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October 28, 2015

USTR Request for Public Comments to Compile the National Trade Estimate Report (NTE) on Foreign Trade Barriers

The Information Technology Industry Council (ITI) is pleased to respond to the Trade Policy Staff Committee's (TPSC) request that interested persons submit comments to assist in identifying significant barriers to U.S. exports of goods, services, and U.S. foreign direct investment for inclusion in the NTE.

ITI's comments cover a wide range of measures that impact trade in goods and services in the information and communications technology sector. Many of our comments focus on governments employing forced localization measures, also known as "localization barriers to trade." ITI's members and companies of all sizes in all sectors have experienced a significant increase in the use of these measures across the globe. This dynamic has forced them to make costly adjustments to their operations on the ground, regionally or globally, in order to comply with these measures. Data localization requirements in particular are in vogue in many large emerging markets. While our comments include information on data localization requirements in six different markets (China, Indonesia, Nigeria, Russia, Turkey, and Vietnam), it is possible that additional governments will consider or implement similar requirements by the time the 2016 NTE is published. ITI is greatly concerned about the impact of such digital protectionism on international trade and investment, innovation, and the ability of people and businesses all over the world to benefit from free and open flows of information and data through the Internet and Internet-based technologies.

With eliminating localization barriers to trade now a prominent negotiating objective in the Bipartisan Trade Priorities and Accountability Act of 2015, ITI requests that the 2016 NTE place specific emphasis on the increase in these barriers around the globe. Ideally, this emphasis would be placed in a separate section to underscore the seriousness of this disturbing trend.

ITI also underscores the importance of promoting greater regulatory coherence in priority foreign markets. Regulations developed within silos without input from other ministries and a wide range of foreign and domestic stakeholders tend to produce inefficient outcomes that distort trade and investment. The U.S. government's ongoing efforts to ensure that governments coordinate regulatory work internally, assess the trade and investment impacts of regulation, and conduct open and transparent public consultation is of significant benefit to technology firms, whose products and services are often subject to wide array of overlapping and onerous regulation. ITI requests that the NTE include a section that examines how governments in priority markets are performing with respect to regulatory coherence, perhaps using the work of the OECD and APEC on good regulatory practices as benchmarks.

We look forward to engaging further with the TPSC staff on the issues contained in our comments and appreciate the opportunity to submit comments.

Argentina

ITI appreciates the United States government's efforts to challenge discriminatory import practices in Argentina, including Resolutions 3252&3255/2012, and 11/2013. These resolutions, in addition to other laws and regulations, have created burdensome and onerous barriers to trade for ITI's member companies. These barriers include non-automatic import license procedures, Certificate of Origin requirements, Advanced Sworn Statements of Imports, and restrictions on ports of entry. These rules and requirements, ostensibly designed to correct balance of payments concerns, have hindered the business operations of our members in Argentina by raising the costs of trade. USTR has done extensive work in this area and should continue to engage the Argentinian government in order to ensure that they uphold their international obligations, particularly in light of the recent WTO dispute settlement outcome (*Argentina – Measures Affecting the Importation of Goods*, WT/DS444/AB/R). ITI is concerned that even if the government of Argentina complies with this decision, it will turn to other means of protecting local companies from competitive, high quality ICT products sourced from outside Argentina, such as discriminatory conformity assessment procedures and technical regulations that are not based on international standards. We encourage the U.S. government to pay close attention to Argentina's actions.

Brazil

The government of Brazil maintains a variety of discriminatory measures in response to the weak competitiveness of its domestic ICT industry. It provides tax incentives for locally sourced ICT goods and equipment (*Basic Production Process* (PPB), Law 8.248/91, Portaria 87/2013), offers government procurement preferences for local ICT hardware and software (2014 Decrees 8.184, 8.185, 8.186), does not recognize the results of conformity assessment procedures performed outside of Brazil (ANATEL Resolution 323), and maintains local content requirements that make it difficult for U.S. firms to participate in spectrum auctions (ANATEL spectrum auction requirements for 2.5Ghz, 450 Mhz, and 700Mhz).

Presidential Decree 8135 of November 5, 2013 and subsequent Ordinances (No. 141 of May 2, 2014, and No. 54 of May 6, 2014) require that federal agencies procure e-mail, file sharing, teleconferencing, and VoIP services from Brazilian "federal public entities" such as SERPRO, Brazil's Federal Data Processing Agency. Decree 8135 requires that federal government communications be provided only by federal agencies, an apparent localization requirement. Other issues of concern include requirements related to sharing of source code as well as standards that appear to deviate from global norms.

