



Ms. Katherine Tai
United States Trade Representative
Office of the United States Trade Representative
600 17th St., NW
Washington, DC 20006

Dear Ambassador Tai:

On behalf of the Software & Information Industry Association (SIIA), we congratulate you on your confirmation to be the United States Trade Representative (USTR). SIIA is the only professional organization connecting more than 700 data, financial information, education technology, specialized content and publishing, and health technology companies. Our diverse members manage the global financial markets, develop software that solves today's challenges through technology, provide critical information that helps inform global businesses large and small, and innovate for better health care and personal wellness outcomes.

SIIA strongly supports the trade enforcement emphasis articulated by the Administration. In addition, we suggest the Administration conclude the trade negotiations with the UK, EU and Kenya, which would make an important contribution in reinforcing President Biden's strategy of engaging with allies in order to ensure that liberal democracies set the rules for commerce and other exchanges in the coming years.

Focus on Enforcement

SIIA was founded to protect the intellectual property of our membership, and we have a long history in both domestic and international policy advocacy and antipiracy work on their behalf. SIIA appreciates your interest in ensuring that our trading partners respect their commitments, and we stand ready to help the U.S. government achieve that goal. Both on our own and through the Alliance for Trade Enforcement (AFTE)^[1], SIIA supports more enforcement resources for U.S. government agencies and the enforcement of existing commitments in the digital trade and intellectual property rights spaces.

While Focusing on Enforcement, Conclude UK, EU and Kenya Trade Agreement Negotiations

While addressing domestic priorities are of paramount importance, concluding the negotiations would have ramifications that go beyond trade. These trade deals would provide the United States with the opportunity to shape rules – particularly in the digital sector – as it competes with China. The fact that the UK and EU are high wage/strict environmental protection trading partners should be received well by the Congress. Assuming a deal with Kenya includes similar labor and environment protections as those found in the United States Mexico Canada Agreement (USMCA), making a deal with Kenya should be possible as well. We note also that the Chairman of the House of Representatives Ways and Means Committee, Richard Neal, has expressed support for finalizing talks with the UK and Kenya this year and for reinvigorating the negotiations with the EU.^[2]

Ensure That the USCMA's Digital Trade, Intellectual Property, Labor and Environment Commitments Are Enforced

The USMCA sets a strong standard for digital trade and intellectual property rights commitments. SIIA very much appreciates your major contribution in shaping this agreement while you were House of Representatives Majority Chief Trade Counsel, which resulted in historically high numbers of both Democrats and Republicans voting for the accord. We hope that USTR will work to ensure that all the commercial commitments, including in the digital and intellectual property rights areas, are upheld as well as the labor and environmental commitments.

Raise National Treatment and Non-Discrimination Arguments With Countries That Do Not Have Explicit Digital Trade Obligations

Unfortunately, there are many U.S. trading partners that do not have explicit digital trade obligations. However, they are committed to National Treatment and Non-Discrimination for U.S. exporters. So, for example, the Dec. 2, 2019 conclusion^[3] of USTR's 2019 investigation into the French Digital Services Tax (DST) already provides a good legal basis for the Biden Administration to oppose unilateral DSTs more broadly. You may also find useful the USTR June 2, 2020 Section 301 investigations^[4] into proposed DSTs from Austria, Brazil, the Czech Republic, the EU, Indonesia, Italy, Spain, Turkey and the UK. We appreciate USTR advocacy for fair arbitration mechanisms for U.S. firms, for instance in the context of the Australia Bargaining Code. It is possible that proposals similar to the Australia Bargaining Code could appear in other countries so continued vigilance is needed.

Revitalize Respect for Intellectual Property Rights and Uphold the “Three-Step Test”

SIIA appreciates President Biden's historically strong support for Intellectual Property Rights and his interest in preventing China from stealing American-developed intellectual property. Many of our members are scientific, technical and medical publishers who have voluntarily made their works freely available in order to aid the development of vaccines, therapeutics and treatment for COVID-19. When U.S. trading partners permit the use of these copyrighted materials through government action, however, they are bound by the three-step test in the Berne Convention and the TRIPS agreement. That test permits signatories to craft exceptions and limitations to exclusive rights in special cases, but those exceptions must not interfere with the normal exploitation of the work nor unreasonably interfere with the legitimate interests of the author. SIIA is concerned that some of our trading partners may use the pandemic as justification to enact measures that would threaten the incentives that result in the creation of these valuable works. We therefore encourage USTR to remind trading partners that as governments, for instance, seek to provide an enabling environment for the use of artificial intelligence in advanced text and data mining, that the certainty of licensing arrangements should be respected. Similarly, we urge USTR's continued vigilance regarding South Africa to ensure that possible new amendments to the Copyright Law there do not run afoul of the three-step test. We also encourage you to work with the U.S. Patent and Trademark Office and the broader interagency to ensure that the World Intellectual Property Organization (WIPO) prioritizes implementation of WIPO treaties, rather than normative work.

