

---

# THE GLOBAL TRADE LAW JOURNAL

---

Volume 1, Number 2

March–April 2024

## **Editor's Note: Digital Trade**

*Victoria Prussen Spears*

## **The Rise of Artificial Intelligence, Big Data, and the Next Generation of International Rules Governing Cross-Border Data Flows and Digital Trade—Part I**

*Frank J. Schweitzer, Ian Saccomanno, and Naoto Nelson Saika*

## **Office of Foreign Assets Control Once Again Warns of Potential Liability of U.S. Parent Companies for Sanctions Violations Committed by Foreign Subsidiaries**

*H. Christopher Boehning, Jessica S. Carey, John P. Carlin, Michael E. Gertzman, Roberto J. Gonzalez, Brad S. Karp, Mark F. Mendelsohn, Richard S. Elliott, David Fein, David K. Kessler, Jacobus J. Schutte, Samuel Kleiner, and Jacob Wellner*

## **U.S. Government Revises Comprehensive Export Controls on Semiconductors and Semiconductor Manufacturing Equipment**

*Steven F. Hill, Jerome J. Zaucha, Guillermo S. Christensen, Jeffrey Orenstein, Catherine A. Johnson, and Brian J. Hopkins*

## **Biden Administration Issues Executive Order and Proposals Targeting Outbound Investment in China**

*Daniel P. Brooks, Nova J. Daly, Nazak Nikakhtar, Paul J. Coyle, and Patrick Griffo*

## **Planning Mergers and Acquisitions in the European Union: Things to Know About the EU's New Foreign Subsidies Regulation**

*Christian Filippitsch and Max Seuster*

---

# THE GLOBAL TRADE LAW JOURNAL

---

Volume 1, No. 2

March–April 2024

- 99 Editor’s Note: Digital Trade**  
Victoria Prussen Spears
- 103 The Rise of Artificial Intelligence, Big Data, and the Next Generation of International Rules Governing Cross-Border Data Flows and Digital Trade—Part I**  
Frank J. Schweitzer, Ian Saccomanno, and Naoto Nelson Saika
- 117 Office of Foreign Assets Control Once Again Warns of Potential Liability of U.S. Parent Companies for Sanctions Violations Committed by Foreign Subsidiaries**  
H. Christopher Boehning, Jessica S. Carey, John P. Carlin, Michael E. Gertzman, Roberto J. Gonzalez, Brad S. Karp, Mark F. Mendelsohn, Richard S. Elliott, David Fein, David K. Kessler, Jacobus J. Schutte, Samuel Kleiner, and Jacob Wellner
- 125 U.S. Government Revises Comprehensive Export Controls on Semiconductors and Semiconductor Manufacturing Equipment**  
Steven F. Hill, Jerome J. Zaucha, Guillermo S. Christensen, Jeffrey Orenstein, Catherine A. Johnson, and Brian J. Hopkins
- 135 Biden Administration Issues Executive Order and Proposals Targeting Outbound Investment in China**  
Daniel P. Brooks, Nova J. Daly, Nazak Nikakhtar, Paul J. Coyle, and Patrick Griffo
- 145 Planning Mergers and Acquisitions in the European Union: Things to Know About the EU’s New Foreign Subsidies Regulation**  
Christian Filippitsch and Max Seuster

**EDITOR-IN-CHIEF**

**Steven A. Meyerowitz**

*President, Meyerowitz Communications Inc.*

**EDITOR**

**Victoria Prussen Spears**

*Senior Vice President, Meyerowitz Communications Inc.*

**BOARD OF EDITORS**

**Robert A. Friedman**

*Partner*

*Holland & Knight LLP*

**Geoffrey M. Goodale**

*Partner*

*Duane Morris LLP*

**Renée Latour**

*Partner*

*Clifford Chance*

**Britt Mosman**

*Partner*

*Willkie Farr & Gallagher LLP*

**Anthony Rapa**

*Partner*

*Blank Rome LLP*

**Brooke M. Ringel**

*Partner*

*Kelley Drye & Warren LLP*

**Samir D. Varma**

*Partner*

*Thompson Hine LLP*

**Timothy C. Welch**

*Partner*

*Weil, Gotshal & Manges LLP*

THE GLOBAL TRADE LAW JOURNAL (ISSN 2995-1089) at \$495.00 annually is published six times per year by Full Court Press, a Fastcase, Inc., imprint. Copyright 2024 Fastcase, Inc. No part of this journal may be reproduced in any form—by microfilm, xerography, or otherwise—or incorporated into any information retrieval system without the written permission of the copyright owner.

For customer support, please contact Fastcase, Inc., 729 15th Street, NW, Suite 500, Washington, D.C. 20005, 202.999.4777 (phone), or email customer service at [support@fastcase.com](mailto:support@fastcase.com).

