ITI Promoting Innovation Worldwide

ITI Response to the U.S. International Trade Commission's Public Consultation on the Economic Impact of Trade Agreements Implemented Under Trade Authorities Procedures

The Information Technology Industry Council (ITI) welcomes the opportunity to provide input into the U.S. International Trade Commission's (ITC) *Economic Impact of Trade Agreements Implemented Under Trade Authorities Procedures, 2021 Report,* Inv. No. TPA-105-008. ITI represents over 70 of the world's leading information and communications technology (ICT) companies. Our membership comprises companies from all corners of the technology sector, including hardware, software, digital services, semiconductor, network equipment, and internet, as well as technology-enabled companies that rely on ICT to drive their businesses. Despite their diversity, our companies share a single goal to bring about policy environments that enable innovation and maximize all the benefits that technology provides, including economic growth, job creation, and tools for solving the world's most pressing challenges. Working to craft, promote, and enforce state-of-the-art international trade rules and market access commitments in the context of U.S. Free Trade Agreements (FTAs) is a central part of that goal.

The last decade has seen a fundamental shift in the way global trade is conducted. Globally competitive companies across all sectors rely on a vast array of data-driven digital technologies to produce, export, market, and sell goods and services. Global cross-border data flows grew by 45 times from 2005 to 2015.[1] By that year, the global value of cross-border data flows had surpassed the value of trade in goods for the first time in history, with some 75 percent of that value accruing to companies outside the technology sector, primarily through increases in growth, productivity, and employment. Technology products and services drive growth and job creation in virtually every sector of the economy. The macroeconomic impact of these trends has been well-documented, with estimates that cross-border data flows have increased current global GDP by at least 10 percent, adding $7.8 trillion to the global economy in 2014 alone.[2] By plugging into the global digital network, technology enables firms across the world to access international markets with limited asset footprints, leading to the emergence of "born-global firms" which quickly attain global reach through reliance on existing available digital technologies and with minimal cross-border investment. This connection between digital trade and entrepreneurship, and the importance of policy actions to enable the digitalization of entrepreneurship and the use of digital technology, have also been noted as key in fostering inclusive development.[3]

The United States is a global leader in the innovation and delivery of data-driven products and services, and benefits greatly and disproportionately from technological innovation and digital trade.

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[1] Manyika, James et al (2016), "Digital Globalization: The New Era of Global Flows," *McKinsey Global Institute*, March 2016, http://ma.mckinsey.com/practicecrm/MGI/MGI_Digital_globalization_Full_report_March_2016.pdf

[2] *Ibid*.

[3] Bineswaree Bolaky (2019), "Digitalization, Entrepreneurship and Inclusiveness," *Digital Trade in Africa: Implications for Human Rights,* UNECA.

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As the ITC has itself estimated, U.S. GDP was between $517 billion and $710 billion (3.4 to 4.8 percent) above the 2011 baseline as a result of digital trade, and that digital trade helped create 2.4 million jobs in the United States in the same year.[4] In 2018, digitally-enabled services accounted for 55 percent of all U.S. services exports, 48 percent of all services imports, and 69 percent of the U.S. global surplus in trade in services. This trade in digital and digitally-enabled services also drives trade and production in other areas of the U.S. economy. For example, over half of digitally-enabled services imported by the United States from the European Union (EU) are used to produce U.S. products for export, and vice-versa.[5]

Concurrent with recent, digitally-driven shifts in global trade, and in line with provisions contained in the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (TPA), the United States has been the global leader in the development and international promotion of strong, state-of-the-art digital trade disciplines. As with modern rules developed and promoted by the United States in other areas, these disciplines have the effect of directly countering existing and prospective barriers to trade. However, as the ITC has noted, even where such rules do not directly reduce or eliminate existing barriers to trade, their economic impact can be quantified on the basis of the relative certainty they provide to digital and ICT-driven businesses operating across a range of sectors.

At the same time, perhaps no other organization is as familiar as the ITC is with the challenges of measuring the digital economy. Owing to these challenges, and the relative novelty of the most commercially meaningful digital trade provisions, the beneficial impacts of digital trade and other modern U.S. FTA provisions must also be considered using more qualitative metrics. We would also emphasize the important role of domestic structural supports that mitigate potentially disruptive impacts of trade liberalization on workers and specific sectors of the U.S. economy. Such mechanisms are part and parcel of an inclusive, socially sustainable national trade policy, and are necessary to maximize the benefits of modern U.S. FTA provisions to the U.S. economy.

