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Office of International Affairs
National Telecommunications and Information Administration
U.S. Department of Commerce
1401 Constitution Avenue, NW, Room 4706
Washington, DC 20230

**Re: Comments from the First Amendment Coalition in Response to Request
for Comments on Global Free Flow of Information on the Internet 75 FR
60068**

The First Amendment Coalition, through its counsel King & Spalding, submits these comments in response to the September 19, 2010 Request for Comments issued by the Department of Commerce ("the Department"). 75 Fed. Reg. 60068. By notice dated November 18, 2010, the Department extended the deadline by which to submit comments until December, 6, 2010. 75 Fed. Reg. 70714.

I. INTRODUCTION

U.S. suppliers of internet and advertising services have encountered a significant number of barriers in providing their services in China. Despite its accession to the World Trade Organization ("WTO"), China has maintained and even expanded the barriers to these products and services. The First Amendment Coalition ("FAC") has prepared this paper to inform the Department's Internet Policy Task Force about the barriers affecting U.S. services and to provide the basis for further discussions about how to most efficiently remove these barriers, including through the informal or formal negotiations and formal initiation of WTO dispute settlement proceedings.

The mission of the FAC is to protect and promote freedom of expression and the people's right to know. The FAC is a non-profit, nonpartisan educational and advocacy organization serving the public, public servants, and the media in all its forms. Its constituency reflects an increasingly diverse society. The FAC is committed to the principle that government is accountable to the people, and strives through education, public advocacy, litigation, and other efforts to prevent unnecessary government secrecy and to resist censorship of all kinds.

This paper was prepared based on publicly available information regarding Chinese measures severely restricting the entry and distribution of internet and advertising services supplied by U.S. entities. FAC is continuing to research the nature and scope of the wide range of ever-changing national, provincial, and local laws, regulations, and practices that may be causing the relevant barriers.

FAC has been working with various agencies of the United States government, including the United States Trade Representative (“USTR”), over the past several years to submit factual information and legal analysis related to potential violations under various WTO agreements. Many of FAC’s submissions to USTR have been legal analysis related to potential WTO violations by China under various WTO agreements. Consistent with its prior testimony and submissions, FAC hereby submits comments to the Department related to its request for information under Trade Agreements. 75 Fed. Reg. 60073. To summarize, FAC believes that China is violating many of its WTO commitments, and that a successful WTO case could be brought against China for its violations against its trade obligations.

II. FACTUAL SUMMARY

China’s regulation of internet and advertising services provided by U.S. companies, the so called “Great Firewall” is elusive and without structure. As the Department rightly points out “[i]n some cases, laws, policies and rules restricting information flows may be vaguely articulated, inconsistently enforced, pretextual, or created without transparent and open processes.” 75 Fed. Reg. 60069. China’s regulation of the internet is partly enforced by unseen and unspoken actions from the Chinese Government. China continues to impose great burdens on foreign Internet service providers through its censorship regime, its blocking of foreign websites, and its “Great Firewall” infrastructure, which greatly inhibits U.S. companies’ ability to do business in China, and to compete with domestic companies. These measures have been ongoing for years, and have had a devastating impact on market share for U.S. companies – perhaps to the extent that it can never be recovered.

Although the laws, regulations, and policies regarding Internet services are not necessarily written down, they are enforced *de facto* nevertheless. Moreover, despite being unwritten, they would constitute “measures” for the purposes of WTO dispute settlement.¹ The discussion below describes how China’s measures violate several GATS provisions, and why claims under these provisions would likely succeed.

III. NATIONAL TREATMENT

China’s measures directed at foreign Internet services providers constitute a violation of Article XVII:1 of GATS, which provides:

¹ See *US – Zeroing (EC)* at paras. 192, 198.

In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.¹⁰

10 Specific commitments assumed under this Article shall not be construed to require any Member to compensate for any inherent competitive disadvantages which result from the foreign character of the relevant services or service suppliers.

These Chinese measures fall within one or more of four services subsectors for which China has inscribed a specific commitment and has scheduled no limitation on its national treatment obligation.² Thus, China's measures must comply with the obligations in Article XVII.³

If China's measures were challenged in a WTO proceeding, a Panel would first need to determine whether China's measures are indeed "affecting" the supply of these services. As noted by the Appellate Body in *EC – Bananas III*:

[T]he term of "affecting" reflects the intent of the drafters to give a broad reach of the GATS. The ordinary meaning of the word "affecting" implies a measure that has "an effect on", which indicates a broad scope of application. This interpretation is further reinforced by the conclusions of previous panels that the term 'affecting' in the context of Article III of the GATT is wider in scope than such terms as 'regulating' or 'governing.'⁴

It is therefore not necessary for China's measures to be directly regulating or governing the business of U.S. Internet service providers, but merely that the measures have an effect on these services, and their providers' ability to do business in China. As discussed in a paper

² FAC understands that some U.S. companies are resistant to formally categorize these services into a particular category. In order to make a claim, however, a category or categories must be proposed.

