Computer & Communications Industry Association
Open Markets. Open Systems. Open Networks.

KEY THREATS TO DIGITAL TRADE 2023[1]

Vietnam

The United States and Vietnam have a longstanding economic relationship underpinned by the U.S.-Vietnam Bilateral Trade Agreement, enacted in 2001 and the U.S.-Vietnam Trade and Investment Framework Agreement. The U.S. and Vietnam are also partners in other regional and multilateral fora, including the WTO, APEC, and the Indo-Pacific Economic Framework.

Strong trade and investment ties are an essential component of relations between the United States and Vietnam, ties which have become ever more important in view of changing geopolitical realities. Digital trade drives U.S. services exports in this mutually beneficial relationship. **The United States generated $782 million[2] in exports of digitally-enabled services to Vietnam in 2022, representing 32% of all U.S. services exports to Vietnam**. The United States ran a $468 million surplus in bilateral digitally-enabled services. Vietnam's profile reflects an enormous growth potential of the online services sector in the country—74% of the country uses the internet as of 2021, a share that has increased from 45% in 2015.

Despite the growth potential of the Vietnamese market for U.S. digital services, the regulatory environment in Vietnam has made it increasingly challenging for U.S. businesses to operate on a level playing field. Several policies pursued or already enacted by Vietnam's government have established barriers to U.S. digital exports and threatened the internet ecosystem:

1

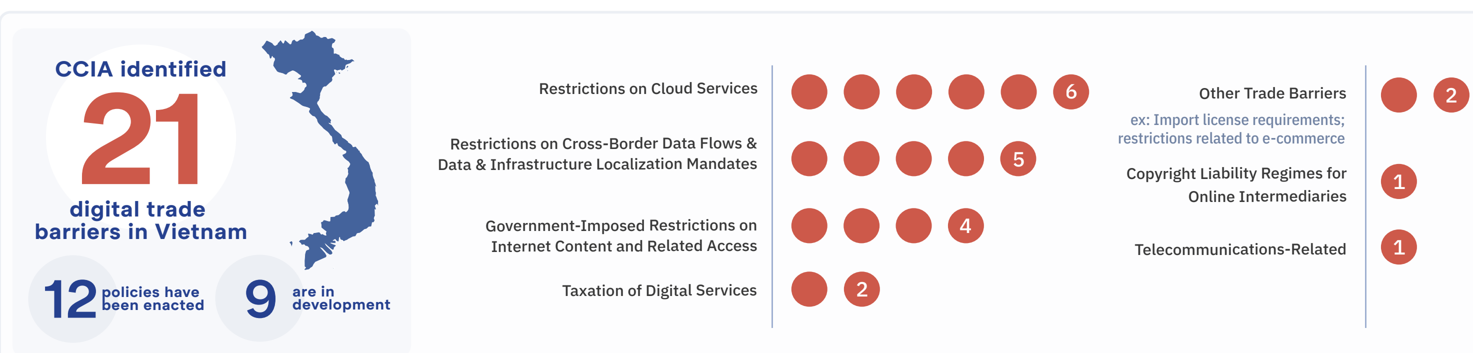
Vietnam has established **several restrictive data policies** that hinder the provision of online services and cloud services from U.S. and foreign suppliers in the country. Overlapping regulations requiring data localization, restricting the transfer of data, and imposing stringent obligations on companies to disclose third-party data processing hinder cross-border data flows and subsequently the provision of online services in Vietnam. Technical standards imposed on cloud services providers—largely tailored to favor local suppliers—restrict access to the market for U.S. and other foreign providers.

2

Vietnam has imposed and continues to expand upon significant **obstacles to online content** through a litany of laws and regulations that simultaneously restrict freedom of expression and undermine the provision of digital services in the country, including through the use of data localization mandates as penalty for the transmission of restricted content.

