

Rise and demise of U.S. social media in China

A touchstone of WTO and BIT regulations

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Introduction

From 2007 to 2010 China added more internet users than there are in the U.S. This high growth in combination with a low saturation level¹ makes it the most promising market in the world for companies that want to provide internet services. Foreign social media,² including Facebook, Twitter and YouTube, have been banned in China. China either blocked the sites or made the access so erratic or slow that discouraged internet users would shun them. A publication of the Chinese Communist Party explained the ban of Facebook³ by pointing out that after the deadly riots in Xinjiang Uyghur Autonomous Region the Xinjiang independence movement⁴ used Facebook as a medium. Twitter was banned before the 20th anniversary of the Tiananmen Square crackdown.⁵ A graph that

¹ Between 2007 and 2010 China gained 246 million internet users, to a total of 459 million internet users in 2010, while in the same years, the U.S. only added 22 million internet users to a total of 244 million internet users in 2010. China's internet penetration is 34 percent of the population, compared to 79 percent of the U.S. population. Mary Meeker, Internet Trends Web 2.0 Summit, San Francisco, KPCB (Oct. 18, 2011), slide 7, available at: <http://www.businessinsider.com/mary-meekers-latest-awesome-web-20-presentation-about-the-state-of-the-web-2011-10#-1>.

² Social media, also known as Web 2.0 applications, have in common that they are based on user-generated content, which is communicated to a network of users.

³ Facebook was first periodically blocked after the riots in Tibet that started in March 10, 2008. Aw Guo, *UPDATE: facebook.com is completely blocked in China then*, Jul. 2, 2008, available at: <http://www.ifgogo.com/94/facebook-blocked-in-china/>. As of July 2, 2009 Facebook was getting blocked or the access was made very slow. See in the comment section Facebook users commenting on the status of Facebook in different parts of China. Jeremy Goldkorn, *Facebook blocked in China*, Jul. 2, 2008, available at: http://www.danwei.org/net_nanny_follies/facebook_blocked_in_china.php#comments.

⁴ The People's Daily Online, mentions a survey done by Huaqiu.com, a site under the auspices of the Chinese Communist Party on July 8, 2009. According to the survey 80 percent of the netizens said that Facebook should be punished for being a medium for the Xinjiang independence movement. *80 percent of netizens agree China should punish Facebook*, People's Daily Online, July 10, 2009, available at: <http://english.people.com.cn/90001/90776/90882/6697993.html>.

⁵ Tania Branigan, *China blocks Twitter, Flickr and Hotmail ahead of Tiananmen anniversary*, The Guardian, June 2, 2009, available at: <http://www.guardian.co.uk/technology/2009/jun/02/twitter-china>.

demonstrates when YouTube was accessible and blocked⁶ corresponds with political events the Chinese government deemed sensitive.⁷

Since foreign social media sites have been banned, three Chinese social media sites,⁸ all listed at the New York Stock Exchange or NASDAQ,⁹ are thriving. Chinese social media are insulated from foreign competition at their domestic market. However doing business in China does not become easier for them. They will have to abide by ever more stringent censorship regulations. Until China's Gini Coefficient¹⁰ for income inequality comes down significantly, China's leaders deem the risk of social unrest so substantial that they will insist on the most sophisticated and extensive form of censorship in the world.¹¹

After banning foreign social media, the Chinese government came to the conclusion that the Chinese social media are an indispensable tool to monitor what millions of Chinese think. Therefore it decided not to ban, but to tame Chinese social media. Especially after witnessing the prominent role social media played during the Arab Spring¹² and after two

⁶ HerdictWeb, demonstrates in a graph the dynamic of giving access and blocking of YouTube, HerdictWeb, Berkman Center for Internet & Society (undated), available at: <http://www.herdict.org/explore/indepth;jsessionid=84FD049D1295D9630E636DB54A014981#!fs=2071&f c=CN>.

⁷ Schwankert suspected that China blocked YouTube because of the upcoming Communist Party Congress in 2007. Steven Schwankert, *YouTube blocked in China; Flickr, Blogspot restored*, Info World, October 18, 2007, available at: <http://www.infoworld.com/d/security-central/youtube-blocked-in-china-flickr-blogspot-restored-351>.

⁸ In this paper the author will use the three most popular Chinese social media as example: social network site RenRen, microblog Sina Weibo and video-sharing site Youku. For an overall view of the Chinese social mediascape read P. Candace Miles & J. Barratt Deans, *A Framework For Understanding Social Media Trends In China*, The 11th International DSI and APDSI Joint Meeting, Taipei, Taiwan, July 12-16, 2011, available at: <http://iceb.nccu.edu.tw/proceedings/APDSI/2011/web/session/aframeworkforunderstandingsocialmediatrends.pdf>.

⁹ RenRen launched in December 2005 (as XiaoNei (which means "On-campus"), changed its name into RenRen (which means "everybody") in August 2009), IPO at the New York Stock Exchange, May 4, 2011. Brendan Greeley & Mark Drajem, *China's Facebook Syndrome, Censorship hinders access to China's online markets*, Bloomberg Businessweek, March 10, 2011, available at: http://www.businessweek.com/magazine/content/11_12/b4220029428856.htm.

Sina Weibo (weibo means "microblogging"), launched August 2009, Sina is listed at NASDAQ since April 13, 2000. Youku (which means "excellent" and "cool"), launched June 2006, listed at the New York Stock Exchange December 8, 2010.

¹⁰ Because of the huge gap between rich and poor in China, the possibility that conflicts escalate into social unrest is not imaginary. China has a Gini Coefficient, which is a measure of income inequality, of 46.9. In comparison, the US has a Gini Coefficient of 40 (according to United Nations) or 45 (according to the CIA). Stephen Young, *Gini Coefficient*, The Nation, April 21, 2010, available at: <http://www.nationmultimedia.com/home/2010/04/21/opinion/Gini-Coefficient-30127515.html>.

¹¹ The OpenNet Initiative report of 2009 describes the Chinese Great Firewall as the most sophisticated and extensive form of censorship in the world. OpenNet Initiative, China Profile (June 15, 2009), available at: <http://opennet.net/research/profiles/china>.

