National Telecommunications and Information Administration
U.S. Department of Commerce
1401 Constitution Avenue NW, Room 4725
Washington, DC 20230

Re: Notice of Inquiry; International Internet Policy Priorities

Internet Association welcomes the opportunity to respond to National Telecommunications and Information Administration's (NTIA) notice of inquiry regarding international internet priorities. Internet Association represents over 40 of the world's leading internet companies. IA's mission is to foster innovation, promote economic growth, and empower people through the free and open internet.

I. The Free Flow Of Information And Jurisdiction

A. What are the challenges to the free flow of information online?

The internet sector is a key driver of the U.S. economy, with internet industries representing an estimated 6 percent of U.S. GDP, totaling nearly $1 trillion. Internet companies are creating new opportunities for all Americans by facilitating millions of transactions around the world through e-commerce, cloud computing, social media, online advertising, communications, online payments, and content-delivery platforms.

Yet, there are market access barriers for internet companies. These barriers may be the result of intentional decisions like targeting internet platforms through burdensome or unnecessary regulations. Alternatively, these barriers may emerge when a country uses other measures – such as unbalanced copyright regimes, restrictions on data flows or data localization requirements, intermediary liability penalties, site-blocking, forced technology transfer, burdensome customs rules, and other restrictions or industrial policies that create barriers for internet-enabled goods and services.

Cross-border, global exchange of information – without censorship, content-based regulation, or filtering mandates – facilitates commerce and promotes economic inclusiveness. The internet ecosystem flourishes when users, content creators, and businesses are empowered through an open architecture that promotes the unrestricted exchange of ideas and information. Internet services instantaneously connect users to goods and services, facilitate social interactions, and drive economic activity across borders. Consequently, support for the free flow of information is vital to eliminate trade barriers that restrict commerce or prevent U.S.-based internet services from having the freedom to operate in a foreign jurisdiction.

Unfortunately, data localization mandates, restrictions on data transfers, and blockages of entire

services are increasingly restricting U.S. services from accessing overseas markets. We encourage NTIA to prioritize breaking down barriers that restrict the free flow of data across borders and tackle measures that require U.S exporters to store, manage, or otherwise process data locally.

The U.S. copyright framework both ensures an appropriate level of copyright protection and drives innovative internet and technology products and services. Internet services rely on balanced copyright protections such as Section 107 of the Copyright Act ('fair use') and Section 512 of the Digital Millennium Copyright Act ('ISP safe harbors') to create jobs, foster innovation, and promote economic growth. The U.S. internet sector – as well as small businesses that rely on the internet to reach customers abroad – require balanced copyright rules to do business in foreign markets.

In countries that lack this two-sided model of copyright law, U.S. innovators are at a significant disadvantage. Increasingly, governments like the EU (including Spain, Germany, and France), Australia, Brazil, Colombia, India, and Ukraine, are proposing new onerous systems of copyright liability for internet services, and several of these countries are out of compliance with commitments made under U.S. free trade agreements.

Critical limitations and exceptions to copyright enable digital trade by providing the legal framework that allows nearly all internet services to function effectively. Web search, machine learning, computational analysis, text/data mining, and cloud-based technologies all, to some degree, involve making copies of copyrighted content. These types of innovative activities – areas where U.S. businesses lead the world – are possible under copyright law because of innovation-oriented limitations and exceptions. In the United States, industries that benefit from fair use and other copyright limitations generate $4.5 trillion in annual revenue and employ one in eight U.S. workers. Unfortunately, foreign trading partners often lack such limitations and exceptions, which limits the export opportunities for U.S. industries in those markets.

In addition, Section 512 of the Digital Millennium Copyright Act (DMCA) is a foundational law of the U.S. internet economy. It provides a 'safe harbor' system that protects the interests of copyright holders, online service providers, and users – assigning responsibilities and rights for each. Safe harbors are critical to the functioning of cloud services, social media platforms, online marketplaces, search engines, internet access providers, and many other businesses. Weakening safe harbor protections would devastate the U.S. economy – costing around 425,000 U.S. jobs and decreasing U.S. GDP by $44 billion annually. And yet key trading partners, including three countries (Australia, Colombia, and Peru) that have obligations to enact safe harbors under trade agreements with the U.S., have failed to implement ISP safe harbors.

