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**Transcript of TPI Event:
What are the Implications of USTR's Changing Position on Digital Free Trade?**

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Scott Wallsten: Thank you all for joining us for this important conversation. Recently, the Office of the U.S. Trade Representative announced a big change in its approach to digital trade, data flows, data localization, and the intricacies of source code protection. While the U.S. has historically promoted free trade in the digital space, USTR effectively says it no longer will.

One key implication is that under USTR's guidance, the U.S. would no longer oppose data localization rules. These rules affect an enormous part of the economy. Definitions of digital data flows can differ, but according to the UN, in 2022 international trade in digitally delivered services were about 4 trillion dollars, and exports from the U.S. alone were about 650 billion dollars.

The stated rationale for this change is to give the government policy space, which seems to me a desire to rethink digital rules without having to worry about international commitments. The move is controversial even within the party. Senator Elizabeth Warren's office praised the change as necessary to regulate big tech. Senator Wyden said the move primarily helped China and other authoritarian regimes.

We've got a great panel of experts here today to discuss the nuances of these policy changes, their history, their broader implications, and the path forward in an increasingly digital global market. Let me very briefly introduce the panelists. In alphabetical order, we have Claude Barfield, a senior fellow at the American Enterprise Institute, who studies international trade policy, WTO, intellectual property, and science and technology policy. Ed Grasser is vice president and director for trade and global markets at the Progressive Policy Institute, where he focuses on trade policy and economics. He recently returned to PPI after serving as Assistant U.S. Trade Representative. Xiaomeng Lu is a senior analyst at the Eurasia Group, where she focuses on the interactions of emerging technologies with geopolitics, market dynamics, and regulatory norms.

Thank you all for joining us. Before we jump in, I'd just like to remind the audience that you should submit questions as we go using the Q&A button at the bottom of your screen. I'll try to work them into the conversation rather than just waiting until the end, although at the end there will hopefully be time for Q&A.

So let's get started, and we'll start with you, Claude. Tell us some of what happened and give us some of the contextual background.

Claude Barfield: For at least a decade, the digital trade policy has been kind of on the frontier, if you will. This is all very brief, and there may be some smaller pieces that I'm skipping over. The first time that you really see it was with the Trans-Pacific Partnership agreement where there was an e-commerce chapter, and it had language relating to data localization, free flow of data. I don't think it had source code language, but someone could correct me if I'm wrong. That was accepted by the nations in the TPP, which included not just developed, but some developing countries like Vietnam, for instance.

We pulled out, and under Japanese leadership, the other nations went on to negotiate and agree to the Comprehensive and Progressive Trans-Pacific Partnership, CPTPP, which I think had the same language. It probably wasn't as strict under Japanese stewardship with the United States out. Then in the US-Canada-Mexico Agreement of 2018, you had even stronger language, and I think that is where it was solidified as US trade policy, which is interesting in the Trump administration. So, you had about the Obama Administration, then a Republican administration, and now in the Biden administration. It was never clear, it didn't really come to the fore just in terms of things I've researched and written about.

It was always true that Catherine Tai, the US Trade Representative, had strong ties to the progressive wing of the Democratic party, and jumping ahead, I think that's really something of what we see in this. There were negotiations and smaller trade agreements around Asia that incorporated some of the same language, trilaterals, bilaterals, and the United States was, at least in the World Trade Organization negotiations on digital trade, continuing the broad policies that you got through all up through the USMCA.

And then last week, as you said, we can talk about the background here and what happened, and who said what and who did what. There was an announcement by Inside US Trade, a trade publication, that the United States was pulling out of those negotiations, the part that had to do with free trade flow, data flows, data localization, and source codes. It was said later that they were not pulling out of the entire negotiation on digital trade, but it wasn't clear when they first said it.

I'll leave it there and come back with some comments. You've already mentioned it certainly took Congress by surprise, and I think members of Congress from both parties assumed that US policy, as adopted through the USMCA by Congressional authority, was the policy of the United States and should not change without more conferring and agreement. It just kind of came out of nowhere. Whether the USTR claims that it briefed Congress on this, in my own case, that just doesn't seem credible, that anybody on the hill knew that we were going to make the statement as boldly as it did. They may have danced around the issue, but I don't think they ever said anything that gave any idea to the staff and the Congressmen and Senators that we were about to make that move.