The remainder of ITI's submission will seek to highlight qualitative and, to the extent feasible, quantitative impacts on the U.S. economy of FTA commitments negotiated in a sample of select areas of importance to the technology sector. We appreciate the ITC's continued efforts to assess the economic impact of U.S. FTA provisions and to develop economic methodologies that ensure that U.S. policymakers can pursue evidence-based approaches to facilitate U.S. trade, competitiveness, and innovation.

[4] U.S. International Trade Commission (2014), "Digital Trade in the U.S. and Global Economies, Part 2," *U.S. ITC*, http://www.usitc.gov/publications/332/pub4485.pdf).

[5] Hamilton, Daniel and Joseph Quinlan (2020), "The Transatlantic Economy 2020: Annual Survey of Jobs, Trade and Investment between the United States and Europe," *Foreign Policy Institute, Johns Hopkins University SAIS,* https://www.uschamber.com/sites/default/files/te2020_report_final.pdf

Digital Trade

ITI has expressed support for U.S. FTAs that incorporate the foundational principles of digital trade, including those that:[6]

- Prohibit restrictions on the cross-border flow of data (allowing only for narrowly tailored exceptions) and localization of computing facilities;
- Prohibit tariffs and customs formalities on electronic transmissions;
- Enshrine non-discriminatory treatment of digital products and commitments to refrain from the implementation of taxation measures that are discriminatory in nature and contravene long-standing principles of international taxation;
- Ensure protection of personal data, taking into account best international practices for privacy and interoperability;
- Strengthen and expand good regulatory practices for digital trade, in accordance with OECD principles, as a means to promote new technologies like Artificial Intelligence (AI), machine learning, and additive manufacturing;
- Promote governmental cooperation and risk-based approaches to cybersecurity;
- Prohibit requirements to disclose source code, algorithms, and proprietary information relating to cryptography;
- Establish limitations to intermediary liability for users and suppliers of interactive computer services to support and safeguard digital supply chains;
- Facilitate access to and use of open public data in minable, machine-readable formats to spur adoption of AI and other new technologies; and
- Enshrine acceptance of electronic contracts, signatures, and authentication.

While the United States has long played a key role in the development of trade provisions reflecting these foundational principles, the United States-Mexico-Canada Agreement (USCMA) is the first fully-implemented agreement containing a modern, holistic digital trade chapter to which the United States is a Party. As such, attempts to directly quantify the beneficial impact of the digital trade commitments contained in USMCA, or even in comparable agreements to which the United States is not a party, such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (from which USMCA digital trade provisions are largely derived), are relatively nascent. However, given the increasing proliferation and expansion of barriers to digital trade, and growing evidence of their detrimental economic impact, it is clear that such disciplines are important and necessary bulwarks against rising digital protectionism.

Proliferation of Barriers to Digital Trade

In recent years we have seen a continued proliferation of precisely the kinds of damaging barriers to digital trade that USMCA-style provisions are designed to counter. These barriers, which include but are not limited to both *de jure* and *de facto* restrictions to the movement of data across national

[6] See, for instance, ITI's Recommendations for a State-of-the-Art U.S.-UK Trade Agreement: https://www.itic.org/news-events/news-releases/iti-recommends-state-of-the-art-approach-for-u-s-uk-trade-agreement

borders, are catalogued extensively by the U.S. government[7] and the private sector.[8] Studies have examined the ways in which barriers to digital trade, and in particular measures that restrict cross-border data flows, inhibit value generation, reduce exports and foreign direct investment, and result in productivity losses for local companies. At the macroeconomic level, one prominent study assessing the impact of recently proposed or enacted data localization legislation in seven economies estimated negative GDP impacts in each instance: Brazil (-0.2%), China (-1.1%), EU (-0.4%), India (-0.1%), Indonesia (-0.5%), Korea (-0.4%) and Vietnam (-1.7%).[9] At the firm level, such restrictions can have a meaningful impact on the cost and availability of key digital services. Specific analysis undertaken with respect to cloud services found that data-localization policies restrict access to the most cost-competitive global cloud providers, and significantly raise costs for local companies purchasing cloud-computing services.[10]

U.S. trading partners, including many of its largest trading partners, continue to innovate digital policy approaches that stand to detrimentally impact not only U.S. exports but the entire global innovation ecosystem. This dynamic has perhaps been most visible in the proliferation and expansion of digital services taxes (DSTs). Though the individual structures of these unilateral measures vary, they frequently share design features that depart from stable and sustainable international tax policies and disproportionately impact U.S.-headquartered companies.[11] An increasing array of analyses, including the Section 301 report issued by the Office of the U.S. Trade Representative (USTR) following the conclusion of its investigation of France's DST,[12] demonstrates the negative commercial impacts of these measures on a widening range of U.S. firms. More recently introduced digital tax measures, such as legislation expanding the scope of India's existing Equalization Levy, adopt a more directly discriminatory approach. Rather than targeting a narrowly defined set of digital services generating revenues above a certain threshold, the Indian measure applies a two percent tax on the sale of goods and services online by virtually any non-resident firm to a consumer based in India or using an Indian IP address. The design of this levy explicitly excludes Indian e-commerce companies from its scope, thereby acting as a trade barrier for U.S. companies that are competing against both Indian e-commerce firms as well as Indian brick-and-mortar establishments. In addition to their direct impact on in-scope firms, these unilateral digital measures create an increasingly unpredictable patchwork approach to international taxation that reduces business certainty for U.S. firms in the tech sector and beyond.

