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The logo for ccianet.org, consisting of three small white circles followed by the text 'ccianet.org' in a white, lowercase, sans-serif font, all contained within a white rounded rectangular border.

A large, abstract graphic composed of numerous thin, concentric, overlapping lines in shades of blue and purple, creating a sense of depth and movement. The lines are arranged in a way that suggests a signal or a network, with some lines curving and others straight, creating a complex, organic pattern.

Responding to the Myths Holding Back U.S. Action on Digital Trade

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Introduction & Executive Summary

In April 2024, U.S. Trade Representative (USTR) Ambassador Katherine Tai testified before the House Ways & Means¹ and Senate Finance² Committees to detail the agency's trade agenda. While there, Ambassador Tai elaborated on USTR's recent actions to abandon long-standing and bipartisan support for protecting U.S. digital exporters abroad through commitments and enforcement.

Specifically, this USTR has withdrawn strong digital trade rules regarding the free flow of data across borders, prohibitions on unjust data localization, and protections for companies from forced source code disclosure as a condition of market access at the World Trade Organization³ (WTO) and the Indo-Pacific Economic Framework (IPEF). USTR also removed a raft of digital trade barriers from its 2024 edition of the annual congressionally-mandated report chronicling significant barriers to trade for U.S. exporters, the National Trade Estimate Report (NTE), as CCIA has covered⁴.

A bipartisan collection of members of both committees⁵ used their allocated time in these hearings to express support for strong digital trade rules and deeper engagement with partners to open up new markets through traditional trade agreements. Commitments in digital trade—and enforcement of those rules—are important to ensuring U.S. suppliers have access to new markets. The benefits to the U.S. economy are multifaceted: increased export revenues, jobs and productivity at home; enhanced national security through improved technological competitiveness; and stronger freedom of expression and the protection of human rights through support of the open internet and cross-border communications. The numbers at stake for the U.S. economy are not trivial—digitally-enabled services exports generated \$626 billion, contributed to a \$256 billion surplus in the sector, made up 70% of all U.S. services exports, and were 2.5% of the U.S. GDP in 2022. Digital exports supported an estimated⁶ 3 million jobs in the United States in 2022, while the digital economy writ large supported⁷ 8.9 million jobs and \$1.3 trillion in annual compensation. Further, granting market access to foreign partners—through traditional free trade agreements—enables the United States to score wins in other priority areas such as commitments to uphold our priorities in environmental and labor policy.

1 <https://www.youtube.com/watch?v=ZeDfYL3Dq0Q>

2 <https://www.finance.senate.gov/hearings/the-presidents-2024-trade-policy-agenda>

3 <https://ccianet.org/library/wtas-ustr-wto-retreat/>

4 <https://www.project-disco.org/21st-century-trade/why-a-ustr-report-represents-another-step-back-for-digital-trade/>

5 <https://ccianet.org/articles/digital-trade-rules-promote-us-interests-abroad-still-enjoy-bipartisan-support/>

6 <https://www.uschamber.com/international/trade-agreements/how-digital-trade-benefits-the-american-economy?state=>

7 <https://www.bea.gov/sites/default/files/2023-12/digital-economy-infographic-2022.pdf>

However, we have seen the Administration mostly leave behind both negotiation and enforcement in the digital trade space in the past few years.

Ambassador Tai's trip to Capitol Hill featured several justifications for USTR's abrupt reversal on digital trade policy, for which she expressed being "proud" in a letter⁸ defending these moves sent the same week to Sen. Marsha Blackburn (R-TN). However, these motivations fail to justify an upheaving of U.S. policy that so fundamentally impacts the U.S. economy, global competitiveness, and millions of workers.

Below, each of these arguments against moving forward to strengthen and enforce digital trade commitments is addressed, in response to direct quotes from these two hearings. Specifically, this piece examines and rebuts statements from the hearing claiming or suggesting that:

- ❖ U.S. digital trade policy is only designed to help the largest technology companies;
- ❖ Proponents of cross-border data flow rules naively think such rules will change China's behavior;
- ❖ Some data localization policies may be considered to be reasonable and legitimate;
- ❖ Existing legislation in the U.S. Congress hinder the ability of the country to seek new digital trade commitments;
- ❖ Digital trade rules undermine privacy protections; and
- ❖ Data flow commitments were originally designed for the trade of goods and are outdated for modern purposes.

8 <https://rethinktrade.org/external-voices/letter-ustr-tai-to-senator-marsha-blackburn-on-digital-trade/>

USTR Ignores that U.S. Digital Trade Policy Was Designed to Empower Companies of All Sizes, U.S. Workers, and the Entire U.S. Economy

“U.S. digital trade policy has also been reliant on a proxy that what is good for an American digital or technology company is also good for American innovation, American workers, the U.S. economy... Unless we change our approach to digital trade, unless we expand the field of stakeholders beyond just our biggest companies, we close out the chance for our values to be reflected in what we do.”

