

KEY THREATS TO DIGITAL TRADE 2022

The Americas

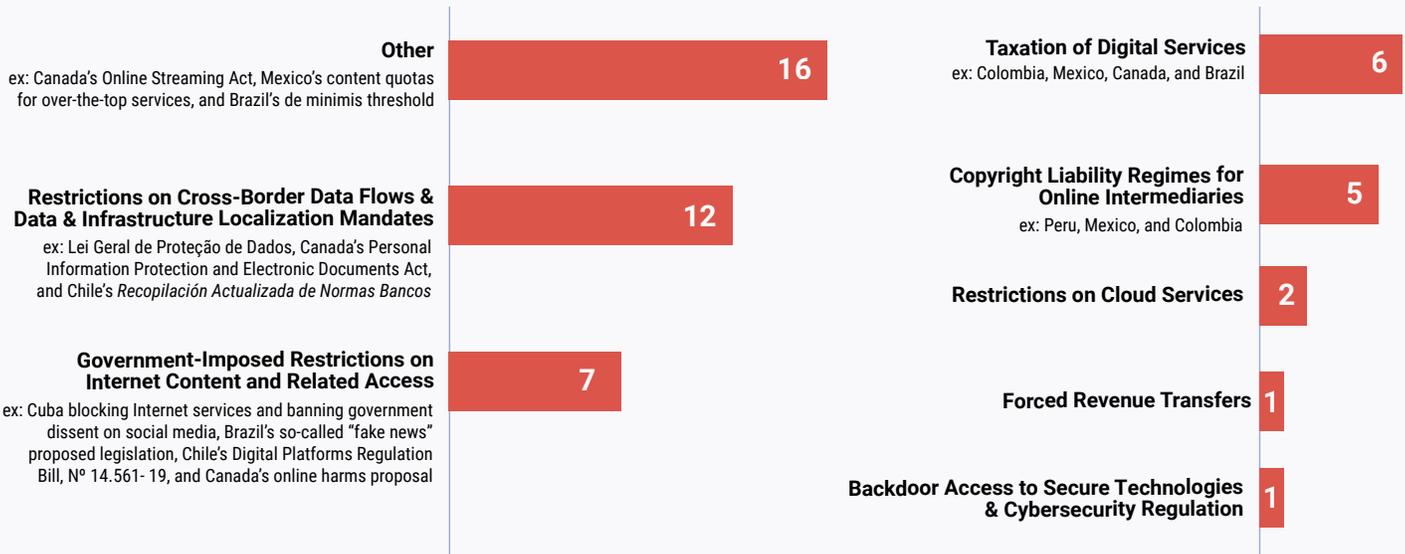
The United States has enjoyed strong diplomatic and economic relationships with the countries in the Americas for centuries. Services drive the modern benefits for U.S. exports in this mutually beneficial relationship, as are digital services. The U.S. **generated \$157.9 billion in exports of digital services** to the region in 2020, bringing numerous positive externalities for business operations and consumers in the region and a **trade surplus of at least \$60.3 billion** in the sector in 2021.

This region includes analysis of policies in Argentina, Brazil, Canada, Chile, Colombia, Cuba, Mexico, and Peru.

The United States has formalized its trading partnership and economic cooperation with countries in the region in several fora, including the U.S.-Mexico-Canada Free Trade Agreement, several bilateral treaties, and the more recently announced Americas Partnership for Economic Prosperity. As work is done to advance these initiatives, the United States should ensure partners do not restrict the ability of U.S. firms to enter or expand into their markets and engage in cross-border delivery of goods and services.

This engagement comes at a critical moment in the relationship. Countries in the Americas have enacted policies that hinder the ability of U.S. digital services to operate. The following is excerpted from CCIA’s annual [comments](#) submitted to the Office of the U.S. Trade Representative regarding its National Trade Estimate report—first, there are broad takeaways from the region followed by details of the trends identified in the region.

Key Threats to the U.S.-EU trading relationship in 2022



CCIA identified **50** digital trade barriers in the Americas

29 policies have been enacted

21 are in development

Digital Trade Barrier Trends for the Americas in 2022.

