



October 2, 2020

Ms. Lisa R. Barton
Secretary
United States International Trade Commission
500 E Street SW
Washington, DC 20436

Oral Testimony, USITC Inv. No. TPA-105-008

Dear Secretary Barton,

BSA | The Software Alliance¹ appreciates the invitation to testify at the hearing of the United States International Trade Commission in its investigation into the Economic Impact of Trade Agreements Implemented under Trade Authorities Procedures, Inv. No. TPA-105-008. BSA provides herewith its oral testimony.

Sincerely,

Joseph Whitlock

Joseph P. Whitlock
Director, Policy

¹ BSA | The Software Alliance (www.bsa.org) is the leading advocate for the global software industry before governments and in the international marketplace. Its members are among the world's most innovative companies, creating software solutions that spark the economy and improve modern life. With headquarters in Washington, DC, and operations in more than 30 countries, BSA pioneers compliance programs that promote legal software use and advocates for public policies that foster technology innovation and drive growth in the digital economy. BSA's members include: Adobe, Atlassian, Autodesk, Bentley Systems, Box, Cadence, CNC/Mastercam, IBM, Informatica, Intel, MathWorks, Microsoft, Okta, Oracle, PTC, Salesforce, ServiceNow, Siemens Industry Software Inc., Sitecore, Slack, Splunk, Trend Micro, Trimble Solutions Corporation, Twilio, and Workday.

BSA | The Software Alliance Oral Testimony

USITC Inv. No. TPA-105-008

Introduction

BSA | The Software Alliance appreciates the invitation to testify at today's hearing. We are honored to appear before the Commission and we greatly value the independent and rigorous analysis that the Commission performs on so many important trade-related topics for the United States.

BSA advocates for the global software industry before governments and in the international marketplace. BSA members are leading enterprise software publishers and cloud service providers, and are among the top employers, exporters, innovators, and IPR holders across the software sector. Software contributes more than 1.6 trillion of US value-added GDP and the industry supports 14.4 million jobs in all sectors. The industry invests some 80 billion dollars in US R&D annually.²

We would like to touch on trade agreement provisions addressing: (1) customs duties on electronic transmissions; (2) non-discriminatory treatment of US software, cloud computing, and other digital exports; and (3) data transfers and data localization.

1. Prohibitions on customs duties, fees, or other charges on or in connection with the importation or exportation of digital products transmitted electronically

This prohibition in US FTAs, and in the WTO Moratorium on Customs Duties on Electronic Transmissions, benefits a wide array of software and other US digital exports. These measures are of great importance to US exporters and US jobs, as we have outlined in materials cited in our testimony.³

Several US trading partners have imposed, or threatened to impose, customs duties in this area. If implemented around the world, measures imposing customs duties on electronic transmissions would have an immediate impact on the global economy – harming not only American digital exporters and workers, but also local industries, workers, and consumers in the implementing countries.

For example, in 2018, Indonesia issued Regulation No.17/ PMK.010/ 2018 (Regulation 17), which amends the Indonesian Harmonized Tariff Schedule to add Chapter 99: “[s]oftware and other digital products transmitted electronically.” The measure has not been fully implemented. Regulation 17 purports to cover a wide array of categories, classified in Indonesia’s tariff schedule between subheadings 9901.10.00 to subheading 9901.90.00, including “multimedia (audio, video or audiovisual)”; operating system software; application software; “support or driver data, including design for machinery system”; and a broad catch-all category covering “other software and digital products.”

Beyond the impacts on US digital exports and US digital exporters, countries imposing these duties would themselves be negatively impacted: Such duties put at risk those countries’ global competitiveness, exports, exports, jobs, and consumer welfare. For example, a country that levies such duties would increase its own industries’ costs of accessing critical technologies and data, including productivity-enhancing software solutions; scientific, research, and other publications; and manufacturing data, blueprints, and other operational information. Local industries need cross-border access to best-in-class software and data.

² See <https://software.org/wp-content/uploads/2019SoftwareJobs.pdf>

³ See <https://www.bsa.org/files/policy-filings/10182019wtomoratoriumus.pdf>

Faced with higher software costs, local industries will become less competitive vis-à-vis their foreign competitors – threatening both domestic and export market sales. Furthermore, as customs duties would impose an unnecessary burden on local industries, they would also undermine those countries' attractiveness as a destination for investment and R&D.

Estimated trade impacts are striking. According to a study recently published by the European Centre for International Political Economy (ECIPE), gross domestic product (GDP) losses would exceed the value of customs duties collected by 160 times for Indonesia, 49 times for India, and over 25 times for South Africa, when the risk of retaliatory or corresponding duties imposed by other countries is taken into account.

There are also legal challenges. The nature of electronic transmissions, which often consist of data packets transiting multiple servers in multiple jurisdictions, makes country of origin determinations difficult – if not impossible.

2. **National treatment disciplines and related prohibitions on discriminatory treatment of digital products, digital services, technologies, and persons**

These national treatment and non-discrimination provisions are critical to protecting US software publishers, cloud service providers, and other digital exporters - and the US jobs supported by the software sector - from unreasonable and discriminatory digital trade restrictions. Around the globe, there is a growing trend towards digital protectionism or digital isolationism that often involves the erection of barriers to digital trade and the movements of data across borders.

