



# Aligning Multistakeholder Norms and the Digital Trade Agenda

Jeremy Malcolm

IGF 2016, Guadalajara

December 6, 2016



## Outline

### **Problems with Internet issues in trade agreements**

At the global level

At the domestic level

### **Rethinking the Internet and trade**

A movement rises to reform trade negotiations



# The case for Internet in trade agreements

## Fact

*Global trade in good and services creates wealth and opportunity*



## The case for Internet in trade agreements

### Fact

*Global trade in good and services creates wealth and opportunity*

### Fact

*The free, open Internet is a form of global trade in information services*



# The case for Internet in trade agreements

## Fact

*Global trade in good and services creates wealth and opportunity*

## Fact

*The free, open Internet is a form of global trade in information services*

## Theorem

*Trade agreements should be used to promote a free, open Internet*



## The case for Internet in trade agreements

### Fact

*Global trade in good and services creates wealth and opportunity*

### Fact

*The free, open Internet is a form of global trade in information services*

### Theorem

*Trade agreements should be used to promote a free, open Internet*



**What is wrong with this logic?**



## **Problems with Internet issues in trade agreements**

### Rethinking the Internet and trade



## Outline

### **Problems with Internet issues in trade agreements**

At the global level

At the domestic level

### **Rethinking the Internet and trade**

A movement rises to reform trade negotiations





# Digital issues cannot be dealt with multilaterally

- Multilateralism has broken down
  - Multilateralism is based around consensus and the **equality of states**
  - WTO Doha Round single undertaking platform abandoned in Nairobi in 2015

## Digital issues cannot be dealt with multilaterally

- Multilateralism has broken down
  - Multilateralism is based around consensus and the **equality of states**
  - WTO Doha Round single undertaking platform abandoned in Nairobi in 2015
- Developing countries are not interested in agreements on digital issues without reciprocity on agriculture
- Priorities of developed countries can be more easily pushed in preferential agreements outside of WTO
  - Also called “mega-regional”, “plurilateral”, or “minilateral”
  - Intended as docking agreements others can join later



## Hegemony, not harmonization

- In theory trade agreements are a compact to **jointly reduce barriers to trade for mutual advantage**
- In reality a game in which the **party with largest market extracts the most concessions**



## Hegemony, not harmonization

- In theory trade agreements are a compact to **jointly reduce barriers to trade for mutual advantage**
- In reality a game in which the **party with largest market extracts the most concessions**
- Also used for geopolitical positioning, mostly for the **containment of China**
  - China kept out of these agreements until the terms have been set
  - China sought entry into TISA, U.S. blocked this in 2013



## Lack of transparency and participation

- No representation of non-governmental stakeholders in negotiations



## Lack of transparency and participation

- No representation of non-governmental stakeholders in negotiations
- Negotiations and texts are withheld from the public
  - WTO is more transparent than lesser plurilateral agreements
  - WTO RTA Transparency Mechanism only requires notification



## Outline

### **Problems with Internet issues in trade agreements**

At the global level

At the domestic level

### **Rethinking the Internet and trade**

A movement rises to reform trade negotiations



## Trade Advisory Committees

- Formal consultation is through systems such as **briefings** and **advisory groups**
- **Informal industry lobbying** and institutional pressures also play a significant role

### United States Trade Representative

- 16 industry trade advisory committees (ITAC)
- Seven non-industry advisory committees (eg. labor)
- 700 advisors in all, the majority of these from industry
- ITAC 8 on ICT services and electronic commerce
  - No civil society or public interest representatives





## Narrower perspectives represented

- Trade negotiators are not diverse
  - No expertise in technological or human rights dimensions
  - Still far more intellectual property staff than e-commerce staff



## Narrower perspectives represented

- Trade negotiators are not diverse
  - No expertise in technological or human rights dimensions
  - Still far more intellectual property staff than e-commerce staff
- Difficult to make the case to include provisions for non-trade related reasons



## Narrower perspectives represented

- Trade negotiators are not diverse
  - No expertise in technological or human rights dimensions
  - Still far more intellectual property staff than e-commerce staff
- Difficult to make the case to include provisions for non-trade related reasons
- Federally-registered lobbyists are eligible to apply for membership on the ITACs



