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US Reversal on Digital Trade Policy: Implications for Digital Governance

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CITI Governance - US Reversal on Digital Trade Policy: Implications for Digital Governance - Nov 15 2023

Eli Noam, CITI: ...potential policy shift of the United States when it comes to certain digital trade issues, which in turn have kind of significant implications for their countries themselves. the decision, the comments, what I'm going to call the decisions, was announced by US Trade Representative Katherine Tai on October 25th, and it raises several questions in my mind, which I hope we will discuss.

What does the decision mean? Who decided this? Third question, should such decisions of such impact about national and international digital policy be made on the trade representative level? Or it's at other levels. And fourthly, why, given the importance of this issue, or potential importance of this issue, why has there not been more of a coverage in press and media, outside of some relatively specialized type sources?

I Was looking around. I found two Reuters stories, and I found a few specialized reportings but not very much else in the leading press publications and so those are some questions that I hope the speakers would be able to shed light on and now I pass this on to Bill Drake, who is the Organizer and moderator and introducer of all this.

Take it away, Bill.

William J. Drake, CITI: Thanks, Ali, and hello, everybody. Great to have you here with us. just to put a little context on this, the United States has a very long history of promoting the free flow of information and data around the world. National policies of international institutions that reflects its kind of deep ideological orientation as well as material interests of American firms and so on.

This has been the approach followed with mass media issues for well over a century where the US has worked in international forums including more recently United Nations. Forums and specialized bodies like the International Telecommunication Union, UNESCO to promote open flows. And the same has been true with point to point communications, with communication for the 1960s.

The same has been true with point to point communications with the merger of computers and telecom, the rise of data flows. We had big negotiations that went on in the 70s into the 1980s about transnational data flows in the US and its allies promoted an open flow approach there successfully. And this approach carried over into the trade world with the rise of trade and services as a focus of global governance and creation of the World Trade Organization and the General Agreement on Trade and Services in 1996 1994.

And later with the growth of the internet internet flows of data became an issue in a variety of international trade bodies. And you had a range of bilateral and plurilateral trade deals, like the US Mexico Canada Agreement and the CPTPP, Comprehensive Trade Partnership, which the US dropped out of.

And there have been various normative frameworks adopted as well in the Group of Seven, the Group of 20, and so on. So this has been a big issue the US has been pushing for a long time, and since 2017, the principal venue for multilateral negotiations on these issues has been the joint statement initiative at Electronic Commerce in the World Trade Organization.

The so called JSI has been co facilitated by Australia, Japan, and Singapore. There the US and its partners have proposed adoption of strong binding provisions on the three big sensitive issues of cross border data flows and barriers to them forced data localization, and forced disclosure of computer source code.

And believing themselves to be working alongside a trusted partner. The US allies have expended a lot of political capital and effort trying to advance that agenda. The negotiations on these issues have been very difficult. There have been tensions between the US and Europe over privacy and how that would impact the kinds of arrangements you could adopt with China and other more autocratic countries that favor strong digital protectionism in line with their policies of cyber sovereignty.

And with the group of 77 of the Global South, especially India, South Africa, and so on, who have often used the rhetoric of, you know, digital colonialism and so on to push back and say there should be no strong trade agreement on these kinds of points. Nevertheless, 90 countries have been laboring along in these negotiations for years now, trying to get agreement on an integrated negotiating text.

in advance of the next ministerial meeting of the WTO, which will be held in Abu Dhabi in February of next year. And they've been trying to square all the circles, as you, you

could see from a leaked consolidated negotiating text in August. But it's against all this backdrop then that the United States set off shockwaves around the trade policy world in October 25, when its representative at the WTO said that in light of the right to regulate in the public interest and the need to address anti competitive behavior.

In the digital economy and the fact that the US and other countries are currently involved in internal consultations on trying to figure out their ways forward, the US was, quote, withdrawing its proposals and attributions on data flows, data localization, and source code, understanding these issues remain a priority for many others in the negotiation.

And the USTR, the US trade Representative, reiterated its support for the GSI and said, look, let's focus on what can be achieved by the end of the year and drop proposals. That have not achieved a significant amount of support. And on the US trade Representative's website, they go further and they talk about the need to create policy space, quote unquote, for national policy processes to evolve.

Policy space used to be a term used mostly in the developing world but now the US is using it, too. And in parallel with all this, the Biden administration has been backing off on its trade pillar in the Indo Pacific Economic Framework negotiations, which are meeting today in San Francisco. They've managed to agree.

The supply chain pillar you've probably seen in the press, but in the trade stuff they have backed off. So, this is a big shift in American policy, and it has set up real shockwaves, especially in Washington. On one side you have the critics of international trade agreements, who warmly welcomed the announcement.

Groups that have historically opposed digital trade agreements are critical of big corporations like Google, Amazon, Facebook, etc. including some progressive Democrats on Capitol Hill like Senator Warren in various civil society organizations and coalitions like Public Citizen, Rethink Trade, the Transatlantic Consumer Dialogue, and Our World Is Not For Sale and others have all said this is really good news, it gives us policy space to figure out good approaches towards regulating and dealing with the Big tech.

On the other side, you've had the proponents of international trade agreements who have blasted the decision. Senator Ron Wyden, who's hardly a right winger called it a win for China, plain and simple. The bipartisan co-chairs of the House Digital Trade Caucus and many other members on both sides of the aisle have criticized it, as have a wide range of industry associations, over 40 coalitions of companies.

Including tech, user industries like apparel and chemicals, and large cross industry groupings like the Chamber of Commerce have all blasted the decision and written to the leadership of the US government at the highest levels, complaining about it and asking for a reversal. Then there's like a sort of a third category of positions, which you

don't hear a lot, which is talked about, which is just the skeptics of international trade agreements who think that Basically, these agreements don't matter that much anyway, and the agreements were so light and loose that, you know, this is not a big deal that this has happened.

Adding to all that hoopla has been the fact that it's clearly a mess within the US government. We now have a reportage coming out where people from the National Security Council are saying this was not approved by us, we don't agree with it, et cetera. You have people at other agencies, the State Department, the Commerce Department of Justice pointing fingers and saying USTR didn't go through the interagency process, didn't approve this in the right way, et cetera. So we have a big mess in Washington and we have a big mess in the world where countries around the world that have been negotiating with the United States alongside it or in opposition to it are suddenly having to recalibrate, figure out what the heck's going on in these international negotiations and how do we go forward.

So to explore all that, we have a panel of leading DC Beltway people who have been very close to the international trade process and who can give us, I think, some good insights. And what's going on and how this might impact the international trade policy environment going forward. Really our focus, we want to think about how this might impact global governance and international trade negotiations.

I'm less interested in debating, going down the rabbit hole of who likes trade deals or doesn't like trade deals. It's, the question is how this is going to affect international governance. That's the focus of this webinar series. Our panel is three people, Nigel Corey, Associate Director of the Information Technology And the Innovation Foundation, Nigel is a prominent writer about the international trade policy, focusing on cross border data flows, data governance, intellectual property, and so on.

He's also a member of the United Kingdom's International Data Transfer Expert Council and he joins us from Washington. Jonathan McHale is Vice President for Digital Trade at the Computer and Communications Industry Association, where he engages with US and foreign governments in seeking to remove barriers to digital commerce through international trade rules.