The uncertainty created by the Decree discourages foreign investment in the IT sector in Brazil and prevents the GOB from accessing best-in-class cloud-based communication and information technology services, with significant costs to the Brazilian government in terms of lost efficiencies and lower productivity.

ITI appreciates the focus that the U.S. government gave to these wide-ranging, burdensome

measures in the 2015 NTE and through its engagements with the Brazilian government. For 2016, ITI requests that the U.S. government place more emphasis on the forced localization measures used by the government of Brazil. These measures not only restrict access to Brazilian markets for US ICT firms, but also undermine the stated long-term development goals of the Brazilian government. They introduce higher costs into global or regional value chains for technology products, thereby making them less efficient and increasing the likelihood that foreign ICT companies will avoid Brazil's market entirely. As a result of these measures, innovative companies in Brazil may not be able to purchase the intermediate goods they need. Ultimately consumers in Brazil will also have to pay higher prices for ICT products or they may not be able to purchase certain ICT products that are widely available in other parts of the world. ITI strongly encourages the U.S. government to roll back these measures and help Brazil's government create a more open and innovative ICT ecosystem in Brazil without forced localization measures.

Colombia

Under current Colombian law, computers, tablets, and other computing devices below a specified price are exempt from the national Value Added Tax (VAT). This exemption, however, does not extend to smart phones even though they often serve as substitutes for more traditional computing devices. Under the spirit of the regulations already in place, the VAT exemptions should be extended to smart phones in order to encourage an atmosphere of fair competition and create value for the Colombian consumer by giving them cheaper access to computing power and connectivity, regardless of device type. This VAT has created an unfair disadvantage for U.S. smart phone manufacturers relative to other computer producers. ITI requests that the U.S. government include this barrier in the 2016 NTE and work to address it as soon as possible.

Another barrier for smart phone manufacturers is the CRC Resolution 4444 of 2014, which prohibits fixed term contracts for mobile services. The industry uses fixed term contracts to offer lower rates to the user in exchange for customer commitment. These types of contracts bring predictability and stability to an otherwise unpredictable market, particularly for international hardware manufacturers and supply chain managers. This policy, in addition to the VAT on smart phones, raises the cost of providing mobile services in Colombia, a cost that is passed on to consumers in Colombia. The U.S. government should include these measures in the 2016 NTE and address them as soon as possible, as they directly affect the ability of many U.S. firms to do business in Colombia.

Costa Rica

As stated in the Section 1377 report for the past several years, the Costa Rican telecommunications regulator, Superintendencia de Telecomunicaciones (SUTEL), continues its unique requirement for retesting and recertification of hardware after a software or firmware updates, focusing on certain electromagnetic compatibility (EMC) testing and certification requirements (RCS-092-2011, RCS-431-2010). Such updates are often frequent, and allow users

to protect their equipment from security threats and improve their user experience. As a matter of international best practices, many other governments do not require re-testing or re-certification after such updates. These country-specific requirements can also lead to redundant testing, particularly when a product is required to undergo testing to the same standard in both the exporting and importing country. ITI requests that the U.S. government include these measures in the 2016 NTE and address them as soon as possible. ITI believes that they constitute an unnecessary obstacle to trade by delaying updates and imposing burdensome requirements on U.S. software developers while raising costs for consumers in Costa Rica.

China

ITI appreciates the work and attention that the U.S. government has dedicated to China and its many discriminatory trade practices, particularly in the area of Intellectual Property Rights (IPR). Strong IPR protections are of critical importance to the success of high-tech business, as the immense investment into research and development is a necessary for technological development. IPR protections in China have long been a troubled area. U.S. business has continually encountered a lack of IP law enforcement, forced technology transfers, and source code disclosure rules. We request that the U.S. government continue to highlight these problems in China in the 2016 NTE so as to urge China to uphold the international commitments that it agreed to when joining the WTO.

In addition to IPR, the technology industry is very concerned about requirements to store, process, or manage data locally within China and restrictions on flows of data in and out of China. In particular, there are a raft of laws and regulations that restrict the flow of data relating to the medical, financial, insurance, and human resources sectors. These measures directly affect the ability of many industries beyond the tech sector to conduct normal business operations and represent a dangerous precedent for the control of the internet. These measures include the Notice to Urge Banking Financial Institutions to Protect Personal Information, the Guidelines for Personal Information Protection within Public and Commercial Services Information Systems, Administrative Regulation on Credit Information Industry, the Draft Counter-terrorism Law, the Guiding Opinions for Promoting the Innovation and Development of Cloud Computing to Cultivate New Types of Information Industry Services, the Population Health Information Management, and the draft Supervision Rules on Insurance Institutions Adopting Digitalized Operations, which was opened for comments in the fall of 2015. This trend toward increased control over where and how data is transferred represents a destructive and misguided attempt to protect Chinese tech companies from foreign competition. Taken together, these measures pose great costs to U.S. firms in all sectors. ITI requests that the U.S. government include these measures in the 2016 NTE and take a strong stand against them in order to support and defend U.S. companies suffering from discrimination by the government of China.

