



Comments of the Electronic Frontier Foundation to U.S. International Trade Commission

Global Digital Trade I: Market Opportunities and Key Foreign Trade Restrictions

Investigation No. 332-561

We thank the Commission for the opportunity to contribute to its development of a report to advise the USTR on digital trade. The Electronic Frontier Foundation (EFF) is the leading nonprofit organization defending civil liberties in the digital world. Founded in 1990, EFF champions user privacy, free expression, and innovation through impact litigation, policy analysis, grassroots activism, and technology development. We work to ensure that rights and freedoms are enhanced and protected as our use of technology grows..

Our work on digital trade dates back to the early days of the Trans-Pacific Partnership. We have also organized workshops on this topic at the most recent Public Forum of the World Trade Organization (WTO), as well as in Brussels and on Capitol Hill. In the course of this work we have brought together a coalition of allied organizations from civil society and the private sector now known as the Open Digital Trade Network, and established a Dynamic Coalition on Trade and the Internet under auspices of the United Nations Internet Governance Forum (IGF).

Whereas the Commission aims to describe regulatory and policy measures currently in force in important markets abroad that may significantly impede digital trade, our bottom line is that not all such measures that impede digital trade are necessarily protectionist. This is sufficiently evident in the examples of such measures that the Commission lists, including cross-border data flow limitations, cybersecurity regulations, ISP regulations such as net neutrality rules, and intermediary liability rules.

We should not too readily assume that such regulations that may be trade restrictive do not also have important non-trade justifications that server broader social and economic needs such as freedom of expression and access to information, consumer safety and privacy, and preservation of the stability and security of Internet networks. In the past, some of these broader contexts have been

overlooked by the USTR; for example in its recommendation of measures on software source code that run counter to the advice of security professionals.¹

We should be even more hesitant to assume that such measures of our trading partners that run counter to U.S. policy objectives should necessarily be tackled in a trade context, rather than through other international fora that may have greater subject matter expertise, such as the Internet Corporation for Assigned Names and Numbers (ICANN), the Organization for Economic Cooperation and Development (OECD), the World Intellectual Property Organization (WIPO), the International Telecommunications Union (ITU), and the Internet Governance Forum (IGF).

We provide further detail on these thoughts in the attached paper, *Trade for the Digital Age: Policy Options for Future-Proofing America's Trade Agreements*. The paper indicates how not all of the Internet public policy issues that are increasingly dealt with by in a trade context by the USTR are necessarily best suited to being dealt with by that agency through U.S. free trade agreements. For those issues that can legitimately be dealt with in trade agreements, a broader perspective on the non-trade impacts of such rules is urgently required.

The attached paper gives some examples of areas that may be able to be dealt with in a trade context if an appropriately open and inclusive consultative on these issues could be held, including taxation, digital certificates and electronic signatures, local hosting mandates, border measures, payment processing, logistics, and intermediary liability. It also gives some examples of issues that we suggest should not be dealt with in trade negotiations, including intellectual property, net neutrality, encryption, access to source code, and domain name rules.

But more fundamentally, the paper also addresses the most serious deficiency in the USTR's current practices in negotiating rules for the digital economy—the lack of openness and transparency in current trade negotiation practices. Above all else, we strongly recommend that these deficits be addressed, and we propose the following reforms to the USTR that would accomplish this:

1. Publish U.S. textual proposals on rules in ongoing international trade negotiations

USTR should immediately make available on its website the textual proposals related to rules that it has already tabled to its negotiating partners in the context of the TTIP, TiSA, and any other bilateral, regional, or multilateral trade and investment negotiations it undertakes.

2. Publish consolidated texts after each round of ongoing negotiations

USTR should impose as a prerequisite to any new or continuing trade negotiations that all parties agree to publish consolidated draft texts on rules after each negotiating round, including negotiations conducted on the entire agreement or a specific element or chapter and among trade ministers or other officials of every party to such negotiations or of a subgroup of the parties to such negotiations.

3. Appoint a "transparency officer" who does not have structural conflicts of interest in promoting transparency at the agency

USTR should immediately appoint a transparency officer who does not have any structural conflicts of interest in promoting transparency at the agency.

¹ See <https://www.eff.org/deeplinks/2015/12/tpp-threatens-security-and-safety-locking-down-us-policy-source-code-audit>.

4. Open up textual proposals to a notice and comment and public hearing process

USTR should initiate 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.

5. Make Trade Advisory Committees more broadly inclusive

If proposed U.S. texts and draft texts from negotiations are made publicly available, the main official advantage of the Trade Advisory Committee system – access to that information – would disappear. However, if Trade Advisory Committees are to be retained in addition to public notice and comment and public hearing processes, then resources must be devoted to making membership and effective participation in these committees more accessible to all affected stakeholder groups, including non-industry groups.

We submit these recommendations in the firm belief that that such reforms will be essential in enabling the successful conclusion of future trade agreements, particularly those that contain provisions relating to the digital and online environment.