

Before the
Office of the United States Trade Representative
Washington, D.C.

Request for Comments on the Proposed
Fair and Resilient Trade Pillar of an Indo-
Pacific Economic Framework

Docket No. USTR-2022-0002

**COMMENTS OF
THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION (CCIA)**

Pursuant to the request for comments published by the Office of the United States Trade Representative (USTR) in the Federal Register at 87 Fed. Reg. 13,789 (Mar. 10, 2022), the Computer & Communications Industry Association (CCIA) submits the following comments in response to USTR’s Request for Comments on the Proposed Fair and Resilient Trade Pillar of an Indo-Pacific Economic Framework (IPEF). CCIA is an international, not-for-profit trade association representing a broad cross section of communications and technology firms.¹ These comments complement those filed concurrently with the U.S. Department of Commerce regarding its negotiating objectives for the IPEF.

I. INTRODUCTION

CCIA is strongly supportive of the Administration’s decision to pursue a comprehensive strategy for engagement in the Indo-Pacific Region. Key to continued economic growth, national security, and U.S. competitiveness is a strong U.S. presence and enhanced cooperation with partners in the region.

The United States is at a significant disadvantage due to its absence from the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) that will advance trade in the Asia-Pacific Region. The United States is excluded from trade promotion enabled by the agreement, which has limited the strength of U.S. economic influence in the Asia-Pacific Region, at a time when regional partners are key to countering China’s discriminatory practices and rising digital authoritarianism. Active engagement with our trading partners in the region will offset this imbalance, and a trade agreement and further economic cooperation with strong commitments would be a positive step forward to re-establishing U.S. leadership.

¹ For 50 years, CCIA has promoted open markets, open systems, and open networks. CCIA members employ more than 1.6 million workers, invest more than \$100 billion in research and development, and contribute trillions of dollars in productivity to the global economy. For more, visit www.ccianet.org.

These comments address the following issue areas identified in USTR’s request for comments: general negotiating objectives for the proposed agreement; labor-related matters; environment and climate-related matters; digital economy-related matters; transparency and good regulatory practice issues; competition-related matters; customs and trade facilitation issues; and issues of particular relevance to small and medium-sized businesses that should be addressed in the negotiations.²

II. GENERAL NEGOTIATION-OBJECTIVES FOR THE PROPOSED AGREEMENT.

The U.S. should build off the progress made in the U.S.-Mexico-Canada Agreement (USMCA) to update trade rules for the 21st century, going further to address new challenges facing the global market. As part of the trade pillar of the IPEF, the United States should be ambitious in its negotiating goals to address as many access barriers to U.S. exports as possible, and secure binding rules and commitments from trading partners. As noted above, the United States is at a disadvantage by its absence in comprehensive regional trade agreements including the CPTPP. The United States should take advantage of the negotiations to address any shortcomings that absence in those agreements has created in terms of non-tariff barriers to trade.

USTR should pursue binding commitments with meaningful enforcement mechanisms and clear built-in review mechanisms to ensure that the IPEF continues to be durable and effective. There should not be broad exceptions that render commitments meaningless, such as the broad exceptions outlined in the Regional Comprehensive Economic Partnership (RCEP)³ that limited the effectiveness of trade liberalization through trade agreements.⁴ U.S. officials have noted that there will be flexibility within the structure of the IPEF, allowing countries to join certain pillars.⁵ To the extent flexibility is needed within the trade pillar, CCIA encourages USTR to allow for phased-in implementation of commitments rather than carve-outs.

As these negotiations are conducted, there should be measures taken to ensure transparency. The IPEF, as currently framed, is to be a multifaceted framework that aims to

² Available at <https://www.govinfo.gov/content/pkg/FR-2022-03-10/pdf/2022-05044.pdf>.

³ Regional Comprehensive Economic Partnership text available at https://www.mofa.go.jp/policy/economy/page1e_kanri_000001_00007.html.

⁴ RCEP’s rules on prohibitions of localization measures and data flows contain broader exceptions and limitations that should not be replicated in U.S.-negotiated frameworks. See RCEP Art. 12.14, 12.15.

⁵ *Bianchi: IPEF participants can join by pillar; U.S. will look for ‘early harvests’*, INSIDE U.S. TRADE (Apr. 5, 2022), <https://insidetrade.com/daily-news/bianchi-ipef-participants-can-join-pillar-will-look-%E2%80%98early-harvests%E2%80%99> (reporting statements made by Deputy U.S. Trade Representative Sarah Bianchi on the IPEF).

include trade commitments and other market access agreements, as well as other agreements on strategic cooperation among key partners, all taking place across U.S. agencies. Given the new multi-structured approach, transparency will be even more important as compared to traditional trade negotiations. There should be readouts following each negotiation round or key engagements that inform stakeholders on topics being discussed and how parties seek to memorize commitments or agreements reached. Further, there should be meaningful opportunities for engagement by all stakeholders to address ongoing discussions as they occur. CCIA welcomes the Administration's commitment to inclusive engagement to ensure equitable and inclusive trade, and encourages USTR to conduct IPEF negotiations pursuant to these principles.