Ed Gresser: I have some speculation. There are a couple of others I'd like to fill in, and it would also be useful to give some primary source quotes. One on the economic scale of these issues, as you mentioned, there's \$4 trillion in digitally deliverable services, and the US has about a sixth or fifth of that. So it's a significant economic issue. But that is only one piece of digital trade. A lot of sophisticated manufactured goods also rely on data transfer. For example, if you're selling a car, you're going to be transmitting information about software upgrades, servicing needs, and warnings about potential accidents. These issues also come up in agricultural machinery and medical equipment. There's a lot of manufacturing trade that is intricately interlaced with digital data. In terms of policy, as Claude mentioned, we have the US-Mexico-Canada agreement in law, which includes similar, though not as elaborate, features of the U.S.-Korea trade agreement. And there's also a U.S.-Japan digital agreement. So we have several things that are in law, and one that's in the bilateral agreement. The typical language of that to look at data flows: "No party

shall prohibit or restrict the cross-border transfer of information, including personal information by electronic means, if this activity is for the conduct of the business of a covered person."

"Nothing in this article shall prevent a party from adopting or maintaining measures inconsistent with paragraph one on the prohibition that's necessary to achieve legitimate public policy objectives, provided that measure is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade, and does not impose restrictions on the transfer of information greater than necessary to achieve the objective."

So then, the language that's in law is: countries in an agreement with us dealing with these issues, putting us itself should have a presumption for free flows of data across borders. There is a clear exception for public policy regulation and law enforcement. And that also shows up in data localization and source code.

What the U.S. Trade representative said, it's a three-sentence paragraph: "Many countries, including us, are examining their approach to data and source code and the impact of trade rules in areas in order to provide enough policy space for those debates to unfold. The U.S. is moved to support the proposals that might prejudice or hinder those domestic policy considerations."

The JSI continue to be an important initiative, and the U.S. intends to remain an active participant in those talks. So the statement is saying there may be something in things like the USMCA. That say, data flow is a good thing ought to be permitted. But there are reasons for regulation or law enforcement that would permit to forbid it or block it or limit it.

Something about that formulation is under debate, but it is not at all clear to me that Congress was dissatisfied with this, wanted to pull it out. Nor am I really familiar with any in Congress that deals with digital regulation that's inconsistent with that feature of the agreement. So it's kind of mysterious. What is the concern here? What are the debates and the policy spaces that USTR is referring to? And when would you need an exception to digital data flow rights that is not related to a legitimate public policy objective? Those are things that are mysterious; they're clouded and they don't. The U.S. Chair statement doesn't go into them, and we're kind of left to wonder what they are and what they're referring to, and that is, I think, reasonably caught a lot of uncertainty. And concern about this announcement.

Xiaomeng Lu: Yeah, maybe, Scott, if you don't mind, I can jump in on what happened and why, and also touch on a few points that Cloud and Bob mentioned in the introduction session. I think, in terms of what happened, I don't know exactly how the policy deliberation process worked in this case. But it's pretty clear that industry consultation didn't happen. They didn't get any opinion from any trade associations or companies that have been involved in the policymaking process of data-related agenda for many, many years, if not decades. And that I think is one process misstep that has infuriated many trade groups in this town. Basically, everyone is sending a letter or a set of comments, protesting they are being excluded from this process because USTR, before Katherine Tai, was a pro-industry agency among U.S. trade agencies, and even, you can say, among the federal government. They are at the forefront of doing negotiations on behalf of U.S. commercial interests, and they work very closely with these trade groups representing commercial interests. That they shut down the communication completely this time,

which is a big shock to everyone, is a big change from the way they have been behaving for a long time.

