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Online and Linked in: Public Morals in the Human Rights and Trade Networks

Uyen P. Le

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Online and Linked in: Public Morals in the Human Rights and Trade Networks

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Online and Linked In: “Public Morals” in the Human Rights and Trade Networks

Uyen P. Le†

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† Free Speech and Technology Fellow, California International Law Center; J.D. University of California, Davis, School of Law 2011; B.A. Yale University 2006. I am grateful to Professor Anupam Chander for his valuable comments and encouragement. I am also indebted to the editorial efforts of Caroline Richardson and the staff members of the North Carolina Journal of International Law and Commercial Regulation. All errors are solely mine.
I. Introduction

In late 2010 and early 2011, the Tunisian and Egyptian uprisings constituted some of the foremost political revolutions facilitated by the Internet, specifically online social networks. The online movements and intimately linked off-line demonstrations united as powerful forces to amplify demands, share crucial information, and spread their revolutionary messages to neighboring countries. At the same time, activists utilized these Internet vehicles to fervently diffuse conditions on the ground to inform and engage global observers. This new era of political activism largely grew and proliferated using business corporations—social news media and networking sites—as public forums for protests. As the Internet revolutionized political activism and discourse, its increasing involvement in challenging repression led authoritarian governments, like China and Iran, to take controlling measures that collateraly affect international trade.

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2 See id.


4 Chander, supra note 3.

5 *Internet Enemies, supra* note 1, at 19.
The Internet forged an intimate link between the global trading system and human rights by channeling personal—social and political—activities into profit-generating businesses. This link was substantiated when the Egyptian government shut down the Internet for five days in early 2011, causing an estimated loss of USD 90 million. By requiring foreign Internet service providers and search engines to censor and filter political contents, governments simultaneously prevent users from participating in the international trading system as consumer-participants and repress users from exercising their freedom of expression, as guaranteed under Article 19 of the International Covenant for Civil and Political Rights (ICCPR). The double-edge nature of censorship pressed Google and other commentators to argue that Internet censorship by governments—in both political and cultural forms—constitutes an "unfair trade barrier," leading them to appeal for actions through the international trading system.

6 See generally Internet Enemies, supra note 1 (discussing global trade and human rights through the Internet medium).

7 See The Economic Impact of Shutting Down Internet and Mobile Phone Services in Egypt, ORG. FOR ECON. COOPERATION AND DEV. (Feb. 4, 2011), http://www.oecd.org/countries/egypt/theeconomicimpactofshuttingdowninternetandmobilephoneservicesinegypt.htm.

8 See International Covenant on Civil and Political Rights arts. 18, 22, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]. The violation of the freedom of expression on the Internet also violates other rights protected by the ICCPR, including those addressed in Article 18, the right to freedom of thought, conscience and religion, and Article 22, freedom of association with others. Id. arts. 18, 22. Blocking social networks and political activities on the Internet automatically takes away fora for other social and religious activities for others. See id.

9 See id.

This paper assumes the legitimacy of the proposition that Internet censoring or related requirements constitute trade barriers in violation of the most favored nation and national treatment obligations of the WTO General Agreement on Trade-in Services (GATS)\textsuperscript{11} The main concern posed by this proposition is that authoritarian governments can justify internet censorship measures under the “public morals” exception of GATS Article XIV to protect legitimate domestic values.\textsuperscript{12} Thus, this paper examines the concept of “public morals” and proposes that such concept serves as a possible linkage between the trade and the human rights regimes, in the context of China’s joint position as the world’s economic powerhouse and Internet censorship champion. Under the World Trade Organization (WTO) agreements, governments can take restrictive measures to protect “public morals” and other legitimate causes.\textsuperscript{13} However, some restrictive measures, such as the Chinese government’s censorship of the Internet, protect “public morals” by repressing certain fundamental human rights. In the particular case that a trade exception requires a violation of core human rights, the WTO adjudicating bodies should account for the existing body of law already established under the human rights regime in interpreting the protective trade measure.

Part I introduces the possible areas of linkage—the consumer-participant services that fuel political activism and the Chinese government’s approach toward repressing those activities—and then briefly discusses the tension that has historically plagued the linking of human rights and trade. Part II attempts to formulate the concept of “public morals” as understood by the various bodies of international law and instruments applicable to the issue concerned: the WTO Dispute Settlement Understanding (DSU) and GATS Article XIV(a) general exception clause; and the Human Rights Committee (HRC) and ICCPR Article 19 concerning the freedom of expression. Part III then analyzes the

\textsuperscript{11} See Wu, Internet Filtering, supra note 10 at 263-65; see Hindley & Lee-Makiyama, supra note 10, at 13-14.

\textsuperscript{12} See Wu, Internet Filtering, supra note 10, at 274; see Hindley & Lee-Makiyama, supra note 10, at 13-14.

\textsuperscript{13} See General Agreement on Tariffs and Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, art. XX, 1867 U.N.T.S. 187 [hereinafter GATT].
"public morals" exception against existing linkage literature and suggests that the "public morals" exception provides a narrow and advantageous linkage for both the trade and human rights regimes.

II. Linkage: Plagued by Past Power Abuse

Historically, developed countries often use human rights arguments as an excuse for new protectionism14 or for asserting political powers to escape obligations under the WTO.15 Now the tide has turned: governments use protectionist trade measures—possibly justified under the "public morals" exception of the WTO—to violate human rights. This section briefly sets out two background elements that are crucial to establishing a successful linkage based on the "public morals" exception: first, the intimate relationship between the Chinese censorship of political speech and economic activities; and second, the political history of linkages between human rights and trade.

A. Political Activities As Consumer-Participant Activities: the Effect of the Chinese Censorship on Both Trade and Human Rights

In March 2011, Reporters Without Borders released Internet Enemies 2010, naming China, by a far margin, "the world’s most consummate censorship regime."16 As demonstrated in February 2011 during the Egypt and Tunisia revolutions, China commenced an "extraordinarily harsh crackdown" on progressives,17 resulting in a wave of new disappearances and detentions.18


16 See Internet Enemies, supra note 1, at 15.


18 See id. (discussing how China Human Rights Defenders estimated that at least
Under the justification of "stability maintenance," China created the Golden Shield, also known as the Great Firewall, a large multi-agency Internet censorship regime. The Great Firewall filtered and censored "sensitive" keywords including "Tiananmen Square," "Dalai Lama," "democracy," "human rights," "Jasmine," and the like. In April 2010, China adopted an amendment to the State Secrets Law requiring Internet and telecom companies to cooperate with the government on matters relating to national security by blocking transmission of defined state secrets, by alerting the government of possible violations, and by suppressing content. In the following summer, the government instituted another wave of crackdowns on online networking tools, focusing in particular on micro-blogging services. The government ordered these websites to hire "self-discipline commissioners" to censor and monitor content that could threaten the country's security or society's stability, including illegal activities such as pornography and violence, as well as rumors and politically sensitive issues. The Chinese government also completely blocked some social networking sites and websites dedicated to human rights advocacy.

The Chinese government continued to hold a firm position in response to international pressure against such degree of censorship. The Chinese Council of State's Information Bureau released the official White Paper on the Internet, justifying its

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23 people have been detained for criminal investigation; while ChinaGeeks.org compiled an incomplete list of about 50 Chinese who have been recently detained, arrested, or made to disappear.

19 See OPENNET INITIATIVE, INTERNET FILTERING IN CHINA 10 (2009), available at http://opennet.net/sites/opennet.net/files/ONI_China_2009.pdf; see also Internet Enemies, supra note 1, at 15.

20 See Internet Enemies, supra note 1, at 15.

21 See id. at 15; see also STRATFOR GLOBAL INTELLIGENCE, CHINA SECURITY MEMO (Apr. 29, 2010); Huazhong Wang & Xing Wang, Police to Work with Phone, Internet Providers, CHINA DAILY, Apr. 27, 2010, at 4.

22 See INTERNET ENEMIES, supra note 1, at 18.

23 See id. at 19.

24 See generally id. (discussing Internet shut down effects on human rights).


26 Id. at § IV
repressive measures as essential to ensuring respect for local laws and maintaining stability. With the recent wave of political mobilization around the world, the architect of the Golden Shield, Dr. Fang, declared that further tightening of the Internet would be needed to counter the number of Internet users trying to circumvent its control, despite the international community’s outcry.

Such censorship of the Internet heavily influences the international trade system, because Web 2.0 essentially functions as a trade platform. John Battelle and Tim O'Reilly, co-chairs of the 5th annual Web 2.0 summit, affirmed this trade function by declaring that on Web 2.0, netizens become the employees who build the businesses of which they are customers. User-generated content, whether in the form of ideas, texts, comments, pictures, or mindlessly surfing online, contributes economic value and generates revenue. Users now become both consumers and participants, or employees, in building and sustaining the services themselves. Without active participants, social networks would cease to be social or networked. Businesses focusing on social networks would cease to exist.