III. LABOR-RELATED MATTERS AND WORKFORCE DEVELOPMENT GOALS.

The IPEF presents an opportunity for like-minded partners to work together to develop a workforce that has the necessary digital skills for the 21st century. There is a growing need for countries to build out job-training programs that reflect the needs of the modern workforce.

Possible avenues to explore with IPEF partners include: creating programs within economic development agencies and public universities to partner with the private sector to upskill students and workers including those in under-represented communities; work with institutions like the World Bank to establish global financing programs in collaboration with the private sector that create funds for small business and entrepreneurs; digital apprenticeship programs that allow citizens of IPEF participants to train in other IPEF countries in partnership with companies; and joint scholarships for digital and STEM education courses throughout the Indo-Pacific region.

IV. ENVIRONMENT AND CLIMATE-RELATED MATTERS.

The IPEF framework should enable companies operating throughout the region to achieve renewable energy goals. Participants should work to open up markets for U.S. and foreign investors in renewable energy, and reduce regulatory barriers for investment in renewable energy.

However, in many markets, regulations favor legacy energy sources and serve as barriers to building new renewable energy projects, leaving companies with no choice but to use more carbon intensive power sources. The IPEF presents an opportunity for governments to remove regulatory barriers to foreign investment and construction of renewable energy plants.

Resource recovery of used technology products can also help in reaching climate-related goals. The use of raw materials recovered from these used products can help reduce the need for mining virgin materials, reduce waste, and can also enhance supply chain resiliency by capitalizing on the supply of critical materials already embedded in consumer devices. A current barrier to wider adoption of resource recovery practices is international rules that limit the cross-border movement of used consumer devices and the resources recovered from them. IPEF partners should use this platform to explore options to reduce these barriers, and explore possibilities around establishing “resource recovery lanes” among trusted partners.

V. DIGITAL ECONOMY-RELATED MATTERS.

The Indo-Pacific Region is a key digital market, where the number of Internet users is expected to grow to 3.1 billion by 2023.⁶ As such, the digital economy pillar will be a critical component in the IPEF and participants should be ambitious in its goals in pursuing trade rules and further economic cooperation on issues relevant to the digital economy.⁷

In the IPEF, the U.S. should continue to negotiate binding commitments in free trade agreements that pertain to digital trade and cross-border delivery of Internet services.⁸ The Digital Trade chapter of USMCA and the U.S.-Japan Digital Trade Agreement represent the gold standard of digital trade provisions, and any agreement on digital trade pursued by the United States should reflect those agreements. It is encouraging that potential IPEF partners have committed to similar rules like those found in the e-commerce chapter of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, which USMCA draws from, and recently pursued in agreements like the Singapore-Australia Digital Economy Agreement, and Singapore-Korea Digital Economy Agreement.⁹ This includes, but is not limited to, commitments enabling cross-border data flows and removing data and other localization requirements, source code protection, and promoting risk-based cybersecurity measures, prohibiting customs duties on

⁶ CSIS, *Filling In the Indo-Pacific Economic Framework* (Jan. 2022), https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/220126_Goodman_Indo_Pacific_Framework.pdf.

⁷ See also Industry Letter to Ambassador Tai, Sept. 10, 2021, available at https://www.itic.org/documents/trade/LettertoAmb.TaionPacificDigitalTradeAgreements_Final09102021.pdf.

⁸ The provisions discussed in this section could be included in a specific Digital Trade Chapter, or in other chapters in the IPEF agreement.

⁹ Australia-Singapore Digital Economy Agreement (DEA), Dec. 8, 2020, text available at <https://www.dfat.gov.au/trade/services-and-digital-trade/australia-and-singapore-digital-economy-agreement>; Press Release, Singapore and the Republic of Korea Conclude Negotiations on a Digital Economy Agreement (Dec. 15, 2021), <https://www.mci.gov.sg/pressroom/news-and-stories/pressroom/2021/12/singapore-and-the-republic-of-korea-conclude-negotiations-on-a-digital-economy-agreement>.

electronic transmission, promoting use of international technology standards, ensuring non-discriminatory treatment of digital products, and ensuring open government data in machine-readable formats.

Strong digital economies also benefit substantially from a balanced intellectual property regime and online enforcement mechanisms that enable stakeholders to address infringement. In addition to strong copyright protection, limitations and exceptions like the fair use doctrine have been central to U.S. success, and contribute substantially to the U.S. economy and U.S. exports.¹⁰ To the extent that the IPEF addresses copyright issues in the digital pillar, the U.S. should continue to uphold commitments included in the Intellectual Property chapters of its FTAs.

a. Enabling cross-border data flows and trust in digital services.

