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A DUAL TRACK APPROACH TO CHALLENGING CHINESE CENSORSHIP IN THE WTO: THE (FUTURE) CASE OF GOOGLE AND FACEBOOK

Anonymous*

INTRODUCTION

As economic and trade policies continue to affect more facets of society, the World Trade Organization’s (WTO) impact on government policy and citizens’ lives has grown. Since its creation on January 1, 1995, the WTO has fostered trade liberalization negotiations and served as a forum where member countries can discuss economic concerns with one another.1 The WTO is perhaps best known for its dispute settlement mechanism.2 News headlines and public attention mainly focus on the relatively few issues that are submitted to a WTO panel for judgment. Most disputes, however, are settled without the use of formal legal proceedings or never even rise to the point of discussion. See Understanding the WTO: A Unique Contribution, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm (last visited July 21, 2013) (“[T]he point is not to pass

* “A censor is a man who knows more than he thinks you ought to.” -Granville Hicks


2. News headlines and public attention mainly focus on the relatively few issues that are submitted to a WTO panel for judgment. Most disputes, however, are settled without the use of formal legal proceedings or never even rise to the point of discussion. See Understanding the WTO: A Unique Contribution, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm (last visited July 21, 2013) (“[T]he point is not to pass

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governed by a trade agreement, they can initiate formal legal proceedings against one another by asking for a panel to be appointed. The panel then hears the complaint and issues a ruling, which may be appealed by either of the parties on legal grounds. The ruling simply identifies which, if any, WTO obligations are being breached, but does not impose punishment. If the losing country does not move to conform to its WTO obligations, the other member country may request permission from the Dispute Settlement Body to impose trade sanctions, which must be granted within thirty days unless a consensus of member countries disagrees.

The current dispute settlement mechanisms were created as a part of the WTO through the Uruguay Round of negotiations. The agreement was signed by the 123 governments that served as the first members of the WTO. Countries subsequently looking to attain WTO membership must formally accede to the scheme. The accession process is time consuming and requires, among other things, the applicant to make a formal application, negotiate bilateral terms individually with every interested WTO member, and adopt all of the WTO multilateral trade agreements.
The People’s Republic of China (PRC) acceded to the WTO in 2001, following its successful trade negotiations with WTO members, principally the United States.\footnote{W AYNE M. M ORRISON, C ONG. R ESEARCH S ERV., RS20139, C HINA AND THE W ORLD T RADE ORGANIZATION 2–3 (2001); Understanding the WTO: Members and Observers, W ORLD T RADE O RG., http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited July 21, 2013) (“Terms and conditions include commitments to observe WTO rules and disciplines upon accession . . . ”).} As part of its accession, the PRC government was also required to adopt the WTO’s multilateral trade agreements, including the General Agreement on Tariffs and Trade (GATT), General Agreement on Trade in Services (GATS), and Trade-Related Aspects of Intellectual Property Rights (TRIPS).\footnote{Cong. Research Serv., supra note 11, at 2. The most important features of GATT and GATS are “Most-Favored-Nation Treatment,” which disallows members from discriminating between member countries in lowering import restrictions, and the National Treatment provision, which disallows a member from discriminating between domestic and imported goods and services once they are inside the country. General Agreement on Trade and Services arts. II, 17, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1896 U.N.T.S. 183, 33 I.L.M. 1167 [hereinafter GATS]; General Agreement on Tariffs and Trade arts. I–III, Oct. 30, 1947, 61 Stat. A–11, 55 U.N.T.S. 194 [hereinafter GATT]. The two agreements also contain concession schedules, wherein members detail their treatment of important goods and services. GATS art. XX; GATT art. II. TRIPS lays out minimum intellectual property right protections and enforcement provisions. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Mar- rakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement].} All three agreements require the PRC to implement domestic laws and regulations in conformity with the agreements. To the ire of many U.S. corporations and under criticism from Western media, however, the PRC has continued a policy of Internet censorship.\footnote{Id. at 14.} The PRC’s censorship regime is estimated to cost U.S. businesses billions of dollars in lost revenue a year.\footnote{China’s Censorship of the Internet and Social Media: The Human Toll and Trade Impact: Hearing Before the Congressional-Executive Commission on China, 112th Cong. 15 (2012) (statement of Gilbert B. Kaplan, President, Committee to Support U.S. Trade Laws), available at http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg72895/html/CHRG-112hhrg72895.htm.} The most high profile situations involve Google and Facebook, each of which receives varying degrees of censorship by the PRC government.\footnote{Id. at 14.} As the growing “information age” capital of the world, the United States will likely seek to protect the Internet giants that are so central to its economic future and its best chance at doing so is through the WTO.
This Article details the dual-track approach that the United States could adopt in a WTO case against the PRC’s censorship regime on behalf of Google and Facebook. First, this Note details the current situation and tracks the recent developments regarding Google and Facebook in the PRC. Second, the intricacies of the PRC market are examined by analyzing the relevant domestic legal issues and local PRC practices, both of which affect Google and Facebook’s operations. Third, by utilizing the PRC’s GATS schedule and pertinent WTO law, this Note concludes that the PRC’s censorship policies are incompatible with its WTO obligations. Concurrently, an examination of the present situation will reveal that the United States could also pursue a TRIPS claim against the PRC government for its strict censorship regime. While the United States will likely prove successful in its legal arguments against the PRC, such a success is unlikely to mark the end of the trade dispute. Instead, the United States will almost assuredly need to engage in a complex series of legal maneuvers to enforce a positive judgment as current WTO law normally requires retaliatory measures to be taken in the same sector of trade as the violation complained of.16 Thus, while the road ahead for a U.S. claim against Chinese censorship may be a long one, it could ultimately be a successful one for the U.S. economy.

I. PRESENT STATE OF AFFAIRS

This Note focuses on the most publicized instances of censorship in the PRC, namely that of California-based Google and Facebook.17 The discussion of Google will focus on its most popular products, including its search engine, GMail, and YouTube. This Note will then focus on Facebook’s social networking services. A brief history of both companies’ involvement and legal presence in the PRC market will be discussed to provide background and context. Subsequently, the widely-publicized present state of affairs and circumstances regarding Google and Facebook in China will be detailed to show how dramatically these corporations and, in turn, the U.S. economy, have been affected by the PRC’s practices.

Google was founded in 1998 to serve as a strong competitor to Yahoo and other search engines.18 From early 2000 to the fall of 2002, Google experienced almost no obstacles to providing its services to the Chinese market, and it was estimated that the Chinese language version of Google


18. GOOG Company Profile, supra note 17; Scott Rosenberg, Let’s Get This Straight: Yes, There is a Better Search Engine, Salon (Dec. 21, 1998, 3:00 PM), www.salon.com/1998/12/21/straight_44/.
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.com was available approximately 90% of the time. By the end of 2002 and continuing into 2003, however, Google was blocked to PRC users for various periods of time as the Chinese Communist Party (CCP) wished to limit access to information that was harmful to the party’s interests. In response, Google launched guge (谷歌, “Google China”), available at google.cn, in January, 2006, to cater to both the Chinese market and CCP officials as Google China would be censored by Google itself. With dependable access to Google China, PRC citizens quickly drove Google’s market and revenue share from approximately 10% to over 35% within three fiscal years. For Google China, the future appeared bright.

In June of 2009, however, Google China’s operations came to a screeching halt. After being accused of allowing individuals to search for pornography, the PRC government “punished” Google by suspending users’ ability to search foreign websites and utilize Google’s well-known associate search function. Contrast this to a similar situation encountered by Baidu (百度), the “Chinese Google,” which actively advertised, disseminated, and profited from Chinese-language searches for pornographic images and videos during the now infamous Edison Chen sex scandal.

