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Subcommittee on International Trade, Customs, and Global Competitiveness
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Hearing on “Censorship as a Non-Tariff Barrier to Trade”

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Chairman Cornyn, Ranking Member Casey, distinguished Members of the Committee,

Thank you for the opportunity to appear before you today to discuss “Censorship as a Non-Tariff Barrier to Trade.” Your attention to this issue is warranted. China continues to expand the use of censorship to promote national interests, with adverse implications for the United States, other countries, and Chinese citizens themselves. This has recently been driven home by the global impact of China’s suppression of information related to the coronavirus. While that issue remains critical, it is also worthwhile to consider the role of censorship in the context of international trade. To date, international trade rules, negotiations, and policy responses have largely focused on other issues, making a thorough discussion of this matter long overdue.

At the outset, I would like to clarify that I am appearing before you today in my personal capacity. Although I served in the White House from April 2017 until April 2019, including in the role of Deputy Assistant to the President for International Economics, Deputy Director of the National Economic Council, and as one of the negotiators on the U.S.-China Phase One trade deal, my testimony does not represent the Administration’s position. It also does not necessarily align with the positions of Akin Gump’s many clients. Indeed, the views I am sharing are solely my own.

In my opening remarks, I will focus on three issues: (1) the scope of the problem, as exemplified by the many types of Chinese censorship; (2) applicable international trade rules, which are somewhat non-specific and untested; and (3) potential ideas to help begin addressing the serious problems caused by censorship.

The Scope of China’s “Explicit” and “Implicit” Censorship

China is far from the only country to use censorship to achieve government objectives. Pervasive censorship is a serious problem in Cuba, Iran, North Korea, and many other countries. But the economic and geopolitical impact of China’s practices stand alone. We are also at a critical moment with respect to the U.S. – China relationship. The Trump Administration’s willingness to take tough trade action on China has completely changed the dynamic between our two countries. I was proud to be part of the team that helped shape a much more clear-eyed and realistic policy toward China’s economic aggression over the past few years, and I am glad that Congressional policymakers are now focusing on multiple aspects of China’s many unfair trade practices. To help better inform this effort, my testimony centers almost entirely on China.

Censorship is one of many tools that China uses to make it more difficult for U.S. companies to access its market. China also restricts market access through tools like tariffs, equity caps, and onerous licensing requirements. And it heavily subsidizes favored companies to create national champions in industries it deems strategic, including technology and the internet. As a result, addressing censorship alone will not solve all of our market access problems with China. But it is an area that has not been adequately prioritized and is ripe for additional policymaking.

China’s censorship activities manifest themselves in many ways, both explicitly and implicitly. China imposes explicit censorship through laws and other actions that restrict free speech on the internet. China’s “Great Firewall” utilizes a variety of techniques to block access to websites and content deemed objectionable. According to USTR’s *2019 Report to Congress on China’s*

WTO Compliance, “China currently blocks most of the largest global sites... and more than 10,000 sites are blocked, affecting billions of dollars in business, including communications, networking, app stores, news and other sites.”¹ The report goes on to state that “[e]ven when sites are not permanently blocked, the often arbitrary implementation of blocking, and the performance-degrading effect of filtering all traffic into and outside of China, significantly impair the supply of many cross-border services, often to the point of making them unviable.”²

Additionally, China controls the major press instruments in China – both on- and off-line – and suppresses views inconsistent with the Party’s objectives. The leading news agencies in China are unambiguous instruments of the government. As a result, the U.S. State Department’s recent decision to treat these agencies as foreign government functionaries, subject to similar rules as diplomats stationed in the United States, is entirely appropriate.³ Predictably, China’s response was not to provide the news agencies with more freedom, but to expel journalists from the Washington Post, New York Times, and Wall Street Journal from China, thereby further limiting the number of free voices in the country.

This is just one recent example of China’s decision to double down on policies of suppression and control. The latest *U.S. – China Economic and Security Review Commission Report* highlighted China’s growing censorship of economic news, noting that “[i]n the past year, Beijing has directed media outlets to avoid stories on declining consumer confidence, local government debt risks, and other unwelcome economic news.”⁴ In December, China promulgated a new internet censorship law prohibiting online content providers from making, reproducing, or publishing information that could harm the nation’s honor and interests, disseminate rumors, or insult others, among other vaguely defined terms.⁵ And of course, too many sources to count have highlighted China’s suppression of information related to the coronavirus.⁶

¹ Office of the United States Trade Representative, “2019 Report to Congress on China’s WTO Compliance”, March 2020, p. 50, available at: https://ustr.gov/sites/default/files/2019_Report_on_China%E2%80%99s_WTO_Compliance.pdf.

² *Id* at 50.

