

International Preemption by “Trade” Agreement: Big Tech’s Ploy to Undermine Privacy, AI Accountability, and Anti-Monopoly Policies

Daniel Rangel, Lori Wallach | March 2023

Nearly every aspect of Americans’ lives are affected by the digital realm. The 117th Congress featured an unprecedented array of bills aimed at mitigating harms to workers, consumers, and smaller firms from the Big Tech giants that now dominate global retail, advertising, transportation, and other sectors. This included initiatives to protect privacy, limit online commercial surveillance, counter exploitation of personal data by digital firms or malign governments, ensure that artificial intelligence (AI) systems do not mask discrimination or deliver inaccurate outcomes, and break monopolistic abuses. Most of these proposals did not become law thanks to Big Tech lobbying. But public support for regulating the digital economy is only growing: Many of the bills will be reintroduced in the new Congress.

One powerful, if stealthy, strategy Big Tech is prioritizing to derail regulatory efforts here and around the world is a form of international preemption. The goal is to lock the United States and other countries into binding international rules that forbid digital governance initiatives. This would effectively excavate the policy space out from under Congress and the administration. Big Tech giants have spent billions on lobbyists and PR to brand these rules as “digital trade.” Their strategy is to use arcane, secretive trade negotiations to limit, if not outright ban, governments from enacting or enforcing domestic policies to counter Big Tech privacy abuses, online surveillance and discrimination, labor violations, monopolistic misconduct and other threats that threaten our economy and democracy.

This policy brief ([full document here](#)) uses excerpts from 117th Congress bills and administration policy documents to show the direct conflicts between prominent U.S. domestic digital governance proposals and the “digital trade” agenda that Big Tech interests seek in current trade negotiations.

This is not a hypothetical danger. Special interests have rigged past trade pacts to achieve unpopular agendas unrelated to trade. For instance, 1990s trade agreements included rules requiring the United States to extend drug patents from 17-year to 20-year monopoly terms after Big Pharma was unable to win this price-boosting change in Congress despite decades of trying.¹

¹ See eg. Schondelmeyer SW, “Economic Impact of GATT Patent Extension on Currently Marketed Drugs,” PRIME Institute, College of Pharmacy, University of Minnesota, 1995.

Today Big Tech lobbyists are trying to exploit trade jargon and closed-door negotiations to push for “digital trade” rules that handcuff Congress and regulators. Their first target is Indo-Pacific Economic Framework (IPEF) negotiations, which aim to set rules for 40% of the world economy. Americas Partnership for Economic Prosperity (APEP) talks, those proximate to the World Trade Organization, and in the U.S.-EU Trade and Technology Council are also at issue. The industry-favored terms not only conflict with congressional proposals but with the White House Blueprint for an AI Bill of Rights and Executive Order 14036/2021 on Promoting Competition in the American Economy. If this strategy succeeds, rules shielding Big Tech abuses would be imposed via the backdoor of “trade” pacts covering much of the world economy, even as anger about Big Tech grows across partisan lines.

The Trump administration included a pro-industry Digital Trade chapter in the U.S.-Mexico-Canada Agreement (USMCA). USMCA Chapter 19 expands on what was viewed as Big Tech-rigged rules in the Trans-Pacific Partnership (TPP). Many of the USMCA’s restrictions on domestic policy are not in other nations’ pacts that have digital terms. Corporate interests have been clear that their goal is to replicate the USMCA/TPP approach to “digital trade” rules in current trade talks, and with respect to some sensitive issues push for broader prerogatives for tech firms and new limits on governments.²

The key USMCA “digital trade” terms that Big Tech wants included in IPEF and other pacts conflict with digital governance initiatives here and abroad. In this policy brief, we examine three of the most invasive USMCA provisions that collide with U.S. policy initiatives. These include:

- **New Secrecy Guarantees that Forbid Screening of Algorithms and Code for Racial Bias, Labor Law Violations, or Other Abuses – USMCA Article 19.16 (Source Code):** In conflict with core concepts in the administration’s Blueprint for an AI Bill of Rights, the American Data Privacy and Protection Act’s rules on civil rights and algorithms, and the Facial Recognition Act of 2022’s testing requirements, among other policies, this term would ban governments from prescreening or conducting general reviews of AI code or algorithms for racial and other forms of discrimination, labor law or competition policy violations, biases in criminal justice applications, and more. This is a uniquely extreme provision: Only 11 of the almost 200 agreements with digital trade or e-commerce terms in the entire world create new algorithmic secrecy guarantees for Big Tech firms.³ And USMCA’s language is the most extreme of these, as it also appears to prohibit governments from requiring even descriptions of algorithms and their uses, in addition to secrecy rights for the detailed source code developed by programmers.

² See U.S. Chamber of Commerce, *The Digital Trade Revolution*. p. 16. Available at: https://www.uschamber.com/assets/documents/Final-The-Digital-Trade-Revolution-February-2022_2022-02-09-202447_wovt.pdf; Christine Bliss, Coalition of Services Industries, Testimony, Senate Finance Subcommittee on International Trade, Wed. Nov. 30, 2022. Available at: <https://www.finance.senate.gov/hearings/opportunities-and-challenges-for-trade-policy-in-the-digital-economy>.