A fundamental reason that the internet has enabled trade is its open nature – online platforms can facilitate transactions and communications among millions of businesses and consumers, enabling buyers and sellers to connect directly on a global basis. This model works because platforms can host these transactions without automatically being held responsible for the vast amounts of content

surrounding each transaction. In the U.S., Section 230 of the Communications Decency Act has enabled the development of digital platforms by ensuring that online services can host user content without being considered the 'speaker' of that content. This law enables features such as customer reviews, which have been essential to building customer trust for U.S. small businesses in foreign markets.

The proliferation of content, applications, and services available online has delivered enormous value directly to consumers as well as small businesses. This includes lower entry barriers, greater access to information, markets, banking, and healthcare, communities of common interest, and new forms of media and entertainment. So called "over-the-top" (OTT) services play key roles in the digital economy. Each 10 percent increase in the usage of these services adds approximately $5.6 trillion to U.S. GDP.

Yet numerous foreign governments – Brazil, Colombia, the European Union (as well as several member states including Italy, Germany, France, and Spain), Ghana, India, Indonesia, Kenya, Thailand, Vietnam, Zimbabwe, among others – are developing and implementing measures to regulate online communications and video services as traditional public utilities. Some regulators and telecommunications providers are applying sector-specific telecom regulations to online services on matters such as emergency calling, number portability, quality of service, interconnection, and tariffing. Similarly, regulators have sought to subject online video services to broadcasting-style obligations on local content quotas, local subsidies, and a variety of regulatory fees. Such special regulation is not necessary for online services, where there are few barriers to new market entrants and low switching costs. While often couched as "level playing field" proposals, these initiatives serve to protect incumbent businesses, impede trade in online services, and make it substantially more difficult for U.S. internet firms to export their services.

B. Which foreign laws and policies restrict the free flow of information online? What is the impact on U.S. companies and users in general?

Please see Internet Association's "2017 National Trade Estimate Report Comments On Digital Trade Barriers" attached to this filing. It is also available online here: https://cdn1.internetassociation.org/wp-content/uploads/2013/04/InternetAssociation-NTE2017.pdf

C. Have courts in other countries issued internet-related judgments that apply national laws to the global internet? What have been the practical effects on U.S. companies of such judgements? What have the effects been on users?

Despite existing protections under the E-Commerce Directive for internet services that host third-party content, courts in some European Union member states have excluded certain internet services from the scope of intermediary liability protections. For example, one platform that hosted third-party content in Italy was found liable because it offered "additional services of visualisation and

indexing" to users. Another U.S.-based platform was found liable because it engaged in indexing or other organization of user content. A third internet service was held liable for third-party content because it automatically organized that content in specific categories with a tool to find 'related videos.' All of these activities represent increasingly common features within internet services, and the existence of these features should not be a reason to exclude a service from the scope of intermediary liability protections under the E-Commerce Directive, in Italy, or any other member state.

We have concerns about the Court of Justice of the European Union's (CJEU's) decision in *GS Media v. Sanoma Media*, which held that linking to copyrighted content posted to a website without authorization can itself be an act of copyright infringement. This case is already generating additional lawsuits testing the extent of the ruling, which may create new liability for online services doing business in the EU. It has also resulted in new monetary demands from publishers to those who provide links to content. We urge NTIA to monitor this situation and engage with European counterparts to prevent other negative impacts from this ruling.

In the Delfi opinion, the European Court of Human Rights held an Estonian news site responsible for numerous user comments on articles, even though the company was acting as an intermediary, not a content provider, when hosting these third-party comments. In response to that decision, the Delfi.ee news site shut down its user comment system on certain types of stories, and the chief of one newspaper association stated: "This ruling means we either have to start closing comments sections or hire an armada of people to conduct fact checking and see that there are no insulting opinions." Without clarification following this opinion, numerous internet services are likely to face increased liability risks and market access barriers in Estonia.

The Russian internet regulator has recently appealed to a court to block LinkedIn over alleged non-compliance with the Russian data localization requirements. The court of first instance has ruled that LinkedIn must be blocked in Russia entirely until the company is in compliance with these requirements. LinkedIn has appealed this order.

