

May 5, 2018

Erland Herfindahl
Deputy Assistant U.S. Trade Representative for GSP
Office of the United States Trade Representative
600 17th Street NW
Washington, District of Columbia 20036

RE: *Input of ACT | The App Association regarding the U.S. Trade Representative's Request for Comments and Notice of Public Hearing Concerning its Initiation of Country Practice Reviews of India and Indonesia* [USTR-2018-0006; USTR-2018-0007]

Dear Mr. Herfindahl:

ACT | The App Association (App Association) writes in response to the Office of the United States Trade Representative's (USTR) request for input regarding Indian and Indonesian compliance with the Generalized System of Preferences (GSP) eligibility criteria.¹

The App Association represents more than 5,000 small business software application development companies and technology firms across the United States and the globe.² Alongside the rapid adoption of mobile technologies, our members have developed innovative applications and products that improve workplace productivity, accelerate academic achievement, monitor health, and support the global digital economy. Today, the app ecosystem is worth more than \$950 billion and employs 4.7 million Americans.³

¹ 83 FR 18618.

² See <http://actonline.org/about>.

³ See http://actonline.org/wp-content/uploads/App_Economy_Report_2017_Digital.pdf
<http://actonline.org/2018/04/16/state-of-the-app-economy-report-highlights-american-leadership-in-the-950-billion-app-economy/>.

I. General Comments on Market Barriers Impacting the Digital Economy

The global digital economy holds great promise for small app development companies, but our members face a diverse array of trade barriers when entering new markets. These barriers may take the form of laws, regulations, policies, or practices that protect domestic goods and services from foreign competition, artificially stimulate exports of domestic goods and services, or fail to provide adequate and effective protection of intellectual property rights (IPR). While these barriers have different forms, they all have the same net effect: impeding U.S. exports and investment at the expense of American workers. Such trade barriers include:

- **Limiting Cross-Border Data Flows:** Limiting cross-border data flows hurts all players in the digital economy. The seamless flow of data across economies and political borders is essential to the global economy. Innovative small app development companies rely on unfettered data flows to access to new markets and customers.
- **Data Localization Policies:** Companies expanding into new overseas markets often face regulations that force them to build and/or use local data infrastructure. These data localization requirements seriously hinder imports and exports, jeopardize an economy's international competitiveness, and undermine domestic economic diversification. Small app developers often do not have the resources to build or maintain infrastructure in every country in which they do business, effectively excluding them from commerce.
- **Customs Duties on Digital Content:** American app developers and technology companies take advantage of the internet's global nature to reach the 95 percent of customers that are outside the United States. However, the "tolling" of data across political borders with the intent of collecting customs duties directly contributes to the balkanization of the internet and effectively blocks innovative products and services from entering new markets.
- **Requirements to Provide Source Code for Market Entry:** Some governments have proposed or implemented policies that make legal market entry contingent upon the transfer of proprietary source code. For app developers and tech companies, intellectual property is the lifeblood of their innovation, and the transfer of source code presents an untenable risk of theft and piracy. These requirements present serious disincentives for international trade and are a non-starter for the App Association's members.

- **Requirements for “Backdoors” in Encryption Techniques:** Global digital trade depends on technical data protection methods and strong encryption techniques to keep users safe from harms like identity theft. However, some governments and companies insist that “backdoors” be built into encryption for the purposes of government access. These policies would degrade the safety and security of data, as well as the trust of end users, by creating known vulnerabilities that unauthorized parties can exploit. From a security and privacy standpoint, the viability of app developers’ products depends on the trust of end users.
- **Intellectual Property Violations:** The infringement and theft of IPR (copyrights, trademarks, patents, and trade secrets) present a major threat to our members and the billions of consumers who rely on their digital products and services. Strong but fair protection of intellectual property for copyrights, patents, trademarks, and trade secrets is essential.

The App Association is pleased to provide its input on, under the new GSP Country Assessment process, whether India and Indonesia’s current laws and practices meet GSP eligibility criteria. We do not offer views regarding whether Kazakhstan is meeting the GSP criterion requiring a GSP beneficiary country to take steps to afford internationally recognized worker rights to workers in the country.