These negotiations present an opportunity to further enable digital trade and the U.S. should be ambitious in its negotiating objectives with respect to data flows and localization barriers. Cross-border data flows are critical to digital trade, and forced localization mandates make it difficult for U.S. exporters to expand into new markets. Studies have found that “for many countries that are considering or have considered forced data localization laws, local companies would be required to pay 30-60% more for their computing needs than if they could go outside the country’s borders.”¹¹ Another study found that the impact of recently proposed or enacted data localization legislation on GDP is “substantial” in seven countries.¹² Recent analysis from the OECD has revealed an increasing level of restrictiveness for digitally-enabled services in part due to restrictions on cross-border movement of data.¹³ Cross-border data flows are the lifeblood of global digital trade and by extension the array of industries that increasingly rely on the Internet to compete in the global marketplace. In the U.S. the productivity gains and efficiencies enabled by data flows have boosted the economy by hundreds of billions of dollars.¹⁴

¹⁰ Andrew Szamosszegi & Mary Ann McCleary, *Fair Use in the U.S. Economy* (Capital Trade, Inc. 2017), <https://www.cciainet.org/wp-content/uploads/2017/06/Fair-Use-in-the-U.S.-Economy-2017.pdf>.

¹¹ Leviathan Security Group, *Quantifying the Cost of Forced Localization* (2014), available at <https://static1.squarespace.com/static/556340ece4b0869396f21099/t/559dad76e4b0899d97726a8b/1436396918881/Quantifying+the+Cost+of+Forced+Localization.pdf>.

¹² Matthias Bauer *et al.*, *The Costs of Data Localization* (ECIPE 2014), available at http://www.ecipe.org/wp-content/uploads/2014/12/OCC32014__1.pdf (finding that the GDP was reduced in the following countries with data localization policies: Brazil (-0.2%), China (-1.1%), EU (-0.4%), India (-0.1%), Indonesia (-0.5%), Korea (-0.4%), and Vietnam (-1.7%).)

¹³ OECD Services Trade Restrictiveness Index: Policy Trends up to 2020, available at <https://issuu.com/oecd.publishing/docs/oecd-stri-policy-trends-up-to-2020?fr=sNmVINzYxOTI3Mw>.

¹⁴ Joshua Meltzer, *Data and the Transformation of International Trade*, BROOKINGS INSTITUTION (Mar. 6, 2020), <https://www.brookings.edu/blog/up-front/2020/03/06/data-and-the-transformation-of-international-trade/>.

With an uptick in data-related barriers in recent years, trade discussions and clear rules are critical to ensure that any restrictions are consistent with existing international obligations and are targeted in a manner that does unreasonably limit legitimate cross-border trade.¹⁵ Policies that restrict data flows, either directly through explicit data and infrastructure localization requirements, or indirectly for national security or other purposes, negate the productivity gains and efficiencies enabled by Internet platforms and cloud computing.

The United States should pursue rules that prohibit governments from interfering with data flows or the exchange of information online, and prohibit regulations or standards that condition market access, procurement, or qualification for certain standards based on nationality of ownership, location of corporate headquarters, or size of company. Specifically, rules should prohibit governments from imposing data localization or local presence requirements on data controllers or processors, as well as linking market access and/or commercial benefits to investment in or use of local infrastructure. To the extent possible, these prohibitions should apply to both explicit and indirect measures to keep data in a particular country. Articles 19.11 and 19.12 of the USMCA Digital Trade chapter represent the strongest rules in trade agreements in force pertaining to cross-border data flows and localization prohibitions. USTR should aim to secure text in the IPEF trade pillar that reflects these commitments.

Trust in the cross-border delivery of these services is critical. Without adequate privacy protections and security in digital communications, governments may continue to enact restrictions on cross-border services citing perceived risks. Privacy and consumer protections and trade rules should work in tandem to further goals of initiatives including the “data free flow with trust” launched by heads of governments under Japan’s G20 leadership in 2019.

To that end, IPEF countries should prioritize development of national privacy legislation that set clear rules on the use of personal data domestically, promote the adoption of bilateral and multilateral agreements on government access to data such as those being pursued by the OECD¹⁶, and commit to codify into domestic law protections for valid basis for transfer of personal data such as the APEC Cross-Border Privacy Rules.

¹⁵ Examples of these barriers are documented in CCIA’s Comments to USTR for the preparation of the annual National Trade Estimates Report, available at <https://www.cciainet.org/library-items/ccia-comments-for-2022-nte/>.

¹⁶ See OECD, Government access to personal data held by the private sector: Statement by the OECD Committee on Digital Economy Policy (Dec. 2020), <https://www.oecd.org/digital/trusted-government-access-personal-data-private-sector.htm>.

b. Prohibition on customs duties for electronic commerce.

Imposing customs requirements on purely digital transactions creates significant and unnecessary compliance burdens on nearly all enterprises, including small and medium-sized enterprises (SMEs). There would need to be several requirements created that would accompany such an approach, many of which would be extremely difficult to comply with. For instance, data points required for compliance include the description of underlying electronic transfer, end-destination of the transmission, value of transmission, and the country of origin of the transmission — all of which do not exist for most electronic transmissions, especially in the cloud services market.

The moratorium on imposing customs duties for electronic transmissions¹⁷ has been key to the development of global digital trade and shows the international consensus with respect to the digital economy, reflected in the number of commitments made in free trade agreements among multiple leading digital economies. Permanent bans on the imposition of customs duties on electronic transmissions are also a frequent item in trade agreements around the world. This includes, but is not limited to, Article 14.3 of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP),¹⁸ Article 19.3 of the U.S.-Mexico-Canada Agreement (USMCA),¹⁹ and Article 8.72 of the EU-Japan Economic Partnership Agreement.²⁰

The United States should continue to advocate for the permanent ban on the imposition of customs duties on electronic transmissions in the IPEF, and continue to discourage countries from including electronic transmission in their domestic tariff codes.

c. Online content regulations and addressing state-censorship practices.

