

Promoting Cross-Border Data Flows

Priorities for the Business Community

The movement of electronic information across borders is critical to businesses around the world, but the international rules governing flows of digital goods, services, data and infrastructure are incomplete. The global trading system does not spell out a consistent, transparent framework for the treatment of cross-border flows of digital goods, services or information, leaving businesses and individuals to deal with a patchwork of national, bilateral and global arrangements covering significant issues such as the storage, transfer, disclosure, retention and protection of personal, commercial and financial data. Dealing with these issues is becoming even more important as a new generation of networked technologies enables greater cross-border collaboration over the Internet, which has the potential to stimulate economic development and job growth.

Despite the widespread benefits of cross-border data flows to innovation and economic growth, and due in large part to gaps in global rules and inadequate enforcement of existing commitments, digital protectionism is a growing threat around the world. A number of countries have already enacted or are pursuing restrictive policies governing the provision of digital commercial and financial services, technology products, or the treatment of information to favor domestic interests over international competition. Even where policies are designed to support legitimate public interests such as national security or law enforcement, businesses can suffer when those rules are unclear, arbitrary, unevenly applied or more trade-restrictive than necessary to achieve the underlying objective. What's more, multiple governments may assert jurisdiction over the same information, which may leave businesses subject to inconsistent or conflicting rules.

In response, the United States should drive the development and adoption of transparent and high-quality international rules, norms and best practices on cross-border flows of digital data and technologies while also holding countries to existing international obligations. Such efforts must recognize and accommodate legitimate differences in regulatory approaches to issues such as privacy and security between countries as well as across sectors. They should also be grounded in key concepts such as non-discrimination and national treatment that have underpinned the trading system for decades.

The U.S. Government should seek international commitments on several key objectives, including: prohibiting measures that restrict legitimate cross-border data flows or link commercial benefit to local investment; addressing emerging legal and policy issues involving the digital economy; promoting industry-driven international standards, dialogues and best practices; and expanding trade in digital goods, services and infrastructure. U.S. efforts should ensure that trade agreements cover digital technologies that may be developed in the future. At the same time, the United States should work with governments around the world to pursue other policies that support cross-border data flows, including those endorsed in the Communiqué on Principles for Internet Policymaking related to intellectual property protection and limiting intermediary liability developed by the Organization for Economic Cooperation and Development (OECD) in June 2011.

U.S. negotiators should pursue these issues in a variety of forums around the world, including the World Trade Organization (WTO), Asia Pacific Economic Cooperation (APEC) forum, OECD, and regional trade negotiations such as the Trans-Pacific Partnership as appropriate in each forum. In addition, the U.S. Government should solicit ideas and begin to develop a plurilateral framework to set a new global gold-standard to improve innovation. Finally, the U.S. Government should identify and seek to resolve through WTO or bilateral consultations or other processes violations of current international rules concerning digital goods, services and information.

The importance of cross-border commercial and financial flows

Access to computers, servers, routers and mobile devices, services such as cloud computing – whereby remote data centers host information and run applications over the Internet, and information is vital to the success of billions of individuals, businesses and entire economies. In the United States alone, the goods, services and content flowing through the Internet have been responsible for 15 percent of GDP growth over the past five years.

Open, fair and contestable international markets for information and communication technologies (ICT) and information are important to electronic retailers, search engines, social networks, web hosting providers, registrars and the range of technology infrastructure and service providers who rely directly on the Internet to create economic value. But they are also critical to the much larger universe of manufacturers, retailers, wholesalers, financial services and logistics firms, universities, labs, hospitals and other organizations which rely on hardware, software and reliable access to the Internet to improve their productivity, extend their reach across the globe, and manage international networks of customers, suppliers, and researchers. For example, financial institutions rely heavily on gathering, processing, and analyzing customer information and will often process data in regional centers, which requires reliable and secure access both to networked technologies and cross-border data flows. According to McKinsey, more than three-quarters of the value created by the Internet accrues to traditional industries that would exist without the Internet. The overall impact of the Internet and information technologies on productivity may surpass the effect of any other technology enabler in history, including electricity and the combustion engine, according to the OECD.

Networked technologies and data flows are particularly important to small businesses, nonprofits and entrepreneurs. Thanks to the Internet and advances in technology, small companies, NGOs and individuals can customize and rapidly scale their IT systems at a lower cost and collaborate globally by accessing on-line services and platforms. Improved access to networked technologies also creates new opportunities for entrepreneurs and innovators to design applications and to extend their reach internationally to the more than two billion people who are now connected to the Internet. In fact, advances in networked technologies have led to the emergence of entirely new business platforms. Kiva, a microlending service established in 2005, has used the Internet to assemble a network of nearly 600,000 individuals who have lent over \$200 million to entrepreneurs in markets where access to traditional banking systems is limited. Millions of others use online advertising and platforms such as eBay, Facebook, Google Docs, Hotmail, Skype and Twitter to reach customers, suppliers and partners around the world.

