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Google's China problem: A case study on trade, technology and Human Rights under the GATS

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GOOGLE'S CHINA PROBLEM: A CASE STUDY ON TRADE, TECHNOLOGY AND HUMAN RIGHTS UNDER THE GATS

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ABSTRACT

Trade and human rights have long had a troubled relationship. The advent of new technologies such as internet further complicates the relationship. This article reviews the relationship between trade, technology and human rights in light of the recent dispute between Google and China from both theoretical and practical perspectives. Starting with an overview of the internet censorship regime in China, the article goes on to assess the legal merits of a WTO challenge in this case. First, the article discusses which service sector or subsectors might be at issue. Second, the article analyzes whether and to what extent China has made commitments in each of the identified sector, as well as any limitation or restrictions that has been inscribed for such commitments. Next, the article reviews whether the Chinese internet filtering regime is in violation of these commitments and other relevant GATS obligations. In the 4th part, the article considers any exceptions that China might be able to invoke in the case of a breach. The tentative conclusion of the article is that, overall, Google does not have a strong case against China under WTO law.

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I. INTRODUCTION

> *As in the universe, each planet, while turning on its own axis, moves only around the sun, so in the system of freedom each of its worlds, while turning on its own axis, revolves only around the central sun of freedom. To make freedom of the press a variety of freedom of trade is a defence that kills it before defending it, for do I not abolish the freedom of a particular character if I demand that it should be free in the manner of a different character? Your freedom is not my freedom, says the press to a trade. As you obey the laws of your sphere, so will I obey the laws of my sphere. To be free in your way is for me identical with being unfree, just as a cabinet-maker would hardly feel pleased if he demanded freedom for his craft and was given as equivalent the freedom of the philosopher.*
>
> Karl Marx
> ***On Freedom of the Press***
> Published in *Rheinische Zeitung*
> No. 139, Supplement
> May 19 1842

For a long time, the relationship between trade law and human rights has been a subject of hot debate between scholars from both trade law and human rights circles. The latest Google episode in China provided yet another chance to revisit the debate. Compared to previous cases, this case is even more intriguing for the following reasons: first, unlike previous cases, which are mostly about the WTO-consistency of trade sanctions adopted in response to alleged human rights violations, the current one is a rare case on the possibility of using trade law to challenge directly the legality of national measures which are regarded as much as a trade law issue as a human rights issue. Second, and this point apparently relates to the first point, in most of the previous cases the alleged human rights violations affect almost exclusively only domestic individuals or firms, but in the current case the foreign firms are affected as much as, if not more than, the domestic firms. Third, the previous cases are mostly concerned with rules governing trade in goods, while most of the potential legal claims in the current case arise under the General Agreement on Trade in Services (GATS), an agreement people are much less familiar with. Fourth, to make the current case even more complicated, the main services at issue are those that only emerged since the dawn of the digital age, and it is highly unlikely that these services were even contemplated when the GATS rules were negotiated. All in all, these unique features make this case an interesting and challenging case study on the relationship between trade

and human rights in the digital era.

In this article, the author will review the many issues – both theoretical and practical – that this case might raise for the WTO system. Starting with a brief explanation of the tools of internet control that the Chinese government employs against both domestic and foreign internet service providers, the article will assess the legal merits of a WTO challenge in this case. First, the paper will try to ascertain the service sectors or subsectors that might be at issue. Second, the article will discuss to what extent China has made commitments in each of the identified sector, as well as any limitation or restrictions that have been inscribed for such commitments. Next, we will discuss whether the Chinese internet filtering regime is in violation of these commitments and other relevant GATS obligations. In the fourth part, the article will discuss any exceptions that China might be able to invoke in the case of a breach. The article will conclude with suggestions on the practical course of action that might be taken in the current case and similar cases in the future, as well as thoughts on how useful the WTO rules may be as a weapon for protecting human rights.

II. CENSORS AND SENSITIVITIES: ONLINE CENSORSHIP EXPLAINED

In his first-ever written work as a revolutionary journalist – "Comments on the Latest Prussian Censorship Instruction" – Karl Marx eloquently asked the Prussian censors to give people "a perfect press to whom you have only to give an order" "[i]nstead of a defective censorship whose full effectiveness you yourselves regard as problematic."[1] To help the clueless censors, Marx also suggested that "a model of [such perfect censorship] has been in existence for centuries in the Chinese state."[2] Ironically, never would the father of Communism have thought that, 170 years later, it is China that would provide not only the last refuge of the ideology named after him, but also yet another model of such "perfect" censorship regime.

As noted by Marx, censorship is nothing new in China. For example, Qin Shi Huang, the first emperor of China who ruled during the second half of third Century B.C., was remembered in history not only for building the Great Wall that would keep the wild barbarians away from the virgin territories of his empire, but also for burning the ancient books to keep the "impure" thoughts away from the innocent minds of his subjects. Unfortunately, not even the mighty Great Wall can keep the Great Censor in power: the Draconian empire fell after merely 15 years – making it the

[1] Karl Marx, *Comments on the Latest Prussian Censorship Instruction*, Marx & Engels Internet Archive, *available at* http://www.marxists.org/archive/marx/works/1842/02/10.htm (last visited Sept. 24, 2011).
[2] *Id.*

shortest among major dynasties in Chinese history. Such dire consequences, however, failed to prevent either the Great Wall or the Great Censor to resurrect in much more powerful modern forms 2,000 years later.

While the history of the Internet in China can be traced back to as early as 1994,[3] until the late 90's the Internet still remained a rarity among the general population. With the dawn of the new millennium, however, the Internet started to take off and grew at exponential rate. This phenomenal growth is well summarized by "The Internet in China," a white paper issued by the State Council of China in June 2010:

> *China has injected enormous sums of money into Internet infrastructure construction. From 1997 to 2009 a total of 4.3 trillion yuan[4] was invested in this regard, building a nationwide optical communication network with a total length of 8.267 million km. Of that, 840,000 km was long-distance optical cables. By the end of 2009 Chinese basic telecommunications companies had 136 million broadband Internet access ports, and international outlet bandwidth was 866,367 Mbps, with seven land-submarine cables and 20 land cables, that had a combined capacity exceeding 1,600 Gb. That ensured Internet access to 99.3% of Chinese towns and 91.5% of villages, and broadband to 96.0% of the towns. [. . .]*
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> *The construction and improvement of the Internet infrastructure has beefed up the spread and application of the Internet. By the end of 2009 the number of Chinese netizens had reached 384 million, 618 times that of 1997 and an annual increase of 31.95 million users. In addition, the Internet had reached 28.9% of the total population, higher than the world average. At the same time, there were 3.23 million websites running in China, which was 2,152 times that of 1997. The number of IPv4 addresses approached 230 million, making China the second-largest owner in the world. Of all the netizens, 346 million used broadband and 233 million used mobile phones to access the Internet. They had moved on from dialing the access numbers to broadband and mobile phones. These statistics make China among the top of the developing countries in developing and popularizing the Internet.*

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[3] Information Office of the State Council of the People's Republic of China, *White Paper: The Internet in China*, June 8, 2010, Beijing, *available at* http://www.china.org.cn/government/whitepaper/node_7093508.htm (last visited Sept. 25, 2011).

[4] Yuan, or Renminbi, is the Chinese currency. As of August 29, 2010, 1 U.S. Dollar equals 6.8 Renminbi.

With its rapid development, the Internet also quickly emerged as a major engine for economic development, which again is recounted in the white paper:

> *In the past 16 years the average growth rate of the added value of Chinese IT industry grew at over 26.6% annually, with its proportion in the national economy increasing from less than 1% to 10%. [. . .] In 2008 Internet-related industries generated a turnover of 650 billion yuan, with sales of Internet-related equipment reaching 500 billion yuan-worth, accounting for 1/60 of China's GDP, and 1/10 of its global trade. Its software operations had a turnover of 19.84 billion yuan, up 26% over 2007. . . .*
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> *According to a sample survey, over 50% of big enterprises have established e-commerce system, over 30% of small and medium-sized companies find their product suppliers through the Internet, 24% of them are engaged in marketing via the Internet, and there are over 100 million online buyers in China. In 2009 the trade volume of e-commerce in China surpassed 3.6 trillion yuan-worth. [. . .]*
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> *Online gaming, animation, music and videos are emerging rapidly, greatly multiplying the overall strength of the Chinese culture industry. In the past five years, the average annual increase rate of online advertisement has maintained a level of 30%, with its turnover reaching 20 billion yuan in 2009. The online gaming industry in China had a turnover of 25.8 billion yuan in 2009, an increase of 39.5% over 2008, ranking top in the world. Online literature, music, radio and television in China have all witnessed rapid development. The increasingly expanding cyber culture consumption is encouraging the birth of many new industries and spurring the growth of the business income of telecommunications services. By March 2010 more than 30 Chinese Internet-related companies had been listed in the United States and Hong Kong, as well as on China's mainland.*

Lest anyone think that the rapid development of the Internet means that the Chinese authorities have loosened its iron grip on the cyberspace, read the following paragraphs from the white paper:

> *Since 1994 China has enacted a series of laws and regulations concerning Internet administration, including the Decision of the National People's Congress Standing Committee on Guarding Internet Security, Law of the People's Republic of China on*

