WRITTEN SUBMISSION OF THE NATIONAL FOREIGN TRADE COUNCIL

Comments Regarding the Compilation of the National Trade Estimate Report on Foreign Trade Barriers

Docket No. USTR-2023-0010

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TABLE OF CONTENTS

INTRODUCTION

These comments are submitted by the National Foreign Trade Council (NFTC) in response to the notice entitled *Request for Comments To Compile the National Trade Estimate Report on Foreign Trade Barriers* (Notice) which was published in the Federal Register on September 11, 2023. Pursuant to the Notice, The Office of the United States Trade Representative (USTR), through the Trade Policy Staff Committee (TPSC), publishes the National Trade Estimate Report on Foreign Trade Barriers (NTE Report) each year. The Notice invites comments to the TPSC in identifying significant barriers to U.S. exports of goods and services, U.S. foreign direct investment, and the protection and enforcement of intellectual property rights for inclusion in the NTE Report.

NFTC is dedicated to making America more competitive in the global economy by ensuring the adoption of forward-looking tax and trade policies, by strengthening global rules and by opening foreign markets to U.S. products and services. Our strong support for these objectives, and our belief that their fulfillment is essential to our members' success in a globalized economy, have been unwavering for over a century. We, therefore, believe that it is critical to provide policymakers in the administration with our clear views about the role trade and tax policies play with respect to U.S. competitiveness in the global economy.

The National Foreign Trade Council is the premier business association advancing trade and tax policies that support access to the global marketplace. Founded in 1914, NFTC promotes an open, rules-based global economy on behalf of a diverse membership of U.S.-based businesses.

While NFTC has an interest in removing a variety of critical trade and investment barriers around the world, the purpose of these comments is to call the TPSC's attention to specific barriers that deserve consideration in the upcoming NTE. These comments are organized by industry sector. Some issues are cross-cutting and affect U.S. companies in a wide range of markets. These issues are discussed briefly below and are discussed in more detail with respect to individual countries.

Digital Trade

EU "Technology Sovereignty"

Notably, over the past three years, EU leaders have actively promoted an aggressive, multi-pronged approach towards "technology sovereignty" as one of the two main policy objectives to be pursued by the current EU Commission. Under this new policy umbrella, the EU has enacted a sweeping Digital Markets Act that applies almost exclusively to U.S. platforms and has pursued new restrictions on U.S. cloud services, artificial intelligence, and data. EU officials have stated that the purpose of digital sovereignty is to create a "new empire" of European industrial powerhouses to resist American rivals. These unilateral regulations discriminate against U.S. companies and appear designed to transfer a portion of the $517 billion U.S. digital export market to their EU competitors.

Unilateral and Discriminatory Digital Services Taxes

An increasing number of foreign trading partners have proposed or imposed unilateral digital services taxes (DSTs) that unfairly target U.S. digital companies for discriminatory taxation. While previous DST proposals mostly emanated from EU countries, governments outside of the EU, including Kenya, Indonesia, and India, have now followed suit, underscoring the risk of contagion if such discriminatory proposals are not stopped before they are adopted. Many governments initially justified DSTs as necessary to address budgetary pressures linked to COVID-19 economic recovery efforts. While many countries agreed to suspend their DSTs while the Organization for Economic Cooperation and Development attempts to reach consensus on a global approach to address these challenges, some countries have gone ahead and implemented their DSTs. Others, such as Canada, have announced plans to move forward with a discriminatory and retroactive DST that would seize billions of dollars from the U.S. tax base.

Other Digital Trade Barriers

Some foreign governments have also devised new ways of targeting U.S. digital companies and reducing their space to operate in foreign markets while protecting their domestic industries. For example, Canada's *Online News Act* and Australia's *News Media and Digital Platforms Mandatory Bargaining Code* require U.S. digital companies to carry domestic news content, transfer revenue to competitors, and in some cases disclose proprietary information related to private user data and algorithms.

Australia

Bargaining Code

Australia's News Media and Digital Platforms Mandatory Bargaining Code requires U.S. digital companies to carry domestic Australian news content, transfer revenue to Australian competitors, and disclose proprietary information related to private user data and algorithms. Countries such as Canada and Czechia are currently pursuing similarly discriminatory measures, with more intrusive revenue expropriation requirements aimed solely at U.S. companies.

ATO Draft Taxation Ruling on Royalties – Character of Receipts in Respect of Software

In June 2021, the Australian Taxation Office (ATO) issued a draft taxation ruling (TR 2021/D4) that proposed an updated domestic interpretation of what constitutes a "royalty" and has considered certain software payments made by distributors and resellers, including through updated methods of software delivery, as royalty, subject to withholding tax in Australia. While TR 2021/D4 would be a reinterpretation of domestic copyright law, its result is in fact a significant departure from global norms regarding the tax characterizations of software payments made by distributors and resellers. The ATO does not consider its view to be out of step with its taxing rights under the Double Taxation Avoidance Agreements ("DTAA") (including with the U.S.) and is expected to apply this new interpretation to the US-Australia DTAA as well.

Specifically, Australia's long-standing guidance, TR 93/12 – Income Tax: computer software (which was withdrawn on July 1, 2021 with the release of draft TR 2021/D4) makes clear that a payment by a distributor for a license of a simple use of software does not constitute a royalty if it is licensed to end-users, as the distributor is not exploiting a software copyright right. The simple use of software means that a licensee or end-user is using the product as intended (and therefore not using the copyright in the software). This is the approach taken in the OECD Model Tax Convention on Income and on Capital and related commentary, which acknowledges that "distributors are only paying for the acquisition of the software copies, not to exploit any right in the software copyrights," and therefore relevant transactions should not be treated as royalties.

TR 2021/D4, however, would expand the scope of payments made by distributors and resellers of software that may constitute a royalty. Under the approach in TR 2021/D4, a distributor/reseller is considered exercising an ancillary "authorization" copyright right in a software program, even though the copyright owner has not granted any of the principal copyright rights in the software (e.g., modify, reproduce, etc.) to the distributor. This means that certain customary commercial elements of computer software distributor and reseller arrangements (e.g., authorizing the user to download software onto its server) would be considered as the distributor or reseller exercising a copyright right rather than transferring a copyrighted article or providing a service.

Audio Visual Services - Streaming Content Quotas

On January 30, 2023, the Government of Australia published the National Cultural Policy. The Policy recommends that the Australian Government introduce "requirements for Australian screen content on streaming platforms to ensure continued access to local stories." In September 2023, the Australian government announced it would delay introducing legislation to impose local content quotas on streaming platforms until 2024. If the Australian government were to mandate that streaming platforms invest a percentage of their Australian revenue in Australian online content, it would prima facie appear to contravene Australia's commitments under the U.S.-Australia Free Trade Agreement, which discipline measures that discriminate in favor of domestic content.

Brazil

Over-the-Top Regulations

Brazil has contemplated measures to apply ill-fitting or cumbersome regulations to value-added services, such as video-on-demand, streaming, or other over-the-top services (OTTs). Recent consultations by both ANATEL and ANCINE question how to regulate these services under existing frameworks or the need to create new regulatory models, without due consideration of specific market and service characteristics, as well as the technical feasibility of the requirements on these services. Specifically, ANATEL is reviewing its Competitive Market Plan and plans to include OTT as a relevant market in order to apply ex-ante regulation. NFTC encourages Brazil to take an approach rooted in good regulatory practices that considers the innovative nature of Internet-based business models and the overall consumer welfare, incentivizing less prescriptive regulations across all services and avoiding any potentially overly burdensome rules that would limit access to these services. NFTC also encourages the permanent prohibition of customs duties for digital products and electronic transmissions to ensure that added costs do not impede the flow of music, video, software, games, or information. Additionally, ANATEL has indicated that it intends to regulate the administrative blocking of piracy content. If ANATEL decides to go in this direction, the agency should consider safe harbors for platforms that are committed to preventing piracy in their services.

Digital Platform Regulations

In November 2022 Brazil's Congress introduced Bill 2768, inspired by the European Union's Digital Markets Act (DMA), that designates the National Telecommunications Agency (ANATEL) as the primary regulator of "digital platforms" in Brazil. The bill also establishes a regulatory framework for the organization, functioning, and operation of "digital platforms" that offer services to users in Brazil. The bill uses vague terminology and does not clearly describe the specific requirements needed to comply. Instead, it grants ANATEL significant discretionary authority to define terms and create rules. While the vague language in the bill makes it hard to determine the specific obligations that would apply to U.S. companies, the bill would at minimum increase compliance costs and may require the restructuring of business operations.

Network Usage Fee

ANATEL launched a consultation exploring the possibility of requiring over-the-top providers to bear the cost of the development of telecom infrastructure in Brazil. ANATEL's consultation echoes calls by European and Brazilian telecommunications companies to require six U.S. companies to directly pay telecommunications operators to support infrastructure development. Introducing an Internet levy to subsidize local telecommunications companies would have significant consequences for the digital economy and would directly discriminate against U.S. companies who are already significantly invested in Brazilian networks and Internet infrastructure. ANATEL's consultation ran from March - August 2023. Despite strong opposition to the idea of a network fee through the consultation, ANATEL is expected to push forward with the proposal.

Data Protection

The Brazilian Congress introduced Bill of Law N° 4097, DE 2023, which would introduce new "digital sovereignty" measures into the General Data Protection Law. It appears to require IT companies providing services in Brazil to have a substantial percentage of Brazilian ownership and control (e.g., 25% of the voting share capital held by Brazilian nationals, be incorporated under Brazilian law or headquartered in Brazil).

Brazilian Artificial Intelligence Strategy

In April 2021, the Federal ICT Ministry published the Brazilian Artificial Intelligence Strategy (EBIA), which guides the actions of the Brazilian government in favor of the development of initiatives to stimulate research, innovation and development of AI solutions, as well as their responsible use. At the legislative level, some bills that intend to regulate the development and use of AI have been presented. Bill 21/2020, which includes principles for the development and use of AI, was adopted in the House and sent to the Senate for deliberation. In

2022, the Senate created a special Commission of Legal Scholars to analyze the draft text of the bill and produce a report with amendment suggestions by December 7. The review resulted in a new bill (Bill 2.338/2023) proposed in May 202. Bill 2.338/2023 outlines three levels of risk for AI systems, similar to the European Union AI Act: (i) excessive risk, in which the use is prohibited; (ii) high risk; and (iii) non-high risk. Before deploying or using the AI system, it shall pass a preliminary self-assessment analysis conducted by the AI provider to classify its risk level.

Digital Services Taxation

We understand there are several proposals – both as standalone measures and as part of broader tax reform – under consideration that would seek to implement new taxes on certain digital activities. In one proposal, a "CIDE-Digital" (PL 2358/2020) would apply at a progressive rate of one to five percent (on the basis of global revenue) on revenue generated in connection with three narrowly defined sets of digital services. The Committee on Science, Technology, Communication and Informatics in the Câmara dos Deputados held a public hearing in September 2021 to discuss this legislation. Other proposals of note would establish a unique COFINS-Digital (Contribution to the Financing of Social Security) of 10.6 percent on gross revenue from specific digital services, and a 3 percent tax on gross revenue from digital services targeting the Brazilian market by companies with more than BRL 4.5 million in global revenues (PLP 131/2020 and PLP 218/2020, respectively).

Introduced by Filipe Barros (PSL/PR), the "CIDE-Internet" (PL 640/2021) would apply a 3 percent gross revenue tax on revenue "arising from the economic exploitation of the availability, distribution, dissemination or supply of content on the Internet carried out in the country." Activities covered under the proposed tax include advertising, sponsorship or merchandising; content targeting; collection, distribution or processing of data; payment platform; or exploration or dissemination of image, text, video, or sound related to an individual or legal entity. Any revenue that has already been subject to taxation in Brazil would be excluded from the calculation base.

Furthermore, in the Ministry of Economy's tax reform proposal, the Ministry proposes establishing the Social Contribution on Transactions with Goods and Services (CBS), a federal contribution similar to the Value Added Tax (VAT) that could introduce significant new obligations for online service providers and marketplaces if not carefully crafted. NFTC urges the Brazilian government to refrain from introducing any tax measure that is discriminatory in nature, and to recommit to finalizing a multilateral solution to tax challenges arising from the digitalization of the global economy.

Canada

Digital Services Tax

On August 4, 2023, the Department of Finance Canada released a revised draft of its proposed Digital Services Tax Act legislation for public consultation. Like its predecessor, the revised legislative proposal would impose a 3% tax on revenue from certain digital services provided by businesses with gross revenues of at least €750 million and in-scope Canadian revenues of at least $20 million (CAD). The tax would apply retroactively to relevant revenues earned as of January 1, 2022, and would not be creditable against Canadian income tax. Canada is moving forward with the DST despite the agreement from nearly all 140 economies participating through the Organization for Economic Cooperation and Development's (OECD) negotiations on international tax rules to extend a moratorium on DSTs through December 31, 2024. Canada's proposed DST would discriminate against U.S. companies and contravene Canada's obligations under both the U.S.-Mexico-Canada Agreement (USMCA) and the WTO General Agreement on Trade in Services (GATS).

C-11 - Online Streaming Act

In April 2023, the Government passed Bill C-11 Act to amend the Broadcasting Act, aimed at extending CRTC regulatory authority over online services and imposing various parameters for regulation aimed at requiring "web giants" to contribute to the creation, production, and distribution of Canadian content in English and in French. While regulations prescribing investment and discoverability requirements are yet to be finalized, the Act gives significant power to an unelected regulator (Canadian Radio-television and Telecommunications Commission – CRTC) to collect information, set rigid investment quotas, and impose fines. Already the CRTC has released early decisions that scope in a wide set of streaming services with revenue over $10M CAD, including podcast networks, most of which are U.S.-based. U.S. streaming services already invest billions of dollars annually into Canada's creative sector, but there are no requirements in the Act for the CRTC to recognize these investments when setting mandatory contribution requirements. Resulting regulations could disincentivize existing investments, and negatively impact customer choice, affordability, and the ability for companies to innovate on behalf of their Canadian customers.

Online Publications Bill (Bill C-18)

The Canadian Online Publications proposal (Bill C-18, aka Online News Act) is an effort by the Canadian Government to subsidize the Canadian news industry in a manner that violates the principles of nondiscrimination and national treatment underpinning USMCA. The bill requires compensation for facilitating access to news in any way and seeks to require payments for links served on Internet platforms. (It is worth underscoring how damaging a link tax would be. The open web is built on links; requiring payment for them would have a significant negative effect on how the Internet operates.) Bill C-18 targets a handful of U.S. platforms while exempting foreign rivals from its regulatory scope including companies like Bytedance/TikTok that are competing aggressively in the Canadian news market. The legislation also applies to a broader range of services than any similar measures in the EU and other markets – not just search engines and social media providers but also podcasting services, voice assistants, app stores, cloud providers, and ads platforms. Bill C-18 includes overbroad language on "unjust discrimination," "undue or unreasonable disadvantage," and "undue preferences" that would subject U.S. platforms to liability for any type of ranking or moderation of content from a news outlet, or any action that might have a negative impact on any outlet, even if that outlet is known to produce propaganda or disinformation. Any attempt to elevate authoritative information (including government information) or reduce and remove low quality information – including from eligible foreign state media outlets – is effectively prohibited under C-18. Meanwhile, the bill does not require eligible news outlets, including foreign state media, to adhere to accepted journalistic standards to qualify for remuneration requirements.

Bill C-18 creates a link tax by requiring U.S. platforms to negotiate payments even when they are merely facilitating access to news "by any means, including an index, aggregation or ranking of news content." U.S. platforms are willing to contribute to Canadian publishers but are not able to operate under a regime that forces unprecedented payments for the act of linking to content. Unfortunately, the structure of the final offer arbitration clause in Bill C-18 includes vague and unbalanced criteria that strongly incentivize the arbitration panel to require the highest level of payment for such activities.

The Parliamentary Budget Office Cost Estimate[1] for C-18 indicated that the PBO "expects news businesses to receive from digital platforms a total compensation of $329.2 million per annum under the Bill" primarily to broadcasters.

There has been no indication that any Canadian, Chinese, or other non-U.S. digital companies will be subject to this measure. Therefore, this policy raises significant national treatment and performance requirement concerns under the USMCA. As bipartisan members of Congress have argued, the U.S. government should ensure that the USMCA is enforced to avoid these negative outcomes for North American strategic interests.

Privacy

Bill C-27, federal privacy legislation, is currently being studied by the House of Commons Industry Committee. The bill aims to update Canada's current privacy law for the private sector, bringing it in closer alignment with European data protection and privacy standards, and introduces new privacy protections for minors. While the government has stated a desire to prioritize interoperability with new regulations, there is still work to be done at the committee level to ensure consistency and predictability for businesses operating across Canada. This includes introducing a consistent definition of a minor (which currently varies across provinces), adding clarity on consent exceptions, and confirming a 2-3-year implementation process. Once approved by the House of Commons Committee, the bill will be studied in the Senate.

Artificial Intelligence

The Artificial Intelligence and Data Act (AIDA), which was introduced in Bill C-27 alongside federal privacy legislation, is loosely modeled off the EU's AI Act. AIDA requires those responsible for AI systems to assess potential harm of outputs, develop mitigation plans to manage risk, and publicly disclose when high-impact systems are used. Penalties include AMPs, and criminal liability in some instances. The bill has just gone to the House of Commons Industry Committee for further study and is expected to pass in early 2023. While the Government appears open to amendments that address some concerns voiced by industry – including lack of clarity on developer/deployer responsibility, no clear definition for "high impact systems" – there remain concerns that the government will take an overly burdensome regulatory approach to AIDA, which could risk interoperability across North America.

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[1] https://www.pbo-dpb.ca/en/publications/RP-2223-017-M--cost-estimate-bill-c-18-online-news-act--estimation-couts-lies-projet-loi-c-18-loi-nouvelles-ligne

Chile

Data Localization

The Chilean financial regulator (CMF) has rules related to the general IT outsourcing of services (RAN 20-7) that allow cloud adoption in country and abroad, but require financial institutions to have local data centers for contingency purposes, when processing relevant data / critical workloads abroad. The 2017 version of the regulation issued by the CMF did not allow for an exception to requirements on local infrastructure for contingency purposes. Following a public consultation process in 2019, the CMF agreed to create an exception for the aforementioned requirement. However, the regulator authorized a narrow exception exclusively for banks that maintain adequate operational risk management per CMF's assessment. Many financial institutions in Chile cannot benefit from the exception, as they do not meet CMF's requirements on "adequate" operational risk management. This has become a blocker for the advance of data hosting services in Chile, as it effectively funnels financial institutions to local infrastructure offerings. During June 2023, the CMF committed the review of RAN 20-7 as part of 2023 priorities but has not been able to deliver.

