

# Combating Censorship in China: Forcing China’s Hand Through the WTO and Collective Action

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The advent of the Internet was once seen as a democratizing force and a symbol of freedom. But today, it has not lived up to this promise in many authoritarian states, like China. The Chinese government has used the Internet to effectively maintain a status quo bias. Specifically, China’s sophisticated censorship infrastructure enables the government to shape public discourse, promulgate propaganda, censor and quash dissent, engage in domestic protectionism, and control both multinational and domestic corporations operating within the country. Thus, contrary to the government’s assertions, its censorship practices are not merely a domestic policy issue; rather, China’s censorship practices have real consequences for the international community.

This Article suggests two ways to force China to change its censorship regime. First, from an international law perspective, the United States can bring an international trade claim to the World Trade Organization (WTO) and argue that China’s censorship practices constitute domestic protectionism. The WTO can reasonably find in favor of the United States because, in an age dominated by digital trade, China’s complete blockages (i.e., its decision to completely block certain websites) are disproportionate to any potential public morals or public order justifications that it may claim. Second, from a domestic Chinese perspective, the Global Network Initiative (GNI), people around the world, and Internet companies operating in China can engage in collective action and protest the government. There is reason to be optimistic about the efficaciousness of collective action because the Chinese government has made concessions relating to censorship in the past. Under the right conditions, therefore, individuals and international and domestic entities may be successful in combating censorship in China.

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## Introduction

Proponents of democracy initially viewed the Internet as a medium that held many great promises. In the 1990s, the optimism about the link between technological advancement and democratization was a powerful assumption in popular thought.<sup>1</sup> Through freely accessing information, the promise was that individuals living under authoritarian regimes would be able to discover the greatness of democracy and universal human

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1. SHANTHI KALATHIL & TAYLOR C. BOAS, OPEN NETWORKS, CLOSED REGIMES: THE IMPACT OF THE INTERNET ON AUTHORITARIAN RULE 1 (2003).

rights.<sup>2</sup> In short, the Internet was seen as a symbol of freedom. Despite this potential, authoritarian governments, like the Chinese government, have quickly adapted to the digital age by finding ways to manipulate the Internet to their advantage through, for example, systematic censorship.<sup>3</sup> For example, the Chinese government reportedly pays netizens to join the infamous “50 Cent Army” to spread pro-government propaganda and dilute online criticism against it.<sup>4</sup> Events like these show the Chinese government’s willingness to use the Internet strategically to promote its own interests.

While academics and foreign policy experts have commonly maintained that it is nearly impossible for foreign entities to meaningfully change China’s censorship regime given the high level of control that the Chinese government exercises over the Internet, this Article departs from this mindset by proposing two ways for the international community to combat censorship in China.<sup>5</sup> Part I lays out the current state of censorship in China by describing how the government censors corporations that operate on the Internet and individuals. Part II distinguishes between circumventing and combating censorship. Through analyzing existing institutions and structures and previous instances where the Chinese government made concessions relating to its censorship program, Parts III and IV present two approaches that the international community and Internet corporations can adopt to combat censorship in China. For example, Part IV outlines how the United States can bring a claim against China at the World Trade Organization (WTO) by arguing that China’s current censorship infrastructure violates its international trade commitments. Finally, Part V asserts that Global Network Initiative members, global citizens, and corporations operating in China can combat censorship by engaging in collective action and protesting against the government.

Of course, these two approaches are subject to practical limitations. For example, given the political nature of WTO claims, whether the United States decides to bring a claim may be based on politics rather than on the legal merits of the claim. Another example is that it may be difficult to comprehend why Internet corporations would want to risk the real market consequences of opposing the Chinese government at all. However, these issues are not dispositive because, in opening its borders to the world, China has subjected itself to global influence. For example, in joining the

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2. EVGENY MOROZOV, *THE NET DELUSION: THE DARK SIDE OF INTERNET FREEDOM* xii–xiii (2011).

3. See generally REBECCA MACKINNON, *CONSENT OF THE NETWORKED: THE WORLDWIDE STRUGGLE FOR INTERNET FREEDOM* (2013).

4. Joyce Lau, *Who Are the Chinese Trolls of the ‘50 Cent Army’?*, VOA NEWS (Oct. 7, 2016), <https://www.voanews.com/a/who-is-that-chinese-troll/3540663.html> [<https://perma.cc/RP2N-3LG7>].

5. See *Banging Your Head Against a Wall: China Shrugs at U.S. Criticism of Censorship*, COUNCIL ON FOREIGN RELS. (Apr. 13, 2016), <https://www.cfr.org/blog/banging-your-head-against-wall-china-shrugs-us-criticism-censorship> [<https://perma.cc/KP3V-ZXAU>] (arguing that there is not much that foreign governments can do to change China’s censorship regime within its borders).

WTO in 2001, China voluntarily subjected itself to the WTO's rules. This Article highlights vulnerabilities like these to facilitate the discourse on combating censorship and to help Chinese citizens realize a right that should perhaps be considered fundamental: Internet freedom.<sup>6</sup>

Allowing China's censorship regime to remain unchallenged may lead to drastic political, economic, and social repercussions. For instance, Chinese citizens may remain in the dark about categories of information that is censored from them; other authoritarian governments can follow China's practices by purchasing censorship technology from China, thereby depriving their citizens of free access to information; and other states may follow China's lead and seek to undermine preexisting international trade rules by citing questionable humanitarian exceptions. For these reasons, the international community can no longer afford to stay idle as China continues developing, implementing, and selling its censorship technology.

## I. China's Censorship Infrastructure

The Chinese government has a history of using censorship to quash dissent and any subversion of its authority.<sup>7</sup> The Communist Party's absolute control of the government, coupled with the opacity of domestic regulations, enable it to impose a highly sophisticated and effective censorship regime.<sup>8</sup> For example, the government can justify censoring content that exposes "state secrets," which can encompass virtually anything that harms the government's political or economic interests.<sup>9</sup> This Part will provide a brief overview of China's censorship infrastructure by examining three interrelated, nuanced features that define the system: (1) how corporations are censored, (2) how individuals are censored, and (3) how the government interacts with virtual private networks (VPNs).

### A. Censoring Corporations

The Chinese government exercises jurisdiction over Internet service providers (ISPs), companies that provide Internet access, by imposing strict standards for "approval, licensing, permitting, inspection and reporting obligations."<sup>10</sup> Thomas Shoemith notes that the government's "total control over information passing over the Internet in China permits it to restrict or block altogether communications as well as entire domains at will, and it frequently does, even where the operator and all its servers are

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6. See Michael Martinez, *Clinton Calls for Global Recognition of Internet Freedom*, CNN: POL. (Feb. 16, 2011, 11:15 AM), <https://edition.cnn.com/2011/POLITICS/02/15/clinton.internet> [<https://perma.cc/VRK5-3273>].

7. See Evan Osnos, *China's Censored World*, N.Y. TIMES (May 2, 2014), <https://www.nytimes.com/2014/05/03/opinion/sunday/chinas-censored-world.html>.

8. Beina Xu & Eleanor Albert, *Media Censorship in China*, COUNCIL ON FOREIGN RELS. (Feb. 17, 2017), <https://www.cfr.org/background/medias-censorship-china> [<https://perma.cc/9DJB-HUJH>].

9. *Id.*

10. THOMAS M. SHOEMITH, INTERNET REGULATION IN CHINA DATA PRIVACY IN CHINA OVERVIEW 1. (2014), <https://www.pillsburylaw.com/images/content/0/7/076.pdf> [<https://perma.cc/4VHW-WP3X>].

located outside of China.”<sup>11</sup>

ISPs must be licensed to operate in China. According to regulations, all Internet traffic must go through Chinese servers, such as ChinaNet, GBNet, CERNET, and CSTNET.<sup>12</sup> The government aggressively cracks down on companies operating without or beyond the scope of their licenses.<sup>13</sup>

ISPs are responsible for their customers’ online activities and back-up storage of all e-mail and other traffic that passes through their networks.<sup>14</sup> ISPs are required to provide the government with any information that it requests, effectively rendering ISPs agents of the government.<sup>15</sup> By operating through ISPs, the government can easily ban citizens from accessing the Internet by refusing service to a particular Uniform Resource Locator (URL), or Internet protocol (IP) addresses.<sup>16</sup>

In addition to ISPs, corporations that provide content on the Internet are held accountable for the content on their platforms.<sup>17</sup> Like ISPs, they are also subject to strict licensing requirements. As such, these Internet corporations must also abide by all domestic laws and regulations in order to operate in China. For example, Internet corporations frequently sign a “Public Pledge of Self-Regulation and Professional Ethics for China Internet Industry.”<sup>18</sup> Signatory firms promise to ban content that “can endanger national security, destroy the unity of the country, contradict the laws and governmental regulations, pornography and other unhealthy information.”<sup>19</sup> These agreements reflect the government’s professed industry norms of nationalism, trustworthiness, lawfulness, and fairness.<sup>20</sup> Hence, the Chinese government is able to outsource a significant amount of censorship enforcement to private Internet corporations.<sup>21</sup> In practice, Internet corporations’ broad commitments enable the government to demand companies to censor virtually any content it deems objectionable and to compel Internet corporations to release private user

11. *Id.*

12. Gaurav Jeyaraman, *China Tightens Grip on Internet*, NEWSBYTES (Mar. 30, 2016), <https://www.newsbytesapp.com/timeline/World/1758/10705/china-s-internet-censorship>.

13. Sijia Jiang, *China Cracks Down on Unauthorized Internet Connections*, REUTERS (Jan. 23, 2017, 5:26 AM), <https://www.reuters.com/article/us-china-internet/china-cracks-down-on-unauthorized-internet-connections-idUSKBN15715U> [<https://perma.cc/5C6P-B9J5>].

14. WILLIAM FOSTER & SEYMOUR E. GOODMAN, *THE DIFFUSION OF THE INTERNET IN CHINA* 36 (2000), <http://fosterbrahm.com/docs/chinainternet.pdf> [<https://perma.cc/UM2Y-U9R5>].

15. *Id.*

16. See MOROZOV, *supra* note 2, at 106.

17. See *id.* at 101.

18. LIJUN CAO, *A STUDY ON SELF-REGULATORY INITIATIVES IN CHINA’S INTERNET INDUSTRY* 27 (2007), <http://www.lse.ac.uk/media-and-communications/assets/documents/research/msc-dissertations/2007/Cao-final.pdf> [<https://perma.cc/S4AU-EGJ4>].

19. *Id.*

20. See *id.*

21. MOROZOV, *supra* note 2, at 101-02.

information.<sup>22</sup>

Yahoo's betrayal of Wang Xiaoning, one of Yahoo's users, is a paradigmatic example of Internet corporations throwing its users under the bus to comply with governmental demands. In 2002, Yahoo voluntarily signed the "Public Pledge on Self-Discipline for the Chinese Internet Industry," which obligated it to identify and censor any information that Chinese authorities deemed objectionable.<sup>23</sup> With Yahoo's help, the Chinese government convicted Wang Xiaoning of "inciting subversion of state power" and providing state secrets to overseas entities because he allegedly disseminated pro-democracy writings via e-mail and on Yahoo forums.<sup>24</sup> In a separate incident, Yahoo disclosed the identity of Shi Tao, a journalist who publicly posted a directive from the government demanding him not to cover the anniversary of Tiananmen Square.<sup>25</sup> As a result, Shi was arrested and sentenced to a ten-year prison term for divulging state secrets abroad.<sup>26</sup> At a United States (U.S.) congressional hearing following this incident, Congressman Tom Lantos reprimanded Yahoo's executives: "While technologically and financially you are giants, morally you are pygmies."<sup>27</sup> After much domestic criticism, Yahoo settled the U.S. lawsuits brought by Wang and Shi.<sup>28</sup> Yahoo's ill-fated compliance with Chinese regulations exemplifies the ethical concerns facing multinational firms that continue to operate in China.<sup>29</sup>

Other multinational firms, such as Google and Facebook, have been wholly blocked in China for, among other reasons, failing to abide by the government's censorship demands and harboring the potential to produce dangerous content. In an effort to maintain operations in China, Google

22. Rebecca MacKinnon & John Palfrey, *Censorship Inc.: If They're Not Careful, Western Companies Could Break Up the Web*, BUS. & HUM. RTS. RES. CTR. (Feb. 27, 2006), <https://www.business-humanrights.org/en/latest-news/opinion-censorship-inc-if-theyre-not-careful-western-tech-companies-could-break-up-the-web> [<https://perma.cc/542Y-ZUD9>].

23. Phelim Kine, *China's Internet Crackdown*, FORBES (May 27, 2010, 6:00 PM), <https://www.forbes.com/2010/05/27/china-internet-web-censor-surveillance-technology-security-google-yahoo-green-dam.html> [<https://perma.cc/J8GL-RBHP>].

24. David Barboza, *China Dissident, Jailed on Evidence Provided by Yahoo, Is Freed*, N.Y. TIMES (Aug. 31, 2012), <http://www.nytimes.com/2012/09/01/world/asia/wang-xiaoning-chinese-dissident-in-yahoo-case-freed.html> [<https://perma.cc/J499-98WK>].

25. Neil Gough, *Chinese Democracy Advocate Is Freed After 8 Years in Prison*, N.Y. TIMES (Sept. 7, 2013), <http://www.nytimes.com/2013/09/08/world/asia/shi-tao-chinese-democracy-advocate-is-released-from-prison.html> [<https://perma.cc/4KFZ-7GUF>].

26. Kine, *supra* note 23.

27. *Id.*

28. Catherine Rampell, *Yahoo Settles with Chinese Families*, WASH. POST (Nov. 14, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/11/13/AR2007111300885.html> [<https://perma.cc/BBY8-YYLG>].

29. Perhaps it is more troubling when American firms assist the Chinese government for economic gain and with disregard for the real consequences of their assistance. Evgeny Morozov points to how international firms, such as International Business Machines (IBM), provided the Chinese government with technology to track social networks and individuals' messaging habits. Morozov also discusses how the University of California accepted funding from the Chinese government to develop video surveillance technology. See MOROZOV, *supra* note 2, at 175, 178.

initially offered to release a version of its web services that conformed to China's censorship policies.<sup>30</sup> However, the arrangement fell apart when Google discovered a cyberattack from within China that targeted and successfully hacked a number of Gmail accounts of human-rights activists.<sup>31</sup> Although Google voluntarily withdrew its services from China in 2010, there have been reports that it is looking to return to the market, which has over 700 million Internet users—the most of any country.<sup>32</sup>

Facebook has been developing a censorship tool specifically to resume services in China.<sup>33</sup> This tool would enable a third party to monitor and delete content on the platform.<sup>34</sup> On one hand, critics of Facebook argue that Facebook is willing to compromise its mission of “mak[ing] the world more open and connected” in order to gain access to the Chinese market.<sup>35</sup> On the other hand, Facebook responds that exposing Chinese citizens to more content through Facebook, albeit a limited version of Facebook, may be better than having no Facebook at all. As Mark Zuckerberg, the Chief Executive Officer (CEO) of Facebook, explained: “It[is] better for Facebook to be a part of enabling conversation, even if it[is] not yet the full conversation.”<sup>36</sup>

All Internet corporations that operate in China face similar dilemmas. Because corporations are primarily motivated by profit and are responsible to their shareholders, these corporations are routinely willing to take all necessary steps to obtain access to the lucrative Chinese market.<sup>37</sup>

## B. Censoring Individuals

The Chinese government imposes censorship on individuals in a variety of ways. First, the nexus of the Chinese government's online censor-

30. Kaveh Waddell, *Why Google Quit China—and Why It's Heading Back*, ATLANTIC (Jan. 19, 2016), <https://www.theatlantic.com/technology/archive/2016/01/why-google-quit-china-and-why-its-heading-back/424482> [https://perma.cc/9JHQ-2DUG]. Similarly, Apple was required to remove certain applications from its App Store in order to continue operating in China. Paul Mozur, *Apple Removes Apps from China Store that Help Internet Users Evade Censorship*, N.Y. TIMES (July 29, 2017), <https://www.nytimes.com/2017/07/29/technology/china-apple-censorship.html> [https://perma.cc/NH4B-97QW].

31. Waddell, *supra* note 30.

32. Nectar Gan, *Is Google Another Step Closer to Being Unblocked in China?*, CNBC (Mar. 12, 2017, 8:16 PM), <https://www.cnbc.com/2017/03/12/is-google-another-step-closer-to-being-unblocked-in-china.html> [https://perma.cc/9NMH-357J].

33. Mike Isaac, *Facebook Said to Create Censorship Tool to Get Back into China*, N.Y. TIMES (Nov. 22, 2016), <https://www.nytimes.com/2016/11/22/technology/facebook-censorship-tool-china.html> [https://perma.cc/JYL3-FWWW]; Dave Lee, *Facebook 'Made China Censorship Tool'*, BBC NEWS (Nov. 23, 2016), <http://www.bbc.com/news/technology-38073949> [https://perma.cc/S8Z5-EAZR].

34. Isaac, *supra* note 33.

35. *Id.*

36. *Id.*

37. See generally Yue Wang, *Try, Try, and Try Again: Facebook and Google Plan New Partnerships to Break into China*, FORBES (Jan. 11, 2018, 3:07 AM), <https://www.forbes.com/sites/ywang/2018/01/11/try-try-and-try-again-facebook-and-google-plan-new-partnerships-to-break-into-china> [https://perma.cc/L4ZS-HVQ6] (pointing to how Facebook and Google are attempting to find ways to re-enter the Chinese market).

ship and its surveillance efforts is in “the Great Firewall of China.” Through applying methods such as bandwidth throttling and keyword filtering, the Great Firewall blocks certain websites that the government deems problematic, like Wikipedia, Facebook, Twitter, YouTube, and Google.<sup>38</sup> As the Council on Foreign Affairs reports, “[t]he government is particularly keen on blocking reports of issues that could incite social unrest, like official corruption, the economy, health and environmental scandals, certain religious groups, and ethnic strife.”<sup>39</sup> Thus, content that threatens political stability, such as controversial photos and videos, and search terms related to Falun Gong, Tiananmen Square, and Tibet are banned.<sup>40</sup>

In addition to employing direct censorship against individuals, the Chinese government also outsources its censorship endeavors. For example, Internet corporations generally monitor harmful content that bypasses the Great Firewall.<sup>41</sup> These corporations are always vigilant in identifying sensitive content because the government can revoke their operating licenses if they fail to comply with the broad expectations of the Pledge of Self-Regulation and other unspoken, industry norms.<sup>42</sup> In addition to Internet corporations, the government has an Internet police force of two million people who monitor public opinion online and collaborate with Communist Party members.<sup>43</sup>

Second, Internet corporations and the government are able to hold netizens responsible for their online actions by requiring them to register with their real identifications.<sup>44</sup> In 2017, the Cyberspace Administration of China (CAC) passed regulations that mandated, among other things, netizens to “be denied service if they do not register under their real identities for online forums and message boards.”<sup>45</sup> Major platforms, such as Weibo (China’s domestic equivalent of Twitter), and WeChat (China’s most popular messaging application), require users to register with their real

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38. See Eva Dou, *China’s Great Firewall Gets Taller*, WALL ST. J. (Jan. 30, 2015, 4:02 AM), <https://www.wsj.com/articles/chinas-great-firewall-gets-taller-1422607143> [<https://perma.cc/W96Y-ZA5G>].

39. Xu & Albert, *supra* note 8.

40. *Id.*

41. *See id.*

42. *See supra* notes 18–21 and accompanying text.

43. Katie Hunt & CY Xu, *China ‘Employs 2 Million to Police Internet’*, CABLE NEWS NETWORK (Oct. 7, 2013, 3:56 AM), <http://www.cnn.com/2013/10/07/world/asia/china-internet-monitors/index.html> [<https://perma.cc/99G9-8TAL>].

44. Charlotte Gao, *China’s New Wave of Internet Censorship: Name Verification for Online Commenting*, DIPLOMAT (Aug. 26, 2017), <https://thediplomat.com/2017/08/chinas-new-wave-of-internet-censorship-name-verification-for-online-commenting> [<https://perma.cc/HTM4-7NMD>]; Nikhil Sonnad, *In China You Now Have to Provide Your Real Identity If You Want to Comment Online*, QUARTZ (Aug. 26, 2017), <https://qz.com/1063073/in-china-you-now-have-to-provide-your-real-identity-if-you-want-to-comment-online> [<https://perma.cc/EC8G-GWEL>].

45. Masashi Crete-Nishihata et al., *Managing the Message: What You Can’t Say About the 19th National Communist Party Congress on WeChat*, CITIZEN LAB (Nov. 6, 2017), <https://citizenlab.ca/2017/11/managing-message-censorship-19th-national-communist-party-congress-wechat> [<https://perma.cc/JZ5N-4C3M>].



names, prohibit the use of fake names, and compel users to observe broad Internet regulations.<sup>46</sup> To emphasize the seriousness of the new regulations, Gaofei Wang, the CEO of Weibo, explained:

The users should instantly manage the comments, reposts, and other interaction of their own accounts. The providers of the online platforms could restrict or cancel the function of commenting of those users who fail to properly manage their accounts. . . . You manage your comments; the platform will not help you manage, but shut down your commenting function.<sup>47</sup>

To supplement the Internet registration requirement, a recent CAC regulation implemented a credit rating system for online users, which allows Internet companies to easily find and ban (via real identification, online identification, or IP address) controversial users without any due process.<sup>48</sup> A third CAC regulation requires both Internet companies and users to “adhere to correct guidance, promot[e] socialist core values, foster [ ] a positive and healthy online culture, and protect [ ] a favorable online ecology.”<sup>49</sup> David Bandurski argues that this package of CAC regulations aims to atomize and personalize censorship.<sup>50</sup> While the government has focused its efforts on censoring Internet companies and outsourcing censorship duties in the past, the focus is now on individual accountability.<sup>51</sup>

The Chinese government’s focus on individual accountability has motivated it to make extreme regulatory demands. For example, Apple was recently forced to relinquish *all* of its domestic iCloud data to a Chinese entity in order to comply with governmental regulations.<sup>52</sup> The implications of this move are profound for Apple’s and individuals’ future interactions with the government and will be discussed later in this Article. Going back to individual accountability, the user information that the government retains, along with browsing logs that ISPs provide the government, enables it to efficiently identify and arrest netizens for spreading misinfor-

46. Sonnad, *supra* note 44.

47. Charlotte Gao, *Please, Self-Censor: China Provides New Regulations for Online Conduct*, DIPLOMAT (Sept. 8, 2017), <https://thediplomat.com/2017/09/please-self-censor-china-provides-new-regulations-for-online-conduct> [<https://perma.cc/VG4M-2XAT>].

48. David Bandurski, *The Great Hive of Propaganda*, CHINA MEDIA PROJECT (Sept. 16, 2017), <http://chinamediaproject.org/2017/09/16/the-great-hive-of-propaganda> [<https://perma.cc/P29K-YN2L>]. The credit rating system’s implications on netizens’ privacy has generated much domestic and international outrage. See Rachel Botsman, *Big Data Meets Big Brother as China Moves to Rate Its Citizens*, WIRED (Oct. 21, 2017), <http://www.wired.co.uk/article/chinese-government-social-credit-score-privacy-invasion> [<https://perma.cc/Q6MA-RX4Q>].

49. Bandurski, *supra* note 48.

50. *Id.*

51. The new regulations also hold users who set up private group chats *legally* responsible for the content in the chat. See Simon Denyer, *The Walls Are Closing In: China Finds New Ways to Tighten Internet Controls*, WASH. POST (Sept. 27, 2017), [https://www.washingtonpost.com/world/asia\\_pacific/the-walls-are-closing-in-chinafinds-new-ways-to-tighten-internet-controls/2017/09/26/2e0d3562-9ee6-11e7-b2a7-bc70b6f98089\\_story.html](https://www.washingtonpost.com/world/asia_pacific/the-walls-are-closing-in-chinafinds-new-ways-to-tighten-internet-controls/2017/09/26/2e0d3562-9ee6-11e7-b2a7-bc70b6f98089_story.html) [<https://perma.cc/GVJ9-3ELF>] (emphasis added).

