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At the Intersection of Cross-Border Information Flows and Human Rights: TPP as a Case Study

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## I. Introduction

Malaysia is 8,402 mi. from Silicon Valley and has little in common with the locus of the Internet universe. Nonetheless, Malaysian Prime Minister Najib Razak vowed to transform Malaysia into the Silicon Valley of Asia. Recognizing that the Internet is built on information flows, in 2011, he stated, ‘Former Prime Minister Dr. Mahathir Mohamad made the promise to the world that Malaysia would never censor the Internet... We intend to keep his word.’<sup>2</sup>

However, in June 2015, the online investigative magazine Sarawak Report alleged that the Prime Minister had some \$700 million in private bank accounts, at the same time that the government’s sovereign wealth fund was missing some \$4 billion. In the months that followed, Malaysian officials not only censored reportage of his Administration’s corruption and impunity but they also arrested dozens of Internet users.<sup>3</sup>

Policymakers and activists in other nations could do little to prod Malaysian officials to stop such censorship or human rights violations. The US, as an example, issued a public rebuke (Department of State 2016), which the Malaysian government seemed to ignore (Rhinehart: 2015). However, the US Government had just agreed to a new tool that could help policymakers challenge censorship in trade partners such as Malaysia. In October 2015, the White House asserted that the Trans-Pacific Partnership (TPP) could make it harder for government officials to censor and filter cross-border information flows. ‘The agreement also includes strong rules

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<sup>1</sup> I am grateful to Valeriya Denisova, who helped with the research and analysis, Nick Ashton-Hart, Executive Director at Internet & Digital Ecosystem Alliance, and attendees at the Georgia Tech Seminar on Political Space and Cyberspace, who provided comments.

<sup>2</sup> Ashu Solo, ed. Handbook of Research on Political Activism in the Information Age, (Hershey: Pa, IGI Global, 2014), p. 176, and <http://projekbrunei.com/asean-regional-bloggers-conference-2011.html>.

<sup>3</sup> Listening Post, ‘The story that is dividing Malaysia’s media,’ 4/20/2016, <http://www.aljazeera.com/programmes/listeningpost/2016/04/story-dividing-malaysia-media-160416073953321.html>; Freedom House, ‘Freedom on the Net 2015, Malaysia,’ <https://freedomhouse.org/report/freedom-net/2015/malaysia>; NA, ‘Malaysia Will Likely Force ‘Political Blogs’ and News Websites to Register With the Government,’ Global Voices, 4/23/2016, <https://globalvoices.org/2016/04/23/malaysia-will-likely-force-political-blogs-and-news-websites-to-register-with-the-government/> and Jeremy Malcolm, ‘Malaysian Internet Censorship is Going from Bad to Worse,’ 3/7/2016, <https://www.eff.org/deeplinks/2016/03/malaysian-internet-censorship-going-bad-worse>

that make sure the best innovation, not trade barriers and censorship laws, shapes how digital markets grow' (The White House 2015). The TPP makes the free flow of information across borders a default and is binding upon the US and Malaysia. Thus, the US Government could use these rules to challenge Malaysia's censorship of information if such censorship has a trade impact, i.e. if Malaysia censors information imported, exported, or financed by the US service suppliers or consumers.

Cross-border information flows are the life-blood of the Internet. Policymakers and activists recognize that to keep information flowing, they must develop and adhere to shared global norms and rules. In developing these norms and rules, decision-makers must define how and when national officials can limit and monitor information flows, and how to ensure that these rules are accepted and transparent to ensure predictability and accountability. With shared understanding, the Internet would be less likely to fragment, more people would have greater access to information, and more information could be created and exchanged (Manyika et al. 2014; Tietje 2011). However, citizens and policymakers around the world disagree on how and where to develop such shared rules (Castro and Atkinson 2014, 2; World Bank 2014).

Scholars, government officials, and executives generally agree that cross-border information flows are 'traded' between individuals and/or firms across borders. The members of the WTO define 'electronic commerce' to mean production, distribution, marketing, sale or delivery of goods and services by electronic means. When they draft provisions regulating information flows in trade agreement e-commerce chapters, they are writing rules to regulate the cross-border provision of Internet access services; the electronic delivery of services as digitized information flows; and the use of the Internet as a platform to buy and sell goods and services (Hartridge 2015). The US defines digital trade as commerce in products and services delivered via the Internet including cross-border information flows (USITC 2013, i).

Cross-border information flows are the fastest growing component of world trade and essential to the economic health of many nations. Economist Michael Mandel used IMF data from 2008 to 2012 and found that these flows increased 49 percent while trade in goods and services grew some 2.4 percent (Mandel 2013). The McKinsey Global Institute asserts that while flows of goods and finance have lost momentum, cross-border information flows have grown by 45 times since 2005 and will increase 900 percent over the next five years (McKinsey Global

Institute 2016). These statistics help us understand why the US and other countries are so eager to use trade agreements to govern cross-border data flows.

Until recently, the US, EU, Korea, Chile, and Canada states negotiated aspirational (nonbinding) provisions which called on signatories to avoid blocking information flows, avoid taxation of the Internet, and address issues, such as spam (Aaronson 2012). The TPP is the first such agreement to make such provision binding upon the trade agreement participants.

However, the signatories of the TPP did not involve many members of the Internet community in the development of the TPP. Hence, many Internet activists are concerned with using trade agreements to regulate cross-border information flows, which contrasts with longstanding approaches to Internet governance. Stakeholders from business, civil society, engineering community, as well as from government work collaboratively to govern the Internet; whereas government officials negotiate trade after advice from legislatures and input from business, labor unions, and others concerned with the effects of trade liberalization. Stakeholders are constantly present in the Internet governance process, but they are not consistently involved in the trade negotiation process. Trade negotiators do not constantly seek public comment on draft text. Members of the public cannot see the negotiated final draft until all potential signatories have signed off on them. Not surprisingly, some Internet activists believe that using trade agreements to govern cross-border data flows is a way to undermine more transparent, traditional multistakeholder approach to Internet governance. Moreover, these critics note that trade agreements are designed to help companies gain greater market access rather than to facilitate interoperability and cyber-stability (Reid Smith 2015; Aaronson 2016; Greenleaf 2016).

The Internet and Jurisdiction Project, an NGO working on Internet and Jurisdiction issues, summed up the basic governance dilemma posed by the Internet. On the one hand, policymakers must ‘preserve the global nature of cyberspace while respecting national laws.’ On the other hand, they must ‘fight misuses and abuses of the Internet, while ensuring the protection of human rights. (De la Chapelle and Fehlinger 2016, 1).

Trade agreements provide a way to solve this governance dilemma, but they are not without flaws. Herein, I examine four chapters of the TPP—the Services Chapter, which

delineates what kind of services are covered; the E-commerce Chapter, which governs cross-border information flows; the Transparency Chapter, which regulates how governments provide information to their citizens; and the Exceptions Chapter, which sets rules governing how and when nations may breach their obligations. I show that these chapters may help Internet users and policymakers advance Internet openness and make it harder for officials to restrict information flows –in those cases where doing so would have a trade impact. Moreover, citizens can more easily share information as to what their government is doing.<sup>4</sup>

TPP also contains transparency requirements that could bring much needed sunshine, due process, and increased political participation to trade (and Internet related) policymaking in countries, such as Malaysia. However, TPP's ability to limit censorship and filtering is limited. First, not all information flows are cross-border and hence subject to trade rules. Therefore, policymakers cannot always rely on trade agreements to defend Internet openness in countries, such as Malaysia. Second, these agreements provide clear exceptions that allow governments to restrict information flows when they deem necessary to achieve important domestic policy goals. Government officials can use national security, privacy, or public morals rationales to restrict information flows as long as they do so in a non-trade distorting manner. Thus, repressive states could use the exceptions to block information flows and other states might be reluctant to challenge these exceptions as discriminatory because trade diplomats recognize that they could also be challenged later if they took similar actions. Third, many Internet activists do not take kindly to the idea that trade agreements should become the main venue to regulate cross-border information flows. Meanwhile, proponents of using trade agreements to govern cross-border information flows have not developed clear and compelling arguments as to how these agreements will benefit Internet users, improve Internet governance and enhance human welfare. Until they do, Internet users are unlikely to support efforts to regulate the global Internet with trade agreements.

Scholars are just beginning to examine the jurisdictional questions at the intersection of trade, human rights, and Internet governance. Celia Lerman (2015) studied how FTAs in Latin America could affect domestic Internet policy. She concludes that these FTAs 'have molded

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<sup>4</sup> This paper does not cover other related chapters affecting information flows, such as the Telecommunications and Financial Services Chapters.