³ U.S. Department of State, “Senior State Department Officials on the Office of Foreign Mission’s Designation of Chinese Media Entities as Foreign Missions,” Special Briefing, Feb. 18, 2020, available at: <https://www.state.gov/senior-state-department-officials-on-the-office-of-foreign-missions-designation-of-chinese-media-entities-as-foreign-missions/>. U.S. Department of State, “Designation of Additional Chinese Media Entities as Foreign Missions,” Press Statement, June 22, 2020, available at: <https://www.state.gov/designation-of-additional-chinese-media-entities-as-foreign-missions/>.

⁴ U.S. – China Economic and Security Review Commission, “2019 Report to Congress,” November 2019, p. 50, available at: <https://www.uscc.gov/sites/default/files/2019-11/2019%20Annual%20Report%20to%20Congress.pdf>.

⁵ State Internet Information Office, “Provisions on the Governance of the Online Information Content Ecosystem,” Chapter I, Article 6, Dec. 15, 2019, English translation available at: <https://www.chinalawtranslate.com/en/provisions-on-the-governance-of-the-online-information-content-ecosystem/>.

⁶ E.g., Foreign Affairs, “China’s Coronavirus Information Offensive,” April 22, 2020, available at: <https://www.foreignaffairs.com/articles/china/2020-04-22/chinas-coronavirus-information-offensive>; NPR, “Critics Say China Has Suppressed and Censored Information in Coronavirus Outbreak,” Feb. 8, 2020, available at: <https://www.npr.org/sections/goatsandsoda/2020/02/08/803766743/critics-say-china-has-suppressed-and-censored-information-in-coronavirus-outbreak>; Wall Street Journal, “China’s Virus and Propaganda Draw Backlash,” Feb. 25,

China's implicit censorship efforts are equally troubling, with an impact beyond China's borders. The best example is perhaps last summer's NBA Twitter controversy. After Daryl Morey, general manager of the Houston Rockets, tweeted an image with the slogan "Fight for Freedom, Stand with Hong Kong", China ceased its cooperation with the Rockets, suspended the broadcast of NBA games, and pressured the NBA to fire Mr. Morey.⁷ To put it another way, in retaliation for a single tweet by a single individual associated with a single NBA team, China prohibited the broadcast of *all* games by *all* teams in China. And it sought retaliation against an individual who simply shared an opinion widely held in the United States. Clearly, China did not intend its response to be proportional, but sought to intimidate others from exercising their free speech rights *outside China* out of fear of jeopardizing a Chinese business interest. Undoubtedly, China's tactics have worked and other U.S. executives with China exposure have since refrained from expressing their opinion *in the United States* out of fear of repercussions *in China*.

Unfortunately, this may be just the tip of the iceberg. China is in the process of implementing another form of "implicit" censorship through its social credit scoring system for individuals and corporations. The details of the system for corporations is not well understood, but it appears to be a state-run data-sharing and algorithmic scoring mechanism that enables regulators to comprehensively monitor and influence corporate behavior in real-time across China's business ecosystem.⁸ Good ratings are expected to lead to better tax rates, lower inspection rates, and better access to public procurement opportunities, while bad ratings could make it more difficult to get loans, buy real estate, or even lead to blacklisting. And among the many criteria is certain to be whether a company and its employees pay fealty to the Communist party line. Equally troubling are recent reports that China may start monitoring U.S. companies operating internationally, and in particular, within the Belt and Road Initiative countries.

The economic impact of these many forms of censorship is impossible to quantify, but the greatest impact to date is likely on lost market share in China for U.S. technology companies that provide internet or mobile device services, such as search, social networking, and communications. Some U.S. companies have tried to navigate China's pervasive set of laws, while others have abandoned the market completely. In this regard, it is worth observing that some of the Chinese national champions that have benefited from a ban on U.S. competition, such as Baidu, had revenues of roughly \$15 billion in 2018,⁹ despite offering a much narrower set of products than would-be competitors. Clearly, U.S. companies should be and could be reaping this type of benefit if allowed to compete fairly.

WTO Provisions Addressing Censorship

2020, available at: <https://www.wsj.com/articles/chinas-virus-censorship-and-propaganda-draw-backlash-11582632006>.

⁷ *E.g.*, New York Times, "NBA Commissioner: China Asked Us to Fire Daryl Morey," Oct. 17, 2019, available at: <https://www.nytimes.com/2019/10/17/sports/basketball/nba-china-adam-silver.html>.

⁸ European Chamber of Commerce in China and Sinolytics, "The Digital Hand: How China's Corporate Social Credit System Conditions Market Actors", Aug. 28, 2019, available at: <https://www.europeanchamber.com.cn/en/publications-corporate-social-credit-system>

⁹ Macrotrends, "Baidu Revenue 2006-2019", available at: <https://www.macrotrends.net/stocks/charts/BIDU/baidu/revenue>.