Censorship and denial of market access for foreign Internet services has long been the case in restrictive markets like China, but it is becoming increasingly common in emerging digital markets as well as some traditional large trading partners, and accomplished through

¹⁷ The 2nd Ministerial Conference of the World Trade Organization in 1998 produced the Declaration of Global Electronic Commerce which called for (1) the establishment of a work program on e-commerce and (2) a moratorium on customs duties on electronic transmission. The moratorium has been renewed at every Ministerial since that time.

¹⁸ Final Text of Comprehensive and Progressive Agreement for Trans-Pacific Partnership, signed Mar. 8, 2018, <https://www.mfat.govt.nz/assets/Trans-Pacific-Partnership/Text/14.-Electronic-Commerce-Chapter.pdf>.

¹⁹ Final Text of U.S.-Mexico-Canada Agreement, signed Nov. 30, 2018, https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/19_Digital_Trade.pdf.

²⁰ Final Text of Agreement Between EU and Japan for Economic Partnership, http://trade.ec.europa.eu/doclib/docs/2018/august/tradoc_157228.pdf#page=185.

different tools and methods.²¹ The U.S. International Trade Commission released its report on foreign censorship policies in January 2022 and detailed how extensive these practices have become, noting that:

The consequences of censorship-related policies and practices can be significant for U.S. firms, especially U.S.-based content producers and digital services firms, as they may restrict trade, impede market access, increase operational costs and reputational risks, or discourage foreign direct investment.²²

IPEF partners should work together to address rising digital authoritarianism and state-censorship practices that pose threats to the open Internet and freedom of expression around the world. Because the business community has a limited technical capacity to assess and respond to interference with cross-border flow of services, products, and information by nation-states, allied governments have a critical role to play in partnering with technology companies and leading in the defense of Internet freedom and open digital trade principles.

Countries should affirm commitments under Article 19 of the International Covenant on Civil and Political Rights as they apply to defending free expression online. IPEF should include clear commitments to refrain from blocking or restriction access to lawful online content, digital services, and infrastructure underlying Internet delivery.

Government-imposed restrictions of digital services and online content can take multiple forms, and the risks associated with each method or regulatory framework providing for censorship methods can vary greatly.²³ For example, some types of content restrictions may be reasonable and legally permissible in certain contexts, but may result in overbroad removals of user speech if attached to filtering or monitoring requirements. Other trade concerns arise where content policies are not applied equally to both domestic and foreign websites. Furthermore, an increasing number of content restrictions do not comply with World Trade Organization (WTO) principles of transparency, necessity, minimal restrictiveness, and due process to affected parties.

²¹ Examples of these barriers are documented in CCIA's Comments to USTR for the preparation of the annual National Trade Estimates Report, available at <https://www.cciagnet.org/library-items/ccia-comments-for-2022-nte/>.

²² U.S. INT'L TRADE COMM'N, *Foreign Censorship, Part 1: Policies and Practices Affecting U.S. Businesses* (Feb. 2022), available at <https://www.usitc.gov/publications/332/pub5244.pdf> at 21.

²³ See, U.S. INT'L TRADE COMM'N, *Foreign Censorship, Part 1: Policies and Practices Affecting U.S. Businesses*; Testimony of the Center for Democracy & Technology Before Senate Finance Committee, available at <https://cdt.org/wp-content/uploads/2022/03/CDT-Emma-Llanso-Senate-Finance-Committee-Testimony-15-March-2022.pdf> at 5-6; Comments of CCIA, U.S. ITC Investigation No. 332-585: Foreign Censorship Part 1: Policies and Practices Affecting U.S. Businesses, <https://www.cciagnet.org/wp-content/uploads/2021/07/CCIA-Comments-USITC-Censorship-Trade-Barriers.pdf>.

Internet services recognize the importance of ensuring user trust and safety and have significantly increased resources to ensure that their services remain spaces for free expression, that users comply with their terms of service, and that illegal and harmful content that violates their terms of service is identified and removed. But the expanding array of emerging content regulatory frameworks often have the impact of making it harder, rather than easier, for U.S. Internet companies to strike the right balance between promoting free expression and taking action against dangerous content.

Trade rules should be modernized in a manner that promotes liability rules that are consistent, clear, and work for Internet companies of all stages of development to encourage the export of Internet services. Doing so enables Internet exporters to establish comprehensive practices to proactively address harmful content and behavior that violates terms of service, while enabling open discourse online.²⁴ These commitments should work in tandem with commitments on good regulatory practice and additional global standards on content removal that ensure due process, oversight, and accountability.

d. Securing digital communications and devices.

Providers of digital devices and services continue to improve the security of their platforms through the deployment of technologies that safeguard the communications and commercial transactions that they enable. Strong encryption has been increasingly enabled on now-ubiquitous smartphones and deployed end-to-end on consumer-grade communications services and browsers. Encrypted devices and connections protect users' sensitive personal and financial information from bad actors who might attempt to exploit that information.

