

## What does TPP mean for the Open Internet?

### From Policy Brief on Trade Agreements and Internet Governance Prepared for the Global Commission on Internet Governance

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**Summary:** TPP is the first trade agreement to include binding commitments that facilitate cross-border information flows and limit digital protectionism. Proponents and opponents have divergent views about its effects on the Internet. On one hand, the Obama Administration asserts that “TPP will help preserve the open Internet and prevent its breakup into multiple, balkanized networks in which data flows are more expensive and more frequently blocked.”<sup>2</sup> On the other hand, critics have said that the agreement undermines Internet freedom and access to information.

Herein, I use the e-commerce, services, and transparency chapters of TPP to argue that proponents and opponents alike are exaggerating the costs and benefits to the Internet.<sup>3</sup> TPP could play an important role in encouraging cross-border information flows and providing tools to challenge censorship and filtering. Moreover, the agreement 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 Vietnam and Malaysia. But TPP critics make some important points that should not be ignored including its effects on freedom of expression and on cyber-security.

TPP will have positive effects on the Internet if: a. the agreement goes into effect and other countries such as South Korea, Indonesia, and Thailand, sign on; b. if policymakers use its provisions to enhance human welfare—for example, to maintain Internet openness and challenge Internet censorship and filtering as barriers to trade, and c. if other nations build on TPP’s language in their free trade agreements and/or at the WTO.

#### **TPP: A Brief History**

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 create a twenty first century trade agreement—one that would tackle new sectors such as

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<sup>2</sup> Summary, Chapter 14 Electronic Commerce, <https://medium.com/the-trans-pacific-partnership/electronic-commerce-87766c98a068>

<sup>3</sup> I do not focus on the financial services chapters which also have important implications for the Internet.

digital trade and introduce new strategies for thwarting protectionism such as transparency and regulatory coherence.

Because of the importance of information technologies to the U.S. economy, the U.S. made the digital trade a top priority for the agreement. Specifically, the U.S. wanted to establish clear rules governing when nations could limit information flows<sup>4</sup> and rules limiting digital protectionism, which can include restrictions on data flows such as censorship or filtering, data localization requirements, and server location requirements among others<sup>5</sup>. However, the 12 negotiating parties disagreed on key issues of privacy and online copyright issues. Although Canada and Australia, for example, were not opposed to including such language, they had never included binding language on digital trade in their FTAs.<sup>6</sup> Surprisingly, although Edward Snowden's revelations colored the negotiations, surveillance issues did not bedevil the talks. Canada, Australia, the U.S. and New Zealand already collaborate closely on intelligence and monitoring of the Internet as members of a signals intelligence alliance called "the Five Eyes." But the public in many of the participating countries became both increasingly vocal and negative about the agreement, citing its potential effects on privacy and on access to information (New 2014).<sup>7</sup>

The negotiators initially had to work out language that would facilitate consumer privacy.<sup>8</sup> Some countries, such as Malaysia and Vietnam, had not developed national regulations on privacy. The U.S.

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<sup>4</sup> *Inside U.S. Trade*. 2012. "USTR Official: U.S. Still Faces Big Challenges on TPP Data Flow Proposal." *Inside U.S. Trade*, September 27. [insidetrade.com/Inside-US-Trade/Inside-US-Trade-09/28/2012/ustr-official-us-still-faces-big-challenges-on-tpp-data-flow-proposal/menu-id-710.html](http://insidetrade.com/Inside-US-Trade/Inside-US-Trade-09/28/2012/ustr-official-us-still-faces-big-challenges-on-tpp-data-flow-proposal/menu-id-710.html).

<sup>5</sup> *Inside U.S. Trade*. 2012. "TPP Countries to Discuss Australian Alternative to Data-Flow Proposal." *Inside U.S. Trade*, July 5. <http://insidetrade.com/Inside-US-Trade/Inside-US-Trade-07/06/2012/tpp-countries-to-discuss-australian-alternative-to-data-flow-proposal/menu-id-710.html>.