> *Electronic Signatures, Regulations on Telecommunications of the People's Republic of China, Measures on the Administration of Internet Information Services, Regulations on the Protection of Computer Information System Security of the People's Republic of China, Regulations on the Protection of the Right to Online Dissemination of Information, Provisions on the Administration of Foreign-funded Telecommunications Enterprises, Measures on the Administration of Security Protection of the International Networking of Computer Information Networks, Provisions on the Administration of Internet News Information Services, and Provisions on the Administration of Electronic Bulletin Services via the Internet, among others. Relevant provisions of the Criminal Law of the People's Republic of China, General Principles of the Civil Law of the People's Republic of China, Copyright Law of the People's Republic of China, Law of the People's Republic of China on the Protection of Minors, Law of the People's Republic of China on Punishments in Public Order and Security Administration and other laws are applicable in the case of Internet administration.*

Not surprisingly, Internet censorship is featured high on the regulatory agenda. Take, for example, Measures for Security Protection Administration of the International Networking of Computer Information Networks,[5] which – issued in December 1997 – is one of the first Internet regulations ever issued by the Chinese government. Article 5 of the Measures list nine types of information that one shall not "produce, duplicate, search and disseminate" on the Internet, e.g.,

> *(1) information that instigates the resistance and disruption of the implementation of the constitution, laws and administrative regulations;*
> *(2) information that instigates the subversion of the state political power and overthrow of the socialist system;*
> *(3) information that instigates the splitting up of the country and sabotage of national unity;*
> *(4) information that instigates hatred and discrimination among nationalities and sabotages solidarity among nationalities;*
> *(5) information that fabricates or distorts facts, spreads rumors and disrupts social order;*

[5] Measures for Security Protection Administration of the International Networking of Computer Information Networks (Promulgated by the Decree No. 33 of the Ministry of Public Security, art.5 (P.R.C.) (Dec. 16, 1997), *available at* http://www.wipo.int/clea/docs_new/pdf/en/cn/cn115en.pdf (last visited Sept. 25, 2011).

(6) information that propagates feudalistic superstitions, obscenity, pornography, gambling, violence, murder and terror and instigates crimes;
(7) information that openly insults others or fabricates facts to slander others;
(8) information that damages the reputation of state organs; and
(9) other information that violates the Constitution, laws and administrative regulations.

Among the nine categories, six ((1)-(5) and (8)) are obvious examples of political censorship, while the remaining three all include elements that can be interpreted in such a way to censor political information as well. Below are two examples of such "creative interpretation":

1. Using fabricated facts to slander others: The Yan Xiaoling – Fan Yanqiong case (also known as the Fujian Netizen Case).[6] In February 2008, Yan Xiaoling, a 25-year old woman in Fujian Province was found dead. While the forensic experts from the local police pronounced the cause of death to be ectopic pregnancy, Yan's mother concluded from her own investigation that her daughter died from being mass-raped by a group of ruffians that are connected to the local police. During her journey to seek justice for her daughter, Yan's mother met Fan Yanqiong, a human rights activist based in Fuzhou, the capital of Fujian. Upon learning her story, Fan posted a summary of the case online in June 2009. Within 72 hours, Fan found herself arrested by the local police. After two court hearings in November 2009 and March 2010 that lasted two minutes each, Fan was sentenced to two years imprisonment for slandering by the Mawei District Court. In June 2010, the Fuzhou Intermediary Court rejected Fan's appeal and affirmed the original sentence.[7]
2. Using online information to propagate feudalistic superstitions: The most famous example for this type of censorship is the anti- Falungong Campaign[8] and the subsequent blockage of the Falun Dafa website,

[6] Guo Bao Feng, Muqian Fujian Wangmin Wugao Xianhai An Zuiquan Ziliao [The Most Complete Data Collections for the Fujian Netizen Case] (Mar. 31, 2010), http://www.civillaw.com.cn/article/default.asp?id=48592 (last visited Sept. 23, 2011).

[7] Zheng Liang, Fuzhou Fan Yanqiong You Jingyou Wu Huaying Wangluo Feibang An Ershen Weichi Yuanpan [Judgment in the Internet Defamation Case Against Fan Fan Yanqiong, You Jingyou and Wu Huaying Affirmed on Appeal by Fuzhou Court] (June 29, 2010), *available at* http://www.chinacourt.org/html/article/201006/28/415837.shtml(last visited Sept. 25, 2011).

[8] *See* Zhong Hua Ren Min Gong He Guo Xin Wen Chu Ban Shu Guan Yu Chong Shen You Guan Fa Lun Gong Chu Ban Wu Chu Li Yi Jian De Tong Zhi [Notice of the General Administration of Press and Publication of PRC Reiterating the Advice to Dispose Books Relating to Falun Gong] (July 22, 1999), *available at* http://www.people.com.cn/GB/channel1/10/20000706/132292.html (last visited Sept. 25, 2011); Zhong Gong Zhong Yang Guan Yu Gong Chan Dang Yuan Bu Zhun Xiu Lian Fa Lun Da Fa De Tong Zhi [Notice of the Central Committee of the Chinese Communist

> which many people are familiar with. The full potential of this provision was revealed in a most bizarre recent case. In this case, the Trademark Appraisal Committee (TAC) of the Chinese State Administration of Industry and Commerce turned down an application by Blizzard Entertainment, a well-known American video game developer, to register its popular online game "Star Craft: Ghost" as a trademark. In their decision, the TAC explained that "Star Craft" means "astrology" while "Ghost" refers to the spirit of the dead. Thus, if registered, the proposed trademark would serve to preach "feudal superstitions" and destroy the high public morale of Socialism. When Blizzard launched a judicial review to overturn the TAC decision, the First Intermediary Court of Beijing rejected the request in a decision handed down in February 2009.[9]

With minor variations, the nine categories of main targets of online censorship have been faithfully copied in the other main regulations, i.e., Decision of the National People's Congress Standing Committee on Guarding Internet Security (2000), Measures on the Administration of Internet Information Services (2000), and Regulations on Telecommunications of the People's Republic of China (2002). Through these laws and regulations, China built up its regulatory framework on Internet control and online censorship.

The consistency of the Internet "Black-list" in the different regulations seems to indicate that the Chinese authorities always have a clear idea on *what* they wish to censor since the very beginning. In contrast, they do not seem to be so confident on *how* the censorship should be achieved. Otherwise, they would not have spent billions of dollars on one project after another from the Great Firewall to Golden Shield to Green Dam. As this paper is mainly about the trade law implications of online censorship, I will not engage in an exhaustive discussion on the many complex techniques of Internet control, which has been subject to extensive analysis elsewhere.[10] Instead, I will focus on the recent Google episode, and only

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Party on the Prohibition of Party Members to Practice Falun Gong] (July 19, 1999), *available at* http://www.people.com.cn/GB/channel1/10/20000706/132282.html (last visited Sept. 23, 2011); Zhong Hua Ren Min Gong He Guo Min Zheng Bu Guan Yu Qu Di Fa Lun Da Fa Yan Jiu Hui De Jue Ding [Decision of the Ministry of Civil Affairs on the Abolition of the Association on the Study of Falun Dafa] (July 22, 1999), *available at* http://www.people.com.cn/GB/channel1/10/20000706/132286.html (last visited Sept. 25, 2011), which designated Falun Gong as an "evil cult" that "spread superstitious evil beliefs."

[9] Chang Ming, Sheji Xuanyang Fengjian Mixin, Baoxue Gongsi Xin Shangbiao Zhuce Beibo Gao Shangpingwei [Blizzard Brought Case Against Trademark Appeal Board's Decision to Reject Registration of Its New Trademark for Promoting Feudal Superstitions] (Feb. 13, 2009), *available at* http://www.chinacourt.org/html/article/200902/13/344450.shtml (last visited Sept. 25, 2011).

[10] For a detailed discussion on the filtering techniques commonly-used around the world, *see* Steven J. Murdoch & Ross Anderson, *Tools and Technology of Internet Filtering*, *in* ACCESS DENIED: THE PRACTICE AND POLICY OF GLOBAL INTERNET FILTERING 57 (Ronald Deibert et al. eds., 2008). For a detailed account of the specific techniques employed by the Chinese authorities,

discuss the technical issues as necessitated by the analysis on the legal issues arising from the case.

III. BUILDING A LEGAL CASE: THE GOOGLE COMPLAINT

While Google.com has been available to users in China just like in the rest of the world since its launch in January 1996, the google.cn service – which is devoted explicitly to the Chinese market – is not launched until 10 years later. In a public announcement[11] issued at the time of the launch of google.cn, Google explained that, having a dedicated Chinese version would enable Google to provide a functional (but censored) service, rather than the uncensored service that was barely functional.[12]

In January 2010, Google announced[13] that they are adopting a "new approach to China" due to "a highly sophisticated and targeted attack on our corporate infrastructure originating from China that resulted in the theft of intellectual property from Google" discovered in the previous December. Such attack (which Google described in detail in the statement), coupled with unsuccessful attempts to compromise the Gmail accounts of human rights activists and "attempts over the past year to further limit free speech on the web" (which Google did not explain in detail) have led Google to conclude that they should "review the feasibility of [the] business operations in China." As the result of such review, Google decided that they "are no longer willing to continue censoring [the] results on Google.cn," and "will be discussing with the Chinese government the basis on which [Google] could operate an unfiltered search engine within the law, if at all."