Many countries, at the behest of their respective national security and law enforcement authorities, have passed laws that mandate access to encrypted communications. Often the relevant provisions are not explicit, but mandate facilitated access, technical assistance, or compliance with otherwise infeasible judicial orders. Other versions require access to or transfer of source code as a condition of allowing technology imports. Other recent measures impose "traceability" requirements that undermine encryption measures, like those included in India's

²⁴ USMCA text provides a basis for these safeguards, while also making clear that these provisions are subject to GATS exceptions and enable countries to legislate in the protection of public interests. USMCA, *supra* note 4 at art. 19.17. These provisions are consistent with U.S. law and will ensure that companies can continue to take steps to proactively remove objectionable content.

2020 IT Act (Intermediary Rules) Amendments.²⁵ Such exceptional access regimes run contrary to the consensus assessments of security technologists because they are technically and economically infeasible to develop and implement.²⁶ Companies already operating in countries that have or are considering anti-encryption or source code access laws will be required to alter global platforms or design region-specific devices, or face fines and shutdowns for noncompliance. Companies that might have otherwise expanded to these markets will likely find the anti-encryption or facilitated access requirements to be barriers to entry.

The United States should continue efforts to promote regulatory cooperation and international standards for securing products and services. The IPEF should contain commitments to promote encrypted devices and connections. Specifically, the IPEF should prevent countries from compelling manufacturers or suppliers to use a particular cryptographic algorithm or to provide access to a technology, private key, algorithm specification, or other cryptographic design details. Similarly, IPEF should prohibit governments from conditioning market access, with appropriate exceptions, on their ability to demand access to cryptographic keys or source code. Additionally, the IPEF should include commitments for partners to pursue risk-based cybersecurity measures, as it is the more effective approach in comparison to prescriptive regulation. IPEF partners should pursue cooperative approaches to cybersecurity and incident responses, including sharing of information and best practices.

e. Fostering innovation in emerging technologies.

Emerging technologies such as artificial intelligence (AI) and machine learning, as well as quantum computing, increasingly impact cross-border trade, and trade rules increasingly govern the development and growth of these technologies. To continue to use and export AI and other emerging technologies, businesses and users need a trade framework that allows them to move data and infrastructure safely across borders while ensuring that other countries will not misuse legal systems to impede the growth of new technologies. This will enable use of emerging technologies in addressing global challenges such as public health, humanitarian assistance, and disaster response.

²⁵ The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, available at <https://prsindia.org/billtrack/the-information-technology-intermediary-guidelines-and-digital-media-ethics-code-rules-2021>.

²⁶ Harold Abelson, et al., Keys Under Doormats: Mandating insecurity by requiring government access to all data and communications, MIT Computer Science and Artificial Intelligence Laboratory Technical Report, July 6, 2015, <http://dspace.mit.edu/bitstream/handle/1721.1/97690/MIT-CSAIL-TR-2015-026.pdf>.

Trade rules that can facilitate the responsible cross-border growth of AI technologies include those on enabling cross-border data flows and removing localization requirements; encouraging governmental investment in and release of open data; identifying and sharing best practices for the responsible use of AI; cooperation and public-private collaboration on AI; and the adoption of innovation-oriented copyright rules that enable machine analysis of data. In addition, to ensure substantive convergence and avoid the potential for discriminatory outcomes, the U.S. and its Indo-Pacific trading partners should agree to avoid adopting any measures that violate national treatment rules or give less favorable treatment to AI products or applications than they give to like products or applications without an AI component.

As a matter of good regulatory practice, the development and implementation of AI regulations should include: adopting a risk-based approach, including transparent processes for assessing, managing, and mitigating risks associated with specific AI applications; assessing whether potential risks can be mitigated or addressed using existing instruments and regulatory frameworks; considering whether any new or proposed regulation is proportionate in balancing potential harms with economic and social benefits; employing risk management best practices, including considering the risk-substitution impact of a specific AI application against a scenario where that application has not been deployed but baseline risks remain in place; and promoting the development of voluntary consensus standards to manage risks associated with AI applications in a manner that is adaptable to the demands of dynamic and evolving technologies.

In addition to trade rules, IPEF countries should work together to facilitate research and development of new applications of AI to address shared challenges; facilitate dialogues among all stakeholders including governments, civil society, academic, and the private sector on best regulatory practices; and pursue joint discussions on the responsible and ethical use of AI.

f. Following global practices on Internet access and interconnection policies.

Countries participating in the IPEF should work to protect the interoperable and interconnected nature of the global Internet architecture that enables cross border data flows, support principles of non-discrimination and market access to telecommunications networks, and enable stakeholders to negotiate the nature of services to be delivered across the network on a commercial basis.

