

Article

# Trade Linkages or Disconnects? Labor Rights and Data Privacy in US Digital Trade Policy

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## Abstract

The ever-expanding regulatory scope of “new generation” trade agreements has created new linkages, and thus, new spheres of political conflicts opposing advocates of trade liberalization and free trade critics seeking to make globalization more socially responsible. Scholars have provided different explanations to understand the determining factors behind attempts to re-embed trade, but little attention has been given to the persistence of “trade disconnects”—as opposed to trade linkages—between economic issues and social or environmental externalities that, at the domestic level, can hardly be dissociated. This article proposes to analyze the dynamics and factors of what might be described as persistent disconnects or enduring “disembeddedness” in US trade policy-making. To do so, it examines US digital trade policy and its mixed social record by comparing two issues: labor rights and data privacy. This article builds upon recent scholarship on deliberative forms of exclusion in trade policy-making to track the hidden dynamics of “non-decision-making.” It demonstrates that discursive, institutional, inter-scalar, and countermobilizing processes have restricted the terms of political participation and perpetuated a disconnect between digital trade and labor rights, by contrast with the growing trade linkages with data privacy.

## Keywords

data privacy; digital labor; digital platforms; digital trade policy; gig economy; labor standards; trade linkages; US trade policy; workers’ rights

## Issue

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## 1. Introduction

The idiosyncratic personality of Donald Trump and his disruptive, if not destructive, impact on international politics have obscured a longstanding axiom in US foreign trade relations. Since the end of World War II, the US can legitimately claim to have been trade liberalization’s most vocal advocate and its fiercest detractor. These political conflicts not only epitomize America’s ambivalent relationship with the rest of the world but also capture a dialectics of dis-embedding and re-embedding processes, that Polanyi (1944/2001) famously theorized as the “double movement,” namely social and political forces seeking to reassert control over a fabled self-regulating market. Indeed, from the Tokyo Round’s

focus on non-tariff barriers to the 1990s’ foray into investment protection, procurement, and intellectual property before the mega-regionals’ ambitious regulatory agenda, the expanding scope of the negotiating trade agenda has gradually internationalized and dis-embedded segments of the economy that were once confined to national regulation and domestic politics, thereby undermining the compromise of “embedded liberalism” envisioned in the post-war era (Ruggie, 1982). Yet, just as “laissez-faire was planned,” in Polanyi’s (1944/2001, p. 147) famous words, free trade has always been “managed trade.” Or, to put it differently, free trade agreements (FTAs) are neither free nor just about trade. Like laissez-faire ideology at the end of the 19th century, free trade has been promoted by a powerful

coalition of business interests that has faced diverse opposition from labor unions, environmentalists, consumer advocates, and nationalist voices. This counter-movement, made of strange bedfellows from both progressive and conservative strands, has mobilized during historic clashes over globalization, including the stormy debates over the North American Free Trade Agreement (NAFTA), the Seattle protests of 1999, and Donald Trump's trade wars.

Social mobilization contributed to transforming or re-embedding US trade policy in four notable ways. First, it has played a central role in linking—or reconnecting—trade to labor rights, as well as environmental standards. Second, and in parallel, the growing discontent surrounding trade liberalization has shifted the locus of trade politics from the scope of social and environmental provisions during negotiations or before trade agreements are signed, to their implementation and enforcement *after* ratification. This “enforcement turn” is permeable with, but distinct from Donald Trump's protectionism and preceded his election, as illustrated by the passage of the Trade Facilitation and Trade Enforcement Act in 2015 (Velut, 2022a). Third, trade contestation from progressive forces, with the help of conservative allies like US Trade Representative Robert Lighthizer, challenged the logic of investor-state dispute-settlement established under NAFTA and significantly curtailed its scope in the US–Mexico–Canada Agreement (USMCA). Fourth, opponents of so-called FTAs have made them so unpopular that they have become taboo in both political parties, as witnessed by the reference to partnerships, agreements, or, most recently “frameworks.” The “de-FTA-zation” of trade policy is not only a discursive and framing process designed to obscure the continuity in trade policy-making, but is, in effect, a departure from the cycle of cross-regional trade agreements of the previous decade, and one concretely at work in both the US and the EU, as witnessed by the proliferation of sectoral agreements, sustainability initiatives, autonomous measures (Velut, 2022b), and other kinds of executive agreements or “mini-deals” (Claussen, 2022). Leaving aside Donald Trump's trade wars, these four trends can be interpreted as attempts to rein in the disembedding impulses of free market advocates without jettisoning the principles of embedded liberalism.

