Reevaluating American Digital Trade Policy

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April 2024

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About the Author

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His policy areas of work range from trade to interstate commerce to immigration. In the Senate he managed Senator John Kerry's portfolio as the Chair on the Subcommittee on Technology and Telecommunications on the Commerce Committee. As Ambassador, he led negotiations on multiple international treaties and bilateral agreements on telecommunications and technology.

Introduction

The United States is in the process of reevaluating its approach to digital trade policy. After decades of bipartisan support for the open global internet and the free flow of data largely in venues outside of trade agreements, the issue has entered the trade space. Though e-commerce chapters in trade agreements have existed for some time, a heated debate has arisen from the American led effort to inject new language into the agreements since the US-Korea Free Trade Agreement that would meaningfully and further restrict states from taking steps to slow or block the free flow of data except for the implicit allowances in trade in general.

As a result of the potential repercussions of new binding obligations for domestic policy from digital trade agreements, the U.S. Trade Representative (USTR) is asking whether we should revisit, pursue, or engage in trade agreements that restrict the ability of participating states to:

1. Block or slow the free flow of data across borders;
2. Mandate that data collected in a jurisdiction stay in that jurisdiction, and/or;
3. Mandate that digital economy participants grant governments access to source code and algorithms as a precondition for market participation.

The USTR argues that the pace of change in technology and its potential for disruption require an active, strong policy response. Without dictating that response, the agency wants to ensure that trade agreements do not excessively restrict the ability of nation states to produce one.

In my view, acknowledging that there is no one-size-fits-all approach to this challenge, in the pursuit of bilateral and plurilateral digital trade agreements, the USTR should:

- **Modify Proposed Text to Trade Agreements:** Propose text to trade agreements that encourage the free flow of data but explicitly allow exceptions for states to slow or block data flows, require some form of limited data localization, and require access to source code subject to intellectual property protection, for specific public interest and consumer protection purposes to the extent necessary.

    - For example, government access to source code and algorithms for artificial intelligence foundation models that due to computational power and capabilities present a potential threat to national security should be allowed. Blocking the transfer of personal data from the U.S. to hostile nation states may be necessary. And access to sensitive information that may be transferred out of our country to a hostile state may be required to be held domestically.

- **Adjust Grants for Exception to Level of Trust in Trading Partners:** Exceptions to restrictions in agreements and the process for their adjudication for judging for necessity and should reflect the level of trust between the parties negotiating.

- **The More Participants the Broader the Exceptions:** In the case of the pending World Trade Organization (WTO) discussions[1], exceptions to restrictions for the free flow of data and access to source code need to be broad and any proposed adjudication of violations subject to non-binding arbitration. That is because of the number of nations involved includes many unlikely to comply and as of today, the United States has little faith in the existing dispute resolution process[2].

- **Err on the Side of Open Commerce:** But WTO agreements on electronic commerce should not remain silent on the questions of the free flow of data, data localization, and access to source code mandates because those provisions could send an important message to the world on the value of open digital markets and our desire to preserve them. To the greatest extent possible, trade agreements should promote open digital commerce.

- **Start Over with Trusted Partners:** In the case of agreements with trusted partners like the US-Mexico-Canada Agreement (USMCA) and the Japan Digital Agreement, the existing exceptions to restrictions are excessively narrow and should be revisited, but they should remain as narrow as possible because those are allies and compatible economies, and we should pursue more agreements with additional likeminded partners. A Digital Trade Agreement for the Americas may be a good place to start that builds on the USMCA.

In revisiting the language in question at the WTO and reconsidering digital trade chapters in other agreements, the Biden Administration should consider the ramifications for

[1] https://www.wto.org/english/tratop_e/ecom_e/joint_statement_e.htm

[2] https://www.reuters.com/world/us-trade-chief-rules-out-wto-dispute-deal-this-week-says-mood-is-positive-2024-02-28/

policymaking at home. But it should also consider the implications of remaining silent on these issues for the continued support of internet freedom abroad, deferring as broadly as possible in favor of the free flow of data and non-discrimination principles.

We can preserve the necessary policy space for states to regulate technology companies while simultaneously fighting for as global and open a digital economy as possible.

With all the challenges the modern, global digital economy creates, it also fuels immense economic activity, improves the delivery of services and goods, and increases the productivity and capability of people at all economic levels to improve their lives. Where barriers to digital commerce are necessary to pursue a specific public interest, with allies we should be able to work out a negotiated resolution as we have on privacy law with the European Union. With adversaries or where we reach impasse on resolution, the WTO should serve as a venue for articulating an argument for why those barriers are unfair and should be lifted.

