THE FIRST CONDITION OF PROGRESS? THE LIMITS OF INTERNATIONAL TRADE LAW AS A PROMOTER OF FREEDOM OF SPEECH

TOMER BROUDE* & HOLGER HESTERMEYER** †

"[T]he first condition of progress is the removal of all censorships".
George Bernard Shaw[1]

When economic actors trade internationally, not only goods and services cross national boundaries, but also the opinions, information and ideas that are When economic actors trade internationally, not only goods and services cross national boundaries, but also the opinions, information and ideas that are When economic actors trade internationally, not only goods and services cross national boundaries, but also the opinions, information and ideas that are [2] This creates links between the regulation of international trade and

* Senior Lecturer, Faculty of Law and Department of International Relations, Hebrew University of Jerusalem; Visiting Professorial Fellow, Institute of International Economic Law, Georgetown University Law Center (2008-2009); Visiting Professor, Università Commerciale Luigi Bocconi, Milano (2009-2010).
** ** Senior Research Fellow and Head of Otto Hahn Group, Max Planck Institute for Comparative Public Law and International Law, Heidelberg; Lecturer, UC Berkeley School of Law (2008), Investigador Visitante, Instituto de Investigaciones Jurídicas, Faculdad de Derecho de la Universidad Nacional Autónoma de México (UNAM) (2009), Visiting Fellow, European University Institute, Florence (2009).
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[1] George Bernard Shaw, *The Author's Apology from Mrs. Warren's Profession* (New York: Brentano's. 1905), p. 41 (available online at Google Books). "All censorships exist to prevent any one from challenging current conceptions and existing institutions. All progress is initiated by challenging current conceptions, and executed by supplanting existing institutions. Consequently the first condition of progress is the removal of censorships".
[2] The Motion Picture Association of America reported $ 15 billion earned in audiovisual services exports and a solid trade surplus for the US: $ 13.6 billion (MPAA, *The Economic Impact of the Motion Picture & Television Industry of the United States*, April 2009, p.7). As to goods, according to

international human rights law: governmental measures that restrict the freedom of speech may concurrently interfere with international trade, and barriers to trade may encroach upon the freedom of expression,[3] which - under international law - applies "regardless of frontiers".[4]

The link between these two regimes is more than mere theory: it has emerged in a number of trade disputes and has recently made headlines in international news outlets. A WTO complaint brought by the EU, US and Canada against China in early 2008 challenged Chinese regulations that required all foreign financial information service providers to act in China through the central news agency, Xinhua,[5] regulations of financial services that thereby simultaneously restricted the freedom of expression (the "Financial Information Services Case"). A broader complaint by the US against China, still pending as of this writing (the "Services Distribution Case"), alleges that China reserves the distribution of films, audiovisual home entertainment products, sound recordings and certain publications to state-designated and -owned enterprises – again posing not only a trade problem but also a potential opaque restriction on the freedom of expression.[6] In January, 2009, a WTO panel tackling the first intellectual property rights enforcement case in the WTO (the "IPR Enforcement Case") ruled partly against China because its legislation denied copyright protection for works that had not been authorized for public circulation by government censors, even though China had invoked a public order exception.[7] The case indicates that intellectual property law is also involved in the entangled net of trade and free speech. Most recently, Chinese authorities made headlines by requiring all personal computers for sale in China to be equipped with a pre-installed web filtering software blocking websites, raising concerns that hardware producers complying with this requirement would be abetting governmental repression and human rights abuses; at the same time, the Chinese regulation

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the OECD US imports for 2006 in HS sector 37.06 (cinematograph film, exposed and developed) were $ 369 million with exports of $ 33 billion, in sector 49 (printed books, newspapers, pictures and other product etc.) 5 billion in imports, 5.5 billion in exports, in sector 85.24 (record, tape, recorded for sound...) $ 1.3 billion in imports with 3.6 billion in exports (OECD Statistics online database).

[3] In this Article we address the freedom of expression as encompassing the freedom of access to information, as well as the freedom to participate in cultural life as protected by international human rights law; see section I *infra* for discussion.

[4] See Article 19(2) of the International Covenant on Civil and Political Rights (ICCPR) [PINCITE].

[5] See *China – Measures Affecting Financial Information Services and Foreign Financial Information Supplier*, WT/DS372/1 (*Request for Consultations by the European Communities*, March 3, 2008); WT/DS373/1 (*Request for Consultations by the United States*, March 3, 2008) and WT/DS378/1 (*Request for Consultations by Canada*, June 20, 2008); the parties reached a mutually agreed solutions whose implementation is pending.

[6] See *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products – Request for Establishment of a Panel by the United States*, WT/DS363/5, 11 October, 2007.

[7] *China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/R, 26 January, 2009. The panel report was not appealed.

could constitute a direct barrier to the importation to China of both hardware and web-based content.[8] Although these disputes and scenarios all involve China, they have implications for all WTO Members,[9] as well as systemic repercussions for human rights law, international trade law and the relationship between them.

But it is not only trade disputes that can have a free speech side: on the other side of the same coin, the promotion of the freedom of expression can have a trade impact. For example, commercial undertakings may benefit from the freedom of speech, even if the exact scope of this protection varies with the applicable human rights instrument.[10] The European Court of Human Rights (ECtHR) has recognized that activities referred to by international trade lawyers as "cross-border broadcasting services" may be covered by the freedom of expression, opening the door to human rights claims with enormous effects on trade in commercial media services.[11]

Anyone who has followed the tortuous debate on trade and human rights will be startled when analyzing these cases in more depth, as all of them share one characteristic: in all of them, international trade law and a human right actually seem to be mutually reinforcing. This stands in stark contrast to the more familiar narrative in which trade liberalization negates human rights or overrides them. Can it be possible that in this case trade law can serve to promote and protect a human right, namely the right to free speech in the face of adverse political regulation and limitation? Indeed, the California First Amendment Coalition (CFAC) seems to think so. They lobby in favor of filing a US complaint in the WTO against China's internet-filtering laws and practices, touting their initiative, grounded in academic writing,[12] as "the biggest access-to-information and free speech case in history",[13]

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[8] See Loretta Chao, "China Squeezes PC Makers", The Wall Street Journal, June 8, 2009, p. A1; and "Political Cues in China Web Filter", Wall Street Journal, June 12, 2009, p. A8.

[9] Internet content filtering, as an increasingly important tool for censorship, is by no means unique to China. For regional surveys of internet filtering, see ACCESS DENIED: THE PRACTICE AND POLICY OF GLOBAL INTERNET FILTERING, Ronald Deibert et al. (eds.)(2008); and Joshua Keating, "The List: Look Who's Censoring the Internet Now", Foreign Policy (Web Exclusive), March, 2009, http://www.foreignpolicy.com/story/cms.php?story_id=4776 (stating that "a growing number of democracies are setting up their own great firewalls"). In addition, measures introduced by governments to prevent internet distribution of pirated copyrighted material may violate the freedom of expression (eg, French law sturck down by French Constitutional court, May 11, 2009 WSJ).

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[11] See European Court of Human Rights, *Groppera AG and Others v. Switzerland*, judgment of 28 March 1990, Series A 173, para. 55. The ECtHR has also held that establishing a radio or television network was within the scope of Article 10 of the ECHR (See *Informationsverein Lentia and Others v. Austria*, judgment of 24 November 1993, para 27).

[12] In particular, see Tim Wu, "The World Trade Law of Censorship and Internet Filtering", 7 Chicago Journal of International Law (2006) 263. For an earlier reference see Mary C. Rundle, "Beyond Internet Governance: The Emerging International Framework for Governing the Networked World",

although it has yet to lead to an actual complaint. To this end, CFAC has retained international trade law counsel, which has presented a legal case against Chinese media control, based entirely on WTO law, to the Office of the US Trade Representative and to the US-China Economic and Security Review Commission.[14] The appeal of trade and free speech marking in lockstep would be that in cases such as Chinese Internet filtering, in which appeals to human rights law falter in practice, international trade law and the robust dispute settlement system of the WTO can be employed, through some creative lawyering, to challenge and remove restrictions on the freedom of expression. For the sake of simplicity, we will refer to this claim as the 'confluence thesis', alluding to the functional convergence between trade and human rights law that it suggests.[15]

In this Article we will critically examine the confluence thesis, and seek its positive and normative limits, while mapping the tortuous boundaries between free speech and free trade in international law. This will be done with a broader view to the fragmentation of international law, in general, and the various perspectives of the trade and human rights discourse, in particular; indeed, the article is intended as a contribution to both of these contemporary debates. However, our focus will be on the specific relationship: is there a genuine confluence between the international human right to freedom of speech and the international law of trade regulation?[16] What are the depth and breadth of this confluence? Is

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Berkman Center Research Publication No. 2002-16 (December 13, 2005), available at http://www.ssrn.com/abstract=870059. See also Marion Panizzon, "How Human Rights Violations Nullify and Impair GATS Commitments, in Marion Panizzon, Nicole Pohl and Pierre Sauvé, GATS and the Regulation of International Trade in Services: World Trade Forum (Cambridge, Cambridge University Press, 2008) 534.

[13] See Peter Scheer, "Acting Globally and Locally: From Internet Censorship in China to a TRO Against Atherton, CA". January 20, 2008, California First Amendment Coalition, http://www.cfac.org/content/index.php/cfac-news/report/.

[14] See "Access to Information and Media Control in the People's Republic of China", Testimony of Gilbert Kaplan, Partner, King & Spalding LLP, June 18, 2008, available at http://www.uscc.gov/hearings/2008hearings/written_testimonies/08_06_18_wrts/08_06_18_kaplan_statement.php.

[15] The confluence thesis we discuss here is a law-focused subset of the general claim that "globalization and the opening up of trade can work in favour of universal human rights [including] civil and political rights as well as economic and social rights"; see Pascal Lamy, Director-General of the WTO, "Globalization and Trade Opening can Promote Human Rights", speech at the University of Geneva delivered on June 5, 2009, http://www.wto.org/english/news_e/sppl_e/sppl128_e.htm); however, note that Lamy is cautious enough to add that in his view "this is true only in certain conditions that need to be specified and that are far from being fulfilled everywhere". In this article we attempt to specify these certain conditions with respect to the operation of international trade law and a particular human right.

[16] In this context we will consider international intellectual property law under TRIPS as part and parcel of world trade law (_____), in accordance with the status of intellectual property protection as a matter of positive international law, even if from legal and policy perspectives free trade in goods and services and intellectual property protection are clearly different and at times even contradictory; on the difficult relationship between trade and intellectual property protection, see _____.

free trade (law) 'good' for free speech? [17] What, indeed, is the position of governmental censorship when viewed through the lens of international trade law, and to what extent might international trade law be used to remove it? Can – and no less importantly, should - the WTO act as an effective forum for the promotion of free speech through free trade, compensating for the relative ineffectiveness of international human rights mechanisms?

Our legal analysis has led us to skeptical (though at times necessarily inconclusive) answers to these complex questions. We assert that despite the basic intuition that free trade and free speech are synergic to each other, the real capacity of WTO law, *de lege lata*, to promote free speech is significantly restricted, casting the shadow of doubt on the confluence thesis. A number of important legal distinctions between WTO law and international human rights law underpin this conclusion, including the different guiding objectives of the law, the dissimilar scope of the protected rights and interests, the limited ability of WTO law to promote the rights of individuals in general and of nationals of importing Members in particular, and the disparate operation of exceptions (such as public morals) in international trade and human rights. These disjunctions become even more pronounced when international intellectual property law is added to the blend. As a result of the combination of these and other factors, WTO dispute settlement challenging barriers to trade and infringement of intellectual property rights might, indeed, in carefully selected cases, successfully remove aspects of censorship creating barriers to trade, but the positive effects on the freedom of speech as a human right – whether positive or negative – would be scattered and incidental at best.

When all is said and done, international trade law is chiefly concerned with market access and economic non-discrimination, not with human rights.[18] These goals draw the outer functional boundaries of the confluence thesis: Generally, WTO law and litigation will promote only that quantum of free speech that is concurrently – and exogenously of the autonomous human rights concern – covered by market disciplines. For example, trade law might increase commercial Internet penetration in country X (with access to some censored websites remaining blocked), which might indirectly increase political discourse in that

[17] Whether freer flows of trade and the technological and social phenomena associated with globalization as promoted by international trade law have positive effects on the freedom of speech and its exercise is in our view ultimately an empirical question best left to political science or socio-anthropological research methods, (for one such analysis see Susan A. Aaronson and Jamie M. Zimmerman, TRADE IMBALANCE: THE STRUGGLE TO WEIGH HUMAN RIGHTS CONCERNS IN TRADE POLICYMAKING (2008) with all their weaknesses. Here we are rather concerned with the directly appreciable impact of international economic law upon the space available for the exercise of human rights law.

[18] Compare Kyle Bagwell, Petros C. Mavroidis and Robert W. Staiger, "It's a Question of Market Access", 96 Am. J. Int'l L. 56. However, here this is a descriptive rather than normative statement, and it is not to say that trade law should not be (re-)designed to better take human rights into account, which should be treated as a separate question.

country, but it will not – as a legal matter – protect political speech in country X. In fact, restrictions on the freedom of speech constituting violations of international human rights law may continue unhampered, so long as they do not distort the competitive market conditions protected by trade law or violate intellectual property protection rules. As will be seen, in certain cases trade law and IPR protection might actually lead to increased or more effective censorship. As a legal conclusion, this is entirely consistent with the empirical research showing that trade agreements promote human rights in foreign countries only where there is a political-economic interest in doing so.[19] To be sure, this does not mean that the human rights impact of trade law cannot or should not be taken into account in its interpretation and application, but this is not the same as claiming that trade law can serve as a sword for human rights.

The Article proceeds as follows. Part I locates the potential confluence between trade liberalization and free speech in the broader "trade and human rights"[20] debate. Part II then discusses and compares the theoretical and teleological bases for the protection of the freedom of expression from the perspectives of both human rights law and international economic law. Part III explains the legal and functional differences between a human rights law approach to a restriction on free speech and a trade law approach, with reference to trade in both goods and services. Part IV adds the complicating layer of international copyright law, since 1994 an integral part of international trade law, to the analysis. Part V analyzes the actual impact of current WTO disputes and their outcomes on the freedom of expression. Part VI concludes by summarizing the gaps between free trade and free speech and discussing their implications in the context of the trade and human rights debate and the fragmentation problem, with suggestions for future courses of action.