¹² Arab Spring started December 18, 2010, Wikipedia (undated), available at: http://en.wikipedia.org/wiki/Arab_Spring.

bullet trains collided¹³ in Wenzhou. In the latter case, millions of Chinese vented their criticism how the government allegedly short-tracked safety for economic progress. This made the Chinese government realise that in order to guide the public it should not only stop the information that is harmful in their eyes, but revising it into wholesome information as well.

After a visit from the Chinese Communist Party Secretary in Beijing to the “Chinese Twitter” called Sina Weibo in September, it was announced that false and harmful information on social media must be squelched¹⁴ and the socialist core value system and advanced culture should be spread. Sina Weibo reacted to the visit of the high profile official by establishing a group of ten anti-rumour league, who monitors, verifies and clarifies false information.¹⁵ Simultaneously, the obligation of real name registration to join social media is considered.¹⁶

Although China is embedded in the global community via many international treaties, the freedom of expression provisions of either the Universal rights or the International Covenant on Civil and Political Rights are not equipped to help foreign companies gain access to the Chinese market.¹⁷ A more suitable route is to lobby the home country’s government to bring the case to the World Trade Organization (WTO). The WTO regulations include a binding dispute resolution system.

The Chinese government has to lift millions of people out of poverty. In order to succeed this Herculean task China considers its WTO membership of paramount importance. Therefore each country that brings a case to the WTO against China gets China’s undivided attention. Two cases: regarding China and censorship¹⁸ and China and market

¹³ Train crash July 23, 2011 Wenzhou, two bullet trains collided. Michael Clendenin, *Risky Business, Sina Weibo Intensifies Censorship Of Tragic Train Crash*, August 11, 2011, available at:

<http://www.slideshare.net/sinocismblog/redtech-advisors-on-sina-weibo-regulatory-risk-and-censorship>.

¹⁴ Qiu Shi (seek the truth), *China's Internet media presents non-rational negative characteristics* (Zhōngguó wǎngluò yúlùn chéngxiàn fùmiàn fēi lǐxíng dèng tèdiǎn), People’s Daily (overseas edition), September 2, 2011, available at: <http://it.people.com.cn/GB/15572164.html>.

¹⁵ David Bandurski, *China tackles the messy world of microblogs*, China Media Project, HKU, August 11, 2011, available at: <http://cmp.hku.hk/2011/08/11/14706/>. See also Qin Xue, Li Jing & Xiao Yu, *Sina Has No License?*, NTD, video on YouTube, available at: <http://www.youtube.com/watch?v=1RsemhfGdpU>.

¹⁶ The real name registration is tried before and is expected to be too costly for social media sites to be implemented in the short term. Bill Bishop, *Rumors of a Real Name Registration Requirement Coming For Weibo And Other Chinese Social Media?* DigiCha, August 29, 2011, available at: <http://digicha.com/index.php/2011/08/real-name-registration-requirement-coming-for-weibo-and-other-chinese-social-media/>.

¹⁷ The Universal Declaration of Human Rights is not really universal. It has no signatories. Therefore it is not binding to any country. Besides, only the predecessor of the People’s Republic of China proclaimed the declaration in 1948. It is to the successor state’s discretion what to do with the declaration. China did sign the International Covenant on Civil and Political Rights (ICCPR) in 1998. However, China can easily base its defense of censorship on the exceptions of article 19.3(a) ICCPR: reputation of others and (b) protection of national security or public order. Furthermore, the ICCPR has no enforcement mechanism.

¹⁸ In the panel report it was determined that a denial of copyright protection of censored works based on article 4 Copyright Law was not compatible with China's obligations under the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs). China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights, WT/DS362, WTO Panel Report (Jan. 26, 2009), available at: http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds362_e.htm.

access¹⁹ are relevant in the sense that they show that a country cannot disregard WTO treaty law. Another route could be Bilateral Investment Treaties (BITs).²⁰ However, this is only relevant for companies from those home countries that signed a BIT with China. These companies can reap the benefit of suing China directly via a transnational tribunal. China's General Principles of Civil Law²¹ recognise the supremacy of international treaties concluded by or acceded to by China, which apply to law in civil relations with foreigners.

Chapter 1 investigates whether the home countries of foreign social media companies can invoke the provisions of GATS²² to ensure that these companies are granted market access. Chapter 2 explores whether a BIT can be used to oblige China to meet its commitments and give foreign social media companies market access. Chapter 3 gives an explanation why influential foreign companies that are willing to censor are still not welcome to provide social media services in China. Followed by the conclusions.

Chapter 1 China's GATS commitment

This Chapter will examine whether social media can be classified as a service. And if this is the case, to what degree China has an obligation to allow market access to foreign providers of this service based on international treaties.

China automatically became a member of the General Agreement on Trade in Services (GATS)²³ when it acceded to the Agreement Establishing the World Trade Organization (WTO)²⁴ on December 11, 2001. GATS has two kinds of commitments: (1) a positive list of commitments²⁵ concerning market access; and (2) national treatment in specifically designated sectors which are disclosed in schedules of specific commitments per member and general obligations which apply directly to all members.

¹⁹ The Appellate Report states that the provisions of China's measures prohibiting foreign-invested entities from engaging in the distribution of sound recordings in electronic form are inconsistent with China's national treatment principle commitments (treating foreign entities at least as good as domestic ones) under article XVII General Agreement on Trade in Services (GATS). China – Publications and Audiovisual Products, WT/DS363 WTO Appellate Body Report (December 21, 2009, available at: http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds363_e.htm).

²⁰ For an analysis of Bilateral Investment Agreements read Bryan Mercurio, *BILATERAL AND REGIONAL TRADE AGREEMENTS: COMMENTARY AND ANALYSIS* (Simon Lester ed., Cambridge University Press, 2009).

²¹ Article 142 General Principles of Civil Law, adopted April 12, 1986, available at: <http://en.chinacourt.org/public/detail.php?id=2696>.

²² General Agreement on Trade in Services (GATS), entered into force on January 1, 1995, <http://www.worldtradelaw.net/uragreements/gats.pdf>.

²³ *Ibid.*

²⁴ Marrakesh Agreement Establishing the World Trade Organization, effective April 15, 1994, available at: http://www.wto.org/english/res_e/booksp_e/analytic_index_e/wto_agree_04_e.htm.