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[7] USTR's annually published National Trade Estimate (NTE) Report provides reporting and analysis of barriers to digital trade in a range of markets: https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2020/march/fact-sheet-2020-national-trade-estimate-strong-binding-rules-advance-digital-trade

[8] Information Technology Industry Council (2020), "ITI Response to USTR Request for Public Comments to Compile the National Trade Estimate (NTE) Report on Foreign Trade Barriers," https://www.itic.org/policy/ITI2021NTEPublicCommentFinal.pdfhttps://www.itic.org/policy/ITI2021NTEPublicCommentFinal.pdf

[9] Bauer, Matthias, Erik van der Marel and Hosuk Lee-Makiyama (2014), "The Costs of Data Localisation: A Friendly Fire on Economic Recovery," *ECIPE*, https://ecipe.org/publications/dataloc/

[10] (2015) "Quantifying the Cost of Forced Localization," *Leviathan Security Group,* https://static1.squarespace.com/static/556340ece4b0869396f21099/t/559dad76e4b0899d97726a8b/1436396918881/Quantifying+the+Cost+of+Forced+Localization.pdf

[11] See ITI's submission to Docket No. USTR-2020-0022: Initiation of Section 301 Investigations of Digital Services Taxes: https://www.itic.org/policy/2020.07.15ITIFinalSubmissionDSTInvestigations.pdf

[12] United States Trade Representative, "Section 301 Investigation Report on France's Digital Services Tax," https://ustr.gov/sites/default/files/Report_On_France%27s_Digital_Services_Tax.pdf

Economic Impact of Modern, U.S. Digital Trade Provisions

Beyond the evident economic gains to be had through the prevention or elimination of existing or emerging barriers to digital trade, the ITC itself has developed perhaps the best analysis of the economic impact of USMCA's digital trade provisions. In its April 2019 report,[13] the ITC asserts that, "USMCA's provisions that reduce policy uncertainty regarding international data transfers and data localization are estimated to have a significant, positive impact on industries that rely on cross-border data flows." The Commission's analysis estimates that changes in USMCA's digital trade provisions across various sectors would likely result in *ad valorem* equivalent tariff reductions ranging from 0.6 to 3.5 percent for U.S. firms exporting to Mexico, and 0.6 to 4.5 percent for U.S. firms exporting to Canada. This analysis centers on USMCA's data-related provisions; however, it merits noting that the economic significance of other provisions in the USMCA digital trade chapter will grow as economies pursue *ex ante* regulatory approaches to new technology, including approaches that contemplate reliance on potentially mandatory certification schemes (e.g., for cybersecurity[14]). By fostering inherently more compatible regulatory approaches, digital trade provisions that center on the risk-based and non-discriminatory governance of new technologies are increasingly likely to prevent the emergence of regulatory barriers to trade and establish greater policy certainty in foreign markets in which U.S. firms operate.

Building on this concept of regulatory compatibility, we also underscore the substantial normative influence of U.S. FTA provisions. U.S. digital trade provisions, developed and iterated in the context of bilateral, regional, and plurilateral negotiating initiatives, have been further iterated and incorporated into a range of FTAs and regional trade agreements (RTAs) to which the United States is not a party, but from which U.S. businesses nevertheless benefit. Taking into account the increasingly interconnected nature of the data-driven global economy, the broadened acceptance of U.S.-style FTA commitments, particularly in key business hubs where U.S. businesses have their regional headquarters, creates positive externalities for U.S. businesses and further cements certainty that U.S.-headquartered businesses will be able to conduct business across multiple jurisdictions without confronting technically burdensome and even prohibitive barriers to digital trade. In this respect, the proliferation of commitments prohibiting the imposition of customs duties on digital products is particularly notable.

