October 4, 2024

The Honorable Jason Smith
Chairman
U.S. House Committee on Ways and Means
Washington, DC 20515

The Honorable Adrian Smith
Trade Subcommittee Chairman
U.S. House Committee on Ways and Means
Washington, DC 20515

RE: Statement for the Record: Subcommittee on Trade Hearing on Protecting American Innovation by Establishing and Enforcing Strong Digital Trade Rules

Dear Chairmen Jason Smith and Adrian Smith:

Public Citizen[1] welcomes the opportunity to provide a written statement for the record for the Subcommittee on Trade Hearing on Protecting American Innovation by Establishing and Enforcing Strong Digital Trade Rules.

As technology has grown to play an ever more important part in our societies and economies, 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. Having enjoyed the benefits of a lack of oversight and regulation over the past two decades, these companies have created business models based on a system of mass corporate surveillance that invades people's privacy and have used their 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 have been grappling with how best to regulate Big Tech to protect consumer privacy, to ensure adequate competition, and to hold companies accountable for discriminatory practice. This has translated into the trade realm as a necessary reversal of previous government policy that sought to push digital trade terms that were

[1] Public Citizen is a nonprofit consumer advocacy organization with more than 500,000 members and supporters. A mission of the Global Trade Watch division is to ensure that, in this era of globalization, a majority of people 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 by identifying the dangers of so-called "digital trade" rules with respect to efforts to regulate the tech industry around the globe.

favorable to Big Tech companies by limiting the ability of governments to regulate their business practices.[2] These corporate-friendly rules sought to:

- Limit the ability of governments to regulate where Big Tech firms send and store consumer 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;[3]
- 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. In practice, they tie U.S. policymakers' hands for future regulatory efforts.

In May 2023, Public Citizen joined prominent civil rights organizations such as the Leadership Conference on Civil and Human Rights (LCCHR), the American Civil Liberties Union (ACLU), the Lawyers Committee for Civil Rights Under Law (LCCRUL), and the NAACP to raise concerns about trade provisions that guarantee digital firms new secrecy rights over source code and algorithms. These rules could thwart potential algorithmic impact assessment and audit requirements, such as testing for racial bias or other violations of U.S. law and regulation.[4]

Later that year, we — along with domestic and international consumer protection and digital rights groups as well as a number of small and medium enterprises — were pleased that the Biden administration took these and other consumer concerns into account when the U.S. Trade Representative (USTR) announced it was withdrawing support for controversial digital trade provisions at the World Trade Organisation (WTO) Joint Statement Initiative on E-Commerce (JSI).[5] We also support the forward-thinking vision of digital trade articulated by the

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[2] 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, https://www.citizen.org/news/public-submissions-to-u-s-government-reveal-corporate-wishlist-for-ipef-more-power-at-our-expense/

[3] Anna Edgerton, "Tech Liability Shield Has No Place in Trade Deals, Groups Say," Bloomberg Law, May 27, 2021, https://www.bloomberg.com/news/articles/2021-05-27/tech-liability-shield-has-no-place-in-trade-deals-groups-say

[4] American Civil Liberties Union, Public Citizen, Centre for Democracy and Technology, et al., "Letter to President Biden", May 23, 2023, https://www.washingtonpost.com/documents/eea26d7a-08ef-4687-a4ba-c26e38ad7ffe.pdf?itid=lk_inline_manual_44

[5] Digital Trade Alliance, "Consumer & Digital Rights Groups Call On Governments to Better Protect People's Fundamental Rights in Trade Deals," January 30, 2024, https://dtalliance.org/wp-

USTR, as well as the broad discussions being carried out with multiple stakeholders (including civil rights groups, trade unions, etc.) with respect to framing a new digital trade policy that is grounded in how trade policy affects regular people: consumers, workers, and smaller innovators. We reiterate our willingness to work with the administration to create new digital trade rules that promote worker rights, consumer privacy, civil rights, and data security goals.

