

January 13, 2017

Dear Ambassador Froman,

I write to update you on ways in which the Digital Trade Working Group (DTWG) that you constituted last July<sup>1</sup> is accomplishing its mission of increasing intra-agency coordination to identify and combat digital trade barriers.

This Administration's commitment to ensuring that the rules of the global trading system evolve in ways that support growth in the U.S. digital economy is a function of the extent to which Internet-enabled products and services are transforming our economy and global trade flows. As home to 11 of the 15 largest Internet-related businesses in the world, the United States enjoys a huge comparative advantage when it comes to the digital economy. We have obtained that advantage because of the quality of our Internet infrastructure, the degree to which our business climate encourages innovation, the ability of our universities and technology companies to attract top talent, and the access of our companies to efficient capital markets. As a result, the United States remains the largest player in the Internet supply ecosystem, and the Internet Association estimates that in 2016, the U.S. digital economy contributed US\$1 trillion to U.S. GDP.

The growth of data networks and Internet-enabled technologies is transforming the competitiveness of every sector of the U.S. economy. For example, advances in the Internet of Things—sometimes referred to as the Industrial Internet—are unleashing significant productivity gains for our manufacturers and making American products even more competitive through related, Internet-enabled services.

The U.S. digital economy and the data networks on which it is based are also transforming the global economy by establishing an open platform for delivering information-intensive products and services instantly. The extent to which the U.S. digital economy will continue to expand depends in no small measure on the ability of our companies to access foreign markets.

Twenty years ago, the 20 million U.S. Internet users made up 61 percent of a global community of 35 million Internet users. Today, 286 million U.S. Internet users account for less than 10 percent of the 3.4 billion connected people worldwide. Therefore, persuading our trading partners to adopt trade laws that facilitate access to their digital and digitally-enabled markets will play a critical role in strengthening this sector of the U.S. economy.

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<sup>1</sup> See <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2016/july/ambassador-froman-announces-new>.

Unfortunately, in the past few years, many of our trading partners have adopted policies that limit our companies' ability to transfer their data freely, access remote data networks, and consequently, to scale to their fullest capacity. Some have adopted localization policies that undermine the efficiency of a truly global network. Some have adopted policies that may have been designed to protect privacy or national security, but that have had the effect of unreasonably restricting access to U.S. technology products and services in their domestic markets. In most of these cases, less trade-restrictive measures that could have met their objectives were available. Finally, in the interest of limiting the democratizing effects of information, some countries have sought to balkanize the Internet by inappropriately blocking access to certain kinds of specific content, or, in some cases, entire classes of services.

Given this reality, in the Bipartisan Congressional Trade Priorities and Accountability Act of 2015, Congress directed U.S. trade negotiators to ensure that bilateral, regional, and multilateral trade rules are updated so that governments refrain from implementing trade-related measures that impede digital trade, restrict data flows, or require the local storage or processing of data. Congress also directed U.S. negotiators to obtain commitments ensuring that when governments adopt domestic measures that adversely impact digital trade and data flows, they do so in a manner that is non-discriminatory, transparent, consistent with an open market environment, and least restrictive on trade.

The DTWG is a concrete manifestation of the Administration's efforts to accomplish these objectives. This letter will summarize the DTWG's efforts to identify, catalogue, and combat existing and emerging digital trade barriers; its efforts to build upon prior work to highlight digital trade barriers in the 2016 National Trade Estimate Report on Foreign Trade Barriers (NTE)<sup>2</sup>; its strategy for promoting a comprehensive set of digital trade rules in various fora; and its effort to facilitate your request to the U.S. International Trade Commission (ITC) to build on its prior work to identify the major trade barriers that U.S. digital industries face in key foreign markets.

### **Cataloging Digital Trade Barriers**

The DTWG is USTR's effort to institute a rapid response team for combatting digital trade barriers. As you know, it is comprised of representatives from the Office of Services and Investment, Innovation and Intellectual Property, Industry, WTO and Multilateral Affairs, the General Counsel, as well as several regional offices. The focus of its efforts has been working with stakeholders and experts within the interagency to fully identify and catalogue existing and emerging barriers to digital trade across the globe. In each of its monthly meetings, the DTWG discussed a specific category of policies that our trading partners have proposed or embraced that had disrupted, or had the potential to disrupt, digital trade.

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<sup>2</sup> See <https://ustr.gov/sites/default/files/2016-NTE-Report-FINAL.pdf> .