Typically, USTR should have sought White House opinion before they make big policy changes like that. It didn't sound like it happened this time, because last week there were two inter-agency meetings convened by the White House, participated by USTR, State Department, National Security Council, to address this process gap. They should have this inter-agency coordination before they go into WTO. But now the damage is already done. I think the inter-agency process that happened last week is sort of a way to find potential options to do damage control. I don't know how effective that will be, but the meetings, from what I heard, were quite contentious, given that USTR made this big statement.

That they think is a way to standardize their approach to the digital chapter of APEC, which they postponed the negotiation over the summer. Given a few Congressional letters pressuring USTR not to do anything that will curtail the space for domestic digital policy debate. So as a result of that, they

postponed the digital chapter negotiation of APEC a few months ago, and they think what they did last week is just standardizing their position across the board, across trade negotiation tables. But I think, from the industry perspective.

Xiaomeng Lu: This is a posture change, as there's a difference between pausing ongoing trade and negotiation and withdrawing from another one. And that's very likely the latter is very likely to lead to the clouds. For at least a major step back off the WTO E-commerce negotiation, I think, from a process perspective, that's two points I want to make. And then, in terms of why you look at constituency groups' reaction to this development. Democratic Senator Elizabeth Warren of Massachusetts reacted immediately with applause and USTR's effort. She said, users, rejecting efforts by big tech lobbyists who use trade deals to evade regulation. She also claimed that the digital chapter and negotiation are also in line with this, and she thinks this is a good step forward. I think that represents certain anti-big-tech groups' voice on this matter. And then in addition to that, you also see Coalition for Prosperous America, a group representing companies and labor unions that make or grow things exclusively in the US, welcome this change. They put their statement on the website; it's very clear that they're very anti-trade. They don't see any benefit of free trade policies and believe that the freedom to move data out of foreign countries that store in the US means that foreign authorities will get some trade concessions from the US. In return, they argue that no matter what that pro-trade compromises are, they would cause more jobs than data localization, like globalization, can ever create in the US. They don't know what's a trade-off data localization concessions in the US, but they're very confident that's not good for labor representatives. So let me follow up on that. There's lots of threads to pull on here with what everybody said but

Scott Wallsten: We invited somebody from Senator Warren's office and USTR, and they were not able to attend but so let me ask a question that somebody in that camp might say in response to what you're saying. Shame! You said that industry groups were really upset and they weren't included. Isn't it possible that somebody who thinks this is a good idea would say, well, that's part of the point that they've had too much influence?

Xiaomeng Lu: Yes, theoretically, I see that. That's a perspective. If you mean to exclude these groups, then you are not giving them a chance to weigh in. But still, I think this is not a normal process to make US trade policy. That's why we see those interagency groups expressing concerns between NSC and State Department. Everyone is pointing to USTR and say, did you really think this was, what are the unintended consequences given by the Administration just put out their landmark executive order on AI. I heard at a White House meeting last week, there are some other agencies raising the points that this will have an impact on AI. The US and China are in this competition for data and for AI, and without having data flow back and forth, exchange cross-border US will lose the opportunity to expand their pool of data that can increase the diversity and minimize bias of the AI system the US is trying to build along with Western allies, and that will undermine US competitiveness in the race of AI against China. At least, that was the argument put forward in protests to USTR.

Claude Barfield: Yeah. But to go back to Scott's Point, and I agree with the point you made, but it's one thing to say that the business should have the dominant influence, or they will be dispositive, but it's another just to confer with them and let them know. So I mean, that was really where the and that were seemingly one of the failures. The other is the one that was just mentioned, and that is we don't know maybe others know more than I do, but we don't know whether there was any interagency process that doesn't seem to have been any. It seemed to have caught people by surprise, but there is a kind of CYA (cover your ass). Nobody in the Administration is actually stepping forward to say that somebody at the White House or Commerce Department, or wherever to say that this was something that was, we think, was a mistake, or even if you didn't go that far, we were not, we were not ourselves consulted by this. I mean, without going too far. But when I wrote about this a few days ago, my headline was about, you know, woke dominates suddenly tested triumph in digital trade. I don't usually use the word woke very often, because I think it's just awfully pejorative, but the language the background is, as was mentioned before, looks like something that was written by Public Citizen or the AFL-CIO. And in the context of the fact that the United States had gone in a different direction, if you're going to change, you've got to give somebody a heads up, and as I keep coming back to the USTR has got itself in a bind here, in effect they're not saying that Wyatt lied, but they're saying that he's he was at least at a minimum uninformed. that they had told his staff, at any rate, or the staff of the Ways and Means committee, both of which all, all of which, whom? Which deny this, that this was coming. So it it's a strange cock up in all directions, it seems to me?