52. *Apple: Chinese Firm to Operate China iCloud Accounts*, BBC: BUS. (Jan. 10, 2018), <http://www.bbc.com/news/business-42631386> [<https://perma.cc/8K58-9N8V>].

mation online.<sup>53</sup> When considered under free speech jurisprudence, the government's regulations effectively create a realm where netizens' personal matters are no longer private.<sup>54</sup> This, in turn, produces a chilling effect where netizens' fear of punishment deters their legitimate exercise of certain natural and legal rights.<sup>55</sup>

Third, the government censors individuals by diluting online content produced by netizens. The government allegedly pays the 50 Cent Army to disseminate online propaganda.<sup>56</sup> According to one reporter, a leaked internal directive showed that the government instructed 50 Cent Army members to bolster online criticism toward the United States and redirect conversations involving democracy by pointing to examples of violence catalyzed by capitalism and democracy.<sup>57</sup>

While the Chinese government appears to permit governmental criticism to a certain extent, it does not tolerate collective action. In a 2013 empirical study that analyzed the content of over 1,400 Chinese media services over time, Gary King, Jennifer Pan, and Margaret Roberts found that

[China's] censorship program is aimed at curtailing collective action by silencing comments that represent, reinforce, or spur social mobilization, regardless of content. Censorship is oriented toward attempting to forestall collective activities that are occurring now or may occur in the future—and, as such, seem to clearly expose government intent.<sup>58</sup>

King, Pan, and Roberts further argue that the current censorship infrastructure may be the “most extensive effort to selectively censor human expression ever implemented.”<sup>59</sup>

In a subsequent study, King, Pan, and Roberts found that the government fabricates and posts around 448 million social media comments a year.<sup>60</sup> They note:

[T]he Chinese regime's strategy is to avoid arguing with skeptics of the party and the government, and to not even discuss controversial issues. We show that the goal of this massive secretive operation is instead to distract the public and change the subject, as most of these [sic] posts involve cheer-leading for China, the revolutionary history of the Communist Party, or

53. See *Chinese Rumormonger Gets Four Years*, GLOB. TIMES (Nov. 18, 2014, 3:35 PM), <http://www.globaltimes.cn/content/892390.shtml> [<https://perma.cc/4DDF-WWT7>].

54. See Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the “Chilling Effect”*, 58 B.U. L. REV. 685, 685-89 (1978).

55. See generally Paul Gewirtz, *Privacy and Speech*, SUP. CT. REV., 2001, at 139, 140-41 (arguing for the need to enhance First Amendment privacy protections because of privacy's implications on free speech).

56. Lau, *supra* note 4.

57. Christina Sterbenz, *China Banned the Term ‘50 Cents’ to Stop Discussion of an Orwellian Propaganda Program*, BUS. INSIDER (Oct. 17, 2014, 3:44 PM), <https://www.businessinsider.com/chinas-50-cent-party-2014-10> [<https://perma.cc/NUC3-HZX8>].

58. Gary King et al., *How Censorship in China Allows Government Criticism but Silences Collective Expression*, 107 AM. POL. SCI. REV. 1, 1 (2013).

59. *Id.* at 1.

60. Gary King et al., *How the Chinese Government Fabricates Social Media Posts for Strategic Distraction, Not Engaged Argument*, 111 AM. POL. SCI. REV. 484, 484-86 (2017).

other symbols of the regime.<sup>61</sup>

Responding to the skepticism about whether these efforts can be attributed to the 50 Cent Army,<sup>62</sup> the authors argue that bureaucrats, responding to government directives at times of heightened tension, are mostly responsible for the online comments.<sup>63</sup> Regardless of the posters' identities, it is evident that online discussions in China are heavily influenced by propaganda.

In 2017, during the period leading up to the 19th National Communist Party Congress, the Chinese government was especially sensitive about censoring what it deems as potentially harmful information. The National Congress is widely considered to be the most important political event in China, and all eyes were on the Politburo Standing Committee as they were set to announce new leadership personnel and ideological principles.<sup>64</sup> In a prominent study by The Citizen Lab, researchers scrutinized how WeChat censored different types of content related to the National Congress by sampling various keywords from news articles that reported on the event.<sup>65</sup> The Citizen Lab found that "keywords related to the Congress were censored well over a year before the event itself. The scope of censored content went beyond criticism of the government or representations of collective action to target general discussions of the event and speculations into its outcomes."<sup>66</sup> WeChat's willingness to censor content for the government enabled the government to ensure ideological consistency. The National Congress is one of many instances where Internet corporations acquiesce to the government's censorship requirements in order to remain operational in China.<sup>67</sup>

On the day before the 19th National Congress, WeChat, QQ, and Weibo cited maintenance issues to prevent users from changing their usernames or personal biographies until the National Congress's conclusion.<sup>68</sup> This form of censorship at the eve of a national event is similar to Weibo's disabling of the candle emoji during Tiananmen Square anniversa-

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61. *Id.* at 484.

62. *Id.*

63. See David Wertime, *Meet the Chinese Trolls Pumping Out 488 Million Fake Social Media Posts*, FOREIGN POL'Y (May 19, 2016, 4:03 PM), <https://foreignpolicy.com/2016/05/19/meet-the-chinese-internet-trolls-pumping-488-million-posts-harvard-stanford-ucsd-research> [https://perma.cc/5YTR-PLCK].

64. See Jeremy Page & Chun Han Wong, *Xi Jinping Is Alone at the Top and Collective Leadership 'Is Dead'*, WALL ST. J. (Oct 25, 2017, 3:02 AM), <https://www.wsj.com/articles/chinas-xi-elevated-to-mao-status-1508825969> [https://perma.cc/B866-H7A4].

65. Crete-Nishihata et al., *supra* note 45.

66. *Id.*

67. A few months before the 19th National Congress, Weibo, Tencent, and Baidu were investigated and fined for hosting content that "endangered national security, public security and social order." *Id.*

68. See Alice Shen, *China in Cyber Lockdown as WeChat, QQ and Weibo Ban Changes to Users' Profiles*, S. CHINA MORNING POST (Oct. 18, 2017, 6:00 PM), <http://www.scmp.com/news/china/society/article/2115913/china-cyber-lockdown-wechat-qq-and-weibo-ban-changes-users> [https://perma.cc/5UVA-Y7ZN].

ries.<sup>69</sup> These practices reflect the reality that Internet corporations generally prioritize loyalty to the government over loyalty to consumers.<sup>70</sup>

### C. Virtual Private Networks

VPNs allow individuals in China to access blocked Internet content by connecting users to international Internet servers that are beyond the jurisdictional reach of the government.<sup>71</sup> In theory, the presence and availability of VPNs should enable Internet users to collectively circumvent parts of the government's censorship infrastructure, such as the Great Firewall. In practice, however, circumventing censorship in China is impractical.

First, it is difficult for activists to effectively circumvent censorship using VPNs. Bloggers, for example, have learned that if they want their content to be viewed by ordinary Chinese citizens, they must use Chinese websites because readers will not make the extra effort and use VPNs to seek out bloggers on sites that are banned in China.<sup>72</sup> As James Fallows argues:

By making the search for external information a nuisance, [the government] drive[s] Chinese people back to an environment in which familiar tools of social control come into play . . . . And being inside China means operating under the sweeping rules that govern all forms of media here: guidance from the authorities; the threat of financial ruin or time in jail; the unavoidable self-censorship as the cost of defiance sinks in.<sup>73</sup>

VPN usage is generally limited to personal browsing. In the unlikely event that a foreign Internet company (e.g., GreatFire.org) becomes a popular platform for dissent, the government has tools in place to respond. Collectively circumventing censorship using VPNs is also difficult because of the reality that there are no irreplaceable foreign Internet companies. As soon as a foreign firm is banned in China, a plethora of functionally similar domestic firms will be ready to absorb its market share. For example, Google and YouTube were easily replaced with Baidu and Youku; Weibo was an alternative to Twitter; and WhatsApp users seamlessly transitioned back to WeChat after the ban on WhatsApp.<sup>74</sup> Even if foreign firms, like Google, threatened to pull out of China, the government would simply view

69. See Farah Mohamed, *China Intensifies Online Censorship Ahead of Tiananmen Anniversary*, HUFFPOST (June 3, 2014, 4:33 PM), [https://www.huffpost.com/entry/china-tiananmen-anniversary-censorship\\_n\\_5439651](https://www.huffpost.com/entry/china-tiananmen-anniversary-censorship_n_5439651) [<https://perma.cc/5NYP-DGU8>].

70. See, e.g., Lotus Ruan et al., *One App, Two Systems: How WeChat Uses One Censorship Policy in China and Another Internationally*, CITIZEN LAB (Nov. 30, 2016), <https://citizenlab.ca/2016/11/wechat-china-censorship-one-app-two-systems> [<https://perma.cc/4DFN-E7S4>].

71. See *China Cracks Down on VPN Vendors*, BBC NEWS (Aug. 17, 2017), <https://www.bbc.com/news/technology-40960423> [<https://perma.cc/8JBH-TDZP>].

72. See James Fallows, "The Connection Has Been Reset", ATLANTIC (Mar. 2008), <https://www.theatlantic.com/magazine/archive/2008/03/the-connection-has-been-reset/306650> [<https://perma.cc/B2RP-3E2K>].

73. *Id.*

74. See Jeremy Goldkorn, *Youtube = Youku? Websites and Their Chinese Equivalents*, FAST CO. (Jan. 20, 2011), <https://www.fastcompany.com/1715042/youtube-youku-websites-and-their-chinese-equivalents> [<https://perma.cc/SV6C-VE3R>].

Google's departure as an opportunity for domestic firms to absorb Google's users and market share. The replaceable status of foreign firms also impacts the utility of VPNs because the presence of domestic alternatives means that Chinese citizens and Internet companies that operate in China may have little incentive to go out of their way to use VPNs to collectively circumvent censorship in the first place.

Second, even if VPN use becomes widespread, the Chinese government can easily crack down on VPNs. In fact, mainstream Western media is routinely flooded with news of China cracking down on VPNs and even threatening to ban them altogether.<sup>75</sup> For example, the government has repeatedly required Apple to remove VPNs from the domestic App Store.<sup>76</sup> Sunday Yokubaitis, the President of Golden Frog, commented on Apple's concession: "Apple removing VPN apps from the App Store effectively removed access to the Internet for billions of people."<sup>77</sup> In 2017, the Ministry of Industry and Information Technology passed a regulation that mandated VPNs to be authorized by state-run telecommunications companies.<sup>78</sup> Because the regulation allows the government to compel VPN providers to disclose their users' personal information, it threatens users' privacy and security, which undermines one of the fundamental purposes of VPNs.<sup>79</sup>

Finally, the government can simply ban the most popular VPNs overnight, just as it did in 2015.<sup>80</sup> The government's authority stems from the fact that VPNs, similar to Internet corporations and ISPs, must also be licensed in order to operate in China.<sup>81</sup> Although VPNs remain popular for those who want to use them for individual browsing purposes,<sup>82</sup> using VPNs as an offensive tool to collectively circumvent the government's censorship may be fruitless.

75. See Benjamin Haas, *China Moves to Block Internet VPNs from 2018*, GUARDIAN (July 11, 2017), <https://www.theguardian.com/world/2017/jul/11/china-moves-to-block-internet-vpns-from-2018> [https://perma.cc/AWY7-AVHL]; Mozur, *supra* note 30.

76. Emily Rauhala, *Apple, Amazon Help China Curb the Use of Anti-Censorship Tools*, WASH. POST (Aug. 2, 2017), [https://www.washingtonpost.com/world/asia\\_pacific/holes-close-in-chinas-great-firewall-as-apple-amazon-snob-apps-to-bypass-censors/2017/08/02/77750f38-7766-11e7-803f-a6c989606ac7\\_story.html](https://www.washingtonpost.com/world/asia_pacific/holes-close-in-chinas-great-firewall-as-apple-amazon-snob-apps-to-bypass-censors/2017/08/02/77750f38-7766-11e7-803f-a6c989606ac7_story.html) [https://perma.cc/PC7F-EKD4].

77. Denyer, *supra* note 51.

78. Crete-Nishihata et al., *supra* note 45.

79. Olivia Solon, *China Cracks Down on VPNs, Making It Harder to Circumvent Great Firewall*, GUARDIAN (Jan. 23, 2017, 4:38 PM), <https://www.theguardian.com/technology/2017/jan/23/china-vpn-cleanup-great-firewall-censorship> [https://perma.cc/G6UC-PC7W].

80. Andrew Jacobs, *China Further Tightens Grip on the Internet*, N.Y. TIMES (Jan. 29, 2015), <https://www.nytimes.com/2015/01/30/world/asia/china-clamps-down-still-harder-on-internet-access.html> [https://perma.cc/3SEK-PMTU] (reporting that a senior government official admitted to banning a number of popular VPNs, including StrongVPN and Golden Frog).

81. *Apple: Chinese Firm to Operate China iCloud Accounts*, *supra* note 52.

82. Joseph Johnson, *Leading Markets for VPN Usage Among Internet Users Worldwide as of 2nd Quarter 2017*, STATISTA (Jan. 27, 2021), <https://www.statista.com/statistics/301204/top-markets-vpn-proxy-usage/#:~:text=this%20statistic%20presents%20the%20online,network%20in%20the%20past%20month> [https://perma.cc/V64W-VHVT].

## II. Differentiating Circumventing Censorship and Combating Censorship

Although *circumventing* censorship at the individual level is common practice, there is a lack of existing literature on *systematically combating* censorship in China. This is likely because censorship has been historically perceived and treated as a domestic policy.<sup>83</sup> Thus, states typically refrain from interfering with other states' censorship regimes due to respect for national sovereignty.

At the individual level, netizens circumvent the government's censors on a daily basis. In addition to using VPNs, netizens use alternative phrases, synonyms, codewords, and misspellings of words.<sup>84</sup> Some netizens use applications that allow them to decrypt messages on social media even after the messages have been removed by censors.<sup>85</sup> Others, like dedicated "hacktivists," constantly develop circumventing software and engage in an arms race with the government.<sup>86</sup> As long as there is demand for access to censored content, the market will inevitably produce new products to bypass censorship.

The primary issue with such circumvention is that it does not stop the Chinese government from using censorship, nor does it restrict the government's censorship practices. Just like with VPNs, the government typically responds to the arms race by strengthening its censorship infrastructure.<sup>87</sup> Considering the imbalance of resources, circumventing censorship at the individual level may even be considered detrimental because it forces the government to respond by devoting additional resources to develop its censorship infrastructure.

In order to combat (i.e., act to reduce or prevent) censorship, there must somehow: (1) exist a force that challenges the Chinese government's underlying authority to exercise censorship; and (2) the Chinese government must actually surrender to that force, whatever it may be. Although scholars, foreign policy experts, and heads of state believe that China's censorship methods are problematic (e.g., censorship violates its citizens' freedom of speech and freedom to access information), they remain pessimistic about their ability to influence, let alone change, China's cen-

83. See Rebecca MacKinnon, *Flatter World and Thicker Walls? Blogs, Censorship and Civic Discourse in China*, 134 PUB. CHOICE 31, 32-38 (2008) (detailing the history of censorship in China).

84. Kuang Keng Kuek Ser, *Want to Circumvent China's Great Firewall? Learn These 9 Phrases First*, PUB. RADIO INT'L (July 20, 2015, 8:00 AM), <https://www.pri.org/stories/2015-07-20/want-circumvent-chinas-great-firewall-learn-these-9-phrases-first> [<https://perma.cc/5YYE-YY6N>].

85. Heather Timmons, *How to Beat China's Great Firewall, One Salvaged Weibo Message at a Time*, QUARTZ (Oct. 4, 2013), <https://qz.com/131368/how-to-beat-chinas-great-firewall-one-salvaged-weibo-message-at-a-time> [<https://perma.cc/4QUX-L92G>].

86. Paul Wiseman, *Cracking the 'Great Firewall' of China's Web Censorship*, USA TODAY (Apr. 22, 2008), [https://usatoday30.usatoday.com/tech/news/techpolicy/2008-04-22-InternetBandits\\_N.htm](https://usatoday30.usatoday.com/tech/news/techpolicy/2008-04-22-InternetBandits_N.htm) [<https://perma.cc/5ZAA-JX7B>].

87. See *id.*

sorship policies.<sup>88</sup>

Historically, states, corporations, NGOs, individuals, and other entities have been unsuccessful in their endeavors to convince the Chinese government to meaningfully change its censorship regime. The international community regularly charges the Chinese government with human rights abuses for imprisoning journalists charged with vague crimes, like revealing state secrets.<sup>89</sup> Despite global condemnation, the Chinese government has remained adamant on preserving its right to censor content at its discretion. China has maintained that the Internet is an important national infrastructure and that “[t]he Internet sovereignty of China should be respected and protected.”<sup>90</sup>

China’s adamant position, in addition to the government’s absolute control and the minimal leverage available for foreign actors, makes academics and foreign policy experts pessimistic regarding the possibility of policy reform. Fundamentally, many believe that “[t]here[ is] nothing we can do about it.”<sup>91</sup> In all, the current discourse is wholly ineffective against China’s censorship because it merely consists of entities criticizing China for its actions. Many believe that, given China’s hegemonic market and military positions, and the importance of state sovereignty, states themselves are not in a position to challenge China’s censorship policies.

This fatalistic perspective, however, discourages innovative solutions. Persuading the Chinese government to completely abandon censorship or to preserve citizens’ absolute free speech rights may be virtually impossible. But the initial standards for success need not necessarily be set that high. Policy change is a process. Tim Cook and Apple’s mere “hope” for censorship to be “lessened”—even after Apple surrendered access to all its domestic iCloud data to the government—is futile and will not contribute to this change.<sup>92</sup> Thus, this Article looks at alternative avenues through which actors can actively pressure the government to scale back its censorship practices. In particular, it analyzes the existing institutions and structures and previous instances where the Chinese government made concessions relating to its censorship program.

Unbeknownst to many, China’s authority to exercise censorship has in fact been challenged both domestically and internationally. In challenging the government in each of these spheres, some states, entities, and individ-

88. See *What Will Drive China’s Future Legal Development: Reports from the Field: Hearing Before the Congressional-Executive Commission on China*, 110th Cong. 13 (2008) (“I am afraid to say, if you watch the year 2007 until now, there is not any other sign that the Chinese central leadership has an agenda for political reform.”).

89. See, e.g., *Chinese Journalist Arrested on Charges of Revealing State Secrets*, COMM. PROTECT JOURNALISTS (July 6, 2017, 3:34 PM), <https://cpj.org/2017/07/chinese-journalist-arrested-on-charges-of-revealin.php> [<https://perma.cc/3JYM-4PHQ>].

90. BINXING FANG, *CYBERSPACE SOVEREIGNTY: REFLECTIONS ON BUILDING A COMMUNITY OF COMMON FUTURE IN CYBERSPACE* 184–85 (2018).

91. *Despite Censorship, China Has Some Cool Bookshops*, ECONOMIST (Sept. 7, 2017), <https://www.economist.com/news/china/21728652-government-ambivalent-about-them-despite-censorship-china-has-some-cool-bookshops> [<https://perma.cc/X7F8-D7YA>].

92. *Apple: Chinese Firm to Operate China iCloud Accounts*, *supra* note 52.

uals have managed to gain leverage against the Chinese government and forced it to make concessions.

At the international level, the United States brought a case against China at the WTO and asserted that China's censorship program violated its WTO commitments. Specifically, the United States challenged the Chinese government's authority to censor an array of entertainment products and publications.<sup>93</sup> After the WTO denied China's appeals, the government complied with the ruling to the U.S.' satisfaction.<sup>94</sup> This case demonstrates that (1) China is subject to the authority of certain international financial institutions, and (2) China may acquiesce to the WTO.

At the domestic level, the Chinese government's authority to censor was challenged by Chinese citizens who mobilized to stop the government from, among other things, censoring GitHub; restricting lesbian, gay, bisexual and transgender (LGBT) content; and requiring all new computers to install an invasive Green Dam Youth Escort program.<sup>95</sup> These examples, in connection with other successful collective action efforts, likewise demonstrate that: (1) individuals (and Chinese citizens in particular) have the power to challenge the Chinese government's censorship programs; and (2) citizens can coerce the government into scaling back certain forms of censorship.

The aforementioned cases demonstrate that pressuring the Chinese government to modify its censorship policies is possible. The next two Parts of this Article explore the possibility of entities and individuals replicating past successes through international law and collective action.

### III. Combating Censorship Using International Law

This Part argues that the United States can bring a claim against China at the WTO for its censorship practices. If the United States were to bring such a claim, the central question before the WTO would be whether China can censor Internet content that restricts trade on services supplied through the Internet. This Part asserts that the government's current censorship infrastructure violates its international trade commitments because China's current means of censorship interferes with the legitimate flow of services. It proceeds in four sections: (1) providing an overview of the existing doctrine and literature on bringing a WTO claim against China; (2) providing a background on the WTO and its processes; (3) analyzing the applicability of the General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Services (GATS); (4) analyzing the viability of a WTO claim; and (5) assessing the legal and practical implications of a censorship case before the WTO.

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93. See discussion *infra* Section IV.D.2.

94. See discussion *infra* Section IV.D.4.

95. See discussion *infra* Section V.B.1.



### A. Existing Doctrine and Literature on Bringing a WTO Claim Against China

Bringing a WTO claim against China is not a novel concept. Scholars, like Tim Wu, have suggested that the Chinese government's means of exercising censorship may violate its WTO commitments.<sup>96</sup> Building on Wu's work, other scholars have laid out potential roadmaps for a WTO claim, including the relevant WTO doctrine.<sup>97</sup> This Article will only summarize these scholars' doctrinal conclusions, rather than comprehensively analyze the technical aspects of a WTO claim.

Scholars generally agree that states *may potentially* undermine China's censorship efforts by bringing a WTO claim. However, the current discourse on the utility of WTO claims generally reflects skepticism and uncertainty, despite many scholars' consensus that China *may* be violating its WTO commitments. For example, Wu himself was uncertain about when and to what extent Internet filtering violates WTO rules.<sup>98</sup> Further developing Wu's framework, Fredrick Erixon, Brian Hindley, and Hosuk Lee-Makiyama outline the applicability of a censorship claim in light of the decisions in *Audiovisual* and *Gambling Services*.<sup>99</sup> They conclude that "[t]he WTO route is weak given it is unlikely to be able to abolish censorship as such. It *may*, however, have the *potential* to discipline the clumsier manifestations of censorship: outright blockages by a government that is capable of enforcing selective filtering . . ."<sup>100</sup> However, they were skepti-

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96. Tim Wu, *The World Trade Law of Censorship and Internet Filtering*, 7 *CHI. J. INT'L L.* 263, 281 (2006); see, e.g., Angelica Bonfanti, *Public Morals in International Trade: WTO Faces Censorship*, in *INTERNATIONAL COURTS AND THE DEVELOPMENT OF INTERNATIONAL LAW* 687-88 (Nerina Boschiero, et al. eds., 2013); Cynthia Liu, *Internet Censorship as a Trade Barrier: A Look at the WTO Consistency of the Great Firewall in the Wake of the China-Google Dispute*, 42 *GEO. J. INT'L L.* 1199 (2011); Susan Ariel Aaronson, *What Are We Talking About When We Discuss Digital Protectionism?* 30 (Inst. for Int'l Econ. Pol'y, Working Paper No. 2017-9, 2017), <https://www2.gwu.edu/~iiep/assets/docs/papers/2017WP/AaronsonIIEPWP2017-9.pdf> [<https://perma.cc/S74B-7SDF>] ("The idea of using trade agreements to regulate digital protectionism may well be one whose time has arrived."); Susan Ariel Aaronson & Miles D. Townes, *Can Trade Policy Set Information Free? Trade Agreements, Internet Governance, and Internet Freedom*, *INST. INT'L ECON. POL'Y* ii, 18 (2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2189153](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2189153) [<https://perma.cc/YSE9-R2P8>] (urging WTO members to request the organization to review whether censorship constitutes a barrier to trade and reporting that the "European Commission Vice President Neelie Kroes told Chinese officials that China's Internet censorship is a trade barrier that should be challenged at the WTO. However, the European Council never launched a formal trade dispute."); Fredrik Erixon & Hosuk Lee-Makiyama, *Chinese Censorship Equals Protectionism*, *WALL ST J.* (Jan. 6, 2010, 4:03 PM), <https://www.wsj.com/articles/SB10001424052748704842604574641620942668590> (arguing that "[b]locking the Internet blocks commerce and trade, and China's latest moves may well run afoul of its World Trade Organization commitments.").

97. See Fredrik Erixon et al., *Protectionism Online: Internet Censorship and International Trade Law I* (Eur. Ctr. for Int'l Political Econ., Working Paper No. 12, 2009), [http://www.europarl.europa.eu/meetdocs/2009\\_2014/documents/droi/dv/droi\\_20100602\\_35po\\_/droi\\_20100602\\_35po\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/droi/dv/droi_20100602_35po_/droi_20100602_35po_en.pdf) [<https://perma.cc/784D-Z5JN>].

