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Shaping the Future of Multilateralism

Digital trade rules:
Big Tech's end run around
domestic regulations

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Digital trade rules: Big Tech's end run around domestic regulations

Trade agreements have become an important battleground for tech companies to fight the regulatory pressure they are finally facing in the Global North. But allowing tech companies to capture digital trade talks to defang domestic regulation creates serious risks for privacy, fundamental rights, competition, social and economic justice, and sustainable development.

Since the dot-com boom of the 1990s, lax domestic and global regulation has allowed technology companies, especially [Big Tech](#), to enjoy broad and unfettered freedom to design and implement – but also to exploit – not only social media and advertising, but also e-commerce and digital services. Rapid advances in technology have [exacerbated many inequalities](#) and have widened the gap between the rich and poor globally. The rise of digital services led to the increasing concentration of power in the hands of a few major platforms and those equipped to use them to their fullest potential. At the same time, the inability of regulators to keep pace with technological change contributed significantly to making Big Tech unstoppable. The result has been a surge in wealth for technologically advanced countries, without corresponding prosperity elsewhere in the world.

As public opinion is growing more skeptical of the dominant position of tech companies, lawmakers and regulators – particularly in the United States and Europe – are finally contemplating and implementing tighter regulations. Big Tech is facing significant investigations and fines under the General Data Protection Regulation (GDPR) in the European Union (EU) and competition rules both in Europe and the United States. It also is feeling increasing heat from additional regulations that are in the works. The European Commission's proposed Digital Services Act (DSA) and Digital Markets Act (DMA), for instance, aim to [bring order to the chaos](#) of unregulated tech and to bolster the bloc's regulatory role in digital markets. Though the United States lags the EU and several other countries across the globe in regulating tech, Democratic Party [control](#) of both the White House and Congress may result in a [federal privacy law](#) and significant reforms to antitrust law for the digital age.

In response, Big Tech is seeking ways to neutralize this regulatory push by engaging in a broad lobbying campaign and funneling that agenda through tech-funded academics, think tanks, and civil society organizations, not only in Washington but also in Brussels. As *The New York Times* [puts it](#), Big Tech lobbying strategies “contribute to a Washingtonization of Brussels, giving money and connections an upper hand over the public interest.”

Big Tech's lobbying efforts are not limited to regulators and lawmakers. The U.S. technology sector and its allies have long been taking advantage of trade agreements to constrain individual jurisdictions from crafting and experimenting with policies and regulations that aim to curb Big Tech's abuses and its concentration of power.