#### Publishing Staff

Publisher: Morgan Morrissette Wright

Production Editor: Sharon D. Ray

Cover Art Design: Morgan Morrissette Wright and Sharon D. Ray

This journal's cover features a 1855 depiction of the American clipper ship *Red Jacket* on her journey from Melbourne, Australia, to Liverpool, England. The artwork was originally created by Charles Parsons and Joseph B. Smith, and later lithographed and published by Nathaniel Currier. It is reproduced courtesy of The Met Museum's public domain library.

Cite this publication as:

The Global Trade Law Journal (Fastcase)

This publication is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

Copyright © 2024 Full Court Press, an imprint of Fastcase, Inc.

All Rights Reserved.

A Full Court Press, Fastcase, Inc., Publication

#### Editorial Office

729 15th Street, NW, Suite 500, Washington, D.C. 20005

<https://www.fastcase.com/>

POSTMASTER: Send address changes to THE GLOBAL TRADE LAW JOURNAL, 729 15th Street, NW, Suite 500, Washington, D.C. 20005.

## Articles and Submissions

Direct editorial inquiries and send material for publication to:

Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc.,  
26910 Grand Central Parkway, #18R, Floral Park, NY 11005, smeyerowitz@  
meyerowitzcommunications.com, 631.291.5541.

Material for publication is welcomed—articles, decisions, or other items of interest to international attorneys and law firms, in-house counsel, corporate compliance officers, government agencies and their counsel, senior business executives, and others interested in global trade law.

This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher.

### QUESTIONS ABOUT THIS PUBLICATION?

For questions about the Editorial Content appearing in these volumes or reprint permission, please contact:

Morgan Morrisette Wright, Publisher, Full Court Press at [morgan.wright@vlex.com](mailto:morgan.wright@vlex.com)  
or at 202.999.4878

For questions or Sales and Customer Service:

Customer Service  
Available 8 a.m.–8 p.m. Eastern Time  
866.773.2782 (phone)  
[support@fastcase.com](mailto:support@fastcase.com) (email)

Sales  
202.999.4777 (phone)  
[sales@fastcase.com](mailto:sales@fastcase.com) (email)

ISSN 2995-1089

# The Rise of Artificial Intelligence, Big Data, and the Next Generation of International Rules Governing Cross-Border Data Flows and Digital Trade—Part I

Frank J. Schweitzer, Ian Saccomanno, and Naoto Nelson Saika\*

*In this two-part article, the authors discuss the proliferation of barriers to cross-border data flows and the current global legal architecture that governs the digital economy, including current World Trade Organization and trade agreement disciplines applicable to such barriers. This article also addresses new digital trade initiatives and concludes with an outlook regarding ongoing U.S. efforts to negotiate new agreements that aim to strike an appropriate balance between facilitating digital trade and international data flows and preserving the space of governments to regulate in the public interest.*

---

This two-part article is divided into eight sections. This first part contains the first four sections.

The first section provides an introduction and overview of the international rules relevant to cross-border data flows. The second section briefly addresses the emergence of artificial intelligence (AI) as an area reliant on massive datasets that underscores the importance of data flow obligations for inclusion in future trade agreements. The third section identifies various government measures that impede cross-border data flows. The fourth section reviews World Trade Organization (WTO) rules relevant to digital trade and data flows, including the E-Commerce Joint Statement Initiative.

Part II, which will appear in the next issue of *The Global Trade Law Journal*, will contain the fifth, sixth, and seventh sections. The fifth section discusses current trade agreement disciplines relevant to data flows, including the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the United States-Mexico-Canada Agreement (USMCA). The sixth section considers new trade initiatives, including the Indo-Pacific

Economic Framework (IPEF), the U.S.-Taiwan Initiative, the EU's Digital Trade Agreements and implications of the EU's data privacy laws, new digital trade agreements in the Asia-Pacific, and emerging work in other international fora. The seventh section analyzes the U.S. political dynamic, the implications of the lack of U.S. trade promotion authority, and the outlook for pending negotiations. Finally, eighth section contains key takeaways.

## **Introduction and Overview**

---

### **Developing International Rules for Cross-Border Data Flows and Digital Trade**

Cross-border data flows are integral to the modern economy, enabling communications, financial transactions, access to a vast array of services, efficient manufacturing, medical research, and so much more. Cross-border data flows are even more important now with the rapid growth of new AI applications, which depend on massive amounts of data. International trade rules governing the digital economy have advanced significantly in recent years, facilitating this foundational feature of modern trade and innovation. Agreements like the USMCA, the CPTPP, and the recent emergence of digital-specific trade agreements reflect early efforts by major economies to establish comprehensive trade rules to address barriers to cross-border data flows and trade in digital goods and services.

