



Trade for the Digital Age

Policy options for future-proofing
America's trade agreements

January 2017



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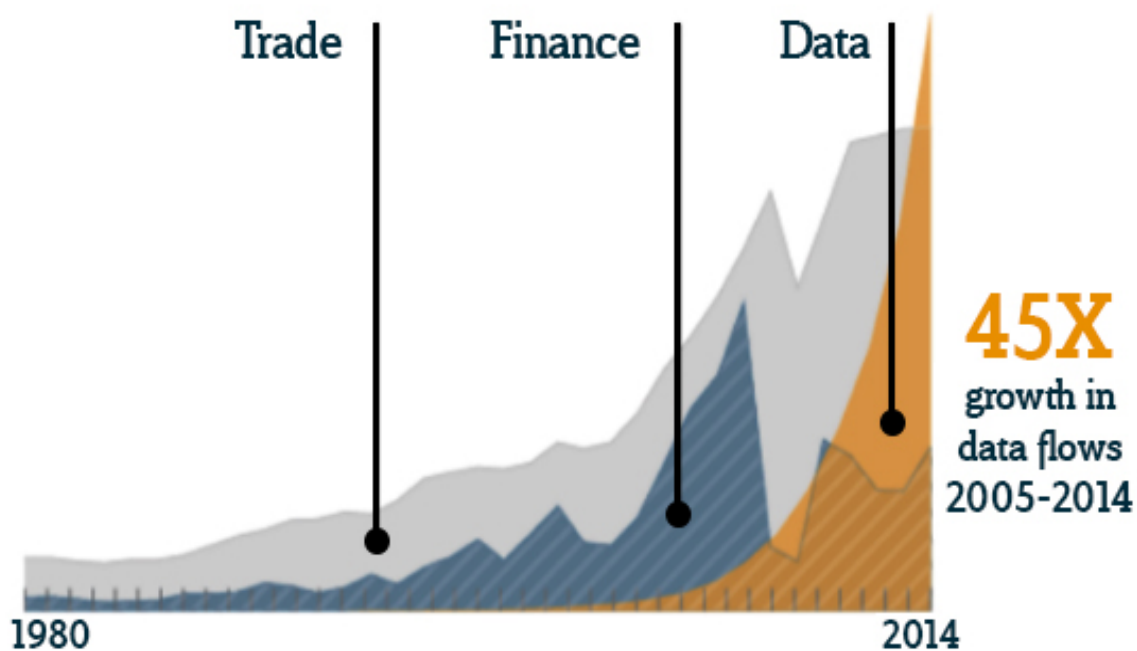
1. Executive summary

America's global economic leadership is under threat because the public has lost trust in government's ability to negotiate trade agreements that provide for the good of all. Trade agreements are disconnected from democratic oversight, mired in a swamp of influence from lobbyists and special interests, and harmful to the interests of American workers and entrepreneurs. Agreements are negotiated with levels of confidentiality that go far beyond those necessary for effective deal-making. When these secretive, omnibus proposals are finally released, they stumble — and fall — in the face of public outrage.

Continued devotion to past methods of negotiating trade agreements will result in further misdirected effort by the hardworking United States Trade Representative (USTR), as further deals fail to meet the public's expectations, and are defeated or abandoned. Instead, a change of strategy is urgently required.

This change would help restore faith when dealing with agreements on manufacturing and industrial jobs. But managing digital trade is equally important for the future of U.S. economic leadership. According to McKinsey (2016), the digital economy now contributes more to economic growth than traditional trade in goods, a trend confirmed in 2016, which saw the slowest growth in trade since the financial crisis.¹

Figure 1: Growth in digital data flows



Source: McKinsey, 2016

Global interoperability is an integral feature of the Internet as a platform for global trade. Notwithstanding a shift of U.S. trade policy from global to bilateral agreements, such interoperability requires consistent and fair shared rules. To achieve this, and to restore public faith in the benefits of trade for the modern, digital economy, requires a dialogue with all stakeholders, whether they be start-up entrepreneurs,² American workers or everyday Internet users.

Our recommendations would reorient U.S. trade policy to become more balanced, more open, and more relevant to today's innovative American businesses and their users:

- New transparency standards should be adopted for the USTR and agreed with our trade partners, requiring the publication of each country's proposals for the text of non-tariff related rules, along with the release of consolidated draft texts of trade agreements under negotiation following each completed negotiating round.
- More diverse participation in the trade advisory process should be encouraged by replacing or supplementing Trade Advisory Committees with on-the-record public notice and comment and public hearing processes during the generation of government positions, and relaxing advisors' confidentiality obligations.
- Our future trade agreements should be given a narrower focus on issues that directly affect foreign trade using the Internet, rather than behind-the-border rules whose impact is mainly on American companies and citizens, working in America, rather than on international trade flows. Such domestic rules can be better addressed through a diversity of other fora, or through domestic law-making and robust negotiation outside of trade agreement.

