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TikTok v. Trump:

The “Renegade” of Digital Fair Trade

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COVID-19 dramatically accelerated the global digital economy.¹ Adapting to lockdowns, both consumers and content creators “went digital,” raising the share e-commerce² holds in global retail trade to seventeen percent in 2020.³ The sharp increase in online cross-border activities was felt across industries, but one phone application certainly found the limelight: TikTok. From amassing swaths of new users to becoming the temporary face of U.S.-China political tensions, TikTok inadvertently challenged the globalized internet’s delicate yet wavering *modus operandi* and shook the already loose foundation on which digital trade policy rests.

This Comment seeks to comprehensively describe the TikTok controversy by highlighting the widening gap between digitization and the shortcomings of international digital trade policy. I first provide an overview of TikTok and its role in bringing digital regulatory concerns to the forefront in 2020. Next, I explain the *TikTok v. Trump* case, detailing the events leading to the lawsuit and why domestic policy failed the Trump Administration’s attempted ban. Then, I discuss the current state of international digital trade, highlighting why the World Trade Organization, and subsequently the international community, may be ill-equipped to address a “TikTok 2.0” properly. Finally, I will discuss two potential solutions to the digital trade problem, reiterating the value of international collaboration above other strategies.

I

OVERVIEW: WHAT IS TIKTOK?

It is vital to understand TikTok as more than a mere video-sharing app to appreciate *TikTok v. Trump* and its impact on digital trade. Thus, this section first covers the logistics of TikTok and the implications of TikTok’s Chinese origins. Second, it discusses content-specific issues

¹ Keith Nurse, *The Digital Creative Economy and Trade: Strategic Options for Developing Countries*, ADAPTING TO THE DIGITAL TRADE ERA: CHALLENGES AND OPPORTUNITIES, 254, 256 (Maarten Smeets ed., 2021), https://www.wto.org/english/res_e/booksp_e/adtera_e.pdf [<https://perma.cc/B7JS-5D74>].

² *Electronic Commerce*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/minist_e/mc11_e/briefing_notes_e/bfecom_e.htm [<https://perma.cc/V48V-534K>] [defining e-commerce as the “production, distribution, marketing, sale, or delivery of goods and services by electronic means.”].

³ *How COVID-19 Triggered the Digital and E-Commerce Turning Point*, UNCTAD (Mar. 15, 2021), <https://unctad.org/news/how-covid-19-triggered-digital-and-e-commerce-turning-point> [<https://perma.cc/JU5D-ZQBY>].

and the regulatory concerns that laid the foundation for the Trump Administration’s crusade against the app. Both elements contribute to the immensity of the dispute and how TikTok, especially in 2020, became the subject of an international controversy.

TikTok is a “short-form, video-sharing” phone application (“app”) that allows users to create, share, and interact with a network of short videos.⁴ The videos encompass anything and everything, including lip-syncing, viral dances, comedy skits, and business marketing.⁵ The app is owned by ByteDance, a privately held Chinese company headquartered in Beijing.⁶ Established in 2016, TikTok’s popularity in the United States and globally surged in 2020 as users flooded the app for entertainment amidst COVID-19 lockdowns.⁷ TikTok is maintaining its immense popularity, as the app recently celebrated breaking the one billion users mark in September 2021.⁸

The reach of TikTok is extensive. Each day, more than one billion videos are watched on the app.⁹ TikTok is active in 155 countries and was the seventh most-used social media app globally in 2021.¹⁰ TikTok’s prominent feature is its user interface: the For You video feed.¹¹ The For You feed, TikTok explains, is a unique amalgamation of individual user preferences.¹² Videos are recommended to each user based on “a number of factors,” including user behavior (tracking videos the user likes, shares, and comments on), video information

⁴ Werner Geysler, *What Is TikTok? – The Fastest Growing Social Media App Uncovered*, INFLUENCER MKTG. HUB (June 11, 2021), <https://influencermarketinghub.com/what-is-tiktok/> [https://perma.cc/SHU9-H9UR].

⁵ Paige Leskin & Palmer Haasch, *Charli D’Amelio Has Taken Over as TikTok’s Biggest Star. These Are the 40 Most Popular Creators on the Viral Video App*, INSIDER (Dec. 24, 2020, 11:42 AM), <https://www.businessinsider.com/tiktok-most-popular-stars-gen-z-influencers-social-media-app-2019-6> [https://perma.cc/8TGX-EFWJ]. See also *Getting Started*, TIKTOK, <https://www.tiktok.com/business/en-US> (discussing TikTok’s model for business marketing on the app).

⁶ Patricia M. Figliola, *TikTok: Technology Overview*, CONG. RSCH. SERV. (Sept. 29, 2020), <https://heinonline.org/HOL/P?h=hein.crs/govdcas0001&i=1> [https://perma.cc/PY6N-NL6B].

⁷ Alicia Faison, *TikTok Might Stop: Why the IEEPA Cannot Regulate Personal Data Privacy and the Need for a Comprehensive Solution*, 16 DUKE J. CONST. L. & PUB. POL’Y SIDEBAR 115, 115 (2021).

⁸ *Thanks a Billion!*, TIKTOK (Sept. 27, 2021), <https://newsroom.tiktok.com/en-us/1-billion-people-on-tiktok> [https://perma.cc/EN4J-ZLGD].

⁹ Deyan G., *33+ Amazing TikTok Statistics You Should Know in 2021*, TECHJURY (Dec. 7, 2021), <https://techjury.net/blog/tiktok-statistics/#gref> [https://perma.cc/Z4MC-TACA].

¹⁰ *Id.*

¹¹ *How TikTok Recommends Videos #ForYou*, TIKTOK (June 18, 2020), <https://newsroom.tiktok.com/en-us/how-tiktok-recommends-videos-for-you> [https://perma.cc/V98A-XK6P].

¹² *Id.*

(frequently visited hashtags), and account settings (user location, language preferences, etc.).¹³ Notably, the For You feed is designed to reflect user feedback, and the algorithm constantly changes to adapt to each user's behavior.¹⁴ This system differs from major social media platforms, such as Twitter, whose algorithm consists of a mix of chronological order and curated "rank[ed] content."¹⁵

Convenient to use and "comfortingly familiar" in content, TikTok has taken the social media game to the next level.¹⁶ The app's mass appeal comes from the way it "flips . . . social media on its head" while retaining "the ability to go viral."¹⁷ The platform "rewards content" instead of user status, meaning anyone can gain massive popularity.¹⁸ Such was experienced by now-celebrity Charli D'Amelio, the first "TikTok star" whose dance videos led her to over one hundred million followers in 2020.¹⁹ High levels of engagement and an easy to watch format, aided by the For You algorithm, made TikTok a unique outlet for user expression.²⁰

However, TikTok is more than teenagers dancing.²¹ The app is a mass marketplace of trends and ideas and has become a popular news source for young people.²² Whenever a topic trends on TikTok, it often results in mass user mobilization. Take, for example, the Black Lives Matter Movement. Although the movement is more than a trend,

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Desiree Johnson, *Understanding the Twitter Algorithm: An Essential Guide*, BITLY (Aug. 23, 2021), <https://bitly.com/blog/understanding-the-twitter-algorithm-an-essential-guide/> [<https://perma.cc/92BT-BFVC>].

¹⁶ Tom Taulli, *TikTok: Why the Enormous Success?*, FORBES (Jan. 31, 2020, 6:38 PM), <https://www.forbes.com/sites/tomtaulli/2020/01/31/tiktok-why-the-enormous-success/?sh=514a0d2065d1> [<https://perma.cc/TZE4-MFTR>].

¹⁷ *Id.*

¹⁸ *See id.*

¹⁹ Leskin & Haasch, *supra* note 5.

²⁰ *TikTok Drives High Engagement for Brands Across Industries*, INSIDER INTEL. (Aug. 30, 2022), <https://www.insiderintelligence.com/content/tiktok-drives-high-engagement-brands-across-industries> [<https://perma.cc/R8AL-2MW7>] (discussing TikTok's comparatively higher engagement rate and potential reasons why TikTok outperforms). *See also Study Shows TikTok Drives Greater Audience Engagement*, TIKTOK (July 19, 2021), <https://www.tiktok.com/business/en-US/blog/tiktok-drives-greater-audience-engagement> (discussing, from TikTok's perspective, how its model "creates a more pleasurable experience" for users).

²¹ *See New Studies Quantify TikTok's Growing Impact on Culture and Music*, TIKTOK (July 21, 2021), <https://newsroom.tiktok.com/en-us/new-studies-quantify-tiktoks-growing-impact-on-culture-and-music> [<https://perma.cc/S9JA-P4ZZ>].

²² *See id.*

TikTok users organized themselves on the app in the wake of social unrest, creating content reflecting both sides of the political spectrum.²³ Videos using the hashtag “#blacklivesmatter” flooded the app, “highlight[ing] unseen moments from protests around the country.”²⁴ In light of Russia’s invasion of Ukraine in 2022, studies indicate that “proportionately, Ukraine content on TikTok outpace[d]” platforms double its size.²⁵ Further, TikTok enabled various political *actions*, including the undermining of Trump’s Tulsa, Oklahoma, rally in 2020.²⁶ Compared to other apps, TikTok is currently foremost in its “ability to spread political messages effectively and immediately” to millions of users.²⁷

Given that content on TikTok can influence user opinions and actions, it is even more important to understand who is in control—the user, the corporation, or even the government behind the app. To that effect, the next section will discuss China’s position both as a global technology producer and as TikTok’s country of origin to break down the concerns motivating Trump’s attempt to ban the app in the United States. By concretizing how influential China’s technology policies are and how TikTok is managed, the need for better regulation in digital trade becomes apparent.

²³ Rachel Janfaza, *TikTok Serves as Hub for #blacklivesmatter Activism*, CNN (June 4, 2020), <https://www.cnn.com/2020/06/04/politics/tik-tok-black-lives-matter/index.html>. See also Taylor Lorenz, *The Political Pundits of TikTok*, N.Y. TIMES (Feb. 27, 2020), <https://www.nytimes.com/2020/02/27/style/tiktok-politics-bernie-trump.html> [<https://perma.cc/2RNC-K568>] (discussing examples of political mobilization by teenagers on both sides of the political spectrum).

²⁴ See Janfaza, *supra* note 23.

²⁵ Alex Hern, *TikTok Algorithm Directs Users to Fake News About Ukraine War, Study Says*, THE GUARDIAN (Mar. 21, 2022), <https://www.theguardian.com/technology/2022/mar/21/tiktok-algorithm-directs-users-to-fake-news-about-ukraine-war-study-says> [<https://perma.cc/9APT-DHYF>].

²⁶ Zeeshan Aleem, *Trump Saw His Tulsa Rally as a Chance to Reset His Reelection Campaign. It Did Not Go Well.*, VOX (June 21, 2020, 4:10 PM), <https://www.vox.com/2020/6/21/21298177/trump-tulsa-rally-low-turnout> [<https://perma.cc/R9Y7-BW6E>]. TikTok users united on the app to flood ticket registrations to “inflate the numbers” of those registered and “deny Trump supporters seats.” *Id.*

²⁷ See Rebecca Jennings, *This Week in TikTok: The Real Story of the Trump Rally Is Not That Interesting*, VOX (June 30, 2020), <https://www.vox.com/the-goods/2020/6/30/21307564/tiktok-trump-rally-tulsa-teens-k-pop> [<https://perma.cc/7NRF-RTLJ>].

A. Behind the Feed—China’s Ownership of TikTok and Regulatory Policies

As mentioned above, TikTok is owned by ByteDance, a Chinese company.²⁸ It is also one of the first non-U.S. social media apps to achieve worldwide popularity.²⁹ As a result, TikTok is unique insofar as it is a powerhouse app originating from a country whose technology trade practice is one of the most protectionist³⁰ globally.³¹ Against this backdrop, policymakers and tech insiders alike raised concerns about the Chinese government’s potential influence over TikTok.³² An overview of China’s digital trade behavior is needed to discern better the Trump Administration’s motivations behind banning the app and why TikTok was perceived as a threat. Understanding the nature of the government’s power over its information technology is imperative to properly framing the *TikTok v. Trump* controversy.

It is no secret that China’s government favors a highly regulatory, highly restrictive technology trade policy.³³ In China, digital

²⁸ Figliola, *supra* note 6.

²⁹ Jufang Wang, *From Banning to Regulating TikTok: Addressing Concerns of National Security, Privacy, and Online Harms*, THE FOUND. FOR L. JUST. & SOC’Y (2020), <https://www.fljs.org/sites/default/files/migrated/publications/From%20Banning%20to%20Regulating%20TikTok.pdf> [<https://perma.cc/KQ7J-7UUZ>].

³⁰ Trade protectionism is a policy stance taken by various countries, including China, whereby a country enacts “measured and purposeful policy . . . control[ling] imports while promoting exports,” usually to promote its own economy above all else. Kimberly Amadeo, *What Is Trade Protectionism?*, THE BALANCE (Mar. 29, 2022), <https://www.thebalance.com/what-is-trade-protectionism-3305896> [<https://perma.cc/6EMG-3TLD>]; *The Rise of Digital Protectionism*, COUNCIL ON FOREIGN REL. (Oct. 18, 2017), <https://www.cfr.org/report/rise-digital-protectionism> [<https://perma.cc/4QXD-Y3KT>].

³¹ Martina F. Ferracane & Hosuk Lee-Makiyama, *China’s Technology Protectionism and Its Non-Negotiable Rationales*, EUR. CTR. FOR INT’L POL. ECON., https://ecipe.org/wp-content/uploads/2017/06/DTE_China_TWP_REVIEWED.pdf [<https://perma.cc/U7AA-YA74>].

³² See Figliola, *supra* note 6.

³³ *The Rise of Digital Protectionism*, *supra* note 30 (explaining that China’s new cybersecurity law requires that “data be physically housed in China.” Apart from the logistics of having a Chinese base, tech companies must also establish improved data security systems, obtain consent from data subjects via the law’s consent requirements, appoint information protection officers, and conduct self-audits to be compliant with the law. Furthermore, companies must get permission from the Chinese government before releasing certain information across the border. Companies must also ensure that the place the data is going to has data protection requirements equal to that of Chinese law. Downstream data handlers in turn conduct data provider reviews to ensure compliance with the law. Ultimately, these requirements heavily restrict the information leaving China). See Junck et al., *China’s New Data Security and Personal Information Laws: What They Mean for Multinational Companies*, SKADDEN (Nov. 3, 2021), <https://www.skadden.com/Insights>

protectionism takes the form of “web censorship . . . forced technology transfer[s] . . . and onerous requirements on nearly every foreign company” working within China.³⁴ This is especially salient considering China’s “Great Firewall,” which limits China’s internet reciprocity with other nations.³⁵ The firewall enables protectionist practices, aiming to keep foreign influence out of the Chinese market.³⁶ Due to the firewall and other policies, U.S. companies do not have equal access to the Chinese market the way Chinese companies have access to the U.S. market.³⁷ The restriction is such that common travel websites warn U.S. travelers that China has blocked U.S. social media apps such as Facebook, Instagram, Twitter, and Snapchat, and advise travelers to download a VPN³⁸ before traveling to bypass the firewall.³⁹ Of those technology companies that bypass the firewall and operate with China’s permission, they must “enter into partnerships with Chinese compan[ies]” to service Chinese citizens.⁴⁰ The Council on Foreign Relations refers to China’s data laws as “a ‘Roach Motel’: the data comes in but cannot get out.”⁴¹

Beyond protectionism, China’s data laws put Chinese apps within the purview of the Chinese government.⁴² China’s “Internet

/Publications/2021/11/Chinas-New-Data-Security-and-Personal-Information-Protection-Laws [https://perma.cc/62AB-RWEE].

³⁴ *The Rise of Digital Protectionism*, *supra* note 30.

³⁵ Danny O’Brien, *China’s Global Reach: Surveillance and Censorship Beyond the Great Firewall*, ELEC. FRONTIER FOUND. (Oct. 10, 2019), <https://www.eff.org/deeplinks/2019/10/chinas-global-reach-surveillance-and-censorship-beyond-great-firewall> [https://perma.cc/RB83-GWWV] (describing the Great Firewall as a government surveillance system blocking access to websites based outside China).

³⁶ *See id.*

³⁷ *Id.* See Evelyn Cheng, *U.S. Firms Still Face More Restrictions in China than Chinese Firms Face in U.S., Says Business Group*, CNBC (May 13, 2021), <https://www.cnbc.com/2021/05/13/american-chamber-of-commerce-in-china-unequal-access-for-us-business.html> [https://perma.cc/73UD-EQC7] (discussing the issues plaguing reciprocal access during the time of the TikTok dispute).

³⁸ *What Is a VPN?*, CISCO, <https://www.cisco.com/c/en/us/products/security/vpn-endpoint-security-clients/what-is-vpn.html> [https://perma.cc/3ZQ9-2MLK] (explaining that a VPN, or “virtual private network,” is an “encrypted connection” securely connecting a device to a network where the device would otherwise be unauthorized).