## Lack of transparency

- Trade advisors must have security clearance and agree to keep texts secret
- Failed attempt to have new commitments included in the Open Government Partnership 2015 U.S. NAP



## Lack of transparency

- Trade advisors must have security clearance and agree to keep texts secret
- Failed attempt to have new commitments included in the Open Government Partnership 2015 U.S. NAP
- EU taking some steps on transparency, US lags behind
  - Disclosure of EU text proposals to the public
  - Disclosure of consolidated text to all MEPs



## Lack of transparency

- Trade advisors must have security clearance and agree to keep texts secret
- Failed attempt to have new commitments included in the Open Government Partnership 2015 U.S. NAP
- EU taking some steps on transparency, US lags behind
  - Disclosure of EU text proposals to the public
  - Disclosure of consolidated text to all MEPs
- Two new measures before Congress
  - Promoting Transparency in Trade Act
  - Reclaiming Congress's Constitutional Mandate in Trade Resolution



Problems with Internet issues in trade agreements

## Rethinking the Internet and trade



## Outline

### **Problems with Internet issues in trade agreements**

At the global level

At the domestic level

### **Rethinking the Internet and trade**

A movement rises to reform trade negotiations





## Brussels Declaration on Trade and the Internet

*"...The procedural deficits that define modern trade agreement negotiations have resulted in instruments that are unduly deferential to the interests of a narrow class of established industry stakeholders, and fail to address the needs of broader affected communities. This stands in stark contrast to the more open Internet governance process norms, to which the governments that negotiate trade agreements also notionally subscribe, which if fully realized would be better adapted to incorporate the values of these communities, such as free expression and cultural facilitation, into trade policies."*

## Main Demands of the Brussels Declaration

- Pro-active dissemination of information, including the regular release of draft proposals and consolidated texts
- Opportunities for meaningful involvement and collaboration with civil society representatives
- Apply freedom of information principles to the development and negotiation of government positions
- Require balanced representation on any trade advisory bodies or processes, including implementation bodies
- Take affirmative measures to engage organizations and experts representing Internet users and consumers
- Ensure the resulting agreements support realization of the targets of the UN 2030 Agenda for Sustainable Development



## BEYOND REGULATION: *Reaching Solutions that Work for Users*

Not every problem on the Internet calls for cross-border rules or principles. If a group or process proposes to address such a problem that way, they should demonstrate at the outset why solutions can't be found at the local level or by directly empowering users. Then, they should comply with these criteria:



### **INCLUSION**

We need to make sure that all stakeholders who are affected by Internet policies have not only the opportunity, but also the resources, to be heard.



### **BALANCE**

Reaching the optimal solution requires letting the best ideas rise to the top, even if governments and corporations don't always get their way.



### **ACCOUNTABILITY**

Institutions and stakeholders who participate in crafting rules, standards or principles for the Internet must be transparent and deserving of our trust.

Even if a just process has been followed, that doesn't mean users will accept the outcome. But if they do—voluntarily—that's good evidence of a successful solution. If the solution also needs to be formally enacted or enforced by an empowered body, there should be a clear way forward to make that happen, with equally clear limits.





## Improving trade negotiations

- **Inclusion**

- Resource user participation in trade advisory processes
- Pull in recommendations from non-trade bodies eg. IGF



## Improving trade negotiations

- **Inclusion**

- Resource user participation in trade advisory processes
- Pull in recommendations from non-trade bodies eg. IGF

- **Balance**

- Closing agencies' revolving door with industry
- Adding a human rights clause to trade agreements



## Improving trade negotiations

- **Inclusion**

- Resource user participation in trade advisory processes
- Pull in recommendations from non-trade bodies eg. IGF

- **Balance**

- Closing agencies' revolving door with industry
- Adding a human rights clause to trade agreements

- **Accountability**

- Posting all text proposals online for public comment
- Release consolidated drafts between negotiation rounds



## Panelists

- **Jeremy Malcolm**, Electronic Frontier Foundation
- **Burcu Kilic**, Public Citizen
- **Marcela Paiva Véliz**, Permanent Mission of Chile to WTO, WIPO, UNCTAD & ITC
- **Viviana Munoz Tellez**, South Centre
- **David Sned**, Internet Infrastructure Coalition
- **Judith Hellerstein**, Hellerstein & Associates