Scott Wallsten: So let's talk more about process on it because it's really interesting how this happened. But also going back to the implications of what it means. Sorry to take the conversation back a couple of steps, but, Ed, you pointed out that it will have large effects on other sectors of the economy. It's not just a platform thing. It's not just big tech.

Ed Gresser: Digital data flow and source code and data localization is similar to rules of customs. If you have to publish import for manifests and forms, and you have to do standardized and impartial regulation. That is of great interest to people who manage ports and air carriers and maritime companies. But it's mainly interesting to people who want to move goods back and forth. And that's kind of what the data flow thing is to me that you know it is a way of giving a default that if you're doing legitimate business, if you're an online shopper, you move data back and forth. Governments have the right to patrol this for law enforcement and so forth. But the

presumption is that you're allowed to do it. And yes, there are platforms interested, but they're not by any means the only or dominant interest in this.

Scott Wallsten: It, even though this is couched as something different about digital trade than other types of trade, all the rationales so far and these answers that you give make it sound like it's exactly the same. I mean, we're talking about protectionism and the same political interests that don't like trade generally. I mean is that what's going on?

Ed Gresser: It doesn't pretty much from what I've seen, there isn't really a proposal to limit inflows of data or of services. It's more linked to a kind of misty concern about regulatory rights. And the rationale isn't explained. There are very clear regulatory exceptions in USMCA, in the Japan agreement, I assume in the WTO proposals. And then there's a statement that we need policy space for something that presumably might not be covered by this regulatory exception. But I think there's a big burden on the administration. Say what that is. What is your concern here? What do you have in mind? It is also, I would note, significantly different from the Declaration for the future of the Internet that's on the White House website that talks about getting the benefits of data flow and trusted ways. And you know, encouraging growth and competition online and so forth. So there's a lot of questions here that are raised by this statement, and nothing in a statement that really gives you a sense of what the concern is, or what direction the administration may be thinking about taking policy.

Claude Barfield: Well, the other thing is to not to get into the weeds, for those of us who do trade on a daily, hourly basis. But the impact of the fact that if you look again, I want to go back to the statements of people who oppose this. The Elizabeth Warren, Public Citizen, the AFL-CIO take, as a matter of fact, as an article of faith, that the Digital trade negotiations are really a way of bowing to big tech. They have identified this with the so-called neo-Brandeisian approach that somehow you would. This is where it ends up in competition policy and with the fact that big tech needs to be reined in. Now we can, as we should, and we have been, go into this in details in terms of the trade policy nuances that we know. But the larger picture is that those who oppose this have been very public about it, and it was part again of Warren's statement when she reacted to it. It's a little odd to me again. I don't have any idea how this came about or worked out. She was right off the mark. She certainly may. If she didn't know previously, she certainly knew right away, and it was Ways and Means who seemed to have been caught by surprise and didn't really react immediately, as did Warren.

Scott Wallsten: I mean, that would make it consistent with certain other parts of the Administration's approach to Big Tech, though even if it is different from their supposed approach to trade and the Internet in general. Right?

Xiaomeng Lu: Are you talking about the FTC, Scott? I hate to say I kind of feel like there's some sort of parallel between what's going on at the practical level at FTC and at USCR. To be this most pro-trade agency. But you know, in recent months, the agency's posture has changed pretty dramatically. You could say that's a U-turn at a certain level. And people's morale is relatively low these days, and you have multiple US PR people left the agency and they were not able to fill those positions. From a capacity perspective, I think there's a little bit of a gap to feel. I think in some ways it's not a function... maybe malfunction is a better description than barely functioning agency to the extent you'll see similar things at FTC. Their professional staff don't

agree with the philosophy of the head of the agency, and I think their work is in a very difficult place as well.