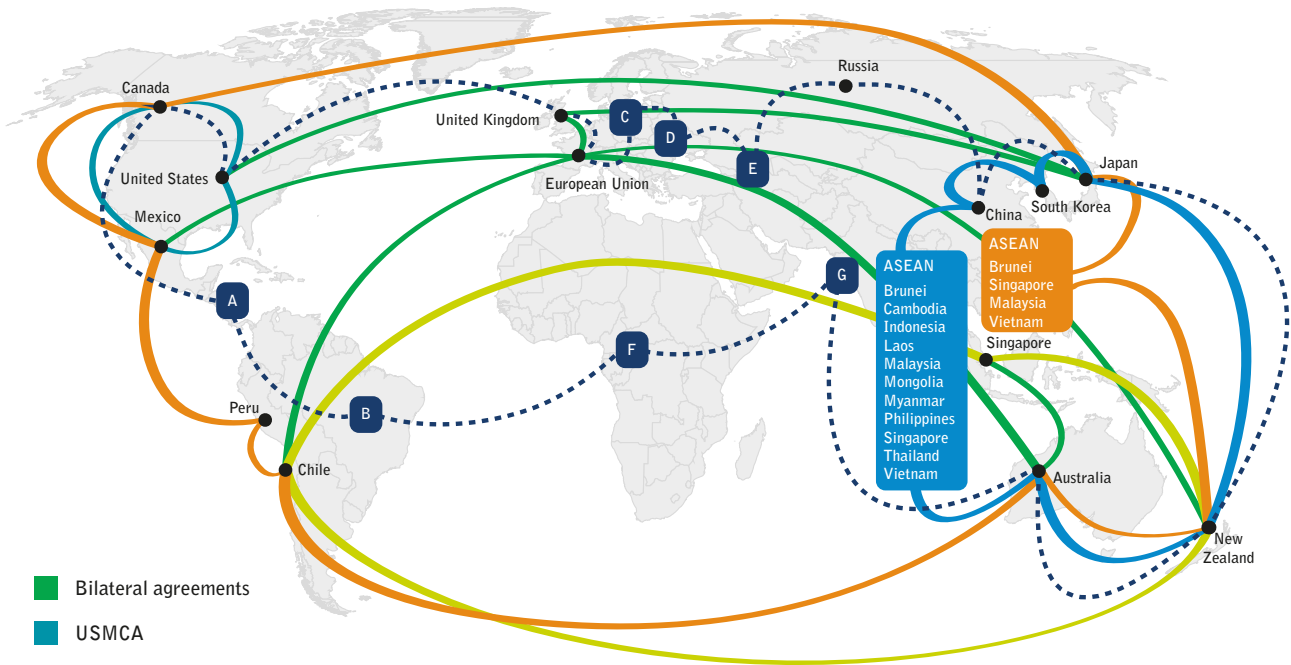
Since the 2015 conclusion of the Trans-Pacific Partnership Agreement (TPP) (rebranded as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) after the Trump administration pulled the United States out of the pact), trade negotiators have shown growing interest in digital issues, with major implications for global digital regulations. The TPP has pioneered the development and global promotion of digital trade rules that become a basis for regulating the digital economy in a way that maintains and reinforces the status quo and thus empowers tech companies.

The TPP (and its CPTPP rebrand) created a significant pathway toward global e-commerce talks that started in the World Trade Organization (WTO) immediately after the TPP was concluded in 2015. The CPTPP was also envisioned as a "living agreement," designed to be open to new membership. While several countries – Thailand, China, Taiwan, and Colombia included – have indicated varying degrees of interest in joining the agreement, China has most consistently expressed the willingness to engage at some point. In February 2021, the United Kingdom applied to be the first new country to join the CPTPP, potentially expanding the geographic scope of the agreement's digital trade rules.

Such rules open a Pandora's box of issues for achieving public policy goals such as protecting privacy, competition, social and economic justice, and sustainable development. Trade agreements today are a prominent forum for creating binding and enforceable rulemaking at the multilateral and global level. These agreements cover a wide array of subjects that extend far beyond traditional trade matters.

The stakes are high for tech companies, as they are for several other industries, because they stand to benefit greatly from the elimination of domestic regulations and public policy protections. Since the early 1990s, such pacts have become effective tools for dominant industries to dilute or eliminate domestic policies, minimize regulatory costs, and maximize the interests of multinational corporations. In many cases, these agreements constrain domestic regulations and establish mechanisms to challenge domestic financial, economic, and consumer protections. This has resulted in a deepened global imbalance between developed and developing countries, as well as widening socioeconomic gaps within nations across the globe.

Big Tech's regulatory ascendancy – the Transpacific Partnership Agreement (TPP)



- Bilateral agreements
- USMCA
- Digital Economy Partnership Agreement (DEPA)
- Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)
- The Regional Comprehensive Economic Partnership (RCEP)
- WTO Joint Statement Initiative

A - South America
 Argentina, Brazil, Chile, Columbia, Ecuador, Paraguay, Peru, Uruguay

B - Central America
 Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, Panama

C - Europe
 Albania, Austria, Belgium, Bulgaria, Czech Republic, Croatia, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Ireland, Iceland, Latvia, Liechtenstein, Luxemburg, Lithuania, Macedonia, Moldova, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine

D - Eurasia
 Kazakhstan, Georgia, Russia

E - MENA
 Bahrain, Israel, Kuwait, Qatar, United Arab Emirates

F - Africa
 Benin, Burkina Faso, Cameroon, Cote d'Ivoire, Kenya, Nigeria

G - South-East Asia
 Brunei, Hong Kong, Indonesia, Korea, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, Taiwan

The TPP was the U.S. tech industry's first shot at successfully setting the U.S. trade agenda through an international trade agreement, with global ramifications. The agreement was a "trade" deal that, as many later found out, ironically dealt little with trade. It was supposed to be President Barack Obama's signature economic project – covering roughly [12 percent of the world's population and 40 percent of global GDP](#). As the largest global deal of the 21st century, it was to include a range of countries spanning different levels of development with varying social, economic, and political priorities: Australia, Brunei-Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, Vietnam, and the United States.

Of the TPP's 30 chapters, only five addressed traditional trade issues such as tariffs, customs and trade remedies. The rest of the chapters covered a wide variety of regulatory and legal issues, including intellectual property, state-owned enterprises, financial services, e-commerce, investment, labor, pharmaceuticals, and more – issues that affect millions of people in the Pacific Rim.

While much public attention focused on the chapters relating to intellectual property and investment, e-commerce rules were essential to the ["21st -century model"](#) TPP agreement. During the five-plus years of TPP negotiations between 2009 and 2015, hundreds of pages of draft chapters were leaked. The e-commerce chapter was never leaked, and the details of the chapter remained unknown until the final text was published in 2015.

Scholars, economists, and other critics raised significant concerns during the trade talks about both the process – negotiations held behind closed doors, with details kept from public view, creating a democratic deficit – and the content of the agreement.

The TPP served as the blueprint for what the development of the digital economy would look like for years to come. The e-commerce chapter introduced [binding rules and procedures](#) for trade in digital goods and services and addressed a range of related issues including custom duties on digital products, paperless trade administration, and rules on electronic signatures, data flows, and protection of source code.

Historically, [Silicon Valley's freewheeling ecosystem](#) has long meant a laissez-faire approach to tech regulation in the United States. Big Tech enjoyed a vastly unregulated marketplace in the United States, but also abroad.

Though the U.S. Congress mostly stayed out of the way and let the industry "regulate" itself, the European Commission began entertaining the idea of strengthening digital privacy rights in the early 2010s. The commission introduced its long-awaited proposals to update and modernize data protection rules and principles in its 2012 ["Data Protection Directive 95/46/EC,"](#) which ultimately was superseded by the GDPR. After regulatory moves like this, tech companies began lobbying for [the removal of so-called non-tariff trade barriers](#) and adopted a new strategy to push for multilateral digital trade rules that might work more in their favor.

Big Tech executives [expressed hope](#) that the TPP could lessen regulations, help them enter new Asian markets, and eventually force China to compete on equal terms with the United States. In fact, the TPP, before it was reconfigured with the U.S. exit, [removed](#) what Big Tech considered to be trade barriers and promised more lax, uniform, and tech-friendly global trade rules.

Ever since the [U.S.-Chile Free Trade Agreement \(FTA\)](#) in 2004, all U.S. FTAs have included a standalone e-commerce chapter addressing digital trade. The scope and depth of commitments included in these FTAs were initially limited. Over time, they have expanded to cover a broader range of issues. The e-commerce chapter of the TPP was built on similar concepts as those put forth in previous U.S. trade agreements, yet more ambitious in its scope.

U.S. trade negotiators persisted in removing trade barriers and establishing common trade rules and disciplines in the Asia-Pacific Rim to protect U.S. tech companies' interests. In the name of promoting U.S. global competitiveness and protecting American innovation, they sought to make sure other countries followed suit by trying to limit domestic regulatory options via the trade agreements.