Web 2.0 businesses require and depend on the increasing user-generated activities to sustain their economic existence. At the same time, these user-generated activities include discussing and disseminating information, forming alliances and networks, waging protests and mobilizing for change, thus transforming political activism into economic activities. Any intervention in these political activities would not only disrupt and prevent social relationships and human interactions, but it would also interfere

27 See id. at § IV.
29 See Internet Enemies, supra note 1, at 19.
31 See id.
32 See id.
33 See id.
34 See id.
35 See id.
with international trade.  

This intimate relationship, resulting from having a common Internet platform, raises an opportunity for a fresh dialogue on the possibility of linking the human rights and trade regimes.

B. When Potential Becomes Abuse: the Political History of Linkage

The effort to link political and civil rights to the WTO trade disputes is not a recent phenomenon. Nontrade arguments have been connected to trade discussions, mainly through the concept of linkage. Linkage originated when the explosive growth of international trade and other social forces converged. More and more social issues have infiltrated the trade regime; while conversely, trade flows have influenced those social norms, particularly in the areas of human rights, worker’s rights, and environmental protection. For example, the natural emergence of linkages could be observed during the historic Uruguay Round and the Seattle Round in the 1990s, which enraged environmentalists by passing resolutions in the name of free trade with little consideration for environmental values.

However, support for linking external regimes and social issues to WTO trade norms has been far from unanimous. While developed nations have sought to link environmental protection and labor standards to WTO negotiations, developing nations have exerted equal effort to oppose them. Thus, “representatives to

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36 See Khaled Y. Oweis, Syria Blocks Facebook in Internet Crackdown, THOMSON REUTERS (Nov. 23, 2007), http://www.reuters.com/article/2007/11/23/us-syria-facebook-idUSOE37285020071123 (discussing the Syrians’ use of Facebook to communicate with relatives and friends abroad; Facebook also assisted civil society in Syria to form civic groups outside governments).


38 See id.

39 See id.

40 See id. at 5.


42 See Leebron, Boundaries, supra note 37, at 6.

43 See id.
the WTO from the global South have long opposed the formal or legal linking of trade and labor issues, particularly in the form of restrictions on market access or trade sanctions.\textsuperscript{44} According to Leebron, linkage arguments of the 1990s were motivated by politics—a structure known as “strategic linkages.”\textsuperscript{45} Strategic linkages depend on negotiation strategies and outcomes, rather than on the compatibility of norms.\textsuperscript{46} Due to its political nature, developing countries opposed this idea of linkage based on the fear that more developed countries would manipulate it unfairly to restrict imports.\textsuperscript{47} Thus, the negative bias against linkage has been heavily influenced by the motivation behind it and not by the concept’s potential merits.\textsuperscript{48} By way of contrast, the next section examines linkage specifically on its merits based on the benefits that linkage brings to mutually strengthen regimes that have seemingly different goals.

III. “Public Morals” in Trade and Human Rights: Moral Here but Not There?

The rise of Internet censorship, against the merging of political activism and consumer-participant trade activities, must at least suggest re-examining the linkage of trade and human rights values. Because Internet censorship can be excused under the “public morals” exception under both regimes, it begs the question: to what extent are the two concepts of “public morals” similar or opposing? The two legal frameworks providing for this “public morals” exception are the WTO’s regulations and the ICCPR’s human rights obligations—specifically the GATS Article XIV general exception provisions and the ICCPR Article 19 freedom of


\textsuperscript{46} See Joel P. Trachtman, Institutional Linkage: Transcending “Trade and...” 96 AM. J. INT’L L. 77, 79 (2002) (explaining that one of the results of strategic linkage was the formation of TRIPS during the Uruguay Round where the United States, the European Union, and others exchanged concessions in agriculture and textiles for concessions in intellectual property protection).

\textsuperscript{47} See id.

\textsuperscript{48} See id.
expression provision. In order to determine whether linkage brings mutual benefit to both regimes, one must first identify the existing body of jurisprudence for the “public morals” exception under both instruments.

A. The WTO’s Dispute Settlement Understanding and a Nascent Formulation of “Public Morals”

The WTO’s “public morals” exception is embodied in several key regulations, while the concept is interpreted and given meaning by the WTO’s Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding or DSU). In order to determine the possibility of linkage, it is necessary to examine the authority and corresponding capacity of the DSU adjudicating bodies to interpret the GATS Article XIV(a). Relevant international law must also be examined.

One of the central pillars of the WTO is its ability to settle disputes through the DSU, which functions as a legal mechanism, similar to an adversarial system of litigation, for trade disputes. This mechanism allows the WTO to address a fundamental flaw in the public international law system and particularly in human rights law—the lack of an effective enforcement mechanism. The WTO dispute resolution mandates require the adjudicating bodies, consisting of panels and an Appellate Body, to determine the facts and interpret their relevancy under applicable laws. DSU Article 3.2 states that the adjudicating bodies can “clarify the

49 See GATT, supra note 13, art. XX; see ICCPR, supra note 8, art. 19.
52 See id.
53 See id.
54 See id.
existing provisions of those agreements in accordance with customary rules of interpretation of public international law.\textsuperscript{55} However, in doing so, the adjudicating bodies must assure that "recommendations and rulings of the Dispute Settlement Body (DSB) cannot add to or diminish the rights and obligations provided in the covered agreements."\textsuperscript{56} Despite the DSU's potential for effective enforcement, the regulations do not provide for a complete legal solution when it comes to multidimensional disputes.\textsuperscript{57} That is, they do not include other laws or policies beyond trade.\textsuperscript{58} Yet, multidimensional disputes characterized many of the recent environmental decisions of the WTO dispute resolution bodies.\textsuperscript{59} There is no mechanism for integrating diverse legal rules, e.g., in situations of conflicting interpretations or conflict of law.\textsuperscript{60} The limited body of law applicable to the WTO dispute resolution\textsuperscript{61} and the lack of linkage mechanisms led to substantive problems.\textsuperscript{62} For example, questions often arose when particular conduct was restricted by WTO regulations but, at the same time, required under non-WTO law; or alternatively, WTO law permitted conduct that would otherwise be forbidden under

\textsuperscript{55} Id.

\textsuperscript{56} Id. art. 3.2.


\textsuperscript{58} See id.

\textsuperscript{59} See id.


\textsuperscript{61} See id. But see David Palmeter & Petros C. Mavroidis, The WTO Legal System: Sources of Law, 92 Am. J. Int'l L. 398, 399 (1998) (arguing that the texts of the WTO agreements "do not exhaust the sources of potentially relevant law"). Palmeter and Mavroidis refer to articles 3(2) and 7 of the DSU as the ostensible basis for incorporation of non-WTO international law. Id. However, these provisions refer only to interpretation of relevant provisions of WTO agreements "in accordance with customary rules of interpretation of public international law." Id.; see also Thomas J. Schoenbaum, WTO Dispute Settlement: Praise and Suggestions for Reform, 47 Int'l & Comp. L.Q. 647, 653 (1998); Appellate Body Report and Panel Report, United States–Standards for Reformulated and Conventional Gasoline, 17, WT/DS2/9 (May 20, 1996) [hereinafter U.S.–Gasoline] ("[T]he General Agreement is not to be read in clinical isolation from public international law.").

\textsuperscript{62} See Trachtman, supra note 60, at 338.
domestic or other international law. The question that has emerged from Internet censorship belongs to the latter: Does the WTO permit conduct that seeks to violate international human rights law as justified by the “public moral” exception?

To answer such a question, the values that constitute “public morals” must first be determined. This subsection examines the general exception clauses set forth in the General Agreement on Tariffs and Trade (GATT) Article XX and GATS Article XIV. The WTO regulations prohibit members from raising trade barriers as protectionist measures. However, China and other regimes that engage in Internet censorship, restrictions, and private information demands could justify their measures under the general exception clause for social concerns recognized by GATS. The relevant portion of GATS Article XIV is:

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

So far, however, few interpretation issues have arisen regarding GATS provision XIV(a), and the WTO adjudicating bodies have offered even less guidance. The exception for “public morals” has not been defined or elaborated during the first

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63 See id. at 341.
64 See GATT, supra note 13, art. XX.
65 GATS Article XIV and GATT Article XX will be used interchangeably in this discussion for the simplification of case law analysis that derives from disputes under the GATT. Id. art. XIV.
67 For a discussion of whether GATS applies to online services, such as search engines like Google, and to other networking and news media sites, see Wu, Internet Filtering, supra note 10, at 274-80; Hindley & Lee-Makiyama, supra note 36, at 5-13.
68 GATS, supra note 50, art. XIV(a).
five decades of the parallel provision under GATT Article XX(a). In 2005, the WTO recognized the first “public morals” exception in U.S.—Gambling, holding that the ban of Internet gambling services could be based on the ground that it violated morals.

