

The new challenge in the digital age.

Redefining Protectionism

BY SUSAN ARIEL AARONSON

Congressman Sandy Levin (MI), the ranking Democrat on the House Ways and Means Committee, did not mince words. In a September 28, 2016, speech to the Council on Foreign Relations, he noted, “For decades, efforts to shape trade policy to address its downsides as well as maximize its upsides were easily labeled protectionism.” Congressman Levin wanted his audience to know, “We need to rethink what is protectionist.”

Congressman Levin is right to point out that twenty-first century protectionism is a slippery concept. Scholars and policymakers alike need to rethink how we define and measure it as well as reconsider the appropriate strategies to address it. Nowhere is this more evident than U.S. policies towards digital trade (goods and services delivered via information flows on the internet) and digital protectionism (barriers or impediments to digital trade, including censorship, filtering, localization) measures, and regulations to protect privacy. The stakes are huge for the internet, for the world’s people, and for the U.S. economy.

In 2015, the World Trade Organization reported that from 1995 to 2014, world exports of computer and information services expanded much more rapidly than any other services sector, recording as much as 18 percent growth on average annually to an estimated US\$302 billion in 2014. While Europe has some 58 percent of computer and information services exports, emerging economies, in particular India and China, have a large

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and growing share. But digital trade is also expanding through e-commerce platforms such as Alibaba, Amazon, and eBay. Approximately 12 percent of the global goods trade was conducted via these platforms in 2014.

While digital trade and the digital economy are important to all countries, they are particularly important to the United States. The United States International Trade Commission reported that in 2014, the United States exported over \$385 billion in digitally enabled services—a broader measure of digital trade. (Statistics about the digital econo-

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my are inexact because economists do not agree on what and how to measure the digital economy or digital trade.) U.S. firms such as Google, Facebook, Twitter, and Amazon are global trade behemoths. Digital trade represents nearly 55 percent of U.S. services exports and has generated an annual trade surplus of over \$150 billion. However, this trade does not only benefit internet companies and consumers.

Digital trade does not only benefit Internet companies and consumers. Seventy-five percent of the value created by the internet and technology sector is captured by companies in traditional industries who embrace digital trade to connect with new customers and suppliers in markets around the world.

Not surprisingly, the United States was the first country to propose binding rules governing digital trade in the Trans-Pacific Partnership. The United States was also the first country to call out other countries for digital protectionism. The United States says it is trying to limit digital protectionism to maintain an open internet and advance the free flow of information. But U.S. officials are struggling to develop transparent and effective strategies to ascertain digital protectionism, measure its impact, and develop appropriate policies to mitigate its effects.

Policymakers now understand that information, whether it is created or altered within their county, is an asset. Moreover, it is a form of currency facilitating productivity,

exchange, technology, and trade. Information is also the building block of the digital economy which is increasingly important to all nations. Thus, measures that restrict content, limit data flows, or impose standards that keep out foreign competition could threaten the generativity of the internet as whole.

Most countries have a wide range of legitimate reasons why they may seek to limit cross-border information flows. For example, many want to develop an indigenous tech sector, requiring them to encourage an effective enabling environment that includes competition, digital literacy, and infrastructure policies. Thus, officials might sometimes take steps that discriminate against foreign market actors and in so doing distort trade, even though this may not be their primary objective. At other times, policymakers want to encourage the rule of law online and prevent unlawful behavior such as the dissemination of hate speech or child pornography, fraud, identity theft, cyberattacks, and money laundering. Here again, these policies may be necessary to achieve important domestic objectives, yet they may, without direct intent, discriminate against foreign firms.

The United States is the Paul Revere of digital protectionism, using naming and shaming to condemn such policies. In 2014, at the behest of Congress, the United States International Trade Commission examined global use of trade-distorting strategies and found that forty-nine nations have adopted “digital protectionist” policies. The United States also argues that cyber-theft of intellectual property is distorting trade. But many governments disagree with the scope and breadth of U.S. claims about digital protectionism. For example, Canadian and Australian policymakers are determined to protect the privacy of their citizens’ health records and require such information to be stored on local servers. Policymakers from these nations argue that by keeping data stored within national jurisdictions, or by

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prohibiting data from travelling through the territory or infrastructure of “untrustworthy” nations or technology companies, data will be better protected. Moreover, some governments use data localization policies as a more efficient means of ensuring that they can easily obtain information about potential criminal activities.