China

Market Access for Cloud Services

China implements a licensing system for telecommunications business operations. Only companies established in China, after obtaining a telecom business license, can engage in telecom business activities. Foreign companies' participation in the value-added telecommunication (VAT) sector is highly restrictive. Based on *Telecommunications Regulations of the People's Republic of China, Classification Catalogue of Telecommunications Services, and Special Administrative Measures for Foreign Investment Access (Negative List) (2021 Version)*, foreign companies are still denied access to the business sectors critical to cloud services, namely B11 Internet data center business, and B12 content distribution network service. There has been little or no progress on this long-standing obstacle and the opening up of IDC and CDN services was neither mentioned in President Xi's latest speeches nor in the recently released *Opinions on Further Optimizing the Foreign Investment Environment and Increasing Efforts to Attract Foreign Investment.*

While foreign service suppliers can earn a licensing or revenue-sharing fee through a contractual partnership with the Chinese company, the existing laws and regulations (1) prohibit licensing foreign cloud service providers (CSPs) for operations; (2) actively restrict direct foreign equity participation of foreign CSPs in Chinese companies; (3) prohibit foreign CSPs from signing contracts directly with Chinese customers; (4) prohibit foreign CSPs from independently using their brands and logos to market their services; (5) prohibit foreign CSPs owning and operating its own data centers; (6) prohibit foreign CSPs from contracting with Chinese telecommunication carriers for Internet connectivity; (7) restrict foreign CSPs from broadcasting IP addresses within China; (8) prohibit foreign CSPs from providing customer support to Chinese customers; and (9) require any cooperation between foreign CSPs and Chinese companies be disclosed in detail to regulators.

On December 31, 2020, the National Development and Reform Commission and the Ministry of Commerce released the Special Administrative Measures for Foreign Investment Access to Hainan Free Trade Port (Negative List) (2020 Version), which opened offshore data center business to foreign CSPs. President Xi said China will unswervingly promote a high level of opening up, and both the central government and some local governments announced plans to open up the VAT sector in pilot FTZs (Free Trade Zones) such as Beijing and Shanghai Lingang, yet the proposed market opening was delayed continuously.

Cross-border Data Flow

China imposes complex restrictions on the storage, movement, and access to data across borders, making it very difficult and costly for foreign companies to manage their global operations. In 2021, China released Personal Information Protection Law (PIPL) and Data Security Law (DSL), which, along with the Cybersecurity Law (CSL) implemented in 2017, established an overarching regulatory framework on data. The framework sets out three pathways for the cross-border data flow, namely security assessments, protection certification and standard contracts.

On security assessment, the Cyberspace Administration of China (CAC)'s Measures on Data Exit Security Assessment, effective since September 1, 2022, stipulate the requirements for cross-border transfer of important data and personal information by Critical Information Infrastructure (CII) operators and other companies that reach certain thresholds of data. The Measures put forward specific requirements for data exit security assessment, stipulating that data processors shall conduct a data exit risk self-evaluation before applying for data exit security assessment. Alongside the Measures, the regulations and standards on protection certification and standard contracts of personal data cross-border flow were also promulgated, forming a cross-border personal data flow management mechanism.

The mechanism imposes heavy compliance burdens and costs on data processors. Furthermore, it requires foreign companies to reveal corporate data mapping and cross-border data flow transfer routes, which carry high risks of divulging trade secrets and key IPR. Over the past 12 months, based on public information, there have been around 1,000 applications lodged across the country. With less than 10% of the applications officially approved, much of the remaining ones are still in the stage of submitting supplementary information.

In addition to personal data, cross-border flow of important data will also trigger security assessment. However, the definition of 'important data' and important data catalogues have yet to be finalized, bringing significant uncertainty for data handlers in some key sectors. Furthermore, we have seen the trend of industry regulators leveraging and expanding the concept of important data, proposing data localization and cross-border data flow restrictions in various industries, such as financial services, auto, ride hailing, Internet publication, mapping, and pharmaceutical sectors.

Perhaps understanding that the existing data transfer framework is impeding economic growth and impractical for domestic and foreign businesses operating in the global economy, on September 28, 2023, CAC released new draft provisions on regulating and promoting cross-border data flows for consultation, which would limit instances in which a data exit security assessment would be necessary. In particular, the consultation draft suggests that personal data transfers due to human resource management and contractual transactions, such as cross-border e-commerce, cross-border payments, plane ticket purchases and hotel bookings, and visa applications be exempted under the aforementioned cross-border personal data flow management mechanism. However, it is not known whether, when, or in what form the draft provisions will be enacted.

Critical Information Infrastructure

The CII Security Protection Regulation, effective from September 1, 2021, requires reinforced protection of CII. This regulation promotes the procurement of "secure and trustworthy" network products and services, which would result in unequal treatment between Chinese and foreign companies' products. If a company is identified as a CII, other obligations under Chinese security legislation, such as mandatory certification and assessment, and cybersecurity review must be imposed, which creates compliance cost and potential entry barrier to certain sectors. Over the past 2 years, regulations and standards relating to CII have been rolled out steadily by relevant authorities. In May 2023, China's first national standard for CII security protection GB/T 39204-2022 Information security technology – Cybersecurity Requirements for CII Protection became effective. The Administrative Measures for the Security Protection of CII for Highways and Waterways promulgated by the Ministry of Transport also became effective on June 1, 2023.

Cybersecurity Review

The Cybersecurity Review Measures (CSRM) were revised on January 4, 2022, making it mandatory for CII operators procuring network products and services, and online platform operators conducting data handling activities that influence or may influence national security, to proactively apply for a cybersecurity review. The review is an opaque process, presumably assessing a host of factors, including the security, openness, transparency, and diversity of sources of products and services; the reliability of supply channels, as well as the risk of supply disruptions due to political, diplomatic, and trade factors. For example, CAC launched and failed a cybersecurity review of Micron in early 2023, resulting in a demand for CII operators to stop purchasing its products. With vague criteria and broad scope, China's cybersecurity review regime could be abused and used to discriminate against foreign technology providers, thus creating entry barrier for many MNCs.

Secure and Controllable ICT Policies

The Chinese government has implemented secure and controllable ICT policies through various laws and regulations, including the Cybersecurity Review, the Critical Information Infrastructure Protection Measures, and the Cryptography Law. These policies have been reinforced under the banner of technological self-reliance and security since the14th Five Year Plan in 2021. In practice, these policies have been widely used, creating obstacles for foreign ICT products to get into sectors ranging from government, CII operators, and even State-Owned Enterprises (SOE). In the past year, the concept of SOE Cloud and State Cloud in China has further exemplified the policy.

Cryptography Law

China's Cryptography Law, enacted on October 26, 2019, and effective from January 1, 2020, classifies encryption into three categories: "core," "common," and "commercial" encryption. “Core” and “common” encryption categories are used to protect information considered to be “state secrets,” while commercial encryption is used to protect information that is not a state secret. In April 2023, Commercial Cryptography Administrative Regulations was amended. The amended regulations fail to support the interoperability of inter-national standards and use of internationally standardized encryption algorithms, suggest an extensive import license/export control scheme, include ambiguous clauses that potentially enforce a de facto mandatary certification instead of a voluntary one, and impose requirements applicable only to CII and party and government organs to networks above MLPS level three. If not clarified, the regulations will impose high compliance cost and create entry barriers for MNCs who heavily rely on encryption algorithms that comport with international standards.

Colombia

Data Localization

In May 2023, the Government of Colombia contracted through the Inter-American Development Bank a technical analysis in strengthening the governance and deployment of the necessary data infrastructure to improve the administration, storage, analytics, availability and sovereignty (security) of the State's data, ensuring the massification of public services to citizens and massifying the use of information exchange systems between public entities through the creation of a Private Cloud for the Government. This project seeks to determine the current and projected 10-year needs for the storage, analysis and management of data for 100% of the national government entities, in order to safeguard data and protect critical infrastructures and achieve efficiency in the investment of public resources.

Most recently, in September 12, 2023, a cyber-attack targeted IFX Networks, a local IT service provider to 46 public entities in Colombia, 21 of which use its data center services purchased through the Private Cloud Framework Agreement. The attack took the form of ransomware and affected more than 700 machines, encrypting information from approximately 762 companies in Latin America (mainly Colombia and Chile). Chile's public procurement platform - http://www.mercadopublico.cl/ - suffered downtime due to the attack. In Colombia, government agencies, including the Superior Council of the Judiciary, the Ministries of Health and Culture, and the Superintendence of Industry and Commerce, also had their websites affected. This cyber-attack has led to confusion and misinformation about the differences between private, public cloud and traditional infrastructure; statements that promote the idea of minimizing cloud in favor of "on-premises" infrastructure for critical government services; and, positioning data sovereignty as the solution to cybercrime. In Colombia, following these attacks, René Guarín, Chief of Technology and Information Systems of the President’s Office, added to the confusion as he called for further data localization.

European Union (EU)

Ex-Ante Regulation

The Executive Vice President of the European Commission has pursued a more assertive and targeted approach consisting of three branches for the EU’s competition policy. The three-pronged approach would include continuous rigorous enforcement of existing rules, new structural measures and an ex-ante regime. Some of these plans are targeted exclusively at U.S.

tech companies while others are due to apply across the board. In recent years, the EU environment has already been marked by aggressive enforcement where U.S. tech companies have been subject to Europe's highest-profile competition enforcement cases. The European Commission has imposed record fines and essential facility-style rules on U.S. companies for conduct most other regulators and courts have found to be legal. The Commission has also required record repayments of tax revenues as part of its state aid cases. As the Digital Markets Act and Digital Services Act are implemented NFTC encourages USTR to work with the EU to uphold principles of non-discrimination and technology neutrality in laws and regulations. It is important that regulatory approaches impacting digital services and technologies are not protectionist, but rather developed in a deliberate and consultative manner subject to traditional trade principles, including non-discrimination and national treatment.

Digital Markets Act (DMA) Implementation

The DMA, which was concluded in the first half of 2022 and entered into force in November despite U.S. government concerns regarding the discriminatory treatment of U.S. companies, creates significant and burdensome requirements for the small set of companies that the measure targets, all but one of which are American firms. The regulatory approach to impose "one-size-fits-all" obligations to different digital services with different business models is inadequate and could hamper innovation. The DMA restricts the use of data, creates new data access and portability obligations, and introduces interoperability requirements with a short implementation period and the threat of significant penalties. Despite commitments the European Commission (EC) made to the Biden administration before finalizing the DMA, no European companies were designated as "gatekeepers". On September 6, the EC designated 22 core platform services from 6 companies as gatekeepers: Amazon, Alphabet, Apple, ByteDance, Meta and Microsoft. Gatekeepers will need to comply with DMA's substantive obligations within six months, with the EC as the main enforcer.

DSA Implementation

The DSA, adopted in July 2022, creates new rules for the handling of illegal third-party content on cloud hosting and intermediary services in Europe, such as video-sharing services, social networks, and online marketplaces. The DSA has a particular focus on content-sharing platforms and marketplaces. Additionally, the DSA creates a new classification of companies called Very Large Online Platforms (VLOPs), a grouping that is almost entirely made up of U.S. companies, based on a presumption that services with more than 45 million active users present "systemic risk" irrespective of any specific risk assessment. The DSA imposes additional restrictions on targeted advertising and obligations for VLOPs and VLOSEs to provide alternative recommendation systems, despite the lack of any clear evidence that the size of a company indicates additional risk. The EU announced the designation of VLOPs on April 25, and of the 19 services announced, 16 were American, two were Chinese (AliExpress and TikTok), and just one was European (Zalando). The EU required the 19 designated VLOPs to come into full compliance by August 25, 2023, seven months earlier than all other companies, even though VLOPs and VLOSEs face a significantly larger compliance burden.

Internet Infrastructure Levy

The European Commission launched a consultation exploring the possibility of requiring over-the-top providers "of a certain size" to bear the cost of the development of telecom infrastructure in Europe. The Internet infrastructure levy, supported by European telecommunications companies, would initially require six U.S. companies to pay €20 billion annually to telecommunications operators to support infrastructure development. Introducing an Internet levy to subsidize EU telecommunications companies would have significant negative consequences for the digital economy and would directly discriminate against U.S. companies that are already significantly invested in European networks and Internet infrastructure. The EC opened a consultation on this proposal on February 23; comments were due on May 19. Despite strong opposition to the proposal through the consultation, including from the National Telecommunications and Information Administration, and opposition from a large group of EU Member states, the EC is pushing forward with the proposal.

Data Act

The Data Act, introduced by the EC in February 2022, regulates access to and transfer of data generated by connected products and related services. It will force sharing of data and the transfer of trade secrets under certain conditions. It also creates new discriminatory barriers for "gatekeepers" designated under the DMA. In particular, users will not be able to utilize a new portability right established by the Data Act to transfer their data to "gatekeepers." The Data Act also creates new obligations on cloud service providers on the access and transfer of non-personal data following third country access requests, leading to a new potential conflict of EU and third-country law. According to the Data Act's impact assessment, concerns over unlawful access to data by authorities not subject to EU legislation is one of the main drivers for the data access and transfer restriction, which implies an equivalence between U.S. and Chinese governments. Lastly, the Data Act imposes switching obligations on cloud service providers designed to make it easier for EU customers of incumbent U.S. providers to switch to EU competitors. The EU Institutions reached a final political agreement on the Data Act in July 2023, formal adoption is expected in Q3 2023 with rules applying in Q2 2025.

EU Foreign Subsidies Regulation (FSR) Implementation

In July 2023, the EU's FSR entered into force, giving the EC new powers to target economic distortions in the EU market caused by foreign subsidies. While the EC claims that the FSR targets subsidies from non-market economies, the FSR will subject U.S. businesses to the same procedures as companies from non-market economies that unfairly compete in the EU market. From October 2023, for example, any company operating in the EU market will be required to disclose "financial contributions" from non-EU governments (e.g., subsidies, certain fiscal incentives, capital injections) granted up to three years prior to their participation in the following activities: (i) public procurement procedures where the tender exceeds €250M and (ii) mergers and acquisitions in which parties' aggregate EU revenues exceed €500M. In addition, the FSR also provides the EC with an ex officio tool to investigate financial contributions on an ad hoc basis from July 2023. If the EC finds businesses to have benefitted from "distortive" subsidies, it could (i) disqualify them from public tenders and M&As in the EU and (ii) apply regressive measures such as subsidy repayments. Failure to disclose financial contributions or to comply with regressive measures may result in fines up to 10% of companies' global revenue.

In July, the EC published an Implementing Regulation (IR) laying out procedural mechanisms for the application of the FSR. The IR significantly reduced the scope of the FSR by, inter alia: (i) limiting the most onerous and in-depth reporting obligations to a narrow range of subsidies considered "most likely to distort"; (ii) excluding from the reporting obligations all contracts for the supply/purchase of goods/services on market terms; and (iii) exempting the notification of general tax measures and incentives valued below €1M. While these changes are a significant step in the right direction, and will help reduce unnecessary red tape for businesses, there are still some problematic elements in the FSR. Most significantly, there are certain incentives that fall within the scope of the FSR but would not have to be notified if granted by an EU Member States (e.g., certain audiovisual incentives and R&D tax credits). In addition, the EC has failed to offer any guidance on how it will operationalize the FSR's ex officio tool; thus, creating significant uncertainty for businesses and opening the door for discriminatory enforcement.

Artificial Intelligence Act (AIA)

In April 2021, the European Commission introduced the AIA, a comprehensive framework for regulating the development and deployment of artificial intelligence (AI) across the 27 EU member states. AIA would be a first-of-its-kind regulation, with the potential to set standards worldwide as businesses adapt to EU-specific requirements. As it stands, AIA presents four key problems: (i) AI is defined broadly, capturing common software not traditionally understood as "AI;" (ii) AIA would regulate based on "risk level," but creates significant uncertainty around how this risk is assessed; (iii) Compliance requirements for "high risk AI" are administrative and technically unfeasible (e.g., requiring "error-free datasets"), with unclear allocation of responsibility between AI developers ("providers") and deployers ("users"); and, (iv) AIA would prohibit use of some systems, but the scope of systems to be prohibited varies widely between the Commission's proposal and positions adopted by the Parliament and Council.

These four issues, if adopted into law, are likely to stifle innovation and limit market access for U.S. companies in Europe. The discussions and proposals regarding targeted rules for general purpose AI, and generative AI, as high-risk classification is also influenced by the broader EU "digital sovereignty" agenda aimed at reducing dependency on U.S. and Chinese technologies. The proposed regulation is entering its final and most critical phase, and adoption may happen as early as November. The AIA will come into effect 24 months after adoption and would potentially enter into force sometime in 2025 or 2026.

Data Flow Restrictions

In addition, the EU and some Member States have been proposing various restrictions on cloud services. The European Commission welcomed a Joint Declaration on cloud services that would erect protectionist barriers to entry into the European market. The declaration says that providers "must fulfil the need of cloud users to maintain control over strategic and sensitive data, including by ensuring that cloud capacities and services are not subject to the laws of foreign jurisdictions that could oblige access to be granted to EU data." The draft document would exclude non-EU cloud providers from participating in the European Cloud Federation.

Data Localization

In Hungary, the rules on the data management of state and local government bodies and organizations providing essential services are governed by Act No 50 of 2013 on the Electronic Information Security of State and Local Government Bodies ("Act"). The data managed by the state and local government bodies under the Act, which form part of the national data assets, may only be processed in electronic information systems operated and stored in the territory of Hungary, and in closed electronic information systems used for defense and diplomatic information purposes. This type of data may be processed in electronic information systems operated within the territory of the EEA States, if authorized by the supervisory authority for the security of electronic information systems or by an international treaty. This restriction applies to the following state and local government bodies: central government administration bodies,"Sándor-palota" (the office of the President of Hungary), Office of the Parliament (National Assembly), Office of the Constitutional Court of Hungary, National Office for the Judiciary and courts, Prosecution offices, Office of the Commissioner for Fundamental Rights of Hungary, State Audit Office of Hungary, Central Bank of Hungary, Metropolitan and county government offices, Offices of the representative body of local governments, Hungarian Defence Forces. Any entity not registered in Hungary operating an electronic information system under the Act must appoint a representative based in Hungary, who is responsible for the implementation of the provisions of the Act in accordance with the rules applicable to the head of such organization. The electronic information systems of organizations providing crucial services may also be hosted in the European Union Member States. Organizations providing crucial services include those in the energy, transport, agricultural, and health sectors.