Jonathan spent two decades at the Office of the Trade Representative, so he knows what's going on and the Department of State focusing in telecom and digital policy, all also joining us from D. C., and finally, Leigh Tuthill. Leigh is a visiting fellow at the University of Adelaide's Institute for International Trade in Australia, but she's based...

In the beltway as well, Lee was for three decades up until 2021, a senior analyst and active player in the international negotiations at the World Trade Organization's Secretariat in Geneva, where she was deeply involved in the negotiation Lee with the general agreement on trade and services and the agreements on telecommunications, ICTs, digital, and so on.

Eli Noam CITI: And a Columbia graduate.

William J. Drake, CITI: And a Columbia graduate, so there you go. So that shows the importance of it all. So, mechanics will be the same as they always are in this session in this seminar series. We'll do four or five rounds of tour de table on some questions that I'll be posing to the group.

And then around the top of the hour, we go to open discussion. We have a lot of... People I see on the side here who've joined us, who have views on these issues. So I'm hoping we can have a good, vibrant discussion for a half hour around all of this. So that's the plan. So let's start by setting a baseline against which to measure change, just to get everybody on the same page.

Can I ask the panelists, what was the state of play in global digital trade governance negotiations prior to the US announcement in Geneva on October 25th. How are the three big hot button issues that we've talked about, barriers to data flow, forced data localization, and mandatory source code disclosure, being dealt with in the JSI negotiations?

What was the state of play in terms of the different positions that players and the prospects prior to the American shift? Who'd like to start us?

Nigel Cory, ITIF: I'll take the first swing. So firstly, thanks Bill, Eli, and the rest of the team at Columbia for the invitation and to pull this together.

Many familiar names and faces in the crowd and obviously a very topical issue at the moment. The baseline is that the JSI has been making steady progress essentially on picking the low hanging fruit of a new JSI e commerce agreement. But... The things that are largely not controversial, yet are still foundational to trade around e signatures and authentication and such.

And I'd made good progress on that and had basically tabled that text. But we're moving then towards the more sensitive issues which are typically left to the end of negotiations. Including these ones in and around data. And while the prospects for a future agreement were still uncertain, given that these are the most sensitive issues, there was a potential path to progress.

In that the United Kingdom, to its credit, as well as other parties like Australia, Singapore and Japan, but also the EU, were basing discussions on data around a UK proposal, which would essentially... Act as a bridge between the UK EU approach to managing data, as well as the CPTPP approach. And that was the basis for constructive, good faith negotiations of whether they could, these parties could square the circle on this very tricky issue.

As they're doing that, the US sort of rolls this hand grenade into the negotiating room. Because I know that negotiators were like pushing ahead. Thinking that they could find a way to square the circle and then they would then, I suppose they were presuming that they'd be able to bring the US on board.

Because the sad fact of the matter is that USTR has not been anywhere near as proactively engaged in these negotiations as you would assume. And so these other parties, it's been left to these other parties to carry the load in terms of like, coming up with text, putting it forward, holding workshops.

Building understanding about what it means amongst a broader membership and to their surprise, as they realize that not only are they getting to the sensitive issues, but they're on the clock in that they want to try and conclude a deal in or get much closer to a final deal in advance of next year's, next February's, next ministerial meeting at the WTO the US pops this hand grenade in there and just upends the constructive work that they'd be doing, change the dynamics, essentially removing the US from the room and changing everyone's expectations of where the talks might ultimately end. And so, it's highly disruptive, to say the least. And also, I just find it, I mean, frustrating to say the least, and that...

USTR Tai had two years to develop and propose texts that, that would get at their, her and USTR's concerns about how these rules may impact, uh, hypothetical future US legislation, but had not done so. And instead of engaging on the basis of the text and trying to figure out how do you as Jonathan knows better than anyone, like, how do you craft both the rules, the commitments, with the balancing exceptions, Instead of engaging on that, they've just said, basically, we're out.

But also to make it even more confusing is that while they've declared they're out, they're still at the table. They're just not engaging on, actively on these issues. And so, as you can imagine, for other negotiators, that's highly frustrating and confusing. And it just adds further sort of, I don't know, sand into the gears or their efforts, their valiant efforts to try and get a deal over the line.

So, again, in summary, like we would have far from certain to get a deal at the JIS on data, but there was a potential path forward. There was a proposal on the table that parties were looking to try and bash into shape in a way that would be acceptable for key parties. And the US has just made what was already a challenging task exceptionally more difficult and confusing.

But anyway, I, hopefully that's a fair summary of play, Jonathan feel free to add anything I might've missed.

Eli Noam, CITI: Thanks Nigel. Jonathan, you want to go? Go ahead

Jonathan McHale, CCIA: I think I would draw the line between what's going on in the WTO and what's going on in IPEF's negotiations. And also, keep, for folks that are interested in this, look at what is announced nothing has been announced so far on the digital side in IPEF.

It might happen tomorrow or the next day. A lot of the controversy is around this very same issue in the WTO, and so I think the most charitable explanation for the retreat is that, you know, the USTR wanted to have consistency, symmetry between what they were doing in IPEF with that group of negotiators and what they were doing in the WTO.

Now what is very puzzling to me is if you look at the statement on the floor from the USTR they, I'll read it out, need to balance the right to regulate the public interest and the need to address anti-competitive behavior in the digital economy. So what does that mean? And I, for my perspective, I'm not quite sure what that means.

What we do know is that there was a hearing yesterday in the House Judicial Committee, where the top antitrust enforcer Jonathan Kanter was asked about why they were getting involved in trade negotiations, and Representative Issa held up a letter that he had that was sent from DOJ and I believe the FTC to the USTR in May expressing concerns on the competition implications of trade rules.

Now, what happened in IPEF, I believe, is they said, all right let's take a timeout and see if we can't work through this. But to Nigel's point, they've had now many months to try and figure out if there is a way to address any arguable competition related constraints that are on these rules.

For me, from my perspective, I don't see it. I don't understand what data flows has to do with a competition issue. You can sort of make the rhetorical point that, you know, data is good for big countries, companies. We don't like big companies. Anything that helps them is something that needs to be constrained.

But... these are not, you know, company specific rules, they're rules that, by design, apply not simply to tech companies, not simply to service suppliers, but to everybody, I mean, to factories, to agricultural exporters, anyone that needs data to be associated with trade that they conduct. So it is a fight on how the various agencies are, pursuing policy objectives and that there's a arguable intersection with trade, but it has not been explained.

Then the final point, I think, is if you listen to the testimony of Jonathan Kanter yesterday, when the representatives were asking him, why are you interfering in the trade space? And are you, do you really care about what happens in these foreign markets? And the answer was no, my sandbox is enforcing US competition laws and rules here in the United States. And what really doesn't make sense is that we know there's lots of action in trying to apply competition law to some of the tech companies, antitrust cases in numerous venues. But these are about US companies, and trade rules

do not constrain how the US treats a US company. They constrain how we treated a foreign country company. And maybe people are afraid that we want competition measures in a foreign market to evolve in a certain direction, but... That's up to them to decide. And the fact that the participating countries were quite eager to move in this direction and were themselves taken aback by it by the US action does point to the fact that they themselves are comfortable with that the rules do allow this so called policy space to deal with privacy, to deal with competition, to deal with security issues. And therefore, it is a puzzle as to what... Additional flexibility is required in order to have reasonable rules of the road in this space.

Eli Noam, CITI: Thanks, Jonathan. Lee based on your experience, 30 years at the WTO I assume this must seem kind of, striking given the historic role of the United States as a catalyst in international trade negotiations generally, and especially around digital and telecom and so on. How does this stuff look to you in terms of what was going on in JSI before and how this impacts?

