

Big Tech’s “*Digital Trade*” Trojan Horse Strategy

Workers’ Rights, Privacy, Safety and Civil Rights Are Threatened While Monopoly Abuses Are Protected — and It Has Nothing to Do with “Trade”

Big Tech interests are attempting to use trade negotiating venues to lock in binding international rules that limit governments from regulating online platforms in the public interest and from fighting corporate concentration and monopoly power. These interests seek to quickly establish international agreements that quietly undermine regulatory efforts in Congress and U.S. agencies. To obscure this, they have misbranded their attack against the very notion of digital governance as “e-commerce” or “digital trade” policy initiatives.

This is a multi-front effort that includes what is formally called the World Trade Organization (WTO) “Joint Statement Initiative on E-Commerce” (JSI-EComm) negotiations now underway in Geneva among 80-plus countries, a plurilateral Pacific Rim “Digital Economic Partnership Agreement” (DEPA) and various bilateral negotiations. The Big Tech strategy replicates pharmaceutical firms’ 1990s maneuver of hijacking “free trade” agreements and inserting provisions that require signatory countries to provide the corporations extended monopoly protections and limit policies that lower drug prices.

The use of the trade frame as a Trojan Horse device also has arisen in domestic legislation. The spring 2021 Senate “China package” included changes to the “Section 301” trade enforcement tool to designate other nations’ digital governance initiatives as “illegal trade barriers.” The bill required U.S. officials to prioritize elimination of such policies, including by investigating and annually publishing a global “hit list” and threatening sanctions against such policies. The Senate bill also conditioned developing nations’ Generalized System of Preferences trade benefits on elimination of digital governance rules.

Neither the international negotiations nor domestic legislation target the real problems with trade in goods purchased online. This includes major consumer safety and inspection problems, tax and tariff evasion, and transshipment and other forms of trade cheating. If the “digital trade” ploy succeeds, Big Tech interests could weaken existing policies worldwide and stop future U.S. policies that constrain digital entities’ monopolistic abuses and anti-competitive market power, that protect privacy and individual rights over personal data, that fight algorithm discrimination, that hold platforms liable for dangerous products and violent incitement, and that protect gig workers’ labor rights.

Once informed about the threat, policymakers and organizations that may disagree on *what*

the best digital governance rules should be all tend to oppose locking in any such rules in trade agreements. One reason is that any changes typically require consensus among all signatory countries. This makes trade agreements unsuitable for setting rules on a sector that is constantly changing as new products and technologies are launched. It is an especially terrible idea for the United States, which is only now trying to establish its own domestic digital regulation policies. Indeed, as U.S. policymakers and the public have become aware of the threats posed by online mega-platforms to a fair and sustainable economy and livelihoods as well as the principle and practice of democracy, the tide has begun to turn against the digital giants here. The U.S. Congress and agencies are now starting to develop policies to counter the mega-platforms' broad power over our society and economy. The "digital trade" agenda – and indeed the few completed pacts – are explicitly designed to stop those efforts with terms that:

- ***Promote further consolidation of corporate power and protect Big Tech monopolies by banning domestic policies that place limits on size or services offered or that require break-ups.*** As corporations exert increasing control over important social functions, governments must be able to combat anti-competitive practices, place limits upon corporate mergers and break up monopolies where warranted. But the "digital trade" terms being pushed by tech firms include provisions similar to those Wall Street firms inserted into past trade pacts that directly forbid countries from establishing or maintaining policies that limit an entity's size, limit the range of services offered by an entity, limit the legal structures under which they may be required to operate, or otherwise restrict the regulation of or break-up of monopolies. These terms have nothing to do with trade. In the pacts, they are labeled as "market access" rules. In really, these terms are anti anti-trust measures.
- ***Hurt working people by designating gig workers' labor rights and other public interest safeguards as illegal trade barriers that must be eliminated.*** The "digital trade" framework reinforces the Original Sin of the "digital economy." That is the notion that leading players in transportation, hospitality, retail, education, healthcare and other industries that provide services online are altogether different than their brick-and-mortar counterparts and that domestic policies that generally apply to protect the rights of workers and consumers do not apply to them. Thus, "digital trade" rules make illegal "trade barriers" out of requirements that large ride-sharing companies meet driver hours-of-service-rules or contribute to drivers' social security, or requirements that buildings of short stay guest units booked online must meet worker and consumer safety rules. One trick is to use trade concepts, such as "non-discrimination." A common provision forbids domestic digital policies that may have a "discriminatory effect." That captures neutral policies that may have a larger impact on firms that dominate a market. An example is the Korean law to end anti-competitive App Store practices. It is similar to U.S. House and Senate proposals with bipartisan support. But Apple and Google are pushing the U.S. trade officials to attack the Korean law as "discriminatory" because it will affect them more than other businesses based on their monopoly practices. Similarly, labor and other public interest policies are characterized as forbidden limits on "market access" if the right to operate is conditioned on meeting such laws. The Wyden "China" bill included both of these devices and also labeled domestic policies that must be met as a condition for

obtaining operating permissions as a form of forbidden censorship. This approach designates the government that shuts down a platform for refusing to meet labor law the violator, while making the online company that is violating domestic labor law a communications platform a victim of “censorship.” This is not a hypothetical concern. Already, Uber has launched an attack under the U.S.-Colombia Free Trade Agreement demanding compensation for being required to register as a transportation company in Colombia and comply with applicable labor laws.