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Whatever other governments' reasons for adopting such strategies, U.S. arguments against digital protectionism are often inconsistent. For example, in its 2013 report on foreign trade barriers, the Office of the U.S. Trade Representative complained about Japan's uneven, and Vietnam's unclear, approach to consumer privacy. Ironically, the United States has argued that China's failure to enforce its privacy laws stifles e-commerce. It seems the United States both criticizes other governments for failing to develop clear or adequate approaches to enforcing privacy and cites privacy as a barrier to trade. Moreover,

Information is an asset.

the United States has long argued that privacy protections maintain trust in the internet, and that they are essential to stimulating the growth of digital technologies. Hence, it is surprising to see the United States describe both too much privacy and inadequate privacy regulations as "protectionist."

The United States also argues that governments that fail to establish a regulatory environment to facilitate the free flow of information are distorting trade. It chided China, South Africa, Thailand, and the United Arab Emirates for unclear internet rules. It criticized South Africa for failing to effectively enforce its laws online; named Vietnam and Turkey for overreaching bans on internet content; and condemned France for its proposals to tax internet activity. In 2015, the U.S. Trade Representative complained about procurement policies in Canada that don't allow U.S. firms to bid on cloud servers for the government, despite the fact that the United States also limits cloud-related procurement for national security. In its most recent report, the United States cited China's internet filtering as a barrier to trade.

Companies have already begun testing the legitimacy of digital protectionist claims in administrative bodies. In 2015, some companies wanted to empower the United States International Trade Commission to block cross-border flows of allegedly pirated or stolen information. Under section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337), the USITC is required to conduct investigations into allegations of certain unfair practices in import trade, such as the infringement of intellectual property rights. A company called ClearCorrect in Pakistan transmitted digital models for braces in Pakistan and then printed the braces on 3D printers in Texas. After another company challenged the digital models as a violation of its patents, the

USITC decided that ClearCorrect was violating U.S. patents. Under section 337, the USITC could have forbidden the company from transmitting data into the United States until the dispute was resolved. However, companies such as Google joined with civil society groups such as Public Knowledge to challenge the ruling in the United States Court of Appeals for the Federal Circuit. The court found that the USITC had no authority under existing legislation to block the importation of electronic data.

In August 2016, U.S. Steel accused the Chinese government of conducting cyberattacks meant to benefit its own state-run steel industries. The company asserts that a Chinese steel firm, Baosteel, used the information stolen from U.S. Steel to make its own high-strength steel, which now competes with U.S. Steel's products. The company wants the USITC to rule on whether the United States should oppose trade sanctions on China. Should the case move forward, the United States could block imports of products manufactured using U.S. trade secrets stolen through a cyber-attack. But as of this writing, the United States struggles to attribute such cyber-theft.

These cases should get all of us thinking. Despite the importance of digital trade and digital protectionism, the United States does not have regulatory strategy to assess:

- Is a policy truly protectionist?
- How harmful are these policies to U.S. digital firms?
- Are trade sanctions an appropriate way to compensate affected firms and workers?
- What agency should decide the attribution and the response?

Neither the United States nor many of its trade partners have found clarity as to what constitutes digital protectionism. To some observers, it seems like the United States defines it as policies that with or without intent reduce U.S. market share in foreign markets. As digital trade takes up a bigger portion of the global economy, policymakers and companies will need clarity.

Given the stakes, the United States should take a leading role in defining protectionism at the World Trade Organization. The United States and like-minded countries should ask the WTO Secretariat to examine whether domestic policies that restrict information (short of exceptions for national security and public morals) constitute barriers to cross-border information flows that could be challenged in a trade dispute. Moreover, the United States should ask the Secretariat to measure the impact of barriers such as censorship and filtering upon digital trade. With more information, we can develop fairer and more universal policies that don't distort the global internet. ◆