Internet laws in 11 countries,’ and ‘led these countries to adopt foreign mechanisms without taking into account how these mechanisms would be integrated into national systems.’ Hence, Lerman believes that these agreements have made it harder for some governments to advance certain human rights priorities (Lerman 2015, 25). Aaronson (2012) investigated whether trade policies and agreements might enhance human rights by increasing the free flow of information. She found that these policies are unlikely to promote human rights because policymakers do not effectively coordinate their efforts to promote cross-border information flows through trade agreements with their efforts to advance human rights online. Force-Hill (2014) studied the rise in data localization policies (government policies that limit the storage, movement, and/or processing of data to specific geographies and jurisdictions, or that restrict the activities of the companies that can manage data based upon the company’s nation of incorporation or principal sites of operations and management. He finds such policies will limit data flows and competition between firms. Over time, these policies will raise costs, retard technological innovation and the Internet’s ‘generativity’ (Force-Hill 2014). Chander and Le (2014) examined data localization policies and found that these policies are distorting trade and undermining human rights. However, Kawauchi et al. (2015) surveyed Japanese businesses regarding investment decisions and found the impact of data localization policies on such decisions is very hard to discern.

Herein, I assess how the TPP attempts to regulate issues at the intersection of cross-border information flows and human rights. Trade agreements delineate how individuals and firms may trade and how and when governments can put in place measures that distort trade. In general, trade agreements say little explicitly about human rights. Trade agreements also speak to relationships between states rather than relationships within states. However, trade agreements include provisions built on a central theme of human rights: non-discrimination. In most trade agreements, including the WTO Agreements and the TPP, member states must extend the best trade conditions granted to any trade agreement participant to all other participants (in trade terminology, MFN). Moreover, participating countries must treat foreign firms in the same way they do local firms (national treatment). Finally, policymakers are not supposed to discriminate

between products originating in different countries nor between imported goods or services and like domestically produced goods or services (like-product).<sup>5</sup>

This article proceeds as follows: first, I give an overview of digital trade and digital trade agreements. Then, I examine international human rights law. Following that, I focus on the intersection of trade and human rights. I discuss how the TPP addresses issues at the corner of trade and human rights. Next, I briefly examine how Internet activists view TPP as a tool to regulate cross-border information flows. Finally, I put forward some conclusions.

## II. Background

### *a. Cross-Border Information Flows Are Powering Digital Trade*

The Internet is built on information flows. By facilitating these flows, the Internet has made it cheaper and easier to trade information, to collaborate and work across borders, and to fund and sell goods and services (Manyika et al. 2014; eBay 2014). Digitization of goods is also transforming global logistics and enabling new and smaller players to participate in trade (McKinsey Global Institute 2014, 2–3; eBay 2014). For example, in a 2015 report, McKinsey notes that cross-border information flows allow greater participation by citizens of emerging economies, more exchanges of free content and services; facilitate instant and global access to information; and permit information flows to flow not just from advanced to emerging economies but also the other way round (McKinsey Global Institute 2015, 5). Growth in global markets for digital technologies is likely to continue because some 61 percent of the world’s population has yet to go online (World Bank 2016).

Cross-border information flows also have important spillover effects for human welfare. Because the Internet is both a platform for trade and a technology transforming trade, more people, especially in the developing world, can participate in trade (World Bank 2016). Hence, these flows are having positive development spillovers. Information flows also have direct effects on human welfare. Economists generally agree that information is also a global public good that governments should provide and regulate effectively. When states restrict the free flow of information, they shrink access to information, which can reduce economic growth,

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<sup>5</sup> [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact2\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm); and WTO ‘Agreement on Technical Barriers to Trade.’ [https://www.wto.org/english/res\\_e/booksp\\_e/analytic\\_index\\_e/tbt\\_01\\_e.htm](https://www.wto.org/english/res_e/booksp_e/analytic_index_e/tbt_01_e.htm).



productivity, and innovation (Maskus and Reichman 2004, 284–285; Kahn 2009). Moreover, when governments retain and control access to large amounts of information on their citizens, they may put their citizens' privacy at risk (Chander and Le 2014; Pearce 2014).

States have the main responsibility to protect, respect, and remedy violations of human rights on and offline. While international human rights obligations related to information flows are clear, they are not binding or enforceable globally. However, trade agreements have both binding and enforceable obligations, which makes them an attractive venue to regulate cross-border information flows (Burri 2013).

Increasingly states rely on cross-border information flows to facilitate economic growth (UNCTAD 2016). In 2014 alone, cross-border data flows generated \$2.8 trillion in economic value — significantly more than global trade in goods. Such growth reflects not just the dynamism of the technology industry, but also the digitization of the economy as a whole. Digital trade is crucial for nearly all firms, from large multinationals to small businesses that rely on online platforms to connect and trade with customers around the world (McKinsey 2016). Half of global trade in services now depends on access to cross-border data flows (Ezell 2015).

Digital trade is particularly important to the US economy. The US International Trade Commission (USITC) estimates that digital trade in certain digitally-intensive industries resulted in a 3.4 to 4.8 percent increase in US GDP in 2011-2013, while online sales of products and services in 'digitally-intensive' sectors were 6.3 percent of US GDP in 2012. The USITC also asserts that the expansion of digital trade caused real wages to increase by 4.5 to 5 percent and boosted US aggregate employment by up to 1.8 percent while reducing average trade costs by 26 percent (USITC 2014). However, these estimates do not include data flows related to subscribers' use of Facebook, Google, Twitter, and other free online services because the US Government cannot capture these transactions as monetary transactions in Federal cross-border trade statistics (US DOC 2014). Moreover, the US is home to 11 out of the world's 15 largest Internet businesses (China is home to the other four) and 17 of the largest cloud computing firms (Atkinson 2016). Given the stakes, the US is quick to label other countries' approaches to regulate information flows 'digital protectionism' (Aaronson 2016). The US is also the key force behind efforts to develop a system of shared trade rules to govern cross-border information flows (Aaronson 2015b).

*b. International Trade Agreements regulating digital trade and cross-border information flows*

The World Trade Organization (WTO) is the most international and most important trade body, with several agreements affecting cross-border information flows.<sup>6</sup> These agreements delineate how the 162 member states can encourage trade, but they also include exceptions: how and when signatory nations can restrict trade in the interest of protecting public health, public morals, privacy, national security or intellectual property, as long as such restrictions do not discriminate among WTO member states (Goldsmith and Wu 2006; Mattoo and Schuknecht 2000).

Trade diplomats drafted the WTO Agreements before the Internet became commercially influential. Thus, these agreements do not mention the Internet or these flows. However, they also drafted these provisions to be ‘technically neutral’ — so policymakers can apply WTO rules even as technologies change over time. Nonetheless, several member states, including the EU and the US, have said that they want to update these rules to avoid misunderstanding (Burri 2013; Makiyama 2011; National Board of Trade, Sweden 2012). In 2011, some 50 members of the WTO agreed to negotiate a new agreement about trade in services. The negotiations began in 2013 and focused on codifying rules on electronic authentication, trust services, cross-border information flows, localization requirements, privacy protection, and cloud computing (WTO 2015, 69). Meanwhile, the members of the WTO agree that the Internet should not be taxed; hence, they have put in place a moratorium on duties for electronic transmissions.<sup>7</sup>

Despite the lack of clarity, member states have had two trade disputes related to information flows (Wunsch-Vincent 2006; Goldsmith and Wu 2006). After Antigua challenged the United States’ ban on Internet gambling, the WTO’s Dispute Settlement Body ruled that

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<sup>6</sup> These agreements include the Information Technology Agreement (ITA), which eliminates duties for trade in digital products; the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which protects trade-related intellectual property pertinent to information technology; and the General Agreement on Trade in Services (GATS), which has chapters on financial services, telecommunications, and e-commerce, all of which relate to cross-border information flows.

<sup>7</sup> WTO, Briefing Note: Electronic Commerce [https://www.wto.org/english/thewto\\_e/minist\\_e/mc10\\_e/briefing\\_notes\\_e/brief\\_ecommerce\\_e\\_e/ecom\\_briefnote\\_e.htm](https://www.wto.org/english/thewto_e/minist_e/mc10_e/briefing_notes_e/brief_ecommerce_e_e/ecom_briefnote_e.htm)

governments could restrict service exports to protect public morals if these barriers were necessary, proportionate and non-discriminatory (not discriminating between foreign and domestic providers). The WTO's Appellate Body also examined China's restrictions on publications and audiovisual products, noting that commitments for distribution of audiovisual products must extend to the distribution of such products by the Internet.