In addition to the above measures, the 2016 NTE must also highlight the new draft Cybersecurity Law, released in July 2015, as a highly discriminatory measure. This law would

pose significant burdens on the technology industry by requiring ICT hardware to be located domestically and restricting the transfer of “important data” out of China, all under the guise of national security. This law would impose large, unnecessary costs on the technology industry while degrading the benefits of the Internet both to Chinese citizens and companies and all global users.

European Union

The European Commission’s Digital Single Market (DSM) Strategy includes numerous elements that could help build consumers’ and businesses’ trust in technology and create a more integrated market in Europe for innovative technologies. As the Commission and member states move forward with DSM implementation, they should take care to advance these laudable goals while maintaining an inclusive environment for ICT products and services from both within and outside Europe.

India

Of primary concern to the tech industry in India is the Compulsory Registration Order, which requires manufacturers to submit product samples from each factory for testing by a “BIS recognized laboratory” located in India. Although India is a member of the IECEE CB Scheme, products in scope of the CRO must be tested again, regardless of whether it had already been tested by a member of the CB Scheme. Also, the requirements for registration are incredibly costly to U.S. firms, while providing no better confidence in the safety of the products. ITI requests that the U.S. government encourages the Government of India to hold consultations with industry and other stakeholders to bring its CRO program into alignment with international best practices.

Another pressing concern for the ICT sector is India’s restriction on the importation of refurbished and used goods ICT equipment. Since 2013, the Ministry of Environment, Forests, and Climate Change (MOEFCC) had been applying importation procedures for e-waste and hazardous waste to imports of used spare parts and whole equipment. In July 2015, MOEFCC went further and issued a Ministerial Decision, rejecting a significant number of used equipment and parts shipments. On July 16, 2015, the MOEFCC published an Official Memorandum regarding imports under the India Hazardous Waste (Management, Handling and Transboundary Movement) Law 2008, which effectively banned importation of used, secondhand and refurbished computer parts and components. Subsequently, MOEFCC rescinded this Official Memorandum in August. Despite this retrieval, ITI member companies’ used equipment shipments are not approved for importation by the Government of India. This directly impacts normal warranty and repair operations for the technology sector, which utilizes refurbished parts and international repair facilities to honor warranties for consumers, businesses, and the government. The uncertainty caused by the delays and restrictions on imports of these parts has already cost ITI companies millions of U.S. dollars and threaten to severely restrict future investments in India. ITI requests that the U.S. government include this issue in the 2016 NTE in order to push the government of India to clarify if and how it will

enforce this regulation.

Indonesia

The government of Indonesia has increasingly introduced forced localization measures into its trading regime in order to favor local companies at the expense of foreign competitors. The 2015 NTE included measures concerning non-automatic import licenses, minimum investment requirements, and local content rules. However, it did not address the Ministry of Communication and Informatics (MICT) Regulation 82/2012 to a satisfactory level. It only mentioned this regulation briefly, despite the fact that it could impose significant costs on U.S. industry. This measure requires companies to store consumer data locally and software developers to surrender their source code. In addition, this summer MICT released another draft regulation for implementing Regulation 82/2012. Article 17 of this proposed regulation includes strict data localization requirements as a means of protecting the personal data of Indonesia citizens. Local storage requirements, however, are ineffective both in protecting personal information and in promoting local ICT sector growth. They also pose higher costs for local companies, especially SMEs, since they would be unable to use cost-effective, secure, and innovative cloud services hosted in data centers outside of Indonesia. This data localization requirement severely raises costs for U.S. companies operating in Indonesia and may raise costs for Indonesian businesses and consumers, further undermining competitiveness in Indonesia. The requirement to surrender source code is inconsistent with international norms and threatens investments in research and development. The 2016 NTE should address regulation 82/2012 and any implementing regulations in detail to reinforce that they would pose significant economic and operational costs and consequences.