–Ambassador Tai, in response to Rep. Brian Fitzpatrick (R-PA)

Part of this quote seems to animate much of USTR’s current agenda: the allegation that existing digital trade commitments have not benefited 1) small businesses, innovation, and non-technology companies; 2) workers; and 3) the broader U.S. economy. Below, these arguments are addressed in turn.

1. Digital trade commitments are sought and enforced to protect the rights of companies of all sizes.

By their very nature, these rules disproportionately benefit small and medium-sized enterprises (SMEs), by shielding them from discriminatory and obstructive policies abroad—measures that impose costs that they, unlike larger companies, often simply cannot absorb. For example, many modern Free Trade Agreements (FTA) include chapters promoting SMEs, a practice that has grown⁹ over time. In the U.S.-Mexico-Canada Free Trade Agreement (USMCA), the SME chapter¹⁰ includes commitments to cooperate to boost trade and investment opportunities for SMEs, share information on such initiatives, establish a committee on the effort, and establish a dialogue, and explicitly cross-references to the Digital Trade chapter.

The SME chapter of USMCA, for example, also notes that other chapters of the agreement also benefit SMEs, and explicitly includes the digital trade chapter in this list. The provisions of this chapter—protection from discrimination of digital products, prohibitions on unjust data localization mandates, support for cross-border data flows, and shielding from compulsory source code disclosure as a condition of market access, to name a few—all significantly help small and medium sized businesses whose operations would otherwise be hindered by such barriers to operating in Canada and Mexico.

9 https://www.unescap.org/sites/default/d8files/event-documents/ESCAP-BGD_Module%204_SME%20provision%20in%20FTAs%20Final.pdf

10 https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/25_Small_and_Medium-Sized_Enterprises.pdf

This is because for smaller businesses, barriers abroad often impose such strong obstacles that operating in foreign markets can become altogether untenable. As Senate Finance Committee Chairman Ron Wyden (D-OR) said¹¹ at his committee’s oversight hearing of USTR, barriers overseas such as data localization mandates “are just poison for small businesses. There is just no way they can move ahead if they are going to be paying for servers and all the rest.”

Sen. Wyden’s point encapsulates the link between competition and digital trade, as well: the free flow of commerce between two markets on fair and open terms, founded upon commitments in a trade agreement, strengthen competition by bringing new suppliers to each market. Rules promoting market access between countries ensure that smaller companies are able to take part in this competition as well, as the commitments prohibit or dissuade governments from imposing restrictions to digital trade that smaller companies would be unable to bear.

In February, 42 U.S. startups, investors, and organizations supporting startups wrote an open letter¹² detailing how “sound digital trade policy is critical to startups’ international competitiveness” and how commitments such as those in the USMCA should be built upon to “support the success of U.S. startups looking to expand into foreign markets and engage customers abroad by embodying these principles.” The coalition details how U.S. trade policymakers should break down barriers that “dictate the markets where startups can reasonably enter and compete, create additional costs that could instead fuel R&D and job creation, and hamper U.S. economic growth by limiting the flow of goods and services across borders.”

As Nathan Lindfors of Engine, an organization that supports thousands of U.S. startups¹³, has noted¹⁴, restrictions to cross-border data flows are particularly harmful to small companies:

When startups encounter limitations on how and when data can be transferred across borders, it increases costs and can cause startups to lose clients in jurisdictions where the restrictions are present... These sorts of barriers — where a foreign jurisdiction’s policy is increasing costs and limiting offerings for U.S. companies — are the type that USTR signals they’ll no longer fight. That’s a stark change and leaves a bleak outlook for startups’ competitiveness.

11 <https://ccianet.org/articles/digital-trade-rules-promote-us-interests-abroad-still-enjoy-bipartisan-support/>

12 <https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/65c3906e36cbbb-45ba281205/1707315310372/Startup+Digital+Trade+Open+Letter.pdf>

13 <https://www.engine.is/about-engine>

14 <https://www.engine.is/news/category/for-startups-sake-congress-needs-to-reorient-us-trade-agency>

The data demonstrate that SMEs are prime beneficiaries of digital trade rules, which facilitate their ability to reach foreign markets:

- ❖ More than 80% of top grossing apps¹⁵ come from small firms.
- ❖ Over 300,000 companies¹⁶ are active in the mobile app market in the United States, participating in an “app economy” estimated to be worth \$1.7 trillion.
- ❖ 70% of the companies¹⁷ using Privacy Shield—a key mechanism facilitating U.S.-EU data transfers—were SMEs.

2. Digital trade rules are also not sector-specific, which is why they are drafted as cross-cutting provisions

Key beneficiaries include manufacturing generally, and, specifically, semiconductors, agriculture, pharmaceuticals, automotive¹⁸. Digital trade rules are critical to these sectors’ strength, ability to grow abroad, and to conduct research and development. For example, support for cross-border data flows and protections from data localization mandates are essential for safety testing for pharmaceutical companies and automakers that rely on a global network of locations, and are central to agriculture firms’ ability to monitor climate and harvesting trends.