2. Process

Given the complexity of trade negotiations and the fast-changing pace of the digital environment, government officials, even with the advice of established businesses, are not always equipped to negotiate fair trade deals. Luckily, many stakeholders can provide invaluable expertise to ensure that trade negotiators maximize the economic potential of trade while preventing it from being captured by special interests. In many cases, a wider and open process can offer a more balanced view of the economic and political stakes of negotiations, thereby bringing more legitimacy to trade policymaking.

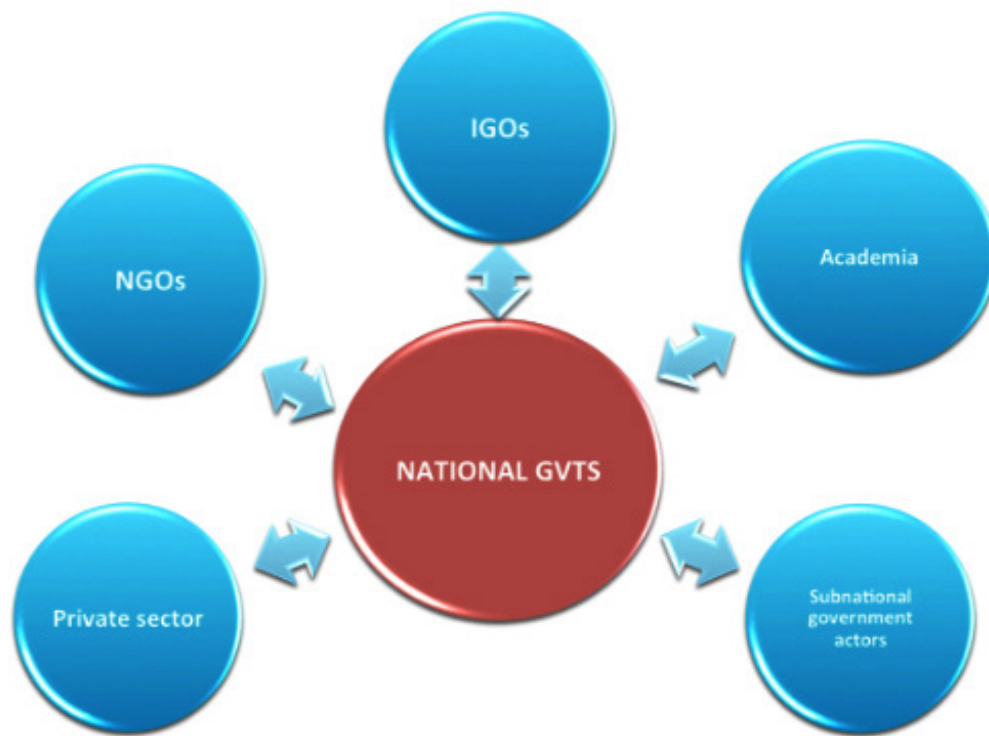


Figure 2: From Exclusive Club to Inclusive Trade

2.1. Transparency

The first step that can be taken to improve public acceptance of trade agreements is to improve transparency of the negotiations and texts, not only to Congress and to cleared advisors, but also to the public at large.

In May 2016, nine U.S. groups including the Association of Research Libraries, the Electronic Frontier Foundation, OpenTheGovernment.org and the Sunlight Foundation, recommended to the USTR that it should:

1. Publish U.S. textual proposals on rules in ongoing international trade negotiations.
2. Publish consolidated texts after each round of ongoing negotiations.
3. Appoint a “transparency officer” who does not have structural conflicts of interest in promoting transparency at the agency.³

2.1.1. Bills before Congress

H.R. 6141, the Promoting Transparency in Trade Act, was introduced by Representative Debbie Dingell, with co-sponsorship by Representatives Rick Nolan, Mark Pocan, Tim Ryan, and Jan Schakowsky. It would require the publication of the negotiating position of the U.S. at the conclusion of such negotiating round, and address the transparency officer’s structural conflict of interest.

Congressman Morgan Griffith (R-VA) also introduced legislation (H.Con.Res 147) to establish a Joint Ad Hoc Congressional Committee on Trade Responsibilities, which would be tasked with developing a plan to move to the legislative branch the functions and responsibilities of the USTR.

2.1.2. Best practices in trade policymaking

Table 1 below compares the U.S. approach to transparency in trade policymaking with other approaches. It reveals that although the U.S. has adopted a number of measures to make trade negotiations more transparent, it could also include reforms based on existing practices from our partners, allowing it to take the lead as the most democratic and balanced of trade negotiators, granting it legitimacy and respect at home and abroad.