Baidu’s slap on the wrist consisted of an official government censure and a requirement that Baidu apologize for its actions. Furthermore, Baidu was one of China’s largest violators of copyrights, generating a substantial portion of its revenue by knowingly providing access to copyright-
infringing material.\textsuperscript{26} It is unclear how logical it was to block Google China’s website as literally tens of thousands of domestic Chinese pornography websites remained easily accessible to the PRC public even though the government knew of them.\textsuperscript{27} While it appears that many of Google’s features regained functionality over the next few months, Google’s services were regularly reported as blocked in China.\textsuperscript{28}

After a continued pattern of outages, the symbolic straw that broke the camel’s back was a series of organized attacks targeting U.S. websites, including Google, in an operation dubbed “Operation Aurora.”\textsuperscript{29} The PRC government recruited a well-organized group of hackers as “part of a coordinated campaign of computer sabotage carried out by government operatives, private security experts and Internet outlaws . . . .”\textsuperscript{30} While U.S. companies have been willing to downplay the costs of these attacks,
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the damage to U.S. companies, including Google, was immense. Google reported that not only were the contents of some of its users’ e-mails revealed, including the then-jailed Ai Weiwei, but that the hackers had succeeded in stealing some of Google’s intellectual property about how its websites’ algorithms and operating systems were designed. Soon after, Google responded to the PRC government by announcing that they would discontinue self-censoring Google China’s search results. Several days later, out of concern for their workforce in the PRC, Google announced that they would simply allow users to redirect to Google Hong Kong, which remains uncensored. In reality, however, this requires extra effort by any PRC user in utilizing Google because Google China, itself, is not functional but requires them to reconnect to Google Hong Kong’s URL. In an effort to save face from intense international criticism, China renewed Google China’s operating license, but its long-term legal status remains in doubt.

Google’s operations in China have certainly strained under the massive weight of the PRC government. Google’s estimated market share of

31. See Zetter, supra note 29 (explaining that valuable intellectual property was targeted by the hackers); see also David Drummond, A New Approach to China, GOOGLE BLOG (Jan. 12, 2010), googleblog.blogspot.com/2010/01/new-approach-to-china.html; Pooja Prasad, Adobe Investigates Corporate Network Security Issue, ADOBE BLOG (Jan. 12, 2010, 3:16 PM), blogs.adobe.com/conversations/2010/01/adobe_investigates_corporate_n.html.


37. Lau, supra note 19.

38. The Chairman of Google, Eric Schmidt, recently detailed how Google China is unlikely to recover anytime soon. Alexei Oreskovic, Google in Industry’s “Defining Fight” with Apple, Schmidt Says, REUTERS (Oct. 12, 2012, 12:37 AM), http://uk.reuters.com/article/2012/10/11/us-google-android-idUKBRE89A03120121011 (“Schmidt also said he did not expect Google to become a significant player in China any time soon, following its 2010 standoff with the government over Web censorship and cyber-attacks that Google said originated in China. Google relocated its search engine to Hong Kong in the wake of the episode, allowing Chinese search engine Baidu Inc. to widen its lead in China, one of the few markets in the world where Google’s search engine is not dominant. ‘Baidu will continue to be the Number One player in China for a long time,’ Schmidt said. He said that he did not expect
the PRC market now stands at a paltry 10.7%. Although not the focus of this Note, Google's other businesses in the PRC have suffered as well, including Google's mobile phone operating software, as potential business partners fled in fear of associating with a CCP-condemned company. Furthermore, YouTube, a wholly-owned subsidiary of Google, has remained completely unavailable in the PRC since 2009. There is unlikely to be an effort on the part of the PRC government to prevent copyright infringement via streaming web-players because YouTube's major Chinese competitors, TuDou and YouKu, host massive amounts of illegal material, including U.S. videos and politically subversive content, before censors remove it. It is clear from this short but complicated history that Google China has been put at an incredible disadvantage compared to its competitors for reasons that often don't appear to be logically related to the PRC government's stated intentions.

The second most publicized case concerning censorship in the PRC involves social media giant Facebook. In 2008, individuals attempting to access Facebook from the PRC began to experience problems, and in 2009, the Xinjiang race riots led the PRC government to block access to Facebook in the PRC. Currently, a minority of PRC web users has access to the original Facebook via VPNs or proxies that have not yet been any mending of ties with the Chinese government, which he said has cut off access to Google's Web services in the past. 'China has in its power to arbitrarily restrict our access to Chinese citizens to keep us at whatever percentage market share they wish,' Schmidt said.


41. See China Firm Boycotts Google, Stuff (Mar. 24, 2010, 8:48 AM), http://www.stuff.co.nz/technology/3499269/China-firm-boycotts-Google (“Companies, however, are liable to think twice about maintaining a partnership with a company that has been condemned by Beijing for running afoul of its censorship rules.”).


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blocked by the PRC government. As a result, Facebook lookalikes that had originally popped up as unpopular alternatives have captured the market for social networking services, with the main competitor, Renren (人人网), boastfully referring to itself as “the Facebook of China.” From a one-time dominant position in the PRC market, Facebook’s market-share in the PRC has become negligible, as have its operating profits in the jurisdiction.

As this background information makes clear, both Google and Facebook have faced enormous setbacks in market-share at the hands of the PRC government. In the period of time that this economic and diplomatic battle continues to rage, Google and Facebook are the most prominent examples of how the PRC censorship regime has affected U.S. companies and, in turn, the U.S. economy. The next step is to explore which Chinese laws and practices have resulted in this situation and lay the factual framework for a possible challenge to the PRC’s policies.

II. A Market Analysis: The Legal and Practical Framework

After discussing the obstacles U.S. companies among the likes of Google and Facebook have faced in the PRC, it is necessary to understand where this official behavior does or does not derive its power. This Part will examine the various sources of law in the PRC to illustrate how they have resulted in an inconsistent set of legal rules prone to abuse with a series of discriminatory effects.

Like nearly all of its global contemporaries, the overarching structure of the PRC government finds its source of power in its constitution, the Constitution of the PRC. While the PRC’s system of law has improved by leaps and bounds, there are many areas where the rule of law is only beginning to develop. Freedom of speech and transmission of communication are two examples of underdeveloped areas.

47. Charles Arthur, China Cracks Down On VPN Use, GUARDIAN (May 13, 2011, 11:41 AM), http://www.guardian.co.uk/technology/2011/may/13/china-cracks-down-on-vpn-use. It is likely that the percentage of people with access to Facebook through a VPN is very small.


52. See Jim Yardley, In Worker’s Death, View of China’s Harsh Justice, N.Y. TIMES, Dec. 31, 2005, at A1 (“Online discussion was censored and news media coverage was almost completely banned”). The PRC’s judiciary also has a great deal of room to grow as it is not...
Under the Constitution of the PRC, all “citizens of the People’s Republic of China enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration.”\footnote{\textnormal{Xianfa} art. 35 (2004) (China).} Article 35, which grants these broad freedoms, is one of the few articles in the PRC Constitution that does not list any exceptions or clarifications to its provisions.\footnote{Id.} Unique to the PRC Constitution is a further section that includes what is traditionally considered part of free speech. Article 40 of the Constitution of the PRC specifies that “the freedom and privacy of correspondence of citizens of the People’s Republic of China are protected by law.”\footnote{Id. art. 40.} Unlike Article 35, Article 40 allows this right to be limited under two narrow circumstances—first, where disclosure of the correspondence is necessary to state security, and second, where the correspondence relates to a criminal offense.\footnote{Id. These provisions appear somewhat redundant as threats to national security are, under normal circumstances, also criminal matters.} However, practice is often different from the law.

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Although the Constitution of the PRC prohibits most forms of Internet censorship, the PRC government has issued a series of regulations granting itself the power to control communication on the Internet. The legislative branches of the PRC first issued rules on Internet use when the Internet was in its initial stages of growth. In 1997, the 42nd Standing Convention of the State Council adopted the Temporary Regulations for the Management of Computer Information Network International Connection (Temporary Regulations). The Temporary Regulations remain in full effect to the present day, fifteen years after they were initially adopted. The Temporary Regulations provide that all internet communications must pass through ChinaNet, GBNet, CERNET, or CTSNET, all of which are PRC government-controlled server systems. A complementary regulation, the “Regulation of the People’s Republic of China for Safety Protection of Computer Information Systems,” charges the Ministry of Public Security with supervision, inspection, and guidance of Internet development. The regulation also allows the Ministry of Public Security to investigate any criminal cases involving use of the Internet. Soon after, the Ministry of Public Security issued the regulations that are well-known today and cited by various levels of the PRC government as

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63. Id.
64. Id. art. 6. It also requires that all Internet Service Providers be licensed by the government. Id. art. 8. Any Internet user in the PRC, therefore, relies on government servers for access to the Internet.
66. Id. art. 17.
support for their actions in limiting and monitoring Internet access. The regulations, issued by the Ministry of Public Security itself, prohibit any communications that defame or attempt to defame government agencies, split the nation, or leak state secrets. These terms have escaped any formal definitions and can encompass almost any situation.

