



Promoting Development of Transparent, Non-Discriminatory Digitally Enabled Services Standards and Conformity Assessment Regimes

January 2023

US enterprises, workers, and their dependents are directly impacted by the acts, policies, and practices of China, Korea, the EU, and other trading partners to condition market access upon compliance with country-unique standards, technical regulations, and conformity assessment procedures that favor local enterprises in those countries. These acts, policies and practices do not simply jeopardize the access to those specific markets that USTR has negotiated on behalf of US enterprises and their workers. The challenge is more pervasive because neighboring countries may also seek to adopt or emulate the discriminatory standards and other measures developed by these highly influential trading partners.

When trading partners like the EU, Korea, and China implement mandatory national standards that are not interoperable and via processes that exclude foreign (especially US-based) enterprises, it has a direct impact on the livelihoods of American workers whose jobs depend upon the exportation of US-delivered services built around international consensus-driven standards.

This paper identifies the challenges to US interests arising from the application of country- or region-specific technical requirements or standards (sometimes mandated via conformity assessment procedures or other means) to services that are delivered or performed electronically (“digitally enabled services”). It also proposes possible solutions to this challenge and introduces several draft trade agreement provisions.

It is important to note at the outset that trade disciplines on standards for digitally enabled services are highly compatible with a government’s right to regulate and would in no way undermine that right. Indeed, we believe the proposal we describe below would be consistent with the approach taken in the recently agreed upon WTO Domestic Regulations text, Good Regulatory Practices provisions in FTAs, and General Agreement on Trade in Services (GATS) transparency provisions, and should also be informed by relevant provisions of the WTO Technical Barriers to Trade (TBT) Agreement. All of these trade commitments support the adoption of a transparent, non-discriminatory regulatory approach while respecting domestic regulatory authority.

Disciplines on standards for services can benefit the US services workforce because such disciplines can help prevent the loss or erosion of existing foreign export market access through the imposition of discriminatory standards that favor local enterprises and that exclude US-origin services. Such disciplines will tend to have particular value for smaller services firms because small-and medium-sized enterprises (SMEs) are less equipped to bear the higher costs and greater trade frictions that have resulted from growing standards-related digital fragmentation.

In describing rising fragmentation and trade barriers in the development and application of digitally enabled services standards, it is helpful to first define what we mean by standards, technical regulations, and conformity assessment regimes. According to the International Standards Organization (ISO), a technical standard is one that provides technical requirements, specifications, guidelines or characteristics that can be used consistently to ensure materials, products, processes, or services are fit for their purpose. For example, a technical standard could be an operating system for a cell phone that governs the interface with applications used on the phone.

A technical regulation is one that provides technical requirements either directly or by referring to or incorporating a standard, technical specification or code of practice. Technical regulations are typically mandatory, while standards -- although sometimes mandated in order to supply a product or service -- are usually voluntary. Finally, a conformity assessment regime consists of procedures used to determine that relevant requirements in technical regulations or standards have been met. For example, to provide cloud services to government agencies, a government might establish a certification requirement to ensure the product complies with specific technical regulations and standards.

I. How Deviation from International Standards Negatively Impacts Services Trade and Economic Competitiveness

International, voluntary, industry-driven standards have proven essential to the development of interoperable technical regulatory requirements for goods. Such standards not only generate efficiencies of scale and expedite the development and distribution of new innovations, but they are also the basis for technical regulations that are neither discriminatory nor unnecessarily restrictive.

However, in digital services, governments are increasingly applying technical regulations or technical standards-based governance approaches that disregard relevant international standards, including in areas such as cybersecurity and cloud computing where the United States benefits from a particularly skilled workforce with which many other countries are unable to compete. Efforts by those trading partners to exclude the services generated by American workers have a direct and material impact on US jobs and prosperity.

Furthermore, some governments are attempting to reduce opportunities for input from foreign countries. As a case in point, the European Commission has said it is seeking to lessen the “undue influence of actors from outside the EU and EEA” in the area of standards.

Consider the EU’s approach to digital IDs, which provide a way of verifying identity. Some U.S. states have already issued digital IDs, using technology based on a standard developed at ISO. However, the EU has appointed an expert group to develop its own specifications, without a clear instruction that this group base its work on the applicable ISO standard. Whether the EU’s specifications will be aligned with existing international standards is an open question. If more governments prioritize local standards over international standards, the result will be a complicated patchwork of country-specific products, hurting exporters and needlessly complicating global trade.