³⁹ Josh Summers, *List of Websites and Apps Blocked in China for 2021*, TRAVEL CHINA CHEAPER (Dec. 1, 2021), <https://www.travelchinacheaper.com/index-blocked-websites-in-china> [https://perma.cc/F9V7-Q3NK].

⁴⁰ Figliola, *supra* note 6, at 9.

⁴¹ *The Rise of Digital Protectionism*, *supra* note 30.

⁴² Scott Ikeda, *China’s New Data Laws Force Tencent to Submit New Apps & Updates for Government Approval*, CPO MAG. (Nov. 29, 2021), <https://www.cpomagazine.com/data>

sovereignty” goals have transitioned into new “policy objectives” requiring the government to “control the Internet outside and inside its borders.”⁴³ China’s 2017 cybersecurity law, along with strict limitations on online activities, “mandate[s] the local storage of user data” and “allow[s] the government to conduct . . . inspection[s] of computer networks.”⁴⁴ The Personal Information Protection Law, which applies to domestic and foreign firms, requires the government to review new apps or pending app updates.⁴⁵ China’s new data laws represent a departure from the previously limited regulation of the technology industry, permitting more regulation of private companies operating in the country.⁴⁶

Further, Chinese companies must “cooperate with government intelligence operations” by allowing “access to any data collected and stored in China.”⁴⁷ TikTok refutes the claim that it shares U.S. data with the Chinese government, asserting that because U.S. user data servers are located in the United States and are only “backed up in Singapore,” U.S. data is therefore not subject to Chinese law.⁴⁸ Despite this, TikTok’s website says that collected information can be shared with ByteDance in China, and ByteDance operates under Chinese law.⁴⁹ Also, China *has* exerted influence over TikTok by “shadowbanning content” critical of Hong Kong and China.⁵⁰ Notably, ByteDance runs two different systems for the platform: the international TikTok that grants users access to “international-specific” content,⁵¹ and Douyin, China’s domestic version of the app that China regulates rather

-privacy/chinas-new-data-laws-force-tencent-to-submit-new-apps-updates-for-government-approval/ [https://perma.cc/7UWN-5ELJ].

⁴³ O’Brien, *supra* note 35.

⁴⁴ Figliola, *supra* note 6, at 6.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Jessica Maddox, *The U.S. Should Regulate TikTok – But It Should Clean Up Their Own House, Too.*, DIGIT. DIPL. (July 14, 2020), <https://medium.com/digital-diplomacy/the-u-s-should-regulate-tiktok-but-it-should-clean-up-our-own-house-too-95e84c4e0fa4> [https://perma.cc/3K52-PWVY].

⁵¹ Minnie Wang, *Douyin: More than the Chinese Version of TikTok*, CAMPAIGN ASIA (Oct. 25, 2021), <https://www.campaignasia.com/article/douyin-more-than-the-chinese-version-of-tiktok/473430#:~:text=TikTok%20is%20known%20in%20China,%3A%20%E2%80%9Cshaking%20sound%E2%80%9D> [https://perma.cc/63B2-EL3S].

heavily.⁵² It is unclear where the line is drawn, if any exists, between ByteDance’s treatment of Douyin and its operation of TikTok. Regardless, both are subject to ByteDance’s deference to the Chinese government.⁵³

Of course, the United States also aggressively surveys and regulates content on its global apps. For example, Facebook has worldwide nudity and sexual language censors applicable even in countries that permit such content.⁵⁴ In fact, Facebook has seen its fair share of privacy scandals, including a five-billion-dollar settlement with the Federal Trade Commission when Cambridge Analytica “improperly obtained and exploited . . . data from as many as 87 million users.”⁵⁵ The tension between U.S. and Chinese trade policies exasperates the “techno-national[ist]” disputes between the two countries, highlighted by both sides’ attempted protection of sensitive technologies through export controls and local laws.⁵⁶ These privacy concerns are two-sided; China’s citizenry pushed back against the idea of ByteDance selling TikTok to the United States, citing the same security risk and data control fears the United States cited against China when demanding the sale.⁵⁷ Scrutiny over TikTok may have originated in the sour political relationship between the United States and China, but anti-TikTok rhetoric took hold once TikTok’s murky data practices came to light.

B. TikTok’s Content and Data Collection Issues

TikTok’s reputation is partially marred by the perception that it is an unsafe app to use.⁵⁸ Although TikTok’s Chinese origin may have aroused the Trump Administration’s concern, a valid criticism at the

⁵² See *Chinese Version of TikTok Limits Use of App by Those Under 14*, REUTERS (Sept. 18, 2021), <https://www.reuters.com/technology/chinese-version-tiktok-limits-use-app-by-those-under-14-2021-09-18/> [<https://perma.cc/Z2MM-LAY2>].

⁵³ Sean Zvi, *Walking the Tightrope Between National Security Threats and Foreign Policy: How the United States Can Protect Its Citizens from Foreign Threats on the Internet and Social Media Without Hurting the Economy*, 21 J. INT’L BUS. & L. 111, 125 (2021).

⁵⁴ O’Brien, *supra* note 35.

⁵⁵ Lawrence J. Trautman, *Governance of the Facebook Privacy Crisis*, 20 PITT. J. TECH. L. & POL’Y 43, 110 (2020).

⁵⁶ Figliola, *supra* note 6.

⁵⁷ Will Knight, *TikTok a Year After Trump’s Ban: No Change, but New Threats*, WIRED (July 26, 2021), <https://www.wired.com/story/tiktok-year-trump-ban-no-change-new-threats/> [<https://perma.cc/ZH94-B7XV>].

⁵⁸ See Rachel Treisman, *The FBI Alleges TikTok Poses National Security Concerns*, NPR (Nov. 17, 2022), <https://www.npr.org/2022/11/17/1137155540/fbi-tiktok-national-security-concerns-china> [<https://perma.cc/2LKX-SYTV>].

time was TikTok's acquisition and unclear use of user data.⁵⁹ *TikTok v. Trump* ultimately required a legal, not political, basis for the dispute. The company's alleged mishandling of content and data provided such a basis, leading to the Trump Administration's argument that TikTok was a threat to U.S. national security.⁶⁰ This section proceeds by outlining TikTok's alleged problems and the lack of domestic solutions to those issues, demonstrating why executive action was taken in the first place.

Distinct from the national security concern, TikTok's internal data collection and content moderation policies were questionable. TikTok's For You feed is powered by an algorithm that collects massive amounts of user data without much transparency.⁶¹ Furthermore, the lack of a concerted effort to regulate videos allows harmful content to slip through the cracks and pop up on the feed of users of any age or disposition. All these factors, as well as political motivations, set the stage for Trump's attempted TikTok ban.

One important part of the Trump Administration's concern over TikTok was the app's possible spread of hostile propaganda.⁶² On paper, TikTok maintains a strict content policy.⁶³ The app touts extensive community guidelines, claiming to "take a firm stance" against violent extremism, the promotion of dangerous organizations, discrimination, and abuse.⁶⁴ To enforce its policy, TikTok uses "a mix of technology and human moderation" and claims to "remove any content" that violates the guidelines.⁶⁵ Exceptions are made for content that falls "in the public interest" and "enables individual expression on topics of social importance."⁶⁶ In TikTok's second-quarter

⁵⁹ *See id.*

⁶⁰ *Id.*

⁶¹ *How TikTok Recommends Videos #ForYou*, supra note 11.

⁶² Administration of Donald J. Trump, *2020 Letter to Congressional Leaders on Addressing the Threat Posed by TikTok and Taking Additional Steps to Address the National Emergency with Respect to the Information and Communications Technology and Services Supply Chain*, DAILY COMP. PRES. DOCS. 1 (Aug. 6, 2020), <https://heinonline.org/HOL/P?h=hein.fedreg/dcpd20580&i=1> [hereinafter Letter to Congress].

⁶³ *See Community Guidelines*, TIKTOK, <https://www.tiktok.com/community-guidelines?lang=en#39> [<https://perma.cc/LQ7V-STD5>].

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

transparency report, the company alleges it removed over 81.5 million videos, which is about one percent of all videos uploaded to the app.⁶⁷

The unfortunate reality of social media is that many companies forego their terms of service and avoid maximizing their internal regulatory power, ultimately permitting content that otherwise violates their rules.⁶⁸ U.S. apps have equally landed in hot water for their in-app regulatory failings, so TikTok is not unique in that regard.⁶⁹ However, where TikTok differentiates itself is in its format. Whereas extremists on Facebook might opt to create a private group to share posts or have private accounts, TikTok enables the formation of “specific, niche communities,” which are a “core part” of user interaction and, most importantly, are public to all.⁷⁰ Some of these communities are harmless interest groups formed around pop culture or lifestyle.⁷¹ Others are not.⁷² Various organizations have conducted their own content investigations with alarming findings.⁷³ Among the concerning micro-groups are those that promoted militarism against the U.S. government, fearmongering about white genocide, and far-right accelerationism.⁷⁴ Reacting to the pandemic lockdowns of 2020 and 2021, these groups also spread COVID-19 conspiracy theories, going so far as to call for the execution of public health officials like Dr. Anthony Fauci.⁷⁵ Important to the success of these campaigns is that

⁶⁷ *TikTok Q2 2021 Community Guidelines Enforcement Report*, TIKTOK SAFETY CTR. (Oct. 13, 2021), [https://www.tiktok.com/safety/resources/tiktok-transparency-report-2021-q-2?lang=en&appLaunch=\[https://perma.cc/7QRE-26US\]](https://www.tiktok.com/safety/resources/tiktok-transparency-report-2021-q-2?lang=en&appLaunch=[https://perma.cc/7QRE-26US]).

⁶⁸ See Michael A. Cusumano, et al., *Pushing Social Media Platforms to Self-Regulate*, THE REGUL. REV. (Jan. 3, 2022), <https://www.theregview.org/2022/01/03/cusumano-yoffie-gawer-pushing-social-media-self-regulate/> [https://perma.cc/4ZUP-NLXT].

⁶⁹ See Bobby Allyn, *Here Are 4 Key Points from the Facebook Whistleblower’s Testimony on Capitol Hill*, NPR (Oct. 5, 2021, 9:30 PM), <https://www.npr.org/2021/10/05/1043377310/facebook-whistleblower-frances-haugen-congress> [https://perma.cc/AX6C-3QRC] (“Facebook consistently [chooses] to maximize its growth rather than implement safeguards on its platforms.”).

⁷⁰ Ciarán O’Connor, *Hatescape: An In-Depth Analysis of Extremism and Hate Speech on TikTok*, INST. FOR STRATEGIC DIALOGUE 7 (Aug. 2021), <https://www.politico.eu/wp-content/uploads/2021/08/24/ISD-TikTok-Hatescape-Report-August-2021.pdf> [https://perma.cc/AV7H-23AV].

⁷¹ See *id.*

⁷² *Id.* (explaining that Vice “uncovered support for neo-Nazi groups,” Media Matters discovered “far-right militia groups in the U.S.,” and the Wall Street Journal reported on the promotion of ISIS on TikTok).

⁷³ *Id.*

⁷⁴ *Id.* (explaining that far-right accelerationism is an ideology which believes that “social collapse should be accelerated by any means necessary” to enable the rise of a fascist ethno-state).

⁷⁵ *Id.*

there is no one true source to blame, especially amidst successful evasion tactics these creators have at their disposal.⁷⁶ Thus, truly anyone, or any entity, could be behind the misinformation. To this extent, the Trump Administration was partially moved to act against TikTok by the possibility that the Chinese government could, at any time, engage in the same tactic to influence American citizens.⁷⁷

In-app regulation, especially for a globally used app, is tricky. Typically, app companies are beholden to the laws of their nation of incorporation and the nation they operate within.⁷⁸ China is the nation of ByteDance's incorporation, so Chinese law does apply. As *TikTok v. Trump* involved U.S. laws and policy, this Comment will explain U.S. app regulation to contextualize the conflict further. In the United States, there is "no overarching data protection law," and typically the responsibility falls on app developers to "provid[e] protections and transparency regarding the use of data."⁷⁹ Further, app regulation in the United States is stymied by section 230 of the Communications Decency Act, which states in part that "no provider . . . of an interactive computer service shall be treated as the publisher . . . of any information provided by another information content provider."⁸⁰ Essentially, this provision protects an app provider from being held accountable for what its users say and deprioritizes regulation since no liability is assigned to inaction.⁸¹

Without firm federal guidelines, app regulation becomes a creature of contract. TikTok use in the United States is governed by an end user license agreement that includes the legal rights and restrictions applying to TikTok use by U.S. citizens.⁸² However, TikTok's team has the responsibility to enforce said terms. And although the Federal Trade Commission (FTC), the United States's primary regulatory agency in

⁷⁶ *Id.* at 42–44. (providing an example of previously banned users who "respawn" with usernames merely a letter or number off from their previous account and pick up right where they left off. Accounts promoting propaganda or other falsities may also restrict comments on their videos or temporarily "go private" to avoid being reported, becoming a public account again once the threat has dissipated).

⁷⁷ Letter to Congress, *supra* note 62.

⁷⁸ *How to Determine Your Law of Reference?*, IUBENDA, <https://www.iubenda.com/en/help/524-how-to-determine-your-law-of-reference> [<https://perma.cc/S7FF-QL47>].

⁷⁹ *Mobile Privacy in the U.S.*, GOLDEN DATA (May 14, 2019), <https://medium.com/golden-data/mobile-privacy-in-the-us-c4a619e07e2b> [<https://perma.cc/T4N5-MHJ2>].

⁸⁰ 47 U.S.C. § 230(c)(1).

⁸¹ See *Section 230 of the Communications Decency Act*, ELEC. FRONTIER FOUND., <https://www.eff.org/issues/cda230> [<https://perma.cc/D743-6R5G>].

⁸² *Legal*, TIKTOK (Feb. 2019), <https://www.tiktok.com/legal/terms-of-service?lang=en#terms-us> [<https://perma.cc/JDJ9-WGYA>].

this field, has acted against Facebook and TikTok,⁸³ the FTC’s power is limited due to its resources.⁸⁴ As such, external regulation by the U.S. government primarily occurs only when suspicious activity prompts an investigation.⁸⁵ Furthermore, an investigation into any particular social media app may be futile for an agency like the FTC. TikTok is a difficult platform to research because its algorithm constantly changes by continuously adapting to the user’s behavior.⁸⁶ The For You feed refreshes the videos shown to a user each time the app is opened, which makes it difficult to access particular videos without rigorous and costly searches.⁸⁷ All in all, absent involvement from the government, so long as a video is not removed by TikTok itself, users are free to market themselves, their products, and, more contentiously, their political ideals to virtually anyone who uses the app.⁸⁸

Disinformation is only one part of the problem. Another vital aspect of why TikTok is so controversial comes from the way it collects user data to support its algorithm, from which the app derives so much of its success.⁸⁹ To sustain its intensive feed curation, TikTok engages in intensive data collection, inciting concerns from both citizens and governments alike.⁹⁰ As data transfers are a part of digital trade, knowing what comes in and what goes out is important to ensuring nations are not taking advantage of each other. In terms of TikTok, the

⁸³ Press Release, Fed. Trade Comm’n, FTC Issues Orders to Nine Social Media and Video Streaming Services Seeking Data About How They Collect, Use, and Present Information (Dec. 14, 2020), <https://www.ftc.gov/news-events/press-releases/2020/12/ftc-issues-orders-nine-social-media-video-streaming-services> [<https://perma.cc/5Z3X-RRRL>].

⁸⁴ Chris Jay Hoofnagle, et al., *The FTC Can Rise to the Privacy Challenge, but Not Without Help from Congress*, BROOKINGS (Aug. 8, 2019), <https://www.brookings.edu/blog/techtank/2019/08/08/the-ftc-can-rise-to-the-privacy-challenge-but-not-without-help-from-congress/> [<https://perma.cc/2LDD-PRNP>].

⁸⁵ See generally *Factbox: How TikTok, Caught in U.S. Regulatory Crossfire, Rose to Global Video Stardom*, REUTERS (Nov. 4, 2019), <https://www.reuters.com/article/us-tiktok-cfius-factbox/factbox-how-tiktok-caught-in-u-s-regulatory-crossfire-rose-to-global-video-stardom-idUSKBN1XE0PU> [<https://perma.cc/AV8U-V7NZ>]. In February 2019, TikTok paid \$5.7 million to the FTC over “illegal [data] collection” from minors. *Id.* This indicates that most external regulation by the United States is retroactive, where the FTC responds to violations instead of instituting proactive checks on TikTok’s activity. See *id.*

⁸⁶ *How TikTok Recommends Videos #ForYou*, supra note 11.

⁸⁷ O’Connor, supra note 70, at 4.