98. See Wu, *supra* note 96, at 264-65, 287.

99. See Erixon et al., *supra* note 97, at 9-12.

100. *Id.* at 17 (emphasis added).

cal because, to them, not only will WTO claims likely not abolish censorship in China, but given the associated risks, there is also no assurance that governments will take action.<sup>101</sup> Similarly, Cynthia Liu argues that, although the WTO route is “an innovative and legitimate strategy,” political reasons counsel against pursuing such a route: political respect for China’s national sovereignty; the potential effectiveness of bilateral talks and even unilateral approaches by the United States; lengthy WTO procedures; WTO compliance issues; and most importantly, an intensifying U.S.-China, political-economic relationship.<sup>102</sup>

Angelica Bonfanti also expressed skepticism, but mostly about the WTO’s limited ability to remedy human rights claims.<sup>103</sup> Given the WTO dispute settlement body’s purpose of preserving the member states’ rights and obligations, Bonfanti argues that its rulings are inherently limited, as “any positive effect arising with respect to freedom of expression before the WTO dispute settlement bodies can only be the incidental consequence of a decision on trade commitments.”<sup>104</sup> As Julia Qin concludes:

“[T]here is a basic lesson to be learned. The WTO is not designed to regulate the domestic political systems of its members. Pushing the limits of WTO governance beyond what it is designed to do risks creating more non-compliance cases, ultimately undermining the effectiveness of the WTO system.”<sup>105</sup> [not a block quote]

In all, scholars are not confident that a WTO claim against China will be viable given some of the aforementioned concerns.<sup>106</sup> Today, over a decade after Wu’s article, the prospect of a WTO claim “remains to be seen.”<sup>107</sup>

This Article contributes to the current discourse by arguing that a WTO claim against China is not just a “potential” strategy, but rather, it is a *viable* strategy that the United States must invoke insofar as it is concerned about the real consequences of censorship. This Article will only summarize the technical aspects of the WTO claim (e.g., the details surrounding China’s commitment schedule, GATT and GATS, dispute settlement procedures, the background of WTO cases) because scholars generally agree on what a potential WTO claim entails and the relevant caselaw that guide the WTO’s potential judgment. This Article will instead focus on the unanswered questions posed by the existing literature, which

101. *Id.*

102. See Liu, *supra* note 96, at 1233-37.

103. See Bonfanti, *supra* note 96, at 692 (arguing that the WTO is not the proper forum for claiming human rights protections).

104. *Id.*

105. Julia Ya Qin, *Pushing the Limits of Global Governance: Trading Rights, Censorship and WTO Jurisprudence—A Commentary on the China-Publications Case*, 10 CHINESE J. INT’L L. 271, 322 (2011).

106. See, e.g., Michael Ting, *The Role of the WTO in Limiting China’s Censorship Policies*, 41 H.K.L.J. 285, 301 (2011) (“Until the rules and commitments of the WTO are utilised to their fullest, it is still uncertain whether the WTO . . . can be the Trojan horse for freedom of speech that human rights advocates had hoped for.”).

107. Liu, *supra* note 96, at 1236.

revolve around the viability of a WTO claim: the U.S.' willingness to bring a WTO censorship claim; the legal merits of such a claim and the public morals exception; the WTO's incentive to find against China; the political-economic relationship between the United States and China; and whether China will actually comply with a WTO ruling that threatens its censorship authority. This Article concludes that these concerns do not minimize a WTO claim's effectiveness.

## B. Background on the WTO

The WTO is an inter-governmental institution that regulates trade by serving as a forum where member governments can negotiate trade agreements and settle disputes.<sup>108</sup> It also establishes the rules for international commerce between member governments.<sup>109</sup> At the heart of the WTO are negotiated agreements that provide the legal ground-rules for international commerce.<sup>110</sup> These agreements are binding, enforceable contracts under which countries open their markets for goods or services.<sup>111</sup> The WTO's role as a facilitator in the operation and implementation of multilateral trade agreements comprises of three purposes: to serve as a negotiating forum, to set forth substantive trade rules, and to settle disputes between member states.<sup>112</sup>

The WTO operates under guiding principles to promote trade without discrimination (e.g., freer, fairer, and more predictable trade). The Most Favored Nation principle, outlined in Article I of the GATT, broadly holds that rights and benefits conferred to one member country are automatically conferred to all other members.<sup>113</sup> The non-discrimination and national treatment principle, outlined in Article III of the GATT and Article XVII of the GATS, provides that foreign goods and services must receive equal treatment as their domestic equivalents.<sup>114</sup> A Dispute Settlement Body (DSB) typically determines whether these principles have been violated.<sup>115</sup>

The WTO is equipped with various dispute settlement mecha-

108. *What Is the WTO?*, WORLD TRADE ORG., [https://www.wto.org/english/thewto\\_e/whatis\\_e/whatis\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm) [https://perma.cc/F6YA-AX69].

109. *Id.*

110. See BERNARD HOEKMAN & MICHEL KOSTECKI, *POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM: THE WTO AND BEYOND* 100 (2001).

111. *Id.* at 111.

112. See *id.* at 72.

113. For instance, the WTO held that Belgium's decision to tax countries on goods from countries whose family allowances did not meet specific requirements violated the Most Favored Nation principle. See Panel Report, *Belgian Family Allowances*, G/32-1S/59 (adopted Nov. 7, 1952).

114. *Id.* at 1-2. For instance, the WTO held that Japan's decision to impose a higher tax for vodka than its domestically produced *shōchū* violated GATT. See generally Appellate Body Report, *Japan-Alcoholic Beverages II*, WT/DS11/AB/R (adopted Nov. 1, 1996).

115. See *WTO Bodies Involved in the Dispute Settlement Process*, WORLD TRADE ORG., [https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_e/disp\\_settlement\\_cbt\\_e/c3s1p1\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_e/disp_settlement_cbt_e/c3s1p1_e.htm) [https://perma.cc/8AX8-2C5J] (last visited June 22, 2021).

nisms.<sup>116</sup> According to the WTO, the process operates under the following principles: equitable, fast, effective, and mutually acceptable.<sup>117</sup> As Bernard Hoekman and Michel Kosteci note: “In contrast to most international organizations that rely on diplomatic means to resolve conflicts, WTO dispute settlement . . . procedures are elaborate and legally binding.”<sup>118</sup> By virtue of membership, member states promise that if fellow members are under suspicion of violating trade rules, they will resort to the dispute settlement system.<sup>119</sup> This procedure bars members from imposing unilateral countermeasures before initiating the formal dispute settlement process.<sup>120</sup>

The dispute settlement process can be initiated whenever a member state believes that another member state’s actions are inconsistent with that state’s WTO agreements or other pertinent commitments.<sup>121</sup> First, during the consultation stage, the parties must consult and actively seek to settle their differences among themselves.<sup>122</sup> Second, if consultations fail, the complaining party can request for the DSB to appoint a panel to issue applicable rulings and recommendations.<sup>123</sup> Importantly, unlike previous procedures, rulings are automatically adopted and cannot be rejected by the losing party.<sup>124</sup> After the panel considers the case and issues a report, the parties have another opportunity to negotiate and reach a mutually acceptable compensation.<sup>125</sup> If the panel finds that the practices at issue violate WTO rules, it will recommend steps on how to bring the non-conforming measure into compliance.<sup>126</sup> At this point, unless the DSB unanimously rejects the panel report within sixty days, it becomes binding.<sup>127</sup> Third, both parties have an opportunity to appeal the panel report to an Appellate Body.<sup>128</sup> Similar to the panel report, unless the DSB unanimously rejects the Appellate Body report, it becomes final and is adopted by the DSB.<sup>129</sup> The entire process follows a strict timeline; without appeal, the first two steps typically conclude in approximately a year, and the third

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116. This Article merely provides a structural overview of the dispute settlement process. For more information on the dispute settlement process, see DANIEL T. SHEDD ET AL., *DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION (WTO): AN OVERVIEW* 2 (2012).

117. *Understanding The WTO: Settling Disputes*, WORLD TRADE ORG., [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/displ\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/displ_e.htm) [<https://perma.cc/S8JM-EGCY>] (last visited June 22, 2021).

118. HOEKMAN & KOSTECKI, *supra* note 110, at 74.

119. *Understanding The WTO: Settling Disputes*, *supra* note 117; see HOEKMAN & KOSTECKI, *supra* note 110, at 74.

120. *Understanding The WTO: Settling Disputes*, *supra* note 117.

121. See HOEKMAN & KOSTECKI, *supra* note 110, at 74.

122. *Understanding The WTO: Settling Disputes*, *supra* note 117.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

step requires approximately three months.<sup>130</sup>

At the conclusion of the three aforementioned steps, the final report must be implemented by the parties. Per Dispute Settlement Understanding (DSU) Article 21.3, the offending party has “a reasonable amount of time” to comply, which can be determined through binding arbitration.<sup>131</sup> If the offending party fails to act, the parties can either negotiate compensation, or the complaining party can request for permission to retaliate by suspending equivalent trade concessions that were previously negotiated.<sup>132</sup> In practice, the scope of retaliation is not limited to the disputed trade agreement, and the complaining party, within reasonable limits, usually has discretion in selecting a sector or product as the target of retaliation.<sup>133</sup> The overarching goal of the dispute settlement is not to punish the offending party, but rather to encourage that party to comply with international trade rules.<sup>134</sup>

### C. The Applicability of GATT and GATS

While GATT provides quantified, binding commitments on tariffs for goods, GATS commits states to grant a certain level of access within specific sectors for foreign service providers. Internet service companies are generally considered services governed by GATS,<sup>135</sup> unless a given service implicates the movement of a good (in which case GATT would apply).<sup>136</sup>

GATS focuses on discrimination in trade against exporting foreign countries and trade between local and imported products.<sup>137</sup> Article XVI of GATS requires member states to ensure market access and to allow service providers to reach domestic markets. Likewise, Article XVI prohibits various forms of quantitative limits on foreign suppliers (e.g., limiting the number of service providers, the total value of service transactions, or the percentage of foreign ownership).<sup>138</sup> Member countries are also bound by a list of commitments enumerated in their respective Schedule of Specific

130. *Id.*

131. HOEKMAN & KOSTECKI, *supra* note 110, at 77.

132. *Id.* at 75.

133. *See id.*

134. *See* OLIVIER LONG, LAW AND ITS LIMITS IN THE GATT MULTILATERAL TRADE SYSTEM 71 (1985) (“[T]he primary objective of [GATT’s] dispute settlement procedures is not to decide who is right and who is wrong . . . but to proceed in such a way that even important violations are only temporary and are terminated as quickly as possible.”); Mark Wu, *A Free Pass for China*, N.Y. TIMES (Apr. 2, 2014), <https://www.nytimes.com/2014/04/03/opinion/a-free-pass-for-china.html> [<https://perma.cc/G3X9-DKB5>] (“The main goal of [WTO] dispute settlement is to force compliance with the law rather than provide economic justice for past harm.”).

135. General Agreement on Trade in Services, Jan. 1, 1995, 1869 U.N.T.S. 183 [hereinafter GATS]; Wu, *supra* note 96, at 266–69; Erixon et al., *supra* note 97, at 11 (emphasis in original) (“[T]here is a logical, prima facie assumption that search engines and most Internet services are simply *online processing services*.”).

136. *See* General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

137. GATS, *supra* note 135, at 269.

138. *Id.* at 269–70

Commitments, which was agreed upon during a series of negotiations.<sup>139</sup> In addition, GATS imposes universal mandates that seek to promote transparency, impartiality, non-discrimination in government actions, and judicial review of administrative decisions.<sup>140</sup>

Two landmark WTO decisions provide the foundation for understanding the strength of a potential WTO claim against China. In *Gambling Services*, a WTO Dispute Panel and Appellate Body held that U.S. statutes forbidding wire-based gambling services violate GATS Article XVI because countries cannot completely ban a mode of supplying a service to the market after agreeing to liberate that mode of service.<sup>141</sup> In other words, even a non-discriminatory, “zero-quota” ban that impacts foreign and domestic service providers equally can violate a state’s market access commitment (i.e., a commitment to allow service providers to reach the domestic market).<sup>142</sup> The Appellate Body weighed the then-current circumstances to find that online gambling, an activity that did not exist at the time of the U.S.’ initial commitment, constituted a “[r]ecreational [s]ervice.”<sup>143</sup> The Appellate Body heavily scrutinized the U.S.’ claim that prohibiting online gambling was “necessary to protect public morals or to maintain public order.”<sup>144</sup> *Gambling Services* likewise confirmed that GATS covers certain Internet services.

Doctrinally, the distinction between companies leaving China voluntarily as opposed to the government censoring them is immaterial. For example, *Gambling Services* highlights how WTO members cannot effectively implement a “zero quota” ban on service suppliers or outputs.<sup>145</sup> As Liu explains:

Like the U.S. measures in *U.S.-Gambling Services*, none of China’s measures state any numerical units or quota limits on the number of service suppliers or on the quantity of service output. Yet, the United States was found to be maintaining quantitative limitations that fall within the scope of Article XVI:2(a) and (c) because it prohibited the “cross-border supply of gambling and betting services.” A prohibition on the supply of certain services effectively “limits to zero” the number of service suppliers and number of service operations relating to that service and therefore results in a “zero quota.” By banning certain web search portal content, video-streaming, and blogging sites, China prohibits at least one means of the delivery cross-border of a scheduled service to which it has (inadvertently or not) committed to providing full market access[,] . . . which is inconsistent with China’s obligations

139. Erixon et al., *supra* note 97, at 8.

140. Claude Barfield, *China’s Internet Censorship: A WTO Challenge Is Long Overdue*, AM. ENTER. INST. (Apr. 29, 2016), <http://www.aei.org/publication/chinas-internet-censorship-a-wto-challenge-is-long-overdue> [https://perma.cc/FT8C-RBMJ].

141. Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 5, WTO Doc. WT/DS285/AB/R (adopted Apr. 7, 2005) [hereinafter *Gambling Services*]; Wu, *supra* note 96, at 276–77; see Joost Pauwelyn, *Rien ne Va Plus? Distinguishing Domestic Regulation from Market Access in GATT and GATS*, 4 WORLD TRADE REV. 131, 132 (2005).

142. Wu, *supra* note 96, at 269–270.

143. *Id.* at 278.

144. *Id.*

145. Liu, *supra* note 96, at 1225–26.

under GATS.<sup>146</sup>

As Liu notes, China's domestic policies completely blocking and filtering foreign websites (e.g., Google, Yahoo, and other American information and communications technology (ICT) companies) can *effectively* "amount to a de facto prohibition on the cross-border supply of certain services that would violate GATS Article XVI."<sup>147</sup>

In a case involving voice-over-Internet protocol services (i.e., where products rely on the Internet, rather than traditional phone lines, to carry voice services), the WTO found that Mexico violated GATS by blocking Skype.<sup>148</sup> The 1998 Agreement on Basic Telecommunication Services created an affirmative duty on member states to prevent domestic companies from unfairly competing against their foreign competitors: "Appropriate measures shall be maintained for the purpose of preventing suppliers who, alone or together, are a major supplier from engaging in or continuing anti-competitive practices."<sup>149</sup> *Teléfonos de Mexico, S.A. de CV (Telmex)*, a state-owned monopoly carrier, effectively prevented users from accessing Skype's voice-over, Internet protocol product by employing domain blocks, downgrading users' bandwidth, and other questionable means.<sup>150</sup> As a result, the WTO found that Telmex engaged in anti-competitive practices and that Mexico failed to ensure U.S. telecommunications suppliers reasonable and non-discriminatory access to public networks.<sup>151</sup>

#### D. The Viability of a WTO Claim Against China

The viability of a WTO claim against China hinges on a number of interrelated factors. First, a member state of the WTO, namely the United States, must be willing to bring the claim. Second, the WTO must find in favor of the United States on the claim's merits. Third, although not dispositive, the WTO must have some incentive to find for the United States. Fourth, even if the United States prevails, there is uncertainty as to whether the political climate in the United States and China is conducive for such a claim, especially in light of the 2018 U.S.-China trade war. This Section concludes that there is optimism to expect that the United States will bring a WTO claim, because such a claim implicates economic and human rights considerations; the claim can reasonably find success at the WTO; the WTO has sufficient incentives to find for the United States; and the political climate in the United States and China does not necessarily hinder the viability of a potential WTO claim.

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146. *Id.*

147. *Id.* at 1229.

148. Panel Report, *Mexico-Measures Affecting Telecommunications Services*, ¶ 7.269, WTO Doc. WT/DS204/R (adopted Apr. 2, 2004) [hereinafter *Telmex*].

149. Wu, *supra* note 96, at 286.

150. See Philippe Biondi & Fabrice Desclaux, *Silver Needle in the Skype*, EADS CORP. RSCH. CTR. (Mar. 3, 2006), <https://www.blackhat.com/presentations/bh-europe-06/bh-eu-06-biondi/bh-eu-06-biondi-up.pdf> [<https://perma.cc/58DX-MZJB>].

151. *Telmex*, *supra* note 148, ¶ 7.269.

### 1. The U.S.' Willingness to Bring a WTO Claim

Perhaps central to the viability discussion is the U.S.' willingness to bring a WTO claim because only member states may bring a claim. In 2011, Google published a prominent article outlining several specific threats that the U.S. government ought to consider when approaching the issue of Chinese censorship: (1) "Internet filtering makes it harder for Internet companies to reach their customers, and it means that the businesses that rely on the Internet are likely to experience lower productivity"; (2) censorship hurts companies seeking to export their services to new markets; (3) censorship provides unfair advantages to local companies by making it harder for foreign firms to compete in the market; (4) censorship impedes business operations by creating an environment where companies are unable to understand or foresee when the government will arbitrarily interfere with its business; (5) censorship hurts businesses that rely on the Internet (e.g., Google, Spotify) to advertise or sell goods and services; (6) censorship hurts downstream businesses that cannot access services or goods (e.g., Google Docs); and (7) censorship puts the global Internet at risk by undermining its intended structure as an open network of networks.<sup>152</sup> This Subsection develops some of these considerations and highlights other concerns that censorship raises.

There is good reason to believe that the United States will bring a case against China because of the market implications of censorship and its restrictions on global trade.<sup>153</sup> Censorship can be seen as a means by which a government provides unfair benefits to domestic firms by preventing foreign competitors from entering the domestic market.<sup>154</sup> In addition to being a virtual cloud of information, the Internet has become a global marketplace. Today, digital trade comprises a dominant part of the global economy. E-commerce, by nature, eliminates traditional market-entry barriers (e.g., physical investments, distributors, real estate, infrastructure) and their regulatory instruments (e.g., permits, licenses, supervision).<sup>155</sup> Thus, the power to censor content may enable governments to ban an entire sector of commerce. Erixon, Hindley, and Lee-Makiyama argue that

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152. Google Inc., *Enabling Trade in the Era of Information Technologies: Breaking Down Barriers to the Free Flow of Information*, TRANSNAT'L DISP. MGMT. 8-11 (2011), <https://www.transnational-dispute-management.com/article.asp?key=1658> [<https://perma.cc/X6YV-SFAE>].

153. As of July 2018, the United States has brought the most cases through the dispute settlement process—bringing twenty-three cases against China alone. Wayne M. Morrison, *Enforcing U.S. Trade Laws: Section 301 and China*, CONG. RSCH. SERV. (2018), [https://digital.library.unt.edu/ark:/67531/metadc1228565/m2/1/high\\_res\\_d/IF10708\\_2018July23.pdf](https://digital.library.unt.edu/ark:/67531/metadc1228565/m2/1/high_res_d/IF10708_2018July23.pdf) [<https://perma.cc/C2SZ-Y64L>].

154. See Paul Carsten & Michael Martina, *U.S. Says China Internet Censorship a Burden for Businesses*, REUTERS (Apr. 8, 2016, 5:00 AM), <https://www.reuters.com/article/us-usa-china-trade-internet/u-s-says-china-internet-censorship-a-burden-for-businesses-idUSKCN0X50RD> [<https://perma.cc/2EMA-SWDF>]; Nithin Coca, *The Missing Trade War Against China's Digital Protectionism*, ENGADGET (Sept. 15, 2017), <https://www.engadget.com/2017/09/15/china-digital-protectionism-firewall-trade> [<https://perma.cc/5BFN-7K4D>].

155. Erixon et al., *supra* note 97, at 2.



such drastic censorship restrictions on commerce lead to dire consequences for non-domestic actors.<sup>156</sup> For example, Google once controlled 40% of the Chinese search market.<sup>157</sup> But as the Chinese government slowly forced Google out of the market by using censorship, strict regulations, and other questionable tactics, Baidu, Google's Chinese counterpart, experienced its market share rise to 80%.<sup>158</sup> Other online services, such as WhatsApp, Skype, YouTube, Flickr, and Apple have also faced similar fates.<sup>159</sup> Shanthi Kalathil, Director of the International Forum for Domestic Studies at the National Endowment for Democracy, argues that "the absence of [U.S.] tech companies allowed China's Internet companies to grow without strong competition and capture the lion's share of the domestic market . . . ."<sup>160</sup> Thus, even if economic protectionism is the primary purpose censorship, it can still be problematic because of the disparate impact it has on foreign companies, and because of the unfair benefits it brings to domestic Chinese firms.<sup>161</sup>

Like other countries, the United States has a vested interest in ensuring that its trading partners do not undermine international trade agreements,<sup>162</sup> especially when the actions in question harm the United States economically.<sup>163</sup> Censorship can deny Internet corporations access to an entire market, and it can also cause the United States to suffer economic harm due to foregone tax revenue.<sup>164</sup> In addition, the lost corporate revenue abroad may also impede the U.S.' economic growth because, without access to the Chinese market, companies may not generate as much revenue and invest as much in personnel, research and development, and infrastructure domestically to accommodate the Chinese market. As Nigel Cory stated in a hearing before the Senate Subcommittee on International Trade, Customs, and Global Competitiveness of the Committee on Finance:

156. *Id.* at 5.

157. Coca, *supra* note 154.

158. *Id.*

159. Erixon et al., *supra* note 97, at 6.

160. Coca, *supra* note 154.

161. *But see* Reuters Staff, *China Internet Regulator Says Web Censorship Not a Trade Barrier*, REUTERS (Apr. 11, 2016, 2:21 AM), <https://in.reuters.com/article/usa-china-trade-internet/china-internet-regulator-says-web-censorship-not-a-trade-barrier-idINKCN0X80HT> [<https://perma.cc/AM2V-GJZC>] (according to a Chinese Internet regulator, "China scrupulously abides by [WTO] principles and its accession protocols, protects foreign enterprises' lawful interests according to law, and creates a fair market environment for them . . . .").

162. Wu predicted that "[i]t would be unexpected and inconsistent with past behavior were the United States to display no interest in maximizing the market for its exporters." Wu, *supra* note 96, at 285.

163. *See* Joseph A. Conti, *The Good Case: Decisions to Litigate at the World Trade Organization*, 42 L. & SOC'Y REV. 145, 145 (2008) (citations omitted) ("[S]cholars have presumed that initiation of a formal WTO dispute results from a cost-benefit analysis, and they have conceived of dispute initiation as a way to force 'renegotiation' of a trade relationship, eliminate inefficiency caused by protectionist trade policies, and yield outcomes congruent with the quest to maximize national income.").

164. *See id.*; Julie Makinen, *Chinese Censorship Costing U.S. Tech Firms Billions in Revenue*, L.A. TIMES (Sept. 22, 2015), <https://www.latimes.com/business/la-fi-china-tech-20150922-story.html> [<https://perma.cc/8Q49-2RM6>].

A host of U.S. industries and firms, in sectors ranging from Internet services to cloud computing, video games, and movies, have likely lost hundreds of billions of dollars in revenues due to Chinese censorship and related market restrictions. Importantly, these revenues would have supported innovation and job creation in the United States, while limiting Chinese firms' ability to grow and capture global market share. While it is not possible to calculate an exact figure, [the Information Technology and Innovation Foundation] . . . conservatively estimates (based on market-share comparisons) that Google, which withdrew from the Chinese market in 2010, subsequently lost \$32.5 billion in search revenue from 2013 to 2019, while Amazon and Microsoft's cloud services ([Infrastructure as a Service], which is restricted in China) lost a combined \$1.6 billion over the two-year period from 2017 to 2018. As the China market continues to rapidly grow, these losses will also grow significantly.<sup>165</sup>

Thus, eliminating protectionist policies will benefit not only the United States, but also the international community by making trade more efficient and consistent with the WTO's principles.