Lee Tuthill, IIT: I would tend to agree very much with Jonathan that I'm mystified. And I also tend to agree with him that I don't see anything that interferes with competition policy in either the WTO in general or the JSI in particular. But given my, that you've Well, advertised my long stretch with the WTO, let me go back to 1998, and in fact, it was my understanding that the U.

S. was not fully behind the idea of starting an e commerce work program, and unlike a couple of countries, I thought the e commerce work program had a pretty broad mandate that could have included, you know, some adjustments to existing rules. For example, I think at the time we were thinking about, you know, what kind of annotations or elaboration we might need for the services agreement, which is What I mainly worked on and the e commerce work program, especially in the services council had some fascinating and very engaged discussions.

And when it came to the idea that we needed to think of some solutions were. They're rules that we had that weren't adequate, and how would we fix them? The program came to a halt, and I remember hearing, not just from the US, but from Japan as well, you know, perhaps it's better if we do nothing. Because we could end up with rules we didn't like that would be proposed by others, and so we're probably better off leaving things as we are, as they are.

And Japan said, well, we don't have any problems, so we don't know what we're solving. In the meantime, problems have cropped up in an environment where... Let me compare this to my experience with telecommunications rulemaking at the WTO and we did have a significant policy of what was commonly agreed to be best practice.

There was a variety of policies by a variety of governments, but I think there was an emerging best practice. I never saw that in digital trade or e commerce, which I use

interchangeably. And I think that affected very much, you know, the JSI discussions. Where is best practice? What can we all agree even in principle?

So you had this, again, the US being fairly non aggressive, except for some of its priorities, which included these data provisions, in fact, and being sort of lukewarm about everything else, but seeing, I think, and Jonathan can correct me if it's, if I'm wrong, some of its priority sections issues such as this and a couple of others we aren't discussing today, being either rejected or progressively watered down.

So you end up with a point of how valuable is this to the US, if in fact, some of its priorities aren't going to make it anyway? What are they losing by coming out of these by backing off on these and focusing on them elsewhere, perhaps? I would have thought that it would have been a continuation of its free trade area efforts in this area, but now that's even being called into question.

And I'll come back later to some issues that I think there are some fundamental misunderstandings. As to how deeply the GATS and the JSI would go into domestic regulation and restrict and tie government's hands, I don't think it would. So I would end there in saying that we'll come back to a couple of these issues.

William J. Drake, CITI: That last point that you raised, I think, is obviously an important one that we're going to have to return to because indeed the opposition on the part of any actors, governments, and also historically the sort of NGO coalition, active in trade, has been predicated on the notion that these agreements do reach deeply into domestic structures and change them for the worse.

So let's come, maybe let's come to that now. I mean, when we think about what happened, I mean, first of all, I'm curious if you guys just have a thought about what the hell happened in the first place, because it's just puzzling to me coming from outside, not being DC, how this happened when you have such a long embedded history of American policy that's being reversed here and done so in a very seemingly abrupt way.

Is this because of a domestic political shift within the Democratic Party in advance of the elections. Is this, as some people, my friend Milton Mueller, who's online with us, speculated that it had to do with sort of surging techno nationalism and the desire to emulate the Chinese model of digital protectionism?

Is it just because the USTR wanted symmetry with its approach to the Indo-Pacific Economic framework negotiations? I didn't want to get out ahead. What do we think happened here? And then I want to ask you a little bit further about policy space, the notion of policy space. So we'll take questions starting at the top of the hour.

So, could panelists come to those points? Nigel, we'll just go in order again.

Nigel Cory, ITIF: Yeah, no, I think there's a pretty clear through line that USTR Tai's approach to these issues and making this decision was clearly related to but progressive politicians like Senator Warren and others obviously amongst those certain officials in the administration like Jonathan mentioned with Jonathan Cantor from DAJ about using digital trade as a tool to attack quote unquote big tech and that, that was the overriding point, objective, here. And the fact that that it was not run through the usual interagency process is indicative of that. They essentially wanted to do an end run around that. I think to to the point that this was not part of a broader strategic reaction to, to, to either Chinese Digital policy or bit related to a strategic U. S. approach to sort of data sovereignty. I think the, that it was domestically driven, and it was explicitly attached to what other parts of the administration, but also what progressive politicians on the Hill have tried, and failed to do legislatively. And so, they're attacking digital trade in this way as a proxy, as a part of this broader ideologically driven battle in and around competition policy antitrust and big US tech firms. So, because I think what you've since seen and what Bill, you mentioned in your very apt summary of the situation is that I mean, in some regards, many... The Chinese officials in Geneva found out about this position before many parts of the Biden administration and many members of the Hill.

This was not some well coordinated, linked up coherent... Position at the same time that USTR made this decision, US Commerce officials were in San Diego as a part of their latest global cross border rules framework workshop talking about how to build trusted data flows and many other officials and state and parts of the NSC and elsewhere, who work specifically on Chinese digital policies were likewise caught off guard. And so, again, this all just points towards USTR TAI prioritizing the view of progressive politicians and policy makers in trying to basically use or undermine digital trade rules and negotiations as a proxy for their preferred but not legislative approach to competition and antitrust policy.

William J. Drake, CITI: Thanks. So, but then it's the linkage between the general approach towards GAFM and, or Big Tech, whatever, and trade is still to be somewhat puzzling in some of these cases. Let's get it, we'll get further into that. Jonathan, your thoughts? I mean, you were at USTR for 20 years, right? How the heck do you get USTR turning around and doing something like this?

I mean, I've never seen anything like it, especially without interagency coordination. That's just, it blows my mind. So. Do you have a thought about what's happening here?

Jonathan McHale, CCIA: Yeah, I mean, I basically agree with what Nigel was saying. It is a domestic debate. It's more an, almost an ideological debate on are we doing rules that benefit one disfavored uh, subsector of the economy versus doing things that arguably are more directly in line with the priorities, worker rights, etc. I think the fallacy of that approach is, again, these rules are general rules. They're not targeting specifically one subset of the economy. They're intended to be cross cutting. If you look at the WTO description and the way they've divided the rules up, this is the so called cross cutting area.

And so yes, obviously technology companies need to move data, but they are often at the service of other companies. So it's the banks that need to move the data, and yes, they use a technology company, but it's the bank, and it's the factory, and it's et cetera, the whole range of folks that need to do that.

I think what is very odd, and you started out on this, is that the long legacy of US policy in this space is being questioned. It goes back, I would say back to 1980 when in the OECD the US was the champion of trying to create privacy principles. You will see it in the revision to the OECD Privacy Principle.

Read an extract from it. This is, you know, 19, is it only five years old? Member countries should refrain from restricting transborder data flows between itself and another country where the other country substantially observes the guidelines of the OECD as put forward. And this, it ticks a couple of boxes.

It ticks an interest in linking data to privacy. We recognize that privacy concerns are a legitimate government role with respect to data, but also ticks the box with respect to free expression, where US policy has been advocating for ensuring that, particularly through the Internet, that people can communicate and views can be expressed without undue government intervention.

The incoherence of what is happening, I think is under underscored by the fact that only, I think it was last year, that the White House, you know, they published the Declaration on the Future of the Internet. One of the big premises of it was, is that you ought to have an open internet where data can move without restriction.