The State of Play

Last October, the USTR withdrew its support at the WTO for language on data flows, data localization, and source code access for governments in the tabled Joint Initiative on E-Commerce.[3] That language was meant to encourage the free flow of data, discourage data localization requirements, and oppose the mandatory transfer of source code information to governments as a precondition for participation in those markets. The withdrawal of U.S. support for those paragraphs shook the trade and tech policy communities and came as a surprise to many.

In principle, the positions outlined in the paragraphs in question at the WTO negotiations are foundational for the efficient and effective functions of the global digital economy and the companies that engage in it. But beyond efficient and effective, the Biden Administration argues that the global digital economy should be competitive, safe, and respectful of human and privacy rights. They further argue that public policy that disrupts the free flow of data or requires access to source code and data localization in the pursuit of those public interest goals should be allowed.

The specific language from which the U.S. withdrew support was based on relatively new text in trade agreements found in the US-Mexico-Canada Agreement (USMCA) and the U.S.-Japan Digital Trade Agreement. Notably, those agreements also called for liability protection for platforms, but that provision was either never in the WTO tabled text or removed earlier without fanfare. That may be because both the Trump Administration and the Biden Administration support the reform of liability protection for platforms in the United States. The important thing to note is that language in those agreements do not serve as useful precedent for the WTO negotiations because it is a different proposition to agree to binding language at the WTO than to agree to it between the U.S. and like-minded allies.

The Trump Administration and Digital Trade

In its presentation of American digital trade policy, the Congressional Research Service (CRS) notes that the 2015 Trade Promotion Authority (TPA) established issues such as promoting cross-border data flows and protecting against data localization as negotiating objectives. But it also notes, the "United States has negotiated more expansive sets of rules on digital trade beginning with the USMCA signed in 2018 and the US-Japan Digital Trade Agreement signed in 2019."[4] That more expansive set of rules contrasts with the language in e-commerce chapters in prior agreements. It was that set of rules that the Trump Administration sought to pursue at the WTO. In fairness, the Obama Administration tabled and supported similar language in the Transpacific Partnership (TPP) negotiations.

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[3] https://www.reuters.com/world/us/us-drops-digital-trade-demands-wto-allow-room-stronger-tech-regulation-2023-10-25/

[4] https://crsreports.congress.gov/product/pdf/IF/IF12347

The USMCA covers digital trade[5] in Chapter 19 and is the foundation for the last publicly available text for consideration at the WTO.[6] The corresponding provisions in the USMCA are Article 19.11: Cross-Border Transfer of Information by Electronic Means, Article 19.12: Location of Computing Facilities, and Article 19.16: Source Code. The language is strong, particularly in barring parties from requiring companies to locate computing facilities in that country as precondition of doing business in that territory. Neither that provision nor the bar on requiring access to source code contain the exception included in the bar on restricting data flows for "a legitimate policy objective." That exclusion was intentional and carries with it repercussions.

> "I'm in favor of more digital trade agreements, within reason. But as business practices and technologies evolve, we need to constantly reevaluate the template."
>
> - Bob Lighthizer, Trump Administration U.S. Trade Representative

Trump's USTR Bob Lighthizer explained his views on the digital trade chapter in the USMCA in his recently published book *No Trade is Free*.[7] There, he explains that he wanted a commitment to the free flow of data without exceptions. He also said, "including strong provisions that prevent forced disclosure of proprietary source code and other tech-related intellectual property would set a strong precedent that the United States could use in future digital trade negotiations."[8]

In his view, allowing for exceptions to these rules for legitimate policy purposes creates a loophole allowing nations to do whatever they want. It's a fair concern that could be addressed by defining legitimate policy purposes or limiting the exceptions to the extent necessary.

USTR Lighthizer pursued similar commitments in the US-Japan Digital Trade Agreement. He goes on to say in his book, "I'm in favor of more digital trade agreements, within reason. But as business practices and technologies evolve, we need to constantly reevaluate the template."[9] The Biden Administration took that advice to heart.

