

Written Statement for the Record of

Melinda St. Louis
Director, Public Citizen's Global Trade Watch

before

Subcommittee on International Trade, Customs, and Global Competitiveness
U.S. Senate Finance Committee
117th Congress, Second Session

on

“Opportunities and Challenges for Trade Policy in the Digital Economy”

December 14, 2022



Melinda St. Louis, Director
Public Citizen's Global Trade Watch
215 Pennsylvania Ave. SE
Washington, D.C. 20003
mstlouis@citizen.org
202-454-5107

Introduction

Public Citizen welcomes the opportunity to provide a written statement for the record for the Subcommittee Hearing: Opportunities and Challenges for Trade Policy in the Digital Economy. Public Citizen is a nonprofit consumer advocacy organization with more than 500,000 members and supporters. A mission of our Global Trade Watch division is to ensure that in this era of globalization, a majority can enjoy economic security; a clean environment; safe food, medicines and products; access to quality affordable services; and the exercise of democratic decision-making about the matters that affect their lives. We have conducted extensive analysis of U.S. trade and investment agreements and their outcomes, starting in 1991 during the initial North American Free Trade Agreement (NAFTA) negotiations. More recently, Public Citizen has been a leader in working to hold Big Tech accountable in the United States as well as identifying the dangers of so-called “digital trade” rules with respect to efforts to regulate the tech industry around the globe.

Over the past three decades, the internet has grown to encompass, or at least touch on, nearly all aspects of economic and social life around the world. During this time, a small number of companies (Big Tech) have emerged as the dominant architects of the global digital system, shaping how content is circulated, services are performed, and infrastructures are designed.

Lax domestic and global regulation has allowed Big Tech to enjoy broad and unfettered freedom to design, implement, and exploit e-commerce and digital systems and technologies. While new digital technologies, products, and systems have brought important benefits to people across the planet, the lack of oversight and regulation has enabled Big Tech to invade people’s privacy, design and deploy a system of mass corporate surveillance, leverage its economic might to diminish competitors, discriminate (typically unintentionally) against vulnerable populations, and concentrate enormous political and economic power. The rise of Big Tech has inarguably contributed to a surge in wealth and income inequality within and between countries.

The Biden administration and Congress are grappling with how best to regulate Big Tech to protect consumer privacy, to ensure adequate competition, and hold companies accountable for discriminatory practices. Yet, behind closed doors in international trade negotiations, such as the U.S.-Mexico-Canada Agreement (USMCA) and the Japan-U.S. digital agreement, Big Tech has pushed digital trade terms that limit governments’ ability to regulate their business practices. Big Tech continues to insert its deregulatory agenda¹ in a patchwork of new Biden administration trade initiatives, including the Indo-Pacific Economic Framework (IPEF), U.S.-EU Trade and Technology Council (TTC), and the U.S.-Kenya Strategic Trade and Investment Partnership

¹ See Sarah Grace Spurgin, “Public Submissions to U.S. Government Reveal Corporate Wishlist for IPEF: More Power at Our Expense,” Public Citizen, published May 20, 2022, accessed Dec. 13, 2022.

(STIP), as well as ongoing discussions in the World Trade Organization's (WTO) E-commerce "Joint Statement Initiative." They seek binding rules to:

- Limit the ability of governments to regulate where Big Tech firms send and store our data;
- Undermine investigation of discriminatory source code and algorithms, intrusive surveillance practices, and violent incitement online via prohibitions on technology transfer requirements and "trade secrets" protections;
- Shield online platforms from corporate accountability via overly broad liability waivers similar to the controversial Section 230 of the 1996 Communications Decency Act;²
- Manipulate "trade" tools of "market access," "trade discrimination" and "conditions for business" to exploit workers in the gig economy; and
- Protect monopolies and promote further consolidation by banning certain pro-competition policies.