Data flows have always been fundamental to the ability of financial services providers—a major strength of the United States—to reach foreign markets. Further, logistics companies rely on the transfer of data across borders to identify suppliers and strengthen their supply chains. Source code protection is another digital trade rule not only helpful to technology companies—manufacturers rely on proprietary software and also hold sensitive and valuable algorithms to improve efficiencies. In short, what is “good for an American digital or technology company,” which Ambassador Tai suggested is a flawed prerequisite to traditional U.S. trade policies, is *indeed* good for U.S. companies in other sectors.

15 <https://actonline.org/2016/05/05/small-businesses-make-it-big-in-the-app-economy/>

16 <https://actonline.org/wp-content/uploads/2020-App-economy-Report.pdf>

17 <https://actonline.org/2020/07/20/what-the-end-of-the-eu-u-s-privacy-shield-means-for-small-businesses/>

18 <https://www.uschamber.com/international/trade-agreements/digital-trade-rules-benefit-every-sector-of-the-u-s-economy>

3. The argument that digital trade commitments do not benefit workers is not borne out by the data.

The average annual compensation¹⁹ for the 8.9 million workers in the digital economy was \$142,748 in 2022, compared to the average annual compensation of \$65,470 for all occupations²⁰ the same year. Studies have consistently shown that jobs in the digital economy are better-paying²¹ and more resilient²² than similar occupations in other industries. Digital exports specifically contributed to these gains for laborers in the United States, as these exports supported²³ 3 million direct and indirect jobs in the United States in 2022.

Some argue that trade rules in the digital space may bolster high-paying jobs, but that they also catalyze offshoring that diminishes those jobs in the United States. However, in the world of digitally-enabled services, that is generally not the reality. Looking at the trade data, there is no evidence suggesting that growth in digitally-enabled services has resulted in a detrimental offshoring of jobs, largely due to U.S. competitiveness in the sector that results in a high opportunity cost of offshoring most services. In two of the biggest categories of traded services—telecommunications, computing, and information service and other business services—annual U.S. exports²⁴ between 2012 and 2022 rose from \$151 to \$311 billion, while imports only increased from \$107 to \$191 billion. To state it plainly: U.S. exports grew at a 28% faster rate than imports, significantly increasing the sectoral surpluses that the United States enjoys. In the service-supplying industries, employment²⁵ went from 118.6 million in 2014 to 135.8 million in 2024.

It helps to think through what digital trade rules are specifically promoting and protecting to understand their importance to U.S. jobs. For example, the cross-border flow of data enables services providers—both digital and more traditional, such as financial—to reach consumers abroad by reducing the need for large-scale establishment in foreign locations, thereby leveraging domestic resources. Data flow rules therefore help prevent offshoring, as do data localization prohibitions. Similarly, the digital product rule—which protects computer programs, e-books, film and TV programs, images, songs,

19 https://www.bea.gov/system/files/2023-12/DigitalEconomy_2017-2022.xlsx

20 https://www.bls.gov/oes/current/oes_nat.htm

21 <https://www.weforum.org/agenda/2024/04/how-to-realize-the-potential-of-rising-global-digital-jobs/>

22 https://www.brookings.edu/wp-content/uploads/2017/11/mpp_2017nov15_digitalization_full_report.pdf

23 <https://www.uschamber.com/international/trade-agreements/how-digital-trade-benefits-the-american-economy?state=>

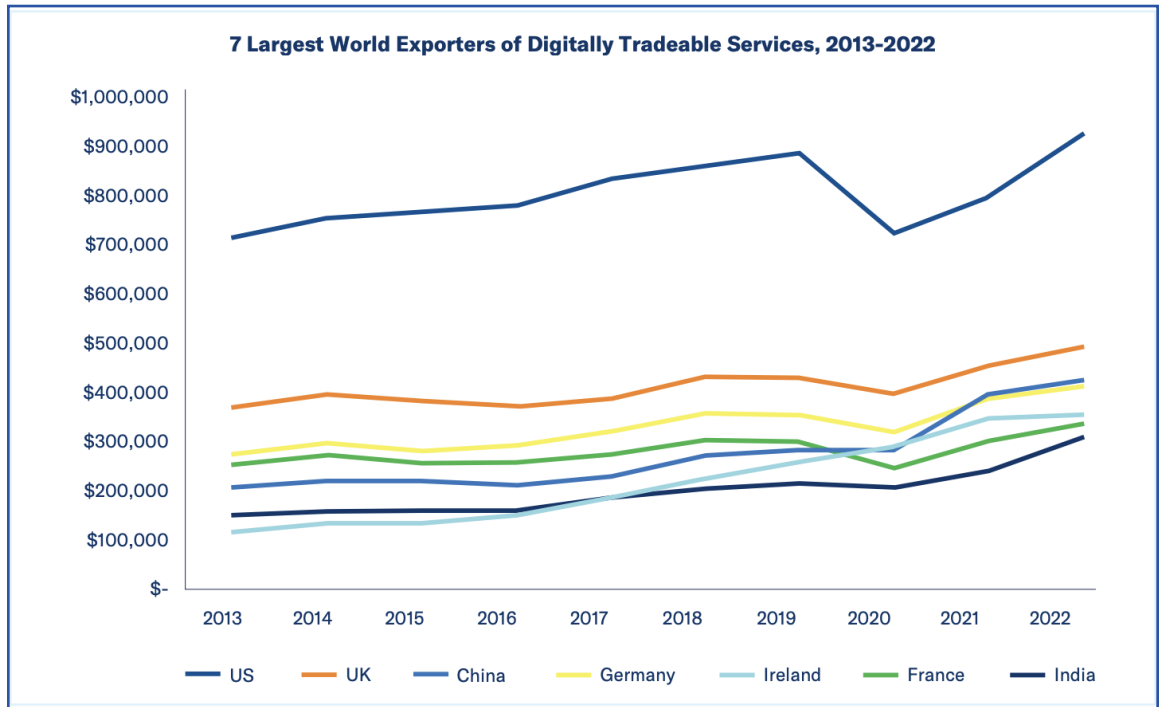
24 https://apps.bea.gov/iTable/?reqid=62&step=9&isuri=1&product=4&_gl=1*pl1lqm*_ga*NzU4MTQ4MjgzLjE3MT

