Solutions to the digital trade imbalance

Susan Ariel Aaronson discusses how governments use trade agreements and policies to address cross-border internet issues and to limit digital protectionism
Cross-border information flows are the fastest growing component of global trade. But countries have struggled to develop a system of trade rules to govern these flows. This column discusses how governments use trade agreements and policies to address cross-border internet issues and to limit digital protectionism. It also provides recommendations on how to build coherent regulation in the near future.

The information superhighway is not limited to any one country. Thus, when we use messaging apps such as WeChat or Kik, download movies from Netflix, or seek a new friend at Ashley Madison or Tinder, our information travels from servers based in one country to computers or mobile devices located in another. Although money may never change hands in such transactions, we have participated in trade by moving information across borders.

Growing cross-border information flows
In fact, cross-border information flows are the fastest growing component of global trade. Using IMF data from 2008 to 2012, economist Michael Mandel\(^1\) found that such flows increased 49%, while trade in goods and services grew some 2.4%. Clearly digital trade (commerce in products and services delivered via the internet through cross-border information flows) is booming. Growth in global markets for digital technologies is likely to continue because some 61% of the world’s population has yet to go online\(^2\).

Digital trade has become increasingly important to the US. The US International Trade Commission (USITC) estimates that digital trade in certain digitally intensive industries resulted in a 3.4% to 4.8% increase in US GDP in 2011-2013, while online sales of products and services in ‘digitally intensive’ sectors were about $935.2 billion—or 6.3% of US GDP—in 2012. USITC also asserts that the expansion of digital trade caused real wages to increase by 4.5 to 5.0% and increased US aggregate employment by up to 1.8% while reducing trade costs by some 26% on average\(^3\).
Although many countries are gaining expertise and market share, the US continues to dominate both the global digital economy and digital trade. The US is home to 11 of the world’s 15 largest internet business (China is home to the other four). Companies such as Facebook, Google, Yahoo, and Twitter dominate much of the web. Not surprisingly, the US is the key force behind efforts to develop a system of trade rules to govern cross-border information flows.

**What rules can govern cross-border information flows?**

But the US has long struggled to find common ground on these rules. Almost every country has adopted policies to encourage the development of digital technologies and firms, as well as steps to protect privacy, enforce intellectual property rights, protect national security, or thwart cyber-theft, hacking or spam. At times, these policies may discriminate against foreign market actors, and in so doing, distort trade.

In May 2015 alone, France, Germany, and the UK asked Twitter, Facebook, and Google to pre-emptively remove content considered extremist. That same month, the Chinese Ministry of Industry and Information Technology (MIIT) 

**Governments have not figured out how to coordinate policies to promote cross-border information flows with national security and digital rights policies**
announced that domain name registrars in China would be forbidden from selling domain names in top-level domains (TLDs) not approved by the Chinese government. Each of these governments would likely argue that such policies are legitimate and necessary.

Given the stakes, many US executives and policymakers label other governments’ efforts to restrict information flows or to enhance local digital prowess as ‘digital protectionism’. The US International Trade Commission (USITC) defines digital protectionism as barriers or impediments to digital trade, including censorship, filtering, localisation measures, and regulations to protect privacy. The US has made efforts to limit digital protection central to its trade policy efforts and even its national security strategy.

Until recently, the US (as well as Canada and the EU) included non-binding language in trade agreements designed to ensure that information moves seamlessly across borders. However, in October 2015 after seven years of negotiation, the US and its 11 negotiating partners found common ground on binding language in the Trans-Pacific Partnership (TPP).

The TPP states that “each party shall allow the cross-border transfer of information by electronic means.” In so doing, the TPP nations have made the free flow of information a default. However, the agreement also includes exceptions to the free flow of information. The parties may impose conditions or restrictions on the cross-border transfer of information as required to achieve public policy objectives, provided those measures are not discriminatory or a disguised restriction on trade. As a result, one TPP party could use the agreement to challenge censorship or filtering in nations that might do so in a discriminatory manner.

Because of this binding language, should TPP go into effect, it will set an important precedent for cross-border information flows. The agreement will cover almost one-quarter of current internet users and will affect the internet
in 12 significant trading nations. TPP parties have a population of some 800 million people, or 11.4% of the earth’s total. Vietnam, Colombia, Indonesia, the Philippines, South Korea, Taiwan, and Thailand have expressed interest in joining TPP should it come into effect\(^\text{10}\).

Moreover, if TPP is approved, it could have significant spillover effects upon how other governments deal with cross-border information flows. They will have to comply with TPP rules when they exchange information with TPP parties. At a minimum, the US will want to use TPP as a guidepost for other trade agreements including TTIP and TISA under negotiation. Meanwhile, other governments too will need to consider this language and what it means for their firms’ cross-border flows\(^\text{11}\).

**Policies to limit digital protectionism: new research**

In a recent paper for the Global Commission on Internet Governance\(^\text{12}\), I examined how governments use trade agreements and policies to address cross-border internet issues and to limit digital protectionism\(^\text{13}\). The ‘digital trade imbalance’ of the title refers to the imbalance between the US’ enthusiasm for and its major trade partners’ resistance to the creation of a system of trade rules to govern cross-border information flows. The imbalance also speaks to the divide over what is ‘protectionist’ and what comprises legitimate national policies.