WTO members still need clarity on other issues that can affect digital trade, such as whether governments can restrict sales of offensive items, such as Nazi memorabilia or in what situations they can legitimately censor and filter websites where doing so affects trade (Mattoo and Schuknecht 2000, 19-20; Mattoo and Wunsch-Vincent 2004; Goldsmith and Wu 2006). However, until members challenge these policies in a trade dispute or negotiate new rules, the world will not have such clarity (Aaronson and Townes 2012). Internet users in particular need further clarity regarding the nexus of information flows and human rights.

***c. What are human rights online and what are the responsibilities of states to respect these rights?***

Under international human rights law, first codified in the Universal Declaration of Human Rights (UDHR) and its associated covenants in 1948, States are obligated to protect the rights of people within their borders and to provide security to these individuals. However, it is not easy for government officials to protect, respect, and remedy all the human rights in the UDHR and its associated covenants. Policymakers must have governance expertise, funds, and will. Moreover, citizens often find it hard and even dangerous to demand respect for their rights in countries where civil and political rights are not recognized or respected. As a result, recognition of and respect for human rights is a work in progress. Government officials must find ways to balance human rights (privacy, vs. freedom of expression) Although human rights are supposedly universal and indivisible, most governments make protecting the right to life, or the security of their citizens, their top human rights priority (Arden 2015). Like trade laws, international human rights laws incorporate exceptions for national security (Bildt 2012; Kettermann 2012, 166).

In recent years, UN member organizations have worked to clarify the human rights responsibilities of states when their citizens go online. In 2011, the UN Human Rights Council

appointed a Special Rapporteur to examine how governments could ensure that they did not undermine the rights to freedom of opinion and expression online. Frank LaRue, who served as the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, tried to help the UN address questions of jurisdiction, information flows, and human rights. He stated that governments should not block access to the Internet and are obligated ‘to promote or to facilitate the enjoyment of the right to freedom of expression and the means necessary to exercise this right, including the Internet. Hence, States should consult with all segments of society to make the Internet widely available, accessible, and affordable to all’ (LaRue 2012).

In 2012 the UN Human Rights Council also approved a landmark resolution on the ‘promotion, protection, and enjoyment of human rights on the Internet.’ Resolution A/HRC/20/L.13 affirms that people have the same rights online as they do offline and these rights are ‘applicable regardless of frontiers.’ The resolution also says that states should promote and facilitate access to the Internet, although it did not declare access to the Internet a fundamental human right.<sup>8</sup>

Although the resolution clarified that the same human rights exist on- and offline, they have not explained how governments should advance human rights online given that the Internet transcends borders. Governments are supposed to provide an appropriate regulatory framework for the Internet to function in an open, efficient, and responsible manner (Kurbalija: 2014). An appropriate regulatory framework includes government respect for due process and for privacy, political participation, freedom of expression, freedom of association, and the rule of law. However, many states, including democratic ones, do not consistently respect these rights. Since the terrorist attacks of September 11, 2001, many democratic governments have expanded their use of the Internet to conduct surveillance of their own citizens, as well as of foreigners. These governments assert that by surveilling the Internet they can prevent threats to their citizens. However, when they monitor people online, these governments may undermine rights, including the right to privacy; the right to freedom of opinion and expression; the right to seek, receive, and impart information; and the right to freedom of association. The UN High Commissioner for

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<sup>8</sup> Human Rights Council Twentieth Session Agenda item 3, ‘The Promotion and protection of Human Rights on the Internet,’ A/HRC/20/L.13, <https://documents-dds-ny.un.org/doc/UNDOC/LTD/G12/147/10/PDF/G1214710.pdf?OpenElement>

Human Rights notes that when monitoring the citizens of another country, states are obligated to protect the privacy of ‘foreigners,’ as well as of their citizens, and not discriminate among noncitizens. In short, in their attempts to protect the right to life by using surveillance mechanisms, many governments have failed to respect other human rights and policy priorities (Mendel 2011).

Information technologies are challenging human rights in new ways and raising important policy questions. For example, states have a responsibility to protect individuals outside of their territory from egregious harm, such as genocide. Do states also have a responsibility to protect human rights online in territories outside of their control? If they do not have this responsibility, how can states assist individuals abroad who are denied their rights to utilize the Internet (which could include their own nationals living abroad)? Is digital protectionism an appropriate tool to alter the behavior of countries that undermine their citizens’ rights on- and/or offline? Government officials are addressing some of these questions in trade agreements, while simultaneously with them in international human rights fora.

### **III. Digital Trade, Digital Protectionism and Human Rights**

Policymakers may find it easy to assert that another nation is practicing digital protectionism, but it is hard to prove that the government officials aim to distort trade. For example, when governments censor the Internet, they may be acting to protect their citizens from harmful information or they may be acting to prevent citizens from knowing what officials are doing in their name. However, they might also be acting to promote domestic producers or protect these producers from foreign competition.

Although US officials acknowledge that countries often have legitimate reasons to take these steps, the United States monitors such actions and policies and labels many of them ‘digital protectionism.’ The US International Trade Commission (USITC) (2013, 5-1-5-2) defines digital protectionism as the establishment of barriers or impediments to digital trade, including censorship, filtering, localization measures, and regulations to protect privacy. In 2014, at the behest of the US Congress, the USITC (2014) examined global use of trade-distorting strategies and found that 49 nations have adopted ‘digital protectionist’ policies in the name of privacy and

cyber stability. The 2016 US Trade Estimate Report does not provide a final count, but the US finds digital protectionism in many of its trade partners (USTR 2016b).

US firms and policy makers are not alone in accusing others of digital protectionism: Canadian firms, for example, are also calling for global rules to regulate this behavior (McKenna 2013). A 2011 study by the Conference Board of Canada found that Canada faced a multitude of barriers to digital trade (Goldfarb 2011). The European Union is also concerned: in its 2015 report on global trade barriers, it found Russia's local server requirements could be trade distorting. It also noted that 'China continues to consider that only Chinese-developed information security technology is regarded as 'safe' and applies a concept of 'national security' far beyond normal international practice. This acts as a tremendous barrier for foreign companies competing for commercial applications in the IT sector. Furthermore, foreign companies continue to be blocked from participating in security-related standardization bodies' (European Commission 2015b, 6, 8).

The Brussels based think tank ECIPE has examined the economic cost of data protectionism. In separate papers, the think tank found that data localization regulations cost EU citizens an estimated \$193 billion per year due, in part, to higher domestic prices. ECIPE also found that Vietnam's strict 2013 data localization requirement has reduced that country's GDP by 1.7 percent. (Bauer et al; 2014, Vershelde:2014, ECIPE: 2015). However, the costs of digital protectionism are not always economic. In 2011, the OECD reported that Egypt's shutdown of the Internet for five days led to 'direct costs of at minimum USD 90 million. This amount refers to lost revenues due to blocked telecommunications and Internet services, which account for around USD 18 million per day, or, on a yearly scale, for 3-4 percent of GDP (OECD 2011,1).

Some scholars assert that digital protectionism undermines Internet stability and interoperability. Data localization policies, filtering or censorship can alter the architecture of the Internet, which has long favored technical efficiency over state politics. When officials place limitations on which firms can participate in the network, they may reduce the overall size of the network, which could also raise costs (Hill 2014, 32; Daigle 2015). Whatever the rationale for such steps, many analysts believe that because they lead to limits on cross-border information flows, such actions fragment the Internet and reduce access to information (Aaronson 2016; Donahoe 2016).

When states attempt to control jurisdiction by retaining and controlling access to large amounts of information about their citizens (and noncitizens) they may undermine human rights (Pearce 2014). Censorship allows countries to determine what data will be available within their borders and to control internal dissent (Chander and Le 2014, 1, 47 -49). When governments censor and filter the Internet and ignore the privacy rights of their citizens, people may become more reluctant to engage in free speech, participate in politics or search for information, because such activities could make them targets of government monitoring. In contrast, individuals who have some control over their information might be more willing to share it (Powles 2015). Frank LaRue, the UN Special Rapporteur, asserts that ‘restrictions on anonymity have a chilling effect, dissuading the free expression of information and ideas...exacerbating social inequalities’ (La Rue 2013, 13, #49, #20).

Given the potential negative effects of protectionist measures, whether censorship, filtering or data localization, it seems logical that states would attempt to develop a clear set of binding rules. The TPP is the first successful effort to do so. The section below delineates what TPP says and does not say about information flows and human rights.

#### **Section IV. What does the TPP say about the Intersection of Information Flows, Trade and Human Rights?**

Trade diplomats worked for many years to negotiate a Pacific-area trade agreement. In 2005, Brunei, Chile, New Zealand, and Singapore agreed to reduce barriers to trade in the Trans-Pacific Strategic Economic Partnership Agreement (TPSEP or P4). In 2008, Australia, Canada, Japan, Malaysia, Mexico, Peru, the United States, and Vietnam decided to join and expand the agreement. The parties agreed to negotiate a different kind of trade agreement—one that would tackle ‘new’ sectors such as digital trade, and introduce new strategies for thwarting protectionism. Hence TPP is the first trade agreement to require its signatories to regulate in a transparent manner. TPP signatories aimed to encourage regulatory coherence so that Internet regulations are interoperable and do not distort trade (Granville 2015).