The TPP rules (and its successor CPTPP) are carefully designed to constrain the ability of governments to regulate a rapidly changing digital environment in areas including consumer rights, privacy, other human rights issues, anti-competitive practices, labor law, government data, cyber security, and national security. The [most controversial provisions](#) include:

- **Cross-border data transfer rules limiting domestic regulatory options:** This provision liberalizes data flows and places objective limits on how domestic privacy rules and regulations may interfere with trade parties' commitments. The in-built exception that purports to balance this obligation is seriously deficient in ways that restrict the TPP parties' ability to establish privacy safeguards and regulatory standards. The parties may maintain privacy standards only to the extent that they do not impose data-transfer restrictions "greater than are required to achieve the objective." Rules along the lines of the GDPR, which requires comprehensive and effective data governance, are very unlikely to pass this test.
- **Prohibition from placing any restriction on the location of computing facilities (or servers) and data processing:** These provisions confuse the very different issues of forced data localization and appropriate regulatory measures to protect privacy, financial data, and the public interest. Although there is a built-in public policy exception to this provision, the exception may not be sufficient to safeguard such regulatory measures. Post-TPP U.S. FTAs include no public policy exception.
- **Restrictions on access to source code:** The TPP limitations on the disclosure of source code restrict public oversight and accountability and create a barrier to due process. Trade-secrets protections for source code may reinforce existing prejudices and inequalities through a "techno-social divide" and act as a barrier to information, which fundamentally affects human rights and social justice issues including bias, discrimination, and equity.

Any disputes surrounding e-commerce arising from the TPP (and its successor CPTPP) are subject to the TPP's state-to-state and investor-state dispute settlement (ISDS) procedures. The latter is particularly controversial, because it allows companies to sue, via international arbitration panels, any TPP country for introducing regulations that they allege exploit their investments.

The end of the beginning – the CPTPP

The TPP was set to become the world's largest free trade deal, but it proved [unable to survive the turbulent U.S. election cycle in 2016](#), in part because it became a [symbol of failed globalization](#) and the [loss of American jobs overseas](#) caused by decades of previous unfair trade deals. The TPP had been promoted by the Obama administration for its domestic constituency as a ["Made in America"](#) agreement, and it certainly advanced the interests of U.S. corporations, including Big Pharma and Big Tech. But upon assuming office, President Donald Trump [signed an executive order](#) formally ending U.S. participation in the agreement.

In the face of the U.S. withdrawal, the remaining TPP countries (the so-called TPP11) agreed on the outlines of a new deal under the CPTPP name. In the process, they suspended or [changed 22](#) of the original [1,000-plus TPP provisions](#), mainly in the investment and intellectual property chapters, and amended some of the most controversial provisions the United States had championed, such as those related to pharmaceutical patent rules. Maintaining an overwhelming majority of the TPP provisions, including all e-commerce rules, the CPTPP became one of the most comprehensive and far-reaching agreements ever signed, despite the U.S. withdrawal. Asia-Pacific is a big market for U.S. companies. They still gain the benefit of many provisions in the CPTPP, as parties generally apply them in a non-discriminatory fashion and therefore raise the "floor" for standards across the region.

The participating countries in the CPTPP also have stepped up their other trade agreement activity in the wake of that deal and started to pursue bilateral trade pacts of their own. The CPTPP text has become a template, and its digital trade provisions have started to show up in multilateral, regional, and bilateral deals, dramatically shaping the e-commerce landscape. That includes the Regional Comprehensive Partnership Agreement (RCEP) led by the Association of Southeast Asian Nations (ASEAN); the Digital Economy Partnership Agreement (DEPA) between Chile, New Zealand, and Singapore (in fact, the TPP began as an [agreement](#) among the same three countries and Brunei); the Japan-Mongolia FTA; the Chile-Brazil FTA; the Chile-Uruguay FTA; the United States-

Mexico-Canada Agreement (USMCA); the U.S.-Japan Trade Agreement; the Japan-U.K. Trade Agreement; and the Australia-Singapore Digital Economy Agreement.