D. What are the challenges to freedom of expression online?

The widespread adoption of the internet has allowed people to develop new ways to express themselves. However, threats to free expression are just as prevalent online as they are off. A number of countries have created laws to limit online participation as a way to limit individuals ability to express themselves.

Brazil is considering certain provisions within its data protection legislation that risk harming both its own growing digital economy and market access by foreign services, including a new type of "adequacy" regime for assessing whether companies in other countries can move data in and out of Brazil. In addition, there are several bills before Brazilian Congress that would implement a form of the

"right to be forgotten" in Brazil, requiring that online services remove information that is deemed "irrelevant" or "outdated," even if it is true. These developments conflict with Brazil's strong commitment to freedom of expression and access to information, and present market access barriers for both small and large U.S. services seeking to enter the Brazilian market.

In Thailand one webmaster faced a sentence of up to 32 years in jail under the "Lèse Majesté" law for allowing comments on an interview with a Thai man known for refusing to stand at attention during the Thai Royal Anthem. Such rules have resulted in the blockage of U.S. online services in Thailand.

E. What should be the role of all stakeholders globally—governments, companies, technical experts, civil society and end users—in ensuring free expression online?

The internet flourishes when users, content creators, and businesses are empowered through an open architecture that promotes the unrestricted exchange of ideas and information. Internet services instantaneously connect users to goods and services, facilitate social interactions, and drive economic activity across borders. Consequently, support for the free flow of information is vital to eliminate trade barriers that restrict commerce or prevent U.S.-based internet services the freedom to operate in a foreign jurisdiction.

F. What role can NTIA play in helping to reduce restrictions on the free flow of information over the internet and ensuring free expression online?

NTIA can continue to coordinate efforts with USTR and other agencies within the federal government that work on internet issues to ensure barriers are not added. NTIA can become an advocate for these issues and act as an ombudsman to break down barriers when they arise.

G. In which international organizations or venues might NTIA most effectively advocate for the free flow of information and freedom of expression? What specific actions should NTIA and the U.S. Government take?

World Trade Organization (WTO) is currently debating establishing rules to remove digital trade barriers. Last December, the United States and 76 other WTO members agreed at the Buenos Aires WTO Ministerial to start exploring WTO negotiations on trade-related aspects of e-commerce. USTR is actively engaged with WTO on this process. NTIA can assist USTR during this process and help to ensure that the approach taken by the U.S. government meets the needs of the internet industry.

NTIA can advocate for the wider adoption of U.S. policies at the World Intellectual Property Organization (WIPO), one of the 15 specialized agencies of the United Nations (UN). This includes advocating for balanced copyright protections like fair use, copyright safe harbors, and intermediary liability protections like Section 230 of the Communications Decency Act. These frameworks are critical to past, present, and future U.S digital trade leadership. Unfortunately, as the internet

becomes ubiquitous to trade, many countries are now taking starkly different approaches to the laws and regulations that affect the internet, conflicting with the U.S. legal frameworks that have allowed digital trade to thrive.

II. Multistakeholder Approach To Internet Governance

A. Does the multistakeholder approach continue to support an environment for the internet to grow and thrive? If so, why? If not, why not?

The internet is one of the greatest engines for economic growth, freedom, and prosperity the world has ever known, thanks in large part to its multistakeholder governance model. For our companies to continue to innovate, to foster development and change, and ultimately to succeed as businesses globally, we need the continuation of the current bottom-up model of internet governance.

The future of the internet community, and businesses that operate within it, is dependent on the continuation of the internet's security, stability, interoperability, and resiliency. Equitable treatment of all stakeholders within a global multistakeholder model will ensure that the internet remains a hub for innovation around the world. Preserving a free internet is also essential to the preservation of political and economic liberty for global citizens.

There are countries that want to impose a top-down, state-centric governance model for the internet. These countries believe that something as powerful as the internet needs to be tamed by governments, or in some cases fragmented so that networks stop at national borders. Fragmentation of the internet would impede the free flow of information online and free speech worldwide, and would have political, economic, social, and cultural costs to society.