I. TERMINOLOGY: THE CONFLUENCE THESIS

At first glance the confluence thesis should appear very attractive to human rights advocates and trade lawyers alike. The professed amalgamation of trade law and the freedom of speech,[21] if confirmed, would be remarkable because it would seem to stand out in a number

[19] See Hafner-Burton, *supra* note 21.
[20] Some commentators have suggested that this term presumes or expresses a hierarchy between trade and the non-trade concern, in this case human rights ... Lang, Koskenniemi, Beckett
[21] Our focus here is on the claim that the legal disciplines of international trade can promote the freedom of speech. Other links between trade law and the freedom of expression do exist; one of them has been analyzed in the very specific context of unfair competition rules under Article 10*bis* of the Paris Convention for the Protection of Industrial Property [cite]; see Thomas Cottier and Sangeeta Khorana, "Linkages between Freedom of Expression and Unfair Competition Rules in International Trade: The *Hertel* Case and Beyond", in HUMAN RIGHTS AND INTERNATIONAL TRADE (Thomas Cottier, Joost Pauwelyn and Elisabeth Bürgi Bonanomi, eds.), 2005, p. 245.

of ways from the broader "trade and human rights" discourse whose standard focal points have generally been *conflict*, *conditionality*, and *'constitutionalism'*, not confluence.

In terms of *regime conflict*, much of this debate revolves on the question of whether economic liberalization furthers or conflicts with human rights. The GATT and the WTO Agreements were drafted under the premise that trade liberalization stimulates economic growth and creates wealth. That view is reflected in the Preambles to the GATT 1947[22] and the 1994 WTO Agreement,[23] both of which state that the Agreements are concluded "with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income (…)." One line of thinking argues that wealth-generation ultimately enables governments and societies to better fulfill their human rights objectives (and obligations). This thesis is hotly contested, however, with an increasing amount of research indicating that mere growth of Gross Domestic Product (GDP) neither means that the population at large profits equitably nor implies that human rights conditions are automatically improved.[24] Critics argue that trade conflicts with human rights by eroding the ability of states to provide social rights protections and/or by creating economic and social disparities whose maintenance drives governments and interest groups to wholesale violations of civil and political rights.[25] In many circles there exists a general perception that trade law "trumps" human rights.[26] Concerns over specific legal conflicts between trade disciplines and international human rights law and policy have been raised and analyzed, such as between patent protection for pharmaceuticals required by the World Trade Organization's (WTO) agreement on Trade Related Aspects of Intellectual Property (TRIPS),[27] on the one hand, and the right to health,[28] on the other.[29]

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[25] For a general survey of the literature on this aspect, see Andrew TF Lang, "The Role of the Human Rights Movement in Trade-Policy Making: Human Rights as a Trigger for Policy Learning", 5 N.Z. J. Pub. & Int'l L. 77 (2007). For an analysis aimed especially at economic, social and cultural rights, see Robert Howse and Ruti G. Teitel, "Beyond the Divide: The Covenant on Economic, Social and Cultural Rights and the WTO", Friedrich Ebert Stiftung, Occasional Paper No. 30, April, 2007. For a useful graphic depiction of the diverging views of the effects of economic liberalization on human rights, see M. Rodwan Abouharb and David Cingranelli, HUMAN RIGHTS AND STRUCTURAL ADJUSTMENT (2007), p. 68.

[26] The rhetorical question recently posed by Pascal Lamy shows as much: "Is not the World Trade Organization for many the symbol of a globalization in which mercantile pursuits have precedence over human beings, the market over individuals, and might over right?"; *Ibid*. note 12.

[27] Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994).

[28] See Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICECSR) [CITE].

[29] See Holger P. Hestermeyer, HUMAN RIGHTS AND THE WTO: THE CASE OF PATENTS AND ACCESS TO MEDICINES (Oxford: Oxford University Press, 2007). For a series of case studies of trade law's

Yet with respect to free speech as viewed through the prism of the confluence thesis, economic liberalization appears vindicated as a veritable handmaiden of a human right. Instead of conflict, a comfortable mutual reinforcement appears to emerge between the two separate bodies of law, that appear to "point in the same direction",[30] in the sense that the removal of restrictions to trade may promote the freedom of speech. Notably, this confluence also differs from the traditional/neo-liberal argument of wealth-generation as a spontaneous promoter of human rights. While the latter argument builds upon the systemic effects of free(r) trade as a whole and ultimately rests on empirical arguments connecting trade, welfare and rights, the confluence thesis proposes a much more direct positive connection between trade law and human rights.

In terms of *human rights conditionality*, the second strand of the "trade and human rights" debate focuses on the advantages and disadvantages of creating explicit, formal linkages between the economic benefits of trade agreements and preference programs, on one hand, and compliance with international human rights norms, on the other hand, whether through international agreement or by unilateral measures. [31] Conditionality as a means of promoting international human rights has its proponents,[32] yet empirical research casts doubt both on the real motivations for the establishment of human rights conditionality and on the extent of its effectiveness, given the low degree of willingness and capability to enforce it.[33] If, however, trade rules can in themselves serve as effective battering rams for free speech, as the confluence thesis would imply, this argument on the merits of conditionality is at least in that respect partially superfluous, with economic rights and human rights already in spontaneous convergence, and hence not dependent on the assessment of conditionality.[34]

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relations with particular human rights in specific contexts, see various contributions in Part II of Cottier, Pauwelyn and Bürgi Bonanomi, *supra* note 12.

[30] The Report of the International Law Commission's Study Group, "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law" (as finalized by Martti Koskenniemi), A/CN.4/L.682, 13 April 2006, noted that in some cases norms that hold a *lex generalis-lex specialis* relationship do not conflict with each other but rather "point in the same direction" (see p. 52 of the Report). Such non-conflictual relations between fragmented norms can exist, however, beyond general-specific relationships, in a broader set of "multi-sourced equivalent norms" (see Tomer Broude and Yuval Shany, THE INTERNATIONAL LAW AND POLICY OF MULTI-SOURCED EQUIVALENT NORMS (2010)); under the confluence thesis, freedom of expression and trade liberalization maintain such an equivalence, at least *prima facie*. To be sure, norm fragmentation can cause problems of legal inconsistency even in the absence of overt conflict (see Tomer Broude, "Principles of Normative Integration and the Allocation of International Authority: The WTO, The Vienna Convention on the Law of Treaties and the Rio Declaration", Loy. U. Chi. Int'l L. Rev. (2009)).

[31] The literature on human rights conditionality is extensive. Important milestones in this literature are Philip Alston “International Trade as an Instrument of Positive Human Rights Policy” 4 Hum. Rts. Q. 155 (1982); and Lorand Bartels, HUMAN RIGHTS CONDITIONALITY IN THE EU'S INTERNATIONAL AGREEMENTS (2005).

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[33] See Emilie M. Hafner-Burton, FORCED TO BE GOOD: WHY TRADE AGREEMENTS BOOST HUMAN RIGHTS (2009).

[34] To clarify, it is surely possible to consider the promotion of the international right to freedom of expression through conditionality, for example, through national measures that impose restrictions on

The third strand of the "trade and human rights" debate, '*constitutionalism'*, is perhaps the most controversial. It contemplates the recognition of 'market freedoms' as human rights in themselves. While supporters of this approach envisage it as a bridge between trade liberalization and human rights, critics have vociferously argued that this approach misconstrues the foundations of modern international human rights law, and threatens to erode them.[35] Although the constitutional approach we refer to here seeks conceptual harmony between trade disciplines and human rights, it should not be conflated with the confluence thesis. 'Constitutionalism' in this vein[36] is a distinctive interpretation of the political philosophy of ordoliberalism,[37] and as such represents a certain normative understanding of global social order, in which market-oriented rules are elevated to the level of human rights. In contrast, the confluence thesis more modestly proposes that trade law enhances traditional human rights and does not resort to the establishment of a new category of human rights. Similarly, it does not rely on a particular justificatory basis but merely claims that under certain conditions the 'rules of the market' (trade law) and human rights can be mutually reinforcing.

II. FREE SPEECH AND FREE TRADE: THE CONCEPTUAL WEAKNESS OF CONFLUENCE

Before we can turn to the protection of freedom of expression through human rights and trade law it is helpful to examine the conceptual, theoretical background of freedom of expression through a trade and human rights lens. This background not only sets the stage for the discussion that is to follow, it already shows the existence of confluence, but also the fundamental weakness of the thesis and its limits.

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or deny preferences from goods and/or services originating in states with a deficient free speech environment. Arguably, the inclusion of the ICESCR in the qualification criteria of the EU's 'GSP+' program does just that. However, the WTO-consistency of such conditionality would be problematic, (see Lorand Bartels, "The WTO Legality of the EU's GSP+ Arrangement", 10(4) J. Int'l Econ. L. __ (2007), as would its effectiveness (see Hafner-Burton, *supra* note 21). In any case, our current interest is in the propositions of the confluence thesis, not conditionality.

[35] For a central exposition of this thesis, see Ernst-Ulrich Petersmann, "Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration", 13(3) Eur. J.Int. L. 621 (2002); for discussion see Robert Howse, "Human Rights in the WTO: Whose Rights, What Humanity? Comment on Petersmann", 13(3) Eur. J. Int. L. 651 (2002); Philip Alston, "Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann", 13(4) Eur. J. Int. L. 815 (2002); and Ernst-Ulrich Petersmann, "Taking Human Dignity, Poverty and Empowerment of Individuals More Seriously: A Rejoinder to Alston", 13(4) Eur. J. Int. L. 845 (2002).

[36] Footnote on differing uses of term constitutionalism

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Expression in Human Rights Law

Free speech is a key human right. The French *Déclaration des droits de l'Homme et du citoyen* from 1789 referred to it as "one of the most precious rights"[38] and it became "the First Freedom" - the First Amendment - of the US Constitution.[39] Its importance has since been emphasized by numerous national courts.[40] But what is the rationale of free speech as a human right? What led to the protection of free speech as a human right rather than other rights.

Two fundamentally different rationales for the protection of free speech have been advanced over the years: a deontological one justifying free speech as an intrinsic value characteristic of human beings and human personality, and a utilitarian one justifying free speech as an instrument in the advancement of truth, democracy and efficient government.[41]

When national courts extoll the virtues of free speech, they generally refer to the instrumental value of free speech. The idea that trade law can not only pry open international barriers to goods and services but also remove political obstacles to opinions, knowledge and information, would appear to sit well with this instrumental approach to free speech, as the approach is commonly phrased in terms of a 'marketplace of ideas' - though a political rather than economic one. The theory goes back to John Stuart Mill's *On Liberty*, to whom "complete liberty of contradicting and disproving our opinion is the very condition which justifies us in assuming its truth for purposes of action".[42] Truth, according to Mill, can only

[38] Art. 11 of the Déclaration reads in the original: "La libre communication des pensées et des opinions est un des droits les plus précieux de l'homme; tout citoyen peut donc parler, écrire, imprimer librement, sauf à répendre de l'abus de cette liberté dans les cas déterminés par la loi."
[39] Nat Hentoff, THE FIRST FREEDOM (Delacorte Press 1980).
[40] As Justice Black - an absolutist when it came to the First Amendment, wrote in *New York Times Co. v. United States*, 403 U.S. 713 (1971): "In the First Amendment, the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy." (*Id*. at 717). The German Federal Constitutional Court referred to it as one of the most important human rights of all ("eines der vornehmsten Menschenrechte überhaupt"), BVerfGE 7, 198 (208), the French Constitutional Court referred to "a fundamental freedom, ... one of the essential guarantees of respect for the other rights and liberties ..." ("une liberté fondamentale, ... l'une des garanties essentielles due respect des autres droits et libertes ..."), C.C. 10 et 11 octobre 1984, GDCC, 599.
[41] See Thomas Scanlon, "A Theory of Freedom of Expression", 1(2) PHILOSOPHY AND PUBLIC AFFAIRS (1972) 204, 205-206; Erwin Chemerinsky, CONSTITUTIONAL LAW. PRINCIPLES AND POLICIES, (Aspen, 3rd ed. 2006), 924-930 (also naming the promotion of tolerance as one of the values free speech purportedly advances).
[42] John Stuart Mill, ON LIBERTY (People's Edition, 1878), P. 11 (CITE FROM MODERN EDITION). However, it is doubtful whether Mill would have approved of the 'marketplace of ideas' metaphor (see

be determined in debate. Oliver Wendell Holmes subscribed to this view introducing the metaphor of the marketplace of ideas, that is best apt to produce acceptable outcomes: "... when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas - that the best test of truth is the power of the thought to get itself accepted in the competition of the market...".[43] The basic argument that debate and competition of ideas advances better outcomes has been embellished over the years by adding different variants or emphasizing different elements. Thus, skeptics of the notion of an absolute "truth" out there to be discovered - be it through debate or any other process - have noted that debate might at least lead to a better outcome through the comparison of various imperfect ideas.[44] Others, particularly courts, have added a specific democratic governance component to the argument, noting that democratic systems vitally depend on the test of ideas in the public sphere, the free confrontation of government with the speech of its citizens and, most prominently of all, the press - and that free speech protects the right to understand and participate in democracy.[45] There seem to be two components to this argument:[46] one is based on the discovery of "the better outcome" - and is thus virtually indistinguishable from the former arguments. The second component is more complex and foreshadows modern discourse theory: open, non-dominated discourse itself may justify the outcome,[47] legitimating the outcome through process, as an outcome reached through discourse better represents the informed opinions and preferences of the public.

This second part of the argument leaves the field of a utilitarian justification of free speech and leads over to a deeper seated justification of free speech as a human right. This school of thought views freedom of expression as "an essential function of self-identity: the

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Jill Gordon, "John Stuart Mill and the 'Marketplace of Ideas'", 23 SOCIAL THEORY AND PRACTICE (1997). This utilitarian logic can also be detected in John Milton's *Areopagitica.*

[43] See Oliver Wendell Holmes Jr.'s dissenting opinion in Abrams v. United States, 250 U.S. 616 (1919). He continues: "That at any rate is the theory of our Constitution".

[44] C. Edwin Baker, Human Liberty and Freedom of Speech (Oxford University Press, 1989), 17 et seq. (Noting that the argument is flawed in that a rejection of "truth" also removes any quantifier as to the quality of the outcome of debate. While the authors certainly do not think that any question has one "true" answer, they strongly believe that some questions do and that in other questions at least a better and worse judgment is possible.)