- ***Undermine investigation of discriminatory source code and algorithms, intrusive surveillance practices and violent incitement online through “trade secrets” protections.*** Every-day decisions made by artificial intelligence components of online platforms affect which individuals and communities access public and private services ranging from home loans to job postings to medical treatments — enabling a sort of high-tech redlining. Governments are likewise increasingly turning to private corporations for aid with “predictive policing” and other surveillance, law enforcement and security functions. “Digital trade” pact terms that require governments to provide trade secrets protection for code and algorithms would limit governments to accessing such information only to instances of *known* violations of law. Congressional committees, scholars and public investigators would be barred from reviewing code and related data to identify racist, sexist and other practices deserving of scrutiny, criticism and correction. To add insult to injury, some pacts with “digital trade” rules require governments to enact liability shields for online firms that allow them to evade responsibility for discriminatory conduct, online racial incitement, and other civil rights violations.
- ***Undermine consumer privacy and data security by prohibiting limits on data flows or location of computing facilities.*** Peoples’ every move on the internet and via cell phone is increasingly tracked, stored, bought and sold — as are interactions with the growing “internet of things.” Many people may not even be aware of this nor have a feasible way to opt out. Trade pacts should not restrict governments from acting on the public’s behalf in establishing rules regarding under what conditions individuals’ personal data may be collected, where it can be processed or transmitted, and how or where it is stored. Yet provisions that guarantee the platforms “free flow” of data without constraint with respect to where data is processed, stored or transmitted are a core aspect of the Big Tech “digital trade” platform. The European Union’s opposition to these requirements is a major fight in the WTO-adjacent E-Commerce deal. To date U.S. trade officials in Geneva continue to insist on these terms, with support from countries that already are bound to such rules in the DEPA and Trans-Pacific Partnership (TPP), such as Australia, Singapore and Chile.
- ***Shield Big Tech firms from corporate accountability via overly broad content liability waivers.*** How to address the ways in which certain online business practices, algorithms and moderation stoke racial and ethnic violence and contribute to other anti-social behavior is a hotly debated topic. While solutions may not yet be widely agreed upon, what is absolutely true is that this rapidly evolving area of public policy must not be restrained via trade agreements. Further, policies such as Section 230 of the Communications Decency Act, which was created to protect free speech online, have

been stretched to allow massive corporations to evade liability for dangerous and deadly goods sold online. Using trade pacts to require countries to enact policies that insulate online sale platforms from product liability is unacceptable. Yet even as the U.S. Congress grapples with whether Section 230 should be altered and how, U.S. trade negotiators have worked to export the policy by obliging other countries to provide liability shields to online entities.

Unfortunately, the push for such rules is not only from the platforms themselves. Various interests at the Biden National Security Council (NSC) and State Department are trying to undermine the Biden administration's domestic policies on competition and anti-trust and worker-centered trade policy by pushing the "digital trade" agenda. They claim that a "digital trade" agreement with Pacific Rim nations somehow would counter Chinese influence and build U.S. power by "setting the rules." They also see a Pacific Rim "digital trade" deal as a pathway to wangle the United States back into the TPP. For instance, a July 21, 2021 *Wall Street Journal* article featured the lead NSC staff for Asia, Kurt Campbell, claiming that foreign policy-oriented U.S. government agencies favored a digital trade deal based on the TPP to counter China's growing power. Beyond the absurdity that the U.S. government agreeing to constraints on digital governance somehow would serve as an effective China foreign policy tool, the piece featured NSC officials taking shots at the U.S. Trade Representative's (USTR) office for blocking this agenda because it undermines the Biden administration's domestic policy goals and its pro-worker approach to trade.

To the extent most policymakers or press or civil society or small business representatives have heard of "digital trade," it is the context of the corporate sales pitch. This includes that "digital trade" deals are about limiting damaging "trade barriers," or are about setting "U.S. rules" so China cannot call the shots, or are a means to help small- and medium-sized businesses reach more potential customers through the internet. Many U.S. policymakers leading legislative efforts to regulate or break up the Big Tech giants and the outside interests most engaged in those efforts were not aware of the threats posed for their domestic policy goals by the "digital trade" agenda. However, if this stealthy strategy is not exposed and derailed, congressional and agency efforts effectively could be entirely gutted through "digital trade" obligations that have nothing to do with trade, but everything to do with Big Tech's goal of evading oversight and accountability so as to maintain their current, destructive mode of operation.

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