Although Edward Snowden’s revelations affected the negotiations in 2013, surveillance issues colored but did not bedevil the talks. Canada, Australia, the US, and New Zealand already collaborated on intelligence as members of a signals intelligence alliance called ‘The Five Eyes.’

Nonetheless, the public in many of these countries remained very concerned about privacy and surveillance (New 2014). After more than seven years of intense negotiations, the participating nations agreed to new rules to govern cross-border trade in information.

In order to understand what the TPP says about information flows and how these provisions might affect human rights, we first need to understand how trade agreements regulate trade and in particular the provision of services across borders. Then we can assess what potential effects these measures may have on Internet users.

Trade agreements regulate the behavior of governments—how and when they can put in place measures that can distort trade. These agreements say very little about firms or individuals, although firms and individuals are affected by the agreements. Hence, I begin with TPP's Services Chapter (Chapter 10), which defines services and service suppliers and delineates how government officials should regulate cross-border services.<sup>9</sup> The agreement defines service suppliers as individuals or firms that supply services across borders. Cross-border services such as e-commerce come in different 'modes,' including a. services delivered from one party into the territory of another party (called cross-border trade); b. services produced in the territory of one party and delivered to a person living in another (called consumption abroad), c. services provided by a service supplier of one Member through commercial presence in the territory of any other Member (called commercial presence); and by an individual located in another country providing a service as an immigrant or worker with a visa (called presence of natural persons).<sup>10</sup> Hence, the TPP is very clear on how individuals and businesses can provide information services to consumers.

The TPP is less clear on the 'what' of the services they are providing Chapter 14. The E-commerce Chapter includes the provisions related to information flows, but it does not define information nor does it delineate if it covers all types of free online services, such as searches of scholarly websites. Trade negotiators may have chosen to do so deliberately for several reasons. Some states may have wanted to have a broader interpretation to allow flexibility, while

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<sup>9</sup> USTR, TPP, Chapter 10 'Cross-Border Trade In Services.'

<https://ustr.gov/sites/default/files/TPP-Final-Text-Cross-Border-Trade-in-Services.pdf>

<sup>10</sup> Ibid. I am grateful to Professor Anupam Chander (UC Davis Law School) for clarification of free services.



repressive states might have sought a more narrow definition that could allow them further control of information. Alternatively, by keeping the language vague, customary international law would apply should any nations engage in a trade dispute.

Article 14.11 states that ‘each party shall allow the cross-border transfer of information by electronic means...*when this activity is for the conduct of the business of a covered person.*’ However, as noted above, some information flows are not for the conduct of the business of a covered person; they do not involve the exchange of money. Facebook and Google, as an example, provide many of their users with free services in return for consumer data in order to target advertising (a transaction that is within the scope of the agreement). A covered person is defined in Article 14.1 and it means an investment, investor or service supplier who is providing services either from business to business (B2B) and/ or business to consumer (B2C) data flows. The agreement only mentions users in article 14.8 where it recognizes the benefits of protecting users’ personal information.<sup>11</sup> In other recent trade agreements, such as with Korea, the US Government has provided clarification that the agreement applies to all Internet users who are not ‘covered persons.’ In fact, in a side letter to the Korean trade minister, the USTR notes that the agreement applies to all Internet users.<sup>12</sup> We do not know why this side letter was considered necessary for Korea but not for the TPP. Again, the trade negotiators may have chosen to be vague, or they may have presumed that the side letter for Korea clarified that the agreement does cover such free services.

Article 10.11 requires that governments make regulations affecting cross-border information flows in a transparent manner. In so doing, the TPP helps ensure that all providers and Internet users can learn about and, where national authorities allow, comment upon such regulations before they go into effect.

While the TPP delineates how governments should regulate cross-border information flows, it says little about how government agencies, which collect lots of data, should behave in

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<sup>11</sup> USTR, TPP, Chapter 14, Electronic Commerce, <https://ustr.gov/sites/default/files/TPP-Final-Text-Electronic-Commerce.pdf>

<sup>12</sup> Assistant USTR Wendy Cutler to Mr. Jong Hoon Kim, Chief Negotiator for the KORUS FTA Seoul, Republic of Korea, 6/30/2007, [https://ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset\\_upload\\_file844\\_12735.pdf](https://ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset_upload_file844_12735.pdf) and US/Korea FTA E-Commerce Chapter, 2007, [https://ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset\\_upload\\_file816\\_12714.pdf](https://ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset_upload_file816_12714.pdf)

sharing it. The chapter has no language related to information held or processed by or on behalf of a government, e.g. health or statistical data collected by the governments. Governments could misuse such information or control the supply of it in ways that undermine human rights, as long as they comply with the national treatment principle (Kilic and Israel 2015, 2-3).

The language also says nothing about whether a TPP party is required to adopt and or maintain an adequate level of protection for the rights and freedoms of individuals. This is not surprising because trade agreements regulate trade and not human rights issues (Aaronson and Zimmerman 2007, 3).

Nonetheless, some parties claim that human rights provisions will benefit Internet users. According to the US Trade Representative (USTR), ‘The power of the Internet rests in ensuring that anyone who is connected can reap its benefits. But under new forms of protectionism, we have seen unprecedented attempts to roll back Internet freedom and access to US products and services. That’s why TPP puts in place strong rules that make sure the best communications tools and platforms are not limited by trade barriers and laws that restrict the flow of data and information... TPP reserves the right of individuals, small businesses, and others to access and move data as they see fit, subject to safeguards, such as privacy protections.’<sup>13</sup>

New Zealand also discussed how the agreement might affect Internet users, as well as the Internet as a whole. Policymakers seemed to see it as human rights enhancing. In examining whether the agreement met the national interest of its citizens, the Department of Foreign Affairs and Trade noted, ‘The digital economy affects the way New Zealanders connect economically and socially to the world - connectivity is also a crucial driver of New Zealand’s economic growth, and can also have significant cultural effects. The TPP could influence New Zealand’s digital culture and digital economy, given the increasing consumption of cultural products online and TPP’s intention to establish a regional framework of all areas of trade... New Zealand also ensured the obligations of the Chapter would not cut across New Zealand’s current policy settings to encourage creativity and cultural expression – including an exception in the Electronic Commerce Chapter that government subsidies or grants to support digital cultural works would

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<sup>13</sup> Compare Medium E-commerce Chapter TPP <https://medium.com/the-trans-pacific-partnership/electronic-commerce-87766c98a068#.bybi4jqt4> to USTR e-commerce chapter TPP <https://ustr.gov/tpp/#ensuring-a-free-open-Internet>.

not be affected, enabling New Zealand to continue its targeted use of government grants to encourage New Zealand creative content.’ The government also stressed that ‘TPP also includes provisions that relate to the regulation of aspects of the way New Zealanders interact with particular online or electronic products,’ such as consumer protection and privacy.<sup>14</sup>

None of the other negotiating parties made a case for the E-commerce Chapter of the TPP based on its benefits to human welfare.<sup>15</sup> Although Japan has argued that ‘the ‘quality of life’ of every person in the information society is based on reliable and stable system of networks,’ Japan did not mention Internet users in its discussion of the TPP.<sup>16</sup> Canada only mentions users once, noting that the TPP protects users’ privacy.<sup>17</sup>

The TPP has more extensive language on privacy than earlier FTAs. In agreements, such as US/Korea, the parties stated that they ‘recognize the importance of maintaining and adopting transparent and effective measures to protect consumers.’ In addition, the parties agreed to cooperate to enforce laws and enhance consumer welfare. However, the TPP requires its signatories to create an effective enabling environment to protect the privacy of Internet users. Article 14.7 demands the parties to ‘adopt or maintain consumer protection laws.’ Moreover, the

<sup>14</sup> New Zealand Foreign Affairs and Trade, ‘National Interest Analysis,’ 1/25/2016, p. 22, 258-259, <http://www.tpp.mfat.govt.nz/assets/docs/TPP%20National%20Interest%20Analysis.pdf>

<sup>15</sup> For Singapore, ‘Summary of Trans-Pacific Partnership Agreement,’ October 2015, <https://www.mti.gov.sg/MTIInsights/SiteAssets/Pages/TPP/Summary%20of%20TPP%20Agreement.pdf>. For Peru, <http://ww2.mincetur.gob.pe/comercio-exterior/acuerdos-comerciales/> For Mexico, <http://www.gob.mx/tpp#textos>. For Chile, <http://www.hacienda.cl/english/the-ministry/mission-and-objectives.html> and [http://www.minrel.gob.cl/minrel/site/edic/base/port/rel\\_economicas\\_eng.html](http://www.minrel.gob.cl/minrel/site/edic/base/port/rel_economicas_eng.html). For Malaysia, <http://fta.miti.gov.my/index.php/pages/view/71> and <http://fta.miti.gov.my/index.php/pages/view/258>. For Australia, Department of Foreign Affairs and Trade, Australia, ‘Chapter Summary: Electronic Commerce,’ <http://dfat.gov.au/trade/agreements/tpp/summaries/Documents/electronic-commerce.PDF> I could not find anything on TPP on the trade ministry websites for Vietnam <http://www.moit.gov.vn/en> or Brunei <http://www.mofat.gov.bn/site/home.aspx>.