So, the only possible explanation is it is a narrow particular agency agenda that is basically hijacking broader US policy interests.

William J. Drake, CITI: That's quite remarkable and quite a shift for USTR. [inaudible] , and what's the other one?

Lee Tuthill, IIT: It's hard for me to say, but I can only guess at a couple of things that, again, don't make sense.

One is that the US was the leader on data flows related issues and localization related issues. In large part. Pushed by corporations who found they felt they were facing major trade restrictions around the world on their ability to do business. Well, if you're going to take a larger group of stakeholders into account, I think that at least it should be done accurately.

I mean, this, all these issues being raised is the reason just are things that The trade rules do not interfere with civil I'm reading from one of the articles that we shared civil rights and liberties, privacy, I mean, they never did interfere with them and the JSI has

added nothing that interferes with them, digital safeguards, in fact, you know, the exceptions clause was already broad enough And the JSI has an even broader exception for legitimate policy objectives, which I've never understood because you didn't need it to begin with.

So I, again, I think that it's totally domestic. And it's also, I think, let me be blunt, it's domestic in the sense that educating the stakeholders about the degree to which there are some inaccurate interpretations of what's going on in Geneva or in other trade agreements, I think is irresponsible.

On the other hand, it would only make sense to me if this whole pull out is a negotiating ploy to move people closer to what they actually wanted, which is inconsistent with what they're saying, and finally, it's extremely unfortunate in my view. And not being in the Secretariat anymore can be a little more critical to use the concept of policy space explicitly.

I mean, that has been associated by the Americans and many other governments for a long time with statements from hardline countries like, for example, South Africa and some others. And it's seen as we want Be able to have protectionism. So that was a very unfortunate phraseology here. And so not only reversal, but a resort to you know, hard line developing country concepts.

William J. Drake, CITI: Let's just probe this policy space. Think a little bit further. The CPTPP language and the [?] that was agreed by that negotiation and the kind of text that have been floated previously that we've all seen. The GSI always had these kinds of exceptions, kind of language that was drawn from the general exceptions in the GATS and so on, with regard to barriers to data flow and data localization. Saying that parties recognize all countries have their own regulatory approaches and they generally shouldn't adopt restrictions. However, and then there's a whole bunch of however's. Nothing prevents a party from adopting measures inconsistent with that general approach to achieve a, quote, legitimate public policy objective, provided it's not arbitrary or unjustifiable discrimination or disguised restriction on trade, and is not more restrictive than is required to achieve the objective.

So there is already quite a lot of wiggle, one would think, there in that language. It provides the possibility for states to say. I'm adopting restrictions on data flow. I'm adopting data localization requirements to serve a legitimate public policy interest and it's not discriminatory and it's not more than is required.

So given that language is there, some parties have always thought, well, these agreements are not that strong, it's not worth the, it's not a big deal if we don't do it. So why that, what is the argument that it is unduly constraining the scope of national action? To have this kind of language, you'd read that.

That's the bit I'm not understanding, but just real quickly on this point Nigel, do you have a thought? Yeah,

Nigel Cory, ITIF: I think just pre-empting Jonathan's, or repeating Jonathan's earlier point, is that it's confounding because it, that's exactly not clear. Like, and it's a point I've made a lot, is that Australia, Singapore, New Zealand, Japan, and others that have enacted, Similarly ambitious, constructed digital trade rules, none of them, it has not stopped any of them from enacting cyber security, privacy, competition, digital content, and other words, as long as they're simply nondiscriminatory, they're not disguised protectionism, like this is not I, to your point, at least point, like I think it's especially confusing and frustrating because these constructs of rules and exceptions are not new.

And they're generally used well, including specifically in the context of these new digital trade rules and provisions. And so, to, to Jonathan's point, like, it's just really unclear exactly how the current construct inhibits the type of laws and regulations they, they want. Because, like, I mean, it, it certainly doesn't inhibit current U. S. law. What I suspect is that the space they want is for a hypothetical future legislation, but that's not the, that's not how this is done. And so, it's confounding as well, to, to leave point in Jonathan's point, like, other countries have obviously been able to do what they feel they want to do on these other digital related issues and digital trade provisions.

That they were pushing for at the JSI have not stopped them from doing that.

William J. Drake, CITI: Yeah, it's fundamentally about non discretion. So, that's the part of it. Jonathan, do you have anything just quickly on this point? I mean, the scope of the exceptions seems to me permissive enough to encompass.

Jonathan McHale, CCIA: I am biased. I'm sure there's people in the audience who don't agree with this, but I do I certainly think the quote unquote policy space granted by the exception is sufficient.

This was the last issue in this provision to be resolved in the TPP context. So it did take a good four years for governments to come around to get comfortable with the notion that if you were going to put a restriction in, that you had to justify it and you had to show that it was necessary. And actually, let me rephrase that.

The burden's really on somebody who wants to move the data and can't to show that there is an alternative. Way of addressing the concern that meets the government's goal. So the premise is the goal is legitimate. The question is how you get there. And let me give you a practical example that short shows how.

These rules could be actually put into play in a helpful manner. When I was dealing with China issues many years ago, one of the a software company came in and complained.

They said their website was being blocked in China. They were, it was a software collaboration site.

And You know, their customers needed access. It was like a GitHub type service. Their customers needed access to the website in order to use the service that they were offering, and they were being blocked. And so I, a good civil servant, went in to the Chinese and said, you know, is there any reason why you need to block a software sharing website?

It turned out, no that obviously the Chinese had made a mistake. They had overblocked. They were probably trying to get some Uyghur website that happened to be using the same domain name. And. They actually ended up not admitting that they were wrong, but undoing it. And that's exactly the way in which one would use these rules.

If you have a legitimate issue that you're trying to address and the restriction is the only way you can do that is within your right, but someone has a right to say, look, there's another way of doing it, and by the way, you don't have to knock off my particular website to deal with something else that you're trying to do.

Lee Tuthill, IIT: I'll just only add to that, in my role for many years which was fundamentally an educational role giving sort of mini seminars or classes around the world, one of the things I think is misunderstood, that the right to regulate is one of the fundamental pillars of the WTO, of the services agreement in particular, and I think we've, we wildly confused people, for example, by having an area that, from the legal point of view, we call domestic regulation as separate from what we consider to be trade restrictions, and the trade restrictions is a much, much narrower collection of measures, which is This is what's been confusing.

There also tend to be domestic regulations because services are not regulated by tariffs, they're regulated by internal. Measures, but the whole area of domestic regulation has very minimal principles of non-discrimination and transparency. And I don't think that's too hard, but I don't think that's well understood that there's a huge universe of domestic regulatory aspects of any government that are not considered trade restrictions, and the huge burden of proof would be on a government who wants to bring evidence of that.

William J. Drake, CITI: Okay, great. Thanks, Lee. All right, look, there's a lot of things I'd like to ask, but I see a lively conversation going on in the discussion, and I see several hands up as well. So let me just ask one more question that will open it up to everybody. Looking forward, I suppose it's possible the USTR will reverse course in light of all the pressure being brought to bear on it.

But they have said, no way, we're not changing, so we'll see. But if instead the USTR stays its course how do we think this might affect the negotiations in the JSI and beyond? I mean, do we anticipate then that the JSI would simply settle for agreeing on

the most low hanging fruit, like paperless trading and e contracting and so on, declare victory, try to lock in gains, and follow a staging approach where maybe you could...

