

# Digital Censorship and the Great Firewall of China

## Corporate Codes of Conduct a Viable Means to Lift the Information Curtain

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Earlier this year, U.S. Secretary of State Hillary Clinton traveled to China where she sternly condemned strict Internet censorship in China and pledged to help Chinese citizens

tear down the “Great Firewall of China.” The remarks of Secretary Clinton that “we stand for a single Internet where all of humanity has equal access to knowledge and ideas” echoed the stern tone of Ronald Reagan twenty years ago when he challenged Soviet leader Mikhail Gorbachev: “Mr. Gorbachev, tear down this wall!”

In 2010 digital walls have replaced Soviet-era “bricks and mortar” to divide repressed citizens of authoritarian regimes from the world’s free-flowing current of information and ideas. Since Secretary Clinton’s visit to China, the State Department has brought the issue of online freedom to the forefront in its diplomacy around the world and joined with Internet providers and social-media companies to forge a public-private partnership in Internet freedom. Such collaboration is key, since authoritarian regimes so often contract out the daily work of censorship to private companies. But it may not be enough. Alternative solutions in U.S. domestic laws and international-trade law have fallen short of posing a viable challenge to digital censorship in China. In the final analysis, voluntary corporate codes of conduct may be the only viable force to bring down the Great Firewall of China.

### What is the Great Firewall of China?

Over sixty laws and administrative regulations have been enacted by the Chinese government to censor and limit access to the Internet.<sup>1</sup> These laws and regulations are implemented and enforced under an elaborate and sophisticated system known as the “Great Firewall of China.”

The “Great Firewall of China” is a complex matrix of filters, censors and barriers that regulate the flow of online information within the People’s Republic of China. The matrix, officially known as the “Golden Shield Project,” is comprised of both technological and human elements that work together to create a distorted version of the Internet—one without all the information the government does not want its citizens to see.

Four key elements make up the Great Firewall of China:

**IP Blocking**—The government can block a unique computer address if it hosts prohibited content.

**Keyword Filtering**—The government monitors all international Internet gateways and blocks specific pages based on keywords and content matched against a “blacklist.”

**Self-Censorship**—The government requires all Internet companies operating within China to self-censor their content or face harsh penalties and possible shutdown if they fail to do so.

**Enforcement**—It is estimated that approximately 30,000 Chinese “Internet police” are monitoring Internet traffic and blocking prohibited content.

This elaborate system can block whole sites, individual pages and even up-to-the-minute search results that constantly change in response to unfolding global news and events.

While the Chinese government identifies broad categories of prohibited content, the rules are far from clear, leaving a great deal of ambiguity about what is off limits. Without any guidance or official statement about why something may have been blocked, companies operating within China often err on the side of caution and diligently delete anything that may bring them into disfavor with the government. This is one of the reasons Google exited the country earlier this year. Given the oppressive unpredictability and gross inequities of China’s Internet censorship regime, many attempts have been made to limit its effect both in the U.S. and internationally.

### Legal Challenges to Great Firewall of China

#### The United States

Difficulties arise when U.S. Internet companies venture into foreign markets to reach out to millions of additional Internet users. In the case of China, companies that want to provide Internet services in the country must become subject to the laws and regulations of the Chinese authorities. Because most of these regulations are contrary to the liberal approach of Internet regulation found in Western states, U.S. companies are caught in a vice-grip between the demands of the Chinese government and the marked displeasure of the U.S. government and human rights organizations. The

most popular examples of companies caught in this grip are U.S. software giants Google, Microsoft, Yahoo!, and hardware maker Cisco Systems. Microsoft and Yahoo! both censor the results of their Chinese-language search engines to varying degrees by removing politically sensitive content from the search results. Google left China earlier this year but recently renewed its license with the Chinese government. The search giant, however, did not make any concessions regarding censorship—for now. For its part, Cisco Systems has been accused of supplying the Chinese government with some of the hardware used to build the Great Firewall.

The tension between China's strict Internet censorship regime and the United States' decidedly hands-off approach to the Internet prompted the U.S. Congress to consider passing a statute to promote freedom of expression on the Internet: the Global Online Freedom Act.<sup>2</sup> The primary purpose of the bill is to establish an Office of Global Internet Freedom empowered to draft a list of "Internet-restricting countries." The bill aims "[t]o prevent United States businesses from cooperating with repressive governments in transforming the Internet into a tool of censorship and surveillance, to fulfill the responsibility of the United States Government to promote freedom of expression on the Internet, to restore public confidence in the integrity of United States businesses, and for other purposes."<sup>3</sup>

Section 201 of the Act states that a "United States business that creates, provides, or hosts any Internet search engine or maintains an Internet content hosting service may not locate, within a designated Internet-restricting country, [any materials] involved in providing such search engine or content hosting service." Under the Act, Internet companies are also prohibited from altering their search engines to produce different results for users accessing the search engine from different countries.<sup>4</sup> Although the bill is unlikely to be enacted for a

host of reasons, it nonetheless points to a promising U.S. trend to look for innovative legal solutions to put an end to digital censorship in China.