⁸⁸ See *id.*

⁸⁹ Ben Smith, *How TikTok Reads Your Mind*, N.Y. TIMES (Dec. 5, 2021), <https://www.nytimes.com/2021/12/05/business/media/tiktok-algorithm.html> [<https://perma.cc/Q263-QAA2>]. “In pursuit of the company’s ultimate goal of adding daily active users, it has chosen to optimize . . . retention . . . and time spent . . . to keep you there as long as possible.” *Id.*

⁹⁰ See *id.*

U.S. government's concern developed in two forms: user data privacy and national security.⁹¹

TikTok's data privacy protection did fall short in certain areas.⁹² For one, TikTok's content delivery system, which transmits data to servers, was highly criticized for sending information via Hypertext Transfer Protocol (HTTP), not Hypertext Transfer Protocol Secure (HTTPS).⁹³ This means the "data was not encrypted when it was sent back," which is concerning seeing that "unencrypted data is easier to access by outside parties."⁹⁴ As a grim indication of the security weakness, a research team was able to exploit TikTok's use of HTTP to "monitor the videos being watched by specific users or IP addresses" and "alter the downloaded content."⁹⁵ TikTok also collects huge swaths of user data, like location, phone model information, and user behaviors.⁹⁶ In the United States, TikTok is also able to collect biometric information such as face and voiceprints.⁹⁷ This being said, it is disingenuous to frame data privacy as the sole crux of the issue, because U.S. apps like

⁹¹ Dave Johnson, *Is TikTok Safe? Here's What You Need to Know*, BUS. INSIDER (May 3, 2022), <https://www.businessinsider.com/is-tiktok-safe> [<https://perma.cc/NDN5-TTU4>].

⁹² See *id.*; Emily Baker-White, *Leaked Audio from 80 Internal TikTok Meetings Shows that U.S. User Data Has Been Repeatedly Accessed from China*, BUZZFEED NEWS (June 17, 2022), <https://www.buzzfeednews.com/article/emilybakerwhite/tiktok-tapes-us-user-data-china-bytedance-access> [<https://perma.cc/7MNG-TVQ7>] (reinvigorating the conversation around TikTok and data privacy in 2022). For an international example, see *UK May Fine TikTok \$29 Million for Failing to Protect Children's Privacy*, REUTERS (Sept. 26, 2022), <https://www.reuters.com/world/uk/uk-could-fine-tiktok-29-mln-failing-protect-childrens-privacy-2022-09-26/> [<https://perma.cc/QJ3S-RRC7>].

⁹³ Maddox, *supra* note 50. Both HTTP and HTTPS are "prescribed order[s] and syntax for presenting information" in data transfers. For example, the two are used at the very beginning of a web address when surfing the internet. Functionally, when users open a connection with a server, like when a person logs into Facebook on their laptop, a session key is formed, which connects the device to the site. HTTPS is encrypted, while HTTP is not, which means "malicious actors can just read the text in the request . . . and know exactly the information someone is asking for, sending, or receiving." *Why Is HTTP Not Secure? HTTP vs. HTTPS*, CLOUDFARE, <https://www.cloudflare.com/learning/ssl/why-is-http-not-secure/> [<https://perma.cc/356X-N96G>].

⁹⁴ *Id.*

⁹⁵ Zak Doffman, *TikTok Users Beware: This Is How Hackers Can Send Dangerous Videos to Your iPhone or Android*, FORBES (Apr. 13, 2020), <https://www.forbes.com/sites/zakdoffman/2020/04/13/tiktok-users-beware-this-is-how-hackers-can-swap-your-videos-for-dangerous-fakes/?sh=748d71353cc8> [<https://perma.cc/FKZ3-ND3N>].

⁹⁶ Joe Tidy, *TikTok: What Is the App and How Much Data Does It Collect?*, BBC (Aug. 3, 2020), <https://www.bbc.com/news/technology-53476117> [<https://perma.cc/D8MP-TBQR>].

⁹⁷ Kate O'Flaherty, *All the Ways TikTok Tracks You and How to Stop It*, WIRED (Oct. 23, 2021, 6:00 AM), <https://www.wired.co.uk/article/tiktok-data-privacy> [<https://perma.cc/4NLS-Q2AD>].

Facebook use substantially similar tactics, just based within the United States.⁹⁸

Furthermore, in terms of national security, concern arose within the Trump Administration as to what exactly China could do with the information it had.⁹⁹ The U.S. government speculated that Beijing’s alleged employment of “hackers to uncover . . . intellectually sensitive information in the U.S.” could be used to target federal workers who use the app recreationally.¹⁰⁰ If someone hacks the device using TikTok, the infiltration could expose information of national concern.¹⁰¹ Given the uncertainty of China’s potential influence over the app, it is unsurprising that the video platform received pushback.¹⁰² Throughout the first half of 2020, various U.S. agencies, including the Department of Defense, the Department of Homeland Security, and the State Department, banned TikTok use on government devices.¹⁰³ The U.S. military followed suit, disallowing the app from its devices.¹⁰⁴ Prioritizing national security, the Senate Committee on Homeland Security issued an order prohibiting “any individuals [employed by the government] from downloading and using TikTok on any device issued by the United States.”¹⁰⁵

Beyond the scope of tangible data hacks, the idea of Chinese influence on TikTok itself posed an additional alleged national security risk.¹⁰⁶ Lingering fear involving Russia’s “use of social media” to “sow divisiveness and . . . undermine democracy” during the 2016 election

⁹⁸ See Ausma Bernot, *Even if TikTok and Other Apps Are Collecting Your Data, What Are the Actual Consequences?*, THE CONVERSATION (July 20, 2022), <https://theconversation.com/even-if-tiktok-and-other-apps-are-collecting-your-data-what-are-the-actual-consequences-187277> [<https://perma.cc/VB8T-J8K8>].

⁹⁹ Letter to Congress, *supra* note 62.

¹⁰⁰ Shirin Ghaffary, *Do You Really Need to Worry About Your Security on TikTok? Here’s What We Know.*, VOX (Aug. 11, 2020), <https://www.vox.com/recode/2020/8/11/21363092/why-is-tiktok-national-security-threat-wechat-trump-ban> [<https://perma.cc/LQ52-A6VD>].

¹⁰¹ *Id.*

¹⁰² *See id.*; *No TikTok on Government Devices Act*, U.S. COMM. ON HOMELAND SEC. AND GOVT. AFF., S. Rept. 116–250 1 (2020).

¹⁰³ *Id.*

¹⁰⁴ Ben Kesling & Georgia Wells, *U.S. Military Bans TikTok over Ties to China*, WALL ST. J. (Jan. 3, 2020, 5:30 PM), <https://www.wsj.com/articles/u-s-military-bans-tiktok-over-ties-to-china-11578090613> [<https://perma.cc/KX4J-PJ8R>].

¹⁰⁵ S. Rept. 116–250 1 (2020).

¹⁰⁶ David A. Hoffman, *Schrems II and TikTok: Two Sides of the Same Coin*, 22 N.C. J.L. & TECH. 573, 577 (2021).

carried over to TikTok.¹⁰⁷ The Trump Administration maintained that the Chinese government moderates TikTok content and “bans” content involving criticism of the Chinese government altogether.¹⁰⁸ As mentioned above, if it is the case that China is able to access U.S. data and control the narrative of TikTok, then it is undoubtedly an issue of national security for the United States, as the Chinese government could “manipulate feeds” to influence “impressionable” users on the app.¹⁰⁹

Other nations matched the United States’s concern. India initially banned TikTok in 2019,¹¹⁰ with an indefinite extension in July 2020.¹¹¹ Similarly to the United States, India’s motives appeared mixed between privacy and politics.¹¹² India’s ministry claims the apps were “prejudicial to [the] sovereignty and integrity of India, defen[se] of India, [and the] security of state and public order.”¹¹³ However, the ban also followed “a skirmish with Chinese troops at a disputed Himalayan border site,” implicating “political tension” between the two countries.¹¹⁴ Pakistan also banned TikTok, claiming the app “promote[s] obscenity and vulgarity” and dismissing the allegation that the ban was politically motivated to silence government critics.¹¹⁵ The

¹⁰⁷ Lawrence J. Trautman, *Governance of the Facebook Privacy Crisis*, 20 PITT. J. TECH. L. & POL’Y 43, 108 (2019–2020).

¹⁰⁸ *Id.*

¹⁰⁹ Zak Doffman, *Yes, TikTok Has a Serious China Problem – Here’s Why You Should Be Concerned*, FORBES (July 9, 2020), <https://www.forbes.com/sites/zakdoffman/2020/07/09/tiktok-serious-china-problem-ban-security-warning/?sh=491e9511f22a> [https://perma.cc/39UP-LL7G].

¹¹⁰ Manish Singh, *India Bans TikTok, Dozens of Other Chinese Apps*, TECHCRUNCH (June 29, 2020, 8:37 AM), <https://techcrunch.com/2020/06/29/india-bans-tiktok-dozens-of-other-chinese-apps/> [https://perma.cc/KPW7-73DU].

¹¹¹ *TikTok Is One of Many Chinese Apps to Be Banned by India*, GQ (June 29, 2020), <https://www.gq.com.au/entertainment/tech/tiktok-is-one-of-many-chinese-apps-to-be-banned-by-india/news-story/2d8752e7139debb1230222e6b8917773> [https://perma.cc/4E8B-QW23].

¹¹² See Aditya Kalra, *ByteDance Cuts India Workforce, Unsure of Comeback After App Ban: Internal Memo*, REUTERS (Jan. 26, 2021), <https://www.reuters.com/article/us-bytedance-india/bytedance-cuts-india-workforce-unsure-of-comeback-after-app-ban-internal-memo-idUSKBN29W0JR> [https://perma.cc/K2R2-NCDY].

¹¹³ Sankalp Phartiyal, *India Retains Ban on 59 Chinese Apps, Including TikTok*, REUTERS (Jan. 26, 2021), <https://www.reuters.com/article/india-china-apps/india-retains-ban-on-59-chinese-apps-including-tiktok-idUSKBN29V15X> [https://perma.cc/7KWE-H4HX].

¹¹⁴ Kalra, *supra* note 112.

¹¹⁵ Salman Masood, *Pakistan Bans TikTok, Citing Morals. Others Cite Politics.*, N.Y. TIMES (Oct. 11, 2020), <https://www.nytimes.com/2020/10/11/technology/tiktok-pakistan-ban.html> [https://perma.cc/DJ3N-HHE3].

Australian government also claimed to be “looking very closely” at TikTok, although no ban followed.¹¹⁶

TikTok is immensely popular. Users internalize massive amounts of information and even use the app to mobilize politically. Furthermore, it is a Chinese app, beholden to Chinese law.¹¹⁷ Public concern mounted over what TikTok and, by extension, China did with the data collected from TikTok users. Given all these components, it is no surprise that TikTok became an international issue. Empowered by an outspoken Congress and TikTok’s public shortcomings, then-President Trump made his move—on August 6, 2020, Trump issued Executive Order 13942, banning TikTok in the United States.¹¹⁸

II

TIKTOK V. TRUMP

Before addressing the legal implications of *TikTok v. Trump*, this section addresses the events leading up to the lawsuit. Next, it explains the outcome of the litigation and the courts’ rationales. This section then concludes by explaining why the Trump Administration’s ban failed, particularly by highlighting the weaknesses in domestic law when it comes to addressing digital trade disputes of this type.

A. Framing the Dispute

The official effort to ban TikTok was relatively swift. However, the relevant executive orders and methods used to implement the ban were crucial to why the courts decided in TikTok’s favor. Piecing together the actions taken by the Trump Administration helps frame the lawsuit and the insufficiencies in U.S. law.

On July 31, 2020, Trump announced the U.S. government’s intent to ban TikTok absent ByteDance’s divestiture of its interest in the app.¹¹⁹ Without much time for TikTok to react, the Trump Administration next attempted to force ByteDance’s hand as

¹¹⁶ Stephen Dziedzic, *TikTok Ban ‘Not Necessary’ but Prime Minister Scott Morrison Urges Caution over App’s China Connection*, ABC NEWS (Aug. 4, 2020, 7:52 PM), <https://www.abc.net.au/news/2020-08-05/prime-minister-scott-morrison-says-government-wont-ban-tiktok/12526246> [https://perma.cc/42BB-UVZJ].

¹¹⁷ See Figliola, *supra* note 6.

¹¹⁸ Exec. Order No. 13942, 85 Fed. Reg. 48637 (Aug. 6, 2020).

¹¹⁹ Makena Kelly, *President Trump Plans to Sever TikTok from Its Chinese Owner*, BLOOMBERG, THE VERGE (July 31, 2020, 1:55 PM), <https://www.theverge.com/2020/7/31/21349841/trump-tiktok-bytedance-sell-ownership-china-us-order-ban> [https://perma.cc/2R4Q-Q6RM].

manifested in the August 6 Executive Order (Exec. Order No. 13942), which directed the Secretary of Commerce to prohibit any transactions with ByteDance under the International Emergency Economic Powers Act (IEEPA).¹²⁰ Strategically for the Trump Administration, Trump had executed Exec. Order No. 13942's precursor, Exec. Order No. 13873, which had established a national emergency regarding the spread of foreign apps and information technology in the United States.¹²¹ Declaring a national emergency was crucial for the U.S. government's ban on TikTok—the president cannot exercise his IEEPA powers until after declaring a national emergency.¹²²

However, Trump pulled back Exec. Order No. 13942 on August 14, 2020, by signing a new executive order giving ByteDance ninety days to divest its interest in U.S. operations.¹²³ This new order mirrored Trump's July 31 announcement and seemed willing to give TikTok a chance. Interestingly, divestment has been an option since 2019, when the Council on Foreign Investment in the United States (CFIUS) began investigating ByteDance's acquisition of the U.S. app Musical.ly.¹²⁴ Musical.ly effectively became TikTok once the merger went through, migrating all Musical.ly accounts to TikTok and opening the door for TikTok use in the United States.¹²⁵ However, CFIUS requires a review of any deals involving "foreign investments in the United States."¹²⁶ ByteDance "did not submit the transaction to CFIUS" when it acquired Musical.ly, thus violating CFIUS rules.¹²⁷ Although CFIUS did not immediately act on TikTok's violation in 2019, it certainly influenced the Trump Administration's strategy here.¹²⁸ ByteDance needed to find

¹²⁰ Exec. Order No. 13942, *supra* note 118.

¹²¹ Exec. Order No. 13873, 3 C.F.R. § 317 (May 15, 2019).

¹²² Faison, *supra* note 7, at 118.

¹²³ Executive Orders, *Order Regarding the Acquisition of Musical.ly by ByteDance, Ltd.* (Aug. 14, 2020), <https://trumpwhitehouse.archives.gov/presidential-actions/order-regarding-acquisition-musical-ly-bytedance-ltd/> [<https://perma.cc/V6LC-SNB9>].

¹²⁴ Greg Roumeliotis et al., *Exclusive: U.S. Opens National Security Investigation into TikTok – Sources*, REUTERS (Nov. 1, 2019), <https://www.reuters.com/article/us-tiktok-cfius-exclusive/exclusive-u-s-opens-national-security-investigation-into-tiktok-sources-idUSKBN1XB4IL> [<https://perma.cc/5XH9-RC8K>].

¹²⁵ Dami Lee, *The Popular Musical.ly App Has Rebranded as TikTok*, THE VERGE (Aug. 2, 2018), <https://www.theverge.com/2018/8/2/17644260/musically-rebrand-tiktok-bytedance-douyin> [<https://perma.cc/CGK9-XWVD>].

¹²⁶ William Alan Reinsch et al., *TikTok Is Running Out of Time: Understanding the CFIUS Decision and Its Implications*, CTR. FOR STRATEGIC & INT'L STUD. (Sept. 2, 2020), <https://www.csis.org/analysis/tiktok-running-out-time-understanding-cfius-decision-and-its-implications> [<https://perma.cc/Y4F4-NKV8>].

¹²⁷ *Id.*

¹²⁸ *See id.*

a U.S. buyer to take over TikTok.¹²⁹ On September 14, 2020, although not a proper sale, it appeared that U.S. company Oracle agreed to a partnership with ByteDance, making Oracle “[the company’s] trusted technology provider in the United States.”¹³⁰ ByteDance had until November 27, 2020, to get the deal approved.¹³¹

For unknown reasons, the proposed partnership between ByteDance and Oracle never came to fruition. On September 18, 2020, the Secretary of Commerce “published a list of five transactions to be prohibited” with ByteDance, the first being a prohibition against “distribut[ing] or maintain[ing]” TikTok after September 27, 2020.¹³² The first prohibition had an earlier imposition date than the other four to allow for “a phased approach” and “freedom to [further] negotiate a possible divestment of ByteDance’s interest in TikTok.”¹³³ For the United States, this effectively translated to a “ban first, talk later” policy stance against the app, cutting short ByteDance’s negotiation period with Oracle. Given the time constraint and impending shutdown, TikTok sued the Trump Administration on September 18, 2020, filing for a preliminary injunction against the first prohibition on September 23.¹³⁴

B. Outcome of Litigation

Compared to the dramatic coverage of the TikTok dispute, the actual litigation of the TikTok ban sputtered and died amidst a series of preliminary injunctions favoring TikTok. This section will explain why domestic law favoring free speech overpowered the concern over national security, especially without substantive evidence to back the Trump Administration’s claim.

TikTok won the initial lawsuit before Judge Nichols in the U.S. District Court for the District of Columbia on September 27, 2020.¹³⁵ There, Judge Nichols determined that the first prohibition against TikTok’s distribution or maintenance “exceed[ed] the lawful bounds

¹²⁹ Figliola, *supra* note 6, at 5.