These "digital trade" terms are not focused on remedying actual problems related to the online sale of imported goods, such as tariff evasion and product safety, but instead seek to undermine the stronger Big Tech accountability rules of many of our trading partners and tie U.S. policymakers' hands for future regulatory efforts. More than 50 national organizations representing labor, civil rights, consumer, and other constituencies oppose these harmful "digital trade" provisions.³

USTR Katherine Tai has articulated a more forward-thinking vision:

"Our approach to digital trade policy must be grounded in how it affects our people and our workers. We must remember that people and workers are wage earners, as well as consumers. They are more than page views, clicks, and subjects of surveillance. They are content creators, gig workers, innovators and inventors, and small business entrepreneurs. This means they have rights that must be protected – both by government policy and through arrangements with other governments."⁴

Congress should monitor ongoing trade negotiations to ensure that any "digital trade" talks advance this vision and do not replicate problematic provisions pushed by Big Tech that were

² Anna Edgerton, "Tech Liability Shield Has No Place in Trade Deals, Groups Say," Bloomberg Law, published May 27, 2021, accessed Dec. 13, 2022.

³ Trade Justice Education Fund, "53 Organizations Warn About Harmful Provisions in 'Digital Trade' Pacts," Press release, Nov. 2, 2021.

⁴ Amb. Tai, "Remarks of Ambassador Katherine Tai on Digital Trade at the Georgetown University Law Center Virtual Conference," USTR Press Office, Nov. 3, 2021.

included in the USMCA.⁵ Trade agreement rules on digital trade should not shrink the policy space of U.S. regulators and the U.S. Congress.

Limiting Government Regulation of Data Flows

Big Tech demands for “free flow of data” refers to binding rules to limit the ability of governments to regulate where Big Tech firms send and store our data. That would mean high-tech giants like Amazon, Google, and Facebook would be free to transfer our data to any other country. People’s every move on the internet and via cell phones is increasingly tracked, stored, bought and sold — as are interactions with the growing “internet of things,” that many people may not even be aware are tracking them nor from which they have a feasible way to opt out.

“Digital trade” terms that ban data localization requirements would significantly undermine the ability of governments to secure their citizens’ data against unauthorized or unlawful exposure or processing, or against cybercrime, accidental loss, destruction or damage, as these rules would mean consumers have no guarantee that their data would be protected where the data were transferred — even if domestic laws require such protections. Further, countries that have superior privacy laws could see their data protection rules undermined, and U.S. congressional efforts to enact privacy rules could be thwarted.

Concepts prohibiting limits on data flows appear in trade negotiations everywhere from the Trans-Pacific Partnership (TPP) to the Digital Economic Partnership Agreement, to the WTO “e-commerce” talks, and governments are signing up to these terms without understanding the implications for their domestic policymaking. We urge adoption of the precautionary principle when it comes to rules governing the storage of data, and as such, we urge lawmakers to not cement a ban on data localization requirements into binding law.

Limiting Algorithm and Source Code Transparency Requirements

Everyday decisions made by artificial intelligence (AI) components of online platforms affect which individuals and communities can access public and private services. AI uses emotion recognition, facial analysis, and social scoring, often with the intent to materially distort a person’s behavior beyond their consciousness and exploit vulnerabilities. Critical components of economic and social stability like home loans, job postings, medical treatments, targeted ads, and much, much more are influenced and determined by AI algorithms, enabling modernized

⁵ See Global Trade Watch, “Analysis of the NAFTA 2.0 Text Relative to the Essential Changes We Have Demanded to Stop NAFTA’s Ongoing Damage,” Public Citizen website, accessed Dec. 13, 2022.

redlining. Governments are likewise increasingly turning to these algorithms developed by private corporations for aid with “predictive policing” and other surveillance functions.⁶

It is clear that there is a huge need for a collaborative effort to address this growing crisis, as demonstrated by the concept of the AI Roadmap, a broad document produced by the U.S.-EU Trade and Technology Council meant to operationalize trustworthy AI.⁷ However, in negotiating the terms of such collaboration, the work carried out in the name of “digital trade” should not lead to the lowest common denominator of legal protections for consumers, and as it stands, the AI Roadmap leaves room for unintended consequences with regard to domestic regulation.⁸ Instead, all AI systems should comply with mandatory rules that include, but are not limited to, transparency, accountability, and fairness, as well as audits and impact assessments that focus on discriminatory impact, statement of appropriate purpose, and capability.

