

USTR and DOC Seeking Public Comments on Digital Trade Issues under the Indo-Pacific Economic Framework

Key Points

- On March 11, 2022, USTR and DOC requested public comments on the trade pillar of the Indo-Pacific Economic Framework, with both requests including a focus on digital trade issues. Comments are due to both agencies by April 11, 2022.
- These comment requests present a key opportunity to influence the administration's digital trade policy on its signature international economic initiative in the Indo-Pacific region and in other ongoing and upcoming initiatives.
- Companies with interests in digital trade issues should consider submitting comments to USTR. In this sense, we encourage companies to think of digital trade holistically to encompass issues ranging from digital product non-discrimination to trade facilitation and from cross-border data transfer issues to innovation and emerging technologies. All of these topics have been addressed in recent digital trade agreements, as described in detail below.

Background

On Friday, March 11, 2022, the Office of the U.S. Trade Representative (USTR) **requested** public comments on the trade pillar of its signature international economic initiative, the Indo-Pacific Economic Framework (IPEF), which is intended to demonstrate U.S. leadership in the Indo-Pacific region. USTR is seeking comment on a number of issues within the IPEF's trade pillar including commitments on labor, the environment, digital economy and competition policy, among others. On the same day, the Department of Commerce (DOC), which is jointly leading IPEF negotiations with USTR, also **requested** public comments on other pillars of the initiative. Commerce's notice identifies key areas of interest, which include digital and emerging technologies; supply chain resilience; infrastructure, clean energy and decarbonization; and tax and anticorruption. Comments are due to both agencies on April 11, 2022.

The Indo-Pacific region accounts for a substantial portion of global economic and trade output and has been the target of active efforts by many countries to strike deals promoting economic cooperation and enabling preferential market access, including the longstanding Association of Southeast Asian Nations (ASEAN),¹ the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP)² and the

Contact Information

If you have questions about how digital trade agreement provisions may impact you, or if you have an interest in drafting and submitting comments to USTR or DOC, please contact:

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Regional Comprehensive Economic Partnership (RCEP).³ The region has also been particularly active in the digital trade space, with numerous bilateral and regional agreements taking shape over the past few years including the Digital Economy Partnership Agreement (DEPA),⁴ the Australia-Singapore Digital Economy Agreement and the Asia-Pacific Economic Cooperation (APEC) Cross-Border Privacy Rules.⁵ Competition over trade rule-setting in the region is thus fierce.

As a result, both the USTR and DOC comment requests present an especially valuable opportunity for companies to shape the administration's approach to digital trade, as it seeks to develop, advance and pursue digital trade policy across a variety of bilateral and multilateral initiatives in addition to the IPEF, such as the Trade and Technology Council (TTC) with the European Union and the newly announced U.S.-U.K. Dialogues on the Future of Atlantic Trade.

Digital Trade Agreements Can Address a Vast Array of Issues

Digital trade should be viewed holistically as comprising all digitally enabled trade in both physical and digital goods and services, and underpinned by the movement of data. To that end, U.S. digital trade policy has generally been to strongly advocate for an open, rules-based environment that supports trade digitalization, fosters trust and confidence in the online trading environment, and reduces barriers to digital trade.

Modern digital trade agreements (including digital trade chapters in free trade agreements (FTAs) like the U.S.-Mexico-Canada Agreement (USMCA)) normally include the following provisions, all of which may be an object of discussion in relation to the development of the IPEF:

- **Commitments on Digital Products:** Most modern and comprehensive digital trade agreements include a non-discrimination obligation for digital products (e.g., software, music, videos, games, e-books, etc.) that prevent countries from discriminating against digital products from FTA partners, including with respect to the coverage of tax measures. Furthermore, many digital trade FTA chapters also prohibit the application of customs duties to digital products distributed electronically, reflecting a longstanding commitment by World Trade Organization (WTO) Members to this practice as a means to encourage the growth of digital trade and to mitigate practical issues with the collection of such duties. Some digital trade agreements also contain obligations preventing countries from requiring the disclosure of source code or encryption methods as a condition for the import, distribution, sale or use of digital products in their territories.
- **Trade Facilitation Commitments:** The minimization of barriers to digital trade and the facilitation of digital transactions is a core objective of modern U.S. FTAs. Commonplace provisions in this category include those promoting the use of e-signatures, e-authentication, paperless trading, electronic invoicing, and e-contracts and electronic payments. Other, more recently developed provisions in this category include those committing the FTA parties to develop collaboratively standards for digital trade and prohibiting FTA parties from requesting prior authorization for the provision of services by electronic means.
- **Commitments on Cross-Border Data Transfers:** Commitments to allow the free flow of data across borders are increasingly becoming a condition for participation in trade agreements with leading digital economies like the United States, though some digital trade agreements include limitations on cross-border transfers to

accommodate domestic policy sensitivities on issues like personal data protection or strategic sectoral issues. Relatedly, many agreements prohibit parties from requiring the localization of servers or other computing facilities for businesses operating in their territories and may prohibit other kinds of local content restrictions on digital products and services.