I note that although policymakers have succeeded at binding language, they should carefully weigh the pros and cons of trade agreements as a strategy for regulating these flows.

- On one hand, trade agreements could help clarify how and when governments can limit information flows, and could have positive implications for global internet governance.
As noted above, TPP will provide an impetus to the development of globally coordinated policies on a wide range of global issues from privacy to cyber security. A system of shared rules could build greater trust and could reduce costs for firms and individuals who must deal with different rules about how and where data can be collected and stored; when and under what conditions data can be transferred to other organisations; and what types of user authorisations are needed for collection, storage, and transfer.

- On the other hand, trade agreements might not be the best venue for governing cross-border information flows.

Trade agreements regulate the behaviour of states, not of individuals or firms; thus, companies and citizens have no direct way to influence trade agreement bodies. Moreover, trade agreements are negotiated in secret by governments; these negotiations move slowly and the public is not directly involved. In contrast, the internet is governed in a more ad hoc, bottom-up and transparent manner.

Stakeholders from civil society, business, government, academia, and national and international organisations make internet governance rules in a timely, open and collaborative manner without a central governing body. Many internet activists would not take kindly such a dramatic change to internet governance. Moreover, many internet issues that involve information flows, such as privacy or the security of data, are not market-access issues — although they are regulatory issues, and finding common ground on cross-border regulations has become an important rationale for 21st century trade agreements.

Trade agreements are sometimes perceived as favouring US interests and actors. Government officials probably do not want to use trade policy to perpetuate US digital dominance and are likely to balk at US
demands unless the US can come up with other arguments as to why such language in trade agreements could be in their interest as well. Finally, trade agreements are not explicitly designed to facilitate interoperability or universal standards, which is how internet policies have traditionally been designed.

- Trade agreements do not include clear language regarding human rights yet will have direct effects on human rights.

Human rights are a key element of the rule of law online and thus must be coordinated with international efforts to regulate cross-border information flows. As information flows across borders, it can simultaneously enhance and undermine specific human rights.

These effects are complex and constantly changing, and governments are just learning to protect and respect such rights online. However, most trade agreements do not contain language that links government obligations to protect, respect, and remedy violations of human rights to government obligations for trade. Policymakers must clarify the relationship of trade obligations to human rights obligations delineated in other agreements.

**Recommendations towards policymakers**

In light of these findings, I recommend that policymakers should:

- Encourage interoperability and the rule of law.

Governments negotiating binding provisions to encourage cross-border information flows should also include language related to the regulatory context in which the internet functions (for example, provi-
sions to encourage interoperability, free expression, fair use, the rule of law and due process). By including such language, policymakers can argue that these rules enhance human welfare and internet operability. Hence, they will be better positioned to argue that trade agreements are appropriate avenues for mediating tensions between national law and cross-border flows of information.

- Define and challenge barriers to digital trade by using the WTO—the most broad-based trade agreement.

A WTO member should ask the WTO Secretariat to analyse if domestic policies that restrict information (short of exceptions for national security and public morals) are also barriers to cross-border information flows that could be challenged in a trade dispute.

Moreover, policymakers should develop strategies to quantify how such information restrictions might affect trade flows. Finally, they should use the WTO (and, if the TPP goes into force, the TPP) to test these provisions in a trade dispute. In so doing, they can reduce the digital trade imbalance.

- Do a better job of linking trade and other internet policies.

Although many countries have taken steps to advance digital rights globally, these governments have not figured out how to coordinate policies to promote cross-border information flows with national security and digital rights policies. Nor have these governments developed clear and compelling arguments as to how these agreements will benefit netizens.

The US should connect these arguments in order to build public support among their publics and to convince citizens and policymakers from other nations (including those that heavily censor the internet) to
Susan Ariel Aaronson is Research Professor and Cross-Disciplinary Fellow at the Elliott School of International Affairs, George Washington University

Endnotes
6. By July 2015, the MIIT will not allow registries not approved by the Chinese government to operate or sell domains in China. Some analysts fear that only Chinese companies will gain approval, but it remains to be seen. See Murphy, K (2015), “Draconian Chinese Crackdown Puts Domain Industry at Risk.” Domain Incite, May 27.and Seng, J (2015), “What’s
Going On in China’s Domain Name Industry.” Circle ID, June 1
7. US Executive Office of the President 2015, p.21
8. The US is also trying to include similar language in the Transatlantic Trade and Investment Partnership (TTIP), and the Trade in Services Agreement (TiSA) under the World Trade Organization (WTO).
9. The US does not explicitly argue that it plans to use the exceptions to challenge censorship or filtering.
https://ustr.gov/sites/default/files/TPP-Final-Text-Electronic-Commerce.pdf; and
https://www.gwu.edu/~iiep/assets/docs/papers/TPP%20Policy%20Brief%20EDIT.pdf
13. On the Global Commission, see https://ourinternet.org/#about

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