[45] This line of thinking is associated with Alexander Meiklejohn. See Eric Barendt, FREEDOM OF SPEECH (Oxford University Press, 1987), 20-23.

[46] Barendt disagrees and sees the position as "firmly utalitarian", Id. 20.

[47] See generally Jürgen Habermas, THEORIE DES KOMMUNIKATIVEN HANDELNS (Suhrkamp, 2006). As Sen notes: "…informed and unregimented *formation* of our values requires openness of communication and arguments, and political freedoms and civil rights can be central for this process. Furthermore, to express publicly what we value and to demand that attention be paid to it, we need free speech and democratic choice"; Amartya Sen, DEVELOPMENT AS FREEDOM (1999) 152.

ability to express oneself as a means of constructing the self".[48] In international human rights law, this approach is grounded in the second recital of the preamble of the International Covenant on Civil and Political Rights (ICCPR),[49] whereby all civil and political rights, including the freedom of expression protected by Article 19(2) ICCPR, "derive from the inherent dignity of the human person". The freedom of expression is the logical extension of the freedom to "hold opinions without interference" (Article 19(1) ICCPR) and is closely related to the freedom of conscience (Article 18 ICCPR), whose deontological moral basis extends to free speech as well.[50]

Expression in Trade Law

At a first glance speech seems to be a stranger to economics. But economists would disagree. Economics values speech in at least two respects: first of all in a merely reflexive sense that trade in products might involve speech (e.g. if the product is a newspaper). However, speech plays an additional important role in economics: freedom of expression and the freedom of access to information are instrumental to the perfection of the market mechanism that is necessary to achieve the goals of efficiency and optimal welfare. As John Jackson has written in the particular context of international trade and human rights, "[s]ome of these [human rights] are even necessary in order for markets to work. A particular example is free speech. One of the major and traditional market failures that economists often mention is asymmetry of information. That is, the lack of enough information for some market players to make decisions that make sense in the market framework. Free speech is part of that question".[51] In other words, the utility of the freedom of expression subsists in its capacity to inform rational market actors, bringing market conditions closer to those of perfect competition, one of whose prerequisites is complete information.[52] This applies to the freedom of access to information as well. In fact, pursuing this logic, WTO law even includes

[48] See David E. Guinn, "Philosophy and Theory of Freedom of Expression" in THE ENCYCLOPEDIA OF AMERICAN CIVIL LIBERTIES (2006), Paul Finkelman (ed.) at __. Eric Barendt, FREEDOM OF SPEECH (Oxford University Press, 1987), 14-20.
[49] Cite + note on binding nature of ICCPR + accession status
[50]
[51] See John H. Jackson, "Reflections on the Possible Research Agenda for Exploring the Relationship between Human Rights Norms and International Trade Rules", in INTERNATIONAL TRADE AND HUMAN RIGHTS: FOUNDATIONS AND CONCEPTUAL ISSUES (Frederick M. Abbott, Christine Breining-Kaufmann and Thomas Cottier, eds.)(2006) 19, p. 22.
[52] _____. For an enlightened survey of the development of the concept of 'perfect competition', see George J. Stigler, "Perfect Competition, Historically Contemplated", 65(1) JOURNAL OF POLITICAL ECONOMY 1 (1957).

some rules requiring governments to publish and provide information that would be helpful to economic operators making economic decisions.[53]

Interplay

A comparison of the human rights and trade view on free speech yields two surprising results. The first one is that trade values speech for some of the same reasons as human rights law does: because it allows the comparison of information and the taking of rational decisions. Trade thus embraces the utilitarian rationale of free speech. However, the second lesson the juxtaposition teaches us is that there are two significant limitations in the approach of economics to free speech. The first difference is one in scope. The utilitarian goal pursued by the economic aspects of free speech solely relates to economic efficiency and market agents. In contrast, the human rights corollary relates to the full scope of human endeavors, ranging from science to politics and, significantly, also embracing political legitimacy and legitimacy of political decisions. The second difference is one of substance. It is at this point that the human rights and economic justifications of the freedom of expression sharply diverge. The economic understanding of free speech entirely lacks the deontological core that the human rights basis includes.

The lack of believe in a deontological core of free speech can have fundamental outcomes on political strategies. In this respect, it is useful to compare the relevant philosophies of Milton Friedman, on the one hand, and Amartya Sen, on the other, both of whom have devoted considerable thought to the connection between the freedom of expression and economics. In *Capitalism and Freedom*, Friedman argued that liberalized markets can promote liberty,[54] including the freedom of speech, mainly due to the separation of economic and political power.[55] However, the freedom of the market is decisively the organizing principle, while political freedom of speech is a derivative effect. In contrast, in *Development as Freedom*, Amartya Sen considers the freedom of expression as an "instrumental freedom" that is both conducive to and constitutive of development.[56] The political freedom of expression is not a contingent side-effect of market freedoms, but a

[53] See, e.g. Art. X GATT; Art. III GATS; Art. 7 SPS Agreement; Art. 10 TBT Agreement; Art. 12 Agreement on Customs Valuation; Art. 2 (g), 3 (e) Agreement on RoO.
[54]
[55] See Norman E. Bowie and Robert L. Simon, THE INDIVIDUAL AND THE POLITICAL ORDER: AN INTRODUCTION TO SOCIAL AND POLITICAL PHILOSOPHY, 3rd ed. (1998) 76-77.
[56] Amartya Sen, Freedom as Development, p. 38.

fundamental element in the formulation of socio-economic policy of which market freedom is a part: "Political rights, including freedom of expression and discussion, are not only pivotal in inducing social responses to economic needs, they are also central to the conceptualization of economic needs themselves".[57]

Thus, at the conceptual level, we find only partial and weak support for a "confluence" between liberal trade and free speech. The economic rationale of freedom of expression looks at freedom of speech only in an instrumental manner for the promotion of efficient outcomes. The human rights rationale is much broader, ultimately also including political freedom. The economic justification ends where expressions and information no longer have a market-perfecting contribution; and some political expressions might even be undesirable from the liberal economic perspective, if they interfere with the market. The lack of confluence should, from a formal legal perspective, not trouble us any more than the observation of a domestic lawyer that tort law, contract law, family law and criminal law all have different objectives (and functionality). However, we are concerned here with the claim that international trade law can promote the human right to freedom of expression, and in turning to the legal analysis of this claim, we must bear in mind the difference in the goals of international trade and human rights law with respect to free expression.

III. RELATING TRADE IN GOODS AND SERVICES TO THE FREEDOM OF EXPRESSION: FUNCTIONAL LINKAGES AND LEGAL OBSTACLES

Import Restrictions on Goods: Human Rights and Trade Perspectives

As the examples presented in the introduction demonstrate,[58] the potential interactions between international trade regulation and the international law protecting free speech are very diverse (and increasingly so), and their precise legal outcomes depend on particular circumstances. It is, however, possible to draw the contours of a general framework of analysis in both human rights law and trade law. Much of today's international trade – and the law that regulates it - is considerably more complex than the traditional "bricks and mortar" models of the past, [59] yet the most basic form of international trade remains trade in goods[60] and it is useful to begin the analysis with this relatively tangible paradigm, leaving relevant aspects of services trade and intellectual property law to subsequent analysis below.

[57] *Ibid.*, 154.
[58]
[59] See Anupam Chander, "Trade 2.0", Yale Journal of International Law (forthcoming).
[60] Trade Data – goods trade as proportion of total trade

Our notional starting point for study is the understanding that some goods carry or enable expressions, information and ideas that are subject to protections established under international human rights law. There are at least three ways in which this happens. First, tradable goods can actually constitute the expression itself, as in the case of plastic artistic works, such as paintings or sculptures.[61] Second, many goods serve as physical media in which expressions are embedded, recorded in print or as audiovisual recordings, digital or otherwise (e.g., books, newspapers, CDs, DVDs etc.). This would include also items that can be deliberate vehicles of explicitly political expression, such as flags, banners, bumper stickers or pins.[62] Third, goods can serve as media that do not already carry expressions but facilitate the process of transmitting and receiving opinions and information, such as computers, telephones, audiovisual recording equipment and the like.[63] Measures restricting the importation of such goods need to be examined under both human rights and international trade law.

The Human Rights Framework. From a human rights perspective, such measures may indeed be considered as restrictions on the freedom of expression. The freedom of expression is broadly construed as a basic international human right. The Preamble of the Universal Declaration on Human Rights (UDHR)[64] lists it as one of those freedoms that are among the

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[61] *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* 2005, preamble, para 21, article 3-4. http://unesdoc.unesco.org/images/0014/001429/142919e.pdf
Preamble, para 21*:* 'Being aware of UNESCO's specific mandate to ensure respect for the diversity of cultures and to recommend such international agreements as may be necessary to promote the free flow of ideas by word and image'; '"Cultural expressions" are those expressions that result from the creativity of individuals, groups and societies and that have cultural content' (Article 3) usually transmitted through 'Cultural activities, goods and services, which at the time they are considered as a specific attribute, use or purpose, embody or convey cultural expressions, irrespective of the commercial value they may have. Cultural activities may be an end in themselves, or they may contribute to the production of cultural goods and services' (Article 4).
Reference to UNESCO

[62] *Ibid*., preamble, para. 21, article 1.
'…Cultural diversity is made manifest not only through the varied ways in which the cultural heritage of humanity is expressed, augmented and transmitted through the variety of cultural expressions, but also through diverse modes of artistic creation, production, dissemination, distribution and enjoyment, whatever the means and technologies used (article 1).
On flag defacing as an act of protected speech under the First Amendment to the US Constitution see *Texas v. Johnson*, 491 US 397 (1989); *US v. Eichman*, 496 US 310 (1990); *Coleman v Power* [2004] HCA 39 (1 September 2004) (Australian student convicted for distributed leaflets attacking the police of being corrupted. The High Court of Australia annulled the conviction after acknowledging an implied freedom of communication on political and government matters protected by the Australian Constitution.

[63] *Ibid*., preamble, para 13, article 1.
Preamble, para. 13: *'Reaffirming* that freedom of thought, expression and information, as well as diversity of the media, enable cultural expressions to flourish within societies'.

[64] **Nature and status of UDHR** For the view that the UDHR forms part of customary International Law see: Myres S. McDougal, Harold D. Lasswell & Lung-chu Chen *Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity* (Yale University Press, 1980), 274, 325,338; John P. Humphrey, "The International Bill of Rights: Scope and Implementation" in 17 *William and Mary Law Review* (1976) 527, 529; H.Waldock, "Human Rights in Contemporary

"highest aspirations of the common people"; Article 19 UDHR provides that everyone has "the right to freedom of opinion and expression", including the freedom "to seek, receive and impart information and ideas through any media and regardless of frontiers". The freedom of expression was further concretized in Article 19(2) of the ICCPR whereby "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice".

A first question one might ask in looking at trade restrictions (such as a ban on the importation of a certain book title or music album) from a human rights perspective is whether states are bound to respect the freedom of expression with regard to foreign authors and expressions. The freedom of expression, like other human rights,[65] appears to have been formulated as a universal and transnational human right. It applies to "everyone", therefore including all authors of expressions regardless of nationality or domicile. No less importantly, it applies "regardless of frontiers". This means that everyone enjoys the freedom to impart information and ideas in every jurisdiction. An author of information or of an idea, having expressed herself in one country, has not exhausted her freedom of expression, which continues to apply in all other countries (subject, of course, to the all-important exceptions yet to be discussed).

This conclusion is strengthened when one recalls that rights protected under Article 19 ICCPR include not only the author's freedom of expression but also the right of "everyone" to access information - the corollary freedom to "seek" and to "receive" information and ideas.[66] This freedom of access to information is an important complement to the freedom to impart information. The same government measure may violate both freedoms; for example, if a certain newspaper is banned from circulation, both the journalists' expression and

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International Law and the Significance of the European Convention", in *International and Comparative Law Quarterly* (1965), Supp. No. 11, 14-15. Although the UDHR is not a legally binding document its articles have been incorporated and elaborated in subsequent binding International treaties, such as, International Covenant on Civil and Political Rights, 6 ILM 368 (1966) [ICCPR]; International Covenant on Economic, Social and Cultural Rights, 6 ILM 360 (1966) [ICESCR], International Convention on the Elimination of All Forms of Racial Discrimination, 5 ILM 352 (1969) [CERD]; Convention against torture and other cruel, inhuman or degrading treatment or punishment, 23 ILM 1027 (1984), as modified 24 ILM 535 (1985).
With regards to the right of freedom of expression, in addition, this right is recognized in numerous international human rights treaties, such as European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), article 10; ICCPR, article 19; American Convention on Human Rights (1969) article 13 [ACHR]; African Charter on Human and Peoples' Rights, 21 ILM 58 (1982) article 9 [African Charter].

[65] Inter alia, the right to non-discrimination, equality and fairness, the right to freedom of thought, conscience and religion, the right to be presumed innocent, the right to freedom from slavery, the right to freedom of torture.

[66] ICCPR, article 19(2): "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice".

readership's freedoms of access have been curtailed.[67] This effectively expands the scope, *ratione personae*, of the protection, and also emphasizes that the maintenance of the freedom of expression is of general public interest, not only individual concern. Through this expansion, the freedom of access to information serves the freedom of expression: generally, "everyone" has the right to hear "everyone" and vice versa. While the party imparting an opinion may be intimidated from pursuing her individual freedom of expression, or lack the will to overcome the barriers to expression in a given jurisdiction, the resolve of a larger audience interested in hearing the opinion might be more difficult to repress, ultimately satisfying the same goals. Conversely, the removal of a restriction of the freedom of access to information would have little real impact if the freedom of expression were not upheld. In the transboundary context, that the public everywhere has the right to be exposed to information and ideas of any source, is supportive of the conclusion that authors of information and ideas have a right to express themselves everywhere, as the term "regardless of frontiers" would imply.