25 https://data.bls.gov/timeseries/CES0700000001?amp%253bdata_tool=XGtable&output_view=data&include_graphs=true

and other digitally-encoded products from discriminatory treatment—ensures that American cultural products, such as music, film, TV, and literature, have fair and open access to consumers in trading partners. These rules empower U.S.-based content creators and streaming or distribution companies with the ability to compete against foreign digital and cultural products abroad and in doing so, the rules support U.S. workers.

4. Digital trade—and the broader digital economy that it supports—is a powerful driver of the U.S. economy²⁶

The digital economy contributed²⁷ 10% of the U.S. GDP and \$2.6 trillion of value added in 2022. Export markets power the digital economy’s growth, as the United States is the world’s leader (by far) in exporting digital services.



Source: U.S. Chamber of Commerce analysis²⁸ of World Trade Organization data. Values are in millions of dollars.

U.S. digital exporters earned²⁹ \$626 billion from digitally-enabled services exports last year, a 5.5% increase from the \$599 billion in exports of the same services from the prior year. Digitally-enabled services exports made up 70% of all U.S. services exports—a traditional area of U.S. export strength—and 2.5% of the 2022 U.S. GDP, a ratio that has overall held steady at that level for the past five years. CCIA has covered³⁰ this in detail as well.

26 https://www.uschamber.com/assets/documents/USCC_Digital-Trade-Report.pdf

27 <https://www.bea.gov/sites/default/files/2023-12/digital-economy-infographic-2022.pdf>

28 https://www.uschamber.com/assets/documents/USCC_Digital-Trade-Report.pdf

29 <https://www.project-disco.org/uncategorized/strength-of-digital-services-exports-to-u-s-economy/>

30 <https://www.project-disco.org/uncategorized/strength-of-digital-services-exports-to-u-s-economy/>

5. Trade agreements bring about broader societal gains as part of these deals as well.

Granting market access to foreign partners—through traditional free trade agreements—enables the United States to score wins in other priority areas such as commitments to uphold our priorities for environmental standards, labor rights, transparency and anti-corruption efforts, and competition. This is extrapolated to the digital space as well, where traditional free trade agreements have included commitments that benefit the overall ecosystem such as strengthening cybersecurity, promoting privacy, bolstering consumer protection, and enabling unimpeded access to the internet. However, we have seen the Administration mostly leave behind both negotiation and enforcement in the digital trade space in the past few years.

U.S. Leadership in Digital Trade is a Proactive Effort to Counteract China’s Influence in the Digital Realm, not a Mechanism to Change China’s Own Behavior

“Tech lobbyists would have us believe that their data flows language will persuade China to abandon its surveillance state and to tear down the Great Firewall. Back when China joined the World Trade Organization supporters made exactly the same claim, arguing that trade would transform China into a liberal democracy... So now ‘Big Tech’ is making the same claim that if we will just let ‘Big Tech’ sell off our data wherever they want, China will become a more open democratic country.”

–Sen. Elizabeth Warren (D-MA), questioning Ambassador Tai

Comparing the pursuit of strong digital trade commitments—and data flow rules in particular—with the debate surrounding China’s ascension to the WTO completely misrepresents what such rules seek to achieve. The goal is *not* to draft agreements for China to join and subsequently abandon its brand of digital authoritarianism—it is to ensure the free and open internet model defeats China’s model in other countries.

This was initially the model of the Indo-Pacific Economic Framework (IPEF), which Secretary of Commerce Gina Raimondo told³¹ reporters was in the pursuit of “restoring U.S. economic leadership in the region and presenting Indo-Pacific

31 <https://www.whitehouse.gov/briefing-room/press-briefings/2022/05/23/on-the-record-press-call-on-the-launch-of-the-indo-pacific-economic-framework/>

countries an alternative to China’s approach to these critical issues.” In fact, the initial White House Fact Sheet³² for IPEF included the following commitment to this very point: “We will pursue high-standard rules of the road in the digital economy, including standards on cross-border data flows and data localization.”