One policy sphere that has been largely spared from this dialectic process is digital trade. Digital trade can be defined as the sum of “digitally enabled transactions in trade in goods and services which can be either digitally or physically delivered, involving consumers, firms, and governments” (López González & Jouanjean, 2017, p. 6). This definition, which includes non-commercial data transfers, is to be distinguished from the narrower but overlapping notion of e-commerce, which the WTO defines as the “production, distribution, marketing, sale, or delivery of goods and services by electronic means” (World Trade Organization, n.d.). From the emergence of e-commerce in the second half of the 1990s to Donald

Trump's less visible US–Japan Digital Trade Agreement, Washington's emerging digital trade agenda has been largely immune to the contentious politics of trade and globalization. The digital sector's disconnect from trade politics is perplexing on more than one account. The digitalization of trade in goods and services and the increasing use of artificial intelligence (AI) have opened a Pandora's box of new issue linkages, including data privacy, fair taxation, antitrust, labor rights, and democratic accountability. Yet, US decision-makers' willingness to integrate social dimensions in digital trade policy remains uneven at best.

This article examines the symptoms and factors of what might be described as an enduring form of “disembeddedness” in US digital trade policy-making. To do so, it analyzes the formation of US digital trade policy through the prism of bilateral and plurilateral trade negotiations. The latter tend to be more far-reaching than WTO agreements (Horn et al., 2010) and often serve as policy experiments for trade linkages (Jinnah & Morin, 2020). This article focuses on two regulatory issues that have gained prominence at the domestic level: workers' rights and data privacy. This study builds upon recent scholarship on deliberative forms of exclusion in trade policy-making (Velut et al., 2022) to track the hidden dynamics of what Bachrach and Baratz (1962, p. 949) defined as “non-decision-making.” The next section conceptualizes the notion of “trade disconnects” as an emerging research agenda, while the third section applies this framework to labor rights and data privacy.

## 2. Conceptualizing Trade Disconnects

One obvious starting point to understand why linkages do not occur is the long-established literature on the formation of American trade policy, whose various contributions have shed light on the importance of three factors. First, structural or systemic approaches in international relations argue that the distribution of power—whether in a period of hegemonic stability or power transition—dictates states' behavior and their proclivity to promote economic openness or restrict trade (Ikenberry & Nexon, 2019; Krasner, 1976). Second, state-centered approaches emphasize the role that the state plays in shaping international competitiveness (Haley & Haley, 2013; Krugman, 1986; Rodrik, 2007; Weiss, 2014) or how institutions shape and constrain policy outcomes (Goldstein, 1986; Haggard, 1988). A third, perhaps more dominant approach to trade policy formation focuses on interest groups mobilization in support of trade liberalization or protective measures, using the factor model (Rogowski, 1989), the sector-specific approach (Baldwin, 1985; Magee & Young, 1987), or a combination of both (Hiscox, 2001). Others have highlighted the heterogeneity of firms within the same sector (Bernard & Jensen, 1995; Melitz, 2003) and/or the notable advantages that large multinationals derive from trade agreements (Autor et al., 2017).

Beyond the usual mechanics of trade policy-making, a subsegment of the literature has sought to explain the emergence of new linkages outside of the usual boundaries of trade negotiations. Aggarwal (2013) distinguishes top-down linkages, which are induced by the executive branch, from bottom-up linkages which result from lobbying by business and nonprofit groups. Trade and security linkages are driven by strategic objectives and therefore more likely to be top-down. In effect, security imperatives can also be instrumentalized by business interests and so may be a combination of both forces. Social and environmental linkages, on the other hand, are more likely to result from bottom-up processes. Indeed, civil society groups have played an important role in re-embedding trade in a broader societal sphere, by pushing for the inclusion of environmental (and labor) standards in trade agreements, whether in the EU (Ahnliid, 2013; Hannah, 2016) or the US (Aaronson, 2001; Aggarwal, 2013; Destler & Balint, 1999; Kay & Evans, 2018). Likewise, the expanding scope of trade negotiations in new regulatory fields has long been traced to the mobilization of individual companies and industry associations, whether this relates to investment, rules of origins, and trade facilitation (e.g., Chase, 2003; Ravenhill, 2017), intellectual property rights (Muzaka, 2009; Sell & Prakash, 2004) or digital trade (Azmeah et al., 2020).

Yet, if the trade policy literature has devoted a lot of attention to understanding the origins, scope, and effects of trade linkages, little attention has been given to the persistence of trade disconnects between economic issues and social externalities that, at the domestic level, can hardly be dissociated. This blind spot in the trade policy literature may be driven by methodological concerns but is hardly justifiable from a theoretical standpoint. Indeed, focusing on the “less apparent face” of power hidden in “non-decision making,” in Bachrach and Baratz’s (1962, p. 949) famous words, can shed light on the embedding and disembedding processes at play in the political economy of trade. As noted by Velut et al. (2022, p. 548), debates on the distributive effects of trade policies—e.g., which workers might be displaced, what sectors might win or lose—have often overshadowed “deliberative forms of inclusion and exclusion that hinge upon the premises, modalities and channels through which trade policy is understood, discussed and ultimately decided.” In practice, distributive and deliberative forms of exclusion have fed on one another to produce the populist backlash. Given the ever-expanding scope of the trade and regulatory agenda, there is a need to understand not only how and why new issues are included and alternative voices are heard (i.e., trade linkages), but also why others remain *excluded* from trade negotiations (i.e., trade disconnects).