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[5] https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/19-Digital-Trade.pdf

[6] https://tradebetablog.files.wordpress.com/2023/10/e-commerce_consolidated_draft_2023-08-04_inf-ecom-w-62r4.pdf

[7] Lighthizer, Robert, *No Trade is Free: Changing Course, Taking on China, and Helping America's Workers*, Broadside Books (2023)

[8] No Trade is Free, Bob Lighthizer, Page 226

[9] No Trade is Free, page 300

The Biden Administration and Digital Trade

In a March 2024 conversation at the Council on Foreign Relations with Ambassador Michael Froman, USTR Katherine Tai recognized that the action her office took last October at the WTO raised concerns from multiple stakeholders and members of Congress[10]. But she also argued it was time for a pause and review on the policy positions in question. [11] She noted that there were supportive comments made by other stakeholders, including important legislators, just as adamantly supportive of the decision as were those opposed.[12]

> People are rightfully concerned about the future of technology and how it will impact their lives and livelihoods… And we therefore must approach our work on digital trade with thoughtfulness, deliberation, and care.
>
> - USTR Katherine Tai

Those objecting to the USTR's decision have long championed the free flow of data across borders and opposed data localization mandates or requirements to make source code accessible to governments as a prerequisite to market-entry. They include a loose bipartisan alliance of technology industry supportive legislators, business groups that support trade liberalization in general, some civil society organizations that work on internet freedom, and large technology companies.

Those supporting the Ambassador's action at the WTO include a loose alliance of legislators that believe some technology companies have grown too large and influential in the markets and in politics along with non-governmental organizations that have long opposed the WTO dispute resolution process and trade liberalization in general.

Though the policy shift came as a surprise to many, USTR Tai telegraphed that she was taking a new look at digital trade in a 2021 speech at Georgetown. In that speech she said, "People are rightfully concerned about the future of technology and how it will impact their lives and livelihoods. But there is a lot that we can and should do to address those anxieties, to guide the development of the digital transformation in a positive direction…Governments and policymakers cannot lose sight of the needs of our people and our collective humanity. And we therefore must approach our work on digital trade with thoughtfulness, deliberation, and

[10] https://www.uschamber.com/international/trade-agreements/how-reversal-on-digital-trade-threatens-u-s-workers-businesses

[11] https://www.linkedin.com/posts/council-on-foreign-relations_us-trade-representative-ambassador-katherine-activity-7162905422922805248-6Kf-/

[12] https://delauro.house.gov/media-center/press-releases/delauro-leads-87-representatives-letter-supporting-us-trade

care."[13] But if those comments were meant to assuage those who wanted to see change in digital trade policy, they did not. Throughout her tenure, USTR Tai has faced accusations of improperly allowing special interests to hijack digital trade policy by both those who think Big Tech has had excessive influence and those who think digital trade opponents have had too much influence.

In a May 2023 paper, the office of Senator Elizabeth Warren released a paper titled "Big Tech's Big Con: Rigging Digital Trade Rules to Block Antitrust Regulation." In it, they assert that Big Tech's revolving door of lobbyists has "behind-the-scenes access to U.S. Trade Representative Katherine Tai and other top USTR officials" and that they use that special access to push for "rigged trade policies."[14] The Senator followed that up with a letter with five of her colleagues to USTR "reiterating concerns that including skewed digital trade rules in the Indo-Pacific Economic Framework for Prosperity (IPEF) will have on the U.S. government's ability to promote competition, regulate AI, and protect consumer and worker privacy."[15] Subsequently, though not necessarily because of that advocacy, the USTR paused its negotiation of the trade pillar in the IPEF and then withdrew support for the three chapters mentioned before at the WTO.

Not to be outdone, after the execution of the shift in position at USTR before the WTO, the House Oversight Committee Chair James Comer, Republican from Kentucky, sent a March 2024 letter to USTR arguing that it was not Big Tech that had undue influence over the agency but rather it was shady groups on the left. He argued that progressive trade and civil society groups share a "privileged relationship" with the USTR and released documents that he said proved it.[16]

We will not get to a consensus on how to move forward if policymakers accuse each other of corruption when they disagree on policy. We can acknowledge that we would favor to err on one side or the other on the degree to which government regulates tech markets and the space trade agreements create or close for that action without caving on principle. We must look at the substance of both the reasons for objections and support and try to find a middle ground that accommodates the merits on both sides of the argument.

In policy debates there are not always merits on both sides, but in this one there are. The digital trade language in the USMCA does not allow for sufficient flexibility in the government's pursuit of public interest regulation and the tools it can use to pursue solutions. But we need not throw out our general preference for open markets with free flows of data to address that challenge.