On 22 March 2010, Google further announced that they have, from the date of announcement, stopped censoring the search services on Google.cn. Instead, users visiting Google.cn are now being redirected to Google.com.hk, where Google offers "uncensored search in simplified Chinese, specifically designed for users in mainland China and delivered

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see R. McKinnon, Testimony in the Hearing on Google and Internet Control in China: A Nexus Between Human Rights and Trade?, held by Congressional-executive Commission in China, Washington, D.C. (Mar. 24, 2010), *available at* http://www.cecc.gov/pages/hearings/2010/20100324/mackinnonTestimony.pdf (last visited Sept. 25, 2011). *See also Country Profile: China*, *in* ACCESS CONTROLLED: THE SHAPING OF POWER, RIGHTS, AND RULE IN CYBERSPACE 449, 449-87 (Ronald Deibert et al. eds., 2010).

[11] Andrew McLaughlin, *Google in China* (Jan. 27, 2006), http://googleblog.blogspot.com/2006/01/google-in-china.html (last visited Sept. 25, 2011).

[12] *Id.* According to McLaughlin, before the launch of google.cn, "Google.com appears to be down around 10% of the time. Even when users can reach it, the website is slow, and sometimes produces results that when clicked on, stall out the user's browser. Our Google News service is never available; Google Images is accessible only half the time." Google admitted that the level of service provided by google.com is something "not very good."

[13] David Drummond, *A New Approach to China* (Jan. 12, 2010), http://googleblog.blogspot.com/2010/01/new-approach-to-china.html (last visited Sept. 25, 2011).

via our servers in Hong Kong."[14]

In another update issued in June 2010, Google stated that, while the automatic redirecting from google.cn to google.com.hk has been working well for the users and for Google, it didn't seem to work for the Chinese government, which threatened to not renew Google's Internet Content Provider (ICP) license if the redirecting continued. Without the ICP license, Google would have to discontinue its google.cn service. After exploring possible alternatives, Google decided to change the landing page of google.cn to one that links to Google.com.hk instead of automatically redirecting all users. Google claimed that "this new approach is consistent with our commitment not to self censor and, we believe, with local law" and re-submitted its ICP license renewal application based on this approach. On July 9, Google's renewal application was approved by the government.

While Google has approached the USTR for challenging China's policy as a trade barrier under the rules of the WTO, so far neither the USTR nor Google has made clear the exact facts or the legal basis for their case. This could be because the information is sensitive, but the more likely explanation is that even Google itself does not have the full picture. Indeed, as Robert Boorstin, Google director of corporate and policy communications, admitted on June 11 2010, while "Google believes very strongly that censorship is a trade barrier," they are still "not quite clear yet exactly how solid [Google] can make [the case];" instead, Google is still "in the middle of drawing up [the] evidence and [the WTO] case."[15] Thus, I will have to limit my analysis on the basis of the information that is publicly available at the time of the writing.

As we can see from the chronology of the events above, Google's problems in China include the following: A. theft of Google's intellectual property; B. attempt to invade accounts of certain Gmail users; C. blocking of the service of google.com; and D. self-censorship by Google of the information on google.cn.

Among the four, the first two are obviously not covered by the WTO for the following reasons. First, as an inter-governmental organization, the rules of the WTO only apply to measures by the government. However, in the current case, Google has not made explicit allegation that the attacks are either conducted directly or authorized by the Chinese government. Second, even if Google later did make such allegations, the evidentiary burden would be insurmountable due to the sensitive nature of the case. Third, even if Google could provide sufficient evidence to substantiate its

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[14] David Drummond, *A New Approach to China: An Update* (Mar. 22, 2010), http://googleblog.blogspot.com/2010/03/new-approach-to-china-update.html (last visited Sept. 25, 2011).

[15] Inside U.S.-China Trade, *Google, Allies Preparing Data, Legal Case For Challenging Internet Censorship* (June 23, 2010).

allegations, it is still very unlikely to find such attacks explicitly authorized by laws and regulations of China. Instead, such attacks probably violate China's own laws and thus would not be regarded as "government measures" regulated by the WTO. To use a simple analogy, if a Chinese official violates China's own anti-corruption laws by demanding bribes from an American company that export goods to China, the correct legal remedy to pursue would be a prosecution under China's domestic criminal law rather than a WTO case on violation of MFN or national treatment obligations against the Chinese government.

The remaining two are obviously covered by the WTO rules. First, they "affect" the provision of services by Google. Second, they are "measures by the government," as evidenced by the government regulations mentioned in the last part. The differences between the two are:

First, because google.com has its server in California, thus its service is provided either through mode 1 – cross-border supply or mode 2 – consumption abroad,[16] but not mode 3. On the other hand, google.cn, at least before the redirecting, had its server in China. Therefore its service must be provided through mode 3 – commercial presence. Nonetheless, as we will discuss later, the differentiation of the different modes of supply is meaningless because China has not made different commitments for the different modes. Furthermore, the issue has become moot as now the most important services on google.cn are provided across the border from its servers in Hong Kong, which is a separate WTO Member.

Second, the blocking of google.com is done by the Chinese government, while the censorship of google.cn is conducted by Google itself. While such distinction might make a big difference for human rights scholars, for the purpose of our discussion such difference is immaterial: regardless of the identify of the enforcer of the censorship, what really matters is that both are done pursuant to the same government measures that affect trade in services.

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[16] In most Mode 2 scenarios, the consumer has to physically cross the border. But this does not necessarily mean that the physical presence of the consumer is always required. In some cases, it's the goods rather than the consumers which cross the border. As noted by the WTO Secretariat, the key distinction between Modes 1 and 2 is "whether the service is delivered within the territory of the Member from the territory of another Member or whether the service is delivered outside the territory of the Member." In the case of Google's search services, while the consumer does not travel physically across the border, the search query of the consumer needs to be sent to the Google server in California, analyzed and given an answer, and sent back to the consumer. If we view the Google search process this way, the services provided by Google is very similar to the services provided by a ship repair firm that receives ship from a foreign consumer, repairs it and sends it back. Such service is Mode 2 as it is a service that is supplied "in the territory of one Member to the service consumer of any other Member." For more discussion on the increasingly blurring line between the two modes, *see* Council for Trade in Services, *Guidelines for the Scheduling of Specific Commitments Under the General Agreement on Trade in Services (GATS)*, attachment 2 & 3, S/L/92 (Mar. 28, 2001); WTO Secretariat, *Cross-border Supply (Modes 1 & 2)*, ¶¶ 9-10, S/C/W/304 (Sept. 18, 2009).

IV. WHICH SERVICE SECTOR?

While Google's website list more than two dozen different "products," Google's main business is actually in services rather than physical products (with the exception of the Nexus One Mobile Phone, which has been discontinued). Most of these products revolve around Google's core competence – search, be it searching webpages, news stories, photos, videos, journal articles or books. There are also a handful of products which provide services other than search, for example Google Chrome (a browser), Gmail (online email), Docs (similar to Microsoft Office), Blogger (a blog publishing tool), Picasa (online photo album), and YouTube (online video-sharing website), etc. These products can be grouped roughly into two categories: first, online information searching services (including the main features of google.com), which Google takes information generated by other people using external platforms and tools, indexes and archives them, and allows users to search for these information in a variety of ways. This is akin to yellow pages (or libraries) with expanded functions; second, online hosting and publication services (including Blogger, YouTube and Picasa), where Google provides the platform and tools for a first group of users to generate contents and store them, then a second group of users can, where applicable, access, view or search the contents generated by the first group.

In addition, there is a third category of services that derive from the two categories mentioned above: advertising services. As almost all of its services are provided free of charge to the consumers, Google attracts a lot of users. In turn, Google sells the attention of its users to businesses by providing advertising services. Again this is very similar to the business model of yellow pages, which itself is provided free of charge to the consumer households but advertising spaces in the Yellow pages are sold to businesses which want to reach a wide audience. Advertising is the main revenue source for Google. For example, out of Google's total revenue of US$ 23.65 billion in 2009, 22.89 billion, or about 96.8%, are from advertising.[17]

In summary, Google's services include three main categories: online information searching services; online hosting and publication services; and advertising services. Among the three, the last one is the easiest to classify in the GATS. According to Services Sectoral Classification List (W/120)[18], advertising services is classified as a service in the "Other Business Services" sub-sector under Section 1: Business Services. The other two, however, are difficult to translate into GATS parlance.

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[17] Google Investor Relations, 2011 Financial Tables, http://investor.google.com/financial/tables.html (last visited Sept. 25, 2011).

[18] WTO Secretariat, *Services Sectoral Classification List*, MTN.GNS/W/120 (July 10, 1991).