Trade disconnects can be defined as persistent deliberative forms of exclusion that explicitly or implicitly marginalize certain political actors and policy issues through a combination of discursive, institutional, inter-scalar, and countermobilizing processes. Far from being

mutually exclusive, these processes are codependent. The first type of trade disconnect is discursive. While the power of ideas has long been established in international relations, the constructivist turn in international political economy is more recent (Abdelal et al., 2010). In the trade policy sphere, constructivist approaches are arguably more prominent among scholars of EU trade policy (e.g., De Ville & Gheyle, 2022; Potjomkina et al., 2022; Siles-Brügge, 2014), often described as “value-based,” than those studying the WTO (Lang, 2011) or US trade policy (Goldstein, 1994), where societal approaches emphasizing interest groups mobilization are more common. In practice, however, ideas do not exist *ex nihilo* and are conveyed and instrumentalized by interests. This is true not only for framing strategies designed to create new trade linkages, as has been established in the trade sphere (Kay & Evans, 2018; Siles-Brügge & Strange, 2020) but also for discursive processes intended to exclude specific stakeholders—e.g., workers, consumers, small-and-medium enterprises (SMEs), indigenous populations—and perpetuate trade disconnects. For instance, the rise of technocratic forms of trade governance relying on complex and seemingly uncontested econometric models and legal arguments long reduced critics of corporate-driven trade policies to “protectionists” (Siles-Brügge, 2019). Unless stakeholders manage to appropriate expert knowledge by translating a trade-related issue into quantitative data, trade disconnects may persist. In other cases, inclusive narratives focusing on SMEs (De Ville & Gheyle, 2022), civil society (Drieghe et al., 2022), or transparency processes (Velut, 2022a) can be repurposed, to the detriment of their targeted stakeholders, thereby acting as exclusionary processes.

Second, institutional trade disconnects are induced by silo effects. As explained earlier, the importance of institutions in trade policy-making is now well established but remains to this day largely dominated by a free trade vs. protectionism dichotomy. This means that institutionalism has not taken stock of recent trends in trade policies, namely the growing importance of (de)regulatory questions (Deblock & Wells, 2017; Velut, 2018; Young, 2017), the enforcement turn, and the digitalization of global trade. Yet, as comparative political economists have shown, if international political economy factors force institutions to adapt, change is also endogenous to each nation’s institutional apparatus (Hall & Thelen, 2009). Thus, there is a need to better understand what allows trade institutions to innovate and effectively take on new issues (trade linkages)—whether this pertains to the creation of governmental agencies, interagency mechanisms, or principles of policy coherence—and what restrains them from doing so (trade disconnects).

The third type of trade disconnects can be described as “inter-scalar” as it relates to the incongruence between scales or levels of government action. This question is determined by the extent to which the

interests of subnational governments like cities, counties, or states, but also those of local actors like SMEs and civil society organizations are represented in the design of trade policies. As the literature on multilevel trade politics has shown, this depends on a host of factors, including institutional mechanisms, state capacities and resources, business mobilization, and trade contestation among local stakeholders (Broschek & Goff, 2020; Freudlsperger, 2020; Lequesne & Paquin, 2017; Schiavon, 2020). In some cases, like procurement, large business actors and state actors have worked hand in hand to internationalize local issues and push for new trade linkages on behalf of US economic interests (Weiss & Thurbond, 2006). In others, like waste trade, business actors and subnational governments may instead favor trade disconnects, preferring that international trade negotiators stay away from their practices.

Fourth, trade disconnects can be maintained by de-mobilizing or countermobilizing forces. As mentioned above, this is a traditional determinant of trade policy that includes both business and civil society mobilization and can be combined with discursive, institutional, and inter-scalar forms of trade disconnects. For instance, US pharmaceutical groups have long mobilized to broaden the scope of patent protection provisions (the so-called “evergreening” of patent protection), while preventing the emergence of linkages between trade and health through both domestic and international channels. The WTO’s long-delayed vaccine patent waiver is only the latest illustration of this trade and health disconnect. The full story behind these protracted negotiations remains to be told but was likely shaped by both business mobilization and discursive processes that silenced public health voices in trade and investment debates (Siles-Brügge, 2020).

These four factors can be assembled in multiple bundles and are also influenced by the forces of the international political economy. Thus, the rise of China, the digitalization of the global economy, or the climate crisis can engender new narratives, initiate innovative institutional behavior, and trigger different forms of social or business mobilization. In sum, trade disconnects are shaped by a combination of discursive, institutional, inter-scalar, and countermobilizing processes that are all structured by the constraints—real or constructed—of the international political economy. Understanding how enduring these adversarial forces can be and whether they can be overcome is crucial to understand the disembedding and re-embedding dynamics of trade policy. The next section applies this conceptual framework to the sphere of digital trade.