Some of these deals closely mimic the language and structure of the CPTPP. Some have built on the CPTPP and have included provisions that go even beyond the commitments in the CPTPP e-commerce chapter.

The WTO e-commerce discussions and the Joint Statement Initiative

Discussions on e-commerce and digital trade rules had already intensified at the WTO by the time the TPP negotiations were concluded in 2015, with some WTO members pushing for the negotiation of new trade laws on e-commerce. Two years later, in 2017, the United States had withdrawn from the TPP but was participating at the 11th Ministerial Conference of the WTO (MC11) in Argentina. The United States and other major developed countries, along with the CPTPP parties, were determined to secure a mandate² on e-commerce to negotiate a new trade agreement that would remove what they considered barriers to digital trade. But the efforts to secure a mandate failed, and the MC11 ended without any substantial outcome, as consensus eluded the 164-member body.

However, a group of countries led by Australia, Singapore, and Japan (all party to the CPTPP) had consolidated the support of 70-plus countries including EU members, the United States, and other large economies to sign the ["Joint Statement on Electronic Commerce"](#) in Argentina in December 2017. It called for "exploratory work together towards future WTO negotiations on trade-related aspects of electronic commerce." It became evident that the digital global trade agenda pursued through this group as a "way forward" was intended to be a default "first step" toward ultimately achieving a deal in the WTO.

- 2** The WTO's Work Programme on E-commerce was established in 1998 to examine all trade-related issues arising from global e-commerce. The mandate of the Programme is limited to discussions, not negotiations, on trade-related issues relating to e-commerce. In order to negotiate a new agreement on e-commerce, the current mandate of the Work Programme would need to be changed via a consensus of the 164 WTO members.

Digital trade negotiations at the WTO, formally dubbed the [“Joint Statement Initiative on e-commerce”](#) (JSI), began in 2019. Coordinated by Australia, Japan, and Singapore, JSI soon became a VIP club for digital trade talks. It now comprises [86 countries](#) “collectively accounting for over 90 percent of global trade and representing all major geographical regions and levels of development.” Many developing countries, while initially resisting a new WTO mandate on e-commerce, have ended up joining the JSI.

Overview of the JSI proposals

Since 2019, JSI countries have been negotiating a new rulebook for digital trade that would define global rules and [make it easier for consumers and companies to trade online](#). Quite a few countries have submitted [proposals](#) outlining their negotiating objectives and their positions. The proposals reflect different priorities and policies, address both narrow and broad issues, and include proposals for new global digital trade rules for issues that can be addressed within existing WTO agreements. They cover a broad range of topics including enabling e-commerce, trade openness, consumer trust, telecommunications, market access and scope, and other general provisions and cross-cutting issues. However, the majority of proposals sit on different ends of the policy spectrum dominated by the United States, the EU, and China, and offer contrasting visions for the future of the digital economy and global trade regulation.

The U.S. vision promotes the competitiveness of U.S. digital networks [dominated](#) by a handful of American companies, and aims to minimize regulatory divergence between countries, to reduce regulatory compliance costs, and to ensure unrestricted cross-border data flows. Clearly, from the U.S. perspective, the priority is to achieve “strong, market-based commitments that address real barriers to digital trade, including restrictions on cross-border data flows and data localization requirements,” according to a [March 2019 statement](#) from former Ambassador Dennis Shea, then-U.S. Permanent Representative to the World Trade Organization.

The U.S. vision places objective limits on how consumer protection or privacy regulations may interfere with digital trade rules. A close look at the [JSI proposals](#) reveals a successful infiltration of this vision. In fact, most of the JSI proposals appear to be a copy and paste of what is in the CPTPP text, with minor adjustments here and there to fit the specific country context. The U.S. proposal replicates clauses from the USMCA, which in turn is built on the TPP. Likewise, proposals from Australia, Singapore, Japan, New Zealand, and other CPTPP countries borrow substantial text from the CPTPP and include provisions on cross-border data transfers, prohibitions on requirements for local

servers and facilities, and restrictions on disclosure requirements for source code and algorithms.