Preventing the Imposition of Tariffs on Digital Products

A longstanding commitment among all members of the World Trade Organization (WTO) that has served the interests of both technology companies and the United States economy as a whole is the Moratorium on the Imposition of Customs Duties on Electronic Transmissions (Moratorium). While not yet reflected in a formal multilateral agreement, and instead subject to renewal at each WTO Ministerial Conference, for more than two decades the Moratorium has ensured that countries refrain from imposing tariffs on digital products. The term "electronic transmissions" is not defined, but is commonly held to encompass anything from software, emails, and text messages to digital

[13] USITC (2019), "U.S.-Mexico-Canada Agreement: Likely Impact on the U.S. Economy on Specific Industry Sectors," https://www.usitc.gov/publications/332/pub4889.pdf

[14] See, for instance, the certification-based approach outlined in the EU's Cybersecurity Act (Regulation (EU) 2019/881). A comparable approach may be replicated in forthcoming European regulation on AI.

music, movies and videogames.[15] To date, no country has imposed tariffs on electronic transmissions, a testament to the success of the Moratorium, the broad recognition of the economic damage the application of customs duties on electronic transmissions would yield, and the technical infeasibility of administering tariffs on electronic transmissions. However, the importance of trade commitments prohibiting the application of such tariffs should not be understood as theoretical, as the Moratorium and FTA provisions that replicate and expand upon the prohibition it enshrines play an increasingly urgent and necessary role.

Against a backdrop of uncertainty regarding the scope of "electronic transmissions" and the administrability of customs duties in this context, some WTO members, most prominently India and South Africa, continue to raise questions around the revenue implications of the Moratorium and to threaten to withhold support of its renewal. These calls could gain traction amongst developing countries in particular as they seek out new revenue streams to fund post-COVID economic recovery. In what is likely the most concrete step toward the potential introduction of customs duties on electronic transmissions, in 2018, Indonesia's Ministry of Finance issued Regulation No.17/PMK.010/2018 (Regulation 17), which amended Indonesia's Harmonized Tariff Schedule (HTS) Chapter 99 to add: "Software and other digital products transmitted electronically." Chapter 99 effectively treats an electronic transmission as a customs "import," which triggers a number of negative implications including: 1) the imposition of customs import requirements (including declaration and other formalities) that will be impossible to meet for certain intangible products; 2) the imposition of import duties and taxes on each electronic transmission; 3) the creation of security risks; and 4) the constraint of information flows into Indonesia. While the tariff rates remain at zero, Indonesia's actions have established a dangerous precedent and will likely have the effect of encouraging other countries to violate the Moratorium.

Several notable attempts have been made at quantifying the negative economic impact of the imposition of customs duties on electronic transmissions. One recent study estimates that levying tariffs on digitally deliverable services could bring about GDP losses for developing countries as high as $10.5 billion, and argues that, for countries like India, GDP losses would outweigh corresponding revenue gains by a factor of 49.[16] Another analysis demonstrates that tariff application would at least partially negate the economic welfare gains associated with digitally-deliverable services, including those related to a reduction in trade costs, increased domestic value added in exports, and enabling export.[17] Even with varying definitions of scope, there exist a range of examples where the application of tariffs would generate a monetary cost for digital content or a digitally-delivered service where previously a consumer would have encountered no direct cost. Moreover, such tariffs would likely be applied in a fragmented fashion across economies and would be unbound by existing market access commitments.

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[15] International Chamber of Commerce (2019), "The WTO Moratorium on Customs Duties on Electronic Transmissions: A primer for business," https://iccwbo.org/content/uploads/sites/3/2019/11/2019-icc-wto-moratorium-custom-duties.pdf

[16] Lee-Makiyama, Hosuk (2019), "The Economic Losses from Ending the WTO Moratorium on Electronic Transmissions," *ECIPE*, https://ecipe.org/publications/moratorium/

[17] Lopez Gonzalez, Javier and Andrea Andrenelli (2019), "Electronic transmissions and international trade – shedding new light on the moratorium debate," *OECD Trade Policy Papers,* https://www.oecd-ilibrary.org/trade/electronic-transmissions-and-international-trade-shedding-new-light-on-the-moratorium-debate_57b50a4b-en

Replicating the Moratorium in Free Trade Agreements

Numerous FTAs incorporate provisions that include variations of the WTO Moratorium. Fifty six WTO Members have signed at least one RTA that includes a provision prohibiting the application of customs duties on electronic transmissions, many of which bind signatories on a permanent basis.[18] Every U.S. FTA that has entered into force since the inception of the Moratorium in 1998 has contained a prohibition on customs duties on digital products. In spite of the informal multilateral ban on such duties, there are at least three clear benefits to business certainty associated with the incorporation of these provisions in U.S. FTAs.