Additional questions relate to the identity of the bearers of the right to freedom of expression. Does the freedom of expression apply to legal persons, such as publishing houses and recording enterprises operating as limited-liability companies, or only to flesh-and-blood authors? A very narrow approach would recall the deontological basis of the freedom of expression and point out that corporations cannot, by definition, fulfill their own human identity, because they have none. However, corporations do facilitate the expression of individual originators and holders of opinions and information, and can even serve as buffers

[67] See ECtHR, *Dammann v. Switzerland* (no. 77551/01, § 52, 25 April 2006 (A Swiss journalist that while investigating robbery received from the Zürich Public Prosecutor's Office convidential data regarding suspects. Although at the end, Dammann did not publish the information and did not use it for any other purpose, Dammann was convicted for inciting another to disclose an official secret. The EctHR ruled that the such sentence would be likely to deter journalists from contributing to public discussion of issues affecting the life of the community and was thus liable to hamper the press in its role as provider of information and watchdog. In the circumstances the Court considered that Mr Dammann's conviction had not been reasonably proportionate to the pursuit of the legitimate aim in question, having regard to the interest of a democratic society in ensuring and maintaining the freedom of the press. Accordingly, the Court held that there had been a violation of Article 10); *The Observer and Guardian v. The United Kingdom,* 26 November 1991, § 59, Series A no. 216 (Concern temporary injunctions imposed in relation to the book "Spycatcher", the memoirs of a retired member of the British security service living in Australia. The book includes an account of allegedly illegal activities by that service. After the applicants published details of some of the contents of the book, the Attorney General instituted proceedings in England against the applicants for breach of confidence. He obtained interlocutory injunctions that prevented those applicants, pending the trial of the actions, from publishing further details about the allegedly unlawful activities of the secret service described in the book. The court ruled in favor of few injunctions accepting the authorities' argument that the interferance was 'necessary' but dismissed the remaining injunctions ruling that they consist a violation of article 10 of the ECHR; see also the reactivation of the *Sri Lankan Press Council Act of 1973* in June 2009 and its critics by the International Federation of Journalists (IFJ) for violating, inter alia, the right of the people of Sri Lanka to be informed about the processes under which they are governed. http://www.ifj.org/en/articles/reactivaction-of-discredited-press-council-law-a-step-backward-for-sri-lanka (accessed on 27.06.09)

against restrictions of individual speech.[68] Furthermore, the 'marketplace of ideas' is a social rationale;[69] if the availability of more ideas and information isldesirable, they should not be precluded only because their direct expressers are legal rather than natural persons – all the more so because ultimately all ideas have originated in human minds. The flip side of this justification of the freedom of speech of legal persons, is the freedom of access to information and opinion, which is to be enjoyed by all natural persons, with no stipulation (or reason to believe) that the information and opinions being accessed must be directly expressed by natural persons only.[70]

Furthermore, when persons or legal entities are not the authors of an expression, but merely carriers of ideas and information engaged in their dissemination rather than their origination, do they enjoy the freedom of expression? Arguments applying to the natural/legal person question apply to the author/carrier issue, suggesting that carriers should enjoy the same rights as authors. In addition, as noted already,[71] the freedom of expression is an extension of the freedom of opinion. The right to freedom of opinion has no requirement of

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[68] Libel cases etc. *New York Times v Sullivan* (1964) 376 U.S. 254 (US Supreme Court decision regarding the protection given press criticism of the official conduct of public officials. The ruling held that First Amendment protection of free speech is not dependent on the truth, popularity, or usefulness of the expressed ideas. The court limited the right of recovery to public officials who could prove actual malice (i.e., requires that the plaintiff in a defamation or libel case prove that the newspaper knew the statement was false or acted in reckless disregard of the truth). The malice standard allowed free reporting of the civil rights campaigns in the southern United States and supported the freedom o press; *Theophanous v Herald and Weekly Times Ltd.* (1994) 182 CLR 104 (This Australian case have established a constitutional defense in situations where the defamatory material is a matter of political discussion. It was held that a defamatory publication will not be actionable under the law relating to defamation if the defendant establishes that it was unaware of the falsity of the material published, it did not publish the material recklessly and that the publication was reasonable in the circumstances; But see: but see *Hill v Church of Scientology of Toronto* [1995] 2 S.C.R. 1130, 126 DLR (4th) 129 (A libel case against the Church of Scientology. Canada's Supreme Court deviated from the actual malice standard that was set forth in *New York Times v Sullivan* case and ruled that the Canadian Charter of Rights and Freedom does not protect individuals from tort of defamation.

[69] See *supra* note __.

[70] Neither article 10 ECHR nor article 19 ICCPR make a distinction between individuals or corporations. For a discussion on corporations' right of Freedom of expression and the scope of such right see *First National Bank v Belloti* 435 US 765 (1978) http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=435&invol=765
(Part III) 'The court below [framed the principal question in this case as whether and to what extent corporations have First Amendment [435 U.S. 765, 776] rights. We believe that the court posed the wrong question. The Constitution often protects interests broader than those of the party seeking their vindication. The First Amendment, in particular, serves significant societal interests. The proper question therefore is not whether corporations "have" First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether 8 abridges expression that the First Amendment was meant to protect… As the Court said in *Mills v. Alabama*, 384 US 214, 218 (1966), "there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free [435 US 765, 777] discussion of governmental affairs." If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decisionmaking in a democracy, 11 and this is no less true because the speech comes from a corporation rather than an individual. 12 The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual….'

[71] See *supra* note 43.

originality: one can believe in God (or in Marx) without having written the Bible (or the Communist Manifesto). Similarly, under human rights law, one can preach religious views as a matter of public opinion, even if the same views were first produced by someone else; it would nevertheless be an assertion of the freedom of expression; and would still be complementarily justified by the right of others to access information and opinions.

Because of the weak institutional character of international human rights law, it is difficult to find jurisprudential support for these conclusions. However, although mindful of the different formal, social and cultural contextual differences, it is of assistance to see how the same questions have been dealt with in the European system of human rights; the freedom of expression is protected under Article 10 ECHR in terms similar (though not identical)[72] to Article 19 ICCPR.[73] In the European system, the right to freedom of expression has been held as applying to both natural and legal persons.[74] Importantly, the ECtHR has (in cases related to services rather than goods; one might argue that the same rationale applies to goods *a fortiori*) upheld the right to freedom of expression of both primary and secondary carriers.[75] Generally, this means that not only the author of an expression is protected by the freedom of expression, but also its carrier. And that the freedom of expression applies to legal persons as well.

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[72] ICCPR, Article 19:
1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
(a) For respect of the rights or reputations of others;
(b) For the protection of national security or of public order (ordre public), or of public health or morals.
ECHR, Article 10 – Freedom of expression:
1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

[73] Similar protection also exists in other regional systems, e.g., Article 13 of the ACHR, Article 9 of the African Charter .

[74] *Autronic AG v. Switzerland*, judgment of 22 May 1990, Series A No. 178. para. 47.

[75] "[B]oth broadcasting of programmes over the air and cable retransmission of such programmes are covered by the right enshrined in the first two sentences of Article 10 § 1."; see *Groppera AG and Others v. Switzerland*, judgment of 28 March 1990, Series A 173, para. 55. Even the establishment of a business for the purpose of carrying expressions would be covered by the ECHR (*Informationsverein Lentia and Others v. Austria*, judgment of 24 November 1993, para 27).

A separate question to be asked is whether all the types of expression-related goods mentioned above are covered by the international human right to the freedom of expression. Indeed, in the drafting process of the ICCPR, some debates centered on the need to specify the modalities, i.e., media, through which protected ideas and information could be expressed.[76] The drafting outcome is expansive, covering ideas and information expressed orally, in writing, in print, as art, or "through any other media". Thus, all goods that are themselves an expression of ideas or information, or are physical media of such, should normally lie within the scope of the protection of the freedom of expression.[77] Goods of the third category described above – those that are neither expressions nor physical media thereof, but have the potential to act as media facilitating the process of disseminating ideas and opinions, should also be covered, at least derivatively, by the freedom of expression. One can construe this directly from the text of Article 19(2) ICCPR which incorporates as part of these freedoms the right of everyone to choose the media through which one expresses or access information or ideas.[78]

One could also query whether the scope of the freedom of expression is limited not by the identity of the right-holder or by the medium of the expression but by the nature and characteristics of the ideas and information included in a restricted good – its expressive content. It might be argued that the freedom of expression is directed primarily at political freedom and that once expressions are scrutinized as goods in the course of trade they should be considered as non-political, commercial expression, which does not deserve protection as a human right. However, Article 19(2) ICCPR clearly refers to ideas and information of "all kinds", with no distinction between political, commercial or any other type of content. The core operative element of the freedom of expression is not participation in the political process but the ability to make opinions, ideas and information available in the public sphere, regardless of their content (subject to the exceptions and limitations of Articles 19(3) and 20 ICCPR, discussed below, which do relate to the content of expression). The freedom of expression in Article 19(2) ICCPR can therefore be understood as the public extension of the freedom of opinion protected under Article 19(1) ICCPR, providing an individual the right not only to hold an opinion but to express his or her opinion in public. Generally, “public” expression is broader than “political” expression. Thus, commercial expression is covered by Article 19(2) ICCPR. In *Ballantyne, Davidson and McIntyre v. Canada*, the UN Human

[76] A French proposal, for instance, underlined “facts, critical comments and ideas”. See MARC J. BOSSUYT, GUIDE TO THE “TRAVAUX PREPARATIORES” OF THE INTERANTIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 381 (Dordrecht; Boston: Martinus Nijhoff 1987).
[77] Examples. Commercial Speech (although the right is narrower)… Advertising… Pornography… Blasphemy and Offence… Am I on the right line of thought???
[78] As evident from the somewhat cumbersome phrase "of his choice" at the end of Article 19(2) ICCPR.

Rights Committee (UNHRC),[79] in deciding whether the prohibition of public commercial advertisement in any language other than French, by the Provincial Government of Quebec, was a violation of Art. 19(2) ICCPR, observed that:

> Article 19, paragraph 2, must be interpreted as encompassing every form of subjective ideas and opinions capable of transmission to others, which are compatible with article 20 of the Covenant [prohibition of propaganda for war and advocacy of hatred], of news and information, of commercial expression and advertising, of works of art, etc.; it should not be confined to means of political, cultural or artistic expression. In the Committee's opinion, the commercial element in an expression taking the form of outdoor advertising cannot have the effect of removing this expression from the scope of protected freedom.[80]

The ECtHR has reached a similar conclusion with respect to the scope of the ECHR, that covers all modes of speech, including commercial:[81] "[With respect to its applicability, n]o distinction is made in [the ECHR] according to whether the type of aim pursued is profit-making or not."[82]

In the present context, these interpretations of the scope of the international protection of the freedom of expression are important, because they expand the potential overlap between free trade and free speech. Without it, this overlap would have been limited only to areas in which restrictions of political expression also impair commercial speech. With the extension (on the part of the human rights regime, it must be noted), the overlap ostensibly includes also areas in which trade restrictions have no political import.

In sum, in reviewing the relevant scope of the international human rights protection of the freedom of expression, it is quite broad and there is little reason to think that this protection would not apply to restrictive measures on the importation of goods that are related to expressions. However, we have not yet addressed the exceptions that exist to this scope, and it remains to be seen to what extent the trade law coverage of the same measures is the similar.

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[79] I think the next note (78) covers this one as well.
[80] *Ballantyne, Davidson and McIntyre v. Canada*, Communications Nos. 359/1989 and 385/1989, U.N. Doc. CCPR/C/47/D/359/1989 and 385/1989/Rev.1 (1993), para. 11.3.
[81] *Markt Intern Verlag GmbH and Klaus Beermann v. the Federal Republic* of *Germany*, judgment of 20 November 1989, Series A No. 165, para. 26.
[82] *Casado Coca v. Spain*, judgment of 24 February 1994, Series A No. 285, para. 35.

The International Trade Regulation Framework. Looking at trade in goods, let us first consider a hypothetical that is deceptively simple, but one that encapsulates some of the complexities of our inquiry: an import ban instituted by a WTO Member on a certain book title.[83] This example is illuminating, because it demonstrates a number of divergences between human rights law and trade law that weaken the confluence thesis. One might have thought that under human rights law the book ban would always be considered a restriction of the freedom of expression and access to information (with its international human rights legality ultimately dependant on the applicability of exceptions that we will discuss later on). This is not, however, always true, as explained below. In comparison, the WTO/GATT consistency of the book ban (and of other conceivable restrictive measures) might be similar in its outcome, but hinges on several technical factors that carry no normative weight in human rights law, relating to the applicability of basic trade rules, namely, the prohibition of quantitative restrictions (Article XI GATT); national treatment (Article III GATT), and most-favored nation treatment (Article I GATT), as well as other more specialized rules on Technical Barriers to Trade (TBT).[84] These differences between normative conditions make the functional confluence between trade rules and human rights law very volatile and contingent.

- *Quantitative Restrictions:* To begin with, the book title ban might be considered a quantitative restriction prohibited under Article XI GATT.[85] This would certainly be the case if the ban were only implemented at the border, "on the importation" (to use the language of Article XI:1 GATT) of the book, and was not complemented by a ban on the production and distribution of the same book in the domestic market.[86] Because Article XI:1 GATT refers to "prohibitions or restrictions… of any product", it would be immaterial if the ban did or did not apply to other book titles; if the "product" is the particular book in question, the ban constitutes a "prohibition"; and if one considers instead the product to be books in general or some sub-category thereof, the ban is a "restriction", which is equally GATT-inconsistent.[87]

Interestingly, here we find a 'reverse' divergence between trade and free speech, in which the GATT is actually more limiting of governmental measures than human rights law. The ban violates a GATT rule – indeed, a rule that is considered to be "one of the cornerstones of the GATT system"[88] - but because the book is in fact available on the

[83] As noted above (___), trade in goods is relevant to the freedom of expression where a good constitutes the expression itself, where a good incorporates an expression, or when a good facilitates the freedom of expression. A book belongs to the second category, but much of the analysis that follows applies, *mutatis mutandis*, to the other categories.
[84] PINCITE TBT
[85] Explanation of QRs purpose etc.
[86] Asbestos, Little Lobsters
[87] Shrimp Panel 7.16 might be relevant.
[88] Turkey – Textiles Panel

domestic market, the right of access to information as well as the author's freedom of expression remain intact despite the ban. Only the freedom of expression of the foreign publishers – whose interest is primarily, if not exclusively commercial - might be said to be impaired. Even this might not be the case, if the foreign publishers were not prevented from publishing the book in the domestic market itself – an issue that relates to the freedom of movement of services, which we will discuss separately below.[89]

No less importantly, this reversal is true even though, as we have seen, human rights law protects foreign and domestic expressions alike, but in contrast the terms of Article XI:1 GATT apply only to a "product *of the territory* of any other contracting party". This limitation clearly draws a distinction between foreign and domestic products, that human rights law does not; put simply, the GATT does not grant any privileges to domestic products, as such.[90] Since in our current hypothetical the book ban does not prevent the local production and sales of the book, this is not a difficulty for domestic publishers, who are actually preferred over the foreign competition, and indeed, this is the difference that provides the basis for applying Article XI:1 GATT in the first place.[91] The economic interest of the GATT/WTO normative system in the removal of such an import ban is clear: unless complemented by an equivalent domestic ban, the ban merely reserves the local market to the locally published book. On the other hand, the human rights interest in the removal of the restriction is minimal. Thus, trade law follows a stricter tack.

