

The Honorable Katherine Tai
U.S. Trade Representative
600 17th Street, NW
Washington, D.C. 20508

December 13, 2023

Dear Ambassador Tai:

On behalf of the undersigned trade associations, we write to express support for prompt and decisive U.S. action in response to Canada's plans to depart from international consensus and move forward with imposing a three percent digital services tax (DST).¹ Canada formalized this plan in legislation it noticed to Parliament on November 28, 2023.² Specifically, we urge the Office of the U.S. Trade Representative (USTR) to open an investigation pursuant to Section 301 of the Trade Act of 1974 regarding Canada's DST upon its passage into law. USTR must initiate legal analysis of the conflicts this law poses with respect to U.S. firms' ability to access the Canadian market and Canada's obligations in this regard under binding trade commitments in order to be in a position to formally respond to the Canadian government with such findings as soon as any legislation is passed. The United States must follow through on its prior warnings³ and heed to bipartisan calls to take action.⁴

U.S. action is warranted as the Canadian DST closely follows taxes enacted in other jurisdictions that USTR has found to discriminate against U.S. services and be actionable under the statute.⁵ The Canadian DST disproportionately targets leading U.S. digital firms through revenue thresholds and careful scoping of covered services. Further, the DST is unreasonable as a matter of tax policy insofar as it is retroactive to January 1, 2022 and applies to revenue rather than profits. The discriminatory nature of the DST also places Canada in conflict with commitments made to the United States through the U.S.-Mexico-Canada Agreement—including those on national treatment and most-favored-nation treatment for both services and investment (articles 14.4 and 14.5, and

¹ 2023 Canada Fall Economic Statement, <https://www.budget.canada.ca/fes-eea/2023/report-rapport/FES-EEA-2023-en.pdf> ("Until that time, and in order to protect Canada's national economic interest, the government intends to move ahead with its longstanding plan for legislation to enact a Digital Services Tax in Canada and ensure that businesses pay their fair share of taxes and that Canada is not at a disadvantage relative to other countries. Forthcoming legislation would allow the government to determine the entry-into-force date of the new Digital Services Tax, as Canada continues conversations with its international partners.")

² <https://fin.canada.ca/drleg-apl/2023/nwmm-amvm-1123-eng.html>

³ U.S. Ambassador to Canada David Cohen said Ambassador Tai's previous "*statement was direct and clear and strong that if Canada decides to proceed alone, you leave the United States with no choice but to take retaliatory measures in the trade context, potentially in the digital trade context, in order to respond to that.*" <https://nationalpost.com/news/politics/no-choice-but-to-retaliate-against-canadian-digital-tax-u-s-ambassador-says#:~:text=Article%20content,to%20Canada%20David%20Cohen%20said>. <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/december/statement-ustr-spokesperson-adam-hodge-canadas-digital-services-tax-described-canadas-notice-ways> (If Canada adopts a DST, USTR would examine all options, including under our trade agreements and domestic statutes.)

⁴ <https://www.finance.senate.gov/imo/media/doc/20231010wydencrapolettertoustoncanadadst.pdf>

⁵ <https://ustr.gov/issue-areas/enforcement/section-301-investigations/section-301-digital-services-taxes>

articles 15.3 and 15.4) – and contravenes nondiscrimination commitments that Canada has made under the World Trade Organization General Agreement on Trade in Services (GATS).⁶

Immediate action is critical to also ensuring that the progress under the OECD/G20 Inclusive Framework is not undermined by proliferation of discriminatory taxes as finalization and implementation is underway. Per the Two-Pillar Solution reached in October 2021, all parties must “remove all Digital Services Taxes and other relevant similar measures with respect to all companies, and . . . commit not to introduce such measures in the future” [emphasis added].⁷ It is very unfortunate that Canada further departed from global consensus by neglecting to support the conditional extension to December 31, 2024.⁸ Implementation of the consensus-based multilateral solution remains the only path forward to provide tax certainty for multinationals and tax administrations, and reduce trade tensions. A pass for Canada would threaten the realization of this shared goal.

We would also note that any “delay” in collection of the DST is not an acceptable compromise on behalf of Canada. If Canada implemented the DST but announced a pause in collection until Pillar One is implemented (which includes a prohibition of the imposition of DSTs), companies would still be required to set up new compliance mechanisms and place the funds aside in the event of collection demands down the line. This is no small sum—the Parliamentary Budget Officer in Canada estimates to extract \$1 (CAD) billion annually from the DST, most of which is likely to be collected from predominantly U.S. companies and all on a gross-revenue basis.⁹ Such an outcome would place no urgency on the Canadian government to aid timely implementation of the global agreement. Further, even if there is an agreement to adjust the revenue thresholds of Canada's DST, it still merits a section 301 investigation, given the unreasonable and discriminatory impact of such a measure, and the extent to which it is likely to burden and restrict U.S. commerce. This is likely to have broader effects, leading to increased costs for SMEs and startups that use these services within the scope of the tax.

To that end, we call for a strong U.S. response and ask that USTR open a Section 301 investigation upon enactment of the DST. We appreciate your engagement on this issue and look forward to continuing to support your efforts to oppose any discriminatory digital taxes by U.S. trading partners.

⁶ While Article 32.3 exempts certain taxation measures, Article 32.3(6)(a) explicitly states that, notwithstanding this exemption, Article 15.3 applies to taxation measures on income related to the purchase or consumption of particular services. As a result, Canada would not be able to even invoke this exception for the national treatment claim. Additionally, the WTO includes no such exemptions for similar national treatment and MFN claims.

⁷ <https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf>

⁸ <https://www.reuters.com/business/finance/countries-agree-extend-digital-services-tax-freeze-through-2024-2023-07-12/>

⁹ Legislative Costing Note (October 17, 2023),

<https://www.pbo-dpb.ca/en/publications/LEG-2324-013-S--digital-services-tax--taxe-services-numeriques> (“The PBO estimates the DST will increase federal government revenues by CA\$7.2 billion over five years.”).

Sincerely,

ACT | App Association
Computer & Communications Industry Association (CCIA)
Engine
Information Technology Industry Council (ITI)
TechNet
Software & Information Industry Association (SIIA)

CC:

The Honorable Janet Yellen
Secretary of the Treasury
U.S. Department of the Treasury
1500 Pennsylvania Avenue, N.W.
Washington D.C. 20220

The Honorable David Cohen
U.S. Ambassador to Canada
The Embassy of the United States of America
PO Box 866 Station B
Ottawa, Ontario K1P 5T1