The regulations described above have tremendously altered the landscape of electronic communications in the PRC. Because all communications go through government servers, there is no information that the PRC government cannot monitor or block. Additionally, some provinces and cities go even further in censoring and monitoring Internet communications within their jurisdiction. This practice can often result in the arbitrary and inconsistent censorship of Internet websites, as some censors are more restrictive than others.

Although the regulations have not been enforced consistently on a city or provincial level, they have universally affected speech. The PRC has the largest number of jailed cyber-dissidents of any country in the world. The level of censorship sophistication is so great in the PRC that it has resulted in the blockage of tens of thousands of websites. In relation to Google and Facebook, the recent censorship regime has cost Google China over 105.8 million users. The loss in revenue due to the blockage is estimated to cost Google $600 million dollars per year in In-

67. The PRC central government benefits from what Westerners might identify as “plausible deniability.” The PRC government has several layers of government and citizens usually blame lower officials as they are under the impression that the highest members of the PRC government are unaware of their inferior officers’ bad acts. See Gudrun Wacker, Chinese Civil Society at a Time of Leadership Change, EUR. UNION INST. FOR SECURITY STUD. (Oct. 5, 2012), http://www.iss.europa.eu/publications/detail/article/chinese-civil-society-at-a-time-of-leadership-change/ (“[E]xpressions of dissatisfaction in China—which can sometimes turn violent are usually caused by local issues with protesters blaming local authorities rather than China’s top leaders or the political system. This local character explains why nation-wide protests have yet to materialise in China.”); see also Jeffrey Hays, Petitions, Retrievers and Black Jails in China, FACTS & DETAILS, http://factsanddetails.com/china.php?itemid=1647&catid=8&subcatid=50 (last updated Apr. 2012) (describing how many with grievances against the government file petitions to the authorities in Beijing, because they “cannot expect the same local officials with whom they have grievances to provide them with justice.”).


69. See id.

70. Computer Information Regulations, supra note 62, art. 6.


72. See id. at 3-6.


74. China Shuts Over 60,000 Porn Websites This Year, supra note 27.

75. Calculated by estimating the market-share of Google China based on 420 million Internet users. See Baidu and Google Lead in Internet Market Share, supra note 39.
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The thefts of source code during various hacking operations that were either sponsored by government or uncontrolled by government have also benefited Chinese companies. As Google and Facebook have continued to suffer from being censored or blocked, their PRC competitors have gained massively in market share, revenue, and profit. This is notable because they offer nearly identical services. Thus, U.S.-based companies appear to be discriminated against for being foreign entrants in the PRC market.

In addition to being a prominent body of adjudication on international trade issues, turning to the WTO would also avoid litigation within the PRC. The PRC legal system may be developing quickly, but still has some way to go. Judges in the PRC are frequently Chinese Communist Party activists appointed to the bench, and many do not have a legal education or background. As a result, a PRC judge cannot necessarily be expected to fairly evaluate the CCP-promulgated censorship policies nor to uphold a verdict against the PRC. The consequence of such a situation is that Google and Facebook may be better off having the U.S. government pursue their claims in the WTO instead of in the PRC courts.


77. Josh Rogen, China’s expansion of economic espionage boils over, FOREIGN POLICY (Jan. 14, 2010, 1:11 AM), http://thecable.foreignpolicy.com/posts/2010/01/13/china_s_expansion_of_economic_espionage_boils_over (“The Chinese government has adapted the tactics it has used for military cyber espionage for corporate purposes and is now using them on a wide scale . . . Some China experts contend that Google, which has been operating in China since 2004, may be simply fed up with the Chinese government’s pattern of allowing in foreign companies and then appropriating their technology for the benefit of Chinese competitors, in this case the rival search engine Baidu.”). Chinese companies, surprisingly, have not been negatively affected or suffered losses in service in the hacking attempts. Stefanie Hoffman, RSA: Aurora Hackers Targeted Google Source Code, CRN (Mar. 4, 2010, 2:28 PM), http://www.crn.com/news/security/223101584/rsa-aurora-hackers-targeted-google-source-code.htm;jsessionid=faXYaQTIXMSYH8EKMB8bFe**.ecappj01.

78. See Baidu and Google Lead in Internet Market Share, supra note 39.


80. See Rule by Law, supra note 51.


82. It is notable that the PRC courts cleared a suit against Baidu by a Western recording industry organization but that the Music Copyright Society of China was successful on the same grounds. See Jacqui Cheng, Baidu Cleared in Copyright Infringement Case Brought by IFPI, ARS TECHNICA (Jan. 26, 2010, 1:14 PM), http://arstechnica.com/tech-policy/2010/01/
III. GATS Obligations Prohibit PRC Censorship Policies and Practices

Not only are the PRC’s censorship policies arguably illegal under the PRC constitution, but they are also prohibited under several WTO obligations, including GATS. This Part will analyze PRC censorship policies through the lens of GATS law through two different legal principles. The first application will examine the PRC’s GATS commitment schedule and show that under all relevant categories, the present state of PRC censorship is inconsistent with these promises. Second, an application of GATS’ Most Favored Nation (MFN) principle similarly renders the current PRC regulatory scheme relating to censorship illegal.

A. Preliminary Steps to Examining the PRC’s Commitment Schedule

The signature feature of GATS is that it encourages, but does not require, member countries to make commitments as to how they will treat services. These promises are reflected in each member country’s Commitment Schedule. The Commitment Schedule contains both horizontal and specific commitments. Horizontal commitments apply to all sectors of trade, while specific commitments apply only to sectors explicitly listed by the member country. Commitment Schedules break the treatment of services into four modes of supply. The four modes of supply are “cross-border supply,” “consumption abroad,” “commercial presence,” and “presence of a natural person.” Additionally, the Commitment Schedule


84. See GATS art. I.
85. See id. art. XX.
87. Id.
88. Id.
89. Id.

Cross-border supply is defined to cover services that flow from the territory of one Member into the territory of another Member (e.g. banking or architectural services transmitted via telecommunications or mail); Consumption abroad refers to situations where a service consumer (e.g. tourist or patient) moves into another Member’s territory to obtain a service; Commercial presence implies that a service supplier of one Member establishes a territorial presence, including through ownership or lease of premises, in another Member’s territory to provide a service (e.g. domestic subsidiaries of foreign insurance companies or hotel chains); and Presence of natural persons consists of persons of one Member entering the territory of another Member to supply a service (e.g. accountants, doctors or teachers). The Annex on Movement of Natural Persons specifies, however, that Members remain
provides both the limitations on “market access” and “national treatment.” The purpose of the Commitment Schedule is for countries to slowly build upon their previous commitments, thereby ratcheting open their economies. Countries are strongly encouraged not to go back on their commitments, but they are legally allowed to withdraw them. Nevertheless, it is rare for a country to remove its commitments and such abdication will only take effect once the commitment is officially removed. The levels of treatment specified in the Commitment Schedules are made legally binding through Articles XVI and XVIII. As such, reliance on Commitment Schedules in proceedings is a “justified practice.”

The first step in applying GATS to the controversy at hand is determining whether GATS actually applies. That is to say, is Internet communication considered a service within the meaning of the GATS and its related Commitment Schedule? GATS came into existence when the Internet was still a burgeoning form of communication, but by the time the PRC ascended to the WTO, the Internet and its potential impact were known across the world. In fact, section 2, subsection c, Telecommunication Services of the PRC’s Concession Schedule, explicitly includes “electronic mail,” “on-line information and database retrieval,” “electronic data interchange,” and “on-line information and/or data processing.” The PRC chose to add these services to their Commitment Schedule even though the Central Product Classification, which is the complete list of product classifications utilized within the WTO, did not include those items at the time of the PRC’s accession.

free to operate measures regarding citizenship, residence or access to the employment market on a permanent basis.

Id. 90. Id.

91. See Services: Rules for Growth and Investment, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm6_e.htm (last visited July 21, 2013) (“These clearly defined commitments are ‘bound’: like bound tariffs for trade in goods, they can only be modified after negotiations with affected countries. Because ‘unbinding’ is difficult, the commitments are virtually guaranteed conditions for foreign exporters and importers of services and investors in the sector to do business.”).

92. See GATS art. XXI.

93. Council for Trade in Services, Guidelines for the Scheduling of Specific Commitments Under the General Agreement on Trade in Services, S/L/92 (Mar. 28, 2001) (“Since schedules, including footnotes, headnotes and attachments, are a record of legal commitments, nothing should appear in them which a Member does not intend to be legally binding.”).