²⁵ In contrast to the exceptions in the commitments of the General Agreement on Tariffs and Trade (GATT) 1994.

Internet is a telecommunication service

China's GATS commitments toward social media are not directly transparent, because they are not mentioned explicitly in China's schedule of commitments. However, the link becomes clear if one finds out its taxonomy.

Taxonomy of social media in China:

((((social media services) internet information service) value-added telecommunication) telecommunication)

China regulates internet services, including social media services as a form of telecommunication.²⁶ The Telecommunications Regulation²⁷ gives a broad definition of telecommunications: the use of wired or wireless electromagnetic systems, or photoelectric systems, to transmit, emit or receive speech, text, data, graphics or any other form of information.²⁸ In addition, the Telecommunications Regulation makes a distinction²⁹ between basic telecommunications services, which include internet and other public data transmission services, and value-added telecommunications services,³⁰ which include electronic mail service, online database hosting and sorting, online data processing and trading processes, internet connection service and internet information service. Social media services are a subcategory of internet information services.

What value-added telecommunication services obligations of GATS are relevant for social media in China?

One can distinguish those provisions in GATS that are relevant to the value-added telecommunication services. During the Uruguay Round³¹ negotiations, to which China was not involved, lead to specific commitments to value-added services, GATS Annex on Telecommunications and the general rules of GATS. It seems a bit arbitrary to categorise internet content providers, including social media, in the category of value-added telecommunication services. And if one does, one must take into account that, although the internet already existed since the 1960s, only in 1989 the medium was popularised by

²⁶ Michael Aldrich & Gaston Fernandez, *A practical insight to cross-border Telecommunication Laws and Regulations*, The International Legal Guide to: Telecommunications Laws and Regulations 2010, Ch. 13, available at: <http://www.iclg.co.uk/khadmin/Publications/pdf/3093.pdf>.

²⁷ Regulation on Telecommunications has been adopted at the 31st regular meeting of the State Council on September 20, 2000, available at: <http://www.lawinfochina.com/display.aspx?lib=law&id=1667>.

²⁸ Article 2, second paragraph, Regulation on Telecommunications has been adopted at the 31st regular meeting of the State Council on September 20, 2000, available at: <http://www.lawinfochina.com/display.aspx?lib=law&id=1667>.

²⁹ Article 8 and Appendix: Catalogue of Telecommunications Business, Regulation on Telecommunications has been adopted at the 31st regular meeting of the State Council on September 20, 2000, available at: <http://www.lawinfochina.com/display.aspx?lib=law&id=1667>. According to Article 8 Regulation on Telecommunications value-added telecommunications business refers to the provision of telecommunication and information services by using the basic facilities of public networks.

³⁰ "Different from traditional content and information industry like movie and newspaper, online information strongly relies on a uniform platform and infrastructure, that is, in legal term, the basic telecommunication service. Another kind of profitable business on the Internet is the so-called value-added telecommunication service that depends on the generative PC and OS." Hu Ling, *Shaping the virtual state: internet regulation (1994-2009)*, dissertation University of Hong Kong, May 2011, available at: <http://hub.hku.hk/bitstream/10722/141945/1/FullText.pdf?accept=1>.

³¹ Uruguay Round between 1986 and 1994.

Berners-Lee's invention of the World Wide Web.³² So it is fair to claim that during the Uruguay Round the negotiators could not oversee the impact the medium would have on society. This applies a fortiori to social media, such as Facebook, Youku and Twitter, which were launched February 2004, February 2005 and July 2006, respectively. Then again, Hindley and Lee-Makiyama³³ point to the Online Gambling³⁴ and Audiovisuals³⁵ cases where the WTO dispute settlement bodies adopted the principle of interpreting provisions in a technology neutral way.

Schedule of commitments

China made a schedule of commitments³⁶ in different service sectors, including telecommunication.³⁷ As social media sites, which fall within the category of value-added telecommunication services, foreign service suppliers were permitted to establish joint-ventures as of December 11, 2001 in Beijing, Shanghai and Guangzhou, with a maximum foreign share of 40 percent. A year later, foreign suppliers were permitted in 17 cities³⁸ with a maximum foreign share of 49 percent. As of December 11, 2003 foreign suppliers were permitted to establish joint-ventures nationwide, with a maximum foreign share of 50 percent.³⁹

GATS Annex on Telecommunications

GATS Annex on Telecommunications⁴⁰ is an integral part of GATS. Article 5 GATS Annex on Telecommunications is crucial to guarantee that all kinds of services, including, value-added telecommunication services, can access and make use of the public telecommunications transport networks and services. The provision ensures that value-added service providers, including those providing social media, can benefit from

³² World wide web, a system of interlinked hypertext documents accessed via the Internet. World Wide Web, Wikipedia, available at: http://en.wikipedia.org/wiki/World_Wide_Web.

³³ Brian Hindley & Hosuk Lee-Makiyama, *Protectionism Online: Internet Censorship and International Trade Law*, ECIPE Working paper, Nr. 12 (2009), 10, available at: <http://www.ecipe.org/publications/ecipe-working-papers/protectionism-online-internet-censorship-and-international-trade-law/PDF>.

³⁴ Panel Report, United States – Gambling Services, ¶ 6.281, WT/DS285/R (Nov. 10, 2004), available at: [http://www.worldtradelaw.net/reports/wtopanels/us-gambling\(panel\).pdf](http://www.worldtradelaw.net/reports/wtopanels/us-gambling(panel).pdf).

³⁵ Appellate Body Report, China – Publications and Audiovisual Products, ¶¶ 396-397, WT/DS363/AB/R (Dec. 21, 2009), available at: [http://www.worldtradelaw.net/reports/wtoab/china-publications\(ab\).pdf](http://www.worldtradelaw.net/reports/wtoab/china-publications(ab).pdf)

³⁶ Article XX GATS: Schedules of Specific Commitments, *supra* note 22.

³⁷ Banking, insurance, securities, distribution/retail, telecommunication, construction, tourism and travel related, videos/movies/cinemas, books/newspapers/magazines are the service sectors in which China has a schedule of specific commitments. China: A summary of Implementing GATS Commitments in Main Service Sectors, World Bank, available at:

<http://siteresources.worldbank.org/INTRANETTRADE/Resources/WBI-Training/288464-1139428366112/SummaryOfTheOpeningProgressOfMainServiceSectors.pdf>.