Table 1: Transparency in trade policymaking: A comparative perspective

	US	EU	CANADA
Release of negotiating mandate / negotiating objectives	No FTA-specific negotiating mandate <ul style="list-style-type: none"> • Broadly defined objectives under trade promotion authority 	Release of negotiating mandate since 2014 (CETA and TTIP negotiations)	No
Impact assessments and reviews	<ul style="list-style-type: none"> • Ad hoc for Congressional hearings; • More systematic for environmental reviews 	Systematic for comprehensive ex-ante studies	Ad hoc for congressional reports

Negotiating texts	Negotiating texts available only to cleared members of trade advisory committees	Position papers and negotiating texts increasingly available online eg. TTIP and EU-Tunisia FTA	No
Information on negotiation rounds	Short and irregular ex-ante briefings on agenda of negotiations, and short chief negotiator reports after rounds	Extensive reports on the content of negotiations leaving out certain specific positions	No
Online consultation: release of public comments	Public comments received on negotiating objectives for TPP and TTIP, but not on specific text proposals	Limited to summary of statistical results	Ongoing for CETA
Investor-state dispute settlement	<ul style="list-style-type: none"> • Private hearings; release of documents conditioned to approval by all parties; • New commitments to transparency under TPP regarding proceedings and documents and third-party participation through amici curiae 	<ul style="list-style-type: none"> • UNCITRAL (2014) transparency rules in CETA: open hearings and release of documents conditioned to approval by all parties 	<ul style="list-style-type: none"> • UNCITRAL (2014) transparency rules in CETA: open hearings and release of documents conditioned to approval by all parties

A common practice among U.S. trading partners consists of carrying out ex-ante studies to reflect on the potential impact of a trade agreement on different sectors and stakeholders. For instance, the European Union commissions independent experts from academia and/or international organizations, empowering them to coordinate stakeholder consultation with

non-state actors on behalf of the European Commission. While the methodology of ex-ante studies and impact assessments (e.g. limitations of CGE models) could be improved, this process improves the transparency and inclusiveness of trade policymaking both before and after negotiations.

Since 2014, the European Commission releases the EU's negotiating texts on an online portal,⁴ and gives members of the European Parliament access to consolidated drafts. This departure from earlier practices showed that trade negotiations need not be considered as zero-sum games played behind closed doors but can keep legislators and the public informed throughout the negotiating process.

The public release of consolidated drafts is also the practice of other intergovernmental treaty organizations such as the World Intellectual Property Organization (WIPO). Even the World Trade Organization (WTO) released consolidated drafts of its recent Trade Facilitation Agreement, along with text proposals from national delegations⁵. The increasing openness of trade policymaking in several venues contrasts with the very strict disclosure rules in U.S. trade advisory committees.

Another example of greater openness in trade policymaking concerns the reporting of each round of negotiation, which in the case of the European Union, is carried out more systematically and extensively than presently in the U.S., where information is generally limited to the negotiating agenda and published more irregularly (only for major FTAs, and not always updated).

In response to growing public concerns over the dilution of national sovereignty and democratic input into these agreements, government officials in the U.S., EU and Canada have attempted to improve transparency and inclusiveness in investor-state dispute settlement mechanisms in yet-to-be ratified FTAs like CETA, by committing to make documents and proceedings more open to the public and allowing third-party participation through *amici curiae*. However, public access to information continues to be conditioned by approval by parties and limited by a number of exceptions relating to e.g. "confidential or protected information" that may affect the competitive position of an investor.

2.2. Multi-stakeholder consultation

A multi-stakeholder model of Internet governance enjoys bipartisan U.S. government support, as recently affirmed in Bill HR 1580 ("Bill to affirm the policy of the United States regarding Internet governance), which provides "It is the policy of the United States to preserve and advance the successful multistakeholder model that governs the Internet."⁶

A more detailed description of what this requires is contained in the NETmundial Multistakeholder Statement, which was concluded in April 2014 and has since been incorporated by reference into a number of multilateral resolutions and recommendations. It relevantly provides:

The development of international Internet-related public policies and Internet governance arrangements should enable the full and balanced participation of all stakeholders from around the globe, and made by consensus, to the extent possible. ... Decisions made must be easy to understand, processes must be clearly documented and follow agreed procedures, and procedures must be developed and agreed upon through multistakeholder processes.⁷

Similar statements are contained in other international instruments supported by the United States, including the OECD Principles for Internet Policy Making,⁸ 2011 Declaration by the Committee of Ministers on Internet governance principles of the Council of Europe,⁹ and G20 Digital Economy Development and Cooperative Initiative issued in September 2016.¹⁰