<sup>16</sup> Japan, Ministry of Economy, Trade, and Industry On e-commerce and Japan’s perspective, ‘METI Proposal on WTO’s approach to E-commerce Towards eQuality: Global E-Commerce presents a Digital Opportunity to Close the Divide Between Developed and Developing Countries,’ 1/6/2013, [http://www.meti.go.jp/interface/honsho/search?q=digital+trade&sa=Search&client=meti&output=xml\\_no\\_dtd&proxystylesheet=meti&sort=date%3AD%3A%3Ad1&oe=UTF-8&ie=UTF-8&lang=en&ud=1&exclude\\_apps=1&site=meti\\_en](http://www.meti.go.jp/interface/honsho/search?q=digital+trade&sa=Search&client=meti&output=xml_no_dtd&proxystylesheet=meti&sort=date%3AD%3A%3Ad1&oe=UTF-8&ie=UTF-8&lang=en&ud=1&exclude_apps=1&site=meti_en). On e-commerce in TPP, Japan, Ministry of Economy, Trade, and Industry, ‘Statement by Minister Miyazawa, Minister of Economy, Trade and Industry Substantial Agreement on the Trans-Pacific Partnership (TPP) Agreement,’ October 6, 2015, [http://www.meti.go.jp/english/speeches/20151006\\_01.html](http://www.meti.go.jp/english/speeches/20151006_01.html)

<sup>17</sup> Global Affairs Canada, ‘Summary of the Agreement,’ <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/services/index.aspx?lang=eng>

TPP nations made it clear that privacy was important to maintaining trust online in article 14.8. ‘Each Party shall adopt or maintain a legal framework that provides for the protection of the personal information of the users of electronic commerce.’<sup>18</sup> Finally, the countries ‘agreed to develop mechanisms to promote compatibility among different privacy regimes,’ although they did not state how or where.<sup>19</sup> States made it clear that the TPP did not require them to reduce privacy protections. As an example, Australia noted, ‘Australia’s open and robust regulatory framework, including the Privacy Act and e-health record system (Personally Controlled Electronic Health Record Act 2012), will not be affected by these TPP commitments.’<sup>20</sup>

The agreement has very clear language limiting digital protectionism, such as data localization laws. For example, Malaysia’s data protection law does not permit a data user to transfer any personal data outside Malaysia except to countries specified by the Minister and published in the Gazette. The law only allows users and firms to transfer personal data out of Malaysia in cases where the individual has given consent to the transfer; if the transfer is necessary for the performance of a contract between the individual and a data user; or if the transfer is for purposes of legal proceedings or for the purposes of obtaining legal advice (Chia 2014). Hence, this law is quite trade distorting. Meanwhile, Vietnam ‘bans the use of the Internet to criticize the government or to do anything else to harm national security, social order and safety.’ The law also requires that the ISPs keep a copy of information in order to facilitate inspection by authority (Chander and Le 2014, 21, 23-24). Should the TPP go into effect, both countries will have to revise their laws to ensure that they do not discriminate between local and foreign Internet and cloud providers.

The binding language in the E-commerce Chapter is disputable under the rules in Chapter 28 of the TPP, which builds on the language in the General Agreement on Trade in Services (GATS). As noted earlier, there have been few WTO trade disputes centered on challenging a state’s use of exceptions, but the few that have been (as in public health or public morals) have

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<sup>18</sup> Chapter 14, Electronic Commerce, <https://ustr.gov/sites/default/files/TPP-Final-Text-Electronic-Commerce.pdf>

<sup>19</sup> Ibid.

<sup>20</sup> Australian Government, Department of Foreign Affairs and Trade, ‘Outcomes: Trade in the Digital Age,’ <http://dfat.gov.au/trade/agreements/tpp/outcomes-documents/Pages/outcomes-trade-in-the-digital-age.aspx>

upheld the rights of states to breach trade norms as long as they are necessary, legitimate, and non-discriminatory.

The two nations that have some record of censorship and filtering, Malaysia and Vietnam, were given two years after the TPP is approved, to revise their policies and should they not alter their policies, they could be subject to such challenges. But member states would probably think twice before initiating a trade dispute. First, a respondent nation would probably justify its behavior under the TPP's exceptions. Secondly, a Dispute Settlement panel would be appointed to issue an opinion on whether such behavior violates TPP norms. Such a body will likely be unwilling to provide a roadmap delineating how Malaysia or Vietnam might alter its censorship) to avoid discriminating against foreign service providers (Gao 2011, pp. 378-382).

For example, in May 2016, Vietnam blocked Facebook, after Vietnamese citizens used Facebook to organize public protests over an environmental disaster.<sup>22</sup> If the US (or other TPP party) wanted to challenge Vietnam's censorship of Facebook as a barrier to trade, Vietnam could claim that it acted under the Exceptions. According to the US Government, the General Exceptions Chapter 'ensures that the United States and the other TPP Parties' are guaranteed 'the full right to regulate in the public interest, including for national security and other policy reasons.'<sup>23</sup> In addition, TPP parties expanded on the National Security exception delineated in the GATS. This exception, 'applicable to the entire Agreement, makes it clear that a party may take any measure it considers necessary for the protection of its essential security interests.' Moreover, the Agreement also provides a Disclosure of Information exception. 'No Party is obligated to provide information under the Agreement if it would be contrary to its law or public interest, or would prejudice the legitimate commercial interests of particular enterprises.'<sup>24</sup>

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<sup>22</sup> Sarah Perez, 'Facebook blocked in Vietnam over the weekend due to citizen protests,' *Techcrunch*, May 17, 2016,

<http://techcrunch.com/2016/05/17/facebook-blocked-in-vietnam-over-the-weekend-due-to-citizen-protests/>

<sup>23</sup> Chapter 29, Exceptions and General Provisions, <https://ustr.gov/sites/default/files/TPP-Final-Text-Exceptions-and-General-Provisions.pdf> and USTR, 'Summary,'

<https://ustr.gov/sites/default/files/TPP-Chapter-Summary-Exceptions-and-General-Provisions.pdf>

<sup>24</sup> *Ibid.*

While some analysts view the exceptions as too broad, others see these exceptions as too restrictive. Greenleaf worries that the exceptions could undermine privacy and could create a regulatory chill, since governments must show that personal data protection rules are necessary and legitimate (Greenleaf 2016, 11). Nevertheless, there is no evidence that governments are decreasing their support of privacy regulations or are unresponsive to citizen or business concerns about privacy. Kilic and Israel assert that a country with strong privacy rules, such as the EU, could find it challenging to enforce data standards on a company registered in a country that does not have clear and sufficient privacy regulations, such as Vietnam (Kilic and Israel: 2015). However, until a TPP party challenges such a case under dispute settlement, it is hard to argue that privacy will be undermined because it is protected under the exceptions.

Although it would not be easy to challenge censorship or filtering as a trade barrier, the US seems to be laying the grounds for such a trade dispute in the WTO. In its most recent report examining trade barriers, the USTR called out several countries for blocking information flows. However, it labeled only China's Great Firewall as censorship (USTR: 2016). The Chinese government justifies its broad program of censorship and filtering as essential to China's social stability (Denyer: 2016). Nevertheless, the Firewall has direct and indirect costs, which are borne by Chinese citizens, non-Chinese internet users, the Chinese government, and foreign companies, such as Twitter or Google. For example, individuals within China need special software and routers to 'jump over' the Great Firewall and freely access to Internet. Moreover, as noted earlier, censorship and filtering could degrade the performance of the connection or reduce the size of the network and in so doing raise costs to Chinese and non-Chinese Internet users (Hill 2014 and Daigle 2015). China has to use scarce resources to maintain the Great Firewall. For example, the government employs some two million censors (Griffiths 2015). China could have spent that money on other priorities such as its citizens' health or education.