### 3. Digital Trade Disconnects and Linkages

#### 3.1. *The Rise of US Digital Trade Policy*

Through an arsenal of domestic and international policies, including the Defense Advanced Research

Projects Agency’s instrumental support for groundbreaking innovations—computer chips, the Internet, GPS, lithium-ion batteries, and cellular technology—and Washington’s sustained advocacy for a WTO moratorium on taxes on cross-border data flows (renewed in June 2022), the US government has played an underestimated role in the emergence and flourishing of the digital sector. Since the turn of the century, Washington has gradually formalized its digital trade policy through multilateral, regional, and bilateral channels. From the Framework for Global Electronic Commerce (Clinton & Gore, 1997) to the ambitious e-commerce chapter of the aborted TransPacific Partnership (TPP) and its modernized transplant in the USMCA, the executive and legislative branches gradually developed a bipartisan digital trade agenda to assert US technological leadership and promote the free flow of information by limiting both tariff and non-tariff barriers on digital trade in goods and services. The first US FTA to incorporate a self-standing chapter on electronic commerce was the Korea–US (KORUS) FTA (signed in 2007), but the real turning point in the formalization of the US digital trade agenda came under the Obama administration. In 2015, Congress officially expanded its traditional focus on e-commerce to a broader policy framework encompassing “digital trade in goods and services and cross-border data flows,” in effect shifting from a more traditional approach to trade administration to a broader regulatory role in data governance. An expanded list of principal US trade negotiating objectives was designed to ensure (a) that WTO rules and disciplines apply to regional trade agreements, (b) that digital goods and services receive the most liberal trade treatment possible, (c) that governments abstain from hampering digital trade or restrict cross-border data flows, (d) to extend the WTO moratorium on duties on electronic transmissions, and (e) that any legitimate regulation is as least trade restrictive as possible (Bipartisan Congressional Trade Priorities and Accountability Act, 2015, §6). In line with these objectives, the negotiations of TPP marked a shift to a broader digital trade agenda. TPP included a more comprehensive electronic commerce chapter whose provisions were, for the first time, enforceable through dispute settlement (Aaronson, 2018). This template would serve as the basis for the negotiations of the USMCA.

Although they have been broadly framed as US national economic interests, these political priorities can have very different implications for a broad range of policy stakeholders, among which are Internet users, consumers, workers, taxpayers, and SMEs. This means that there is potentially a wide range of digital trade policy linkages to be addressed by policymakers, including data privacy, transparency, labor rights, fair taxation, and antitrust/competition law. While it is beyond the scope of this article to survey all policy linkages in digital trade, it will compare two of these social or “non-economic” issues to understand the dynamics and factors of enduring disembeddedness in US digital trade policy.

The first issue pertains to workers' rights, more specifically the rights of digital labor. As the next section shows, the rise of platform capitalism and the proliferation of digital workers have significant implications for workers' rights both in the US and other countries. Given the prominence of labor standards in US trade policy debates for the past 30 years and the growing importance of digital trade in negotiations, it is remarkable that the two policy agendas have neither converged nor collided. The second issue under study is data privacy, a social question related to digital trade that has received increasing attention at both domestic and international levels, and a test case to assess how and why non-economic issues might be linked to or remain disconnected from US trade policy.

### *3.2. The Puzzling Absence of Digital Workers' Rights in US Trade Policy*

The rise of digital workers has been a significant feature of the digital economy, as illustrated by its dramatic increase over the past decade: Between 2010 and 2020, the number of digital labor platforms has increased fivefold (from 142 to 777). The International Labour Organization (ILO) distinguishes online web-based platforms, which can draw from a global workforce, from local-based platforms, whose services are primarily provided at the local level (ILO, 2021). Aggregate employment figures are more difficult to estimate for several reasons, including definitional issues, limited data (platforms do not disclose the number of workers), and oversupply of workers, but recent estimates of the proportion of digital workers in developed countries range from 0.5% to 12% (ILO, 2021). Whereas the proliferation of digital labor has been shown to offer employment opportunities, it also created a long list of challenges for workers, among which downward pressure on wages, lack of social benefits, long working hours, discrimination and harassment, limited or inexistent access to freedom of association and collective bargaining, and acute work safety risks in some sectors, like delivery (Carelli et al., 2022; ILO, 2021; Vallas, 2019).

At first sight, one may disclaim the question of digital labor rights as irrelevant to US trade policy under the pretext that foreign gig workers are primarily embedded in local labor markets and do not compete with US workers. This premise, however, leaves out a growing segment of platform workers who compete internationally for both low-skilled and high-skilled tasks. In fact, the last decade has witnessed a trend in outsourcing digital services from the Global North to the Global South that is reminiscent of the offshoring of manufacturing jobs in previous decades. This invisible but growing pool of "telemigrants" was already gaining significance before the Covid-19 pandemic and now covers a wide range of services including customer relations, editing, translation services, accounting, medical services, and finance (Baldwin, 2019; ILO, 2021).