3

Vietnam is pursuing a **broad revision of its telecommunications law** that would inappropriately extend its existing obligations from the telephony space to online, over-the-top messaging services and cloud services providers that could require foreign suppliers to enter into paid contracts with local telecommunications providers to offer service in the country. The rules would expand local representation requirements and could apply beyond OTT messaging services and cloud providers due to a broad definition for suppliers.



1 As of July 2023.

2 Since many U.S. firms book sales to Vietnam through local subsidiaries in countries like Singapore, whose $23 billion in ICT exports to Vietnam likely includes a significant amount of U.S. firms' sales, this U.S. export figure may significantly undercount the importance of Vietnam for U.S. firms.

The following sections profile key policies that concern the U.S. technology exports in Vietnam:

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

Vietnam remains a country of concern for industry as it continues to pursue localization measures. **The Law on Cybersecurity**, a key vehicle for localization, took effect January 1, 2019, and implementation continues through a range of related decrees. The law is expansive and includes data localization mandates, local presence requirements, and content regulations. Under the law and subsequent decrees, covered service providers are required to store personal data of Vietnamese end users, data created by users, and data regarding the relationships of a user within the country for a certain period of time.

On Aug. 15, 2022, the Vietnamese government issued **Decree No. 53/2022/ND-CP** which added detail to several of the articles under the original Law on Cybersecurity regarding local data storage and went into effect on October 1, 2022, with no adjustment period. The Decree was issued without Vietnam conducting any consultation regarding the final drafts, which were kept confidential by the government, contravening obligations Vietnam undertook in CP-TPP at Article 14.13. The Decree includes potential confusions for companies attempting to comply with the Law including on localization requirements for domestic and foreign companies; a failure to delineate between domestic companies and Vietnamese companies, rendering foreign companies forced to incorporate locally; a lack of clarity regarding whether all data sets need to be kept in Vietnam or whether a copy suffices; and other issues implicating provisions of the Law and other laws regarding data localization, local representation, and data processing. The Law on Cybersecurity appears to be in conflict with the Location of Computing Facilities (Article 14.13) and Local Presence (Article 10.6) provisions of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership—implicating the many U.S. companies that are incorporated in CPTPP member countries and that do business in Vietnam. Although Vietnam negotiated a five-year moratorium on dispute settlement in CPTPP with respect to cybersecurity measures, this moratorium expires in January 2024. Vietnam remains legally bound by these obligations.

USTR cited the Law on Cybersecurity and Decree No. 53 in its 2023 National Trade Estimates Report.

The Vietnamese government finalized its **Personal Data Protection Decree (PDP)**, which was issued as **Decree No. 13/2023/ND-CP** in April 2023 and is set to go into effect on July 1, 2023. Here as well, *de facto* localization effects raise concerns: the Decree prescribes conditions including maintenance of extensive records relating to each individual data transfer and 'registration' of transfer of data of Vietnamese citizens overseas, impacting cross-border data flows. A related draft Decree on Administrative Penalties for cybersecurity contains high penalties for violations of the PDP - up to 5% of total revenue. There are also so-called "additional penalties" in the form of withdrawing licenses, information or video takedown, confiscation of evidence, equipment, public apologies and correction.

USTR cited the PDP in its 2023 National Trade Estimates Report, noting that "[m]any of these requirements appear infeasible for companies seeking to supply services in Vietnam on a cross-border basis" since most services require data transfers. Given the broad number of service sectors where Vietnam took on full national treatment obligations for cross-border services as part of its accession to the WTO, these restrictions raise serious compliance issues.

Draft Telecommunications Bill

The Vietnamese Ministry of Information and Communications has proposed the **Draft Law on Telecommunications** to replace the current telecommunications law for the digital age with several iterations emerging from Oct. 22, 2022, to June 2023. The bill would expand dozens of existing regulations to include over-the-top (OTT) communications services and cloud services providers. In doing so, the legislation would classify OTT communications providers as telecommunications services and subsequently require them to enter into paid contracts with Vietnamese telecommunications providers to offer service in the country, though the specific structure required of this relationship is not yet clear.