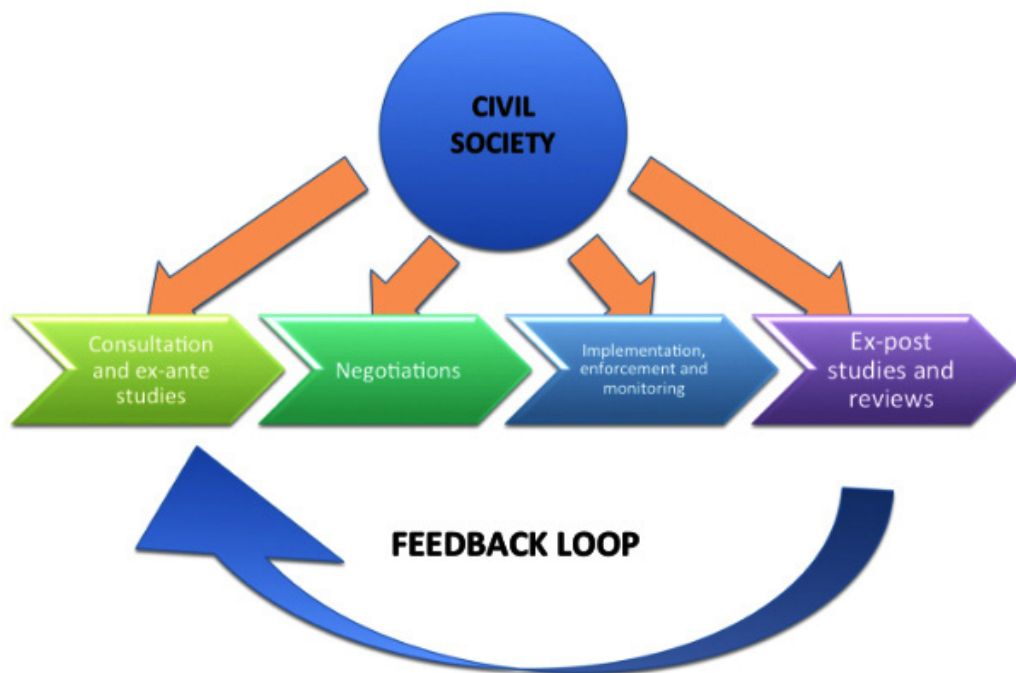


Figure 3: Transparent, inclusive and accountable processes

2.2.1. Trade Advisory Committees

Members of the USTR's Trade Advisory Committees are given access to view and comment on live drafts of its various trade agreements under the condition that they take an oath of confidentiality. Due to this requirement, they are now largely composed of industry representatives.

As part of their primary mission to share information with the public, grassroots and civil society organizations have been unable to accept these confidentiality conditions and have therefore refused to take up membership. This differs from the much more clear participatory process in domestic rule making.

2.2.2. Recommendations

Recommended reforms, which are drawn from the multi-stakeholder Brussels Declaration on Trade and the Internet issued in February 2016,¹¹ should include:

1. Initiating on-the-record public notice and comment and public hearing processes—at least equivalent to that normally required for other public rulemaking processes—at relevant points during the generation of government positions.
2. Applying freedom of information principles to the development and negotiation of government positions.
3. Requiring balanced representation on any trade advisory bodies or processes, including implementation bodies, and requiring that they reflect all interests potentially affected and generally operate in open forums subject to public observance and access to documentation.

2.3. Involving other agencies

Other agencies of government that have deep expertise in Internet governance and e-commerce should be more deeply integrated into the process of formation and consultation on U.S. trade policy concerning these issues.

2.3.1. Office of Science and Technology Policy

Under the National Science and Technology Policy, Organization, and Priorities Act of 1976, the Office of Science and Technology Policy (OSTP) serves as a source of scientific and technological analysis and judgment for the President with respect to major policies, plans, and programs of the federal government. This includes leadership of an inter-agency effort to develop and implement sound science and technology policies and budgets. The OSTP could be better utilized to offer valuable, science-based neutral analysis on technology and innovation issues to the USTR.

2.3.2. National Telecommunications and Information Administration

Like the OSTP, the National Telecommunications and Information Administration (NTIA) of the U.S. Department of Commerce also has responsibility for advising the President on technology issues, but in this instance with particular reference to telecommunications and information policy issues, including the multi-stakeholder model of Internet public policy development.

2.3.3 United States Department of State

The Department of State advances U.S. global cyber policy by facilitating the participation of civil society and private sector representatives in Internet-related policy making, both at national and international levels. There is obvious untapped potential for USTR to draw upon the State Department's expertise in this area.

3. Substance

3.1. Digital issues in trade agreements

The focus of this administration's trade policy should be on facilitating international trade in goods and services utilizing the Internet. Attention should be directed towards rules that directly facilitate business to business and business to consumer transactions, rather than on seeking to harmonize behind-the-border rules that have more indirect impacts on trade.

This is because rules that have impacts outside of trade, such as intellectual property, net neutrality, and personal data protection, will be more contentious and may result in the failure or weakening of U.S.-led agreements. Moreover, there are more appropriate fora for the conclusion of international standards on these behind-the-border issues.

Below we survey some of the issue areas for which trade rules may be an appropriate vehicle. The reference to these issues as having a possible fit with trade agreements does not derogate from our recommendations above that negotiations over such agreements should be made more transparent and inclusive.

3.1.1. Taxation

The WTO already extends a moratorium on imposition of customs duties on electronic transmissions. In order to preserve the free flow of Internet transactions across borders and foster the continued development of electronic commerce, this existing moratorium at the WTO should be maintained and renewed, or made permanent.