<sup>6</sup> See DFAIT (2012; 2013a). In Canada-Columbia, however, Canada notes the importance of "(a) clarity, transparency and predictability in their domestic regulatory frameworks in facilitating...electronic commerce; (b) encouraging self-regulation by the private sector to promote trust and confidence in electronic commerce, ensuring that...electronic commerce policy takes into account the interest of all stakeholders; and (f) protecting personal information in the on-line environment." Canada's recent FTAs also state that "each Party shall endeavour to guard against measures that unduly hinder trade conducted by electronic means." Finally, the parties agree to cooperate to maintain cross-border flows of information (DFAIT 2013b).

<sup>7</sup> See [www.smh.com.au/federal-politics/political-news/public-concern-over-the-transpacific-partnership-trade-deal-mounts-20150416-1m](http://www.smh.com.au/federal-politics/political-news/public-concern-over-the-transpacific-partnership-trade-deal-mounts-20150416-1m);  
<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCIQFjAAahUKEwjdp8TWt4bGAhVIKawKHQ2uALU&url=http%3A%2F%2Fwww.itsourfuture.org.nz%2Fwhat-is-the-tpa%2F&ei=Ct14Vd36HMjSsAWN3IKoCw&usq=AFQjCNGEot189FbHbfmCpz6JHcIkFttXJw&sig2=9Fib00c5d0ue-hfz3CCMmQ&bvm=bv.95277229,d.b2w>; and <http://citizen.typepad.com/eyesontrade/2013/09/peruvian-chilean-lawmakers-urge-public-debate-on-tpp.html>.

<sup>8</sup> Remarks of Rob Atkinson, 'Cloud Computing for Business and Society', Brookings Institution, Washington, DC, Jan 20, 2010, [http://www.brookings.edu/~media/events/2010/1/20%20cloud%20computing/20100120\\_cloud\\_computing.pdf](http://www.brookings.edu/~media/events/2010/1/20%20cloud%20computing/20100120_cloud_computing.pdf). Also see Paul Taylor, 'Privacy Concerns Slow cloud Adoption', *Financial Times*, 8/2/2011, <http://www.ft.com/intl/cms/s/0/c970e6ee-bc7e-11e0-adac-00144feabdc0.html>; and Jennifer Baker, 'EU upset by

saw this gap as an opportunity to encourage these nations to adopt adequate privacy protections that could reassure investors, while at the same time encouraging these governments to adopt America's voluntary approach to privacy.<sup>9</sup> However, countries such as Australia and Canada with strong privacy laws wanted a different approach. In September 2012, Australia tabled alternative language that simply allowed TPP countries to put in place restrictions on the free flow of data, as long as these countries could justify that they were not disguised barriers to trade.<sup>10</sup> The U.S. responded to Australian demands by proposing a more ad hoc strategy, which adhered to the Asia-Pacific Economic Cooperation Privacy Framework: firms could develop their own strategies to guard sensitive data, but each government would make the firms' commitment enforceable through domestic institutions, such as the Federal Trade Commission in the U.S.<sup>11</sup>

U.S. policy makers gradually recognized that they must be more sensitive to privacy concerns. The U.S. agreed to accommodate Australian law, which requires that health care data be stored locally in Australian servers to protect the privacy of Australian citizens. Soon other negotiating states demanded their own exceptions from the data flow obligation.<sup>12</sup> Nonetheless, the U.S. and allies found common ground both on language to encourage the free flow of information and language to limit digital protectionism.

### **What does TPP say related to the Open Internet?**

In order to understand TPP's scope and potential, readers need to understand the role of services such as e-commerce in TPP. Hence, we begin not with the e-commerce chapter, but with the services chapter (Chapter 10), which defines services and service suppliers and delineates how cross-border services can be regulated. Service suppliers are defined as individuals or firms that supply services across borders. Service suppliers do not need to interact financially with their consumers. Thus, service providers include firms that provide e-commerce services to users for free (such as Dropbox, Facebook, or Google or free apps). Cross-border services (such as e-commerce) are defined as services delivered from one party into the territory of another party; services produced in the territory of one party and delivered to a person