In addition, there are two new draft regulations introduced this year that the 2016 NTE should cover. These include the MICT Technical Requirements for Equipment and Facilities for Purpose of Long-Term Evolution Time Division Duplexing (Lte Fdd) and Long-Term Evolution Frequency Division Duplexing (Fte Fdd) Broadband Services, as well as the accompanying draft implementation rules put forward by the Ministry of Industry titled the Procedure for Calculation of Local Content in Telecommunication Devices. These two draft regulations would impose strict local content rules on 4G LTE smartphones and all related equipment. These requirements would be phased in over the next few years, progressively raising costs and pushing out U.S. industry. These follow Ministry of Trade regulations (MoT 38/2013 read with MoT 82/2012) that require importers of mobile phones, PDAs, and tablets to have local production/assembly by January 2016. ITI requests that the U.S. government include these new regulations in the 2016 NTE and address them as soon possible, as they would impose significant barriers to trade for U.S. phone hardware manufacturers. These types of measures will not help Indonesia meet any of its broadband or mobile connectivity objectives and will make it harder for local companies in Indonesia to operate and innovate.

Mexico

In 2014, Mexico's National Commission on Efficient Energy Use (CONUEE) published an energy

efficiency measure, PROY-NOM-032-ENER-2013 (“NOM-032”), which requires certain testing methods, standby energy consumption limits, and labeling for electronic and electrical equipment. These labeling requirements not only have little to no benefit to the Mexican consumer, but also add large costs to ICT producers. This overly trade restrictive measure warrants continued attention from the U.S. government in the 2016 NTE.

On April 20, 2015, Mexico’s tax authority, the Servicio de Administración Tributaria (SAT) issued an amended version of the Customs Law Rules (reglamento de la ley aduanera), ostensibly to harmonize its terminology and regulatory definitions with the Customs Law while including new documentary requirements. The most significant change resides in Article 81, which establishes the “requirement for an Importer of Record to provide documented support on the valuation of imported merchandise to the Mexican customs broker.” Documents must be available at the time of importation to be provided to customs upon request. As written, the article makes imports cumbersome and sometimes impossible, as it asks for documents that are non-existent, confidential, or issued after the import. SAT has twice delayed the enforcement of this requirement. Importers and customs expeditors continue to express concern with this requirement, not only because of the burden it imposes on companies, but also because of its potential to become a barrier to trade. ITI requests that the U.S. government include this issue in the NTE 2016 and address it as soon as possible, as it creates an uncertain environment for U.S. exports to Mexico and is inconsistent with international norms.

New Zealand

In 2013, New Zealand passed amendments to the Telecoms Interception Capability and Security (TICS) Act that require technology providers to offer interception capabilities for all telecommunication services. The amendments, for which domestic telecommunications firms advocated, apply to online services providers as well as “traditional” telecommunications companies, and providers outside of New Zealand can be required to provide the intercept services. This could lead to conflicts with laws in other jurisdictions that may limit disclosure of users’ communications to foreign law enforcement agencies, thus making it difficult for overseas providers to offer Voice over IP (VOIP) services in New Zealand.

Nigeria

The Guidelines for Nigerian Content Development in ICT (“Guidelines”), issued in draft form in 2014, require both foreign and local businesses to store all of their data concerning Nigerian citizens in Nigeria. It also establishes local content requirements for hardware, software, and services. In October 2015, the Nigerian Government issued a notice mandating compliance with the Guidelines by December 3, 2015. ITI requests that the 2016 NTE emphasize how much economic damage the Guidelines would cause for businesses across all sectors in Nigeria – an increasingly important market. These rules would damage U.S. business interests by greatly increasing the cost of entry to the Nigerian market, imposing discriminatory rules on hardware sourcing, and incurring unanticipated costs on already established business operations. We request that the U.S. government address the gravity of the costs of the Guidelines in the 2016

NTE and continues to monitor the development of this policy closely.

Philippines

In September 2014, the government released a draft administrative order that appears to require government agencies to procure cloud services from the Government Cloud, and only where this is not possible will they be permitted to purchase commercial cloud services. These restrictions could prevent Philippine government agencies from accessing best-in-class cloud services.

In addition, telecommunications regulators have sometimes interpreted existing regulations to mean that cloud service providers are required to obtain a Valued Added Telecom Services license, which is open only to Filipino companies. The requirement has not been consistently enforced, but if it were, it could severely limit overseas companies' ability to provide cloud services in the Philippines.