Enabling and facilitating open data flows between participating parties is likely to remain a core objective of future trade arrangements, but achieving meaningful outcomes could prove difficult. While Western economies have been generally guided by the principle of Data Free Flow with Trust (DFFT), which aims to foster openness in cross-border data transfers between participating nations, there is increasing pressure to balance this with other policy objectives, including privacy concerns, national security considerations, and industrial policy. A wide and diverse range of stakeholders have competing and sometimes overlapping interests related to the collection, storage, analysis, processing, and movement of data. There is no guarantee that new rules will mirror those that came before.

The trade environment has changed considerably in the years since the early digital trade disciplines were negotiated. New trade initiatives will be influenced by major shifts in U.S. domestic politics, rising geopolitical tensions, an emerging bipartisan focus on U.S.-China relations, supply chain disruptions, and technology advances, including the meteoric rise of AI and accompanying concerns about AI safety. These change agents affect international investment, business strategies, trade flows, and the regulatory calculus for balancing policy objectives and security concerns against the removal of barriers that disrupt commerce and stifle innovation. These debates could slow the development of trade disciplines or even lead to a further bifurcation or fragmentation of the global digital economy. A recent change in U.S. digital trade policy is a prominent example. The United States withdrew its support for proposals at the WTO concerning the negotiation of rules to preserve cross-border data flows, discipline data localization requirements, and prohibit forced transfers of source code, in a striking departure from its traditional leadership on these issues and its position as a major supporter of DFFT.

This article discusses the proliferation of barriers to cross-border data flows and the current global legal architecture that governs the digital economy, including current WTO and trade agreement disciplines applicable to such barriers. This article also addresses new digital trade initiatives and concludes with an outlook regarding ongoing U.S. efforts to negotiate new agreements that aim to strike an appropriate balance between facilitating digital trade and international data flows and preserving the space of governments to regulate in the public interest.

## **Emergence of Trade Policy for AI**

---

### **Artificial Intelligence and Its Reliance on Massive Datasets Underscores the Importance of Data Flow Obligations in Trade Agreements and Raises New Questions for Regulators**

AI has increasingly attracted political attention in 2023 following high-profile advances in the field,<sup>1</sup> highlighting both the nascent state of the regulatory environment in which it is evolving<sup>2</sup> and the significant role AI may play in future negotiations over



digital trade and cross-border data flows.<sup>3</sup> AI requires processing massive volumes of data for training and to produce useful insights, reinforcing the relevance of the rules for managing cross-border data transfers.<sup>4</sup> AI also relies heavily on other data-intensive cross-border activities that are subject to digital trade rules, including cloud computing services and data collection from the Internet of Things (IoT). Beyond its need for data and digital services, AI development depends on the use of hardware, such as the most advanced semiconductors, which have also been subject to recent trade policy measures.<sup>5</sup>

Trade agreements that provide for data flows enable the access to information that AI developers need to facilitate the development of the technology and the advancements that will flow from AI. Restrictions on cross-border data transfers could slow AI development by limiting access to training data and important commercial services. Beyond the foundational level of accessing training data, open cross-border data flows also enable access to commercial services and foreign talent. Cloud computing services, for example, provide an important resource for training models and opens the industry to smaller companies that may not have the resources to invest in building their own hardware.

At the same time, the lack of a sufficient regulatory framework raises concerns that are emerging alongside the rapid growth of AI, like the weaponization of AI, misinformation, surveillance, bias, and intellectual property protection. These risks are prompting regulators to look more carefully at how the sector uses data. As regulators consider how developers manufacture, acquire, or use advanced semiconductors, gather data, develop algorithms, and own or utilize the output, any targeted new rules could also have more general implications for cross-border data flows. That wider regulatory system for AI is still under development, as can be seen in the AI Act<sup>6</sup> emerging in the European Union and the Voluntary AI Commitments<sup>7</sup> recently unveiled in the United States. Managing the tension between openness and risk management in an already globalized industry will present challenges for regulators,<sup>8</sup> and international coordination is only just beginning.<sup>9</sup> The input and participation of the private sector, and particularly the key technology companies at the center of the AI revolution, will be critical to the creation, operation, and maintenance of emerging international legal frameworks governing cross-border data flows.

## Barriers to Cross-Border Data Flows

---

### Various Government Measures Around the World Increasingly Target Cross-Border Data Flows, Creating New Obstacles to Trade and Competition in the Age of Digital Commerce

The digital economy, which is comprised of both digital goods and digital services, has grown rapidly in recent years. In the United States alone, digital value-added output increased from \$1.3 trillion in 2010 to \$2.6 trillion in 2022, with digital services such as e-commerce, cloud services, telecommunications, and internet and data services accounting for nearly two-thirds of this total.<sup>10</sup> International trade in the digital economy has grown at a similar speed.<sup>11</sup> U.S. two-way trade in information and communication technology (ICT) services grew from \$90 billion in 2010 to \$156 billion in 2022.<sup>12</sup> Cross-border data flows have played a critical role in enabling this growth, and data volumes have increased exponentially during the same time period.<sup>13</sup> Companies continue to increase their reliance on technologies like AI and machine learning, which require access to massive amounts of data. Seamless cross-border access to data will help spur continued economic growth and innovation.