The WTO does not have explicit rules governing censorship *per se*, but there are at least some rules that may be applicable. However, these rules are untested with respect to issues like censorship on the internet, which adds uncertainty to any challenge.

The most likely avenue for a WTO claim against China's restrictions on U.S. internet services providers is under the General Agreement on Trade in Services (GATS). In particular, the United States could allege that China violates prohibitions on market access (because it bans U.S. service providers from conducting certain activities)¹⁰ and non-discrimination (because it treats China-based internet service providers different than foreign-based providers),¹¹ among other potential complaints. The nature of China's activities clearly lend themselves to these claims.

One complication could arise from the fact that many of the specific types of services China prohibits on the internet did not exist at the time that the GATS Agreement was negotiated, which could allow China to argue that its behavior with respect to these activities falls outside WTO rules. The United States made a similar argument in defense of its regulation of online gambling in its WTO dispute with Antigua and Barbuda and lost,¹² which suggests that the United States should win this threshold question here. However, there is some risk for the U.S. position in light of the WTO's lack of precedent and U.S. complaints that the decision in the *US – Gambling* dispute was a clear case of WTO overreach.

If the United States prevails on its fundamental GATS claim, China could still seek to defend its behavior by relying on certain WTO exceptions. The GATS public morals exception permits Members to deviate from WTO commitments where such action is “necessary for public morals or to maintain public order”¹³ and the measure taken is not more trade restrictive than necessary to achieve that goal, taking certain factors into account. China sought to defend restrictions on the distribution of foreign films in the *China – Publications and Audiovisual Products* dispute on this basis and lost, but that decision was predicated on the determination that China's measure was an ineffective means of achieving its goal.¹⁴ It may be somewhat more difficult to make such a determination with respect to a policy that clearly does permit the Chinese government to promote its Party's objectives by suppressing contrary views. That said, the United States could argue that China's policy is more restrictive than needed, which would help defeat this defense.

If China loses on the public morals exemption, it could also theoretically invoke national security as a defense.¹⁵ Unlike the public morals defense, the United States consistently argues that the

¹⁰ WTO General Agreement on Trade in Services (GATS), Art. XVI.

¹¹ GATS Art. XVII.

¹² Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services (Antigua and Barbuda)*, WT/DS285/AB/R, adopted Apr. 20, 2005.

¹³ GATS Art. XIV(a).

¹⁴ Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (United States)*, WT/DS363/AB/R, adopted Jan. 19, 2010.

¹⁵ GATS Art. XIV bis.

national security exception is self-judging,¹⁶ which could allow China’s assertion to go unchallenged. While such an argument might seem like a stretch, China increasingly equates any threat to the government’s policies and Communist party control *writ large* as threats to national security.

Therefore, while a WTO dispute has serious merit, existing rules may be ambiguous enough to give the United States pause. The United States would also be rightly concerned that for political reasons, the WTO may be hesitant to issue an “explosive” ruling that declares a core tenet of China’s government policies in breach of WTO rules, especially in the absence of more explicit direction from WTO Members on the topic.

Recommendations for Moving Forward

In light of the foregoing, what is the best way to begin to deal with this difficult and under-developed trade issue? This is something we all need to further consider, but as a starting point, I would like to share a few ideas to help start the conversation.

First, the U.S. Government must consistently highlight the pervasive nature of China’s activities and make clear that this behavior is unacceptable and inconsistent with global norms. This means that both the Administration and Congress should forcefully denounce all forms of Chinese censorship – explicit, implicit, and in-between – at every opportunity and at the highest levels. Governments are better positioned by virtue of their size and role in society to push back against intimidation than individual companies who fear damaging retaliation. China may complain, noting that the United States is interfering in its internal affairs. But as China increasingly seeks to impose its model of censorship on American companies and export it to the rest of the world, the United States is justified in advocating for a clear alternative.

Second, the U.S. government should strongly encourage key U.S. allies to do the same. Countries that share U.S. values on free speech, such as the European Union (EU) Member states, must not equivocate on this topic, and must not hedge their bets with respect to the type of world that they want their citizens to live in. China will find it more difficult to ignore critiques of its behavior or stir up anti-U.S. nationalism to excuse it if other major countries stand by the U.S. side. At the same time, the EU and others must also be very careful not to adopt internet policies, such as data localization and other forms of internet control, that drift closer to the Chinese model, thereby sending the wrong signal to China’s policymakers about what is acceptable. A recent report from the EU Parliament that advocates for a European Firewall and glowingly speaks of China’s efforts to promote innovation through its own firewall is particularly disconcerting.¹⁷

Third, this same advice goes for the United States. As we seek to counter the economic threat posed by China, we must be very careful not to adopt the very same policies we are condemning.