China's vision for a government-dominated network is evident in its [proposals](#), which aim to protect regulatory space for maintaining societal control and imposing additional restrictions on foreign businesses. Chinese JSI proposals prioritize establishing a sound environment for electronic commerce transactions by facilitating e-commerce, global value chains, and paperless trading; creating a safe market environment for electronic commerce by protecting consumers from fraudulent business practices and shielding personal data; and promoting pragmatic and inclusive development cooperation by bridging the digital divide.

Given Chinese restrictions on data flows and expansive data localization requirements, Chinese proposals avoid making binding and enforceable commitments on cross-border data flows and data localization. Rather, the Chinese [recognize](#) "members' right to regulate, strike a balance among technological advancement, business development and legitimate public policy objectives of Members, such as internet sovereignty, data security, privacy protection" and seek a "balanced pragmatic outcome reflecting all Members' interests through equal consultation."

While the United States and other governments in developed countries are playing regulatory catch-up to Big Tech, the EU appears to have a stronger grip on oversight of the industry. The EU's stance on digital trade places an emphasis on the protection of data privacy. While the EU supports cross-border data transfers and restrictions on requirements for data localization, the EU's JSI [proposals](#) aim to secure a privacy-friendly outcome by allowing members to "adopt and maintain the safeguards they deem appropriate to ensure the protection of personal data and privacy, including through the adoption and application of rules."

Some developing countries have put forward their own proposals and some have joined developed country proposals as co-sponsors. A negotiating text consolidated from these proposals has circulated among the participants and will form the basis of the next stage of negotiations, possibly this year, for a new set of global digital trade rules. Those talks, too, may be shrouded by secrecy and heavily influenced by the tech industry. A December 2020 update by the co-conveners of the JSI stated, "Provisions that enable and promote the flow of data are key to a high standard and commercially meaningful outcome. Discussions on these issues are ongoing and will intensify from early 2021. Japan and Singapore hosted an information session on data flows and localization rules in November 2020, *involving negotiators and the private sector*, to build better understanding and support for strong commitments." (emphasis added)

Pandora's Box

As mentioned, this new race toward a global digital trade agenda opens a Pandora's box of problems for the Global South. Digitalization and the "fourth industrial revolution" are driving a new type of capitalism known as "surveillance capitalism," which profits from the capture, rendering, and analysis of behavioral data in the world's largest space that remains overwhelmingly unregulated. Yet these trends also reinforce the underlying economic and social challenges that generate development hurdles, in particular high poverty and inequality.

While the global North is experiencing – and in many ways benefiting from – this fourth industrial revolution, digital transformation in developing countries lags dramatically. Most of the least developed countries remain largely excluded from technological breakthroughs such as artificial intelligence, big data analytics, cloud computing, the Internet of Things (IoT), advanced robotics, and additive manufacturing. At the rate technology is advancing, the gap between the North and South is widening rapidly and threatening to leave developing countries, and especially the least developed countries, even further behind.

Certainly, the global trade agenda is complex; it includes far-reaching provisions on the cross-border delivery of services affecting privacy, data protection, cybersecurity and net neutrality, and new Internet-related IP rights in the digital context. Impacts can be far-reaching, touching social and economic issues, human rights, labor markets, education, security, governance issues, and more.

Yet, again, many developing countries have not yet crafted their own domestic digital agenda. E-commerce markets in developing countries are premature; they lag in digital competitiveness and skill. For digital technologies and services, they depend largely on foreign service providers.

These disadvantages prevent these countries from interacting at the WTO in a way that is beneficial to their needs. Trade policymakers in developing countries are not informed on highly technical digital issues and their far-reaching implications. And yet they are under intense pressure from developed countries to participate and negotiate global digital trade rules. There are many unknowns regarding the technological advances ahead and the digital economy that evolves with those changes. Given the uncertainty in the policy landscape, trade rules devised at the WTO can have potentially devastating consequences for these countries.