But “digital trade” terms that require governments to provide trade secret protections for source code and algorithms would limit governments from accessing such information only to instances of known violations of law. Congressional committees, scholars, and public investigators would be barred from reviewing code and related data to identify racist, sexist and other practices deserving of scrutiny and correction. Rather than shield these “trade secrets” from public scrutiny, continuous, independent oversight and transparency is key to ensuring human and civil rights are maintained in the digital age.

Undermining Workers’ Rights

Corporate surveillance of workers has reached new heights. Workers’ activity is being surveilled in and out of work, and their data is being created, collated and sold by and to employers to make managerial decisions. Managers are increasingly relying on source code-protected algorithmic decision systems, allowing employers to sidestep accountability and limit the ability of workers and unions to resist unfair labor practices, discriminatory hiring and firing, and further intrusive surveillance and monitoring.⁹ Data stored by employers is personal and sensitive, including real-time and past physical locations, health information, and more, so we must not make it harder for countries to protect that data via bans on data localization.

⁶ Jane Chung, “Racism In, Racism Out: A Primer on Algorithmic Racism,” Public Citizen report, accessed Dec. 13, 2022.

⁷ Read the text of the AI Roadmap: <https://digital-strategy.ec.europa.eu/en/library/ttc-joint-roadmap-trustworthy-ai-and-risk-management>

⁸ University of Maryland. (Dec. 5, 2022). *U.S. Department of Commerce Roundtable for U.S. and European Stakeholders* [Video]. YouTube. <https://www.youtube.com/watch?v=MHH6TmAwIEo>

⁹ Duncan McCann, “e-Commerce: Free Trade Agreements, Digital Chapters and the impact on Labour,” International Trade Union Confederation, published Apr. 30, 2022, accessed Dec. 13, 2022.

Further, there is a false notion that workers providing services online or in the gig economy are somehow different from those in their brick-and-mortar counterparts, and so domestic policies that generally apply to protect the rights of workers do not apply to them. Trade terms such as “discrimination” and “market access” may serve legitimate business concerns, but they can be manipulated by Big Tech companies to disguise attempts to avoid worker protection regulations altogether.

For instance, regulations that require large ride-sharing companies to meet driver hours-of-service rules or to contribute to drivers’ social security have been illegal “trade barriers.” Big Tech corporations allege such industry standard regulations to be applying “burdensome measures” that impose “unilateral regulations or taxes that deviate from global norms and single out digital platforms for special treatment, often with the intention of giving domestic companies an advantage.”¹⁰ Similarly, government action that shuts down operations of a company in their territory due to violations of local labor laws have been characterized by Big Tech companies as illegal limitations to “market access.”

Additionally, firms like Google and others¹¹ are seeking trade terms that would bar governments from requiring a local representative or office as a condition for doing business, which could make enforcement of local labor laws that much more difficult.¹² In the case of unsafe labor practices, if a foreign-owned company is not required to have a local representative, the authorities’ only option would be to enforce labor laws against the gig worker themselves, not their employer. Local legal entities therefore are extremely useful for holding corporations accountable to their workers, consumers, and more.

No trade or other international commercial agreement should limit countries’ policies that condition permission for an entity to operate on compliance with labor, health and safety, civil rights, competition, consumer and other policies that apply across an economy or to a sector.

Shielding Online Platforms from Corporate Accountability

Some pacts with “digital trade” rules require governments to enact liability shields for online firms that allow them to evade responsibility for discriminatory conduct, online racial incitement, and other civil rights violations.

¹⁰ Internet Association, “Comments Regarding International Internet Priorities,” Comment Submission to the National Telecommunications and Information Administration, published July 20, 2018, accessed Dec. 13, 2022.

¹¹ Google, “Comments Regarding the Indo-Pacific Economic Framework, Comment on FR Doc # 2022-05206,” International Trade Administration, published Apr. 11, 2022, accessed Dec. 13, 2022.