Begin discussions for progressive liberalization and the other tougher issues later? Or is it more likely that if we lock in a deal like that there's no second bites at the apple and the multilateral system gets stuck at a very low level of liberalization like the, you know, the Regional Comprehensive Economic Partnership?

Or something like that. Will we see more if everything atrophies in the multilateral level? Will we see more push for unilateral deals among the like-minded with a more complex digital spaghetti bowl of plurilateral negotiations and free trade agreements and leaving out much of the world? Many developing countries would not be able to participate in those.

How do we see this going forward if the USTR stays its course? Nigel?

Nigel Cory, ITIF: Yeah, I mean, I suspect that they will try and do an early harvest and not lose the progress they've made on basic issues, because while basic, it's still important to try and set a common floor on, on many sort of foundational elements that, that support e commerce and digital trade, and that they will put data and source code and such in the two hand basket for some subsequent agreement or negotiations, which I just don't I think it's incredibly difficult to think that they would take place in some separate vacuum and be successful. I think it'll be really hard to have a second bite of the apple.

These issues will not get any easier. To negotiate and square the circle there especially in the absence of clear leadership from the US and so, especially the fact that they're on the clock, like, one of the more confounding or frustrating parts of this is the timing. That USDR made this decision, I think to Jonathan's point, there's a direct through line to IPEF and the JSI.

But they, in the JSI context, like, the timing couldn't have been any more disruptive, like, as the folks were trying to wrap up and move to the more sensitive issues, because they're on the clock, the window of getting a broader deal done before next year's ministerial was closing, and so they really needed it.

Well, they constructive engagement for everyone to get there. And then the US, exactly when they're trying to do that, they flip the table and walk away. So, so I think yeah, I and I've made this case directly to the negotiators like, it's going to be really hard to get another. Bite of the apple on this because how can we, how, like, how can the WTO, well, how can this JSI initiative come up with a deal on e commerce that doesn't include data?

Like, it's just, it's, it seems counterfactual in a way. So, and that's, it gets extraordinarily difficult. And so what we'll see is the trend we've already seen in terms of emerging plurilateral agreements whereby those countries that recognize the importance of this will continue to push ahead in creating initiatives that they hope will attract broader support that they can then build on.

Much like the P4 initiative eventually turned into the TPP, which turned into the CPTPP, in building out a vehicle that includes both strong binding digital rules, but also mechanisms for cooperation on digital issues. Because for many of these countries, they need to have certain, certainty in market access on this to build the critical economies of scale in the digital economy.

Because they don't have that domestically. And so, in, in the context of rising restrictions around the world on data and digital trade, they recognize that they need to try and get ahead of it. And build market certainty and digital free trade for their firms to stand a chance. Because if the rising restrictions continue unabated, which will now only likely accelerate in response to UFCL's decision, those folks that, that want to provide updated new digital trade rules, like, they're challenged, they're, it just gets that much harder but even more important in many ways.

So, I think we'll see those efforts continue.

William J. Drake, CITI: Okay, so yes to Spaghetti Bowl at best, and probably no second bites. Jonathan, your thought?

Jonathan McHale, CCIA: I'd agree. You know, in negotiations you need momentum. And if one of the bigger parties pulls out you, Put that at serious risk. There are plenty of other elements that are on the table that could be wrapped up into a, into some sort of an agreement.

I think data is different in that there were such different views on it within the, in the JSI. So that the text for for better or for worse has leaked. And you can see where the different parties had laid out their positions. You've got the US china and the EU with three different positions.

It would take an awful lot to consolidate that. It's certainly possible. There's certainly a, you, one can conceive of a path that, that it gets there. But in addition, you have Nigeria that put down a provision saying this will, will not apply to developing countries. Well, you know, why would the U.S. take on an obligation when, you know, 20, 30, 40 percent of the members believe themselves within a category where the rule doesn't apply. It's all the obligations and none of the benefits. So there was a lot to sort out. I think simply removing yourself from the conversation does make it extremely difficult for this to actually take up take up any momentum again.

I mean, the way it should have happened was. They would have listened to DOJ or who the advocate was for you know, changing the text. Come up with a proposal, and that would be what one would have tabled within the WTO, not simply pulling yourself out completely and leaving what is now just a complete vacuum with many of our allies on the other side.

I mean, you've got Canada, Australia, Japan on the other side that have supported this, that now don't have the US does not have their back.

William J. Drake, CITI: Yeah, if I was a US ally, a negotiating partner, I think I'd be a little annoyed to be, for years, drawn, let's go out, march up the hill, and then the Americans go, whoop, sorry, we're not going, you guys go ahead.

So, okay Lee?

Lee Tuthill, IIT: Yeah, I might only add, Bill, that were the USTR to want to reverse this reversal, I think given the arguments they've made for doing it, it would be exceedingly hard to go back on what they've said. Given that they had seemingly agreed that they don't have policy space to do a variety of things.

So they put themselves in a box. On the other hand, if they stick with this policy, what do you, what are you left with in the JSI text? You're essentially left with the provisions that China put on the table. So you're essentially left with the Chinese draft that provisions that I always called a trade facilitation agreement plot.

A few things that perhaps some governments had hoped to get in the Trade Facilitation Agreement, but didn't get them. So it becomes a Chinese agreement, which I think is a shame because from the services point of view, there are huge issues in terms of the ability to trade and digitize products.

Nigel Cory, ITIF: Just to follow Lee's point there besides, besides Jonathan's, the right points he makes about the technical aspects of this is... The political, also the change on political perceptions Could the other parties try and push towards an outcome that includes ch, potentially includes China, but predominantly the us.

And I can tell you for a fact that for negotiators that's essentially a non-starter. So besides the technical barriers, they had to jump now on their own without the US. There's the issue of political perception in that can they sell a deal that include, potentially includes China, but not the United States.

And that's just, you put the technical and the political together here and the prospects for actually pushing ahead absent the US just gets that much harder.

William J. Drake, CITI: Thanks Nigel. I think that's an important clarification. Okay. Well, so we have a half hour for open conversation and I'd see some hands up already.

And I, as I said, I see. Lively discussion in the chat, which hopefully some of that will port over to raised hands here. Otherwise, I can try to read some questions. But let's start with folks who have had their hands up for a while. So, I see Sherry Stephenson's had her hand up for a while. Sherry, are you with us?

Sherry Stephenson, PECC: Indeed, I am. Thank you so much, Bill. I am Sherry Stephenson. I'm with the PECC, Pacific Economic Cooperation Council, and have been supporting the work of APEC for many years, including most recently on a major project on logistic services. And from this perspective I don't know, I think that the panelists have been excellent and all the comments are really perceptive, but maybe I add one more probability or possibility into the fire for the reason for this reversal, which seems so incomprehensible.

And I'm wondering if this was a big geopolitical gamble on the part of the Biden administration. And that as we've, as we know, IPEF and APEC, they tried to finalize at the same time, but the IPEF deadline came before, uh, the WTO ministerial and it coincided with this APEC week. And for the U.S. administration, IPEF has really been a top priority. For these past two years, a huge priority, perhaps more than people realize in the Asia Pacific. Working in the Asia Pacific, it is really very obvious. And that priority has even eclipsed in some ways a lot of their ambitions in APEC. And it very, it was considerably, it's under consideration that this IPEF initiative.

For the administration, it was so important that they were willing to compromise on these three major issues in order to try to get the trade pillar over the line and successfully agreed in order to announce it this week at the APEC summit and that they thought this might be the way to do so and get everybody on board.