Digital Services Taxes (DST)

The United States and EU Member States are among the 137 member jurisdictions to have joined the October 8, 2021, OECD/G20 "Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalization of the Economy". On October 21, 2021, the United States, Austria, France, Italy, Spain, and the United Kingdom issued a joint statement that describes a political compromise reached among these countries "on a transitional approach to existing Unilateral Measures while implementing Pillar 1." According to the joint statement, DST liability that accrues to Austria, France, Italy, Spain, and the United Kingdom during a transitional period prior to implementation of Pillar 1 will be creditable in defined circumstances against future corporate income tax liability due under Pillar 1. In return, the United States terminated the existing Section 301 trade actions on goods of Austria, France, Italy, and Spain and committed not to take further trade actions against these countries with respect to their existing DSTs until the earlier of the date the Pillar 1 multilateral convention came into force or December 31, 2023. USTR, in coordination with the U.S. Department of the Treasury, is monitoring the implementation of the political agreement on the OECD/G20 Two-Pillar Solution as pertaining to DSTs, the commitments under the joint statement, and associated measures.

Croatia Media Act

Croatia has separated digital and print media, with digital media regulated by The Electronic Media Act which was amended in 2022 to reflect changes in the market. Now, a new Croatian Media Act is also being drafted to answer to the challenges and opportunities of the modern media. While this proposed legislation is still in discussion raft stage, it could lead to government censorship and greater control over what is published online.

EU Cloud Security Scheme (EUCS)

In a February 2022 Commission Staff Working Document, the EU identified "cloud and edge computing" as a strategic dependency for Europe, noting that "the EU cloud market is led by a few large cloud providers headquartered outside the EU."

The EU's 2019 Cybersecurity Act established the legal basis for EU-wide certification of cloud providers. The EU agency for cybersecurity (ENISA) is currently developing a European Cybersecurity Certification Scheme for Cloud Services (EUCS). In a June 2022 proposal, and modified in subsequent drafts, ENISA proposed to add digital sovereignty requirements to the EUCS that would preclude companies headquartered outside the EU from obtaining the highest level of cybersecurity certification. The highest level of certification is expected to become mandatory for companies wishing to compete for certain cloud contract tenders with European governments and critical infrastructure operators; thus, the inclusion of sovereignty requirements would effectively prohibit U.S. companies from competing for a large swath of cloud government contract tenders for cloud projects across Europe. Provisions that discriminate on the basis of national origin violate the EU's trade obligations under the WTO Government Procurement Agreement (GPA) and the GATS .

Czech Cybersecurity Act

The Czech government, through the National Cyber and Information Security Agency (NÚKIB), is currently implementing the EU NIS 2 Directive with a new draft Cybersecurity Act. The current version of the draft will determine the requirements for servicing public administration information systems and has proposed to categorize data workloads from public administration information systems at security level 4 (critical) on the risk scale, thereby limiting the storage of this data to servers located in the Czechia.

SecNumCloud

France's national cybersecurity agency, Agence nationale de la sécurité des systèmes d'information (ANNSI), revised its cybersecurity certification and labeling program, known as SecNumCloud , in March 2022 to disadvantage—and effectively preclude—foreign cloud firms from providing services to government agencies as well as 600-plus firms that operate "vital" and "essential" services. France's "Trusted Cloud Doctrine" and SecNumCloud require that cloud providers must be "immune to non-EU laws" and, per Article 19.6 explicitly disqualify any company that is more than 39 percent foreign-owned (i.e., non-European) from eligibility for certification. As a result, U.S. companies must partner with, and transfer technology and control to, a local company in order to compete for cloud contracts with French public sector agencies and commercial entities considered "operators of vital importance.". The EU's and France's international trade commitments under the WTO GPA and the GATS include the principles of non-discrimination and national treatment in terms of the nationality of persons, products, services, or technologies. Article 19.6 of SecNumCloud appears to be a clear violation of Article 3 of the WTO GPA and Article XVIII of the GATS, both of which stipulate that signatories shall not discriminate against suppliers on the basis of nationality. The French legislature is currently contemplating an amendment that would extend SecNumCloud requirements to private entities in the healthcare sector.

Egypt

Licensing

In May 2020, Egypt's top media regulator, the Supreme Media Regulatory Council (SMRC), issued Decree No. 26 of 2020 which enforces a strict licensing regime on Media and Press outlets, in addition to online platforms. The regulation requires a 24-hour window for removal of harmful content. It also requires international companies to open a representative office in Egypt and identify a liable legal and content removal point of contact. The regulation lacks safe harbor protections for international companies and stipulates an average of $200,000 of licensing fees. The fees exceed the ceiling for such fees stipulated in the Media Law of 2018 and therefore unconstitutional.

Egypt's VAT

In their bid to raise fiscal revenues, the Egyptian Government proposed Amendments to the Value Added Tax Law No. 67 for 2016, to include taxation of advertising revenue, including digital advertising through a proposed stamp tax in addition to the VAT. While the stamp tax was dropped, companies are still liable for the currently proposed fourteen percent VAT. Online platforms suffer from the lack of distinction between digital and non-digital services for VAT liability, while international companies face the uncertainty of how the VAT will be applied to their services. Other issues of concern include designating an account point of contact and e-billing (online transactions are automatically registered at the authority and VAT value is determined).

Egypt's Data Protection Law

In July 2020, Egypt enacted its first general privacy legislation, the Data Protection Law. The Law imposes significant administrative and regulatory burdens on all entities operating in Egypt, with no exemptions on the basis of an organization's size. Key problematic requirements of the Data Protection Law include:

- Sensitive Personal Data, including financial data, requires explicit consent to process (exemption for entities under Central Bank supervision);
- Accountability, including Data Protection Officer (DPO) appointment requirement and data breach notification obligations;
- Records of Processing required;
- Grounds for processing and cross-border data transfers are limited;

- Restrictions on re-use of data by organizations; and
- Licenses are required for several activities.

Imprisonment and fines for non-compliance are up to USD 320,000 per violation and the law contemplates personal criminal liability for responsible managers and for the DPO.

Hong Kong

Data Localization

There have been concerns about the ability of Hong Kong to maintain a free and open digital ecosystem after the imposition of a national security law on Hong Kong since June 30, 2020. The Internet serves as a platform for the exchange of information and knowledge and drives collaboration between the public and private sectors. With the national security law in effect, the free and open Internet, which is foundational to digital trade, is at risk. In October 2019, the Hong Kong Securities and Futures Commission (SFC) issued a circular that requires financial institutions to store data in Hong Kong with locally registered external electronic service providers (EDSP) -- a de facto data residency requirement -- or requires the financial institution's internationally registered EDSP to sign an undertaking to provide the SFC unrestricted access to a financial institution's data hosted with the EDSP as a condition for doing business. The circular, as written, bypasses existing legal processes and provides blanket authorization for the regulator to access customer records. The circular mandates EDSPs to respond to the SFC's request for customer data in contradiction with the EDSPs' legal obligation to their customers.

India

Equalization Levy

In March 2020, India adopted an additional two percent equalization levy, expanding on an earlier equalization levy that targeted digital advertising revenue earned by non-resident providers. The tax applies only to non-resident companies and covers online sales of goods and services to, or aimed at, persons in India. The tax applies only to companies with annual revenues in excess of approximately Rs. 20 million (approximately U.S. $267,000). NFTC appreciates USTR's decision to terminate but continue to monitor the implementation of the removal of India's levy as provided for under Pillar 1 and the transitional approach agreed to by India.

Digital Services Tax

India has failed to adopt international tax norms, including by continuing to maintain a DST despite the OECD agreement to halt DSTs until Pillar One of the Inclusive Framework is entered into force.

Special Economic Zones

There are several concerns related to the Special Economic Zones (SEZ) which allow for exempt units and/or developers in SEZs from paying any duties or taxes on goods and/or services procured from Domestic Tariff Area (DTA) for authorized operations. Under the regime the endorsement process for goods must be completed within 45 days. However, most DTA suppliers provide a credit period beyond 45 days. Furthermore, tax authorities in certain zones are refusing to endorse the invoices where the payment is not made for the invoices. Further, India's Development of Enterprise and Service Hubs Bill should be simplified so it does not impede ease of doing business within the SEZs.

E-Commerce Restrictions

The Indian government is in the final stages of finalizing its new E-commerce policy which will implement a number of changes that are explicitly discriminatory, including: (1) broad-based data localization requirements and restrictions on cross-border data flows; (2) expanded grounds for forced transfer of intellectual property and proprietary source code; (3) preferential treatment for domestic digital products and incentives for domestic data storage in India (e.g., provision of infrastructure, incentives to domestic data center operators). The policy requires e-commerce portals to identify goods on the country of origin and include a filter mechanism and display notification to suggest domestic alternatives to imported goods. The policy also introduces the notion of community data as a "national resource" where countries are "custodians" over data. Media reports have suggested that: (i) certain categories of data such as defense, medical records, biological records, cartographic data, and genome mapping data should not be transferred outside India; and (ii) certain categories of e-commerce data should be mirrored/stored in India (with the government/a proposed e-commerce regulator deciding the categories). Such proposals, if implemented, would significantly affect cross-border flows of data and pose barriers to free trade. The rules also impose obligations on all e-commerce entities without regard to unique e-commerce models and relationships between the entities, buyers, and sellers. It is also unclear how the requirement for every e-commerce entity to register itself with the Department for Promotion of Industry and Internal Trade (DPIIT) is connected with protection against unfair trade practices by e-commerce entities and creates an arbitrary and artificial distinction between offline sellers and e-commerce entities, as registration requirements do not apply to offline sellers. Such additional non-tariff barriers have a dampening impact on the market access of foreign players into the Indian e-commerce market. India is taking a European-like approach to competition in digital markets, including "ex ante" regulations that target U.S. tech companies, changing the basis for competition penalties from 'India-specific turnover' to 'global turnover,' and issuing orders affecting how operating system creators can market mobile apps in India.

Import License Requirement for Information and Communication Technology (ICT) Equipment

In August 2023, the Indian government announced that beginning November 1, 2023, it will require a license to import laptops, tablets, all-in-one personal computers, and ultra-small form factor computers and servers. This new import licensing requirement could potentially delay and is likely to disrupt imports of in-scope information and communication technology (ICT) equipment into India. In a Stakeholder Consultation by the Directorate General for Foreign Trade (DGFT) in September 2023, it was noted that Data Centers will be required to obtain a license to import servers into India. DGFT also noted that while applying for a license, the applicant will be required to provide the manufacturing turnover, trading turnover, import turnover and export turnover for the prior three years. As part of this measure, India is also considering the institution of an annual quota on these products that would start in 2024.

Data Localization and Data Flows

In October 2018, the Reserve Bank of India (RBI) implemented a requirement for all foreign payment system providers to ensure that data related to electronic payments by Indian citizens are stored on servers located in India. The requirement for local storage of all payment information is explicitly discriminatory as it raises costs for payment service suppliers and disadvantages foreign firms, which are more likely to be dependent on globally distributed data storage and information security systems. Government data on the cloud is also localized in India and the upcoming privacy bill might impose further data localization requirements for all companies, including U.S. CSPs.

The Draft Digital Personal Data Protection Bill is based on the creation of a 'positive list' of countries where data can be transferred. Industry prefers a 'negative list' approach so that data can be transferred anywhere that is not on the negative list. The bill also could be strengthened through, among other things, aligning rules for children's data with global standards, tightening the definition of "data breach" to avoid over-reporting, and removing the exemption for India's Central Government.

In February 2021, MeitY released the 2021 Intermediary Guidelines and Digital Ethics Code (Guidelines), which impose significant and burdensome requirements on a wide range of Internet-based service providers, particularly those that operate social media, messaging, and streaming news and entertainment services. The Guidelines were notified to the Gazette of India without public consultation and are significantly different from the version MeitY had initially released for public comment in December 2018. Many of the new requirements entered into effect immediately, while "significant social media intermediaries" (5 million or more registered users in India) were given only three months to comply with sweeping regulatory changes that in some cases require significant technical re-structuring of services. These changes include the appointment of a Chief Compliance Officer, who can be held legally liable if the intermediary fails to observe the "due diligence" requirements. In addition to concerns over the lack of comprehensive stakeholder engagement, the Guidelines contain many troubling elements that could undermine privacy, security, and freedoms of speech and expression. There are also concerns about whether the Guidelines force the localization of company operations and restrict market access for non-Indian companies through the imposition of burdensome regulatory requirements that erode safe harbor protections in India's Information Technology (IT) Act and significantly overstep international best practices. Additionally, the Indian government is reported to currently be working on a significant revision to the IT Act governing intermediary liability protections in India (the "Digital India Act").

Requirement to Report Importation of "Non-physical Imports"

Indian banks have a requirement to advise Indian Customs of the importation of "non-physical imports" when related to Direct Import Remittances. This requirement appears to originate from a 2010 Circular "*Master Circular on Import of Goods and Services*"[2] of the Reserve Bank of India. Specifically, the requirement is: *"Payment for software download If the import payment is towards design and drawing, advance payment for Software import, a Declaration from the importer is required confirming that they will inform customs of such import."* Therefore, a U.S.-origin sale to an Indian buyer of downloaded software would be considered a capital good under Indian regulations. Thus, the payment is leaving India to the U.S, and the requirement forces the importer to obtain specific certifications in order to release funds from the bank.

The specific requirement is below:

> *C.7.3. Non-physical Imports*
> *"(i) Where imports are made in non-physical form, i.e., software or data through internet / datacom channels and drawings and designs through e-mail / fax, a certificate from a Chartered Accountant that the software / data / drawing/ design has been received by the importer, may be obtained.*
> *(ii) AD Category – I bank should advise importers to keep Customs Authorities informed of the imports made by them under this clause."*

Mandatory Telecom Certification Framework

Indian Telecom licensees are required to connect their networks only with telecom equipment that has been tested and certified under the Mandatory Testing and Certification Framework (MTCTE). The mandatory testing and certification scheme is operational for certain IT and telecom products on parameters of safety, functionality and potentially security as well. The scope of this requirement was recently increased to include cloud software (Hypervisors), which goes beyond telecom products.

Indonesia

Digital Services Tax

Under Law 2/2020, Indonesia introduced a series of changes to its tax code, including an expansion of the definition of permanent establishment for purposes of Indonesia's corporate income tax and a new electronic transaction tax (ETT) that targets cross-border transactions where tax treaties prohibit Indonesia from taxing corporate income from the transaction. The ETT blatantly discriminates against foreign companies as it only applies to non-Indonesian operators. This effort to deem foreign companies with SEP as permanent establishments undermines the traditional definition of a permanent establishment and creates a significant barrier to cross-border trade. The Ministry of Finance would need to issue additional legal measures for these new taxes to go into effect. Such proposals are based on an unprincipled and unsupported distinction between digital and non-digital companies.

[2] https://www.rbi.org.in/scripts/BS_ViewMasCirculardetails.aspx?id=5792

E-Commerce Barriers

Indonesia's GR80/2019 on Electronic Commerce (followed by the Trade Minister Regulation No. 50/2020) requires any e-commerce provider passing a set of thresholds (i.e. more than 1000 transactions or more than 1000 delivery packages in 1 year) to set up or appoint a local trade representative to act on behalf of the foreign entity. No. 80/2019 (GR80) on E-Commerce draws a clear distinction between domestic and foreign e-commerce business actors and prohibits personal data from being sent offshore unless otherwise approved by the Ministry of Trade through a list of countries which can store Indonesian e-commerce data. This effectively requires e-commerce business actors to locally reside personal data for e-commerce customers. The local trade representative's office is required to handle consumer protection, promotion of domestic products, and dispute resolution locally. This requirement effectively forces U.S. businesses to establish a local presence without a business need which also triggers unintentional tax consequences. To strengthen consumer protection, Indonesia should follow international best practices and consider alternative measures to ensure consumer protection without forcing a local presence for digital products and services.

Trade Regulation 50/2020 (TR50) on E-Commerce, an implementing regulation of GR80, also requires e-commerce providers with more than 1,000 domestic transactions annually to appoint local representatives, promote domestic products on their platform, and share corporate statistical data with the government. Both GR80 and TR50 pose de facto data localization measures and local content requirements, which increase overhead costs for foreign entities and create undue market barriers.

Indonesia's Data Flow Restrictions

While the government of Indonesia has introduced Government Regulation 71/2019 to revise the earlier GR 82/2012, forced data localization measures remain. In the draft implementing regulations of GR71/2019 (in the form of Communications & Informatics Ministerial Regulation on the Governance of Electronic Systems Providers for Private Scope), storing and processing of data offshore by any Electronic Systems Providers (ESPs) require prior approval from the Minister. These measures reflect market access barriers, which require foreign services to undergo additional red tape when delivering products and services online.

While Indonesia's GR71 provides greater visibility on its data localization policy (i.e. only Public Scope Electronic System Providers (ESPs) are required to store and process data onshore), the ensuing implementing regulations (or the lack thereof) continue to be a significant barrier to digital trade and is inhibiting foreign firms' participation in Indonesian e-commerce. Public Scope ESPs are defined to also include public administration which goes beyond national security and intelligence data. No further clarity has been made on the circumstances by which data can be stored and processed offshore in the case of Public Scope ESP including the guidelines that the Minister of Communications and Informatics will use when reviewing every individual data offshoring request by Private Scope ESPs. Indeed, U.S. firms have lost, and continue to lose, business in Indonesia from customers due to the ambiguity in the data localization requirements.

GR71 was a step in the right direction toward reforming Indonesia's data localization policy and strengthening international trade. But the lower-level regulations are at risk of resurfacing significant market access barriers because of the incongruent approach with GR71 as the umbrella regulation. For instance, data localization policy remains in place for the banking and financial sectors despite the possibility of Private Scope ESPs to store and process data offshore based on GR71.

Additionally, GR71 has mandated the advent of an interagency committee to set up and oversee the exception for Public Scope ESPs to store and process data offshore. The industry is concerned that there is limited progress in the finalization of the implementing regulations of GR71, creating tremendous business uncertainty and increased compliance risks. We urge USTR to strongly encourage Indonesia to move swiftly in finalizing the implementing regulations of GR71 and for these regulations to prohibit data localization.

Financial Services Data Localization

The Bank of Indonesia still requires core/important financial transactions to be processed domestically. The Financial Services Authority (OJK) has incrementally allowed some electronic processing systems to be based offshore for banking services, insurance services, multi-financing services, and lending based technology, but for the most part, the policy remains highly restrictive and burdensome for global companies trying to operate within Indonesia.

Indonesia's Personal Data Protection Bill

Indonesia ratified a Personal Data Protection bill which presently differentiates the responsibilities between data controllers and data processors with major references from EU GDPR. Cross-border data transfer is currently limited to countries that have the same standard of data protection but there are no guidelines on assessing the data protection level across countries. The draft bill also imposes extraterritoriality as a cross-jurisdictional basis similar to the EU GDPR. NFTC urges USTR to encourage Indonesia to remain consistent with its cross-border data flow principles in its personal data protection bill in order to promote international digital trade.