For American enterprises and workers that have invested and trained to deliver services designed to meet existing international standards (e.g., ISO/IEC or IEEE standards relating to privacy, cybersecurity, and AI-based services), it is manifestly unfair for a country to unilaterally declare that those services can no longer be offered to local consumers because the services do not meet a newly developed national with which only domestic enterprises are able to comply.

Other examples of problematic measures and processes include:

- A certification process with requirements that essentially force companies to create unique products just for that market. For example, Korea’s Cloud Security Assurance Program (CSAP) requires cloud suppliers to segregate their computing facilities for exclusive use of government-owned customers, forcing suppliers to produce a Korea-specific product. And the impact of CSAP is not confined to the Korean government market: in some cases, the Korean bureaucracy has also advised private sector organizations to use services from CSAP-certified providers.
- The absence of due process safeguards that are typically part of international standards development. This can result in country- or region-specific government-directed groups that are directed to establish technical requirements or standards for particular technologies but lack the due process and inclusiveness that are typically part of multi-stakeholder international standards development processes;
- Measures requiring certification that aligns with unique national requirements or encryption standards, which are not consistent with international standards;

- And public procurement criteria for emerging technologies, such as AI, Blockchain, or cloud computing that mandate the use of domestic technical requirements, national standards, local testing bodies, or technology that discriminate against foreign suppliers or otherwise preference local services and/or suppliers.

Current Gaps in Coverage by International Trade Rules

Currently, the coverage by international trade obligations of digitally enabled services falls into a “grey area” in existing rules regarding standards and technical regulations used for conformity assessment.

GATS: While GATS contains some disciplines on regulatory matters, they are weak, falling short of TBT disciplines, and their application is limited to sectors in which WTO Members have undertaken express market access commitments.

The GATS includes general transparency obligations under Articles III and VI regarding measures of general application affecting trade in services. Article III includes requirements that apply on an MFN basis for prompt publication of “relevant measures of general application” which affect the operation of the GATS and to respond to requests for information regarding a measure or international agreement affecting trade in services and to establish a national point of inquiry. Article III also contains a requirement that in areas in which they have taken specific market access commitments, WTO Members must notify the Council for Trade in Services at least annually on any new or amended laws or regulations which “significantly affect” trade in services for services sectors covered in their GATS schedules.

While the transparency elements of Article III are particularly weak, Article VI provides some greater specificity as to the administration of services regulation, requiring in Article VI.1 that in all sectors where a WTO Member has taken specific commitments they must ensure that measures of general application affecting trade in services must be administered in a reasonable, objective and impartial manner. In order to try to ensure that measures relating to qualification requirements and procedures, technical standards and licensing requirements, do not create unnecessary barriers to trade, Article VI.4 directed the “Council for Trade in Services..., through appropriate bodies it may establish,” to “develop any necessary disciplines” to ensure that such requirements are based on objective and transparent criteria, and not “more burdensome than necessary to ensure the quality of the service.”

Services Domestic Regulation Reference Paper: The negotiating mandate provided under GATS Article VI.4 ultimately produced a Reference Paper on “Services Domestic Regulation,”¹ which builds on the limited domestic regulation provisions contained in Article VI of the GATS, specifically Article IV:4. The scope of the Reference Paper includes disciplines that, “... apply to measures by Members relating to licensing requirements and procedures, qualification requirements and procedures and technical standards affecting trade in services.” This covers measures that apply to submitting and processing applications, fees, assessment of qualifications, independence of regulators, and publication of information regarding requirements/procedures. The disciplines call for advance publication of laws, regulations, and administrative procedures; opportunity to comment on, and understand the rationale for, laws and regulations; and sufficient time periods to allow for companies to comply with them.

Regarding technical standards, the Reference Paper provides as follows:

Each Member shall encourage its competent authorities, when adopting technical standards, to adopt technical standards developed through open and transparent processes, and shall encourage any body, including relevant international organizations designated to develop technical standards to use open and transparent processes.” [Note: The term “relevant international organizations” refers to international bodies whose membership is open to the relevant bodies of at least all Members of the WTO.]