Limiting Regulatory Autonomy:

We note that the USTR in its announcement of October 3, 2023, correctly pointed to the need to preserve congressional autonomy to ensure that the digital ecosystem can be regulated in the interests of all stakeholders.

Contrary to what is claimed by many industry lobbyists, extreme digital trade provisions of the kind seen in the U.S.-Mexico-Canada Agreement (USMCA) would significantly limit the ability of domestic lawmakers and regulators to implement consumer protection or other public interest regulation to the digital ecosystem. As aptly described by Mr. Eric Gottwald, Policy Specialist on Trade and Economic Globalization for the AFL-CIO, in his testimony before this Committee, we are not faced with a binary choice between digital authoritarianism and a totally unregulated data marketplace. There is a need for well-tailored regulation, which allows Congress to hold Big Tech companies responsible for unethical data processing and other harmful practices. However, extreme digital trade provisions as seen in the USMCA impose a regulatory straitjacket, restricting the ability of Congress to act in citizens' interests.

For example, the data flow and localization provisions in the USMCA would limit the ability of lawmakers to appropriately secure their citizens' data against unauthorized or unlawful exposure or processing, or against cybercrime, accidental loss, destruction, or damage. Under these provisions, consumers would have no guarantee that their data would be sufficiently protected upon export, even if domestic laws require such protections. Further, countries that have superior privacy laws could see their data protection rules undermined. This would significantly limit any U.S. congressional efforts to enact strong privacy rules for Americans.

Steps taken by the administration, such as the recent executive order[6] to limit the export of U.S. data to countries of concern, could be challenged under the most extreme data flow rules. Further, as demonstrated by the European Union's objections to extreme data flow provisions at

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content/uploads/2024/01/JSI-Civil-Society-Letter-2024.pdf; Citizens Trade Campaign, Accountable Tech, AI Now Institute et al., "Letter thanking president Biden for withdrawing US support for Extreme 'Digital Trade' Provisions," February 2, 2024, https://www.citizenstrade.org/ctc/wp-content/uploads/2024/02/DigitalTradeThankYouLetter_020224.pdf; Coalition for App Fairness, "Letter to President Biden," November 15, 2023, https://appfairness.org/coalition-for-app-fairness-applauds-biden-harris-administrations-withdrawal-from-digital-trade-negotiations/

[6] The White House, "President Biden Issues Executive Order to Protect Americans' Sensitive Personal Data," February 28, 2024, https://www.whitehouse.gov/briefing-room/statements-releases/2024/02/28/fact-sheet-president-biden-issues-sweeping-executive-order-to-protect-americans-sensitive-personal-data/

international trade fora including the WTO JSI, strong privacy rules cannot coexist with free flow of data provisions as exemplified by the USMCA.

Similarly, USMCA-style provisions that limit the ability of public authorities and independent researchers to access source code of algorithms to instances of known violations of law would affect how congressional committees, scholars, and public investigators could review code and related data to identify discrimination and other malpractices that may be baked into AI systems that are increasingly ubiquitous in both the private and public sectors.

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. This has been recognized repeatedly in global fora and by the U.S. government, and it has been demonstrated by recent agreements signed between the U.S. government and the AI companies Anthropic and Open AI. These agreements would allow the U.S. AI Safety Institute access to AI models for safety testing both before and after their public release.[7] While in these cases the companies concerned voluntarily agreed to safety audits, it is not a stretch to imagine the need to implement regulation to require disclosure of AI algorithms (and their source code) in other contexts. Any digital trade provisions that limit such an ability will be detrimental to user safety and the continued development of the AI ecosystem.

Extreme digital trade rules as exemplified by the USMCA would also limit the ability of lawmakers and regulators to implement pro-competition regulation in the digital ecosystem. As seen in the 2020 Report of the House Judiciary Committee's Subcommittee on Antitrust, Commercial, and Administrative Law as well as several subsequent bills brought to Congress, there is bipartisan support in the U.S. Congress to combat various anti-competitive business practices of Big Tech companies.