¹³⁰ *Id.* at 7.

¹³¹ *Id.* at 8. The deadline was then extended by CFIUS to December 4, 2022. Jay Greene, *TikTok Sale Deadline Will Pass, Though Regulators Will Hold Off on Enforcing Divestiture*, THE WASH. POST (Dec. 4, 2020), <https://www.washingtonpost.com/technology/2020/12/04/tiktok-sale-deadline/> [<https://perma.cc/B6UU-A23W>].

¹³² *TikTok Inc. v. Trump*, 490 F. Supp. 3d 73, 77 (D.D.C. 2020).

¹³³ *Id.* at 79.

¹³⁴ *Id.* at 77.

¹³⁵ *Id.*

proscribed by [the] IEEPA.”¹³⁶ As it stood, TikTok, classified in part as a personal communication service, appeared exempt from the prohibition because the IEEPA explicitly protects personal communications.¹³⁷ TikTok also met its burden proving “irreparable harm” to its user base without an injunction, as it would lose the entire U.S. market.¹³⁸ As a result, the injunction was granted, and the first prohibition did not take effect as intended.¹³⁹ Because the scope of a preliminary injunction is limited to the specific harm raised, the decision as to the other four prohibitions listed by the Secretary of Commerce was deferred until December 4, 2020.¹⁴⁰

In the interim, the Trump Administration faced another lawsuit in a Pennsylvania federal court.¹⁴¹ In this auxiliary lawsuit, three TikTok creators sued the federal government, alleging that the ban would cause them to “lose access” to their TikTok followers, “as well as to the professional opportunities afforded by [the app].”¹⁴² Judge Beetlestone, the assigned judge for this case, cited similar concerns to Judge Nichols, stating that TikTok videos are “expressive and informative” and “expressly protected under the [IEEPA].”¹⁴³

On December 7, 2020, Judge Nichols granted preliminary injunctions against the Secretary’s four remaining prohibitions,¹⁴⁴ reaffirming that the ban fell outside the IEEPA and stating that the Secretary “acted in an arbitrary and capricious manner by failing to consider obvious alternatives.”¹⁴⁵

Although the Trump Administration was poised to appeal the decision, no legal progress on this case occurred before Trump lost reelection. Joe Biden became president¹⁴⁶ and subsequently dismissed the lawsuit on July 14, 2021.¹⁴⁷ With Trump’s departure from office,

¹³⁶ *Id.* at 80.

¹³⁷ *Id.* at 83.

¹³⁸ *Id.* at 79.

¹³⁹ *Id.* at 76.

¹⁴⁰ *TikTok Inc. v. Trump*, 507 F. Supp. 3d 92, 101 (D.D.C. 2020).

¹⁴¹ *Marland v. Trump*, 498 F. Supp. 3d 624, 628 (E.D. Pa. 2020).

¹⁴² *Id.* at 632.

¹⁴³ *Id.* at 636.

¹⁴⁴ *TikTok Inc. v. Trump*, 507 F. Supp. 3d at 96.

¹⁴⁵ *Id.* at 114–15.

¹⁴⁶ Mark Sherman, *Electoral College Makes It Official: Biden Won, Trump Lost*, AP NEWS (Dec. 14, 2020), <https://apnews.com/article/electoral-college-confirm-joe-biden-win-2d4fd7368d8fd6cb47ff0b2cc206271a> [<https://perma.cc/W6KE-S2VD>].

¹⁴⁷ *TikTok Inc. v. Biden*, No. 20-5381, 2021 U.S. App. LEXIS 22070, at *1 (D.C. Cir. July 14, 2021).

ByteDance later abandoned its deal with Oracle, ending the United States’s effort to secure control over TikTok.¹⁴⁸

Actions involving TikTok have slowed since President Biden dismissed the lawsuit. Biden revoked Trump’s executive orders targeting TikTok and other Chinese apps.¹⁴⁹ As a replacement to Trump’s orders, President Biden signed Exec. Order No. 14034 on June 9, 2021, titled “Executive Order on Protecting Americans’ Sensitive Data from Foreign Adversaries.”¹⁵⁰ The Executive Order sets “rigorous, evidence-based” analysis standards to address “any unacceptable or undue risks” relating to national security and foreign policy.¹⁵¹ The responsibility is placed on the Secretary of Commerce to continually evaluate “software applications that may pose an undue risk of sabotage” and “take appropriate action.”¹⁵² The Department of Commerce was also given a deadline—120 days to provide recommendations on privacy protection for Americans for foreign apps, including TikTok.¹⁵³ Although a spokesperson for the Department of Commerce confirmed that the department did submit “initial recommendations” to national security advisors,¹⁵⁴ limited information has since been divulged as to what those recommendations look like. The relative silence on the matter was addressed by U.S. Senators who requested answers to questions relating to the 120-day deadline findings.¹⁵⁵ As of the writing of this Comment, no new

¹⁴⁸ Julie Gerstein, *ByteDance Is Walking Away from Its TikTok Deal with Oracle Now that Trump Isn’t in Office, Report Says*, BUS. INSIDER (Feb. 15, 2021), <https://www.businessinsider.com/bytedance-ending-oracle-deal-because-trump-is-out-scmp-2021-2> [<https://perma.cc/DK2K-D7F8>].

¹⁴⁹ Brian Fung, *President Biden Revokes Trump Executive Orders Targeting TikTok and WeChat and Issues Fresh Order*, CNN (June 9, 2021), <https://www.cnn.com/2021/06/09/politics/tiktok-wechat-executive-order/index.html> [<https://perma.cc/SM3Z-BWKR>].

¹⁵⁰ Exec. Order No. 14034, 86 Fed. Reg. 111, 31423 (June 9, 2021).

¹⁵¹ *Id.*

¹⁵² *Id.* § 2(d).

¹⁵³ *Id.* See also David Shepardson, *U.S. Commerce Department Rescinds TikTok, WeChat Prohibited Transactions List*, REUTERS (June 22, 2021, 8:01 AM), <https://www.reuters.com/technology/us-commerce-department-rescinds-tiktok-wechat-prohibited-transactions-list-2021-06-21/> [<https://perma.cc/FLY4-2YGU>].

¹⁵⁴ David Shepardson, *U.S. Agency Submits Initial Recommendations on App Data Security to White House*, REUTERS (Oct. 21, 2021), <https://www.reuters.com/technology/us-agency-submits-initial-recommendations-app-data-security-white-house-2021-10-12/> [<https://perma.cc/C8Y7-YMNY>].

¹⁵⁵ Press Release, Marco Rubio, U.S. Senator for Fla., to Gina Raimondo, U.S. Sec’y Com. (Oct. 12, 2021), <https://www.rubio.senate.gov/public/index.cfm/2021/10/rubio-requests-biden-administration-s-plan-for-tiktok-protecting-americans-data> [<https://perma.cc/AHK4-KY7T>].

information from the Department of Commerce has been released. The Biden Administration and TikTok have allegedly “drafted a preliminary agreement to resolve national security concerns” relating to TikTok use in the United States, although the agreement remains in negotiation.¹⁵⁶ For now, TikTok still operates within the United States, and ByteDance still owns the app.¹⁵⁷

C. Why Trump Failed: Unilateralism in International Digital Trade

The Trump Administration’s failure is in part due to its dependence on the IEEPA. However, there was little other law to rely on to execute the ban. Specifically, U.S. domestic law, at least as argued by the Trump Administration, does not provide the tools to control the byproducts of international digital trade. This section proceeds in three parts to explain why domestic law fails. First, this section proposes a definition of international digital trade. Second, it expands further on the IEEPA and why IEEPA was used as the Trump Administration’s legal basis for the ban. Lastly, this section addresses why existing U.S. law cannot solely control unwanted digital products in our increasingly globalized economy. Recognizing that unilateralism is an ineffective strategy makes clear the need for a more robust international system.

1. Defining International Digital Trade

Succinctly defining digital trade is no easy feat—three international organizations (OECD, the WTO, and the IWF) came together in 2020 to do so, landing on a fairly broad definition of “trade that is digitally ordered and/or digitally delivered.”¹⁵⁸ Looking domestically, the U.S. International Trade Commission (ITC) defines digital trade as “commerce and international trade in which the Internet and Internet-based technologies play a particularly significant role in ordering, producing, or delivering products and services.”¹⁵⁹ The World Fair Trade Organization defines fair trade as “a trading partnership, based on dialogue, transparency, and respect, that seeks greater equity in

¹⁵⁶ Lauren Hirsch, et al., *TikTok Seen Moving Toward U.S. Security Deal, but Hurdles Remain*, N.Y. TIMES (Sept. 26, 2022), <https://www.nytimes.com/2022/09/26/technology/tiktok-national-security-china.html> [<https://perma.cc/R2FG-HPV8>].

¹⁵⁷ Knight, *supra* note 57.

¹⁵⁸ ORG. FOR ECON. COOP. & DEV., HANDBOOK ON MEASURING DIGITAL TRADE 32 (Nadim Ahmad ed., 2020), <https://www.oecd.org/sdd/its/Handbook-on-Measuring-Digital-Trade-Version-1.pdf> [<https://perma.cc/Y8BC-4BVB>].

¹⁵⁹ U.S. INT’L TRADE COMM’N, DIGITAL TRADE IN THE U.S. AND GLOBAL ECONOMIES, PART 2, 13 (publ’n no. 4485, investigation no: 332-540 Aug. 2014), <https://www.usitc.gov/publications/332/pub4485.pdf> [<https://perma.cc/L8FN-C995>].

international trade.”¹⁶⁰ Merging these definitions, this Comment proposes that digital fair trade should be viewed as an agreement to trade internet technologies and data with transparency, openness, and equity. Functionally, there are two goals to digital fair trade: maximizing opportunity relating to international trade and mitigating the impact the trade may have on other important domestic goals like privacy and cybersecurity.¹⁶¹

Digital fair trade may be best explained by example or counterexample, considering the breadth of the definition. The TikTok dispute, from a fair trade standpoint, was far from an idyllic outcome. Understanding what allowed the dispute to become so extreme sets the stage for a deep dive into the shortcomings of the digital trade system. To do so, this Comment will look at the Trump Administration’s legal problems invoking the IEEPA to ban TikTok and the limitations of current domestic legal frameworks to address app-related concerns.

2. *Why Use the IEEPA?*

Consensus is split as to whether the TikTok ban was a legal Presidential maneuver. Some say banning TikTok through international trade laws is “a valid, albeit nontraditional, approach,”¹⁶² while others believe the approach was “ultimately untenable.”¹⁶³ Most legal analysis draws on the administration’s use of the IEEPA, an emergency statute which gives the president “broad authority to regulate” international economic transactions when a national emergency is declared.¹⁶⁴ Section 1701(a) of the Act states:

Any authority granted to the President by section 1702 of this title may be exercised to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the

¹⁶⁰ WORLD FAIR TRADE ORG., *Definition of Fair Trade*, <https://wfto.com/who-we-are> [<https://perma.cc/6JS9-4JA3>].

¹⁶¹ Joshua P. Meltzer, *Governing Digital Trade*, 18 WORLD TRADE REV., s23, s24 (2019).

¹⁶² Gabrielle Supak, *Political Posturing or a Move Towards “Net Nationalism?”: The Legality of a TikTok Ban and Why Foreign Tech Companies Should be Paying Attention*, 22 N.C. J.L. & TECH. 527, 530 (2021).

¹⁶³ Faison, *supra* note 7, at 117.

¹⁶⁴ CHRISTOPHER CASEY ET AL., THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT: ORIGINS, EVOLUTION, AND USE (Cong. Rsch. Serv., July 14, 2020), <https://sgp.fas.org/crs/natsec/R45618.pdf>.

United States, if the President declares a national emergency with respect to such threat.¹⁶⁵

The IEEPA grants the president restricted emergency powers from Congress but also places restrictions on the president's exercise of that authority.¹⁶⁶ The statute empowers the president during a national emergency to "prohibit . . . transactions involving any property in which any foreign country . . . has any interest."¹⁶⁷ The TikTok ban was not the Trump Administration's first invocation of the IEEPA; Trump used the IEEPA to justify a five percent tariff on imports from Mexico¹⁶⁸ and as a basis to ban Chinese company Huawei's 5G technology exports to the United States.¹⁶⁹ If anything, the TikTok ban was merely a continuation of what "political leaders in both parties" considered "an abuse, or at least uncomfortable stretch, of the IEEPA."¹⁷⁰

Of the various domestic strategies Trump could have pursued, invoking the IEEPA was a wash for the Trump Administration based on judicial interpretation. After *TikTok v. Trump*, it appears that the IEEPA is not the catchall statute justifying executive action that the Trump Administration gambled it would be.

The IEEPA has only recently been applied to "geographically nonspecific emergencies"¹⁷¹ involving technology. Seven of the thirteen "global" emergencies occurred between 2015 and today, including Obama's use against "persons engaging in malicious cyber-enabled activities" and Trump's response to "foreign adversaries . . . exploiting vulnerabilities" in information technology.¹⁷² Although the applicability of the IEEPA has been challenged throughout its history, the TikTok lawsuit is unique because it put pressure on the courts to determine what constitutes "informational material" in terms of technology and apps.¹⁷³

¹⁶⁵ 50 U.S.C. § 1701(a).

¹⁶⁶ CASEY ET AL., *supra* note 164, at 9–11.

¹⁶⁷ 50 U.S.C. § 1702(a)(1)(B).

¹⁶⁸ David W. Opderbeck, *Huawei, Internet Governance, and IEEPA Reform*, 47 OHIO N.U.L. REV. 165, 168 (2021).

¹⁶⁹ *Id.* at 167.

¹⁷⁰ *Id.* at 168.

¹⁷¹ CASEY ET AL., *supra* note 164, at 20.

¹⁷² *Id.*

¹⁷³ See *TikTok v. Trump*, 490 F. Supp. 3d 73, at 80–81. (D.D.C. 2020).

3. *Why the IEEPA’s Domestic Exemptions Failed*

TikTok’s success against the Trump Administration resulted from the court’s conclusion that the app fell within two exceptions to the IEEPA: the information materials exception and the personal communications exception. The inapplicability of these two exemptions demonstrates a broader issue: current laws without amendment cannot encapsulate digital information trade, and as a result, the Trump Administration was fighting a battle it could not win.

First, TikTok argued that the app constitutes a mode of importing or exporting “information materials.”¹⁷⁴ The court was convinced by this argument, as TikTok’s videos, photographs, art, and news feeds fit squarely within the informational materials exception laid out in the IEEPA.¹⁷⁵ Since the prohibition would inevitably reduce the number of U.S. TikTok users to zero, cutting off their access to that informational material, the injunction was proper.¹⁷⁶ Even though the government framed the TikTok ban as a “prohibition on business-to-business transactions,” it was still unlawful because Congress explicitly included a commercial component to the scope of the exception.¹⁷⁷ The initial ban sought to “de-platform” TikTok by removing it from app stores, thus preventing more downloads and eventually making the app obsolete by not being able to update.¹⁷⁸ Even though business does occur in-app, TikTok’s “central feature is information sharing” via videos.¹⁷⁹ In attacking that aspect, the Trump Administration effectively attacked the free dissemination of information within U.S. borders.¹⁸⁰

Second, TikTok raised the point that the IEEPA does not allow the President to regulate personal communication if it does not involve “anything of value.”¹⁸¹ The definition of “anything of value” requires further explanation. Judge Nichols interpreted the statute in favor of TikTok, determining that the phrase refers to “the transfer of value

¹⁷⁴ Christopher R. Taylor, *TikTok Inc. v. Trump: Can TikTok’s U.S. Operations Last?*, WAKE FOREST L. REV. BLOG, <http://www.wakeforestlawreview.com/2020/10/tiktok-inc-v-trump-can-tiktoks-u-s-operations-last/> [https://perma.cc/B6UU-A23W].

¹⁷⁵ *TikTok Inc. v. Trump*, 490 F. Supp. 3d at 81.

¹⁷⁶ *Id.* at 80–81.

¹⁷⁷ *Id.* at 81.

¹⁷⁸ Supak, *supra* note 162, at 533.

¹⁷⁹ *Id.* at 537.

¹⁸⁰ *Id.* at 537–38.