The fact that many US digital labor platforms have built their business model on non-standard forms of employment raises important questions concerning the enforcement of fundamental principles and rights at work. As explained previously, the structuring of the American digital trade strategy since the second half of the 1990s took place against the backdrop of fierce debates over the scope and enforceability of labor standards in trade agreements, with the 1998 ILO declaration at the center of the US approach to trade and labor. As the ILO has long noted, applying this policy framework to the digital sphere would require guaranteeing that "crowdwork" performed on online web-based platforms is not performed by child labor, that compensation is not discriminatory, and that workers can organize for better conditions (ILO, 2015). Given how much political capital and financial resources US trade officials have devoted to the enforcement of freedom of association and collective bargaining conventions (ILO Conventions 87 and 98 respectively), most recently under the USMCA's rapid response mechanism, it seems paradoxical that the US has given so little consideration to the role that digital trade and platform capitalism have played in the proliferation of non-unionized jobs and the infringement of workers' rights in the digital sphere. This disconnect goes beyond core labor standards: Digital platforms also raise questions on other essential rights beyond the 1998 declaration such as the minimum wage and working hours, both of which have long been an integral part of labor chapters in US trade agreements.

Yet, the working conditions of so-called gig workers were absent from the negotiating objectives of the 2015 Bipartisan Congressional Trade Priorities and Accountability Act and Obama's assertive digital trade agenda. Within the framework of the TPP, the US Trade Representative (USTR) claimed to have negotiated both "the strongest protections for workers of any trade agreement in history" (Office of the United States Trade Representative, 2015a) and "the most ambitious and visionary Internet trade agreement ever attempted" (Office of the United States Trade Representative, 2015b). Yet, these two separate chapters on labor and electronic commerce had no common language or cross-reference. Likewise, the TPP-inspired USMCA left little room for linkages between digital trade and labor rights. Its "digital trade" chapter, which largely drew from TPP's electronic commerce chapter, did not include any reference to digital workers. And despite the praise it received from labor advocates and House Democrats, the labor chapter did not make any advances in the digital economy.

Recently, the Biden administration has begun to acknowledge the potential effects that the digital economy might have on workers. In a speech on digital trade in November 2021, US Trade Representative Katherine Tai went a long way to re-embed digital trade in its social context, underlining the need to protect both workers and consumers:

I also believe that our approach to digital trade policy must be grounded in how it affects our people and our workers. We must remember that people and workers are wage earners, as well as consumers. They are more than page views, clicks, and subjects of surveillance. They are content creators, gig workers, innovators and inventors, and small business entrepreneurs. This means they have rights that must be protected—both by government policy and through arrangements with other governments. (Office of the United States Trade Representative, 2021a)

Tai's speech marked a departure from the US free market approach to digital trade policy and its agnosticism to labor issues. This discursive shift, however, has yet to be met with policy change. In theory, these questions could emerge in ongoing trade negotiations such as the Indo-Pacific Economic Framework (IPEF), or as part of the transatlantic dialogue under the EU–US Trade and Technology Council (TTC). In the former case, one notable precedent is the reference to “workers in the digital economy” in the discussion of labor rights under the “trade pillar” of IPEF (Office of the United States Trade Representative, 2022). The uncertain scope and legal form of IPEF, and whether it can survive congressional scrutiny as an executive agreement, mean that the rights of digital workers have a long way before becoming enforceable labor provisions. An alternative path for linking digital trade and labor rights could come from the TTC. Indeed, the TTC's inaugural joint statement outlined an intention to “discuss the impact of technology on labor markets, working conditions, and worker rights, including policy issues related to the ‘gig economy’ and to undertake an economic study examining the impact of AI on the future of our workforces” (Office of the United States Trade Representative, 2021b). Yet, while the TTC takes a first step in calling for cooperation on workers' rights in the digital economy, this non-binding regulatory dialogue is far from any harmonized approach to regulating digital workers' rights, let alone any kind of enforceable agreement. In short, US trade agreements are still miles away from linking digital trade to workers' rights in any substantive manner.

### 3.3. Linking Digital Trade and Data Privacy

The OECD has listed the protection of privacy and consumers as one of three potentially conflicting policy goals in the digital sphere, along with maintaining open access to the Internet and preserving market competition (Koske et al., 2014). The proliferation of digital platforms collecting an endless stream of personal data, and the growing use of machine learning and AI technology (so-called Web 3.0) monitoring online behavior mean that these social concerns will continue to be central in the digital trade sphere in the near future.

While labor rights have been largely left out of the digital trade agenda, the question of data privacy

has been part of the US policy discussions since the early days of the Internet. In its Framework for Global Economic Commerce, the Clinton administration argued that e-commerce would “thrive only if the privacy rights of individuals are balanced with the benefits associated with the free flow of information” (Clinton & Gore, 1997). It dedicated a significant portion of its policy platform to the question of privacy. Although Clinton saw private standards as preferable to government regulation, the US government remained open to reevaluating this policy should the market fail to guarantee effective privacy protection. Unlike digital labor rights, however, data privacy has remained a prominent issue in digital trade policy debates, as evidenced by its progressive codification through two main channels: US FTA policy and its sustained regulatory dialogue with the EU.

