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Digital Trade and Data Policy: Select Key Issues

Background

Digital trade refers to all forms of commerce conducted by electronic means and includes trade in both goods and services. The digitization of the global economy in the 21st century has facilitated traditional trade in goods by allowing businesses to access markets worldwide more easily in addition to generating trade flows in services sectors that businesses can deliver digitally (e.g., financial services) and creating trade in services integral to the digital economy (e.g., cloud computing services). The Biden Administration’s policies emphasize addressing barriers to digital trade because cross-border data flows play a large role in facilitating trade and overall economic activity. Congress may consider setting negotiating priorities related to digital trade, in addition to implementing legislation related to data privacy, an important aspect of the digital economy.

Because digital trade covers different methods of trading goods and services, its total value is not captured by one statistic. According to the U.S. Bureau of Economic Analysis (BEA), U.S. exports of one component of digital trade, information and communications technology (ICT) services—which consist of telecommunications, computer services and charges for the use of intellectual property—were \$89 billion in 2021 (11% of total U.S. services exports), a 21% increase since 2016. Total U.S. services exports grew by only 1.5% during this time. U.S. exports of all services that can be delivered digitally, including business services, were \$594 billion in 2021 (75% of total U.S. services exports), an increase of 33% since 2016.

The digital economy is also growing quickly. The BEA defines the digital economy as consisting mainly of digital services (e.g., telecommunication, cloud, internet and data services), infrastructure (software and hardware) and e-commerce. The U.S. digital economy contributed \$3.7 trillion to output (9% of total U.S. output) and employed 8 million workers (5% of total U.S. workers) in 2021, an increase of 36% and 11%, respectively, from 2016.

Data Flows in the Digital Economy

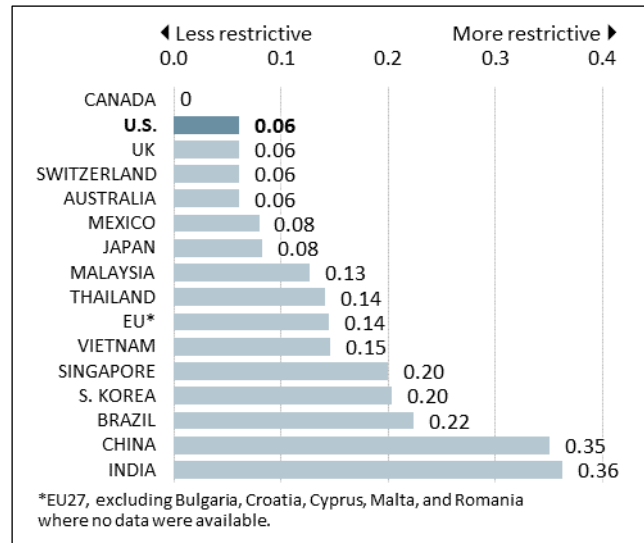
Cross-border flows of data are essential to the technologies used to digitally order and deliver both goods and services. A 2021 United Nations Conference on Trade and Development (UNCTAD) Report notes that in the digital economy “everything” is data; any activity on the internet can be digitized by converting it into binary code, and data flows are transfers of digitized activities. The majority of cross-border data flows are exchanges related to the operation of the internet. Only cross-border data flows that are commercial transactions are considered international trade. For example, the purchase and use of U.S.-based

Amazon cloud computing services by a foreign company is a U.S. export of cloud services.

Select Key Issues for U.S. Trade Policy

The important role of data flows in all economic activity and the fast growing digital economy have created new types of trade barriers and policy questions, in addition to creating new areas in which countries can negotiate and set rules. Barriers to digital trade can directly affect e-commerce (e.g., limitations on cross-border credit card payments) or have broader implications (e.g., data privacy).

Figure 1. Digital Services Trade Restrictiveness Index for Select Key U.S. Trading Partners, 2022



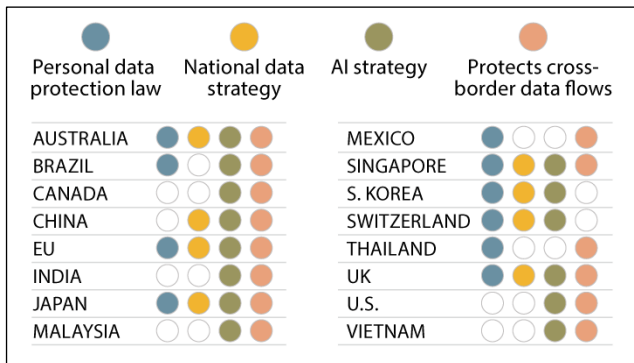
Source: CRS calculations using Organisation for Economic Cooperation and Development (OECD) data.