Sen. Warren’s skepticism of leveraging commitments to enable the free flow of data across borders to promote U.S. values in the digital space contradicts the platform of another early initiative of the Biden Administration in foreign policy—the Declaration For the Future of the Internet³³ (DFI). The United States actively promoted the Declaration with a view³⁴ to “advance a positive vision for the Internet and digital technologies,” to “[reclaim] the promise of the Internet in the face of the global opportunities and challenges presented by the 21st century,” and to “[reaffirm and recommit] its partners to a single global Internet – one that is truly open and fosters competition, privacy, and respect for human rights.”

To further these goals, the Declaration included a commitment to: “Promote our work to realize the benefits of data free flows with trust based on our shared values as like-minded, democratic, open and outward looking partners.”

One does not have to read between the lines to see the effort as competition in the governance space with China—the Biden Administration explicitly promoted this vision of an open internet as a means of providing countries with an alternative to the China model of governance and promoting integration between like-minded partners. At an event launching the DFI, National Security Advisor Jake Sullivan stated³⁵ that the initiative is “not ... about what we are against, it’s about what we are for. It’s about an affirmative vision.” On a press call previewing the DFI, a senior administration official told³⁶ reporters:

“You look at what Russia is doing, some of the steps that China has been taking – and I think we actually see this as, in many ways, a response to these kind of splinternet tendencies by a number of the authoritarian countries around the world. Because what we’re really doing is taking a big-tent approach, laying out a broad – you know, and as I say, you know, more than 55 countries – broadly-shared vision of the future of the Internet. And we think that kind of galvanizing the world behind a shared vision is a very important part of pushing back on these splinternet tendencies.”

32 <https://www.whitehouse.gov/briefing-room/statements-releases/2022/05/23/fact-sheet-in-asia-president-biden-and-a-dozen-indo-pacific-partners-launch-the-indo-pacific-economic-framework-for-prosperity/>

33 https://www.whitehouse.gov/wp-content/uploads/2022/04/Declaration-for-the-Future-for-the-Internet_Launch-Event-Signing-Version_FINAL.pdf

34 <https://www.state.gov/declaration-for-the-future-of-the-internet>

35 <https://www.brookings.edu/articles/the-declaration-for-the-future-of-the-internet-is-for-wavering-democracies-not-china-and-russia/>

36 <https://www.whitehouse.gov/briefing-room/press-briefings/2022/04/28/background-press-call-by-senior-administration-officials-on-the-declaration-for-the-future-of-the-internet/>

This initiative, which has largely been left idle in the past two years, understood that bringing together partners from the Asia-Pacific, Latin America, and Europe with an aim to broaden the list of signatories (all in areas where the United States battles China's influence) to agree to one vision of internet policy was an important step in imprinting this model of governance on the world. Despite its flaws, the Declaration of the Future of the Internet reflected proactive and positive engagement on these issues abroad and demonstrated how cross-border data flows were seen by the Administration as a piece of an effort critical to combating China's growing influence globally.

In fact, other federal agencies in this Administration continue to champion the pursuit of data flow commitments to promote the open internet, support democratic values, and ensure the ability of U.S. companies to operate abroad. In the State Department's "International Cyberspace and Digital Policy Strategy"³⁷, released on May 6 at the RSA Conference, the United States expresses an interest in securing "digital solidarity," which the Administration argues "seeks to develop shared mechanisms that will help maintain an open, interoperable, secure, and reliable Internet as well as trusted cross-border data flows" and "works to foster democratic values-based and rights-respecting policies." The State Department's Strategy elaborated on this in the Strategy further:

U.S. government and private sector actors seek to leverage data and the digital economy for positive economic and social benefits: preserving openness while protecting privacy, promoting safety, and mitigating harms. The Department of State, working with other agencies, looks to shape markets and safeguard innovation from regulatory excesses. Although there is an increasing willingness by some countries to embrace narratives of digital sovereignty and protectionism by blocking access to their markets, unduly preventing cross-border data flows, and preferencing domestic manufacturers and service providers, we continue international engagement to enhance interoperability, security, and market access.

...

The United States supports the trusted free flow of data and an open Internet with strong and effective protections for individuals' human rights and privacy and measures to preserve governments' abilities to enforce laws and advance policies in the public interest. Legitimate concerns about data privacy can be addressed through protective mechanisms that follow the data while at the same time facilitate cross-border data flows and strengthen global cooperation among enforcement authorities. The United States will continue championing trusted cross-border data flows by promoting data transfer mechanisms that improve interoperability between different data privacy regimes...

37 <https://www.state.gov/united-states-international-cyberspace-and-digital-policy-strategy/>

While the State Department highlights the importance of data flows to its work strengthening ties with allies and bolstering connectivity and cooperation among like-minded allies in this just-released report, these priorities are no longer reflected in U.S. trade priorities, a concern going forward as problematic and protectionist approaches proliferate.

If the United States is not leading discussions and advocating for digital trade rules with the values of the free flow of commerce and freedom of expression, China will fill that void and more easily advocate for third party nations to adopt China's vision of digital authoritarianism domestically. A Digital Silk Road, the antithesis to a free and open internet, is not in the U.S. interest or that of the global and open internet, but without robust engagement its reach will only grow.