As the scale and importance of the digital economy has grown, so has government regulation of international data transfers. Requiring data localization is one of the primary tools adopted by various governments. According to recent estimates, the number of data localization measures in force around the world more than doubled between 2017 and 2021, with 144 such measures in force and dozens more under consideration.<sup>14</sup> These measures can take a variety of forms, including the following:<sup>15</sup>

- “Data mirroring” rules, which require firms to store copies of certain data locally before transferring a copy out of the country;
- Explicit local data storage rules, which require firms to physically locate data in the country where it originates (and which may or may not allow foreign processing);
- “De facto” local storage and processing requirements, in which firms choose to store data locally because of stringent conditions on transferring the data out of the country;

- Restrictions to transfer of certain data outside the country, except to specific countries deemed to provide adequate data protection;
- Outright prohibitions on the transfer of certain data to other countries; and
- The use of regulatory requirements (e.g., licensing and certification schemes) to require local data storage and exclude foreign firms from managing and processing data.

In addition to measures related to data localization objectives, other common barriers include restrictions on the provision of digitally enabled services, requirements to allow governments' access to data, and restrictive technology requirements, such as forced disclosure of software source code and algorithms.<sup>16</sup> Governments have offered a range of policy justifications for digital trade barriers, including privacy and data protection, intellectual property rights protections, regulatory control or audit purposes, and national security.<sup>17</sup> In some instances, however, the measures amount to nothing more than old-fashioned protectionism or efforts to build domestic champions in a particular sector. Successive U.S. administrations have taken the view that regulation lacking a legitimate public policy purpose poses a significant threat to the growth of the modern economy and have sought to develop trade disciplines that discourage such barriers.

## **WTO Rules and Initiatives Relevant to Digital Trade Barriers**

---

### **The WTO's Services Commitments Predate the Development of Digital Trade But Still Include Measures Relevant to Digital Trade and Data Flows, While WTO Members Are Negotiating New Commitments Through the Moratorium on Customs Duties on Electronic Transmissions and the E-Commerce Joint Statement Initiative**

Cross-border data flows are far more pervasive and deeply embedded in international commerce today than when the WTO agreements entered into force nearly three decades ago in 1995. Understandably, the WTO agreements lack dedicated provisions on emerging digital trade issues such as cross-border data flows

and localization measures. Nevertheless, certain provisions of the WTO's General Agreement on Trade in Services (GATS) are relevant to government measures that restrict cross-border data flows, where such measures affect trade in services. This is important given that much of the rise in global data flows over recent decades is associated with the digital delivery of services.<sup>18</sup>

Also, since 1998, WTO Members have agreed to refrain from imposing customs duties on electronic transmissions. However, this agreement has taken the form of a temporary moratorium that Members must periodically extend by consensus, rather than a permanent prohibition.

Finally, in January of 2019, the United States and 75 other WTO Members launched negotiations for a plurilateral agreement on "trade-related aspects of electronic commerce" to "seek to achieve a high standard outcome that builds on existing WTO agreements and frameworks with the participation of as many WTO Members as possible."<sup>19</sup> To date, the E-Commerce Joint Statement Initiative negotiations among the participating states has made progress on less controversial issues, but reaching consensus on an agreement will be difficult.

### *GATS Commitments*

At the core of GATS are WTO Members' scheduled commitments to afford national treatment and market access to services and service suppliers of other Members.<sup>20</sup> Unlike other GATS obligations, which apply to all services sectors, Members are required to accord market access and national treatment only in the services sectors in which they have taken specific commitments to do so. Each Member has inscribed its market access and national treatment commitments for each sector in its Schedule of Specific Commitments. Members' schedules further delineate these commitments along the four "modes" of service supply recognized by GATS.<sup>21</sup> For example, a Member may pledge not to restrict market access for a particular service supplied by "mode 1" (which concerns the cross-border provision of services from one Member's territory into another Member's territory, through means such as electronic delivery), while reserving the right to restrict market access for the same service supplied by "mode 3" (which covers the supply of services through a supplier's commercial presence in the export market).

Sector-specific commitments under GATS can constrain a WTO Member's ability to impose data localization requirements or restrictions on cross-border data flows, particularly where the commitments apply to modes 1 and 3. A WTO panel recognized that "a market access commitment for mode 1 implies the right for other Members' suppliers to supply a service through all means of delivery, whether by mail, telephone, Internet etc., unless otherwise specified in a Member's Schedule."<sup>22</sup> This ruling affirmed the principle of "technological neutrality" of GATS (i.e., that sector-specific commitments apply regardless of the technology through which the service is supplied). This means that, where a Member has taken a market access commitment for supply of a service by mode 1, restricting cross-border transfers of data that are necessary to supply that service could run afoul of the commitment.

