



## ITI Comment Submission to USTR-2018-0034

*Negotiating Objectives for a U.S.-Japan Trade Agreement*

DECEMBER 3, 2018

### Introduction

The Information Technology Industry Council (ITI) welcomes the opportunity to provide comments in response to USTR-2018-0034 soliciting comments on a potential U.S.-Japan Trade Agreement (USJTA). ITI and its member companies view this bilateral trade agreement as a unique opportunity to increase trade flows between the two countries and strengthen an already robust economic partnership. ITI supports the pursuit of a USJTA that will reduce market access barriers and address services, particularly digital trade, as well as goods.

A comprehensive trade agreement between the U.S. and Japan creates a unique opportunity for a “gold standard” of new trade negotiations that can be particularly impactful and helpful as the U.S. government seeks future bilateral trade agreements. The USTR should build on existing achievements of the U.S.-Mexico-Canada Agreement (USMCA) and seek to expand those provisions within this bilateral framework. The U.S.-Japan trade negotiations can set the stage for high-standard trade agreements, establish global rules dealing with previously unaddressed trade issues, and support long-term growth of American goods and services exports.

ITI represents 70 of the world’s leading information and communications technology (ICT) companies. Our membership comprises companies from all corners of the technology sector, including hardware, software, digital services, semiconductor, network equipment, and internet, as well as “technology-enabled” companies that rely on ICT to transform their businesses. With a broad geographic membership across Asia, Europe, and North America, we engage with governments and associations around the globe to share information and work with stakeholders to identify and advance best practices. We work collaboratively with governments to develop effective policy approaches that enhance cybersecurity, protect privacy, and enable businesses to thrive in an ever-changing and dynamic global market.


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## Overview

A USJTA provides an opportunity for USTR to build on the successes of pre-existing agreements that advanced important provisions on digital trade, free data flows, cybersecurity, intellectual property protection, technical barriers to trade, good regulatory practice, and non-IP intermediary liability that the U.S. has already secured in other agreements such as the USCMA.

The U.S. and Japan should commit to the free flow of cross-border data and prohibit data localization laws that would create needless barriers and costs to data access for business purposes. We urge USTR to seek commitment from Japan to allow importation of ICT devices for purposes of testing, development, and demonstration that do not yet have regulatory authorization into Japan.

Any agreement should promote development of global, voluntary, consensus-based and industry-led standards, as this method of developing standards remains flexible for adaptation to rapid advances in development while also enabling interoperability and furthering market access. We encourage USTR to draw from the USMCA Chapter 11 on Technical Barriers to Trade (TBT), maintaining the TBT principles therein. The language on suppliers' declaration of conformity (SDOC) is particularly robust for promoting trade facilitation.

ITI further recommends that the agreement protect corporate innovation by expressly prohibiting source code transfers as a condition for import, distribution, sale, or use, as well as ensuring robust patent lifespans and protections against counterfeit products. These provisions will allow companies to thrive without the threat of forfeiting their core innovations. We would support a strong IP chapter to be adopted in a USJTA similar to on the language achieved in the USMCA. ITI also suggests that a USJTA incorporate language from Chapter 28 of the USMCA on Good Regulatory Practices.

A USJTA can be a platform for deepening bilateral cooperation on cybersecurity and personal information protection. ITI also encourages the USTR to seek new language that can promote IT modernization of public and private information systems to incorporate IT solutions like cloud computing.

## Data Flows and Digital Trade

ITI recommends that USTR pursue an agreement with Japan on digital trade that mirrors provisions of those secured in the USMCA<sup>1</sup> prohibiting data localization. We hope both countries can continue to capitalize on their strong digital trade partnership by not only solidifying them through a trade agreement, but also committing to increased regional and global partnership on these issues through establishing a U.S.-Japan Digital Trade Steering Committee under the agreement.