Further confirmation that GATS covers services delivered via the Internet can be found from various WTO resources, including the Appellate Body’s decision in United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services (U.S.—Gambling).\textsuperscript{97} In U.S.—Gambling, Antigua and Barbuda brought a case against the United States for its restrictions on online gambling.\textsuperscript{98} Antigua and Barbuda argued that the United States’ Commitment Schedule specified that there would be no restrictions on the cross-border supply of gambling and betting services while the United States argued that it had made no such commitment.\textsuperscript{99} Both the Panel and Appellate Body found that the United States had violated its obligations because its commitment to leaving gambling and betting services unrestricted also applied to online gambling. This is known as the “technological neutrality” principle, meaning that, subject to a member country’s commitments to the contrary, services can be transmitted through any means of delivery.\textsuperscript{100} This principle is well accepted among WTO members and was also upheld in China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Product (China—Audiovisual).\textsuperscript{101} Additionally, the Council on Trade in Services, the WTO committee charged with examining GATS in light of current developments, has plainly stated that GATS covers electronically delivered services, citing unanimity in WTO member opinion.\textsuperscript{102} As such, the evidence suggests that both the PRC and substantive WTO law intended GATS to apply to Internet services.

The second step in a GATS analysis ordinarily involves examining which mode of supply has been utilized. In electronic communication there is some debate about whether the information has been accessed by


\textsuperscript{99} Id.

\textsuperscript{100} Id. ¶ 6.285 (“Therefore, a market access commitment for mode 1 implies the right for other Members’ suppliers to supply a service through all means of delivery, whether by mail, telephone, Internet etc., unless otherwise specified in a Member’s Schedule. We note that this is in line with the principle of ‘technological neutrality’, which seems to be largely shared among WTO Members.”).

\textsuperscript{101} Id. ¶ 3.161; Appellate Body Report, China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, ¶ 398, WT/DS363/AB/R (Dec. 21, 2009) [hereinafter China—Audiovisual Products].

\textsuperscript{102} Council for Trade in Services, Interim Report to the General Council: Work Programme on Electronic Commerce, S/C/8 (Mar. 31, 1999) (“Members agreed that GATS applied to all services regardless of the means of technology by which they were delivered. This was further reinforced by the fact that in no area of the WTO were there different rules for different techniques of delivery. It was noted that the principle of technological neutrality also applied to scheduled commitments, unless the schedule specified otherwise: it was therefore possible for Members to schedule commitments in a non-technologically neutral manner.”).
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access. The relevant domestic laws and policies of the PRC, at their most basic, lay out a relatively straightforward set of rules stating that, although seemingly in tension with the constitution, the government may monitor and intercept electronic communications. The PRC government also requires that all electronic communications be routed through state-controlled servers. Combined, these two domestic regulations are easily satisfied: the government has blocked access to certain information and all PRC users are reliant upon government servers for their Internet connection. These regulations are difficult to avoid as Google and Facebook must route their traffic via government servers if they hope to provide any services to PRC users at all. Nevertheless, U.S. providers of online services, including Google and Facebook, continue to have their access to the PRC market completely shuttered. This is even though providers of nearly identical online services like Baidu, RenRen, and YouKu continue to enjoy access to the Chinese market. This illustrates that, in practice, the PRC censorship regime has closed access to mainland China by several Western companies engaged in online services.

Treating the blockage of Google and Facebook as a market access limitation is also ground in WTO case law. In U.S.—Gambling, the United States had specified a certain level of treatment for gambling services in its Commitment Schedule. Antigua and Barbuda challenged that delivery of gambling services were impeded by a series of U.S. laws, the blocking of

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112. See Lau, supra note 19; Wauters, supra note 46.

113. See Josh Ong, The Great Firewall: China’s Digital Margins, THE NEXT WEB (Oct. 14, 2012, 12:14 PM), http://thenextweb.com/asia/2012/10/14/the-great-firewall-chinas-digital-margins/ (“Services that we take for granted outside of China, such as search, Twitter, Facebook and YouTube have all been replaced by Chinese equivalents (namely, Baidu, Sina Weibo, Renren and Youku Tudou.”).

114. But see Appellate Body Report, supra note 97, ¶¶ 11617, for an example demonstrating that not all policies that may affect a service-provider’s ability to provide services in a country should be treated as market access limitations.

several websites, and other government actions. The case noted that domestic providers of the same services could operate nearly unencumbered in the United States. The panel and appellate body treated the U.S. measures as restrictions on market access. In comparison, the PRC has enacted a regime to block websites it disapproves of without any constitutional grounding. The effects of the PRC-government’s actions and unofficial policies are similar, as Google and social networking sites such as Facebook continue to be blocked from any access to the market while their competitors are not. As such, the comparison with U.S.—Gambling indicates that a WTO panel would treat the PRC regime as a market access limitation.

Moving toward the heart of the matter, the PRC has made three sets of GATS commitments that are relevant to the situation at hand, two of which are related directly to the censorship matter. The PRC has made commitments regarding both “Telecommunications Services Value-added Services” and “Computer and Related Services.” Value-added telecommunications services include e-mail, voice-mail, online information and database retrieval, electronic data interchange, enhanced facsimile services, code and protocol conversion, and online information and/or data processing. In this category, the PRC has made commitments both in market access and national treatment. In terms of national treatment, the PRC has indicated that there are no limitations. Interpreting the market access limitations is more difficult as Mode 2 is subject to no limitations, but Mode 1 is subject to the same limitations as Mode 3 in market access limitations: “Foreign service suppliers will be permitted to establish joint venture value-added telecommunication enterprises, without quantitative restrictions, and provide services . . . foreign investment shall be no more than 50 per cent.”

Whether this means that there are no limitations on mode 1 unless the foreign service supplier chooses to locate operations in the PRC or whether foreign service suppliers must have operations in the PRC is somewhat debatable. Although they may not ultimately be conclusive, two

117. See Appellate Body Report, supra note 97, ¶¶ 36164.
119. See Ong, supra note 113 (“‘The Chinese government blocked every single international Web 2.0 Internet service, and we Chinese copycat every one,’ he said, describing the country’s strategy as a simple ‘block and clone’ tactic.”).
120. The PRC government made commitments regarding advertising services, which serve as a source of revenue for both Google and Facebook. This advertising service is impossible without having their sites accessible in mainland China. Rather, this category would only become relevant if their websites were actually to become accessible.
121. PRC Concession Schedule, supra note 95, at 17.
122. Id. at Annex 1.1.
123. Id. at 17.
124. Id.
factors weigh heavily in favor of the former interpretation. Based on the context, it appears that if the PRC had intended to remove all limitations on foreign service suppliers except for investment, the explanation of limitations would have started with “none, except . . .”125 Additionally, countries should only be held to the narrow commitments they have made due to the voluntary nature of the commitment schedules.126

Ultimately, however, both methods of interpretation will lead to similar results. If it means no limitations, then the PRC government has failed to fulfill its commitments because it has imposed restrictions in a sector where it has committed to impose none. As described above, the PRC has blocked access to Google, YouTube, and Facebook in mainland China although its immediate competitors continue to operate in the same fashion as their U.S. counterparts would. There are no explicit laws or regulations that require the companies to censor information themselves, so it cannot be the case that the U.S. telecommunication providers have failed to uphold any legal obligation.127 This is supported by the fact that the PRC government has been credited as having the most advanced Internet controls of any government in the world and censors all of the information itself so it is even more irrational to expect private corporations to censor at a level any higher than the PRC government’s.128 In fact, the method whereby search engine providers in the PRC determine which sites should be blocked is by systematically accessing every known Internet address and seeing which ones are not retrievable.129 Thus, the PRC government’s actions appear to be inconsistent with its Telecommunications Services Value-added Services obligations contained in its Commitment Schedule.

The same conclusion is also reached if the PRC’s policies are interpreted as requiring foreign providers to enter into joint ventures before they can offer telecommunications services in mainland China. The PRC government requires most Wholly-Foreign Owned Enterprises (WFOEs) to establish some sort of joint venture with a local company, often related to the local government, to engage in any sort of business.130 Disregarding


126. See GATS, supra note 12, art. XIX (The WTO remains conscious of individual member’s sovereignty); see also Top 10 Reasons to Oppose the World Trade Organization? Criticism, yes . . . misinformation, no!, WORLD TRADE ORG., http://www.wto.org/english/the WTO_e/minist_e/min99_e/english/misinf_e/09sov_e.htm (last visited July 21, 2013).