The spread of China's repressive model of digital oversight has already begun. Both Cambodia and Nepal have in recent years moved to put in place "National Internet Gateways"³⁸ which filter the internet and create a government-owned intranet. Similarly, Vietnam passed³⁹ its own version of data localization requirements aligned with China's approach. U.S. leadership in the digital space can combat the spread of similar efforts in the Indo-Pacific region, a key piece of U.S. diplomatic and security policy objectives. Meanwhile, exiting the arena and letting go of this leadership could give time for these draconian policies to proliferate widely.

This is why 12 civil society organizations and academics warned⁴⁰ the Biden Administration of their concern that "the withdrawal of key commitments at the World Trade Organization and in international trade negotiations will signal that the United States no longer stands by a free and open internet." The groups cautioned that rules "opposing forced data localization, supporting the free flow of information, combatting mandatory transfers of intellectual property, and championing non-discrimination for information products" are all fundamental to the open internet that "[a]dvocates and governmental bodies have long championed... as key for fostering human rights and ensuring access to information globally."

38 <https://www.internetsociety.org/resources/2024/internet-impact-brief-nepals-proposed-national-internet-gateway/>

39 <https://thediplomat.com/2019/12/vietnams-internet-control-following-in-chinas-footsteps/>

40 <https://www.aclu.org/documents/coalition-letter-urging-biden-administration-to-protect-free-and-open-internet>

Data Localization Requires Specific and Concerted Attention

“Over time, the NTE has become a very, very large catalog of complaints that haven’t actually gotten much scrutiny. What we did this year was begin a process of asking our teams to look at the NTE entries and first to ask, the barrier that is being discussed, is it actually a barrier? Do we actually export the product that is of concern? And with respect to digital, whether the measure that is being complained about is being erected as a barrier or if it is a regulatory measure that, frankly, we see a lot of bills in Congress trying to address?”

–Ambassador Tai, in response to Rep. Kevin Hern (R-OK)

In this response, Ambassador Tai elaborated on the justification USTR gave when it released⁴¹ its 2024 NTE report that had removed a slew of digital trade barriers abroad that as the agency considered whether a policy was a significant barrier or not, they wanted to underscore “the sovereign right to govern in the public interest and to regulate for legitimate public policy reasons.”

CCIA has previously covered⁴² the deprioritizing of digital trade barriers in the NTE report in detail, but in the context of data localization, USTR’s response regarding “sovereign rights” is worth unpacking further. Data localization measures harm businesses and consumers in the following ways:

1. They significantly impinge on the ability of U.S. companies to access certain markets and can render markets unattainable for small firms altogether;
2. They can further the goals of authoritarian regimes that seek broad control over data for ease of control over speech, “creating unique risks for people’s privacy, free expression, access to information, and other fundamental freedoms,” as civil society organizations warned⁴³ in February; and
3. They weaken the security of companies attempting to operate in markets with such restrictions by expanding the “attack surface,” assisting attackers by requiring the storage of data in facilities locally, making them predictable and easier targets, and “restrict[ing] the ability to conduct integrated cybersecurity management – including information sharing of emerging

41 <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2024/march/ustr-releases-2024-national-trade-estimate-report-foreign-trade-barriers>

42 <https://www.project-disco.org/21st-century-trade/why-a-ustr-report-represents-another-step-back-for-digital-trade/>

43 <https://www.aclu.org/documents/coalition-letter-urging-biden-administration-to-protect-free-and-open-internet>

cyberattacks, trend analysis, and forensics concerning data breaches,” as experts Peter Swire and DeBrae Kennedy-Mayo attest⁴⁴. In fact, these authors found that requirements to localize personal data would impact 13 of the 14 ISO 27002 controls that set the standards for cybersecurity globally, as well as multiple sub-controls.

As such, the broad claim that countries have the right to regulate how they wish is a deeply concerning narrative for USTR to publicly state given the clear effort to remove examples of data localization measures in the 2024 NTE report and to, in some cases, scale back language criticizing such measures even when they were included. Taken together, it suggests that USTR views such policies—a concerning model of authoritarian regimes like China that, as previously discussed, are constantly spreading to new markets—as permissible and legitimate.

Digital Trade Commitments Do Not Constrain Domestic Lawmakers and Regulators From Instituting Justified or Non-Discriminatory Rules

Throughout her testimony, Ambassador Tai cited the introduction and movement of several bills and the February “Executive Order to Protect Americans’ Sensitive Personal Data”⁴⁵ as justification for reversing course on long standing U.S. digital trade principles. These bills included the legislation requiring ByteDance to divest TikTok, the Protecting Americans’ Data from Foreign Adversaries Act of 2024⁴⁶, the American Innovation and Choice Online Act⁴⁷, and the Kids Online Safety Act (KOSA).