This is not only a domestic issue, as a number of jurisdictions are attempting to implement regulations aimed at creating fairer digital marketplaces globally. Big Tech companies have however sought to stifle any attempts at pro-competition regulation through the (mis)use of "non-discrimination" related digital trade provisions.

U.S. Big Tech companies have argued that other countries' enforcement of their domestic laws are "discriminatory" if such laws affect U.S. Big Tech companies more than the tech companies from other countries, even if those laws are designed to affect any company with extensive market power. This has been seen, for instance, in the pushback against the EU's Digital Markets Act, South Korea's App store-related regulation and, more recently, in criticism of South Korean proposals to implement a Platform Fair Competition Promotion Act. Similar pro-digital competition laws are being debated in several countries across the world, from Brazil to India. More often than not, attempts at addressing market concentration affect U.S. firms

[7] Lauren Feiner, "OpenAI and Anthropic will share their models with the US government," August 29, 2024, https://www.theverge.com/2024/8/29/24231395/openai-anthropic-share-models-us-ai-safety-institute

disproportionately due to the fact that these firms do indeed monopolize various digital markets, frequently to the detriment of consumers. The U.S. should lead regulatory developments aimed at ensuring a level playing field in the digital economy rather than undermining efforts by other nations.

The U.S. government has a long history of intervening to regulate concentration in markets where this could threaten consumer interests or general economic welfare. 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, or restrict the regulation or break-up of Big Tech monopolies whether American or foreign. Rather than seeking to misuse trade concepts to enable the continued monopolization of digital marketplaces, Congress should have the ability to learn from the regulatory frameworks being implemented in other jurisdictions so as to take action on the domestic front. We reiterate that targeting policies aimed at ensuring a level playing field in the digital ecosystem does not serve the interests of small and medium American enterprises. A coalition of small businesses have in fact pointed out that "the preservation of fair and competitive markets should play a central role in the United States' foreign trade goals, law, and policy" and accordingly note that U.S. trade policy must be in harmony with the U.S. government's domestic work to address the anticompetitive conduct of digital gatekeepers.[8]

While some have argued that public interest regulation can be implemented using the public policy exceptions provided in trade agreements, the use of such exceptions in practice is notoriously difficult. A Public Citizen study found that only two such attempts out of 48 have ever proven successful in defending domestic policies at the WTO.[9] Relying on poorly drafted and legally uncertain exception clauses in trade agreements limits U.S. sovereignty and the ability of our lawmakers to make decisions in the interests of all domestic stakeholders.

As highlighted by Mr. Gottwald, in his testimony before this Committee, digital trade rules have profound implications for the lives of workers in the United States. The changing social and economic dynamics occasioned by the use of emerging technologies implies that it is vital for Congress and regulators to retain the ability to implement public interest regulation. For example, the use of technology has significantly changed the worker-management relationship. Workers are subject to fine-grained surveillance, algorithmic management, and the precariousness occasioned by gig work. There is therefore a need for new regulatory interventions that can re-balance this increasingly skewed relationship between workers and employers. Preserving regulatory autonomy can enable Congress to pass laws to protect workers' privacy, ensure that algorithmic management systems are designed in accordance with

[8] Coalition for App Fairness, "Letter to President Biden," November 15, 2023, https://appfairness.org/coalition-for-app-fairness-applauds-biden-harris-administrations-withdrawal-from-digital-trade-negotiations/

[9] Daniel Rangel, "WTO General Exceptions: Trade Law's Faulty Ivory Tower," Public Citizen, February 4, 2022, https://www.citizen.org/article/wto-general-exceptions-trade-laws-faulty-ivory-tower/

high labor standards, and prevent non-discrimination-related rules from being used to challenge safety and other pro-labor regulation.[10]

Taking the Leadership in Crafting an Inclusive Digital Trade Vision

Rather than abandoning leadership at international trade negotiations, the change in U.S. position has demonstrated that the administration is willing to balance the needs and interests of a diverse group of stakeholders rather than merely adopting the wish list of Big Tech companies. Indeed, the administration has not pulled back from negotiations at various trade fora but has sought to articulate a new vision by enabling the regulation of the digital ecosystem in the public interest, rather than baking in a deregulated ecosystem that could continue to expose Americans to a range of harms. This is also seen in how the 2024 National Trade Estimate (NTE) Report recognizes that countries have a right to implement public interest regulation over the technology ecosystem.