Within the framework of US FTAs, the linkage between digital trade and data privacy have taken shape incrementally, over the course of two decades. The first US FTA to incorporate e-commerce provisions was the US–Jordan FTA. While it did not include any chapter on e-commerce or digital trade, it stood out from previous PTAs for its Joint Statement on Electronic Commerce, which featured an article on privacy (unless stated otherwise, all quotations of trade agreements rely on texts available on the archives of the Office of the US Trade Representative). Although non-binding, it put the “effective protection of privacy” on par with “the need to continue the free flow of information.” Here again, the Clinton administration called for “flexible” solutions undertaken by the private sector at the industry level. But the mere reference to privacy, even outside the core text of the US–Jordan FTA set a precedent for future trade agreements. The next step was the inclusion of a chapter on electronic commerce in the KORUS FTA. Fairly concise and non-binding, this set of articles reasserted the dual goals of promoting the free flow of information to facilitate trade and protect personal information. This time, however, it abstained from recommending industry-specific solutions to consumer protection, exhorting instead each party's national consumer protection enforcement agencies to cooperate (Chap. 15, Arts. 15.5 and 15.8).

The US free market approach to privacy protection nonetheless collided with other countries' regulatory proclivities, and as a result, did not include references or commitments to the free flow of information. TPP's e-commerce chapter went beyond the focus on online consumer protection of the KORUS FTA to include an article on “personal information protection” (Art. 14.8) which, first, required that each country ensure the protection of personal information through a legal framework following principles and guidelines of international bodies and, second, called parties to publish information on privacy protection and inform individuals about how to pursue remedies. To preserve the US voluntary approach to privacy, a footnote clarified that the legal framework included “laws that provide for the enforce-

ment of *voluntary* undertakings by enterprises relating to privacy” (chap. 14, Art. 14.8, emphasis added). Of course, the US withdrew from TPP and never implemented these provisions. However, these attempts to link digital trade and privacy came to fruition during the USMCA negotiations. The text of the TPP inspired USMCA negotiators to clarify the said principles of privacy protection, which now include “limitation on collection; choice; data quality; purpose specification; use limitation; security safeguards; transparency; individual participation; and accountability” (Art. 19.8, §3). Another notable addendum was a provision of the Cooperation article exhorting parties to share information and practices on “regulations, policies, enforcement, and compliance relating to digital trade”, including on personal information protection (Art. 19.14, §1). These principles were in direct conflict with the free market objectives that Washington had embraced both internationally, with its initial emphasis on the free flow of information, and domestically, as illustrated by the federal government’s reluctance to legislate on data governance and personal information protection.

Finally, these emerging linkages—and prolonged conflicts—between digital trade and privacy have also been on full display outside of FTAs, through a sustained regulatory dialogue between the US and the EU. Since the late 1990s, the EU and the US have conducted negotiations on digital trade and personal information protection. This transatlantic dialogue has given birth to two agreements, both of which have been invalidated by the European Court of Justice for failing to provide adequate privacy protections for European citizens: the Safe Harbor (2000) overturned in 2015 and the Privacy Shield (2016) struck down in July 2020. In March 2022, the two partners reached a new agreement on a Trans-Atlantic Data Privacy Framework designed to address the shortcomings of the Privacy Shield, namely providing additional protection for European citizens’ data being transferred to the US. Notable provisions include new binding safeguards on US intelligence authorities and the creation of a Data Protection Review Court to resolve potential complaints of Europeans on data transfers (Fahey & Terpan, in press).

While the tensions between free data flows and personal information protection are far from solved, advances through both US FTAs and the transatlantic regulatory dialogue are evidence of incremental linkages between digital trade and privacy. In the words of Burri and Polanco (2020, p. 33): “Privacy and data protection have become a trade topic.” These policy linkages contrast with the lingering disconnect between digital trade and labor rights. The next section discusses these contrasting policy developments.

### 3.4. *Interpreting Trade Disconnects*

These two case studies have shown that digital trade policy is not indifferent to all social linkages: While US

decision-makers have largely come short of incorporating labor rights, they have gradually integrated provisions to protect data privacy in the development of US FTA policy. What factors account for these different developments and what can we learn about the nature and dynamics of trade disconnects?

The first type of factor driving trade disconnects is of a discursive nature and requires understanding the framework in which e-commerce emerged. An oft-cited policy framework in the history of e-commerce is Clinton and Gore’s Framework for Global Electronic Commerce, which defined the guiding principles for what would become US digital trade policy. The first of its five key principles stated that “the private sector should lead” (Clinton & Gore, 1997). Clinton and Gore’s (1997) roadmap for e-commerce praised the “decentralized nature and tradition of bottom-up governance” of the Internet and was infused with anti-regulatory rhetoric. Governments were deemed to be too slow to follow the rapid pace of technological innovation and, therefore, “should refrain from imposing new and unnecessary regulations, bureaucratic procedures, or taxes and tariffs on commercial activities.” This “hands-off” approach was not the mere product of a decade dominated by free market economics but also dovetailed with the self-regulatory and multistakeholder demands of the Internet governance community that famously issued a Declaration of the Independence of the Cyberspace (Aaronson, 2018, p. 192; Barlow, 1996).