³ In the case of potential market access violations in relation to telecommunications services, the United States will need to address potential Chinese arguments that the measures are non-discriminatory and are based on China's right, under the footnote in its schedule, to require that such services be channeled through approved gateways. Moreover, in relation to national treatment for video/entertainment distribution services, China has not scheduled any limitation in relation to "content review" and thus discriminatory content review would not be justified by any reservation or limitation.

⁴ Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (adopted 25 September 1997), para. 220.

recently released by Google, China's measures clearly have "an effect on" these services – indeed, a very detrimental one.⁵

Second, the United States would need to demonstrate that China's measures accord "less favorable" treatment to U.S. suppliers than to China's domestic suppliers of "like" services. As set forth in GATS Article XVII:3, the test for less favorable treatment is whether the measure "modifies the conditions of competition in favour of services or service suppliers of" China compared to like services or services suppliers of the United States.⁶ Persuading a panel in this regard will require the production of extensive data and specific information demonstrating the competitive disadvantage suffered by U.S. companies due to China's measures. The FAC has compiled information from third-party sources regarding blockages of U.S. websites, upload times for content of U.S. websites, and other significant impediments to U.S. Internet service providers being able to compete with their Chinese competitors on an even playing field. This information has revealed significant and swift loss of market share by U.S. providers.

In response, China may argue that the adverse business conditions in the Chinese market confronting U.S. providers, particularly slow performance time, are not the result of discriminatory treatment but rather the result of the "inherent competitive disadvantages that result from the foreign character of the relevant services or service suppliers" referred to footnote 10 of GATS. In accordance with jurisprudentially determined norms regarding burden of proof in the WTO dispute settlement system, however, China would have the burden of demonstrating that this footnote applies as a defense, and that the business effects suffered by U.S. providers are solely the result of their own "inherent" disadvantages in competing in the Chinese market. These adverse business conditions are significant enough that China would have a difficult time convincing a panel that they are totally unrelated to the measures that it imposes on these providers.

IV. TRANSPARENCY

China's measures also violate Article III of the GATS, which provides for transparency in Members' application of measures affecting services. This provision applies to all Members, regardless of their individual commitments in their services schedule. Article III:1 of GATS states

Each Member shall publish promptly and, except in emergency situations, at the latest by the time of their entry into force, all

⁵ See Appendices 1 and 2; See also "Enabling Trade in the Era of Information Technologies: Breaking Down Barriers to the Free Flow of Information," Google paper released November 15, 2010, available at http://static.googleusercontent.com/external_content/untrusted_dlcp/www.google.com/en/us/googleblogs/pdfs/trade_free_flow_of_information.pdf.

⁶ See, e.g., Panel Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/R, WT/DS142/R (adopted 19 June 2000), para. 10.80.

relevant measures of general application which pertain to or affect the operation of this Agreement.

China's measures against Internet services have not been published promptly, and in fact, the blocking and filtering measures have not been published at all.⁷ Further, "[t]he obligation is of an absolute character and due diligence obliges WTO members to publish more, rather than less, because of the terms 'relevant' and 'affecting' invite a wide reading."⁸ The simple fact that the FAC is unable to document with specificity China's measures constituting the "Great Firewall" lends support to the argument that China is not transparent in its practices related to controlling and censoring Internet content.

A panel has previously interpreted the term "publish" in the WTO Agreements as more than "making publicly available." In *Chile-Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, the panel held that the requirements to publish a report in the Agreement on Safeguards meant "to make generally available through an appropriate medium."⁹ To FAC's knowledge, China has published few, if any, regulations related to Internet services.

Moreover, if China is unable to publish its measures related to Internet services because it is "not practicable", Article III:2 requires that "information shall be made otherwise publicly available." FAC has performed considerable research and has not found information on China's measures publicly available over the Internet. This would seem to be a strong indication that China has not made its practices regarding Internet services otherwise publicly available, which would violate Article III:2 of GATS even if it succeeded in defending its actions under Article III:1.

China may also argue that in accordance with GATS Article III *bis*, it does not need to publish the measures in question because publishing the measures is "confidential information," the disclosure of which "would impede law enforcement, or otherwise be contrary to the public interest, or which would prejudice legitimate commercial interests of particular enterprises, public or private."¹⁰ FAC disagrees with this argument and believes that China could publicly admit, through the use of laws and regulations, that it is censoring the internet and even publish the types of censorship that is occurring while still enabling legitimate law enforcement efforts. Publication of laws and regulations related to China's censorship is very different than publishing confidential information that may impede law enforcement efforts. Any arguments to

⁷ See Appendix 3-4.