³⁸ Beijing, Shanghai, Guangzhou, Chengdu, Chongqing, Dalian, Fuzhou, Hangzhou, Nanjing, Ningbo, Qingdao, Shenyang, Shenzhen, Taiyuan, Xiamen, Xi'an and Wuhan.

³⁹ Robert Lewis, *New Telecom Enterprise Regulations: The Door is Opened, but MII Still Keeping the Gate*, China Law & Practice, February 2002, available at:

<http://www.chinalawandpractice.com/Article/1693772/Channel/9949/New-Telecom-Enterprise-Regulations-The-Door-is-Opened-but-MII-Still-Keeping-the-Gate.html>.

⁴⁰ Annex on Telecommunications, available at: http://www.wto.org/english/tratop_e/serv_e/12-tel_e.htm.

the schedule of commitments by the WTO member if they do not have their own network to transport their services.

General commitments GATS

It is clear that China needs to apply the general provisions of GATS to the regulation of internet information services. Of these general provisions transparency; domestic regulation and national treatment will be reviewed.

Article III:1 GATS prescribes that each member shall publish all relevant measures at the latest by the time of their entry into force, except in emergency situations. Emergency situations are not defined. Since this is an exception clause, it seems reasonable to interpret emergency situations narrowly. The deadly uproar in Xinjiang Uyghur Autonomous Region⁴¹ might qualify for this clause, in contrast to censoring news reports about the high-speed trains accident in Wenzhou in July 2011.⁴² The concretisation of the provision into a list of prohibited words is unacceptable to China. China is only making these ever changing lists available to those, including internet content providers such as social media that are made responsible/liable for censoring the internet.⁴³ They are not allowed to share the content of the list with the public.

As already stated, social media can be classified as value-added telecommunication services and as internet information services. Article 57 Telecommunications Regulation and article 15 Measures on the Administration of Internet Information Services⁴⁴ sum up respectively what kind of information cannot be produced, copied, published or

⁴¹ After ethnic riots in Xinjiang Uyghur Autonomous Region, in July 2009, China cut off the Internet, text messaging and international phone service for half a year. After that period, the Internet and phone service was restored, but with severe limitations: people have a limited number of text messages they can send, no access to non-Chinese websites and even limited access to Chinese websites. Rebecca MacKinnon, *China's Internet Censorship and Controls: The Context of Google's Approach in China*, in "CHINA'S INTERNET": STAKING DIGITAL GROUND, China Rights Forum, Human Rights in China, nr 2, 2010, available at: http://www.hrichina.org/public/contents/article?revision_id=175187&item_id=175185.

⁴² Michael Wines & Sharon LaFraniere, *In Baring Train Crash, Blogs Erode China Censorship*, New York Times, July 28, 2011, available at: <http://www.nytimes.com/2011/07/29/world/asia/29china.html?pagewanted=all>.

⁴³ Article 62 Telecommunications Regulation: When providing public information service, a telecommunications service provider finding that information falling within the scope as provided by Article 57 is being transmitted in the networks shall terminate the transmission immediately and keep record and report to relevant authorities.

⁴⁴ Measures on the Administration of Internet Information Services, Published by the official state media Xinhua News Agency, October 1, 2000, available at: <http://www.lehmanlaw.com/resource-centre/laws-and-regulations/information-technology/asures-for-managing-internet-information-services-2000.html>.

transmitted via the telecommunication⁴⁵ or via internet.⁴⁶ This is done with a lot of overlap and in opaque terms that stimulate an expansive self-censorship. Companies start to censor more broadly, just to be on the safe side and avoid becoming liable. Hu enunciates three different categories of prohibited expressions⁴⁷ that can be determined in both provisions. 1. Harmful content or politically sensitive content, which are enforced strictly. 2. Obscenity, violence and gambling, which are not so strictly enforced. 3. Piracy, privacy and parody, which can be used to prohibit some speech using copyright instead of invoking the information security law.

One intrinsic goal of the Chinese censorship is to hide what information is censored. For a normal internet user it can be near impossible to determine whether a site is blocked or whether there appears a technical problem: one either gets a technical error message, or the internet connection speed decreases to a level that the site becomes de facto inaccessible.⁴⁸ Article III:2 GATS states that if publication of these measures is not practicable it should be made otherwise publicly available. One can imagine that the government fears that publishing such a list could spark its own social unrest.

Article VI GATS consists of Domestic Regulation. Article VI:2 (a) GATS obliges members to have legislation in place that institutes an independent review of administrative decisions affecting trade, for an objective and impartial review. This applies “as soon as practicable”. More importantly article VI:2 (b) states that members

⁴⁵ Article 57 Telecommunications Regulation: All organisations and individuals shall not produce, copy, publish and transmit information having the contents as follows by using telecommunication networks:

1. against the Cardinal Principles set forth in the Constitution;
2. detrimental to State security, State secrecy, State power and national unification;
3. detrimental to State honour and interests;
4. instigating ethnic hatred or discrimination and detrimental to national unity;
5. detrimental to State religious policy, propagating heretical or superstitious ideas;
6. disseminating rumours, disrupting social order and stability;
7. disseminating obscenity, pornography, force, brutality and terror or crime-abetting;
8. humiliating slandering others, trespassing the lawful rights and interests of others;
9. other contents forbidden by laws and regulations.

⁴⁶ Article 15 Measures on the Administration of Internet Information Services states that no unit or individual may use the Internet to create, replicate, retrieve, or transmit the following kinds of information:

1. Information that goes against the basic principles set in the constitution;
2. Information that endangers national security, divulges state secrets, subverts the government, or undermines national unity;
3. Information that is detrimental to the honor and interests of the state;
4. Information that instigates ethnic hatred or ethnic discrimination, or that undermines national unity;
5. Information that undermines the state's policy towards religions, or that preaches the teachings of evil cults or that promotes feudalistic and superstitious beliefs;
6. Information that disseminates rumors, disturbs social order, or undermines social stability;
7. Information that spreads pornography or other salacious materials; promotes gambling, violence, homicide, or terrorism; or instigates crimes;
8. Information that insults or slanders other people, or infringes upon other people's legitimate rights and interests; or
9. Other information prohibited by the law or administrative regulations.