Under binding and enforceable WTO rules, members must conform all existing and future domestic policies to the terms of the WTO agreements. Members can challenge the policies and practices of other members that do not meet these standards. Trade sanctions can be imposed against a country until non-conforming domestic policies are eliminated or changed. Countries almost always eliminate or alter successfully challenged policies. Thus, the addition of WTO rules on e-commerce, redefining privacy regulations, or competition policies as “trade barriers” could expose countries with privacy regulations and other competitive measures to direct challenges and, by doing so, inhibit other countries from enacting such policies. Trade negotiators ill-equipped to appreciate the complex, multifaceted, and dynamic nature of digital trade put many WTO member countries at a further disadvantage. The lack of awareness and understanding raises significant concerns for the digital economy, its global infrastructure, and the governments’ right to regulate tech industries.

Indeed, increasingly the Big Tech response to instances of governments regulating [privacy](#), [data](#), or [platforms](#) is to attack such policies as “[digital protectionism](#),” a label that is easy to assert, hard to define, and deeply polarizing.

The risks of allowing Big Tech to capture digital trade talks are serious. Their first actions under the new Biden administration in the United States suggest they are continuing to pursue their goal of protecting their digital trade agenda against regulation. Tech industry trade associations, for instance, [sent a letter](#) urging the administration to make open and global “rules-based digital trade” a top economic priority. The letter cautions the Biden-Harris team that countries around the world are moving toward “digital protectionism” and introducing new regulations, which they assert would impede U.S. global competitiveness.

Given increasing public antipathy toward tech companies and the increasing readiness by lawmakers and regulators to limit their power, Big Tech appears to be doubling down. Its rhetoric suggests a no-holds-barred interest in shaping the course of tech policy in its favor and to the detriment of privacy and the interests of the developing world, whether in legislation and regulation at home or in trade agreements that span borders.

Conclusion

The Pandora's box of digital trade has been open for some time, and its curse has spread out far and wide through the CPTPP and other bilateral and multilateral trade agreements that echo the preceding pact's provisions. Globally, 2020 and thus far 2021 have posed unprecedented challenges on many fronts. Among other things, the phenomena of digital transformation have rapidly reshaped the world and accelerated the rise of the digital economy. Now, the world requires solutions that reflect these dramatic shifts.

Social, economic, and technological challenges, today and in the years to come, will require the adoption of policies across a range of fields and disciplines. Increasingly, one of the key steps for embracing the digital economy is expanded access to the digital skills needed to start new businesses and create new jobs for the people hardest hit by unemployment, including those with lower incomes, women, and underrepresented minorities. In addition to benefits for the Global North, this would significantly aid the Global South and ensure that more people see advantages from Industry 4.0.

In the story of Pandora, "hope" remained at the bottom of the box. In the digital realm, hope lies in reforming the global trade system that has undermined the search for growth and prosperity in the Global South for decades. The increasing number and variety of voices that have engaged in the debate over global trade rules throughout the years shows that the pro-trade consensus that served Big Tech interests so well in recent years has been broken. It is time to think about real, systemic change.

Achieving a global trade policy that promotes competitive and functional markets, social and economic justice, and development, and that protects fundamental rights and privacy, will require more than the typical one-size-fits-all solutions in multilateral trade agreements. Every country is different. Each has its own characteristics, its own legal structures, and its own pace of digital transformation and economic growth.

The solution lies not in imposing data liberalization in trade agreements or via the WTO, but in balancing international cooperation with locally tailored solutions and looking beyond rigid global trade rules to address the needs and considerations of developing countries. Such a balance would consist of advancing international regulatory and enforcement cooperation and promoting the adoption of high regulatory standards worldwide, while formulating meaningful technical assistance programs to strengthen the regulatory infrastructure in developing countries – prioritizing domestic regulations in order to protect people and planet from the power of Big Tech.

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