129. See Thompson, supra note 79.

130. Zhonghua renmin gongheguo zhongwai hezi jingying qiye fa (中华人民共和国中外合作经营企业法) [Law of the People’s Republic of China on Chinese-Foreign Joint Ventures] art. 1 (promulgated by the Fifth Nat’l People’s Cong., effective July 1,
the merits of such a system, it is clear that Google is compliant with this standard through its legal status and presence in the PRC. Nor has the PRC government claimed that Google has violated this condition.

Facebook, however, is a different story. At the time of this analysis, Facebook has no sort of legal physical presence in the PRC, but this is largely because it would be impossible for it to create one. Facebook is banned in the PRC and it would be an enormous and unjustified risk to create a government backlash against a possible joint venture partner. Google’s own story is a reminder of this lesson as most of its business partners in the mobile telecommunication industry suddenly ceased cooperation after the PRC government began to target Google. As Facebook cannot be expected to fulfill this obligation due to the PRC-government’s own measures to prevent Facebook’s compliance, Facebook should be excused from meeting this legal requirement.

Even though a WTO panel and appellate body would likely interpret the PRC’s regulations as a market access limitation as they did in U.S.—Gambling, the result of analyzing the measures as limitations on national treatment would be much the same. In its Commitment Schedule, the PRC has committed itself to imposing no limitations to the national treatment of foreign service suppliers. Quite simply, this requires that the PRC government treat foreign companies, including Google and Facebook, just like it would treat domestic companies. As detailed above,
however, Google and Facebook continue to be discriminated against by the PRC government in favor of competitors with domestic and political roots in mainland China.

Additionally, the PRC appears to be in violation of Article VI's main obligations, found in Section 1: “In sectors where specific commitments are undertaken, each Member shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner.”136 Nevertheless, the facts suggest that the PRC's treatment has not been reasonable, objective, and impartial. The PRC is required to detail the procedures and regulations that foreign service providers are expected to comply with in the country, but no serious effort to do so has been made.137 Instead, Google and Facebook are expected to uphold a series of rules that not only appear unconstitutional, but that are also implemented in an extremely arbitrary and subjective manner. While it has been suggested that the reason for the PRC's strained relationship with the U.S. service providers is because they have not engaged in “self-censorship,” no set of official regulations either explicitly requires or details these demands.138 Additionally, the process of self-censorship appears flawed and subjective because the PRC has not laid out any standards for determining which pieces of information should be banned from transmission into the PRC.139 Instead, “self-censorship” was initiated by a series of search engine and social media providers on their own accord through a process of systematically attempting to access websites and discovering which were unavailable in the PRC but available in neighboring and Western countries.140 This is the only method whereby Google and Facebook could discover which sites should be blocked in the PRC.141 Additionally, if it is the PRC’s responsibility to determine which websites pose a threat to the state and they alone have ultimate control over all PRC servers, it is unreasonable to censor the service providers as a whole rather than the specific information the PRC has the right to limit references to, as detailed below in the discussion of Article XIV.142

136. GATS, supra note 12, art. IV (emphasis added).
137. See id. art. VI. No significant regulations or procedures concerning foreign service providers have been passed complying with GATS Article IV. Regulation of the People’s Republic of China for Safety Protection of Computer Information Systems, supra note 65; Computer Information Regulations, supra note 109.
138. Computer Information Regulations, supra note 109. No additional laws are regulations are to be found through the PRC government’s online recourses or elsewhere.
139. Id.
140. See Thompson, supra note 79.
141. See id.
142. The PRC government does have the right to limit access to certain types of information, as discussed later, but cannot limit foreign service providers as a whole without justification. Additionally, if they have made specific commitments as to particular services they will allow foreign service providers to make available in the PRC, then those services must also be allowed electronically.
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The second commitment schedule category in which the PRC has made commitments is “Computer and Related Services.”143 Unlike the value-added telecommunication services category, here the PRC directly refers to the CPC in including “data processing service.”144 As defined by the CPC, data processing services include: “processing of data supplied by the customer, tabulation, computation, etc., without any design of specific software,” “capture of data (supplied by the customer) on tape, diskette, or other medium or directly into a data processing system,” and “provision of data processing services not elsewhere classified.”145 Google and Facebook provide a variety of different services to their users, or “customers” in this situation, that fall into these categories. For example, Google stores the user history of all its users in order to improve search functionality for everyone and prioritizes an individual’s search results based on this history.146 Google also allows customers to create documents and e-mails online to store on Google’s servers for access anywhere.147Facebook similarly allows its customers to upload information and data to share with countless others, processing it into accessible information and prioritizing friends’ information in a “news feed.”148 Although the computer and related services described above are reminiscent of a time where data storage and processing required the use of physical data storage units, this does not prevent Google and Facebook’s modern systems from qualifying for protection under the PRC’s commitment schedule. The Appellate Body’s decision in U.S.—Gambling recognized the electronic delivery of a service falls into that service’s category, based on the “technological neutrality” principle.149 Additionally, while some of these standards refer to tapes and diskette, they clearly leave room for future technological upgrades by specifying “or other medium” and recognizing the importance of electronic data storage.150

Having established that several of Google and Facebook’s services qualify as computer and related services, the PRC’s commitments regarding these categories can be evaluated. The results are much more straightforward than under the value-added telecommunications services category as the PRC has committed to impose no limitations on both market access and national treatment in the area of computer and related services.151 The PRC appears to be in violation of these obligations as it has prevented Google and Facebook from providing their services in mainland China in

143. PRC Concession Schedule, supra note 95.
144. Id. at 10.
145. Central Product Classification, supra note 96, at 247.
147. Id.
149. See Appellate Body Report, supra note 97, ¶ 180.
150. Central Product Classification, supra note 96, at 247.
151. PRC Concession Schedule, supra note 95, at 10.
almost any form. Blocking Google China’s search functionality stopped it from acquiring information from its mainland Chinese users, and the intermittent blocking of GMail and document services indicate that the PRC government has broken its promise to allow providers of those services access into the country under similar conditions as domestic competitors. Similarly, Facebook has been denied any access to the PRC market, making it impossible for it to gather, index, prioritize, and share the information of its potential customers. Thus, the PRC likely has not upheld its specific promises embodied in its Commitment Schedule in the case of Google and Facebook.

C. Application of the Most Favored Nation Principle

Now that the PRC’s obligations regarding its commitment schedule have been identified, an analysis of another critical GATS provision can take place. All WTO member countries are parties to the GATS, which in addition to the voluntary commitments described above, includes a mandatory provision, MFN. The MFN provision was intended to prevent member countries from discriminating between foreign-based services if the member had already opted to allow the importation of those services. The MFN principle is codified at Article II of GATS and is regularly referred to as one of the cornerstones of the WTO. As with the various other WTO commitments, the WTO does allow member countries to participate in free trade areas, an important exception to most WTO commitments, including the GATS. The GATS does allow for several exceptions to its articles, but the discussion below will highlight that their impact on the MFN principle is quite limited.

The MFN requirement of the GATS may be overlooked in arguments regarding PRC censorship, but it could have an incredibly positive impact for the United States if it were to file a case on behalf of Google and Facebook. Google was incorporated in California in September of 1998 and reincorporated in Delaware in October 2002. Fourth Amended and Restated Certificate of Incorporation of Google Inc., http://investor.google.com/corporate/certificate-of-incorporation.html (last visited July 21, 2013); Our History in Depth, GOOGLE, http://www.google.com/about/company/history/ (last visited July 21, 2013).

152. Lau, supra note 19; Wauters, supra note 46.
153. Lau, supra note 19; Wauters, supra note 46.
154. Wauters, supra note 46.
155. GATS, supra note 12, art. II.
157. Id.
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regularly referred to as a U.S. titan. Google’s primary “Chinese” competitors are Baidu and Youku, the former being the dominant provider of search engine services and the latter providing video streaming services. Baidu and Youku benefit from extensive government support and favoritism. Both Baidu’s and Youku’s headquarters are located in the People’s Republic of China’s capital city, Beijing, and are respectively referred to as the “Chinese Google” and “Chinese YouTube.” These titles are actually misnomers, however, as neither Baidu nor Youku are PRC-incorporated companies. Both Baidu and Youku are officially Cayman Island-incorporated entities. Facebook’s situation is similar to Google’s as its only “Chinese” competitor is not as Chinese as one might assume. Renren may appropriate Facebook’s designs and refer to itself as the “Chinese Facebook,” but it is also a Cayman Islands-incorporated entity.

