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
- 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;\(^5\)

(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\(^6\) imposition or collection of direct taxes in respect of services or service suppliers of other Members;

\(^5\) 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.

\(^6\) 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