Research into the *travaux préparatoires* of the exception has likewise been unable to further illuminate the term. The “public morals” exception was introduced into the trade regime in 1945. Since its introduction, the “public morals” exception has been consistently incorporated into later drafts. Despite its consistent subsequent appearance, the drafting history and purpose of the exception provide little information for defining the text substantively. The drafting records indicate that the clause was discussed very little, without any discussion on what the term would encompass. The only consideration came from the delegate of Norway, who indicated that Norway’s restrictions, based on the “public morals” exception, concerned mainly “morality-oriented measures.” From 1948 to 2004, the “public morals” exception clause lay dormant. At the same time, the concept continued to be incorporated into various trade

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71 See *U.S.—Gambling*, supra note 69, at 241-42.

72 “Travaux préparatoires” is a French phrase that refers to the official records of negotiations. See *Black’s Law Dictionary* 712 (9th ed. 2009).


77 See id.

78 Id.
instruments. Yet, the rarity of exploitation of the clause in more than five decades questions the need for further interpretation.

B. International Human Rights Law and a Robust Concept of “Public Morals” in the ICCPR

The acts of Internet censorship, filtering, blocking access to information and forums, and outright site-blockage potentially violate WTO agreements and seriously affect human rights en masse. Internet filtering and data interception violate the freedom of expression in addition to a multitude of other rights. The most widely-recognized and binding instrument of international law protecting these rights is the ICCPR. The ICCPR also acts as the authoritative version of the Universal Declaration of Human Rights (Universal Declaration), a document containing principles protecting basic rights that scholars now consider customary international law. Additionally, freedom of expression and other rights are codified in various regional human rights instruments, such as the Inter-American Commission on Human Rights (IACHR) and the European Convention of Human Rights

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79 For extensive lists of trade instruments espousing the “public morals” exception, see id. at 221.

80 Additional rights susceptible include: ICCPR Article 17 (arbitrary or unlawful interference with privacy, family, home or correspondence), Article 18 (right to freedom of thought, conscience and religion), and Article 22 (right to freedom of association with others). See ICCPR, supra note 8, arts. 17, 18, 22.

81 See id.


83 See generally SCOTT N. CARLSON & GREGORY GISVOLD, PRACTICAL GUIDE TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (2003) (analyzing the history and effect of the ICCPR).

ONLINE AND LINKED IN: PUBLIC MORALS

This section specifically discusses the freedom of expression, often the first of human rights that repressive regimes attempt to control via the Internet.86 Article 19 of the ICCPR provides that:

(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... may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (b) for the protection... of public... morals.87

Article 19(3) provides for an exception for state actions that fulfill certain legal criteria; thus, the protection guaranteed under Article 19 is not absolute.88 International human rights law has interpreted the concept of “public morals” extensively through the two major bodies of legal jurisprudence, the Human Rights Committee (HRC) and the ECtHR.89 The WTO should examine these existing bodies of jurisprudence when interpreting the “public morals” exception in GATS Article XIV.

The similar “public morals” exception in Article 19(3) of the ICCPR has been scrutinized to a greater extent in the human rights


87 ICCPR, supra note 8, art. 19.

88 See id.

context. Significantly, in *Mukong v. Cameroon*, the HRC formulated a strict, three-part test to determine if a state act violating the freedom of expression can be justified as a measure protecting legitimate “public morals.”

International human rights law permits interference only when the measure is “necessary to further a legitimate societal aim, and the interference is *prescribed by law.*”

The HRC’s first prong requires a state measure to be “prescribed by law[.]” That is, the measure must be timely and not “arbitrary or unreasonable,” which was interpreted to mean “precise” and “narrowly tailored.” More specifically, the HRC requires that national laws enabling interferences specify in details the precise circumstances in which such interferences are permissible and that the laws provide safeguards and remedies to guard against abuse. Often, in cases where private communications come under surveillance, domestic judicial bodies must approve the sufficiency of procedural safeguards.

The laws prescribing censorship are neither precise nor tailored with regard to China’s surveillance of Internet activities. Article 19 of the Provisions on the Administration of News Information Services, issued by the Ministry of Information

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90 See, e.g., *Mukong Communication*, supra note 89 (setting forth conditions for applying Article 19(3) of the ICCPR).
91 See id. ¶ 9.7.
96 See *Siracusa Principles*, supra note 93, ¶¶ 31, 34, 70.
97 See Israel, supra note 92, at 625.
98 See id. at 619.
Industry and the State Council,\(^{99}\) prohibits any contents “violating the basic principles” in the Constitution, “jeopardizing the security of the nation,” “harming the honor or the interests of the nation,” “propagating evil cults,” “spreading rumors,” and so on.\(^{100}\) These phrases are broad and vaguely defined.\(^{101}\) Facing such vague language, a netizen cannot effectively identify whether a criticism or comment of any aspect of his or her country could fall under “harming the honor or interest of the nation.”\(^{102}\)

The Chinese censorship framework also lacks required judicial oversight and other procedural safeguards.\(^{103}\) When Internet companies disclose user information, they typically fail to specify what formal procedures are required or what evidentiary standards are to be met as required by Chinese decree.\(^{104}\) Governmental requests for disclosure of personal information are often informal and lacking in detail, but Internet service providers have no discretion to refuse such requests.\(^{105}\)

After determining that the concerned measure is “prescribed by law,” the HRC then considers if the measure “protects a

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\(^{100}\) Id.


\(^{102}\) See generally Article 19, *supra* note 99 (“Neither the News Information posted or transmitted, nor the current event electronic bulletin service provided, by Internet News Information Service Work Units may on the Internet include any of the following content . . . (3) harming the honor or the interests of the nations . . .”).

\(^{103}\) See OPENNET, *supra* note 101.


\(^{105}\) For an example of one such ambiguous request, see *Police Document Sheds Additional Light on Shi Tao Case*, DUI HUA NEWS, July 25, 2007, http://duihua.org/wp/?page_id=1888.
legitimate state interest.\textsuperscript{106} The legitimate aims listed under the ICCPR and the WTO GATS/GATT are similar in that they both permit any measures falling under protecting "public morals," which currently is not defined.\textsuperscript{107}

Although a state measure can fall easily under the second prong—the inchoate category of legitimate aims—the measure "must be necessary" for the realization of the legitimate purpose.\textsuperscript{108} The necessary element requires that a measure be narrowly tailored to protect the stated legitimate aim and be proportional to the societal interest at stake.\textsuperscript{109} Proportionality was interpreted to require a high level of causal certainty—that failing to restrict the specific right would cause the adverse reaction, as the government claimed.\textsuperscript{110} The Chinese government uses the Golden Shield to filter numerous keyword combinations.\textsuperscript{111} Commenting sections, forums, and other interactive features with higher risks of containing sensitive content are often shut off completely.\textsuperscript{112} Troublesome bloggers with too many sensitive posts experience cancelation of their accounts.\textsuperscript{113} Because these compulsory control mechanisms are informal and automatic, the effectiveness of a protective measure is neither proportionate nor entirely predictable.\textsuperscript{114}

Additionally, studies demonstrate that censorship control methods, the amount of content censored, and providers' transparency about deleting and de-publishing in China vary substantially.\textsuperscript{115} The Citizen Lab study examined the four most


\textsuperscript{107} See ICCPR, supra note 8, art. 19; GATT, supra note 13, art. XX(a); GATS, supra note 50, art. XIV(a).

\textsuperscript{108} See Mukong Communication, supra note 89, ¶ 9.7.

\textsuperscript{109} See id. ¶ 10.

\textsuperscript{110} See Sunday Times, 30 Eur. Ct. H.R. (ser. A) at 65-67 (considering the consequences of dissemination of information subject to an injunction, and comparing these consequences to the public interest in access to the information).

\textsuperscript{111} See Welcome to the Machine, supra note 86.

\textsuperscript{112} See id.

\textsuperscript{113} See OPENNET, supra note 101.

\textsuperscript{114} See Welcome to the Machine, supra note 86, at 112-13.

