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Correcting the Record: USTR's Revisionist History on Data and Trade Agreements

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Introduction

The treatment of data in trade policy has recently become one of the more fraught issues of an already contentious trade agenda. Last summer, the U.S. Trade Representative (USTR) abruptly abandoned proposals to include rules for the cross-border transfer of data in the Indo-Pacific Economic Framework (IPEF), and followed suit in the fall at the World Trade Organization (WTO). Subsequently, it also removed several key data-related digital trade barriers from the Congressionally-mandated National Trade Estimate report.

It is hard to conceive of meaningful digital trade rules without strong data-related provisions, a conclusion underscored by persistent U.S. strength in this area and its importance to U.S. economic welfare: according to the U.S. Bureau of Economic Analysis, digitally-enabled services exports accounted for \$626 billion in 2022,¹ or 2.5 percent of the U.S. GDP. These exports also fueled a persistent and growing surplus—\$256 billion in 2022—and millions of well-paying jobs. Foreign barriers to the cross-border flow of data, and lack of rules to combat them, puts this U.S. success story at significant risk.

At a recent hearing before Congress on USTR’s trade agenda, Ambassador Katherine Tai unveiled a new justification for this broad retreat from established digital trade rules: she argued that the rules were outdated and no longer ‘fit for purpose.’ Specifically, on cross-border data rules, she asserted that:

..those provisions are still largely based on an understanding that what we are dealing with is data as a facilitator of traditional trade transactions, goods transactions, data as a facilitator of e-commerce, data traveling along with the information that has to be traded in order for goods to move across borders. That was certainly the case 20 years ago.²

If she were correct—*i.e.*, that a trade rule based on a legacy business model was being misapplied to cover vastly different economic activities—one might accept the rationale. It is, however, fiction: data rules were never intended to simply facilitate goods trade. Repeating this fiction is a disservice to decades of policy work that, from the beginning, grappled with the same opportunities that digital trade now presents and the same concerns now portrayed as novel, be they privacy, security, or consumer protection. The rules were designed to address both those opportunities and concerns through deliberate and careful negotiation.

- 1 See BEA estimates at <https://apps.bea.gov/iTable/?reqid=62&step=9&isuri=1&product=4#eyJhcHBpZCI6NjI-sInNOZXBzIjpbMSw5LDZdLCJkYXRhIjpbWyJwcm9kdWN0IiwuNCJdLFsiVGFiVGVMaXN0IiwuMzU5I1dfQ==>
- 2 Amb. Tai response to Sen. Grassley, before the Senate Finance Committee, April 17, 2024. <https://www.finance.senate.gov/hearings/the-presidents-2024-trade-policy-agenda>.

Cross-Border Data Flow Rules Were Never Solely— or Primarily—About Goods Trade

As early as 40 years ago, trade negotiators clearly understood the need to integrate data-related rules into broader trade frameworks—first, in services; then vis-a-vis digitized products; and later as a cross-cutting rule applying to all sectors.

The source of Ambassador Tai’s mistake, her assertion that such rules were to promote the trade of traditional goods, probably lies in the fact that these rules were most recently discussed under the rubric of ‘electronic commerce,’ a term that has come to refer to online sale of physical goods. It is true that this was one of the first consumer-facing commercial applications of the internet, and a source of initial enthusiasm for policy engagement. But electronic commerce, as a trade concept, was never meant to be that limited. When the WTO Work Program on Electronic Commerce was launched in 1998, it introduced the following provisional definition: *“the term ‘electronic commerce’ is understood to mean the production, distribution, marketing, sale or delivery of goods and services by electronic means.”*³

Trade in traditional goods was never really the focus of electronic commerce deliberations for the simple reason that core goods rules were mature, and apart from incremental adjustments (e.g., use of electronic documents in customs procedures), there was little further work to be done to fill gaps engendered by the growth of the internet. In fact, the key issue that occupied the WTO’s Committee on Trade in Goods, when it submitted its first report⁴ under the Electronic Commerce Work Program, was the uncertainty on how to classify digitized products transmitted electronically⁵—as they were outside the realm of traditional goods trade.