One might linger further on the scope of the phrase "of the territory" in Article XI:1 GATT: is a book written by a local author in the territory of the import-restricting state, but printed and bound in the territory of another WTO Member, covered by the prohibition on quantitative restrictions on imports? The rationale and jurisprudence of Article XI:1 GATT focus on the physical production of the goods,[92] and therefore suggest that such a locally-authored, foreign-produced volume should indeed be covered by the prohibition of quantitative restrictions, and hence be allowed open access to the domestic market. This implies that Article XI:1 GATT, like the human right of freedom of expression, is indifferent to the nationality of the author, and therefore conducive to the free speech of foreign and domestic authors alike. However, this seeming confluence with the human rights law framework can do little to promote the freedom of expression. In the scenario analyzed here the local author already enjoys this freedom in her home country through unrestricted domestic publication; if the sales of the domestically produced book were also prohibited, Article XI:1 GATT would be to no

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[91] Had domestic production been banned, the national treatment disciplines of Article III would apply in examining the GATT-consistency of the respective bans.

[92] QR jurisprudence focus on physical goods (examples).

avail because it would not apply. In the converse situation - a book authored abroad, but physically produced domestically – the book would not be a product "of" the territory of another Member and hence would not be covered by Article XI:1 GATT and in any case would not be subject to the import restriction.

One evident conclusion of this discussion of bans of expression as quantitative restrictions is that restrictions on the importation of expressive goods that are not augmented by equivalent domestic bans, like the book ban, are primarily protectionist, but not necessarily human rights violations. A reflection of this is that the removal of these restrictions would be aimed at the reduction of protectionism, as based on technical interpretations of trade law. This would have only a minimal effect on the freedom of expression and access to information in the importing state, because these freedoms already exist locally, without a parallel domestic ban (which if had existed, would have undermined the application of Article XI altogether).

Consequently, Article XI:1 GATT cannot be relied upon to promote the freedom of expression and access to information. If the expressive good is banned for import but available domestically, the prohibition of quantitative restrictions may apply but these human rights are fulfilled regardless of the ban or its removal. If the good is banned or restricted both for import and domestically, the question is one of national treatment, not of quantitative restrictions, as will be discussed below.

The hypothetical analysis made so far is upheld by GATT and WTO jurisprudence related to similar, though technically more complicated, problems. In 1984, well before the WTO era, a GATT panel[93] found that restrictions instituted by the US on the importation of printed material under the (now defunct) 'Manufacturing Clause'[94] were violations of Article XI GATT. While much of the panel report revolved on the question of whether the US legislation was 'grandfathered' or not,[95] a temporal issue that has no bearing on the free speech-free trade nexus, it is important to note that the substantive inconsistency of the Manufacturing Clause with GATT Article XI:1 was not contested during the panel proceedings by the US.[96]

The Manufacturing Clause case was very much an extension of some of the hypothetical instances analyzed above. The Manufacturing Clause prohibited the importation into the US and public distribution therein of copyrighted non-dramatic, literary works in the English language authored by US domiciliaries, unless they had been manufactured in the US or Canada. The Manufacturing Clause had implications in the area of international intellectual

[93] See *The United States Manufacturing Clause*, Report of the Panel adopted on 15/16 May, 1984 (L/5609, BISD 31S/74), March 1, 1984), at para. 34, hereinafter the "Manufacturing Clause" report.
[94] Section 601 of Title 17 of the United States Code, as extended by Public Law 97215 of 13 July 1982 – PROPER CITE
[95]
[96]

property, because copyright protection was denied to works imported in contravention of the Manufacturing Clause, and we will return to this in our discussion of the *China – IPR Enforcement* case below,[97] but more basically the Manufacturing Clause was simply a ban on the importation of a class of foreign published books, deliberately aimed at nurturing and sustaining the domestic US publishing industry.[98] Like the book ban discussed above, the Manufacturing Clause did not in itself obstruct the freedom of expression of US (or foreign) authors or publishers, although it did restrict the US commercial activity of foreign publishers in ways that might have been understood as a restriction of their freedom of expression.[99] From an international trade perspective, the Manufacturing Clause was clearly protectionist,[100] and the panel report is faultless in its application of GATT law, including the application of Article XI GATT rather than article III GATT; the fact that the import ban was enforced by internal measures (the prohibition on distribution and the denial of copyright) did not turn the dispute into a national treatment issue, because the internal measures were aimed only at imports.[101] Clearly, whether this quantitative restriction was GATT-consistent or not would ultimately depend on the application of GATT exceptions – several of these might have applied, and we will discuss them separately in more detail below; but these possibilities were not pertinent in this case and were not raised by the US. What is clear, however, is that the finding that US legislation was not GATT compliant could have had no effect on the freedom of expression.

In the 1997 WTO *Canada – Periodicals* case,[102] Canada was taken to task *inter alia* for prohibiting the importation of so-called "split-run" periodicals - magazines with the same or similar editorial content as those published abroad, which contained advertisements directed to the Canadian market. Periodicals domestically produced with the same advertising material were not prohibited, but subjected to discriminatory treatment that was problematic in terms of national treatment.[103] This ban was straightforwardly found to be a violation of Article XI GATT, shifting the discussion to the exceptions clauses.[104] The *Periodicals* case clearly related to the commercial interests - and commercial speech - of media and advertisers. Yet even this commercial speech, in the form of advertisements directed at the Canadian market, would have been available to the public through Canadian advertising media, which was not restricted by

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[99] At the time the US had not yet committed to the ICCPR _____

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[101] Article III ad note, Asbestos

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[103] See *infra* note __

[104] *Periodicals.*, paras. 5.5 *et seq.*

the Canadian measure. The removal of the disputed legislation would have had no effect on the freedom of expression or access to information in Canada, in the import-restricting state.[105]

Overall, the analysis of Article XI GATT shows that it has some parallels with the freedom of expression, but also significant divergence, and in practice does not appear to have the potential to promote it. Taking this analysis a step further, an import ban on a good that does not incorporate an expression (like a banned book, or DVD) but rather facilitates it – such as a computer terminal or telephone - would be analyzed under similar terms. Consider a hypothetical case in which a WTO member bans the importation of mobile telephones equipped with cameras, a type of hardware that has proven very effective in increasing access to information.[106] If the regulation allowed domestic production of such telephones, this would be, *prima facie*, an Article XI GATT issue, especially if telephones were in fact domestically produced and applied; but then, there would be no indirect restriction of the freedom of expression, because the phones would be available for use. Now, if such phones were not produced domestically because of local political pressure, lack of economic capacity or other extra-legal reasons, arguably Article III GATT should apply, not Article XI, drawing on the asbestos case,[107] but in any event, if the WTO Member were indeed intent on restricting the freedom of expression, rather than protecting domestic production, it could evade Article XI GATT by formally applying the ban to local producers as well.

National Treatment: The prohibition on quantitative restrictions has its limitations in the promotion of free speech, and many of them relate to the borderline with the national treatment principle,[108] whose potential impact on the freedom of expression will now be explored. The national treatment principle generally provides that all taxes and regulations affecting the internal sale of products (i.e., their commerce within a WTO Member) "shall not be applied to imported and domestic products so as to afford protection to domestic production".[109] This pertains even if the tax or regulation are collected or applied to the foreign product at the time or point of importation.[110] Taxation applied to "like" domestic products should not be "in excess of" the taxation applied to domestic products (Article III:2 GATT); any other regulations applied to imported products shall be "no less favourable" than the treatment accorded to the "like" domestic product (Article III:4 GATT). If the domestic and imported products being compared are not "like" and yet belong to the broader category

[105] Articles on Periodicals case
[106]
[107]
[108]
[109] Article III:1 GATT; interpretation of "so as to afford protection"; basic literature on NT.
[110] Ad Note III.

of "directly competitive or substitutable products", differential treatment would still run afoul of the GATT if their tax treatment afforded protection to the domestic product.[111]

In this brief description of the national treatment principle we find its chief weaknesses in promoting the freedom of expression, revealing significant divergence rather than confluence. First, by definition the national treatment principle aims at "leveling the playing field" between foreign and domestic producers and goods.[112] This is a market-oriented principle, but one that does not have the capacity to remove regulatory restrictions that are non-discriminatory.[113] A restriction on free speech or access to information that is equally intolerant, even repressive, of expressions embedded in or facilitated by foreign and domestic goods will be unmoved by national treatment disciplines. Second, a measure that violates national treatment by granting a preference to a local product may contravene trade law, but not human rights law, at least to the extent that the freedom of expression is allowed through the domestic product. Third, as a general matter, National treatment, with its focus on the national source of products and the nebulous concept of product "likeness",[114] is a comparative rule; the freedom of expression, in contrast, is not – it is absolute in the sense that it is applied without comparison to the treatment of others, and regardless of nationality (but not in the sense that it applies without exception or without balancing of other considerations).[115]

To see how these gaps play out in practice, consider the same book ban we discussed with respect to the prohibition on quantitative restrictions, except that now the ban is enacted not only towards imports (either internally or at the point of importation), but with a complementary and equivalent ban on domestic production and distribution of the same book. Such a ban would probably be more clearly aimed at preventing the expression embedded in the book from gaining public purchase in the territory of the restricting Member, and from a human rights perspective, it would undoubtedly be a restriction on the freedom of expression and access to information, requiring justification by the various human rights law exceptions discussed below. From a trade perspective, however, there would be, at least *prima facie*, no violation of national treatment because the same product is being granted the same (negative) regulatory treatment; neither would there be a violation of the prohibition on quantitative restrictions. This would generally be the case also with respect to goods that facilitate rather

[111] Ad note III:2 + jurisprudence.
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[113] Debates on environmental regulation as eg?
[114]
[115] But see Articles 2 ICCPR and ICESCR on non discrimination. Very different: (a) different bases of comparison; (b) if an advantage is given on expression, it is a violation of article 2, it is not necessarily a violation of article 19.

than incorporate expressions. It would also be the case with discriminatory treatment that falls short of an import ban.

Under a different scenario, if a book title were banned from local production, but not for import, there might be a restriction of human rights (particularly the right to freedom of expression accorded to domestic publishers), but trade law would have nothing to say in this respect, since there would be no restriction of imports or discrimination against foreign producers. Conversely, however, if national regulations granted a preference to domestic production, sales and distribution of the book – not as an import ban, which would be covered by the prohibition on quantitative restrictions, but as a tax preference, for example - there might be a violation of trade law, but the restriction on the freedom of expression would be minimal at worst. For example, in the *Canada – Periodicals* case, Part V.I of Canada's *Excise Act*, under which an eighty-percent excise tax was levied only on the value of foreign printed "split-run" periodicals, was found to violate Article III:2 GATT, first sentence.[116] Yet the tax involved could hardly be considered as violation of international human rights law. The tax did not prevent the expression or the reception of the advertising content, or of the editorial content of the periodicals in Canada. They might have been altered, but on the general facts it is difficult to find a specific violation og the freedom of expression or access to information in this case.

International trade lawyers, however, will quickly note that this discussion of the book ban grossly simplifies the issues by treating the foreign and domestic versions of the banned book as the only products relevant to the analysis. In practice, national treatment analysis in GATT/WTO law (and in the equivalent law of regional trade agreements)[117] depends on the scope of "like" or "directly competitive or substitutable" products, that WTO jurisprudence has likened to an accordion that "stretches and squeezes in different places".[118] The foreign-printed, restricted title is surely "like" its domestically produced version, but is it also "like", domestically manufactured editions of other book titles that are *not* restricted or banned in any way?

On one hand, at the extreme, the products whose treatment should be compared might include all books of all sorts, but this would ignore the underlying issue of substitutability and competition that informs the question of "likeness": telephone books and motorcycle maintenance manuals,[119] both printed and bound, are not in competition with each other, regardless of their place of publication, anymore than are law treatises and novels. On the other hand, the (hypothetical) ban of imports of certain books while allowing the domestic

[116] Periodicals, para. 5.30.
[117]
[118] Japan – Alcoholic beverages + footnote on likeness with basic references.
[119] Need to find dumping case on this

distribution of domestically published books of similar content but different authorship seems to enter the domain of product likeness,[120] without reverting to the quantitative restrictions framework of analysis, because the products are not the same. Yet increasing the resolution of the inquiry into likeness along these lines is a slippery slope potentially leading *ad absurdum*, to queries such as whether Voltaire and Balzac, or Shakespeare and Marlowe are "like";[121] or whether different translations of the Bible are directly competitive or substitutable. Similar difficulties arise in copyright law,[122] to be sure, but they are time-limited,[123] and rely on different tests.[124]

The established tests of product-likeness in the WTO relate to the physical product (the book, in this case), with little regard to its expressive content. These tests are tariff classification, physical properties, consumer preferences and end-uses;[125] these tests might be helpful in some narrow circumstances, at least if clear differences in consumer preferences were shown, but generally they are not appropriate for the purpose of defining categories of expression. All books of similar character or genre would be aimed at the same audiences and so might be considered "like" or at least competitive or substitutable; any finding more general or more narrow would raise questions requiring the evaluation of the contents of the products. It is no surprise that the *Canada-Periodicals* panel, in comparing imported "split-run" periodicals and domestic non-"split-run" periodicals for the purpose of determining "likeness", made clear that it was not its mandate to consider the likeness of "periodicals in general".[126] In that case, however, the panel could fall back on a market distinction that did not relate to the substantive content of the foreign and domestic periodicals, but that is a luxury not enjoyed in most expression related distinctions. If one is to seriously pursue the path of likeness in comparing foreign and domestic expressive products, reference to their content is required.[127]

For present purposes – the examination of the extent of confluence between human rights and international trade regulation with respect to the freedom of expression - there is no

[120] This hypothetical borders on copyright protection, but can also be viewed from a national treatment perspective. Consider, for example, the case of 'The Adventurous Prince', a book of Chinese authorship (by Zhou Yiwen) intended for Chinese readership, but reportedly accused of bearing a strong resemblance to JK Rowlings' Harry Potter novels (http://english.people.com.cn/90001/90782/90873/6680948.html). While this is clearly a copyright issue, had Harry Potter been banned in China, but the Adventurous Prince permitted, regardless of the copyright question, the similarity between the works could be the basis for a national treatment claim, especially if Harry Potter books were mainly imported, while Adventurous Prince books were mainly printed locally.