The first is that, in contrast to the Moratorium, which must be renewed at each WTO Ministerial Conference, U.S. FTA commitments are intended to apply on a permanent basis, providing the long-term certainty that a company's exports will not be subject to future customs duties. Moreover, many U.S. FTA commitments are fully subject to dispute settlement, providing a clearer channel of enforceability than the WTO Moratorium. The second, related benefit is that U.S. FTA commitments may provide a greater degree of legal certainty regarding scope and application of the ban on customs duties than both the Moratorium itself and commitments contained in FTAs to which the U.S. is not a party. For instance, the Australia-China FTA includes a provision that codifies an agreement to not impose customs duties on electronic transmissions but allows the flexibility to opt out of that commitment in the event that the Moratorium lapses. This model, which essentially ties the FTA provision to the fate of the Moratorium, has been replicated in a range of other agreements. Finally, the existence of a web of commitments prohibiting tariffs on digital products presumes that, even in the event of a lapse of the Moratorium, parties to agreements containing such provisions would not seek to levy tariffs against their FTA partners.

While the economic benefit of U.S. FTA provisions prohibiting the imposition of customs duties on digital products is difficult to quantify, their importance is equally difficult to overstate in a possible scenario in which the Moratorium lapses. The United States' leadership both in supporting the Moratorium and integrating strong, permanent bans on the imposition of customs duties on digital products generates a meaningful level of certainty for businesses, and, as evidenced in agreements such as the CPTPP, contributes to the helpful proliferation of such commitments in agreements to which the United States is not a party.

International Standards, Conformity Assessment, and Regulatory Compatibility

TPA objectives governing regulatory practices establish meaningful baselines for reduction or elimination of regulatory barriers to trade and progress toward innovation-facilitative regulatory compatibility. This is economically significant: non-tariff measures are almost twice as restrictive as tariff barriers.[19] TPA language calls for FTA provisions that achieve increased transparency and stakeholder participation in the development of regulations; science- and risk-based approaches to regulation; greater regulatory compatibility through harmonization, equivalence, or mutual recognition of different regulations and standards; greater reliance on international and

[18] *Ibid.*

[19] WTO (2012), "World Trade Report 2012," https://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report12_e.pdf

interoperable standards; and acceptance of good regulatory practices more broadly. In U.S. FTAs, provisions manifesting these objectives are often contained in chapters covering technical barriers to trade (TBT), sanitary and phytosanitary (SPS) measures, and, more recently, good regulatory practices (GRPs). As noted above, elements of good regulatory practices are also contained in discrete provisions found elsewhere in U.S. FTAs.[20] In areas such as TBT, U.S. FTA chapters have historically sought to build upon provisions contained in corresponding multilateral agreements (i.e., the WTO TBT Agreement).

Trade in ICT products tends to be particularly susceptible to non-tariff barriers to trade. There are several explanations for this: relative to other goods sectors ICT products are disproportionately designed for the global market; have large numbers of components and rely on global supply chains; are constantly evolving in response to user demands and technological advances; are deployed in a wide and varied array of scenarios and sectors; and are highly configurable (i.e., one product family can have hundreds of different configurations). Moreover, ICT goods (and increasingly, services) are standards-intensive, and the U.S. technology sector is a key contributor to the development of technical standards in a wide range of international standardization bodies and consortia domiciled in various jurisdictions. Innovations in recent U.S. FTAs therefore bear a great deal of significance for our companies in preventing the emergence of non-tariff barriers to trade and fostering regulatory compatibility across increasingly connected industry sectors.

International Standards

USMCA commitments covering international standards – both in the context of TBT chapters as well as in discrete provisions outside of the TBT chapter –are representative of such innovations. Looking to the text of USMCA's TBT Chapter, it improves significantly upon both the WTO TBT Agreement and the most recent FTAs to which the United States was a signatory. For example, Article 11.4, *International Standards, Guides and Recommendations* expands on existing WTO TBT Agreement commitments surrounding the use of international standards, and builds in several new, helpful clarifications, such as:

> *11.4.3. Each Party shall apply no additional principles or criteria other than those in the TBT Committee Decision on International Standards in order to recognize a standard as an international standard. For greater certainty, criteria that are not relevant to determining whether a standard is an international standard include:*
>
> *(a) the domicile of the standards body;*
>
> *(b) whether the standards body is non-governmental or inter-governmental; and*
>
> *(c) whether the standards body limits participation to delegations.*

This language drives forward innovation-facilitative policies that enable industry and regulators alike to draw on the widest range of technical standards solutions in assessing or demonstrating compliance with regulatory requirements. While U.S. technology firms participate actively in standardization processes in organizations including the International Organization for Standardization (ISO) and International Electrotechnical Commission (IEC), this provision is notable in that it effectively stipulates that international standards developed in these bodies are not the *only*

[20] See, for instance, USMCA Article 19.15, *Cybersecurity*, in which "…the Parties recognize that risk-based approaches may be more effective than prescriptive regulation in addressing [cybersecurity] threats."