Customs Declarations on Electronic Transmissions

In 2018, the Ministry of Finance (MOF) issued Regulation 17/2018, which establishes five HS lines at the eight-digit level (with import duty rates currently set at zero percent) for software and other digital products transmitted electronically, including applications, software, video, and audio. In December 2022, the Indonesian Minister of Finance (MOF) issued Regulation No. 190/PMK.04/2022 ("MOF Regulation 190"), which came into force on 13 January 2023, introducing the new import declaration procedure for intangible goods. This measure effectively established a customs administrative regime that would enable Indonesia to start collecting duties on intangible goods and would result in significant compliance costs and administrative burdens for businesses of all sizes operating in Indonesia. Imposition of any duties on digital products under this regulation would raise serious concerns regarding Indonesia's longstanding WTO commitment, renewed on a multilateral basis in June 2022, not to impose duties on electronic transmissions. In addition, using a tariff schedule for the application of such duties on non-physical products raises fundamental questions and challenges related to the harmonized tariff system, the role of customs authorities in the digital space, and the determination of country of origin for electronic transmissions. If implemented on a mandatory basis, these customs duties would be levied on the same electronically supplied services (ESS) that are subject to a VAT in Indonesia.

WTO Information Technology Agreement Commitments

Indonesia continues to contravene its WTO binding tariff commitments by charging tariffs on a range of imported technology products that are covered by Indonesia's commitments under the Information Technology Agreement (ITA) and should receive duty free treatment. Indonesia has only implemented ITA commitments that fall under 5 categories of goods/HS codes (Semiconductors, Semiconductors Equipment, Computers, Telecommunications Equipment and Software, and Electronic Consumer Goods). Further, Indonesian customs has also sought to re-classify technology goods that have similar functions into dutiable HS codes that are outside of the 5 categories as a means to raise revenue, but in most cases the reclassified HS codes are also themselves covered by Indonesia's ITA commitments. This practice widely affects the IT industry and negatively impacts U.S. investors and their workers.

Local Content Requirements

Indonesia's Ministry of Industry issued regulation No.22/2020 (IR22) on the Calculation of Local Content Requirements (LCR) for Electronics and Telematics, with a government target to achieve 35% import substitution by 2025. IR22 provides specific and extensive requirements for manufacturing and development for both digital and non-digital physical products. The policy will have an additional administrative burden to physical ICT products that are needed for ICT companies to operate in Indonesia. There are also indications that the Indonesian government may also introduce an importation threshold for ICT equipment. The government has also signaled intention to build on this LCR requirement and add similar LCRs for software and applications, which would impact companies that provide services over the Internet, including cloud services. In addition to that, Presidential Instruction Number 2 Year 2022 requires government agencies to plan, allocate, and realize at least 40% of the national budget for goods/services to utilize MSMEs and Cooperative products from domestic production.

Restrictions on E-Commerce Imports Under $100

On September 27, 2023, the Ministry of Trade (MOT) issued Regulation No. 31/2023 ("Reg 2023"), which prohibits foreign merchants from selling any goods valued below $100 to Indonesian customers via online marketplaces and includes several other discriminatory requirements that will restrict imports and foreign investment in Indonesia. For example, the regulation requires foreign ecommerce platforms to receive a permit from the Ministry of Trade in order to conduct business activities in Indonesia and mandates that platforms that meet certain criteria appoint a locally based representative. Additionally, it prohibits companies with a marketplace business model from acting as a manufacturer and selling their own branded products. Reg 2023 appears to violate Indonesia's international trade commitments, including under the WTO, and will directly affect U.S. exports and the ability of U.S. companies to operate in the country.

Japan

Platform to Business Regulation

Japan's new regulation on "platform-to-business" (P2B) relations that would require online intermediaries to meet onerous transparency obligations concerning differentiated treatment and access to data went into effect in February 2021. These rules targeted to "specific digital platforms" that will be assigned by the Ministry of Economy, Trade and Industry (METI) under certain thresholds. The Japanese government says this new law only targets App Markets and Online Shopping Malls at the moment, but METI is able to assign other types of platforms like Digital Ads without changing the law.

Kenya

Data Localization

The Data Protection Act which was passed in 2019 and gives the government some residual power to mandate that certain types of data shall be processed through "a server or data centre located in Kenya." The Data Protection Act does not require the localization of personal information, and Section 50 leaves it to the Cabinet Secretary (CS) to stipulate which personal data should be stored and processed in Kenya on grounds of strategic interests of the state or for the protection of revenue. However, the Data Protection Regulations of 2020 mandates the localization of a broad set of data including national civil registration systems, population register and identity management, primary and secondary education, electronic payment systems, revenue administration, health data, and critical infrastructure. The Regulations require that at least a copy of the data falling under these categories to be stored in a data center located in-country. The law also requires that, before data may be transferred outside of Kenya, the Data Commissioner must be provided with proof of the security of the data. Data localization undermines product design, user experience, and the local industry's access to global infrastructure while not materially improving privacy or security.

Digital Services Tax

NFTC members have serious concerns with Kenya's DST. Kenya's 2021 Finance Act applies a 1.5 percent DST to nonresident businesses. The DST taxes gross revenue accrued through any "digital marketplace," defined as "an online platform which enables users to sell or provide services, goods, or other property to other users." Kenya has not expressed support for the OECD/G20 Inclusive Framework's October 8, 2021, Statement that commits participating governments to provide for the removal of unilateral DSTs for all companies.

Withholding Tax on Creators

Kenya has recently adopted a tax of 5% gross withholding on creators in Kenya. The tax is payable even by nonresidents and creates significant burdens. The tax can be read broadly enough to include many types of contractors who perform services for nonresident companies.

Mexico

Cloud Services Restrictions

Mexico continues to enforce a 2021 regulation which requires electronic payment fund institutions maintain a business continuity plan in the case of disaster recovery that relies on either 1) a multi-cloud approach with at least two cloud service providers from two different jurisdictions, or 2) an on-premise data center in country that doesn't depend on the primary (foreign) cloud provider. The approvals process run by the National Banking and Securities Commission (CNBV) that is required for financial services companies to use cloud services is resource intensive and is discriminatory towards foreign cloud providers, whereas existing local on-premise data centers merely need to complete a shorter, simpler notification process. This de facto data localization requirement is in addition to an already complex and time-consuming process that electronic payment fund institutions, face in order to gain regulatory approval to use offshore cloud infrastructure whereas in country infrastructure enjoys an expedited process.

The United States has raised concerns with the Mexican government that the requirements relating to use of cloud service suppliers by electronic payment fund institutions have a negative competitive impact on the business of U.S. service suppliers.

Nepal

Digital Services Tax

Nepal passed a new law on May 29, 2022, that introduced a 2% DST on a specified list of digital services provided by non-residents to consumers in Nepal. The DST became applicable shortly from July 17, 2022, onwards without any public consultation on the law or the implementing procedures. The DST: (i) discriminates against non-resident companies; (ii) is inconsistent with existing international tax principles; (iii) imposes an additional tax burden and potential double taxation on non-resident companies; and (iv) creates a disproportionate compliance burden as additional resources are required to comply with the DST's payment and reporting requirements.

Nigeria

Data Protection

Nigeria's National Information Technology Development Agency's (NITDA) Content Data Development Guidelines of 2019/2020 requires all "sovereign data" to be stored in country. While sovereign data remains undefined in the Guidelines, it is understood that all public sector workloads would be captured under its definition. Earlier this year, under the previous administration, the NITDA Bill and National Shared Services Corporation (NSSC) Bill were presented to the National Assembly. The Bill intended to (i) extend NITDA's supervisory rights over digital services providers and the private sector's use of ICT; (ii) extend NITDA's 1% tax on foreign digital platforms; (iii) introduce new ICT requirements and (iv) grant NITDA oversight rights over the telecom industry. The NSSC Bill aimed to centralize under a single, state-owned corporation the provision of ICT infrastructure and services (including cloud) to Nigerian government bodies. The intent was for government-controlled Galaxy Backbone to become the exclusive provider of ICT infrastructure, services and operations to the Federal Government of Nigeria. Neither of the two Bills was approved by the National Assembly before the elections, but they could be revived under the new administration.

Significant Economic Presence Tax/DST

The Minister of Finance, Budget and National Planning issued the Companies Income Tax (Significant Economic Presence) Order, 2020 (SEP Order), which sets out the conditions under which non-resident companies that provide digital services; or technical, professional, management, or consultancy services (TPMC); to Nigerian customers, from outside Nigeria will be deemed to have a taxable nexus, and therefore be liable to tax, in Nigeria. The SEP runs contrary to Nigeria's commitment to the OECD process on DSTs.

Pakistan

E-commerce Policy Framework

In October 2019, Pakistan's cabinet approved an E-commerce Policy Framework. The Framework states that "Consumer/Business payments from Pakistani banks and payment gateways to unauthorized and unregistered (GST non-compliant) websites/applications will be barred". This would appear to prohibit payments to U.S. businesses unless they are registered with provincial tax authorities. NFTC encourages USTR to monitor the implementation of this policy and to promote a light-touch framework for regulating online services that is consistent with the U.S. approach, and that encourages innovation and investment.

Internet Services

In October 2021, Pakistan issued the Removal and Blocking of Unlawful Online Content (Procedure, Oversight and Safeguards), Rules 2021" (Rules) which superseded the 2020 version of the Rules. The Rules apply to the removal and/or blocking of online content that is deemed unlawful on any "information system". Local and international industry players have expressed concerns regarding provisions that would pose significant barriers to operating in Pakistan, including requirements to deploy mechanisms to monitor and block livestreaming content, remove content within short timeframes when ordered by the authorities, and provide data to authorities in decrypted and readable format.

Data Localization

In 2022, Pakistan also launched a Cloud First Policy. This policy imposes data localization requirements on wide and open-ended classes of data ("restricted", "sensitive", and "secret"). In the financial sector, the State Bank of Pakistan (SBP) prohibits financial sector institutions from storing and processing core workloads on offshore cloud. These data localization requirements are ineffective at enhancing data protection, and significantly increase costs for U.S. firms, potentially deterring market entry.

The Philippines

Internet Transactions Regulation

The Philippine Congress resumed deliberations of the proposed Internet Transactions Act, after it was reintroduced in July 2022 and was certified as a priority legislation by the Office of the President. The legislative proposal aims to promote the development of e-commerce in the country, establish stronger online consumer protection, safer e-payment gateways, easier online business registration, and formulating other policies and programs to increase the number of online merchants and consumers. However, industry stakeholders have expressed concerns on the legislative proposal, including imposition of onerous obligations on electronic commerce platforms to have regulatory oversight, e.g. collection of valid business certificates of merchants, and submission thereof to the government authority on a regular basis.

Data Localization

The Philippines' President's Office is considering a draft Executive Order that would mandate data localization for its public sector, healthcare and health insurance sector, any financial service institutions supervised by Bangko Sentral, and any private sector entity that processed sensitive personal information or subscriber information. If issued, the draft Executive Order would be a significant step back in the country's digital trade policy, which historically has been one of the more progressive in the ASEAN region. While the Executive Order appears to have lost much of its traction for now due to industry outcry, there remain significant concerns that the proponents of the measure will attempt to move this policy through the Philippines legislature or as an Executive Order at a later time.

Saudi Arabia

Data Localization

The National Cybersecurity Authority (NCA) has implemented data localization under the form of Essential Cybersecurity Controls (ECC-1: 2018) for government- and state-owned enterprises and Critical National Infrastructure (CNI). This regulation has a data localization requirement for these entities, stating that an "organization's information hosting and storage must be inside the Kingdom of Saudi Arabia" (ECC-1:2018, 4-2-3-3). ECC-1:2018, 4-1-3-2 sets another localization requirement relating to cybersecurity services, stating that "cybersecurity managed services centers for monitoring and operations must be completely present inside the Kingdom of Saudi Arabia". This covers a broad spectrum of customers from financial services and aviation to oil and gas that by their nature need the safe and free flow of data across borders to maintain and enhance their operations and keep them safe and secure by cyber threats.

There are additional localization requirements, including in the Cloud Cybersecurity Controls (CCC-1:2020) issued by the NCA. CCC-1:2020 2-3-P-1-10 & 11 require that companies provide cloud computing services from within KSA, including systems used for storage processing, disaster recovery centers, and systems used for monitoring and support. While it does allow for level 3 and 4 data to be hosted outside KSA, this is heavily reliant on the entity seeking this exception.

South Africa

Cloud Computing

South Africa's Cloud Computing Policy, currently in draft but expected to be released by the Department of Communications and Digital Technologies (DCDT) by the end of the calendar year, contain references to data sovereignty and explicitly encouraged the use of local providers ("indigenous providers") in government cloud outsourcing. Private sector consultations on the latest draft are ongoing.

Taiwan

Digital Intermediary Services Act

Taiwan's National Communications Commission (NCC) has previously released the draft of the Digital Intermediary Services Act in 2022 for public consultation. The draft would impose content moderation and services design requirements on online platforms and Internet providers and directly cites the EU's Digital Services Agreement on numerous provisions. The bill would empower the regulator with arbitrary authority over the scope of compliance, *i.e*. the government can impose more obligations on platforms or exempt platforms from certain requirements at its own discretion. The bill would mandate "digital intermediary service providers" to implement uniformed mechanisms of user takedown requests and government orders for content removal, onerous user appeal interface, mandatory user data disclosure upon government orders, local representation, and more stringent risk assessment and management requirements for larger firms. In the public consultation, the government content takedown provisions were heavily criticized by the public, resulting in the legislative process being postponed due to political pressure. The industry remains concerned that similar onerous content moderation and services design obligations could be proposed in other forms, i.e. enacting content removal provisions in regulations dealing with specific content, and be implemented in Taiwan. We urge U.S. trade officials to continue monitoring developments.

Digital Advertising Competition and News Bargaining Code

Taiwan's Ministry of Digital Affairs (MODA) has been leading policy discussion on how "very large cross-border digital platforms" should compensate or subsidize news publishers suffering from the declined advertising revenue, including enacting laws similar to Australia's News Bargaining Code or Canada's Online News Act, which impose a mandatory revenue sharing mechanism. The policy or eventually, regulations, will go against the longstanding international trade principles of national treatment and most favored nation (MFN), by unfairly discriminating against foreign digital service suppliers and providing preferential treatment to local advertising and other digital service providers.

Ban on China-Branded Goods

On September 22, 2023, the Taiwanese Government announced a draft amendment to the Cybersecurity Management Act (CSMA) that would ban the use of 'China-Branded' Products by its agencies. The ban applies directly to Taiwanese government agencies, with indirect implications to its solution providers who will be contractually required to comply with the ban. Terms used in the measure are vague or not clearly defined, e.g., the definition of "China-branded" and the scope of ICT products. The draft also does not define "products that endanger national cyber security" as well as the criteria and process to decide whether a product endangers national cyber security or not. Most important of all, a supplier may not know its products are banned in the public sector and has no means to ask for an appeal. The vagueness and uncertainty have created practical impediments to doing business in Taiwan. There is currently a 60-day consultation period ongoing.

Data Residency / Data Localization

Taiwan's financial services regulatory agency and healthcare services regulatory agency have promulgated data residency and data localization regulations and requirements governing the use of cloud services provided by third parties. In the financial services sector, regulations require that material financial customer data be stored within the country, unless an exemption has been obtained from the regulatory agency. In the healthcare sector, regulations governing Electronic Medical Records Management require medical data be stored within the country unless an exemption has been obtained with the governing agency. In both cases, the regulations governing how to obtain an exemption are vague and unclear.

Draft Amendments to Cybersecurity Management Act

In September 2023, the Taiwan government announced the draft of amendments to Cybersecurity Management Act (CSMA) for a 60-days public consultation. The draft requires sectoral regulators to issue rules governing the criteria and the process to designate a critical infrastructure (CI) provider. The draft defines CI as "physical or virtual systems or networks, used in the critical fields formally announced by the Cabinet, once discontinued from operation or becoming less effective, would lead to significant negative impact upon the national security, public interests, living standard of citizens and economic activities." The draft does not specify the process and criteria how the Cabinet selects and decides the so-called "critical fields". A private entity may be designated as a CI provider by a sectoral regulator and thus to be subject to obligations under CSMA. However, the criteria and process to select and decide the "critical fields" lack transparency and creates uncertainty. This measure goes against the principle of good regulatory practice, but also raises compliance costs and potential barriers to potentially impacted sectors.

Tanzania

Digital Services Tax

On 28 June 2022, the Tanzanian Parliament passed the Finance Bill, 2022. On 30 June, the Bill was assented to by the President to become the Finance Act, 2022 and went into effect July 1, 2022. The regulations amended Income Tax Act, CAP 332 by imposing income tax by way of single installment on a nonresident who receives a payment that has a source in Tanzania from an individual, other than in conducting business, for services rendered through a digital marketplace. A simplified registration process will apply to nonresident suppliers of electronic services to account for income tax and value-added tax and nonresident suppliers of electronic services are required to register within six months from 1 July 2022. There is no threshold for registration.

Turkey

Additional E-Commerce Regulations

A new set of e-commerce regulations in a law dubbed the Law on Amending the Law on Regulation of Electronic Commerce was adopted in July 2022 and went into effect on January 1, 2023. Firms that facilitate sales equaling or topping ten billion Turkish lira net ($538.3 million) annually and over one hundred thousand executed transactions are required to obtain a license to operate in the country and renew that license when the Ministry of Commerce dictates. Further, the law requires a restriction on e-commerce providers selling goods of their own brand or brands with which they have economic associations. E-commerce providers are also subject to obligations to take down illegal content and ads, ensure information is correct, obtain consent before using brands for promotions, and refrain from anticompetitive practices. For firms with a net transaction of over 60 billion liras ($3.3 billion), there are additional restrictions regarding banking, transportation, and delivery.

Data Localization

A 2019 Presidential Circular on Information and Communication Security Measures introduced localization requirements on government workloads deemed “strategic”. In 2020, the Digital Transformation Office published Guidelines clarifying that the scope of the localization requirements included critical information and data; however, the loosely defined residency obligations under the Presidential Circular remains a regulatory challenge as the legislation overrides the DTO Guidelines. Strict data localization also applies in the financial services sector, where the Banking Regulation and Supervision Agency requires primary and secondary information systems to be hosted in Turkey. The Central Bank of Turkey implements similar restrictions on cloud outsourcing, and prohibits the use of cloud for certain workloads.