Another legal innovation recently employed in the U.S. to chisel away at the Great Firewall of China is the Alien Tort Claims Act (ATCA). The ATCA provides a private cause of action for aliens for torts committed in violation of the law of nations or a treaty of the U.S.<sup>5</sup> In April 2007, the U.S.-based NGO "World Organization for Human Rights" filed a major lawsuit in a U.S. district court against Yahoo! based on the Alien Tort Claims Act, accusing the Internet corporation of aiding and abetting the Chinese authorities to arrest and torture a Chinese journalist.<sup>6</sup>

According to the Complaint, Yahoo! revealed, at the request of the Chinese authorities, the name of the journalist who was using a Yahoo! Internet account to disseminate his calls for democracy in China. Use of the ATCA could add some pressure on Internet service providers to show more respect toward basic human rights and democratic standards of free speech. Given the Supreme Court's recent trend toward narrowing the applicability of the ATCA, however, it remains to be seen whether new claims brought under the Alien Tort Claims Act will exert any meaningful pressure of China to reconsider its current regime of Internet censorship.<sup>7</sup> While the U.S. continues to develop alternative ways to address Internet regulation in China, some compelling arguments are being made at the international level.

### International Trade Law

Many in the international community have argued that China's firewall system is a barrier to entry and violates international trade law. The thrust of this argument is that the Chinese government is using the "Great Firewall" as an instrument of online protectionism, by systematically excluding foreign providers in favor of domestic services. This is why,

for example, Google's search engine is being squeezed out by Baidu, Facebook by Ren Ren Wang, and Youtube by Tudou and Youku.

Although there may be some challenges related to audio-visual media content under the General Agreement on Trade and Tariffs (GATT), the more logical approach relevant to search engines and social networking services would be to challenge the practice under the General Agreement on Trade in Services (GATS). Given the crucial structural difference between GATT and the GATS, however, the arguments are far from straight forward.<sup>8</sup> One of the most difficult challenges to overcome regarding the filtering of online content by the Chinese government is the General Exceptions clause in Article XIV of the GATS. Unless the contested measure constitutes a means of unjustifiable discrimination, the GATS cannot be invoked to prevent the adoption of laws that are "necessary to protect public morals or to maintain public order." It is possible, however, that a challenge to the measure could prevail under the WTO framework if it is shown that there exists a reasonably available alternative that is less restrictive.

While there are valid points to challenging the Great Firewall of China in the WTO context, the incendiary political fallout from bringing such a claim would undoubtedly fuel a trade war unprecedented in scale. Given the political volatility of such an approach, other less-confrontational solutions must be considered. Corporate codes of conduct present such an alternative.

### Corporate Codes of Conduct a Viable Means to Challenge Digital Censorship in China

Corporate codes of conduct played a major role in the collapse of apartheid in South Africa and are a viable means to end digital censorship in China.<sup>9</sup> Secretary Clinton's remarks concerning the "information curtain" dividing the world, echoes the in-

justices of the apartheid era where much greater injustice and unspeakable acts against humanity were challenged and ultimately overcome through the use of corporate codes of conduct.

These corporate codes of conduct, which came to be known as the Sullivan Principles, were pioneered by the African-American minister Rev. Leon Sullivan, a zealous promoter of corporate social responsibility.<sup>10</sup>

In 1977, Rev. Sullivan was a member of the board of General Motors. At the time, General Motors was one of the largest corporations in the United States. General Motors also happened to be the largest employer of blacks in South Africa, a country that was pursuing a harsh program of state-sanctioned racial segregation and discrimination targeted primarily at the country's indigenous black population.

### Corporate Codes of Conduct Originally Developed to Challenge Apartheid

Rev. Sullivan developed the codes to apply economic pressure on South Africa in protest of its system of apartheid. Before the end of South Africa's apartheid era, the principles were formally adopted by more than 125 U.S. corporations with operations in South Africa.<sup>11</sup> Of those companies that formally adopted the principles, many completely withdrew their existing operations from South Africa.<sup>12</sup> The principles eventually were widely adopted by United States-based corporations and played a significant role in the collapse of the South African regime. In reflecting on the success of his anti-apartheid efforts, Rev. Sullivan recalled:

Starting with the work place, I tightened the screws step by step and raised the bar step by step. Eventually I got to the point where I said that companies must practice corporate civil disobedience against the laws and I threatened South Africa and said in two years Mandela must be freed, apartheid must end, and blacks must vote or else I'll

bring every American company I can out of South Africa.<sup>13</sup>

Given the success of the Sullivan principles in ending apartheid, we should look at applying the same principles to lift the information curtain in China.