Services, however, and digitized products, were an entirely different matter. The impact of data-fueled trade through the growth of the internet was, and continues to be, the focus of what is now known as digital trade.⁶ The goal of digital trade policymaking, consistent for two decades, has been the same: to identify and address bottlenecks in suppliers’ ability to leverage electronic networks to conduct trade. Primary among potential bottlenecks, once a physical network is built, is the treatment of data.

3 See <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/L/274.pdf&Open=True>.

4 See <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=O:/WT/GC/24.pdf&Open=True>.

5 This debate was never resolved within the WTO, leaving unclear how, or whether, discriminatory measures against such products could be addressed under trade rules. This unsatisfactory outcome was the primary inspiration for developing an independent rule on digital products that was negotiated in FTAs, starting with the 2003 U.S.-Singapore FTA.

6 A key reason for adopting the term “digital trade” was that China had co-opted the term electronic commerce to focus on what it saw as its core trade interests—promoting the global expansion of firms like Alibaba—and wanted to ensure that a focus on goods trade would avoid any discussion of data. When considering whether it would join the WTO Joint Statement on Electronic Commerce in 2018, China originally indicated that inclusion of data flow issues would be a “red line” preventing its participation.

Data flows and how they relate to trade have a long history in policy deliberations. The United States has advocated for the development of international frameworks to ensure resilient data flow regimes for decades. For example, the 1980 OECD Privacy Principles, championed by the United States, framed members' goals in pursuing the principles as “**DETERMINED** to further advance the free flow of information between Member countries and to avoid the creation of unjustified obstacles to the development of economic and social relations among them.”⁷

Similarly, the General Agreement on Tariffs and Trade (GATT) first considered the phenomenon of data flows as an exception to goods disciplines (bypassing traditional customs procedures, previewing the customs duties moratorium): in 1984, when grappling with a novel customs valuation issue, the Customs Valuation Committee noted that:

*[with respect to software] the importer is, in fact, interested in using the instructions or data; the carrier medium is incidental. Indeed, if the technical facilities are available to the parties to the transaction, the software can be transmitted by wire or satellite, in which case the question of customs duties does not arise.*⁸

At that point, of course, there were no rules for services and these early deliberations placed data flows as an activity generally outside of goods disciplines. Once negotiators began developing trade rules for services, however, data became a critical element in ensuring that trade disciplines for services would be effective. In laying out its goals for a services agreement at the GATT in 1985, the United States stated:

*The United States believes that priority should be given to an understanding on international information flows. It is critical that we address this particular area as soon as possible because of its critical role in most service sectors and its role in the technological change of all our economies.*⁹

Subsequently, initial internal U.S. drafts of the General Agreement on Trade in Services (GATS) proposed creating a horizontal rule for data flows, akin to Article XII (Payments and Transfers) to ensure, as was done for payments and transfers, that restrictions on data would not undermine specific commitments. Just as trade without the ability to move money is not meaningful, so too is a significant part of services trade meaningless without the ability to move information. The U.S. draft proposal did not survive as a horizontal provision in the GATS, but

7 See <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0188>.

8 See <https://docs.wto.org/gattdocs/q/TR/VAL/8A1.pdf>.

9 See p. 3, https://www.wto.org/Gatt_docs/English/SULPDF/91150082.pdf.

a similar approach found its way into two provisions, in the Financial Services Understanding (Article 8)¹⁰ and the Annex on Telecommunications (Article 5 (c)).¹¹ The latter states:

Each Member shall ensure that service suppliers of any other Member may use public telecommunications transport networks and services for the movement of information within and across borders, including for intra-corporate communications of such service suppliers, and for access to information contained in databases or otherwise stored in machine-readable form in the territory of any Member.

Both of these provisions were motivated by a similar concern: whether for financial services, or services generally, an inability to transfer data cross-border could render market access commitments, particularly for cross-border services, meaningless. These provisions, while critical to the effectiveness of services commitments, had limitations: the Financial Services Understanding only applied to the small subset of WTO members who chose to adopt it; and the Annex rule only applied to specific commitments, the particular set of services subsectors a particular WTO member chose to bind, which varied widely between members. Nonetheless, this was a solid and far-sighted beginning, and provided a model for all subsequent data flow rules.¹²

The prescience of U.S. negotiators was evident in a description of U.S. goals offered by a chief architect of the GATS, USTR Counselor Geza Feketekuty. As he stated in a 1989 article, 5 years before negotiations concluded:

[S]ince [the] computers can be attached anywhere in the network, it has become technologically and economically feasible to supply such services competitively from different geographic locations – sometimes across national frontiers.¹³

Under the right of non-establishment, foreign providers of covered services would be allowed to provide services across the border from a foreign location via the telecommunications network, without having to establish local facilities in the importing country.¹⁴

10 https://www.wto.org/english/tratop_e/serv_e/21-fin_e.htm.