The Turkish Data Protection Law (DPL) permits the transfers of personal information to jurisdictions deemed adequate, subject to the explicit consent of the data subject or after obtaining permission from the data protection authority (KVKK). However, Turkey has not yet made a determination on countries deemed adequate for international transfers. The adequacy decision has been postponed several times since 2021; with the latest timeline for the announcement being Q4 2024.

Ex ante Regulation

Turkey is considering the adoption of an ex-ante regulation similar to the EU DMA which is discriminatory against U.S companies. We encourage USTR to educate Turkish counterparts on the impact that these types of regulations could have on trade and investments to the detriment of Turkish economic growth.

Digital Services Tax

Turkey's DST imposes a tax on revenue generated from a broad range of digital services offered in Turkey, including digital advertising, digital content sales, and digital platform services. The current tax rate is 7.5%, but the Turkish President has the unilateral authority to increase that rate up to 15%, or to decrease it as low as 1%. The DST only applies to companies that generate revenues from covered digital services of at least: (i) TRY 20 million (about €2 million) in Turkey; and (ii) €750 million globally. NFTC encourages USTR to continue working with Turkey to address the discrimination against U.S. companies under Turkey's DST.

United Arab Emirates

Data Localization

The UAE Cybersecurity Council (CSC) requires government workloads at the federal (UAE) and emirate-level to be hosted in-country. This long-standing requirement applies to government agencies and state-owned commercial enterprises alike. Similar localization obligations apply to the financial services and healthcare sectors. While the UAE Central Bank's outsourcing rulebook prohibits the storing and processing of personal information outside the country by financial services organizations (excluding subsidiaries of foreign banks), the 2019 Health Law also requires the processing of health data to be conducted in-country. Abu Dhabi ADHICS Standards further prohibit the hosting of information sharing systems on cloud.

United Kingdom

Digital Services Tax

In July 2020, the UK Government adopted a digital services tax, which began to accrue retroactively on April 1, 2020. The digital services tax imposes a two percent tax on the revenues of search engines, social media services, and online marketplaces, as well as associated online advertising services. It applies to businesses that provide a covered service when the business's worldwide revenues from these digital activities are more than £500 million (approximately $694.4 million) and more than £25 million (approximately $34.7 million) of these revenues are derived from the UK.

Vietnam

Law on Cybersecurity and Data Protection

Vietnam issued Decree 53/2022/ND-CP guiding the Law on Cyber Security in August 2022, effective in October 2022, requiring foreign enterprises working in several sectors, including the payments industry, must store the Vietnamese users' data in Vietnam ONLY IF (i) their services are used to commit illegal cybersecurity activities AND (ii) they fail to comply with written requests by the management agencies of the Ministry of Public Security (MPS) for coordination in prevention, investigation and handling of violations. This regulation creates a potential risk of data localization for U.S. companies which fail to comply with Vietnamese law enforcement agencies' requests. Decree 13/2023/ND-CP on Personal Data Protection, issued in April 2023, and effective in July 2023, without any transitional period, requires personal data controllers, processors, and transferers to prepare, make available for inspection and submit to MPS a dossier for assessment of the impact of personal data processing and overseas transferring. We encourage the U.S. Government to continue to reiterate with the Vietnamese Government and require its long-term commitments on the importance of the ability to move data and access information across borders which is essential for businesses of all sizes, sectors, and geographies. It is important to secure the essential nature of free data flows which is recognized in Vietnam's international trade obligations and in global best practices for data protection and remove all barriers for cross-border data movement.

Personal Data Protection Draft Decree

In April 2023, Vietnam's Government promulgated Decree 13/2023 (Personal Data Protection Decree-PDPD), imposing onerous obligations on the processing of personal data – both within and beyond Vietnam, that would impede the ability of companies that need to process cross-border data from continuing to offer services to individuals. The decree also contains overly broad, disproportionate audit and reporting requirements and enforcement measures.

Draft Decree on Internet Services and Online Information

After several attempts to amend Decree 72/2013, Vietnam's Ministry of Information and Communication (MIC) released a new draft decree on the management, provision and usage of Internet services and online information to replace Decree 72/2013. The new draft decree transfers most of the direct oversight of data centers and cloud services to the draft Telecommunications Law. It also broadens the scope of services subject to various obligations related to user data and account registration, proactive screening of online content, and online content removal.

Telecommunications Services

The National Assembly is expected to approve the new Law on Telecommunications, amending the 2009 Law. Per the latest draft released in September, the law redefines value-added telecommunication service so as to extend regulatory coverage intended for traditional telecommunications service providers to in-country and cross-border suppliers of cloud computing services, data center colocation services, and over-the-top Internet-enabled services. Data centers were defined to be a type of telecommunications facility. While the latest draft includes a statement (Article 29-1(a)) that investments in data center and cloud computing services providers are not limited, the regulatory expansion of the telco laws exposes future risks that limitation may be reinstated in the future in its implementing decree or other relevant legislations. Furthermore, as such services now fall within the definition of a telecommunication service, that statement in Article 19-1(a) does not completely displace the foreign investment limits set out elsewhere in the same law (Article 12-4) nor does it extinguish the potential for new limits to be imposed in the future consistent with Vietnam's various trade allowances in respect of telecommunications services. This has increased uncertainty around future investments in Vietnam's traditionally unrestricted computer services sector.

Technical Barriers to Enforce Digital Protectionism

On 3 June 2020, Vietnam's Prime Minister signed Decision 749/QD-TTg, which announces the country's National Digital Transformation Strategy, and specifically calls for the introduction of technical and non-technical measures to control cross-border digital platforms. The Ministry of Information and Communications (MIC) has subsequently issued Decisions 1145 and 783 which sets out technical standards and considerations for the use of cloud services by state agencies and smart cities projects that favor local private cloud use. These decisions clearly intend to create a preferential framework for local CSPs, creating de facto market access barriers. Furthermore, the MIC Minister has made public statements noting that "as Vietnamese firms are getting stronger hold of physical networks, [Vietnam] must do the same for cloud computing and digitalization infrastructures […]". While these standards are technically "voluntary," in practice, this will be adopted by the Vietnamese public sector as if it is mandatory.

Civil Cryptography Trading and Import License Requirements

The Government Cipher Committee (GCC) requires that the importation and exportation of any product containing cryptographic functionality obtain specific permits and licenses. Importers and exporters entering IT products with data encryption capabilities must obtain Cryptography Trading License ("CTL") and Cryptography Import License ("CIL"). Time taken to obtain CTLs and CILs are inordinately long – taking approximately six months to obtain. They also require detailed information alongside the application, including detailed product information, defined technical plans, information regarding the cryptographic function of the equipment, information regarding local personnel, as well as additional information. In implementation of these requirements, companies often experience delays and inconsistent application of approval processes by GCC. These burdensome requirements, and their routine follow-ups, limit the ability for companies investing in Vietnam to import critical hardware. The new regulation (Circular 23/2022/TT-BQP of Ministry of Defense) for cryptographic certification requirement was passed in 2022, but the Vietnamese government is still working through the enforcement mechanism, which will likely introduce additional burdens to importers once it comes into force although its degree of complexity is unclear at this time.

Cross Border Provision of Advertising Services

Decree No. 181/2013/ND-CP (Decree 181) significantly restricts the supply of online advertising. The decree requires Vietnamese advertisers to contract with a Vietnam-based advertising services provider in order to place advertisements on foreign websites. It also requires any foreign websites with advertising targeting Vietnam to notify the Ministry of Culture, Sports and Tourism in writing of the name and main business lines of the Vietnamese agent who has facilitated the advertising service in Vietnam at least 15 days before publishing an advertisement.

Services - Electronic Payment Services

U.S. companies are leaders in the electronic payments services (EPS) sector but face discriminatory treatment in a number of foreign markets as discussed below.

Bangladesh

TakaPay Processing Mandate

As the Government of Bangladesh and Bangladesh Bank prioritize digital payments as a conduit for financial inclusion for Bangladeshi citizens and small businesses towards building SMART Bangladesh, we urge USTR to ensure that any forthcoming regulations or policies allow for the full participation of U.S. payments firms on a level playing field in the market. A primary concern is Bangladesh Bank's position as both regulator and market participant in the National Payment Switch (NPSB), now introducing domestic scheme named "TakaPay", a state-owned domestic competitor. In recent years, Bangladesh Bank has introduced several draft policies that would impose requirements to route certain payment transactions over local infrastructure, as well as require all cards in the market to bear the logo of NPSB's brand -- although these regulations have been held in abeyance. We suggest that banks be allowed to process ATM transactions via International Payment networks, given the lower fees with best-in-class processing capabilities. This arrangement would enable banks to handle and process more transactions at a lower cost, thus providing round-the-clock, uninterrupted service to the end consumers by ensuring level playing field. We ask that USTR remain vigilant of these policies and any regulations – including pricing interventions – that may favor use of local brands and urge Bank of Bangladesh to consult with U.S. payment companies as it develops policies intended to facilitate a robust, secure, and inclusive ecosystem for digital payments, e-commerce, and financial inclusion.

Brazil

Mandatory Participation in National Payment Scheme

In the past few years, the Brazilian Central Bank's (BCB) role as a regulator and a competitor has created a conflict of interest. The BCB's Competitiveness and Market Structure Department (Decem) oversees not only the development of policy that affects all payment schemes in the Brazilian market, but also the development and regulation of PIX, a real-time payment scheme (including its participation rules and licenses), which went live on November 16, 2020. In February 2020, the BCB announced its plans to launch PIX, which is intended to enable immediate transactions, such as money transfers and payments, and as such, would compete directly with U.S. payment firms. All Brazilian financial institutions with over 500,000 accounts were mandated to participate in the PIX scheme by November 2020.

Under the existing regulatory framework Law 12,865/13 (and Circular 3682), U.S. payment firms are required to maintain a local legal entity and to obtain a license from the BCB as payment scheme operators. On June 15, 2020, U.S. payment networks partnered with WhatsApp and launched a new payments solution to enable WhatsApp users in Brazil to transfer money and pay businesses. However, the BCB immediately suspended the payments program and abruptly modified the payments regulation (through BCB Circular 4031 dated June 23, 2020), without notice or opportunity for public comment, to (1) clarify its power to suspend payment arrangements and (2) indicate that any payment scheme that the regulator designates, irrespective of the volume or transactions, can be part of the Brazilian Payment System (also called SPB) and would therefore subject the partnership to an indefinite review and a new licensing requirement with unknown criteria. Additionally, on October 22, 2020, the BCB issued a new regulation (Resolution BCB 24) to regulate the activity of payment initiators, a role not previously considered within its regulatory perimeter. Before this change, a payment scheme was part of the SPB, and therefore under the scope of Central Bank jurisdiction, only if it met certain thresholds, such as volume and number of transactions. The combination of (i) the newly-issued regulation to bring within the regulatory perimeter a payment scheme not included beforehand, (ii) the related requirement for U.S. firms to obtain a new license, and (iii) the creation of a new regulated category "payment initiator" are creating a substantial delay for the implementation of the partnership between U.S. payments firms and WhatsApp, which effectively provides PIX an unfair commercial advantage.

China

Compliance with China-EPS Dispute

When China joined the WTO in 2001, it committed to allowing non-Chinese EPS companies to compete and do business in its domestic market on equal terms with Chinese companies, including by processing renminbi-denominated transactions in China. While U.S. EPS suppliers have continued to process "cross-border" transactions in China for decades, which primarily involve purchases by individuals traveling to and from China as of September 2022 only one U.S. EPS supplier has secured a license to operate in China's domestic market.

Under the January 2020 Agreement, China committed, among other obligations, that it would accept, and make a determination on, any application for a Bank Card Clearing Institution (BCCI) license from a U.S. EPS supplier, within prescribed time limits and without regard for the applicant's ownership structure. To date, only one U.S. EPS supplier has been approved for a BCCI license. We welcome steps taken by China towards fulfillment of its commitments under the January 2020 Agreement and the WTO and encourage the Administration to prioritize licensing of all U.S. EPS suppliers that have applied for a BCCI license in engagements with China on commercial issues.

Costa Rica

Payment Card Price Controls

In March 2020, the Congress of Costa Rica enacted Law 9831 granting powers to the Central Bank of Costa Rica (BCCR) to set pricing control measures to the card payments system, including a wide range of electronic service providers with operations in Costa Rica. However, in November 2022, the BCCR, as part of an annual review process mandated by the Law, issued an updated version of the implementing regulation that caps, among others, the international Interchange Reimbursement Fee (XB IRF), and the international Merchant Discount Rate (XB MDR) for payment transactions on digital service providers or digital platforms.

Although Law 9831 does not reference inbound international transactions – that is, those made with debit and credit credentials issued by a financial institution outside Costa Rica purchasing from a Costa Rican merchant – BCCR has interpreted and implemented the regulation to include international transactions. The decision of the BCCR is impacting financial institutions outside Costa Rica, as the XB IRF cap set by the BCCR alters the contractual agreements signed between each financial institution (issuer) in a different jurisdiction and its corresponding payment network. U.S. financial institutions are affected as their clients represent a large share of international tourists and visitors to Costa Rica. Costa Rica is the only nation in the world that regulates XB IRF and other international fees.

While the BCCR capped XB IRF at 1.25%, it capped the domestic IRF at a higher rate of 1.5%, which represents another anomaly, and a unique case in the world, as this arrangement ignores the much riskier nature of an international transaction, the different currency exchanges involved and, therefore, the higher costs related. The XB IRF cap became effective as of July 1, 2023. We urge the U.S. Government to encourage the Government of Costa Rica and BCCR to work with industry to find a solution in line with global best practices.

European Union

European Retail Payments Strategy

The European Commission and the European Central Bank are driving a European payment sovereignty agenda that is geared at making instant payments the "new normal" and Europeanizing the payment value chain in Europe. This has been most evident in the political support for the European Payment Initiative, which notably excludes non-European players from participating. The European Commission published its proposal for instant payments regulation in October 2022 and the interinstitutional negotiations are ongoing and expected to be finalized by the end of the year. In June 2023 the Commission published a package of payments initiatives, including a proposal to review the Payment Services Directive, and a proposal for financial data access (FIDA) with the aim to improve consumer protection and competition in electronic payments as well as to develop fairer access and use of data in the EU Digital Single Market. Separately, the European Commission published a regulation on a Digital Euro that gives extensive power to the ECB as both the issuer of the Digital Euro and the scheme manager and regulator of competitors to the Digital Euro. On 18 October, the European Central Bank voted to advance the digital euro project, moving it from the "investigation phase" to a "preparation phase," focusing on finalizing the scheme rule book and selecting providers for infrastructure.

India

Preferential Treatment for National Payment Schemes

The National Payment Council of India (NPCI) is a quasi-government agency that operates the largest domestic payment system in the country, including United Payments Interface (UPI) and RuPay (debit and credit) cards. In the past several years, the Government of India has taken many direct and indirect actions that give preferential treatment to NPCI, some of which are described below and give an unfair advantage to NPCI, creating a non-level playing field for U.S. EPS providers.

In April 2018, the RBI issued a directive for payments firms to store data solely in India and ensure that any data processed abroad be deleted within 24 hours. The payment networks have complied with the RBI directive, despite the short deadlines, by investing significant capital. In a recent development, the RBI in a submission to the Personal Data Protection (PDP) Parliamentary committee, requested that financial data not be classified as Sensitive Personal Data. However, it also requested that RBI be exempted from the PDP bill, which could further lay the stage for soil data processing and/or access requirements.

In August 2018, the Finance Ministry's Department of Financial Services issued a circular requiring any re-carding or issuance of new cards by banks to comply with the standards defined for the National Common Mobility Card (NCMC). Subsequently the Ministry of Housing and Urban Affairs (MoHUA) mandated that the NPCI qSPARC standards would be the NCMC standards. In July 2023, the DFS issued another circular instructing all banks to issue only NCMC compliant contactless cards. The banks view the circular as a mandate which directly impacts their ability to issue contactless cards from international card networks, hence creating an unlevel playing field.

Rupay and NPCI are the de facto solutions for any Government disbursement programs, known collectively as Direct Benefit Transfers (DBT), and are now being aggressively also pushed in government-driven credit and commercial transactions, keeping the international networks out of consideration. Storage of cards on file and tokenization are globally recognized to offer faster, more secure, and seamless customer experiences where B2C or Account to Account transactions are concerned. In September 2020, the RBI issued guidelines disallowing storage of cards on file by merchants and payment aggregators. Given that this ban did not extend to the UPI network it provides NPCI with an unfair advantage.

A January 2020 circular from the RBI mandated that, effective October 1, 2020, all cards being reissued would need to be switched off for e-commerce, contactless, and international usage, effectively targeting international networks because RuPay has minimal international acceptance and a very limited number of contactless cards in circulation.

Indonesia

Localization of Payments/Vision 2025

In May 2019, Bank Indonesia (BI) released an Indonesia Payment System 2025 Vision (IPS 2025). The IPS 2025 Vision includes five key initiatives: 1) open banking and interlink between Bank-Fintech; 2) development of retail payments; 3) development of wholesale payments and financial market infrastructure; 4) creation of a data hub; and 5) regulation, supervision, licensing and reporting. Initiative 5 indicates that Bank Indonesia (BI) will be reviewing payments regulation with a view to creating an umbrella payments regulation. BI should ensure consultation with the private sector (both foreign and domestic) during this process.

Over the past several years, Indonesia has adopted a series of measures that prohibit cross-border electronic payment systems and require payment processing to take place locally. These measures, including BI Circular 17/52/2015, BI Regulation 18/40/2016, BI 19/8/2017 and POJK no. 38, present substantial challenges to continued investment and innovation by U.S. EPS companies in Indonesia.

BI released the Payment Transaction Processing regulation (PBI 18/40/2016) in November 2016. This regulation introduces licensing requirements for e-wallets and payment gateways. This regulation also requires all domestic transactions to be processed domestically and introduced a foreign equity cap of 20 percent on all payment system providers. Existing payment system providers were grandfathered out of this local ownership requirement provided they do not change equity structure or apply for any new license.