## *Digital Single Market Strategy Copyright Reforms*

On September 14, 2016, as part of its Digital Single Market (DSM) strategy, the European Commission (Commission) published a package of proposals to update and reform the rules related to copyright in the digital environment. These proposals included a new press publishers' right; a rule allowing the reopening of contractual agreements between creators and producers and publishers; a limited exception to copyright for text and data mining; new copyright clearance mechanisms for online transmissions of broadcasts; and an obligation on online platforms that provide access to large amounts of content uploaded by their users to cooperate with rights holders and take affirmative steps to control infringement.

In anticipation of this proposal, the USTR team and I met with interested stakeholders and Commission officials in July 2016 to discuss the DSM's potential to remove barriers to innovative and disruptive entrepreneurial businesses, while ensuring that the incentives for innovation and creativity remain and rights are respected. We stressed the interest of the United States in the Commission's consultations on copyright reform and recommended that the Commission carefully consider the impact of any new proposals on all stakeholders.

Since the Commission published its copyright reform proposals in September, USTR has actively participated in the National Security Council (NSC)-led U.S. government examination of the DSM proposals related to copyright protection, and members of the DTWG have worked together to engage with interagency counterparts, including NSC and the U.S. Patent and Trademark Office (PTO), to better understand the substance and potential trade implications of various aspects of the proposal and related initiatives. While there are other aspects of the DSM that are likely to impact digital trade between the United States and EU in the coming months and years, the copyright proposal has been a key focus of the DTWG's efforts on DSM to date because that proposal is currently the most fully developed.

## *Data Flow and Localization Barriers*

Cloud computing provides distributed access to computer processing and is utilized by an increasing percentage of the economy to more efficiently manage the processing and storage of data and the hosting and updating of software applications. Barriers to the use of cloud computing generally either (a) restrict the free flow of data and/or (b) require use of a server physically located in the territory of the market to be served. In some cases, investment restrictions prevent U.S. entities from providing such services.

Although some restrictions are explicitly intended to protect local industry, most restrictions on the free flow of data are intended to address public policy goals such as privacy, cybersecurity, law enforcement, or national security. Many government officials also continue to believe that requirements to locate or use servers within their territories help achieve these policy goals, as well as ensure jurisdiction over and access to information for regulatory and enforcement purposes.

Drawing from publicly available research, stakeholder submissions, and previous U.S. Government publications, the DTWG compiled a worldwide catalogue of data flow and localization barriers which it has shared with digital trade experts at U.S. embassies in the process of preparing the 2017 NTE. In its initial sessions, the DTWG has discussed alternative methods of accomplishing the public policy goals of privacy and cybersecurity protection through various industry practices. It has also carefully examined the rules USTR and the interagency have developed to prevent our trading partners from adopting measures restricting flows and requiring data localization, subject to limited exceptions designed to ensure that governments can accomplish their legitimate regulatory objectives.

### *Intermediary Liability*

Interactive computer services provide the platform for much of the communication and commerce that occurs over the Internet. In the United States and some other jurisdictions, legitimate platforms generally may not be held liable for a range of non-IP harms if their services are used by third parties to create and share certain kinds of information later determined to be illegal. This principle is encapsulated in Section 230 of the Communications Decency Act. This legal certainty is critical to the business models of many Internet companies, and has supported much of the growth of the digital economy by allowing platforms to store, process, and transmit information without having to monitor what passes through their systems. Where governments have considered or passed measures that impose inappropriate liability on Internet platforms for third party information, including without appropriate safeguards in place, the resulting destabilization of business expectations merits attention from a trade perspective to ensure that market access and foreign investment is not inappropriately curtailed.

USTR's digital trade experts developed a package of rules in the context of the Trade in Services Agreement (TiSA) negotiations in an effort to provide that legal certainty to our interactive computer services providers. USTR's digital trade experts provided the DTWG with a detailed history concerning the evolution of this proposal and updated its members on its efforts to secure support for this proposal with various TiSA partners.

### *Internet-Enabled Services*

Internet-enabled services often disrupt established business models, challenging incumbents while offering additional benefits to consumers. Such services include communication services such as messaging and voice, streaming video services, and others. The DTWG discussed an emerging, troubling trend of real and threatened regulatory barriers to the provision of Internet-enabled services. Such barriers have included limitations or absolute bans to the provision of Internet-enabled services in certain markets, as well as inappropriate and misplaced application of old regulatory regimes to new business models.