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Microsoft warning on U.S. access to EU cloud', *Computerworld*,  
[http://www.computerworld.com/s/article/9218167/EU\\_upset\\_by\\_Microsoft\\_warning\\_on\\_US\\_access\\_to\\_EU\\_cloud/](http://www.computerworld.com/s/article/9218167/EU_upset_by_Microsoft_warning_on_US_access_to_EU_cloud/)

<sup>9</sup> 'USTR official: U.S. Still Faces Big challenges on TPP Data Flow Proposal', *Inside U.S. Trade*, 9/24/2012, <http://insidetrade.com/201209242411012/WTO-Daily-News/Daily-News/ustr-official-us-still-faces-big-challenges-on-tpp-data-flow-proposal/menu-id-948.html>

<sup>10</sup> *Inside U.S. Trade*. 2012. "US, Australia make Little Headway Toward Resolving differences on Data Flows." *Inside U.S. Trade*, September 12. <http://insidetrade.com/201209122409796/WTO-Daily-News/Daily-News/us-australia-make-little-headway-toward-resolving-differences-on-data-flows/menu-id-948.html>

<sup>11</sup> *Inside U.S. Trade*. "US, Australia Make Little Headway."

<sup>12</sup> *Inside U.S. Trade*. 2015. "US Yields to Australian Data Flow Exemption in TPP, Mulls Demands by Others." *Inside U.S. Trade*, February 24; and *Inside U.S. Trade*. 2015. "TPP Ministerial Meeting In Guam Looking More Unlikely After TPA Delay." *Inside U.S. Trade*, May 21.

living in another party, or services from a national of one party into the territory of another party.<sup>13</sup> Hence, the rules governing services cover both Internet service providers and Internet users.

However, the language in the e-commerce chapter raises a key question: do the rules cover all cross-border information flows by all Internet actors? Does the chapter apply to suppliers and consumers of digital transmissions? USTR says yes, based on the service chapter, but the language in the chapter raises questions. E-commerce is covered in Chapter 14; the key article related to information flows is Article 14.11. It notes 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.” But some information flows are not for the conduct of the business of a covered person; they don’t involve the exchange of money. A covered person is defined in Article 14.1 and it means an investment, investor or service supplier. The agreement only mentions users in article 14.8 where it recognizes the benefits of protecting users’ personal information.<sup>14</sup> The US is not alone in describing the benefits of the chapter as accruing only to business. “For the first time in a trade agreement, TPP countries will guarantee the free flow of data across borders for service suppliers and investors as part of their business activity. This ‘movement of information’ or ‘data flow’ is relevant to all kinds of businesses ...TPP countries have retained the ability to maintain and amend regulations related to data flows, but have undertaken to do so in a way that does not create barriers to trade.”<sup>15</sup> The language in TPP differs from that of Korea, which although not binding, did not limit the chapter to “covered persons.” In fact in a side letter to the Korean trade minister, USTR notes that the agreement applies to Internet users.<sup>16</sup> Why was this side letter and language necessary for Korea but not for TPP? USTR should simply clarify that by covering “covered persons” users will also accrue TPP’s benefits.

TPP includes very specific language related to privacy of consumers. In earlier FTA’s such as U.S./Korea, the Parties simply stated that they “recognize the importance of maintain and adopting transparent and effective measures to protect consumers.” The Parties agreed to cooperate in the enforcement of laws and enhancement of consumer welfare. However, the TPP parties agreed to new and enhanced privacy rules. Article 14.7 requires the parties to “adopt or maintain consumer protection laws.” Moreover, the TPP nations made it clear that privacy is 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>17</sup> They will publish information on personal privacy protection and “endeavor to adopt non-discriminatory practices.” Finally, the countries agreed to develop mechanisms to promote compatibility among different privacy regimes.” With this language, the parties were able to find common ground on the free flow language that could satisfy nations with strong

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<sup>13</sup> <https://ustr.gov/sites/default/files/TPP-Final-Text-Cross-Border-Trade-in-Services.pdf> . I am grateful to Professor Anupam Chander (UC Davis Law School) for clarification of free services.