Russia

Federal Law 242-FZ, which requires all data collected on Russian citizens to be stored in Russia, came into effect on September 1, 2015. While the 2016 NTE 2015 covered this law, it did not explore the significant costs that both domestic and foreign companies would have to bear to comply with its provisions. This law affects the normal business operations of all industries in Russia by imposing inefficient operational rules, particularly the requirement in Article 18 to store any initial personal data concerning Russian citizens in data centers located in Russia. While the Russian Ministry of Communications did provide informal "clarifications" on how companies can comply with the law on August 3, 2015, it is still not clear whether companies can transfer data out of Russia freely after initial generation of that data. The Ministry of Communications has also informally said it would not enforce this requirement until early 2016, which adds to the uncertainty and therefore costs for businesses operating in Russia. The 2016 NTE should clearly articulate the state of play regarding entry into force and implementation of this law and highlight the data localization requirement in particular as a trade barrier. ITI urges the U.S. government to address this barrier to trade and investment as soon as possible.

South Africa

South Africa is reviewing draft changes to its intellectual property policy. It is important that any such changes do not undermine intellectual property protections for software and other information and communication technologies that foster innovation and growth.

South Africa's Black Economic Empowerment (BEE) policies include "Equity Equivalent" provisions by which multinational companies can contribute to advancement of minority groups in lieu of explicit share set-asides. These rules include local content and manufacturing provisions that are inconsistently interpreted and applied, hindering availability of best-in-class ICT products and services in South Africa.

Turkey

In 2014 Turkey passed the E-Payment Law, requiring companies to process all digital payment transactions initiated in Turkey in a data center within Turkey's borders. This data localization requirement acts as a high barrier for entry into the Turkish market for small- and medium-sized enterprises (SME) and impacts the operations of all companies in Turkey whether foreign or domestic. The 2015 NTE covered this law when it was in draft form. ITI requests that the U.S. government again include an entry in the 2016 NTE on this law that appropriately reflects its entry into force, implementation, and the economic impact of the law for companies operating in Turkey.

In addition, Turkey is considering safeguard duties on ICT hardware, including tablets and mobile phones, despite the fact that the conditions required under WTO rules to use such safeguards do not appear to be present. The proposed safeguards appear to be part of a broader push to use protectionist measures to foster local manufacturing. ITI requests that the 2016 NTW include this issue and that the U.S. government continues to engage with the government of Turkey to dissuade it from this potential action.

Vietnam

Vietnam has increasingly considered or implemented restrictive forced localization measures. First among them is the Decree on Information Technology Services (Decree No.72/2013/ND-CP). This law requires every digital service or website to locate and least one server within Vietnam. Clearly this presents significant barriers for SME market entry without providing any benefit to Vietnam's economy or consumers. One recent study by the Brussels-based think-tank ECIPE stated that such a data localization requirement reduced GDP growth in Vietnam in 2014 by 1.8 percent. The 2015 NTE covered this law. ITI requests that the U.S. government again include it in the 2016 NTE, as it imposes barriers to market entry and imposes significant costs to all U.S. businesses providing digital services in Vietnam.

As mentioned in the 2015 NTE, the government of Vietnam also promulgated a draft IT Services Decree that would have included additional data localization requirements as well as restrictions on cross-border data flows. While the government of Vietnam had shelved the draft decree at the time of publication of the 2015 NTE, ITI requests that USTR remain vigilant in watching this or any other data localization requirements that may appear in Vietnam in the future.

Multiple Countries

Problems with Intellectual Property Enforcement

Widespread use of unlicensed software remains a problem across much of the Middle East and Africa. The rate of unlicensed software installation was 59% in 2013 (BSA), and much higher in numerous countries across the region.

Problems with Customs Valuation of Software

Numerous countries in West Africa, including Cameroon, Ghana, and Senegal, have used inconsistent methodologies for valuation of software for the purposes of assessing Customs duties. A 1984 Decision of the then-GATT Committee on Customs Valuation enables countries to calculate the customs value of software based only on the value of the underlying carrier medium (WTO Decision 4.1, Valuation of Carrier Media Bearing Software for Data Processing Equipment). In some instances, countries are using this method, while in others they are assessing duties based on the IP value of the loaded software. To ensure wide availability of best-in-class technologies, these countries should consistently apply the valuation method provided for in Decision 4.1.

Restrictions on Provision of VOIP Telecom Services

A number of countries in the Middle Eastern and African regions restrict or block the use of VOIP services, including Algeria, Ethiopia, Jordan, Morocco, Oman, Saudi Arabia, and the United Arab Emirates. Such restrictions prevent consumers and businesses from accessing innovative communications services that can foster innovation and productivity.