

# THE DIGITAL TRADE IMBALANCE AND ITS IMPLICATIONS FOR INTERNET GOVERNANCE



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# PAPER FINDINGS

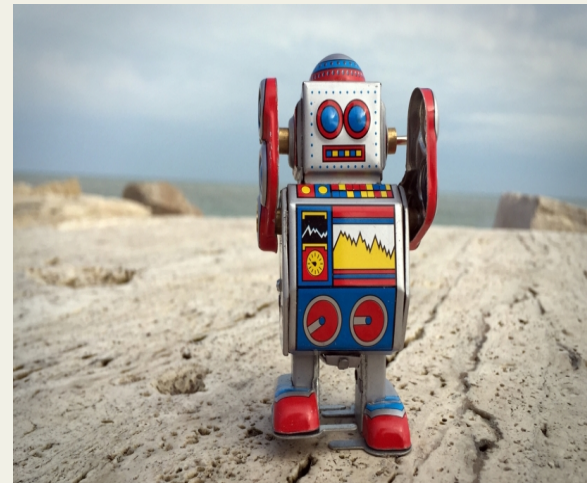
- Trade agreements and policies increasingly ‘govern’ the Internet. Digital trade imbalance refers to the imbalance between US enthusiasm for trade agreements and **the ambivalence** of many other parties to turn to trade agreements as Internet governance tools.
- Example: TPP will cover  $\frac{1}{4}$  current Internet users, 12 significant Internet markets. All other nations sending information flows must conform to TPP rules.
- We should not confuse process and outcomes. Process is multilateral. Only governments negotiate. Governments are making the policies with limited stakeholder input.
- Outcomes for Internet openness, digital rights and interoperability, largely positive, some negative (as in online copyright)

# WHY TRADE POLICY AND AGREEMENTS?

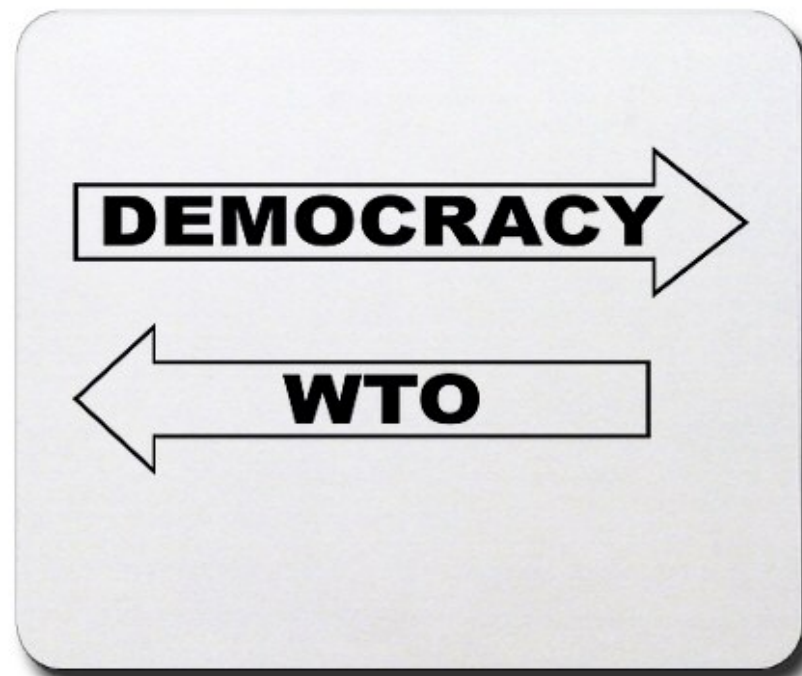
- Today information is currency, it facilitates productivity, exchange, technology and trade.
- Information is also the building block of the digital economy (products and services delivered via the Internet.)
- When people exchange information across borders they are trading.
- Hence, increasingly governments use trade agreements to regulate information flows.

# WHY TRADE AGREEMENTS AS A TOOL TO REGULATE INFORMATION FLOWS, HENCE INTERNET?

- Flexible, language can be used as technology changes.
- Often binding and enforceable. Can challenge digital protectionism. When nations don't meet commitments, they can be challenged in a trade dispute.
- Include exceptions for national security, public morals governments want to maintain Internet stability
- **Built on trust**, just like online exchanges.



# DIFFERENT QUESTION BUT ELEPHANT IN THE ROOM



# EU, US AND CANADA FTA DISCREPANCIES ON DIGITAL TRADE

Internet provisions in FTAs



Intellectual property rights provisions	Strong enforcement	Strong enforcement	Encourage cooperation: no binding language
Privacy	Human/consumer right No binding language	Consumer right No binding language	Human/consumer right No binding language
Free Flow	Encourage cross border flows.	Free flow: Proposed binding language	Encourage cross border data flows: No binding language
Server Location		No restrictions: Proposed binding language	

# TPP CHAPTERS AND INTERNET EFFECTS

Provisions	Effects on Internet Openness	Effects on Operability	Effects on Digital Rights
Free flow Limits local server requirements	Sets open Internet as default		Free flow encourages Access to information, education
Encryption , spam malware	Addresses spam, says nothing about malware. Why?	No government access to source code requirements	
Privacy	Nations must adopt such rules as effective enabling environment		Nations with health care /citizen privacy server requirements not affected.
Censorship filtering	Could be challenged as trade barriers	Governments can't disrupt interoperability to filter/censor	If nations are challenged could lead to less restrictions
Transparency	Governments must regulate in sunshine		Encourage feedback loop. Sets up system of due process allowing people to challenge Internet regulation.
Exceptions	Must pass necessity test, Legitimate regulation		Public health, morals, national security etc....