The fact that all of Google’s and Facebook’s PRC-market competitors are registered abroad raises a novel issue. If these “Chinese” companies have their headquarters in the PRC but are incorporated abroad, are the GATS’ MFN principles triggered? In order to maintain consistency within the WTO and PRC law, the answer to this question must be in the affirmative. The WTO mandates that its dispute settlement mechanisms be governed by law rather than politics. Therefore, in order to determine the nationality of an entity, its legal status and registration must be the decisive factor. Additionally, if a country is expected to maintain uniform and objective laws, the PRC should be required to rely on legal registration. When foreign companies attempt to do business in the PRC, they face a host of regulatory requirements that they must fulfill, including a require-
ment to form joint ventures with local entities in most industries.\(^{168}\) As the PRC relies upon the registration status of a corporation to judge whether a corporation is a foreign entity, it should be required to rely on it in this circumstance as well.\(^{169}\)

Assuming that a panel or appellate body would label Baidu, Tudou, and Renren as foreign entities relative to the PRC, the United States could easily succeed on a claim that the PRC has failed to uphold its MFN obligations. The MFN requirement of the GATS requires the PRC to treat all foreign service importers in the same manner, but that has not been the case.\(^{170}\) As detailed above, the PRC government has forced the complete closure of Google China, regularly blocks Google.com, and has intermittently blocked GMail.\(^{171}\) Baidu, however, continues to enjoy full access to the PRC market even though its practices are no better than Google’s in censoring pornography,\(^{172}\) dissident material, or copyright-infringing data.\(^{173}\) Google’s YouTube remains completely unavailable in the PRC, but Youku and Tudou remain completely accessible even though the latter is well known for hosting videos that neither they nor their uploaders have a copyright over.\(^{174}\) Youku and Tudou have also hosted anti-government and pornographic videos.\(^{175}\) Similar to Google’s story, Facebook’s main

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168. Law of the People’s Republic of China on Chinese-Foreign Joint Ventures, supra note 130, art. 1. Jeffrey Hays, Foreign Companies and Foreign Investment in China, FACTS AND DETAILS, http://factsanddetails.com/china.php?itemid=349 (last visited July 21, 2013) (“Foreign companies doing business in China are generally required to form joint ventures with Chinese companies instead of forming wholly owned subsidiaries.”). There is evidence that the PRC government has become less adamant about foreign companies forming joint ventures with domestic partners in order to enter the PRC market. Nevertheless, in industries that are considered “sensitive” or where it would be beneficial for a PRC partner to acquire industrial knowledge, the PRC government continues to require any foreign entrants to form a joint venture with a domestic partner. MAARTEN ROOS, CHINESE COMMERCIAL LAW: A PRACTICAL GUIDE 131 (2010) (“Chinese law continues to restrict foreign investors from operating wholly foreign-owned subsidiaries. In these industries, the only way for foreign investors to legally participate is through a joint venture with a local counterpart. Typical examples of industries that remain open only to Chinese-foreign joint ventures, as determined in the Foreign Investment Catalogue, are car manufacturing, life-insurance, finance, securities, printing telecommunications, and certain mining activities.”).


170. GATS, supra note 12, art. II.

171. See Lau, supra note 19.

172. See Tan, supra note 24 (“Baidu rapped for spreading [Edison Chen] photos”).

173. Chen, supra note 26 (discussing the Music Copyright Society of China’s complaint, which alleged that Baidu “‘stealthily provide[s] unlicensed music streaming and downloading via its Web site, and thus earn[s] significant advertising revenues via its massive online traffic brought about by its music download service.’”); see also Thompson, supra note 79.


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competitor, Renren, is for all intents and purposes a copy of Facebook.\textsuperscript{176} Their designs and functions are nearly identical, including the “newsfeed,” “wall,” and other functions, with the PRC government regularly perusing users’ information and blocking what it deems inappropriate.\textsuperscript{177} The most common defense against compliance with the MFN requirements is a free trade area, but the PRC and Cayman Islands do not have such a relationship.\textsuperscript{178}

Without explicit justification, the PRC government has blocked Google and Facebook while their similarly situated competitors continue to enjoy relatively free reign.\textsuperscript{179} Google, Baidu, Youku, Facebook, and Renren are all foreign corporations under WTO principles and PRC law, so the MFN requirement should logically apply to the situation at hand. Nevertheless, the PRC has chosen not to treat these foreign competitors similarly and is, therefore, likely in violation of the MFN principle contained in GATS.

D. Defenses to the Most Favored Nation Clause: Step One

If the United States brought this case, the PRC would have an opportunity to defend its practices. Article XIV of the GATS states:

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; The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.\textsuperscript{180}

The exceptions allow a WTO member country to skirt its GATS requirement in order to protect public morality or prevent threats to national security.\textsuperscript{181} The PRC government has often claimed the public morals and public security exceptions in the face of international criticism.

\textsuperscript{176} See Ong, supra note 113 (“The Chinese government blocked every single international Web 2.0 Internet service, and we Chinese copycat every one,” he said, describing the country’s strategy as a simple ‘block and done’ tactic.”); \textit{5 Reasons Why Renren Will Never be a Facebook Equivalent}, \textsc{Signature9}, http://www.signature9.com/electrotech/5-reasons-why-renren-will-never-be-a-facebook-equivalent (last visited July 21, 2013).

\textsuperscript{177} See Ong, supra note 113; \textit{5 Reasons Why Renren Will Never be a Facebook Equivalent}, supra note 176.

\textsuperscript{178} \textit{Regional Trade Agreements}, \textsc{World Trade Org.}, http://www.wto.org/english/tratop_e/region_e/region_e.htm (last visited July 21, 2013).

\textsuperscript{179} See generally Ong, supra note 113.

\textsuperscript{180} GATS, supra note 12, art. XIV.

\textsuperscript{181} Id.
over its censorship scheme, but the analysis below will illustrate that it is unlikely to succeed on such a defense. The public morality and security exceptions to the GATS should not be understated, as the China-Audiovisual opinion affirmed the WTO’s commitment to these principles. That said, however, any panel or appellate body is likely to take an extremely narrow approach to interpreting Article XIV. The footnote to Article XIV explicitly seeks to limit the ability for member states to invoke the Article, and the Article’s applicability to this situation is unclear.

In order to determine whether a country may benefit from the protections of Article XIV, the WTO determines whether the measures taken are related to and necessary to achieve an acceptable objective. In examining whether a measure is necessary, WTO panels conduct a weighing and balancing test. Such a test looks at the relative importance of the interest furthered by the challenged measure, the contribution of the measure to the realization of the interest, and the impact on international commerce. Ultimately, these factors indicate whether there are any reasonable WTO-consistent alternatives available to the challenged measure. As with any affirmative defense, the burden of proof rests with the party seeking to invoke Article XIV’s protections.

The PRC government espouses several reasons in support of its censorship regime. Beyond the general statement that the PRC’s censorship is meant to protect public morality, the two specific justifications that are most often mentioned are the desires to inhibit the flow of pornography and to halt the flow of “false” information that might incite ethnic tensions. Additionally, scholars and Western politicians regularly claim that the entire regime is intended to protect the CCP from negative information. Before diving into the tests a WTO panel would apply, it is relatively easy to discard the argument that PRC censorship is necessary to protect the CCP from negative coverage. Protecting the CCP from unflattering information is not related to one of Article XIV’s narrow exceptions, which provide that a member state may employ measures to

184. See GATS, supra note 12, art. XIV. n.5.
186. Id. ¶ 305.
187. Id. ¶ 306. According to the recent Appellate Bodies to deal with issues of this nature, this list of factors is not exhaustive but no further factors have yet been enumerated. Id.
188. Id. ¶ 307.
189. Id. ¶ 309. It’s important to note that the burden is not to prove that no reasonably available alternatives, but to show that it engaged in a diligent search for less restrictive alternatives. See id. ¶¶ 30911.
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maintain public order. 192 Importantly, it does not state that a member country may employ measures to protect the political order. 193 It would be untenable to argue that WTO signers had intended to allow member states the power to protect a specific political hierarchy or a specific ruling class. 194 Even the PRC’s constitution reflects this distinction perfectly, as it explicitly allows the government censorship authority to protect the state’s interests but fails to grant the same power to protect a political party’s interests. 195 As member countries are entitled to protect the public order but not the political order, it is unlikely that a WTO panel would allow the PRC to adopt measures on the basis of protecting a political party.