We support efforts by the U.S. government to protect American small businesses and we commit to partner with USTR to support fair and reasonable market access to foreign markets to help our members continue to grow and create American jobs.

II. Specific Input Regarding India and Indonesia's Compliance with GSP Eligibility Criteria

A. India

The App Association is pleased to provide input on India's adherence to the GSP's eligibility criterion, which requires beneficiary countries to provide equitable and reasonable access to its market.⁴ The App Association does not offer a view regarding USTR's request for input regarding the two GSP petitions asserting that India is not meeting this criterion, but rather offers comments to inform a review of India under the new GSP Country Assessment process with the GSP criterion that requires a GSP beneficiary country to assure the United States that it will provide equitable and reasonable access to its market. We also note our support for USTR's reference to the "wide array of trade barriers that create serious negative effects on U.S. commerce" in the latest NTE.⁵ Building on the above, we provide the following, non-exclusive list of trade barriers that inhibit equitable and reasonable access to India's market:

Issue: Restrictive Data Localization Laws

India has proposed and implemented policies that restrict the flow of data across its borders, which creates significant issues for small business innovators seeking to enter the Indian market. These policies include:

- India's National Data Sharing and Accessibility Policy, which requires all data collected using public funds to be stored within the borders of India.⁶
- The 2015 National Telecom M2M (machine to machine) Roadmap,⁷ which has not yet been implemented, states that all M2M gateways and application servers serving customers in India must be located within India. The draft policy also proposes that foreign SIM cards not be permitted in devices used in India.
- The Reserve Bank of India, on April 5, 2018, announced that all payment system operators must ensure data related to payments is stored only in India.

⁴ 19 U.S.C. 2462(c)(4).

⁵ FR at 18619.

⁶ Government of India Ministry of Science & Technology, *India's National Data Sharing and Accessibility Policy*, (2012), available at <http://ogpl.gov.in/NDSAP/NDSAP-30Jan2012.pdf>.

⁷ Government of India Ministry of Communications & Information Technology Department of Telecommunications, *National Telecom M2M Roadmap*, available at <http://www.gsma.com/connectedliving/wp-content/uploads/2015/05/150513-DoT-National-Telecom-M2M-Roadmap.pdf>.

Issue: Continuing Threats and Uncertainty Regarding the Use of Strong Encryption

Currently, Indian internet providers must attain government approval from the Telecom Regulation Authority of India (TRAI) to employ security methods stronger than 40-bit encryption. Laws like this limit the touchpoints our members' apps can use to reach consumers. Although U.S. companies are not primarily affected by the regulation, it affects American business and should be considered a trade barrier. In addition, as recently as late 2015, the Indian government proposed a National Encryption Policy that presented numerous concerning proposals. This is an ongoing issue of serious concern to the App Association and small business innovators.

IPR Enforcement

India represents an immense opportunity for American small business tech and software development companies. However, App Association members continue to experience a wide range of IPR infringement and lack of legal redress in India.

Certain steps indicate the Indian government's willingness to adequately protect IPR. For example, the Indian government undertook efforts to further its commitment to formally establish a Copyright Royalty Board and appoint a functional Intellectual Property Appellate Property Board. Under the Finance Act of 2017, the informal Copyright Board merged with the IP Appellate Property Board. As a result, applications for copyrights in 2016-2017 increased by 78 percent when compared to 2015-2016.⁸ Moreover, as of May 20, 2016, the Indian government established additional commercial courts, advancing the 2015 Commercial Courts Act.⁹ The App Association perceives these steps as further evidence of India's commitment to enhance its IP procedures.

The Indian government appears committed to the IPR Task Force announced by the Maharashtra government. As of January 24, 2018, Cell for IPR Promotion and Management (CIPAM) and Federation of Indian Chambers of Commerce & Industry (FICCI) made an IPR enforcement toolkit for police, and there have been 26 programs dedicated to training police officers on IP enforcement.