Scott Wallsten: We're getting some questions that I want to start integrating in. But before we do, Senator Wyden said that this mostly benefits China, and I know he was being descriptive. But, Xiaomeng, you study China and China's approach to technology. How is this kind of rule similar or not? To what China did admit? I can't ask you to explain what Senator Wyden meant. But you know what? What's behind that? What truth might there be?

Xiaomeng Lu: Yeah, I think that's a... I'm still thinking this one through. But if you look at China's position on data flow for the past 8 years or so in their cybersecurity law, they lay out their data localization principle, which is in direct contrast with the back then traditional US policy of pro-cross border data flow, and they have modified their rules and changed more of their regulations. And finally, I think last year, they rolled out their data localization regulation. They ask every company that transfers data across China a certain amount when they reach a certain threshold to report every one of their data transfer scenarios, whether you're a hotel, your automobile manufacturer, your cloud company. And for some of those companies, it's almost mission impossible to lay out all of their scenarios, report them, and make sure they can comply with the rule. So in the past 3 months or so, China actually modified their practice to be more friendly to data flow, telling them that unless you are told by the government that you are moving important data across the border, you are not important data from a national security perspective, and you can do your normal thing and just go ahead and keep your business running as usual. That's a big caveat to their traditional data localization principles, which is still, I think, runs counter to what the US have been proposing as a CPTPP or DPA type of trade association. And I think this is almost ironic that when China is moderating their position, turning a page, the US, which used to be spearheading this effort, is taking a very awkward step back. And as a consequence of that, a lot of people have argued what China would do at the WTO e-commerce negotiation table, and even regarding their application for CPTPP and DPI. Those are very complicated, geopolitically complicated questions. But people are thinking like even India has posed the question that whether the US's decision is going to spark a worldwide reassessment of national e-commerce policy. I'll just stop here, right, because we berated them for doing it and has actually made a pretty significant change to be more pro data flow. And now that the US are turning their back on it, India said, "Hey, what do you expect me to do now?"

Ed Gresser: One of the things that Wyden's comments are pointing at, and also those of his Republican counterpart, is that this is a very contested world. China's had a very strong commitment to Internet sovereignty, rights to surveillance, rights to block data flows. The US and its and like-minded countries, you know, Japan and Australia, in a lot of ways, European countries have been arguing for a different approach, and that is laid out in the declaration that the White House has promoted, such as promote our work, to realize the benefits of data, free flow with trust, protect privacy, personal data, confidentiality of electronic communications, supported rules-based international trade, and so forth.

And, you know, if there's a perception that the US is withdrawing from these positions, that will have a kind of demoralizing effect on countries that have, you know, been willing to stand up to Chinese pressure a bit. And so, I'm you know what I think. What Wyden is saying is that this is likely to have international consequences. Even if the US is explaining it as well, we need to take

a pause and look at some domestic debates. There will be pretty significant international repercussions.

Claude Barfield: I think that's dead right. What people will remember is the United States announced that it was withdrawing from the e-commerce negotiations at WTO. We're not going to go anywhere for the reason we've touched on with China and others, but the announcement itself signals a big change, as Ed just mentioned, and so people will remember that rather than the nuanced details underneath it.

Scott Wallsten: To me it seems like we are on a steady slope towards a more mercantilist world. It started under Trump, but the Biden administration has continued many of those policies with the Inflation Reduction Act, and now this. Do you think this is consistent with the general direction we're going, or is it an aberration that maybe we will see? I mean that there's still hope of more free trade, at least among allied countries.