⁸ Mitsuo Matsushita, Thomas J. Schoenbaum, & Petros C. Mavroidis, *The World Trade Organization, Law, Practice, and Policy* (2003).

⁹ Appellate Body Report, *Chile-Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R (adopted 23 October 2002), para. 7.128.

¹⁰ GATS Art. III *bis*.

the contrary by China would appear to be weak and without foundation and are likely to fail before a panel.

V. DOMESTIC REGULATION

Article VI of GATS imposes a range of obligations relating to the domestic regulation of services, applying to those services for which a Member has made commitments. Articles VI:1 and VI:2(a), for example, state:

1. In sectors where specific commitments are undertaken, each Member shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner.

2. (a) Each Member shall maintain or institute as soon as practicable judicial, arbitral or administrative tribunals or procedures which provide, at the request of an affected service supplier, for the prompt review of, and where justified, appropriate remedies for, administrative decisions affecting trade in services. Where such procedures are not independent of the agency entrusted with the administrative decision concerned, the Member shall ensure that the procedures in fact provide for an objective and impartial review.

Thus, for services sectors in which specific commitments have been undertaken, China must administer its measures in a “reasonable, objective and impartial manner” and, for all services sectors, must ensure that tribunals or procedures are available for the prompt review and remedy of administrative decisions. Given that China’s measures regarding Internet and content regulations are mostly subjective and non-transparent, it would be difficult for China to argue that these measures are administered in a “reasonable, objective, and impartial manner.” In *Mexico- Measures Affecting Telecommunication Services*, the panel held that exorbitant rates charged to U.S. telecommunication providers “excluded price competition in the relevant market of the telecommunication services bound under Mexico's Schedule, [and did] not provide access to and use of public telecommunications transport networks and services in Mexico ‘on reasonable ... terms’.”¹¹ Although the panel found only a violation of Art. 5(a) of the Telecommunication Annex to the GATS, the panel notes that the Annex builds upon GATS Art. VI and indeed, the language is very similar. We believe for the very reasons Mexico was in violation of Art. 5(a) of the Telecommunications Annex to GATS, China could be in violation of GATS Art. VI:1. Here, U.S. service providers do not pay exorbitant prices for access to China’s Internet consumers – they cannot pay any price at all because they are shut out completely.

¹¹ Panel Report, *Mexico- Measures Affecting Telecommunication Services*, WT/DS204/R (adopted 1 June 2004), para. 7.335.

Because they are shut out completely, China has “not provided access to and use of public telecommunications transport networks and services in China on reasonable...terms.”

The FAC is unaware of any instances where U.S. companies subject to China’s measures have sought assistance from a tribunal or judicial forum, and in any event does not believe that China offers any forums to dispute the application of its measures. In the absence of any tribunals or procedures for the review of administrative decisions, China’s measures violate its obligations under Articles VI:1 and VI:2(a) of GATS.

In addition, Article VI:5 states:

- (a) In sectors in which a Member has undertaken specific commitments, pending the entry into force of disciplines developed in these sectors pursuant to paragraph 4, the Member shall not apply licensing and qualification requirements and technical standards that nullify or impair such specific commitments in a manner which:
 - (i) does not comply with the criteria outlined in subparagraphs 4(a), (b) or (c); and
 - (ii) could not reasonably have been expected of that Member at the time the specific commitments in those sectors were made.

China’s measures constitute technical standards that affect trade in Internet services, and as discussed above, China has made commitments in one or more relevant services subsectors. China’s measures nullify or impair its commitments because they are not “based on objective and transparent criteria” (as required under subparagraph 4(a)) and because they are “more burdensome than necessary to ensure the quality of the service” (as addressed under subparagraph 4(b)). Finally, some of China’s measures could not reasonably have been expected at the time China made its commitments (in 2001). China’s measures are constantly evolving and new measures against new companies are routinely introduced.

VI. CHINA’S PROTOCOL OF ACCESSION

China’s measures also likely violate the provisions of China’s Protocol of Accession listed below. Because the language in China’s Protocol of Accession is very similar to China’s GATS commitments discussed above; the U.S. may be able to allege violations for the same reasons discussed above. The relevant sections of the Accession Protocol are as follows:

Section 1

2. Administration of the Trade Regime

(A) Uniform Administration

{...}

2. China shall apply and administer in a uniform, impartial and reasonable manner all its laws, regulations and other measures of the central government as well as local regulations, rules and other measures issued or applied at the sub-national level (collectively referred to as "laws, regulations and other measures") pertaining to or affecting trade in goods, services, trade-related aspects of intellectual property rights ("TRIPS") or the control of foreign exchange.