More broadly, economies that are open to international trade in ICT and information grow faster and are more productive than countries which close their borders to them. When Egypt shut down the Internet for five days earlier this year, the OECD estimated that the country incurred a direct cost of about \$90 million. But that figure does not take into account the cascading costs associated with the negative effects on the real economy, including the untold number of companies and individuals around the world who lost business opportunities or were less productive because of the shutdown and the potential long term negative impact on Egypt's outsourcing industry – all of which Forbes estimated to amount to an additional \$110 million. Studies show that networked technologies –hardware and software linked together via the Internet – contribute significantly more to economic growth than technology products that are not connected. Limiting network access dramatically undermines the economic benefits of technology and can slow growth across entire economies.

Our objective: Modernize international rules and practices governing cross-border flows of data and information technologies

Economies and businesses would benefit from a network of consistent, transparent and reinforcing rules governing the treatment of digital goods, services and data flows that are able to accommodate new advances in technologies. The United States should take the lead in modernizing these rules while also holding countries to existing international obligations. Such efforts must recognize and accommodate legitimate differences in regulatory approaches to sensitive issues such as privacy, confidentiality and security between countries as well as across sectors. They should also be grounded in key concepts such as non-discrimination and national treatment that have underpinned the trading system for decades. New commitments and stepped up enforcement of current trade rules will stem the rising tide of digital protectionism, ensure greater access to economic opportunity globally and improve the ability of businesses and consumers to retrieve information reliably and securely.

The U.S. Government should seek international commitments on the following key objectives:

1. **Expressly prohibit restrictions on legitimate cross-border information flows.** Countries around the world are increasingly employing a host of measures to exclude or discriminate against foreign information, information services or technology. Governments around the world have blocked access to information services, variously including Facebook, Twitter, WordPress and YouTube. Countries should commit to permit the transfer of data and should not inhibit access by companies or individuals to lawfully available information that is stored outside of the country. In the financial services sector, such transfers will enable institutions to conduct adequate due diligence, manage risks appropriately, and ensure regulator access to critical information, as appropriate. More broadly, reliable access to data is critical to the success of entrepreneurs, workers and companies in the United States and around the world.
2. **Prohibit local infrastructure or investment mandates.** A variety of countries have introduced or enacted measures that would compel financial services providers to process data on-shore or require online service providers or other companies to locate physical infrastructure such as servers within their borders. Others, in pursuit of indigenous innovation policies, have proposed conditioning market access on the basis of where the intellectual property has been developed or registered. These measures are both discriminatory and contrary to the notion of cross-border trade. Governments should commit to prohibit measures that would require service providers to locate infrastructure within a country's borders or operate locally. In addition, countries should not discriminate against goods or services providers based on the location of financial or commercial information or the place where intellectual property is created or registered. Global companies should be afforded fair and transparent access to local infrastructure and national spectrum.
3. **Promote international standards, dialogues and best practices.** Government regulation of standards and technical rules can either open markets to technology or skew the playing field in favor of local providers or particular technologies. The United States should encourage the development of international industry-driven standards, technical regulations and best practices in relevant forums around the world. Pursuing global public-private partnerships and, where appropriate, developing international standards, norms or best practices can help countries harmonize, converge or at least better understand divergent national systems and establish compatible policies that ensure a secure Internet while minimizing the ability of countries to engage in digital protectionism.

4. **Improve transparency and predictability** – Governments should provide transparency, predictability and due process when regulating the digital economy. For instance, governments should publish proposed measures in draft form and offer sufficient time and full opportunity for comment; make public requests for information or other government demands on service providers to the maximum extent practicable; and provide opportunities to contest government measures that restrict cross-border information flows.

5. **Address emerging legal and policy issues involving the digital economy.** Governments should work to resolve emerging legal and policy issues raised by cross-border data flows. If not properly managed, new regulation in these areas could become significant non-tariff trade barriers to the digital economy. There is increasing evidence that governments are using the pretext of legitimate policy objectives – such as law enforcement, cyber-security or consumer protection – in order to restrict digital trade. In response, the U.S. Government should establish and support international frameworks and dialogues in the following key areas:
 - **Open nature of the Internet** – Users should have the ability to access the Internet and to purchase or otherwise access lawfully available digital products, content and services. Government efforts to limit choice or competition undermine the ability of individuals and businesses to participate in and benefit from the digital economy. Rules and understandings should be developed to support technology neutrality for digital products, fair and transparent competition policies and technology choice for consumers.
 - **Security and privacy** – The business community supports the right of governments to ensure the safety, security and privacy of its citizens and recognizes that approaches may differ between countries and across sectors. At the same time, as in any measure affecting international trade, governments must be able to communicate clearly the rules, rationale and compliance procedures governing these interests to businesses and individuals and make certain that those procedures are not overly-burdensome, discriminatory or a disguised restriction to international trade. For example, some countries have discriminated in favor of local businesses by selectively applying filtering regimes which degrade service; by mandating the use of domestic products or intellectual property; by requiring product certifications to be carried out locally; by rerouting traffic from global Internet brands to local competitors; or by applying their laws in a manner that discriminates against foreign suppliers or services. In addition, governments often work outside of established legal frameworks or processes when seeking commercial, financial or personal data, which raises a host of concerns about privacy, safety and security.
 - **Jurisdiction** – A host of still-emerging practices involving digital goods and services, including the storage of and access to data on remote servers, presents new legal complexities for businesses. Evolving digital frameworks such as cloud computing have contributed to new questions about jurisdiction and applicable law. For example, if there is a dispute over the use of documents resident on a remote server, multiple governments may assert jurisdiction over a single set of data, based upon the location of the server, the nationality of the company which controls the information, the jurisdiction in which the relevant service is offered or the policies of the country in which the person accessing the data is present. There is also ambiguity surrounding when cloud computing activities involving export-controlled data trigger export licensing requirements, which ordinarily apply as soon as such information moves outside of the regulating country. Clarifying jurisdiction claims and applicable law will reduce uncertainty for businesses operating globally, and would be particularly valuable for small enterprises, which have fewer resources to navigate these complex issues.