Recent drafts have replaced mandatory paid contracts with a requirement to notify the Vietnamese government of market presence which reflects progress worthy of cautious optimism. However, the process has lacked transparency and such obligations have not been definitively dismissed. If Vietnam were to follow through with the prior draft which requires OTTs to form commercial agreements with telecommunications providers and to establish a representative office, the draft bill would impose unnecessary and unduly burdensome requirements for foreign providers. Vietnam could as a result run afoul of its commitments in the CPTPP, which generally bans local presence requirements. Additionally, this mandatory framework would likely give licensed operators significant leverage in demanding anticompetitive concessions that are clearly unnecessary because Vietnamese consumers are currently able to access a wide array of high-quality digital services with ease, suggesting that there is no market failure in need of remedying. Moreover, requiring commercial agreements could negatively impact consumer choice, as many providers may be unable to negotiate such agreements and choose to preemptively exit the market. This scenario would subsequently reduce the value of the internet to consumers and would in turn hurt network operators, as demand for online content drives demand for broadband access.

Requiring platforms to have a local representative office would impose significant costs and thus serve as a barrier for players to access the market. As long as there is a contact channel to address regulatory concerns, the requirement of a local representative is not necessary. Since many OTT services (e.g., e-mail) are covered by Vietnam's WTO commitments, requiring a local presence could also be viewed as inconsistent with national treatment obligations governing specifically-listed cross-border value-added services.

The draft contains several other concerning provisions for U.S. digital exporters even beyond OTT messaging services as the definition of OTT could scope in services with a central function of processing, sending, transmitting, and receiving information through a telecommunications network. This would effectively include every conceivable internet-enabled service.

Various iterations of the Draft Telecommunications Bill have included onerous provisions regarding cloud services, although, recent drafts of these rules have loosened some of these requirements to be more friendly to industry and investment. However, lack of transparency in the drafting process and a history of burdensome and protectionist proposals means that vigilance remainst warranted. And, notwithstanding progress, problematic provisions remain, including cloud computing customers' rights to specify the telecommunications supplier that a cloud supplier uses, and vague requirements for cloud services providers to remove data deemed illegal by the Vietnamese government, a takedown regime that could impinge on both ability to operate as well as privacy and the freedom of expression.

USTR also cited the draft law in its 2023 National Trade Estimates Report.

Restrictions on Cloud Services

On June 3, 2020, Vietnam's Prime Minister signed **Decision 749/QD-TTg**, announcing the country's National Digital Transformation Strategy by 2025. The Decree calls for the creation of technical and non-technical measures to control cross-border digital platforms.

The Ministry of Information and Communications (MIC) has subsequently issued **Decisions 1145 and 783** which include a local cloud standard and cloud framework, respectively, and set forward cloud technical and national infrastructure standards and considerations for state agencies and smart cities projects which offer preferential treatment to local private cloud providers. These decisions aim to create a preferential framework for domestic cloud service providers, which would be inconsistent with Vietnam's government procurement obligations under CPTPP. The MIC Minister has stated a desire for Vietnamese firms to attain a stronger hold in cloud computing and digitalization infrastructure, comparable to what they have with facilities-based telecommunications networks. While the standards are technically voluntary, in practice, these standards are expected to be adopted by the Vietnamese public sector.

Government-Imposed Content Restrictions and Related Access Barriers

The **Law on Cybersecurity** also includes provisions on content regulation, requiring online services to monitor user-generated content and remove "prohibited" content within 24 hours upon notification from the government. It also establishes procedures for the service provider to both terminate access for a user posting "prohibited" content and share information regarding the user (information service suppliers may not have, if data is encrypted). "Prohibited" content includes vaguely-defined content that is critical or disparaging of the Vietnamese government. Companies have already been fined under this provision.