¹⁸¹ *TikTok Inc. v. Trump*, 507 F. Supp. 3d 92, 96 (D.D.C. 2020).

between participants in a personal communication itself.”¹⁸² So, while the court recognized that the prohibitions against TikTok would regulate communications “spread[ing] CCP (Chinese Communist Party) propaganda,”¹⁸³ it was important that the Court also determine if the regulation impermissibly spilled into personal communications.¹⁸⁴ Since personal communication on TikTok takes the form of text, images, and videos, and the prohibition against TikTok would cause those features to eventually fail, the prohibition was an improper restriction on personal communications under the IEEPA.¹⁸⁵ Importantly, TikTok did not prevail on this factor simply because “TikTok . . . derives more value . . . than [the] 1977-era telephone networks” recognized by Congress when passing the IEEPA.¹⁸⁶ The statutory analysis was still required. This indicates that the IEEPA may be able to encompass future technologies, but likely not social media, because of the personal communications exception, even if hostile propaganda is a legitimate problem. The policy interest ultimately did not and cannot outweigh the statutory text.¹⁸⁷

The litigation also reveals that although the IEEPA “does not explicitly cover digital social media apps,” apps, in general, may constitute “informational materials” as “just a form of new technology” that the statute accommodates and exempts.¹⁸⁸ This seems contradictory to the goal of the IEEPA, as foreign app companies could skirt the “executive block” by “ensuring at least a part of [their] business [involves] informational materials.”¹⁸⁹ The IEEPA’s limitations imply that the United States cannot have its cake and eat it too—if policy favors the free flow of information, especially through social media, then that value is going to weigh heavily where a potential ban limits free speech. As it stands, the IEEPA, without revision, is likely incapable of covering the transactions involved with global apps in a way that is conducive to unilateral oversight by the United States.

For one, the court shut down the argument that the ban was targeting only the “business-to-business” aspect of TikTok, which is permissible

¹⁸² *Id.* at 108.

¹⁸³ *Id.* at 106.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 108.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 109.

¹⁸⁸ Supak, *supra* note 162, at 535.

¹⁸⁹ *Id.* at 536.

under the IEEPA.¹⁹⁰ The Administration could have taken an alternate route by arguing that the app is not free “because users agree to let TikTok collect their valuable data” as consideration.¹⁹¹ If successfully argued as a transactional service of data for content, TikTok’s business model could have instead been framed as an economic transaction falling within the scope of the IEEPA.¹⁹² However, given Judge Nichols’s opinion, it is unclear whether a designation as an economic transaction would override the fact that the ban would limit personal communications between users. Furthermore, this sort of argument would undoubtedly create a slippery slope, as many, if not all, other communication apps could be reduced to an “economic transaction” under this framework. To the extent the Trump Administration’s goal was to target one app, redefining the law for all apps, foreign and domestic, would only create new regulation problems.

Additionally, the Trump Administration did not properly articulate what the national emergency constituted. If the government had properly cited TikTok as being an exchange in “weapons proliferation, international terrorism, [or] espionage,” then the government may have been able to override the informational materials exemption.¹⁹³ By invoking the Espionage Act, the ban may have been supported by the IEEPA, as the IEEPA exceptions do not apply when the proposed controls function to circumvent one of the above three exchanges.¹⁹⁴ The Espionage Act is broad but seeks to protect national defense by prohibiting the acquisition of “information . . . used to the injury of the United States.”¹⁹⁵ In terms of TikTok, the Commerce Department was fairly explicit in stating that Chinese intelligence and economic espionage is “the greatest long-term threat to U.S. national security.”¹⁹⁶ Furthermore, the PATRIOT Act of 2001 strengthened the IEEPA by amendment, giving the President the authority to “confiscate any property” but only where the United States is “engaged in armed hostilities or has been attacked by a foreign country.”¹⁹⁷

¹⁹⁰ *TikTok v. Trump*, 507 F. Supp. 3d at 106.

¹⁹¹ Supak, *supra* note 162, at 537.

¹⁹² *Id.* See also *TikTok v. Trump*, 507 F. Supp. 3d at 107.

¹⁹³ *Id.* at 538; 50 U.S.C. § 1702(b)(3).

¹⁹⁴ Supak, *supra* note 162, at 538.

¹⁹⁵ 18 U.S.C. § 793.

¹⁹⁶ Supak, *supra* note 162, at 538.

¹⁹⁷ CASEY ET AL., *supra* note 164, at 13. See also P.L. 107–56 § 106, 115 Stat. 272, 277, codified at 50 U.S.C. § 1702(a)(1)(C) (2018), <https://www.congress.gov/107/plaws/publ56/PLAW-107publ56.pdf> [<https://perma.cc/4TXR-7Q42>].

Again, however, the court dismissed this argument, stating that “nothing shows . . . Congress created a cyber-espionage exception to the informational-materials limitation.”¹⁹⁸ Based on the court’s reasoning, it appears the IEEPA will fail to suppress apps from providing or involving personal communications and informational materials.¹⁹⁹

As for other domestic options, the Trump Administration had few avenues to implement the ban. The Trump Administration could have solely left the issue up to CFIUS, the committee assigned to review foreign investment transactions involving U.S. businesses.²⁰⁰ If CFIUS had found a national security risk that TikTok and ByteDance could not mitigate, CFIUS could have recommended a prohibition of the app’s transaction.²⁰¹ The Trump Administration recently employed this strategy to force the sale of the dating app Grindr in 2020, where its Chinese owners sold Grindr to a U.S. company after CFIUS declared a national security risk.²⁰² Fully banning an app based on CFIUS’s findings is an “extraordinary move” based on precedent, but since the authority of CFIUS and the IEEPA became entangled in litigation, it is unknown whether CFIUS alone would have been sufficient.²⁰³

Further, the Trump Administration could have added TikTok to the Department of Commerce’s Entity List just as it did to Chinese tech company Huawei.²⁰⁴ Huawei was placed on the list “due to the perceived risk that [it] would grant Chinese authorities access to sensitive American user data,” the same concern cited with TikTok.²⁰⁵ However, Huawei had a thirteen-count indictment against it, and its business model involved the production of telecommunications

¹⁹⁸ TikTok Inc. v. Trump, 507 F. Supp. 3d 92, 101 (D.D.C. 2020).

¹⁹⁹ See generally Faison, *supra* note 7.

²⁰⁰ See U.S. DEP’T OF TREASURY, *CFIUS Laws and Guidance*, <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/cfius-laws-and-guidance> [<https://perma.cc/ZE7E-VFLS>].

²⁰¹ Supak, *supra* note 162, at 542.

²⁰² Jay Peters, *Grindr Has Been Sold By Its Chinese Owner After the U.S. Expressed Security Concerns*, THE VERGE (Mar. 6, 2020, 1:26 PM), <https://www.theverge.com/2020/3/6/21168079/grindr-sold-chinese-owner-us-cfius-security-concerns-kunlun-lgbtq> [<https://perma.cc/U7UE-NP5R>].

²⁰³ Supak, *supra* note 162, at 543–44.

²⁰⁴ Paige Leskin, *No, Donald Trump Really Can’t ‘Ban’ TikTok*, BUS. INSIDER (Aug. 5, 2020, 5:47 AM), <https://www.businessinsider.com/can-trump-ban-tiktok-no-legal-experts-cfius-alternative-options-2020-7> [<https://perma.cc/ASV4-ZBX4>].

²⁰⁵ Supak, *supra* note 162, at 546.

equipment, not communications itself like TikTok.²⁰⁶ The *TikTok v. Trump* outcome implies that U.S. law may permit the regulation of physical devices or platforms, but not to the extent that regulation would restrict in-app communications.

Free speech and free market values may limit domestic avenues for technology regulation. TikTok shows that unilateralism fails to properly manage the complexities of digital trade as applied to specific product disputes, especially when free speech is involved. However, U.S. laws are not the end of the conversation, as the international community’s fair-trade agreements and policies exist to address international trade concerns.

III

INTERNATIONAL CAPABILITY TO ADDRESS DIGITAL FAIR TRADE

As *TikTok v. Trump* demonstrates, international digital trade, and banning specific exports therein, is more complicated than controlling what physical items cross a border. Although clear rules, treaties, and commitments exist and govern how physical goods or services are traded, they are outdated and do not accommodate the digital sector. This Comment, to portray the seriousness of the lack of formal rules on digitalization, proceeds in three parts. Section A discusses the World Trade Organization (WTO) and its current stagnation. Section B addresses how member states attempt to use existing WTO rules to their advantage and how those attempts are undermining the organization altogether. Section C, using India’s successful TikTok ban as an example, explains the extent to which the WTO could moderate this sort of dispute if its trade rules were formally applied.

²⁰⁶ David Shepardson & Karen Freifeld, *Trump Administration Hits China’s Huawei with One-Two Punch*, REUTERS (May 15, 2019, 2:01 PM), <https://www.reuters.com/article/us-usa-china-trump-telecommunications/trump-administration-hits-chinas-huawei-with-one-two-punch-idUSKCN1SL2QX> [<https://perma.cc/2RE2-D9XC>]; Brian Fung, *Why the Trump Administration’s Win over Huawei Could Be Bad News for TikTok*, CNN (July 16, 2020), <https://www.cnn.com/2020/07/16/tech/huawei-tiktok-trump/index.html#:~:text=Compared%20to%20Huawei%2C%20TikTok%20may,for%20Strategic%20and%20International%20Studies> [<https://perma.cc/AAW2-KNZP>] (placing TikTok on the watchlist “could be legally murky” as little evidence connects TikTok to the typical behavior which warrants placement on the list). See generally Yifan Yu & Coco Liu, *As U.S. Scrutiny Mounts, Is TikTok Set to Be the Next Huawei?*, NIKKEI ASIA (July 17, 2020), <https://asia.nikkei.com/Economy/Trade-war/As-US-scrutiny-mounts-is-TikTok-set-to-be-the-next-Huawei> [<https://perma.cc/8EAZ-ZLM8>] (noting general differences between Huawei and TikTok and the difficulty of banning apps).

A. WTO Limitations in Digital Trade

When international trade issues arise, the WTO is seemingly the entity poised to address them. As a brief overview, the WTO is “the only global international organization dealing with the rules of trade between nations.”²⁰⁷ The WTO’s precursor, the General Agreement on Tariffs and Trade (GATT), set the global stage for “reciprocal and mutually advantageous arrangements” to dismantle both barriers to trade and discriminatory treatment in commerce.²⁰⁸ GATT introduced long-withstanding trade concepts, notably the most-favored-nation (MFN) principle in Article I and the nondiscrimination agreement in Article III.²⁰⁹ Over time, the need for further regulation heralded the creation of the WTO in 1995, whose membership has since expanded to 164 members, including the United States and China,²¹⁰ and now represents ninety-eight percent of international trade.²¹¹

When the WTO was established, it also enacted the General Agreement on Trade in Services (GATS) treaty as a counterpart to GATT with the aim of regulating services trade similarly to how GATT regulates merchandise trade.²¹² The WTO uses GATT and GATS to oversee agreements that “provide the rules for international commerce,” maintain open trade, and, importantly here, settle trade disputes.²¹³ Some important exceptions apply and are enumerated in

²⁰⁷ *The WTO*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/thewto_e.htm [<https://perma.cc/E2DM-V45Y>].

²⁰⁸ *Legal Texts: GATT 1947*, WORLD TRADE ORG., https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm [<https://perma.cc/CJ5U-ARQ4>] (GATT was enacted in 1947 and consists of 38 Articles governing international trade between member states).

²⁰⁹ *See id.* *See also Principles of the Trading System*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm [<https://perma.cc/U6PR-HMVG>] (explaining that the MFN principle in trade protects member states from competitive disadvantages arising from circumstances where the trader later grants more favorable trade terms to a different member state. Under this principle, the best term offered by a member must be offered to all other trading partners within the WTO. The nondiscrimination provision of Article III states that “the product of the territory of any contracting party imported into the territory of [another] shall be accorded treatment no less favorable than accorded to [the importing member’s domestic products]”).

²¹⁰ *Understanding the WTO: The Organization*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm [<https://perma.cc/KF73-87F8>] (The United States is a founding member of the WTO. China joined the WTO on December 11, 2001.).

²¹¹ *History of the Multilateral Trading System*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/history_e/history_e.htm [<https://perma.cc/3P5T-MA4N>].

²¹² *The General Agreement on Trade in Services (GATS): Objectives, Coverage, and Disciplines*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm [<https://perma.cc/SEZ3-S58U>].

²¹³ *Who We Are*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm [<https://perma.cc/LFF2-4FJS>].

GATS Article XX, including actions that are “necessary to protect public morals” under section (a) and necessary to “the prevention of deceptive [trade] practices” under section (d).²¹⁴ The decisions passed down by the WTO, and the WTO Agreements are legally binding; the losing party cannot reject rulings, and WTO Agreements function as enforceable contracts between member states.²¹⁵ Since its inception, the WTO has overseen 614 disputes and issued 350 rulings.²¹⁶

The WTO and its Agreements have evolved, albeit slowly and incompletely, to capture the rapid rise of technology in trade. The WTO enacted technology-related policies such as the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) in 1994 and the Information Technology Agreement (ITA) in 1996.²¹⁷ The ITA, of which China and the United States are members,²¹⁸ covers high-technology products, like computers and software, implementing “tariff liberalization arrangement[s]” between member states.²¹⁹ TRIPS caters to intellectual property rights issues, carrying forward the MFN principle and nondiscrimination policy of GATT and GATS to some areas of technology trade when IP is at issue.²²⁰ In 1998, the WTO created the Work Programme on E-Commerce, tasking WTO bodies with the objective of “examin[ing] all trade-related aspects of e-commerce” and providing “recommendations for further action.”²²¹

Although these developments have utility, the WTO still falls well behind the rapid advancement of digital trade. The Organization recognized that the WTO “need[s] to reform the rules that govern

²¹⁴ *Article XX General Exceptions*, WORLD TRADE ORG., https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art20_e.pdf [<https://perma.cc/5KC7-MPE5>].

²¹⁵ Simon K. Zhen, *Combating Censorship in China: Forcing China’s Hand Through the WTO and Collective Action*, 53 CORNELL INT’L L.J. 731, 750 (2020).

²¹⁶ *Dispute Settlement*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm [<https://perma.cc/T3HA-AWST>].

²¹⁷ *Information Technology Agreement – an Explanation*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/inftec_e/itaintro_e.htm [<https://perma.cc/8DPQ-KMP7>]; *Intellectual Property: Property and Enforcement*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm [<https://perma.cc/5P7X-4FQC>].

²¹⁸ *The WTO’s Information Technology Agreement (ITA)*, WORLD TRADE ORG., https://www.wto.org/english/news_e/brief_ita_e.htm [<https://perma.cc/86AP-CLTA>].

²¹⁹ *Information Technology Agreement – an Explanation*, *supra* note 217.

²²⁰ *Intellectual Property: Protection and Enforcement*, *supra* note 217 (explaining how, although not explicitly catered to technological advancements, TRIPS applies Intellectual Property law to technology transfers under Article 7 in an effort to facilitate technological trade). *See also TRIPS: Issues*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/trips_e/techtransfer_e.htm [<https://perma.cc/V6VD-9GRT>].

²²¹ *Work Programme on E-Commerce*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/ecom_e/ecom_work_programme_e.htm [<https://perma.cc/K4PJ-K3NH>].

trade” to capture the emerging digital market.²²² However, what that exactly means is still up in the air. Policy drafting takes time, but the WTO slipped into a steady rhythm of releasing nonbinding publications relating to digital trade. Although the publications provide suggestions for best practices and future conversations between trade partners,²²³ no firm rules have been proposed to lay out WTO member obligations in this area.

Further exasperating the problem is that the WTO has yet to definitively create a framework for digital trade, creating difficulties in deciding what type of technology or technology issues are governed by existing agreements.²²⁴ In February 2022, e-commerce negotiators “revisit[ed] text proposals,”²²⁵ but focused primarily on extending already existing e-commerce moratoriums. At this meeting, Ambassador Yamazaki, “co-convenor of the [e-commerce] initiative,” reiterated the importance of making progress, but the e-commerce group imposed no firm deadlines to effectuate the goal of “[making] substantial progress to demonstrate that the WTO remains relevant.”²²⁶ This gap between intention and action created a vacuum. Because there are no concrete guidelines for WTO members to follow, digital trade is governed by a piecemeal application of existing WTO agreements and the parties’ terms in any given transaction. Without overarching rules to enforce, the WTO must rely on individual member states’ obligations and schedules to regulate on a case-by-case basis.

For example, India and the United States’s GATS schedules include commitments for computer-related services.²²⁷ A WTO panel could liberally recognize that TikTok falls within that commitment for GATS to apply.²²⁸ But, although apps are “generally understood to be new services or digital services,” falling under GATS, the WTO’s

²²² WTO Chairs Programme, *Adapting to the Digital Trade Era: Challenges and Opportunities*, WORLD TRADE ORG. 6 (Maarten Smeets ed., 2021), https://www.wto.org/english/res_e/booksp_e/adtera_e.pdf [<https://perma.cc/3ALZ-4W4N>].

²²³ *Publications on Digital Technologies and Trade*, WORLD TRADE ORG., https://www.wto.org/english/res_e/publications_e/pubsubject_e.htm?pubsubject=CATHDIGITALTECH [<https://perma.cc/A899-D2WG>].

²²⁴ See Sunanda Tewari, *The TikTok Controversy: Can WTO Prevent Bans?*, WOLTERS KLUWER (Jan. 9, 2020), <http://regulatingforglobalization.com/2020/09/01/the-tiktok-controversy-can-wto-prevent-bans/> [<https://perma.cc/WCE4-HHGA>].