There are recent legislative proposals that have threatened this approach by attempting to regulate interconnection charges between Internet service providers (ISP) and content providers,

and risk creating significant barriers to cross-border data flows by taxing the delivery of online content.²⁷ Globally, the business practice on Internet interconnection is for content providers and ISPs to enter into agreements through autonomous negotiations. An OECD paper found that 99.5% of interconnections are made without written contracts, and “the Internet model of traffic exchange has produced low prices, promoted efficiency and innovation, and attracted the investment necessary to keep pace with demand.” IPEF countries should ensure that Internet-based telecommunications service providers seeking to exchange of traffic with content and application providers, and vice versa, are able to negotiate with the other party on a voluntary and commercial basis, and that access to domestic telecommunications network should be on reasonable and non-discriminatory terms.²⁸

g. Avoiding unilateral and discriminatory taxation rules.

International trade requires a consistent and predictable international tax system, and tax measures play a significant role on global competitiveness of U.S. companies.

On October 8, 2021, the Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalization of the Economy was released outlining the agreed-upon framework for global corporate tax reform.²⁹ Pursuant to this commitment, all countries that have agreed to this framework cannot introduce any new unilateral measures and CCIA urges countries to abandon any national plans to implement national digital taxes and encourages policymakers to continue work on swift implementation of the global framework.

IPEF partners should continue efforts to implement this multilateral solution, and should commit to avoid any digital taxation measures that are discriminatory in nature and contravene long-standing principles of international taxation.

²⁷ See Hudson Institute, *A Harmful Step for the Internet in Korea* (Jan. 11, 2022), <https://www.hudson.org/research/17470-a-harmful-step-for-the-internet-in-korea>; see also Son Ji-hyoung, *GSM to press streaming platforms on network cost-sharing: KT CEO*, KOREA HERALD (Mar. 2, 2022), <http://www.koreaherald.com/view.php?ud=20220302000769>.

²⁸ U.S.-Korea FTA Article 14.2.

²⁹ OECD G20/Base Erosion and Profit Shifting Project, *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalization of the Economy* (Oct. 8, 2021), <https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf> (stating “The Multilateral Convention (MLC) will require all parties to remove all Digital Services Taxes and other relevant similar measures with respect to all companies, and to commit not to introduce such measures in the future. No newly enacted Digital Services Taxes or other relevant similar measures will be imposed on any company from 8 October 2021 and until the earlier of 31 December 2023 or the coming into force of the MLC. The modality for the removal of existing Digital Services Taxes and other relevant similar measures will be appropriately coordinated.”).

h. Addressing technical barriers to trade.

The Administration has limited the discussion of technical barriers to trade under the IPEF to the agriculture sectors. However, U.S. technology exporters face growing number of non-tariff measures such as technical regulations, conformity assessment practices, and standards-based measures. As noted elsewhere in these comments, adoption of global standards is critical to ensuring regulatory coherence and avoiding country-specific standards that deter market entry. Some U.S. cloud service providers (CSPs) have been unable to serve the public sector due to onerous security certification requirements that deviate from internationally accepted standards and make it impossible for CSPs to comply without creating a market-unique product, including physically segregating facilities for exclusive use for government-owned customers and onshoring data. The adoption of country-specific standards creates de facto trade barriers for U.S. companies and raises the costs of cutting-edge technologies for consumers and enterprises.

In the IPEF, the United States should (1) pursue commitments like those outlined in USMCA Chapter 11 on addressing technical barriers to trade; and (2) pursue commitments to follow good regulatory practices as detailed in Section VI of these comments in the development of standards, regulations, and conformity assessment procedures for services.

i. Non-discriminatory approach to cybersecurity certification.

Cybersecurity is essential as countries across the Indo-Pacific regions work to advance their digital transformation goals for their government, their economies, and their societies. However, there is a growing trend of governments using cybersecurity certification requirements to discriminate against foreign technology companies, particularly in the cloud sector. As noted previously, some countries in the Indo-Pacific region require government agencies, state-owned entities, and even critical infrastructure companies to select only from vendors with a national cybersecurity certification, which foreign companies are unable to meet. As part of the digital component in the IPEF, the United States should secure binding commitments from trading partners to adopt a risk-based approach to cybersecurity certifications, as well as to treat foreign companies no less favorably than local companies in the cloud sector, and specifically to agree that cybersecurity certification eligibility should not be conditioned on nationality of ownership of a cloud company seeking such certification.

j. Provisions to enable trade in electronic services.

Electronic payment (e-payment) systems which are interoperable across borders are critical in enabling the growth of cross-border digital trade. Trade policy can help drive the development of cross-border e-payment systems through commitments on the free flow of data including financial services data, promoting interoperability through international standards, and encouraging open innovation and competition through the adoption of open e-payment models such as real-time payments (RTP) systems and encouraging open application programming interfaces (APIs) to allow all e-payment service providers to compete.

Additionally, the United States should use the IPEF to pursue provisions on electronic signature, electronic authentication, paperless trading, and other best practices often included in trade agreements.

k. Copyright rules for emerging technologies.