[121] Mention claims that Shakespeare and Marlowe are the same

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[125] Japan – Alcoholic etc..

[126] *See* Periodicals 5.22.

[127] Literature on cultural products – Wunsch-Vincent, Tania Voon, my article on GIs

need, however, to pronounce on these difficult content-related questions. What emerges is that where different books or other expressive products are similar enough for national treatment requirements to apply clearly – a thorny enough exercise if the products are not simply identical - trade law might in theory be useful in promoting the freedom of expression of some authors as well as foreign publishers. However, several paradoxes reduce the potential human-rights effect of this seeming confluence. Most clearly, none of the substantive distinctions that inform the question of product likeness matter at all as far as human rights law is concerned. Subject to specific exceptions, a book ban is a restriction of the freedom of expression, regardless of the book's similarity or dissimilarity to other expressions, whatever its comparative basis or scope. Furthermore, the more similar the domestic and foreign expressive products are to each other (and hence, the greater the potential for applying national treatment rules), the smaller the ban's restrictive effect on the freedom of expression and access to information. The same expression and information would be available on both the market and the 'marketplace of ideas'. The outstanding question would be who is entitled to make the expression public. As such, the restriction and its removal would be more closely associated with commercial competition, and intellectual property rights, which could themselves restrict the freedom of expression.[128]

In general, the national treatment requirements of international trade law have little direct impact on the freedom of expression, if any. They clearly promote only foreign-produced physical products that embed or facilitate expression; they rely on substantive tests that are much more detailed than those of human rights law, and are irrelevant to substantive human rights, such as the "like product" test; and when they do apply, the upshot is that they have no appreciable effect on human rights. In some cases a trade cause might parallel a human rights one, but there is little basis to claim consistent substantive confluence.

Other Trade Rules: The prohibition of quantitative restrictions and the national treatment principle are the most important international trade rules that might apply in instances affecting the freedom of expression, but there are others, and we will mention them briefly here. The most-favoured nation principle holds pride of place in international trade law – literally - enshrined in Article I GATT.[129] As a non-discrimination rule it is functionally very similar to the national treatment principle, protecting the equal treatment of imports of different sources of products.[130] It also relies on the "likeness" of products.[131] This means that when the product in question is an expressive good, it can at most protect expressions of one foreign source from the competition posed by other foreign sources. In such cases, there

[128] For example,.
[129]
[130]
[131] Article I:1 GATT; jurisprudence.

might be a restriction of the freedom of speech of some authors, but if the products are not "similar or directly competitive or substitutable", at least, trade law could even hypothetically have no effect on the freedom of speech.

Technical Barriers to Trade, notification TRIMS, GPA

- *Non-Violation Complaint*

Trade in Services and the Freedom of Expression

If the boundaries between free trade in goods and the human right of free speech remain unclear, they become even more tortuous with respect to trade in services.

As in trade in goods, restrictions on free speech, the right of access to information and the right to participation in cultural life can give rise to barriers to trade in services in many ways – and vice versa. The most celebrated propositions in this respect relate to internet filtering, as set out in some detail by Wu[132] and by others,[133] to the point that The general claim is that the removal of measures inconsistent with the law of the WTO's General Agreement on Trade in Services (GATS)[134] can lead to an expansion of the rights of free speech. In the present context, this position certainly has its merits but suffers from significant qualifications. Indeed, from the outset Wu seems to have recognized one aspect of this when he wrote that "[L]eaving censorship aside, it is also true that some Internet filtering, like the blocking of Internet-based telephony discussed within, seems to have little to do with political control and much more to do with the protection of domestic incumbents".[135] In other words, as is part of our argument here, like in the area of trade in goods, the law on the liberalization of trade in services can at best promote the market access interests of foreign service providers, that only partially overlap with general human rights concerns, and not the human rights of residents of the restrictive member; and in any case the focus is on market access and commercial non-discrimination, not freedom of expression.

One important issue – evident in trade in goods but more salient in services – is that there are gaps between the beneficiaries of GATS, on one hand, and the ultimate beneficiaries of the freedom of speech. In many potential cases, the service that might benefit from GATS law (albeit indirectly, since the direct right-holder is of course the service-exporting WTO

[132] Tim Wu, The World Trade Law of Censorship and Internet Filtering, 7 Chicago Journal of International Law (2006) 263).
[133] For an early reference see Mary C. Rundle, "Beyond Internet Governance: The Emerging International Framework for Governing the Networked World", Berkman Center Research Publication No. 2002-16 (December 13, 2005), available at http://www.ssrn.com/abstract=870059. See also Marion Panizzon, "How Human Rights Violations Nullify and Impair GATS Commitments:, in Marion Panizzon, Nicole Pohl and Pierre Suavé, GATS and the Regulation of International Trade in Services: World Trade Forum (Cambridge, Cambridge University Press, 2008) 534.
[134]
[135]

Member) is in fact only a carrier or facilitator of information or expression, rather than their generator. For example, in the case of internet filtering, the GATS-protected service providers are Internet Service Providers (ISPs) or search engines (e.g., Google.cn).[136] Such entities should generally enjoy the freedom of speech (although perhaps to reduced extent), like the radio broadcasters in the ECHR cases mentioned above,[137] but may not enjoy the freedom to participate in cultural life insofar as it is restricted to natural persons. However, in many cases, the actual initiator of expressions that should be protected under human rights law, i.e., the authors of ideas and opinions, will not directly benefit from GATS.[138] Even more clearly, the public at large as a beneficiary of the freedom of access to information can be understood as a beneficiary of services liberalization only in the most indirect of senses.[139] Both the authors and the audience would be dependent on the media. So, while GATS might be capable of promoting the free speech rights of some economic actors, differences of both economic interests and opinions would leave some erstwhile beneficiaries of human rights law unprotected, and one cannot say that the regimes overlap perfectly in their coverage *ad personam*.

In any case, for the purpose of market access and national treatment claims, an analysis of a speech-related services restriction would first require that the restricting WTO Member will have made specific commitments in a relevant services sector and in relevant modes of service supply, in its schedule of specific commitments. Thus, in the typical internet-related claims, a specific market access and/or national treatment commitment in Mode 1 (cross-border supply) would be required, while in other claims relating to commercial activity in the importing market itself, commitments in Modes 3 (commercial presence) and/or 4 (temporary presence of natural persons) would be required. These requirements create an obvious discrepancy with free speech obligations, which would apply generally, "regardless of frontiers", and in any form. The boundaries and overlaps between free speech and free trade would therefore depend upon the specific commitments of WTO Members.[140]

Let us assume a case in which specific commitments do apply. If the service-importing WTO Member discriminates against the foreign service provider, for example, by permitting certain content to be provided only by domestic service providers, a national treatment claim may attach. However, not unlike the case of discrimination in goods, the

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[136] For analysis, see Panizzon __.

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[138] This is not always true: in some cases, the freedom of speech of the service-provider itself might be at issue, for example, a theatrical entertainment service provider whose act had been banned, or an educational service that has been barred from an export market.

[139] Section 301 panel reference.

[140] In principle this is true in trade in goods as well, with Members' openness to the freedom of expression potentially defined by tariff schedules and taxation, but in terms of commitments rather than autonomous regulation, this fragmentation is more manifest in the area of services commitments.

freedom of speech and access to information are only incidentally affected, to the extent that the same content is available in the domestic market. It would only be the freedom of speech of the commercial carrier that is restricted. As for market access claims, although WTO jurisprudence has not been entirely clear on the bounds of market access commitments,[141] there is good cause to argue that if the grounds for the restrictions are qualitative rather than quantitative, the market access commitment will not avail.[142] In that case, the question would rather be one of domestic regulation under Article VI GATS, with its commensurate requirements of transparency and administrative propriety. There is no reason to assume that a system of government censorship that abuses freedom of speech could not conform to these requirements. Moreover, the legal conditions for enacting free speech, on one hand, and free trade in services, on the other, would be very different.

As in trade in goods, much of this analysis would ultimately hinge on the application of exceptions under Article XIV GATS. These would similarly include public morals (and also public order, however limited to cases in which there is "a genuine and sufficiently serious threat posed to one of the fundamental interests of society"),[143] the securing of compliance with other laws or regulations – which may include censorship laws (Article XIV(c) GATS) – and measures taken in times of war or other emergency in international relations for the protection of essential security interests (Article XIV bis (1)(b)(iii)). Generally, the same paradoxes noted above with respect to goods will appear with respect to services.h

Structural restrictions on broadcasting, press, media as expression problems as well as market

d) Exceptions

The freedom of expression and its associated rights are not absolute. The IICPR itself, in Article 20, requires propaganda for war, as well as "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence", to be prohibited by law. Furthermore, the exercise of the rights found in Article 19(2) ICCPR "carries with it special duties and responsibilities" and may be subject to restrictions that conform to Article 19(3) ICCPR; but as the Committee stated in its General Comment 10, “when a State party imposes certain restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself.”[144].

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[141] Gambling
[142] Pauwelyn WTR
[143] Footnote 5 to Article XIV GATS.
144 *Human Rights Committee*, General Comment 10, Article 19 (Nineteenth session, 1983), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 11 (1994), para. 4.

Any such interference in the right must be prescribed by law, serve one of the listed purposes and be necessary to reach that purpose. The necessity requirement implies a proportionality test, so that the burden on an individual resulting from a governmental restriction must be proportional to the purpose sought to be obtained by the restrictive measure.[145]

In *Tae Hoon Park v. Republic of Korea,* the UNCHR scrutinized a case where the complainant allegedly had been penalized following conviction for crimes related to participation in protests against government policy.[146] The UNCHR noted that any restriction on the freedom of expression "must meet a strict test of justification." Even though the Government argued that the measures were justified on the grounds of national security, the Committee observed that it must still determine whether the measures were necessary for that purpose. Upon making such determination, it held that the Government "failed to specify the precise nature of the threat which it contends that the [complainant's] exercise of freedom of expression posed and finds that none of the arguments advanced by the State party suffice to render the restriction of [his] right to freedom of expression compatible with paragraph 3 of article 19."[147]

Similarly, in *Kivenmaa v. Finland* the Committee held that police removal of a banner critical of the human rights situation in the country of a visiting head of state, was not shown to be necessary under Article 19 (3).[148] In a separate opinion in *Faurisson v. France*, several members of the Committee pointed out that not only must restrictions be necessary to protect the rights of others, but be "necessary to protect the given value.

Restrictions justified for the purpose of the public order (*ordre public*) exception of Article 19(3) have generally not been successful before the Committee. In several cases against, *inter alia*, Uruguay, Zaire and Korea the Committee has concluded that there is a violation of Article 19(2) ICCPR without any detailed analysis of the public order justification provided by the Governments.[149] According to Nowak, the facts in these cases

145 NOWAK, *supra,* n. 1, 460.

146 *Tae Hoon Park v. Republic of Korea*, Communication 628/1995, Views of the Human Rights Committee, adopted 20 October 1998.

147 Ibid, para. 10.3

148 *Kivemaa v Finland*, Communication 412/1990, Views of the Human Rights Committee, adopted 31 March 1994. A dissenting opinion by Mr. Kurt Herndl argued that the applicable provision was not Article 19, but Article 21 of the Covenant. In his opinion, Article 21 was *lex specialis* in the case of demonstrations and therefore trumped Article 19. He found no violation of Article 21 and that if the Committee had found no violation of Article 21, it would hardly have found a violation of Article 19.

149 See for instance, *Weinberger v. Uruguay*, Communiation 28/1978, para. 17; *Muteba v Zaire* Communication no. 124/1982, para. 12 and *Kim v. Republic of Korea*, Communication no. 574/1994, para. 12.2-13. Further references can be found in NOWAK, *supra*, n. 1, 450.

"were so obvious that any balancing of interests seemed moot."[150]

Concerning public morals, the UNCHR observed in *Hertzberg et al. v. Finland* that the content of this concept "differ widely. There is no universally applicable common standard. Consequently, in this respect, a certain margin of discretion must be accorded to the responsible national authorities".[151] In that case, this margin of discretion meant that the general prohibition by a public broadcasting entity on programs about homosexuality was not a violation of Article 19(3) ICCPR.

On the side of the person expressing ideas or information, Article 19(3) ICCPR underlines that this right also entails duties and responsibilities. Presumably, this is meant to emphasize that the right to express one's opinion may have an impact on the rights of others, notably the right to privacy. It seems unclear what, if any, practical, legal implications follows from the phrase as far as the relationship between private individuals is concerned, because a balancing test between two rights then is required in any case. For public entities providing information, this phrase means that they have a "special responsibility to inform the public in an objective, impartial and balanced manner and to provide small groups within the population with the possibility of making use of" such entities.[152]

Another form of exception to the freedom of expression and the freedom of access to information is the derogation under Article 4(1) ICCPR that may apply "[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed".[153]

The ECHR contains similar (though not identical) exceptions (Article 10(2)) and emergency derogations (Article 15).

The rights to participate in cultural life under the ICESCR may be limited by law "only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society" (Article 4 ICESCR).

restrictions

GATT exceptions might still apply. It is at this point that a paradox emerges for the idea that free trade can break down restrictions on speech that violate human rights. The greater the differences – such as political views - between the prohibited and permitted products, the greater the differences in properties, nature, end uses in the market, consumers'

150 Ibid.
151 *Hertzberg et al v. Finland*, Communication 61/1979, adopted 2 April 1982, para. 10.3.
152 Ibid, 460.
153 See Cordula Droege, The Interplay between International Humanitarian Law and International Human Rights law in Situations of Armed Conflict, 40(2) Israel Law Review 310 (2007). Article 19 is not one of the ICCPR provisions to which the derogation does not apply under Article 4(2) ICCPR.

tastes and habits and even tariff classification,[154] making it less likely for the prohibited product to benefit from likeness.[155]

Once again the discussion would shift to the realm of exceptions, and here a similar, more acute, paradox would arise. The more the restriction is based on political/public-morals/security exceptions, rather than trade-protectionist goals, the greater the likelihood that the relevant exception would apply; and the more the restriction would be justifiable under the *chapeau* of Art. XX GATT, and hence, would not benefit from trade law**.** All this is not to say that there would not be cases in which the provision of trade-law based rights with respect to a particular good would enhance the freedom of speech; only that market access and national treatment rights would apply to different expressions differentially, and in fact would possibly apply least effectively to politically controversial expressions whether they enjoy human rights protection or not. In short, while the law of trade in goods and the international law of free speech may overlap, their boundaries are very different.