Ed Gresser: Well, I would say two things. One, it depends a bit on who one is listening to in the Administration. The National Security Council said, you know, we don't think trade is at the core of international economics. The Treasury Department has quite a different view; they're trying hard to emphasize support for open markets and diversification of sourcing. USTR sometimes has an argument that we're looking for a more inclusive and worker-centric approach. So there is a lot of different emphasis in the Administration's rhetoric. At the same time, they're putting a lot of money and a lot of work into satellites, port efficiency, and infrastructure, and trade tends to grow in part because of government policy, but also in part because physical infrastructure makes it cheaper and easier. And it's too early to say what the next 10 years are going to look like. It may be that government policies become more restrictive, or maybe the governments think they're becoming more restrictive, but their investment in port and air and maritime and high-tech stuff actually makes it a little bit more liberal.

Claude Barfield: I agree with Ed that I'm reluctant to use the sweeping term mercantilism. It is certainly true, however, that in terms of trade policy the Biden administration is an extension, as others have said, of Trump policy. Biden is very upfront about America first kinds of things, and that these are American jobs. Now there are leaks all over the place, I understand, in the Inflation Reduction Act and others, but certainly the rhetoric, if not mercantilist, at least is not for free trade if you look back at the Obama administration, the Bush administration, or Clinton. It's not the same rhetoric, it's not the same mindset.

There's one other point I'd like to make. It's going to be interesting to me to see how this works out in terms of trade policy and Congressional-Executive relations. Both Democrats and Republicans have been very restive under what started under Trump with executive agreements, as if they were the same as trade agreements that don't go to Congress, and it's been increased under Biden. And we've got something coming up that will be able to see the Administration, and we don't know in terms of the IPF what the trade, where there will be anything on the trade pillar and the other pillars may not be directly affected here in terms of Congressional and executive relations, but the Congress has warned Biden and others. It's not just Republicans; they have warned the Administration not to go forward with new executive agreements that don't bring in to have Congress having some say. The Congress has been wishy-washy about this, but the interesting thing for me is that Wyden's statement is so bold in terms of his reaction, he's

going to get an egg on his face if he doesn't really move to force the Administration to take into account or even control not just consult. The administration always talks about consulting, but then they go ahead. Then they actually don't say this, but the inference is that they will consult, but then they're going to do this on their own, so it'll be interesting to see how this plays out now, given the events that relate to digital trade and other things.

Xiaomeng Lu: My two sentences that I will go back to the interagency discussion mentioned earlier, because when the US here made this statement last week, at the same time, the leaders of G7 countries reaffirmed their support for cross-border data flow. They recognize that data localization measures impose unnecessary costs on small and medium-sized enterprises and heighten cybersecurity risks. A member of the group also reiterated our commitment to enable digital trade and facilitate data free flow with trust. And that's a different US government agency participating in that type of G7 dialog, and their position is definitely not consistent with what USTR said. Maybe USTR is a bottleneck right now, maybe in the trade policy realm, we hit a little bit of a roadblock, but there are other channels of global collaboration. For example, the Commerce Department is still engaging through APEC, which will have their summit next week in San Francisco. They call it CBPR, the Cross-Border Privacy Framework, and that's another mechanism to facilitate cross-border data flow. I have a little bit of hope that other agencies other than USTR can do some of these efforts to counteract the recent developments we saw last week.

Scott Wallsten: So, another topic I want to talk about is national security. Whether that has any merit as part of this discussion. But before we do, I want to stay on this institutional question. What should USTR's role be? And is this proposal, the statement that they've made, consistent with the way USTR has historically operated? Or is it different without saying whether it's, you know, bad or good? How does it sort of fit with USTR's role?

Ed Gresser: Well, without saying whether it's better or good, the USTR according to the 1974 Trade Act, is the coordinating body for trade policy and is the President's chief trade policy advisor and spokesperson. They have some ability to decide to do things and not to do other things. They are the head of a 21 agency organization called the Trade Policy Staff Committee, the same policy review group that is supposed to decide policy through an interagency process which USTR leads. So it's not an agency that by law and practice has the first and last say, it is sort of a leading group. If they decide not to do something, it's not outside the historic role they've played.

Scott Wallsten: So people think of USTR's role as at least in part to advocate for US firms abroad, is that part of its at least informal purpose?