⁴⁷ Hu, *supra* 30, 35.

⁴⁸ *Gmail now 45 times slower than QQ and 8 times slower than Yahoo*, GreatFirewall, biz June 22, 2011, available at: <http://www.greatfirewall.biz/blog/2011/mar/gmail-now-45-times-slower-qq-8-times-slower-yahoo>. See also Steven Millward, *Google+ Has Been Throttled to Death – Now Blocked in China*, Penn-Olson, July 6, 2011, available at: <http://www.penn-olson.com/2011/07/06/google-plus-blocked/>.

with a constitutional structure incompatible to article VI:2 (a) are not held to its obligation. However, China committed in its Protocol of Accession to the WTO⁴⁹ that review procedures shall include the opportunity for appeal, without penalty, by individuals or enterprises affected by any administrative action subject to review. And if the initial right of appeal is to an administrative body, there shall in all cases be the opportunity to choose to appeal the decision to a judicial body. Notice of the decision on appeal shall be given to the appellant and the reasons for such decision shall be provided in writing. The appellant shall also be informed of any right to further appeal. However, in China it is not possible to sue the government for censorship. However, one Shanghainese man demonstrated that it is possible to file a lawsuit against China Telecom because they censored his website.⁵⁰

Article XVII:1 GATS states the crucial national treatment principle. Within the conditions of the specific schedule of commitments of the value-added telecommunication services, China should treat each foreign value-added service providers the same as domestic ones. One can argue that China is inconsistent in this commitment. RenRen is a direct clone of Facebook.⁵¹ The same can be said for Youku in relation to YouTube. Sina Weibo is more complicated, because it might have started out as a copycat of Twitter, but one can argue that it has developed into a more innovative platform. In regard to the services and the service providers the “likeness”⁵² of the services between the three pairs of social media seems very comparable. There appears to be no legal impediment for foreign companies with a maximum share of 50 percent in a joint-venture to have access to provide social media services nationwide in China. Encouraged by the market access case,⁵³ which was based on national treatment article XVII GATS, the U.S. or EU⁵⁴ could consider to bring a case to the WTO against China. To bring a case to the WTO⁵⁵ seems a better option than to classify internet censorship as

⁴⁹ Protocol of Accession to the World Trade Organization, Section I:2(D), WT/L/432:2, available at: http://www.wto.org/english/thewto_e/acc_e/completeacc_e.htm.

⁵⁰ Jeremy Goldkorn, *Suing the Net Nanny*, Danwei, May 28, 2007, available at: http://www.danwei.org/media_regulation/suing_the_net_nanny.php.

Yetaai, A practical lawsuit against China internet censorship, May 9, 2007, available at: <http://yetaai.blogspot.com/2007/05/practical-lawsuit-against-china.html>.

⁵¹ According to Kirkpatrick RenRen “blatantly copied some of Facebook’s software code and even initially included at the bottom of each page ‘A Mark Zuckerberg Production Production’”. DAVID KIRKPATRICK, *THE FACEBOOK EFFECT: THE INSIDE STORY OF THE COMPANY THAT IS CONNECTING THE WORLD* (Simon & Schuster, 2010), 171.

⁵² “The concept of “like services and service suppliers” used in the General Agreement on Trade in Services (GATS) is still very much uncharted territory.” Mireille Cossy, *Determining “likeness” under the GATS: Squaring the circle?*, Staff Working Paper ERSD-2006-08, September 2006, http://www.wto.org/english/res_e/reser_e/ersd200608_e.pdf.

⁵³ China – Publications and Audiovisual Products, WT/DS363 WTO Appellate Body Report, December 21, 2009, available at: http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds363_e.htm.

⁵⁴ Farah Master, *China's Web "firewall" should be WTO issue: EU's Kroes*, Reuters, May 17, 2010, available at: <http://www.reuters.com/article/2010/05/17/us-china-eu-kroes-idUSTRE64G10020100517>.

⁵⁵ United States Seeks Detailed Information on China’s Internet Restrictions, USTR, October 2011, <http://www.ustr.gov/about-us/press-office/press-releases/2011/october/united-states-seeks-detailed-information-china's-i>.

a barrier to trade that should be raised in any trade negotiations, as some have suggested,⁵⁶ but which could lead to trade retaliations.⁵⁷

Chapter 2 China's BIT commitments

Countries sign Bilateral Investment Treaties (BITs) in order to protect their respective companies' investments in the host country against damages caused by violations of substantive and procedural provisions contained in the treaty. In comparison to the WTO, the great advantage of BITs for companies that invest abroad is that they are granted direct legal personality under international law,⁵⁸ as opposed to a WTO procedure where they are dependent on whether or not their home government wants to bring a claim against the host government.

China has signed BITs⁵⁹ with 126 countries. Despite several negotiations, China and the U.S. have not been able to agree on the contents of a BIT, yet. So unfortunately the banned U.S. social media sites cannot rely on the protection of a BIT. After China opened up its economy for the last thirty years, it received large amounts of foreign investment inflows. Because China was primarily a host country for investments, it was in China's interest to draft the BITs restrictive. In one aspect China was rather liberal: it had already started to acknowledge investor-state arbitration since 1985, even before it signed the convention of the International Centre for Settlement of Investment Disputes (ICSID)⁶⁰ in 1990⁶¹. Chen argues that this is not in China's interest, because China receives a lot of foreign direct investment (FDI)⁶² inflows, and the country is going through a transitional

⁵⁶ "Maaten's proposal would require the EU to classify any Internet censorship as a barrier to trade, and would require that the issue be raised in any trade negotiations." Simon Lester, *Trade and Censorship: The EU View*, February 28, 2008, <http://worldtradelaw.typepad.com/ielpblog/2008/02/trade-and-censo.html>.

⁵⁷ A discussion on trade retaliations can be found in Bryan Mercurio, *Retaliatory Trade Measures in the WTO Dispute Settlement Understanding: Are There Really Alternatives?* in *TRADE DISPUTES AND THE DISPUTE SETTLEMENT UNDERSTANDING OF THE WTO: AN INTERDISCIPLINARY ASSESSMENT* (James Hartigan (ed.), Emerald/Elsevier, 2009) 397-442.