WTO panels have also recognized that the ability to supply certain services for which a Member has made mode 3 market access commitments may be fully contingent on the ability to transfer data into and out of that Member's territory. For example, "a mode 3 commitment on data processing services would allow a foreign company established in the territory of a Member to supply data processing services to a consumer located in the territory of another Member."<sup>23</sup> Certain digital trade barriers (e.g., data localization measures) could therefore run afoul of a Member's mode 3 commitments, where they prohibit outbound transfers of data necessary to supply a service from that Member's territory.

GATS sets out several exceptions to Members' general obligations and specific commitments, subject to the satisfaction of certain requirements. The general exceptions set out in Article XIV allow members to impose certain types of measures (e.g., those "necessary to protect public morals or to maintain public order;"<sup>24</sup> "necessary to protect human, animal, or plant life or health;"<sup>25</sup> or "necessary to secure compliance with laws or regulations which are not inconsistent with" GATS, "including those relating to" fraud prevention, privacy, and safety<sup>26</sup>). To be justified under Article XIV, such measures may not be "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services[.]"<sup>27</sup> Separately, the security exception set out in Article XIV *bis* allows a Member to take, among others, "any action which it considers necessary for the protection of its essential security interests . . . taken in time of war or other emergency in

international relations.”<sup>28</sup> Governments could invoke these exceptions in an effort to justify digital trade restrictions that might otherwise violate their GATS commitments, especially where the restrictions purport to further objectives such as privacy protection and cybersecurity, as is often the case with modern digital trade barriers.

Although GATS commitments can prohibit countries from imposing barriers to cross-border data flows in certain circumstances, they may be insufficient to address the full spectrum of those barriers that have emerged over the past decade. This is due in part to the scope of GATS (which is limited to services), as well as the sector-specific nature of GATS market access and national treatment commitments. The coverage and level of ambition of these commitments varies widely among Members and service sectors, and in the absence of specific commitments in the relevant sector, GATS provides little protection against barriers to cross-border data flows. These limitations, combined with substantial changes in technology and government regulation of the digital sphere, have generated the need for more comprehensive rules that target the full spectrum of modern digital trade barriers. Given the obstacles to establishing such rules at the multilateral level, like-minded Members have taken the first steps toward addressing the issue in bilateral and regional free trade agreements (FTAs).

#### *Moratorium on Customs Duties on Electronic Transmissions*

Since 1998, WTO Members have agreed to refrain from imposing customs duties on electronic transmissions. However, this agreement has taken the form of a temporary moratorium that Members must periodically extend by consensus, rather than a permanent prohibition.<sup>29</sup> Members typically have agreed to extend the moratorium in two-year increments, with the most recent extension scheduled to last until the WTO’s 13th Ministerial Conference (scheduled for February 26-29, 2024, in Abu Dhabi),<sup>30</sup> or at the latest until March 31, 2024, unless it is extended further.<sup>31</sup> Efforts to replace the moratorium with a permanent prohibition have encountered opposition from certain developing countries, which argue that the moratorium disadvantages them by denying them customs revenue on e-commerce transactions and preventing them from protecting their domestic industries against overseas competition. For the same reasons, even temporary extensions of

the moratorium have become controversial in recent years.<sup>32</sup> This is another digital trade issue that like-minded countries have sought to address through bilateral and regional FTAs.

### *E-Commerce Joint Statement Initiative*

The E-Commerce Joint Statement Initiative (JSI) negotiations focus on the following six key areas:

1. Enabling electronic commerce;
2. Openness and electronic commerce (which includes issues of cross-border data transfers);
3. Trust and digital trade;
4. Cross-cutting issues;
5. Telecommunications; and
6. Market access.<sup>33</sup>

As of October 2023, participation in the initiative has grown to 90 Members, which accounts for 90 percent of global trade.<sup>34</sup> These Members include several parties that have already taken comprehensive digital trade commitments in regional FTAs (e.g., Japan, Singapore, Australia, Canada, and Mexico), as well as parties that have not (e.g., China).

So far, participants have made progress on less controversial issues and have finalized the technical work on the negotiating text on provisions concerning (1) online consumer protection, (2) electronic signatures and authentication, (3) unsolicited commercial electronic messages (spam), (4) open government data, (5) electronic contracts, (6) transparency, (7) paperless trading, (8) cybersecurity, (9) open internet access, (10) electronic transaction frameworks, (11) electronic invoicing, (12) “single windows” (i.e., practice of establishing a single entry point for the exchange of information between trader and government), and (13) personal data protection.<sup>35</sup>

At the same time, however, the co-convenors of the initiative (Australia, Japan, and Singapore) recognized that the more difficult issues of cross-border data flows, data localization, and source code “require substantially more time for discussions as divergent approaches and sensitivities remained.”<sup>36</sup> Also, a proposed inclusion of services market access commitments has proven to be “challenging.”<sup>37</sup> While the co-convenors contemplate a roadmap for concluding negotiations in early 2024, reaching agreement on

the difficult outstanding issues seems unlikely. The co-convenors have proposed to further discuss the outstanding issues at the “next stage.”<sup>38</sup>