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[13] https://ustr.gov/about-us/policy-offices/press-office/speeches-and-remarks/2021/november/remarks-ambassador-katherine-tai-digital-trade-georgetown-university-law-center-virtual-conference

[14] https://www.warren.senate.gov/imo/media/doc/USTR%20REPORT.pdf

[15] https://www.warren.senate.gov/oversight/letters/senator-warren-lawmakers-reiterate-concern-over-big-tech-pushing-digital-trade-rules-that-conflict-with-biden-competition-agenda-and-pending-legislation

[16] https://www.politico.com/live-updates/2024/03/04/congress/oversight-ustr-probe-digital-pivot-house-comer-00144789

At the Council on Foreign Relations, Ambassador Tai explained that the agency decided to remove its support for the tabled language at the WTO to reevaluate the text and positions considering the Administration's views on potential new legislation and regulation of the digital economy.

The USTR is not bound to further a position abroad because there are a specific handful of American companies that benefit from it if the Ambassador and the Administration believe those positions conflict with the public interest at home or principles of justice abroad. But silence on these issues – data flows, data localization, and mandated access to source code – is not a responsible option. The Administration should produce language that would preserve our authority to regulate technology markets while at the same time preserving as open and global a platform for electronic commerce as possible.

The three paragraphs of tabled language that the USTR withdrew from supporting as tabled went further than anything the Obama Administration had done in its e-commerce chapters in trade agreements. In fairness, the Obama Administration did support similar text to that in the Trump trade agreements in the TPP negotiations. But that language and agreement never reached the Senate.

That the text proposed was the Trump Administration's and not Obama's does not make it inherently bad, but it is both fair and prudent for the Biden Administration to revisit that language to ensure that it is consistent with its values and goals. Arguably, due to the introduction of artificial intelligence and its potential for positive and negative disruption, a review of policy restrictions to address the challenge is warranted.

USTR Tai has said that she needs to ensure that commitments in trade agreements do not preempt domestic action in the areas of competition and consumer protection policy at home that the Biden Administration supports. That is reasonable, but if the U.S. does not return to the WTO with a clear position that it is willing to champion on the three issues in question, the agreement will remain silent on them and that would not be in our interest. We would see nations that are not adversaries, including India and Brazil, continue to shift toward a digital nationalism that is both harmful and unnecessary for them or us to succeed.

The US should make clear its general support for free flows of data, general opposition to data localization, and its general opposition to mandates of access to source code. There are many nation states that are neither aligned on those views with us nor as restrictive as China with whom we can and should work to promote as low a level of barriers to the free flow of data as possible. Silence at the WTO on these issues will make those conversations more difficult.

Requiring access to source code to governments as a prerequisite to engage in commerce in those markets presents two challenges. First, that mandate often results in the transfer of intellectual property to domestic competitors. Second, access to source code gives governments the ability to exploit security gaps in design that they can use against any user for the service, including our government and people. Limited requirements for access to source code should be agreeable for software or services that are powerful enough to present a potential national security threat or for which access is necessary to enforce consumer protection law or protect market competition, but the exercise of that authority should

remain rare and limited to when necessary.

The problem with barriers to the free flow of data is that the flow of data is necessary for the internet to survive as a global platform not just for commerce but for discourse and association. Where that flow between us and democratic allies is a threat to the implementation of privacy law, for example, a negotiated resolution such as the Privacy Shield agreements are preferable to blocking data transfers as a solution. And mandatory data localization, barring there being no alternative way to pursue a legitimate public policy goal, would create inefficiency and impose unnecessary costs on the operations of firms and communication. Further, authoritarian and authoritarian leaning states often use data localization requirements as a mechanism to enable domestic surveillance and political repression.

A separate question on whether taxation of the delivery of digital commerce across borders creates an unfair barrier to trade has also risen at the WTO[17]. It may very well be bad public policy to impose tariffs or taxes on these services because the costs, like any sales tax, are regressive. They would make services for small business and lower income individuals more expensive, reducing the productivity gains that come from leveraging digital tools by discouraging their use. But they do not block or technically slow the free flow of data and each nation will have to weigh the merits of the idea against its larger tax, tariff, and spending regimes. The US should discourage that taxation but there are multiple ways to do that outside of the WTO and India and others have made clear that they will no longer support the moratorium. The USTR may be able to persuade them otherwise, but it would come at a cost and until we know that cost, we should withhold judgement on whether the effort is worth it.