¹² Duncan McCann, “e-Commerce: Free Trade Agreements, Digital Chapters and the impact on Labour,” International Trade Union Confederation, published Apr. 30, 2022, accessed Dec. 13, 2022.

The rules that govern the internet are still hotly debated, particularly Section 230 of the 1996 Communications Decency Act.¹³ Section 230 states that no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider. Online platforms use this law to claim they are not liable for content posted by third parties; for example, fraudulent or defamatory posts on Facebook. Some experts argue this is a core component of free speech online, while others say it mainly serves Big Tech companies to avoid liability for negligence.

There is vigorous opposition to and support for Section 230 by Democrats and Republicans. Such contentious, still-debated issues should not be locked in via a trade agreement, but should be decided in an open and democratic forum. Policymakers must have flexibility to address concerns with Section 230, not have the expanding digital policy space preempted by international trade agreements. Using trade pacts to prevent signatory countries from determining the best ways to protect the public interest online is unacceptable.

Undermining Antitrust Regulation

In October 2020, the House Judiciary Committee's Subcommittee on Antitrust, Commercial, and Administrative Law published a report on the monopolistic practices of the four largest tech firms: Apple, Amazon, Alphabet, and Facebook (now Meta).¹⁴ The report concluded that the dominant platforms have:

- Consolidated segments of the digital marketplace and abused monopoly power by advantaging their own products and services on their platforms over independent or smaller ones;
- Acquired hundreds of companies within the past decade, including purchasing potential competitors and shutting down or discontinuing services to foreclose the market; and
- Developed and acted on a financial incentive to abuse their significant and durable market power.¹⁵

Big Tech companies seek “digital trade” terms that ban limits on size, services offered, or break-ups. As corporations and conglomerates exert increasing control over important social functions, governments must have the authority to combat anti-competitive business practices, place limits on corporate mergers, and break up monopolies where warranted.

¹³ Anna Edgerton, “Tech Liability Shield Has No Place in Trade Deals, Groups Say,” Bloomberg Law, published May 27, 2021, accessed Dec. 13, 2022.

¹⁴ Rep. Jerrold Nadler, Rep. David Cicilline, “Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations,” Subcommittee on Antitrust, Commercial, and Administrative Law of the Committee on the Judiciary of the House of Representatives, October 2020, accessed Dec. 13, 2022.

¹⁵ Ibid.

In further manipulation of trade rules to undermine worker and consumer safety, there is a concerning trend of encouraging U.S. trade officials to consider other countries' enforcement of their domestic laws to be "discriminatory" if such laws affect U.S. Big Tech companies more than the tech companies from other countries. But sometimes laws of general application addressing market concentration might impact U.S. firms because they have monopolized the industry. For example, Apple and Google are pushing U.S. trade officials to challenge a Korean antitrust law to end anti-competitive App Store practices, claiming the law is "discriminatory" because, due to their monopoly practices, it would affect them more than other businesses.¹⁶

The United States federal government has a long history of intervening when mergers and consolidations have reduced competition to protect workers' safety, consumers' rights, and economic health. Manipulating trade rules for the consolidation of corporate power does not fit into the Biden administration's new approach to trade policy that empowers workers, defends their rights, and stops the global race-to-the-bottom. Therefore, "digital trade" rules must not include terms that forbid countries from establishing or maintaining policies that limit the size or range of services offered by companies, limit the legal structures under which they may be required to operate, nor otherwise restrict the regulation or break-up of Big Tech monopolies.

In addition to the efforts to include binding standards in future trade agreements, U.S.-based Big Tech companies are seeking assistance from the U.S. government in their quest to undermine robust consumer and social protections in other nations.¹⁷ These efforts can be seen in the annual USTR National Trade Estimates report that identifies other countries' laws that Big Tech firms (among others) don't like.¹⁸ In the Biden administration, Big Tech has made the greatest inroads with the U.S. Commerce Department, which has intervened repeatedly – and with deleterious impact – in the EU's adoption of a new digital services regime.¹⁹ Congress should oppose inappropriate U.S. efforts to undermine these kinds of regulatory frameworks, which the United States should in fact be emulating.

