

European Centre for International Political Economy (Ecipe)

## The internet and the international trading system

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## » Today's agenda

- ▶ The internet and the WTO system
- ▶ Case study: The Golden Shield a.k.a. The Great Firewall of China
- ▶ W(h)ither global trade rules online?

## » World Trade Organization, services and the internet

- ▶ General Agreement on Trade in Services (1995)
- ▶ Minor WTO texts relevant to the internet – the unsung heroes of the internet revolution
  - » The “W/120”
  - » GATS Annex on Telecommunications
  - » Reference Paper on Basic Telecommunications, 1996
  - » E-Commerce moratorium, Ministerial declaration of 1998
- ▶ Even lesser texts
  - » Memorandum of understanding on the scope of coverage of CPC 84 (TN/S/W/60), 2007
- ▶ Almost irrelevant texts
  - » Doha offers, 2001~2008, including the Signalling Conference, 2007
- ▶ Disputes
  - » Mexico – Measures Affecting Telecommunications Services (Telmex)
  - » United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, DS285
  - » China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audio-visual Entertainment Products, DS363

## » The case study: Internet management of China

- ▶ Half a billion users, largest internet economy in the world
  - » More than 50% use various social media
  - » E-commerce and online advertising growing 60% year on year
  - » 300 million blogs, 61% express government critical opinions
  - » Higher share of original content creation, compared to rest of the world
- ▶ At the time, blocking was the weapon of choice
  - » Blocking at least 18,000 web sites
  - » Monitoring all cross-border traffic
  - » 30,000 full-time employees monitoring internet traffic
  - » China is not alone (Turkey, Thailand, France, Germany, the US)
- ▶ Filtering
- ▶ Search engines, user-generated content
  - » Baidu increasing its market shares from 3 to 65% in six years
  - » Foreign search engines have 90% market share in Japan
- ▶ US response

## » Internet management in the eye of WTO law

- ▶ What is a search engine, blog, online banking, video streaming, ...
  - » W/120, the memorandum
  - » CRS, telecom or advertising
  
- ▶ Has China made relevant commitments?
  - » Technological neutrality
  - » Drafting error in the US schedules
  - » Exemptions were not made in China's accession
  - » No objections to later developments of the CPC classification system
  
- ▶ Is a “ban” the same as “restricting” trade?
  - » Zero quota principle of Online Gambling case
    - ▶ Wire Act, Travel Act, Illegal Gambling Business Act and various state acts



## » The Devil (a.k.a. the trade lawyer) is in the details

### *Article XIV*

#### *General Exceptions*

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:

- (a) necessary to protect public **morals** or to maintain public order;<sup>5</sup>
- (b) necessary to protect human, animal or plant life or health;
- (c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:
  - (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts;
  - (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;
  - (iii) safety;
- (d) inconsistent with Article XVII, provided that the difference in treatment is aimed at ensuring the equitable or effective<sup>6</sup> imposition or collection of direct taxes in respect of services or service suppliers of other Members;

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<sup>5</sup> 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.

<sup>6</sup> Measures that are aimed at ensuring the equitable or effective imposition or collection of direct taxes include measures taken by a Member under its taxation system which:

## » Wait a minute...

### ▶ Exceptions

- » Public morals
- » Human, animal and plant life
- » Public order
- » Fraud, data privacy
- » Collecting taxes

### ▶ The article XIV chapeau:

- » Subject to the requirement that such measures are not applied in a manner which would constitute
  - ▶ a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail
  - ▶ or a disguised restriction on trade in services

## » Does the exceptions apply? A two-tier test

### ▶ Necessity criteria

- » US—Online Gambling: Protecting the public from gambling
- » China—Audiovisuals: Protection of audiovisual content is “a matter of fundamental importance” recognised by panel.
- » Genuine and sufficiently serious threat to the fundamental interests of the society?

### ▶ Least trade-restrictive measure

- » Are there less trade-restrictive options?
- » Are they genuine alternatives?



## » Summing it up in six questions

- ▶ ONE — are search engines an data processing service or value-added telecom service?
- ▶ TWO — was China restricting trade in that category of service?
- ▶ THREE — The exceptions certainly apply but...
- ▶ FOUR — Was it “necessary” for the objective?
- ▶ FIVE — was it the “least trade restrictive” measure?
- ▶ SIX — How do you rule?
- ▶ The most important question — Should you pursue a case or not?  
What were the consequences of pursuing / abstaining from a case?

## » **W(h)ither internet trade rules**

- ▶ How are international trade rules on internet different from national law?
- ▶ The “next generation” FTAs
- ▶ Plurilaterals