

Biden Administration Digital Trade Policy Pivot: Facts vs. Myths

What just happened on “digital trade” that is making Big Tech lobbyists so mad?

Truth: On Oct. 25, Biden administration officials informed the World Trade Organization (WTO) that the United States would no longer support four specific provisions pushed by Big Tech lobbyists that the Trump administration had proposed in WTO “digital trade” negotiations. Those terms could internationally preempt data privacy and security, anti-monopoly, online civil rights and liberties, and AI policies being developed by Democrats and Republicans in Congress and by the Biden administration. USTR had suspended negotiations on similar terms in the Indo-Pacific Economic Framework (IPEF) this spring after [Democrats](#) and [GOP](#) in Congress, [digital businesses](#) like Yelp, [unions](#), [civil rights](#) and faith groups, [privacy](#) and [right-to-repair](#) advocates, and [consumer](#) groups raised concerns. U.S. officials remain engaged in the WTO talks and are pushing for a final deal in early 2024.

Big Tech Myth: The Biden administration withdrew from WTO digital negotiations.

Is this a big change to U.S. trade rules?

Truth: Yes and no: President Biden is being thanked [by Congress](#) and outside [groups](#) for derailing the Big Tech trade-pact hijack attempt. Corporate interests have often used closed-door trade talks to force international rules on Congress. So, it’s a big deal that the Biden administration protected domestic policy space. On the other hand, as a practical matter, **what U.S. trade officials just did was reaffirm longstanding U.S. trade pact e-commerce rules.** Since the early 2000s, some U.S. trade pacts have had “E-Commerce” chapters that set technical rules on online exchanges of goods and services, such as what is a legitimate digital contract and rules for “Paperless Trading.” The U.S. supports those rules at the WTO also. But what Big Tech interests branded as “digital trade” rules and started pushing recently is different. **The Big Tech digital trade agenda is about controlling countries’ domestic agendas by restricting or altogether forbidding common policies relating to online privacy and data security, tech anti-monopoly, and AI oversight even if they apply equally to domestic and foreign firms.** Big Tech lobbyists were able to slip extreme terms into the 2020 U.S.-Mexico-Canada Agreement (USMCA). But USMCA is one of the only agreements in the world with these provisions, which do not appear in other nations’ pacts that have digital terms or in past U.S. agreements. Few in Congress realized that USMCA even had a “Digital Trade” chapter until it was too late to get the terms removed (Then-Speaker Pelosi and some conservative GOP senators tried to do so when they became aware).

Big Tech Myth: U.S. trade officials have reversed longstanding U.S. trade rules.

Would the “digital trade” rules in question affect countries’ ability to regulate?

Truth: Unfortunately, there is a sorry history of trade agreements being used by industry to undermine domestic policies and to lock in special privileges. U.S. country-of-origin meat labels are just one recent fatality after a WTO tribunal authorized more than a billion dollars in sanctions per year until the policy was gutted. U.S. Clean Air Act rules and food inspection standards have also been rolled back among other successful trade-pact attacks on U.S. policies. Countries that have begun enacting digital oversight are now also facing such attacks on domestic policymaking via trade pact. Recently, a [European Union law on Artificial Intelligence oversight was significantly weakened](#) because a trade deal the EU had negotiated with the United Kingdom included the extreme source-code secrecy term for which U.S. officials just suspended support at the WTO. The result is that the new EU policy significantly limits when regulators can demand access to a high-risk AI application’s source code, *even when the regulators have reason to believe that the developer could be infringing the law!* **It is worth noting that [industry groups have spent years criticizing privacy laws and digital competition proposals in other countries as illegal trade barriers.](#)** This includes lobbying for U.S.

trade officials to attack Australia's News Media Bargaining Code and a similar Canadian policy that are almost identical to the U.S. Journalism Competition and Preservation Act bill. And attacks on Korea's App Store policy that is very similar to the U.S. Open Apps Market Act. Today the same corporate lobbyists are arguing there is no threat to digital regulation posed by the rules they seek. But, in fact there are years of written submissions related to [the U.S. National Trade Estimate](#) process where they argue the opposite. The only reason why those corporate digital policy complaints have not translated into formal trade challenges is because most agreements do not have the extreme "digital trade" rules needed to do so.

Big Tech Myth: Trade agreements cannot undermine domestic public interest policies. Countries have been able to enact digital privacy, AI, and competition regulation despite digital trade rules existing.

Don't these "digital trade" rules have exceptions that allow governments to regulate?

Truth: The "exceptions" to the provisions in question are designed not to work. **The data flows provision appears to provide a "public policy" exception, but it replicates controversial terms from the General Agreement on Trade and Tariffs (GATT) exceptions that sets limitations that have resulted in the GATT version of the language being [rejected in 46 of 48 attempts](#) by countries trying to use it to protect their domestic policies over many decades.** Another provision from which the United States withdrew support provides new secrecy rights for Big Tech to evade government oversight of AI and to derail right-to-repair policy. It would forbid government officials from being able to review source code or even get detailed algorithm descriptions to screen for racial discrimination or anti-competitive self-preference violations or require firms to provide consumers with software updates or digital keys. The "exception" to this is so narrow that the provision would undermine numerous proposed bills to stop online civil rights and liberties violations and most forms of AI oversight.

Big Tech Myth: Some of these provisions have exceptions, so nothing to worry about!

Why does China keep getting mentioned in relation to these digital trade rules?

Truth: One of the WTO rules from which U.S. officials withdrew support would ban government regulation of data flows. Yet **a growing number of U.S. proposals restrict data from going to China. Trade rules that guarantee unregulated data transfers would facilitate movement of U.S. residents' data to China. Proposals to require TikTok to keep U.S. users' data out of China or bills like the Protecting Americans' Data From Foreign Surveillance Act of 2023 would be forbidden.** That bill, sponsored by Sen. Wyden (D-Ore.) and Rep. Davidson (R-Ohio) with bipartisan cosponsors, forbids offshore transfer of large sets of U.S. personal data when a transfer could threaten national security. The bill specifically bans movement of large sets of U.S. data to "high-risk" countries, which would include China and Russia. Yet both are part of these WTO talks and when the Trump administration signed on to the problematic data flows provision, it did not propose a national security exception. Since then, WTO tribunals ruled against the United States *twice* when U.S. officials raised the GATT Art. XXI Security Exception to defend U.S. policies on China. The WTO ruled that the WTO, not the United States, decides when there is an "emergency in international relations" that justifies use of this exception and that the U.S.-China situation did not qualify. So even if a security exception were added, it is no guarantee that a WTO tribunal would allow its use to safeguard a U.S. policy limiting data flows to China. That's why ending U.S. support for the extreme data flow provision is a smart move that protects U.S. national interests. Big Tech firms seeking unlimited control over our data want to shift the debate away from their attempt to use "digital trade" rules to do so. Thus their claim that somehow the administration move "helps China." In fact, the United States ceding all control over data flows would be a boon for China.

Big Tech Myth: The U.S. action at WTO gives China control of U.S. data.

For More Information: <https://rethinktrade.org/digitaltrade/> or info@rethinktrade.org