\textsuperscript{115} See Rebecca MacKinnon, China's Censorship 2.0: How Companies Censor Bloggers, 14 FIRST MONDAY, no. 2, 2009, http://www.uic.edu/htbin/
popular search engines in China and concurred that there is no comprehensive and narrowly tailored system for determining the contents to be censored, resulting in arbitrary and inconsistent censoring of information—that is, some terms are censored by some engines and not by others.\textsuperscript{116} Such inconsistency indicates that the measure is not narrow.\textsuperscript{117} The inconsistent filtering and blocking also strongly suggest that the partially censored materials are not so critically destructive to "public morals" that their censorship was not absolute across all search engines.\textsuperscript{118}

Opportunely, in April 2003, the then U.N. Commission on Human Rights provided specific guidance on which measures cannot be justified under the "public morals" exception.\textsuperscript{119} Resolution 2003/4, the Right to Freedom of Opinion and Expression, warns states against abusing the exception under Article 19(3) of the ICCPR.\textsuperscript{120} The Resolution also outlines specific areas, rather than giving vague suggestions, in which member states cannot invoke the "public morals" exception.\textsuperscript{121} These areas include: discussing government policies and political debate; reporting on human rights, government activities, and corruption in government; engaging in peaceful demonstration or political activities, including for peace and democracy; expressing opinion and dissent; and expressing religion or belief.\textsuperscript{122} The Resolution also protects the free flow of information and ideas by prohibiting the unjustifiable banning or closing of publications or other media; prohibiting the abuse of administrative measures and censorship; and guaranteeing access to or use of modern telecommunication technologies, including radio, television and the Internet.\textsuperscript{123}


\textsuperscript{117} See id.

\textsuperscript{118} See id.


\textsuperscript{120} See id.

\textsuperscript{121} See id.

\textsuperscript{122} See id.

\textsuperscript{123} See id.
In 2010, during its one hundredth session, the HRC declared that penalizing a media outlet, a publisher, or a journalist solely for being critical of the government or of the political social system valued by the government, falls outside of the “public morals” exception under Article 19(3) of the ICCPR. The HRC defined the term “journalists” as “including professional full time reporters and analysts, as well as bloggers and others who engage in forms of self-publication in print, on the Internet or elsewhere.” This definition permits and extends protection to all netizens who use the Internet as a platform for expression.

The HRC not only focused on organizations that disseminate substantive information using the Internet but also defined the boundary of government interferences for institutions servicing the Internet. The Committee concluded that “any restrictions on the operation of websites, blogs or any other Internet-based, electronic or other such information dissemination system, including systems to support such communication, such as [I]nternet service providers or search engines [like Google], must be compatible with paragraph 3,” the “public morals” exception of Article 19. The Committee also declared that “[g]eneric bans on the operation of certain sites and systems are not compatible with paragraph 3.” Therefore, governments are prohibited from implementing generic bans on these institutions even under the “public morals” justification. Any restrictions with the legitimate aim of protecting “public morals” must be “content-specific.”

Moreover, in 2010 the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression proposed a series of principles for determining whether a restriction or limitation on the right to freedom of expression is a


125 Id. ¶ 46.
126 Id. ¶ 45.
127 Id.
128 Id.
129 Id.
130 General Comment No. 34, supra note 124, ¶¶ 30, 45.
legitimate measure or an abuse of authority. The Special Rapporteur further indicated that these principles should be used as "a means of ensuring that [s]tates do not abuse restrictions or limitations for political ends and that the application of such restrictions or limitations does not cause other rights to be violated."

Thus, the human rights regime's extensive deliberation on the "public morals" exception can be of benefit to the budding examination of the same concept within the WTO. The next section examines whether the concepts can still be successfully linked despite the past political impurity of linkage between the two regimes.

IV. Linking "Public Morals" to the Possibility of a Positive Sum Game

Given that the WTO's regulations and the ICCPR's provision share the same terminology in public international law, their interpretations should naturally present some sort of coherence. Furthermore, the trade aspect of Internet censorship concerns a universal human right, the freedom of expression. Part A of this section examines the existing framework of linkage to determine whether linking "public morals" concepts brings benefits to both regimes. Part B determines whether the WTO adjudicating bodies have the authority to incorporate human rights jurisprudence into the definition of the WTO "public morals" exception and identifies the technical mode of incorporation. Finally, part C addresses the existing unilateral solution to Internet censorship and

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132 Id. ¶ 80.

133 It should be noted that the suggestion that two issues should be linked often triggers the assumption that the issues cannot be perceived as the same. Leebron, Boundaries, supra note 37, at 9. As Leebron notes, a more intimate relationship between two issues is generally rejected once the notion of linkage is established. Id. Here though, a more intimate relationship cannot practically be established because one of the "public moral" concepts is presently undefined. Consequently, in analyzing linkage through interpretive incorporation, this section does not necessarily rule out the possibility that the "public morals" concepts from each regime could be identically defined, if the WTO adjudicating bodies determine so.
attempts to articulate its potential downfall.

A. Linking Specific Human Rights Obligations to the WTO Regulations

Although the concept of "public morals" in the human rights regime is well-developed and contemporary to the problem of online censorship, whether such jurisprudence has any effect on the trade exception is a question of whether linkage is feasible.\(^{134}\) When it was formed, the WTO did not incorporate classic human rights.\(^{135}\) The regulations prescribed in the WTO agreement focus on guaranteeing the equal treatment of foreign goods by WTO members.\(^{136}\) This narrow focus reflects a general understanding that trade is an instrument, rather than a value.\(^{137}\) It is also affirmed in practice, as the WTO has gradually isolated itself from the broader institutional setting of public international law.\(^{138}\) More specifically, the WTO dispute resolution panels and the Appellate Body are restricted to the interpretation and enforcement of WTO law and are unauthorized to apply general substantive international law or other conventional international law.\(^{139}\) This limitation is reasonable given that various fields of substantive international law already have their own judicial bodies, such as the Human Rights Committee in its oversight of human rights.\(^{140}\)

\(^{134}\) See id. at 14.


\(^{136}\) JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW 71 (James Crawford & John S. Bell eds., 2003).

\(^{137}\) Id. at 73 (proposing that trade liberalization “is not sought after for the achievement of some ‘global common’ that transcends the sum total of individual state interests”; rather, the purpose of the WTO rules is to increase the economic welfare of the states, while social and other benefits are determinate on what states do with their economic welfare).

\(^{138}\) See generally P.J. Kuyper, *The Law of GATT as a Special Field of International Law*, 25 NETH. Y.B. INT’L L. 227, 228 (1994) (assessing whether the WTO has become a self-contained regime and identifying specific areas in which the WTO has deviated from general principles of international law).

\(^{139}\) Marceau, *WTO Dispute Settlement*, supra note 135, at 763.
Additionally, the WTO lacks the resources to adjudicate both trade and human rights violations.\textsuperscript{141}

However, if the adjudicating bodies were to interpret anew concepts already established elsewhere in the course of applying the terms of the WTO agreements, the result would be parallel and conflicting standards.\textsuperscript{142} Thus, when faced with the task of interpreting concepts that have existing counterparts in other regimes, the WTO should refrain from unnecessarily creating a diverging or conflicting set of interpretations. For reasons of economic conservation and cohesiveness in public international law, the WTO adjudicating bodies should instead contemplate linking the existing bodies of interpretation.\textsuperscript{143}

This section examines and analyzes a framework set forth by Leebron and Alvarez for determining the different types and feasibility of linkage, discussing only factors pertinent to the linking of the two “public morals” exceptions.\textsuperscript{144} This section examines the linking of “public morals” jurisprudence in three parts: (1) whether the human rights and the WTO’s concepts of “public morals” constitute legitimate issue areas; (2) whether the concerns underlying the possible linkage are unfounded; and (3) whether the WTO allows for the process of interpretive incorporation to elaborate on an undefined term.