We review below several non-discrimination disciplines from US trade agreements that are particularly relevant to the emerging trend of digital protectionism. Because digital trade encompasses data flows, digital products, digital services, digital technologies, and US-based enterprises, each of the following digital trade disciplines may be relevant to the economic impact of rising digital protectionism.

- Data transfer restrictions and data localization mandates: These measures may include measures that constitute unnecessary, unjustified and/or disguised restrictions on data transfers across borders; measures that treat cross-border data transfers less favorably than domestic data transfers; or measures that require data to be stored or process locally. These measures are further in the next portion of my testimony below.
- Discriminatory digital taxes, levies or other charges: These measures may include internal taxes or charges on imported products (imposed directly or indirectly) in excess of those imposed on like domestic products⁴. Taxes and charges shall not be applied in way that would afford protection to domestic production.⁵ For example, arbitrary value thresholds, definitional scoping, and other specific features that afford protection to domestic digital products, while burdening imported digital products, could raise concerns.
- Discriminatory regulations for digital products and services: These measures may include rules that afford less favorable treatment to imported products vis-à-vis domestic products in respect of sale, use, investment, technical regulations, etc.⁶ Such measures may also afford less favorable treatment to non-national services or

⁴ See GATT Art. III:2.

⁵ See GATT Art. III:1.

⁶ See GATT Art. III:4, TBT Art. 2.1, TRIMS Art. 2.1; etc.

service providers vis-à-vis domestic services or service providers.⁷ They may also include rules that afford less favorable treatment to digital products created in another country or by non-national relative to a digital product created domestically or by a national.⁸ An example (in relation to technical regulations) would include a mandatory national technical cybersecurity standard that favored national commercial cybersecurity products and services over non-national products and services.

- Innovation frameworks that disfavor foreign innovators and IPR holders: These measures may include digital innovation rules that discriminate between nationals and non-nationals in relation to the protection of IP rights, or that discriminate on the basis of type of technology at issue, the place of invention, or whether products are locally produced.⁹ These rules can frequently impact copyrighted or patented software or source code, proprietary data sets, or trade secrets, and many other aspects of the digital economy.

In an era of increasing digital protectionism, all of the foregoing disciplines are important because digitally protectionist measures may exclusively or primarily impact foreign digital products, digital services, technologies, or persons – while largely protecting domestic digital products or services, technologies, or persons. As noted above, these measures may also restrict or block the movement of digitized information across borders. They may also take the form of highly selective digital taxes or charges that exclusively or overwhelmingly impact foreign cloud service providers and or software publishers, and their products, services and technologies. Finally, they may take the form of discriminatory technical regulations, licensing, investment or technology transfer requirements that have a disproportionate impact on foreign patent or copyright holders, software publishers, or digital product or service providers.

These types of measures, and the value of US trade agreements in disciplining such measures, merit close economic study and analysis at a time of increasing digital trade barriers and restrictions.

3. Prohibitions on data localization mandates and cross-border data transfer restrictions

As we alluded to above, these disciplines are critical to protecting the interests of US exporters – both for digital and tangible products – and to fostering economic development around the world. US trade agreements containing these provisions benefit both parties to the agreement.

Cross-border data transfers – the seamless movement of information from one country to another – are essential to creating jobs and stimulating growth in a time of unprecedented economic change. As connectivity and cloud computing technologies sustain and drive economies, cross-border data transfers are estimated to contribute trillions of dollars to global GDP. 60 percent of global GDP is expected to be digitized by 2022, with growth in every industry driven by data flows and digital technology. Furthermore, 75 percent of the value of data transfers accrues to traditional industries like agriculture, logistics, and manufacturing. Across every sector of the economy, and at every stage of the production value chain, data transfers enable the digital tools and insights that are critical to enabling entrepreneurs and companies of all sizes to create jobs, boost efficiency, drive quality, and improve output. The ability to transfer data across borders also directly contributes towards important policy objectives relating to the protection of privacy, security, and regulatory compliance.

⁷ See GATS Art. XVII.

⁸ See *e.g.*, USMCA Art. 19.4.

⁹ See TRIPS Art. 3.1 and 27.1.

There has been an increase in the number of data transfer localization and data transfer restrictions that impact US digital trade with countries including China, India, Indonesia, Korea, Pakistan, and other markets. Data localization mandates typically require a company to store certain data, such as personal data, on local servers, whereas cross-border data transfer restrictions often place unreasonable restrictions on transferring data beyond territorial boundaries. These types of mandates and restrictions can harm the very countries implementing them as well as resident companies— suppressing economic productivity while discouraging R&D and investment. They also undermine data security and put local businesses at a competitive disadvantage

The economic costs – both for the US economy and US exporters and for local economies, and their enterprises and citizens – merit further economic analysis and study.

Conclusion

Thank you again for the opportunity to testify. We look forward to any questions that you may have, which we will endeavor to answer today or after the hearing.