One significant barrier that government entities (e.g., the U.S. government and the U.S. Trade Representative (USTR)) face in bringing a WTO claim is that they have limited resources.<sup>166</sup> Thus, they rely on industries to act as their "eyes" and provide them with information.<sup>167</sup> For the U.S. government to bring a WTO claim, industries "must present the USTR with a strong legal case supported by a detailed factual record. The USTR wants a strong partner not only in terms of ensuring broad industry support; it wants a winning case."<sup>168</sup> The groundwork for convincing the USTR has already been paved and, as will be discussed in the next section, the USTR has already *sua sponte* concluded, per its reports and WTO filings, that censorship is a barrier to international trade. Further, as will be discussed in the next Section, anti-censorship claims (e.g., *Audiovisual*) filed against China in other contexts reaffirm the U.S.' condemnation toward China's censorship regime. The fact that the United States has filed—and won—a similar claim is evidence that winning WTO censorship claims is possible.

In addition to the economic and trade incentives, the human rights implications of winning such a claim provide another strong incentive for the United States to bring a WTO censorship claim against China. A victory for the United States would be profound because any progress in combating systematic government censorship would signify a major step towards securing additional rights for individuals in China, such as the freedom of information. As Tomer Broude and Holger Hestermeyer point out, "international trade law and human rights seem to be mutually reinforcing, in contrast to the more familiar narrative in which trade liberaliza-

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165. *Hearing on Censorship as a Non-Tariff Barrier to Trade, Before the Subcomm. on International Trade, Customs, and Global Competitiveness of the Comm. on Finance*, 116th Cong. 2 (2020), (testimony of Nigel Corey, Associate Director, Information Technology and Innovation Foundation) [hereinafter Cory's Testimony].

166. Conti, *supra* note 163, at 152.

167. GREGORY C. SHAFFER, *DEFENDING INTERESTS: PUBLIC-PRIVATE PARTNERSHIPS IN WTO LITIGATION* 35 (2003).

168. *Id.* at 34.

tion negates or overrides human rights.”<sup>169</sup> Reliance on the WTO solely as a means to pursue human rights ends, as Bonfanti points out, is imprudent given the international financial institution’s structural incentives.<sup>170</sup> However, this does not preclude WTO rulings from positively impacting the human rights for which the United States purportedly advocates. The market effects and human rights implications at stake will continue to surface on the USTR’s radar and will militate in favor of bringing a WTO claim against China.

## 2. *The Merits of a WTO Claim and the Public Morals Exception*

As an initial matter, the USTR publishes an annual “National Trade Estimate Report on Foreign Trade Barriers” that surveys significant barriers to U.S. exports. In its 2017 report, for example, the USTR noted many ways in which China’s censorship policies harmed international trade. These include cloud computing restrictions; web filtering and web blocking; voice-over-Internet protocol services; domain name rules; cybersecurity law and sector-specific laws implementing data and facilities localization; restrictions on online video and entertainment software; encryption; and restrictions on Internet-enabled payment services.<sup>171</sup> Regarding web filtering and blocking, the primary forms of censorship, the USTR reported how censorship serves as an effective barrier to international trade:

China continues to engage in extensive blocking of legitimate websites, imposing significant costs on both suppliers and users of web-based services and products. According to the latest data, China currently blocks [eleven] of the top [twenty-five] global sites, and U.S. industry research has calculated that up to 3,000 sites in total are blocked, affecting billions of dollars in business, including communications, networking, news and other sites. While becoming more sophisticated over time, the technical means of blocking, dubbed the Great Firewall, still often appears to affect sites that may not be the intended target, but that may share the same Internet Protocol address. In addition, there have been reports that simply having to pass all Internet traffic through a national firewall adds delays to transmission that can significantly degrade the quality of the service, in some cases to a commercially unacceptable level, thereby inhibiting or precluding the cross-border supply of certain services.<sup>172</sup>

Using the findings of the report, the USTR argued that countries, like China, that failed to establish a regulatory environment to facilitate the free flow of information were, in essence, distorting trade.<sup>173</sup>

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169. Tomer Broude & Holger P. Hestermeyer, *The First Condition of Progress—Freedom of Speech and the Limits of International Trade Law*, 54 VA. J. INT’L L. 295, 297 (2014).

170. Bonfanti, *supra* note 96, at 692.

171. OFFICE OF THE U.S. TRADE REP., EXEC. OFFICE OF THE PRESIDENT, 2017 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 90–91 (2017).

172. *Id.* at 90.

173. *Digital Protectionism? Or Label the U.S. Government Uses to Criticize Policy It Doesn’t Like?*, COUNCIL ON FOREIGN RELS. (Mar. 3, 2016), <https://www.cfr.org/blog/digital-protectionism-or-label-us-government-uses-criticize-policy-it-doesn't> [<https://perma.cc/D9HH-WH3Y>].

Despite these violations, the United States has been the only government to take action against China.<sup>174</sup> In 2011, the USTR filed a formal WTO request for China to clarify its rules governing online censorship.<sup>175</sup> The United States argued that, according to WTO regulations, China must undergo judicial or administrative review of its censored content.<sup>176</sup> Although China has not released an official response, Hong Lei, the Spokesperson for the Ministry of Foreign Affairs, was asked about the WTO request by a reporter. He commented:

The Chinese Internet is developing vigorously and provides a vast development space for firms from every country. China's policy of attracting foreign investment will not change, our policy of protecting the legal rights of foreign companies in China will not change, and our policy of creating a favorable operating environment for foreign companies in China will not change. We hope that every country respects other countries' choice of Internet development path, management methods, and public policy, as well as their right to participate in international Internet governance.<sup>177</sup>

The sentiment underlying this unofficial statement makes clear that China believes the international community ought to respect its right to censor. Although the USTR's reports and requests for information themselves may not yield many concessions, the United States can use the data underlying the USTR reports and requests for information to support a WTO claim against China.<sup>178</sup>

At the WTO, the United States can argue that China's current censorship policies undermine its service commitments.<sup>179</sup> Although China has only committed to eventual liberalization of cross-border and Internet services, it has agreed to the full liberalization and open supply of a range of services, including "data processing services," "wholesale or retail trade services away from a fixed location," and "online information and database retrieval services."<sup>180</sup> China can argue that it did not fully appreciate the scope of its commitments to encompass allowing robust

174. See Aaronson, *supra* note 96, at 3.

175. Press Release, U.S. Trade Representative, United States Seeks Detailed Information on China's Internet Restrictions (Oct. 19, 2011) (on file at the U.S. Trade Representative's archives).

176. Aaronson, *supra* note 96, at 26.

177. *Banging Your Head Against a Wall: China Shrugs at U.S. Criticism of Censorship*, *supra* note 5.

178. See HEEJIN KIM, REGIME ACCOMMODATION IN INTERNATIONAL LAW: HUMAN RIGHTS IN INTERNATIONAL ECONOMIC LAW AND POLICY 282 (2016) ("As the request for information is arguably the preliminary step in a potential WTO dispute, it is not unlikely that the U.S.'[] complaint can be brought against Chinese measures of internet censorship.").

179. See Aaditya Mattoo, *China's Accession to the WTO: The Services Dimension*, 6 J. INT'L ECON. L. 299, 320 (2003) (pointing to how, upon accession to the WTO, China promised to radically reform its service practices).

180. Wu, *supra* note 96, at 281 (noting that China has agreed to full liberalization of the following services: "accounting, auditing and bookkeeping services; integrated engineering services; data processing services; audiovisual services like videos, including entertainment software and distribution; sound recording distribution services; translation and interpretation services; wholesale or retail trade services away from a fixed location; and travel agency services.").

databases, such as Google and Yahoo, unrestricted domestic access at the time it committed to GATS in 1994 and when it re-joined in 2001.<sup>181</sup> However, *Gambling Services* weakens China's argument because that decision demonstrates the Appellate Body's willingness to consider GATS commitments under changed circumstances. Just as "recreational services" include online gambling, the Appellate Body can reasonably find that online data processing and database retrieval services include search engines like Google and Yahoo. Thus, *Gambling Services* renders the Chinese government's complete blockages a violation of GATS because member states are not permitted to have "zero quotas" for services that they have liberalized domestically.<sup>182</sup> In addition to maintaining "zero quotas," China's practice of allowing certain domestic Internet corporations (e.g., Baidu and Weibo) to operate while censoring their foreign counterparts (e.g., Google and Twitter) allows the United States to argue that the government has engaged in discrimination.

The United States can also argue that mandatory Internet and content filtrations that are tailored to the Chinese government's censorship requirements are violations of China's service commitments. However, this argument is less persuasive because the traditional ban on types of limits "pertain to matters like number of outlets, number of employees, and so on, but do not suggest that a country cannot limit what the service does pursuant to local laws."<sup>183</sup> Lastly, insofar as delivery of a digital product is considered delivery of a "good" under GATT, outright bans will also violate GATT Article XI's elimination of quantitative restrictions.<sup>184</sup>

Doctrinally, the most important counterargument that the WTO will need to opine on is whether China can claim the public morals exception and be exempt from liability. Even if China is found to violate its WTO commitments, there are certain exceptions that it can raise to excuse its trade violations. WTO exceptions include measures necessary to protect public morals; necessary to maintain public order; necessary to protect human, animal, or plant life or health; and necessary to ensure compliance with laws or regulations which are not inconsistent with the provisions of GATS.<sup>185</sup> However, GATS Article XIV (as well as GATT Article XX) states that "[t]he public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society."<sup>186</sup> The exceptions do not allow states to apply provisions "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 . . ."<sup>187</sup> Thus, permitted restrictions must be transparent, provide due process, be minimally restrictive, and apply

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181. *Id.* at 282.

182. *Id.*

183. *Id.* at 284.

184. *Id.* at 282.

185. GATS, *supra* note 135, at art. XIV.

186. *Id.*

187. *Id.*

equally to foreign and domestic companies.<sup>188</sup> In practice, the WTO panel uses a two-pronged approach to evaluate exception claims; the party claiming the exceptions must prove that (1) the measure must be one designed to “protect public morals” or to “maintain public order”; and (2) the measure for which justification is claimed must be “necessary” to protect public morals or to maintain public order.<sup>189</sup>

China will likely have difficulty satisfying the first prong.<sup>190</sup> In *Gambling Services*, “public morals” was defined as “standards of right and wrong conduct maintained by or on behalf of a community or nation”—not that of the government or a particular political party.<sup>191</sup> Because different cultures may be involved in any given WTO dispute, the panel applies a broad standard of “right or wrong” that generally affords parties some discretion, with the caveat that the party must respect other members’ treaty rights.<sup>192</sup> As Henry Gao points out, however, “[s]ave for a few pornographic or racist websites, it is doubtful that most Chinese would find having access to websites on democracy or the truth about [the] ‘Tiananmen Incident’ in 1989 offensive to their ‘standards of right and wrong conduct.’”<sup>193</sup> “Public order” refers to a state’s interest in protecting the “fundamental interests of a society,” which are reflected in the policies, laws, and the constitution of a society.<sup>194</sup> Gao points out the irony in this claim’s underlying logic in the context of Chinese censorship:

According to the Chinese Constitution, Chinese citizens shall enjoy the freedom of speech and press, the freedom of religious belief, the right to criticize public officials and make suggestions to any state organ or functionary, and the freedom to engage in scientific research, literary and artistic creation and other cultural pursuits. If these provisions really mean what they are supposed to mean, allowing people unhindered access to foreign websites would not pose “a genuine and sufficiently serious threat . . . to one of the fundamental interests of society,” but, quite the contrary, serve to promote such “fundamental interests.”<sup>195</sup>

Although China may be able to satisfy the first prong because of the discretion afforded to states,<sup>196</sup> it will face an uphill battle in its efforts to prove that its censorship system is designed to protect public morals or to maintain public order.<sup>197</sup>

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188. Ed Black, *China’s Internet Censorship Harms Trade, US Companies*, FORBES (Dec. 6, 2011, 9:27 AM), <https://www.forbes.com/sites/edblack/2011/12/06/chinas-internet-censorship-harms-trade-us-companies/#761f948f5a3f> [<https://perma.cc/AM4E-8YFX>].

189. Henry S. Gao, *Google’s China Problem: A Case Study on Trade, Technology and Human Rights Under the GATS*, 6 ASIAN J. WTO & INT’L HEALTH L. & POL’Y 349, 377 (2011).

190. *See id.* at 379.

191. *Id.* at 377–78.

192. *Id.* at 378.

193. *Id.* at 379.

194. *Id.* at 378.

195. *Id.* at 379.

196. *Id.* at 378.

197. The Chinese government often asserts that censorship is necessary to prevent the spread of “false” information. However, protecting the public from “false” informa-

China will also have difficulty satisfying the second prong. A recent U.S.-China WTO decision implicating censorship highlights the contours of the second prong. In *Audiovisual*, the United States brought a WTO claim against China for banning a variety of entertainment products (e.g., video cassettes and DVDs) and publications (e.g., books, magazines, newspapers, electronic publications) through importation and distribution control measures.<sup>198</sup> The Appellate Body confirmed that China acted inconsistently with its market access and national treatment commitments under GATT.<sup>199</sup> In reaching its conclusion, the Appellate Body analyzed the second prong—whether the measures were “necessary”—by balancing (1) the measure’s contribution to the ends pursued by it, and (2) the measure’s restrictive impact on international trade.<sup>200</sup> In the end, it rejected China’s necessity argument after finding that reasonable alternatives were available to protect public morals (e.g., selective filtering), and censorship only tangentially contributed to protecting public morals.<sup>201</sup> This ruling demonstrates the WTO’s reluctance to accept the public morals exception as a license for unrestricted censorship.<sup>202</sup>

Even assuming, *arguendo*, that the Chinese government can satisfy the first prong, it is unlikely to satisfy the second prong—that its censorship regime is *necessary* to protect public morals or to maintain public order. If the United States were to bring a WTO claim, the Chinese government will likely contend that censorship is necessary to prevent netizens from spreading false rumors, which may lead to citizens receiving misinformation on important issues and incite domestic insurrection. As it did in *Audiovisual*, the WTO will balance China’s domestic interests against censorship’s restrictive impact on international trade (a number likely to be in the billions of dollars).<sup>203</sup> Similar to its finding in *Audiovisual* that censoring entertainment products and publications was only tangentially related to protecting public morals, the Appellate Body can also find that a complete blockage preventing Internet corporations from entering the domestic market is not sufficiently related—and thus not necessary—to protect public morals. This is because “[i]f a website is blocked entirely, then the trade impact is quite large, as those parts of the websites which do not offend ‘public morals’ are also blocked.”<sup>204</sup> After it assesses the evidence and the circumstances of the blockages, the WTO can find that there are obvious,

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tion is, at best, only tangentially related to the public morals and public order standards set forth above.

198. See generally Appellate Body Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R (adopted Dec. 21, 2009) [hereinafter *Audiovisual*].

199. Tania Voon, *Appellate Body Report, China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* (WTO), 49 INT’L LEGAL MATERIALS 516, 532 (2010).

200. *Id.* at 548.

201. See Eleanor A. Mangin, *Market Access in China—Publications and Audiovisual Materials: A Moral Victory with a Silver Lining*, 25 BERKELEY TECH. L.J. 279, 299 (2010).

202. See, e.g., Barfield, *supra* note 140.

203. See Cory’s Testimony, *supra* note 165.

204. Gao, *supra* note 189, at 380.

reasonable alternatives available to protect public morals besides complete blockages, such as selective filtering. Although less sophisticated countries that do not have access to selective filtering technology may be able to argue that no reasonable alternatives to complete blockages are available, this argument is likely unavailing in China's case because of its sophisticated censorship infrastructure and technological prowess.

### 3. *The WTO's Incentive to Find Against China*

A WTO censorship claim against China is meritorious and warrants serious consideration by WTO adjudicators. Although WTO cases are typically determined on an individualized basis, *Gambling Services*, *Telmex*, and *Audiovisual* provide the WTO with the legal foundation to hold governments that abuse censorship accountable. First, *Gambling Services* bars zero quota policies in trade sectors previously liberalized by member countries.<sup>205</sup> As such, China's complete bans on a host of Internet corporations undercuts the holding in *Gambling Services*. Second, *Telmex* struck down policies that intentionally promoted domestic protectionism.<sup>206</sup> As the rise of domestic services like Baidu and Weibo after the expulsion of Google and Twitter demonstrate, domestic protectionism is a likely and foreseeable consequence of censorship. Finally, *Audiovisual* shows the WTO's willingness to scrutinize—and reject—China's necessity argument because there are reasonable measures available to protect public morals in a society other than complete blockages.<sup>207</sup> *Audiovisual's* holding is particularly instructive since it demonstrates the WTO's ability to weigh the economic harms caused by censorship.

Today, the effects of China's censorship infrastructure are exacerbated because censorship includes complete bans on multinational Internet corporations. The negative externalities stemming from censorship on international trade in the digital age, coupled with the authority of WTO precedent, provide powerful incentives for the WTO to rule against China's censorship practices for the second time.

Indeed, there are structural and economic incentives for the WTO to rule against China. The WTO was specifically created to promote free trade and to combat unfair protectionism practices.<sup>208</sup> In close cases, like *Audiovisual*, the WTO's objectives weigh in favor of finding for the harmed party. Moreover, the WTO encourages parties to engage in negotiations and come to a mutual agreement. Hence, it generally disfavors complete bans because they leave no room for negotiations between countries.

The WTO may also rule in favor of the U.S. if it finds that China's sales of censorship technologies to other countries bear grave conse-

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205. *Id.* at 371.

206. *Telmex*, *supra* note 148, at 224-25.

207. *See Audiovisual*, *supra* note 198, at 109.

208. *See The Case for Open Trade*, WORLD TRADE ORG., [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact3\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact3_e.htm) [<https://perma.cc/2RHD-MDFB>].



quences.<sup>209</sup> Such exports have the potential to empower developing countries to engage in their own censorship practices after acquiring the infrastructure and technology.<sup>210</sup> Even if these countries acquire censorship technology and elect not to use it, possession of the technology may provide them with the same type of leverage that the Chinese government has over domestic Internet corporations, thereby further threatening global trade.

The issue of censorship is particularly ripe for decision. Historically, there has been a dearth of WTO claims challenging governments' Internet censorship practices. Countries around the world, including India and Russia, have censored and continue to censor content for a host of social, political, and economic reasons.<sup>211</sup> The potential benefits of censorship, augmented by the absence of trade consequences for censoring governments, provide states with enormous economic incentives to censor content and restrict citizens' access to information.<sup>212</sup> Given the prevalence and increasing dominance of digital trade, the WTO is in opportune position to set the standard for determining when a state's censorship policies cross the line and violate its WTO commitments. By hearing the case, the WTO can dismiss China's justifications for its censorship practices and make international trade fairer and more transparent for all states involved.<sup>213</sup>

One challenge to the WTO finding in favor of the U.S. is that WTO precedent is not formally binding and panels are not required to adhere to previous panels' reasoning.<sup>214</sup> DSU Article 3.2 states: "Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."<sup>215</sup> Accordingly, critics may be skeptical about the U.S.' ability to prevail in a potential WTO claim. In practice, however, the non-binding nature of previous panels' holdings does not pose a significant concern. As Hoekman and KostECKI point out, given similar factual issues, there is a very high likelihood that WTO panels will follow Appellate Body rulings. The Appellate Body has made clear that its rulings should be applied by subsequent panels. . . . [F]ailure to do so would undermine the development [of] a coherent and predictable body of

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209. See Maya Wang, *China's Dystopian Push to Revolutionize Surveillance*, WASH. POST (Aug. 18, 2017, 10:09 AM), <https://www.washingtonpost.com/news/democracy-post/wp/2017/08/18/chinas-dystopian-push-to-revolutionize-surveillance> [<https://perma.cc/7LZN-TRFD>].

210. Coca, *supra* note 154.

211. See Barney Warf, *Geographies of Global Internet Censorship*, 76 GEOJOURNAL 1,11 (2011).

212. Coca, *supra* note 154.

213. Forcing China to justify its censorship policies may lead to other unintended consequences. For example, it may empower international actors to challenge censorship based on the purported justifications on grounds such as human rights.

214. HOEKMAN & KOSTECKI, *supra* note 110, at 86.

215. See *Understanding on Rules and Procedures Governing the Settlement of Disputes*, WORLD TRADE ORG., [https://www.wto.org/english/tratop\\_e/dispu\\_e/dsu\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm) [<https://perma.cc/BH7A-Z4DP>]; Krzysztof J. Pelc, *The Politics of Precedent in International Law: A Social Network Application*, 108 AM. POL. SCI. REV. 547, 550 (2014).

jurisprudence.<sup>216</sup>

Despite WTO precedent's non-binding nature, in WTO jurisprudence, Krzysztof Pelc notes how "both judges and parties routinely invoke past rulings under the banner of legal consistency."<sup>217</sup> In addition, after examining WTO claims that countries chose to file and considering the decisions with prudential value, Pelc found that although "[g]overnments insist that precedent is not formally binding . . . they behave as if it were. Even as precedent in the trade regime remains, legally speaking, a fiction, political and legal actors tacitly agree to be bound by its logic."<sup>218</sup> Thus, the notion that WTO precedent is not formally binding will not, in practice, hinder the WTO's ability to find against China if a claim were to be brought against it.

#### 4. *The U.S.' 2018 Trade War with China and Compliance Concerns*

Another factor affecting the viability of the U.S.' WTO claim is the efficaciousness of the claim in light of the already-strained U.S.-China relationship. Namely, given the 2018 trade war between the U.S. and China, there is concern as to whether a WTO claim will affect China's policies and whether China will comply with a potentially adverse ruling. However, there is good reason to believe that political tensions will not undermine the viability of a WTO claim since the trade war is analytically distinct from a WTO claim against China's censorship practices. Moreover, China will comply with a WTO order to preserve its economic interests.

The U.S. and China have rarely sustained a harmonious trade relationship. Tensions escalated upon President Donald Trump's inauguration in the United States. In early 2018, the United States imposed tariffs on key Chinese imports, such as solar panels, washing machines, steel, and aluminum.<sup>219</sup> China responded with similar tariffs on soybeans, cars, and airplanes.<sup>220</sup> In July 2018, President Trump imposed tariffs on \$34 billion worth of Chinese goods.<sup>221</sup> President Trump cited the USTR's report on Section 301 of the Trade Act of 1974 (i.e., domestic law) and asserted that the tariffs were necessary to protect the U.S.' national security and intellectual property interests.<sup>222</sup> The United States believes that the tariffs

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216. HOEKMAN & KOSTECKI, *supra* note 110, at 86 (noting how the Appellate Body overturned a panel report on antidumping because "panels are expected to follow previously adopted [Appellate Body] reports addressing the same issue").

217. Pelc, *supra* note 215, at 550.

218. *Id.* at 563.

219. See Rebecca Tan, *The U.S.-China Trade War Has Begun. Here's How Things Got to This Point*, WASH. POST (July 6, 2018, 10:20 AM), [https://www.washingtonpost.com/news/worldviews/wp/2018/07/05/a-timeline-of-how-the-u-s-china-trade-war-led-us-to-this-code-red-situation/?noredirect=ON&utm\\_term](https://www.washingtonpost.com/news/worldviews/wp/2018/07/05/a-timeline-of-how-the-u-s-china-trade-war-led-us-to-this-code-red-situation/?noredirect=ON&utm_term) [<https://perma.cc/3YAN-6CFP>].

220. *See id.*

221. *See id.*

222. Section 301 of the Trade Act of 1974 empowers (1) the President to take necessary steps to respond to unfair, unreasonable, and discriminatory international trade practices; and (2) the USTR to compel another country to discontinue the offending practice. See Stephanie Segal & William Alan Reinsch, *Section 301, Tariffs, and Chinese Trade and Investment*, CTR. STRATEGIC & INT'L STUD. (Mar. 23, 2018), <https://www.csis.org/analysis/section-301-tariffs-and-chinese-trade-and-investment> [<https://perma.cc/3QBE-4LTF>].

represent the economic damage caused by the forced transfer of technology and intellectual property to the Chinese government, a prerequisite to conducting business in China.<sup>223</sup> The USTR report found that “the acts, policies, and practices of the Chinese government related to technology transfer, intellectual property, and innovation are unreasonable or discriminatory and burden or restrict U.S. commerce.”<sup>224</sup> Thereafter, China retaliated with tariffs on \$34 billion worth of U.S. goods.<sup>225</sup>

In addition to the tariffs, in March 2018, the United States also filed a WTO case against China for its intellectual property licensing practices.<sup>226</sup> In particular, the United States claimed that China “appears to be breaking WTO rules by denying foreign patent holders, including U.S. companies, basic patent rights to stop a Chinese entity from using the technology after a licensing contract ends.”<sup>227</sup> The United States asserted that China’s refusal to grant patent rights violates Article 3 (discrimination against foreign intellectual property rights holders) and Article 28 (failure to ensure patent rights for foreign patent holders) of the Trade-Related Aspects of Intellectual Property Rights agreement.<sup>228</sup>

As of 2020, the United States had imposed tariffs on more than \$550 billion worth of Chinese goods and China, in return, retaliated with tariffs on more than \$185 billion worth of U.S. products.<sup>229</sup> Despite the discord, trade talks continued, and the two countries signed phase one of a trade deal on January 15, 2020.<sup>230</sup> Phase one reduced U.S. tariffs and increased China’s purchase quota for U.S. manufactured goods, energy purchases, agricultural goods, and services.<sup>231</sup> It also facilitated cooperation on other disputed issues, such as intellectual property, technology transfer, currency practices, and foreign exchange.<sup>232</sup>

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223. Grant Clark, *What’s Intellectual Property and Does China Steal It?: QuickTake*, WASH. POST (Jan. 21, 2019), [https://www.washingtonpost.com/business/whats-intellectual-property-and-does-china-steal-it-quicktake/2018/03/22/83b980b8-2dd1-11e8-8dc9-3b51e028b845\\_story.html](https://www.washingtonpost.com/business/whats-intellectual-property-and-does-china-steal-it-quicktake/2018/03/22/83b980b8-2dd1-11e8-8dc9-3b51e028b845_story.html) [https://perma.cc/VUQ6-Z3YB].