Despite this positive movement, the App Association believes India still needs to create an adequate IPR system and implement strong enforcement to provide the necessary certainty to our members seeking to enter the Indian market.

⁸ <https://spicyip.com/wp-content/uploads/2018/01/IPR-Regime-In-India-Government-Initiatives.pdf>

⁹ <https://timesofindia.indiatimes.com/city/delhi/Commercial-courts-begin-functioning-in-Delhi-Mumbai/articleshow/52488068.cms>

B. Indonesia

The App Association supports USTR’s examination of, under the new GSP Country Assessment process, whether Indonesia meets the GSP criterion that requires a GSP beneficiary country to assure the United States that it will provide equitable and reasonable access to its market. We are pleased to provide comments on whether Indonesia is providing equitable and reasonable access to its market,¹⁰ and whether Indonesia is reducing trade-distorting investment practices and reducing barriers to trade in services.¹¹ The App Association also notes its support for USTR’s reference to the “wide array of trade barriers that create serious negative effects on U.S. commerce” implemented by the Indonesian government, as described in the latest National Trade Estimate (NTE).¹² Building on the above, we provide the following, non-exclusive list of trade barriers that inhibit equitable and reasonable access to the Indonesian market.

Issue: Data Localization Requirements on Electronic System Providers of Public Services

Indonesia’s Ministry of Communications and Information Technology (MCIT) has enacted regulations that require electronic system providers for public services to locate a data center and disaster recovery center within Indonesia.¹³ These data localization laws cover a broad and expanding range of sectors and technologies. In 2012, Indonesia enacted regulation no. 82,¹⁴ regarding the provision of electronic systems and transactions, which requires “electronic systems operators for public service” to store data locally. Indonesia has also implemented regulations regarding e-payments and the local storage of financial data. While larger companies possess the ability to absorb these costs to provide their products and services to Indonesian consumers and businesses, these requirements pose a massive disincentive for the App Association’s small tech innovators. The especially broad implications are evident in the language that covers “personal data” and applies to “any institution that provides information technology-based services”.¹⁵

¹⁰ 19 U.S.C. 2462(c)(4).

¹¹ 19 U.S.C. 2462(c)(6).

¹² FR at 18619.

¹³ See Mary R. Silaban, *Unleashing Indonesia’s Digital Innovation*, American Chamber of Commerce in Indonesia (June 10, 2014), available at <http://www.amcham.or.id/fe/4614-unleashing-indonesia-s-digital-innovation>. See also, U.S. Dep’t of State Bureau of Economic and Business Affairs, *2014 Investment Climate Statement – Indonesia*, (June, 2014), available at <http://www.state.gov/documents/organization/226821.pdf>.

¹⁴ Vasey, Kay, *Indonesia moves towards comprehensive data law – how will it impact your business?*, CMS UK Datonomy Blog (July 4, 2017) available at <http://datonomy.eu/2017/04/07/indonesia-moves-towards-comprehensive-data-law-how-will-it-impact-your-business/>

¹⁵ *Cross-Border Data Flows: Where Are the Barriers, and What Do They Cost?*, Information Technology & Innovation Foundation (May 1, 2017), available at <https://itif.org/publications/2017/05/01/cross-border-data-flows-where-are-barriers-and-what-do-they-cost>.

Issue: Proposed Regulations on “Over the Top” Service Providers

The App Association has significant concern with the Ministry of Communication and Informatics’ (Kominfo) *Draft Regulation of the Minister of Communications and Information of the Republic of Indonesia, Number ___ of 2016, concerning Provision of Application Services and/or Content over the Internet (OTT)*.¹⁶ We believe that the proposal, when implemented, will create an overly burdensome regulatory environment that will hamper the growth of Indonesia’s economy and its burgeoning mobile app developer business community. This concerning, publicly-proposed Kominfo regulation, includes:

- Requirements for physical presence in Indonesia by OTT service providers. Small businesses simply cannot afford to open local offices in every market in which they offer their services, nor can they afford to dedicate resources to establishing partnerships with local conglomerates. This requirement would create a cost burden to market entry that is untenable for small businesses, particularly in the case of attaining licensing from the Investment Coordination Board.
- Mandatory partnerships between OTT service providers and telecommunication providers. Such a policy would be extremely expensive for all Kominfo-defined OTT service providers, and particularly onerous for small app makers.
- Requirements of the localization of data storage or processing, specifically (1) the use of national payment gateways legally incorporated in Indonesia, specifically for paid OTT [services]; (2) the use of an Indonesian internet protocol number and placement of part of the server in data centers in Indonesia; and (3) the local storage of data for a minimum of three (3) months, or longer should law enforcement request it.