⁵⁸ "The most notable of all BIT features has been the inclusion of a provision which grants foreign investors direct legal personality under international law." Luc Eric Peterson, *The Global Governance of Foreign Direct Investment: Madly Off in All Directions*, Geneva: Friedrich-Ebert-Stiftung (Occasional Papers Nr. 19, May 2005), 8, available at: http://www.nuso.org/upload/fes_pub/Peterson.pdf.

⁵⁹ Total number BITs concluded, June 1, 2011, UNCTAD Investment Instruments Online, available at: http://www.unctad.org/sections/dite_pcb/docs/bits_china.pdf.

⁶⁰ Convention on the Settlement of Investment Disputes between States and Nationals of Other States, entered into force October 14, 1966, available at: http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf.

⁶¹ The ICSID convention was signed by China on February 9, 1990, and it entered into force for China on February 6, 1993. List of contracting states and other signatories of the convention, as of May 5, 2011, available at:

<http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=English>.

⁶² Definition of the World Bank: Foreign direct investment is the net inflow of investment to acquire a lasting management interest of at least 10 percent of the voting stock, in an enterprise operating in an economy other than that of an investor. Foreign direct investment, net inflows (BoP, current US\$), World Bank, available at: <http://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD>.

phase.⁶³ Since 1998, China's FDI outflows⁶⁴ have become more significant, although it is still a net-foreign direct investment country.⁶⁵ China started to invest especially in developing countries.⁶⁶ Therefore it wants a stronger protection for its investments, which suggests that China would be more inclined to sign more liberal BITs.⁶⁷ Berger writes that the main difference found in liberal BITs is the degree to which they protect investments already in the pre-establishment phase.⁶⁸ In other words: before the FDI project has been admitted by the host country's authorities in accordance with national laws and regulations. In principle, a country needs to sign only one liberal BIT, in order to make all its earlier signed BITs more liberal. This is caused by the continuing effect of the most favoured nation (MFN) provisions in previous signed BITs.

If the Sino-German BIT⁶⁹ is any indication of what China would like to see in a BIT with the U.S., there are important differences of opinion about the application of the national treatment⁷⁰ and MFN principles.⁷¹ In the Sino-German BIT protocol,⁷² which is an integral part of the Sino-German BIT, it becomes clear that the non-discrimination provisions do not apply to existing nonconforming measures. So in the unlikely scenario that a Sino-U.S. BIT would be signed under these conditions,⁷³ it cannot really help U.S. companies that already have invested in providing social media services in China. Another condition in the Sino-German BIT is that measures that have to be taken for reasons of public security and order, public health or morality shall not be deemed "treatment less favourable"⁷⁴ as in the meaning of the non-discrimination provisions. This

⁶³ An Chen, *Distinguishing Two Types of Countries and Properly Granting Differential Reciprocity Treatment. Re-comments on the Four Safeguards in Sino-Foreign BITs Not to be Hastily and Completely Dismantled*, in: *Journal of World Investment and Trade* 8(6), 2007, 771-795.

⁶⁴ More about China's outbound investments can be found in Julien Chaisse, *International Investment Treaties and China Outbound Investments in CHINA OUTBOUND INVESTMENTS – A GUIDE TO LAW AND PRACTICE* (Lutz-Christian Wolff ed., Hong Kong: Kluwer CCH, 2011) Chapter III (8) 213-234.

⁶⁵ Foreign direct investment, net inflows (BoP, current US\$), World Bank, available at: <http://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD>.

⁶⁶ Axel Berger, *China and the Global Governance of Foreign Direct Investment. The Emerging Liberal Bilateral Investment Treaty Approach*, Bonn: Deutsches Institut für Entwicklungspolitik (Discussion Paper 10/2008), 11-15, available at: [http://www.die-gdi.de/CMS-Homepage/openwebcms3.nsf/\(ynDK_contentByKey\)/ANES-7FXHY6/\\$FILE/DP%2010.2008.pdf](http://www.die-gdi.de/CMS-Homepage/openwebcms3.nsf/(ynDK_contentByKey)/ANES-7FXHY6/$FILE/DP%2010.2008.pdf).

⁶⁷ Alex Berger, *China's new bilateral investment treaty programme: Substance, rational and implications for international investment law making*, ASIL IELIG 2008 biennial conference "The Politics of International Economic Law: The Next Four Years", Washington, D.C., November 14-15, 2008, 7, available at: <http://www.asil.org/files/ielconferencepapers/berger.pdf>.

⁶⁸ Berger, *supra* note 66, 4, A more complete enunciation of conditions that characterise restrictive and liberal BITs can be found in UNCTAD: *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking, New York and Geneva*: United Nations (2007), available at: http://www.unctad.org/en/docs/iteiia20065_en.pdf.

⁶⁹ Agreement between the People's Republic of China and the Federal Republic of Germany on the Encouragement and Reciprocal Protection of Investments, December 1, 2003, available at: http://www.unctad.org/sections/dite/ia/docs/bits/china_germany.pdf.

⁷⁰ Article 3 (2) *ibid.*

⁷¹ Article 3 (3) *ibid.*

⁷² Article 3 *ibid.*

⁷³ Sarah Anderson, *U.S.-China Bilateral Investment Treaty Negotiations – Fact Sheet – IPS*, December 7, 2009.

⁷⁴ Article 4 (a) *supra* note 69.

condition, which gives China much leeway, will make the protection of investments by German companies that want to provide social media in China very uncertain.

Chapter 3 Why social media in China stay Chinese

As one can read in Chapter 1, based on GATS and China's special schedule of commitments, China should give market access to social media sites that is maximally fifty percent foreign owned. In this Chapter the instrumental objectives of Chinese social media will be reviewed. The question why China does not want any influential foreign social media to be active in China, even if they are willing to censor, just as many foreign internet sites are already doing⁷⁵, will be answered.