Preventing the dissemination of pornography could certainly be an appropriate goal under Article XIV. 196 Although it is less clear if halting the spread of information that could lead to ethnic tensions is acceptable, a WTO panel could defer to the member country invoking such a basis. 197 As described above, the first test that the contested measures must meet is that they be related to the pursuit of a specific goal. 198 Assuming that the censorship regime is intended to prevent the spread of pornography and violence-inciting information, this test is easy to meet. 199 Although it is a crude tool, blocking Google, YouTube, and Facebook certainly removes three of the many ways that individuals can access pornography and share violence-inciting communications. Thus, a WTO panel may agree that the PRC’s censorship regime is related to its goals of halting pornography and information that may result in ethnic tensions.

The PRC is unlikely to fare as well when it comes to the “necessary” test, however. Under this weighing and balancing analysis, the importance

192. See GATS, supra note 12, art. XIV.
193. See id.
196. See Jonathan Lynn, Internet Censorship Liable to WTO Challenge—Study, REUTERS (NOV. 4, 2009, 5:49 PM), http://in.mobile.reuters.com/article/businessNews/idINIndia-43677220091104; Main Building Blocks: Agreement, Annexes, and Schedules, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/cbt_course_e/c2s6p1_e.htm (last visited July 21, 2013) (“As noted before, the Agreement clearly distinguishes between, on the one hand, trade liberalization under specific commitments and, on the other hand, domestic regulation for quality and other legitimate policy purposes. By the same token, there is no need to schedule access restrictions, such as sales bans on arms or pornographic material and the like, that fall under the General Exceptions of Article XIV or prudential measures aimed to ensure the stability and integrity of the financial services sector.”).
197. The WTO remains conscious of individual member’s sovereignty. See Top 10 Reasons to Oppose the World Trade Organization? Criticism, yes . . . misinformation, no!, supra note 126.
199. See generally id. ¶¶ 254–330.
of the end goal, the contribution of the measure to achieving it, and the impact on international commerce are examined.\footnote{200}{Id. ¶¶ 254–265.} Halting the spread of pornography is likely to be considered an important goal.\footnote{201}{See Lynn, supra note 196.} Preventing ethnic strife is also an important desire, but the fact that it may involve silencing communication of truthful information certainly weighs against it to some degree.

As for the second prong, it is hard to show that blocking Google and Facebook has had any meaningful impact on the battle against pornography\footnote{202}{See China Shuts Over 60,000 Porn Websites This Year, supra note 27.} and ethnic strife.\footnote{203}{See Didi Tang, Anti-Japan Protests in China Swell, Turn Violent, YAHOO! NEWS (Sept. 15, 2012), http://news.yahoo.com/anti-japan-protests-china-swell-turn-violent-044101740.html.} Tens of thousands of pornographic websites remained accessible within the PRC\footnote{204}{See China Shuts Over 60,000 Porn Websites This Year, supra note 27; Tan, supra note 24.} and the most direct competitors to Google and Facebook in the PRC appear to have facilitated it.\footnote{205}{Thompson, supra note 79; Tan, supra note 24.} Ethnic tensions remain extremely dangerous within the PRC.\footnote{206}{China’s Online Video Website Youku in Hot Water for Distributing Child Porn Videos, supra note 175.} The measures have also dammed the flow of international commerce to an incredible degree. In the U.S.—Gambling case, the ultimate effect on trade was only estimated to be about $21 million.\footnote{207}{Dispute Settlement: United States, supra note 115.} In this instance, the impact on the U.S. economy is likely to be in the billions.\footnote{208}{China’s Censorship of the Internet and Social Media: The Human Toll and Trade Impact Before the Congressional-Executive Commission on China, 112th Cong. 15 (2011) (statement of Gilbert B. Kaplan, President, Committee to Support U.S. Trade Laws).}

The ultimate purpose of the weighing and balancing test is to examine whether there are any reasonably available alternatives to the contested measure that have a less detrimental impact on trade.\footnote{209}{Appellate Body Report, supra note 97, ¶ 307.} In this, the PRC’s measures are likely to fail for several reasons. First, it’s clear that the reasons the PRC has given for blocking Google and Facebook may be just a pretext.\footnote{210}{See Ong, supra note 113.} Many have accused the PRC of blocking these U.S. titans simply to aid their competitors.\footnote{211}{See, e.g., Peter Scheer, China’s Great Firewall Impedes Foreign Trade, SF\textsc{\textregistered}\textsc{\textregistered}GATE (Jan. 24, 2010, 4:00 AM), http://www.sfgate.com/opinion/article/China-s-Great-Firewall-impedes-foreign-trade-3202538.php (“The United States can argue that China’s ‘Great Firewall’—a system of filters and bottlenecks that effectively shuts the country within its own intranet—is an illegal restraint on international trade because it bars foreign companies from competing, via the Internet, in the vast Chinese market.”).}
PRC can rely upon. The PRC government has proven so adept at blocking material by itself that it can simply block references or certain information from appearing on Google or Facebook rather than blocking those services as a whole.212 As detailed previously, the only way Internet companies in the PRC actually know what material should be blocked is by attempting to access it themselves and seeing what makes it through and what does not.213 Therefore, there is no need to censor Google and Facebook themselves. Removing the restrictions on access to Google and Facebook would limit access to the same number of pornographic and violence-inciting websites as is currently the case while allowing U.S. companies to operate in the PRC. The fact that such an obvious alternative has not been utilized also illustrates that the PRC government likely did not engage in a search for reasonable alternatives. Therefore, a WTO panel is likely to view the censorship of Google and Facebook as unnecessary to uphold public morals and order.

E. **Defenses to the Most Favored Nation Clause: Step Two**

In the final analysis of whether the PRC may claim an exception to its GATS requirements, the PRC would likely be unsuccessful in defending its practices. The GATS’ “chapeau” finds its source in the very first section of Article XIV: “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 . . . .”214

The chapeau clause received quite some attention in the U.S.—Gambling case, and it serves as a powerful tool in preventing member countries from abusing the Article XIV exceptions.215 Quite simply, the chapeau applies when a member country has used the exceptions as a pretext to unjustifiably discriminate between countries, and when more reasonable or less trade distorting alternatives were available in achieving the claimed goal.216

As it is intended to do, the chapeau would step into this situation and likely invalidate the PRC’s practices if it had succeeded thus far in defending its practices under Article XIV. First, the evidence suggests that the PRC government has attempted to use the Article XIV exceptions as pretext to discriminate against America’s Internet titans while allowing Baidu

212. See Thompson, supra note 79.

213. See id.

214. GATS, supra note 12, art. XIV.

215. See Appellate Body Report, supra note 97. The chapeau clause of Article XX of the GATT was also analyzed in Brazil—Measures Affecting Imports of Retreated Tyres (Brazil—Tyres). Appellate Body Report, Brazil—Measures Affecting Imports of Retreated Tyres, ¶¶ 27–43, WT/DS352/AB/R (Dec. 3, 2007). Although there are differences in the texts of the provisions, Article XX and Article XIV are treated similarly by WTO panels. Appellate Body Report, supra note 97, ¶ 291.

216. See Appellate Body Report, supra note 97.
and Youku free reign in the PRC market. Baidu and Youku are, in fact, no less effective at blocking the material the PRC government wishes it to. Most telling, however, is the fact that the PRC possesses tools and alternatives that would not distort billions of dollars in trade. As the PRC government already censors Internet activity, it already possesses the most efficient and thorough tools. As such, there is no need to cause a trade distortion by censoring Google, YouTube, and Facebook. Furthermore, if a member country wishes to block material due to its immoral nature or other threat to society, logically, the member country would block that type of material coming in from any other country. In contrast, if the member country claims to block material from one country on the grounds that it is objectionable but allows the importation of the same material from another country, the material has not been objectionable enough to be considered a threat to public morals or public order.

IV. APPLICATION OF TRIPS TO THE PRC CENSORSHIP REGIME

Although this topic remains largely unexplored in the current controversy, TRIPS could serve as a powerful tool for the U.S. government in challenging the PRC’s censorship of Google and Facebook. TRIPS applies to all WTO members. Among its most important features, it sets minimum standards for the protection of intellectual property among member countries and mandates that every country have venues whereby intellectual property rights holders can challenge infringing parties. A U.S. argument relying on TRIPS could proceed on two grounds that will be discussed below. First, the PRC government itself has been involved in the theft of Google’s intellectual property rights. Second, rather than create a system whereby intellectual property rights are enforced, the PRC’s policies actually encourage the infringement of copyrights.