3.1.2. Digital certificates and electronic signatures

Trade agreements should not themselves be used for technical standard setting, but there is a respectable history of multilateral agreements being used at a high level to promote the interoperability of digital transactions. These rules should be technology-neutral, and avoid specifying particular certificate formats.

For example, the Trans-Pacific Partnership (TPP) contains provisions requiring parties to have a domestic electronic transactions framework in conformity with either the UNCITRAL Model Law on Electronic Commerce 1996 or the United Nations Convention on the Use of Electronic Communications in International Contracts.

3.1.3. Local hosting mandates

These are provisions that are designed to subvert data localization laws such as rules that require data on citizens to be stored and processed on servers located in their own country. On the one hand, these can prevent countries from distorting Internet traffic flows and imposing unnecessary costs on platform operators—so they do have the potential to protect free expression and access to information on the Internet.

On the other hand, these same rules could be used to undermine consumer protections for personal data. For example, these kinds of provisions could be used to unravel national efforts to pass legal requirements around how companies handle citizens' sensitive medical data.

It is therefore imperative that any text on this topic be the subject of wide, open public consultation with all affected stakeholders, as described above, in order to ensure that the resulting rules are not over-prescriptive and do not have unforeseen impacts. Consideration should be given to the use of other instruments, besides trade agreements, to address the problem of data protectionism.

3.1.4. Border measures for digital goods in import, export and transit

Trade agreements can facilitate electronic commerce by promoting paperless customs clearance, electronic transaction documents, mutual recognition of digital authentication, and electronic payments. Provided that the measures agreed are technologically neutral, such provisions are a modern extension of the traditional subject matter of trade agreements.

Trade agreements should not however require countries to imbue their border authorities with additional powers for the ex officio enforcement of domestic rules such as intellectual property rules. Such enforcement measures can frequently be a disguised restriction on trade and an unjustifiable derogation from judicial powers.

3.1.5. Payment processing

Transnational payment processors and intermediaries such as banks, credit card networks, and online payment systems such as PayPal and Transferwise, may privately agree on rules that affect the ability for international payments to take place. These rules could have anti-competitive effects, as well as inhibiting international trade in lawful goods and services.

Consistent with countries' international obligations to combat money laundering and financing of terrorism, trade agreements could usefully establish minimum criteria of transparency and accountability of arrangements between payment processors, to ensure that these private arrangements do not become trade restrictive.

3.1.6. Logistics

Similarly, opaque private arrangements have been reached between logistics companies and other stakeholders seeking to constrain the flow of certain types of products across borders, bypassing judicial scrutiny. Trade agreements could place a check on these arrangements in order to ensure that they are not misused for anti-competitive purposes.

3.1.7. Intermediary liability

Intermediary liability rules govern the legal liability of Internet Service Providers (ISPs) and online platforms for their users' communications. Trade agreements most conspicuously regulate this area in obligating signatory countries to provide legal incentives for ISPs to privately enforce copyright protection rules.

More recently a proposal has been tabled in the Trade in Services Agreement (TISA) for a rule that would require countries to protect Internet intermediaries from liability for a broader range of user speech. In principle such a rule is deserving of broader consideration, however it is imperative that this take place with input from all affected stakeholders, including Internet platforms and users. This cannot be done without significant reforms to transparency and consultation practices, as outlined above.

3.1.8. Data flows

A free and open Internet does have the potential to benefit global trade, just as it benefits freedom of expression and innovation. As the WTO General Agreement on Trade in Services (GATS) already covers the trade in information services, this is not a new topic for trade agreements, and it is likely that future agreements will address this topic in some form.

Nonetheless, there is a very contentious intersection between the promotion of information flows, and the protection of user privacy as a fundamental right. It is difficult to adequately reconcile these competing demands while trade negotiations are conducted in such opaque isolation. The procedural reforms outline above are an imperative precondition for the inclusion of any new rules on data flows in future trade agreements.

3.2. More troubled issues

A sharp distinction must be drawn between relatively constrained trade-related rules that promote the infrastructure and technical conditions for e-commerce in a technologically and industry-neutral way, and protective rules that favor certain industries sectors in international trade.

The latter sorts of rules are to be avoided for inclusion in trade agreements. They have the tendency to derail otherwise productive trade negotiations, to attract industry lobbyists seeking to capture such negotiations for the promotion of their private interests, and to require excessive concessions that harm other American industry sectors and workers.

3.2.1. Intellectual property

The archetypal example of this is intellectual property (IP) rules. It would be beneficial to omit rules that are prescriptive, and could become outdated as technologies such as the Internet, and social changes such as the sharing economy, continue to develop. Including such rules in trade agreements could inhibit the United States from modernizing its own intellectual property rules in the future.

Moreover because the strict level of intellectual property protection demanded by the United States recording, motion picture and pharmaceutical industries are so contentious amongst our trading partners, insisting upon these prescriptive rules requires the expenditure of extraordinary amounts of political capital. This weakens America's position on other issues, benefiting a single industry sector at the expense of other sectors of the U.S. economy.