Let's start with the easier one. In the Services Sectoral Classification List, publishing services is included as a service in the "Other Business Services" sub-sector. Given the principle of "technology-neutrality," this might be taken to indicate that the online hosting and publishing services shall also be included. However, when we dig a little bit deeper, the answer becomes elusive. In addition to the textual description, the Classification List also provides the corresponding CPC code to individual services. For publishing services, the code is subclass 88442 in the provisional CPC [hereinafter CPCprov], which is listed in the CPCprov as follows:

> *Section: 8 – Business services; agricultural, mining and manufacturing services.*
> *Division: 88 –Agricultural, mining and manufacturing services.*
> *Group: 884 – Services incidental to manufacturing, except to the manufacture of metal products, machinery and equipment.*
> *Class: 8844 – Manufacture of paper and paper products; publishing and printing, on a fee or contract basis.*
> *Subclass: 88442 – Publishing and printing, on a fee or contract basis.*

From this structure, we can see that subclass 88442 is meant to include only publishing services that satisfy two conditions: first, the service must be "incidental to manufacturing" (this applies to all the services covered in Group 884); second, the service must be provided "on a fee or contract basis." Unfortunately, none of the Google products mentioned above satisfy either condition. First, services such as Blogger, YouTube and Picasa are generally not provided as something "incidental to manufacturing." Second, as Google provides these services for free to consumers, they are not provided "on a fee or contract basis." Thus, it is unlikely that the online hosting and publishing services provided by Google will be covered under "publishing services."

Can sub-sectors other than "publishing services" cover Google's services? A review of Services Sectoral Classification List reveals two possibilities. The first concerns only YouTube. According to the *China – Audio-visual Products* case, "video distribution services" covers online video distribution services, which certainly include YouTube. The second possibility is to view all Google's online hosting and publication services (including blogger, YouTube and Picasa) with a fresh perspective. Regardless of what they offer, they all share one thing in common: they provide a way for consumers to store some information online, and for others to access and retrieve such information. Viewed this way, it does not matter whether the contents being stored online are videos, pictures, or personal diaries. They are all just plain bytes in the eyes of the computer,

and they should be treated the same way as we treat the storage of other information online, as provided by Google's main search service. The only difference between online information searching services and online hosting and publication service is that the information searchable in the former case is not necessarily created using tools provided by Google (such as Blogger) or stored on Google's server, while in the latter case, the information is either created using a tool provided by Google (Blogger), or stored on Google's server (YouTube and Picasa). However, as our focus of inquiry in the current case is what kind of services Google is providing regarding these information, rather than where these information are created or stored, they can be viewed together as one service: online storage and retrieval of data.

For online storage and retrieval of data, again Services Sectoral Classification List provides four possibilities:

1. *On-line information and data base retrieval (7523) under the Telecommunication Services sub-sector of Communication Services Sector;*
2. *On-line information and/or data processing (incl. transaction processing) (843) under the same subsector as the first;*
3. *Data processing services (843) under the "Computer and Related Services" sub-sector of Business Services sector; and*
4. *Data base services (844) under the same "Computer and Related Services" sub-sector as above.*

Because Services Sectoral Classification List does not provide detailed explanations on each service activities, their exact meanings shall be ascertained by consulting the explanatory note in the CPC. As mentioned above, "On-line information and/or data processing" and "Data processing services" services refer to the same CPC number. Thus we basically have three CPC numbers: 7523, 843 and 844. Now let's find out which one offers the best match for Google's services.

First is Class 7523, which is defined in CPCprov as "data and message transmission services." However, as no explanatory note is provided at the Class level, we have to go one level lower to find the detailed explanations. 7523 includes two subclasses, which are further defined as follows:

> *Subclass: 75231 – Data network services – Network services necessary to transmit data between equipment using the same or different protocols. This service can be provided via a public or dedicated data network (i.e., via a network dedicated to the customer's use).*
> *Subclass: 75232 – Electronic message and information services – Network and related services (hardware and software) necessary to send and receive electronic messages (telegraph and*

telex/TWX services) and/or to access and manipulate information in databases (so-called value-added network services).

The explanatory notes indicate that 7523 only covers the necessary network services (mostly the underlying hardware) for data transmission, rather than the provision of info online. Thus, it does not seem to cover search engine services like Google.

As further support for this interpretation, we can look at the other services covered in the telecom services sector. Among all the individual telecom services included in Services Sectoral Classification List, nine refers to 7523. They are:

b.	*Packet-switched data transmission services*	*7523***
c.	*Circuit-switched data transmission services*	*7523***
d.	*Telex services*	*7523***
g.	*Private leased circuit services*	*7522**+7523***
h.	*Electronic mail*	*7523***
i.	*Voice mail*	*7523***
j.	*On-line information and data base retrieval*	*7523***
k.	*electronic data interchange (EDI)*	*7523***
l.	*enhanced/value-added facsimile services, incl. [. . .]*	*7523***

As we can see, these services all refer to the underlying network services for the transmission of data, rather than the provision of content online. Thus, they do not cover Google's services.

The next option is Group 843 "Data processing services." Again we need to refer to the detailed explanation at the subclass level, which are as follows:

8431 84310 Input preparation services – Data recording services such as key punching, optical scanning or other methods for data entry.

8432 84320 Data-processing and tabulation services – Services such as data processing and tabulation services, computer calculating services, and rental services of computer time.

8433 84330 Time-sharing services – This seems to be the same type of services as 84320. Computer time is bought; if it is bought from the customer's premises, telecommunications services are also bought. Data processing or tabulation services may also be bought from a service bureau. In both cases the services might be time sharing processed. Thus, there is no clear distinction

between 84320 and 84330.

Obviously, Google's services would not be covered by either 8431 or 8433. Instead, the only possibility is 8432. The note to 8432 refers to three forms, i.e., "data processing and tabulation services, computer calculating services, and rental services of computer time." Apparently Google's services are neither computer calculating services nor rental of computer time. Does that mean that it is data processing and tabulation services? Again the answer is no. Data processing and tabulation typically means the process of converting disorganized raw data into useful information that is arranged and presented in a systematic format. A good example is the service provided by market research firms, which take the raw data obtained from questionnaires and generate meaningful reports on the preferences of consumers that firms can use to guide their investment and production plans. Another example is the service provided by TurboTax Online, which is a popular software in the U.S. that helps clients to prepare their income tax return and file it electronically. While Google's search services could offer something useful for the users, its level of sophistication is certainly not in the same league as the two examples given above and probably will not qualify as data processing or tabulation services.

This leaves us with only Group 844 "Data base services." This group includes only one class and one subclass, which are defined as follows:

> *8440 84400 – Data base services – All services provided from primarily structured databases through a communication network. Exclusions: Data and message transmission services (e.g., network operation services, value-added network services) are classified in class 7523 (Data and message transmission services).*

As we can see from the explanatory note, there are two main attributes for the services covered in the subclass. First, the service must be provided from primarily structured databases. Second, it must be provided through a communication network. In my view, Google's search services satisfy both conditions:

First, while the websites in Google's search results list are mostly not created or maintained by Google, this does not necessarily mean that Google's search service is not provided through a database. Instead, given the speed and accuracy of Google's search service, it would be unthinkable if Google did not have its own database which sift and organize the many websites and enable users to search for information and obtain results within a matter of seconds. Another proof is the availability of cached

versions of Google's search results, which, roughly speaking, is a version of the webpage that Google captures at an earlier time and stores on its own server.[19] Because of this, the cached version is not necessarily the same as the current version. This is most useful when the page is no longer available or has been modified from its former versions. If Google did not have its own database, how could it provide the cached versions when the current version may not even exist any longer?

Second, Google's service is provided mainly over the internet, which by definition is a kind of communication network.

Thus, Group 844 seems to be the most appropriate match for Google's search services. Under the Services Sectoral Classification List, 844 corresponds to item C under the "Computer and Related Services" Sub-sector of "Business Services" sector. This reading is further confirmed by two more facts:

First is the relationship between Group 844 and Class 7523. As mentioned above, database services could refer to either the data transmission services or the services provided using the actual data transmitted. To avoid confusion, Group 844 explicitly excludes "data and message transmission services" from its scope and states that they are covered by Class 7523. This not only confirms that Group 844 covers content services like Google's search services, but also reaffirms our previous conclusion that Class 7523 covers network services but not the actual contents being carried over such network.

Second is the current classification of internet search engines. One may argue that the CPCprov (which was published in 1990) and the Services Sectoral Classification List (which was drafted in 1991) are too out-dated to provide reliable guidance. Google certainly did not exist then, and the internet was only in its infancy. How could we expect the drafters of CPCprov and Services Sectoral Classification List to include a service which most people had not even heard of? On the other hand, the situation was entirely different when the latest version of the CPC, i.e., Ver.2, was completed: the time was the end of 2008, and both the internet and Google have become household names. Indeed, CPC Ver.2 does include explicit reference to online search engines, which is classified under Subclass 84394 "web search portal content." The explanatory note for 84394 states that the subclass includes "content provided on web search portals, i.e., extensive databases of Internet addresses and content in an easily searchable format". Without any doubt, this certainly includes Google's search service. Interestingly, the online version of the CPC Ver.2 also includes a link to "complete correspondences for this code." A click on the link takes us to the Subclass 84300 "online information provision services"

[19] Google Guide, Cached Pages: What Are Cached Pages?, http://www.googleguide.com/cached_pages.html (last visited Sept. 25, 2011).

under CPC Ver.1.1, which was updated in 2002. Again Subclass 84300 includes another link to "complete correspondences for this code", which takes us, not surprisingly, to Subclass 84400 and Group 844 under CPCprov.

In summary, Group 844 is, in my view, the most appropriate classification for Google's search services.