# 'DEEP' DIGITAL TRADE RULES IN PREFERENTIAL TRADE AGREEMENTS US MAIN DRIVER: GOT WHAT IT WANTED!

Rules bolstering certain policy objectives which facilitate e-commerce and related trust

Rules or provisions which aim at the elimination of new digital trade barriers

- **Domestic regulation** (pledge to avoid barriers)
- **Transparency**
- **Consumer protection**
- **Data protection**
- **Spam (BUT NOT MALWARE)**
- **Liability of Internet service providers**
- **Authentication and Digital Signatures** (mutual recognition)
- **Paperless trading**
- **Privacy**

# US ALSO WANTS TO LIMIT INTERNET RELATED BARRIERS TO TRADE

- Requirements that servers be located in a country or region
- Local content requirements
- Excessive privacy regulations.
- Insufficient privacy regulations.
- Cyber-security, hacking spam, and probing
- Barriers to the free flow of data



# ARE THESE BARRIERS PROTECTIONIST? DEPENDS!

- US and EU have both released reports describing the others' policies on privacy, censorship, server location, and security as barriers to trade.
- In 2014 US ITC found 49 nations had “digital protectionist policies.” US claims Nigeria, Algeria, China the worst.
- Meanwhile US argues Australia's approach to privacy is too protectionist, Japan's is too uneven; and Vietnam's is too unclear. US also says S. Africa fails to enforce its laws online; and criticized France for proposals on online taxes. US also sees failure to enforce online copyright as trade distorting.
- **However, US also has barriers to trade such as encryption, investment incentives and distortions, procurement rules, cloud server requirements.**



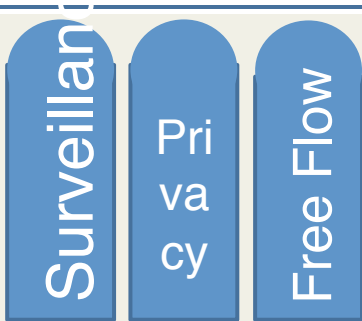
# WHAT DOES THE WTO SAY ABOUT INFORMATION FLOWS?

- WTO negotiated before 1995, does not mention Internet. However, dispute settlement bodies have interpreted WTO rules as addressing the Internet/information flows (2 disputes US/Antigua gambling case and US China magazine/journalism case)
- ITA (approved in December) and TISA (in progress) could update WTO rules making free flow of information default for 50 plus nations...
- But these negotiations do not address stability questions: increasingly Internet is disrupted by probing, hacking, site blocking, take-down requirements; site self-censorship and cyber war among individuals, firms and states.
- So Internet is both a trading platform and a battlefield.

# TRADE AGREEMENTS COULD BE KEY COMPONENTS IN THE FUTURE OF INTERNET GOVERNANCE

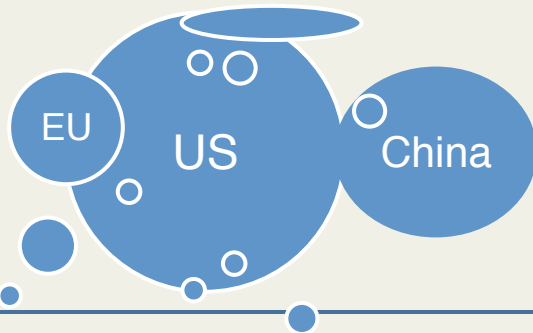
- But....trade agreements regulate the behavior of states not individuals or firms.
- Companies and individuals can't directly influence negotiations.
- Trade agreements could be seen as favoring US interests and actors.
- Trade agreements negotiated in secret by government, very different from IG process.

# TRADE POLICIES NOT MADE IN SYNC WITH OTHER IMPORTANT INTERNET POLICIES POLICYMAKERS DON'T THINK HOLISTICALLY



Officials make policies in silos  
–fail to think holistically

Trade policies and foreign policy goals (Internet openness Internet freedom) are sometimes at odds leading to incoherence.



Over time, US and other countries focus on bilateral/regional agreements could lead to fractured and less open Internet, precluding shared language and norms

# CONCLUSIONS

- Trade agreements may not be the only or best venue to set information free.
- May favor US interests and actors.
- Need to make different arguments for trade agreements as tool to govern internet: can build trust and yield benefits to human welfare and Internet as a whole.



# RECOMMENDATIONS

- Governments negotiating binding free flow provisions should also include language on regulatory context (interoperability, digital rights, multi-stakeholderism, rule of law and due process).
- WTO Secretariat should examine if domestic policies that restrict information flows (short of WTO exceptions for public morals, national security and public health) constitute barriers to cross-border trade.
- Governments should do a better job of linking digital trade and digital rights.

Paper will be Available Jan 30, 2016 at



<https://www.cigionline.org/activity/global-commission-internet-governance>

I WELCOME YOUR COMMENTS AND  
QUESTIONS.