\textbf{1. The concepts of “public morals” from both regimes are legitimate and narrow issues to be linked}

Linking the concepts of “public morals” constitutes an issue area linkage—one that is “between relatively narrow questions on which well-defined resolutions can be reached.”\textsuperscript{145} Broadly speaking, the censoring of the Internet is an issue area of concern

\begin{itemize}
\item \textsuperscript{141} Id. at 20.
\item \textsuperscript{142} Id.
\item \textsuperscript{143} See Marceau, \textit{WTO Dispute Settlement, supra} note 135, at 779.
\item \textsuperscript{144} See generally Leebron, \textit{Boundaries, supra} note 37 (providing a complete overview of the linkage framework).
\item \textsuperscript{145} Id. at 6.
\end{itemize}
to both the human rights and the trade regimes, based on the Internet’s inherent function as an information- and trade-sharing platform. Narrowly speaking, the exception of “public morals” to state action is an even more specific question.146

According to Leebron, issue areas are determined “not only by agreement but also by the normative relationship of the issues to each other.”147 It seems unlikely that there is an expressed agreement for what could qualify as a justification for “public morals.”148 But in terms of the normative and descriptive dimensions, the trade and human rights regimes’ Internet censorship, as justified under the “public morals” exception, constitute “areas of regulation or negotiation that are substantively very closely related in the sense that they ought to be dealt with in a single regulatory context and are in fact widely seen as requiring such bundling because of this substantive relationship.”149 First, the Internet transforms the demonstration of political rights into a subset of consumer participant activities; therefore, an act repressing political rights automatically interferes with trade.150 Second, “public morals” must be based on unique cultural and social practices.151 Therefore, when a state raises a “public morals” justification in the trade framework, the justification’s underlying social and cultural practices must logically constitute evidence of a public moral in another framework, such as human

146 Id. at 9.
147 General Comment No. 34, supra note 124, ¶ 33.
Thus, the two concepts must be structurally and substantively related. Both the WTO agreements and the ICCPR allowed for the same exception regarding state action, so both regimes have agreed that there is a consensus but have failed to articulate what the consensus entails.

2. Arguments Favoring Linkage

The second component of the linkage framework addresses the arguments integral to the concept of linkage. Based on these arguments, this section claims that linkage of the “public morals” concept will result in a positive sum game for both regimes.

The “public morals” justification for Internet censorship constitutes a substantive rather than strategic linkage. This type of linkage is based on the connection between the norms rather than negotiations between members. The substantive relationship of the “public morals” exception satisfies both the coherence-based and consequentialist claims for linkage.

First, a coherence claim is based “either on the congruence of the norms governing the linked issues, or on the conflict between them.” If the norms are congruent, then establishing a linkage would assure their continued coherence. Procedurally, the WTO jurisprudence is similar to that of the ICCPR in that the “public morals” exception must satisfy a two-tier analysis: (1) whether the measure of censorship falls under one of the legitimate objectives of “public morals”, and (2) whether there exists a sufficient nexus between the measure and the objective pursued.

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152 See id.
153 See supra text accompanying notes 149-153.
154 ICCPR, supra note 9, at 178; GATT, supra note 13, at Annex IA.
155 See Leebron, Boundares, supra note 37, at 11.
156 Id.
157 Id. (identifying coherence-based and consequentialist as two types of substantive linkage claims).
158 Id.
159 Id.
160 See Appellate Body Report, Mexico—Taxes on Soft Drinks and Other Beverages, ¶ 72, WT/DS308/AB/R (Mar. 6, 2006); U.S.—Shrimp/Turtle, supra note 41, ¶ 116.
161 U.S.—Gambling, supra note 69, ¶ 292; see generally Panagiotis Delimatis, Determining the Necessity of Domestic Regulations in Services, 19(2) EUR. J. INT’L L.
Similarly, the ICCPR permits states to interfere with the freedom of expression through the “public morals” exception only when the measure is prescribed by law, addresses one of the aims set forth in the exception, and is necessary to further a legitimate societal aim. Both bodies also formally recognize that what constitutes “public morals” varies over time and inter-culturally. Because both adjudicating bodies have approached these concepts similarly, they are procedurally coherent.

In contrast, substantive coherence—defined as similar or conflicting norms—cannot thus far be determined. The term “public morals” has been defined only within the human rights framework. However, several scholars have suggested that the WTO should interpret the “public morals” concept dynamically to include human rights and labor rights, given that human rights are considered to be at the core of public morality. The U.N. High Commissioner for Refugees (UNHCR) also endorsed interpreting the “public morals” exception of the WTO to include “concern for human personhood, dignity, and capacity reflected in fundamental rights,” further stating that “excluding notions of fundamental rights would simply be contrary to the ordinary contemporary

365 (2008) (proposing the implementation of a necessity test for the WTO in making determinations on the legitimacy of regulations).

162 Mukong Communication, supra note 89, ¶ 9.7.

163 Siracusa Principles, supra note 93, ¶ 27; U.S.—Gambling, supra note 69, ¶ 296 (“[T]he Panel found that the term 'public morals' denotes standards of right and wrong conduct maintained by or on behalf of a community or nation.”).

164 See supra text accompanying notes 159-163.

165 See, e.g., Leebron, Boundaries, supra note 37, at 11.

166 Marceau, WTO Dispute Settlement, supra note 135, at 789.

167 Wu, Free Trade and Public Morals, supra note 70, at 224; see Stephen J. Powell, The Place of Human Rights Law in World Trade Organization Rules, 16 FLA. J. INT’L L. 219, 223 (2004) (“Article XX(a) likely... would support state action on a number of other human rights concerns, which might prompt a WTO Member to ban trade to protest immoral acts by a foreign government against its citizens, such as products made by indentured children or... with a consistent pattern of gross violations of human rights.”); Salman Bal, International Free Trade Agreements and Human Rights: Reinterpreting Article XX of the GATT, 10 MINN. J. GLOBAL TRADE 62, 78 (2001) (“Another way to include human rights in Article XX(a) is to consider certain human rights as ‘moral standards.’”); Marceau, Dispute Settlement. supra note 135, at 789 (“In the context of import restrictions imposed for human rights considerations, a WTO Member may want to justify its actions by invoking the exception for ‘public morals’ in GATT Article XX(a)....”).
meaning of the concept.” Collectively, these sources point to a future of substantive coherence between the “public morals” exception and fundamental human rights.

Second, a consequentialist type of substantive linkage claim focuses on the aligned policy goals of the linked regimes, rather than on the relationship between norms. Leebron suggests that “[i]f the application of the rules of one regime would undermine the achievement of the goals of another, it may be desirable to reformulate the rules of the first regime so that the goals of the second can be achieved.” It should be noted that consequentialist claims often assume conflict between the norms of two regimes. Despite the absence of conflict due to the lack of definition of “public morals” in the trade regime, context indicates that conflicts are often presumed between the two regimes. Despite the presumed conflict, the linkage of the narrow concepts of “public morals” actually would help mutually strengthen the seemingly diverging purposes of two regimes.

Because the history of linkage has been riddled by politics, the potential for mutual benefit has not been fully examined or accepted. Linkage was not a universally desirable concept for WTO members for many reasons. During the 1990s, developed countries were engaging in strategic linkage of human rights and labor standards, which led developing countries to allege that such rhetoric amounted to nothing but protectionism disguised as a

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169 Leebron, Boundaries, supra note 37, at 12.
170 Id.
171 Id.
173 Id. at 674.
174 See generally id. at 628-69 (summarizing the history of linkage in the context of the “bitter social upheaval” that accompanied the evolution of global trade).
175 See generally id. at 632-33 (exploring arguments against linkage).
176 See generally Leebron, Boundaries, supra note 37, at 12-13 (defining strategic linkage as an alternative to substantive linkage, in which links are based on political reciprocity rather than substantive similarities in issues).
moral high ground. Leebron advises that linkage “ought not to substitute for attempts to formulate and improve the distinct international regimes that govern the linked areas” because that tends to cause frustration for borrowing regimes. Other scholars believe that linkage would be detrimental to both regimes, resulting in “the loss of the traditional economic benefits of trade liberalization” and diminished “regulatory objectives of linked subjects.”

However, rhetoric has also perpetuated this presumption of negative consequences. Cho states that such an approach of affirming the negative “often leads to a ‘dialogue of the deaf’ framed in terms such as of ‘[f]ree trade versus labor standards’ or ‘growth versus the environment.” Thus, Cho proposed that the global trading system should adopt a more “positive perspective on linkage in order to transform international trade into a positive sum game.”

The “public morals” linkage would empower both the trade and human rights regimes, rather than weaken them. Unlike the 1990s usage of linkage to justify protectionist measures and damage trade liberalization, this narrow “public morals” linkage actually prevents member states from instating protectionist measures justified by insincere moral reasons. Because fundamental human rights represent the bare minimum of rights

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178 Leebron, Boundaries, supra note 37, at 27.

179 Cho, supra note 172, at 633 (noting that scholars such as Jim Rollo, Alan Winters, and Frieder Roessler take the position that linkage will result in lowered standards and benefits for both regimes).

180 See id at 645.


182 Id. at 646 (emphasis in original).

183 See id. (noting that international trade leads to better social conditions, while regulatory improvement benefits international trade).

184 See id. at 646.

185 See Wu, Free Trade and Public Morals, supra note 70, at 244-45.
unalienable to all persons, overriding the most fundamental of rights requires the state’s public moral concern to be of a serious caliber. This linkage raises the threshold of when the “public moral” concern is sufficient. This threshold can be lowered accordingly when the values violated are not fundamental to all persons, such as social- or cultural-specific preferences.