standards that are to be considered international within the meaning of the WTO TBT Agreement. This commitment is further strengthened by provisions reflecting the preeminence of the TBT Committee Decision on International Standards[21] in determining whether a standard is international.[22]

Such provisions are reflective of the U.S. standardization ecosystem, in which there are hundreds of active, industry-led standardization bodies and consortia, many of which develop international standards in accordance with the principles of the TBT Committee Decision on International Standards. They also reflect elements of the U.S. government's approach to the use of standards in regulation as enshrined in OMB Circular A-119 and the National Technology Transfer and Advancement Act. Most importantly, they advance a standardization policy approach that is favorable to both trade and innovation by pushing back on government policies, whether *de jure* or *de facto,* that stipulate mandatory reliance on either country- or region-unique standards, rather than the broadest range of fit-to-purpose international standards. Such policies at a minimum require leading U.S. technology firms to develop costly and often unnecessary variations in supply chains in order to meet country-specific criteria. In addition to reducing the likelihood of such barriers, reliance on the broadest range of international standards is aligned with risk-based governance approaches which are better suited to keeping pace with technological development and avoiding unnecessarily restrictive requirements. Trade tools play an increasingly important role in pushing back on trade-restrictive standardization policies, particularly as governments pursue standards-driven approaches to the regulation of new technology.

The economic impact of standards-related barriers to trade can be difficult to assess, in part because such barriers can, but do not necessarily, prohibit market access outright. However, particularly in the technology sector, regulatory reliance on either non-international standards or a limited subset of international standards is likely to increasingly lead to regulatory divergence and market fragmentation in the form of new non-tariff barriers to trade. Over 80 countries have technical regulations for safety, electromagnetic interference, and telecommunications; many base requirements on national standards that deviate from global norms.[23] We also see risk for technical barriers to trade as countries pursue certification-based governance approaches in areas of new technology, such as cybersecurity. Several jurisdictions, including the European Union (EU), are already moving forward with such approaches. To the extent forthcoming certification and/or conformity assessment requirements are not grounded in fit-to-purpose, international standards, there is a risk not only of market fragmentation (i.e., divergent legislative requirements between jurisdictions), but of technical disruption (i.e., impact on the ability of some firms to deliver optimal products and services).

[21] Annex 2 to Part 1 (Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with relation to Articles 2, 5 and Annex 3 of the Agreement) in the Decisions and Recommendations adopted by the WTO Committee on Technical Barriers to Trade Since 1 January 1995 (G/TBT/1/Rev.13), as may be revised, issued by the WTO Committee on Technical Barriers to Trade.

[22] See, for instance, USMCA Article 11.5.

[23] ITI (2016), "Localized Standards and Regulatory Requirements: Don't Reinvent the Wheel," *TechWonk Blog*, https://www.itic.org/news-events/techwonk-blog/localized-standards-and-regulatory-requirements-dont-reinvent-the-wheel

Conformity Assessment

USMCA provisions governing conformity assessment are likewise crucial to the U.S. ICT goods sector. Given the prevalence of divergent ICT hardware technical regulations around the world, localized testing requirements for ICT products are regularly atop the list of technology sector trade concerns. U.S. provisions that build on Article 6.4 of the WTO TBT Agreement[24] and lock in national treatment for conformity assessment bodies directly challenge such ill-founded localization requirements. India's Compulsory Registration Order (CRO) is a compelling, long-standing example of such a requirement. Under the CRO, companies are required to retest products to meet international safety requirements in India despite having already passed identical tests in internationally accredited labs. The registration process is incredibly costly to U.S. firms, and fails to improve product safety. To compound concerns, in 2020, the Ministry of Electronics and Information Technology (MeitY) proposed to expand the CRO to cover additional products; however, it failed to perform any risk or regulatory impact assessment to justify these additions. In fact, stakeholder meetings revealed that the emphasis now seem to be on limiting imports of products into India from certain other countries, rather than on product safety and risk to the Indian public. India is not alone in its pursuit of such requirements, and the expanded acceptance of strong FTA provisions on conformity assessment is necessary as a means of pushing back on this protectionist trend.

International Schemes

Similarly beneficial both in reducing trade barriers and fostering regulatory compatibility are provisions that promote reliance on international accreditation schemes as a means of facilitating the acceptance of reliable, international test results. Schemes such as the International Laboratory Accreditation Collaboration (ILAC) Mutual Recognition Arrangement (MRA), the International Accreditation Forum (IAF) Multilateral Recognition Arrangement (MLA), and the IEC System of Conformity Assessment Schemes for Electrotechnical Equipment and Components (IECEE) CB Scheme provide for a rigorous peer-review process that ensures the quality of test results produced by accredited conformity assessment bodies (CABs) and certification bodies. Expanding reliance on these schemes through U.S. FTA provisions would not only facilitate increased trade in regulated areas where testing and certification is necessary, but would have positive ramifications for safety, quality, and consistency, both by broadening the range of acceptable, trustworthy results, and allowing regulators and market surveillance authorities to concentrate resources in the most efficient and effective manner possible.