In the end, that gamble failed. It didn't work, but I think that could be one of the explanations of why this was done so quickly. Without any interagency collaboration or consultation, without any public comment, without any of the normal regulatory process that, that the US always goes through and, you know, adheres to in, in trade agreements, and that actually goes against its, you know, legal requirements in other trade agreements, which no one has mentioned so far.

But I just want to put on the table that the US actually has very strong discipline binding in the US [?] and US Japan digital trade agreement. So now it could be in a situation where it has to enforce more liberalized requirements, rules, digital rules on digital trade. With these trading partners, then it would have in the context with other trading partners in the world, and that seems a little incomprehensible and totally a fragmented approach to...

to this area. Not, that's one of the consequences. I won't go into the others, but I have noted down several. Okay, just wanted to put that.

William J. Drake, CITI: I did note the possible links to the IPEF negotiations, but yes, absolutely. That's the thing we should pursue. Let's take two questions at a time, because we've got multiple people, and then go back to the group.

So next one, I see Milton Mueller in line. Milton?

Milton Mueller, Georgia Tech: Yeah, so, I'm trying to make sense out of the procedural aspect of this, so let me just see if I got this right. I heard Jonathan say that there was some kind of a caveat sent by the Department of Justice to the USTR in May. And it seems like he was sort of identifying that as one of the triggers of this shift.

And if I'm wrong about that, let me know. But I think, again, it looks like also there was a deliberate attempt to bypass the interagency coordination process. And it seems to me that one possible explanation of this is simply that, the US Government, the Biden administration, in particular the USTR, pushed by the anti-platform political forces in the US, are essentially saying we don't want to pursue a trade policy that would benefit the platforms. And that's fundamentally the reason for that. And that faction within the US government succeeded in kind of hijacking the trade negotiation process. So I'd like to know if that interpretation is correct.

And also, I do think that we've been having this discussion in the chat. It would be interesting to know whether this push to regulate, and I use that in scare quotes, AI, is somehow feeding into this decision, because even though I think so much of the regulatory approach to AI is really wrong headed, it might be possible that is perceived as something that would have...

Motivated them to call off the trade agreements.

William J. Drake, CITI: Okay, so basically an anti GFAM kind of explanation. All right, so, let's go back to the panel. So, we have Sherry raising the link to the IPEF negotiations going on right now and Milton on the GFAM stuff. But... Nigel?

Nigel Cory, ITIF: Yeah, no, Hi, sorry. I think in the April May period with a series of letters sent by, especially by Senator Warren et al. sort of catalyzed the response, and that progressive power pressure essentially froze talks. As soon as they came under political pressure, the US told the text that was on the table was frozen, and that they weren't tabling the remaining few bits of text that they hadn't done, and from there we quickly slid downhill from there, and they never sort of got back to doing it.

So, I don't think it was, I mean, they'll, prior to that, they were trying to figure out how to, whether they could try and square the circle, given that USTR TAI had not put

forward any other prior text on, on, on what it wanted to do on these issues but I think it, I know it quickly became apparent to other trade partners that Their commitment to this was pretty thin and quickly dissipated under progressive political pressure.

And then, that then obviously catalyzed a similar reaction at the WTO. To Milton's point given, and I'm sure Milton, you understand the broader ramifications of this as well as anyone. It points towards the lack of a comprehensive usual interagency process. They essentially did a notification and then ran and the fact that the National Security Council spokesman was ready for a question about it is indicative of that.

If you talk to people at State and Commerce, they can say that they had cert, that works, that had, many of these folks have long worked on these issues and recognize the implications, saying that they, none of them had any idea that this was coming down the pipeline. Sorry. As much as folks in the chat and elsewhere have pointed out potential connections to China and TikTok and other strategic issues I think there are obviously implications there, but as a animating motivation for this, it's, it, that, that's, it sort of comes after the fact.

We're throwing it into the wagon. After the competition antitrust wagon has already started moving downhill. And so, and so I, that's not to say that this decision will not impact those China related decisions henceforth, but I think in terms of the initial setting the starting gun going it was the domestic antitrust competition, ideological battle to attack big tech.

William J. Drake, CITI: Jonathan?

Jonathan McHale, CCIA: Nothing to add. I think that well, well summarizes it.

William J. Drake, CITI: Okay.

Lee Tuthill, IIT: We. I would agree with Sherry that it's puzzling that the US has many legally binding commitments under the digital or e commerce chapters of FTAs that it has done, that it has been very proud of. So it has obligations already that are probably stronger than what JSI was doing.

On the one hand, given domestic political issues, did, USTR decide that what they were getting in JSI wasn't really worth the fight anyway and wanted to back out because it wasn't good enough. And that's a possibility. It's fundamentally though, puts them in a self contradictory position.

To say they're backing out because they don't want them. And on the other hand, having seen, you know, what was happening to various provisions that were dear to them, feeling like it wasn't going to be enough anyway.

William J. Drake, CITI: Okay. Let's broaden out the discussion. We've got some interesting folks here. So we have Daniel Rangel from Briefing Traders, one of the progressive groups critical of the treaty agreements, and also Yik Chan Chin from China. So Daniel, go ahead.

Daniel Rangel, Rethink Trade: Thank you. Thank you for opening up the floor for a little bit of a discussion. Of course, I'm not going to be able to dispute all of the, what the other panelists have said. But I just want to touch on two points.

I think that it's important to take things into perspective about whether this decision actually is killing momentum on the negotiations. Because, as a matter of fact, last week, on November 6th, the facilitators of Australia, Singapore, and Japan, the allies of the US pushing this agenda, issued a new text on data flows that potentially gathers more support than the different positions that were, frankly, in a deadlock.

So I think that it's important to keep that thing into perspective because what we could be seeing here is something that is actually helping out to reach an outcome that has support from different parties that are participating in these talks. And I, the other issue that I wanted to touch on is related to policy space.

And I think that if the whole issue of trade rules affecting the policy space of countries were a hoax, then it will be very likely that the EU will have accepted the C-T-P-P-P text many years ago, or it will have accepted something similar with Japan. When they were negotiating their bilateral deal.

And the fact is that model has language that comes from the gut that has proven to be ineffective to promote and defend other policy objectives. The most important example there is the necessity test that basically means. That if there's an alternative to the policy that you are trying to defend that is deemed to be less trade restrictive, then it's very likely that your policy is going to be deemed incompatible with that commitment and you're going to have to change it.

So I think that the whole issue here is striking the right balance, and that's what the USTR was proposing, and I would just like to bring that into the table, because I think that it's important to invite everybody to figure out how do we get to that place in which we have the right balance, and that probably goes into also trying to fix the process in which we These agreements are made on how US trade policy is conducted, because in this way, what we have also seen is that in the past, these trade policies have been conducted through a very secretive process in which industry has a lot of access and other groups don't, and I think that's why we get this kind of view and that has them here in the US, a lot of implications for policy space and not enough safeguards for furthering other interests.

William J. Drake, CITI: Thanks, Daniel. That's really helpful. So, you know what? Actually, Chan, I'll come to you in a second, but Daniel asked so many meaty questions, I

think we should go back to the panel. So, the co-facilitators looms in, in light of the change, the EU's approach, and the general question of policy space and accepting constraints on policy space, Necessity test, and the process, the secretive process aspect, which is a perpetual problem with trade agreements that many of us are, particularly people covered for the internet environment, think is not a good idea.