The National Payment Gateway (NPG) regulation (PBI 19/8/2017) issued on July 6, 2017, established the NPG and three new institutions: a switching body; a services body and a standards body. The NPG regulation requires any entity wishing to process domestic transactions to apply for a new NPG switching license. Criteria to obtain a new license include (i) onshore processing of transactions and (ii) a cap of 20 percent on foreign ownership. Obtaining an NPG switching license would require processing of all domestic transactions according to pricing and rules as set out by a new NPG "Services Institution," comprising the domestic switches and banks and adopting standards set out by the Standards Body (this role is fulfilled by the Indonesian Payment System Association, ASPI). The new Services body, PT Penyelenggara Transaksi Elektronik Nasional (PT PTEN) is a consortium made up of the 4 domestic switches (Artajasa, Rintis, ALTO, Jalin) and the 4 largest banks (BCA, Mandiri, BRI and BNI). On September 20, 2017, BI released implementing guidelines (PADG 19/10/2017) for the NPG regulation (PBI 19/8/2017) along with three appendices (including pricing guidelines that set a cap on the Merchant Discount Rate for regular domestic debit transactions of 100 bps). These guidelines establish high-level criteria for commercial partnerships between NPG and non-NPG switches, subject to approval by BI. The published criteria establish that, if a foreign payments company enters into a commercial partnership with a maximum 2 out of 4 local NPG players and has onshore processing capabilities, it would be allowed to process its own branded domestic transactions on behalf of its NPG switching partners. Two of the international networks have received approval from BI for commercial partnership with local NPG switches for domestic debit processing.

The Government of Indonesia recently issued its new regulation no 71/2019 replacing GR82/2012 on data localization. The new regulation simplifies data categories into public and private sector data, allowing the last to be kept either off-soil or on-soil. For financial sector data including payment systems, this regulation gives leeway for BI and OJK as financial sector authorities to further define their requirements creating continued uncertainties for doing business in Indonesia. Implementing Minister of Information Communications and Technology (ICT) regulation was issued in September 2022, reiterating BI and OJK's authority to oversee financial sector data.

Malaysia

Payment Processing Approval

Bank Negara Malaysia's (BNM) Interoperable Credit Transfer Framework (ICTF) was finalized in March 2018 and came into effect on July 1, 2018. The ICTF applies to certain credit transfers, specifically payment services that allow a consumer to instruct the institution with which the consumer's account is held to transfer funds to a beneficiary (also known as push payments). In December 2019, Bank Negara Malaysia reversed a policy that would have only allowed a single operator, i.e. local network PayNet (partially owned by Bank Negara Malaysia), to process all domestic credit transfer transactions. This change is a welcome development as it enables U.S. providers to compete on a level playing field, in alignment with Malaysia's WTO GATS commitments. However, payment providers have to obtain approval from BNM and these approvals are subject to meeting conditions such as safeguards to protect and access data located offshore, enabling interoperability and reducing fragmentation of multiple providers and pricing transparency.

Mexico

USMCA Enforcement

Industry urges the U.S. government to prioritize engagement concerning Mexico's policy framework for electronic payment service suppliers. As mentioned in previous reports, current regulatory arrangements continue to limit U.S. suppliers' ability to compete and fully offer their services and differentiate themselves in Mexico, preventing innovations and security solutions that could be adopted by financial institutions benefiting Mexican citizens and small businesses. On Sept. 14, 2023, the Federal Economic Competition Commission (Cofece), issued its final resolution of a 5-year investigation to the card payments system which confirms the lack of effective competition conditions in the market, making a series of recommendations to both the Central Bank of Mexico (Banxico) and the National Banking and Securities Commission (CNBV) to eliminate the existing entry barriers that are hindering the participation of new entrants, including U.S. providers. The United States should urge Mexico to facilitate a competitive market and level playing field for U.S. electronic payment service suppliers, aligned with Mexico's USMCA obligations, and adjust the legal framework to grant the necessary conditions for the interoperability and competition among payment networks. These actions would not only fulfill Mexico's USMCA commitments but will also facilitate digital financial inclusion through payments innovation and fraud prevention.

Myanmar

National Payment System

In February 2021, a military coup ousted the democratically elected government and brought the State Administration Council (SAC) to power. Prior to the couple, the previous government had released the National Payment System Strategy 2020-2025 sets out a five-year strategy to modernize payment system infrastructure, digitize all government payments, and introduce new payment technologies with the aim of expanding financial inclusion. There had also been plans to develop a National Payment Systems Law. It is understood that the SAC is still following the National Payments Strategy though there have been no signs of further development of the National Payments Law. As/when there are developments, we encourage thorough consultation with the private sector (both foreign and domestic) as these policies and strategies are developed.

South Africa

Prohibition on Domestic Processing

In order to mitigate against perceived sovereign risk, the South African Reserve Bank (SARB) has been reviewing the status of the processing of domestic transactions. A moratorium was imposed by SARB informally since 2013, and formally reinforced in July 2018, which prevents banks from migrating the switching of domestic transactions away from the local processing system operator to the international card networks. In August 2019, the SARB published its policy position which stated that: (i) payment system operators will require a SARB license to process domestic transactions using on-soil infrastructure; (ii) issuing banks are required to process domestic transactions through payment system operators whose infrastructure is established and maintained in South Africa; and (iii) the July 2018 moratorium restricting banks from contracting new volumes to be processed with international networks remains in place until the SARB publishes the anticipated Directive on domestic processing.

Furthermore, the program requires manufacturers to have EMI/EMC testing done at SABS verified third-party labs. If testing is required from an independent lab that is not SABS verified, the manufacturer must request that the lab be verified through SABS at the expense of the lab. Ultimately, the regulation is meant to ensure that all electronic equipment entering South Africa meets the required quality-performance standards. However, some industry stakeholders have raised concerns that the five-fold increase in certification costs, the additional administrative burden, and the lack of resources in South Africa to support the new procedure, will extend time to market for quickly evolving (and obsolescing) information and communications technology products. South Africa still accepts test results from ILAC certified labs, but SABS also conducts a comprehensive review of the test results to ensure that the product meets South African EMC standards. The protracted review can take up to 18 months to complete.

Vietnam

National Payment System

In recent years, the government of Vietnam and State Bank of Vietnam (SBV) have issued several policies and regulations intended to support the uptake of digital payments, including measures to cultivate the National Payments Corporation of Vietnam (NAPAS), a de facto monopoly established in 2016 by consolidating two Vietnamese payment processing networks and partially owned by SBV. In 2016, Vietnam issued Circular 19/2016/TT-NHNN (Circular 19) mandating that all domestic and cross-border retail credit and debit transactions be processed through NAPAS initially starting in January 2018, although Vietnam subsequently extended the implementation deadline. Circular 19's requirements would have prohibited foreign electronic payment services suppliers from supplying services fully on a cross-border basis (i.e., without involving NAPAS, a competing service supplier). A December 2019 revision to Circular (Circular 28), helpfully limits requirements to route transactions through NAPAS to domestic card present transactions only and extends the implementation deadline to January 2021. We encourage the U.S. Government to reiterate with the Vietnamese Government and require its long-term commitments on the importance of keeping the current domestic routing mandate under Circular 28 unchanged as a fundamental to providing stability and a level playing field in the market.

In July 2020, Vietnam issued a draft amendment to the Non-Cash Payment decree. The SBV is still finalizing the draft. The draft introduces a new licensing requirement for banks and financial switching and electronic clearing service providers to connect with international payment networks, including U.S. electronic payments companies. Specifically, when the new decree comes into effect, the existing clients must meet specific requirements and obtain SBV's approval/license to connect with U.S. electronic payments companies within a transition period of 24 months. New clients must obtain the approval/license before the connection, These measures would appear to also require NAPAS (a financial switching and electronic clearing service provider) to obtain written approvals from the SBV to connect to U.S. electronic payments companies. We urge USTR's continued close attention to developments in this space, and the opportunity for close consultation with private sector (both domestic and international).

Import Policies - Customs and Trade Facilitation Barriers

Argentina

Informal Entries

NFTC is concerned with a recent amendment to the value threshold for informal entries under the courier regime in Argentina, which was published and put into force on the same day – without prior notice or consultation. This limitation was previously enacted and removed, and the current process is an example of the need to ensure transparency in trade and border procedures in Argentina. The United States should encourage Argentina to abide by its international commitments related to transparency and providing the opportunity to comment on new regulations, including the WTO Trade Facilitation Agreement (TFA) and the WCO Revised Kyoto Convention (RKC).

Special Customs Areas

Argentina currently has a tax-exempt trading area called the Special Customs Area (SCA), located in Tierra del Fuego province. The SCA was established in 1972 through Law 19,640 to promote economic activity in the southern province. The SCA program, which is set to expire at the end of 2023, provides benefits for established companies that meet specific production, exportation, and employment objectives. Goods produced in Tierra del Fuego and shipped through the SCA to other parts of Argentina are exempt from some local taxes and benefit from reductions in other taxes. Additionally, capital and intermediate goods imported into the SCA for use in production are exempt from import duties. Goods produced in and exported from the SCA are exempt from export taxes. Some products are brought from outside Argentina to facilities in the SCA where they are taken apart and reassembled for sale inside Argentina in order to qualify for tax benefits. In light of the recent WTO Dispute Settlement decisions WT/DS472/R and WT/DS497/R, Argentina should revise its SCA.

Import-Restrictive Currency Controls

In response to the current economic crisis in Argentina (i.e., 113.4% YoY inflation as of Jul-23, ARS devaluated by 159% YoY as of Aug-23, and ~$9B of negative foreign currency net reserves as of Aug-23), over the last 12+ months the Argentine Central Bank (Central Bank) has been tightening FX controls, including restricting access to USD to pay for imported goods and services.

In November 2022, Argentina issued new laws (Communications 5271/2022 and 7622/2022) that expanded licensing requirements to all imports. The laws establish a new framework (SIRA) under which each import requires approval by multiple government agencies based on a review of the importer's proposed payment method, tax status, and financial capability (among other details). For transactions in U.S. dollars, the process has increased approval lead times from 3-15 days to approximately 60 days, preventing businesses from operating at speed.

Moreover, if shipment information changes between approval and entry into Argentina, importers may need to reapply for the approval.

Regarding services (such as legal, cloud, software licenses, etc.), the Central Bank implemented an online process to manage the requests to access the FX market to make cross-border payments for imported services called SIRASE (Sistema de Importaciones de la República Argentina y Pagos de Servicios al Exterior). In April 2023, the Central Bank further tightened the FX controls and required that the Central Bank, the Secretary of Commerce (Secretary), and the Argentine Tax authority approve all requests to access the FX market to make cross-border payments for imported services (known as a SIRASE request). The Secretary has up to 60 days to respond to a SIRASE request, which may be extended for an additional 60 days if the Secretary requests additional information. In July 2023, Argentina issued a decree (Decree No. 377/2023) that imposes new value-added taxes on imports and related services paid with U.S. dollars. With limited exceptions, the decree imposes a 7.5% tax on imports under most tariff classifications, for which payment is in U.S. dollars, and a separate 7.5% tax on import/export freight services that are paid for with U.S. dollars. In effect, a single import could trigger an additional tax of up to 15% solely on the basis that its purchase and transport is paid in USD.

Customs Release Delays

In Argentina, Customs detains shipments in "channels" when it has a question about the shipment or import documentation (yellow channel) or decides to perform a physical inspection (red channel). Argentine Customs often detains such shipments for up to one year, even after all inspections are complete and the importer answers all inquiries, resolves any discrepancies or disputes, and pays any fines imposed. This practice causes significant delay to delivery timelines, creating disruption and unpredictability in the supply chain. It also imposes costs on importers, who may need to reorder goods and incur additional fees for storage.

Brazil

Imports Licensing

The imports of products that require import licenses in the current Brazilian licensing system face challenges related to the time it takes to issue the license, which does not keep up with the required for shipments. Air shipments are consolidated with thousands of other products that may not require an import license, but as the license requirement is applied on a per-product and per-shipment basis, a product that requires licensing can interrupt the shipment and delivery of other products to consumers. Brazil should offer the possibility to issue an import license by product through a process that requires categories of information that correspond with those in the product catalog (i.e., there should not be a requirement to specify commercial data). It is also necessary to extend the validity of import licenses from six months to one year, and to allow for their application to multiple shipments with no limit of quantity within the period of validity.

De Minimis

Historically, Brazil's de minimis threshold (the level below which no duty or tax is charged on imported items) of USD50 applies only to postal shipments. Moreover, de minimis is limited only to Consumer-to-Consumer transactions (C2C) and does not apply for both Business-to-Consumer (B2C) and Business-to-Business (B2B) transactions. Recently, however, Brazil announced the Remessa Conforme which opens up de minimis to non-postal shipments of the B2C variety under certain conditions. Brazil should build upon this new program to further level the playing field. For example, the program does not address C2C de minimis shipments carried by couriers, and, although important to SMEs, B2B shipments are excluded entirely. This varied treatment under current law and the low de minimis value threshold for imported items create unnecessary barriers to trade through increased transaction costs for Brazilian businesses, and act to restrict consumer choice and competition in the Brazilian market. Brazil should raise the de minimis threshold to USD $100, lower the 60% charge for shipments cleared by couriers using the simplified clearance process, and raise the value thresholds for use of that process – three reforms recently introduced in the Brazilian legislature.

NFTC requests that the U.S. Government work with the Brazilian government to extend the application of the de minimis threshold to both B2C and B2B transactions for all operators, and to increase the de minimis threshold to a rate more in line with international standards and consumer shopping behavior, and to make other changes to the simplified clearance regime to the benefit of SMEs.

Ex-Tariff Regime

Brazil's customs regime allows for ex-tariff imports of foreign and U.S. manufactured goods under some circumstances. When there is no similar equipment being manufactured locally, an importer can seek import duty waivers to reduce import costs. This reduction is called ex-tariff (ex tarifário) The ex-tariff regulation consists of a temporary reduction on import duties of capital goods and information technology and telecommunications products, when there is no domestic equivalent production.

In August 2023, the Brazilian Government published a new resolution for "Ex-Tariff" concessions, adding requirements to the process for renewal /concession of the regime. For a renewal or future "Ex-tariff" request, importers should present an investment project in addition to the proof of no domestic production of similar/like products. In summary, the investment project needs to justify the creation of the tariff exception by presenting the strategic relevance of the equipment to the development of the internal market. The project should include the function of the equipment in a given production line; the schedule and location of use; the essentiality or productivity gains from the use of the new equipment; the innovative technologies the product presents or improvements in the final product, plus any other information that justifies the duty exemption. This is part of the Administration's strategy to attract more investment and strengthen the local/national industry.

Trade Facilitation

Brazil has advanced its trade facilitation policy by implementing the new Single Window project for imports and exports. The goal of this project is to reduce the average time of customs procedures by implementing one integrated system and cutting bureaucracy and paperwork requirements. The creation of the Product Catalog, a database of products and foreign operators, is an additional component of this proposal aimed at reducing import time and increasing the quality of the product description. NFTC encourages the Brazilian government to consider e-commerce particularities within this process to guarantee a simplified process for products bought online. It is crucial that the government considers the e-commerce contributions to the corresponding public consultation and ensures that businesses have proportional time to adapt to new requirements.

Importation of Remanufactured Goods

Brazil is one of the few countries in the Western Hemisphere that does not allow the importation of remanufactured goods. The Ministry of Economy issued a Public Consultation (Circular Secex 45/2021) in July 2021 to collect information and investigate the potential impacts on the economy, industry, investments, employment and environment if Brazil were to allow the importation of remanufactured goods. Companies and industry associations sent contributions. While the process is still pending, USTR should encourage Brazil to allow for the import of remanufactured goods and parts, which can reduce consumer costs and company service costs of such goods and help advance environmental goals by facilitating a more circular economy.

Canada

Customs and Trade Facilitation

The Canadian Border Services Agency (CBSA) is pursuing several concerning changes to customs procedures and practices that may conflict with Canada's customs and trade facilitation obligations in the USMCA and the World Trade Organization's Trade Facilitation Agreement.

The CBSA Assessment and Revenue Management project, better known as CARM, is a multiyear initiative to change the Canadian importation process. While ostensibly implemented to streamline the border process, several aspects of the new CARM system require more complicated processes and increase the customs formalities required for informal entries. Although Canada recently extended its aggressive implementation timeframe for the next CARM release to a May 2024 effective date, concerns nonetheless remain that the new process could increase complexity at the border, with policies for low-value shipment clearance still undefined in key areas. The United States should encourage CBSA to commit to continued engagement with various stakeholders, especially U.S. small- and medium-sized (SME) traders, with an eye toward truly simplifying customs procedures.

Last year's budget implementation bill (Bill C-19) made changes to Canada's Customs Act that will, among other things, require express carriers to take on new obligations and potential liabilities when delivering goods into Canada. These changes will have significant impacts, particularly for SME traders such as those who infrequently import small numbers of e-commerce shipments into Canada. For example, carriers in those instances could be liable for any additional taxes, duties, penalties, and other costs for up to four years after importation and would have to seek reimbursement from the shipper. As a result, shifting such significant financial and legal risk to carriers is likely to raise costs and cause unintended consequences for SMEs that rely heavily on these services. Taken together, in their current form these changes could further disrupt supply chains and increase costs for traders of all sizes on both sides of the border.

Chile

DeMinimis Shipments

Under the U.S.-Chile Free Trade Agreement (FTA), Chile committed to expedited customs procedures for express shipments and to allow a shipper "to submit a single manifest covering all goods contained in a shipment transported by the express shipment service, through, if possible, electronic means" (Article 5.7. express shipments.). However, the current customs systems cannot process all the data from different carriers, causing delays at the border.

The Chilean government has in place a trade facilitation mechanism for shipments under $41, excluding those shipments from VAT and customs duties. However, a new proposal from the government would eliminate de minimis benefits. At least with respect to the customs duty component of de minimis, this proposal would violate Chile's obligations under the WTO's TFA. Specifically, TFA, article 7, paragraph 8.2(d), requires member countries to "provide, to the extent possible, for a de minimis shipment value or dutiable amount for which customs duties and taxes will not be collected…" – a practice Chile has maintained for many years.

Additionally, under the FTA, Chile agreed to "their desire to maintain the level of open market access existing on the date this Agreement is signed" (Annex 11.6 on express delivery services). This proposal would reduce the existing open market access policies for express delivery shipments and represent a "restriction[] on express delivery services" *contrary to the FTA and TFA.*

Colombia

Customs Penalties

On June 9, 2023, Decree 920 of 2023 went into effect, establishing a new customs penalty regime in Colombia. Among other concerning features, the new regime includes excessive and draconian penalties disproportionate in scale with the nature of the infraction, including strict liability for transportation companies for hidden or undeclared shipments. For these reasons, the decree is in tension with Colombia's commitments under the WTO Trade Facilitation Agreement. In addition, NFTC believes that the decree fosters an operating environment not conducive to facilitating trade for U.S. and Colombian traders alike.