We would like to see a commitment by both countries to free data flows and prohibition of measures that might restrict data transfers, as this was a significant achievement under USMCA Article 19.12. Similarly, we would ask the USTR to refer to the personal information protection language of the USMCA under Article 19.8 in negotiating a USJTA. These are already strong areas of bilateral cooperation between the U.S. and Japan that could be enshrined in the text of a trade agreement and potentially

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<sup>1</sup> Art. 19.11-19.12

further promotion of the APEC Cross-Border Privacy Rules, to which both the U.S. and Japan are signatories.

### Cloud Computing and IT Modernization

ITI commends the United States and Japan for implementing Cloud First policies. Cloud computing has brought forth a new and more efficient means of managing government information technology resources, and has opened up avenues for modernization, innovation, and cost savings, and improves cybersecurity. Commercial cloud computing for government entities spurs innovation, facilitates inter-agency collaboration for greater efficiency and better public services, results in faster deployment of services, enhances cybersecurity, increases operational continuity and business recovery, allows for greater budget control, decreases spending on legacy infrastructure, and increase efficiency and sustainability. Given these numerous benefits, the USJTA has the opportunity to include first of its kind measures on implementation and maintenance of Cloud First policies, applicable to all sectors, including financial services. This would cement U.S.-Japan leadership in cloud computing, while also setting an important precedent for other agreements being negotiated in the Asia-Pacific and the rest of the world.

### Financial Services and Electronic Payments

A USJTA should follow the financial services commitments in the USMCA, providing for both market access and national treatment, to ensure a level playing field for domestic and foreign-based suppliers of electronic payment services (EPS) in both markets. Regulation should account for, and be respectful of, different business models, encouraging a diverse set of players in the payments space. This competition among players will not only result in greater consumer choice, but will also spur innovation, contributing to a more robust payments ecosystem that will allow all market participants to develop and supply a wide range of payment services with differing product features and value propositions.

The agreement should also apply digital trade provisions to electronic payment services suppliers. Specifically, digital trade provisions of the agreement should: a) ensure EPS suppliers are able to transfer information across borders; and b) prohibit requirements to use or locate computing facilities in a nation's territory as a condition for supplying EPS in that territory.

### Digital Content and Platforms

The Japanese Government is considering a new, aggressive form of platform regulation apparently targeted at U.S. digital intermediaries. This is one of many policies emerging across the globe, but particularly in the Asia-Pacific, that aim to regulate digital services platforms in ways that stymieing to growth and with a disproportionate effect on U.S. firms. An interim report released by the Japanese government has had no industry consultation and contains several unsubstantiated allegations. It suggests new regulation that would dictate contractual terms between businesses and require disclosure of commercially sensitive information. We urge USTR to engage with the Japanese government on this issue as part of the trade discussions and ensure that new regulation does not target U.S. businesses or impede the export of U.S. services to Japan.

### Non-IP Intermediary Liability

ITI advocates for the adoption of non-IP intermediary liability protections like those in the USMCA, so that governments cannot make innovative U.S. online services liable for activity by third parties that

they do not control. Internet services have transformed communications and enabled small and medium-sized businesses to reach global audiences in ways never possible in the past. A fundamental reason that services have been able to play this role is their open nature: online services and/or intermediaries can facilitate communications and transactions among millions of individuals, businesses and consumers, enabling them to connect directly on a global basis. USTR should secure language on such that intermediaries can continue to enable transactions without being held liable for the vast amounts of content surrounding each transaction.

## Cybersecurity

ITI encourages USTR to use this negotiation to advance cybersecurity cooperation efforts with Japan. This is already an area where both countries have significant capacity and great potential benefit.

Both countries should affirm that risk-based, consensus-driven, and interoperable cybersecurity approaches are more effective at combatting digital threats than prescriptive, mandatory, and sometimes conflicting regulatory regimes that are emerging throughout the world. We encourage the U.S. and Japan to cooperate in the exchange of information on regulations, policies, enforcement, and compliance regarding digital trade, including security of electronic communications and personal information protection.<sup>2</sup> USTR should seek to build on the language of the USMCA cooperation article by adding supply chain security best practices to Art. 19.14(1)(a).

