Digital trade rules and digital protectionism

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Main points:

- Digital protectionism: easy to assert, hard to define
- Stem from efforts to control the Internet and the Internet economy within state borders.
- Such efforts are not necessarily protectionist in motivation, but may be protectionist in effect. But US also has policies that appear protectionist to others.
- Clarity will help achieve broad US goals re. Internet governance, foreign policy, and advancing human rights. Hence, we need/want trade disputes.

US is leading demandeur of digital trade rules

- Reflects dominant US internet position and relevance of open markets/ open Internet to U.S. objectives

US objectives re. digital trade rules reflect changing international economic/political context

- On one hand, US wants to encourage a vibrant global Internet with few barriers to entry.
- On the other hand, US wants to preserve its Internet dominance, which is clearly declining as China, India, Indonesia and other nations develop both their digital prowess and bring more people online.
- **Rising clout of these nations online reflects huge demographic and Internet governance shift—these nations (China, India, Indonesia, Malaysia etc.) regulate and monitor the Internet within their borders, long history of SOEs too.**

Why need to delineate digital protectionism?

- US companies confront a world where the Internet is increasingly fragmented, where government plays an intrusive role, and where government officials from other countries can use such rules to limit US produced online goods and services.
- US says it is using trade agreements to keep the Internet open and to reduce digital protectionism. But US needs to take a different approach if it wants to achieve multiple objectives such as maintaining the open Internet; US online comparative advantage; promoting human rights online etc.)

Economic Reasons for perception rise in digital protectionism

Desire to stimulate local Internet economy

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Concerns about US/China internet dominance and increased surveillance

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Digital protectionism

Rising interest in home grown internet

Political/Governance Strategic Reasons for perception rise in digital protectionism

Encourage rule of law online prevent hate speech , child porn, cyber attacks

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Concerns about control, political stability, protecting human rights

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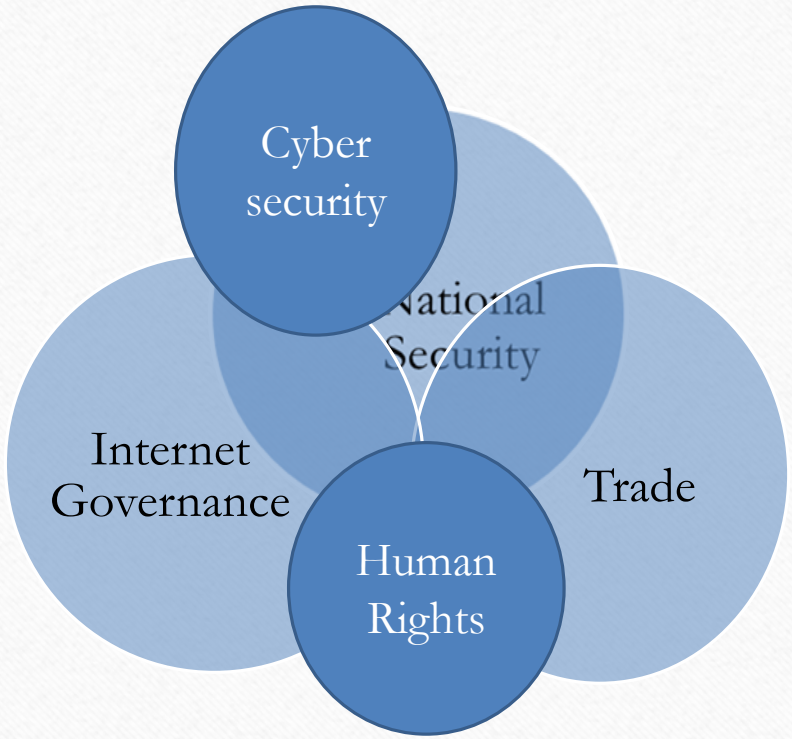
Former CIA contractor Edward Snowden

Increased efforts at data localization, digital protectionism



Jurisdictional conflicts

Defining digital protectionism

- USITC: "barriers or impediments to digital trade including censorship, filtering, localization measures and regulations to protect privacy." 2014 USITC found 49 nations have adopted "digital protectionist" policies. 2016 NTE reports more.
- US definition says nothing regulatory context and role of trust, although since 1996, USG has asserted that trust in providers in key to success of Internet.
- But some governments see data localization or procurement policies as a strategy to maintain trust and protect citizens from harm.

US inconsistency: national security procurement

- In 2015 NTE, US condemned Canada for banning foreign providers from bidding on Canada's email platform and requiring that support personnel must be Canadian citizens. Canada admitted it does not confirm with the GPA and invoked national security exception.
- But US acts in a similar manner. Congress declared in 2013 Appropriation Act that DOC and DOJ can't buy information technology systems "produced, manufactured, or assembled" by entities "owned, directed, or subsidized by PRC."