A flexible copyright regime is necessary for the continued growth of the digital economy. Principles such as fair use are cornerstone of U.S. copyright law, and industries that rely on this right are a significant contributor to the U.S. economy and exports. CCIA released a report in 2017 on the economic contribution of fair use industries which found that these industries account for 16 percent of the U.S. economy and generate \$5.6 trillion in annual revenue.³⁰ Fair use is also critical to activities central to new areas of innovation and cutting-edge technology such as artificial intelligence and text and data mining.³¹

A balanced copyright regime with appropriate limitations and exceptions is also what Congress intended when it granted prior Trade Promotion Authority (TPA) in 2015. TPA provides that the principal negotiating objectives of the United States should include promoting intellectual property in a way that facilitates legitimate digital trade.³² Committee reports from both chambers of Congress contained identical language elaborating on this mandate, specifically recognizing that trade agreements should “foster an appropriate balance in copyright systems, inter alia by means of limitations and exceptions consistent with the internationally

³⁰ *Id.*

³¹ European Alliance for Research Excellence, *The Global AI Race* (June 2018), <http://eare.eu/assets/uploads/2018/06/Global-AI-Race.pdf>.

³² Section 102(b)(5)(A)(ii) of the Bipartisan Congressional Trade Priorities and Accountability Act of 2015.

recognized 3-step test.”³³ USTR has also noted that the United States “seeks . . . the commitment of our free trade agreement partners to continuously seek to achieve an appropriate balance in their copyright systems, including through copyright exceptions and limitations.”³⁴

Additionally, mandated technological protection measures (TPMs) are a frequent inclusion in U.S. trade agreements. Corresponding statutory exceptions to these anti-circumvention measures are a critical component of these provisions. Consistent with USMCA, any TPM provision should include exceptions to anti-circumvention that are consistent with 17 U.S.C. § 1201, including § 1201(f) on reverse engineering and interoperability, in providing limitations and exceptions to TPMs.³⁵

To the extent copyright considerations are included in the IPEF trade discussions, including in the digital trade pillar, the United States should secure commitments that reflect U.S. law and that will foster innovation in emerging technologies.

I. Online copyright enforcement for digital services.

Intermediary liability protections for Internet service providers, such as the framework in Section 512 of the Digital Millennium Copyright Act, have been critical to growing the U.S. digital economy by providing business certainty to U.S. investors and innovators.³⁶ U.S. trade policy has long reflected domestic copyright principles by including necessary intermediary protections for online services in trade agreements dating back to 2003.³⁷ USMCA continues this tradition, drawing directly upon Title 17 of the U.S. Code.³⁸ Ensuring these protections are included in trade agreements is also consistent with Congressional intent under prior TPA.³⁹

³³ S. REP. NO. 114-42, at 17 (2015), *available at* <https://www.congress.gov/114/crpt/srpt42/CRPT-114srpt42.pdf>; H. REP. NO. 114-100, at 45 (2015), *available at* <https://www.congress.gov/114/crpt/hrpt100/CRPT-114hrpt100-pt1.pdf>.

³⁴ OFFICE OF THE U.S. TRADE REP., *The Digital 2 Dozen* (2017), <https://ustr.gov/sites/default/files/Digital-2-Dozen-Updated.pdf>.

³⁵ USMCA, at art. 20.H.11.

³⁶ Matthew Le Merle *et al.*, *The Impact of Internet Regulation on Early Stage Investment* (Fifth Era 2014), <http://www.fifthera.com/s/Fifth-Era-report-lr.pdf>.

³⁷ *See* U.S.-Austl. Free Trade Agreement, May 18, 2004, 43 I.L.M. 1248, art. 17.11, para. 29; U.S.-Bahr. Free Trade Agreement, Dec. 7, 2005, 44 I.L.M. 544, art. 14.10, para. 29; U.S.-Chile Free Trade Agreement, June 6, 2003, 42 I.L.M. 1026, art. 17.11, para. 23; U.S.-Colom. Free Trade Agreement, Nov. 22, 2006, art. 16.11, para. 29; U.S.-S. Kor. Free Trade Agreement, June 30, 2007, art. 18.10, para. 30; U.S.-Morocco Free Trade Agreement, June 15, 2004, art. 15.11, para. 28; U.S.-Oman Free Trade Agreement, Jan. 19, 2006, art. 15.10, para. 29; U.S.-Pan. Trade Promotion Agreement, June 28, 2007, art. 15.11, para. 27; U.S.-Sing. Free Trade Agreement, May 6, 2003, 42 I.L.M. 1026, art. 16.9, para. 22.

³⁸ USMCA, *supra* note 4 at art. 20.J.10-11.

³⁹ H. REP. NO. 114-100, at 46 (2015) (“Strong intellectual property rights protection should be accompanied by provisions on liability that are consistent with U.S. law, including the Digital Millennium Copyright Act, and that provide limitations on the scope of remedies available against service providers for copyright infringements they do

To the extent copyright considerations are included in the IPEF trade discussions, including in the digital trade pillar, the United States should secure commitments that reflect U.S. law.

VI. TRANSPARENCY AND GOOD REGULATORY PRACTICE ISSUES.

International regulatory cooperation is an important tool for improving regulatory quality, reducing the likelihood of creating trade barriers or unnecessary regulatory differences, aligning regulation with shared principles and values, avoiding unintended consequences or conflicts with broader foreign policy objectives, building trust and expertise among regulators, and deepening understanding of trends in regulatory governance to inform current and future approaches to policymaking.⁴⁰

This is critical as countries move fast to introduce new regulatory frameworks on data governance, and seek to craft rules on the development of emerging technologies. Across digital governance frameworks, regulations should be non-discriminatory and principles-based, made pursuant to a transparent regulatory process, ensure due process to those affected, and include adequate safeguards to reduce the impact of any unintended consequences.