²²⁵ *E-Commerce Negotiators Seek to Find Common Ground, Revisit Text Proposals*, WORLD TRADE ORG., https://www.wto.org/english/news_e/news22_e/jsec_23feb22_e.htm [<https://perma.cc/L8HY-4MED>].

²²⁶ *Id.*

²²⁷ Tewari, *supra* note 224.

²²⁸ *Id.*

Committee on Specific Commitments is still reviewing whether that is a correct understanding.²²⁹ GATS is technologically neutral and encompasses the “sectoral coverage of a Member’s commitments to include the digitized version of a service that could have been provided physically.”²³⁰ However, the applicability of GATS to digital trade is controversial because adding the digital market to its framework violates the voluntary commitments members undertake when signing on.²³¹ With this infirmity laid out, the conundrum arises—if the byproducts of digital trade, like service-providing phone apps, do not fall within any existing WTO framework, it may be the case that the WTO is powerless to regulate digital trade and e-commerce effectively.

B. WTO in the Modern Era: Strategies and Shortcomings

Although the WTO is a highly recognized international agency, it is limited in its regulatory power when handling digital trade issues. Applying the lapse in coverage to the current challenges faced by member states in handling digital trade disputes, this section proceeds in two parts. The first section discusses the WTO’s dispute resolution process and the potential outcome of using the WTO’s current frameworks to solve the TikTok dispute. The second section parses out the limitations of the WTO’s ability to address digital trade issues in the status quo and the growing acknowledgment by nations and scholars as to its shortcomings.

Before diving into why the TikTok dispute was not elevated to the WTO, it is important to have a baseline understanding of the dispute resolution process. WTO disputes arise when a member state claims that another member state’s actions are violative of WTO agreements or the obligations of membership.²³² Joinder rules apply and permit third party members to declare an interest in the pending dispute if they so desire.²³³ Previously managed under GATT, the process was amended by the Uruguay Round Agreement, which “introduced greater discipline for the length of time [of cases] . . . with flexible deadlines set.”²³⁴ Adhering to principles of equity, effectiveness, and mutual

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

²³² *Understanding the WTO: Settling Disputes*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/displ_e.htm [<https://perma.cc/UQ3Z-G83E>].

²³³ *Id.*

²³⁴ *Id.*

acceptability,²³⁵ the WTO emphasizes the value of discussion between the adverse parties by enforcing a sixty-day consultation period before setting a panel to hear the dispute.²³⁶ Following the consultation period, the complaining party can request that the Dispute Settlement Board establish a panel to issue a ruling, giving the WTO forty-five days to set the panel.²³⁷ The panel then has six months to execute a final panel report.²³⁸ After that point, three more weeks are allocated to return the report to WTO members for review, and another sixty days for the Dispute Settlement Body to adopt the report.²³⁹ In all, a dispute can take about a year to resolve, tacking on another three months if the decision is appealed.²⁴⁰

The concept of either China or the United States bringing a claim to the WTO against the other is not novel. China is a complainant against the United States in sixteen of its pending disputes, and the United States is a complainant against China in twenty-two of its pending disputes.²⁴¹ Members' use of retaliatory tariffs and subsequent disputes over them are of particular interest to the digital trade discussion. Amidst growing tensions relating to China's alleged theft of American intellectual property, the Trump Administration in 2018 attempted to unilaterally address the problem by imposing billions of dollars' worth of tariffs on Chinese product imports.²⁴² China requested consultations with the WTO promptly after in April 2018,²⁴³ while also raising its tariffs on U.S. goods by \$60 billion in 2019.²⁴⁴ Over two years later, in September 2020, the WTO panel brought a decision against the United States for violating WTO rules.²⁴⁵ Although the United States raised

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Understanding the WTO: Settling Disputes*, *supra* note 232.

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Dispute Settlement: The Disputes*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm [<https://perma.cc/Q6DF-4U24>].

²⁴² James Bacchus, *How the World Trade Organization Can Curb China's Intellectual Property Transgressions*, CATO INST. (Mar. 22, 2018, 3:13 PM), <https://www.cato.org/blog/how-world-trade-organization-can-curb-chinas-intellectual-property-transgressions> [<https://perma.cc/AS5P-8ATA>].

²⁴³ Notification of an Appeal by the United States, *United States – Tariff Measures on Certain Goods from China*, WT/DS543 (Oct. 27, 2020), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds543_e.htm [<https://perma.cc/6CGV-23W4>].

²⁴⁴ Jacob Pramuk, *China Is Raising Tariffs on \$60 Billion of U.S. Goods Starting June 1*, CNBC (May 13, 2019, 8:21 AM), <https://www.cnbc.com/2019/05/13/china-is-raising-tariffs-on-60-billion-of-us-goods-starting-june-1.html> [<https://perma.cc/K545-ALZL>].

²⁴⁵ *United States – Tariff Measures on Certain Goods from China*, *supra* note 243.

the GATS public morals exemption as a defense, the WTO panel stated that “the United States [did] not adequately explain how [the tariffs] are necessary to protect public morals” and that “the United States [did not meet] its burden” of demonstrating that the tariffs were justified.²⁴⁶ Further, the United States’s likelihood of success in this matter was already hindered by Article 23.1 of the WTO’s Dispute Settlement Understanding (DSU). Article 23.1 imposes a “fundamental obligation” to redress a violation of obligations or agreements under the rules and procedures of the DSU and not through unilateral action.²⁴⁷ Basically, if the United States believed a trade violation was occurring, it should have pursued a resolution with the WTO. Such legal loss was expected given the WTO’s existing policies against unilateralism,²⁴⁸ and demonstrates that the WTO does hold power over its members and will uphold its clear expectations.

Applying the outcome of the tariff dispute to TikTok, China appears to have some WTO precedent on its side. Parallels can be drawn between the United States’s unilateral imposition of tariffs against intellectual property injustices and the United States’s unilateral ban of TikTok against perceived data breach concerns. Each case involves one member state acting unilaterally against the other in a trade conflict, with the same member state reaching for a national security exemption under Article XX of GATS. So, why didn’t China place the TikTok dispute in the regulatory hands of a WTO panel?

Timing played a large factor in the TikTok dispute. At a closed-door WTO meeting, China clearly stated that the United States’s restrictions on Chinese apps like TikTok “violates the basic principles and objectives of the [WTO’s] multilateral trading system.”²⁴⁹ China also repudiated India’s ban of TikTok for the same reasons in 2021.²⁵⁰ But for China’s dispute with the United States over TikTok, China arguably had little time to react with much forethought as to the WTO. TikTok

²⁴⁶ Report of the Panel, *United States – Tariff Measures on Certain Goods from China*, WT/DS543/R (Sept. 15, 2020), https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?file_name=q:/WT/DS/543R.pdf&Open=True [<https://perma.cc/9CSD-RZS2>].

²⁴⁷ *Recourse to the DSU for Violations of the Covered Agreements*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/tratop_e/dispu_e/repertory_e/r0_e.htm [<https://perma.cc/2ZNA-7KHF>].

²⁴⁸ Bacchus, *supra* note 242.

²⁴⁹ *China Says U.S. TikTok, WeChat Bans Break WTO Rules*, REUTERS (Oct. 5, 2020, 10:08 AM), <https://www.reuters.com/article/usa-tiktok-ban-wto/china-says-u-s-tiktok-wechat-bans-break-wto-rules-idUSKBN26Q2LL> [<https://perma.cc/9PT4-ST4G>].

²⁵⁰ *China Says Indian Ban on Apps Violates WTO Rules*, REUTERS (Jan. 27, 2021, 1:00 AM), <https://www.reuters.com/article/india-china-bans/china-says-indian-ban-on-apps-violates-wto-rules-idUSKBN29W0TV> [<https://perma.cc/6P34-LALQ>].

faced immediate shutdown of U.S. operations in September 2020, which would have cost the company about ninety percent of American users after six months.²⁵¹ In response, TikTok swiftly filed lawsuits in an attempt to circumvent the loss. Although TikTok is not a service of the Chinese government, it was extremely successful, and China had a logical interest in keeping TikTok afloat to sustain that success. Few in the legal field would argue that litigation is a speedy process, but from China's perspective, letting litigation play out may have been (and was) faster than waiting for a WTO panel decision. This paid off because the attempted ban ultimately failed. Pursuing WTO consultations on the matter became a moot point when the Biden Administration took control and dismissed the case.

Even if the United States's effort to ban TikTok fell apart, member states still need answers as to what digital trade actions are allowed under WTO Agreements. In terms of Chinese apps, the TikTok story placed a spotlight on China's restrictive digital trade policies and underscored mounting concerns by other member states as to how far China can push its limits as a WTO member. Furthermore, India's ban on TikTok is still active, and there is no guarantee that the United States or another WTO member state will not attempt another ban on Chinese apps.²⁵² There is no definitive way to determine exactly what the WTO would decide without a crystal ball. However, looking at the context of India's ban and the United States's arguments for its attempted ban, some distinctions arise that indicate likely outcomes.

C. WTO Potential, a Case Study: India's TikTok Ban

India's TikTok ban is important because it demonstrates likely permissible action taken under the WTO with respect to mobile apps and trade. Those who have analyzed India's ban agree that if China took India to the WTO over its ban of TikTok and other apps, the WTO would probably validate India's actions.²⁵³ Because there is agreement

²⁵¹ Bobby Allyn, *TikTok: Even a Temporary Ban Could Make 90% of Users Quit the App*, NPR (Sept. 23, 2020, 6:19 PM), <https://www.npr.org/2020/09/23/916206862/tiktok-even-a-temporary-ban-could-make-90-of-users-quit-the-app> [https://perma.cc/RMB9-V9UG].

²⁵² Amanda Aronczyk, *A Look at the Fallout of TikTok Ban in India*, NPR (Jan. 15, 2021, 4:02 PM), <https://www.npr.org/2021/01/15/957371287/a-look-at-the-fallout-of-tiktok-ban-in-india> [https://perma.cc/YMT8-RLA6].

²⁵³ See Himanshu Singh Rajpurohit & Tilak Dangi, *Is India's Ban on TikTok and Other Apps Justified by the WTO National Security Exception?*, WOLTERS KLUWER (Oct. 10, 2020), <http://regulatingforglobalization.com/2020/10/27/is-indias-ban-on-tiktok-and-other-apps-justified-by-the-wto-national-security-exception/> [https://perma.cc/6SGX-KZQT].

as to the viability of India’s ban, it is valuable to quickly summarize why India would succeed.

This analysis depends on the applicability of GATS, which this Comment assumes applies for purposes of dissecting India’s ban. Article I of GATS defines four types of “trade in service,” the first being “the supply of a service from the territory of one Member into the territory of any other Member.”²⁵⁴ Service is defined circularly as “any service in any sector.”²⁵⁵ Using that incredibly broad framework, this Comment assumes that TikTok falls within the GATS protection because it is a digital entertainment and information service provided by another member state. Admittedly, there is a “lack of binding international law/norms” relating to GATS’ ability to regulate the internet, implying that GATS “has a limited role, particularly in cases involving direct conflict between . . . internet norms and domestic internet policies.”²⁵⁶ Regardless, the argument can be made that TikTok provides services mainly in a digital format, which likely places it under WTO authority as it connects to electronic commerce.²⁵⁷

At first glance, China could easily argue that India violated the MFN principle of GATS by discriminating against Chinese services.²⁵⁸ That being said, India clearly delineated a national security threat under GATS, which justified the discrimination.²⁵⁹ Relying on prior disputes

See also Alexander R. Kerr Alvarez, *Dancing into Conflict: TikTok, National Security and WTO*, EDINBURGH STUDENT L. REV. (Apr. 12, 2021), https://www.eslr.ed.ac.uk/2021/04/12/dancing-into-conflict-tiktok-national-security-and-the-wto/#_ftn13 [<https://perma.cc/8GAW-DXR7>].

²⁵⁴ *General Agreement on Trade in Services, Article I*, WORLD TRADE ORG., https://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm#ArticleI [<https://perma.cc/NW42-2T3H>].

²⁵⁵ *Id.*

²⁵⁶ Neha Mishra, *Privacy, Cybersecurity, and GATS Article XIV: A New Frontier for Trade and Internet Regulation?*, 19 WORLD TRADE REV. 341 (2020).

²⁵⁷ *TikTok v. Trump*, 490 F. Supp. 3d 73, 81–82. (D.D.C. 2020). TikTok, as Judge Nichols described, is an electronic “medium of transmission” for information materials. I argue that it is not unreasonable to categorize this interpretation under the broad umbrella of providing services. See Rajpurohit & Dangi, *supra* note 253 (noting that WTO precedent indicates a total ban on applications affects trade in services, and the financial loss companies experienced due to India’s TikTok ban “buttresses the claim that trade in services is being effected.”). See generally Mishra, *supra* note 256, at 350–51 (supporting an “evolutionary interpretation” of GATS to cover related issues such as cybersecurity and internet privacy).

²⁵⁸ Rajpurohit & Dangi, *supra* note 253. See also GATS: General Agreement on Trade in Services, 1869 U.N.T.S. 183; 33 I.L.M. 1167 (1994), https://www.wto.org/english/docs_e/legal_e/26-gats.pdf [<https://perma.cc/3DG5-SAMN>] [hereinafter GATS].

²⁵⁹ India defended its ban on apps, which followed a “deadly border clash” between India and China, by claiming the move “ensure[s] [the] safety and sovereignty of Indian

in which a WTO member restricted imports from another country, it is clear that the WTO gives members flexibility in determining whether an action is “necessary for the protection of its security assets” so long as the interest is “sufficiently articulated.”²⁶⁰ The WTO previously determined that an “‘emergency in international relations’ referred generally to a situation of armed conflict, or of latent armed conflict, of heightened tension or crisis, or of general instability.”²⁶¹

In applying that definition, the border conflict, which formally motivated the ban of Chinese apps, likely permits India to act counter to China’s interests. India had cited that the apps “were prejudicial to [the] sovereignty . . . and defense of India” due to privacy and security concerns.²⁶² Absent satisfactory responses from the banned apps as to their privacy and security policies, India made the ban permanent considering its conflict with China.²⁶³ Recognizing the ongoing border dispute, the conflict would likely satisfy the heightened tensions and latent armed conflict prongs of an emergency previously enumerated.

However, India’s good faith, which is an element the WTO considers when a nation raises the national security exemption,²⁶⁴ is questionable. The WTO makes clear that it “assume[s] [WTO members] . . . will abide by their treaty obligations in good faith” and that any member’s use of Article XX of GATS is but one expression of

cyberspace.” Siladitya Ray, *India Bans TikTok, 58 Other Chinese Apps, Citing Security Concerns*, FORBES (June 29, 2020, 4:03 PM), <https://www.forbes.com/sites/siladityaray/2020/06/29/india-bans-tiktok-58-other-chinese-apps-citing-security-concerns/?sh=6f2184847e60> [<https://perma.cc/4PC5-THR4>]. “The exception provided under GATS Article XIV bis safeguards India’s ban because it gives complete discretion to a member to decide what national security threats it faces.” Rajpurohit & Dangi, *supra* note 253. For a second analysis, see Raushan Tara Jaswal, *TikTok-ing on the National Security Defense*, INDIAN J.L. TECH. (Nov. 26, 2021), <https://www.ijlt.in/post/tiktok-ing-on-the-national-security-defence> [<https://perma.cc/TH5J-9NNL>].

²⁶⁰ Panel Report, *Russia – Traffic in Transit*, WTO Doc. WT/DS512/7 (adopted Apr. 29, 2019), https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds512sum_e.pdf [<https://perma.cc/23YD-G6M9>].

²⁶¹ *Id.* See also Alvarez, *supra* note 253.

²⁶² *India Permanently Bans TikTok and 58 Other Chinese Apps*, NIKKEI ASIA (Jan. 26, 2021), <https://asia.nikkei.com/Business/Technology/India-permanently-bans-TikTok-and-58-other-Chinese-apps> [<https://perma.cc/VU9Y-C3AF>].

²⁶³ *Id.*

²⁶⁴ See, e.g., William Alan Reinsch & Jack Caporal, *The WTO’s First Ruling on National Security: What Does It Mean for the United States?*, CTR. FOR STRATEGIC & INT’L STUD. (Apr. 5, 2019), <https://www.csis.org/analysis/wtos-first-ruling-national-security-what-does-it-mean-united-states> [<https://perma.cc/YLU4-FHP2>] (discussing, in part, the role of the good faith component as applied to the 2019 WTO Panel decision).

the principle.²⁶⁵ Each party to a dispute has a burden to act accordingly.²⁶⁶ As it were, internal criticisms of India’s actions raise this issue.²⁶⁷ The argument has been made that the real point of India’s ban was economic nationalism.²⁶⁸ By removing TikTok, the market opened for Indian apps of the same type to gain popularity and fill the void.²⁶⁹ Merit of the claim aside, it would contravene the WTO’s interest in facilitating trade that its own exceptions can be used for a protectionist end. However, considering the very real border conflict between the nations, the argument that India acted in good faith to defend its information technology would likely override the fact that members of India’s private sector replicated TikTok for economic gain.