Restrictions on Cross-Border Data Flows and Data and Infrastructure Localization Mandates

- **Brazil:**

- » In 2018, Brazil passed a privacy law, Lei Geral de Proteção de Dados (LGPD) that went into effect in August 2021. The law is closely modeled after the EU's General Data Protection Regulation (GDPR) and has extraterritorial scope. However, the LGPD lacks a number of provisions in the GDPR designed to lessen the burden on smaller firms. Further, the LGPD does not permit cross-border data transfers based on the controller's legitimate interests, but rather lists ten instances in which cross-border data transfer under the LGPD is permitted. In addition, the national authority is tasked with determining whether a foreign government or international organization has a sufficient data protection scheme in place before any data is authorized to be transferred to the government or organization.
- » Other localization barriers reported include tax incentives for locally sourced information and communications technology (ICT) goods and equipment, government procurement preferences for local ICT hardware and software, and non-recognition of the results of conformity assessment procedures performed outside of Brazil for equipment connected to telecommunications networks.
- » The Presidency Institutional Security Group (GSI), led by a military, published a Normative Instruction which establishes new rules for the contracting of cloud services by the Federal Public Administration. It established requirements for data and metadata residency exclusively in national territory in a few situations that are red flags for U.S. digital services providers.

- **Canada:**

- » Guidelines promulgated for cross-border data flows under the Personal Information Protection and Electronic Documents Act direct lawmakers to reevaluate existing law and determine whether legislative changes are needed.
- » The Government of Quebec passed privacy legislation in September 2021 that, amongst other things, would make data transfers extraordinarily difficult. The law entered into effect on September 22, 2022, with various provisions entering into effect in phases over three years. The U.S. International Trade Commission [identified](#) the law as a barrier to digital trade in its "Year in Trade 2021" report published in August 2022.

- **Chile:**

- » Chapter 20-7 of the *Comisión para el Mercado Financiero's* compilation of updated rules, *Recopilación Actualizada de Normas Bancos*, requires that "significant" or "strategic" outsourcing data be held in Chile.
- » The same requirement is outlined in Circular No. 2, which is addressed to non-banking payment card issuers and operators. In effect, these regulations can apply to any confidential records. In the case of the international transfer of such data, transfer may occur but duplicate copies of such records must be held in Chile.

Government-Imposed Restrictions on Internet Content and Related Access Barriers

- **Cuba:**

- » There have been many cases of the Cuban government disrupting access or blocking certain Internet services to stifle political dissent and organization. Government ownership and control of the Empresa de Telecomunicaciones de Cuba S.A, the telecommunications services provider for the country, increases the risk of censorship.
- » In August 2021, the Cuban government adopted new regulations that ban dissent against the government on social media, making it illegal to criticize "the constitutional, social and economic" rules of the country or that provoke acts "that alter public order." The definitions behind false information and public safety are vague and left in the hands of the government authorities.

- **Brazil:**

- » A law designed to address “fake news” was passed by the Senate in July 2020 - Internet Freedom, Responsibility, and Transparency Bill. While there were improvements from its initial draft, concerns remain that some requirements would be used in a manner to pursue restrictions on speech. A new version of that bill—which maintained many of the provisions causing concerns of content and speech restrictions—received a hearing in July 2022.
- » Further, on September 21, 2021, President Jair Bolsonaro signed an Executive Order that—although temporary in nature and now lapsed—prevented social media companies from taking down content regarding the 2022 Brazilian election that violates their disinformation rules, marking one of the first instances globally of a blatant use of such restriction.
- » A new set of rules, adopted by the Superior Electoral Court on October 20, 2022, in the build-up to the Brazilian elections, would allow the leader of Brazil’s electoral justice system to unilaterally demand online platforms to take down content perceived to be in violation of prior removal orders absent any other entity making such a request. If the social media provider does not adhere to the takedown order within two hours, the platform would potentially have to suspend their operations in the country.

- **Chile:**

- » In September 2021, five Senators introduced the Digital Platforms Regulation Bill, N° 14.561- 19, to put in place a series of rules for digital platforms that the bill defines as “all digital infrastructure whose purpose is to create, organize and control, through algorithms and people, a space for interaction where natural or legal persons can exchange information, goods or services.” The bill would implement convoluted requirements for online platforms to conduct proactive monitoring of user activity to take down illegal content to avoid punishment, while also limiting their ability to remove harmful legal content.

- **Canada:**

- » Canada announced a proposed legislative and regulatory framework to “address harmful content online”. The proposal includes a number of concerning proposals including 24-hour takedown requirements, content filtering and monitoring, and site-blocking. The broad definition of “harmful” content could lead to requirements to take down otherwise lawful content. In March 2022, Canadian Heritage announced the creation of a 12-person expert panel which would devise recommendations for a pending proposal aimed at addressing “harmful online content”, after publishing a report in February surveying the feedback they had received on the framework.