Need for Pro-Consumer Rules

There are some legitimate international trade concerns associated with e-commerce and the broader digital economy that should be considered in IPEF or other trade negotiations. If digital trade rules are to be included, they should instead ensure that goods purchased online across

¹⁶ David McCabe, Jin Yu Young, "Apple and Google's Fight in Seoul Tests Biden in Washington," *New York Times*, published Aug. 23, 2021, accessed Dec. 13, 2022.

¹⁷ See Letter from the Transatlantic Consumer Dialogue to Speaker Pelosi and Leader Schumer, dated June 9, 2022.

¹⁸ See United States Trade Representative, "2022 National Trade Estimate Report on Foreign Trade Barriers," published March 31, 2022, accessed Dec. 13, 2022.

¹⁹ Samuel Stolton, "Raimondo: U.S. has 'serious concerns' about EU digital rules," *PoliticoPro*, published Dec. 8, 2021, accessed Dec. 13, 2022.

borders meet labor, environmental and consumer safety standards, including by raising de minimis levels so that, for instance, the two million packages arriving from China to the U.S. daily to fulfill online orders can no longer evade U.S. inspection regimes.²⁰ They should prevent corporate misclassification so that so-called “digital platforms” involved in transportation, hospitality, healthcare, retail, education and other industries cannot evade labor, consumer and other regulations imposed on “brick-and-mortar” businesses. To combat the growing high-tech discrimination in artificial intelligence, international trade rules should guarantee access to source codes and algorithms by congressional committees, government agencies, academic scholars, labor unions and nongovernmental organizations. Any rules should also introduce corporate liability for personal data collected via computers, cell phones and the “Internet of Things” without consumers’ explicit, informed permission, shared or sold without their permission, and/or stolen.

Transparency and Oversight

Congress and the public must monitor, investigate, and publicly debate the “digital trade” terms that may be sought by Big Tech firms in the context of the IPEF, U.S.-Kenya STIP or other trade negotiations, to ensure that they do not become tools for weakening, preventing, or dismantling labor, consumer, or other public interest policies in the digital sphere. In order for Congress to exercise its constitutional authority over the regulation of foreign commerce, Fast Track Trade Promotion Authority (TPA) must not be renewed. TPA is an extreme delegation of Congress’ constitutional trade authority. It empowers a president to choose prospective trade partners, negotiate deals and sign a trade pact all before Congress has a vote on any element of it. TPA also empowers the executive branch to control Congress’ voting schedule, and both the House and Senate are required to vote on a trade agreement’s implementing legislation within 90 days of the White House submitting it. No floor amendments are allowed and debate is limited, effectively eliminating the transparency, accountability, and oversight necessary for the far-reaching trade and investment agreements that the administration is negotiating.

Instead, Congress should insist that the U.S. Trade Representative and the Department of Commerce replace the past secretive trade negotiation process with an on-the-record public process, including public hearings, to formulate U.S. positions and obtain comment on draft and final U.S. text proposals. U.S.-proposed texts and draft consolidated texts after each negotiating session must be made public. Strict conflict of interest rules must be enforced. Only by issuing detailed goals and making draft texts available will the American public know in whose interest the negotiations are being conducted.

²⁰ Rep. Earl Blumenauer (D-Ore.), “Chairman Blumenauer Unveils New Legislation to Fix Import Loophole, Level Playing Field, and Boost Oversight,” Congressional Press Release, Jan. 18, 2022.

Conclusion

As governments worldwide work to address fundamental issues relating to digital governance and build a framework for the future, these important policy debates and decisions that will shape every facet of our lives must not be constrained, undermined, or preempted via “trade” pacts or policies. To achieve President Biden’s worker-centered approach to trade that will complement the administration’s efforts to build a more resilient economy, its “digital trade” agenda must not undermine domestic policy space on critical emerging issues like gig economy worker protections, discrimination and algorithm transparency, corporate liability, and consumer privacy, but instead should be structured to raise the floor to help ensure that human and civil rights are protected at home and around the globe.