V. CHINA'S SPECIFIC COMMITMENTS

Once we determine the sectoral classification for Google's services, we should turn to China's schedule of specific commitments to find out whether China has made commitments for the relevant sectors. Unlike the GATT, the GATS obligations on market access and national treatment apply only to sectors in which commitments have been scheduled. Thus, unless China has made commitments for the relevant sectors, Google will not find the legal basis for a case against China. Again let's start with easier ones:

First, advertising services. Here, China's commitments seem to be quite liberal: there are almost no limitations on national treatment while the only limitation on market access is the right to provide such services in China. However, this is of no help to Google's case as Google's advertising services are not blocked in China.[20] The only way Google may make a case is by arguing that China has somehow restricted Google's ability to provide advertising services by blocking its search services, but this is rather unlikely considering that most of the blocked contents relates to either political or religious issues, none of which are of substantial commercial interests to businesses which wish to advertise their services.

The second service is video distribution services, which, as we mentioned earlier, could encompass YouTube. Here China has committed to "none" for both modes 1 and 2, but YouTube is completely blocked in China. Thus, it is very clear that Google has a strong case in this sector.

Regarding the other two sub-sectors, however, the picture again is less clear. Let's take a look at the commitments in the respective sectors:

First, for the computer services subsector, China has included the following services in its schedule:

1. *Consultancy services related to the installation of computer hardware (CPC 841)*
2. *Software implementation services (CPC 842)*
3. *Data processing services (CPC 843)*

However, data base services (Group 844) are not included. This seems to indicate that China has made no commitment on search engines like Google. However, some scholars take a different view. They argue that

[20] Google, Mainland China Service Availability, http://www.google.com/prc/report.html (last visited Sept. 25, 2011).

Google's service should be classified under CPC 843.[21] In support of their argument, they point out that the CPCprov was revised between the time of its first publication and China's accession. As a result, the version that existed at the time of China's accession was CPC Ver.1, which was completed in 1998 and include under Group 843 "On-line information provision services." According to the explanatory note, this group includes the following services "database services; provision of information on web-sites; provision of on-line data retrieval services from databases and other information, to all or limited number of users; provision of on-line information by content providers," which can certainly be interpreted to include search engines.

In a way, their theory seems to find support from the ruling of the Panel in the *China – Audio-visual* case. One of the issues in that case is whether China has made commitments with respect to "sound recording distribution services." According to China, the answer is no because "the electronic distribution of sound recordings as an established business and the legal framework for such business emerged only after the negotiation of its GATS Schedule and its accession to the WTO."[22] Thus, the services at issue is a new type of service totally different from the "sound recording distribution services" listed in China's Schedule, as China could not have been expected to include in its schedule a service which did not exist at the time of its accession. At first, the Panel appears to agree in principle with China. According to the Panel, in seeking to "confirm the 'common intention of Members' with respect to a commitment in a GATS Schedule, evidence on the technical feasibility or commercial reality of a service at the time of the service commitment may constitute circumstances relevant to the interpretation of its scope under Article 32 of the Vienna Convention."[23] As a result, "any evidence that sound recordings delivered in non-physical form were not, unlike today, technically possible or commercially practiced at the time China's Schedule was negotiated might, in principle, be relevant as a supplementary means of interpretation with respect to the scope of that commitment."[24] However, upon examining the actual evidence submitted by the parties, the Panel ruled against China by concluding that "electronic distribution of music had become a technical possibility and commercial reality, albeit limited, by 1998, and in any case

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[21] *See* Tim Wu, *The World Trade Law of Censorship and Internet Filtering*, 7(1) CHI. J. INT'L L. 263, 282 (2006); *See also* Brian Hindley & Hosuk Lee-Makiyama, *Protectionism Online: Internet Censorship and International Trade Law*, 10-12 (ECIPE Working Page No. 12/2009), *available at* http://www.ecipe.org/publications/ecipe-working-papers/protectionism-online-internet-censorship-and-international-trade-law/PDF (last visited Sept. 25, 2011).

[22] Panel Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶ 7.1235, WT/DS363/R (Aug. 12, 2009) [hereinafter *China – Publications* Panel Report].

[23] *Id.* ¶ 7.1237.

[24] *Id.*

before the entry into force of China's GATS Schedule following its accession to the WTO on 11 December 2001."[25] As we mentioned earlier, search engines have not only existed but also been widely used before China's accession in late 2001. Thus, it seems that search engines, classified as CPC Group 843 and included in China's schedule, should be among China's commitments.

In the view of the author, these arguments are rather absurd. First, as China has explicitly noted in its accession protocol, "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." As the Services Sectoral Classification List itself was drafted on the basis of CPCprov, the corresponding codes under CPCprov rather than any subsequent editions should be used. Second, these arguments presume that China has made commitments for the entire Group 843. However, if we take a closer look at China's commitments under "Data processing services (CPC 843)," we can see that this is not true. Instead of making a blanket commitment for all the services encompassed by 843, China only made commitments on three categories, i.e. "Input preparation services (CPC 8431); Data processing and tabulation services (CPC 8432); and Time-sharing services (CPC 8433)." The structure of the categories is identical to the one under CPCprov, but bears no resemblance to the one under CPC Ver.1. Quite the contrary, if we were to follow the new structure of CPC Ver.1, China could not have made any commitments on CPC 8431, 8432, & 8433. The reason is that CPC Ver.1 only includes one Class (8430) and one Subclass (84300) under Group 843. However, Class 8430 can be found nowhere in China's services schedule! Last, if China indeed adopted the new CPC Ver.1, its commitment for Group 843 should read as "on-line information provision services," which is the title under CPC Ver.1, rather than "Data processing services," which is the title under CPCprov. It would be absurd to believe that, while the members of China's WTO accession Working Party took so much trouble to have China make commitments in Group 843 under the new CPC Ver.1, they would somehow still allow China to use the title and structure provided under the old CPCprov.

In summary, there is only one possible conclusion: China has not made commitment on Group 843 under CPC Ver.1, or Class 844 under CPCprov.

Next, for telecom services subsector, China includes the following value-added services in its commitments:

h. Electronic mail

[25] *Id.* ¶ 7.1242.

i. Voice mail
j. On-line information and database retrieval
k. Electronic data interchange
l. Enhanced/Value-added facsimile services (including store and forward, store and retrieve)
m. Code and protocol conversion
n. On-line information and/or data processing (including transaction processing)

While there is no explicit reference to the CPC codes in China's schedule itself, as the list in China's services schedule copy verbatim the list in Services Sectoral Classification List, it is safe to assume that the list corresponds to the respective CPC codes under W120. As I discussed above, unfortunately no service in the list really encompasses Google's search services.

In summary, except regarding its YouTube service, Google would have great difficulty arguing for a case based on China's commitments under the GATS. Nonetheless, for the sake of argument, I will still examine the possibilities of Google's services being classified under either "computer and related services" or "telecom services," and whether Google may have a legal case if such classification were accepted by the Panel. As I mentioned earlier, other than Group 844, there are two other possibilities: Class 8432 and Class 7523. To make our task simpler, I will only focus on the first three modes of supply as the blockage and censorship certainly does not apply to mode 4. Regarding Class 8432, China has committed to "none" for all three modes on both market access and national treatment. Regarding Class 7523, there are two entries in China's commitments on value-added telecom services that might be relevant: j. On-line information and database retrieval; and n. On-line information and/or data processing (including transaction processing). The commitments for both are the same, i.e., "none" for national treatment, and the following for market access:

(1) See mode 3.
(2) None.
(3) Foreign service suppliers will be permitted to establish joint venture value-added telecommunication enterprises, without quantitative restrictions, and provide services in the cities of Shanghai, Guangzhou and Beijing. Foreign investment in joint venture shall be no more than 30%.
Within one year after China's accession, the areas will be expanded to include Chengdu, Chongqing, Dalian, Fuzhou, Hangzhou, Nanjing, Ningbo, Qingdao, Shenyang, Shenzhen, Xiamen, Xian, Taiyuan and Wuhan and foreign investment

shall be no more than 49%.
Within two years after China's accession, there will be no geographic restriction and foreign investment shall be no more than 50%.

(4) Unbound except as indicated in Horizontal Commitments.

To summarize, the only restriction is the cap on foreign equity in modes 1 and 3, and censorship and blocking are clearly not such restriction. Thus, we do not have to decide under which mode of supply we shall put Google's search services, as the commitments are essentially the same for our purposes.

Assuming, for the purpose of argument, that Google's search services, instead of being covered under CPC Group 844, is covered under either of the two sectors that we mentioned above, the next logical question would be: is internet filtering and censorship a trade barrier?

This is where the issue gets tricky. In my view, a key distinction must be drawn between complete blocking and selective filtering. If the website is fully blocked, this would amount to a "total prohibition," which, according to the *U.S. – Gambling* decision, is a "zero-quota" that violates the Market Access obligation under Article XVI.