11 https://www.wto.org/english/tratop_e/serv_e/12-tel_e.htm.

12 In the Obama Administration, USTR relied on this provision to challenge China's pervasive blocking of content and software applications, with some limited success.

13 Geza Feketekuty, *Negotiating the World Information Economy*, (1989) p, 169, available at https://business.columbia.edu/sites/default/files-efs/imce-uploads/CITI/Articles/10.4324_9781351115704-19_chapterpdf.pdf.

14 Op. cit., p. 192

The annex [i.e., what became the Annex on Telecommunications] could... allow foreign firms to process, store, and transfer data across national borders so long as they abide by regulations designed to protect privacy, intellectual property, public safety, and national security.

Feketekuty's description in 1989 of why cross-border data disciplines are important perfectly echoes the current policy goals animating modern digital trade rules—underscoring an historical amnesia that is a disservice to good policymaking.

Digital Trade-Specific Rules were Kicked off with The E-Commerce Moratorium

By the late 1980s, trade policy had pivoted beyond traditional goods rules to address nascent challenges. The following decade saw the entry into force of the WTO, the GATS, and the conclusion of a signature agreement that proved foundational for digital trade, the Basic Telecommunications Agreement (the BTA). It also marked the first post-WTO data-specific commitment which remains in place to this day: the moratorium on applying customs duties to electronic transmissions.

Although this commitment has been derided, in the words of USTR, as a relic of the age of faxes,¹⁵ such characterization completely misses the point. As was clear as early as 1984 (as noted above), companies were using networks to transmit products of significant value that did not come into contact with traditional customs procedures. The only reason this commitment was meaningful was precisely because of the value embedded in that data, the basis on which duties could have begun to be assessed. Negotiators in 1998 were not thinking about faxes—they were thinking about software, e-books, music, and videos.¹⁶ These are all critical U.S. exports, and core commercial interests that continue to drive trade.

In 2000, USTR's Ambassador Charlene Barshevsky, following off the success of the BTA, sought to chart new grounds, and in one of her last major policy speeches, proposed a "Networked Economy Initiative." The need for rules outside the traditional goods framework was clear:

15 Amb. Tai, responding to Rep. Hern, House Ways & Means Committee, April 16, 2024 said: "On the e-commerce moratorium, there is a similar stuck-in-time element. It was developed at a time when we talked about electronic transmissions because the relevant transmission was about fax transmissions, the e-commerce transmission related to the technological world where we were still faxing information to each other." <https://www.youtube.com/watch?v=ZeDfYL3Dq0Q>.

16 See figure 7.3 at <https://www.unescap.org/sites/default/files/aptir-2016-ch7.pdf>. Even in 1998, the value of such products exceeded \$30 billion annually.

This new initiative will create a lasting set of rules and agreements which help to ensure that the trading system provides for electronic business the same guarantees of freedom, fair competition, respect for intellectual property rights and access to markets that conventional commerce enjoys.¹⁷

The first concrete manifestation of this policy was in the 2000 launch of the U.S.-Singapore Free Trade Agreement (FTA), where a standalone chapter was eventually memorialized (in 2003) as a discrete, cross-cutting set of rules addressing digital trade. Notably, the rules had nothing to do with goods, focusing on technological neutrality for services,¹⁸ a binding commitment not to impose customs duties on electronic transmissions, and a related rule ensuring National Treatment and Most-Favored-Nation for digital products transmitted electronically.

It would take another 4 years for a cross-cutting data flow rule to find a home in a bilateral trade agreement, the U.S.-Korea FTA. This rule would come to be replicated in all subsequent U.S. FTAs and carried forward independently by U.S. trade partners as they negotiated further agreements without the United States. It would also extend beyond services, to any “covered person” needing to transmit data, thus addressing the trade interests of manufacturers, drug developers, etc., all of whom increasingly had to move massive amounts of data to conduct R&D, manage global operations, and serve their customers.