Comparing India’s ban with the United States’s attempted ban, the United States lacks a concrete conflict that necessitates invoking the national security exemption. Along with Article XX, Article XIV bis of GATS allows member states to adopt any measure in the interest of national security that may otherwise be inconsistent with its membership obligations.²⁷⁰ However, the burden is on the adopting party to show why the measure meets a national security interest, subject to the WTO’s judicial deference.²⁷¹ India and the United States claim two different issues under the same national security exemption: for India, physical conflict necessitated the protection of its data, while for the United States the amorphous concern of data security and data privacy motivated the ban.

As stated above, each Member must assume the good faith of the other. Without clear evidence of China’s foul play, the United States would be making only an accusatory argument about China’s bad faith regarding TikTok. Absent further WTO guidance on digital trade, and considering the WTO’s emphasis on multilateralism, the United States would need to offer either more concrete evidence of wrongdoing or point to a specific security interest compromised by TikTok’s presence in the United States. As for evidence made public, it appears that TikTok did not “pose any more risk to a user than any other social

²⁶⁵ *Principles and Concepts of General Public International Law*, WORLD TRADE ORG., [https://www.wto.org/english/tratop_e/dispu_e/repertory_e/p3_e.htm#:~:text=%2FAB%2FR\)-,%E2%80%A6,faith%20of%20every%20other%20Member](https://www.wto.org/english/tratop_e/dispu_e/repertory_e/p3_e.htm#:~:text=%2FAB%2FR)-,%E2%80%A6,faith%20of%20every%20other%20Member) [https://perma.cc/4NJX-8HAJ].

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ Aronczyk, *supra* note 252.

²⁷⁰ Rajpurohit & Dangi, *supra* note 253.

²⁷¹ See Reinsch & Caporal, *supra* note 264, at A3.

media sharing application.”²⁷² TikTok’s software vulnerabilities, which were “par for the course” with other domestic apps, were patched in subsequent versions, and security experts state that they have “yet to see a documented, material threat” from TikTok.²⁷³ Whether or not the Biden Administration’s security inquiry uncovered information that would create a national security issue is unknown, but it would be necessary for a successful claim by the United States against China in this context.

Underlying this entire discussion is the risk to China if the WTO were to analyze China’s digital trade practices. Critical to China’s willingness to seek out the WTO for help against app bans is the fact that China is not “very enthusiastic” about taking issues of e-commerce to the organization.²⁷⁴ China is not the unwitting victim of WTO member bullying. Rather, “China’s record of compliance with [the terms of its WTO membership] has been poor.”²⁷⁵ The aforementioned blocking of foreign apps and websites by China itself speaks only to a small portion of China’s overarching WTO commitment issues. China’s intensified commitment to a “state-led industrial policy” faces criticism from the West, particularly due to “subsidies that distort the global economy” and asymmetrical “restricted market access.”²⁷⁶ China has doubled down on its restrictive tech-related activities due to its state-led “[m]ade in China 2025” plan that seeks to make China “dominant in global high-tech manufacturing” by 2025.²⁷⁷ Other WTO members, including the United States, have argued that the plan “relies

²⁷² Delfino & Johnson, *Is TikTok Safe? How to Make Your TikTok as Private and Secure as Possible*, BUS. INSIDER (May 3, 2022), <https://www.businessinsider.com/guides/tech/is-tiktok-safe> [https://perma.cc/69X5-SKYB].

²⁷³ Zak Doffman, *Is TikTok Seriously Dangerous—Do You Need to Delete It?*, FORBES (July 11, 2020), <https://www.forbes.com/sites/zakdoffman/2020/07/11/tiktok-seriously-dangerous-warning-delete-app-trump-ban/?sh=c5500c2b0e17> [https://perma.cc/GPY9-CKUN].

²⁷⁴ Henry Gao, *Digital or Trade: The Contrasting Approaches of China and U.S. to Digital Trade*, 21 J. INT’L ECON. L. 297, 312–13 (2018).

²⁷⁵ U.S. TRADE REPRESENTATIVE, 2021 REP. TO CONGRESS ON CHINA’S WTO COMPLIANCE 2, <https://ustr.gov/sites/default/files/files/Press/Reports/2021USTR%20Report%20CongressChinaWTO.pdf> [https://perma.cc/UCZ8-U856]. See also Robert D. Atkinson & Stephen Ezell, *False Promises: The Yawning Gap Between China’s WTO Commitments and Practices*, INFO. TECH. & INNOVATION FOUND. (Sept. 17, 2015), <https://itif.org/publications/2015/09/17/false-promises-yawning-gap-between-chinas-wto-commitments-and-practices> [https://perma.cc/2HMX-DFHB].

²⁷⁶ James McBride & Andrew Chatzky, *Is ‘Made in China 2025’ a Threat to Global Trade?*, COUNCIL ON FOREIGN REL. (May 13, 2019), <https://www.cfr.org/background/made-china-2025-threat-global-trade> [https://perma.cc/8PDZ-PFJM].

²⁷⁷ *Id.*

on discriminatory treatment of foreign investment, forced technology transfers, intellectual property theft, and cyber espionage.”²⁷⁸ There is a real possibility that the WTO could try to shut down China’s protectionist practices—it did so once before in the *China-Publications* case, where the WTO determined that China’s policies on audiovisual entertainment product imports were inconsistent with its WTO commitments.²⁷⁹ Negative WTO rulings can also “theoretically lead to retaliation from other countries,”²⁸⁰ and it is not an unreasonable leap to assume that a finding against TikTok would permit other member states to act against that app and others of Chinese origin.²⁸¹ With the risk of receiving an undesired response, seeking the WTO’s decision-making authority may not be in line with China’s internal goals.

Although the dispute resolution process is clear and actively used, sole reliance on the process cannot satisfy digital trade problems without a proper backdrop to judge disputes. Member states and scholars are becoming increasingly vocal about the need for standardization around digital trade.²⁸² Robert Lighthizer, the U.S. Trade Representative during the Trump Administration, stated in September 2020 that the “WTO is completely inadequate to stop China’s harmful technology practices.”²⁸³ Part valid criticism and part fatalistic bemoaning of its own WTO losses, the statement reflects the sentiment that current frameworks are not enough.²⁸⁴ It’s clear that if

²⁷⁸ *Id.*

²⁷⁹ Gao, *supra* note 274, at 312. See also Panel Report, *China - Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WTO Doc. WT/DS363/R & Corr.1 (adopted Aug. 9, 2009).

²⁸⁰ Joe Walsh, *Trump’s China Tariffs Are Illegal, WTO Finds*, FORBES (Sept. 15, 2020), <https://www.forbes.com/sites/joewalsh/2020/09/15/trumps-china-tariffs-are-illegal-wto-finds/?sh=1979a4c7223e> [<https://perma.cc/F5ST-LX6A>].

²⁸¹ See generally Mohd Rameez Raza & Raj Shekhar, *Indian Ban on Chinese Apps: Does the Move Contradict WTO Rules?*, JURIST (July 20, 2020), <https://www.jurist.org/commentary/2020/07/raza-shekhar-india-wto-apps/> [<https://perma.cc/S5KD-ETTT>].

²⁸² See *Standards Toolkit for Cross-Border Paperless Trade, Foreword*, WORLD TRADE ORG. (2022), https://www.wto.org/english/res_e/booksp_e/00_foreword.pdf [<https://perma.cc/JK9G-S6B7>].

²⁸³ *WTO Report on U.S. Action Against China Shows Necessity for Reform*, OFF. OF THE U.S. TRADE REPRESENTATIVE (Sept. 15, 2020), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/september/wto-report-us-action-against-china-shows-necessity-reform> [<https://perma.cc/X9S5-JALR>].

²⁸⁴ WTO CHAIRS PROGRAMME, *ADAPTING TO THE DIGITAL TRADE ERA: CHALLENGES AND OPPORTUNITIES* (Maarten Smeets ed., 2021), https://www.wto.org/english/res_e/booksp_e/adtera_e.pdf [<https://perma.cc/47RF-ARC2>]. “We need to ensure that our trade system is up to date so that we can exploit new opportunities and address challenges of the present world.” *Id.*

the international community seeks to rely on the WTO to regulate digital trade, something needs to change.

IV

WHAT COMES NEXT? CURTAILING A TIKTOK 2.0

This Comment analyzes two potential solutions the international community could take to address TikTok’s exposure—gaps in the digital trade system. First, the WTO could prioritize expanding its rules by placing e-commerce under its regulatory control. This is the modality this Comment prefers, as it both resolidifies the WTO’s position in global trade and keeps digital trade within the WTO’s bounds. Second, based on behavior in the private sector, perhaps those in the tech industry could be tasked with setting digital trade rules, as they would be the ones obligated to abide by them. All in all, when a “TikTok 2.0” inevitably arises, and WTO members are in serious conflict, there should be some system of governance in place to handle it.

A. Option One: Using the WTO

The first option is easier said than done. Here, this Comment takes an optimistic approach and calls upon the WTO to issue formal rules guiding digital trade. Reshaping existing WTO policy may rely more on the “exercise of political will” than anything else.²⁸⁵ However, it is not impossible and is a more direct route than forming a new entity. Filling the gap with “an alliance of techno-democracies” against “authoritarian norms and practices”²⁸⁶ in digital trade seems unnecessary and wasteful, given that the WTO can enforce rules against biased practices. The WTO already has members, and its members understand how the organization works. Keeping all aspects of trade within one organization is a tall task, especially when it also needs to regulate disputes. However, doing so will greatly resolidify the WTO’s role in a rapidly digitizing world.

²⁸⁵ Tewari, *supra* note 224.

²⁸⁶ Robert D. Williams, *To Enhance Data Security, Federal Privacy Legislation Is Just a Start*, BROOKINGS (Dec. 1, 2020), <https://www.brookings.edu/techstream/to-enhance-data-security-federal-privacy-legislation-is-just-a-start/> [<https://perma.cc/9T35-CJRN>]. See also *Trade Policy Reviews: Ensuring Transparency*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm11_e.htm [<https://perma.cc/4G4F-SJ9D>] (noting that “the WTO conducts regular reviews” of trade policies for compliance with WTO commitments).

As of January 2021, about seventy-six WTO members, including China and the United States, are participating in negotiations relating to the trade-related aspects of e-commerce.²⁸⁷ Looking to China’s 2019 e-commerce proposal, China made six recommendations for e-commerce, the fifth of which calls for the WTO to “strike the balance among technological advances, business development[,] and such legitimate public policy objectives as Internet sovereignty, data security, and privacy protection, so as to reach a balanced and pragmatic outcome acceptable to all through equal consultations.”²⁸⁸ With this subject matter potentially on the table for discussion, there is reason for optimism as to progress. At the 12th WTO Ministerial Conference in June 2022, WTO members agreed to “reinvigorate the work under the Work Programme on Electronic Commerce,”²⁸⁹ demonstrating a formal commitment to addressing some of the problems plaguing digital trade. What the reinvigorated efforts will entail is up in the air, but if any change should be prioritized, it should be the role of GATS.

This Comment confirms an existing sentiment among scholars: it is time for the WTO to finally decide whether GATS governs e-commerce in a way that encompasses digital trade and cyber policy. If GATS does apply, this would mean data laws, like restrictions and localization requirements, would be firmly subject to the MFN principle and individual member obligations.²⁹⁰ Further, Article VI of GATS imposes domestic regulation obligations on members, including requirements that trade rules be “based on objective and transparent criteria, not more burdensome than necessary,” and administered impartially.²⁹¹ This would improve the digital trade sector by obliging trade partners to act in accordance with other trade obligations already in place, which standardizes each nation’s perspective to trade regardless of subject matter. The domestic regulation requirement

²⁸⁷ *Joint Initiative on E-commerce*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/ecom_e/joint_statement_e.htm [<https://perma.cc/XUK2-VXY7>].

²⁸⁸ Proposal for WTO Reform by China, *China – China’s Proposal on WTO Reform*, WTO Doc. WT/GC/W/773 (May 13, 2019), https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?CatalogueIdList=254127&CurrentCatalogueIdIndex=0#:~:text=China%20believes%20the%20necessary%20reform,efficiency%20of%20the%20WTO%3B%20and [<https://perma.cc/67FT-FEPW>].

²⁸⁹ World Trade Organization, Ministerial Declaration of 17 June 2022, WTO Doc. WT/MIN(22)/32.

²⁹⁰ Henry Gao, *Data Regulation in Trade Agreements: Different Models and Options Ahead*, in ADAPTING TO THE DIGITAL TRADE ERA, 324, 327, https://ink.library.smu.edu.sg/cgi/viewcontent.cgi?article=5309&context=sol_research [<https://perma.cc/XX4D-DDHS>].

²⁹¹ *Id.*

would also likely undercut digital trade protectionism by enforcing standards for conduct and holding members accountable for their inconsistencies.

There are clear benefits to solidifying GATS's role in digital trade. For one, expanding the scope of available remedies to include those within GATS can address the "existential crisis of the WTO," as members could decrease their reliance on and arguable "abuse of [the WTO's] national security exemption."²⁹² This is specifically salient in the context of TikTok-related disputes, as the national security exemption has been the primary route to justify the ban. Under the GATS framework, however, parties have more options. Although the Trump Administration pursued a national security argument against the app, the United States could target TikTok by arguing to the WTO that China's regulatory policies violate its GATS service commitments. If successful, China would be forced to act pursuant to the WTO panel's direction. At this point, China "has only committed to eventual liberalization of cross-border and Internet services."²⁹³ Included in the full scope of liberalization, however, are "audiovisual services like videos, including entertainment software and distribution" and "wholesale or retail trade services away from a fixed location."²⁹⁴ TikTok would appear to fall squarely within that scope.

As for apps in trade more generally, under GATS, members are not permitted to have "'zero quotas' for services they have liberalized domestically."²⁹⁵ China allows domestic versions of international social media apps, like WeChat, Weibo, and Youku, to operate,²⁹⁶ but blocks entirely foreign counterparts such as WhatsApp, Twitter, and YouTube.²⁹⁷ Thus, the United States can argue that China is violating the national treatment principle of GATS.²⁹⁸ Continuing the hypothetical, China could then raise the public morals exception under GATS and have the opportunity to fairly explain how its censorship and Great Firewall protect against "fundamental interests of [Chinese] society" and do not constitute "a disguised restriction on trade in

²⁹² Proposal for WTO Reform by China, *supra* note 288.

²⁹³ Zhen, *supra* note 215, at 758.

²⁹⁴ *Id.* (quoting Tim Wu, *The World Trade Law of Censorship and Internet Filtering*, 7 CHI. J. INT'L L. 263, 281 (2006)).

²⁹⁵ *Id.* at 759.

²⁹⁶ Claudio Iobbi, *5 Differences Between Chinese and Western Social Media*, ASIALINK (Apr. 23, 2020), <https://asialinkchina.com/5-differences-between-chinese-and-western-social-media/> [<https://perma.cc/4CAS-PJD8>].

²⁹⁷ Summers, *supra* note 39.

²⁹⁸ Zhen, *supra* note 215, at 759.

services.”²⁹⁹ Although the national treatment argument would not support a ban of TikTok within the United States, it would force China to be accountable for its firewall. Potentially, the WTO could demand that China ease restrictions to allow foreign apps greater access within the country,³⁰⁰ which would be a significant development in digital reciprocity between two major WTO entities.

Expanding GATS, however, does not fix everything. GATS cannot solely accommodate the full scope of the TikTok dispute without amendment. The treaty is not up to the task of punishing the alleged boogeyman infiltrating TikTok servers to steal data and propagandize users. Nevertheless, enforcing GATS principles in digital trade would change the protectionism narrative by moving from hypothetical discussion to tangible results. China’s actions would either be a violation or not a violation, and from there, the WTO could move forward. Overall, obliging WTO members to defend their technological or protectionist digital policies before the WTO would deepen the WTO’s involvement in this sector.

This Comment does not choose to ignore the likelihood of members opposing stricter e-commerce rules and developments. Trade protectionism is more than economic—it is “political and strategic,”³⁰¹ and China has firmly stated that its internet sovereignty “should be respected and protected.”³⁰² It is true that China has been cautious as to discussing new rules and has had reservations about discussing “pure digital services.”³⁰³ However, to counter the nihilistic approach to China’s willingness to negotiate, China’s proposals show engagement with the process.³⁰⁴ China has had the luxury of avoiding an in-depth conversation about its digital trade practices in the WTO forum. If placed in the hot seat, “there is reason to be optimistic about the efficaciousness of collective action” against China’s digital trade practices.³⁰⁵ Assuming a defeatist approach that China would simply withdraw from the WTO or ignore its rulings undermines the entire

²⁹⁹ *Id.*

³⁰⁰ *See id.*

³⁰¹ Wei Li, *Trade Protectionism and Economic Growth: The Chinese Example*, GLOB. ASIA (Sept. 2009), https://globalasia.org/v4no3/feature/trade-protectionism-and-economic-growth-the-chinese-example_wei-li [<https://perma.cc/6GMQ-HFZT>].

³⁰² Zhen, *supra* note 215, at 735 (quoting BINGXING FANG, *CYBERSPACE SOVEREIGNTY: REFLECTIONS ON BUILDING A COMMUNITY OF COMMON FUTURE IN CYBERSPACE* 184–85 (2018)).