Other differences between trade law and human rights law arise with respect to the identity and status of the holder of the protected right. Most obviously, in international trade the rights are allotted to states, with as opposed to individual or corporate legal persons, whereas freedom of speech is the right of the latter (with some uncertainty regarding the application of the freedom to legal persons). A further distinction that might cause discrepancies between the fields of law arises between the authors of expressions and the carriers of expressions, whose rights may benefit differently under either human rights law or the international law of trade in goods. In another vein, there is also the distinction between bearers of the freedom of speech, on one hand, and the freedom to seek information, on the other hand; the former would normally have stronger rights (albeit indirectly) through international trade law, than the latter.

One striking aspect of this analysis is that from a trade-in-goods perspective, it might not really matter what would be the nationality of either the author or the public whose freedom is being restricted. That is, a banned book written by a local author, published by a foreign publisher, would not benefit from trade law anymore or any less than a banned book by a foreign author. Or, imagine a regulation that permitted the sale of an otherwise forbidden book in the territory of the importing WTO Member, but to foreign nationals only. From a trade perspective, this might constitute a quantitative restiction, but a public morals/order exception might apply, and indeed the measure is less restrictive than an alternative measure that would ban the sale of the book altogether.

[154] Japan – Alc etc

[155] Setting aside the example of like books, consider, for example, a red lapel-pin, whose importation and local production is prohibited because of its political association with a censored cause, compared to a green lapel-pin, that is freely available _____.

IV. INTERNATIONAL INTELLECTUAL PROPERTY LAW AND THE INTERNATIONAL HUMAN RIGHT TO FREE SPEECH

a) History and Parameters of the Problem

We will now discuss the interplay between international copyright law and the international protection of freedom of expression. We will show that while the two areas of law are factually intertwined – in a complex relationship of mutual reinforcement and conflict, the two legal regimes on the international level are oblivious to each other.

The traditional view used to be that copyright furthers free speech, to a large extent eliminating the need to be aware that there are two separate regimes. Even though it was referring to U.S. Copyright law, the statement of the U.S. Supreme Court is symptomatic that copyright is intended "to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas".[156] Many authors have supported this position of the Supreme Court.[157] They point to one of the rationales of copyright law, namely that it provides incentives for authors to publish their works – thus limiting some speech to produce more speech,[158] but also to the so-called "idea/expression dichotomy".[159] According to that principle, contained in Art. 9.2 of the TRIPS Agreement, copyright protects only expressions, not ideas themselves. Thus, copyright law can prevent people from copying a book on an accounting method, but not from using the method.

But a more thorough examination of the relationship between copyright law and free speech suggests that copyright law is mostly neutral towards free speech – and while its incentive function can have a positive impact on free speech, the exclusive rights granted by copyright can have just as much of a negative impact. We will illustrate the difficult relationship between copyright and free speech by pointing to history and discussing

[156] *Harper & Row, Publishers v Nation Enterprises*, 471 U.S. 539, 558 (1985); *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003). Note that the foundation of the civil law *Urheberrecht* or *droit d'auteur*, the protection of the author (see e.g. Möhring/Nicolini, UrhG, 2. Aufl. 2000, § 1 Rdn. 1, also at first sight seems to provide an incentive rather than a disincentive towards free speech.
[157] Melville B. Nimmer, Does Copyright Abridge the First Amendment Guarantee of Free Speech and Free Press?, 17 UCLA L. Rev. 1180, 1186-1189 (1970). As pointed out by Larry Lessig, though, it is the Supreme Court that supported Nimmer, rather than the other way around. Lawrence Lessig, Copyright's First Amendment, 48 UCLA L. Rev. 1057, 1059 (2001).
[158] Lawrence Lessig, Copyright's First Amendment, 48 UCLA L. Rev. 1057, 1059 (2001).
[159] *Harper & Row, Publishers v Nation Enterprises*, 471 U.S. 539, 556 (1985) referring to *New York Times v. United States*, 403 U.S. 713, 726 footnote (Brennan, J., concurring). See also Herman Cohen Jehoram, Urheberrecht und Freiheit der Meinungsäußerung, Rechtsmissbrauch und Standardschikane, Grur Int. 2004, 96, 98. It should be noted that according to the "merger doctrine" when idea and expression merge there is no protection.

balancing mechanism contained in copyright law as well as pointing to recent developments in copyright law.

History offers a first glance of what is in reality a deeply intertwined relationship: copyright in Common Law systems dates back to "stationer's copyright", developed in the 16th Century by the "stationers", i.e. members of the book trade (publishers, printers and bookbinders but not authors), as a right granted to a member of the trade entitling that member to prevent unauthorized printing of a work.[160] The stationers entered into a complex, but profitable relationship with the government: they eagerly sought to protect their monopoly on the book trade and printing – and the government, while indifferent to questions of ownership of copyright, equally eagerly turned to the members of the book trade to police the press.[161] The incorporation of the stationers in 1557 by a royal charter for the "Company of Stationers of London"[162] itself already illustrates the relationship, as the foundation of the Company and its endowment with an almost complete monopoly over printing was, according to the preamble to the charter, a means against seditious and heretical publications, i.e. an act in the fight by Mary and Philip II of Spain to restore the Roman Catholic religion in England.[163] The stationers lobbied for stronger censorship regulations to enhance their monopoly[164] and succeeded exceptionally well, obtaining the power to search and seize unlawful books in an alliance of copyright and censorship interests.[165] Not until 1709 with the Statute of Anne did the system start to change – away from rights granted to publishers towards rights granted to authors, away from unlimited rights towards rights limited in time, away from rights granted for any book to rights granted for newly authored books.[166]

While the dubious origin of copyright law can be considered a thing of the past,[167] the relationship between copyright and free speech has not, over night, turned into an entirely harmonious one. The reason for this is quite obvious: copyright grants authors, amongst others, the exclusive right, in the words of the Berne Convention, "of authorizing the reproduction of [their literary and artistic works protected by the Convention], in any manner

[160] Id. 42-44
[161] Id., 21.
[162] Lyman Ray Patterson, Copyright in Historical Perspective, 1968, 28.
[163] Id., 29, 32.
[164] Id. 114-115.
[165] Such powers were granted by the Star Chamber Decree of 1586 that also prohibited, with few exceptions, printing of unlicensed (i.e. unauthorized by censors) matters (id. 115-118, 51-55). The regulations became stricter with the Star Chamber Decree of 1637 abolished in 1641 and restored with minor changes in the Licensing Act in 1662 that expired at the end of the 17th century (id. 119-125, 134-138).
[166] Id. 143; Pamela Samuelson, Copyright and Freedom of Expression in Historical Perspective, 10 J. Intell. Prop. L. 319, 324-325 (2003).
[167] Herman Cohen Jehoram, Urheberrecht und Freiheit der Meinungsäußerung, Rechtsmissbrauch und Standardschikane, Grur Int. 2004, 96, 97.

or form".[168] "Infringing copies of a work shall be liable to seizure in any country of the Union [formed by the Berne Convention] where the work enjoys legal protection."[169] Authors are thus endowed with the power to control the circulation (with respect to the first sale) of their work – and can, if the conditions are fulfilled, make use of enforcement procedures guaranteed in Part III of the TRIPS Agreement. The implication clearly is that the freedom to copy an author's work ends where the author's exclusive right starts.

One could now argue that copying, distributing and broadcasting the idea of someone else should not be protected by the freedom of expression – after all, these acts are not about pronouncing one's own ideas, but someone else's.[170] But we have pointed out already that this argument is not the view accepted in international human rights law: the freedom of expression also protects the carrier of someone else's speech. One could also argue – with the U.S. Supreme Court in *Harper & Row*[171] – that the idea/expression dichotomy allows the carrier of a message to convey the idea in a different expression and hence does not infringe the freedom of expression. But the idea/expression dichotomy should not veil the fact that copyright law prevents the carrier of the message from using the precise expression it wants to use – the copied one. Indeed, copyright also extends to making adaptations or producing derivative works, which seems to reduce part of the freedom granted by the dichotomy. We can thus argue that to some extent, the domains of freedom of speech and copyright border on one other.[172] Some examples may help to illustrate the point. Thus, the Soviet Union made use of copyright law to silence critics.[173] Germans have a hard time studying the dangerously deranged ideas of Hitler's "Mein Kampf" first hand, as the book is not available in German bookstores. Despite prevailing rumors to the contrary this is not because of a legal ban, but because the Bavarian Chancellary holds the copyright and does not allow a new publication of the text in Germany.[174] Finally, the song "Happy Birthday to You", almost never absent

[168] Art. 9.1 Berne Convention.
[169] Art. 16 Berne Convention.
[170] In *Eldred v. Ashcroft*, Justice Ginsburg argued for the Court: "[The First Amendment] bears less heavily when speakers assert the right to make other people's speeches." 537 U.S. 186, 221 (2003).
[171] *Harper & Row, Publishers v Nation Enterprises*, 471 U.S. 539, 556 (1985).
[172] The Supreme Court seems to agree with this statement. Justice Ginsburg writing for the majority in Eldred v. Ashcroft: "We recognize that the D.C. Circuit spoke too broadly when it declared copyrights 'categorically immune from challenges under the First Amendmet'." 537 U.S. 186, 221 (2003).
[173] Herman Cohen Jehoram, Urheberrecht und Freiheit der Meinungsäußerung, Rechtsmissbrauch und Standardschikane, Grur Int. 2004, 96, 97.
[174] Hitler's estate was condemned by court order and transferred to the State of Bavaria. The publishing right, which had been transferred to the NSDAP publisher, was transferred to Bavaria with the dissolution of the publisher. Since then, Bavaria has been engaged in an active campaign to prevent the publication of the book. Walter Seitz, Das Wagnis der Freiheit – Weshalb darf Deutschland Hitler's "Mein Kampf" nicht lesen?, NJW 2002, 572.

from a birthday party, is also still under copyright protection, so be careful before posting your personal birthday video on YouTube.[175]

National lawmakers have not been oblivious to the fact that copyright law borders on free speech and hence national copyright law contains mechanisms to protect free speech, as pointed out by the Supreme Court in *Eldred v. Ashcroft*.[176] Countries have developed different mechanisms in addition to the already mentioned idea/expression dichotomy to take free speech interests into account, e.g. by permitting news clips or, in the U.S., by way of the so-called "fair use" defense.[177] However, recent developments have increased the threat copyright law poses to free speech. Pamela Samuelson lists a number of changes that put modern copyright law dangerously close to its ancient precedent, the "stationer's copyright". Among these changes is the increasing concentration of creative industries, putting authors at a disadvantage in their negotiation with publishers.[178] Possibly even more threatening is the extension of copyright protection by providing for longer copyright terms,[179] by protecting digital rights management technology for works in the public domain as well as an attack on balancing public rights such as fair use.[180]

b) The WTO/TRIPS Dimension

Free speech and copyright law are thus deeply intertwined in terms of their effects on each other. How does the international copyright system under the WTO deal with this

[175] The copyright status of the song is somewhat questionable. Thomas Hoeren, Happy Bithday to You: Urheberrechtliche Fragen rund um ein Geburtstagsständchen, in: Klaus Peter Berger (ed.), Festschrift für Otto Sandrock, 357 (2000); Robert Brauneis, Copyright and the World's Most Popular Song, GWU Legal Studies Research Paper No. 1111624 (2008). Note that Justice Breyer lists a number of examples of dubious effects of copyright law in his dissenting opinion in Eldred v. Ashcroft, 537 U.S. 186, 250-251 (2003).

[176] Again, of course, this decision stems from the U.S. not the international context, but it illustrates national attempts to achieve a balance. *Eldred v. Ashcroft*, 537 U.S. 186, 218 (2003). Justice Breyer writes in his dissent: "The Copyright Clause and the First Amendment seek related objectives – the creation and dissemination of information. When working in tandem, these provisions mutually reinforce each other, the first serving as an 'engine of free expression,' (…) the second assuring that government throw up no obstacle to its dissemination. At the same time, a particular statute that exceeds proper Copyright Clause bounds may set Clause and Amendment at cross-purposes, thereby depriving the public of the speech-related benefits that the Founders, through both, have promised." Id., at 244.

[177] *Eldred v. Ashcroft*, 537 U.S. 186, 218 (2003). See e.g. 17 U.S.C. §§ 107-121; Pamela Samuelson, Copyright and Freedom of Expression in Historical Perspective, 10 J. Intell. Prop. L. 319, 320 (2003); Paul Goldstein, Copyright and the First Amendment, 70 Colum. L. Rev. 983, 1011-1015, 1017-1022; Robert C. Denicola, Copyright and Free Speech: Constitutional Limitations on the Protection of Expression, 67 Cal. L. Rev. 283 (1979).

[178] Pamela Samuelson, Copyright and Freedom of Expression in Historical Perspective, 10 J. Intell. Prop. L. 319, 327 (2003).

[179] This was the subject of *Eldred v. Ashcroft*, 537 U.S. 186 (2003), see Lawrence Lessig, Copyright's First Amendment, 48 UCLA L. Rev. 1057, 1065-1072 (2001).

[180] Pamela Samuelson, Copyright and Freedom of Expression in Historical Perspective, 10 J. Intell. Prop. L. 319, 329-332 (2003).

relationship besides incorporating the idea/expression dichotomy? We will see that while the system provides for some flexibility, this flexibility is not targeted at free speech interests, making the system oblivious to those concerns. Besides some specific exceptions, Art. 9.2 of the Berne Convention allows countries to "permit the reproduction of … works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author." Art. 13 of the TRIPS Agreement somewhat differently states that WTO Members "shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder." While the precise relationship between the two provisions and their precise scope is unclear, it is clear that Art. 13 of the TRIPS Agreement subjects limitations to the exclusive rights granted by copyright law to a three-step test.[181] The only case brought under the provision so far has in a solomonic manner upheld part and struck down part of a provision under US Copyright law exempting private homes and certain business from the obligation to pay royalties on some copyrighted music.[182] It is far from certain what exactly this will mean for the interpretation of Art. 13 TRIPS Agreement, but it does indubitably mean one thing: countries' liberty to provide for exceptions from copyright law is limited. And it is essential to realize that Art. 13 does not explicitly list free speech as a criterion permitting an exception.