The DTWG also explored how a newer class of peer-to-peer platforms—collectively dubbed the “sharing economy”—has encountered similar challenges. These platforms connect individual service providers to consumers in a previously untapped market; in so doing, they often challenge entire industries such as local transport and lodging. The tools incumbents use to push back against these new entrants often have their basis in legitimate regulatory goals such as

consumer protection. The DTWG examined how excessive or poorly targeted regulation can chill innovation, deter investment, and constrain the economic value generated by these innovative services.

## **2017 NTE**

USTR is planning to reorganize the 2017 NTE to reflect the DTWG’s efforts to catalogue existing and emerging digital trade barriers.

Members of the DTWG shared its catalogue of digital trade barriers with embassy representatives from the relevant bureaus at the Departments of State and Commerce to ensure that their submissions for the 2017 NTE accurately identified all relevant digital trade barriers. DTWG members also instructed interagency colleagues to include a dedicated section that focuses on barriers to digital trade in every country chapter in the NTE. USTR is planning to organize these sections into five main categories of issues, including (1) data localization; (2) technology; (3) digital products; (4) Internet services; and (5) other digital trade issues. This approach will help to ensure that the NTE presents a complete and fulsome discussion of the issues confronting the digital economy and the ongoing work that USTR is engaged in to address existing and emerging barriers.

In 2016, USTR released, for the first time, a Digital Trade Fact Sheet that identified some of the most egregious digital barriers identified in the NTE.<sup>3</sup> In conjunction with the 2017 NTE, USTR is planning to issue an expanded fact sheet that will offer a more fulsome accounting of the identified barriers.

## **Promoting Digital Trade Rules**

As you know, in the Trans Pacific Partnership Agreement (TPP) we negotiated the highest-standard and most comprehensive combination of pioneering disciplines to promote an Internet-enabled economy in any trade agreement to date. These disciplines—which we refer to as our “Digital 2 Dozen”—can be found in a number of the agreement’s chapters, including its telecommunications, e-commerce, investment, technical barriers to trade (TBT), and intellectual property chapters. Given that this package of disciplines was the result of five years of intensive negotiations with a specific set of trading partners, the DTWG has begun to devise a strategy for encouraging the adoption of these rules in other negotiations, as well as bilateral, plurilateral, and multilateral contexts. Below is a summary of efforts by DTWG members to promote adoption of our digital trade rules around the globe.

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<sup>3</sup> See <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2016/march/fact-sheet-key-barriers-digital-trade>.

- **TPP:** Following finalization of the TPP text, USTR focused on tracking developments in key TPP markets where compliance with new provisions (*e.g.*, data localization, encryption) will require amendments to existing measures or vigilance against newly proposed measures that would be inconsistent. Markets of particular focus included Japan, Vietnam, and Malaysia.
- **TiSA:** In TiSA, the United States proposed an ambitious set of proposals for an Electronic Commerce annex, including commitments to allow for the free flow of data and open access to the Internet and to prohibit the imposition of localization requirements for data or computing facilities. The United States also proposed that TiSA permanently bar customs duties on digital products as well as prohibit other discriminatory practices regarding digital products. Finally, as described above, the United States proposed a recognition of the importance of Interactive Computing services to the digital economy and commitments not to impose civil liability on interactive computing services for content created by the users of such services.
- **TTIP:** To address barriers to digital trade in the Trans-Atlantic Trade and Investment Partnership (T-TIP), the United States proposed an ambitious set of proposals for a chapter on Electronic Commerce, including commitments to allow for the free flow of data and open access to the Internet, and to prohibit the imposition of localization requirements for data or computing facilities. The United States also proposed that T-TIP permanently bar customs duties on digital products as well as prohibit other discriminatory practices regarding digital products.
- **WTO:** Following the 2015 WTO Ministerial in Nairobi, a number of WTO Members have demonstrated interest in revitalizing the Work Programme in Electronic Commerce. The United States contributed a non-paper released in July 2016, which highlighted trade measures relating to data flows, digital products, and other areas that could help define future negotiated outcomes in this space. USTR continues to engage other interested Members to define a productive path forward for the WTO's work on digital trade.
- **G20:** Under China's presidency in 2016, the G20 created a new task force on the digital economy, in which USTR participated actively to ensure productive outcomes on digital trade-related issues. Germany plans to continue this work under its 2017 presidency, and USTR will remain engaged.
- **G7:** In 2016, the G7 convened the first Information and Communications Technology ministerial in 20 years, which provided an opportunity for discussion and joint statements on issues including data flows, data localization, and the protection of source code. USTR will remain involved in work-streams related to digital trade as the G7 is guided by Italy in 2017.