The U.S. and Japan can also use this negotiation to build the capabilities of national entities responsible for cybersecurity incident response.<sup>3</sup> USTR should seek to build on the language of USMCA Article 19.15 to require the parties to also build the capabilities of their national entities responsible for coordinated vulnerability disclosure and handling, including (but not limited to) entities that facilitate the coordinated disclosure of both known and unknown ("zero-day") security vulnerabilities to private sector organizations and other governments (i.e., CERT-CERT cooperation). We further recommend that the U.S. and Japan seek an agreement under the U.S. CLOUD Act to ensure law enforcement access to data.

## Customs and Duties

We encourage the USTR to seek elimination of customs and taxes for physical goods as well as an increase in the *de minimis* threshold for tax and duty. A USJTA should also prohibit customs duties on digital products and electronic transmissions, thereby reducing unnecessary costs on digital trade. As the kinds of products and services offered digitally continues to expand and develop, it is tempting for governments to consider applying tariffs or other blanket fees to digital goods and services. However, these types of duties and fees have broad negative implications for the development and accessibility of digital goods and services.

## Regulatory Practices

Currently, Japan does not allow for the importation of any devices for the purposes of testing that do not already hold regulatory authorizations. The U.S. Federal Communications Commission (FCC) provides for import conditions under these circumstances.<sup>4</sup> Specifically, devices that have not yet

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<sup>2</sup> See USMCA Art. 19.14(1)(a)(i)-(ii)

<sup>3</sup> See USMCA Art. 19.15(1)(a)

<sup>4</sup> 47 C.F.R. 2.1204(a)(3)

obtained regulatory authorization can be imported in limited quantities for demonstration at industry trade shows and for testing and evaluation to determine compliance with the FCC Rules and Regulations, product development, or suitability for marketing. We ask USTR to seek a similar commitment from Japan that will allow for equal opportunities in Japan's market.

For global companies where engineering is completed in multiple countries, it is necessary in the development process to be able to import devices that have not received their regulatory authorizations so that Japanese engineers can iterate on devices and collaborate with engineering teams located in the U.S. This also allows for testing of devices on carrier networks in Japan, as necessary. The device must be tested locally to ensure that it will function as intended in the local conditions and that it meets the expectations of local users.

U.S. companies are unfairly disadvantaged against local Japanese companies if thorough testing of performance cannot be completed until a device has received its full authorization and is able to be imported. It is also necessary to import devices prior to receiving full certification to further design, develop, and create accessories, companion products, and marketing materials, as well as to ensure product compatibility with other devices.

Finally, it is important that devices without regulatory authorization can be imported for demonstration purposes to potential customers or at trade shows. This will allow companies to enjoy the benefit of customer feedback during the development process, as well as ensure a successful launch to market.

### Product Safety

The U.S. and Japan should consider ways to minimize the incremental burden on both manufacturers and service providers to comply with Japan's Electrical Appliance and Material Safety Act ("DENAN") and OSHA requirements. Harmonization or coordination product safety requirements helps to reduce regulatory burdens for firms and eliminate potentially unnecessary regulatory and compliance processes.

### E-Labeling

We urge USTR to refer to the text on electronic labeling ("e-labeling") contained in the ICT Annex of the USMCA as well as its TBT chapter. This new language requires members of the agreement to allow electronic display of regulatory information (e.g., radio frequency, compliance markings) rather than traditional physical labels on devices, which may no longer be feasible with new device sizes and designs. E-labeling is widely used for screen devices, but the ICT industry has also sought other methods of e-labeling for various device types to better accommodate new, increasingly small product types and an increasing number of certification labels.

Thank you for your consideration of our comments. Please do not hesitate to reach out for any additional information or questions.