Thus, even though free speech and copyright law are closely intertwined, the international copyright regime is oblivious to the international human rights regime of the freedom of expression. Consequently, there is some debate on the extent to which international law permits the balance between free speech and copyright law struck in national systems.[183]

But the lack of connection between the two regimes, the "neutrality" of international copyright law towards free speech, can be demonstrated even more clearly. Suppose that state X exercises the most classic of all limitations of free speech: a system of strict censorship. There is nothing in copyright law under the TRIPS Agreement or the provisions of the Berne Convention (1971)[184] integrated by reference by Art. 9.1 TRIPS Agreement that prevents state

[181] See on the provision Carlos M. Correa, Trade Related Aspects of Intellectual Property Rights, 134 - 155 (2007).
[182] US – Section 110(5) Copyright Act, WT/DS160/R.
[183] See discussions in Eric Smith, Worldwide Copyright Protection Under the TRIPS Agreement, 29 Vand. J. Transnat'l L. 559, 577-78 (1996), Pamela Samuelson, The U.S. Digital Agenda at WIPO, 37 Va. J. Int'l L. 369, 398-409 (1997).
[184] The Berne Convention for the Protection of Literary and Artistic Works was originally adopted on September 9, 1886 and has been revised several times, with the first major revision dating back to 1908 in Berlin and then in Rome in 1928, Brussels in 1948, Stockholm in 1967 and Paris in 1971. It is this latter version that the TRIPS Agreement has integrated, UNTS 1161, 30.

X from doing so. Quite to the contrary. The Berne Convention may demand protection of works listed non-exhaustively in Article 2,[185] but as long as copyrights with the relevant rights are granted to the works, there is nothing in those provisions preventing the censorship of the work. That is so, because copyright, much like other intellectual property rights, grants only negative and not positive rights.[186] Thus, authors may have the exclusive right of prohibiting or authorizing the reproduction of their work,[187] but copyright does not allow authors to publish their work. In fact, Art. 17 Berne Convention clarifies this point by stating the "provisions of this Convention cannot in any way affect the right of the Government of each country of the Union [for the protection of the rights of authors formed by the States Parties to the Convention] to permit, to control, or to prohibit, by legislation or regulation, the circulation, presentation, or exhibition of any work or production in regard to which the competent authority may find it necessary to exercise that right." The fact that this provision permits censorship is generaly uncontested.[188]

Moreover, copyright law is connected to yet another human rights provision we have mentioned: Art. 15(1)(c) ICESCR. That provision protects an author's moral and material interests resulting from any scientific, literary or artistic production of which he is the author. It has been a subject of some debate, which segments of modern intellectual property law are protected by this provision (with copyright generally being regarded as protected). However, the Committee on Economic, Social and Cultural Rights clarified the relationship between the provision and modern day intellectual property law, by pointing out that the provision is a human right, protecting individuals – literally the author's interests – and is not meant, in fact has little to do, with modern-day intellectual property law. The Committee thus clarified that

[185] For more see WIPO Intellectual Property Handbook: Policy, Law and Use, 2nd. ed. 2004, paras. 5.171 et seq.

[186] See to this effect e.g. EC – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs (USA), WT/DS174/R, para. 7.210 "the TRIPS Agreement does not generally provide for the grant of positive rights to exploit or use certain subject matter, but rather provides for the grant of negative rights to prevent certain acts. This fundamental feature of intellectual property protection inherently grants Members freedom to pursue legitimate public policy objectives since many measures to attain those public policy objectives lie outside the scope of intellectual property rights and do not require an exception under the TRIPS Agreement."; WIPO, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore. Preliminary Systematic Analysis of National Experiences with the Legal Protection of Expressions of Folklore, WIPO/GRTKF/IC/4/3, para. 68.

[187] Art. 9 (1) Berne Convention.

[188] The U.S. conceded as much in its recent challenge of Chinese copyright law that will be discussed in more depth *infra*, when stating that the alleged violations of the TRIPS Agreement "do not arise because China prohibits certain works from being published or distributed in China. The TRIPS Agreement does not obligate China, or any other WTO Member, to permit all works to be published and all works to be distributed." China – Measure Affecting the Protection and Enforcement of Intellectual Property Rights, First Submission of the United States of America, WT/DS362, para. 207. The Panel equally pointed out that its findings "do not affect China's right to conduct content review." *China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/R, para. 7.144. See also WIPO, Guide to the Berne Convention for the Protection of Literary and Artistic Works, 1978, paras. 17.2-3.

intellectual property law can be a tool for promoting the human right, but the regulations are not identical and, indeed, modern intellectual property law with its provisions for commercialization is at times entirely detached from the human rights provision. However, it is probably fair to say that many aspects of copyright law unequivocally promote the value of Article 15(1)(c) ICESCR. Nevertheless in practice the human rights protection of the author's interests has – to our knowledge – never featured in copyright litigation.[189]

V. CONFLUENCE IN ACTION? THE IMPACT OF WTO CASES ON THE FREEDOM OF SPEECH

a) Case Study: The Chinese Copyright Enforcement Dispute

The third claim made by the US in *China–Measures Affecting the Protection and Enforcement of Intellectual Property Rights*[190] is curiously illustrative of the difficult factual relationship between copyright and free speech and the lack of connection between the two international legal regimes. The case is part of the U.S.' attempt to force China to strengthen its protection of intellectual property rights. The U.S. challenged three separate features of Chinese intellectual property law: its thresholds for criminal prosecution of IP infringement,[191] its measures for disposing of confiscated goods infringing IP rights[192] and the denial of copyright and related rights protection and enforcement to works not yet authorized for publication or distribution within China.[193] It is this third claim that is of interest to us in the present context. The factual background can be summarized as follows: Article 4 of the Chinese Copyright Law denies copyright protection to works the publication or distribution of which is prohibited by law. The publication or distribution of works is commonly prohibited and copyright protection therefore denied in relationship to China's censorship system. The U.S. listed a number of categories of works subject to this denial of protection, namely works that are not submitted for content review under Chinese censorship rules, works that have been rejected under the review, works that have not yet completed the review process (that can be a few months' long) and works that had to be changed due to content review – resulting in the original work not being protected.[194] The WTO Panel ruled that the U.S. failed

[189] Note that
[190] WT/DS362/R. The Panel treats the US' third claim first.
[191] WT/DS362/R, paras. 7.396 – 7.682, the Panel rejected this challenge.
[192] WT/DS362/R, paras. 7.193 – 7.395, the Panel rejected the challenge to a large extent, but the U.S. prevailed on one aspect relating to custom's ordering the auctioning of counterfeit trademark goods after merely removing the unlawfully affixed trademark.
[193] WT/DS362/R, paras. 7.1 – 7.192; China – Measure Affecting the Protection and Enforcement of Intellectual Property Rights, First Submission of the United States of America, WT/DS362.
[194] The U.S. submitted a number of different laws and regulations prohibiting publication or distribution. See China – Measure Affecting the Protection and Enforcement of Intellectual Property

to make a *prima facie* case with respect to works never submitted for content review, works awaiting the result of content review and unedited works for which an edited version has been approved for distribution in China. However, the Panel found that protection was denied to works that failed content review and deleted portions of works edited for content review.[195]

The U.S. alleged that this denial of copyright protection violates, amongst others, China's obligations under Art. 9.1 of the TRIPS Agreement in connection with Art. 5(1) the Berne Convention.[196] Its argument was that the Berne Convention demands that authors "enjoy, in respect of works for which they are protected under this Convention (…), (…) the rights specially granted by this Convention"[197] and that the Chinese law denied immediate, automatic protection to certain works. The Convention does – still according to the U.S. – not allow for an exception for works the distribution of which is illegal.[198] China raised a number of defenses, amongst them that Art. 4 only denied "copyright protection" and not copyright.[199] The Panel correctly dismissed this argument, as it is difficult to see what remains of copyright if all protection is denied.[200]

China's most convincing legal defense was an appeal to its right to conduct censorship under Art. 17 of the Berne Convention.[201] There is some scholarly support for the position that the provision allows WTO Members to deny copyright protection to works for reasons of the *ordre public*.[202] The U.S., on the other hand, argued that Art. 17 Berne

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Rights, First Submission of the United States of America, WT/DS362, paras. 62-85, 198; WT/DS362/R, paras. 7.73 – 7.74

[195] WT/DS362/R, para. 7.103. Note also paras. 7.118-119.

[196] China – Measure Affecting the Protection and Enforcement of Intellectual Property Rights, First Submission of the United States of America, WT/DS362, paras. 205-206. The US raised a number of additional legal provisions – receiving different responses from the Panel. However, they are of little interest for our purposes.

[197] Art. 5(1) Berne Convention. It also raised a claim under the national treatment part, but the claim was not pursued. WT/DS362/R, para. 7.106.

[198] China – Measure Affecting the Protection and Enforcement of Intellectual Property Rights, First Submission of the United States of America, WT/DS362, paras. 209-214. China's argument that the United States through its obscenity laws also extinguishes authors' rights is, as the U.S. notes in its second submission, wrong in the light of e.g. *Mitchell Brothers Film Group v. Cinema Adult Theater*, 604 F.2d 852 (5th Cir. 1979), see China – Measure Affecting the Protection and Enforcement of Intellectual Property Rights, Second Submission of the United States of America, WT/DS362, para. 195. Note however, that the U.S. does indeed deny protection to one category of work based on "illegal" content and thereby is, following the U.S. own argument, in violation of the TRIPS Agreement: 17 U.S.C. § 103 (a) denies protection for all parts of derivative works in which the original material has been used unlawfully, i.e. in breach of copyright law.

[199] WT/DS362/R, para. 7.61.

[200] WT/DS362/R, paras. 7.66 – 7.68.

[201] China – Measure Affecting the Protection and Enforcement of Intellectual Property Rights, Second Submission of the United States of America, WT/DS362, para. 221.

[202] Estelle Derclaye, Intellectual Property Rights and Global Warming, 12 Marquette Intellectual Property Law Review 263, 276 (2008); Sam Ricketson, The Berne Convention for the Protection of Literary and Artistic Works, 1987, 9.72; Sam Ricketson & Jane C. Ginsburg, International Copyright and Neighbouring Rights, The Berne Convention and Beyond, 2nd ed. 2006, para. 13.88; Kong Qingjiang, The Doctrine of *Ordre Public* and the Sino-US Coypright Dispute, SSRN.

Convention allows for censorship, but does not allow states to deny copyright protection.[203] The wording of the provision clearly supports that position. As stated it allows States "to permit, to control, or to prohibit, by legislation or regulation, the circulation, presentation, or exhibition of any work or production in regard to which the competent authority may find it necessary to exercise that right". It thus allows for a complete prohibition of a work in a country – but that does not mean that it allows for the denial of copyright. Accordingly, the Panel found in favor of the U.S. It adduced a number of arguments in favor of that position, some less convincing (e.g. that the terms "circulation, presentation or exhibition" in Art. 17 do not correspond to the substantive rights granted by the Berne Convention)[204] and some more so. One of the most convincing arguments[205] stems from the nature of intellectual property rights: they are negative rights that grant their holder power to prohibit certain acts. Intellectual property rights do not grant a right to actually use the protected product or publish the protected book. All of the policy objectives that China and some scholars adduce to justify a denial of copyright – namely prevention of any possible "threat" to public policy goals by publications – can be reached by a ban of the product.[206] Article 17 of the Berne Convention intends to confirm this principle of negative rather than positive rights. The equivalent document for patent law, the Paris Convention for the Protection of Industrial Property, dating back to 1883, contains a similar clause in its Art. 4quater which provides that the "grant of a patent shall not be refused and a patent shall not be invalidated on the ground that the sale of the patented product or of a product obtained by means of a patented process is subject to restrictions or limitations resulting from the domestic law." Thus, states can ban the product, but that does not mean they do not have to grant intellectual property protection. Granting intellectual property protection does not endanger these public policy goals, rather it furthers the states' purpose: in addition to the states enforcement power under a ban, private interests could use their legal powers under intellectual property law.

The most fascinating aspect of this dispute for present purposes is the interesting interplay between censorship and free speech in the case: The U.S. intellectual property interests would not have been harmed if China had actually enforced its censorship law

[203] WT/DS362/R, paras. 7.16 – 7.23 summarizes the arguments of the parties; China – Measure Affecting the Protection and Enforcement of Intellectual Property Rights, Second Submission of the United States of America, WT/DS362, para. 221; China – Measure Affecting the Protection and Enforcement of Intellectual Property Rights, Oral Statement of the United States of America at the Second Substantive Meeting of the Panel, paras. 71-74.
[204] WT/DS362/R, para. 7.127.
[205] The Panel seems to adduce this argument in para. 7.133, although somewhat obscurely.
[206] The Panel pointed out that the second sentence of Art. 4 of the Chinese Copyright Law obliging copyright owners to abide by the constitution, laws and public interest also addressed China's public policy concerns. WT/DS362/R, para. 7.129.

efficiently.[207] Far from pitting copyright and censorship against each other, in the case the interests were actually factually aligned. We do not argue that this always has to be the case, nor do we want to impugn the protection of copyright interests. However, this case illustrates our basic point: free trade rules are neutral towards free speech. They can support it at times, they may at times run counter to it, and there is no general rule governing the inter-relationship.

b) Case Study: The Chinese Distribution Case

c) Case Study: The Chinese Internet Filter Software Requirement

VI. CONCLUSION: THE FRAGMENTATION OF INTERNATIONAL LAW AND THE "BENIGN INDIFFERENCE" BETWEEN THE FREEDOM OF SPEECH AND TRADE LAW

[207] In fact, China argued that an effective enforcement of its censorship laws would remove the threat to U.S. copyright interests. Note, however, that the argument is also irrelevant to the dispute: the failure to grant copyright protection violates WTO law whether or not there is an actual impact on works. The two legal regimes of censorship and copyright are legally distinct. WT/DS362/R, paras. 7.137-7.138.