

Key Upcoming Opportunities Will Test Biden Administration's Approach to Digital Trade Issues

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The Biden Administration is facing several upcoming decisions that could advance its approach to addressing digital trade issues through multilateral action.

First, momentum is growing for the United States to join Asia-Pacific countries in forming a multilateral digital trade agreement to counteract China's restrictive data policies. Second, at the World Trade Organization (WTO), parties are discussing whether to extend or alter the moratorium on imposing customs duties on e-commerce transactions.

These two issues will give insight into the Office of the U.S. Trade Representative's (USTR) priorities and approach to addressing multilateral digital trade issues. They also will provide opportunities for U.S. companies and industries to have input into upcoming negotiations.

Asia-Pacific Digital Trade Agreement

USTR appears to be laying the groundwork for an Asia-Pacific digital trade agreement to counter Chinese influence in the region. U.S. Trade Representative Katherine Tai recently held meetings with officials from Asia-Pacific countries to discuss digital trade.

Any multilateral digital trade agreement in the Asia-Pacific region will likely contain elements and objectives from other existing agreements, such as the Chapter 19 of the U.S.-Mexico-Canada Agreement (USMCA) or the U.S.-Japan Digital Trade Agreement. These agreements affirm the importance of access to the internet for

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digital trade, prohibit most restrictions on cross-border data transfers, and reaffirm non-discriminatory treatment of digital products. Including provisions that combat data localization in a potential Asia-Pacific agreement would be an especially clear message to China.

An Asia-Pacific agreement may also build on existing digital trade agreements in the region. Tai has recently held meetings with leaders in Asia-Pacific countries with existing digital trade agreements of their own. In July, Tai met with Australia's Minister for Trade, Tourism, and Investment to discuss developing a policy on digital trade "that supports the digital economy and addresses the needs of workers, recognizing the importance of collaboration among those with open, free, democratic systems." Tai also met with Singapore's Trade and Industry Minister Gan Kim Yong to discuss digital trade and U.S. engagement in Southeast Asia and the Indo-Pacific region.

Notably, in August 2020, these two countries entered into the Singapore-Australia Digital Economy Agreement, which covers artificial intelligence, data innovation, digital identities, personal information protection, and e-invoicing, among other areas. This was Singapore's second digital trade agreement after it entered into the Digital Economy Partnership Agreement (DEPA) with Chile and New Zealand earlier last year. As with the USMCA, the DEPA agreement features assurances of cross-border data flows, protection of personal data, and open access to government data.

However, an Asia-Pacific digital trade agreement would face multiple hurdles. First, the Biden Administration has emphasized that any trade agreement must align with the Administration's worker-centric trade policies. Second, pursuing strategic action to counteract China will involve numerous national security decision-makers within the Administration. As the *Wall Street Journal* reported, National Security Council and State Department officials likely want to help shape any digital trade rules used to limit Chinese influence. Finally, the Biden Administration will need to draft an agreement in a way that avoids needing Trade Promotion Authority.

WTO Moratorium on E-Commerce Customs Duties

Since 1998, the WTO has maintained a moratorium on imposing customs duties on electronic commerce. The e-commerce moratorium has become a key principle supporting the global digital economy. The WTO Work Programme on Electronic Commerce was established in September 1998 to address global trade issues involving e-commerce and describes e-commerce as "the production, distribution, marketing, sale or delivery of goods and services by electronic means." The second session of the WTO Ministerial Conference imposed this moratorium with the expectation that the decision would be reviewed at subsequent ministerial conferences. In December 2019, as part of the eleventh Ministerial Conference, the General Council again agreed to continue the moratorium. However, shortly after the most recent continuation, representatives from developing nations described the moratorium's negative effects as equivalent to "giving the digitally advanced countries duty-free access to {developing} markets."

In advance of the Twelfth Ministerial Conference, to be held from November 30, 2021 through December 3, 2021, WTO members agreed to review the scope, definition, and impact of the moratorium. While WTO members have traditionally supported the moratorium, the movement to terminate it – led by India and South

Africa – is gaining support. While unlikely, revoking the moratorium would be a sea change in global e-commerce. Even a loosening in the moratorium would have far-reaching effects for companies conducting cross-border digital transactions. The WTO must announce any changes to the moratorium at the Ministerial Conference.

As of now, the parties are no closer to finalizing any changes to the e-commerce moratorium, despite the impending Twelfth Ministerial Conference deadline. While it is unlikely the moratorium will be lifted—given its broad support—the terms may be changed or clarified. For example, at a recent meeting of the Work Programme on Electronic Commerce, presenters highlighted calls to define the terms of “electronic transmissions” and the scope of the moratorium, requests to clarify the types of goods classified as e-commerce transactions (*i.e.*, services vs. goods), and inquiries into the fiscal implications of the moratorium.

The United States has repeatedly reiterated its support for the e-commerce moratorium across multiple administrations. In USTR’s 2021 Trade Policy Agenda and 2020 Annual Report, it reaffirmed that it has “continued to work to develop support for making this moratorium permanent and binding under the WTO.” Further, USTR has received increasing calls from U.S. industries to take a more aggressive role in WTO discussions to ensure a moratorium extension is included in the Twelfth Ministerial Conference.

Wiley’s Digital Trade Group is monitoring these issues and has experience negotiating key digital trade, e-commerce, and telecommunications-related provisions of bilateral and multilateral agreements. For more information, please contact the authors.