A major factor contributing to the difficulties to reach an agreement on the pending issues is the recent shift in the U.S. digital trade policy. The United States had previously tabled proposals at the JSI working group on, among others, rules to preserve cross-border data flows, restrict data localization requirements, and prohibit forced transfers of source code.<sup>39</sup> However, on October 24, 2023, the Office of the United States Trade Representative (USTR) announced withdrawal of U.S. support for previously submitted proposals in these areas “[i]n order to provide enough policy space” for relevant debates to unfold.<sup>40</sup> It has been reported that USTR made this announcement to align the U.S. position at the WTO with its negotiating stance—that is, a pause—in other ongoing negotiations involving the same digital trade issues, including negotiations of the Indo-Pacific Economic Framework for Prosperity.<sup>41</sup> The announcement drew mixed responses from the U.S. Congress; while some members of Congress praised the move as securing the policy space to effectively regulate “Big Tech,”<sup>42</sup> other members of Congress (including 32 bipartisan Senators) expressed concerns with USTR’s decision and requested that the Biden administration run “a comprehensive consultation process . . . to reach a consensus U.S. position” on the digital trade issues.<sup>43</sup> Representatives of several U.S. industries also expressed their disappointment in the administration’s decision and urged it to reverse its position.<sup>44</sup>

Despite the seeming retreat from its long-standing policy position, the United States continues to participate in the JSI negotiations. In light of the divided views of U.S. stakeholders (in government and the private sector), the direction and ultimate outcome of negotiations related to cross-border data flows, data localization, and source code are uncertain.

\* \* \*

*Editor’s note:* The conclusion of this article will appear in the next issue of *The Global Trade Law Journal*.

## Notes

---

\* Frank J. Schweitzer is counsel in the Washington, D.C., office of White & Case LLP. Ian Saccomanno is a senior trade analyst based in the firm’s



office in Washington, D.C. Naoto Nelson Saika is an associate in the firm's Washington, D.C., office. The authors may be contacted at frank.schweitzer@whitecase.com, ian.saccomanno@whitecase.com, and nelson.saika@whitecase.com, respectively.

1. *See, e.g.*, "Generative AI Raises Competition Concerns," U.S. Federal Trade Commission, June 29, 2023, <https://www.ftc.gov/policy/advocacy-research/tech-at-ftc/2023/06/generative-ai-raises-competition-concerns>.

2. *See, e.g.*, "As A.I. Booms, Lawmakers Struggle to Understand the Technology," *New York Times*, March 3, 2023, <https://www.nytimes.com/2023/03/03/technology/artificial-intelligence-regulation-congress.html>.

3. *See, e.g.*, "USMCA at 3: Reflecting on Impact and Charting the Future," Brookings, July 19, 2023, <https://www.brookings.edu/articles/usmca-at-3-reflecting-on-impact-and-charting-the-future/>.

4. *See* Joshua P. Meltzer, "The Impact of Artificial Intelligence on International Trade," 2018, [https://www.hinrichfoundation.com/media/2bxtgzf/meltzerai-and-trade\\_final.pdf](https://www.hinrichfoundation.com/media/2bxtgzf/meltzerai-and-trade_final.pdf).

5. *See* "Implementation of Additional Export Controls: Certain Advanced Computing and Semiconductor Manufacturing Items; Supercomputer and Semiconductor End Use; Entity List Modification (87 FR 62186)," October 13, 2022, <https://www.federalregister.gov/documents/2022/10/13/2022-21658/implementation-of-additional-export-controls-certain-advanced-computing-and-semiconductor>; *see also* "Export Controls on Semiconductor Manufacturing Items (88 FR 73424)," October 25, 2023, <https://www.federalregister.gov/documents/2023/10/25/2023-23049/export-controls-on-semiconductor-manufacturing-items>; *see also* "Implementation of Additional Export Controls: Certain Advanced Computing Items; Supercomputer and Semiconductor End Use; Updates and Corrections (88 FR 73458)," October 25, 2023, <https://www.federalregister.gov/documents/2023/10/25/2023-23055/implementation-of-additional-export-controls-certain-advanced-computing-items-supercomputer-and>.

6. *See* "Artificial Intelligence Act: Deal on Comprehensive Rules for Trustworthy AI," European Parliament, December 9, 2023, <https://www.europarl.europa.eu/news/en/press-room/20231206IPR15699/artificial-intelligence-act-deal-on-comprehensive-rules-for-trustworthy-ai>.

7. *See* "Fact Sheet: Biden–Harris Administration Secures Voluntary Commitments from Leading Artificial Intelligence Companies to Manage the Risks Posed by AI," White House, July 21, 2023, <https://www.whitehouse.gov/briefing-room/statements-releases/2023/07/21/fact-sheet-biden-harris-administration-secures-voluntary-commitments-from-leading-artificial-intelligence-companies-to-manage-the-risks-posed-by-ai/>.