### Why Multinationals Should Adopt Corporate Codes of Conduct

Google, to its credit, has pioneered the corporate-code movement. Google's defiance of China's censorship mandate illustrates the power of corporate social responsibility initiatives to influence and reshape the repressive policies of authoritarian regimes.

While most major multinational companies consider a presence in China critical to their future success, Google has demonstrated that even the largest of corporations are willing to forgo short-term gain in the interest of an ultimate triumph over censorship—similar to how corporations sacrificed profits to challenge apartheid in the 1970's and 1980's. In Google's case, this will come at a cost of an estimated \$300 million a year in revenue.<sup>14</sup> Although this will hardly make a dent in Google's coffers, it is a step in the right direction.

### Conclusion

Corporations adopting codes of conduct must be unified and patient in their approach. The challenge now will be to put these ideas into practice by incorporating them into diplomacy and trade policy. Doing so will apply meaningful pressure on companies to act responsibly through the adoption of corporate codes of conduct with respect to their China operations. Pressing China to open the Internet to its people and allow for freedom of expression will not happen overnight. Indeed, the Chinese experience with the Internet is still in the early phases of development. Just as the Great Wall of China became an ancient relic of

times gone by, the Great Firewall of China may one day become one, too.

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### Endnotes:

1 These laws are not applicable in Hong Kong and Macau, which are designated as special administrative regions not subject to most of the laws of the People's Republic of China, including limits placed on the free-flow of information. H.K. Basic Law, ch. II, arts. 8, 9.

2 Global Online Freedom Act, H.R. 2271, 111th Cong. (2009-2010). This bill is in the first stage of the legislative process. It has been referred to the House Foreign Affairs Subcommittee and the House Energy and Commerce Subcommittee.

3 *Id.* Preamble.

4 *Id.* § 203.

5 28 U.S.C. § 1350 (2006). The ATCA states that: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”

6 *Wang Xiaoning v. Yahoo! Inc.*, No. C07-02151 C (N.D. Cal. Apr. 18, 2007). Under international pressure, Yahoo! settled the lawsuit. In a written statement, Yahoo! said it will provide “financial, humanitarian and legal support to these families” and create a separate “humanitarian relief fund” for other dissidents and their families. *Yahoo Settles With Chinese Families*, WASH. POST, Nov. 14, 2007.

7 See *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). In *Sosa*, the U.S. Supreme Court cautioned against liberal expansion of the ATCA beyond the original scope of offenses contemplated when it was passed in 1789: “[W]e are persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and

acceptance among civilized nations than the historical paradigms familiar when section 1350 was enacted.” *Id.* at 732-33. Within this historical context, the Court struck a balance and set forth a standard which recognized the evolving nature of international law and provided a modern framework for determining whether a tort constitutes a cause of action. The framework incorporates four features that approximate the considerations used in 1789 to establish a private right of action: universality, obligatory nature, specificity and prudential considerations.

8 The primary structural difference between the GATT and GATS is that the GATT applies to all categories of goods except those a Member specifically excludes, whereas under the GATS, they are obligated only to the sector-specific commitments they choose to assume. For example, a Member may accept GATS obligations in relation to cross-border supply of data processing services but make no similar commitments in relation to financial services.

9 Corporate codes of conduct have also been

proposed to address international environmental concerns. See, e.g., Santiago A. Cueto, *Oil's Not Well in Latin America, Curing the Shortcomings of the International Environmental Law Regime in Addressing Industrial Oil Pollution Through Corporate Codes of Conduct*, 11 FLA. J. INT'L LAW 535 (1997).

10 Richard L. Herz, *The Liberalizing Effects of Tort: How Corporate Complicity Liability Under the Alien Tort Statute Advances Constructive Engagement*, 21 HARV. HUM. RTS. J. 207, 224 (2008).

11 Cristina Baez, et al., *Multinational Enterprises and Human Rights*, 8 U. MIAMI INT'L & COMP. L. REV. 183, 327 (2000).

12 John G. Scriven, *Corporate Responsibility and Regulating the Global Enterprise*, 16 TRANSNAT'L LAW. 153, 163 (2002).

13 KEVIN MCNAMARA, *THE MACBRIDE PRINCIPLES: IRISH AMERICA STRIKES BACK*, n. 30 (U. Chi. Press 2010).

14 Miguel Helft, *For Google, a Threat to China With Little Revenue at Stake*, N.Y. TIMES, Jan. 15, 2010 at A-10.