224. OFF. OF THE U.S. TRADE REP., EXEC. OFF. OF THE PRESIDENT, 2018 SPECIAL 301 REPORT, at 44 (2018).

225. Xiaoqing Pi et al., *Trump Eyes Even Higher Tariffs as China Trade War Escalates*, BLOOMBERG (July 6, 2018, 11:44 AM), <https://www.bloomberg.com/news/articles/2018-07-05/trump-s-trade-war-threat-to-turn-reality-as-china-tariffs-begin> [https://perma.cc/52LU-27EC].

226. Segal & Reinsch, *supra* note 222.

227. Vicki Needham, *US Launches Trade Case Against China over Licensing Practices*, HILL (Mar. 23, 2018, 4:30 PM), <http://thehill.com/policy/finance/380009-us-launches-trade-case-against-china-over-licensing-practices> [https://perma.cc/34L5-W7RQ].

228. *US Drags China to WTO on Discriminatory Technology Licensing Requirements*, ECON. TIMES (Mar. 23, 2018, 8:35 PM), <https://economictimes.indiatimes.com/news/international/us-drags-china-to-wto-on-discriminatory-technology-licensing-requirements/articleshow/63433503.cms> [https://perma.cc/V47S-4HDJ].

229. Dorcas Wong & Alexander Chipman Koty, *The US-China Trade War: A Timeline*, CHINA BRIEFING (Feb. 25, 2020), <https://www.china-briefing.com/news/the-us-china-trade-war-a-timeline> [https://perma.cc/U9U7-9T5F].

230. *Id.*

231. *Id.*

232. *Id.*

Although these trade talks may have alleviated the tension between the United States and China, there are still important distinctions between a Section 301 claim and a WTO claim that warrant discussion. First, Section 301 is domestic U.S. law, and China is not legally bound by decisions originating from the U.S.' Executive Branch or the USTR. Due to this limitation, the USTR typically brings WTO claims in conjunction with invoking Section 301.<sup>233</sup> President Trump's decision to invoke Section 301 is not unprecedented, as the United States has previously brought Section 301 cases against China and, each time, China retaliated and negotiations ensued.<sup>234</sup> Although the United States may have gained some leverage through its Section 301 actions, these claims are unreliable and do not consistently produce positive results. Rather, Section 301 claims against China typically serve as a symbolic political message.

In contrast, the WTO is uniquely positioned to decide claims against powerful countries like China. Unlike other international institutions that are restrained by excessive bureaucracy, politics, and the lack of effective enforcement mechanisms, WTO members voluntarily submit to the WTO, which operates under a *self-enforcing* regime.<sup>235</sup> Thus, the WTO avoids difficult issues, such as those involving self-execution, domestic ratification, jurisdiction, and enforcement, which often plague claims under human rights treaties, like the United Declaration of Human Rights (UDHR); International Covenant on Civil and Political Rights (ICCPR); and International Covenant on Economic, Social, and Cultural Rights (ICESCR).<sup>236</sup>

Studies show that the WTO has one of the highest compliance rates amongst international courts. Bruce Wilson, for example, found that in "virtually all" of the cases from 1995 to 2007, a WTO member who violated its WTO obligations either indicated its intent to comply or had already conformed to the requisite compliance obligations.<sup>237</sup> Wilson further notes that "the overall positive record of Members in complying with adverse WTO rulings is reflected in, and confirmed by, the low number of cases where Members have sought and received authorization to impose retaliatory measures."<sup>238</sup>

The WTO's effectiveness is attributed to the reality that members states are self-interested and are vulnerable to trade disruptions.<sup>239</sup> Alexander Keck and Simon Schropp note that "[t]he threat of reprisal by an aggrieved party maintains the initial balance of concessions and prevents

233. Morrison, *supra* note 153.

234. *Id.*

235. Claire R. Kelly, *The Value Vacuum: Self-Enforcing Regimes and the Dilution of the Normative Feedback Loop*, 22 MICH. J. INT'L L. 673, 675 (2001).

236. See Paul L. Hoffman & Nadine Strossen, *Enforcing International Human Rights Law in the United States*, 26 STUD. TRANSNAT'L LEGAL POL'Y 477, 478-83 (1994).

237. Bruce Wilson, *Compliance by WTO Members with Adverse WTO Dispute Settlement Rulings: The Record to Date*, 10 J. INT'L ECON. L. 397, 399 (2007).

238. *Id.* at 397.

239. HOEKMAN & KOSTECKI, *supra* note 110, at 91.

opportunism.”<sup>240</sup> From a realist perspective, in a world where all states are self-interested, the WTO is effective because it already employs mechanisms designed to efficiently sanction non-complying parties. If parties refuse to comply, recourse is readily available because the harmed party can simply sanction the other party by imposing tariffs. Not only do non-complying parties incur short-term economic costs via tariffs, but long-term ramifications may also be forthcoming. The WTO promotes trade by serving as a negotiation forum where countries continuously negotiate and enforce trade agreements. As Hoekman and Kostecki point out:

Losing parties knew that at some point in the future they would bring cases themselves. If they were to block disputes or adoption of reports this would greatly reduce the value of negotiated commitments. The GATT (and the WTO) is a repeated game . . . parties know they will interact over an indefinitely time horizon.<sup>241</sup>

The real repercussions of defying WTO decisions create the universal expectation that all parties—regardless of regime type or size—have a strong interest in compliance.

Unlike Section 301 claims, WTO claims have unique benefits and consistently yield positive results for several reasons. First, under the WTO regime, states voluntarily submit to jurisdiction.<sup>242</sup> When governments become members, they are bound by, and are *legally obligated* to accept, the final determinations and recommendations of the panel and the Appellate Body.<sup>243</sup> In effect, this binding authority bestows the WTO with the legitimacy that Section 301 lacks. Moreover, the presence of mutual consent, along with the self-contained nature of WTO adjudications, mitigates the impact of WTO trade disputes on state sovereignty. Second, under WTO rules, countries are prohibited from implementing countermeasures without first engaging in the dispute settlement process, which (in theory) prevents members from taking unilateral countermeasures without authorization.<sup>244</sup> Third, the WTO dispute settlement process is independent from Section 301, which means that the WTO panel and Appellate Body’s rulings will bind both parties, regardless of what transpires with Section 301 claims.

The fourth, and perhaps most important distinction between Section 301 and the WTO, is that the WTO is self-enforcing and contains a reliable enforcement mechanism after a final judgement is rendered. Critics are

240. Alexander Keck & Simon Schropp, *Indisputably Essential: The Economics of Dispute Settlement Institutions in Trade Agreements* 3 (World Trade Org.: Econ. Res. & Stat. Division, Working Paper No. ERSD-2007-02, 2007).

241. HOEKMAN & KOSTECKI, *supra* note 110, at 91.

242. See Joost Pauwelyn, *The Transformation of World Trade*, 104 MICH. L. REV. 1, 25 (2005).

243. *Id.* (“Unlike GATT Article XXIII, which focused on maintaining a mere balance of concessions, the DSU for the first time, albeit implicitly, imposes a legally binding obligation to comply with WTO rules and WTO dispute rulings.”); see John H. Jackson, *The WTO Dispute Settlement Understanding-Misunderstandings on the Nature of Legal Obligation*, 91 AM. J. INT’L L. 60, 63-64 (1997).

244. See *Understanding The WTO: Settling Disputes*, *supra* note 117.

often skeptical about the ability of international institutions to force China to comply with tribunal orders. For example, China famously defied an international tribunal's order condemning its actions and unequivocally rejecting its claims during the South China Sea dispute.<sup>245</sup> While China's overall record of complying with international institutions may be suboptimal, WTO dispute settlement orders warrant a separate analysis because it is in China's self-interest to comply with WTO rulings.<sup>246</sup>

Although China's record of complying with WTO orders is not perfect, there is reason to be optimistic. Marcia Harpaz notes that

[a]fter adamantly rejecting international third-party adjudications in the past, China—by permitting WTO panels to determine its fate in trade disputes—has begun expressing new willingness to accept binding international adjudications.<sup>247</sup> [not a block quote]

Harpaz found that, “when it has lost in the limited number of cases it has been involved in, China has complied with the panel [or Appellate Body] findings, by changing the measures deemed illegal, demonstrating willingness to accept third party adjudication.”<sup>248</sup> As a result, the WTO has yet to authorize sanctions against China for failing to implement a decision or recommendation.<sup>249</sup>

However, some scholars argue that, while China has complied in most WTO rulings, many of its implementation efforts are merely “paper compliance” because China retained regulations that were inconsistent with WTO disciplines, and it did not follow all of the WTO's compliance procedures.<sup>250</sup> For example, Timothy Webster argues that not only did China fail to comply reasonably in *Audiovisual*, it left in place three (out of eighteen) provisions of regulations that were inconsistent with WTO agreements, such as reserving approval power over the importation of certain audiovisual products.<sup>251</sup> Similarly, Tomer Broude and Holger Hestermeyer argue that the U.S.' victory “is superficial at best” because China merely rearranged its content review system.<sup>252</sup> As Webster acknowledges, however, while inconsistent regulations are still in effect, the two countries reached an agreement by negotiating a Memorandum of Understanding.<sup>253</sup> This agreement signifies that the U.S. “was satisfied with, or at least

245. Tom Phillips, *China Attacks International Court After South China Sea Ruling*, *GUARDIAN* (July 13, 2016, 2:29 PM), <https://www.theguardian.com/world/2016/jul/13/china-damns-international-court-after-south-china-sea-slapdown> [https://perma.cc/DNE6-FSYK].

246. See discussion *supra* Section IV.D.4.

247. Marcia Don Harpaz, *Sense and Sensibilities of China and WTO Dispute Settlement*, 44 *J. WORLD TRADE* 1155 (2010).

248. *Id.* at 1172.

249. Timothy Webster, *Paper Compliance: How China Implements WTO Decisions*, 35 *MICH. J. INT'L L.* 525, 556 n.158 (2014).

250. *Id.* at 556, 574.

251. *Id.* at 556–68.

252. Tomer Broude & Holger P. Hestermeyer, *The First Condition of Progress? Freedom of Speech and the Limits of International Trade Law*, 54 *VA. J. INT'L L.* 295, 320–21 (2014).

253. Webster, *supra* note 249, at 569.

resigned to the inevitability of, the terms.”<sup>254</sup>

The lack of full compliance in *Audiovisual* does not compromise the viability of a WTO claim against China. Complete abolishment of censorship is an unrealistic goal. As Webster admits, the stakes of complete and comprehensive compliance are high: “Full implementation would have required completely dismantling the Chinese government’s monopoly on importing information and culture, as well as the vast censorship regime embedded within it.”<sup>255</sup>

Yet, there is much to be optimistic about. First, in contrast to China’s poor reputation of complying with international tribunal orders, its record with the WTO demonstrates that it is willing to comply with panel and Appellate Body decisions.<sup>256</sup> China’s receptiveness to the *Audiovisual* decision also highlights its willingness to engage in good-faith negotiations on implementing WTO decisions, including those directly related to and implicating its censorship regime. On a larger scale, a WTO censorship claim presents the United States with an opportunity to force China’s hand and legally demand additional censorship concessions. Thus, there is good reason to believe that China will comply with an adverse WTO decision, even amid high political tensions with the United States.

#### E. The Legal and Practical Implications of a WTO Censorship Case

While a WTO censorship claim itself is important, it would be prudent to also consider the legal and practical implications if the United States were to prevail in its censorship claim against China. A WTO claim that targets China’s censorship infrastructure provides international law with the teeth and reputation needed to be effective. Many academics and foreign policy experts have been skeptical about the effectiveness of international law, particularly from an enforcement and compliance perspective.<sup>257</sup>

For example, Michael Ting is skeptical of the WTO because of its inability to limit domestic censorship. Ting argues that even if a WTO claim against China is successful, the government can still censor domestic products (e.g., books), services, and political speech *within* China without restrictions.<sup>258</sup> Ting overlooks two important consequences of a potential WTO ruling against China. First, if China complies with the ruling, it will

254. *Id.*

255. *Id.*

256. See Harpaz, *supra* note 247, at 1155.

257. See, e.g., Shima Baradaran et al., *Does International Law Matter?*, 97 MINN. L. REV. 743, 816-17 (2013) (finding that roughly one in seven international actors is willing to violate international law, and that the existence of penalties actually motivates some actors to break international law in greater numbers); Joshua Kleinfeld, *Skeptical Internationalism: A Study of Whether International Law Is Law*, 78 FORDHAM L. REV. 2451, 2527-28 (2010) (“Nothing intrinsic to international law deprives it of the character of law. In operation it can and often does fail of its promise, but the failure is with the courts charged with interpreting and applying the law, not with the law itself.”).

258. Ting, *supra* note 106, at 299 (“Though the WTO can be effective at limiting a member’s censorship policies when they inhibit trade liberalisation, the WTO cannot impugn restrictions of a purely domestic nature.”).

be forced to lift its complete blockage on certain categories of Internet services, which may include removing blockages against Internet companies like Yahoo, Google, and Twitter. These services can, in turn, serve as alternative forums for Chinese citizens to access and express ideas that they could not otherwise access or express through similar domestic services. Further, as will be discussed later in this Section, the WTO's rulings against complete blockages, as applied to censorship, would compel China to selectively filter content. Although forcing the government to selectively filter content does not eliminate its actual ability or authority to censor content, it considerably mitigates censorship's impact on Internet corporations and Chinese and global citizens.

Other scholars cite the South China Sea dispute as another source of their skepticism. During that dispute, which was governed by the United Nations Convention on the Law of the Sea, an arbitral panel held that China had no historic rights to the territory in its claims.<sup>259</sup> However, China called the verdict "a piece of paper that is destined to come to naught" and dismissed the tribunal's decision as "a lackey of some outside forces" that would be remembered "as a laughing stock in human history."<sup>260</sup> These examples of China's noncompliance pervade media outlets and cause individuals to question whether international law is *really* law.<sup>261</sup>

Although powerful countries like China openly defy international law, the argument distorts the truth in the context of institutions that contain robust enforcement mechanisms, such as the WTO and its dispute resolution process. China's record at the WTO proves that it will not ignore a WTO panel and Appellate Body decision. With the imminent threat of sanctioned retaliation via tariffs, noncompliance can be costly:

A defendant in a case over censorship who was found to have behaved inconsistently with its WTO obligations, but refused to lift the censorship or correct its form, would therefore have to either accept authorised retaliation against it or withdrawal from the relevant obligation through compensation.<sup>262</sup> [not a block quote]

As explained in the previous section, the WTO operates differently than other international institutions because not only is there a self-enforcement mechanism, but China also voluntarily joined the institution—thereby surrendering its state sovereignty—and made trade concessions that it is legally obligated to follow under international trade law.

A WTO censorship claim has many important effects. First, it challenges domestic laws and policies that censor content and effectively

259. Phillips, *supra* note 245.

260. *Id.*

261. Anthony D'Amato, *Is International Law Really "Law"?*, 79 Nw. U.L. REV. 1293 (1984-1985) (emphasis in original) (recalling how "[m]any serious students of the law react with a sort of indulgence when they encounter the term 'international law,' as if to say, 'well, we know it is[ not] really law, but we know that international lawyers and scholars have a vested professional interest in calling it 'law.'").

262. Erixon et al., *supra* note 97, at 16.



undermine WTO principles. Second, it allows the WTO to reaffirm that a member's WTO trade obligations are superior to its domestic censorship policies. Third, by scrutinizing the substance and necessity of "public morals" and "public order" claims, the WTO can foreclose loopholes for violating members to defy their trade obligations. Such scrutiny places the burden on members to prove that their censorship policies are not overly restrictive. Since there is almost always a less-restrictive alternative to complete blockage, members that currently have broad censorship practices will likely be pressured instead to selectively filter content. Before it was censored in China, Google faced a similar situation when authorities blocked Google's main website but allowed it to operate under a selectively filtered, Chinese version of Google that complied with domestic regulations.<sup>263</sup>

The doctrinal question underlying these implications—and the elephant in the room—is precisely Wu's original question when he suggested the possibility of a WTO challenge in 2006: How much control is legitimate domestic regulation, and how much is a barrier to trade and a breach of promises made to other members of the WTO?<sup>264</sup> This Article contends that complete blockages violate China's WTO obligations under GATS. However, the WTO has yet to opine on the question, and no government has challenged China's Internet censorship practices at the WTO.<sup>265</sup> The closest that the U.S. has gone is its 2011 request for information that China largely ignored.<sup>266</sup> A WTO claim, however, would yield a different outcome. On one hand, it compels China to outline, defend, and justify its censorship policies. And on the other hand, it simultaneously compels the WTO to draw the line on how much control is legitimate and how much amounts to a breach of WTO obligations.

A WTO decision provides members with the guidance and transparency necessary to enact legitimate and efficient policies. As Erixon, Hindley, and Lee-Makiyama note: "Contesting arbitrary and disproportionate blocks on access to such markets will incrementally help to reduce legal uncertainty and therefore contribute in the long run to a regulatory environment where the risks and costs of market participation are foreseeable."<sup>267</sup> The authors also highlight the importance of the claim: "It would also be economically significant. Censorship is the most important non-tariff barrier to the provision of online services, and a case might clarify the circumstances in which different forms of censorship are WTO consistent. Such clarification would reduce legal uncertainty for online businesses."<sup>268</sup>

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263. For more information on Google's situation in China and selective filtering, see Gao, *supra* note 189, at 357-58.

264. Wu, *supra* note 96, at 287 (quotations omitted).

265. See Aaronson, *supra* note 96, at 3.

266. *Id.*

267. Erixon et al., *supra* note 97, at 17-18.

268. *Id.* at 16.

Indeed, the WTO has (whether intentionally or not) neglected to delineate the limits of the public morals exception. Its holdings in cases like *Audiovisual* have been narrow, perhaps due to concerns surrounding the perceived inadequacy of the WTO or respect for national sovereignty. However, as explained above, there is a pressing need to clarify the limits of domestic censorship insofar as censorship policies implicate a state's WTO commitments. States, including the United States, routinely exercise censorship by blocking what they deem to be harmful content (e.g., child pornography, terrorism-related content). The distinction between the legitimate versus illegitimate exercises of censorship is increasingly important because China's exportation of its censorship technology to developing countries will soon enable those countries to exercise censorship—thereby creating the possibility that they, too, can systematically gain unfair advantages in international trade.<sup>269</sup> However, the WTO's leverage against China and the dominance of the Internet as *the* medium for global commerce and services places the WTO in a unique position where it has become perhaps the *only* actor that can authoritatively differentiate between legitimate uses of censorship and protectionism cloaked as censorship. The WTO has authority to challenge domestic policies because states have surrendered their sovereignty to the WTO and have a vested interest in complying with WTO rulings. The lack of meaningful leverage against the Chinese government explains why scholars' suggestions for diplomacy as a means to *combat* censorship have been, and will continue to be, futile.<sup>270</sup>

#### IV. Combating Censorship Using Collective Action

In addition to using international law, in the domestic context, Global Network Initiative (GNI) members, global citizens, and corporations operating in China can combat censorship by engaging in collective action.<sup>271</sup> Collective action against the government has typically been viewed as single, isolated events that arise out of citizens' grievances. In reality, however, the commonalities among successful collective action demonstrations suggest that it can be a viable systematic approach. This Article contributes to the existing discourse by analyzing—at a macro level—the viability of collective action against the Chinese government.

Global organizations have repeatedly called for the need to stand up against China every time it engages in objectionable human rights violations, such as jailing activists domestically and in Hong Kong.<sup>272</sup> But because of China's continued disregard of the international community's

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269. See Wang, *supra* note 209.

270. See discussion *infra* Part III; Liu, *supra* note 96, at 1233–37.

271. By “collective action,” this Article refers to voluntary actions that groups of individuals can take to further the common objective of combating censorship. See, e.g., FRANCESCO VANNI, AGRICULTURE AND PUBLIC GOODS: THE ROLE OF COLLECTIVE ACTION 21–22 (2014).

272. See, e.g., Reuters Staff, *Canada Will Continue to Stand Up Against Chinese Human Rights Abuses, PM Trudeau Says*, REUTERS (Oct. 16, 2020, 1:18 PM), <https://>

demands, these callings have largely been ignored. This Part builds on the international community's demands by suggesting that international actors can come together and collectively take action against the Chinese government.

Perhaps unbeknownst to many, collective action in China is common.<sup>273</sup> Chinese citizens routinely protest issues that impact their daily lives, such as uranium and copper plant constructions, paraxylene plant expansions, land seizures, and other not-in-my-backyard issues.<sup>274</sup> Under the right circumstances, protesters can act collectively and force the government's hand on certain policy issues. This Part proceeds by analyzing (1) who the proper actors ought to be, (2) when collective action has been successful against the Chinese government, and (3) the viability of collective action. Finally, although much literature is devoted to the theories, logic, and organizational aspects of collective action, this Article will not delve into this body of literature.<sup>275</sup>

#### A. Who Should Engage in Collective Action

The basic forms of collective action, including online activism, action through global institutions, standing up against China, or pressuring other governments to act, are accessible to virtually anyone who wishes to participate. In particular, three sets of actors are uniquely situated to pressure the Chinese government: GNI members, global citizens, and Internet corporations currently operating in China.

GNI members are in a prime position to act because the GNI is a non-governmental organization (NGO) established for the specific purpose of protecting and advancing internationally recognized human rights, such as the freedom of expression and privacy.<sup>276</sup> The GNI was founded in 2008, largely as a response to the controversial concessions that companies, like Yahoo, made to the Chinese government.<sup>277</sup> GNI members include a host of ICT companies (e.g., Google, Facebook, Yahoo, Microsoft, Nokia, Human Rights Watch, Wikimedia Foundation) and NGOs (e.g., Human

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[www.reuters.com/article/us-china-canada-diplomacy-idUSKBN2712OF](http://www.reuters.com/article/us-china-canada-diplomacy-idUSKBN2712OF) [<https://perma.cc/L34V-9UBB>].

273. See Max Fisher, *How China Stays Stable Despite 500 Protests Every Day*, ATLANTIC (Jan. 5, 2012), <https://www.theatlantic.com/international/archive/2012/01/how-china-stays-stable-despite-500-protests-every-day/250940> [<https://perma.cc/DA4Y-TXDT>].

274. See *id.*; Elaine Pang, *From Nuclear Plants to Land Seizures: When Protests Are Successful in China*, ECHINACITIES (Aug. 8, 2013), <https://www.echinacities.com/expat-corner/From-Nuclear-Plants-to-Land-Seizures-When-Protests-are-Successful-in-China> [<https://perma.cc/ZD5N-EMQ3>].

275. For a discussion on the theory of collective action, see Hayagreeva Rao et al., *Power Plays: How Social Movements and Collective Action Create New Organizational Forms*, in 22 RSCH. ORG. BEHAV. 237, 239 (2000).

276. Michael Auerbach, *Hardware Risk: China Targets PC Manufacturers*, HUFFPOST (May 25, 2011), [https://www.huffingtonpost.com/michael-shtenderauerbach/hardware-risk-china-target\\_b\\_213800.html](https://www.huffingtonpost.com/michael-shtenderauerbach/hardware-risk-china-target_b_213800.html) [<https://perma.cc/G3MW-LZRP>].

277. About GNI, GLOB. NETWORK, <https://globalnetworkinitiative.org/about-gni> [<https://perma.cc/2K7L-BGNW>] (last visited Mar. 10, 2021).