Meanwhile, we can see the trade distortions in lost business and market share. The American Chamber of Commerce in China found that 79 percent of its members reported a negative impact on business due to China's Internet censorship (USTR 2016b; Makinen 2015). In a 2015 survey the European Chamber of Commerce found 86 per cent of companies reported a negative effect on their business as a result of certain websites and online tools being blocked, a 15 per cent increase from June 2014 (Coonan: 2015).

## V. What was the response of Internet Civil Society Groups to the TPP and what is missing in the TPP?

When Internet civil society groups read the final TPP agreement, they concluded it provided few benefits for Internet users.<sup>25</sup> They also stressed that the TPP does not effectively address some of the tensions between cross-border information flows and human rights. For example, the web site Boing Boing reported that activists have concluded that the TPP ‘spells doom for free speech online.’<sup>28</sup> The Electronic Frontier Foundation, an Internet activist group, warned that individuals that seek to circumvent paywalls could be accused of civil or criminal offenses under the TPP.<sup>29</sup> Another group, Expose the TPP, came to the most radical conclusion, noting the agreement ‘would undermine Internet Freedom.’<sup>30</sup>

These analysts based their concerns on the intellectual property provisions. The US and Japan (and, to a lesser extent, Australia) want to protect and enhance online copyright, believing that strong copyright protection incentivizes further innovation, which is a key factor in the competitiveness of these nations (IP Commission 2013). However, as activist Evan Greer notes this extensive regime of copyright enforcement ‘has been co-opted by special interests to censor legitimate content from the web and to discourage free expression (Greer 2015). These critics stress that the TPP would force the adoption of the US approach, which they believe does not provide due process to individuals who allegedly breach online copyright laws. Moreover, they note that, if approved, the TPP would require countries, such as Chile (which has established a judicial notice-and-takedown regime), to change to the US system (which they argue provides less protection to Internet users’ expression and privacy). Finally, they stress that signatories would be required to adopt criminal sanctions for copyright infringement that occurs without a commercial motivation. These critics also argue that users could be jailed or hit with debilitating fines over file sharing or have their property or domains seized without a formal complaint from the copyright holder (EFF 2015; New 2014). Others noted that TPP’s approach to protecting online copyright is too biased towards the needs of copyright owners and it could reduce

<sup>25</sup> <http://www.ripessasia.org/en/quick-posts/sad-day-for-netizens-tpp-supporters/>

<sup>28</sup> <https://boingboing.net/2015/10/09/leaked-final-tpp-intellectu.html>

<sup>29</sup> <https://www.eff.org/deeplinks/2015/10/how-trade-agreements-harm-open-access-and-open-source>

<sup>30</sup> [http://www.exposethetpp.org/TPPImpacts\\_InternetFreedom.html](http://www.exposethetpp.org/TPPImpacts_InternetFreedom.html)

innovation by stifling opportunities to explore and develop new models that exploit the Internet and digital services (Samuel 2011).

Meanwhile, TPP proponents argued that critics misunderstand the objectives and consequences of the online copyright language in the TPP. They maintain that this approach is balanced because it provides exceptions for individuals who want to access protected content online with ‘fair use’ — criticism, commentary, news reporting, teaching, scholarship, and research — hence, non-commercial sharing would not be criminalized (Holleyman 2015). However, the US and other proponents of these provisions have not adequately addressed whether trade agreements should require developing countries to utilize scarce resources to protect online Intellectual Property Rights (IPR). These proponents have also not explained how strong measures to protect content online do not undermine access to information with fair use exceptions.

TPP critics in the US have also implied that the disappointing language of the TPP stems from an undemocratic process that favored business at the expense of Internet users. They may be confusing process and outcome. In June 2015, the website Intellectual Property Watch obtained some 400 pages of email traffic between the Office of the USTR and officials and industry advisers related to the TPP. Although most of the content of the emails is blacked out, these emails provide insights into how the Office of the USTR develops policy, who USTR staff talk to and what information they provide. The emails reveal that the USTR is receptive to business interests and that at times firms draft language for the USTR. However, the released emails do not include emails to non-business representatives concerned about IPR. Hence, we cannot say that the US did not consult with or consider opinions of individuals critical of the US approach to protecting online IPR (New 2015).

Although the critics are probably right that the process was not transparent, they are exaggerating the negative effects upon Internet users, as well as upon Internet operability and openness. Large tech corporations also have a stake in maintaining an open and stable Internet. While these firms do not speak for Internet users, Internet users are their clients. Like their customers, these firms desire clarity and want to maintain trust. They need the rule of law online, as well as limits to censorship, filtering, and protectionist policies.



Finally, critics condemn the agreement because it was negotiated in secret. While the critics are quite right to note that the process of negotiating the TPP did not engender trust, the US and many of its negotiating partners have not revised the processes by which trade negotiations take place (which require trust among negotiating partners). Neither have they implemented transparency expected by many public policy participants when the Internet is the subject of regulation and in their view necessary for good governance in the Internet age (which requires greater openness and dialogue with the public (Aaronson and Moore 2013).

TPP critics have probably not carefully reviewed the Transparency Chapter (Chapter 26). While it is ironic that an agreement negotiated in secret could promote transparent accountable governance, the Transparency Chapter is likely to alter how several of the twelve countries regulate the Internet. Chapter 26 requires government officials to ‘ensure that its laws, regulations, procedures, and administrative rulings are promptly published and allow individuals to comment on these measures.’ The parties shall ‘consider comments received during the comment period.’ Hence, the parties must be accountable and show that they ‘heard’ such comments. In addition, each party shall provide ‘reasonable opportunities’ to present their concerns with regulations and administrative proceedings. Article 26.4 notes that each party shall establish or maintain judicial or administrative tribunals to review administrative actions and allow the parties affected by such actions opportunities to support or defend their positions. Finally, these review bodies must provide decisions based on evidence and submissions of record. Hence, the agreement requires due process and political participation in the regulatory process. Consequently, the TPP can advance access to information, due process, and political participation for Internet and other areas of regulation provided the areas in question are covered by TPP. Moreover, previous studies have shown that such improvements in governance related to trade issues can spill into the policy as a whole (Aaronson and Abouharb 2011, 2013).

Many critics of the e-commerce provisions focused on what it includes, but it is equally important to examine the human rights implications of what it does not include. The TPP, like other trade agreements, bans spam but says nothing about banning malware. Yet malware is an important trade issue, because malware can be redefined as malicious cross-border information flows that are designed to injure targets. Moreover, malware can have significant negative effects on human rights. When business or home computers are infected, users may be less able

to use his/her computer in the manner that he or she is accustomed to. He/she may experience slower computer performance, systems problems, and cyber-insecurity, including exposure of opinions or other material considered illicit, subjecting that user to serious negative consequences. US trade agreements have included voluntary language on cyber-security writ large; it seems strange to address cyber-theft and unsolicited email (spam) and not at least try to address malware.

## **VI. Conclusion**

The TPP is complicated and legalistic, easy to demagogue, and hard to understand. The TPP answers only some questions at the intersection of cross-border information flows and human rights. TPP is very clear on how individuals and businesses can provide information services to consumers. TPP is less clear on the ‘what’ of the services they are providing. The E-commerce Chapter, includes the provisions related to information flows, but it does not define information nor does it delineate if it covers all types of free online services, such as searches of scholarly websites. Moreover, it allows government an exception on the disclosure of information that it deems contrary to its law or public interest,

The TPP clarifies that data localization policies are inherently protectionist. Moreover, governments could use its provisions to challenge filtering and censorship as barriers to trade in countries, such as Malaysia or Vietnam, if the government discriminates between foreign and domestic suppliers of like information services or limits access to them in ways that are disproportionate to an otherwise-legitimate public policy objective. But it gives TPP parties a big out. Governments can argue that they are limiting information flows to achieve legitimate domestic policy objectives.

Moreover, the TPP has some important gaps. The TPP does not address malware. Furthermore, the TPP does not clarify the relationship of trade obligations to human rights obligations delineated in other international agreements and treaties.

Nonetheless, if it goes into effect, the TPP’s influence will likely be significant. In 2015, TPP parties had 11.4 percent of the Earth’s population and almost 25 percent of all Internet

users.<sup>31</sup> Moreover, the TPP includes important and growing markets for digital products and services in countries, such as Vietnam. Countries, including Colombia, Indonesia, the Philippines, South Korea, Taiwan, and Thailand, have expressed interest in joining the TPP should it come into effect (Bryson and Nelson 2015). If the TPP is approved it could have significant spillover effects on how other governments deal with cross-border information flows, especially as regards relationships between TPP parties and other parties outside the TPP. Non-TPP nations will have to comply with TPP rules when they exchange information with TPP members.