Performance Requirements for Tax Preferences in FTZs

Article 10 of Colombia's tax bill No. 118 of 2022 would establish cascading tax thresholds for companies operating in Free Trade Zones (FTZs) that do not have an established export obligation (export performance requirement), regardless of if they are a goods or services company. Under the new proposal, in order to qualify for the more favorable 20% tax rate, companies will need to develop and provide an "internationalization and annual sales plan" that demonstrates the "sum of their net income from operations of any nature in the national customs territory and the other income obtained by the industrial user different to the development of its activity for which it was authorized, etc." must be below increasingly smaller thresholds, in order to maintain the FTZ tax rate. While service companies do not historically have minimum export commitments, the article as proposed does not include a carve-out for services industries.

The original text would have applied a 35% rate to non-compliant companies (and effectively eliminated the income tax rate reduction benefit from operating in FTZs), but the revised text provides that "industrial users that do not comply with the provisions of the first paragraph [performance requirements] of this article for three (3) consecutive years, shall lose the qualification, authorization or recognition as industrial users to develop their activity in free zones and shall lose free zone benefits."

U.S. companies obtained FTZ status and corresponding benefits based on specific investment and employment requirements to be performed, which did not include an obligation to draft an internationalization plan or meet a minimum threshold of exports. The imposition of new export performance requirements in FTZs contravenes commitments Colombia made under the WTO Agreement on Subsidies and Countervailing Measures, which prevents governments from creating performance requirements in exchange for receiving a direct tax benefit. It also violates Colombia's obligations under Article 10.9 of the Investment Chapter of the USCTPA, which prohibits the imposition of mandates to export a given level or percentage of goods or services as a condition "in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory."

Trade Facilitation

Under the USCTPA, Colombia committed to modernize their customs procedures through automation and the use of electronic systems. For example: Article 5.3 states that each party shall "provide for electronic submission and processing of information and data before arrival of the shipment to allow for the release of goods on arrival" and "employ electronic or automated systems for risk analysis and targeting." Colombia also committed to adopt expedited customs procedures for express shipments, including the full incorporation of express shipments into Colombia's Single Window (Articles 5.2, 5.3, and 5.7). This includes providing for the submission and processing of information necessary for the release of an express shipment before the express shipment arrives, as well as allowing for a single manifest through electronic means, if possible. However, the Colombian government has yet to implement these commitments and still requires physical documents at the border.

Dominican Republic

Customs/Border Closure

The sudden closure of the Dominican Republic/Haitian border in September 2023 is preventing the flow of commercial goods from the Dominican Republic into Haiti, is exacting a heavy human and economic cost in both countries, and that damage is, in turn, gravely undermining the trade and economic partnership each country has with the United States. For example, The Caribbean Basin Initiative, expanded under the U.S./Central American-Dominican Republic Free Trade Agreement and the Haitian HELP and HOPE measures, led to the creation of important co-production models uniting the Dominican Republic and Haiti. These co-production models have led the Dominican Republic support ing many communities on both sides of the border. The Dominican – Haitian border partnership supports an important market for the U.S. textile industry, with the Dominican Republic (primarily because of these border operations) currently positioned as to be the second largest market for U.S. yarn exports. Continued closure of the border puts at risk this important export market and substantial investments made by U.S. companies in the apparel sector. Reopen the and seek alternative, diplomatic solutions to resolve this crisis as each day this border closure persists greatly offsets the value of any solution with irreversible economic damage.

Egypt

Express Delivery Services

The Egyptian National Post Organization (ENPO) must grant special authorization to foreign-owned private courier and express delivery service suppliers seeking to operate in Egypt. In addition, although express delivery services constitute a separate, for-profit, premium delivery market, ENPO requires private express delivery operators to pay a postal agency fee of 10 percent of annual revenue on shipments of less than 20 kilograms (approximately 44 lbs.). The ENPO imposes an additional fee of 46 Egyptian Pounds (approximately $2.36) on private couriers and express delivery services for all shipments under 5 kilograms (approximately 11 lbs.).

European Union

De Minimis

The EU is considering significant reforms to its customs procedures that will have long-lasting effects on trade with the EU. The customs reform proposal includes, among other things, the elimination of the EU's duty de minimis. Eliminating duty de minimis would be a violation of the EU's obligations under the WTO's Trade Facilitation Agreement (TFA). Under TFA, article 7, paragraph 8.2(d), signatories are obligated to "provide, to the extent possible, for a de minimis shipment value or dutiable amount for which customs duties and taxes will not be collected…". With a de minimis provision in place since 1983, the EU has proven it more than possible to have and maintain a de minimis provision. Therefore, any elimination of the EU's de minimis provision would be in contravention of its obligations under the TFA. In addition, any elimination would have serious negative effects on U.S. exporters to the EU, disproportionally harming small-and-medium sized traders. Furthermore, the cost of implementation for EU member states would dwarf projected revenue collection increases and likely slow the flow of low-value goods that are exports from the U.S. and inputs for American small businesses.

Retaliatory Tariffs

NFTC urges the administration to secure the permanent return to zero-for-zero tariffs on distilled spirits between the U.S. and EU. Since 1997, the U.S. and EU spirits industries have largely enjoyed duty-free access to each other's markets. This duty-free access was provided for under the "zero-for-zero" agreement negotiated in connection with the Uruguay Round by the U.S. and the EU (and subsequently several other countries) to eliminate tariffs on virtually all distilled spirits products on a most-favored-nation (MFN) basis. However, from June 2018-January 2022, the EU imposed a 25% retaliatory tariff on American Whiskeys in response to U.S. Section 232 tariffs on steel and aluminum. This tariff caused a 20% decrease in American Whiskey exports to the EU, our largest American Whiskey export market, from $552 million to $440 million (2018-2021). Similarly, between November 2020 and June 2021, the EU imposed a 25% tariff on U.S. rum, brandy, and vodka in connection to the WTO Boeing-Airbus dispute. These retaliatory tariffs have been temporarily suspended but could be reinstated in the future.

The Biden Administration needs to secure permanent resolution of these conflicts to ensure the EU does not return to retaliatory duties on U.S. distilled spirits exports.

India

Customs and Trade Facilitation

India's customs and import procedures do not fully comply with their WTO TFA and ITA obligations and Indian customs officials do not properly apply their laws. The lack of an efficient process for resolving customs disputes is a major disincentive for investors seeking to build out supply chains in India.

India imposes duties on products covered by its zero-duty ITA commitments, including a 10% import duty on printer ink cartridges, and is considering duties on other new IT items, such as multifunctional devices (fax/print/scan), that have emerged since the ITA was signed but are covered by the original ITA.

India's timeline for granting advanced customs classification rulings is unpredictable, sometimes taking years, and sometimes rulings are not issued at all. The TFA calls for advance rulings to be provided within a "reasonable, time-bound manner," and India's own law requires rulings within 3 months. Furthermore, India has no process for obtaining rulings for goods already in the market. This means that classification disputes in India are common, but their adjudication is painfully slow (8-10 years for resolution is not uncommon).

Indonesia

Express Delivery Services

Indonesia maintains restrictions on the provision of postal services, broadly defined to include courier, express delivery, and other logistics services. Indonesian law requires that postal service suppliers be majority-owned by Indonesians and that foreign suppliers limit their activities to provincial capitals with international airports and seaports. Under Customs Regulation 11/2020, logistic services companies are required to include a Tax ID Number (NPWP) or designated identification numbers of Indonesian consignees or consignors in the manifest of all inwards and outwards shipments to and from Indonesia. Indonesian customs has since relaxed the requirement by allowing a phone number to be used in lieu of a NPWP on the manifest. However, the Customs Directorate has not yet issued a written regulation for this relaxation of the policy and industry fears the lack of legal certainty will cause future obstacles for shipping.

Survey Report (SR) Requirement

The Ministry of Trade ("MOT") Regulation No. 87/2015 ("Reg 2015") applies to imports of goods classified in specific HS codes including servers. The importer is required to appoint a company accredited by the Indonesian Government (known as the "Surveyor") to inspect its shipment in the origin prior to Customs clearance. The SR requirement was initially enforced by Indonesian Customs ("Customs"), until MOT Regulation No. 51/2020 ("Reg 2020") introduced a post-entry SR inspection process administered by the Directorate General of Consumer Protection and Trade Compliance of MOT, effective on August 28, 2020. Reg 2015 was repealed and replaced by MOT Regulation No. 20/2021 ("Reg 2021") effective on November 19, 2021 to introduce new HS codes requiring SR. The product scope covers imports including servers, cooling equipment, hard disk drives, network interface cards and battery back-up units. The SR can cost up to USD1,600 per shipment and significantly increase the supply chain costs. Although both Reg 2015 and Reg 2021 allow capital goods to be imported without SR if an exemption letter from the MOT is obtained, there has been limited transparency and timeline provided for applying and issuing such exemption.

Price Controls

Indonesia is moving in the direction of increased state control over drug and medical device prices under the pretext of ensuring equitable and affordable health access for patients, while in fact it could threaten patient access to innovative treatments. The Omnibus Health Law, which was issued in August of this year, gives the government authority to regulate and control the price of drugs and medical devices in the context of securing their accessibility for public health and make necessary interventions. It is unclear how controls will be implemented but several implementing regulations are currently being finalized. The government is also developing an online "pharmaceutical and medical device dictionary" where the public can get access to information about the products, including their price. With this kind of price transparency policy, the government expects that hospitals and pharmacies will feel discouraged to set high drug prices so that people can buy drugs at affordable prices. In addition, listing decisions on the National Formulary (FORNAS) appear to be primarily based on price, whether the medicine and vaccine is locally produced and the overall National Health Insurance (JKN) budget.

Kenya

Excise Taxes

The Government of Kenya imposes excise duties on certain goods under its *Excise Duty Act of 2015*. Line items to which these taxes are applied include a variety of food, agricultural, and industrial goods. The level of these excise duties has risen consistently since the law was implemented.

Each year, in June/July, as part of its annual budget process, and in October/November, when the Kenyan Revenue Authority (KRA) revises its tax rules based on annual inflation data, the scope of application and level of these excise taxes are revisited. Most recently, in July and October of 2022, the KRA announced increased excise duty rates, and at the same time, the agency *exempted like domestically produced goods*, on the following line items:

- sugar confectionery of tariff heading 17.04;
- white chocolate, chocolate in blocks, slabs, or bars of tariff nos. 1806.31.00, 1806.32.00 and 1806.90.00;
- potatoes, potato crisps, and potato chips of tariff heading 0701.10.00, 2004.10.00, and 2005.20.00;
- glass bottles (excluding glass bottles for packaging of pharmaceutical products) provided that the tax shall not apply to glass bottles from any of the countries within the East African Community;

- pasta of tariff heading 1902 whether cooked or not cooked or stuffed (with meat or other substances) or otherwise prepared, such as spaghetti, macaroni, noodles, lasagna, gnocchi, ravioli, cannelloni, and couscous, whether or not prepared;
- eggs of tariff heading 04.07;
- onions of tariff heading 07.03;
- motor vehicles of cylinder capacity exceeding 1500cc of tariff heading 87.02, 87.03 and 87.04;
- SIM cards; and
- cellular phones.

The KRA's exempting domestically produced goods from the application of these excise duties raises serious questions about compliance with international trade rules on treating imports no less favorably than like domestic goods.

Mexico

Carta Porte

On May 1, 2021, the Tax Administration Service published on its website the electronic document called" Bill of Lading Complement" (Complemento carta porte). This requirement will be applied to all importation and exportation of goods in transit within Mexican territory. The parties involved must comply in advance with this new requirement. Initially, it was to become effective on September 30th, 2021, but after several consultation sessions with the business community and transportation chambers, the requirement is now slated to become effective on January 1st, 2024. The Mexican government is looking to have information in advance of all goods in transit by any means of transport (air, sea, train road, and others) throughout the Mexican territory. The main purpose is to combat contraband and impose taxes from the informal economy through transportation services. NFTC believes that Mexico must reinvigorate dialogue with industry to work through the outstanding implementation issues, particularly those issues that affect international shipments.

Energy Sector Barriers

Mexican energy policymakers continue to create hurdles for companies seeking to connect to the electricity grid and purchase clean and reliable energy. These hurdles include directing energy consumers to purchase energy from the state-owned utility, Federal Electricity Commission (CFE), and receiving disproportionate transmission infrastructure requests as part of the process to connect to the grid with the National Center for Energy Control (CENACE). Many of the infrastructure requests are actual recognized obligations of the Mexican State that have simply not been met. This takes place as the government continues to block all possibilities to pursue off-grid and private generation. As a result, U.S. companies are unable to adequately source their energy needs in Mexico and see their clean energy targets compromised. The United States has already requested dispute settlement consultations with Mexico under the USMCA.

Temporary Tariff Increases

In an August 2023 presidential decree, Mexico imposed temporary 5-25% tariff rate increases on various categories of imports. The rate changes cover a broad range of products - including metals, textiles, chemicals, oil, soap, paper, electronics, and furniture - and were imposed without prior public notice or opportunity for interested parties to comment. In addition to imposing the rate increases, the August 2023 decree also suspends previously-planned tariff rate reductions. In sum, the tariff rate changes increase the cost of importing into Mexico with little adjustment time for importers. The decree states these changes are needed to stabilize domestic industry and eliminate distortions in trade, and sets a general expiration date of July 31, 2025 (with certain exceptions).

Full implementation of Mexico's commitments in the USMCA's Custom Administration and Trade Facilitation Chapter, including those related to expediting the release of goods, transparency in customs procedures, communicating with traders, the use of information technology, and the adoption and maintenance of a single window, would address these concerns.

Tax ID registration affecting U.S. SMEs

In 2020, Mexico passed legislation requiring U.S. businesses that store inventory in Mexico to register for a local tax ID with the Tax Administration Service (SAT) and file monthly tax reports. While this process alone is not novel, the process to obtain this tax ID, known as a Registro Federal de Contribuyentes (RFC), is extremely complicated and costly. This process alone has become the primary barrier for U.S. small and medium-sized enterprises (SMEs) that seek to sell their products to Mexican consumers and businesses.

To receive an RFC, U.S. businesses are required to have a local Mexican address and a local Mexican legal representative that shares 50% of the company's tax liability, as well as pay income tax on all income generated in Mexico. The registration process is slow and bureaucratic, and involves 1) apostilling of documentation in the U.S., 2) translating all documentation to Spanish by a certified translator, 3) legalizing documentation with a Mexican Notary, 4) obtaining a SAT appointment (which can take one to four months due to limited availability), and 5) registering the RFC in SAT's offices. All of these steps are offline and in-person and can take over five months, costing over $5,000, in addition to the costs of complying with income tax obligations.

Trade Facilitation and Border Issues

U.S. exporters continue to face significant challenges at the U.S.-Mexico border. The Government of Mexico has still not fully complied with the letter or spirit of its U.S.-Mexico-Canada Agreement (USMCA) customs obligations, and instead is moving to erect new customs barriers that harm the ability of U.S. small businesses to benefit from the agreement. Specifically, U.S. exporters are experiencing a significant increase in inspections and competing requests for information from multiple agencies at the same time in order to clear customs. SAT's customs automation interface has also repeatedly failed, including after recent changes were abruptly made to tariff levels, which has further increased border crossing times. Similarly, U.S. companies are experiencing regulatory uncertainty in Mexico, including significant delays, when seeking to apply or reapply for authorizations to operate customs warehouses and other authorizations necessary for the continued operation of the important U.S. supply chains that run through Mexico. U.S. companies have also experienced an increase in security incidents in northern Mexico near the border that have endangered employees and business operations.

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Peru

De Minimis

The U.S.-Peru Trade Promotion Agreement (the "Agreement") entered into force on February 1, 2009. Under Article 5.7(g) of the Agreement, the parties established a USD200 de minimis provision, the value threshold below which no customs duties or taxes are charged on imported goods. However, the National Superintendent of Customs and Tax Administration (SUNAT) has implemented restrictions to the number of express delivery shipments (three maximum) that an individual without a tax number (RUC) can receive per year under the de minimis provision. Also, for individuals, it is not clear whether personal shipments beyond the three allowed would be considered commercial transactions that create new income tax obligations. Thus, this RUC requirement limits the ability of individuals to import goods for personal use and constitutes a trade barrier and a limitation to the use of express delivery shipments in Peru.

Express Delivery Services

Starting on January 1, 2024, each courier company will be forced to have its own storage facility, instead of using a shared warehouse space as they do now. This would negatively impact express delivery services, harming individual and SME customers. Peru should reevaluate this regulation specifically to permit flexibility for couriers to choose between contracting with a third-party warehouse or operating their own facility, in line with ordinary market and competition principles. Without change, the regulation will undermine standards and performance of the courier process, as established by the U.S.-Peru Trade Promotion Agreement.

Various Signatories of WTO TFA

Challenges Accessing Customs Data

Under Article 10.4.1 of the TFA, signatories "shall endeavour to establish or maintain a single window, enabling traders to submit documentation and/or data requirements for importation, exportation, or transit of goods through a single entry point to the participating authorities or agencies. After the examination by the participating authorities or agencies of the documentation and/or data, the results shall be notified to the applicants through the single window in a timely manner."

In many countries, including signatories to the TFA that have established a single window, the government does not make data and entry information available to importers and exporters. Companies in the following countries can only access their own shipment data through their broker: China, India, Indonesia, Ireland, Italy, Japan, Malaysia, Morocco, Norway, the Philippines, Saudi Arabia, Taiwan, and Turkey (all of these countries except Morocco have implemented a single window under the TFA). In other countries (e.g., France, Germany, Israel, Singapore, Spain, and the United Arab Emirates – all of which have established a single window under the TFA), a company can acquire its own data and entry information, but the process is burdensome. In some cases, the information can only be accessed by paying a fee.

The inability of companies to easily access information on their own imports and exports – including through the single window in TFA signatories – creates a trade barrier in these markets. The lack of access to data can cause delays in clearing shipments, increases costs, and generally makes it more difficult to do business and assess compliance in these countries.

In the European Union specifically, the lack of access to data creates difficulties for parties that seek to understand their obligations and exposure to the Carbon Border Adjustment Mechanism (CBAM). USTR discussed the CBAM in the 2022 National Trade Estimate Report on Foreign Trade Barriers,[3] and the CBAM entered into effect (in a transitional phase) on October 1, 2023. As of now, competent authorities must provide CBAM reporting obligations (derived from import data) to what is called the CBAM Competent Authorities Portal. Once again, importers cannot access this portal, and as mentioned above, many European Union countries do not make declaration data available to the importer for use in a program such as CBAM. As a result, importers close the gap by implementing costly solutions to aggregate their government data derived from non-government sources.

Sanitary and Phytosanitary Barriers

India

Health Certificates for Food Imports

Imported consignments of milk, milk products, pork, fish and fish products require health certificates issued by the competent authority of the exporting country. The certificates only will

[3] https://ustr.gov/sites/default/files/2022%20National%20Trade%20Estimate%20Report%20on%20Foreign%20Trade%20Barriers.pdf at 226.

be valid for 90 days from the date of issue. The certificate requirement was adopted to discourage imports to protect domestic producers and make them more competitive.