Additionally, one notable enabler of the multistakeholder approach has been the Internet Governance Forum (IGF), a vital platform for discussions and global engagement. IA supports the IGF, as well as efforts to ensure it can continue to play its important roles most effectively. Specific suggested goals include achieving greater participation by governments, enhanced sectoral balance in choice of workshops, and sustainable sources of funding.

B. Are there public policy areas in which the multistakeholder approach works best? If yes, what are those areas and why? Are there areas in which the multistakeholder approach does not work effectively? If there are, what are those areas and why?

The multistakeholder approach is well suited to the development of internet policy because it encourages participation in decision-making by the groups that actually own and operate the

technical infrastructure of the internet, as well as by its users. As noted by former Assistant Secretary of Commerce for Communications and Information Lawrence E. Strickling:

"The multistakeholder model of Internet governance is the best mechanism for maintaining an open, resilient, and secure Internet because, among other things, it is informed by a broad foundation of interested parties – including businesses, technical experts, civil society, and governments – arriving at consensus through a bottom-up process regarding policies affecting the underlying functioning of the Internet domain system." (Testimony before the Senate Committee on Commerce, Science, and Transportation, February 25, 2015)

"By encouraging the participation of industry, civil society, technical and academic experts, and governments from around the globe, multistakeholder processes result in broader and more creative problem solving than traditional governmental approaches." ("Moving Together Beyond Dubai" Blog Post, April 2, 2013)

D. Should the IANA Stewardship Transition be unwound? If yes, why and how? If not, why not?

Unwinding the IANA Stewardship Transition would undermine the credibility and the ultimate position of the United States. It would give new life to the efforts of authoritarian governments to battle for control of the core internet functions in intergovernmental organizations, such as through the International Telecommunication Union (ITU), empowering those around the world who want to divide and wall off parts of the internet and it would limit freedom of commerce and expression worldwide.

The United States performed a largely administrative role as the overseer of the contract with the Internet Corporation for Assigned Names and Numbers (ICANN). From the beginning, the recognition existed that ultimately the internet should be governed and held accountable not by governments but rather by public and private stakeholders. Therefore, since the creation of the model that governs the internet today, it was always envisaged that this oversight role held by the United States would eventually transition to the private sector.

While U.S. government stewardship served the global community well, the transition also fortified the principles that have made the internet exceptional and helped protect the it from bitter ideological battles among governments, including authoritarian governments that seek to fragment and control the internet for political ends. Seeking to resume the U.S. government's "special" role – which has always hidden the reality that it was the internet community itself that was primarily responsible for keeping the internet working around the world – could also encourage other governments to break off and create their own systems, endangering the seamless functionality and openness of the global internet.

E. What should be NTIA's priorities within ICANN and the GAC?

NTIA's top priority should be to strongly advocate for U.S. interests where needed. NTIA should be applauded for its active engagement within ICANN and the GAC since the IANA transition occurred. The U.S. can and should continue to be a leading voice within ICANN, as it has done recently in regard to the GDPR and WHOIS discussion, and during the course of discussions surrounding the use of geographic names in the DNS. Further, NTIA should remain vigilant in ensuring that ICANN is accountable to the full community of stakeholders.

J. What role should multilateral organizations play in Internet governance?

We do not believe inter-governmental bodies are the right way to govern the internet. A global internet that is not constrained by geographic boundaries should not be governed solely through institutions defined by them. Instead, we should look for innovative solutions involving the breadth of the internet community.

Notwithstanding the internet's success as an incubator of both democracy and economic growth, many member states in the ITU persist in efforts to increase governmental and intergovernmental control over the internet. The internet's open and decentralized governance framework should not be challenged by some states' top-down assertion of control over aspects of internet governance and their desire to use the ITU as a mechanism for asserting such control. These regimes have led the charge against an open and global internet and its liberalized markets, seeking to wall off their networks or otherwise maintain greater control over their citizens' online behavior, actions that could lead to fragmentation of the global internet and isolation of certain populations. Allowing intergovernmental oversight of internet functions and policy may also legitimize such restrictions on online content and interactions.

Additionally, internet governance fora should not be subject to capture by any one stakeholder or group of stakeholders, including national governments. Well-constructed multistakeholder governance models contain checks and balances that foreclose capture and lead to consensus driven decision-making to the long-term benefit of all internet stakeholders

To the extent multilateral organizations are involved in internet governance, they should be focused on promoting best practices and educating member countries on the benefits of internet access and use.