Data Flow Rules Are Not Solely About Personal Data

Finally, it is worth addressing one other myth that appears to persistently follow this debate—that data flow rules are designed primarily for the transfer of personal information for corporate profit. Some suggest that data flow rules are nothing more than an excuse to allow the largest companies to “keep auctioning off your data to the highest bidder,” as Sen. Elizabeth Warren (D-MA) stated in USTR’s oversight hearing on April 17.¹⁹ This argument, like the assertion “data flows were focused on goods trade,” misses the point of such rules: they are designed to ensure that a broad range of services and digital products are able to reach foreign markets and that communications across borders is possible. Obviously, a Zoom call transmits personal information, and that ability is what makes it valuable, but direct monetization of personal information relates to only a very small portion of data flows—65 percent of which, based on credible estimates, is commercial videos.²⁰

17 <https://usinfo.org/usia/usinfo.state.gov/topical/global/ecom/00102301.htm>.

18 This concept, now part of WTO jurisprudence, ensures that service commitments are not nullified by the advance of technology, repudiating India’s assertion that that an internet-enabled service was a novel service, not captured by a commitment made pre-internet (i.e., all of the original GATS commitments).

19 Sen. Elizabeth Warren (D-MA), questioning Ambassador Tai at a Senate Finance Committee Hearing, April 17, 2024.

20 See [Sandvine's 2023 Global Internet Phenomena Report Shows 24% Jump in Video Traffic, with Netflix Volume Overtaking YouTube](#).

Although advertising is certainly part of those flows, the specific data that companies are and are not allowed to collect and monetize is a factor completely determined by domestic law and not affected by cross-border data flow commitments. Data flow rules govern whether a company is able to transfer data between various jurisdictions, not whether the information can be gathered in the first place or subsequently monetized. If a government seeks to restrict what data that company can collect or sell, it is perfectly free to do so, unencumbered by data flow rules. In fact, many current U.S. measures do just that (e.g, the Children’s Online Privacy Protection Act, and the Health Insurance Portability and Accountability Act), without any conflict with trade rules. Similarly, recently-enacted measures such as the Executive Order on Sensitive Personal Data, or Data Broker legislation, which are narrowly crafted to address specific countries of concern based on a clear security rationale, are not the kinds of restrictions that trade rules would constrain.

Conclusion

Trade negotiators have spent decades building the policy foundation to support the free flow of data in trade agreements. Since the onset of such rules, the intent has always been to be forward-looking, anticipating the growing value of such data to services, digitized products, and the broader economy. This USTR has opted to abandon this legacy. While one may debate the value of such rules, claiming that they are no longer fit for purpose because we have moved beyond faxes and data as an adjunct to goods transactions is both baseless and unhelpful. To assert as much is nothing more than revisionist history.

The broad appeal of data flow rules, including by countries who lack large technology companies and who often have privacy regimes far more stringent than ours, suggest that the value of these rules reflects something more fundamental. The number of recent trade agreements containing such rules is instructive. To name a few: Singapore has concluded “Digital Economy Agreements” with partners such as New Zealand, Australia, the United Kingdom, and South Korea that include this language,²¹ as has the Pacific Alliance²² (a group including Chile, Colombia, Mexico and Peru); the EU and Japan have revised their trade agreement to include rules on data flows; and Canada and Ukraine have data flow language in their updated 2023 FTA.²³

21 <https://www.mti.gov.sg/Trade/Digital-Economy-Agreements>.

22 <https://alianzapacifico.net/en/instruments-alcaps/>.

23 <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ukraine/text-texte/2023/08.aspx?lang=eng>.

One particularly important recent example that demonstrates the maturity and broad consensus such rules now represent is found in African countries' embrace of a robust cross-border data flow rule, largely based on the United States' groundbreaking work, in their signature African Continental Free Trade Area Digital Trade Protocol.²⁴

This is the successful maturation of a policy once championed by the United States. For the United States to now reject its own significant contribution to durable and sustainable trade policy is a fact hard to fathom.

24 See Article 20, <https://www.bilaterals.org/?afcfta-digital-trade-protocol-49908>.