Emerging Regulatory Barriers to Services Trade

Extending beyond the realm of technical barriers to trade, emerging regulatory approaches to new technology bear implications not only for ICT products (e.g., connected devices), but for digital services and even "processes" as well. We therefore see it as essential that the U.S. government seek to expand and develop commitments that extend TBT-style commitments to digital services, including as regards regulatory reliance on international standards developed in accordance with the TBT Committee Decision on International Standards. As these barriers to goods and services trade are prospective, their impact is not yet quantifiable. However, recent studies have shown that policy-induced services trade costs are relatively high. Expressed as percentages of total trade value,

[24] See USMCA Articles 11.1 and 11.2.

average multilateral costs for cross-border services trade are around 57 percent for communication services and 54 percent for business services, around 60 percent for transport services, around 103 percent for insurance services, and around 255 percent for financial services.[25] Absent expanded standards-related commitments, coupled with strong services market access commitments we fear that such costs could increase as governments pursue new regulatory approaches for digital services.

Additional Areas of Regulatory Compatibility in U.S. FTAs

Finally, ITI recognizes the tangible economic benefits of both good regulatory practices, including provisions aimed at engendering greater degrees of transparency and stakeholder participation in the development of regulations that may impact trade, and discrete regulatory compatibility provisions contained in sectoral annexes to U.S. FTAs, including provisions governing supplier's declaration of conformity and electronic labeling (e-labeling). With specific respect to e-labeling, allowing the display of regulatory and other product information via electronic means provides a practical solution that ensures labels will not inhibit product innovation while helping to minimize manufacturers' logistical burden and allowing compliant products to move freely without additional administrative barriers.[26]

Market Access

Services Market Access

As a means of complementing and giving effect to the modern, rules-based digital commitments described above, U.S. efforts to enshrine market openness through full liberalization of services market access has had a profound impact on the United States' role as a global leader in services trade. According to U.S. Census Bureau data, U.S. services exports – a large proportion of which, as noted in the introduction, are digitally delivered – increased from $200 billion in 1994 to $845 billion in 2019.[27] U.S. FTA commitments are especially impactful given that, with the exception of accession commitments, no new services market access commitments have been finalized at the WTO since the conclusion of negotiations on the General Agreement on Trade in Services (GATS) in 1995.

More specifically, the U.S. approach of negotiating services market access on a negative list basis, with minimal non-conforming measures, has been essential to the growth of U.S. services trade and the vibrancy of the U.S. technology sector. Beyond opening U.S. market access in sectors that are key to digital trade, including computer and computer-related services, telecommunications, advertising services, distribution services, electronic payment services, audiovisual services, and postal and express delivery sources, the U.S. adoption of a negative list approach ensures that new sectors benefit from market access commitments without further negotiation. The value of this approach

[25] Benz, S. and A. Jaax (2020), "The costs of regulatory barriers to trade in services: New estimates of ad valorem tariff equivalents", *OECD Trade Policy Papers*, No. 238, https://doi.org/10.1787/bae97f98-en

[26] Cory, Nigel (2017), "How E-labels Can Support Trade and Innovation in ICT", *Information Technology Innovation Foundation*, https://itif.org/publications/2017/09/25/how-e-labels-can-support-trade-and-innovation-ict

[27] https://www.census.gov/foreign-trade/statistics/historical/gands.pdf

has become more apparent as U.S. trading partners such as the EU have sought in preferential trade agreements to retain the right to discriminate in the broad and ill-defined category of "new services."

Goods Market Access

Similarly, U.S. efforts to secure full market liberalization for ICT products with trading partners, including through efforts to broaden participation in the WTO Information Technology Agreement (ITA) and its expansion, have both broadened global markets for exporting U.S. technology firms and facilitated meaningful benefits for consumers. By reducing the price of ICT goods, the ITA has boosted U.S. export competitiveness, increased the availability of productivity-enhancing goods such as mobile phones, and reduced the import prices of computers and semiconductors by 66 percent since 1996.[28] While approximately 97 percent of trade in ICT goods has been liberalized, half of all WTO members are not parties to the ITA, and large countries such as China and India have either yet to fully implement ITA and ITA expansion commitments, or in some instances appear to willfully break ITA tariff bindings. U.S. efforts both in FTAs as well as at the WTO remain essential to expanding participation in and enforcing implementation of the ITA and further broadening the list of covered products, including as a means of ensuring that rapidly evolving technology products can benefit from tariff-free treatment. Expanding ICT goods market access in non-ITA signatory markets is also consistent with U.S. and TPA development objectives, given its demonstrated boosts to the economic growth of developing countries.[29]