Sen. Marsha Blackburn (R-TN), a leading sponsor of KOSA in the Senate, highlighted the problem with this argument: “The Biden Administration might think the change is going after big tech, but what you’re doing is really hurting countless small businesses... You brought up KOSA as a justification for not doing something on digital trade provisions, I would remind you that international agreements on digital trade do not preclude countries from passing privacy laws. You can look at the EU, you can look at GDPR, you can look at New Zealand, Canada, Australia, that is an excuse and not an accuracy.”

44 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4030905

45 <https://www.whitehouse.gov/briefing-room/statements-releases/2024/02/28/fact-sheet-president-biden-issues-sweeping-executive-order-to-protect-americans-sensitive-personal-data/>

46 <https://energycommerce.house.gov/posts/rodgers-and-pallone-celebrate-house-passage-of-legislation-to-protect-americans-data-from-foreign-adversaries>

47 <https://www.project-disco.org/competition/010623-aicoas-failure-and-the-future-of-competition-policy-in-congress/>

Sen. Wyden similarly stated at the same hearing, “I feel strongly that keeping these markets for digital free and open and fighting these sleazy data brokers are not mutually exclusive, we can do both.”

Such space to regulate and pursue legislation is always inherent in trade agreements—policymaking is expected to continue, as no policy issue ever enjoys unending consensus—but laws and rules can still be crafted to be nationality-neutral or not otherwise discriminate against trade partners with whom commitments exist.

Digital trade rules developed to date in agreements like USMCA are designed to include guardrails to focus the target of the commitments on the most unreasonably trade-restrictive practices, thereby leaving most economic activity wholly in the domain of domestic regulation. Such a tailored approach ensures companies are protected from governments seeking policies that unfairly discriminate in favor of local suppliers, while governments are still empowered to legislate and regulate in the public interest.

Trade rules further include explicit flexibility for legitimate exceptions such as privacy, security, public morals, and other issues of national interest. If a country invokes one of these exceptions, a trading partner challenging the policy would then be required to demonstrate that there is a reasonably available approach that achieves the regulatory goal of that country. This reflects one of the key achievements of a negotiated trade rule—it is not a lasting guarantee that discrimination will not happen, since sovereign countries cannot be compelled to take action—but rather, it brings a level of accountability between trading partners based on shared values and promotes fair and transparent processes in the development of regulations. To the extent that domestic regulation targets domestic companies, trade rules are irrelevant, as they discipline our treatment of foreign firms, not our own.

In short, the existence of these bills do not undermine the ability of the United States to strike new commitments abroad or enforce existing agreements.

Digital Trade Rules Allow for Personal Data Protection and Can Enhance Privacy

“We are absolutely concerned with US national security, security of Americans’ privacy rights, the security of their data that we changed our position on these digital trade provisions... Not changing our approach is what was going to put at risk all of the work you are doing here to assert the rights of Americans to their data. At the moment, Americans have little to no privacy rights with respect to their data, that is something that I know the Congress is working to change. Unless we change our approach to digital trade, unless we expand the field of stakeholders beyond just our biggest companies, we close out the chance for our values to be reflected in what we do.”

–Ambassador Tai, in response to Rep. Brian Fitzpatrick (R-PA)

First and foremost, data privacy laws and regulations do not inherently implicate cross-border data flows, as long as they do not set up a differential regime for the transfer of data abroad. Data flow rules are designed to ensure services and digital products are able to operate between countries and to promote communication across borders. The specific data that companies are and are not allowed to collect and monetize—which would be dictated by privacy law—is a question completely separate from cross-border data flow commitments. Data flow rules govern whether a company is able to transfer data between various jurisdictions, not whether the information that can be gathered in the first place. If a government seeks to restrict what data that company can collect, it has broad leeway to do so, and would not be hindered by data flow rules.

Further, in many cases, trade commitments can actually promote the adoption of privacy rules, as it does in the U.S.-Japan Digital Trade Agreement or USMCA, which include explicit commitments⁴⁸ to “adopt or maintain a legal framework that provides for the protection of the personal information of the users of digital trade” aligned with principles and guidelines from existing efforts such as the APEC Privacy Framework and the OECD Recommendation of the Council concerning Guidelines governing the Protection of Privacy and Transborder Flows of Personal Data.

48 <https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/19-Digital-Trade.pdf>

“What we see is that all of our friends and allies are all in the process of struggling with the same types of questions we are having today, around privacy, around where you set the limits with who can do what with peoples’ data. The progress that we are making is in advancing more updated proposals, and you’re right, our proposals might not be the same as the Europeans, but we are all facing the same challenges.”

–Ambassador Tai, in response to Sen. Todd Young (R-IN)

This is a further myth—the allegation that trade policy must be halted in its tracks because there is no consensus over privacy law. Such a drastic action is not necessary, and has not halted the progress of our partners around the globe, most of which do not have uniform privacy regulations but still manage to strike cross-border data flow commitments.