The United States should pursue binding commitments on good regulatory procedures that promote transparency and accountability in the development and implementation of regulations in the trade pillar of the IPEF. This includes provisions, like those secured in Chapter 28 of USMCA on transparent development of regulations (Art. 28.9), through timely publication of draft regulatory measures and public consultations, regulatory impact assessment requirements (Art. 28.11), and retrospective review of regulations (Art. 28.13). The IPEF further presents an opportunity to build off these provisions to include additional practices relevant for the regulation of the digital economy including through the promotion of international standards in regulation of digital services to enhance regulatory coherence and interoperability, and ensure that technical requirements are no more restrictive to trade than necessary to fulfill a legitimate government objective.

not control, initiate, or direct, and that take place through systems or networks, controlled or operated by them or on their behalf. Such limitations also must create legal incentives for service providers to cooperate with copyright owners in deterring the unauthorized storage, and transmission of copyrighted materials.”).

⁴⁰ See *CCIA Recommendation on U.S.-EU Trade & Technology Council: Incorporating Stakeholder Input within International Regulatory Cooperation* (Aug. 2021), <https://www.ccianet.org/wp-content/uploads/2021/09/CCIA-TTC-Recommendations-Incorporating-Stakeholder-Input-within-International-Regulatory-Cooperation-2021.pdf>.

The IPEF should also include services-specific “good governance” provisions that supplement the general good regulatory practice obligations detailed above. In USMCA, Article 15.8 of the Cross-Border Trade in Services chapter describing the “development and administration of measures” addresses matters such as fair administration of licensing procedures, and transparency and timeliness in regulatory processes. There are also provisions in Chapter 15 of USMCA that prevent active discriminatory measures on foreign services, placing clear obligations on governments to allow foreign suppliers to enter the market and provide digital services to business and consumers in their country. This includes provisions on “national treatment” (Art. 15.3), “most-favored-nation treatment” (Art. 15.4), the prohibition against quantitative supplier limitations (Art. 15.5), “local presence” (Art. 15.6), and “payments and transfers” (Art. 15.12).

VII. COMPETITION-RELATED MATTERS.

Competition provisions in trade agreements can help to propagate pro-competitive policies around the world. The United States and partners should promote and strengthen a common understanding of the importance of maintaining competitive markets that deliver long-run consumer welfare benefits. These provisions also foster convergence on substantive principles and procedural norms that increase legal certainty for businesses and consumers across multiple jurisdictions. To increase convergence, the parties should agree to avoid targeted rules or thresholds for specific sectors or groups of companies, which create the potential for discretionary or discriminatory implementation of competition rules, including in the digital context. As countries around the world, including those in the Indo-Pacific Region, look to review existing competition rules in light of the digitalized global economy, IPEF partners should work to ensure that any new approaches follow recognized good regulatory practices and avoid discriminatory measures that target one country’s exporters.

VIII. CUSTOMS AND TRADE FACILITATION ISSUES.

As part of a comprehensive approach to digital trade, the United States should pursue commitments in the IPEF that pertain to customs and trade facilitation like those secured in the USMCA. This includes setting eligibility for *de minimis* shipments in a manner that facilitates e-commerce including potential green lanes for shipments that arrive with greater advance data; avoiding unnecessary trade import licenses for important of digital hardware and software; requirements on information sharing between government and private sector entities on seizures;

strengthening informal entry language; and providing unified entry process through Single Window from all partner government agencies.

The United States should also use the IPEF to extend Authorized Economic Operator (AEO) mutual recognition agreements in the Indo-Pacific Region and obtain baseline commitments from IPEF countries to maintain AEO programs (as in USMCA Art. 7.14), and expand the AEO programs to include trusted trader programs for individual sellers that do business via trusted e-commerce marketplaces.

IX. ISSUES OF PARTICULAR RELEVANT TO SMALL AND MEDIUM-SIZED BUSINESSES THAT SHOULD BE ADDRESSED IN THE NEGOTIATIONS.

Digital services enabled businesses of all sizes and across different industries to continue operations throughout the COVID-19 pandemic, and access to digital tools can help SMEs overcome export challenges. The IPEF should have a dedicated work stream focused on helping SMEs throughout the Indo-Pacific region continue to grow and reach new markets, working to establish dialogue among interested stakeholders to identify ways and share best practices on how the digital economy can facilitate SMEs. Additionally, IPEF countries should commit to rules that ensure that licensing and registration procedures for exporters are simple, fair, and transparent. SMEs would also benefit from prohibition of local presence requirements.

X. CONCLUSION

CCIA supports the Administration's efforts to pursue a comprehensive strategy for engagement in the Indo-Pacific Region. Industry appreciates the opportunity to share its views on how the IPEF can lead to continued economic growth and U.S. competitiveness in the region through enhanced cooperation with key partners.

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Respectfully submitted,

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