An example of a trade agreement that includes a relatively non-prescriptive chapter on intellectual property is the Trans-Atlantic Strategic Economic Partnership (TPSEC, which is the direct predecessor of the TPP).¹² The original North American Free Trade Agreement (NAFTA) is a somewhat more prescriptive example.¹³ Some FTAs have no IP chapter at all.

3.2.2. Net neutrality

Provisions on net neutrality—which regulate how ISPs treat the data that travels over their networks and whether they are prohibited from discriminating in favor of particular apps, sites, or services—have only recently begun to appear in trade agreements, such as in the TPP and TISA.

The trade relevance of this topic lies in the fact that national net neutrality rules can have an impact on international peering and traffic flows. It has been argued that a rule ensuring that international Internet backbones remain unaffected by discriminatory national rules could be included in trade agreements.

However domestic net neutrality legal regimes are still in flux. Even in the United States, the FCC's net neutrality rules remain new, untested, and under challenge. Is it appropriate to be enshrining these rules in international agreements, thereby inhibiting the United States from further developing its own regulatory response to challenges to the open Internet?

Although we are strong supporters of a free, open, and neutral Internet, we do not consider trade agreements to be the optimal venue for the dissemination of global standards on net neutrality. Instead, we suggest that countries continue to discuss these issues through more inclusive multi-stakeholder processes, such as at the Internet Governance Forum (IGF).

3.2.3. Encryption technology

Recent trade agreements such as the TPP have included rules that prohibits signatory governments from mandating companies to disclose or transfer details of the cryptographic technology used in their products, as a condition of manufacturing, selling, or distributing them in their country.

It is probably impossible to craft comprehensive rules on encryption purely within a trade context. Such rules implicitly have impacts on cybersecurity and other areas of government policy, and cannot be dealt with adequately in isolation from that broader context. Therefore, we consider it inappropriate to attempt to deal with this topic in trade agreements.

3.2.4. Access to source code

The TPP contains a provision prohibiting countries from mandating open source or code audits of software originating from another signatory country. This could prevent companies from supplying source code to enable security researchers to quickly uncover and eliminate vulnerabilities in their devices. Such rules could also prohibit any requirement that code be submitted for private review by regulatory authorities, such as a health and safety watchdog or consumer protection agency.

At a time when the security threats to American users and companies from vulnerable digital devices has never been higher, it is inappropriate to be including rules of this nature in international trade agreements. If it is necessary to address particular misuses of confidential source code practised in certain countries, narrower agreements could be reached on a

3.2.5. Domain name rules

The TPP also includes rules on Internet domain names, relating to the manner in which domain name disputes are to be resolved, as well as the publication of contact information of domain name registrants.

However there is already a well established and highly complex multi-stakeholder international organization for developing global Internet domain name policy—the Internet Corporation for Assigned Names and Numbers (ICANN)—and similar organizations exist at the national level for managing country-code domains.

If changes to domain name dispute resolution processes and rules on access to the domain name registration data would benefit a broad range of American stakeholders, a case for this should be made within the multi-stakeholder bodies tasked with developing such rules.

4. Venues for rulemaking

4.1. Trade agreements and organizations

4.1.1. World Trade Organization

As noted above, the WTO's current electronic commerce agenda includes a moratorium on customs duties on electronic transmissions. However there is movement towards the adoption of a more expansive digital agenda for the organization. Several non-papers outlining a suggested work program for the WTO were tabled during 2016, including one by the United States.¹⁴

A multitude of workshops on the topic were held on digital trade at the 2016 WTO Public Forum. One of the key messages from a workshop organized by some of the participants in this roundtable was that if the WTO is to adopt an expanded work program on electronic commerce, then the modalities of this work should be more open, inclusive and transparent than recent equivalent plurilateral trade negotiations.¹⁵

4.1.2. Trans-Pacific Partnership

The TPP aimed to address a range of issues affecting the digital economy including intellectual property, e-commerce, and telecommunications, at a higher level of ambition than previously attempted in a plurilateral agreement of this size. In hindsight, the agreement was too broad and ambitious to be pulled off successfully.

A further problem that dogged the TPP was the erosion of public support for the deal as a result of the perceived secrecy of the agreement and the lack of inclusion of affected stakeholder groups in the advisory process. Elements of the TPP's e-commerce chapter survive in TISA (see below), and in the U.S. proposal for an electronic commerce work program for the WTO (see above).

As for intellectual property, given how contentious these issues are, and how narrow are the set of industry groups directing their inclusion in trade negotiations, it is far from clear whether there is any way forward for TPP-style intellectual property rules in future trade agreements. Indeed, at an event in October 2016, Steve Metalitz of the International Intellectual Property Alliance (IIPA) frankly acknowledged, "We may well have reached the high water mark of linking IP and trade."¹⁶

4.1.3. Trade in Services Agreement

No official release of the draft text of TISA has been made, making it the most secretive of all recent plurilateral negotiations. However, leaked drafts suggest that the United States is pursuing many of the same provisions on electronic commerce that were contained in the now-defunct TPP. The fate of these provisions likely lies in the hands of the European Union, which has expressed concerns about the U.S. proposals.