Rights Watch, Center for Internet and Society).<sup>278</sup> Its principles are largely based on the UDHR, ICCPR, and ICESCR.<sup>279</sup> GNI members pledge to live up to the organization's core principles:

Participants will take a collaborative approach to problem solving and explore new ways in which the collective learning from multiple stakeholders can be used to advance freedom of expression and privacy. Individually and collectively, participants will engage governments and international institutions to promote the rule of law and the adoption of laws, policies and practices that protect, respect and fulfill freedom of expression and privacy.<sup>280</sup>

By prioritizing transparency in public and independent assessments, the GNI maintains a governance structure that ensures continued compliance with its core principles, which are to protect, respect, and remedy human rights.<sup>281</sup>

Arguably the most important characteristic of the GNI is the demographics of its members. The GNI includes some of the most powerful ICT corporations in the world that have specifically congregated to protect the Internet rights of individuals living under authoritarian regimes.<sup>282</sup> In addition to economic capacity, GNI members' platforms may facilitate collective action on a global scale by enabling self-expression, providing access to international markets, and ensuring high levels of public exposure. GNI members' platforms empower them to become catalysts for shaping the international discourse on combating censorship in China. Moreover, since many GNI members do not operate in China, members may be less affected by governmental retaliation. Given the GNI's global network and sphere of influence, it can also mobilize Chinese NGOs that focus on human rights and rule of law issues to join the overall effort. Chinese NGOs are particularly helpful in congregating Chinese citizens because of their familiarity with local customs, practices, and processes. Even if some GNI members are unwilling to participate in collective action out of fear that they may be permanently blacklisted from the Chinese market, the influence that other members have, in the aggregate, renders the collective action's success not dependent on GNI members' full participation.

Global citizens are another key to collective action's success. ICT companies play a crucial role in messaging, coordinating, and planning collective action through their respective platforms. Equally crucial to collective action's success, however, is global citizens' efforts to create and disseminate

278. *Portfolio*, GLOB. NETWORK, <https://globalnetworkinitiative.org/participants> [<https://perma.cc/STP8-U9L6>] (last visited Mar. 10, 2021).

279. *GNI Principles on Freedom of Expression and Privacy*, GLOB. NETWORK 1 (2017), [http://globalnetworkinitiative.org/sites/default/files/GNI-Principles-on-Freedom-of-Expression-and-Privacy\\_0.pdf](http://globalnetworkinitiative.org/sites/default/files/GNI-Principles-on-Freedom-of-Expression-and-Privacy_0.pdf) [<https://perma.cc/5TXH-UYGJ>].

280. *Id.* at 5.

281. *Id.* at 1, 2.

282. See generally Michael Samway, *The Global Network Initiative: How Can Companies in the ICT Industry Respect Human Rights?*, in *BUSINESS AND HUMAN RIGHTS: FROM PRINCIPLES TO PRACTICE* 136, 136 (Dorothee Baumann-Pauly & Justine Nolan eds., 2016).

nate social media posts and blogs, encourage involvement from their respective networks, and actively engage in other forms of collective activism. The goal is to actively engage with issues related to censorship and establish grassroots movements to oppose censorship. In China's case, perhaps the most important global citizens are Chinese citizens themselves.<sup>283</sup> As will be discussed later in this Part, many collective action efforts that resulted in governmental concession have involved Chinese citizens protesting the government in some form.

In addition to GNI members and global citizens, Internet companies operating in China also play an important role in pressuring the government. Even if these corporations lack meaningful leverage and *ultimately* obey the government's orders, their acquiescence does not render them powerless in the interim. As part of the global movement, international actors and consumers can pressure companies like Apple to resist the Chinese government's censorship policies. For example, as it has done (or at least claimed it would do) in the past, Apple can stand up against the government and ask—in good faith—for negotiations.<sup>284</sup> Although negotiations may not alter the government's censorship policies, the purpose of the request is to initiate an open dialogue with the Chinese government on censorship—a discussion that can be revisited in the future. Thus, companies operating in China can collectively exert significant pressure against the government. If properly coordinated, these efforts can build on the momentum provided by GNI members, global citizens, and other potential participants.

## B. When Collective Action Has Been Successful

Collective action has enormous potential because it can pressure governments to make policy concessions that they would not have otherwise made under the status quo. Instead of analyzing the theories underlying why collective action works, this Section examines six cases in which actors have taken collective action against the Chinese government: (1) the Green Dam installation incident, (2) GitHub, (3) LGBT rights, (4) Hong Kong protests, (5) domestic rural takings disputes, and (6) the COVID-19 pandemic. The government's responses to each of these cases shed light on why collective action may be a viable option in combating censorship.

### 1. *Green Dam*

In 2009, the Chinese government required all computers sold domestically to install a content-control software called Green Dam Youth Escort

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283. See Ting Xue & Jacquelin van Stekelenburg, *When the Internet Meets Collective Action: The Traditional and Creative Ways of Political Participation in China*, 66 *CURRENT SOC. REV.* 911, 918 (2018).

284. See Ben Lovejoy, *Opinion: Apple's Relationship with China Is Turning into a Massive Liability*, 9TO5MAC (Oct. 10, 2019, 6:10 AM), <https://9to5mac.com/2019/10/10/apples-relationship-with-china> [<https://perma.cc/XU9Y-L8GQ>] (noting that “[n]egotiations are ongoing, but they are not going well”).

(Green Dam).<sup>285</sup> According to the government, Green Dam was necessary “in to order to build a green, healthy, and harmonious online environment, and to avoid the effects on and the poisoning of our youth’s minds by harmful information on the [I]nternet.”<sup>286</sup> However, critics argue that Green Dam was an initiative to strengthen the government’s censorship infrastructure by imposing additional barriers to politically sensitive web-sites, automatic security downloads, and tracking software.<sup>287</sup>

Green Dam sparked high levels of domestic backlash, which led to the government withdrawing its installation mandate.<sup>288</sup> Domestically, despite the Chinese government’s attempts to prevent the topic from going viral by urging media outlets to censor criticism of Green Dam, political memes, such as the “Green Dam Girl,” emerged as a symbol of mockery against the installation policy.<sup>289</sup> Even domestic lawsuits were filed against the makers of Green Dam. Li Fangping, a lawyer in China, argued that “[t]he impact of this software will be huge. It will violate the rights of many citizens.”<sup>290</sup>

The international community was equally critical. The U.S. Embassy issued a statement expressing its concerns after meeting with Chinese officials:

The U.S. is concerned about actions that seek to restrict access to the Internet as well as restrictions on the internationally recognized right to freedom of expression . . . . The U.S. Government is concerned about Green Dam both in terms of its potential impact on trade and the serious technical issues raised by use of the software . . . . We have asked the Chinese to engage in a dialogue on how to address these concerns.<sup>291</sup>

Other prominent voices expressed similar concerns. For example, Ed Black, President of the Computer and Communications Industry Associa-

285. *Chinese Government Orders Computer Manufacturers to Pre-install Filtering Software*, HUM. RTS. CHINA (June 8, 2009), <http://www.Hrichina.org/en/content/301> [https://perma.cc/9CHX-WV3M].

286. *Id.*

287. Jonathan Watts, *China Orders PC Makers to Install Blocking Software*, GUARDIAN (June 8, 2009, 2:24 PM), <https://www.theguardian.com/world/2009/jun/08/web-blocking-software-china> [https://perma.cc/49DY-3U37].

288. Jonathan Watts, *China Backs Down over Controversial Censorship Software*, GUARDIAN (June 16, 2009, 7:59 AM), <https://www.theguardian.com/world/2009/jun/16/china-backs-down-censorship-software> [https://perma.cc/8RNJ-TGRV].

289. Jeremy Goldkorn, *Green Dam Girl*, DANWEI (June 14, 2009, 7:11 PM), [http://www.danwei.org/net\\_nanny\\_follies/green\\_dam\\_girl.php](http://www.danwei.org/net_nanny_follies/green_dam_girl.php) [https://perma.cc/H429-T2X6]. The fact that the Green Dam Girl memes successfully bypassed the government’s censorship for an extended period of time is shocking given the government’s intolerance against Internet memes and political cartoons. As a more recent example, depictions of Xi Jinping as Winnie the Pooh were heavily censored. See Shannon Liao, *Winnie the Pooh Is Now Banned in China for Resembling President Xi Jinping*, VERGE (July 18, 2017, 5:42 PM), <https://www.theverge.com/2017/7/18/15993136/winnie-the-pooh-china-ban-censorship-xi-jinping-lol> [https://perma.cc/ZR4Q-AHQV].

290. Watts, *supra* note 288.

291. Associated Press, *U.S. Pressures China over Internet Censorship Efforts*, DAILY NEWS (June 22, 2009, 6:12 AM), <http://www.nydailynews.com/news/world/u-s-presures-china-internet-censorship-efforts-article-1.378447> [https://perma.cc/9LM2-Q6K9].

tion, called Green Dam an “unfortunate development” due to its damaging ramifications on Internet freedom, economic, trade, cultural, and social values.<sup>292</sup> The aforementioned examples represent only a sample of the barrage of criticism that the Chinese government received. This collective criticism eventually forced the government to abandon its firm stance on mandating the installation of Green Dam.<sup>293</sup>

## 2. GitHub

The Chinese government’s relationship with GitHub sheds further light on censorship and collective action. Owned by Microsoft, GitHub is a website and cloud-based service for programmers. It is the largest repository in the world for open-source software, and it allows software developers across the world to collaborate on projects.<sup>294</sup> China is GitHub’s second largest market after America.<sup>295</sup>

GitHub is also known as the “last land of free speech in China”; Chinese authorities cannot censor individual projects since GitHub uses the Hypertext Transfer Protocol Secure (HTTPS) protocol, which encrypts all traffic.<sup>296</sup> As a result, GitHub has become a sanctuary from censors and a platform for online resistance where users distribute anti-censorship software (e.g., GreatFire).<sup>297</sup> Because GitHub is an influential platform for creating and sharing anti-censorship technology, however, it has been targeted by distributed denial-of-service (DDoS) attacks and domain name system (DNS) hijacking.<sup>298</sup> On January 21, 2013, for example, GitHub was blocked using DNS hijacking. The blocking immediately triggered outrage from programmers.<sup>299</sup> Kai-Fu Lee, the former head of Google’s China operations, posted about the incident on Weibo: “GitHub is the preferred tool for programmers to learn and connect with the rest of the world . . . Blocking GitHub is unjustifiable, and will only derail the nation’s programmers from the world, while bringing about a loss in competitiveness and

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292. Asher Moses, *China’s Green Dam-Youth Escort Net Filter Draws Fire*, AGE (June 10, 2009, 12:43 AM), <http://www.theage.com.au/news/technology/biztech/chinas-internet-filter-plan-draws-fire/2009/06/09/1244313123970.html?page=2> [https://perma.cc/VT9X-7MBH].

293. Watts, *supra* note 288.

294. Cory’s Testimony, *supra* note 165, at 16-17.

295. *Microsoft’s GitHub Mulls Expansion in China*, ECONOMIST (Dec. 6, 2019), <https://www.economist.com/business/2019/12/06/microsofts-github-mulls-expansion-in-china> [https://perma.cc/78ER-XQGX].

296. Yi-Ling Liu, *In China, GitHub Is a Free Speech Zone for Covid Information*, WIRED (Sept. 9, 2020, 7:00 AM), <https://www.wired.com/story/china-github-free-speech-covid-information> [https://perma.cc/73T5-C8Q4].

297. *Id.*

298. Emily Feng, *GitHub Has Become a Haven for China’s Censored Internet Users*, NAT’L PUB. RADIO (Apr. 10, 2019, 10:28 AM), <https://www.npr.org/2019/04/10/709490855/github-has-become-a-haven-for-chinas-censored-internet-users> [https://perma.cc/8N3D-UPCX].

299. Ivan Zhai, *Programmers Angry over Blocking of GitHub Code-Sharing*, S. CHINA MORNING POST (Jan. 23, 2013, 11:00 AM), <https://www.scmp.com/news/china/article/1134717/programmers-angry-over-blocking-github-code-sharing-site> [https://perma.cc/Z7X9-3UPG].

insight.”<sup>300</sup> Lee’s post was re-posted over 80,000 times.<sup>301</sup> On January 23, 2013, a mere two days after the initial DNS hijacking, the block was lifted.<sup>302</sup>

Although the Chinese government reversed course and unblocked GitHub for economic reasons, it has taken important steps to mitigate the social and political consequences of allowing GitHub to remain operational. First, there are blacklisted keywords on GitHub. Citizen Lab analyzed GitHub code repositories and found over 1,000 Chinese blacklists comprising over 200,000 keywords.<sup>303</sup> As it observed, “[t]he blacklisted keywords reflected a variety of taboo topics, including those related to prurient interests, Falun Gong references, political movements, government criticism, and political leaders. Many lists contained over 1,000 words, making it unlikely that individual developers compiled these lists on their own.”<sup>304</sup> Second, the government has the ability to request GitHub to remove content that it wants censored. It exercised this power in 2019, for example, when it sent GitHub notices to take down content related to Falun Gong.<sup>305</sup> Third, the government tracked and charged individuals with “picking quarrels and stirring up trouble,” a charge frequently used to target critics of the government.<sup>306</sup> Lastly, the government has been attempting to localize businesses’ source codes by supporting Gitee, a Chinese alternative to GitHub.<sup>307</sup>

### 3. LGBT Rights

LGBT rights is another area where collective action has produced tangible results. Because many traditional values continue to dominate China’s political discourse and public policies, LGBT individuals continue to experience social and legal challenges to accessing rights that their heterosexual counterparts enjoy. For example, in Chinese media, LGBT-themed content is routinely censored.<sup>308</sup> Individuals have found courts

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300. Michael Kan, *GitHub Unblocked in China After Former Google Head Slams Its Censorship*, COMPUT. WORLD (Jan. 23, 2013, 5:51 AM), <https://www.computerworld.com/article/2493478/github-unblocked-in-china-after-former-google-head-slams-its-censorship.html> [<https://perma.cc/2L7B-J9H2>].

301. Cory’s Testimony, *supra* note 165, at 17.

302. *Id.*

303. Miles Kenyon, *An Analysis of Censorship in Chinese Open Source Projects*, CITIZEN LAB (Aug. 20, 2018), <https://citizenlab.ca/2018/08/an-analysis-of-censorship-in-chinese-open-source-projects> [<https://perma.cc/4CYP-NNNX>].

304. *Id.*

305. Cory’s Testimony, *supra* note 165, at 17.

306. See, e.g., Lu Xi et al., *China Tries Online Activists Who Saved Censored Coronavirus Posts on Github*, RADIO FREE ASIA (May 11, 2021), <https://www.rfa.org/english/news/china/posts-05112021134613.html> [<https://perma.cc/7P2G-6MAD>].

307. Rita Liao, *China Is Building a GitHub Alternative Called Gitee*, TECHCRUNCH (Aug. 21, 2020, 5:53 AM), <https://techcrunch.com/2020/08/21/china-is-building-its-github-alternative-gitee> [<https://perma.cc/L9TH-75SY>].

308. See, e.g., Lilian Lin, *China’s Censors Pull More Web Dramas, Including Hit Rom-Com*, WALL ST. J. (Jan. 21, 2016, 2:17 AM), <https://blogs.wsj.com/chinarealtime/2016/01/21/chinas-censors-pull-more-web-dramas-including-hit-rom-com> [<https://perma.cc/E8JQ-BAK7>]; Lilian Lin & Chang Chen, *China’s Censors Take Another Gay-Themed Web*



and the legislature to be ineffective in redressing their grievances and have instead turned to collective action.<sup>309</sup>

Weibo has traditionally been subservient to the government and has exercised tight control over content on its platform. The Chinese government's position on LGBT matters has generally been "do[ not] encourage, do[ not] discourage, do[ not] promote."<sup>310</sup> In April 2018, however, Weibo unexpectedly banned all LGBT-related content on its website as part of its "cleanup" campaign, which sought to reduce "undesirable content" online.<sup>311</sup> Although LGBT rights advocates have not found much success in China (e.g., same-sex marriage is not recognized), Weibo's ban sparked a tremendous amount of outrage from the LGBT community.<sup>312</sup> Tens of thousands of netizens protested the ban with the hashtag "I am Gay," rainbow emojis, and blog posts.<sup>313</sup> James Palmer hypothesized that "[t]he strength of the reaction may also be down to increasing frustration and anger against tightening censorship."<sup>314</sup>

Responding to this backlash, in a somewhat unprecedented move, the People's Daily, the national newspaper of the Communist Party, openly criticized Weibo's decision: "LGBT is a minority group of the society regarding sexual orientation, and it's the obligation of a just society to protect the rights of minorities."<sup>315</sup> Weibo quietly reversed the ban thereafter.<sup>316</sup> The Gay Voice, a popular Weibo page that focuses on gay rights advocacy, responded with the following posting: "What[ has] transpired in the last [forty-eight] hours is enough to prove that only speaking up can bring about changes . . ."<sup>317</sup> Following this victory, media outlets reported that "unprecedentedly large" gatherings across China celebrated International Day Against Homophobia 2018.<sup>318</sup>

*Drama Offline*, WALL ST. J. (Feb. 24, 2016, 2:41 AM), <https://blogs.wsj.com/chinareal-time/2016/02/24/chinas-censors-take-another-gay-themed-web-drama-offline> [<https://perma.cc/73T5-C8Q4>].

309. See Merrit Kennedy, *Chinese Court Rules Against Gay Couple Seeking to Get Married*, NAT'L PUB. RADIO (Apr. 13, 2016, 10:54 AM), <https://www.npr.org/sections/thetwo-way/2016/04/13/474065742/chinese-court-rules-against-gay-couple-seeking-to-get-married> [<https://perma.cc/NQB9-25BA>].

310. James Palmer, *It's Still (Just About) OK to Be Gay in China*, FOREIGN POL'Y (Apr. 17, 2018, 8:46 AM), <https://foreignpolicy.com/2018/04/17/its-still-just-about-ok-to-be-gay-in-china> [<https://perma.cc/3PPC-D4LB>].

311. *Id.*

312. *Id.*

313. Si Chen, *China's Complicated LGBT Movement*, DIPLOMAT (June 1, 2018), <https://thediplomat.com/2018/06/chinas-complicated-lgbt-movement> [<https://perma.cc/H2PU-KUHT>].

314. Palmer, *supra* note 310.

315. Chen, *supra* note 313.

316. *Id.*

317. Steven Jiang, *Rare Win for China's LGBT Community After Censorship U-turn by Sina Weibo*, CABLE NEWS NETWORK (Apr. 16, 2018, 3:56 AM), <https://www.cnn.com/2018/04/16/asia/china-sina-weibo-lgbt-censorship-intl/index.html> [<https://perma.cc/2LKP-9PRC>].

318. Chen, *supra* note 313.

#### 4. Hong Kong Protests

The various protests against the Chinese government in Hong Kong, including the 2014 Hong Kong democracy protests (also known as the “Umbrella Revolution”), offer another important perspective on the prospects of collective action against the Chinese government. The Umbrella Revolution, which lasted around seventy-nine days, arose after the Chinese government voted to reform Hong Kong’s electoral system to allow Hong Kong citizens to vote for only a pre-selected set of candidates.<sup>319</sup> This decision, along with pro-Beijing Chief Executive Leung Chun-Ying’s refusal to resign from office, sparked outrage because pro-democracy groups demanded universal suffrage and the right to elect their own leaders.<sup>320</sup> Jonathan Kaiman vividly described the situation:

[T]he so-called “umbrella revolution” has turned the city’s gleaming central business district into a virtual conflict zone, replete with shouting mobs, police in riot gear, and clouds of tear gas. Tens of thousands of Hong Kong residents—young and old, rich and poor—have peacefully occupied major thoroughfares across the city, shuttering businesses and bringing traffic to a halt.<sup>321</sup>

Despite the effort by citizens (including many students), the Chinese government refused to make any major concessions, except to permit a few unproductive meetings with leaders of the protest. Apart from the few websites and searches that bypassed Internet censors, the Chinese government heavily censored most of the coverage<sup>322</sup> and even arrested citizens, including poets and artists, who showed support to protesters.<sup>323</sup> The Chinese government’s aggressive response mirrored its hard stance against the Tiananmen Square protests in 1989 when it forcefully quashed public appeals for democracy in Beijing.

According to a party source, the Chinese government was worried that if it “move[s] back one step the dam will burst”—meaning that yielding to Hong Kong protesters may cause a domino effect where Tibet, Xinjiang, and other minority groups will also demand democracy.<sup>324</sup> China’s

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319. Adam Connors, *Hong Kong’s Umbrella Movement: A Timeline of Key Events One Year On*, ABC NEWS (June 15, 2019, 4:36 AM), <http://www.abc.net.au/news/2015-09-28/timeline-hong-kong-umbrella-movement-one-year-on/6802388> [<https://perma.cc/4SDK-C5YE>].

320. Jonathan Kaiman, *Hong Kong’s Umbrella Revolution—The Guardian Briefing*, GUARDIAN (Sept. 30, 2014, 4:25 PM), <https://www.theguardian.com/world/2014/sep/30/sp-hong-kong-umbrella-revolution-pro-democracy-protests> [<https://perma.cc/4M64-9HVK>].

321. *Id.*

322. VOA, *RFA Evade Chinese Government Censors with Coverage of Hong Kong Protests*, BROAD. BD. GOVERNORS (Oct. 6, 2014), <https://www.bbg.gov/2014/10/06/voa-rfa-evade-chinese-government-censors-with-coverage-of-hong-kong-protests> [<https://perma.cc/646Y-L3EM>].

323. *China: Detained for Supporting Hong Kong Protests*, AMNESTY INT’L (Oct. 9, 2014), <https://www.amnesty.org/en/documents/asa17/053/2014/en> [<https://perma.cc/HKR9-NETR>].

324. Benjamin Kang Lim & Ben Blanchard, *China Won’t Cede to HK Protests, Army Used Only as Last Resort-Sources*, REUTERS (Oct. 14, 2014, 7:18 AM), <https://>

aggressive response was also informed by how the government had already “given in twice to demands from Hong Kong” in recent history.<sup>325</sup> For example, in 2003, Hong Kong’s Chief Executive Tung Chee-hwa withdrew an anti-subversion bill that would have created laws broadly prohibiting treason, sedition, theft of trade secrets, and other acts that could harm the Chinese government after 500,000 people protested against the bill.<sup>326</sup> Similarly, in 2011, the government postponed requiring Hong Kong schools to teach “national education” after 120,000 protesters besieged the government headquarters.<sup>327</sup> With these concessions still fresh in mind, the Chinese government was unwilling to show further signs of weakness, especially in the context of highly controversial areas like democracy.

In 2019, additional protests erupted in Hong Kong after the Chinese government introduced a new extradition bill that would allow Hong Kong to extradite fugitives to mainland China.<sup>328</sup> Opponents of the bill protested the Chinese government to withdraw the controversial bill in fear that the government could leverage the extradition law to prosecute individuals for political reasons.<sup>329</sup> Protesters submitted five key demands: (1) fully withdraw the extradition bill, (2) set up an independent inquiry to probe police brutality, (3) withdraw the characterization of early protests as “riots,” (4) release those arrested at protests, and (5) implement universal suffrage in Hong Kong.<sup>330</sup> Although the protests were initially non-violent when approximately two million people marched the streets of Hong Kong, tensions quickly escalated.<sup>331</sup> Hong Kong police responded with batons, tear gas, pepper spray, rubber bullets, and water cannons.<sup>332</sup> Carrie Lam, Hong Kong’s Chief Executive, ultimately withdrew the extradition bill in September 2019, but protesters were not satisfied because the government refused to concede to their other demands.<sup>333</sup> Protesters con-

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[www.reuters.com/article/us-hongkong-china-beijing/china-wont-cede-to-hk-protests-army-used-only-as-last-resort-sources-idUSKCN0I315G20141014](http://www.reuters.com/article/us-hongkong-china-beijing/china-wont-cede-to-hk-protests-army-used-only-as-last-resort-sources-idUSKCN0I315G20141014) [<https://perma.cc/9DPL-24SR>].

325. *Id.*

326. *Huge Protest Fills HK Streets*, CABLE NEWS NETWORK (July 2, 2003, 12:20 PM), <http://edition.cnn.com/2003/WORLD/asiapcf/east/07/01/hk.protest> [<https://perma.cc/UR5L-QK2Q>].

327. Stuart Lau et al., *Protest Against National Education to End After Government Climbdown*, S. CHINA MORNING POST (Sept. 9, 2012, 12:00 AM), <http://www.scmp.com/news/hong-kong/article/1032535/protest-against-national-education-end-after-government-climbdown> [<https://perma.cc/MKK2-KUGY>].

328. Jessie Yueng, *From an Extradition Bill to a Political Crisis: A Guide to the Hong Kong Protests*, CABLE NEWS NETWORK (Dec. 20, 2019, 4:08 AM), <https://www.cnn.com/2019/11/15/asia/hong-kong-protests-explainer-intl-hnk-scli/index.html> [<https://perma.cc/7S6Y-D8NM>].