The heightened threshold would act to reduce unilateral protectionist measures and support the WTO’s pursuit of trade liberalization. By requiring that certain moral norms be shared universally, or at least be recognized by some international instruments and institutions, this type of linkage prevented the “public morals” exception from becoming an open forum for unilateral actions for and against particular values. Similarly proposed by Wu, inward-imposed, unilateral restriction based on “public morals” must demonstrate roots in domestic legislation, and some international treaty or guideline must codify the moral norm at stake. Equally, on the other hand, countries imposing outward restrictions on another member must demonstrate that the targeted state has endorsed the “public moral” violation in question.

Moreover, the linkage of “public morals” with WTO jurisprudence strengthens the human rights regime by reaffirming that certain moral and legal values are indeed universal. Thus, the linkage of “public morals” would ensure a positive-sum game for both the trade and the human rights field.

186 See BLACK’S LAW DICTIONARY 809 (9th ed. 2009).
187 See Wu, Free Trade and Public Morals, supra note 70, at 240 (explaining that in order to justify taking trade actions in the name of public morals, a state would have to show evidence of its commitment to the particular norm at issue).
188 See id.
189 See id. at 240-42 (implying, through the example of Burma and China’s censorship policies, that a transnational approach to action under the public morals exception would accommodate national and cultural preferences).
190 See id. at 244-45.
191 See id. at 240.
192 See id. at 241.
193 See Wu, Free Trade and Public Morals, supra note 70, at 246.
194 See id. at 240.
195 See Cho, supra note 172, at 646.
3. The WTO's regulations permit interpretative incorporation.

The third component of linkage examines the structure within which “public morals” linkage can be actualized. Leebron identified several types of linkage structures accommodating different relationships between regimes and issue areas. Instead of taking the broad route of membership linkage or incorporation of entire issues areas, the linking of “public morals” is based on a very narrow interpretative issue linkage structure. That is, only a specific provision in an issue area is identified and linked while other components remain detached. The narrow issues of “public morals” can best be linked through interpretative incorporation. This mode is particularly applicable when the linked provisions function as the exception clause in both regimes, have the same procedural requirements, and only one of the regimes is extensively developed.

B. Interpretative Incorporation of “Public Morals” and Its Permissibility

This section analyzes the interpretative mode of linkage, which relates to how the human rights jurisprudence of the term “public morals” could be incorporated into the WTO agreements to articulate its “public morals” exception. If interpretive incorporation is to have legitimate value, the DSU must first permit it. After determining the adjudicating bodies’ authority, human rights jurisprudence can be incorporated. Finally, the discussion attempts to identify implied consent from China for this

196 See Leebron, Boundaries, supra note 37, at 15.
197 Leebron identified the linkage structure to include several types. See id. at 15-24 (providing a more detailed description of these types).
198 See id. at 20 (stating that membership linkage and issue areas incorporation, while at opposite ends of the linkage spectrum, both take a wholesale approach to the linkage problem).
199 See id. at 21.
200 See id. at 20.
201 See id. at 21.
202 See Leebron, Boundaries, supra note 37, at 20-22; see also Wu, Free Trade and Public Morals, supra note 70, at 217-25.
203 The interpretive analysis in this section is more in-depth than Leebron’s steps.
204 See Leebron, Boundaries, supra note 37, at 21.
form of incorporation.

1. The WTO adjudicating bodies have the authority to consult the HRC's body of interpretation.

The DSU’s Article 3.2 states that the WTO adjudicating bodies could “clarify the existing provisions of” the covered WTO agreements in accordance with customary rules of interpretation in public international law. In doing so, the adjudicating bodies “cannot add to or diminish the rights and obligations provided in the covered agreements.” Notably, the general interpretation in public international law is to interpret so as to avoid conflict wherever possible. The obligation of the panels and the Appellate Body not to “add to or diminish the rights and obligation provided in the covered agreements” does not constitute a general conflict clause of the WTO regulations against other international legal norms. Legal scholars asserted that such provisions could not be interpreted to mean “that no other law, be it pre- or post-1994, can ever influence WTO-covered agreements.” Even in the case of conflict, such provisions shall not automatically permit the WTO rule to prevail over other international norms.

The DSU’s Article 3.2 does not address the jurisdiction of the panels or the applicable law before them; it only deals with the inherent limit of the panels as a judicial organ for interpreting the WTO-covered agreements. The Appellate Body confirmed the

205 DSU, supra note 51, art. 3.2.
206 Id.
208 See Lorand Bartels, Applicable Law in WTO Dispute Settlement Proceedings, 35 J. WORLD TRADE 499, 507 (2001) (quoting DSU, supra note 51) (internal quotation marks omitted) (stating that, if the provision meant the complete exclusion of public international law, the long series of the Appellate Body reports to which general international law referred would be legally incorrect, and the WTO panels would be prevented from applying general international law to “fill gaps” left open because doing so would “add” to the WTO agreements).
210 See id.
211 See id.
specificity of this interpretive limit by stressing that "[a]n
interpreter is not free to adopt a reading that would result in
reducing whole clauses or paragraphs of a treaty to redundancy or
inutility."212 Moreover, by referencing the general rules of
interpretation of the Vienna Convention, the WTO provision
further stresses that the restriction applies narrowly to the
interpretative function of the panels, not to how the panels should
determine applicable laws or resolve conflicts of norms.213

In addition, when examining trade claims, the adjudicating
bodies may have to refer to and apply non-WTO rules of
international law.214 According to case law, it is now generally
accepted that panels can do so in the interpretation of terms set
forth in the agreements.215 Standard practice allows the
adjudicating bodies to apply certain rules of general international
law in matters on which the WTO agreements are silent.216 This
application of "secondary" rules of general international law—
laws that are "binding on all WTO Members and from which the
WTO treaty did not "contract out"217—further requires that
member states be bound to "primary" rules of law.218 Primary
rules are substantive laws that directly impose rights and
obligations on the states, including customary laws and general
principles of law on the use of force, genocide, and human
rights.219 Unless a treaty or WTO agreement, contracts out of a
rule of general international law, the aforementioned principle
remains valid.220 In such a case, despite restricting the Appellate
Body and panels from applying substantive international law, the
GATT does not explicitly contract out specific obligations of

212 U.S.—Gasoline, supra note 61, at 23; see also Appellate Body Report, Japan—
213 See Pauwelyn, supra note 209, at 1421-22.
214 See id.
215 See id. at 1421.
216 See id.
217 Id. at 1424.
218 See id. at 1424-25.
2nd ed. 1961) (explaining that primary rules, such as prohibitions on violence and
deception, although often unofficial or customary, are the basic obligations to which any
group that is to function with relative peace must adhere).
220 See Pauwelyn, supra note 209, at 1407.
international human rights law. 221 This means that WTO member states are still bound to "primary" rules of international law.

Finally, even if the DSU's Article 3.2 only mandates that interpretation be in accordance with the general interpretive principles of public international law, legal scholars have read the provision to require incorporation of other principles of international law pursuant to Article 31 of the Vienna Convention. 222 This is especially true when the WTO agreements refer to concepts that can be or are already understood in light of international legal jurisprudence. 223 At the same time, Article 31 of the Vienna Convention on the Law of Treaties, 224 the general rule of interpretation, has been used independently to define legal relationships between trade measures and environmental law, 225 human rights, and labor standards. 226

2. Interpretive incorporation of fundamental human rights jurisprudence as customary norms.

The panels' authority to interpret the terms of the general exception clause, which is within the scope of its mandate, is to interpret the term of the agreement without adding or omitting any rights and obligations under the agreement. 227 Importing the human rights interpretation of the terms "public morals" only functions to clarify and give shape to the general exception clause

221 See id. at 1417-18, 1424-25.

222 See Marceau, WTO Dispute Settlement, supra note 135; see also Vienna Convention on the Law of Treaties, art. 31(3)(c), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention] ("There shall be taken into account, together with the context:... Any relevant rules of international law applicable in the relations between the parties.").

223 See Gabrielle Marceau, A Call for Coherence in International Law: Praises for the Prohibition Against "Clinical Isolation" in WTO Dispute Settlement, 33 J. WORLD TRADE 87, 87-123 (1999) [hereinafter Marceau, A Call for Coherence].

224 See Vienna Convention, supra note 222.

225 See U.S.—Shrimp/Turtle, supra note 41, ¶ 114.


227 See DSU, supra note 51.
The right of a member state to raise a "public morals" exception remains available as intended, without any additional rights or obligations entailed.