³⁰³ Gao, *supra* note 274, at 314.

³⁰⁴ *Id.*

³⁰⁵ Zhen, *supra* note 215, at 731.

concept of international collectivism. Change cannot and should not be instantaneous, but Member states' calls should not be ignored or postponed. If the WTO acts, or rather does not act, to placate a fear of retaliation by individual nations, then it has already failed in its purpose.

B. Option Two: Private Sector Self-Regulation

The alternative to the WTO proposed by this Comment is bittersweet; if the WTO cannot rise to the occasion, perhaps the Electronic World Trade Platform (e-WTP) can. The e-WTP is a rising star in the digital trade reform movement. It is “a private sector-led, multi-stakeholder initiative to promote public-private collaboration and dialogue in support of inclusive global trade.”³⁰⁶ The e-WTP was founded by business magnate Jack Ma and is managed by Alibaba,³⁰⁷ China's biggest online commerce company.³⁰⁸ Alibaba launched the e-WTP in 2016 to enable global trade participation by small- and medium-sized enterprises (SMEs).³⁰⁹ It began by establishing two hubs in China (Hangzhou and Yiwu) and then expanded by setting up eHubs with partners in participating countries.³¹⁰ Alibaba OneTouch, which is Alibaba's “global cross-border supply chain management platform” connects the hubs back to the center hub in China.³¹¹

The e-WTP's goals are expansive and ambitious. Central to the e-WTP is its effort to facilitate the development of “the digital economy through the development of global digital economy infrastructure and the adoption of policies to promote best practices.”³¹² To do so, the e-WTP focuses on what it refers to as four key digital networks: the global trading network, the global logistics network, the global financial services network, and the global public service platform.³¹³

³⁰⁶ *Who We Are*, E-WTP, <https://www.ewtp.org/about#who> [<https://perma.cc/9DH9-8JAR>] [hereinafter E-WTP].

³⁰⁷ Lauren A. Johnston, *World Trade, E-Commerce, and COVID-19*, 21 CHINA REV. 65, 65 (May 2021), <https://www.jstor.org/stable/pdf/27019010.pdf> [<https://perma.cc/R7GM-4APB>].

³⁰⁸ Marc Lajoie & Nick Shearman, *What Is Alibaba*, WALL ST. J., <https://graphics.wsj.com/alibaba/> [<https://perma.cc/22G6-72K2>].

³⁰⁹ Sangeet Paul Choudary, *China's Country-as-Platform Strategy for Global Influence*, BROOKINGS (Nov. 19, 2020), <https://www.brookings.edu/techstream/chinas-country-as-platform-strategy-for-global-influence/> [<https://perma.cc/9367-JYXZ>].

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² E-WTP, *supra* note 306.

³¹³ *Id.*

Within these four spheres, the e-WTP “works with governments and enterprises,” develops “smart logistics hubs,” “supports the development of global financial networks” for cross-border payment, and supports platforms for merchants to navigate local law, like customs and taxation.³¹⁴

Highlighting the e-WTP’s prominence in digital trade, the WTO, in an “unheard of” maneuver, partnered with the e-WTP to “get the private sector involved to lobby” on the issue of e-commerce in 2017.³¹⁵ Considering that the e-WTP is “designed to complement” the WTO,³¹⁶ collaboration between the two supports Ma’s vision of developing global e-commerce infrastructure. Since then, the e-WTP has had five years to grow and specifically capitalized off COVID-19 to accelerate its trade model.³¹⁷

Allowing the private sector to set the tone for digital trade is both pragmatic and efficient—the private sector is “an agent of change” with the “potential to kick-start development,” especially in developing nations and among SMEs.³¹⁸ This Comment would be remiss to propose that the WTO can solve all digital trade issues without consultations with those directly involved. But, however vital the private sector is to the development of proper e-commerce infrastructure and digital trade rules, giving Alibaba the reigns to influence e-commerce is likely not the collaborative method the international community should prefer.

First, the e-WTP is functionally an export of Chinese digital infrastructure.³¹⁹ As the world slowly emerges out of the COVID-19 pandemic protocol, the growth in international e-commerce “allows companies like Alibaba” to “create points of control in the international

³¹⁴ *Id.*

³¹⁵ Kirtika Suneja, *WTO Ropes in Alibaba’s Jack Ma to Promote E-Commerce Talks*, ECON. TIMES (Dec. 12, 2017), <https://economictimes.indiatimes.com/small-biz/sme-sector/wto-ropes-in-alibabas-jack-ma-to-promote-e-commerce-talks/articleshow/62034131.cms?from=mdr> [<https://perma.cc/K3KK-57JJ>].

³¹⁶ *Alibaba Signs Agreement with Belgium for E-Commerce Trade Hub*, REUTERS (Dec. 5, 2018), <https://www.reuters.com/article/us-alibaba-logistics/alibaba-signs-agreement-with-belgium-for-e-commerce-trade-hub-idUSKBN1O410T> [<https://perma.cc/7M9P-D8R9>].

³¹⁷ See Johnston, *supra* note 307, at 74.

³¹⁸ Lorenzo Pavone et. al., *How the Private Sector Can Advance Development*, OECD, <https://www.oecd.org/dev/development-posts-private-sector.htm> [<https://perma.cc/3PXS-LQWG>].

³¹⁹ Arjun Kharpal, *The Splinternet: How China and the U.S. Could Divide the Internet for the Rest of the World*, CNBC (Feb. 3, 2019), <https://www.brookings.edu/techstream/chinas-country-as-platform-strategy-for-global-influence/> [<https://perma.cc/MSB9-GTV3>].

economy.”³²⁰ With the growth of the e-WTP, Alibaba is set to “write the rules for how small businesses engage in international trade.”³²¹ Out of context, this development is simply the byproduct of private sector development. After all, the e-WTP does have ties with the WTO, and nothing the e-WTP has done is illegal or immoral. In fact, the way the e-WTP helps SMEs navigate the complicated red tape associated with greater market access is a net positive development.³²² However, the e-WTP is not neutral, nor does it negotiate with the broader international trade community to the extent that the WTO does. Within the context of China’s “Digital Silk Road” ambitions, the situation becomes murkier.³²³

China has effectively set up a “country-as-a-platform strategy” for digital trade.³²⁴ The country is aggressive about digital exports, plays a large role in technology development, and, through the e-WTP, is setting up “unique points of control” in e-commerce.³²⁵ China is “the world’s largest e-commerce market” and has no intention of slowing down.³²⁶ The e-WTP is a critical part of this endeavor, because it is doing the work of hitching SMEs and other countries to its platforms through its own global logistics network strategy.³²⁷ Furthermore, Chinese “public and private actors” have concerted their efforts to promote digital trade infrastructure that aligns with the Digital Silk Road policy goals.³²⁸ Intentions of Jack Ma and the e-WTP aside, Chinese state media refers to the e-WTP activity as “China’s comprehensive cross-border e-commerce pilot zone.”³²⁹ Although the e-WTP does mix WTO stipulations in within its digital trade rules,³³⁰ the aforementioned lack of solidified policy from the WTO on digital trade gives the e-WTP room to implement its digital trade policy upon which its hubs rely. Although inconsequential now to larger technology companies who benefit from existing free trade zones, it does matter that the e-WTP has risen to the task of bringing developing economies to the same, and potentially competitive, level.

³²⁰ *Id.*

³²¹ *Id.*

³²² See Johnston, *supra* note 307, at 70.

³²³ Choudary, *supra* note 309.

³²⁴ *Id.*

³²⁵ *Id.*

³²⁶ See Johnston, *supra* note 307, at 66.

³²⁷ See E-WTP, *supra* note 306.

³²⁸ Choudary, *supra* note 309.

³²⁹ Johnston, *supra* note 307, at 71.

³³⁰ *Id.* at 72.

Assuming that China’s goals never reach fruition, Alibaba, and to an extent, the e-WTP, is still beholden to the Chinese government. Alibaba “has been targeted by antitrust authorities” and the Chinese Communist Party for “alleged monopolistic conduct in e-commerce.”³³¹ China cracked down on Alibaba in 2021, fining the company 2.8 billion dollars and ordering Alibaba to change its business practices.³³² China’s motivations for cracking down on Alibaba and other tech giants are unclear. However, one possible purpose is to reassert dominance over the “mostly private entities over which it has little direct control.”³³³ If that motivation holds weight, China’s interactions with Alibaba could spell trouble for digital fair trade. On one end of the spectrum, those opposed to Chinese policy can argue that the Chinese government and Alibaba are working together to prioritize Chinese infrastructure exports, linking a slew of nations to China in pursuit of global technology dominance. Thus, digital trade development could be further shaped by Chinese values and not the values of a united international community. Alternatively, and more likely, Alibaba faces more risks as the e-WTP grows. Although the e-WTP positively supports developing nations now, the Chinese government in the future may feel compelled to reassert control over Alibaba and use its laws to reign Alibaba in, which will influence the e-WTP’s overall functionality. In either scenario, China is theoretically poised to drastically influence digital trade and e-commerce if the e-WTP growth is unchecked by a neutral international entity, a.k.a., the WTO.

Second, the e-WTP is polarizing due to its relationship with China. Although currently expanding to Europe, the e-WTP’s plans to expand into the United States are “put on ice due to trade tensions.”³³⁴ Also important is the fact that COVID-19 “has awakened sleeping prospective digital giants in Europe [and] North America.”³³⁵ As Chinese enterprises continue to go global and are met with Western resistance and competition, “excessive restrictions on cross-border transfer of data” will be obstacles to the development of a

³³¹ *Why China Keeps on Targeting Its Technology Giants: Quicktake*, BLOOMBERG (Feb. 23, 2022), <https://www.bloomberg.com/news/articles/2022-02-23/why-china-keeps-on-targeting-its-technology-giants-quicktake> [<https://perma.cc/Q3L8-EXQ6>].

³³² *Id.*

³³³ *Id.*

³³⁴ *Alibaba Signs Agreement with Belgium for E-Commerce Trade Hub*, REUTERS (Dec. 5, 2018), <https://www.reuters.com/article/us-alibaba-logistics/alibaba-signs-agreement-with-belgium-for-e-commerce-trade-hub-idUSKBN1O410T> [<https://perma.cc/L76K-HZ8F>].

³³⁵ Johnston, *supra* note 307, at 80.

comprehensive digital trade regime.³³⁶ As the Global West begins developing its digital trade policies and integrating SMEs into its foundation, the appeal of working with the e-WTP will be lost. Assuming accelerated growth occurs for both the e-WTP and western frameworks, undoubtedly the two will find a point of conflict in the future.

This scenario is referred to as “the splinternet,” a future in which the internet is fractioned between the United States and China as both nations’ “apps and services each dominate half of the internet.”³³⁷ In fact, the e-WTP may make this prophecy a reality by uniting China and other Eastern countries without involvement from the West. The trend of expansion by the e-WTP will possibly be compounded across digital trade; essentially, although “Chinese apps will have a hard time getting adopted in the U.S. and Europe,” other countries in “Southeast Asia, South America, [the] Middle East” and Africa will adopt Chinese systems.³³⁸ As the e-WTP has built a presence in “Ethiopia, Malaysia, Rwanda, Thailand” and now Belgium,³³⁹ this concern is salient and already taking root. Given the intimacy of the connection between the e-WTP and its home base in China, logically the SMEs of those nations will grow reliant on Chinese infrastructure, making the splinternet a reality.

Continuing this course, the international community may replicate the TikTok dispute on a grander scale and with more consequences. The countries that resisted TikTok out of concerns of Chinese influence will remain resistant to adopting Chinese digital infrastructure without assurances that China has changed in its highly restrictive and protectionist ways. China, which benefits from the e-WTP in the status quo and has already invested much of its resources in the Digital Silk Road, is unlikely to change. However, unlike a single social media app, China’s influence over digital trade cannot be banned. The Digital Silk Road will develop and likely will “fundamentally shift trade and financial flows toward a China-centric economic order.”³⁴⁰ With countries realizing the need for digital infrastructure post-pandemic,

³³⁶ Gong Baihua, *The Establishment of eWTO Regulations on Cross-Border E-Commerce*, 6 J. WTO & CHINA 59, 68 (2016).

³³⁷ Arjun Kharpal, *The ‘Splinternet’: How China and the U.S. Could Divide the Internet for the Rest of the World*, CNBC (Feb. 3, 2019), <https://www.cnbc.com/2019/02/04/the-splinternet-an-internet-half-owned-by-china-and-the-us.html> [https://perma.cc/QR4N-QYDY].

³³⁸ *Id.*

³³⁹ E-WTP, *supra* note 306.

³⁴⁰ Choudary, *supra* note 309.

China is “well-positioned to increase [the] export of its digital infrastructure and standards.”³⁴¹ Thus, the techno-nationalist dispute between the United States and China, two highly influential actors in digital trade, will worsen before it gets better.

Anticipating the growth of the e-WTP and its impact on global digital trade is speculative at best. COVID-19 arguably gave the e-WTP an artificial boost as the digital trade sector boomed. As the international community rebalances and initiates its own digital trade measures, the prominence of the e-WTP may fade. Little information exists regarding the hub-building selection process,³⁴² and the organization broadcasts only its successes. But, regardless of the efficacy of the e-WTP, one thing is clear: if the WTO does not tighten its regulatory power, other organizations will claim that role in digital trade, the results of which are too inconsistent and too uncertain to rely on.

CONCLUSION

TikTok is more than an ordinary app. TikTok is demonstrably a vehicle of e-commerce, data collection, and socialization. The concerns that arose from its domestic use and subsequent politicization cut directly to the heart of international trade disputes. International trade cooperation relies on actual cooperation, which has been lost when it comes to digital trade. *TikTok v. Trump* reflects that cooperative loss by illustrating how the status quo requires an all-or-nothing solution to conflicts; if you don’t like a digital trade import, either ban it or live with it. *TikTok v. Trump* also highlighted the imbalanced power dynamics of trade: while one country’s protectionist or suspicious practices go unchecked, the likelihood of success if one country takes unilateral action against that practice is uncertain.

The questions that remained after *TikTok v. Trump*, from in-app content regulation to the permissibility of bans under a fair-trade scheme, must be addressed to promote consistency in international trade frameworks. With an artificially aging WTO practically asleep at the wheel, countries are increasingly relying on drastic measures that they know work based on prior dispute resolutions. The overuse of exemptions to bypass accountability for discrimination in trade, particularly with the national security exemption, is a problem. If WTO members can skirt their obligations entirely on a case-by-case basis,

³⁴¹ *Id.*

³⁴² Johnston, *supra* note 307, at 80.

then existing Agreements lose their weight and effect. The threat of war or a massive, clear violation of consumer rights should not be the litmus test for when a country is able to protect itself from digital trade violations.

For the WTO to retain the value of its rules and regulations, it must speak not only to physical trade but also to digital trade. Regulations have value. WTO members “generally live up to WTO rules” when those rules are unambiguous and hold the weight of reprimand within the Organization.³⁴³ However, the WTO has not risen to encompass digital trade and e-commerce in a way that mitigates conflict. If the international community wants an organization to turn to when digital trade agreements go south, the WTO cannot meet the demand in its current state. The unexpected and unregulated growth of digital trade will recklessly expand if issues are addressed intermittently and not holistically. As dire as inaction may be, this Comment equally asserts that policymaking should not be left to big businesses in collaboration with their individual host nations for the sake of expediently crafting a digital trade regime.

As it stands, the vicious cycle of tariff against tariff, ban in response to ban sours fair trade and severely undermines the goals nations sought to codify in 1995. Using TikTok as an example, it is clear that reliance on domestic laws and policy will lead to conflicts that compound the trade dispute in question. Without substantive change, the international community is not prepared to handle global cross-border tech integration and regulation in a way that can mitigate future harm. The issue should not be considered in a vacuum but in a way that speaks to the needs of SMEs, powerhouses like Alibaba and Google, and the political concerns of the governments bartering for reform. The WTO should also set data collection and consumer privacy standards that every nation must follow. This task is not impossible. Crucially, change must be facilitated by a neutral entity and reflect not the positions of only the United States or China but rather the collective conscience of all participating nations. The WTO is capable of being that guide—but to do so, it must act now before the private sector or various nations rise to the task and further splinter an already fracturing digital economy. Ultimately, until some international commitment is made to

³⁴³ See THE VALUE OF THE WTO, CTR. FOR STRATEGIC & INTL. STUD. (Nov. 13, 2017), <https://www.csis.org/analysis/value-wto> [<https://perma.cc/GL5L-NCHP>].

address digital trade, it appears that the door has been left open³⁴⁴ to whatever trade dispute comes next.

Figure 1. *WTO TikTok Screenshot: Leave the Door Open*



³⁴⁴ World Trade Organization (@wto), TIKTOK (Mar. 27, 2022, 4:10 PM), <https://www.tiktok.com/@wto/video/6979245308735671557>. The WTO's TikTok contains a video in which employees recite commitments of the Organization to the song "Leave the Door Open" by Silk Sonic and Bruno Mars. See Figure 1.