The Obama Administration, Internet Freedom, and Digital Trade

American support for a global free and open internet was first articulated by Secretary of State Hillary Clinton in 2010 in Washington, DC at the Newseum[18] and then reiterated and expanded upon in Seoul in 2015 by Secretary of State John Kerry[19]. Both speeches called for the United States and its partners to work together to ensure the development and growth of the internet as an open global platform because we believed that is how it would best serve as a force for freedom and the democratization of discourse and commerce worldwide.

In juxtaposition at the United Nations and elsewhere, authoritarian regimes including China fought that vision, and still fight it. They were and are blocking the free flow of data thereby locking their people into domestic intranets. They force data localization mandates to enable massive domestic surveillance. They mandate the transfer of intellectual property from

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[17] https://www.ft.com/content/aea64aa4-fde2-46f3-9376-c56b8e94263b

[18] https://2009-2017.state.gov/secretary/20092013clinton/rm/2010/01/135519.htm. The size and scope of the digital economy and the economic importance of cross border data flows are well explained in this report, pages 2-10.

[19] https://2009-2017.state.gov/secretary/remarks/2015/05/242553.htm

foreign based internet companies to the government as a precondition for participation in those markets and without protection for the violation of that intellectual property. In the venues where I engaged with my Chinese counterparts, they not only argued their sovereign right to pursue those policies but encouraged others to do so as well.

The Obama Administration fought for a global free and open internet because of the positive repercussions we believed the provision of internet services and access to them would have on people around the world.

The Obama Administration fought for a global free and open internet because of the positive repercussions we believed the provision of internet services and access to them would have on people around the world. It is also worth noting that the Obama Administration worked at home to pursue a Consumer Privacy Bill of Rights, defended network neutrality in the face of the opposition of telecommunications companies, and initiated multiple other forms of consumer protection and competition initiatives. The Administration also negotiated the Privacy Shield agreement with the EU rather than challenge its authority to make privacy law. We never believed that regulation in the public interest would constitute a violation of our support for internet freedom or serve as a tool to block data flows, particularly between us and allies. We saw those efforts as reinforcing.

Potential Path Forward at the WTO

There is room for the USTR to return to the WTO and reaffirm the American commitment to the free flow of data and information with the appropriate exceptions necessary to serve the public interest, protect consumers and competition, and protect our national security. These need not be values in conflict.

The WTO is going through a period of review and reform. Both the previous Administration and this one believes that the WTO has overstepped its authority on multiple occasions and treated the U.S. unfairly. Trump USTR Lighthizer called the WTO "a colossal and tragic failure" in his book. USTR Tai somewhat more diplomatically asserted that the United States is "committed to the organization and its foundational goals and values" but she argued "being committed to the WTO also means being committed to real reform agenda."[20]

Until the WTO is reformed to the satisfaction of its members, there is little meaningful impact that debating language in the ongoing negotiations at the WTO on the Joint Initiative on E-Commerce will have on actual global digital trade. But it matters because the USTR's decision on how to move forward with that language or some alternative to it will indicate their likely approach to digital trade chapters in future agreements and negotiations. It also matters because it sends a message to the world on what we think digital trade policy should seek to

[20] https://ustr.gov/about-us/policy-offices/press-office/speeches-and-remarks/2023/september/remarks-ambassador-katherine-tai-world-trade-organization-and-multilateral-trading-system

achieve. Simply stripping the language without replacing it would send the wrong message.

Given the close relationship between our three countries, the requirement for joint review of the agreement every six years, and the sixteen-year sunset clause, the language in the USMCA may be acceptable for digital trade between the three of us. If possible, inserting the exception for legitimate policy purposes into the entire chapter on digital trade is worth pursuing.

But the binding obligation we make with our North American allies should not be replicated in an agreement with 192 other nations without greater safeguards. Each paragraph should explicitly allow for exceptions to the restriction for the legitimate policy objectives including for the enforcement of competition policy, privacy protections, and consumer protection.

There are multiple ways that USTR could inject language into the paragraphs on data flows, data localization, and source code access that would explicitly preserve our rights and that of any other nation to act in the public interest. And at the WTO, these exceptions should be subject to discussion but not dispute resolution. It is important to reassert that in principle of support for the open internet and free flows of data. Whenever possible, we should favor the free flow of data, discourage the requirement for source code data to be shared with governments, and discourage mandates on local data storage. But the Administration is correct in asserting that where the public interest requires it, we should be able to exercise exemptions to the rule.

Once the USTR develops language that meets those ends, it should amend the US-Japan Digital Agreement and can and should work on bilateral U.S. Digital Agreements with other nations to further our leadership on the issue and preserve as large a footprint as possible for open digital commerce.