We therefore commend the USTR for taking the leadership to update digital trade rules to provide the policy space necessary for our nation to enact urgently needed policies that Congress and regulators are currently crafting regarding online competition, gig worker rights, online consumer privacy and data security protections, and AI accountability measures.

We also recognize the need for the USTR to build on the improvements made in the 2024 NTE Report (compared to past versions). It is a welcome change that the report is no longer simply a hit list of other countries' laws and regulations that large U.S. corporations dislike. Now, for the first time in memory, USTR is recognizing that it is not in the U.S. national interest to attack and threaten other nations' consumer and worker protection measures. As governments around the world, including our own, work to regulate the rapidly changing tech space, it does not make sense to list new public interest regulations as "barriers to trade."

The Need for Pro-Consumer Rules

There are some legitimate international trade concerns associated with e-commerce and the broader digital economy that should form the bedrock for U.S. policy in any trade negotiations. If digital trade rules are to be included in a trade agreement, they should ensure that goods and services purchased online across borders meet labor, environmental, and consumer safety standards, including by raising de minimis levels so that, for instance, the four million packages arriving from China to the U.S. daily to fulfill online orders can no longer evade U.S. inspection regimes.[11] They should prevent corporate misclassification so that so-called "digital platforms"

[10] AFL-CIO, "A Worker-Centred Digital Trade Agenda," February 7, 2023, https://aflcio.org/worker-centered-digital-agenda; Digital Trade Alliance, "A Primer on the Intersection of Labor Rights, Technology and Trade," October 1, 2024, https://dtalliance.org/2024/10/01/a-primer-on-the-intersection-of-labor-rights-technology-and-trade/

[11] Rep. Earl Blumenaur, Rep. Rosa DeLauro, Rep. Suozzi, "DeLauro, Blumenauer, Suozzi Release Letter Signed by Majority of House Democrats Urging President Biden to Use Executive Authority to End

involved in transportation, hospitality, healthcare, retail, education, and other industries cannot evade labor, consumer, and other regulations imposed on "brick-and-mortar" businesses. We reiterate the comments of Mr. Gottwald to the Committee that the USTR needs to develop clear labor standards and benchmarks for trade deals. Moving forward, all trade agreements must be designed to ensure high labor standards, which would benefit not just workers in the U.S. but also abroad.

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.

U.S. leadership could also move the needle on various broader issues that could enhance trust in the digital economy. Building consensus on issues such as access to the internet or preventing internet shutdowns, enabling global cooperation towards fair taxation of the digital economy (thereby avoiding the multiplicity of digital services taxes), amongst other issues could benefit both U.S. companies as well as citizens from around the world.

Transparency and Oversight

While the USTR's move away from a number of problematic "digital trade" provisions is a welcome change, it will continue to be necessary for Congress and the public to monitor and publicly debate any future textual proposals on digital trade terms in the context of the WTO JSI on E-Commerce, the Indo-Pacific Economic Framework, U.S.-Kenya STIP or other trade negotiations to ensure 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 trade pacts 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.

Dangerous De Minimis Trade Loophole," Press Release, September 11, 2024, https://tinyurl.com/v37sr6am

Instead, Congress should insist that the USTR and the Department of Commerce replace the past secretive trade negotiation process with an on-the-record public process, including public hearings (advertised sufficiently in advance), to formulate U.S. positions and to obtain comment on draft and final U.S. text proposals. After each negotiating session, U.S.-proposed texts and draft consolidated texts 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.

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 a 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 AI regulation, 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.

The USTR under the Biden administration has taken important steps in the right direction to rebalance the interests of Big Tech companies with important public interest goals, but there is still work to be done to ensure that Big Tech companies do not inappropriately use trade rules to target other countries' legitimate public policy regulations.