On the other hand, a different analysis must be applied to selective filtering, that is, instead of blocking a website completely, only part of the website is blocked. This is exactly the kind of situation that Google is in. For example, if you search for innocuous terms such as "iPhone," you would get exactly the same results in China as what you would get in the U.S. On the other hand, if you were to search for "Falun Gong" in China, you would only get the sites that criticizes or condemns it but not those which supports the group. Apparently, selective filtering is not a restriction that is based on the "quantity" or "numerical quota" of the services at issue. Instead, the focus is on the "quality" of the services. You are allowed to have a million webpages on iPhone, but not even one short paragraph sympathetic to the Falun Gong is allowed. It is true that blocking some webpages has the effect of limiting market access. However, as the Panel made clear in *U.S. – Gambling*, the list in Article XVI.2 is exhaustive.[26] If a measure does not take the *form* of one of the six categories, it is not a prohibited market access restriction, even if it has the effect of restricting market access. In this case, selective filtering is not a limitation on the number of service suppliers, or the total value of service transactions or assets, or the total number of service operations or the total quantity of service output. Thus, it should not be subject to the obligations on market

[26] Panel Report, *United States – Measures Affecting the Cross-border Supply of Gambling and Betting Services*, ¶ 6.298, WT/DS285/R (Nov. 10, 2004) [hereinafter *U.S. – Gambling* Panel Report].

access in Article XVI. Otherwise, many other WTO Members would be in technical violation of Article XVI simply by banning webpages that have pornographic contents (whether or not such measures could be justified by Article XIV is a totally different question that we will explore later).

If selective filtering doesn't come under Article XVI, then which GATS provision is applicable? There are three possibilities:

A. National Treatment

According to Article XVII of GATS, WTO Members shall "accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favorable than that it accords to its own like services and service suppliers." In the current case, the internet filtering is directed at foreign websites but not domestic ones. Does this mean that foreign firms like Google receive "less favorable" treatment than domestic service suppliers? In the view of the author, this is far from the truth. The only reason why domestic websites with similar contents as those found in foreign websites are not blocked is they can not be blocked for two reasons: first, due to the structure of the Great Firewall, the filtering only applies to websites with servers not based in China. If your server is based in China, you do not need to go through the Great Firewall at all. Thus, it is technically impossible to block domestic websites. Second, the more important reason why domestic websites are not subject to the filtering is because they do not contain contents which the censorship regime deems inappropriate. They either do not exist at all, or live very short lives. For example, if you try to compose a blog entry on Falun Gong in your blog maintained on a Chinese blogging website, you will receive the following error message when you try to post the entry on the blog: "Due to sensitive words contained in your entry, it cannot be posted." Most likely, this error message is generated by some elaborate automated system that could be triggered by one of a number of sensitive words. Sometimes people try to play cat-and-mouse game with the system by twisting the spelling of the sensitive words, for example by intentionally misspelling "Falun Gong" as "Falun G0ng" or "Fal*n Gong." While this could trick the system and allow the entry to be posted, within a matter of minutes you would find your entry disappears mysteriously. While you are wondering about the mystery, an email arrives in your inbox, and in it you will find the explanation for the mystery along with a stern warning from the administer of the blogging site to avoid creating any further trouble in the future. To draw an analogy, if we were to regard websites as human beings, the foreign websites would be aliens who are deemed as "*persona non grata*," who are not allowed into the country but instead being repatriated into his home country whenever he tries to cross

the border; on the other hand, the domestic websites would be those fetuses who were aborted once the state discovered through some psychic scan that they were incarnations of devil, or those infants who were murdered when the state determines that, even though they were born to be normal, they somehow became possessed by some evil spirits after they were born. In such a case, we would certainly all agree that the aliens did not receive less favorable treatment than their domestic counterparts. Similarly, in the case of internet filtering, while only foreign sites are blocked, this does not mean that they receive "less favorable" treatment than domestic websites. This conclusion is also supported by paragraphs 2 and 3 of Article XVII, which states that a Member is not obliged to meet its national treatment obligation through formally identical treatment; instead, depending on the circumstances, formally different treatment could also translate into "no less favorable" treatments.

B. Domestic Regulation

While the national treatment obligation is of no help to Google's case, the disciplines on domestic regulation contained in Article VI might provide fertile ground for a GATS-based claim:

First, under Article VI.1, WTO Members shall ensure that "all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner." As anybody who has any experience with the Chinese online censorship regime will tell you, the regime is anything but "reasonable, objective and impartial." It's quite arbitrary, as anything could become sensitive words. For example, the sensitive words list includes not only Dalai Lama (the leader of the Tibetian government in exile) but also Jiang Zemin (the former president of China), as well as both Falun Gong and the Communist Party of China. In addition to the regular terms, whenever a new event occurs, the names of person, places or other key terms in the event will also be added to the list. Thus, when you wake up one morning, you might find that a term that was perfect legit tomorrow has been banned. As a real world example, in March 2010, netizens around China found that even "carrot" and "thermostat" became sensitive words and all related searches were blocked.[27] This will cause great inconveniences, especially for the people who, because of their occupation, have to use those terms on a daily basis. Of course, in the eyes of the Chinese authorities, all these are but a small price to pay for stability

[27] The reason for the special treatment is because the Chinese term for carrot shares the same first character as President Hu Jintao, while the term for thermostat shares the same first character as Premier Wen Jiabao. *See* Posting of gzsums, to mitbbs.com, Hu Luo Bo & Wen Du Ji Cheng Wei Min Gan Ci [Carrot and Thermostat Are Becoming Sensitive Words] http://www.mitbbs.com/article_t/ChinaNews/32082851.html (last visited Sept. 25, 2011).

– the ultimate goal of the government.

While the arbitrary system governs both domestic Chinese internet firms and foreign ones, it is particularly troublesome for foreign firms. As noted by an article in the New York Times Magazine, while they do not "actually talking about it much, everyone who lives and breathes Chinese culture understands more or less where those lines are."[28] In contrast, the foreign firms which "typically arrive in China expecting the government to hand them an official blacklist of sites and words they must censor" would "quickly discover that no master list exists."[29] "Instead, the government simply insists the firms interpret the vague regulations themselves. The companies must do a sort of political mind reading and intuit in advance what the government won't like."[30] This also happened to Google, which were not given the blacklist either. How did they solve the problem? They "set up a computer inside China and programmed it to try to access Web sites outside the country, one after another. If a site was blocked by the firewall, it meant the government regarded it as illicit – so it became part of Google's blacklist."[31]

Another relevant obligation under Article VI is paragraph 5, which requires Members to:

> *not apply licensing and qualification requirements and technical standards that nullify or impair such specific commitments in a manner which:*
> *(i) does not comply with the criteria outlined in subparagraphs 4(a), (b) or (c); and*
> *(ii) could not reasonably have been expected of that Member at the time the specific commitments in those sectors were made.*

In turn, the obligations referenced under paragraph 4 are that the requirements and standards shall be: "(a) based on objective and transparent criteria, such as competence and the ability to supply the service; (b) not more burdensome than necessary to ensure the quality of the service; (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service".

As discussed above, the Chinese censorship regime is rather arbitrary. There are no objective criteria, and even if there are such criteria they are not made known to the public, thus also failing the transparency

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[28] Clive Thompson, *Google's China Problem (and China's Google Problem)*, N.Y. TIMES (Apr. 23, 2006), *available at* http://www.nytimes.com/2006/04/23/magazine/23google.html?_r=1&pagewanted=print (last visited Sept. 25, 2011).
[29] *Id.*
[30] *Id.*
[31] *Id.*

requirement. As noted by the New York Times Magazine article, the Chinese censorship regime relies heavily on self-censorship, "[t]he Chinese system relies on a classic psychological truth: self-censorship is always far more comprehensive than formal censorship . . . . The government's preferred method seems to be to leave the companies guessing, then to call up occasionally with angry demands that a Web page be taken down in 24 hours." "As a result, Internet executives in China most likely censor far more material than they need to."

Being largely a guess-work, the Chinese censorship regime probably creates more burden than necessary. A regime that is based on clearly-identified and transparent criteria would take out the need for the "political mind reading" and be much less burdensome.

While there is a good chance that the Chinese censorship regime is in violation of two of the three obligations under paragraph 4, this does not necessarily mean that it will be found inconsistent with paragraph 5(a). As paragraph 5(a) is designed as an interim obligation that applies before the relevant disciplines for a given sector is developed pursuant to paragraph 4, it includes another key condition that must be satisfied even if a violation under paragraph 4 can be found. This condition is in paragraph 5(a)(ii), i.e., the standards or requirements is applied in a manner that "could not reasonably have been expected of that Member at the time the specific commitments in those sectors were made."

In my view, this could refer to either of the two situations: first, the relevant regulations on the standard or the requirement did not exist when the commitments are made; or second, while the regulations existed before the commitments are made, they are applied in a different manner now than before. This is where Google's legal case might run into a problem: the list of banned information on the internet has not changed much ever since they first appeared in 1997 in *Measures for Security Protection Administration of the International Networking of Computer Information Networks*. While the exact operating mechanism of the censorship regime might have been fine-tuned and become more sophisticated since China's accession, the general features of the regime, and the manner in which it operates, is more or less the same today as it was before late 2001, when China acceded to the WTO.