Ed Gresser: I would say not. Advocating for US firms specifically is much more the job of the Commerce Department and the State Department. They are in charge of export promotion and also the Department of Agriculture and the Treasury Department. USTR is much smaller, they do not have a lot of overseas staff and are not really able to do that sort of advocacy work. They typically are supposed to concentrate on negotiations and legal matters and WTO work.

Claude Barfield: But I would say, I agree with that, but I would say that they certainly have a role in ensuring that US firms are not discriminated against, or that there are rules that actually

hurt US firms, whether on their face or even in subtle ways. That's a different thing from promoting big tech or any other particular firm in the manufacturing sector or service sector.

Ed Gresser: That's right. They're supposed to be trying to create an international environment in which US firms have opportunities and aren't discriminated against.

Scott Wallsten: Let's talk about national security for a minute. Last year, Senator Wyden introduced the Protecting Americans Data from Foreign Surveillance Act. That bill would enact export controls, stopping or limiting the transfer offshore of certain personal data of American citizens when such a transfer would threaten US national security under the language of the bill. The US would have to defend this policy as necessary to fulfill a policy objective, which includes proving that there are no less restrictive alternatives to bans on data transfers. Can you think of a less trade-restrictive alternative to protect national security than blocking bulk data going to foreign nations? And if so, is there a conflict between those proposals and domestic legislative proposals? Before that, by saying, you know, is national security something that goes into this kind of trade conversation?

Xiaomeng Lu: I will say, the U.S. needs a federal privacy law. That's the first ideal tool to address this type of problem. I think last year we were one vote short of passing Federal level privacy legislation, and we see the downside of not having a U.S. privacy framework in many global policy discussion forums. For example, back in March and April, there were questions about TikTok's influence in the U.S. The election is coming. What type of political meddling can we expect from the Chinese Government? Even though TikTok is a Chinese owned platform, what type of content are they going to push to everyone? Given they have a lot of users' personal information, is that a national security question or not? If it is, how do we build some guardrails around those personal data national security concerns? I think a privacy law will be a comprehensive answer to that. Not only for TikTok but for other platforms like X or Meta or other popular social media. They need this type of legislation to set up the rules of the game, generally speaking. And don't blame the absence of free trade for data security concern, you know, pass a law first.

Ed Gresser: Was it as a really personal example, I believe it was 8 or 9 years ago when the Chinese Intelligence Service was able to find its way into the Office of Personnel Management records and extract security forms and personal background information of a lot of American government officials, including myself. So that was a big movement of data out of the U.S. to another country. That was a security breach. The U.S. Government has every right, and, in fact, an obligation, to try to prevent those sorts of things. That is not at all inconsistent with having a general view that legal commerce and lawful shopping are fine. There are some things that are threatening to national security. If we have a policy of trying to stop and detect disinformation, I think that's a positive thing. But you know you need some limiting principle. Not all movement of data is a security issue. The more you focus on the things that are really dangerous, the more effective you'll probably be.

Claude Barfield: Right. That's a good point about the data breach. My data is in there, too. That was clearly the Chinese, and we really do try to get in each other's data, whether or not there, you've got open information. Ultimately, as some people in Congress think, it is ultimately a security issue to have all this information about young people and others going into the Chinese

Government, even though it's not directly related to the OPM and others. And the United States, by the way, we have the most highly organized methods of doing that to the Chinese and to the Russians and others who we worry about.

Scott Wallsten: That also has nothing to do with data localization, right? It was because OPM had terrible security protocols. So it may be a lesson in the dangers of overly localized data. Right? Good point, yeah. So, I want to make sure that we address the source code review part. I saw something about the source code part, and I do want to talk about that because I don't understand it, either. I hope somebody else does. But before we get to that, we've talked there's been a lot of talk about various trade deals, the trade agreements that currently exist. Where are we right now? I mean, there's the USMCA, so digital trade is, you know, the free trade between Mexico, Canada, and the U.S. And whatever the USTR says doesn't change that. How does this announcement fit into the current trade agreements? And if you are a company that relies on digital transfers, what do you do right now? What do you think? What rules should you be following? And what should you be preparing for?