Besides regulatory roadblocks, U.S. companies face challenges from technical intervention, at the behest of the government, such as **throttling or limiting server access**. These technical interventions are part of the government's effort to influence and control content, and undermine U.S. company competitiveness in the marketplace.

The Authority of Broadcasting and Electronic Information issued a **regulation (Decree 6) that regulates video on-demand services** in the same manner as broadcast television, departing from global norms on video on-demand regulations. The draft, which came into effect in January 2023, defines "on-demand" content broadly, and could include a variety of online content including content uploaded by users. Requirements envisioned as a result of these changes include licensing requirements, local content quotas, local presence mandates, and translation requirements.

This tracked with Vietnam's long-running effort to regulate internet-enabled subscription video services, particularly that provided on a cross-border basis, which reached a major milestone with the promulgation of **Decree 71** in October 2022. It remains unclear whether wholly-owned foreign firms can supply such service and many popular foreign services have entered into partnerships with Vietnamese ISPs. This decree also limits foreign-controlled advertising on such services.

In July 2023, the Vietnamese government published a new draft of amendments to the **Ministry of Information and Communication Decree 72/2013** first put forward in July 2021. Numerous new restrictions were proposed, including requiring all foreign enterprises providing cross-border services with over 100,000 Vietnamese unique visitor access per month to collect and store a wide range of data of Vietnamese users which can be demanded by local authorities upon written request. These cross-border services suppliers are also obligated to monitor and remove information and services deemed illegal and to respond to takedown demands of the Ministry of Information and Communications ("MIC") and work to prevent such content (no specifics detailing how companies should achieve these goals or conduct such scanning of content are provided). The content-related obligations to prevent violations of domestic laws and policies online are onerous and sweeping, especially in light of the broad definitions of what prohibited acts could entail. In addition, digital platforms, including cross-border providers, are required to take down violating content within 24-hours once notified by MIC and a deadline of 48 hours to temporarily block content following user complaints. The Decree includes concerning and poorly-defined obligations for online platforms that involve the online services suppliers entering into cooperation agreements with Vietnamese press agencies regarding information that cites from content produced by these news publishers. Further, the Decree requires all apps offered on app stores to be licensed, while also mandating that online, multi-player, and interactive game providers must secure licenses for publication in Vietnam. The processes associated with this licensing process are onerous, particularly for foreign companies, as it effectively mandates foreign suppliers to work through local publishers. A public consultation will close on September 15, 2023.

USTR cited Decree 72 in its 2023 National Trade Estimates Report, noting that the regulation would "impose burdensome, impractical, or technically infeasible requirements on a wide range of suppliers of Internet services and content providers."

Additional Restrictions on E-Commerce

On September 25, 2021, the government issued **Decree 85 on E-commerce**, broadening its scope to include cross-border platforms without a local presence in Vietnam (including websites in Vietnamese language or exceeding 100,000 transactions per year). The Decree requires local and cross-border e-commerce platforms to provide vendors' information to authorities upon request and remove, within 24 hours, marketing for goods that violate Vietnamese laws. The law also includes social media services providers for promotional and other sales-adjacent operations. The Decree came into effect on 1 January 2022.

Taxation of Digital Services

The **Tax Administration Law**, effective July 1, 2020, taxes cross-border e-commerce and other digital services. The Ministry of Finance issued **Circular 80** providing guidance on Law on Tax Administration and its Decree 126 in September 2021. The Circular added a requirement for foreign digital service/e-commerce suppliers without a permanent establishment in Vietnam to directly register and pay tax to the tax authorities. If the foreign service providers do not register, service buyers (or commercial banks in case of individual buyers) will withhold tax from their payment to foreign suppliers at deemed tax rates. The legislation allows digital suppliers to seek exemptions under bilateral tax treaties but the process for obtaining such benefits remains unclear. This onerous procedure coupled with the deemed tax rates (Corporate Income Tax and Value Added Tax) will further complicate tax obligations for cross-border service providers and conflict with international taxation rules.