Indeed, it might be safe to say that the situation was worse before 2001 than after. As stated by Elliot Schrage, a senior Google executive in 2006,

> *Since 2000, Google has been offering a Chinese-language version of Google.com, designed to make Google just as easy, intuitive, and useful to Chinese-speaking users worldwide as it is for speakers of English. Within China, however, Google.com has proven to be both slow and unreliable. Indeed, Google's users in*

> *China struggle with a service that is often unavailable. According to our measurements, Google.com appears to be unreachable around 10% of the time. Even when Chinese users can get to Google.com, the website is slow (sometimes painfully so, and nearly always slower than our local competitors), and sometimes produces results that, when clicked on, stall out the user's browser. The net result is a bad user experience for those in China . . . . The cause of the slowness and unreliability appears to be, in large measure, the extensive filtering performed by China's licensed Internet Service Providers (ISPs).*[32]

Thus, while a claim under Article VI:1 might be fruitful, Article VI:5 would not be of much help to Google's case.

C. Most Favored Nation Principle

According to GATS Article II, WTO Members shall "accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favorable than that it accords to like services and service suppliers of any other country." While the same Article also allows Members to schedule exemptions, none would apply in this case as China's only exemptions are in the maritime transport sector. As the MFN obligation is an unconditional obligation, China would be obliged not to discriminate among foreign websites.

Ironically, the Chinese censorship regime has as its main target Chinese language websites, be it based in China or abroad. The reason is not difficult to guess: as most people in China are proficient only in Chinese, filtering the Chinese language websites would get rid of most of the troubles. These websites are mostly based in countries with the largest number of Chinese immigrants, namely the U.S., Canada, Australia, Japan and several European countries. Not surprisingly, these same countries also top the list of countries whose websites are subject to the filtering. In addition to Chinese language websites, most of the other websites are those in English and a few other commonly-used languages such as French and German. This would be a classical case of MFN violation, as service providers are being treated differently based on their respective country of origin, even if both might contain the same sensitive contents.

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[32] Elliot Schrage, *Testimony of Google Inc. Before the Subcommittee on Asia and the Pacific, and the Subcommittee on Africa, Global Human Rights, and International Operations*, Committee on International Relations, United States House of Representatives (Feb. 15, 2006), http://googleblog.blogspot.com/2006/02/testimony-internet-in-china.html (last visited Sept. 25, 2011).

VI. POSSIBLE EXCEPTION UNDER ARTICLE XIV

Assuming that some violations under Articles XVI and/or II can be found, China probably will try to defend its internet filtering regime under the general exceptions clause under Article XIV. As the Appellate Body stated in *U.S. – Gambling*,[33] the application of the general exception clause requires a two-tier analysis: first, the challenged measure must fall under one of the paragraphs of Article XIV. If it doesn't fit with any of the detailed exceptions therein, the measures will not be justified and the inquiry stops there. If, however, the measure can be justified under one of the exceptions, then the Panel shall move on to the second step, i.e., whether the measures satisfies the requirement under the chapeau. In the following part, we will follow these two steps to analyze the Google case.

A. Protecting Public Morals or Public Order?

Given the sensitive nature of online censorship, the most likely exception that China will invoke will be the "public morals/public order" exception under Article XIV(a). In *U.S. – Gambling*, the Panel noted that a Member invoking Article XIV (a) must demonstrate two elements, namely: "(a) the measure must be one designed to 'protect public morals' or to 'maintain public order;' and (b) the measure for which justification is claimed must be 'necessary' to protect public morals or to maintain public order."[34]

Citing to the definition found in the *Shorter Oxford English Dictionary*, the Panel interpreted the term "public morals" to mean "standards of right and wrong conduct maintained by or on behalf of a community or nation."[35] As to the "public order" exception, the original text includes a footnote, which states that "[t]he public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society." This note, read together with the dictionary meaning of the term, suggests that "public order" refers to the preservation of the fundamental interests of a society, as reflected in public policy and law.[36] Thus, the Panel concludes that "public morals" and "public order" are two distinct concepts under Article XIV(a) of the GATS.[37] At the same time, there are also some overlaps between the two as both concepts seek to protect largely similar values.[38] For example, the

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[33] Appellate Body Report, *United States – Measures Affecting the Cross-border Supply of Gambling and Betting Services*, ¶ 292, WT/DS285/AB/R (Apr. 7, 2005).
[34] *U.S. – Gambling* Panel Report, *supra* note 26, ¶ 6.455.
[35] *Id.* ¶¶ 6.463-.465.
[36] *Id.* ¶ 6.467.
[37] *Id.* ¶ 6.468.
[38] *Id.*

fundamental interests under the "public order" exception can relate, *inter alia*, to standards of morality, which is also within the domain of the "public moral" exception.

As the Panel stated in the Gambling case, it was unnecessary in that case to determine which exception the U.S. measures fall under. So long as the challenged measure may be justified under either "public morals" or "public order", it will be enough.[39] Let's first take a look at "public morals", which was defined as "standards of right and wrong conduct maintained by or on behalf of a community or nation." Recognizing the difference between the cultures and histories of different Members, the Panel generally allows some discretion for the Member invoking the exception, subject to the requirement that such discretion shall be kept in balance by the duty of that same Member to respect the treaty rights of other Members.[40] The question is, though, where shall we draw the line? In its accession package, Saudi Arabia invoked Article XX(a) to prohibit the importation of the Holy Quran. If that is permissible on religious grounds for a country that is predominantly Muslim, shall we allow another country to do the same even though they do not have a dominant religion? Extending the logic a bit further, shall the same leeway be accorded to a Member that is invoking the exception to ban foreign websites so that its people would not be corrupted by "Capitalist Liberalism thoughts"?

In the view of the author, the answer to the last two questions lies primarily in whether or not such restrictions are supported by "standards of right and wrong conduct maintained by or on behalf of a community or nation." Note here that the standard is that of "a community or nation," rather than that of the government, not to mention that of a particular political Party. Moreover, the standard is one of "right or wrong," not of "legal or illegal." Thus, while government laws and regulations can be taken as an indicator of such standard, the fact that such standard has not made its way into formal legislation does not necessarily mean that such standard is not the one held by "a community or nation." *Vice versa*, the mere fact that such standard happens to be the one adopted in the laws and regulations of a country does not automatically elevate it to the status of a standard held by "a community or nation." Starting with the persecution of Christians by the Roman emperors, there have been many examples in history where the standard of right or wrong for "a community or nation" is not exactly the one forced by the government upon its people, or sometimes even the exact opposite of the one adopted by the ruling class. In such cases, the standard set by the government can hardly be taken as the one held by the "community or nation."

Applying the analysis above to the circumstances of the case, it is

[39] *Id.* ¶ 6.469.
[40] *Id.* ¶ 6.452.

doubtful that the internet filtering or blocking could be justified as one that is dictated by the need to uphold the "standards of right and wrong conduct maintained by or on behalf of a community or nation". Save for a few pornographic or racist websites, it is doubtful that most Chinese would find having access to websites on democracy or the truth about "Tiananmen Incident" in 1989 offensive to their "standards of right and wrong conduct."

Let's now turn to the "public order" exception, which serves to protect "fundamental interests of a society." As noted by the Panel in *U.S. – Gambling*, the "fundamental interests of a society" is often reflected in public policy and law.[41] Where then is a better place for the manifestation of such "fundamental interests of a society" than the Constitution? According to the Chinese Constitution, Chinese citizens shall enjoy the freedom of speech and press,[42] the freedom of religious belief,[43] the right to criticize public officials and make suggestions to any state organ or functionary,[44] and the freedom to engage in scientific research, literary and artistic creation and other cultural pursuits.[45] If these provisions really mean what they are supposed to mean, allowing people unhindered access to foreign websites would not pose "a genuine and sufficiently serious threat . . . to one of the fundamental interests of society," but, quite the contrary, serve to promote such "fundamental interests".

B. Necessity Requirement

As the author has demonstrated in the last section, only a very weak case can be made to support the argument that internet filtering serves to protect "public morals" or "public order." Given the importance of censorship to the Chinese government, however, it is unlikely that the U.S. will be willing to put on a good fight with China over this issue. In the *China – Audio-visual Products* case, where China invoked a similar defence under GATT Article XX(a) to justify its restriction on the importation of foreign books and films, the U.S. made clear that it did not intend to challenge the censorship regime *per se*.[46] Instead, the U.S. only took issue with the means that China chose to achieve the stated purpose of protecting public morals. In other words, the U.S. only argued that China failed to satisfy the "necessity" requirement. As a matter of fact, the U.S. even suggested many ways that the Chinese government could employ to better serve the purpose of its censorship regime. If history can be of any guidance, in the Google case, the U.S. probably will not challenge the

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[41] *Id.* ¶ 6.467.
[42] XING FA [CONSTITUTIONAL LAW] art. 35 (1982) (P.R.C.).
[43] *Id.* art. 36.
[44] *Id.* art. 41.
[45] *Id.* art. 47.
[46] *China – Publications* Panel Report, *supra* note 22, ¶ 7.808.

censorship regime directly, but will again focus on the "necessity" requirement. However, this time around, the US will have to face a much tougher case.

In *U.S. – Gambling*, the Panel held that the term "necessary" refers to "a range of degrees of necessity . . . a 'necessary' measure is, in this continuum, located significantly closer to the pole of 'indispensable' than to the opposite pole of simply 'making a contribution to.'"[47] In determining whether or not a measure is "necessary", a "weighing and balancing" test has to be applied.[48] This includes the following components: "(a) the importance of interests or values that the challenged measure is intended to protect . . . ; (b) the extent to which the challenged measure contributes to the realization of the end pursued by that measure . . . ; (c) the trade impact of the challenged measure . . . ."