8. *See* Desmond Israel, "Assessing the Effectiveness of Cross-Border Data Flow Regulations in the Age of Artificial Intelligence (AI)," 2023, <https://ssrn.com/abstract=4448648>.

9. See, e.g., “Antony Blinken & Gina Raimondo: To shape the Future of AI, We Must Act Quickly,” *Financial Times*, July 24, 2023, <https://www.ft.com/content/eea999db-3441-45e1-a567-19dfa958dc8f>.

10. Figures based on current dollars of value added, data available at “Digital Economy,” last updated December 6, 2023, Bureau of Economic Analysis, U.S. Department of Commerce, <https://www.bea.gov/data/special-topics/digital-economy>.

11. Digital trade is relatively difficult to define, track, and value. The official data presented here, though still significant in scale, do not capture the full contribution of digital services to the economy, including the contribution to traditional goods and services production and the household welfare gains from free digital services. See Annabelle Mourougane, “Measuring Digital Trade, OECD Going Digital Toolkit Notes,” [https://www.oecd-ilibrary.org/trade/measuring-digital-trade\\_48e68967-en](https://www.oecd-ilibrary.org/trade/measuring-digital-trade_48e68967-en).

12. Table 3.1. U.S. Trade in ICT and Potentially ICT-Enabled Services, by Type of Service, last updated July 6, 2023, Bureau of Economic Analysis, U.S. Department of Commerce, <https://apps.bea.gov/iTable/iTableHtml.cfm?reqid=62&step=9&isuri=1&6210=4>.

13. See “Cross-Border Data Flows: Designing a Global Architecture for Growth and Innovation,” Zurich Insurance, June 2022 at p. 9, <https://www.zurich.com/en/knowledge/topics/digital-data-and-cyber/cross-border-data-flows-designing-global-architecture-for-growth-and-innovation>.

14. Nigel Cory & Luke Dascoli, “How Barriers to Cross-Border Data Flows Are Spreading Globally, What They Cost, and How to Address Them,” July 2021, <https://itif.org/publications/2021/07/19/how-barriers-cross-border-data-flows-are-spreading-globally-what-they-cost/>.

15. *Id.*

16. See “2023 National Trade Estimate Report on Foreign Trade Barriers,” Office of the U.S. Trade Representative (“2023 USTR NTE Report”), March 2023, <https://ustr.gov/sites/default/files/2023-03/2023%20NTE%20Report.pdf>.

17. See “Fostering Cross-border Data Flows with Trust,” OECD Digital Economy Papers, No. 343, December 2022 at p.13, [https://www.oecd-ilibrary.org/science-and-technology/fostering-cross-border-data-flows-with-trust\\_139b32ad-en](https://www.oecd-ilibrary.org/science-and-technology/fostering-cross-border-data-flows-with-trust_139b32ad-en).

18. See “Trade and Cross-Border Data Flows,” OECD Trade Policy Papers, No. 220, January 23, 2019, at pp. 30-31, <https://doi.org/10.1787/b2023a47-en>.

19. “Joint Statement on Electronic Commerce” (WT/L/1056), January 25, 2019, <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/L/1056.pdf&Open=True>.

20. The GATS market access obligation set forth in Article XVI generally requires each Member, with respect to market access, to “accord services and service suppliers of any other Member treatment no less favorable than that provided for under the terms, limitations, and conditions agreed and specified

in its Schedule.” The national treatment obligation set forth in Article XVII obligates each Member, with respect to the “sectors inscribed in its Schedule” and “subject to any conditions and qualifications set out therein,” to “accord to services and service suppliers of any other Member . . . treatment no less favorable than that it accords to its own like services and service suppliers.”

21. The four modes of service supply, set forth in Article I:2, cover the supply of a service:

1. From the territory of one Member into the territory of any other Member;
2. In the territory of one Member to the service consumer of any other Member;
3. By a service supplier of one Member, through commercial presence in the territory of any other Member; and
4. By a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.

22. Panel Report, United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/R, adopted April 20, 2005, as modified by Appellate Body Report WT/DS285/AB/R, paras. 6.281-6.285 (U.S.—Gambling).

23. Panel Report, China—Certain Measures Affecting Electronic Payment Services, WT/DS413/R and Add.1, adopted August 31, 2012, para. 7.618, n.808 (China—Electronic Payment Services).

24. GATS Article XIV(a).

25. GATS Article XIV(b).

26. GATS Article XIV(c).

27. GATS Article XIV chapeau.

28. GATS Article XIV bis:1(b)(iii).

29. *See* Geneva Ministerial Declaration on global electronic commerce, May 25, 1998 (WT/MIN(98)/DEC/2).