As highlighted in the earlier quote by Sen. Blackburn, countries with varying understandings of privacy, as enshrined in their laws, have cross-border data flows baked into free trade agreements with other jurisdictions. To name just a few that have been finalized in just the past few years, Singapore’s “Digital Economy Agreements”⁴⁹ with New Zealand, Australia, the United Kingdom, and South Korea include data flow provisions; the Pacific Alliance (a collective including Chile, Colombia, Mexico, and Peru) agreement⁵⁰ with Singapore includes such language; the EU and Japan struck an agreement on data flows; Canada and Ukraine have data flow language in their updated 2023 FTA⁵¹; and the African Continental Free Trade Area’s Digital Trade Protocol⁵² includes a cross-border data flow rule, largely based on the United States’ groundbreaking work.

49 <https://www.mti.gov.sg/Trade/Digital-Economy-Agreements>

50 <https://alianzapacifico.net/en/instruments-alcaps/>

51 <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ukraine/text-texte/2023/08.aspx?lang=eng>

52 <https://www.bilaterals.org/?afcfta-digital-trade-protocol-49908>

Cross-Border Data Flows Have Never Been Primarily About Goods Trade

“The digital trade provisions that you have referenced go to data flows, data localization, and source code as well. They were developed as part of a trade policy that is really rooted in our recognition and our understanding 20 years ago that data is just about facilitating traditional trade transactions. What we have discovered today... Today, data is not just something that facilitates traditional trade, data is the commodity and the thing that has value in and of itself.”

–Ambassador Tai, in response to Rep. Darin LaHood (R-IL)

“When you look at those long-time developed proposals in the digital trade negotiations on data, that those provisions are still largely based on an understanding that what we are dealing with is data as a facilitator of traditional trade transactions, goods transactions, data as a facilitator of e-commerce, data traveling along with the information that has to be traded in order for goods to move across borders. That was certainly the case 20 years ago, but in 2024, data has become the commodity itself, data has become the powerful thing that has value, that enables more innovation, that when you accumulate enormous amounts of it, technological innovation like generative AI.”

–Ambassador Tai, in response to Sen. Chuck Grassley (R-IA)

This characterization of the incorporation of data flow rules into trade agreements does not reflect history. Data flow rules have been suggested as a key piece of trade rules going back to the origins of the General Agreement on Trade in Services. In 1985, the United States argued⁵³, when identifying its priorities for a services agreement at the General Agreement on Tariffs and Trade:

The United States believes that priority should be given to an understanding on international information flows. It is critical that we address this particular area as soon as possible because of its critical role in most service sectors and its role in the technological change of all our economies.

Data flow rules were enshrined in 1994 through the conclusion of the General Agreement on Trade in Services (GATS), where commitments for financial services and services overall were adopted to ensure that cross-

53 https://www.wto.org/Gatt_docs/English/SULPDF/91150082.pdf

border services trade would not be hindered through data restrictions. As such, both the Financial Services Understanding⁵⁴ (Article 8), and the GATS Annex on Telecommunications⁵⁵ (Article 5(c)), contained specific provisions designed to ensure that governments (or telecommunications suppliers) were not able to exert control over data to “nullify and impair” a service commitment. In turn, banks, insurance companies, travel agencies, or computer service suppliers would be able to operate globally and serve customers in far-flung markets. Those concerns remain as valid now as they were then, and reflect how such rules were never limited to merely facilitating the movement of goods.

In response to the assertion that the nature of data has changed in the past 30 years, this, too, ignores the “policy space” that U.S. trade policymakers baked into agreements 30 years ago through provisions that clarified that commitments were subject to reasonable exceptions, including specifically for privacy. Provisions promoting data flows were included in the first modern Free Trade Agreements (FTAs) struck by the United States—the North American Free Trade Agreement and the subsequent FTAs signed by the United States, such as with Jordan⁵⁶ in 2000.

These early FTAs make it clear that digital trade was not focused on facilitating traditional goods trade. For example, the U.S.-Chile FTA and U.S.-Singapore FTAs—both struck in 2003—both have commitments prohibiting the adoption of customs duties on electronic transmissions and discrimination against other Parties’ digital products. Electronic transmissions and digital goods and services were seen as necessary to protect signatories’ broader interests in an emerging new area, not simply to transfer goods efficiently.

This forward-looking nature of the policy is made evident by remarks⁵⁷ made by Charlene Barshefsky, the USTR at the end of the Clinton Administration, in 2000 that ring true as a response to these arguments against digital trade today:

This new initiative will create a lasting set of rules and agreements which help to ensure that the trading system provides for electronic business the same guarantees of freedom, fair competition, respect for intellectual property rights and access to markets that more conventional commerce enjoys.

54 https://www.wto.org/english/tratop_e/serv_e/21-fin_e.htm

55 https://www.wto.org/english/tratop_e/serv_e/12-tel_e.htm

56 <https://ustr.gov/sites/default/files/Jordan%20FTA.pdf>

57 <https://usinfo.org/usia/usinfo.state.gov/topical/global/ecom/00102301.htm>



Commitments in digital trade—and enforcement of those rules—are important to ensuring U.S. suppliers have access to new markets, enabling the United States to maximize benefits to the economy both in export revenue generated and increase in jobs and productivity at home, benefit national security by increasing U.S. technological competitiveness, and promote freedom of expression and the protection of human rights by supporting the open internet and cross-border communications.