6. **Expand trade in digital goods, services and infrastructure.** Despite progress in past agreements, significant impediments remain to trade and investment in areas critical to the digital economy. Some countries employ restrictive investment rules to impede the ability of foreign providers to operate telecommunications networks or to deliver digital products such as electronic applications. Others limit access to spectrum or maintain opaque allocation policies that favor local suppliers. In the financial services sector, some countries are looking to exclude or hinder foreign service suppliers, and establish or support a competing domestic payments system, by requiring the on-shore processing of data. Such policies limit the ability of American companies to participate effectively in foreign markets, while potentially raising access costs and limiting the supply of innovative products to local governments, businesses and consumers. The United States should aggressively pursue ambitious, market-opening agreements which promote the adoption of information and communication technologies around the world and competition and investment in network infrastructure. For example, global telecommunication services providers must be able to obtain licenses, spectrum allocation, and invest in and operate networks, which is critical for helping the Internet become the “trade route of the 21st Century.”
7. **Ensure that trade agreements cover digital services that may be developed in the future.** Governments need to craft trade agreements that do not just address the problems of today, but also anticipate the problems of tomorrow. They need to be crafted in a technology-neutral way that covers sectors that have yet-to-be-developed, so that agreements do not regularly need to be re-negotiated. Thus, it is critical that trade agreements be negotiated on a “negative list” basis, such that all service sectors (including yet-to-be-developed sectors) are covered unless the negotiators specifically agree to exclude them.

Appropriate forums to modernize trade rules

We believe the above objectives can be advanced best through a variety of approaches:

1. **Bilateral and regional free trade agreement negotiations** – Free trade agreements provide an important forum for raising the bar for open access to digital goods, services and information with willing trading partners. Current negotiations such as the Trans-Pacific Partnership (TPP) along with future talks would be ideal opportunities to leverage and build on existing commitments that already address cross-border flows for the financial services sector. Negotiators should also seek to introduce new language expressly permitting cross-border information flows for other sectors; prohibiting measures that link market access or other commercial benefits to local infrastructure, investment or establishment; and improving transparency, IPR systems, market access for information and communications technologies and cooperation on standards and conformity assessment.
2. **Existing multilateral and regional forums** – Improving the multilateral framework for digital trade at the WTO should be a high priority for all governments seeking to promote innovation. The Organization for Economic Cooperation and Development (OECD), which has organized a series of high-level dialogues and developed a set of principles on Internet policy-making, is another useful forum to engage some of the world’s most innovative economies. The Asia Pacific Economic Cooperation (APEC) forum is also a constructive way to build trust and understanding among governments. A number of APEC initiatives, including its Digital Prosperity Checklist and ongoing work on “next generation trade issues” and “cyber-security initiatives against cyber threats” would support the development of rules and best practices in a key region of the world.

3. **New bilateral and multilateral frameworks on digital goods, services and information** – The United States should also pursue ad hoc or informal frameworks to clarify rules and standards and improve transparency. Such understandings can be particularly useful where regimes take divergent approaches to complex issues such as privacy or government access to data. Bilateral or multilateral frameworks could be designed to address key issues, such as clarifying jurisdiction over data or bridging national privacy regimes. Governments could also seek to pursue enhanced mutual legal assistance treaties with key trading partners to improve cooperation on key legal issues surrounding cross-border data flows.
4. **A gold-standard innovation framework** – The U.S. Government should also solicit ideas and begin to develop a plurilateral innovation framework. Crafting a modern framework for rules governing goods and services market access, e-commerce, transparency, government procurement and cyber-security would set a new global gold-standard to which countries could subscribe. Such an effort would provide a useful reference point for future trade agreements and understandings.
5. **Trade dispute settlement** – The U.S. Government, in consultation with industry and workers, should identify and seek to resolve through WTO or bilateral consultations or other processes violations of international rules concerning digital goods, services and information. While the rules governing cross-border data flows need to be upgraded, countries are already obligated to honor a series of commitments involving the digital economy. America’s trading partners should understand that if they do not abide by their international obligations, there will be consequences.



This document was developed in collaboration with companies including:

