



November 6, 2020

Ms. Lisa R. Barton
Secretary to the Commission
U.S. International Trade Commission
500 E Street SW
Washington, D.C. 20436

Re: Investigation No. TPA-105-008

Dear Ms. Barton:

Pursuant to the notice issued by the U.S. International Trade Commission (ITC), the Computer & Communications Industry Association (CCIA) submits the following written comments in relation to Investigation No. TPA-105-008, *Economic Impact of Trade Agreements Implemented Under Trade Authorities Procedures, 2021 Report*.

These comments supplement the testimony delivered at the October 7, 2020 public hearing.

Respectfully submitted,

/s/ Rachael Stelly

Rachael Stelly

Computer & Communications Industry Association

25 Massachusetts Avenue NW, Suite 300C

Washington, D.C. 20001

(202) 783-0070

Before the
Office of the United States International Trade Commission
Washington, D.C.

In re

Economic Impact of Trade Agreements
Implemented Under Trade Authorities
Procedures, 2021 Report

Investigation No. TPA-105-008

**WRITTEN COMMENTS OF THE
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION (CCIA)**

Pursuant to the notice issued by the U.S. International Trade Commission (ITC), the Computer & Communications Industry Association (CCIA) submits the following written comments in relation to Investigation No. TPA-105-008, *Economic Impact of Trade Agreements Implemented Under Trade Authorities Procedures, 2021 Report*. CCIA represents large, medium, and small companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications, and Internet products and services.¹ CCIA welcomes the opportunity to document the economic impact of U.S. free trade agreements (FTAs) to the digital economy.

CCIA's comments address the following: (1) the role of U.S. free trade agreements to expand market access for U.S. digital services; (2) the negative impact of imposing customs duties on electronic transmissions and importance of the e-commerce moratorium; and (3) expanding on questions asked to the panel at the public hearing which took place on October 7, 2020.

I. Introduction

U.S. FTAs have been critical to expanding market access for U.S. Internet and technology companies of all sizes around the world. The U.S. has made steady progress over each FTA to modernize and further digital trade. Commitments in intellectual property, telecommunications, customs, and with recent agreements such as the U.S.-Mexico Canada Agreement (USMCA) and the U.S.-Japan Digital Trade Agreement, comprehensive digital trade chapters have played an important role in the success of the U.S. technology sector.

¹ CCIA represents technology products and services providers of all sizes, including computer hardware and software, electronic commerce, and telecommunications and Internet products and services. A list of CCIA members is available at <https://www.ccianet.org/members>.

As trade barriers continue to rise around the world, studies like this are critical to show how important U.S. trade policy and comprehensive FTAs are to ensure digital trade proliferates.

II. The Role of U.S. Free Trade Agreements to Expand Market Access for U.S. Digital Services

Firms rely on regulatory certainty and symmetric frameworks when looking to expand into new markets. This is true for services of all sizes.² It is important that U.S. trade agreements are comprehensive and include critical commitments to trade in digital and Internet-enabled goods and services.

There are many provisions in FTAs that can contribute to this. Agreements like the U.S.-Korea Free Trade Agreement (KORUS) and USMCA include more explicit references to “digital” services or electronic commerce, but Internet services have long relied upon commitments in intellectual property, telecommunications, and customs and trade facilitation chapters to expand into new markets. USMCA contains strong commitments important to the digital sector and CCA members and, especially with respect to the digital trade chapter, should serve as the gold standard in future U.S. trade agreements. Below are provisions in relevant FTA chapters that have been critical for U.S. Internet and technology exporters. These comments also note areas where negotiators can go further in obtaining strong commitments on digital priorities.

A. Digital Trade

1. Enabling Cross-Border Data Flows and Prohibitions on Localization Mandates

Cross-border data flows are critical to digital trade and forced data and infrastructure localization mandates make it difficult for U.S. exporters to expand into new markets. The U.S. should work to remove barriers to cross-border data flows and discourage data localization

² Data collected through the Future of Business Survey, a project between Facebook, the OECD, and the World Bank, shows how social media platforms enable exports. The Survey data was collected through businesses’ responses to their interactions on Facebook and perspectives on trade issues that affect their ability to export. Utilizing this data, the Mercatus Center has a series of policy briefs released earlier this year breaking down these numbers and highlighting that firms using Facebook have a higher propensity to export. The data shows that businesses, particularly small businesses, utilizing online platforms have a higher propensity to engage in international trade than traditional firms. 6.75 percent of U.S. small and medium-sized businesses (SMBs) on Facebook engage in international trade, compared to 4.33 percent of SMBs not on Facebook. In other reporting countries, the share of businesses who were engaged in trade was up to 30.9 percent (Bangladesh), with other high shares were reported in businesses located in Nigeria, Egypt, Portugal, Pakistan, and the Czech Republic. Christine A. McDaniel & Danielle Parks, *Businesses on Facebook and Propensity to Export: The United States*, MERCATUS CENTER (Feb. 2019), https://www.mercatus.org/system/files/mcdaniel_and_parks_-_policy_brief_-_digital_platforms_small_and_medium-sized_businesses_-_v1_0.pdf; OECD, *The Future of Business Survey*, <http://www.oecd.org/sdd/business-stats/the-future-of-business-survey.htm> (last accessed Nov. 5, 2020).

mandates, encouraging partners to build off strong commitments in the digital trade chapter in USMCA. While KORUS and the negotiated text of the Trans-Pacific Partnership (TPP) include references to enabling cross-border data flows, Articles 19.11 and 19.12 in USMCA represent the strongest language to enable data flows and prohibit forced localization and related restrictions.

2. Protections for Interactive Computer Services

U.S. firms operating as online intermediaries face an increasingly uncertain environment in a variety of international markets which impedes U.S. Internet companies from expanding services abroad. While generally in pursuit of legitimate and valid goals to address illegal and/or harmful content online, many of the proposals are expansive in scope and will conflict with U.S. law and free expression values.³

Countries are increasingly using outdated Internet service liability laws that impose substantial penalties on intermediaries that have had no role in the development of objectionable content. These practices deter investment and market entry, impede legitimate online services, and undermine ongoing efforts to identify and remove third-party content that violates terms of service. Commitments included in Article 19.17 of USMCA will help ensure that as countries consider new approaches to online content and speech regulations, these rules are consistent with international commitments and provide adequate liability frameworks for services that do not originate content. Section III of these comments expands on the inclusion of this text in free trade agreements.

3. Preventing Government Censorship and Internet Shutdowns

Among the most explicit barriers to digital trade is the outright filtering and blocking of U.S. Internet platforms and online content, a trend that continues to grow. Another concerning trend in recent years is authoritarian governments pursuing content regulations to fight “fake news” that have the effect of targeting dissidents and political opposition. Trade agreements can contain more explicit provisions on government censorship measures.

4. Promoting Secure Communications

Countries should adopt risk-based approaches to cybersecurity, rather than prescriptive regulations, that are based on consensus-based standards and risk management best practices to

³ Examples of these policies can be found in CCIA’s 2020 NTE submission to USTR. CCIA Comments to USTR (Oct. 2020), <https://www.cciainet.org/wp-content/uploads/2020/10/USTR-2020-0034-CCIA-Comments-on-2021-National-Trade-Estimates-Report.pdf>.

identify and protect against cybersecurity risks and to detect, respond to, and recover from cybersecurity events. Text included in USMCA Art. 19.15 details important practices that countries should pursue in order to achieve this.

Additionally, strong encryption has been increasingly enabled on now ubiquitous smartphones and deployed end-to-end on consumer-grade communications services and browsers. Many countries, at the behest of their respective national security and law enforcement authorities, are considering or have implemented laws that mandate access to encrypted communications. Trade agreements should prevent countries from compelling manufacturers or suppliers to use a particular cryptographic algorithm or to provide access to a technology, private key, algorithm specification, or other cryptographic design details.

5. Prohibiting Customs Duties on Electronic Transmissions

The WTO moratorium on customs duties for electronic transmissions has recently been under threat by countries including Indonesia and India. The moratorium has been key to the development of global digital trade and shows the international consensus with respect to the digital economy.

B. Intellectual Property

1. Notice-and-Takedown Frameworks for Online Copyrighted Content

Internet services need regulatory certainty to operate abroad. Numerous conflicting liability regimes undermine this certainty and unpredictable liability rules for online intermediaries represent a considerable barrier to international Internet commerce. Guaranteeing minimum standards for the protection of Internet services from liability for third-party content is critical to promoting U.S. digital trade exports.⁴ In FTAs since 2003 U.S. trade agreements have long reflected domestic copyright law by including necessary intermediary protections for online services.⁵ USMCA continues this tradition, drawing directly from Title 17 of the U.S. Code, and

⁴ See CCIA, *Modernizing Liability Rules for Digital Trade* (2018), available at <http://www.cciainet.org/wpcontent/uploads/2018/07/Modernizing-Liability-Rules-2018.pdf>.

⁵ U.S.-Austl. Free Trade Agreement, May 18, 2004, 43 I.L.M. 1248, art. 17.11, para. 29; U.S.-Bahr. Free Trade Agreement, Dec. 7, 2005, 44 I.L.M. 544, art. 14.10, para. 29; U.S.-Chile Free Trade Agreement, June 6, 2003, 42 I.L.M. 1026, art. 17.11, para. 23; U.S.-Colom. Free Trade Agreement, Nov. 22, 2006, art. 16.11, para. 29; U.S.-S. Kor. Free Trade Agreement, June. 30, 2007, art. 18.10, para. 30; U.S.-Morocco Free Trade Agreement, June 15, 2004, art. 15.11, para. 28; U.S.-Oman Free Trade Agreement, Jan. 19, 2006, art. 15.10, para. 29; U.S.-Pan. Trade Promotion Agreement, June 28, 2007, art. 15.11, para. 27; U.S.-Sing. Free Trade Agreement, May 6, 2003, 42 I.L.M. 1026, art. 16.9, para. 22.

is consistent with prior free trade agreements.⁶ This is the reason why U.S. Internet services have been able to export around the world.

2. Copyright Limitations and Exceptions

Limitations and exceptions to copyright are necessary for the continued growth of the digital economy, and critical to activities central to new areas of innovation and cutting-edge technology such as artificial intelligence and text and data mining. A missed opportunity in USMCA was language supportive of balanced copyright provisions, and the U.S. should include stronger language to protect the export of U.S. technology products and services. USMCA cites the Berne three-step test language.⁷ However, this is not as strong as language in previously negotiated U.S. trade agreements that fully reflects the importance of this principle.⁸

C. Telecommunications

Business models depend on access to local networks, often from a local incumbent. However, due to inadequate regulatory institutions and insufficient rules to enable access to infrastructure on fair terms, some businesses are restricted from doing so. For example, even in the United States there is no adequate regulation on bottlenecks in access layers, particularly in the business data service market. Trade agreements should provide consistent, pro-competitive regulation of business-grade whole access and prevent discrimination by major suppliers. Another market access concern reported by industry is regulatory forbearance without an actual finding of competition. Trade agreements should make clear that any forbearance determination is justified with empirical support. Favorable provisions are found in the EU-Mexico trade agreement, and analogous provisions should be pursued by U.S. policymakers.⁹ Public procurement regimes must be fair and transparent. The U.S. should also support full implementation of the WTO's 2017 Trade Facilitation Agreement in order to reduce administrative barriers in relation to the import of communications equipment.

⁶ Art. 20.89.

⁷ Art. 20.39.

⁸ *See* TPP.

⁹ The text makes clear that any decisions not to regulate, made by the regulator, must be based in fact. *See* Modernisation of the Trade part of the EU-Mexico Global Agreement, http://trade.ec.europa.eu/doclib/docs/2018/april/tradoc_156809.pdf (last accessed Nov. 5, 2020).

III. Negative Impact on the Imposition of Customs Duties on Electronic Transmissions and Importance of E-Commerce Moratorium

In 1998, WTO members recognized that in order to facilitate the Internet economy, customs duties should not be extended to electronic transmissions. This moratorium has been key to the development of global digital trade and shows the international consensus with respect to the digital economy, reflected in the number of commitments made in free trade agreements among multiple leading digital economies. Permanent bans on the imposition of customs duties on electronic transmissions are included in U.S. trade agreements, including USMCA.

However, some countries are taking steps to eliminate, or at the very least undermine the moratorium. Attempts to undermine or eliminate the moratorium will do little to address revenue concerns and will deter growth by introducing significant compliance burdens.¹⁰ Making this moratorium permanent will encourage e-commerce and provide predictability. A departure from this practice would create difficulties in technical feasibility as well as increase costs for U.S. exporters. USMCA ensures that parties will not place duties on electronic transmissions, which is consistent with longstanding WTO commitments. This provision is one of several that will enable digital trade.

IV. Expanding on Questions Asked at the October 7 Public Hearing

The following section expands on questions directed to CCIA and the panel at the October 7, 2020 public hearing. Comments may reiterate points made in other sections of this submission.

A. Addressing Digital Protectionism

Governments are increasingly adopting policies designed to favor domestic innovation and specifically target U.S. companies, ushering in a new form of protectionism.¹¹ An illustrative example of this is the rise in unilateral digital services taxes (DSTs). The Office of

¹⁰ Andrea Andrenelli & Javier López González, *Electronic transmissions and international trade - shedding new light on the moratorium debate*, OECD (Nov. 13, 2019), https://www.oecd-ilibrary.org/trade/electronic-transmissions-and-international-trade-shedding-new-light-on-the-moratorium-debate_57b50a4b-en (finding that “the revenue implications of the Moratorium are likely to be relatively small and that its lapse would come at the expense of wider gains in the economy”).

¹¹ See Submission of CCIA In Re Section 301 Investigation of French Digital Services Tax, Docket No. USTR-2019-0009 (filed Aug. 19, 2019), <https://www.cciagnet.org/wp-content/uploads/2019/08/USTR-2019-0009-CCIA-Written-Comments-on-French-Digital-Tax.pdf>; CCIA Comments to Office of the U.S. Trade Rep., In re Initiation of Section 301 Investigations of Digital Services Taxes, Docket No. USTR-2020-0022 (filed July 14, 2020), <https://www.cciagnet.org/wp-content/uploads/2020/07/Comments-of-CCIA-USTR-2020-0022-Section-301-Digital-Services-Taxes-.pdf>.

the U.S. Trade Representative concluded in 2019 that the “French DST is intended to, and by its structure and operation does, discriminate against U.S. digital companies.”¹²

Regulatory scrutiny of the digital economy by any government is to be expected as Internet services continue to grow and expand into new markets around the world. However, trade plays an important role in making sure enforcement actions and new regulatory frameworks are consistent with international trade commitments and follow best regulatory practices. The U.S. should engage with trading partners to raise concerns, pursue trade agreements that will open up foreign markets for U.S. exports, and ensure that countries fulfill their international obligations.

Trading partners’ pursuit of “technological sovereignty”, with protectionist features, is an alarming trend Internet and technology services have encountered.¹³ Similarly, in its 2020 *Freedom on the Net* report, Freedom House highlighted the rising “allure of cyber sovereignty”.¹⁴ The report observed that it is no longer just regimes such as China and Russia that are pursuing an isolationist and protectionist digital environment, but also regions such as the European Union seeking to draw up digital borders. This risks unprecedented fragmentation of the open Internet and delivery of digital services.

B. Inclusion of Protections for Interactive Computer Services in Trade Agreements

As noted above, U.S. trade policy should reflect existing U.S. law that has enabled innovation in the Internet sector. USMCA includes protections for online intermediaries regarding civil liability for third-party content, consistent with existing U.S. law. These provisions provide certainty to U.S. Internet exporters by ensuring that they enjoy the same protections and expectations under U.S. law when delivering services outside the United States and will encourage the cross-border delivery of services.

Questions were raised at the October 7 hearing regarding the ability of Congress to change U.S. law in the future. Provisions on “Interactive Computer Services” in USMCA

¹² Ambassador Robert E. Lighthizer, *Report on France’s Digital Services Tax Prepared in the Investigation under Section 301 of the Trade Act of 1974*, OFFICE OF THE U.S. TRADE REP. (Dec. 2, 2019), https://ustr.gov/sites/default/files/Report_On_France%27s_Digital_Services_Tax.pdf, at 31.