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

<sup>15</sup> Department of Foreign Affairs and Trade, Australia, “Chapter Summary: Electronic Commerce,” <http://dfat.gov.au/trade/agreements/tpp/summaries/Documents/electronic-commerce.PDF>

<sup>16</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)

<sup>17</sup> Chapter 14, Electronic Commerce, <https://ustr.gov/sites/default/files/TPP-Final-Text-Electronic-Commerce.pdf>

domestic (or principal regulations) on privacy such as Australia and nations with more voluntary approaches such as the U.S.

The agreement clearly limits data protectionism. As Australia noted, “TPP countries cannot force businesses to build data storage centers or use local computing facilities in TPP markets. TPP countries have committed not to impose these kinds of ‘localization’ requirements on computing facilities – providing certainty to businesses as they look to optimize investment decisions.”

In addition to language encouraging digital trade, reducing digital protectionism, and protecting privacy, TPP has language supportive of the Open Internet. First, Article 14.4, Non-Discriminatory Treatment of Digital Products, includes binding language which prohibits a party from providing less favorable treatment to digital products, and the creators and owners of those digital products, of other Parties than it accords to “other like digital products.” Hence, parties can’t favor domestic products, creators and owners or discriminate between products or producers from home or abroad. However, governments are still allowed to provide subsidies or grants to their own producers or creators. Secondly, Article 14.10 builds on longstanding principles for Internet governance designed to empower consumers. “The Parties recognize the benefits of consumers being able to make their own choices; connect their own devices to the network and access information on the network management practices of a consumers’ access service supplier. However, this language is not binding.

The TPP recognizes that there are times when nations must limit information flows; these times are protected by rules called “exceptions.” USTR notes that “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. “The TPP incorporates the general exceptions delineated in the GATS. Chapter 29 contains the General Exceptions and General Provisions.<sup>18</sup> If a government censors or filters, it may cause rerouting of information flows and such actions often distort trade between entities within and among nations. Hence, one TPP party could use the agreement to challenge censorship or filtering in nations that might do so in a discriminatory manner.<sup>19</sup> The US and the EU considered such a challenge to China’s censorship of Google, but in the end decided not to pursue such a case. The two nations that have records of censorship and filtering, Malaysia and Vietnam, were given two years to revise their policies but after that could be subject to such challenges.

The binding language in the e-commerce chapter is disputable under the rules in Chapter 28 of TPP. The law firm Covington and Burling also notes “a government measure that violates a commitment in the e-commerce chapter might also violate an investment commitment in Chapter 9, and to that extent could be subject to investor-state dispute settlement.” (Hansen and Slater: 2015)

### **What does TPP mean for future Trade Agreements and Internet Governance?**

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<sup>18</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>19</sup> The U.S. does not explicitly argue that it plans to use the exceptions to challenge censorship or filtering. I looked to see if other governments made such a case, but so far other governments seem to have only posted the text as of November 12, 2015. For New Zealand, <http://www.mfat.govt.nz/Trade-and-Economic-Relations/2-Trade-Relationships-and-Agreements/Trans-Pacific/index.php>; for Chile, <http://www.direcon.gob.cl/en/tpp/>; for Mexico; [http://www.acuerdoscomerciales.gob.pe/index.php?option=com\\_content&view=category&layout=blog&id=191&Itemid=210](http://www.acuerdoscomerciales.gob.pe/index.php?option=com_content&view=category&layout=blog&id=191&Itemid=210); for Brunei, <http://www.mofat.gov.bn/pages/tpp.aspx>

TPP will have an impact on Internet governance simply because it covers so many Internet providers and users and because its commitments will affect how governments can behave when regulating cross-border information flows. TPP parties have a population of some 800 million people, or 11.4% of the Earth's total and almost 25% of all Internet users as of June 2015 (some 3.27 billion).<sup>20</sup> Many of these individuals are already active on the Internet. Moreover, 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 TPP should it come into effect. (Bryson and Nelson: 2015). Moreover, if TPP is approved, it could have significant spillover effects on how other governments deal with cross-border information flows. They will have to comply with TPP rules when they exchange information with TPP parties. At minimum, the U.S. will want to use TPP as a guidepost for other trade agreements including TTIP and TISA under negotiation. Meanwhile, other governments too will need to consider this language and what it means for their firms' cross-border flows. However, the U.S. may be overselling the benefits of the agreement to the Internet just as critics are exaggerating the agreement's costs to the Internet and Internet governance.