Xiaomeng Lu: I will say, throw your weight behind CPTPP. I think the UK is the latest country to join that comprehensive digital framework that sets a very high standard for cross-border data flow, and even the US has withdrawn from the trade agreement between Japan, Australia. They carry the flag forward, and it has been gaining momentum. In the Asia Pacific Theater, a lot of the more developed digital economies like Singapore, South Korea, they are all doing their own bilateral and regional free trade agreement that has a digital component that benchmarks to the CPTPP language across border data flow. I think that's the most helpful spots to start with, and I have the most hope for them to keep going and carry this useful policy practice forward.

Scott Wallsten: Another related question. I'll read it and then add another part to it. Some have said that USTR's decision would lead to American data going to Chinese servers, how would withdrawing support from a rule that would bind the US to guarantee unfettered data transfers to participant countries, including China, facilitate data going to China. Wouldn't that have the opposite effect? The related question, or the broader question is, what would this change mean for where companies want to keep their data?

Ed Gresser: At the moment, it's very hard to say because we don't really know what policy might come out of this. It's hard to see why this would lead to more data going to China or less. The US is not participating in further policy development on these topics for the time being. So I think people should be slow to reach conclusions about what this means until the Administration explains its thinking a bit more. One quick note on the source code question, you can read in chapter 19 of the USMCA, Article 16 is the source code piece. It's quite similar to the data localization and data flow provisions with slightly different wording.

Xiaomeng Lu: Yeah, I'm reading this question again. I agree with that. The jury is still out on this one; we don't know where US policy will land, and even if it ends up a place that's closer to the USTR position last week, I can't imagine why this would lead to more American data going to Chinese servers.

Scott Wallsten: But it will lead to more American data going to servers in Japan or countries that are in the TPP?

Xiaomeng Lu: That I think is a more possible scenario to talk about. If companies lean towards data localization policy, let's say Vietnam or Indonesia or India roll back their recent policy change and decide to mandate big tech, big cloud companies, you are all required to build a data center domestically. Then I think it's more likely that foreign user's data will be more likely to be stored locally in their country. For US data, it's still hard to say.

Scott Wallsten: We're almost out of time. Does anybody want to make any predictions about what will happen? If you're wrong, we'll just delete it from the recording.

Claude Barfield: I don't really know because we're in a limbo administration. It drops something out publicly, and then part of the USTR drops something, and we don't know. We haven't heard anything from the rest of the Administration, and the USTR is only saying that it conferred with Congress, so we don't really know whether this has what this would mean internally. I think clearly it reverberates in terms of other countries, and things have changed, maybe in the last 5, 6 years, that countries have moved to restrict data one way or the other. An administration that really wanted to go forward with the kind of language in the USMCA would encounter difficulties. But we have kind of thrown up our hands, at least to the world for the moment, and said that we're not even going to try.

Xiaomeng Lu: Maybe I would say, near term I'm pessimistic, long term a little bit more optimistic. Near term pessimistic is, I think, now the US has withdrawn from the JSI WTO e-commerce negotiation. It's hard to see Japan, Korea, or Australia, Singapore, moving that negotiation forward by themselves. I feel like that track of negotiation will slowly wind down and lose its life. But long term I'm somewhat optimistic that there will be a little bit of self-correction in US data policies. Then if the next administration comes into the White House next year, whether it's Biden's second term or someone else, I hope the next USTR will be taking a more traditional role and approach to these issues than Katherine Tai is doing right now.

Scott Wallsten: In the even more near term, what's the discussion going to be like at APEC about this?

Ed Gresser: Probably kind of puzzled. I don't think many foreign governments really understand what the US is trying

to do or why.

Xiaomeng Lu: Yeah, I agree. I'm heading to Bangkok next week for the APEC meeting, and I think the US delegates will have a hard time explaining this sudden change of policy position to our allies.

Scott Wallsten: Well, with that, we're out of time. Thanks to everybody for participating. Thanks to our panelists for the great discussion, and we hope to see you all soon.