This mix of techno-libertarianism and free market ideology contributed to disembody the digital sphere, to the detriment of digital workers’ rights, and initially at least, privacy protection. It percolated through Obama’s emerging digital agenda, which primed the free flow of information and dismissed foreign attempts to regulate the tech industry as digital protectionism, including European attempts to regulate privacy:

We have owned the Internet. Our companies have created it, expanded it, perfected it in ways that they can’t compete. And oftentimes what is portrayed as high-minded positions on issues, sometimes is just designed to carve out some of their commercial interests. (Obama, 2015)

Here, the new power structure of the international political economy, with the emergence of China as a rival technological power was an important factor behind the US free market posture. Unlike labor rights, however, data privacy was part of the discussion on e-commerce from the early days of the Internet, including in Clinton and Gore’s (1997) Framework for Global Electronic Commerce. This early connection between the two issues was likely more conducive to future policy linkages.

These discursive processes coalesced with institutional factors to maintain a disconnect between digital trade and labor rights. According to the OECD (2017), the US decentralized and market-driven approach to the

digital sector is quite unique among the other members, that have favored more centralized digital trade strategies. This institutional fragmentation has contributed to policy gaps. Both the USTR and the Department of Commerce work to promote digital trade policies and identify foreign trade barriers in consultation with business stakeholders, but neither institution has a clear mandate to address questions pertaining to platform workers. Meanwhile, the Bureau of International Labor Affairs and its Office of Trade and Labor Affairs primarily focus on the enforcement of workers' rights in developing countries and tend to prioritize the eradication of child labor, forced labor, and human trafficking in the agricultural, mining, or services sector. It has yet to broaden its focus to digital workers.

These silo effects contrast with the greater interaction of US federal agencies on data privacy. During the 1990s, several agencies released reports on the Internet and its policy implications for personal information and consumer protection. These included the Department of Commerce's National Telecommunications and Information Administration, the Federal Trade Commission, and the White House's Information Infrastructure Taskforce, which convened working groups soliciting public commitments about how to implement privacy (Clinton & Gore, 1997). Hence, the cause of data privacy, unlike labor rights, had initial institutional support outside of US trade agencies that gave it greater visibility in policy debates.

Inter-scalar processes have also contributed to the disconnect between digital trade and labor rights. The fragmentation of the US regulatory space is illustrated by the conflicting regulatory approaches that US states have adopted to protect platform workers. California has undoubtedly experienced the fiercest political battle to regulate the rights of platform workers. In 2019, the Californian legislature voted to codify an "ABC" test defining the conditions under which platform workers must be classified as employees to be entitled to labor protections and benefits. In response, digital platforms like Uber and Lyft put Proposition 22, an initiative designed to maintain the status of digital workers as independent contractors, on the ballot for the 2020 elections. After digital platforms won the ballot measure in November 2020, a California judge ruled Proposition 22 to be unconstitutional and unenforceable in August 2021. A month later, the Protect App-Based Drivers & Services Coalition representing platform companies appealed the decision (O'Brien & LeBlanc, 2021).

These fierce political battles contrast with the political inertia of the US federal government and are, in theory, inherent to the internal diversity of the American political economy. These battles might have discouraged US federal agencies from developing a formal negotiating position at the international level. In practice, however, the executive branch has at times promoted policies abroad that were far from consensual at home, whether this pertains to environmental standards, labor rights in

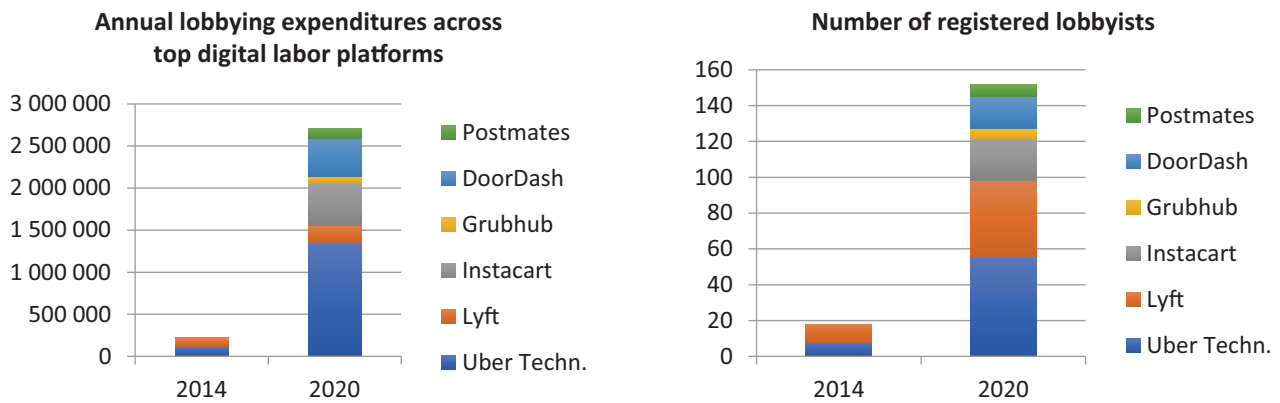
general, and even data privacy. Indeed, in the absence of federal law protecting personal information, several states, including California, Virginia, and Colorado have passed consumer privacy laws (Fahey & Terpan, in press). These, however, have been far less contentious than attempts to regulate digital labor, which might partly explain the federal government's reluctance to protect digital workers through federal legislation.