So let's go back to the panel on those points. Nigel, go ahead.

Nigel Cory, ITIF: I think the point Daniel makes, one of which is that USTR Tai has had two years to run its own process to, to draft, develop, debate, and test its own preferred approach to these issues, and yet at no point has it done that.

And so, I think, I mean, the point of balance is, this is not a new issue in the context of trade talks. USTR Tai could have changed the paradigm about how DIP provisions are developed and made, and who gets a say in it and of them, but we just haven't seen it either. And so... I think that goes to the point about how this was made not in the pursuit of developing a new approach to these issues and defining.

The balance between rules and exceptions and goes more to the point that it's been, these, it's opposition is being co-opted as a part of other objectives. I can tell for a fact that the negotiators in Geneva are scrambling, were scrambling, continue to scramble to try and figure out what they can try and salvage given what the US has done on this.

And so, there's adjustment underway, but... It's, I mean, to, to Bill's earlier point, like, they're too polite to ever say it, but like, many of its closest trading partners, whether in the IPEF context or the JFI, are pissed. I just saw that they have put so much time and energy into these initiatives, into trying to work with the US and make IPEF successful, make the JSI successful, and then to be just blindsided like this.

When they had all the time in the world to develop to articulate another way, I think just, I mean, they have expended so much time on trying to make those respective initiatives successful, it's you can understand why they're pretty frustrated with where they've done, where they've ended up, and so, I think what we've seen more recently is them just trying to, still trying to figure out what they can get done, but in the absence of the U. S. and they're on the clock with the window closing, with the ministerial meeting and various elections on the horizon, like, it's it would be, I mean, Jonathan can speak better to it, but like, for them to, like, thread the needle and get something done on data, especially is extraordinarily difficult given the issues involved.

William J. Blake, CITI: Remember when Biden said America is back, when he got into power, you know, we wouldn't just walk out of international agreements anymore? Here we are again, kind of Trump like. Anyway Jonathan, go ahead.

Jonathan McHale, CCIA: Yeah, just to, I guess, to respond to the basic idea of we need policy space. That's fine as a rhetorical slogan.

The question is, what are the boundaries you're looking to? Established that gives free reign for government to do measures that, that violate, violate the rules. If you look at what the Europeans have put on the table, their policy space is privacy. Basically, what they have said is anything we do in the name of privacy is outside the scope of any any review.

Not too different than what we have typically done on national security. If you look at what China has done talk about policy space and if this is what you want, go for it. But there's no point in negotiating a rule. The Chinese proposal says. Unless otherwise prohibited under its laws and regulations, each party shall allow for cross border data.

Pure discretion on their point. What's the point of having a rule when you're granting unbounded discretion to a trade party to violate the rule? There's no point. And so this jurisprudence of allowing for a rule, but allowing a government to to challenge a violation of the rule is well is well established.

I mean, I've had this 20 years. People got comfortable in the TPP context and the question is, what is the alternative to that here? And until someone comes up with an alternative that demonstrates that, yes, you can allow for a certain level of discretion, but you're still creating enough business certainty, then you don't have any path forward.

And you know, again, what you don't want, and where there's a tipping point where things become affirmatively unhelpful is granting so much discretion through a trade rule to a foreign party that you've basically legitimized their forms of discrimination. They're off the hook and everybody has agreed, we, that's fine, you can do that, and we're not going to be able to challenge it.

So, one view and I often personally take this view, is you're better off with no rule than a rule that grants so much discretion that you're, Essentially legitimizing the very thing the rule is supposed to constrain.

William J. Drake, CITI: And since the US has gutted the dispute resolution system in the WTO, you're not going to have any kind of you wouldn't have a mechanism to be able to examine cases if somebody wanted to bring a dispute and say your claims for policy space are beyond what is necessary to achieve the objective, et cetera.

You know, what do you do? So, sorry, Lee.

Lee Tuthill, IIT: Yeah, let me tie the most recent question in with a couple of others. We had the question about is the AI executive order got something to do with it? Well, I

tend to agree with a commentary I read that said this AI executive order is too little, too late.

I might also perhaps even characterize the GSI text as it's emerging as too little, too late. And moving that in with the, because the data flows provision, as I last saw it, still had basically an exception that, That was deliberately devoid of the necessity test. Now, how that would sit with pre existing commitments in the services agreement that did have a necessity test, I don't know.

But eliminating the necessity test, I think, is dangerous because one of the points I would emphasize on what I think Dan said is that the necessity test, yes. Is there an alternative that achieves the same goal? Well, the goal itself is not questioned. The goal isn't to find an alternative that achieves a lower level of protection meaning, you know, of the policy goal.

Then it otherwise would. Well, the important thing to remember is the necessity test never questions the objective per se of the policy. It questions how you got there and is it a trade restricted way that didn't need to be done? So, you know, I think that all ties in together as some of the things I call misimpressions that lead to a situation where, you know, we thought.

That these JSI people went off and do it, did their own thing, primarily because they thought we'll get like-minded countries together in a couple years, we'll have it all nailed up. Well, it's been many years now, and it's still controversial, and things have gotten worse, because in the, in, in the gap there, more and more measures have been done, and people have been following a Chinese model, or And many of us questions perhaps about the EU model being targeting certain big companies of a certain nationality.

So you, you're left with people following models of which there are legitimate questions about how effective they are alongside, you know, trade objectives.

William J. Drake, CITI: Okay, great. And speaking of the Chinese model Yik Chan Chen is with us from China. You've been very patient. Thanks for that. Yeah. Would you like to weigh in and give us your view?

Yik Chan Chen, Beijing Normal University: Yeah. . It's Yik Chen from Beijing Normal University. And I think I have some comments, not even necessary questions. The first one is actually within the domestic trade debate discussion, we never, you know, put WTO as a focus.

I think recent year actually the main focus is the regional FTA, for example, like CPTPP and then previously WTO had a problem to enforce it is ruling because of the book by the US government, you know, in it's tribunal. So, so I'm just wondering whether the WTO is that important, to achieve like a trade agreement in the data flow because at

least from my observation within China, they didn't protect the focus of with the policy making. And so this is my first questions whether this is also the case, you know, because just like Sherry mentioned, there's other platform, for example, like CPTPP and also the APAC and the HR Pacific APAs.

So this is my first question.

Second question. I heard a lot of colleagues talk about the Chinese model. But maybe in the last month, actually, the Chinese government had a significant change of its position on the cross border flow because it released a provisional measurement which actually give a lot of the space to the inflow of data.

You know, basically they removed many the major restriction on the outflow and the inflow of data. The major reason for doing that is because they want to encourage the investment. And also the big company to invest, to enter China, because the domestic economical situation. So, for me, it's like we can see the U-turn in the Chinese side, at the Chinese side, and the U-turn at the American side, because China's become more liberal in terms of the trade agreement and the data flow, and the way the American is become, you know, kind of more restrictive in terms of, because they want to do the competition restriction of the domestic IT company. I'm not seeing a convergence between these two countries.

There's a middle ground, you know, and China is moving from left to the middle, where the American moving from the right to the middle. So that is my observation. Just want to get some feedback from the panel as well.

William J. Drake, CITI: Thank you. The prospect of Chinese American convergence and trade is a tantalizing one and interesting.

I did read the Google translation of the Chinese announcement. I was really kind of unclear though exactly how much change there was. In terms of what categories of data would now be allowed or would be, have to get approval, etc. Do you have clarity on that? Exactly how?