Facebook can be used as an example: the U.S. social network launched a Chinese language version of its site in 2008. A year later Facebook was banned.⁷⁶ CEO Zuckerberg visited China twice⁷⁷ to see whether a joint-venture with a Chinese firm⁷⁸ is possible. Zuckerberg has made it clear that Facebook is willing to abide by China's censorship policy.⁷⁹ Unfortunately for Facebook, Businessweek published a story in which it is said that "Zuckerberg believes Facebook can be an agent of change in China, as it has been in countries such as Egypt and Tunisia".⁸⁰ Whether true or not, this statement will not charm the Chinese government.

⁷⁵ MSN has been censoring bloggers in China since 2005. *Microsoft censors bloggers*, BBC News, June 14, 2011, available at: <http://news.bbc.co.uk/2/hi/technology/4088702.stm>. Yahoo.cn was considered one of the strictest censors in China, according to Reporters Without Borders. Eli Milchman, *Yahoo 'Strictest' Censor in China*, Wired, June 15, 2006, available:

<http://www.wired.com/politics/onlinerights/news/2006/06/71166>. Google censored in China from 2005 until 2010. Google also filed for a U.S. patent application for a location-based censoring methodology. Danny Friedmann, *Paradoxes, Google and China - How Censorship Can Harm and Intellectual Property Can Harness Innovation*, in *Google And The Law: IT And The Law*, (Aurelio Lopez-Tarruella, ed., TMC Asser, Forthcoming), available at: <http://ssrn.com/abstract=1885267>.

⁷⁶ Jessica Lee, author of the Inside Facebook blog, is quoted saying that not only censorship is responsible for Facebook's demise in China, but also a lack of innovation and bad timing. "Timing is also an issue as translating into Chinese only occurred in spring 2008, after local Chinese social networking sites had already started gaining momentum." Harsha Sharma, *Facebook's journey into the East*, BBC News, September 16, 2009, available at: <http://news.bbc.co.uk/2/hi/technology/8256997.stm>.

⁷⁷ Stan Schroeder, *Mark Zuckerberg's First Stop in China: Baidu Headquarters*, available at: December 20, 2010, available at: <http://mashable.com/2010/12/20/mark-zuckerbergs-first-stop-in-china-baidu-headquarters/>.

Alexei Orescovic & Jennifer Saba, *Facebook CEO Mark Zuckerberg To Make Second Trip*, May 25, 2011, Reuters, available at: http://www.huffingtonpost.com/2011/05/20/facebook-china-mark-zuckerberg-2011_n_864613.html.

⁷⁸ Zuckerberg visited Baidu, Sina, Alibaba and China Mobile. Michael Kan, *Facebook's CEO launches charm offensive with Chinese tech firms*, Techworld, December 22, 2010, available at: <http://news.techworld.com/applications/3254463/facebooks-ceo-launches-charm-offensive-with-chinese-tech-firms/>.

⁷⁹ "With respect to openness in China (or lack thereof), Zuckerberg says that different countries around the world have different values, which Facebook has historically respected. For example, in Germany it's illegal to post content about Nazism, so Facebook blocks it in Germany (but not in other countries)." Jason Kincaid, *Mark Zuckerberg On Facebook's Strategy For China (And His Wardrobe)*, October 16, 2010, available at: <http://techcrunch.com/2010/10/16/mark-zuckerberg-on-facebooks-strategy-for-china-and-his-wardrobe/>.

⁸⁰ Brad Stone, *Why Facebook Needs Sheryl Sandberg*, Businessweek, May 12, 2011, available at: http://www.businessweek.com/print/magazine/content/11_21/b4229050473695.htm.

The Chinese government realised that social media played a crucial role within the media-mix offered to the public. After the Wenzhou trains accident, it became known that a quarter billion people had spent more time watching TV online than offline and got as much news from Chinese social media than they got from Chinese mainstream, and thus state-controlled, media.⁸¹

When China opened up to the outside world, especially after it acceded to the WTO, it was anticipated that globalisation would become more powerful and that nationalism would lose importance. Decentralisation would become more prominent than centralisation. It was also expected that the playing field for foreign companies that wanted to be active in China would be levelled. Tuinstra argues in 2003 that China acceded to the WTO to use the treaty as a vehicle to regain the power it lost during decentralisation efforts.⁸² Also many thought that social media would bring freedom of expression. However, it becomes increasingly clear that China uses social media as an instrument to control its people. And this is not limited to censorship. Moreover, it wants to use social media to spread propaganda, monitor public opinion and use nationalism as a soft power tool and counter foreign cultural influences. To breed national champions, insulated from foreign competition, might be another objective of the Chinese government or a welcome collateral effect of its other objectives.

China's instrumental use of social media

China's top propaganda chief urged microblogging services, such as Sina Weibo, to serve the works of the Chinese Communist Party and the nation. Further, microblogging services should popularise sciences, advance culture and project social morality.⁸³ In general the main objectives of the Chinese government for social media can be described as: to continue the political integrity of the Chinese Communist Party, guiding and elevating the people to social morality, and keep social cohesion and harmony. Social media also have the function of society's safety valves.⁸⁴ People can vent their frustrations about local corrupt bureaucrats. The Chinese government is monitoring the trends of the public opinion in real time and tries to respond to it with actions and policies.⁸⁵ This could be interpreted as a kind of embryonic form of direct democracy. In its foreign affairs the Chinese government sometimes uses the voice of the people if it is aligned with its own strategic objectives. Sometimes it whips up nationalist sentiments

⁸¹ Bill Bishop, *China's Internet: The Invisible Birdcage*, China Economic Quarterly, September 2010, available at: <http://digicha.com/index.php/2011/02/chinas-internet-the-invisible-birdcage/>.

⁸² Fons Tuinstra, *Beijing's Secret WTO Agenda*, 2003.

⁸³ Wang Chen, director general of China's State Council Information Office, was quoted by State media at a seminar on microblogging in Beijing, October 13, 2011. Josh Chin, *Top Chinese Propaganda Official Puts Pressure on Microblogs*, China Real Time Report, Wall Street Journal, October 15, 2011, available at: <http://blogs.wsj.com/chinarealtime/2011/10/15/sina-weibo-top-chinese-propaganda-official-puts-pressure-on-microblogs/>.

⁸⁴ Sino CEO Charles Chao wrote on his blog: "Weibo has become a social 'pressure valve,' Especially with the active participation of government microblogs, its easier to guide the public mood. Through Weibo you can gauge public sentiment in a timely manner and make policy accordingly." Chin, *supra* note 83.