On May 26, 2016, the App Association filed detailed comments with Kominfo describing the difficulties posed by many of the specific provisions in the draft OTT regulation – we urge the Trade Policy Staff Committee to review these comments.¹⁷ Further, we respectfully requested that Kominfo refrain from implementing this regulation and instead engage in further consultation with affected stakeholders to allow for meaningful and win-win solutions to Indonesia’s concerns when seeking to regulate OTT services. Small business app developers continue to face great uncertainty in the Indonesian market due to the OTT regulation.

¹⁶ Republic of Indonesia’s Ministry of Communication and Information Technology, *Draft Number 3 of 2016 concerning Provision of Over-The-Top Application and/or Content Services via the Internet*, (Mar. 31, 2016), available at <http://www.lexology.com/library/detail.aspx?g=4aa11c3e-cf65-4998-921a-2ac8408b375b>.

¹⁷ ACT | The App Association, *RE: Kominfo’s Draft Regulation, Number ___ of 2016, Provision of Application Services and/or Content over the Internet (OTT)*, (May 26, 2016), available at http://actonline.org/wp-content/uploads/act_comments_to_kominfo_re_draft_ott_regulation_052616-1.pdf.

Issue: Creation of Tariff Classification for ‘Intangible Goods’ (such as software and other digital goods)

The App Association has become aware of the Indonesian Ministry of Finance’s recent issuance of a new regulation to amend Indonesia’s import duty Harmonized System (HS) classification system and add a new HS Chapter 99 to their tariff system to include ‘intangible goods’, like software and other digital goods.¹⁸ While we continue to work with the Indonesian government as more details emerge, the App Association understands Indonesia’s new regulation to be the first of its kind in attempting to quantify digital commerce for the purposes of imposing a tariff. This kind of approach should be condemned, and we stand in partnership with the U.S. government and others to ensure such an approach is not adopted by more countries. The App Association also believes the enactment of this new regulation constitutes a violation of the WTO moratorium on e-commerce taxation.

Issue: IPR Enforcement

Indonesia continues to provide inadequate IPR protections and enforcement mechanisms, which serve as an extraordinary barrier to entry for U.S. small business innovators. We acknowledge the Indonesian government’s attempts to improve IPR enforcement. For example, its revisions to Indonesian trademark law in November 2016 demonstrated a positive step forward to advance the rights of trademark holders through shorter examination times and better criteria for protected marks. These steps will also help prepare Indonesia to join the Madrid Protocol.

However, there remain ongoing concerns around whether the recent provisions will be adequately enforced and there has been minimal progress in integrating USTR’s suggested reforms in Indonesia’s 2017 review. For example, Indonesia has not yet created a specialized IPR unit within its National Police to enforce against Indonesian criminal syndicates that create counterfeit and pirated marks and works, nor have they removed counterfeit and pirated material from Indonesian markets.

As USTR noted in its 2017 301 review, Indonesia’s 2016 revisions to its Patent Law continue to raise concern. The revised law included localization rules that require foreign patentees to transfer proprietary technologies to local companies, which effectively force American companies to create products in Indonesia to protect their rights.

¹⁸ <http://www.sidih.depkeu.go.id/fullText/2018/17~PMK.010~2018Per.pdf>

III. Conclusion

The App Association appreciates the opportunity to submit these comments to USTR, and we commit to work with all stakeholders to address the above concerns to create a prosperous U.S. economy and great market access of U.S. businesses in these areas.

Sincerely,



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