329. *Id.*

330. *Id.*

331. *Hong Kong’s Protests Explained*, AMNESTY INT’L, <https://www.amnesty.org/en/latest/news/2019/09/hong-kong-protests-explained> (last visited Mar. 10, 2021) [<https://perma.cc/BNC5-LEBQ>].

332. *Id.*

333. Jin Wu et al., *Six Months of Hong Kong Protests. How Did We Get Here?*, N.Y. TIMES (Nov. 18, 2019), <https://www.nytimes.com/interactive/2019/world/asia/hong-kong-protests-arc.html> [<https://perma.cc/F478-PSEE>].

tinued to clash with the police for the next few months, culminating in two civilian deaths, a ban on wearing face masks in public, and a siege by riot police after protesters occupied a local university.<sup>334</sup> Protests ceased upon the coronavirus disease 2019 (COVID-19) outbreak due to fears that mass congregations would facilitate the spread of the virus.<sup>335</sup>

Both the Chinese and Hong Kong governments faced international backlash for their management of the protests. As part of the backlash, in November 2019, President Trump signed the Hong Kong Human Rights and Democracy Act in support of the movement.<sup>336</sup> The Act enables the United States to “bring diplomatic action and economic sanctions against Hong Kong”; “suspend Hong Kong’s special trading status based on an annual certification by the U[S.] State Department about whether the city retains a sufficient degree of autonomy under the ‘one country, two systems’ framework”; “give the State Department the discretion to sanction people deemed responsible for acts that undermine Hong Kong’s autonomy from mainland China”; and “direct[ ] its officers not to deny visas to individuals subjected to ‘politically motivated’ arrests or detention in the city.”<sup>337</sup>

On June 30, 2020, a renewed wave of protests erupted<sup>338</sup> when the Chinese government secretly passed a new security law that broadly criminalizes activities involving secession (breaking away from the country); subversion (undermining the power or authority of the central government); terrorism (using violence or intimidation against people); and collusion with foreign or external forces.<sup>339</sup> To enforce these provisions, the law empowered China to establish its own institutions in Hong Kong to oversee security.<sup>340</sup>

Activists feared that the law would transform Hong Kong’s judicial system into a system resembling that of China’s. As Johannes Chan expressed: “Almost all trials involving national security are conducted behind closed

334. *Id.*

335. Marta Colombo, *Coronavirus Hardens Local Anger in Hong Kong*, U.S. NEWS (Mar. 17, 2020), <https://www.usnews.com/news/best-countries/articles/2020-03-17/why-coronavirus-is-a-major-setback-for-hong-kong-protesters>.

336. Robert Delaney & Owen Churchill, *Donald Trump Signs Hong Kong Human Rights and Democracy Act into Law, Brushing Off China’s Warnings*, S. CHINA MORNING POST (Nov. 28, 2019, 7:20 AM), <https://www.scmp.com/news/china/diplomacy/article/3039673/donald-trump-signs-hong-kong-human-rights-and-democracy-act> [<https://perma.cc/9J8P-9JLJ>].

337. *Id.*

338. See Abigail Ng, *Hundreds Arrested in Hong Kong Protests, as Analysts Weigh in on National Security Law’s Impact*, CNBC (July 2, 2020, 2:43 AM), <https://www.cnbc.com/2020/07/02/hong-kong-national-security-law-protests-hundreds-arrested.html> [<https://perma.cc/3YMS-3CV5>]; Austin Ramzy et al., *Protesters in Hong Kong Rally Against China’s Tightening Grip*, N.Y. TIMES (May 28, 2020), <https://www.nytimes.com/2020/05/27/world/asia/hong-kong-protest-china-anthem.html> [<https://perma.cc/R43A-QDSJ>].

339. *Hong Kong Security Law: What Is It and Is It Worrying?*, BBC NEWS (June 30, 2020), <https://www.bbc.com/news/world-asia-china-52765838> [<https://perma.cc/89ZA-NMJ4>].

340. See *id.*

doors. It [is] never clear what exactly the allegations and the evidence are, and the term national security is so vague that it could cover almost anything . . . .”<sup>341</sup> Following the law’s passage, Hong Kong witnessed mass arrests under vague provisions of the security law specifically targeting pro-democracy groups and individuals, such as media tycoon Jimmy Lai.<sup>342</sup>

China’s actions sparked a wave of international backlash. For example, Boris Johnson, the United Kingdom’s (U.K.) Prime Minister, called the security laws a “clear and serious breach” of the 1985 Sino-British Joint Declaration—the original agreement between the U.K. and China that granted Hong Kong autonomy for fifty years—and offered three million Hong Kong residents a path to British citizenship.<sup>343</sup> The European Parliament adopted a resolution calling the security law “a comprehensive assault on the city’s autonomy, rule of law, and fundamental freedoms” and urging the European Union (EU) to leverage its trading position against China.<sup>344</sup> Specifically, the resolution

[s]trongly condemns all cases of human rights violations in Hong Kong, in particular arbitrary arrests, rendition, forced confessions, incommunicado custody and violations of the freedoms of publication and of expression; calls for an immediate end to human rights violations and political intimidation; expresses grave concern over the reported practices of secret detention, of torture and ill-treatment, and of forced confessions; calls on the EU Member States to fully apply the relevant EU human rights guidelines, mobilising all diplomatic personnel to resolutely react to arrests and convictions of activists, including by ensuring trial observation, requesting prison visits, reaching out to relevant authorities to urge the release of those detained and convicted for the peaceful exercise of their freedom of expression . . . .<sup>345</sup>

The resolution even urged legal action against China by “[c]all[ing] on the EU and its Member States to consider, in the event the new security law is applied, filing a case before the International Court of Justice alleging that China’s decision to impose national security legislation on Hong Kong violates the Sino-British Joint Declaration and the ICCPR . . . .”<sup>346</sup>

In the United States, President Trump announced that he would “begin the process” of ending the U.S.’ trade and law enforcement relationship with Hong Kong (e.g., advantages with regard to tariffs, export con-

341. *China’s National Security Law: How Hong Kong Will Be Impacted*, VISION TIMES (June 21, 2020), <https://visiontimes.com/2020/06/21/chinas-national-security-law-how-hong-kong-will-be-impacted.html> [<https://perma.cc/96PV-JYHX>].

342. *China/Hong Kong: Mass Arrests Under Security Law*, HUM. RTS. WATCH (Aug. 11, 2020, 7:40 AM), <https://www.hrw.org/news/2020/08/11/china/hong-kong-mass-arrests-under-security-law> [<https://perma.cc/F4P6-6LCK>].

343. Madeline Roache, *U.K. Prime Minister Offers 3 Million Hong Kong Residents Path to British Citizenship*, TIME (July 1, 2020, 1:22 PM), <https://time.com/5862191/uk-citizenship-hong-kong-china-law> [<https://perma.cc/748B-XE26>].

344. Resolution on the PRC National Security Law for Hong Kong and the Need For the EU to Defend Hong Kong’s High Degree of Autonomy, EUR. PARL. DOC. RC-B9-0169/2020.

345. *Id.*

346. *Id.*

trols, visas, and law enforcement cooperation) after Secretary of State Mike Pompeo reported that Hong Kong no longer exercised significant autonomy.<sup>347</sup> Thereafter, President Trump signed into law the Hong Kong Autonomy Act and an executive order aimed at sanctioning officials, entities, and financial institutions that encroached on Hong Kong's autonomy, and aimed at revoking certain special privileges held by Hong Kong, including preferential trade treatment.<sup>348</sup> By “treat[ing] Hong Kong as just another Chinese city,” the United States was, in effect, “pressur[ing] mainland China into relaxing its tightening grip over the city.”<sup>349</sup>

## 5. Rural Takings

An often-overlooked area of collective action against the Chinese government is rural takings. Chinese citizens do not have absolute legal rights to land, which enables the government to engage in takings (also known as “requisition” in China) without many administrative roadblocks.<sup>350</sup> Without robust due process and recourse measures, each year, the government's infatuation with economic development causes millions of rural residents to be grossly undercompensated and lose their land.<sup>351</sup> Many displaced individuals—and generational farmers in particular—become homeless because they are unable to pay the prohibitively high costs for replacement property.

Although the government attempts to censor the violent episodes of rural takings, these disputes frequently lead to “mass incidents” during which citizens rally to protest and revolt against the government.<sup>352</sup> Elizabeth Economy notes that land conflicts account for 65% of the 180,000 yearly protests in China.<sup>353</sup> Taisu Zhang and Xiaoxue Zhao found, after analyzing land takings in rural villages from 1986-2006, that kinship networks in China deter takings in part by encouraging collective action

347. Michael Crowley et al., *Rebuking China, Trump Curtails Ties to Hong Kong and Severs Them with W.H.O.*, N.Y. TIMES (May 29, 2020), <https://www.nytimes.com/2020/05/29/us/politics/trump-hong-kong-china-WHO.html> [<https://perma.cc/84M7-6FZ4>].

348. See Gary Cheung & Teddy Ng, *National Security Law: Beijing Vows to Retaliate After Donald Trump Ends Special Treatment for Hong Kong and Targets Officials with Sanctions*, S. CHINA MORNING POST (July 15, 2020, 11:05 PM), <https://www.scmp.com/news/hong-kong/politics/article/3093344/national-security-law-beijing-vows-retaliate-after-trump> [<https://perma.cc/FQ5G-UJQ3>].

349. *Id.*

350. See Shitong Qiao, *The Politics of Chinese Land: Partial Reform, Vested Interests and Small Property*, 29 COLUM. J. ASIAN L. 70, 78 (2016).

351. See Zhu Keliang & Roy Prosterman, *Land Reform Efforts in China*, CHINA BUS. REV. (Oct. 1, 2012), <http://www.chinabusinessreview.com/land-reform-efforts-in-china> [<https://perma.cc/36QP-UZJ9>]; *Summary of 2011 17-Province Survey's Findings*, LANDESA (Apr. 26, 2012), [http://zmpmd2mggwg34rgsm60didr9-wpengine.netdna-ssl.com/wp-content/uploads/Landes\\_a\\_China\\_Survey\\_Report\\_2011.pdf](http://zmpmd2mggwg34rgsm60didr9-wpengine.netdna-ssl.com/wp-content/uploads/Landes_a_China_Survey_Report_2011.pdf) [<https://perma.cc/2VU5-TR9K>] (examining 1,791 reported takings and finding that, while the government paid farmers an average of \$17,850 per acre of land, it resold the land to developers for an average of \$740,000 per acre).

352. Keliang & Prosterman, *supra* note 351.

353. Elizabeth C. Economy, *A Land Grab Epidemic: China's Wonderful World of Wukans*, COUNCIL ON FOREIGN RELS. (Feb. 7, 2012), <https://www.cfr.org/blog/land-grab-epidemic-chinas-wonderful-world-wukans> [<https://perma.cc/N5LE-L778>].

against governmental encroachment.<sup>354</sup> However, collective action against rural takings have largely resulted in mixed outcomes. For example, some citizens have stood their ground against developers to the point where their property stands like a lone nail that refuses to be hammered down.<sup>355</sup> These infamous “nail houses” represent a rare series of cases in which the government retracts (at least temporarily) its economic development plans due to pressure. Concessions by the government typically occur if the coverage of the protests somehow bypass the government’s censors and goes viral.

The Wukan protests are a prominent example of collective action against the government’s takings practices.<sup>356</sup> Wukan, a costal settlement in Guangdong China, has long been a government target for land seizures. These land seizures have resulted in systematic local corruption. The simmering discontent among residents reached a breaking point when the government profited \$156 million from selling a village-owned pig farm to develop luxury housing.<sup>357</sup> As a response to the ensuing violent protests, the government fired two party leaders and offered to negotiate with village representatives.<sup>358</sup> However, the village of 20,000 revolted again when the government reported that a village representative had suddenly died of cardiac arrest while in police custody.<sup>359</sup> The New York Times reported that the “dispute between farmers and local officials in southern China exploded into open rebellion this week after villagers chased away government leaders, set up roadblocks and began arming themselves with homemade weapons . . . .”<sup>360</sup> Following this standoff, in 2012, the government acquiesced and allowed Wukan to hold open local elections after ousting the village’s former leaders.<sup>361</sup>

But the 2012 victory was relatively short-lived. In 2016, Lin Zhulan, the elected party secretary from Wukan, was jailed for bribery and abuse

354. See Taisu Zhang & Xiaoxue Zhao, *Do Kinship Networks Strengthen Private Property? Evidence from Rural China*, 11 J. EMPIRICAL LEGAL STUD. 505, 505–06 (2014).

355. See, e.g., *China’s ‘Nail Houses’: The Homeowners Who Refused to Budge*, CABLE NEWS NETWORK (June 1, 2015, 5:04 AM), <http://www.cnn.com/2015/05/19/asia/gallery/china-nail-houses/index.html> [<https://perma.cc/TMV6-CKCV>].

356. For another example of citizens successfully protesting the government, see Michael Wines, *Police Fire Tear Gas at Protesters in Chinese City*, N.Y. TIMES (Dec. 21, 2011), <http://www.nytimes.com/2011/12/24/world/asia/china-jails-rights-activist-chen-wei-for-9-years.html> [<https://perma.cc/55XK-MWWW>] (reporting that government officials agreed to temporarily suspend the expansion of a power plant after thousands of people showed up to protest the measure in Haimen).

357. Andrew Jacobs, *Village Revolts over Inequalities of Chinese Life*, N.Y. TIMES (Dec. 14, 2011), <http://www.nytimes.com/2011/12/15/world/asia/chinese-village-locked-in-rebellion-against-authorities.html> [<https://perma.cc/6Q26-7UMR>].

358. *Id.*

359. *Id.*

360. *Id.*

361. Josh Chin, *Wukan Elections the Spark to Set the Prairie Ablaze?*, WALL ST. J. (Feb. 1, 2012, 8:31 PM), <https://blogs.wsj.com/chinarealtime/2012/02/01/china-wukan-elections-the-spark-to-set-the-prairie-ablaze> [<https://perma.cc/5FHM-RN9R>].

of power after speaking out against the government.<sup>362</sup> Consequently, the protests, rubber bullets, and tear gas re-emerged in the village.<sup>363</sup> One netizen wrote that the Wukan protests invoke one of Mao Zedong's famous revolutionary slogans: "If you want freedom and democracy, you have to fight for it yourself . . . . A single spark can start a prairie fire."<sup>364</sup> The Wukan protests went on to inspire other episodes of collective action throughout China.<sup>365</sup>

## 6. *The COVID-19 Pandemic*

China's handling of the COVID-19 pandemic presents a rather peculiar example of collective action against the government. Dr. Li Wenliang, a doctor in Wuhan, warned his colleagues about the virus on December 30, 2019.<sup>366</sup> His message about the risks of the virus went viral, and the Chinese government subsequently reprimanded and forced him to sign a "disturbing public order" letter.<sup>367</sup> During this time, a Canadian research group known as The Citizen Lab reported that YY, a Chinese streaming platform, and WeChat began censoring COVID-19-related content, including "criticism of government, rumours and speculative information on the epidemic, references to Dr. Li Wenliang, and neutral references to Chinese government efforts on handling the outbreak that had been reported on state media."<sup>368</sup> From its censorship tests, The Citizen Lab concluded that "Chinese social media began censoring content related to the disease in the early stages of the epidemic and blocked a broad scope of content."<sup>369</sup>

On January 20, 2020, Chinese President Xi Jinping publicly acknowledged the virus after recognizing the domestic and international severity of the situation.<sup>370</sup> Despite President Xi's acknowledgement of the presence and potential danger of the virus, China nonetheless continued to warn,

362. Javier C. Hernández, *Wukan, a Chinese Village, Erupts in Unrest over Activists' Arrests*, N.Y. TIMES (Sept. 13, 2016), <https://www.nytimes.com/2016/09/14/world/asia/wukan-china-land-use-protests.html> [<https://perma.cc/H8XL-VUBY>].

363. *Id.*

364. Chin, *supra* note 361.

365. See, e.g., *Chinese Official Denies Reports of Deaths at Haimen Protest*, REUTERS (Dec. 21, 2011, 12:51 AM), <https://www.reuters.com/article/china-protest-plant/chinese-official-denies-reports-of-deaths-at-haimen-protest-idUSL3E7NL0KR20111221> [<https://perma.cc/N3D6-R5PV>]; Scott Greene, *Wukan 2.0? Zhejiang Villagers Protest Land Grabs*, CHINA DIGIT. TIMES (Feb. 8, 2012), <https://chinadigitaltimes.net/2012/02/wukan-2-0-zhejiang-villagers-protest-land-grabs> [<https://perma.cc/78UV-KF83>].

366. Paulina Cachero, *The Next Tiananmen Square? Chinese Citizens Are Demanding Increased Free Speech After the Death of a Coronavirus Whistleblower Doctor. China Is Censoring Their Calls*, BUS. INSIDER (Feb. 7, 2020), <https://www.businessinsider.com/calls-free-speech-online-doctor-li-wenliang-death-censored-china-2020-2> [<https://perma.cc/SN2R-NCUX>].

367. Cachero, *supra* note 350.

368. Lotus Ruan et al., *Censored Contagion: How Information on the Coronavirus Is Managed on Chinese Social Media*, CITIZEN LAB (Mar. 3, 2020), <https://citizenlab.ca/2020/03/censored-contagion-how-information-on-the-coronavirus-is-managed-on-chinese-social-media> [<https://perma.cc/C8FS-EUAQ>].

369. *Id.*

370. See James Griffiths, *Did Xi Jinping Know About the Coronavirus Outbreak Earlier Than First Suggested?*, CABLE NEWS NETWORK (Feb. 17, 2020, 7:44 AM), <https://>



fine, and punish individuals for allegedly spreading rumors on COVID-19.<sup>371</sup> On February 5, 2020, the Cyberspace Administration of China issued a chilling public statement, stressing that it would punish “‘websites, platforms, and accounts’ for publishing ‘harmful’ content and ‘spreading fear’ related to COVID-19.”<sup>372</sup> As COVID-19 worsened, YY began unblocking some previously censored keywords.<sup>373</sup>

Upon learning that Dr. Li contracted COVID-19 while treating patients and died of the virus on February 7, 2020, Chinese citizens expressed their grief on social media and demanded an apology from the government.<sup>374</sup> Netizens explicitly “accused authorities of trying to control public opinion online by censoring social media posts critical of the Chinese government and how they[] handled the coronavirus.”<sup>375</sup> As a result, the hashtags “[t]he Wuhan government owes Li Wenliang an apology,” “I want freedom of speech,” and “[w]e want freedom of speech,” went viral and were seen by millions of users before being censored.<sup>376</sup> These posts have since been replaced with “verified” social media posts that Dr. Li’s death was due to a “work injury.”<sup>377</sup>

Despite the government’s censorship endeavors, Dr. Li’s death prompted Chinese citizens to encourage others to continue speaking up online.<sup>378</sup> One user cited Lu Xun, a famous Chinese poet: “Speak up if you can. Generate a little heat, emit a little light, like a firefly flickering in the dark. There is no need to wait for the torch. If the torch never comes, I’ll be the light.”<sup>379</sup> Another user quoted Dr. Li in an interview he gave during his final days: “I believe a healthy society should not just have one voice.”<sup>380</sup>

Domestically, Dr. Li was hailed as a hero. Internationally, the Chinese government received a barrage of criticism for prematurely censoring COVID-19-related information and detaining doctors and whistleblowers. Shadi Hamid noted that “this pandemic should, finally, disabuse us of any remaining hope that the Chinese regime could be a responsible global actor. It is not, and it will not become one.”<sup>381</sup>

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[www.cnn.com/2020/02/17/asia/china-coronavirus-xi-jinping-intl-hnk/index.html](http://www.cnn.com/2020/02/17/asia/china-coronavirus-xi-jinping-intl-hnk/index.html) [<https://perma.cc/8MVS-G3UP>].

371. See Ruan et al., *supra* note 368.

372. *Id.*

373. *Id.*

374. Cachero, *supra* note 350.

375. *Id.*

376. *Id.*

377. *Id.*

378. See *id.*

379. *Id.*

380. James Freeman, *This Whistleblower Really Was a Hero*, WALL ST. J. (Feb. 10, 2020, 2:13 PM), <https://www.wsj.com/articles/this-whistleblower-really-was-a-hero-11581362030> [<https://perma.cc/F8D9-SMDS>].

381. Shadi Hamid, *China Is Avoiding Blame by Trolling the World*, ATLANTIC (Mar. 19, 2020), <https://www.theatlantic.com/ideas/archive/2020/03/china-trolling-world-and-avoiding-blame/608332> [<https://perma.cc/KJ9D-FEKW>].

In addition to relying on its traditional methods of censorship, China also expelled all journalists from the New York Times, Washington Post, and the Wall Street Journal on March 17, 2020—amid the pandemic.<sup>382</sup> Marty Baron, the Washington Post’s executive editor, condemned China’s actions:

We unequivocally condemn any action by China to expel U[.S.] reporters. The Chinese government’s decision is particularly regrettable because it comes in the midst of an unprecedented global crisis, when clear and reliable information about the international response to Covid-19 is essential. Severely limiting the flow of that information, which China now seeks to do, only aggravates the situation.<sup>383</sup>

Publishers from the New York Times, Washington Post, and the Wall Street Journal issued an open letter in response to the Chinese government’s ban noting, among other things, that the government’s actions were “threatening to deprive the world of critical information at a perilous moment.”<sup>384</sup>

### C. The Viability of Collective Action Against China

Even if collective action does not force the government to abolish its censorship practices, it nevertheless plays a major role in fostering a global culture that rejects systematic censorship. Measuring success using short-term policy impacts sets an unreasonably high bar for collective action, especially collective action against the Chinese government. It also undermines other positive and long-term effects that collective action may bring about, such as shedding light on the real consequences of censorship. In this sense, analyses of the prospects of collective action would be more productive by exploring: (1) the barriers to collective action succeeding, (2) the circumstances in which actors are motivated to engage in collective action, (3) what the Chinese government will yield to and when it will yield, and (4) the keys to overcoming the barriers to collective action succeeding. The aforementioned cases and the relevant literature shed light on the structural impacts of collective action that may not be otherwise apparent.

#### 1. *The Barriers to Collective Action Succeeding*

Although this Article highlights several cases of collective action that resulted in favorable outcomes, it is important to acknowledge that collective action against governments—and in particular against authoritarian governments like China—is difficult, and success is never guaranteed. A

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382. Lily Kuo et al., *China: Expulsion of US Journalists Was Response to ‘Unreasonable Oppression’*, GUARDIAN (Mar. 18, 2020), <https://www.theguardian.com/media/2020/mar/18/us-media-accuse-china-of-cold-war-mentality-after-move-to-expel-journalists> [<https://perma.cc/H5L7-C53V>].

383. *Id.*

384. Helen Davidson, *US Newspapers Appeal to China Not to Expel Their Reporters*, GUARDIAN (Mar. 24, 2020), <https://www.theguardian.com/media/2020/mar/24/us-newspapers-appeal-to-china-not-to-expel-their-reporters> [<https://perma.cc/YPT6-MC55>].

number of barriers impede collective action from successfully overturning censorship policies.

First, the most significant barrier is arguably China's censorship system itself. As scholars have found, "[c]ensorship is oriented toward attempting to forestall collective activities that are occurring now or may occur in the future."<sup>385</sup> This orientation makes it difficult for dissidents to amass support because China's censorship infrastructure, including governmental regulations and directives, are designed to preempt collective action. For example, ISPs and ICPs are constrained by licensing requirements, which effectively convert them into the government's loyal watchdogs.<sup>386</sup> Individuals are constrained by the Great Firewall and Internet police.<sup>387</sup> Even if individuals bypass censors using a VPN, the government has proven that it can shut down VPNs overnight.<sup>388</sup> If necessary, the government could also direct the 50 Cent Army to dilute a movement's credibility and disseminate pro-party propaganda.<sup>389</sup> As a result, even if a movement accumulates mass support domestically, it will still be difficult for that movement to bypass all of the above censors. Thus, scholars believe that

"[t]he odds for engaging in collective action are even lower in a modern authoritarian state where the government not only commands superior resources to quell dissent by force, but has also become increasingly adept at controlling flows of information and monitoring its population."<sup>390</sup> [not a block quote]

The second barrier is that the Chinese government has a vested interest in sending a clear message to potential dissidents that it will not tolerate collective action. By "opening up" and taking an active role in international affairs and global markets, the government has simultaneously opened the door for activists to challenge its governance and policies. As mentioned previously, the government is primarily concerned that if it "move[s] back one step the dam will burst."<sup>391</sup> Hence, as seen from the Hong Kong Umbrella Revolution, the Hong Kong protests in 2019-2020, and the Tiananmen Square massacre, the government will push back on matters that it considers to be of paramount importance. Notwithstanding the merits of collective action efforts, just as major corporations must devote resources to litigating small-scale lawsuits brought against it, China's government has a similar interest in not conceding to collective action demonstrations.