III. Privacy and Security

B. Which international venues are the most appropriate to address questions of digital privacy? What privacy issues should NTIA prioritize in those international venues?

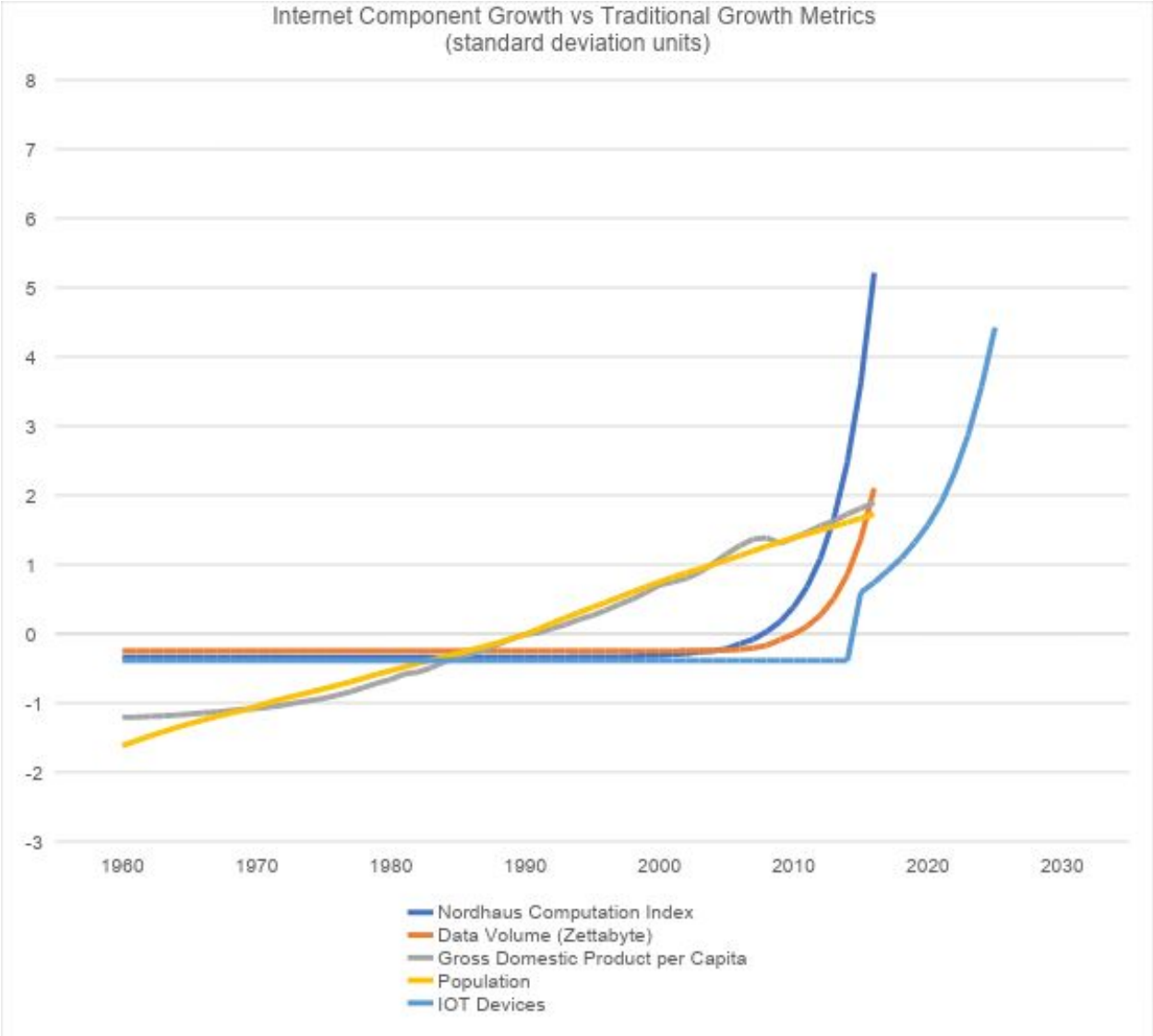
We support NTIA's involvement with the Organization for Economic Co-operation and Development (OECD) and the Internet Governance Forum (IGF) policy-making processes and encourage NTIA to be an advocate for continued multistakeholder processes. These venues, and U.S. participation in them, are more important than ever. NTIA should prioritize the continued multistakeholder approach to setting international internet policy rather than risking laws such as GDPR become the baseline international approach for the global internet community. Internet Association believes in flexible but robust approaches to online privacy and data security policies