¹⁶ See, e.g., First Written Submission of the United States of America, *United States – Certain Measures on Steel and Aluminum Products (China)*, WT/DS544, Jun. 12, 2019 (making this argument with respect to a similar national security exception under the General Agreement on Tariffs and Trade (GATT)).

¹⁷ “New Developments in Digital Services,” European Parliament, Study prepared for the IMCO Committee by the Policy Department for Economic, Scientific and Quality of Life Policies, May 2020, available at: [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/648784/IPOL_STU\(2020\)648784_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/648784/IPOL_STU(2020)648784_EN.pdf).

Policies that stifle free speech in the United States or increase market access barriers through tariffs or discrimination would directly contravene the policies that made American democracy and the American economy the envy of the world in the first place. These policies will not only backfire on us economically, but they will also cause us to lose the moral high ground that is so important to building an international coalition to effectively push back on China.

Fourth, the U.S. government should consider how to better address these issues at the WTO as part of a much broader reform initiative. In particular, if USTR's lawyers do not believe that the current rules support a winning dispute on censorship-related issues, they should advocate for explicit rules on this topic in the context of the E-Commerce negotiations. The United States should also seek to include new rules on forced technology transfer, industrial subsidies, and intellectual property theft, require China to classify itself as a developed country that must commit to the same rules as the United States, and improve the dispute settlement system so it can be used more effectively by the United States to challenge China's bad behavior. To be clear, the WTO is not meeting our expectations at the moment, but abandoning the system that we (not China) helped create will not solve our problems. In fact it may be exactly what China desires. After all, a reformed rules-based international trading system that paints China as an international outlier remains the most promising way for us to pressure China to change its behavior, and China would like nothing more than to see the U.S.-created system evaporate.

Fifth, the United States should also expand its efforts to include provisions banning censorship in a broad range of FTAs, especially with countries on China's periphery. The United States has begun moving in this direction with the United States-Mexico-Canada Agreement (USMCA) digital trade chapter and U.S.-Japan Digital Trade Agreement, but these provisions could be strengthened and new negotiating partners identified. In this regard, the United States should seek more explicit anti-censorship provisions in the context of the U.S.-EU-Japan trilateral, negotiate enhanced digital trade agreements with existing FTA partners, consider an FTA with Taiwan, and begin negotiating the terms of its re-entry into the Trans-Pacific Partnership (TPP). Putting politics aside, the longer the United States ignores the TPP, the longer it ignores an opportunity to encircle China with policies that oppose its economic model. The United States should immediately state that it will seek to renegotiate the terms of re-entry and condition this re-entry on the inclusion of provisions banning censorship, stronger provisions governing additional pernicious Chinese practices, and other changes the United States deems necessary.

Sixth, the United States must find better ways to help protect the interests of U.S. companies that want to access a market of over one billion people, but have been pressured into censoring their activities or have been retaliated against for voicing their opinion. One idea that has been floated by Members of Congress is legislation to protect employees from being terminated for voicing opinions about foreign governments.¹⁸ Another idea that has been discussed is to prohibit companies from complying with certain Chinese laws or requests for censorship, at the very least with respect to their activities in our jurisdiction. A related idea is to require U.S. companies to disclose any pressure received from the Chinese government to censor their activities.¹⁹ This last idea, which could also theoretically be applied to other pressures like forced technology transfer,

¹⁸ H.R. 5830, "Preventing Foreign Censorship in America Act," introduced Feb. 10, 2020.

¹⁹ S. 2743, "To establish the China Censorship Monitor and Action Group, and for other purposes," introduced Oct. 30, 2019.

could help insulate U.S. companies from specific retaliation by focusing the blame on U.S. law. Ideas like this deserve debate, but the full implications on U.S. business interests should be considered before they are adopted.

Finally, we must be very careful in our policymaking efforts with respect to both censorship issues and China more broadly not to draw a false equivalence between the Chinese government and its people. Many good Chinese citizens have suffered for years under these troubling policies, and their views and interests should in no way be equated with that of the Chinese government. Indeed, many Chinese people tried earlier this year to speak out with respect to the coronavirus only to have their voices muffled. A Chinese commentary briefly posted online before being deleted stated: “These days, everyone’s saying the openness of information is the best vaccine. Blocked ears and eyes are also a contagious disease, and no one can escape.”²⁰ And in the words of Dr. Li, the late Chinese doctor who was reprimanded by police for raising early awareness of the disease, “I believe a healthy society should not have just one voice.”²¹ We need to be clear that our concern is with the unfair practices of the Chinese government, not the Chinese people, and do everything we can to empower reformers in Chinese society to improve the country that they live in.

²⁰ Wall Street Journal, “China’s Virus and Propaganda Draw Backlash,” Feb. 25, 2020.

²¹ *Id.*