¹³ Christian Borggreen, *European ‘tech sovereignty’ or ‘tech protectionism’?*, DISRUPTIVE COMPETITION PROJECT (Oct. 30, 2019), <https://www.project-disco.org/european-union/103019-european-tech-sovereignty-or-tech-protectionism/>.

¹⁴ Adrian Shahbaz & Allie Funk, *Freedom on the Net 2020: The Pandemic’s Digital Shadow*, FREEDOM HOUSE (Oct. 2020), <https://freedomhouse.org/report/freedom-net/2020/pandemics-digital-shadow>.

provide sufficient flexibility for Congress to legislate in the future. If Congress chooses to act in this area, it would not be precluded from doing so based on specific provisions outlined in USMCA for the following reasons.¹⁵

First, the provisions in Article 19.17 in the negotiated text are specifically written at a higher level of generality than U.S. law. Article 19.17 is an exact transposition of U.S. law regarding intermediary liability provisions, notably Section 230 of the Telecommunications Act.

Second, the Digital Trade chapter is subject to Article 32.1 of USMCA outlining General Exceptions, allowing for parties to enact measures “necessary for the protection of public morals” (consistent with Article XIV of GATS). Negotiators went a step further to make clear that this applies to Article 19.17.¹⁶

Third, the Annex also makes explicit reference to recent changes to Section 230 by Congress. Negotiators cite the recently-enacted 2017 FOSTA-SESTA legislation as a recognized example of an exception to the requirements under Article 32.1 (exceptions for measures to protect public morals).¹⁷

Finally, the assertion that FTAs preclude Congressional activity is not accurate. Congress has previously amended statutes that are the subject of Free Trade Agreement commitments.¹⁸

V. Summary

At the hearing, the ITC requested that commenters submit a summary of their position to be included in the final report. CCIA would like to submit the following to be included in the Annex.

¹⁵ See Rachael Stelly, *Setting the Digital Standard for U.S. Trade Agreements*, DISRUPTIVE COMPETITION PROJECT (Aug. 9, 2019), <https://www.project-disco.org/21st-century-trade/080919-setting-the-digital-standard-for-u-s-trade-agreements/>.

¹⁶ The Annex (19-A) states: “For greater certainty, Article 19.17 (Interactive Computer Services) is subject to Article 32.1 (General Exceptions), which, among other things, provides that, for purposes of Chapter 19, the exception for measures necessary to protect public morals pursuant to paragraph (a) of Article XIV of GATS is incorporated into and made part of this Agreement, *mutatis mutandis*.”

¹⁷ “The Parties agree that measures necessary to protect against online sex trafficking, sexual exploitation of children, and prostitution, such as Public Law 115-164, the ‘Allow States and Victims to Fight Online Sex Trafficking Act of 2017,’ which amends the Communications Act of 1934 . . . are measures necessary to protect public morals.”

¹⁸ For example, Free Trade Agreement commitments in Intellectual Property chapters dating back to 2003 on copyright anticircumvention measures did not prevent Congress from authorizing consumers to circumvent when unlocking their lawfully purchased cell phones in 2014. See *Unlocking Consumer Choice and Wireless Competition Act*, Pub. L. 113-144.

Summary of the Comments of the Computer & Communications Industry Association

The Internet is now integral to international trade in services and goods. However, in recent years U.S. trading partners have begun adopting laws and regulations that hinder the further growth of cross-border delivery of Internet services and hardware. As the Internet continues its exponential growth and becomes even more intertwined with international commerce, U.S. trade policy should continue to reduce digital trade barriers and empower U.S. firms of all sizes to export and expand into new markets. Free trade agreements can do this directly, and also help establish norms around the world.

VI. Conclusion

CCIA welcomes the analysis of the ITC to study these important issues and inform policymakers going forward to ensure that U.S. digital industries are able to continue to grow and expand to new markets abroad. Pursuing ambitious and comprehensive trade agreements is increasingly important as trading partners adopt laws and regulations that hinder the further growth of cross-border delivery of Internet services and technologies.

November 6, 2020