Taxation of Digital Services

- **Colombia:**

- » The third Commission of both Chambers of Congress passed a new tax bill that introduces new difficulties for U.S. exporters, called No. 118 of 2022, on October 6th, 2022, with a goal of final passage in November 2022. The bill implicates U.S. firms operating in Colombia for both digital goods and services through Articles 57 and 61. Under the legislation, effectively all U.S. firms would be forced to make a choice between paying Colombian income tax paired with a 10% withholding tax at source or instead paying a 5% tax on all gross income from the sale of goods, the supplying of digital services, or both to consumers in Colombia.
- » For companies providing goods to the Colombian market, the bill would implicate U.S. firms with a “deliberate and systematic interaction” to Colombia’s market and earn “31,300 tax units” (which would translate to USD \$300,000 currently) during the relevant tax year, a relatively low bar for inclusion. Digital services providers would be included regardless of their relation to or earnings in Colombia, the provision of select services defined in the proposed bill would trigger its obligations for such suppliers that are so wide sweeping they would likely include all online services offered in Colombia.

- **Mexico:**

- » On September 8, 2020, the Secretary of Finance & Public Credit, Arturo Herrera, presented to the Mexican Congress the legislative project for the Government's Budget for 2021. Included in the proposal is the implementation of a "kill switch," which is an enforcement mechanism that the Mexican government initially proposed in their 2020 Budget against non-resident entities that do not comply with the application of the VAT on non-resident supplies of digital services to Mexican consumers. The measure was reintroduced and entered into force on January 1, 2021.
- » The regulation empowers tax authority to work with the telecom regulator to non-resident Internet platforms, removing them from accessibility to Mexican users. At time of filing, the provision hasn't been used as the vast majority of U.S. Internet companies have already been registered and have been complying with fiscal obligations.

- **Canada:**

- » Canada announced its plans to proceed with a DST as part of its annual Budget. The tax would be 3 percent on "digital services reliant on the engagement, data and content contributions of Canadian users" and in scope revenue include revenue derived from online marketplaces, social media, and online advertising. The thresholds would be set at firms who collect global revenue of 750 euro million or more per year, and in-scope revenue associated with Canadian users of more than \$20 million per year.

- **Brazil:**

- » Brazil is currently considering various digital tax initiatives, including the introduction of a DST through an expansion of its existing CIDE (contribuição de intervenção no domínio econômico) regime. The CIDE-Digital tax (PL 2,358/2020) would apply progressively from 1 percent to 5 percent on gross revenues derived from (1) digital advertising; (2) operating a digital service that permits users to interact with each other for the sale of goods and services; and (3) collection of user-generated data in the operation of a digital platform.

Copyright Liability Regimes for Online Intermediaries

- **Peru:**

- » Peru remains out of compliance with key provisions under the U.S.-Peru Trade Promotion Agreement (PTPA). Article 16.11, para. 29 of the PTPA requires certain protections for online intermediaries against copyright infringement claims arising out of user activities. USTR cited this discrepancy in its inclusion of Peru in the 2018 Special 301 Report, and CCIA supports its inclusion in the 2021 NTE Report. CCIA urges USTR to engage with Peru and push for full implementation of the trade agreement and establish intermediary protections within the parameters of the PTPA.

- **Mexico:**

- » Mexico made reforms to its Federal Copyright Law in 2020 in attempts to bring its law in compliance with commitments under USMCA. There are concerns that the text of the provisions implementing Article 20.87-88 of the USMCA inappropriately narrows the application of this framework for Internet services.
- » Likewise, the provision implemented through the amendment of in Article 232 Quinquies fr. II of the Copyright Law establishes administrative offenses and a fine, when ISPs: do not remove, take down, eliminate or disable access to content upon obtaining a notice from the right holder; or do not provide to a judicial or administrative authority information that identifies the alleged offender. This provision contravenes Article 20.89.(9) of the USMCA, and other provisions of the Bill, since the impossibility of applying the measures provided in the treaty do not per se originate a responsibility for ISPs.



- **Colombia:**

- » Colombia has failed to comply with its obligations under the 2006 U.S.-Colombia Free Trade Agreement to provide protections for Internet service providers. Revision to the legislation in 2018 that sought to implement the U.S.-Colombia FTA copyright chapter includes no language on online intermediaries. Without such protections required under the FTA, intermediaries exporting services to Colombia remain exposed to potential civil liability for services and functionality that are lawful in the United States and elsewhere. The legislation also does not appear to include widely recognized exceptions such as text and data mining, display of snippets or quotations, and other non-expressive or non-consumptive uses.