One hundred and thirty one members of the WTO ratified or signed the ICCPR, the legally binding instrument of the Universal Declaration of Human Rights (UDHR). Even member states such as China, although it has yet to ratify the ICCPR, must adhere to the obligations and interpretation of the HRC regarding the concepts of "public morals" as they relate to the rights of expression and privacy. First, according to Marceau, requiring that all WTO members of a dispute be parties to a non-WTO rule of international law before that non-WTO rule can be used to interpret WTO obligations is problematic and unrealistic. Such a requirement would result in a multitude of problems: inconsistencies and incoherence between systems of law; restricting the number of outside legal principles available under Vienna Convention Article 31(3)(c); and the further isolation of the WTO as its membership increases. Furthermore, the requirement of membership contradicts the previous principle adopted by the Appellate Body in U.S.—Shrimp, which examines

228 See Cleveland, supra note 226, at 157-63 (arguing that incorporation of human rights norms into international trade dispute resolution is consistent with Article XX of GATT).

229 See id. at 180-81.


231 See ICCPR Ratification Status, supra note 230 (noting that China has not ratified the ICCPR but signed it on October 5, 1998).

232 See Marceau, WTO Dispute Settlement, supra note 135, at 789-91 (noting that the WTO panels, when determining the necessity of an action pursued in the name of protecting public morals, should consider the participation of all concerned members in international human and civil rights agreements as evidence of the importance of the values at issue, the efficacy of the action taken, and the good faith of the acting member).

233 See id. at 781.

234 See id.
various multilateral, environmental agreements that did not have the same membership as the WTO. 235 Regardless of the membership inconsistency, some of the definitions in the various environmental agreements were considered to have sufficient consensus. 236

Secondly, and most importantly, the freedom of expression coded in the ICCPR and UDHR is part of the general principles of law, or customary international law. 237 Customary laws, or general principles of law, are the legal norms the panels and Appellate Body have discretion to use as guides in interpreting WTO-covered agreements. 238 Moreover, all members of the United Nations, through the General Assembly, adopted the UDHR in 1948, regardless of its non-binding nature. 239 Subsequently, most of the WTO members ratified the binding ICCPR. 240 Most members are also bound by regional human rights instruments such as the European Convention on Human Rights (ECtHR), 241 the African Charter on Human and People’s Rights (Banjul

235 See U.S.—Shrimp/Turtle, supra note 41, ¶ 130 (noting that Thailand and the United States had signed but not ratified the Convention on Biological Diversity; India and Pakistan had ratified the Convention on the Law of the Sea, while Thailand had signed but not ratified it, and the United States is not a party to it).

236 See id. ¶¶ 127-34 (noting that in spite of slight variance in language, “exhaustible natural resources” has been interpreted similarly under several environmental agreements).


239 See Universal Declaration, supra note 82.

240 See ICCPR Ratification Status, supra note 230.

Charter), the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights. Finally, members have codified similar freedoms of expression and privacy in their national constitutions. Given that the trade regime's "public morals" concept has not been substantively defined, good faith interpretations of the WTO agreements should reflect relevant international law obligations and a presumption against conflicts between trade and human rights obligations.

The existing body of interpretations of the "public morals" concept in human rights law could serve as a heightened threshold, limiting what qualifies as a reasonable, legitimate aim when the measure in question violates a fundamental human right. When WTO disputes concern trade barriers and "public morals" unrelated to human rights violations, the adjudicating bodies should formulate their own interpretations of trade law. When fundamental human rights are in jeopardy, however, the HRC is better qualified to formulate the outer boundary of legal permissiveness.

To understand the full implication of linking the "public morals" concepts between the WTO and the HRC, the reverse scenario in which the WTO institutions interpret "public morals" in isolation should be examined. If the WTO adjudicating bodies were to permit "public morals" justifications to extend beyond the boundary provided by the HRC, then the two bodies of law would conflict and violate Article 53 of the Vienna Convention.

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243 American Declaration, supra note 84, at 5.


246 See Marceau, WTO Dispute Settlement, supra note 135, at 805.

247 See id. at 786-89.

248 Vienna Convention, supra note 222, at 18.
out in the ICCPR. The WTO would then become a vehicle for enabling oppressive governments in their justification of domestic measures that fall under the trade regime and are intended to restrict human rights. In short, not having congruent interpretations would effectively weaken both the human rights and trade regimes, allowing for the proliferation of unilateral protectionist measures that also purposefully and directly violate human rights.

3. The WTO adjudicating bodies have already engaged in interpretive incorporation of jurisprudence external to the WTO agreements

Even though the WTO agreements do not substantially define the concept of “public morals,” the incorporation of existing jurisprudence from outside the WTO has been applied in practice. In a separate provision of the general exceptions clause, the adjudicating bodies reached out to international laws external to the WTO. The Appellate Body has emphasized the incorporation of public international law in interpreting the WTO agreements as well. The case of U.S.—Shrimp/Turtle demonstrated the utilization of non-WTO law to interpret one of the general exceptions under GATT XX. In a complete defense of living resources, the Appellate Body found that Article XX(g), which allows member states to impose measures to conserve “exhaustible natural resources,” logically includes living resources, such as turtles. Even though the history of Article XX(g) only discussed mineral resources as “exhaustible,” the Appellate Body endorsed an evolving approach to interpretation with its decision. The term “exhaustible natural resources” “must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and

249 See ICCPR, supra note 8.
250 See Marceau, WTO Dispute Settlement, supra note 135, at 778.
251 See GATT, supra note 13.
253 See U.S.—Shrimp/Turtle, supra note 41.
254 Id. ¶ 134.
255 Id. ¶¶ 127-34.
conservation of the environment." To reach this conclusion, the Appellate Body examined the Convention on International Trade in Endangered Species of Wild Fauna and Flora, external to the WTO Agreements, to inform its determination that sea turtles, a species threatened by extinction, are "exhaustible natural resources." Thus, the WTO adjudicating bodies have employed interpretive incorporation to articulate a general exception that is similar to the "public morals" exception.

4. Implicit consent to interpretive incorporation of non-WTO jurisprudence

Even China, in its most recent White Paper, expressed public support and called for a global network to oversee issues relating to the Internet. The White Paper emphasizes the need for the United Nations to possess the full scope of international Internet administration through the establishment of an authoritative and just international administration organization. A call for regulation under the U.N. system would compel the application of an even more extensive body of substantive international law on the member states' control of the Internet. Specifically, the various responsible judicial bodies, in addition to those of the WTO, would scrutinize all violations of all the rights guaranteed by U.N. conventions concerning the Internet platform. The Office of the High Commissioner of Human Rights (OHCHR) alone monitors nine core international human rights treaty bodies, one of which is the HRC, which only implements the ICCPR. Thus, if

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256 Id. ¶ 129.

257 Id. ¶ 132 (citing the Convention on International Trade in Endangered Species of Wild Fauna and Flora, app. 1, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 (1973)). Importantly, the Appellate Body specifically declined to rule on whether there is a territorial or jurisdictional limitation in Article XX(g) and whether the "extraterritorial" nature of the U.S. measure removed it from eligibility for an exception under that provision. It was able to do so because the sea turtles at issue are migratory, migrating to and from U.S. waters. See id. ¶ 133.

258 See WHITE PAPER, supra note 25, ¶ IV.

259 See id. ¶ VI.

260 The other eight human rights treaty bodies include: The Committee on Economic, Social and Cultural Rights (CESCR), the Committee on the Elimination of Racial Discrimination (CERD), the Committee on the Elimination of Discrimination Against Women (CEDAW), the Committee Against Torture (CAT), the Committee on the Rights of the Child (CRC), the Committee on Migrants Workers (CMW), the
the Chinese government, as expressed in its White Paper, welcomes the application of the broader legal bodies of law under the United Nations, then it should have no objection to the WTO’s seeking guidance from the HRC’s existing interpretation of the “public morals” concept in international public law.

C. Unilateral Action Begets Unilateral Action

Unilateral actions, either legal state actions or those stemming from private compacts, do not resolve the issue in the long-run. Human rights violations that negatively affect international economic order, and vice versa, are global problems that must be addressed on a global scale. Unilateral actions have the potential to worsen the state of human rights by allowing Internet companies engaging in violations to proliferate outside of their domestic markets without legitimate control mechanisms and by allowing the increasing supply of amoral companies to work with other oppressive governments.