US inconsistency: privacy

- US has long recognized key role of trust online. To build and maintain trust, must have privacy and secure systems.
- Yet in 2015 trade barrier report US argues that Canadian province privacy laws discriminate against US suppliers because they require that personal information be stored and accessed only in Canada.
- In 2015 and 2016 US complained about Japan's uneven and Vietnam's unclear approach to privacy. US deeply concerned about compliance costs with EU data protection requirements especially right to be forgotten.
- The US has also argued that China's failure to fully enforce its privacy laws stifles e-commerce.
- **US is essentially saying unclear or inadequate approaches to enforcing privacy is a trade barrier and too strong enforcement of privacy is a trade barrier. But need privacy to enable online trust. Should signal need for global norms re. privacy.**

US inconsistency: defining appropriate regulatory environment for Internet

- Until recently US did not include "fair use" or ISP liability provisions in FTAs. These provisions provide exceptions for use of copyrighted materials on/offline and protect ISPs from liability when individuals misuse copyright. Key elements of regulatory environment. In 2016 US citied inadequate regulatory environment Chile and India, as barriers to trade.
- Clearly US did not require or delineate what an appropriate regulatory environment for the Internet "is. "
- However in 1997, USG delineated in a 'Framework for Global Electronic Commerce' which included private sector leadership, a limited role for government intervention including on cross-border flows, appropriate regulatory environment, and provisions on privacy and security. The US government "**will develop an informal dialogue with key trading partners…to ensure that differences in national regulation … do not serve as disguised trade barriers."**

Defining appropriate regulatory environment--Cyber-security and Internet stability-trust -TPP

- Trade agreements help delineate appropriate regulatory environment for digital economy and digital trade. Freedom Online Coalition (29 countries) notes that privacy and confidentiality of information are essential to the security of people, as well as to data, especially in the digital context where physical security and digital information are linked
- TPP says firms should not have to hand over source code or proprietary algorithms to their competitors…but Parties can obtain access to source code to achieve legitimate regulatory goals. Some critics assert that this language could make it harder for US and other countries to spot malware and other security flaws in source code –more access=more secure.
- TPP bans spam but says nothing about malware. Includes voluntary language on cyber-security. TPP requires TPP parties to establish criminal procedures for trade secret theft (and to encourage whistleblowing)
- Seems strange not to include broader language on malware (which can enable cyber theft or undermine personal privacy and security).

General Exceptions and Censorship

- General Exceptions: TPP parties full right to regulate in the public interest. Governments can block information flows for national security and other policy reasons-GATS Chapter 29.
- If a government censors or filters, it may cause rerouting of information flows and distort trade within and among nations (e.g. Egypt shutting off Internet).
- 2016 report noted Turkey blocks US ISPs but called out China's Great Firewall as censorship. Individuals need special software and routers to jump over the firewall. Firewall also raises costs and slows down work. A 2016 survey by the American Chamber of Commerce in China showed 79 percent of its members reported a negative impact on business due to internet censorship. US in so doing is gathering evidence re. these costs.

China response

- The Cyberspace Administrator of China stated that "The aim of the internet security inspection system is to guarantee the security and controllability of information technology products and services, safeguard user information security, and strengthen market and user confidence." So in China's perspective, it builds trust and stability.

Public Opinion

- With such a case, US could make important start both in clarifying role of trade agreements as a tool to keep Internet open and stable.
- Global pubic support for such action. Example. 2015 Harvard survey of 7,357 respondents from HK, India, Indonesia, Japan, SK, Malaysia, Pakistan, Singapore, Taiwan, Thailand, and Vietnam found 78% say free freedom of expression on the Internet needs to be protected. 71% say they are censored and some 25% use tools to access the Internet anonymously.

Aaronson argument

- Best way to determine protectionism is through pushing for shared norms re Internet regulatory context and challenging them in WTO trade disputes rather than naming and shaming per se. US has yet to engage in trade dispute re. censorship, filtering, localization measures and/or regulations in the name of privacy and cyber-stability.

Previous trade disputes

- In Internet Gambling case, the WTO ruled that governments could restrict service exports to protect public morals if these barriers are necessary and non-discriminatory.
- In China's restrictions on publications and audiovisual products, DSB noted that commitments for distribution of audiovisual products must extend to distribution of such products by the Internet.

Conclusion and Recommendations:

- Be realistic: work to develop universal norms for global Internet and to delineate appropriate strategies when countries don't live up to those norms.
- Be proactive: seek clarity with trade disputes and in so doing establish rule of law.
- Be consistent and coherent: develop Internet policies in a more coherent manner to avoid policy conflicts—Internet ombudsman