel services to China’s citizens instead of seeking to establish a local presence.

2. Changing Commitments

The analysis so far has examined the GATS and GATT as if statutes, which is slightly unrealistic. Unlike the typical actor in a domestic system, China has more power to ignore or terminate the GATS commitments it does not like. There is no WTO police force that can compel China to obey world trade law; and China may also simply announce that it will no longer honor specified GATS commitments. Whether it can get away with such action depends upon questions of international relations rather than physical coercion. For example, while the WTO Appellate Body may conclude that “video services” includes modern Internet services, if

⁷⁹ GATS, Art XIV n 5 (cited in note 4).

China disagrees, it retains the power to ignore the WTO sanctions and suffer whatever economic consequences may follow.

Stated otherwise, much depends on the will of other nations to force China to comply with its service liberalization commitments or face economic consequences. There certainly exist other well-known areas where, thanks to the nature of international relations, violations of GATT and the GATS stand unchallenged. Yet there are reasons to expect the China–GATS situation to be different, and for the United States, in particular, to have strong reasons to want to maximize the prospects of its Internet services exporters in the Chinese market. For now, the United States continues to enjoy an absolute advantage among nations in the invention and delivery of Internet-based services. It would be unexpected and inconsistent with past behavior were the United States to display no interest in maximizing the market for its exporters.

B. VOICE OVER IP

Voice-over-IP products rely on the Internet, as opposed to traditional phone lines, to carry voice services. By their nature they defy existing regulatory categories, which are premised on the assumption of a dedicated phone network. They also allow users with an Internet connection to make long distance calls, even international calls, for free. Those calls are sometimes a lucrative source of revenue for national telephone companies, and the temptation to block Voice-over-IP service can be great indeed.

Perhaps unsurprisingly, Voice-over-IP products have run into various kinds of blocks at every stage of their history, and what follows is only a representative sample.

An earlier, and vivid example comes from China—the story of the Chen brothers.⁸⁰ In 1997, at first as a form of promotion for their electronics store, the Chens allowed customers to

⁸⁰ See Jennifer Lin, *Little Shop A Horror To Chinese Monopoly: The Net, 2 Brothers And 1 Idea Are Testing An Ancient Nation's Control Of New Technology*, *Phil Inq* A3 (Mar 14, 1999).

place Internet phone calls from the store, using the services of an American company, Net2Phone. The service proved popular. However, at the direction of China Telecom, China's incumbent carrier, the police raided the store and detained both brothers. By the end, police seized nearly \$6,000 along with the Chen's computers. The Chens eventually filed suit, contending that no law actually made their business illegal, and won at least one favorable court decision.⁸¹ While the story of the Chen brothers precedes China's accession to the WTO, the blocking of a foreign-provided VoIP service could not be more clear.

A second set of examples are the blocking of VoIP provided by the company Skype in Mexico, at the hands of Mexico's incumbent monopoly carrier, Teléfonos de México, SA de CV ("Telmex"). Because many of Mexico's citizens work in the United States, the temptation to protect long distance revenue is particularly strong. According to reports and discussions with Skype officials, Telmex maintained several measures that prevented Mexicans from using Skype's VoIP product. The most basic, yet effective method was to block users from reaching Skype's domain name—www.skype.com—and thereby prevent users from accessing the service in the first place. One Mexican user even reported seeing a message indicating that the site is "forbidden."⁸² Other methods reportedly included the downgrading of bandwidth for users identified to be employing Skype.⁸³ Telmex denied that it was involved in any such blocking, but the weight of anecdotal evidence and Skype's own testimony seem to support the proposition that at least some blocking occurred.

Does the Chinese or Telmex blocking raise a GATS issue? The relevant law for the question is the GATS—extending 1998 Agreement on Basic Telecommunications Services. As

⁸¹ *Chen Brothers, Innovators, Internet Telephony, China*, Bus Wk 80 (June 14, 1999).

⁸² Ben Charny, *Mexico Telephone Operator Under VoIP Fire*, CNET News (Apr 25, 2005), available online at <http://news.com.com/Mexico+telephone+operator+under+VoIP+fire/2100-7352_3-5681542.html> (visited Apr 16, 2005).

⁸³ For a presentation discussing methods of blocking Skype, see <<http://www.blackhat.com/presentations/bh-europe-06/bh-eu-06-biondi/bh-eu-06-biondi-up.pdf>> (visited Apr 16, 2006).

discussed earlier, the agreement was designed to oblige governments to prevent incumbent carriers from preying on foreign competitors. In relevant part, it creates the following duty: “Appropriate measures shall be maintained for the purpose of preventing suppliers who, alone or together, are a major supplier from engaging in or continuing anti-competitive practices.”⁸⁴

There is no question that China Telecom and Telmex are “major” suppliers—the only question is whether blocking VoIP would have constituted an “anti-competitive practice.” Because few doubt that the evident purpose of the blocking was to prevent competition from VoIP, and particularly competition with long-distance services, the answer seems obvious. According to sources at the USTR, similar practices can be found in a range of countries, including, Qatar and Venezuela, for example.⁸⁵

A final point. This discussion of VoIP demonstrates a potentially unexpected consequence of the GATS and similar agreements. Among other things, one question is whether the Telecommunications Services Reference Paper might be relevant to debates within American telecommunications and antitrust law. On the one hand, the USTR is asking incumbent carriers in other countries to open their markets to Internet competitors. Within the United States, however, the question as to whether local carriers like Verizon, or cable broadband providers may legally block or degrade VoIP services is discussed under the rubric of “network neutrality,” a proposed rule that would bar broadband carriers from blocking or degrading any Internet application. The fact that the United States also has an international commitment similar to the one it promotes abroad is, as of now, not yet part of the discussion.

III. CONCLUSION

⁸⁴ WTO, *Telecommunications Services: Reference Paper* at § 1.1 (cited in note 35).

⁸⁵ Interview with Chris Libertelli, Director, Government and Regulatory Affairs, Skype, in Washington, DC (Jan 26, 2006).

The rise of the Chinese model of internet control is what is prompting many of the new trade questions discussed in this paper. China's conduct opens hard questions about the control of content and international trade. How much control is legitimate domestic regulation, and how much is a barrier to trade and a breach of promises made to other members of the WTO? Over the next decade, the WTO and its major members will face a choice, that can be framed as a decision on burden of proof. It might force countries like China to justify each and every blockage or filtering of the internet, which may dampen other countries' efforts to impose such measures. That's a path that the *Gambling Services* decision takes, and if followed it will put the WTO in the center of international internet relations. Alternatively, one way or another, the WTO may make it clear that blocking and filtering of content are presumptively allowed – that a nation doesn't need a good reason to engage in censorship or content controls. If that's the direction taken, we can expect to see further balkanization of the internet as between different nations and their ideas of what the internet should be. Each position has its backers, and the direction that the world trading system will go is by no means clear. The long term implications, however, are obvious.