A key priority in this area is maintaining regulatory coherence and cross-border predictability for consumers and businesses. NTIA should therefore engage in those fora with the broadest international reach, so as to avoid a patchwork of inconsistent regimes on privacy. These include the ongoing multilateral discussions on e-commerce within the WTO, the Asia-Pacific Economic Cooperation forum, and the OECD.

IV. Emerging Technologies and Trends

A. What emerging technologies and trends should be the focus of international policy discussions? Please provide specific examples.

A key starting point for understanding the array of emerging trends and technologies related to the digital ecosystem is the fundamentally different growth trajectory of the internet. Plainly, the internet is growing exponentially. This is seen in terms of the data it produces, the number devices connected to it, the number of users on it, and the power of computers to process the information traveling on it. Compared to standard metrics for country-level growth, internet components exhibit a fundamentally different pattern as illustrated in the following chart.



Sources: Nordhaus Computation Index (Nordhaus, 2010); Data Volume (Computer Science Corporation, 2016); IOT Devices (Statista, 2018); Population and GDP per Capita (US Census Bureau)

This context is crucial for understanding the pace of change. The current emergence of new technologies and the potential for the emergence of future technologies is moving far more rapidly than many stakeholders appreciate due to a tendency among some to examine the internet through the lenses of traditional industries. Such a tendency, beyond the potential for missing or not fully appreciating key developments, can hamper economic growth. As illustrated by Hooton and Kaing (2018), these growth components of the internet intrinsically and increasingly drive U.S. economic growth.

Any discussion about specific emerging trends and technologies, from machine learning to quantum computing, must be based on a solid understanding of their respective key engineering features and a full appreciation of the timeframe for their development/maturation.

B. What are the current best practices for promoting innovation and investment for emerging technologies? Are these best practices universal, or are they dependent upon a country's level of economic development? How should NTIA promote these best practices?

There is a longstanding set of research illustrating the importance of skilled labor markets and high-quality technology infrastructure (e.g. high-speed internet) for promoting innovation and investment. These two factors extend beyond simply technology development to other industries as well, but research has demonstrated a particularly strong link to the development of emerging technologies and businesses that develop them. They help to explain the highly concentrated nature of the digital and internet technology sectors within individual countries as well as the concentration of investment firms around them. They also appear to outweigh other negative factors, such as cost of living, regulator environment, and others. (Hooton, Chung, and Kaing, 2017)

More recent literature from a variety of authors at the World Bank (see Farole et al., 2018; Farole, Goga, and Ionescu-Heroiu, 2018; and Hooton and Farole, 2018), Brookings Institute (see Austin, Glaeser, and Summers, 2018), and elsewhere have also highlighted the role of regional economic potential rather than national economic development levels. A high-skilled labor force and good infrastructure are two critical ingredients in developing economic potential while high levels of inequality and differing historical economic growth rates over the past 30 years likely help create agglomeration forces that 'lock in' innovation and investment in a few key regional areas (e.g. Silicon Valley, Route 128, etc.).

This regional concentration, however, should not mask the overarching importance of national legal frameworks. While innovation and investment in emerging technologies has shown a tendency to concentrate similarly to other tertiary services, they depend on national level frameworks to ensure sufficient investment incentives and protections to fundamental aspects of digital technology business models (Internet Association, 2017). For example, Dippon (2017) demonstrated the value of U.S. intermediary liability protections at over $44 billion per year as well as approximately 425,000 jobs. Internet Association has demonstrated consistent industry consensus among businesses on principles around net neutrality, strong privacy protections, and other guiding principles. And future unreleased research from Internet Association demonstrates the lost economic potential from barriers to the international internet economy, innovation, and investment from restrictions in national digital frameworks.

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