Yik Chan Chen, Beijing Normal University: Well, I also want to add that because I talked to the people involved in the consultation of this measurement.

Most of them are so shocked, even people doing this, you know, was consulted to making this measurement, was really shocked because they saw the previous version of this measurement and that is more conservative. So, even by that standard, they was not really happy about how liberal the previous measurement was.

And actually, when they see the latest version, open published version, It's more liberal than the previous one, you know, so a lot of people actually were shocked. But we

understand why is that, as many news report, news region agents, already commented on that, mainly because of the, going to the boost the foreign investment, and also because of the economical concern.

And the other thing is that, because of that, negotiate, negotiating the CPTPP as well.

William J. Drake, CITI: No change on the data localization and stuff, but on the. Dataflow stuff, it seems there's some liberalization. All right, thank you, we'll take Nigel.

Nigel Cory, ITIF: Yeah, Yik Chan, it's good to see you. Thanks for your question. It's ironic that the week the U. S. withdraws from talking on data and digital trade in Geneva and in IPEF, China actually takes measures to potentially liberalize it's that approach. And as I've long characterized it in the United States and many countries around the world, data flows are the norms and restrictions are the rare exceptions.

China is the inverse to that, but that recent policy changes and economic conditions have made them realize that they need to take a better approach in trying to make their data export review requirements a little easier. It could be, it could signal a shift, but it's a matter of how it works in practice.

I've heard from firms that inspections and such they've had are still pretty punitive and very intrusive in what their, what data they do or don't allow, and sometimes it's very petty, like HR data or payments data, and so, But it will be, it was an interesting signal. Sam Sachs from New America and I have a piece specifically on the implications with China in regards to the USTR's decision, hopefully should be published on Lawfare today, the long and short of it is that... the China card gets played a lot in DC, but in this regard, with USTR's decision it's clearly justified. So, but you raise the question of like, is there a world where China moves towards a more pragmatic middle that means it, it stands a chance of abiding or joining the CPTPP?

I'm still doubtful at this stage, maybe after 12 months of clear implementation of this new change, maybe that puts it on a stronger footing. But the fact that China did it is another really interesting part of the changing dynamic of this issue globally. As China recognizes that for its own domestic economic performance, for its foreign investment, for its own Chinese global firms that it needs to have a, strike a better balance in this.

But it also gets to a point that Lee and Jonathan, the new maid, is like why we need safeguard language in and around exceptions is because broad self-judging exceptions, whether for privacy in Europe or national security in China, means that the rules will be made essentially worthless and What we've seen thus far, and maybe we're seeing some moderation of this, although I'm skeptical, is that in China, they equate national security with cyber security with regime security.

And if that's the case, then it's very hard to provide clear, consistent rules and market access in and around data and digital services. And so, hopefully...

Maybe we'll see China moderate its approach and provide clearer access. But we'll just have to wait and see. But, the point you make is a funny one in that USTR's vision of data sovereignty moves towards Chinese cyber sovereignty.

Which is like just a sentence or a concept or construct that I just would have never expected.

William J. Drake, CITI: Thanks. We're running towards the end of time and I want to just try and get a couple of the comments from the side here. For the dialogue into the conversation before we go. But just real briefly, Jonathan and Lee, if you have anything on this point.

Jonathan McHale, CCIA: Just that it does seem obvious that it is in China's interest with all their very successful companies operating outside of China that they do need to facilitate data flows and a burdensome review mechanism for data is obviously an impediment. So it does make sense that they would over time try and calibrate it. I don't think for foreign companies it solves the problem of the broad discretion that is employed, in the Chinese system for deciding how you comply with a rule or not. I mean it's not really a rule of law country and in the US if you have a regulation you can go to court, you can have it reviewed as being within the scope of the agency's discretion.

That doesn't exist in China and so the sense of always being potentially under the gun of an authority is a real one. And the result is simply that, that people self-censor not too different than how it works in Europe with respect to privacy. It's just so much trouble that you just localize your data rather than run the risk of having some authority be able to come in and audit you or whatever.

But it does make sense to the extent that anything becomes the clearer and more rules based in China, that's all for the good.

William J. Drake, CITI: I have yet to hear somebody explain to me why data localization is a great thing for human rights activists and... Others from GAFAM. But anyway, okay just Lee, real quick.

Lee Tuthill, IIT: You know, I'll only add and combine it with a concluding remark. I think it's true that if you look at the Doha services negotiations, China and even India had become proactive, substantive, realizing the importance of services to their economies. And become more of a champion of the round than perhaps even some of the major players such as the

U. S. And in that sense, I think if the JSI were to founder and you're left with the GATS, I think people have not examined and has dismissed how much of the GATS covers data flows as the provision of services and it would actually get you quite a ways if you look at the dispute settlement cases the half a dozen or so that have been in services, most of them have been on a digitally delivered product be it telecom or be it the downloadable music or the networked financial services.

And so you have a history of the GATS being able to deal with these issues. The one exception that I'll close with is platforms. In order to make a good case for trade restrictions where they may exist, you have to pretty much have a commitment and a schedule of commitments. And nobody can tell you where platforms may exist and they probably don't have commitments.

So you're left with nothing but Most favored nation treatment, targeting a particular country unfairly as opposed to the way you treat other countries. So there's work there that should have been done at the technical level at my services people to try to figure out where these commitments are and if the Doha Round hadn't died, how to make some commitments on these kinds of things.

William J. Drake, CITI: There's no question the existing GATS rules already apply to a lot of this, but a lot of countries just... Insists that they, they don't in some measure. I mean that the debates about like computer and business services commitments They, you know, got countries to say that has nothing to do with any of the stuff we're talking about platforms localization, etc So, you know, that's a big issue I just wanted to close by flagging that there were a number of comments being made on the side which people didn't raise their hand, but Hildegund asked about the relationship to the Executive order on AI.

Daniel raised a number of interesting points. JJ Bryson mentioned Andrew Bradford's book on digital empires, the three different models you know, Europe China, America and so on. Anyways, have a look. You can also save the chat if you want. But so, Alejandro Pisanty asked how this impacts traditional Internet governance, which is certainly a big question, obviously.

This relates to internet fragmentation and data flows and so on. But, okay, we have run out of time. So, I want to thank the panelists for their excellent presentations, and everybody for their interventions. As I said, the next at the outset, the next meeting in this series will be on Thursday, December 14th, Topic TBD.

I want to thank Jason Buckweitz, the Executive Director of CITI, for pulling this together. And I turn back over to Eli Noam, Director, to close us out. Eli. Thank you.

Eli Noam, CITI: Thank you, Bill. Thank you, Lee, Jonathan, Nigel, and Jason. Great event. I've learned a lot. But for all of the questions that I raised at the beginning, there was one question that I still kind of have in my mind, and that is...

We clearly have identified here that this is an issue that is a really interesting story, a trade story, a global story, an inside the beltway story, a diplomatic story, a tech policy story, an economic policy story everything. And yet, why isn't it a story in the Washington Post, in the Wall Street Journal, in the New York Times?

It seems to be a reversal of a very traditional, very important American policy, and yet, just a second here, and yet we don't hear anything about it. We know about it, and I hope you hear me, because my screen has gotten weird, but why is it not a story? And so, with that final question in our minds, I'd like to say goodbye to you.

Thank you very much again, in particular, Bill, for organizing it. Goodbye from New York. Thank you, everybody.