³ Calculations made using the TAPED dataset, “The Governance of Big Data in Trade Agreements,” Universities of Lucerne and Bern. Accessed on Oct. 3, 2022. Available at: <https://www.unilu.ch/en/faculties/faculty-of-law/professorships/managing-director-internationalisation/research/taped/>.

- No Limiting Firms' Control of Data, Including Rights to Move, Process, and Store Personal Data Wherever the Firms Choose – USMCA Article 19.11 (Cross-Border Transfer of Information by Electronic Means) and Article 19.12 (Location of Computing Facilities):** The goals and terms of policies like the American Data Privacy and Protection Act and My Body, My Data Act of 2022, or similar legislation, could be undermined if firms can simply evade obligations to eliminate private data per users' requests or minimize collection by transferring data to another firm in a jurisdiction where U.S. law enforcement cannot reach or if an offshore processor is able to sell data onward to another firm that is located in a country where no protections apply. Yet, addressing those issues would likely conflict with the USMCA-style rules prohibiting government regulation of data that industry seeks for the IPEF and other pacts. The terms Big Tech seeks also would directly forbid security initiatives such as the Protecting Americans' Data From Foreign Surveillance Act. This bipartisan bill would enact export controls on transfer offshore of certain personal data when it threatens U.S. national security. Only certain countries would be eligible to receive Americans' personal data without being subject to controls and flows to some nations would be banned, both of which violate the USMCA-style rules sought for IPEF. The industry-favored rules would also forbid proposals to require sensitive infrastructure data to be held on U.S. servers and various proposals to limit flows of Americans' data to China.
- Designation of Key Anti-Monopoly Policies as Discriminatory Illegal Trade Barriers – USMCA Article 19.4 (Non-Discriminatory Treatment of Digital Products):** This broad provision brands policies that treat foreign and domestic firms the same, but have a greater impact on bigger firms, as illegal trade barriers that must be eliminated. USMCA and TPP have an extreme version of this rule while previous U.S. pacts' e-commerce chapters were more nuanced. Industry filings for the National Trade Estimate reports reveal how U.S. tech lobbyists have used the underlying concept to try to attack cutting-edge anti-monopoly policies around the world. This includes policies in effect in other countries that Congress also is considering:

 - South Korea's App Stores Law that, like S. 2730/H.R.5017 The Open App Markets Act,** requires app stores to allow diverse payment systems (not only their own) and to not forbid app developers from selling on other platforms;
 - Australia's News Media Bargaining Code, a law similar to S.673/H.R.1735 The Journalism Competition and Preservation Act** that remedies Big Tech platforms' monopolization of ad revenue and decimation of local journalism by creating the conditions for digital platforms to pay for the news they distribute;
 - EU's Digital Markets Act**, the European Union's crackdown against abusive behavior by dominant digital firms, which shares many elements of S.2992/H.R.3816 The American Innovation and Choice Online Act and the imposition of data portability and interoperability requirements on large online platforms of the H.R.3849 Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act of 2021;

- **EU's Digital Services Act**, which establishes consumer rights online like [S.1896/H.R.3611 The Algorithmic Justice and Online Platform Transparency Act](#); and
- **Germany's GWB Digitization Act**, a competition law revamp that proactively prevents anticompetitive actions by the biggest digital players, which shares some elements with the [S.3847/H.R.7101 Prohibiting Anticompetitive Mergers Act](#), such as restricting the anticompetitive behavior of dominant firms and modernizing antitrust law to deal with the realities of digital markets.

Many of the “digital trade” rules pushed for IPEF and other pacts by Big Tech interests are written using trade jargon that has specialized meanings. For instance, some provisions seemingly include exceptions. But these either are not clear and broad enough to safeguard the policy space needed for essential digital governance policies or they replicate controversial terms from the General Agreement on Trade and Tariffs’ (GATT) general exceptions. These exceptions have failed in all but two of 48 attempted uses thanks to language replicated in the digital trade rules, such as a ‘necessity test’ and a burden for governments to prove that a policy is not a ‘disguised restriction on trade.’⁴

The lack of U.S. domestic digital governance policy makes the threat posed by international preemption via “digital trade” rules in trade negotiations particularly dangerous. Congress has not established national privacy or data safety protections or created rules so that AI uses do not undermine civil, labor, and other rights, or set parameters to ensure fair digital markets. That means negotiators effectively are making U.S. law as they negotiate international rules, rather than being guided by domestic policies already established by Congress.

The bottom-line is that the USMCA and related TPP digital rules that represent the agenda promoted by Big Tech interests must not become the model or starting text for future agreements. And indeed, the provisions in the few existing pacts that include such rules must be revised to ensure the United States and others countries’ retain the ability to adopt effective policies required to ensure the health of both our economy and democracy in a digital age.

⁴ Daniel Rangel, “WTO General Exceptions: Trade Law’s Faulty Ivory Tower,” Public Citizen’s Global Trade Watch, Jan. 2022. p.18-19. Available at: <https://www.citizen.org/article/wto-general-exceptions-trade-laws-faulty-ivory-tower/>.