218. See China Shuts Over 60,000 Porn Websites This Year, supra note 27.
219. See, e.g., Thompson, supra note 79.
220. See id.
222. Id.
223. Facebook might also be able to make an argument that it is not receiving national treatment as its intellectual property is being used by Renren, but Facebook would likely have to make a case in the PRC courts first to make an argument in front of the WTO. Additionally, such an argument would likely follow the reasoning laid out above.
224. Lanxiang Vocational School, a government-run military school has now been traced as the source for a variety of hacking events, including those discovered by State Department officials in February 2010. School Linked to Operation Aurora is Tied Indirectly to Hacktivist Group, Infosecurity (Feb. 19, 2010), http://www.infosecurity-magazine.com/view/7486/school-linked-to-operation-aurora-attack-is-tied-indirectly-to-hacktivist-group/ [hereinafter Operation Aurora].
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Article XLIV of TRIPS requires WTO member countries to establish procedures that enforce the protection of intellectual property rights. There have been a variety of instances where hackers have infiltrated Google from abroad, but Operation Aurora marked a new chapter. In Operation Aurora, a PRC-funded government program not only infiltrated Google’s user accounts, but it also resulted in the theft of some of Google’s source code. The PRC government continues to deny responsibility, but nearly all of the attacks were traced to a military school, and the disclosures by WikiLeaks have revealed that a member of the PRC’s Politburo ordered the attack. While Google’s executives have declined to comment specifically on which pieces of intellectual property were stolen, the issue was considered serious enough to warrant a public statement by the company. Although most of the WTO’s obligations focus on the sort of regulations and treatment a member country’s government must provide for private commerce, some requirements must logically relate to the government’s own behavior. In this instance, if the government itself is involved in a breach of intellectual property rights, it ordinarily cannot be the case that the government has fulfilled its obligations to protect intellectual property rights. Instead, the PRC has likely gone beyond what TRIPS attempted to prescribe by actually participating in the violation of intellectual property protections.

The U.S. government also made a powerful argument in regards to the PRC’s audiovisual importation restrictions. Although the China—Audiovisual case was decided largely on the application of GATS, the United States stated that imposing restrictions on the amount of copyrighted material that may enter the PRC only serves to create an underground black market for those materials. For example, limiting the number of foreign films that were allowed to be released in the PRC only led consumers to purchase pirated versions of those movies. The result in the Google/Facebook case has been similar. As Facebook remained blocked in the PRC, Renren simply took its place by copying Facebook’s interface, tools, and functionality exactly even though this had been copyrighted by Facebook. In blocking Google, the PRC government has pushed traffic both to Baidu and Youku, both of which are well known for disregarding copyright laws. Baidu itself allows users to download copyrighted music and Youku streams copyrighted videos without acquiring the necessary rights. Together, this is a harder TRIPS argument to make, but one that

225. TRIPS Agreement, supra note 12, art. 44.
226. Shane & Lehman, supra note 30; Leigh, supra note 30. “[T]he hacker attacks which forced Google to quit China in January were orchestrated by a senior member of the Politburo who typed his own name into the global version of the search engine and found articles criticizing him personally.” Leigh, supra note 30; see Operation Aurora, supra note 224.
227. See generally China—Audiovisual Products, supra note 101.
228. Id. ¶¶ 70, 76.
229. See, e.g., Darwell, supra note 177.
might be worthy of U.S. attention. After all, how can the PRC be protecting intellectual property rights when it is causing their theft or, at a minimum, taking a complicit role in allowing their theft? While many policies lead to unintended consequences, the results here are foreseeable and due to an irrational policy.231

V. ENFORCEMENT

As any U.S. lawyer might ask, “what good is a right without a remedy?” While the preceding Parts have focused on the legal arguments against the PRC’s censorship regime, changing the status quo would come with great difficulty. Due to a combination of real world politics and WTO law, any remedies the United States would be awarded might benefit the United States economically but not affect the current censorship regime. The analysis below provides a guide for how the dispute mechanism would likely deal with the issue of remedies.

If the United States were to win, the PRC government, after entering into settlement negotiations, would have to choose between whether to conform, provide compensation, or suffer retaliation. As an initial matter, it seems unlikely that the PRC would refrain from censoring Google or YouTube. Even after immense pressure from nearly all of the Western world, it has continued to hold steady. Indeed, the issue has become of such prominence that the PRC government may have become entrenched in its position, especially given Chinese culture’s emphasis on not losing face.232 If the PRC does not comply with the ruling, it could choose to pay compensation in the amount that Google and Facebook suffer due to the PRC’s WTO violations.233 This option would benefit both the PRC as its government gets to maintain its regime and helps the United States recover the economic harms suffered by Google and Facebook.

Ultimately, however, the PRC may be unwilling to respond to the United States’ victory at all. This would put the United States in a difficult situation due to the WTO laws surrounding the forms of retaliation a member country may utilize. The relevant provisions suggest that the United States take action within the same category of services and intellectual property as the violations that have taken place.234 An interesting

231. As described above, none of Facebook and Google’s competitors actually do a better job at censoring harmful material.

232. The concept of losing face is not unique to China and is a concept recognized in most Asian countries. Although there are several facets to the concept, among the most important are avoiding embarrassment and not admitting wrongfulness. See generally Greg Rodgers, The Concept of Saving Face, ABOUT, http://goasia.about.com/od/Customs-and-Traditions/a/Saving-Face.htm (last visited July 21, 2013).

233. DSU, supra note 16, art. 22, cl. 2.

234. Id. art. 22, cl. 3; The Process—Stages in a typical WTO dispute settlement case, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/dispu_e/dispu_settlement_cbt_e/c6s101p1_e.htm (“Regarding the type of obligations to be suspended, the DSU imposes certain requirements. In principle, the sanctions should be imposed in the same sector as that in which the violation or other nullification or impairment was found (Article 22.3(a) of the DSU).”).
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response to this would be to block PRC Internet service providers or their stock listings in the United States, but the analysis above has shown that this would actually be a retaliation against the Cayman Islands rather than the PRC. As the Cayman Islands are not parties to the WTO, however, it is not impossible for the United States to pursue such a route. Yet, blocking “PRC” Internet services is unlikely to serve much use as none of them have the stature or revenue in the United States as Google and Facebook would have in the PRC absent the censorship regime.

The inability to sanction PRC service providers would lead to a precarious situation, as the United States is most likely to benefit from retaliating against goods manufactured in the PRC, which represents a large portion of U.S. imports. Utilizing previous WTO arbitration decisions as a guide, members who seek to retaliate in a sector different from the one that was the subject of the dispute must overcome a significant burden. Such a country must prove that imposing sanctions under the same sector of trade would either not be practicable or would not total an amount equal to the damages it is entitled to. Additionally, it would have to prove that the circumstances are serious enough to seek suspension under another agreement. While these are major obstacles to overcome, it is likely that the United States would satisfy the requirements. As detailed above, the amount of trade being impacted here is in the billions of dollars and, therefore, a serious circumstance. Additionally, the lack of services and intellectual property that flow from the PRC into the United States likely requires utilizing a separate agreement. Indeed, the vast majority of PRC exports to the United States come in the form of manufactured goods and the United States should have no trouble imposing measures upon those imports that amount to the damages the censorship regime has inflicted as the trade deficit in goods between the two countries alone is enough.

CONCLUSION

In this information age we live in, the U.S. economy will become more dependent on its Internet pioneers for economic growth. As such, Google and Facebook are important companies for the future of the United States. The United States faces a difficult task ahead of it in challenging the PRC for what may traditionally have been referred to as a “domestic policy” of censorship. The WTO is the best venue for such a battle and its primary obligations, including the GATS and TRIPS, should enable the United States to claim victory against the PRC’s discrimination against Google and Facebook for several reasons. First, the censorship of Google and Facebook appears to contradict the PRC’s own concession schedule, which is made binding through the GATS. Second, blocking Google and

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236. Id.
Facebook in mainland China while allowing Baidu, Tudou, and Renren is likely a violation of the MFN principle. Lastly, allowing or sponsoring the theft of intellectual property from U.S. Internet titans goes against TRIPS, which requires members of the WTO to protect intellectual property rights.