Push Back Against Digital Protectionism Globally and Especially With the EU

SIIA supports a coordinated and comprehensive USG approach to fully address the rapidly worsening and global trend toward data protectionism, particularly with respect to regulatory frameworks that seek to inhibit the secure and free flow of data in the name of data privacy. Of paramount importance is the need for special and early attention to the ongoing risks to our transatlantic trading partnership resulting from the Schrems II ruling that invalidated the Privacy



Shield agreement, which potentially disrupts billions of dollars' worth of transatlantic trade. We encourage the Administration to leverage all diplomatic, legislative, policy and enforcement resources to develop a permanent solution for the continuity of secure and lawful data transfers. This should include: (1) calling on European regulators to implement a moratorium on enforcement actions, regulatory guidance and other decisions relating to transatlantic data flows in order to give the United States and the European Commission time to meaningfully negotiate a refreshed Privacy Shield Framework that addresses the concerns raised in the Schrems II ruling, (2) prioritizing the Privacy Shield negotiations and identifying solutions (including Executive Orders and legislation to address any gaps in U.S. law requiring immediate remediation) in order to resuscitate the Privacy Shield Framework and ensure the continuity of secure and lawful data flows, (3) leveraging the USTR's expertise and authority with respect to our trade priorities and/or enforcement options, including making it clear that a trade deal with the EU is not possible without a durable data flows agreement and, where appropriate, raising concerns about the failure to give U.S. firms national treatment and the potential inapplicability of the WTO necessity test with respect to restrictions on transatlantic data flows, and (4) pursuing other long-term and permanent solutions, including passing a federal data privacy law and seeking an adequacy determination from the European Commission and participating in the development of non-binding principles for transfers of data with like-minded allies.

Consider Supporting the EU Proposal for an EU-US Trade and Technology Council

We hope the Council would provide a way for the United States and the EU to expand bilateral trade and investment and provide impetus for a U.S.-EU trade deal. In addition, if created the Council should forge common approaches in helping to ensure that democracies set the rules for global technology policy – for instance, through cooperation in international bodies such as the International Telecommunications Union (ITU). Joint approaches to technology standard setting could be explored. Cooperation on investment screening and export controls should fall within the remit of the Council. Furthermore, the Council might be a good venue for the Administration to argue that aspects of the Digital Service Act and Digital Markets Act – especially ex ante provisions directed at large online service providers – could be considered discriminatory as they are clearly directed at U.S. firms. The Administration should argue forcefully that it would be better for both the EU and the U.S. to avoid divergent and/or discriminatory regulations and instead forge a common approach to combat digital restrictions in China and other markets.

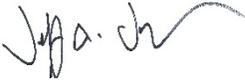
Work With Allies and With the World Trade Organization (WTO) to Address Market Access in China

The Biden Administration has a full agenda with respect to China, including strong concerns surrounding tariffs and bans on doing business with certain companies. The payoff associated with establishing a joint allied approach to dealing with China – arguably perhaps more realistic now given many countries' growing concerns regarding China – suggests that decisions with respect to these matters should factor in their potential impact on establishing joint allied approaches to China. The priority should be to eliminate cloud service provider restrictions, drop online video services prohibitions, suppress joint venture requirements, and even limit the Great Firewall. Chinese restrictions are clearly discriminatory and the U.S. should explore the possibility of finding countries to potentially join a WTO case against these practices. Finally, SIIA supports the U.S. engaging on making the WTO's dispute settlement system functional again.



Again, we very much look forward to working with you and your colleagues to fashion a trade policy that works for the American middle class, continues and expands U.S. leadership in innovation, and complements the Biden Administration's domestic priorities.

Sincerely,



Jeff Joseph
President and CEO
SIIA

[1] Alliance for Trade Enforcement
<https://enforcementalliance.org/>

[2] GHY, "Key House Democrat 'Hopeful' Trade Deals with UK and Kenya Can be Completed in 2021," February 10, 2021
<https://www.ghy.com/trade-compliance/key-house-democrat-hopeful-trade-deals-with-uk-and-kenya-can-be-finalized-i/>

[3] USTR, "Conclusion of USTR's Investigation under Section 301 into France's Digital Services Tax," December 2, 2019
<https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/december/conclusion-ustr%E2%80%99s-investigation#:~:text=Washington%2C%20DC%20%E2%80%93%20The%20U.S.%20Trade,international%20tax%20policy%2C%20and%20is>

[4] USTR, "USTR Initiates Section 301 Investigations of Digital Services Taxes," June 2, 2020
<https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/june/ustr-initiates-section-301-investigations-digital-services-taxes>