U.S. Engagement at the WTO

The WTO, and the rules-based international order it reflects, remains central to U.S. innovation, economic growth, and international leadership in the modern, global economy. Current TPA objectives reflect the importance of the WTO to the U.S. economy, and call on U.S. trade policymakers "to expand competitive market opportunities for United States exports and to obtain fairer and more open conditions of trade, including through utilization of global value chains, through the negotiation of new WTO multilateral and plurilateral trade agreements, such as an agreement on trade facilitation."[30] ITI also supports TPA objectives of expanding country participation in and further enhancing plurilateral agreements such as the ITA and the Agreement on Government Procurement (GPA).

The WTO Agreement on Government Procurement (GPA)

The GPA ensures that leading U.S.-headquartered technology firms in sectors in which the U.S. has a clear global competitive advantage are able to do business with governments on competitive, non-discriminatory terms. Based on WTO estimates of the size of government procurement markets, the GPA creates a market of $4.0 to $6.2 trillion across the 48 economies that have agreed to take on rules-based and market access commitments. This figure will grow as economies such as Brazil

[28] https://www.wto.org/english/res_e/booksp_e/ita20years_2017_chap1_e.pdf

[29] *See* Ezell, Stephen and John Wu (2017), "How Joining the Information Technology Agreement Spurs Growth in Developing Nations," *Information Technology Innovation Foundation*, https://itif.org/publications/2017/05/22/how-joining-information-technology-agreement-spurs-growth-developing-nations

[30] 19 USC § 4201 (b) (13) (C)

accede to the GPA. ITI members across different verticals of the technology sector depend on these commitments – as well as procurement commitments negotiated with non-GPA signatory countries in U.S. FTAs – for the ability to compete for government contracts on non-discriminatory terms and continue to lead globally in selling goods and services to governments outside of the United States. Moreover, the United States' active engagement in the GPA is essential to negotiating the terms under which countries with large, closed procurement markets – such as China – may ultimately be able to accede to the Agreement.

The WTO E-Commerce Joint Statement Initiative

Consistent with the aim of broadening international acceptance of USMCA-style digital trade commitments, ITI strongly supports U.S. leadership in the WTO Joint Statement Initiative (JSI) on E-Commerce. Since January 2019, a group of (now 85) WTO Members has been engaged in these JSI negotiations. A successful outcome would broadly reflect the foundational principles identified in the digital trade section of this paper. At the same time, we recognize that participating WTO Members including China and Russia have a fundamentally different perspective than the United States and its allies on the value of a free and open Internet. In addition, while the EU generally shares important values with the United States, it continues to promote digital trade policies that preserve the right to restrict cross-border data flows. The presence of all these parties at the negotiating table creates challenges to concluding a truly ambitious multilateral agreement. These doubts notwithstanding, the JSI negotiations represent a crucial international opportunity to broaden the influence of the strongest existing digital trade provisions, and the United States should remain engaged and open to the possibility that rules negotiated in this context may initially only apply to a portion of the WTO's membership.

Institutional Reform

The structural challenges inherent to the E-Commerce JSI negotiations also underscore the need for U.S. engagement in the pursuit of broader institutional reform at the WTO. The economic benefits afforded to the United States by way of commitments already negotiated at the WTO, as well as prospective rules-based and market access commitments, have been alluded to throughout this response and are likely incalculable in their entirety. Going forward, the United States should continue to prioritize robust engagement across the WTO and forward-looking reforms in areas including dispute settlement, the negotiating function, transparency and notification, and special and differential treatment.

Conclusion

U.S. technology firms operate in an increasingly digitalized and globalized economy. Firms of all sizes depend on the certainty that undue restrictions will impede neither access to goods and services nor the ability of data to cross borders. U.S. FTA provisions remain essential to fostering that certainty. They do so both by directly countering and preventing the emergence of protectionist measures, and by exerting a broad, normative influence that serves as a crucial underpinning to the regulatory compatibility that, along with the cross-border movement of data, is essential to the ability of tech

and tech-enabled firms to succeed in the 21st century. ITI thanks the ITC for this opportunity to inform the *Economic Impact of Trade Agreements Implemented Under Trade Authorities Procedures, 2021 Report*, and we look forward to continuing to partner with the ITC to advance modern, evidence-based approaches to U.S. trade policy.