### **The Response to TPP: What are the key Concerns Related to TPP?**

Many netizens did not greet TPP with a parade along their Twitter feeds (or any other virtual Main Street). Instead, they signaled disaster. For example, Boing Boing reported that activists have concluded that TPP "spells doom for free speech online."<sup>21</sup> The Guardian headlined that "WikiLeaks release of TPP deal tests stokes' freedom of expression fears among activists."<sup>22</sup> The Electronic Frontier Foundation blogged, "The Final Text is all we feared.... In a pitifully ineffectual nod towards users, it suggests that parties "endeavor to achieve an appropriate balance in its copyright and related rights system," but imposes no hard obligations for them to do so, nor even offers U.S.-style fair use as a template that they might follow."<sup>23</sup> Meanwhile, Evan Greer, campaign director of the internet activist group "Fight for the Future", argued that TPP threatens basic access to information. "The agreement poses a grave threat to our basic right to access information and express ourselves on the Web and could easily be abused to criminalize common online activities and enforce widespread Internet censorship."<sup>24</sup> Expose the TPP came to the most radical conclusion, noting the agreement "would undermine Internet Freedom."<sup>25</sup>

These analysts based their concerns on the intellectual property provisions. The U.S. and Japan (and, to a lesser extent, Australia) want to protect and enhance online copyright, believing that strong copyright protections further innovation, which is a key factor in the competitiveness of these nations (IP Commission 2013). But as activist Evan Greer notes, this extensive regime of copyright enforcement "has been repeatedly 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 U.S. approach, which they believe does not provide due process to individuals who allegedly breach online copyright. 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 U.S. system (which they argue

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<sup>20</sup> <http://www.internetworldstats.com/stats.htm>

<sup>21</sup> <https://boingboing.net/2015/10/09/leaked-final-tpp-intelectu.html>

<sup>22</sup> <http://www.theguardian.com/business/2015/oct/09/wikileaks-releases-tpp-intellectual-property-rights-chapter>

<sup>23</sup> <https://www.eff.org/deeplinks/2015/10/final-leaked-tpp-text-all-we-feared>

<sup>24</sup> <http://www.theguardian.com/business/2015/oct/09/wikileaks-releases-tpp-intellectual-property-rights-chapter>

<sup>25</sup> [http://www.exposethetpp.org/TPPImpacts\\_InternetFreedom.html](http://www.exposethetpp.org/TPPImpacts_InternetFreedom.html)

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 even without a formal complaint from the copyright holder (EFF 2015; New 2014).

Some critics of TPP make economic and human welfare arguments against TPP and online copyright. They stress that the current approach to protecting online copyright is too biased towards the needs of copyright owners and it could reduce innovation by stifling opportunities to explore and develop new models that exploit the Internet and digital services (Samuel: 2011). The TPP critics have concluded that the current approach to protecting online copyright may be counterproductive: it neither enhances human welfare nor encourages innovation.

Proponents, in turn, argued that critics misunderstand the objectives and side effects of the online copyright language in TPP. They maintain that this approach is balanced because it allows the dissemination of content and protects individuals who want to assess that content online with exceptions and limitations for "fair use" — criticism, commentary, news reporting, teaching, scholarship and research. Hence, non-commercial sharing would not be criminalized (Holleyman: 2015). Given the importance of this debate, policymakers should carefully consider the current strategy and ask if it is the most appropriate approach for nations with inadequate governance, funds and will to protect IPR. They should also examine if it truly enhances human welfare and encourages innovation in the digital age.