The Reference Paper sets disciplines to ensure measures are objective and based on transparent criteria, are impartial and do not in themselves “unjustifiably prevent the fulfillment of requirements.” We

note that the Reference Paper provides WTO Members with the option of excluding the application of the disciplines to technical standards for financial services.

While the Reference Paper is a useful step forward in encouraging that digitally enabled services standards be created through open and transparent processes, it lacks specificity and falls far short of those provided for in the TBT Agreement. In addition, like GATS Articles III.3 and VI, the coverage of the Reference paper is not comprehensive: the paper only applies with respect to sectors in which the member has taken specific market access commitments, and members retain the right to decide whether or not to abide by the obligations of the Reference Paper itself and incorporate in their GATS market access schedules. Finally, while WTO Members do have the ability to schedule market access commitments covering digitally enabled services such as database, cloud and other computer related services, coverage of such services in member schedules is lacking, underscoring the need for a more comprehensive set of disciplines.

Good Regulatory Practices (GRP): The Good Regulatory Practices chapter, which applies to regulatory measures of general application, includes important provisions regarding eliminating unnecessarily burdensome regulatory requirements. It also encourages regulators to take approaches that avoid unnecessary restrictions on competition and consider relevant international standards in regulatory development. It requires transparency in the development of regulations as well as an explanation and provision of rationale for regulatory approaches that are chosen. However, it is not clear whether digitally enabled services standards and conformity assessment regimes would be considered as measures of general application to be included within the scope of the GRP. It would therefore be important to clarify that these elements are within the scope of the GRP and/or to incorporate relevant provisions from the GRP in any new digitally-enabled services standards disciplines.

TBT Agreement: The TBT Agreement contains non-discrimination and procedural commitments for the development and application of technical requirements and standards by governments relating to “products or related processes and production methods.” The coverage of “products or related processes” could support a range of digital services related to the operation of products in various sectors of the economy, including AI-, cloud-, and other digitally enabled processes. Additionally, the coverage of “production methods” could involve digital services relating to product design, fabrication, assembly, repair, and follow-on support. It would be important to seek confirmation of this interpretation as part of the effort to create new digital disciplines on services standards. If this confirmation can be achieved, then those non-covered digitally enabled digital services standards would still need the development of new disciplines.

Whether or not it is possible to confirm that the TBT applies to certain digitally-enabled services, the TBT contains useful provisions which could be drawn upon in creating new disciplines for digitally enabled services standards. For example, the TBT Agreement requires WTO Members to base technical regulations on international standards² and encourages interoperability among different countries’ technical regulations. These and other TBT provisions facilitate regulatory compatibility and reduce barriers to trade, especially when requirements are based on open, consensus-based, industry-driven standards.

As a practical point, it is worth noting that governments have begun to publicly acknowledge the relevance of TBT commitments to emerging technologies, including services-dependent products such as AI. For example, in December 2022 the U.S. and EU pledged to uphold TBT disciplines as part of their newly announced collaboration on AI. In the *Trade and Technology Council Joint Roadmap on Evaluation and Measurement Tools for Trustworthy AI and Risk Management*,¹ the two trading partners committed: “Without prejudice to the specificities and needs of their respective legal systems, the EU and United States aim to act as a model for others by adhering to the WTO TBT principles. This includes support and

¹ *Trade and Technology Council Joint Roadmap on Evaluation and Measurement Tools for Trustworthy AI and Risk Management*, December 2022, <https://www.nist.gov/artificial-intelligence/ai-policy-contributions>

use of international standards, as appropriate, as the basis for technical regulations, conformity assessments and regional standards.”

In the same document, both parties affirmed the importance of key TBT principles to guide AI standards setting, saying the U.S. and EU “are committed to supporting multi-stakeholder approaches to standards development, and recognize the importance of procedures that advance transparency, openness, fair processes, impartiality, and inclusiveness.”

II. Solution: Apply Trade Principles to Digitally Enabled Services in IPEF

In the Indo-Pacific Economic Framework (IPEF), there is an opportunity for negotiating partners to work to strengthen digital policy coordination. It is critical that these efforts protect the interests of US enterprises and US workers by:

- Supporting disciplines and best practices to address discriminatory, unnecessary, and/or non-transparent technical requirements or standards affecting digital services, including in the supply of cross-border services; and
- Ensuring that digitally enabled services benefit from greater regulatory interoperability and compatibility, based on a broad commitment to the open, voluntary, and industry-driven development of technical requirements or standards.