Assuming that the U.S. will not challenge the censorship regime *per se*, our conclusions on the three components are as follows:

First, by conceding the legitimacy of the censorship regime, the U.S. also implicitly recognizes the importance of the Communist values that the censorship regime intends to serve. In other words, the U.S. probably will not challenge the importance of these values.

Second, as the filtering applies directly to the websites which contain sensitive information, it seems reasonable to conclude that it does make a contribution to the protection of public morals.

Third, in terms of the trade impact of such measures, we have to consider instances of full blockage and selective filtering separately. If a website is blocked entirely, then the trade impact is quite large, as those parts of the websites which do not offend "public morals" are also blocked. However, selective filtering is probably fine as it only affects those webpages with "inappropriate" contents. Indeed, there is evidence to suggest that the internet filtering system in China is quite sophisticated and constantly evolves in response to changes in the web pages. According to a leading study by Zittrain and Edelman,[49]

> *From our data, it appears that the set of sites blocked in China is by no means static: whoever maintains the lists is actively updating them, and certain general-interest high-profile sites whose content changes frequently appear to be blocked and unblocked as those changes are evaluated. (This is particularly noticeable with news sites such as CNN and Slashdot.) Some new*

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[47] *U.S. – Gambling* Panel Report, *supra* note 26, ¶ 6.475.
[48] *Id.* ¶ 6.476.
[49] Jonathan Zittrain & Benjamin Edelman, *Empirical Analysis of Internet Filtering in China*, Berkman Center for Internet & Society, Harvard Law School, http://cyber.law.harvard.edu/filtering/china/ (last visited Sept. 25, 2011).

sites with sensitive content do not appear to take long to be blocked.

In summary, the interests to be protected are quite important, and the filtering does make a direct and substantial contribution to the protection of public morals. Thus, while a full blockage might not be justified due to its significant restrictive effect on trade, a selective filtering, i.e., the one that is applied against Google, will probably be held as necessary.

As we "yield a preliminary conclusion" that a measure is necessary after our "weighing and balancing" exercise, then we must, as explained by the Appellate Body in *China – Audiovisual Product*, try to confirm the necessity of the measure by comparing the measure with possible alternatives, in the light of the importance of the interests or values at stake.[50] Unfortunately, again, as the trade-restrictive effect of a selective filtering mechanism is already minimal, it seems unlikely that there will be any possible alternatives which can refute the necessity of the regime.

C. Non-discrimination Requirement Under the Chapeau

Once we concluded that the selective filtering is provisionally justified under Article XIV(a), we shall then proceed to consider if the measure satisfies the requirement under the chapeau of Article XIV, which reads as follows: "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."

As noted by the Panel in *U.S. – Gambling*, "the chapeau of Article XX of the GATT 1994 addresses not so much a challenged measure or its specific content, but rather the manner in which that measure is applied, with a view to ensuring that the exceptions of Article XX are not abused. In order to do so, the chapeau of Article XX identifies three standards which may be invoked in relation to the same facts: arbitrary discrimination, unjustifiable discrimination and disguised restriction on trade."[51] Citing the Appellate Body in *U.S. – Shrimp*, the Gambling Panel further explains that a finding of "arbitrary or unjustifiable discrimination" must include three elements: "First, the application of the measure must result in discrimination . . . . Second, the discrimination must be arbitrary or

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[50] Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶ 241, WT/DS363/AB/R (Dec. 21, 2009).

[51] *U.S. – Gambling* Panel Report, *supra* note 26, ¶ 6.581.

unjustifiable in character . . . . Third, this discrimination must occur between countries where the same conditions prevail."

In the current case, it seems such discrimination does exist. In addition to the uneven treatment of websites in different languages and based in different countries mentioned earlier, the study by Zittrain and Edelman also notices the uneven enforcement of the filtering on websites with different subjects. According to them:

> *[E]ven some longstanding sites of apparent sensitivity remain unblocked. This is most easily noticed in our data with respect to sexually-explicit sites – we found blocking of only 13.4% of our sample of well-known sexually-explicit sites – but is also anecdotally apparent from our data, as one notes blocking of some U.S. intelligence sites but not others, etc.*

As both websites with political sensitive information and pornographic materials are deemed by the Chinese government to be against the "public morals," China would have to explain why the internet filtering is enforced more strictly on political but not pornographic websites. Unless China is able to produce convincing arguments, its filtering regime will probably be stricken down as "arbitrary or unjustifiable discrimination" under the chapeau.

VII. CONCLUDING THOUGHTS

In summary, it does not seem to be a good idea to use the Google case to challenge the Chinese internet censorship regime under the GATS legal framework. There are many significant legal obstacles that the US would have to overcome:

First, the most likely sectoral classification for Google's services is data base services, which China has not even included in its Schedule of Specific Commitments.

Second, even if the U.S. could persuade the Panel to somehow classify the services at issue into one of the value-added telecom services, it would still be hard for the US to make a case for violations of Article XVI or XVII, at least for cases of selective filtering. Instead, the best legal case the US can make would be for violations of softer obligations under Articles VI and II.

Third, should the U.S. manage to prove violations of some GATS obligations, it's highly likely that China will invoke the "public morals" exception under Article XIV(a). If the U.S. follows its practice of not challenging China's censorship regime *per se*, China might still be able to escape unscathed unless the Panel is willing to find that China has failed

prohibition against "arbitrary or unjustifiable discriminations" in the chapeau.

Moreover, even if the U.S. could win a favorable decision in paper, it will find the actual implementation of the decision to be a bigger problem. Due to concerns over possible infringement on state sovereignty, WTO Panel and Appellate Body always end their decision with vague recommendation for the losing Member "to bring the relevant measures into conformity with its obligations under the WTO agreements" but never explicitly specify the exact measures that shall be taken to address the inconsistency. As a result, China might use one of the many different ways to achieve technical compliance with the Panel's rulings that defeats the very purpose of the case. For example, to address violations of the MFN obligation or the prohibition against "arbitrary or unjustifiable discriminations," China could greatly expand its filtering regime to cover websites from all countries and in all languages; to comply with the obligation under GATS Article VI.5, China can further streamline and institutionalize its censorship regime. Alternatively, to save itself of all the trouble of having to revamp its censorship regime, China could adopt the easy route and choose either to revise its GATS pursuant to Article XXI or, following the wonderful example set by the U.S. in the Gambling case, simply refusing to comply and pay compensation instead. Indeed, given the recent statement by a senior Chinese official that places the preservation of the Communist regime as the number one "core interest" of China ahead of other key interests such as maintaining territorial integrity or economic and social development,[52] no price seems to be too high for the Chinese government to pay to maintain its censorship regime. Just like their brothers in 1984, they understand too well that "who controls the past controls the future; who controls the present controls the past."[53] The power to control information, be it online or in books, is too important for the survival of the Communist regime to be given away.

In conclusion, even a company as powerful as Google would find futile their attempt to search for the missing link between trade on the one hand, and human rights on the other hand. Even if they can win a WTO case on internet censorship, it will be a Pyrrhic victory. In this regard, Google would fare much better if they were to heed the advice of Philip Alston on the possibility to use WTO as a human rights forum: "[d]espite the expansion of the original GATT mandate into areas such as the services industries and intellectual property rights, and proposals to expand its role to cover the enforcement of regimes at the national level which are

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[52] Sun Jia Ye, *Wai Jie Dui Zhong Guo He Xin Li Yi Bu Bi Da Jing Xiao Guai* [*Other Countries Do Not Need to Worry about the Code Interests of China*], MING PAO (July 14, 2010), *available at* http://www.chinanews.com.cn/hb/2010/07-14/2401289.shtml (last visited Sept. 25, 2011).

[53] This is the slogan of the Party in George Orwell's 1984.

favorable to international foreign investment, the basic structure of the Organization has remained unchanged. It is an institution which is dominated by producers, and in which the economic, social, cultural, political and various other interests of a great many people are not, in practice, represented. Its institutional structure, its processes and the outcomes it sanctions are far from what would be required of a body to which significant human rights authority could be entrusted."[54] While trade sanctions might be effective against human rights violations, trade law, at least in its current form, is not a good weapon to fight human rights violations. Only when Google and the US understand this can they realize that the best way to attack censorship regimes is not to hide behind the WTO and pretend that this can be addressed as a trade barrier problem, but to come forward and confront the Chinese government to deal directly with the human rights issues. While the human rights approach might not be as effective as the trade law route, it at least will not produce unintended consequences that push people further away from the essence of the problem, i.e., freedom of *information*, rather than freedom of *trade*.[55]

[54] Philip Alston, *Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann*, 13(4) EUR. J. INT'L L. 815, 836 (2002).

[55] Of course, the term "freedom of trade" used by Marx in his "On Freedom of the Press" has an entirely different meaning than the "freedom of trade" that the author refers to here. By "freedom of trade," Marx means the freedom to conduct a particular trade or profession. In contrast, the author's "freedom of trade" is more commonly known as "freedom to trade." Notwithstanding the differences, however, the author still agree with Marx's warnings, in the sense that just as freedom of the press shall not be made a variety of freedom of trade, human rights shall also not be made a variety of the right of free trade.

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