Unilateral actions against China’s treatment of Internet companies, without intervention from the WTO, would legally justify—and thus solidify—China’s unilateral protectionist censorship measure. At the same time, resorting to unilateral action over multilateral action defeats the purposes of the WTO, which are to liberalize


264 See id.

trade by multilateral cooperation and to reduce unilateral barriers.\textsuperscript{266}

In 2008, Google, Microsoft, and Yahoo! launched a private unilateral action called the Global Network Initiative (Initiative) to protect and advance the freedom of expression and privacy in information and communication technology against authoritative governments.\textsuperscript{267} The principles of the Initiative outline the obligations that are embedded in the ICCPR.\textsuperscript{268} The Initiative also delineates precise and concrete applications for participating companies, requiring corporations to interpret restrictions narrowly and to challenge restrictions contradicting international human rights law.\textsuperscript{269}

But the Initiative is still far from resolving the problems of political censorship and trade protectionism.\textsuperscript{270} One of the main concerns is that the Initiative does not provide enough protection for human rights and is still weak in its principles.\textsuperscript{271} Reporters Without Borders withdrew its endorsement of the Initiative, asserting that the Initiative should have completely rejected any compliance with oppressive local laws.\textsuperscript{272} Moreover, even if the Initiative were to outright reject all requirements for compliance, the Initiative still could not yield enough pressure to exert much leverage on oppressive regimes to negotiate away the imposed surveillance requirements.\textsuperscript{273} Google, Microsoft, and Yahoo!, as recognized by the European Parliament, do not possess the market

\textsuperscript{266} See id.
\textsuperscript{267} GLOBAL NETWORK INITIATIVE, supra note 262, at 1.
\textsuperscript{269} See id.
\textsuperscript{270} See Johnson, supra note 263.
\textsuperscript{272} See REPORTERS WITHOUT BORDERS, supra note 271, ¶ 1.
\textsuperscript{273} See generally Johnson, supra note 263 (explaining that the Initiative is not strong enough for endorsement).
power to induce change in Chinese policy. Therefore, the implementation of the Initiative would have the unintended reverse effect; that is, its withdrawal would implicitly make the Chinese government's trade barrier successful, abetting repression by inaction.

Even more troubling, the Initiative potentially digs a one-way trade channel flowing out from China to the rest of the world. Within China, there are a great number of companies ready to be the up-and-coming names on the Internet platform, and there is an increasingly expanding pool of sophisticated users to match—an estimated 718 million by 2013. Thus, the withdrawal allowed companies like Baidu to take advantage of the isolated domestic market to strengthen themselves before taking over the global market. As China's leading search engine following Google's pullout, Baidu claimed 75% of the market share of China in early 2011, with its stock price rising 2300% from 2006 to 2011. Sina Corp., NetEase.com, Sohu.com, Baidu, and other companies that proliferated in China have already accessed the global market. Demand from global investors remains high for Chinese Internet companies, despite their willingness to engage in domestic censorship and violate human rights. The Chinese Internet

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274 Google has requested that the United States government treat Internet censorship as a trade barrier. See Andrew McLaughlin, Censorship as Trade Barrier, GOOGLE PUBLIC POLICY BLOG (June 22, 2007, 3:36 P.M.), http://googlepublicpolicy.blogspot.com/2007/06/censorship-as-trade-barrier.html; see also Resolution, on the EU's Strategy to Deliver Market Access for European Companies, EUR.PARL. DOC. (2007/2185(INI)) 2008 O.J. (C 184) E/16.

275 See generally Johnson, supra note 263 (attacking the "weaknesses" of the Initiative).


279 Cao, supra note 277, ¶ 2 (“NetEase.com (NTES) Inc., Sohu.com Inc. (SOHU) and Baidu Inc., each climbed at least 3 percent as the Nasdaq Composite Index advanced for a third day.”).

280 See id. (illustrating the strength of Chinese Internet companies).
company Qihoo 360 demonstrated this demand.\textsuperscript{281} "[w]hen . . . Qihoo 360 went public . . . on the New York Stock Exchange, shares immediately doubled on opening, according to CNNMoney. The company had priced its stock at $14.50, but the stock soared as high as $33.40 its first day of trade."\textsuperscript{282}

In January 2008, Baidu launched its search engine service in Japan, "marking its first major overseas venture."\textsuperscript{283} In 2010, Baidu’s Chief Executive, Robin Li, stated that "he is planning to expand into new countries . . ."\textsuperscript{284} When Internet companies like Baidu expand beyond China, they can easily conform to the foreign states’ censorship requirements, or lack thereof.\textsuperscript{285} These companies benefit from their flexibility, accommodating oppressive regimes while simultaneously catering to more open governments.\textsuperscript{286}

Furthermore, if censorship is not addressed under the global trade regime, unilateral measures could lead China to develop a state-controlled Internet platform.\textsuperscript{287} In August 2010, Xinhua and the largest state-owned Chinese telecommunication operator, China Mobile, signed an agreement to create a joint venture called the Search Engine New Media International Communications Co.\textsuperscript{288} The joint venture’s mission is to launch a search engine that

\textsuperscript{281} See Inocencio, supra note 278, ¶ 12.
\textsuperscript{282} Id. ¶ 12.
\textsuperscript{285} See generally John Liu, Baidu Web Site with Links to Porn, China Critics, is Blocked, BLOOMBERG (Apr. 18, 2007, 1:36 P.M.), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aWqRkvO7tXw&refer=home (showing varied restrictions based on country).
\textsuperscript{286} Baidu’s varied censorship was best demonstrated on April 18, 2007, when Baidu.com Inc. announced that the Chinese government had blocked Baidu.jp, its search engine for Japan, for two days when the Japanese search engine returned links to pornography and criticism of the Chinese regime. Id. at paras. 1-2.
\textsuperscript{287} See generally Xinhua, China Mobile to Establish Internet Search Engine Joint Venture, XINHUA (Aug. 12, 2010), http://news.xinhuanet.com/english2010/china/2010-08/12/c_13442049.htm (discussing an agreement between Xinhua and China Mobile Communications Corp.).
\textsuperscript{288} Id. at paras. 1-2.
is directly controlled by the State. Such a move would give the state government control over both the Internet and the active mobile phone network, as well as over future political discourse. In this case, both the trade and the human rights dialogue regarding censorship would come to an abrupt end.

The demand for amoral Internet companies by authoritarian regimes will only increase as political activism proliferates on and through the Internet. Reporters Without Borders reported that there are “[a]round 60 countries... implementing some form of Internet censorship, which entails either content filtering or netizen harassment.” The organization also detected an increasing number of countries engaging in censorship. For example, Bangladesh recently blocked access to sites offensive to the Prophet, while Cambodia has begun censoring news sites. Thus, a global demand for search engines and Internet companies that are willing to engage in information policing is expected in the near future. This increased demand will be satisfied by the supply of amoral Internet companies unless censorship is addressed globally. According to the European Centre for International Political Economy, “[i]n a European Parliament hearing on Human Rights in June 2010, Hosuk Lee-Makiyama warned against unilateral sanctions advocated by free speech groups that would have detrimental effect on China relations, free speech, and EU/US business interests...” Instead, he advocated for “trade negotiations, as China is a ‘responsible

289 See id. at para. 4.
290 See INTERNET ENEMIES, supra note 1, at 17.
291 See generally Yutian Ling, Upholding Free Speech and Privacy Online: A Legal-Based and Market-Based Approach for Internet Companies in China, 27 SANTA CLARA COMPUTER & HIGH TECH. L.J. 175, 193 (2010-11) (illustrating the difficult position Internet companies are put in when working with China).
292 INTERNET ENEMIES, supra note 1, at 5.
293 See id. (giving examples of censoring activities in Bangladesh and Cambodia).
294 Id.
295 See id. (analyzing the increasing prevalence of Internet censorship).
member of the WTO. Thus, resolving this situation under the WTO is more reasonable, less political, and more likely to yield a long-term and stable solution if enough states join in the dispute.

V. Conclusion

The Internet creates an open forum that facilitates human interaction in a realistic and comprehensive manner, economically, politically, and socially. As of 2011, the number of Internet users stood at approximately 2,267,233,742 out of approximately seven billion people worldwide. Any interference affecting such magnitude requires a critical re-examination of all available international legal institutions and instruments to determine ways in which these already existing institutions might build capacity. Although censorship is a trade barrier and a violation of human rights, it can be justified under both the WTO general exceptions clause and the human rights “public morals” exception. Due to the similarity between and relatedness of these “public morals” exceptions, a narrow and mutually beneficial linkage can be formed between the two regimes. Through interpretive incorporation of the human rights jurisprudence on “public morals” concerning Internet censorship, this linkage would bring about positive results for both international trade and human rights by strengthening their individual purposes while also reinforcing each other’s existence and authority.

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297 ECIPE, supra note 296, at para. 8.
300 See Husain, supra note 298.
302 See id.