Other almost universal provisions in modern digital trade agreements of this type include a commitment—aspirational at minimum—to adopt or maintain personal information protection laws, consumer protection laws, and laws requiring business to obtain consent to contact consumers and allowing consumers them to opt out of receiving unwanted electronic messages. Provisions promoting the interoperability of enforcement mechanisms for these laws are also commonplace.

In the USMCA, which is likely to serve as a model for the IPEF, the United States insisted on the inclusion of a provision requiring that the parties establish a liability shield for suppliers of interactive computer services, which prohibits their treatment as an information content provider or publisher. This provision is modeled on U.S. law under Section 230 of the Communications Decency Act and was widely criticized for its inclusion in the USMCA by a large, bipartisan group of members of Congress given ongoing domestic debates about the policy underlying that statute. It is thus unclear whether the administration would seek to include a similar provision in the IPEF, and stakeholders interested in this provision in particular should strongly consider commenting.

- **Digital Inclusion:** Digital trade agreements increasingly contain provisions related to digital inclusion, particularly focusing on ensuring that small and medium-sized enterprises (SMEs) and minority or historically disadvantaged groups can equally reap the benefits of digital trade. Other provisions in this category that may appear in digital trade agreements include the right of consumers to access and use the Internet and the creation of a safe and secure online environment. We expect that issues related to digital access and censorship will likely be raised in the IPEF negotiations.
- **Infrastructure Provisions:** A few digital trade agreements have begun to include provisions regarding Internet infrastructure, and these provisions could easily become more common as both countries and the private sector continue to expand undersea cable networks. Examples of provisions falling within this category include obligations relating to the installation, maintenance and repair of submarine telecommunications cable systems or commitments to enable Internet interconnection charge sharing.
- **Emerging Technologies and Innovation:** Digital trade chapters are increasingly drafted with technological neutrality in mind to “future-proof” their content such that the substantive obligations remain relevant even while technology continues to evolve. However, some new technologies are now the object of specific provisions in digital trade agreements such as artificial intelligence, FinTech, RegTech and LawTech. It is also becoming common for agreements to feature a commitment to publish all publicly available government data in a machine-readable and open format to facilitate access and use of information for trade and innovation purposes. More ambitious agreements may also include commitments to facilitate the compatibility of digital identity regimes and to foster the creation of an environment that enables and is conducive to experimentation and innovation, including through the use of regulatory sandboxes.

- **General Provisions:** This category of provisions normally includes commitments between countries to further cooperate on areas of mutual interest in the realm of digital trade, including on cybersecurity, consumer protection, personal information protection, relevant international standards and anticompetition law enforcement, among others. This category also includes provisions that define the scope of the agreement's digital trade provisions more generally. For example, a digital trade agreement may carve out government procurement or specific categories of goods or services. Certain digital trade agreements also provide for specific dispute settlement mechanisms applicable to digital trade disputes. Transparency obligations with respect to digital trade measures are also common.

¹ Members include Brunei, Cambodia, Timor-Leste, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam.

² Members include Australia (in force), Brunei (signatory), Canada (in force), Chile (signatory), Japan (in force), Malaysia (signatory), Mexico (in force), New Zealand (in force), Peru (signatory), Singapore (in force) and Vietnam (signatory). Applicants include the United Kingdom (applied February 2021, in accession negotiations), China (applied September 2021), Taiwan (applied September 2021) and Ecuador (applied December 2021).

³ Members include Australia* (in force), Brunei* (in force), Cambodia (in force), China (in force), Indonesia (signatory), Japan* (in force), Laos (in force), Malaysia* (signatory), Myanmar (signatory), New Zealand* (in force), Philippines (signatory), Singapore* (in force), South Korea (signatory), Thailand (in force) and Vietnam* (in force). The asterisk indicates countries that belong to both CPTPP and RCEP.

⁴ Members include Chile, New Zealand and Singapore.

⁵ Current participants are limited to Australia, Canada, Japan, Korea, Mexico, the Philippines, Singapore, Taiwan and the United States, but all APEC members contributed to the development of the rules and have endorsed them.

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