The Organisation for Economic Cooperation and Development (OECD) Digital Services Trade Restrictiveness Index measures barriers that primarily affect e-commerce and digitally traded services in infrastructure and connectivity, electronic transactions, payment systems and intellectual property rights. According to the index, the United States is less restrictive in these barriers than all countries except Canada in a select group of key trading partners (Figure 1).

Barriers to digital trade, however, also may have an impact beyond e-commerce. Such barriers affect data flows or privacy, digital platforms, or emerging technologies. A country’s data governance regime captures the different policies that may impact the use and flow of data and, by extension, digital trade. When compared to its trading partners, the United States does not have some attributes of what some stakeholders view as a comprehensive data governance regime, such as a federal data privacy law and a

national data strategy, although it has attributes such as binding protection of data flows and an artificial intelligence (AI) strategy (**Figure 2**). While the existence of legislation or a strategy does not necessarily indicate that a country is fully protecting consumer data or imposing few restrictions on data flows, countries legislating and conducting oversight in these areas may have a greater opportunity to set international standards on data policy. Protection of personal data and cross-border data flows and strategies for digital markets, data and AI, among other attributes of a data governance regime, may provide a blueprint for future economic conditions and challenges.

Figure 2. Select Key Indicators of a Comprehensive Data Governance Regime



Source: Digital Trade and Data Governance Hub, available at <https://datagovhub.elliott.gwu.edu/>. Figure, CRS.

Data Privacy and Protection

Data protection legislation generally aims to secure the privacy of consumer data, including sensitive data that can be biometric or personally identifiable information. In addition to easing cybersecurity concerns, protection of personal data provides a foundation for uninterrupted data flows between countries, which is critical for cross-border e-commerce and the operation of digital platforms. The EU’s General Data Protection Regulation (GDPR), implemented in 2018, is an example of comprehensive data privacy legislation.

Data Localization and Cross-Border Data Flows

Data localization policies require that data generated within a country be stored and processed on servers within that country. This restriction on the free movement of data across borders may act as a trade barrier by increasing the cost for businesses to store data by requiring them to comply with different regulations across countries, in addition to causing inefficiencies in business operations. Prohibiting data localization requirements in free trade agreements (FTAs) appears in nearly 100 FTAs, but circumstances exist in which limits on cross-border data flows may be considered, such as for privacy and national security concerns, particularly for flows of sensitive data to foreign firms or governments.

Strategies for Digital Markets and Technology

The EU implemented the Digital Markets Act (DMA) and Digital Services Act (DSA) in 2022, which regulate large digital platforms, create content moderation and increase competition, among other objectives. The Digital Economy Partnership Agreement (DEPA) between New Zealand,

Chile, and Singapore aims to help businesses engage in digital trade by removing barriers in the overall digital economy.

Bilateral cooperation between the United States and EU happens in multiple settings, including the U.S.-EU Trade and Technology Council (TTC), a forum for cooperation on high tech and digital economy issues, such as green technologies and best practices on AI.

U.S. Digital Trade Negotiations

The digital trade provision under Trade Promotion Authority (TPA) in 2015 established issues such as cross-border data flows and data localization as negotiating objectives. The United States has negotiated more expansive sets of rules on digital trade beginning with the U.S.-Mexico-Canada Agreement (USMCA) signed in 2018 and the U.S.-Japan Digital Trade Agreement signed in 2019. In addition to provisions on nondiscrimination of digital products and digital trade facilitation that were common in the e-commerce chapters of previous FTAs, these newer agreements include more advanced provisions (see **text box**). Digital trade issues are a focus of current U.S. trade discussions, including in the Indo-Pacific Economic Framework for Prosperity (IPEF), an upcoming trade initiative with Taiwan and talks at multilateral fora.

Select Provisions of USMCA and the U.S.-Japan Digital Trade Agreement

- **Cross-border data flows and data localization.** Prohibits restrictions on cross-border data flows and requirements for data localization.
- **Consumer protection and privacy.** Requires parties to adopt or maintain consumer protection laws.
- **Source code and technology transfer.** Prohibits requiring the transfer of source code or algorithms.
- **Liability for interactive computer services.** Limits liability for third-party content for digital platforms.

Source: USTR.

Current Considerations for Congress

Although the United States has no federal data privacy law, the 117th Congress introduced relevant bills (e.g., H.R. 8152). Congress may consider if federal data privacy legislation is necessary and, if so, what the objectives would be with respect to consumer data protection and treatment of cross-border flows of sensitive information.

Congress also may consider whether or not to set negotiating priorities, including in TPA, for ongoing and future negotiations. In assessing U.S. trade policy approaches to digital trade, Congress may examine issues related to the overall digital economy, including protecting personal data, balancing prohibitions on data localization requirements with privacy and national security concerns, establishing global standards to counter China’s growing influence in the digital space, and best practices with new technologies. Oversight issues regarding the impact of new technologies and foreign legislation on U.S. firms and workers also may come before Congress.

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