30. “WTO Members Elect Chairperson for 13th Ministerial Conference in Abu Dhabi,” World Trade Organization, July 24, 2023, [https://www.wto.org/english/news\\_e/news23\\_e/gc\\_24jul23\\_e.htm](https://www.wto.org/english/news_e/news23_e/gc_24jul23_e.htm).

31. *See* Ministerial Decision on the Work Programme on Electronic Commerce, June 17, 2022 (WT/MIN(22)/32).

32. *See, e.g.*, “WTO Members Discuss Proposals on Work Programme on E-commerce,” World Trade Organization, December 8, 2023, [https://www.wto.org/english/news\\_e/news23\\_e/ecom\\_08dec23\\_e.htm](https://www.wto.org/english/news_e/news23_e/ecom_08dec23_e.htm); *see also* “Work Programme on Electronic Commerce, Moratorium on Customs Duties on Electronic Transmissions: Need for a Re-Think, Communication from India and South Africa,” July 13, 2018 (WT/GC/W/747).

33. *See* “Joint Initiative on E-Commerce,” World Trade Organization, [https://www.wto.org/english/tratop\\_e/ecom\\_e/joint\\_statement\\_e.htm#](https://www.wto.org/english/tratop_e/ecom_e/joint_statement_e.htm#); *see*

also “Joint Statement Initiative on Electronic Commerce,” Geneva Trade Platform, [https://wto plurilaterals.info/plural\\_initiative/e-commerce/](https://wto plurilaterals.info/plural_initiative/e-commerce/).

34. *See id.*

35. *See* “Co-Convenors of the WTO Joint Statement Initiative on E-Commerce Announce Substantial Conclusion of Negotiations on a Number of Global Digital Trade Rules,” Australian Government Department of Foreign Affairs and Trade, December 20, 2023, <https://www.dfat.gov.au/news/media-release/co-convenors-wto-joint-statement-initiative-e-commerce-announce-substantial-conclusion-negotiations-number-global-digital-trade-rules>.

36. *See id.*

37. “E-Commerce Negotiations: Members Finalise ‘Clean Text’ on Unsolicited Commercial Messages,” World Trade Organization, February 5, 2021, [https://www.wto.org/english/news\\_e/news21\\_e/ecom\\_05feb21\\_e.htm](https://www.wto.org/english/news_e/news21_e/ecom_05feb21_e.htm).

38. *See* “E-Commerce Co-Convenors Set Out Roadmap for Concluding Negotiations in Early 2024,” World Trade Organization, November 30, 2023, [https://www.wto.org/english/news\\_e/news23\\_e/jsec\\_30nov23\\_e.htm](https://www.wto.org/english/news_e/news23_e/jsec_30nov23_e.htm).

39. *See* “Joint Statement on Electronic Commerce Initiative, Communication from the United States,” March 25, 2019 (INF/ECOM/5), <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/INF/ECOM/5.pdf&Open=True>.

40. “USTR Statement on WTO E-Commerce Negotiations,” Office of the U.S. Trade Representative, October 24, 2023, <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2023/october/ustr-statement-wto-e-commerce-negotiations>; *see also* “US Drops Digital Trade Demands at WTO to Allow Room for Stronger Tech Regulation,” Reuters, October 25, 2023, <https://www.reuters.com/world/us/us-drops-digital-trade-demands-wto-allow-room-stronger-tech-regulation-2023-10-25/>.

41. *See, e.g.*, “Pagán: U.S. Pulled Back on WTO E-Commerce Proposals to ‘Match’ IPEF Stance,” Inside U.S. Trade’s World Trade Online, November 21, 2023, <https://insidetrade.com/daily-news/pag-n-us-pulled-back-wto-e-commerce-proposals-match-ipef-stance>.

42. “Schakowsky, Warren Lead 10 Lawmakers Commending Biden Administration for Countering Big Tech Influence in Trade Negotiations,” United States Congresswoman Jan Schakowsky, November 7, 2023, <https://schakowsky.house.gov/media/press-releases/schakowsky-warren-lead-10-lawmakers-commending-biden-administration-countering..>

43. “32 Bipartisan Senators Call on White House to Reverse Course on Digital Trade and Stand Up to China, Support American Workers and Human Rights,” United States Senate Committee on Finance, November 30, 2023, <https://www.finance.senate.gov/ranking-members-news/32-bipartisan-senators-call-on-white-house-to-reverse-course-on-digital-trade-and-stand-up-to-china-support-american-workers-and-human-rights>.

44. “U.S. Chamber and Other Associations Letter to NSC/NEC on Digital Trade,” U.S. Chamber of Commerce, November 7, 2023, <https://www>

[.uschamber.com/international/trade-agreements/u-s-chamber-and-other-associations-letter-to-nsc-nec-on-digital-trade](https://www.uschamber.com/international/trade-agreements/u-s-chamber-and-other-associations-letter-to-nsc-nec-on-digital-trade).