⁸⁵ The Internet in China, III. Guaranteeing Citizens' Freedom of Speech on the Internet, Whitepaper, Information Office of the State Council, June 8, 2010, available at: http://english.gov.cn/2010-06/08/content_1622956_5.htm.

and sometimes it reins them in.⁸⁶ The Chinese government is actively promoting socialist culture to resist the invasion of foreign cultures and enhance national identity and solidarity.⁸⁷

In addition to keeping control over content that potentially damages socialist morale, there might be another underlying economic reason to withhold market access to foreign competition, or it might be a welcome collateral to censorship: to first breed national champions, such as RenRen, Sina Weibo and Youku, that hopefully later can prosper in the global market. According to Brahm, one of the Chinese government's major objectives is to use the WTO to prepare these local champions for the international arena.⁸⁸ It must be bitter for U.S. social media, excluded from China, that the Chinese social media, funded through U.S. stock exchanges, could grow into national champions in China, and use the economies of scale which allowed them to come up with innovations, with which they now start to compete with U.S. social media outside China.

Why foreign companies are not suitable as instrument for the Chinese government

If history is any guide, the Chinese government wants social media sites not just to censor, but also to collaborate to catch transgressors. To ask cooperation from foreign companies is maybe one bridge too far. If one recalls the public backfire to companies such as Yahoo, which released information that led to the arrest of at least two subscribers,⁸⁹ this might be a correct estimation of the Chinese government. Another problem that could arise is that foreign governments could export their legislation to companies doing business abroad, including in China. U.S. representative Christopher Smith drafted the Global Online Freedom Act (GOFA),⁹⁰ which makes it a crime if U.S. companies share personal information with a censoring government. It was proposed in 2007 and again in 2009, but it did not become law, yet. Another possible point of concern is that the asymmetric information between Chinese and foreign social media users would become a bit too obvious and embarrassing. An English version of Sina Weibo is launched⁹¹ and will probably be censored up to the Chinese standard, also outside China.⁹² In short, foreign companies will remain dependent on the government's wishes of their home market and cannot be completely relied upon by China.

⁸⁶ Hu, *supra* 30, 38.

⁸⁷ *Ibid*, 35, footnote 4. see Kang Xiaoguang, *China Returns* (Singapore: bafang wenhua chuangzuoshi, 2008), 328-329. President Hu Jintao has warned against Westernisation and has called for greater efforts to enhance China's cultural influence overseas. *Hu warns Chinese culture being 'Westernised'*, AFP, January 2, 2012, via Yahoo News, available at:

<http://news.yahoo.com/hu-warns-chinese-culture-being-westernised-062549889.html>.

⁸⁸ L.J. Brahm, (ed.) *CHINA AFTER WTO*, (China Intercontinental Press, Beijing 2002), 222.

⁸⁹ *Yahoo 'helped jail China writer'*, BBC News, September 7, 2005, available at:

<http://news.bbc.co.uk/2/hi/4221538.stm>. John Leyden, *Yahoo! link confirmed in second Chinese dissident case*, The Register, February 27, 2006, available at:

http://www.theregister.co.uk/2006/02/27/yahoo_dissident_court_papers/.

⁹⁰ Global Online Freedom Act, H.R. 2271, sponsored by Representative Christopher Smith in May 6, 2009, available at <http://www.govtrack.us/congress/bill.xpd?bill=h111-2271>.

⁹¹ Chudaye, *China's First English Microblog Service Launched*, Xinhua, October 11, 2011, available at: <http://english.crid.cn/6826/2011/10/11/168s662201.htm>.

⁹² The English version of Sina Weibo will be filtered in the same way as in China. According to a Sina spokesperson: "Sina will continue to comply with Chinese regulations." This could mean that Chinese

not only restrict, but also monitor and influence the information on social media. High Chinese Communist Party officials pressured social media sites to guide the masses to the socialist values, and promote coherence and solidarity, and squelch rumours.

Although it is clear that the government policy is a gross violation of the freedom of expression protected by human rights treaties, these treaties are either toothless or irrelevant for China and therefore impossible to use as a crowbar to open up the Chinese market. What remains are the World Trade Organization (WTO) or Bilateral Investment Treaty regulations.

To bring the case at the WTO is promising. The only disadvantage for companies, is that they need to lobby their home government, because they cannot bring the case directly to the WTO. Social media could be classified as value-added telecommunication services. China has GATS commitments to allow foreign companies nationwide market access with a share of 50 percent via a joint-venture. But despite that some of these social media might be willing to abide by Chinese censorship rules, Facebook, Twitter and YouTube were banned in China. Therefore it can be argued that there is a market access national treatment violation.

This legal remark leaves us with its practical implication. It is questionable whether a foreign social media company wants to be used in a WTO case against China and by doing so explicitly exposing its willingness to contribute to Chinese censorship policy. Making a case against China might push the country to legally fulfil its legal obligations. On the other hand, China might resort to practical non-legal barriers to keep the western social media from competing on equal footing by slowing down traffic to its sites or making online access erratic.

Another route for foreign companies is to sue the Chinese government directly based on a Bilateral Investment Treaty (BIT). The advantage is that companies can bring a claim directly against a host country at a transnational tribunal. However, China and the U.S. have thus far not agreed on any text for a BIT. So for U.S. companies this route is inaccessible. German companies, however, can make use of the Sino-German BIT. German companies that invested in China after the treaty became effective could in principle sue China if they are banned. However, China can invoke the protocol to the BIT that gives an interpretation of how the national treatment principle should be applied. If China takes measures based on the public security, social order and morality these measures should not be seen “not less favourable” in the sense of the national treatment. This makes doing business in China also for German companies that want to provide social media services in China uncertain. After making use of a BIT, a victorious company might still need to address practical trade barriers.

China uses social media as an instrument to censor and guide its population. These tasks are too important to trust to foreign companies. Therefore, even if a company wins a WTO or BIT case, market access can still be made de facto impossible. In addition to the slow and erratic access to their websites, social media need to get 11 licenses, available at

different departments. This could be another formidable tool to guarantee that social media in China stays Chinese.