- **APEC:** In Asia-Pacific Economic Cooperation (APEC) forum, the United States has advanced work on facilitating digital trade through a series of trade policy dialogues that brought industry experts, academics, and policy makers together to examine the opportunities and challenges presented by digital trade. These dialogues will continue in 2017 and may lead to the creation of best practices or principles that help facilitate, rather than impede, digital trade. In addition, the United States led an initiative in APEC to create a permanent moratorium on customs duties on electronically transmitted content and will seek to expand participation in that initiative in 2017.
- **ASEAN:** Efforts with the Association of Southeast Asian Nations (ASEAN) have focused on continued engagement on US-proposed, non-binding ICT Trade Principles, which reflect and incorporate many of TPP digital trade outcomes; as well as a week-long training session for a broad range of ASEAN officials, hosted by Singapore, for extensive briefings and discussions on how to expand digital trade opportunities through policies and rules based on TPP.
- **JCCT:** With regard to China, DTWG members worked to combat digital trade barriers that limit opportunities for U.S. ICT goods and services providers. Given widespread concerns about China's measures on data localization, encryption, cybersecurity, regulation of digital content, and limited digital services market access, in the U.S.-China Joint Commission on Commerce and Trade (JCCT) and other bilateral fora, USTR pressed China to ensure that its ICT regulations not impose nationality-based conditions or restrictions, that its cybersecurity measures are narrow in scope and take into account international norms, and that it expand services market access for digital industry sectors.

### **ITC Report Referral**

To support its efforts to catalogue existing and emerging digital trade barriers and quantify the economic effects of digital barriers on U.S. companies in certain markets, the DTWG has worked with the U.S. International Trade Commission (ITC) to determine how best to update the ITC's two recent reports on digital trade. Based on your request, the ITC will conduct three investigations, the first based on a review of literature and other available information, and the following two based on a survey of U.S. firms in selected industries that are particularly involved in digital trade.

The first investigation will describe recent developments in the markets for business-to-business (B2B) and business-to-consumer (B2C) digital technologies and digital services, as well as the regulatory and policy measures currently in force that impact those markets.

The second investigation will provide a qualitative, and, to the extent possible, quantitative analysis of measures in key foreign markets (identified in the first report) that affect the ability of U.S. firms to develop and/or supply B2B digital services and products abroad.

The third investigation will provide qualitative, and to the extent possible, quantitative analysis of measures in key foreign markets (identified in the first report) that affect the ability of U.S. firms to develop and/or supply B2C digital products and services abroad.

The ITC has indicated that it will complete the reports in August 2017, October 2018, and March 2019 respectively.

## **Conclusion**

Given the importance that key Congressional and private-sector stakeholders have placed on eliminating digital trade barriers, the DTWG has engaged in an extensive outreach strategy. This engagement has complemented regular engagement by DTWG members on digital trade issues with Congressional, industry, and civil society stakeholders.

After you announced the creation of the group last summer, members of the DTWG briefed interested Congressional staff on the group's organizational structure, mission, and provisional agenda.

On September 30, 2016, senior members of the DTWG and I briefed interested private-sector stakeholders on the same issues at a widely attended gathering hosted by the U.S. Council for International Business and the U.S. Chamber of Commerce. We engaged extensively with stakeholders to call their attention to the role that the NTE can play in identifying and combatting digital trade barriers. As a result of these efforts, USTR received a greater number of submissions relevant to digital trade than in years past and a more comprehensive assessment of the issues by commenters.

Finally, on January 12, 2017, I hosted a second briefing to update interested private sector and Congressional stakeholders on the DTWG's work thus far. We invited stakeholders to share their assessment of the DTWG's activities to date and their recommendations for future priorities around digital trade.

Stakeholders suggested that we examine further how data analytics are transforming traditional industries like agriculture; efforts by trading partners to force U.S. companies to transfer propriety algorithms; the use of tax measures as disguised restrictions on trade; the impact of block chain technologies on the debate about government access to encrypted technologies, among other items. Members of the DTWG are continuing their engagement with a wide variety of stakeholders and Congressional representatives as a means of ensuring USTR remains well-informed and engaged on current and emerging issues that impact the digital economy.

Since its inception, the DTWG has benefited from considerable stakeholder input and the dedicated efforts of USTR's talented team of career professionals. We believe the success of USTR's efforts to combat digital trade barriers and open opportunities for the digital economy, American innovators, companies and workers will depend in no small measure on this kind of focused, continued engagement.

Sincerely,

Ambassador Robert W. Holleyman  
Deputy U.S. Trade Representative