{...}

(C) Transparency

1. China undertakes that only those laws, regulations and other measures pertaining to or affecting trade in goods, services, TRIPS or the control of foreign exchange that are published and readily available to other WTO Members, individuals and enterprises, shall be enforced. In addition, China shall make available to WTO Members, upon request, all laws, regulations and other measures pertaining to or affecting trade in goods, services, TRIPS or the control of foreign exchange before such measures are implemented or enforced. In emergency situations, laws, regulations and other measures shall be made available at the latest when they are implemented or enforced.

2. China shall establish or designate an official journal dedicated to the publication of all laws, regulations and other measures pertaining to or affecting trade in goods, services, TRIPS or the control of foreign exchange and, after publication of its laws, regulations or other measures in such journal, shall provide a reasonable period for comment to the appropriate authorities before such measures are implemented, except for those laws, regulations and other measures involving national security, specific measures setting foreign exchange rates or monetary policy and other measures the publication of which would impede law enforcement. China shall publish this journal on a regular basis and make copies of all issues of this journal readily available to individuals and enterprises.

3. China shall establish or designate an enquiry point where, upon request of any individual, enterprise or WTO Member all information relating to the measures required to be published under paragraph 2(C)1 of this Protocol may be obtained. Replies to requests for information shall generally be provided within 30 days after receipt of a request. In exceptional cases, replies may be provided within 45 days after receipt of a request. Notice of the delay and the reasons therefor shall be provided in writing to the interested party. Replies to WTO Members shall be complete and shall represent the authoritative view of the Chinese government. Accurate and reliable information shall be provided to individuals and enterprises.

(D) Judicial Review

1. China shall establish, or designate, and maintain tribunals, contact points and procedures for the prompt review of all administrative actions relating to the implementation of laws, regulations, judicial decisions and administrative rulings of general application referred to in Article X:1 of the GATT 1994, Article VI of the GATS and the relevant provisions of the TRIPS Agreement. Such tribunals shall be impartial and independent of the agency entrusted with administrative enforcement and shall not have any substantial interest in the outcome of the matter.

2. Review procedures shall include the opportunity for appeal, without penalty, by individuals or enterprises affected by any administrative action subject to review. 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.

3. Non-discrimination

Except as otherwise provided for in this Protocol, foreign individuals and enterprises and foreign-funded enterprises shall be accorded treatment no less favourable than that accorded to other individuals and enterprises in respect of:

(a) the procurement of inputs and goods and services necessary for production and the conditions under which their goods are produced, marketed or sold, in the domestic market and for export; and

(b) the prices and availability of goods and services supplied by national and sub-national authorities and public or state enterprises, in areas including transportation, energy, basic telecommunications, other utilities and factors of production.

{...}

7. Non-Tariff Measures

{...}

2. In implementing the provisions of Articles III and XI of the GATT 1994 and the Agreement on Agriculture, China shall eliminate and shall not introduce, re-introduce or apply non-tariff measures that cannot be justified under the provisions of the WTO Agreement. For all non-tariff measures, whether or not referred to in Annex 3, that are applied after the date of accession, consistent with the WTO Agreement or this Protocol, China shall allocate and otherwise administer such measures in strict conformity with the provisions of the WTO Agreement, including GATT 1994 and Article XIII thereof, and the Agreement on Import Licensing Procedures, including notification requirements.

{...}

VI. GATS EXCEPTIONS

In response to a claim that it is violating one or more of the GATS provisions discussed above or its Protocol of Accession, it is likely that China would attempt to invoke a GATS exception under Article XIV – in particular, the exception for measures that are “necessary to protect public morals or maintain public order” under Article XIV(a).¹² FAC does not believe these arguments would succeed, however, because although China would no doubt invoke GATS exceptions to justify its Internet restrictions, good arguments are available to convince a WTO panel that (i) these restrictions have nothing to do with public morals or public order, (ii) there are less trade restrictive alternatives available, and (iii) China’s Internet restrictions are implemented in a discriminatory manner and constitute a disguised restriction on trade in services.

V. CONCLUSION

¹² The question of whether China could apply an Article XIV GATS exception to a violation of its accession protocol is unclear. This situation was presented in the *China – Audiovisuals* case, but in exercising judicial economy, neither the panel nor the Appellate Body ultimately made this determination.

The FAC urges the Department to review carefully China's violations of the GATS provisions discussed above, and to take those actions as are necessary to ensure that China is abiding by its WTO obligations and the commitments it made as a condition of entry into the WTO. U.S. Internet service providers, both present and future, have the right to full knowledge of China's measures affecting their ability to do business in China, and also the right to compete in China on conditions no less favorable than those facing China's domestic Internet service providers. These rights are clearly enunciated as a matter of international law in various WTO legal instruments. These rights are enforceable by the United States under the WTO's dispute settlement system and should be enforced under that system if China cannot be persuaded to implement fully and in good faith its WTO obligations.

Sincerely,



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Counsel to the First Amendment Coalition