These inter-scalar conflicts are related to another important factor of trade disconnects: business mobilization. Over the past decade, the digital sector has become an increasingly organized political force, including in the trade sphere (Azmeh et al., 2020). This politicization has occurred at local, federal, and international levels. At the local level, companies have mobilized to prevent local authorities from imposing costly regulations. This was the case with the 200-million-dollar campaign for Proposition 22 in California, funded by platform companies including Uber, Lyft, DoorDash and Instacart, and Uber-owned Postmates (Azmeh et al., 2020). While this was arguably the most visible political battle related to digital workers' rights, it was also part of a larger organizing endeavor by app-based platforms.

Figure 1 shows the dramatic increase in the lobbying efforts of digital labor platforms between 2014 and 2020. Lobbying expenditures and the number of lobbyists respectively increased twelve-fold and eight-fold over six years. Admittedly, these numbers must be examined with caution. On the one hand, the dramatic growth in lobbying activities contrasts with aggregate trends: The total number of US registered lobbyists stagnated and even narrowly declined between 2014 and 2020 (from 11,789 to 11,534), while annual expenditures increased from \$3.26 billion to \$3.53 billion. On the other, given that many of these tech companies were founded in the past 10 to 15 years, the increase in political spending appears anything but logical and should not be over-interpreted.

Additional evidence of this form of mobilization includes the large interaction between the Obama administration and the digital sector, as illustrated by the so-called "revolving door" between top government officials and representatives of the tech industry. The most prominent example of this process was Obama's nomination of Business Software Alliance's former CEO Robert Honeywell to the position of deputy USTR in 2014, an important signal that the US government was more concerned with dealing with other countries' attempts to regulate the digital industry—lumped under the notion of digital protectionism—than developing linkages between digital trade and labor rights. Another notable example was Uber's hiring of former Obama adviser David Plouffe as vice president for Policy and Strategy between 2014 and 2017 (Kirchgaessner et al., 2022). While it is notoriously difficult to establish a direct link between lobbying and policy developments (or lack thereof, in the case of labor rights), these lobbying efforts at multiple levels, most prominently in California,





**Figure 1.** The rising lobbying activities of US digital labor platforms. Note: Since 2020, Postmates is owned by Uber Technologies, which also includes Uber Eats. Source: OpenSecrets (2022).

may have, directly or indirectly, contributed to undermining attempts to link trade policy and digital labor rights at the international level.

A trove of leaked documents called the “Uber files” has recently shown that the digital industry’s lobbying offensive went far beyond domestic activities to include a complex web of high-level diplomacy on different continents. Here again, intensifying competition in the digital sector played an important role in triggering business mobilization against different forms of digital protectionism, thereby reinforcing the predominant antiregulatory narrative of the US digital trade agenda.

Yet, if the rising lobbying activities of tech companies contributed to promoting the US free market approach to digital trade, why did they allow concessions on privacy protection that conflicted with the once-preeminent principle of the free flow of information? Here, part of the answer may be found in the mobilization of digital rights advocates, not simply in the US but also in other TPP countries, which forced US negotiators to reconsider their position on data privacy (Aaronson, 2018). By contrast, the widely-known obstacles to organizing digital workers can also explain the enduring “disembeddedness” of digital trade policy.

#### 4. Conclusion

By comparing the progress made to advance workers’ rights and data privacy in the digital trade policy sphere, this article has shown that the causes of trade disconnects are multiple and complex. The reasons for the enduring disembeddedness of digital trade policy are to be found in four interrelated factors: (a) the strong antiregulatory narrative that has permeated the digital sphere since the origins of the Internet; (b) the policy gaps between different institutions overseeing the development of the digital trade policy on the one hand, and the enforcement of labor rights on the other; (c) the inter-scalar conflicts between different states and the federal government; (d) the increased political mobilization of digital platforms seeking to deter state interven-

tion on behalf of digital workers. As the growing linkages between digital trade and data privacy show, these obstacles are not insurmountable.

From a bottom-up perspective, social mobilization at the local, national, and/or transnational levels could challenge the status quo on digital labor rights. From a top-down approach, the timid steps toward acknowledging the social effects of the digital economy could benefit from stronger interagency and consultation processes giving a voice to workers, consumers, local and state governments, as well as trading partners, to institutionalize digital labor rights in line with the ILO’s fundamental principles and rights at work.

Beyond this attempt to understand the absence of linkages between digital trade and labor rights, this article has reaffirmed the need to study the dynamics of non-decision-making, by offering a new theoretical framework centered around the notion of trade disconnects. This emerging research agenda provides theoretical tools to understand the dynamics of disembedding processes at work in the trade policy sphere and the conditions under which trade linkages may or may not occur in the future, whether this relates to digital labor rights or other neglected social causes.

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#### Conflict of Interests

The author declares no conflict of interest.

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