Technical Barriers to Trade

Colombia

Regulatory Approvals

In recent years, the pharmaceutical industry has experienced worsening delays in regulatory approval times resulting in a significant market access barrier. Colombia's Instituto Nacional de Vigilancia de Medicamentos y Alimentos (INVIMA) takes up to 35 months to complete the evaluation and approval process, while other agencies are conducting this process in less than 12 months. This delay means that the pharmaceutical industry is unable to get new products approved even though the same products have been approved by other high standard agencies around the world. In fact, many countries are reducing approval times while the timelines in Colombia continue to increase. This has a direct impact on access to medicines and vaccines for patients in Colombia while also contributing to an unpredictable business environment, which could ultimately impact investment from the pharmaceutical sector. INVIMA needs a clear legal framework aligned with international standards and the adoption of FDA and EMA good practices. Public policies function as scaffolding for the construction of a predictable, efficient, transparent, and sustainable environment.

European Union

EU Proposed Revisions to the Packaging and Packaging Waste Decree

On February 27, 2023, the EU notified the WTO of proposed revisions to its Packaging and Packaging Waste Decree (G/TBT/N/EU/953). The revision was issued as a "Regulation" and not a "Directive." It is important that the U.S. government continue underscoring that this proposal remain a "Regulation" that reflects consistency across the EU Member States to avoid fragmentation of the EU's internal market. Further, the exemption for distilled spirits from reuse targets and the recognition of U.S. spirits as distinctive products of the U.S. in the EU, similar to products recognized as GIs should continue. And finally, NFTC urges the U.S. government to ensure that the EU retains marketing and consumer acceptance as performance criteria justifying additional packaging weight and volume.

Labeling

In February 2021, the EU published its Beating Cancer Plan, under which the EU will propose a mandatory requirement to include a nutrition declaration and a list of ingredients on labels before the end of 2022 and mandatory health warnings on labels by the end of 2023. In December 2021, the EU launched a public consultation seeking general feedback on, among other things, requiring nutrition information on beverage alcohol products that may either appear 'on label' or 'off label' with a QR code 'on label'. The proposed nutrition declaration and ingredient list regulatory text has not been published. It is unclear when the EU will issue a proposed warning statement regulation.

Ireland – Public Health (Alcohol)(Labeling) Bill

Ireland's Public Health (Alcohol) Bill was signed into law in October 2018, completing a process that began in 2015. In June 2016, the draft bill was notified to the WTO (G/TBT/N/IRL/2), and Ireland notified a revised bill through the EU's TRIS internal review system for comment in January 2018.

In July 2022, Ireland notified the EU through TRIS and FIC of its intent to adopt regulations under the Bill on beverage alcohol labeling. Specifically, the proposal would require information on calories and grams of alcohol per container, a pregnancy pictograph warning, and warning statements. In February 2023, Ireland notified the draft regulation to implement the beverage alcohol labeling requirements of the Bill to the WTO (G/TBT/N/IRL/4). The draft is the same text notified through the EU's TRIS and FIC systems in June 2022. On May 22, 2023, the proposal was signed into law and will go into effect on May 22, 2026.

There is no EU-wide beverage alcohol warning statement requirement, and beverage alcohol products over 1.2% a.b.v. are exempt from nutrition labeling requirements. The EU published its Beating Cancer Plan in February 2021 and, in December 2021, launched a public consultation seeking general feedback on, among other things, requiring nutrition information on beverage alcohol. However, when the EU will issue a proposed warning statement regulation is unclear.

India

Health Star Ratings

The Food Safety and Standards Authority of India (FSSAI) is in the process of framing rules for front-of pack nutrition labelling (FOPL) of packaged foods. The health star rating (HSR) format ranks a packaged food item based on salt, sugar, and fat content and the rating will be printed on the front of the package to help make it easier for consumers to understand the calorific value of the product. NFTC members report that compliance with this new system is extremely challenging and creates a barrier to U.S. exports to India.

Other Barriers

Australia

Country-by-Country Reporting

The Government has issued a "Treasury Laws Amendment (making multinationals pay their fair share – integrity and transparency) Bill 2023 Explanatory Memorandum" ("Explanatory Memorandum") addressing Country-by-Country Reporting ("CbCR"). The Draft Bill contains a new reporting requirement aimed to increase transparency in how companies structure their subsidiaries for tax purposes in Schedule 1. Schedule 2 will limit the amount of debt that entities can deduct for tax purposes and ensure that these debt deductions are directly linked to an entity's economic activity. The proposed scope of information requested is still overly broad and is beyond what is included in OECD Confidential CbCR. The scope of CbCR was agreed at the OECD as 'appropriate' to enable tax authorities to make a confidential risk assessment of an

MNE's tax affairs. While NFTC understands the need for this data to conduct risk assessments, there seems to be no objective policy goal for publishing that information.

Colombia

Significant Economic Presence Taxation

In August 2022, the Colombian government introduced a significant economic presence (SEP) proposal, a new tax on gross income derived by overseas providers of goods and digital services into Colombia. In November 2022, the Colombian government approved the SEP rule (Law 2277/22, Article 57) which distinguishes between goods and digital services. For goods and services, a person is in scope if it has a deliberate and systematic interaction with the Colombian market (maintaining a marketing interaction with 300,000 or more users or customers located in Colombia) and if it obtains gross income of approximately USD 300,000 or more from users in Colombia. The tax applies to both the sale of tangible goods, but also to an enumerated list of digital services, including cloud services. As such, the SEP provisions apply to more than companies operating in the digital services sector. The rule imposes a 10% withholding tax on a non-resident with a deemed SEP in Colombia. The tax is imposed at the source, on the total payment made to the non-resident for the sale of goods and/or provision of services. Using other enacted DSTs and other relevant similar measures as a benchmark, the 10% proposed rate for withholding is unusually high. There is an elective, alternative regime, whereby the non-resident can elect to pay a 3% tax on the gross income derived from the sale of goods and/or the provision of digital services from abroad, sold, or provided to users in Colombia when registered. The SEP rule is expected to enter into force on January 1, 2024.

The Colombia proposals represent significant departures from international tax norms, which allocate taxing jurisdiction on the basis of nexus (i.e., the concept of permanent establishment, physical operations, workforce, etc.) or source (the location of income-generating activity), rather than destination-based criteria. The proposal does not align with the current ongoing negotiations at the Organisation for Economic Co-operation and Development (OECD)/G20 Inclusive Framework and violates the spirit of both the 2021 DST standstill agreement, and the conditional, one-year extension reached in July 2023, which Colombia agreed to. A new gross-basis tax imposed on non-residents of Colombia on income derived from sales to the Colombian market would create barriers to trade to U.S. companies engaging with the Colombian market and may constitute a violation of the the United States-Colombia Trade Promotion Agreement (USCTPA).

European Union

CBAM, Russia Sanctions, and Other Measures

In implementing various laudable policies and priorities, the European Union/its member states impose requirements on importers to collect extensive information from other parties with limited or late guidance and with varying enforcement strategies across the European Union. For example, the CBAM requires an effort to collect extensive data from upstream suppliers regarding inputs and raw materials in the imported product and marrying it to import data in a very short timeframe. Another example is the European Union's sanctions against Russia, which include a prohibition on imports of iron and steel of Russian origin effective September 30, 2023.

The guidance on particular matters was not released until October 2, and companies were surprised to learn from customs brokers that each implicated import declaration required a certification. To verify the content or production date of the concerned iron or steel takes time, and the late guidance release will likely create risk of production delays. Although these measures pursue legitimate policy objectives, without co-creation of the "how" with importers, the implementation of these measures at the border creates a trade barrier.

Discriminatory Taxation

The EU's excise tax rules and minimum rates for distilled spirits are set forth in two EU Directives: 92/83 and 92/84. EU legislation only sets harmonized minimum rates, meaning that EU Member States may apply excise tax rates above these rates. Under the Directives, some member states can provide preferential tax benefits to certain spirits producers under "derogations" from general excise tax rates. In May 2018, the European Commission published a revised legislative proposal, which retains the derogations for certain spirits producers. Such measures put U.S.-origin spirits at a considerable disadvantage in these markets while affording protection to certain domestically produced products in contravention of the EU's WTO national treatment obligations. EU Member States that provide preferential excise tax rates for certain domestically produced products include Austria, Croatia, Czechia, France, Greece, Portugal, Romania, Spain, and Slovakia.

The Philippines

Reconfirmation of Tax Treaty Benefits

The U.S. and the Philippines executed an Income Tax Convention in 1976. Under this treaty, "taxation of business profits derived by a resident of the other country is governed by the standard treaty concept that tax liability will arise only to the extent that the profits are attributable to a "permanent establishment" in the taxing country." To access benefits under the tax treaty, the Philippines Bureau of Internal Revenue (BIR) requires that income payors file a request for confirmation (RFC) with the BIR. The BIR has issued guidelines to administer such annual pre-approval which comes with onerous documentation requirements which undermines the benefit of the existing tax treaty. The BIR also indicates possible penalties and criminal liabilities for non-compliance. There is significant ambiguity on how long BIR will take to review the RFC and there is no guarantee of a positive outcome. Such requests have to be made by each and every income payor (customers) of U.S. non-resident service providers selling to the Philippines.

Government Procurement Issues

India

India imposes rules that prohibit or create incentives against U.S. suppliers in procurement and research. For example, local content requirements for software and cloud services create market entry barriers for multinational companies that have global R&D centers; wholly-owned subsidiaries of foreign firms would be blocked by recent guidance from completing already approved contracts to discharge certain offset obligations; and geospatial guidelines prevent foreign companies from partnering with Indian companies to develop innovative technologies using higher resolution geospatial data.

Pharmaceutical Local Content Requirements

Aligned with the Government of India's continued stress on self-reliance, the Public Procurement (Preference to Make in India), Order 2017 and subsequent revisions mandate that only Class-I suppliers (local content equal or more than 80%) and Class-II suppliers (local content more than 50% but less than 80%) are eligible to bid for Government procurement. except where a global tender enquiry is issued (for an amount more than USD 2 billion.) Such a global tender enquiry is unlikely in the pharmaceutical sector as the value of the tender released by the procuring entities is invariably less than USD 2 billion. Hence the current framework creates challenges for global pharmaceutical companies to continue supplying even patented medicines (for which there are no local generics) that are manufactured outside India to Govt procurers.

In addition to being a major concern for the multinational pharmaceutical industry which has been importing lifesaving patented drugs for cancer and other critical ailments, this order poses a significant compliance challenge in particular to foreign software and cloud service providers (CSPs) to demonstrate local value add. This model does not consider the investments and other contributions made by foreign CSPs that enable the Indian Tech ecosystem and their global competitiveness, such as skilling initiatives, cloud innovation centers, quantum computing lab etc. Even if CSPs don't directly bid for government contracts, partners need to certify their percentage of local content, for which they rely on their vendors' local value addition as well. For example, where cloud services are a substantial cost element in a public procurement bid, percentage of local value add from a CSP becomes important. Moreover, the Indian government is considering revisions to the order and increasing the minimum local content requirement for Class-I suppliers to 60% and Class-II suppliers to 30%.

As a solution, while the Government of India has in April this year created a list of GTE (Global Tender Enquiry) exceptions (exemption from localization) that included 70 patented drugs at that time, this list has not been refreshed and no additional drugs have been added. As such, for these medicines that are not yet included, access to Govt procurers remains challenging. Industry is seeking the inclusion of additional patented therapies and an automated process of biannual review and refresh of GTE exemption list.

Indonesia

Local Content Requirements

Local content requirements (LCR) are a growing concern for many industries, including the pharmaceutical industry. The newly issued Omnibus Health Law (Law No. 17/2023) prioritizes the use of pharmaceutical products and medical devices produced locally. Articles 327 and 328 of the Law explicitly dictate that the government and healthcare facilities – both public and private – must prioritize the procurement and utilization of domestically produced and sourced pharmaceuticals and medical devices, imported products will only be used if there are availability or supply issues. This further escalates the aggressive import substitution policy pursued in recent years, which has centered around the imposition of local content requirements as well as the "freezing" of imported products from the public procurement catalog should local alternatives be available.

Separately, Presidential Instruction No. 6/2016 mandates local content requirement calculation to be used as a criterion for government procurement of biopharmaceutical and medical device products. Finally, this trend was further bolstered by Presidential Decree 2/2022, which prioritizes government procurement of products with domestically produced raw materials, specifically those with a local content threshold of at least 25 percent. It is critical that these requirements are not applied in a manner that restricts patient access to innovative medicines in Indonesia and that greater recognition is given to biopharmaceutical innovators for their contribution in bringing innovative therapies to Indonesia.

Korea

Cloud Services Procurement Requirements

Despite its ICT leadership status globally, Korea maintains a hallmark discriminatory policy in the cloud computing service industry to block U.S. cloud service providers (CSPs) from participating in government procurement. The Cloud Security Assurance Program (CSAP) is administered by the Korea Internet & Security Agency under the supervision of the Ministry of Science and ICT (MSIT). CSAP has been in place since 2016, acting as a pre-condition to participate in all cloud-related public procurement bids.

CSAP imposes a set of highly restrictive, brick-and-mortar operational requirements that no U.S. CSPs can meet. CSAP is built upon the data localization principle in its design, by requiring CSPs to physically separate the server, network, security equipment, operational personnel, access control, etc. from general cloud systems and to place their computing facilities within the national borders. As a result, U.S. CSPs are unable to access the public procurement market despite being certified to the highest security and privacy standards globally and equipped with state-of-art technical capacity.

While Korea took a positive step in January 2023 to revamp the CSAP into three tiers -- High, Moderate and Low, the reform was limited in effect. Even though the physical separation rule for the cloud information network was lifted for the Low-tier segment, U.S. CSPs are not able to qualify for Low-tier certification status, let alone in the Moderate and High tiers. A set of local technical standards-based requirements remain unchanged throughout the three tiers, specifically concerning the Korea-developed version of the Common Criterial (CC) certification and Korea's standalone encryption module known as the Korea Cryptographic Module Validation Program (K-CMVP). Furthermore, the physical separation rule is still required for the Moderate and High tiers.

CSAP also does not comply with Korea's international trade commitments including the WTO Government Procurement Agreement (GPA), the government procurement chapter of the U.S.-Korea Free Trade Agreement and the WTO's Technical Barrier Treaty Agreement (TBT). Given Korea's participation in IPEF, it is also noteworthy that CSAP is also in conflict with other widely-accepted digital trade rules that is expected to be discussed under IPEF, including on ensuring seamless cross-border data flows, prohibitions of data localization, safeguards against the forced use of local encryption modules and prohibitions on the forced disclosure of source codes.

Mexico

Healthcare procurement

Mexico's healthcare procurement system is undergoing significant reform (resulting in shifting and competing authorities for conducting procurement), and the lack of industry consultation and transparency has created not only significant trade barriers for U.S. companies but also drug lag (delay in approval of innovative products) as well as drug shortages in Mexico. Publication of procurement information is inadequate, and notices of intended procurement are not released with enough lead time for U.S. companies to participate competitively. Furthermore, the tendering process includes onerous requirements that constitute TBT, e.g., requiring letters or documents that are difficult to obtain from other institutions. The lack of transparency and not adhering to administrative protocols tends to favor local companies or companies that are favored by the NHC. Mexico's Comission Federal d'Electricidad (CFE), the government agency responsible for building and operating many of Mexico's government-owned communications networks, is a covered entity under Mexico's Government Procurement Chapter obligations. However, CFE is abrogating its USMCA commitments by not giving adequate notice of public tenders, not providing enough time for suppliers to respond, and not using technology-neutral specifications. We urge USTR to re-engage Mexico on its government procurement practices so that U.S. exporters of secure Internet technologies can compete on a level playing field in the Mexican government procurement market.

Intellectual Property Protection

Mexico

Patent Enforcement

As part of its USMCA commitments, Mexico enacted the Federal Law for Protection of Industrial Property, which entered into force on November 5, 2020, but implementing regulations have not been issued and U.S. companies are unable to assess whether the new law will address some deficiencies in Mexico's patent enforcement system.

Mexico has taken some positive steps to improve patent enforcement, including adopting the Linkage Decree of 2003, although the decree has not been implemented in a comprehensive and consistent manner. The publication in the Gazette of Patents Protecting Medicines (Gazette) is a positive step toward the goal of eliminating unnecessary, costly and time-consuming court actions to obtain appropriate legal protection for biopharmaceutical patents. However, many times formulation and use patents still require lengthy and costly litigation to achieve protection or even inclusion in the Gazette. COFEPRIS appears to apply linkage inconsistently and possibly in a discriminatory manner. In several cases, marketing authorizations have been issued to generics despite valid patents being listed in the Gazette. The lack of implementing regulations for the Federal Law for Protection of Industrial Property has left companies without key details regarding the scope of the patent enforcement regime, including which patents would be subject to the system. This undermines company confidence in the IP system in Mexico and impedes companies' ability to do business in Mexico.

The Philippines

Procurement Practices

The government procurement system in the Philippines generally favors Philippine nationals or Filipino-controlled enterprises for procurement contracts. Republic Act No. 9184 or the Government Procurement Reform Act[4], in consonance with Republic Act No. 5183[5] adopts as a general principle the preference for Philippine nationals and corporations in the award of government projects. Also, under Commonwealth Act No. 138 (*An Act to Give Native Products and Domestic Entities the Preference in the Purchase of Articles for the Government*)[6] and reiterated in Section 43.1. of the implementing rules of Republic Act No. 9184[7] the government procuring entity can award a contract to the lowest domestic bidder even if there is a lower foreign bid, provided its bid is not more than fifteen percent (15%) in excess of the lowest foreign bid.

CONCLUSION

NFTC believes that these recommendations will contribute to the preparation of the 2024 NTE and USTR's 2024 trade agenda. We look forward to continuing to work with you on the important work of enforcing U.S trade agreements and improving access for U.S. goods and services in foreign markets. Thank you for the opportunity to present our comments. If you have any questions regarding our comments, please contact Tiffany Smith, Vice President of Global Trade Policy at tsmith@nftc.org or Margaret Cekuta at mcekuta@nftc.org.

4 https://www.gppb.gov.ph/assets/pdfs/Updated 2016 IRR_31 March 2021.pdf.

5 https://www.gppb.gov.ph/laws/laws/RA_5183.pdf.

6 https://www.gppb.gov.ph/laws/laws/CA_138.pdf.

7 https://www.gppb.gov.ph/assets/pdfs/Updated 2016 IRR_31 March 2021.pdf.