Opponents have also expressed concerns about the e-commerce chapter and cybersecurity. The chapter says that governments can't force suppliers to give up their source code to foreign governments even for national security reasons. The TPP prohibits signer countries from asking software companies for access to their source code. According to cyber-security expert Stewart Baker, "Right now, this is a measure U.S. software companies want," because they provide the bulk of mass-market software in the market. But that's likely to change, especially given the ease of entry into smart phone app markets. We're going to want protection against the introduction of malware into such software. The question of source code inspection is a tough one. If other countries can inspect U.S. source code, they'll find it easier to spot security flaws, so the U.S. government would like to keep other countries from doing that. But I doubt U.S. security agencies are comfortable letting Vietnam write apps that end up on the phones of their employees without the ability to inspect the source."<sup>26</sup> I agree with Baker that these provisions could undermine cybersecurity efforts. Moreover it is interesting that the agreement bans spyware, but says nothing about banning malware. Yet malware is an important trade issue, because malware can be redefined as malicious cross border information flows. Malware not only damages business, but has significantly negative effects on human rights. When business or home computers are infected, users may be unable to use their computers in the manner that they are accustomed to. They may experience slower computer performance, systems problems, and cyber-insecurity. U.S. trade agreements have included voluntary language on cyber-security writ large; it seems strange to address cyber-theft and not try to address malware.

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<sup>26</sup> Stewart Baker, "Cybersecurity and the TPP," *The Volokh Conspiracy*, <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/11/06/cybersecurity-and-the-tpp/>

TPP critics have also implied that the disappointing language of TPP stems from an undemocratic process that favored business at the expense of netizens. 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 U.S. Trade Representative and officials and industry advisers related to 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 often receptive to business interests and that at times firms even draft language for the USTR. However, the released emails do not include emails to non-business representatives, such as members of Congress or academics and civil society groups concerned about IPR. Hence we cannot say that the U.S. did not consult with or consider opinions of individuals critical of the U.S. approach to protecting online IPR (New 2015).

Although the critics are probably right that the process was not sufficiently transparent, they are exaggerating the effects upon Internet operability and freedom. Firms such as Google, eBay, Walmart, and Citigroup also have a stake in maintaining an open and stable Internet. While these firms don’t speak for netizens, netizens are their clients and these firms share their need for 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 TPP did not engender trust, the U.S. and its negotiating partners have not figured out how to update trade negotiations (which require trust among negotiating partners) and the transparency necessary for good governance in the Internet age (which requires greater openness and dialogue with the public). I am not excusing them, but rather explaining why it is so hard for trade negotiators to catch up to good governance expectations.

Moreover, the critics have not carefully reviewed the transparency chapter. While it is ironic that an agreement negotiated in secret could promote transparent accountable governance, the transparency chapter is likely to have such an effect on how the twelve countries regulate the Internet. Here’s why. 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 take the comments into account. 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. To put it differently, the TPP can advance access to information, due process, and political participation for Internet and other types or regulation. Moreover, previous studies have shown that such improvements in governance related to trade issues can spill into the polity as a whole (Aaronson and Abouharb: 2011).

### **Conclusion:**

Trade agreements like TPP are not only complicated and legalistic; they are easy to demagogue and hard to understand. To fully understand the potential impact of the agreement, we need to examine the document’s many chapters that can affect the Internet coherently and understand both the motivations of



governments and the limitations of international agreements. Moreover, we must evaluate how the trade agreement as a whole affects the Internet as a whole and specifically Internet norms of open access and free flow of information, interoperability, and multi-stakeholderism. In that regard, both sides have exaggerated the benefits and costs of TPP.

As noted above, TPP could prove helpful to an open Internet but TPP can only have those effects only if:

- a. the agreement goes into effect and other countries such as South Korea and Indonesia sign on;
- b. if policymakers use its provisions to enhance human welfare—to use trade disputes to challenge censorship and filtering; and
- c. if other nations copy and build on TPP's language in their free trade agreements or at the WTO.

These are all big ifs and not certitudes. Advocates of TPP as well as critics need to take a deep breath before they laud or condemn the TPP's effects upon the Internet.

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