Moreover, should they approve the TPP, the US, Canada, and Australia will want to use the TPP as a guidepost for other trade agreements they are negotiating such as TiSA or the Trans-Atlantic Trade Partnership-the proposed US/EU trade agreement. However, because citizens, firms, and policymakers from the world's other nations were not involved in setting these rules, they may balk at accepting rules they did not negotiate as the template.

The nations that have signed the TPP did not involve and educate the public in the rules governing cross-border information flows. They also did not encourage a public debate as to whether trade agreements are the best place to locate such shared rules. Thus, while the TPP (if approved) could be an effective mechanism to govern the intersection of information flows and human rights, it may not be the most trusted or appropriate strategy.

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31 <http://www.internetworldstats.com/stats.htm>

## Bibliography

- Aaronson**, Susan A. 2015b. ‘What does TPP mean for the Open Internet?’ *Inside US Trade*, November 16. <https://insidetrade.com/content/academic-says-tpp-could-have-positive-effects-Internet-if-membership-expands-parties-enforce>
- Aaronson**, Susan A. 2016. ‘The Digital Trade Imbalance and Its Implications for Internet Governance.’ *Global Commission on Internet Governance Paper Series* 25. February 3. <https://www.cigionline.org/publications/digital-trade-imbalance-and-its-implications-internet-governance>
- Aaronson**, Susan A., and M. Rodwan Abouharb. 2011. ‘Unexpected Bedfellows: The GATT, the WTO and Some Democratic Rights.’ *International Studies Quarterly* 55 (2): 379–408.
- Aaronson**, Susan A., and Miles Townes. 2012. ‘Can Trade Policy Set Information Free?’ *SSRN*. December 5. [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2189153](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2189153)
- Aaronson**, Susan A., and Jamie Zimmerman. 2007. *Trade Imbalance: The Struggle to Weigh Human Rights Concerns in Trade Policymaking*. NY: Cambridge University Press.
- Arden, Mary. 2015. *Human Rights and European Law: Building New Orders*. UK: Oxford University Press.
- Atkinson, Robert D.** 2015. Testimony Before the House Judiciary Committee, Subcommittee on Courts, Intellectual Property and the Internet, ‘International Data Flows: Promoting Digital Trade in the 21<sup>st</sup> Century.’ November 3. [http://www2.itif.org/2015-atkinson-international-data-flows.pdf?\\_ga=1.45972131.623591014.1447024182](http://www2.itif.org/2015-atkinson-international-data-flows.pdf?_ga=1.45972131.623591014.1447024182)
- Bauer** Matthias, Hosuk Lee-Makiyama, Erik van der Marel, and Bert Verschelde. 2014. ‘The Costs of Data Localization: Friendly Fire on Economic Recovery.’ ECIPE Occasional Paper 3. [http://www.ecipe.org/app/uploads/2014/12/OCC32014\\_\\_1.pdf](http://www.ecipe.org/app/uploads/2014/12/OCC32014__1.pdf)

- Bauer** Matthias, Hosuk Lee-Makiyama, and Erik van der Marel, 2015. ‘Data Localisation in Russia: A Self-imposed Sanction,’ June, <http://ecipe.org/publications/data-localisation-russia-self-imposed-sanction/>
- Bildt**, Carl. 2012. ‘A Victory for the Internet.’ *New York Times*, July 5. <http://www.nytimes.com/2012/07/06/opinion/carl-bildt-a-victory-for-the-Internet.html>
- Bryson**, Jay A., and Erik Nelson. 2015. ‘TPP Agreement: More Than Initially Meets the Eye.’ *Wells Fargo Securities*, October 7. <https://www08.wellsfargomedia.com/assets/pdf/commercial/insights/economics/international-reports/global-tpp-20151007.pdf>
- Burri**, Mira. 2013. ‘Should There be New Multilateral Rules for Digital Trade? Think Piece for the E15 Expert Group on Trade and Innovation.’ *SSRN*. Sep. <http://ssrn.com/abstract=2344629>.
- Castro, Daniel and Robert Atkinson. 2014. ‘Beyond Internet Universalism: A Framework for Addressing Cross-border Internet Policy.’ *Information Technology and Innovation Foundation*. Sep. [www2.itif.org/2014-crossborder-internet-policy.pdf](http://www2.itif.org/2014-crossborder-internet-policy.pdf).
- Chander**, Anupam, and Le Uyen P. 2014. ‘Breaking the Web: Data Localization vs. the Global Internet.’ *SSRN*. Apr. <http://ssrn.com/abstract=2407858>
- Chia**, Jillian. 2014. ‘Data Protection in Malaysia.’ *TaylorWessing*, May. [http://united-kingdom.taylorwessing.com/globaldatahub/article\\_malaysia\\_dp.html](http://united-kingdom.taylorwessing.com/globaldatahub/article_malaysia_dp.html)
- Coonan, Clifford**, 2015, “Great Firewall is harming EU business in China, says Chamber,” 2/17/2015, <http://www.irishtimes.com/business/economy/great-firewall-is-harming-eu-business-in-china-says-chamber-1.2105965>
- De La Chapelle**, Bertrand, and Paul Fehlinger. 2016. ‘Jurisdiction on the Internet: From Legal Arms Race to Transnational Cooperation.’ *Global Commission on Internet Governance Paper Series* 28. April 1. <https://www.cigionline.org/publications/jurisdiction-Internet-legal-arms-race-transnational-cooperation>

- Donahoe**, Eileen. 2016. 'So Software Has Eaten the World: What Does It Mean for Human rights, Security and governance?' *Just Security*, March 18.  
<https://www.justsecurity.org/30046/software-eaten-world-human-rights-security-governance/>
- Ezell**, Stephen. 2015. 'Data a Key Driver of Transatlantic Economic Growth,' *Innovation Files*, July 23. [http://www.innovationfiles.org/data-a-key-driver-of-transatlantic-economic-growth./](http://www.innovationfiles.org/data-a-key-driver-of-transatlantic-economic-growth/)
- Froman**, Michael. 2014. 'A Values-Driven Trade Policy: Remarks by Ambassador Froman at the Center for American Progress.' *USTR*. February 14. <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2014/February/A-Values-Driven-Trade-Policy-Remarks-by-USTR-Froman-at-Center-for-American-P>
- Gao**, Henry. 2011. 'Google's China Problem: A Case Study on Trade, Technology and Human Rights Under the GATS,' *SSRN*. December 24.  
[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1976611](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1976611)
- Granville**, Kevin. 2015. 'The Trans-Pacific Partnership Trade Accord Explained.' *New York Times*, October 5. [http://www.nytimes.com/2015/10/06/business/international/the-trans-pacific-partnership-trade-deal-explained.html?\\_r=0](http://www.nytimes.com/2015/10/06/business/international/the-trans-pacific-partnership-trade-deal-explained.html?_r=0)
- Greenleaf**, Graham. 2016. 'The TPP and Other Free Trade Agreements: Faustian Bargains for Privacy.' *SSRN*. February 14.  
[http://papers.ssrn.com/sol3/Papers.cfm?abstract\\_id=2732386](http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2732386)
- Griffiths James. 2015. 'Great Firewall rising: How China wages its war on the Internet.' *CNN*, October 25. <http://www.cnn.com/2015/10/25/asia/china-war-Internet-great-firewall/>
- Guinchard**, Audrey. 2010. 'Human Rights in Cyberspace: Keynote paper at the Cyber-law Section 2010 Society of Legal Scholars Conference.' *SSRN*. September 15.  
[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1694483](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1694483)

- Hartridge, David. 2015. 'The WTO Work Programme on electronic commerce.' *Lexology*, March 13. <http://www.lexology.com/library/detail.aspx?g=a1770783-f8a5-4128-8020-60368b794044>
- Institute** for Human Rights and Business. 2015. 'Security v Access: The Impact of Mobile Network Shutdowns. Case Study: Telenor Pakistan.' Sep. <https://cihr.eu/wp-content/uploads/2015/09/2015-09-Telenor-Pakistan-Case-Study.pdf>
- IP Commission. 2013. 'The Report of the Commission on the Theft of American Intellectual Property.' The National Bureau of Asian Research. May. [www.ipcommission.org/report/ip\\_commission\\_report\\_052213.pdf](http://www.ipcommission.org/report/ip_commission_report_052213.pdf).
- Kawauchi**, Junko, Takeshi Shinohara, and Makoto Yokozawa. 2015. 'Study on factors for evaluating the economic impact of data localization requirement policies on the IT industry.' 26th European Regional Conference of the International Telecommunications Society. Madrid, Spain. June 24-27. <https://www.econstor.eu/bitstream/10419/127154/1/Kawauchi-Shinohara-Yokozawa.pdf>
- Kettemann**, Matthias C. 2012. 'The UN Human Rights Council Resolution on Human Security Perspectives.' *SSRN*. Jan. [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2199431](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2199431)
- Kilic, Burcu, and Tamir Israel. 'The Highlights of the Trans-Pacific Partnership E-commerce Chapter.' *Public Citizen*, November 5. <https://www.citizen.org/documents/tpp-ecommerce-chapter-analysis.pdf>
- Kirby**, John for US Department of State. 2016. 'United States Calls for Freedom of Press and Internet in Malaysia.' March 2. <http://www.state.gov/r/pa/prs/ps/2016/03/253883.htm>
- Kurbalija, Jovan. 2014. 'Virtual Sovereignty: Governments, Stakeholders and Internet Governance.' *World Politics Review*, March 11. <http://www.worldpoliticsreview.com/articles/13619/virtual-sovereignty-governments-stakeholders-and-internet-governance>