Such efforts would complement other disciplines in the areas of cross-border trade in services, financial services, digital trade, and telecommunications, as well as domestic regulation and good regulatory practices. Possible vehicles³ include:

- Developing joint statements, principles, memoranda of understanding, mutual recognition agreements/arrangements, compilations of best practices, international regulatory roadmaps, or other outcomes; and
- Jointly building on the technical standards language agreed to in WTO Services Domestic Regulations text, plus key provisions adopted from USMCA Good Regulatory Practices and the TBT Agreement.

III. Suggested Elements

We believe the following elements should be included in digital chapters or provisions of trade agreements or dialogues (such as the Indo-Pacific Economic Framework (IPEF) Trade Module, or U.S.-Taiwan, U.S.-Kenya, U.S.-UK initiatives, WTO E-Commerce JSI, the U.S.-EU Trade and Technology Council, the U.S.-Japan Digital workstream, etc.).

1. Scope and Definitions: This section applies to technical regulations, standards and conformity assessment procedures regarding the development, distribution and supply of digitally enabled services.

2. An Affirmation of the Right to Regulate

3. Seek Affirmation (perhaps in a “for greater certainty” footnote clarification) that the Commitments under the WTO TBT Agreement Apply to Technical Regulations and Standards Regarding Digitally Enable Services to the Extent Set Forth in Annex I covering “product characteristics or their related processes and production methods.”

4. Affirmation of Application of WTO Reference Paper on Services Domestic Regulation to Digital Services

5. Affirmation that the GRP applies to Digitally Enabled Services Regulations, Standards and Conformity Assessment Regimes

6. Procedural Fairness, Non-Discrimination, and Adherence to International Standards for Other Digitally Enabled Services⁴:

Drawing from GRP, TBT and the WTO Domestic Regulations text disciplines should include the following commitments:

- (a) Not to discriminate with regard to technical regulations, standards and conformity
- (b) Not to create unnecessarily burdensome regulations while allowing countries to pursue public policy objectives at a level it considers appropriate
- (c) Technical regulations [and standards] are not prepared, adopted, or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, inter alia: national security requirements; the prevention of deceptive practices; and protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, inter alia: available scientific and technical information, related processing technology, or intended end-uses of products.
- (d) Consider relevant international standards and to encourage use of regulatory approaches that avoid unnecessary restrictions on competition
- (e) Provide an explanation and justification if a relevant international standard is not used.
- (f) Whenever a technical regulation is prepared, adopted, or applied as necessary to fulfill one of the legitimate objectives, and is in accordance with relevant international standards, it shall be rebuttably presumed not to create an unnecessarily burdensome requirement on trade
- (g) Commitment to provide adequate notice and consultation periods prior to adopting any new technical regulation or standard for digitally enabled services.⁵

¹ WTO Document WT/L/1129 of 2 December 2021, “Declaration on the Conclusion of Negotiations on Services Domestic Regulation” and WTO Document INF/SDR/2 of 26 November 2021 on “Joint Initiative on Services Domestic Regulation.”

² *i.e.*, All those developed in accordance with Annex 2 to Part 1 (Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with relation to Articles 2, 5 and Annex 3 of the Agreement) in the Decisions and Recommendations adopted by the WTO Committee on Technical Barriers to Trade Since 1 January 1995 (G/TBT/1/Rev.13), as may be revised, issued by the WTO Committee on Technical Barriers to Trade.

³ In the long term, another goal could be to clarify application of existing WTO obligations in the Agreement on Technical Barriers to Trade (TBT) and the General Agreement on Trade in Services (GATS). This could take place by, for example, extending TBT-related disciplines to digital services, including in the context of trade agreements such as the WTO TBT Agreement and recent trade agreements; raising the issue in the TBT Committee, including triennial reviews; and pursuing the issue as part of implementation of the GATS “Reference Paper on Services in Domestic Regulation.”

⁴ Article 4 does not apply to digitally enabled financial services.

⁵ As specified in TBT Annex 3, *Code of Good Practice for the Preparation, Adoption and Application of Standards*.