The third barrier is actors' willingness to participate. As noted previously, a number of actors are well-situated to engage in collective action:

385. King et al., *supra* note 58, at 1.

386. See discussion *supra* Section II.A.

387. See discussion *supra* Section II.B.

388. See discussion *supra* Section II.C.

389. See *supra* notes 55-56 and accompanying text.

390. Xianwen Kuang & Christian Gobel, *Sustaining Collective Action in Urbanizing China*, 2013 CHINA Q. 850, 852 (2013).

391. Lim & Blanchard, *supra* note 324.

GNI members; global citizens; and Internet corporations, both international and domestic.<sup>392</sup> However, their willingness to participate in collective action is not guaranteed. For example, because many GNI members do not operate in China, they may not have much leverage within the country. For Internet corporations, like Google,<sup>393</sup> their efforts to appease the government in order to operate in the largest Internet market in the world may become futile if it engages in collective action against the government. Given the widespread nationalism in China,<sup>394</sup> it may also be difficult to congregate enough Chinese citizens willing to go out of their way to actively engage in collective action.

## 2. *When Actors Are Motivated to Engage in Collective Action*

Despite China's sophisticated censorship regime and the uphill battle that those who engage in collective action must face, collective action against the government has been successful. Looking at the motivating circumstances behind collective action in the Green Dam, GitHub, LGBT rights, Hong Kong, rural takings, and COVID-19 cases, it appears that actors will engage in collective action against the Chinese government when they believe that the government has gone too far with its governance and policies.

First, Green Dam was exceptionally intrusive on citizens' private lives, and citizens rejected the government's justification of protecting children from harmful content.<sup>395</sup> Second, in an age where software is becoming increasingly complicated, programmers and software development companies in China relied—and continue to rely—heavily on GitHub, the world's largest repository for open source code.<sup>396</sup> Third, LGBT individuals felt personally threatened as their rights and expressions were being censored by media entities.<sup>397</sup> Fourth, the Chinese government's actions in Hong Kong were equally intrusive, but on political rights that Hong Kong citizens believed they were entitled to: the right to universal suffrage, the right to determine their own domestic policies, and the right to not be puppeteered by the Chinese government.<sup>398</sup> Most recently, China's passage of the 2020 national security law blatantly violated the Sino-British Joint Declaration

392. See discussion *supra* Section V.A.

393. See Alex Hern, *Google 'Working on Censored Search Engine' for China*, *GUARDIAN* (Aug. 2, 2018, 4:43 PM), <https://www.theguardian.com/world/2018/aug/02/google-working-on-censored-search-engine-for-china> [<https://perma.cc/THD5-V7PT>].

394. See Shameer Modongal, *Development of Nationalism in China*, 2 *COGENT SOC. SCI.* 1, 1 (2016).

395. Watts, *supra* note 287.

396. Kenyon, *supra* note 303.

397. See Chen, *supra* note 313.

398. See Lina Chan, *Justice and Peace Commission in Hong Kong*, in *Support of the Democratic Umbrella Movement*, *ASIANEWS* (Apr. 10, 2015, 12:00 AM), <http://www.asianews.it/news-en/Justice-and-Peace-Commission-in-Hong-Kong,-in-support-of-the-democratic-umbrella-movement-33941.html> [<https://perma.cc/KP4U-Z42X>] (reporting how “[t]he protests precipitated a rift in Hong Kong society, and galvanised youth—a previously apolitical section of society—into political activism or heightened awareness of their civil rights and responsibilities.”).

and Hong Kong's right to self-governance in the face of international backlash—reminiscent of Russia's annexation of Crimea in 2014.<sup>399</sup> Fifth, many villagers in rural China had deep-rooted sentiments for maintaining their way of life, ousting corrupt government officials, and against how they were grossly undercompensated after governmental takings.<sup>400</sup> Lastly, the Chinese government's handling of the COVID-19 pandemic, including its decision to censor initial reports, was widely criticized. Chinese citizens were outraged that the government censored and punished individuals, like Dr. Li, who blew the whistle early and made the ultimate sacrifice to treat COVID-19 patients.<sup>401</sup>

### 3. *What the Government Will Yield to and When It Will Yield*

If actors are indeed willing to engage in collective action against the Chinese government under certain circumstances, the inquiry should now be into *what* the government will concede to and *when* it will make these concessions. Using the Green Dam, GitHub, LGBT rights, Hong Kong, rural takings, and COVID-19 incidents as a starting point, it is clear that censorship is on the table for negotiation. The Green Dam case shows that the government is willing to rescind some of its more ambitious censorship projects.<sup>402</sup> In allowing GitHub to operate in the country, the government is willing to risk a certain level of political instability in order to avail domestic programmers of access to open-source code. The Weibo LGBT incident illustrates that, not only will loyal, social media companies yield to extreme backlash, but the government will also go out of its way to speak out in support of protesters. The Hong Kong protests confirm that the government is willing to revoke some of the laws that it imposes. The rural takings protests show that the government is even willing to tolerate removing loyal party officials for locally elected officials. Lastly, the COVID-19 pandemic shows that there are certain phenomena (e.g., global public health emergencies) that are simply too consequential to censor.

Despite these seemingly successful examples of collective action against the government, it is important to note that these cases are uncommon. There are non-negotiable areas that China will not compromise to. One of these areas is democracy. Unless the Communist Party falls, China is unlikely to allow various forms of democracy (e.g., voting rights, representativeness, openness, full and transparent respect for the rule of law) to undermine or influence the Politburo Standing Committee's

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399. See Marc Champion & Peter Martin, *In Hong Kong, Xi Jinping Takes a Page from Vladimir Putin's Playbook*, BLOOMBERG (June 2, 2020, 6:54 AM), <https://www.bloomberg.com/news/articles/2020-06-02/china-s-hong-kong-playbook-looks-like-putin-s-crimea-annexation> [<https://perma.cc/4G9Z-ZNA7>].

400. See Zhang & Zhao, *supra* note 354, at 505–06.

401. See Colombo, *supra* note 335.

402. *Audiovisual* is also applicable here because it verifies that the government is willing, albeit reluctant, to adapt its censorship regime to satisfy a WTO Appellate Body judgment. *Audiovisual*, *supra* note 198, at 169.

governance.<sup>403</sup>

If the scope of censorship can in fact be negotiated, the question becomes: Under what circumstances will the government negotiate and make concessions on its censorship policies? Again, using the Green Dam, GitHub, LGBT rights, Hong Kong, rural takings, and COVID-19 cases as a starting point, the reoccurring theme appears to be that the government is willing to make concessions when it is under a significant amount of pressure. For Green Dam, the U.S. Embassy, netizens in China, and the international community expressed a substantial amount of backlash at the installation mandate. GitHub was spared censorship because, in addition to backlash, the Chinese government recognized the website's crucial role in aiding domestic programmers, the success of whom directly contributes to the government's competitiveness in the global ICT industry. In the absence of a domestic equivalent, blocking GitHub would lead to drastic economic and developmental consequences.<sup>404</sup> When Weibo banned all LGBT content, the backlash came in the form of LGBT individuals coming out on social media to publicly confront the government's feeble position on LGBT rights. Each of the Hong Kong protests involved hundreds of thousands of Hongkongers committed to fighting against, in their eyes, the Chinese government's encroachments on their sovereignty. Rural takings protests were perhaps the most extreme demonstrations with entire villages congregating, revolting, and even taking up arms against the government. For individuals who live in nail houses, this could mean standing one's ground until the very end in hopes of exposing the government's inequitable takings practices, if and when the story goes viral. COVID-19 presented the Chinese government with an unwinnable dilemma because censoring and downplaying the outbreak was directly at odds with actively addressing and containing virus.

The above analysis has important implications about the prospects of collective action against the Chinese government. First, it undermines the widespread and uninformed belief that there is little to nothing international and domestic actors can do to combat the government's censorship policies. Second, despite the fact that China's sophisticated censorship apparatus is aimed at preventing collective action, the cases examined above show that even the "most extensive effort[s] to selectively censor human expression ever implemented" are not always successful at preventing large-scale protests from going viral.<sup>405</sup> Third, perhaps the most crucial and difficult element of collective action is the willingness and ability of Chinese citizens to engage in domestic protests, whether that be online or in person. Although collective action against the government is chal-

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403. The 2011 "Jasmine Revolution," which comprised of a series of domestic democracy protests, faced a similar fate. See *China Rounds Up 100 Activists to Rapidly Quash Pro-Democracy 'Jasmine Revolution' Organised Online*, DAILY MAIL (Feb. 20, 2011, 2:47 PM), <http://www.dailymail.co.uk/news/article-1358834/China-quashes-pro-democracy-jasmine-revolution-force.html> [<https://perma.cc/GP94-CUG7>].

404. Lichen Zhen, *Social Coding Platform as Digital Enclave: A Case Study of Protesting '996' on GitHub*, 15 INT'L J. COMM. 886, 896 (2021).

405. King et al., *supra* note 58, at 1.

lenging, under certain circumstances, the GNI and other global actors can be well-positioned to ignite global backlash against the government's censorship practices.

#### 4. *Overcoming the Barriers*

Analyzing what the government will yield to and when it will yield in the censorship context provides insight on how to overcome the barriers to collective action succeeding. The cases examined above suggest that if activists can somehow ignite global backlash and motivate domestic and international actors to engage in various forms of collective action against the government, if the protests go viral and bypass Chinese censors, and if Chinese citizens can be motivated to get involved, collective action against the government may have a high chance of yielding concessions from the government. Each of these factors and actors serve to increase the pressure exerted against the government and are by no means outcome determinative or necessary for collective action to succeed. In the digital age, there is reason to be optimistic that actors can in fact combat censorship because the Chinese government is not always successful in its censorship endeavors, Chinese citizens can be motivated to act collectively, and collective action can be propelled by technological developments.

Dissidents' struggles with the Chinese government seem to be akin to that of a never-ending cat and mouse chase where activists find loopholes to the system and the government responds. What is clear, however, is that the government's censorship apparatus is vulnerable to events going viral. If a cause brings together sufficient support, the sheer capacity of Internet users, including netizens in China, can overpower the Chinese government's censorship system. As of December 2017, the China Internet Network Information Center reported that the number of Internet users in China has reached 772 million—90% of whom are on mobile devices.<sup>406</sup>

The government's censors are not always successful in the cat versus mouse chase.<sup>407</sup> Like other developed countries in the digital age, the Internet has transformed Chinese citizens' lives in many important aspects. As *The Economist* explains:

[Weibo] have [sic] transformed public discourse in China. News that three or four years ago would have been relatively easy for local officials to suppress, downplay or ignore is now instantly transmitted across the nation. Local protests or scandals to which few would once have paid attention are now avidly discussed by [Weibo] users. The government tries hard, but

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406. *Chinese Internet User Count Hits 772 million, 90 Percent on Mobile*, PANDAILY (Feb. 1, 2018), <https://pandaily.com/chinese-internet-user-count-hits-772-million-90-percent-mobile> [https://perma.cc/HH89-EVF9].

407. Kathryn Snowdon lists events in which censorship backfired, including Tiananmen Square, police brutality, the Umbrella Revolution, violence against foreign reporters, pornography, and support for Tibet. See Kathryn Snowdon, *Tiananmen Square Massacre Anniversary: Ten Times Chinese Censorship Backfired*, HUFFPOST (Apr. 6, 2016, 11:35 AM), [https://www.huffingtonpost.co.uk/entry/tiananmen-square-massacre-nine-times-chinese-censorship-failed\\_uk\\_57513ccae4b0b23a261a0186](https://www.huffingtonpost.co.uk/entry/tiananmen-square-massacre-nine-times-chinese-censorship-failed_uk_57513ccae4b0b23a261a0186) [https://perma.cc/LS2N-C9HH].

largely ineffectively, to control this debate by blocking key words and canceling the accounts of muckraking users. Circumventions are easily found. Since December the government has been rolling out a new rule that people must use their real names to open accounts. So far, users seem undeterred.<sup>408</sup>

Once user participation reaches a certain capacity, the government's power to stop discussions from continued circulation diminishes greatly. For example, leading up to the 18th Party Congress, China tried censoring content related to the Wukan protests: "Officials were alarmed by images that circulated on [Weibo] of triumphant residents rallying in the centre of their village, like students in Tiananmen Square [twenty-two] years ago . . . . They tried, unsuccessfully, to stop news spreading by ordering a block on the village's name and location."<sup>409</sup> The government's censorship endeavors were also unsuccessful during the Umbrella Revolution.<sup>410</sup> This is partially because the government's censors are reactionary to new coined phrases that netizens use.<sup>411</sup> Thirty years after the fact, China remains unable to fully censor netizens' micro demonstrations during anniversaries of the Tiananmen Square massacre.<sup>412</sup> Indeed, protesters are cognizant that "[t]he bigger and more disruptive the protest . . . the quicker the party would respond and the more likely it would be to address their concerns."<sup>413</sup>

In the aforementioned viral events, domestic Chinese actors were highly motivated to get involved. From the cases mentioned, it appears that actors were willing to stand up against the government when the government infringed on rights that certain groups deemed non-negotiable. Moreover, Chinese actors' motivation can be attributed, in part, to the Internet and popular media exposing Chinese citizens to alternative governance structures and policies.

In line with these observations, scholars have found that there is a growing awareness of the importance of rights in China.<sup>414</sup> For example, Dingxin Zhao notes that, in the modern era, protests have evolved from those threatening the regime's stability (e.g., the Cultural Revolution and anti-free-market protests) to protests reacting to governmental policies

408. *A Dangerous Year*, ECONOMIST (Jan. 28, 2012), <https://www.economist.com/briefing/2012/01/28/a-dangerous-year> [<https://perma.cc/5G22-HNUF>].

409. *Id.* (emphasis in original).

410. Sui-Lee Wee, *HK Protests' 'Umbrella Revolution' Tag Escapes China's Censors—So Far*, REUTERS (Sept. 30, 2014, 2:39 AM), <https://www.reuters.com/article/us-hongkong-china-censorship-idUSKCN0HP0H120140930> [<https://perma.cc/U98B-NCQG>].

411. *Id.*; Snowdon, *supra* note 407.

412. Snowdon, *supra* note 407.

413. Fisher, *supra* note 273.

414. See MERLE GOLDMAN, FROM COMRADE TO CITIZEN: THE STRUGGLE FOR POLITICAL RIGHTS IN CHINA 2 (2007); GUOBIN YANG, THE POWER OF INTERNET IN CHINA: CITIZEN ACTIVISM ONLINE 25 (2011); Hongyi Lai, *Uneven Opening of China's Society, Economy, and Politics: Pro-Growth Authoritarian Governance and Protests in China*, 19 J. CONTEMP. CHINA 819, 819 (2010); Keith B. Richburg, *Labor Unrest in China Reflects Changing Demographics, More Awareness of Rights*, WASH. POST (June 7, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/06/AR2010060603295.html> [<https://perma.cc/KP4Y-ZV9G>].



(e.g., protests responding to new economic policies and urban expansion projects). Today, “rights consciousness” has come to spur collective action:

This stage is notable for a heightened sense of rights consciousness among Chinese citizens, especially the middle class, which was made possible by the increasing use of the [I]nternet and cell phones . . . . The growing influence of nongovernmental organizations in China and an overall higher standard of living also accelerated rights consciousness . . . . As rights awareness became more widespread, protests became proactive and not reactive . . . . Instead of assembling in response to government actions, citizens now voiced their support for welfare programs for the country’s poor, underdeveloped regions—an issue that did not necessarily directly affect them. Many Chinese protesters also assembled for migrant rights, community land rights and the rights of AIDS patients.<sup>415</sup>

Activists can leverage domestic actors’ increased rights consciousness to motivate them to engage in collective action.

Organizers could potentially frame the issue by focusing on how, for example, censorship is problematic because it allows a government to deny and conceal historical wrongdoings.<sup>416</sup> The most commonly cited example is the pro-democracy Tiananmen Square massacre of 1989 where the government suppressed student protesters with military force, which led to many student deaths.<sup>417</sup> Despite international outrage, the government continues to heavily censor all discussion related to the incident.<sup>418</sup> Consequently, generations of Chinese citizens may remain in the dark about the government’s wrongdoings. Even if individuals are later exposed to information about the event, the heavy propaganda and rhetoric that citizens are bombarded with during their transformative years enables the government to spin the truth. As Chang Ping argues:

Just how successful this strategy proves is clear when we see how many Chinese graduate students abroad continue to show sympathy towards the government even after seeing the gory documentary evidence of the Tiananmen massacre for the first time. They have accepted the spin from the government, namely, that China’s rise as an economic powerhouse is contingent upon the crushing of lives under tank treads twenty-five years ago.<sup>419</sup>

Censorship is also problematic because it violates, among other things, the public’s freedom of information. If activists frame the story on censorship effectively, they may be able to cast doubt on the government’s overarching narrative—that rather than censoring content to protect certain “public

415. Kevin Sprague, *Collective Action Pressures Chinese State to Continue Reforms*, UNIV. CAL. L.A. (June 7, 2017), <http://www.international.ucla.edu/apc/Article/176602> [<https://perma.cc/CPQ5-NSMV>].

416. Chang Ping, *How Brainwashing Works in China*, CHINA CHANGE (Aug. 30, 2014), <https://chinachange.org/2014/08/30/how-brainwashing-works-in-china> [<https://perma.cc/B4GB-BAML>].

417. Snowdon, *supra* note 407.

418. Bill Birtles, *Tiananmen Square Massacre: China Detains Activists, Censors Internet Ahead of 27th Anniversary*, ABC NEWS (June 3, 2016, 11:25 PM), <http://www.abc.net.au/news/2016-06-04/china-detains-activists-amid-tiananmen-square-anniversary/7477362> [<https://perma.cc/H6SC-2PB9>].

419. Ping, *supra* note 416.

morals” and to main “public order,” the government may actually be motivated by self-preservation and absolute control.

In the digital age, individuals around the world, including those in China, have more access than ever to activism.<sup>420</sup> In the context of protesting against migrant rights, community land rights, and the rights of AIDS patients, Zhao notes how “[c]ell phones, now increasingly commonplace, gave the public an ability to not only record the state’s actions, but to disseminate that information. As a result, the Chinese government was held accountable and protester’s demands were at least partially appeased . . . .” Perhaps more impactfully, technological developments continue to provide users with access to systems that are designed for activism.<sup>421</sup> As Simon Denyer reports, “[f]ree systems such as Lantern, Psiphon, Ultrasurf, Tor and Streisand secure servers are inspired by the idea that information should be able to flow both freely and confidentially over the Web.”<sup>422</sup> Another example is how “The Guardian,” a “revolutionary mobile phone software,” will be “the first open-source, secure, privacy-focused mobile phone with a target user base of activists, human rights advocates—people working for good and change within difficult circumstances.”<sup>423</sup>

In practice, it is not uncommon for individuals to avail themselves of these technological developments for activism. For example, in April 2018, a student at Peking University leveraged the #metoo movement’s momentum to bring to surface a sexual assault incident involving a professor and a student from two decades ago.<sup>424</sup> Initially, the student’s message “started spreading like wildfire on China’s top messaging platforms for millennials, WeChat and Weibo,” but officials censored the message shortly thereafter.<sup>425</sup> However, savvy student activists fought back by uploading the student’s memo on the Ethereum’s impenetrable blockchain, which enables anyone with access to an Ethereum node to see the

420. See Sprague, *supra* note 415.

421. See, e.g., Yunkang Yang, *How Large-Scale Protests Succeed in China: The Story of Issue Opportunity Structure, Social Media, and Violence*, 10 INT’L J. COMM. 2895, 2895 (2016) (finding that environmental “protesters are able to organize via social media—a rather risky mode of organizing—to construct inclusive, flexible, consistent collective action frames to further exploit political opportunities and generate the high online visibility that renders police brutality less likely.”).

422. Simon Denyer, *Internet Activists Are Finding Ways Around China’s Great Firewall*, WASH. POST (June 14, 2016), [https://www.washingtonpost.com/world/asia\\_pacific/the-cat-and-mouse-game-between-chinas-censors-and-internet-activists/2016/06/14/77f2b3a8-1dd9-11e6-b6e0-c53b7ef63b45\\_story.html](https://www.washingtonpost.com/world/asia_pacific/the-cat-and-mouse-game-between-chinas-censors-and-internet-activists/2016/06/14/77f2b3a8-1dd9-11e6-b6e0-c53b7ef63b45_story.html) [<https://perma.cc/5F5N-PPKP>].

423. Rebecca Novick, *Technology of Liberation? Activists Get Their Own Smartphone*, HUFFPOST (Dec. 6, 2017), [https://www.huffingtonpost.com/rebecca-novick/technology-of-liberation\\_b\\_385294.html](https://www.huffingtonpost.com/rebecca-novick/technology-of-liberation_b_385294.html) [<https://perma.cc/5HDM-U47M>].

424. Gerelyn Terzo, *China’s #Metoo Movement Dodges Censorship on the Ethereum Blockchain*, CCN: BLOCKCHAIN NEWS (Apr. 27, 2018, 9:11 AM), <https://www.ccn.com/chinas-metoo-movement-dodges-censorship-on-the-ethereum-blockchain> [<https://perma.cc/FUP9-K2PV>].

425. *Id.*

memo.<sup>426</sup> Isaac Mao, an entrepreneur who is building a media platform that uses blockchain technology to fight censorship, commented on the event: “[It] is] symbolic but [will not] . . . be easily adopted by the public masses . . . . Decentralised media still has miles to go. But it gives people new hope.”<sup>427</sup>

Another example is netizens’ use of GitHub to keep an online repository of banned COVID-19 content. As the Chinese government scrambled to censor content related to COVID-19 during the early days of the pandemic, *thousands* of netizens repurposed GitHub as a COVID-19 archive, racing against censors to preserve sensitive news articles, medical journals, and personal accounts related to the virus.<sup>428</sup> The fact that netizens were willing to risk punishment and defy the government reaffirms the reality that, under the right circumstances, citizens can be motivated to become dissidents.<sup>429</sup>

Technology will continue to empower dissidents to circumvent censorship and engage in collective action efforts to combat censorship. The GNI, global citizens, and Internet companies that are operating in China are well-equipped to be the catalysts for shaping the discourse on censorship given their access to both markets and mediums at the international and domestic levels. Although the fight may be a long and painful one, “in this cat-and-mouse game, the cat does[ not] always win.”<sup>430</sup>

## Conclusion

Western media outlets are routinely flooded with news stories of China intensifying its censorship policies and cracking down on VPNs. The general consensus amongst many academics, foreign policy experts, and even Chinese citizens is that “[t]here[ is] nothing we can do about it.”<sup>431</sup> This Article attempts to debunk this sentiment by exploring two ways to combat censorship in China. At the international level, the United States can bring an international trade claim to the WTO and argue that the extent to which China employs censorship constitutes domestic protectionism. The WTO can reasonably find in favor of the United States because China’s censorship practices are disproportional to any public morals justifications it may claim under international trade law. At the domestic level, the GNI, global citizens, and Internet companies operating in China can engage in collective action against the government. It is difficult to predict the chances of success for collective action given the uncertainties involved. However, underlying both paths to combating

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426. Keith Zhai & Lulu Yilun Chen, *Chinese #MeToo Student Activists Use Blockchain to Fight Censors*, BLOOMBERG (May 1, 2018, 2:08 AM), <https://www.bloomberg.com/news/articles/2018-04-24/chinese-metoo-student-activists-use-blockchain-to-fight-censors?srnd=cryptocurrencies> [<https://perma.cc/S96L-37ZU>].

427. *Id.*

428. Liu, *supra* note 296.

429. See, e.g., Xi et al., *supra* note 306.

430. Denyer, *supra* note 422.

431. *Despite Censorship, China Has Some Cool Bookshops*, *supra* note 91.

ensorship is the reality that the Chinese government has made concessions relating to censorship in the past. Thus, there is good reason to believe that, under the right conditions, it will make future concessions.

The issues that must be further explored are the logistics and practicalities of (1) how entities can cause the United States to bring a WTO censorship claim against China, and (2) how global actors and Chinese citizens can create campaigns to motivate actors to take action and to motivate the government to make concessions related to censorship. Given the real humanitarian and economic repercussions at stake, the international community can no longer afford to remain bystanders as China continues to develop its censorship regime.