

The First Condition of Progress? - The Limits of International Trade Law as a Promoter of Freedom of Speech

Dr. Tomer Broude, Hebrew University of Jerusalem & Dr. Holger P. Hestermeyer, Max Planck Institute for Comparative Public and International Law

The fragmentation of international law is often considered a source of normative conflict, but in some cases it may provide opportunities for clever lawyering that uses the strengths of one regime to promote the goals of another. Some suggest that contrary to the common critique of trade law as restricting human rights, WTO law can be used to promote the freedom of speech. Thus, the "California First Amendment Coalition" is now lobbying for a WTO case against China's internet filtering system, touting it as "the biggest access-to-information and free speech case in history".

Free Speech under International Law

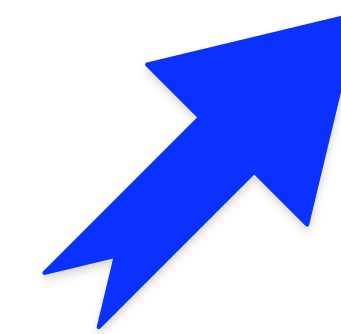
The attempt to protect free speech by other means does not stem from a lack of normative protection: freedom of expression is protected by the UDHR and the ICCPR, with some limitations. The right under the ICCPR encompasses the right to seek, receive and impart speech of all kinds regardless of frontiers – including commercial speech. It protects all types of media and benefits authors of an expression as well as those who distribute it. However, the enforcement mechanism under the Optional Protocol is not the most effective.

Our study also encompasses the freedom of access to information and the freedom to participate in cultural life.



A Marketplace of Ideas?

Where human rights law fails, e.g. with respect to China's Internet filtering, could trade law step in to benefit free speech? Where speech is incorporated in a product such as a book or a newspaper, barriers could be challenged under the GATT. Where information services are at stake challenges (depending on specific commitments) could be made under GATS. Transparency of censorship requirements could be promoted under both Agreements. TRIPS guarantees that copyright incentives are available for authors worldwide.



Limits to a Market Approach

A closer study reveals that the free speech impact of trade is far more complex. The operation of exceptions in WTO law and its focus on non-discrimination often fail to promote free speech where it is most vulnerable: where an idea is not available on the market. The history of Copyright Law and free speech is even more troublesome, intimately linking copyright and censorship during the birth of Common Law Copyright Law and clearly allowing for censorship nowadays under the TRIPS Agreement and the Berne Convention.

Conclusions

Although usually not in direct conflict, the claims of mutual reinforcement between trade and human rights law are tenuous. Short of real normative integration, the use of free speech rhetoric in trade disputes can be a distraction from the real interests involved. Human rights advocates have to use caution before getting co-opted into a cause that is not theirs.

Challenging – What Exactly?

- US – Manufacturing Clause (1984) (L/5609 – 31 S/74): requirement to manufacture certain works for the US in the US.
- China – Intellectual Property Rights (WT/DS362): copyright protection of censored works.
- China – Audiovisual Services (WT/DS363): trading rights and distribution services of audiovisual products and publications.
- China – Financial Information Services (WT/DS373): structure of the Chinese financial information services distribution.

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