Makinen, Julie. 2015. 'Chinese Censorship Costing U.S. Tech Firms Billions in Revenue.' *LA Times*, September 22. <http://www.latimes.com/business/la-fi-china-tech-20150922-story.html>

Malcom, Jeremy. 2015. 'How Trade Agreements Harm Open Access and Open Source.' EFF. October 21. <https://www.eff.org/deeplinks/2015/10/how-trade-agreements-harm-open-access-and-open-source>

**Mandel**, Michael. 2013. 'Data, Trade and Growth.' *Progressive Policy Institute*, Mar.

**Manyika, J., J. Bughin, S. Lund, O. Nottebohm, D. Poulter, S. Jauch, and S. Ramaswamy.** 2014. "Global Flows in a Digital Age: How Trade, Finance People, and Data Connect the World Economy." McKinsey Global Institute, April. [http://www.mckinsey.com/insights/globalization/global\\_flows\\_in\\_a\\_digital\\_age](http://www.mckinsey.com/insights/globalization/global_flows_in_a_digital_age)

**McKinsey** Global Institute. 2016. 'Digital Globalization: The New Era of Global Flows.' Mar. <http://www.mckinsey.com/business-functions/mckinsey-digital/our-insights/digital-globalization-the-new-era-of-global-flows>

McKinsey Global Institute. 2011. "Internet Matters: The Net's Sweeping Impact on Growth, Jobs, and Prosperity." May. [http://www.mckinsey.com/insights/high\\_tech\\_telecoms\\_internet/internet\\_matters](http://www.mckinsey.com/insights/high_tech_telecoms_internet/internet_matters)

McKinsey Global Institute, 2014, "China's Digital Transformation: The Internet's Impact on Productivity and Growth, July.

**Mendel**, Toby. 2011. 'Freedom of Information as an Internationally Protected Human Right.' *Article 19*. <http://www.article19.org/data/files/pdfs/publications/foi-as-an-international-right.pdf>.



- New Zealand Foreign Affairs and Trade. 2016. 'TPP: National Interest Analysis.' January 25.  
<http://www.tpp.mfat.govt.nz/assets/docs/TPP%20National%20Interest%20Analysis.pdf>
- New, William. 2014. 'Leaked TPP Draft Reveals Extreme Rights Holder Position of US, Japan, Outraged Observers Say.' *IP Watch*, October 17. <http://www.ip-watch.org/2014/10/17/leaked-tpp-draft-reveals-extreme-rights-holder-position-of-us-japan-outraged-observers-say/>.
- OECD. 2011. 'The economic impact of shutting down Internet and mobile phone services in Egypt.' February 4.  
<http://www.oecd.org/countries/egypt/theeconomicimpactofshuttingdownInternetandmobilephoneservicesinegypt.htm>
- Perez, Sarah. 2016. 'Facebook blocked in Vietnam over the weekend due to citizen protests.' *Techcrunch*, May 17. <http://techcrunch.com/2016/05/17/facebook-blocked-in-vietnam-over-the-weekend-due-to-citizen-protests/>
- Powers, Shawn. 2014. 'Beyond Information Sovereignty.' In 'Beyond Netmundial: The Roadmap for Institutional Improvements to the Global Internet Governance Ecosystem.' Pennsylvania: University of Pennsylvania Internet Policy Observatory.
- Reid Smith, Sanya. 2015. 'Potential human rights impacts of the TPP.' *Third World Network*.  
<http://www.twn.my/title2/FTAs/General/TPPHumanRights.pdf>
- Rhinehart, Ian. 2015. 'Malaysia: Background and US Relations.' CRS Report R-43505. November 19. <https://www.fas.org/sgp/crs/row/R43505.pdf>
- Rothkopf, David. 2015. 'VOICE: Is Unrestricted Internet Access a Modern Human Right?' *Foreign Policy*. February 2. <http://foreignpolicy.com/2015/02/02/unrestricted-Internet-access-human-rights-technology-constitution/>
- Samuel, Rebekah. 2011. 'Controlling copyright: stifling creativity, Innovation and Growth.' December 20. <http://rebekahsamuel.com/blog/controlling-copyright-stifling-creativity-innovation-and-growth/>

- Thielman, Sam. 2015. 'Wikileaks Release Of TPP Deal Text Stokes 'Freedom Of Expression' Fears.' *The Guardian*, October 9.  
<http://www.theguardian.com/business/2015/oct/09/wikileaks-releases-tpp-intellectual-property-rights-chapter>
- UN Human Rights Council. 2014. 'The promotion, protection, and enjoyment of human rights on the Internet.' A/HRC/RES 2/13. July 14. <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/082/83/PDF/G1408283.pdf?OpenElement>
- UNCTAD. 2016. 'In Search of Cross-Border E-Commerce Trade Data: Technical Notes on ICT for Development 6.' Apr.  
[http://unctad.org/en/PublicationsLibrary/tn\\_unctad\\_ict4d06\\_en.pdf](http://unctad.org/en/PublicationsLibrary/tn_unctad_ict4d06_en.pdf)
- UNDP. 2003. 'Access to Information: Practice Note.' Oct.  
[http://www.undp.org/content/dam/aplaws/publication/en/publications/democratic-governance/dg-publications-for-website/access-to-information-practice-note/A2I\\_PN\\_English.pdf](http://www.undp.org/content/dam/aplaws/publication/en/publications/democratic-governance/dg-publications-for-website/access-to-information-practice-note/A2I_PN_English.pdf)
- US Department of Commerce, Economics and Statistics Administration. 2014. 'Digital Economy and Cross-Border Trade: The Value of Digitally-Deliverable Services.' January 27.  
<http://www.esa.doc.gov/reports/digital-economy-and-cross-border-trade-value-digitally-deliverable->
- US ITC. 2013. 'Digital Trade in the US and Global Economies, Part 1.' Investigation No. 332-531 July. <https://www.usitc.gov/publications/332/pub4415.pdf>
- US ITC. 2014. 'Digital Trade in the US and Global Economies, Part 2.' Investigation No. 332-540, Publication 4485, September.
- USTR 2016b. 2016. 'National Trade Estimate Report on Trade Barriers.' <https://ustr.gov/about-us/policy-offices/press-office/reports-and-publications/2016/2016-national-trade-estimate>
- USTR. 'TPP, Chapter 10 'Cross-Border Trade In Services.'  
<https://ustr.gov/sites/default/files/TPP-Final-Text-Cross-Border-Trade-in-Services.pdf>

USTR. 2007. 'US/Korea FTA E-Commerce Chapter.'

[https://ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset\\_upload\\_file816\\_12714.pdf](https://ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset_upload_file816_12714.pdf)

**Vershelde**, Bert. 2014 'The Impact of Data Localization on Vietnam's Economy,' November, <http://ecipe.org/publications/impact-data-localisation-vietnams-economy/>

**White** House, President Barack Obama. 2015. 'Fact-Sheet: How the Trans-Pacific Partnership (TPP) Boosts Made in America Exports, Supports Higher-Paying American Jobs, and Protects American Workers.' October 5. <https://www.whitehouse.gov/the-press-office/2015/10/05/fact-sheet-how-trans-pacific-partnership-tpp-boosts-made-america-exports>

**World** Bank. 2016. 'World Development Report 2016: Digital Dividends.'

WTO. 'Agreement on Technical Barriers to Trade.'

[https://www.wto.org/english/res\\_e/booksp\\_e/analytic\\_index\\_e/tbt\\_01\\_e.htm](https://www.wto.org/english/res_e/booksp_e/analytic_index_e/tbt_01_e.htm).

WTO. 2015. 'WTO Annual Report 2015.'

[https://www.wto.org/english/res\\_e/booksp\\_e/anrep\\_e/anrep15\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/anrep_e/anrep15_e.pdf)