The essential sticking point was identified in a February 3, 2016 resolution of the European Parliament which acknowledged "that data protection and the right to privacy are not a trade barrier, but fundamental rights". The resolution also touched on transparency issues, calling on the European Commission "to encourage our negotiating partners to increase transparency so that TISA is not negotiated under more opaque conditions than those arranged under the aegis of the WTO."¹⁷

A December 5, 2016 TISA summit was cancelled in view of the likelihood that little further progress could be made or announced.

4.1.4. Transatlantic Trade and Investment Partnership

Similar problems confront the Transatlantic Trade and Investment Partnership (TTIP), which has been suspended for the time being following similar expressions of concern from the European side about the effects of TPP-style electronic commerce rules on European data protection principles. Following the 14th round of negotiations in July 2016, Germany's Vice-Chancellor Sigmar Gabriel was reported as saying, "In my opinion, the negotiations with the United States have de facto failed, even though nobody is really admitting it."¹⁸

4.1.5. North American Free Trade Agreement

President-Elect Trump has foreshadowed the possible renegotiation of the North American Free Trade Agreement (NAFTA). Apart from its intellectual property chapter (which more closely tracks the WTO TRIPS Agreement), the existing NAFTA does not include the Internet-related provisions that were included in the TPP and are proposed for TISA and TTIP.

Any proposal to expand the agreement to include new rules on these topics would be certain to complicate and lengthen the negotiation of more favourable terms on manufactured good and agricultural commodities.

4.1.6. Future bilateral agreements

Along with the President-Elect's promise to withdraw the United States from the TPP was a commitment to refocus on bilateral negotiations. Since many of the unfair trade practices that the U.S. complains of and attempts to address in the TPP's e-commerce chapter—such as local hosting mandates and the misuse of trade secrets—are those practised by particular trading partners such as China, it makes sense to address these discrete issues in a more targeted, bilateral approach.

On the other hand, there is still merit in attempting to set global standards to safeguard the free and open Internet and to promote global trade in digital products and services. This cannot be done through a handful of bilateral agreements. Given the difficulties of setting these standards through traditional trade negotiations, other policy venues offer a better option. Some of these will be addressed below.

4.2. Other venues for digital trade policy

4.2.1. UNCTAD

The UN Conference on Trade and Development (UNCTAD) is the only development-focused United Nations body devoted to trade. An UNCTAD-led initiative entitled "eTrade for All", launched at its Fourteenth Ministerial Conference in Nairobi, aims to improve the ability of developing countries, and particularly least-developed countries, to use and benefit from

e-commerce. These measures would have flow-on benefits for Americans at home and abroad. One of seven key policy areas recognized is trade logistics and trade facilitation, on the basis that an effective and competitive national and international trade environment is vital for achieving effective e-commerce. UNCTAD contends that effective trade logistics and cross-border facilitation measures are key for the fulfillment of goods-related e-commerce.

Figure 4: eTrade for All



Source: UNCTAD, 2016

4.2.2. Internet Governance Forum

The IGF is a global forum for dialogue on public policy issues related to key elements of Internet governance, such as the Internet’s sustainability, robustness, security, stability and development. Its dialogues follow a multi-stakeholder approach, where governments, the technical community, the private sector and civil society collaborate to exchange best practices on Internet public policy.

At the 2016 IGF meeting in Guadalajara, three workshops and a plenary session¹⁹ on the trade and the Internet were held. The concluding main session, which included amongst its panelists two former trade negotiators and a representative of U.S. technology company Cisco Systems, sent a strong message about the need to conduct trade negotiations in a more transparent and inclusive manner.²⁰

Although the IGF does not currently produce formal recommendations, it does produce a range of outputs including reports of its Best Practice Forum and Dynamic Coalitions. The IGF is therefore a good venue to inculcate best practice norms amongst our trading partners, without the overhead of negotiating binding rules. The IGF has been a key forum for the U.S. State Department in its Internet freedom outreach, and with the formation in 2017 of a Dynamic Coalition on Trade at the IGF, the possibility exists for it to be used to conduct

work on trade-related Internet rules.

4.2.3. ICANN

The Internet Corporation for Assigned Names and Numbers (ICANN) coordinates functions which are key technical services critical to the continued operations of the Internet's underlying address book, the Domain Name System (DNS). Policy development processes involving domain names, intellectual property and other relevant aspects to the future of the internet are defined within an empowered community. ICANN also follows a multistakeholder approach with representatives from government, technical community, private sector and civil society in constant dialogue.

Although ICANN's mandate is too narrow for it to host the full range of Internet-related public policy discussions of concern to the United States, as noted above it is a much better forum for the determination of issues relating to Internet domain names.

4.2.4. OECD

The Organisation for Economic Co-operation and Development (OECD) aims to promote policies that will improve the economic and social well-being of people around the world. The OECD provides a forum for a dialogue between governments, and most of its outputs take the form of reports and recommendations rather than hard rules. This includes significant work on trade.²¹

Recently, the OECD has broadened the dialogue on economics and development by bringing in other stakeholder groups to the dialogues it promotes. CSISAC (Civil Society Information Society Advisory Council) is the space in OECD where selected civil society members collaborate on the organization's work including relevant trade related themes. The OECD

also works with business, through the Business and Industry Advisory Committee to the OECD (BIAC), and with labour, through the Trade Union Advisory Committee (TUAC).

5. Conclusion

Despite widespread public skepticism about their recent implementation, the promotion of reasonable trade agreements between the United States and its partners has the potential to unlock wealth and opportunity for American workers and businesses.

However the world in which such agreements are made has changed since America's first trade agreements were negotiated in the 1930s under the Reciprocal Tariff Act. Today, transparency and broad public consultation are expected, and fierce public opposition can be expected to follow any trade agreement that does not follow these practices. This is especially so in relation to Internet-related rules, where prescriptions nominally about commerce and trade can affect citizens' free speech and other fundamental individual rights.

Our trading partners, such as the European Union, have already begun to adapt their trade negotiation practices to this new reality. Meanwhile, the United States is being left behind. The legacy of this is the failure of ACTA and the TPP, and the struggles of TISA and TTIP. A shift of focus to bilateral negotiations, alone, will not address the USTR's travails.

The future for America's trade negotiations lies in the adoption of more transparent, consultative practices, to build trust in our leadership role amongst the public and our trading partners, and keep U.S. firms on top. Simple measures that could be adopted early in the new administration include the regular release of U.S. text proposals and consolidated negotiation texts, the development of U.S. proposals through an open, notice-and-comment process, and (if they are to be retained at all) the relaxation of confidentiality obligations applicable to Trade Advisory Committees.

Simultaneously, it must be recognized that not all trade-relevant issues can be most productively dealt with in the context of trade negotiations. There are numerous other fora that may be better suited to the development of rules and principles on these topics. Sometimes, more headway can be made in a soft-law forum such as the OECD or IGF, than in hard treaty negotiations.

This particularly applies to Internet-related rules such as domain name dispute resolution and access to registrant data, the use of encryption standards and source code disclosure mandates, net neutrality, and cross-border information flows. A key advantage of flexible, soft law instruments for dealing with these fast-moving Internet-related issues is that they do not lock our country into a set of rules that may become outmoded as business models and technologies continue to evolve.

Endnotes

¹ https://www.wto.org/english/news_e/pres16_e/pr779_e.pdf

² The benefits of digital trade are particularly promising to SMEs. McKinsey (2014) reports that 86% of tech-based start-ups surveyed reported cross-border activity.

³ <http://www.openthegovernment.org/sites/default/files/USTR%20Open%20Government%20Plan%20recommendations.pdf>

⁴ <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230>

⁵ https://www.wto.org/english/tratop_e/tradfa_e/tradfa_negoti_docs_e.htm

⁶ <https://www.congress.gov/bill/113th-congress/house-bill/1580>

⁷ <http://netmundial.br/netmundial-multistakeholder-statement/>

⁸ <http://www.oecd.org/sti/ieconomy/oecd-principles-for-internet-policy-making.pdf>

⁹ <https://wcd.coe.int/ViewDoc.jsp?id=1835773&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>

¹⁰ http://www.g20chn.com/xwzxEnglish/sum_ann/201609/P020160912341422794014.pdf

¹¹ https://www.eff.org/files/2016/03/15/brussels_declaration.pdf

¹² <https://www.mfat.govt.nz/en/about-us/who-we-are/treaties/trans-pacific-strategic-economic-partnership-tpsep-or-p4/>

¹³ <https://www.nafta-sec-alena.org/Home/Legal-Texts/North-American-Free-Trade-Agreement>

¹⁴ https://docs.wto.org/dol2fe/Pages/FE_Search/ExportFile.aspx?id=229772&filename=q/Jobs/GC/94.pdf

¹⁵ <https://www.eff.org/deeplinks/2016/09/world-trade-organization-sets-its-eyes-internet>

¹⁶ <http://web.law.columbia.edu/kernochoan/events/symposium-2016-trading-ip>

¹⁷ <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2016-0041+0+DOC+XML+V0//EN>

¹⁸ <http://bigstory.ap.org/article/611ff828b5ed44d5ad56ab46e0781e52/german-economy-minister-says-eu-us-trade-talks-have-failed>

¹⁹ <http://www.intgovforum.org/multilingual/content/igf-2016-day-3-main-hall-trade-agreements-and-the-internet>

²⁰ <https://www.eff.org/deeplinks/2016/12/internet-governance-forum-wakes-trade>

²¹ <https://www.oecd.org/trade/>

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