



Indonesia Practice Review
Re: Indonesia's Satisfaction of GSP Eligibility Criteria
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Docket No. USTR-2019-0021

Erland Herfindahl
Deputy Assistant US Trade Representative for the Generalized System of Preferences
Office of Trade Policy and Economic Affairs
Office of the United States Trade Representative
Executive Office of the President
600 17th Street, NW
Washington, DC 20508

Dear Mr Herfindahl,

BSA | The Software Alliance¹ provides the following information pursuant to your request (84 Fed. Reg. 63955, Nov. 19, 2019) for written submissions to the Office of the US Trade Representative (USTR) as to whether Indonesia is meeting the Generalized System of Preferences (GSP) eligibility criterion requiring a GSP beneficiary country to provide equitable and reasonable access to its markets and basic commodity resources.

Software has a profound impact on the American economy. According to a recent study from *Software.org: the BSA Foundation*, the US enterprise software industry has expanded nearly twice as fast as the overall US economy in the past three years. According to the same *Software.org* study, software contributed more than \$1.6 trillion to US value-added GDP in 2018 — a 19.1 percent increase in two years. The industry supports 14.4 million jobs in all sectors of the economy and throughout the United States, and it employs 3.1 million people directly. BSA members are among the top US patent

¹ BSA | The Software Alliance (www.bsa.org) is the leading advocate for the global software industry before governments and in the international marketplace. Its members are among the world's most innovative companies, creating software solutions that spark the economy and improve modern life. With headquarters in Washington, DC, and operations in more than 30 countries, BSA pioneers compliance programs that promote legal software use and advocates for public policies that foster technology innovation and drive growth in the digital economy.

BSA's members include: Adobe, Atlassian, Autodesk, Bentley Systems, Box, Cadence, CNC/Mastercam, IBM, Informatica, Intel, MathWorks, Microsoft, Okta, Oracle, PTC, Salesforce, ServiceNow, Siemens Industry Software Inc., Sitecore, Slack, Splunk, Trend Micro, Trimble Solutions Corporation, Twilio, and Workday.

recipients and the software industry invested more than \$82.7 billion in research and development (R&D) in the United States in 2016.²

BSA members rely heavily on open access to US trading partners' markets as software product and services exports have been critical drivers of US leadership in innovation and creativity, and job creation, in the digital economy. The ability of US companies to continue to lead global advances in innovative technology is under a rising threat from digital protectionism and isolationism and discrimination against foreign companies, products, and technologies. Innovative US companies, operating internationally, depend upon cross-border data transfers and global digital delivery models to support American jobs at home.

The commercial environment for the software and IT sector in Indonesia is very challenging.³ A variety of authorities have issued, or are in the process of developing, policies that will make, or threaten to make, it increasingly difficult to provide digital and other software-enabled products and services to the Indonesian market. In addition, the use of unlicensed software by enterprises in Indonesia is among the highest in the world at 83 percent, representing a commercial value of unlicensed software of approximately US\$1.1 billion — a situation that materially harms the legitimate software market in Indonesia and puts the enterprises using unlicensed software at risk for security vulnerabilities and malware.⁴

As provided by the GSP statute and related authorities, in determining whether to designate any country as a beneficiary developing country, USTR (on behalf of the President) shall take into account, *inter alia*:

the extent to which such country has assured the United States that it will provide equitable and reasonable access to the markets and basic commodity resources of such country and the extent to which such country has assured the United States that it will refrain from engaging in unreasonable export practices.⁵

In this submission, we discuss whether Indonesia meets the statutory elements of the GSP statute in relation to equitable and reasonable market access. We discuss the following issues of particular concern:

- (1) Indonesia's imposition of customs requirements on electronic transmissions (Regulation 17);
- (2) Government Regulation 71 of 2019 on the Operation of Electronic Systems and Transactions (GR71);
- (3) Government Regulation 80 of 2019 on E-Commerce (GR80);
- (4) Over-the-Top Regulation; and
- (5) Local Content Regulation.

² Software.org, The Growing US Jobs and the GDP (Sep. 2019), available at: <https://software.org/wp-content/uploads/2019SoftwareJobs.pdf>

³ See generally, BSA Cloud Scorecard – 2018 Indonesia Country Report, at: https://cloudscorecard.bsa.org/2018/pdf/country_reports/2018_Country_Report_Indonesia.pdf

⁴ Data on the rates of unlicensed software use and commercial values are taken from the 2018 BSA Global Software Survey at https://gss.bsa.org/wp-content/uploads/2018/05/2018_BSA_GSS_Report_en.pdf. This study assesses the rates of unlicensed software use and the commercial value of unlicensed software installed on personal computers during 2017 in more than 100 markets. The study includes a detailed discussion of the methodology used.

⁵ 19 USC § 2462(c)(4).

1. Customs Requirements on Electronic Transmissions (Regulation 17)

In February 2018, the Ministry of Finance (MOF) issued Regulation 17, which amended Indonesia's Harmonized Tariff Schedule (HTS) to add Chapter 99 "[s]oftware and other digital products transmitted electronically."⁶ Although Chapter 99 is currently duty free, Chapter 99 effectively treats electronic transmissions as imports to which customs requirements apply, including requirements to comply with all customs laws that attach to imports, prepare and file import declarations, and pay 10 percent value-added tax (VAT) and 2.5 percent income tax. Indonesia continues to indicate that it is also prepared to begin imposing additional customs duties under chapter 99 at a future date.

Regulation 17 purports to cover a wide array of categories, classified in Indonesia's tariff schedule between subheadings 9901.10.00 to subheading 9901.90.00, including "multimedia (audio, video or audiovisual)"; operating system software; application software; "support or driver data, including design for machinery system"; and a broad catch-all category covering "other software and digital products."

Indonesia's customs requirements on electronic transmissions threaten a wide range of US digital exports — potentially including subscription or streaming services for music, film, and publications; cloud and other remote software services; app updates and software security patches; data used in manufacturing plants; and a broad catch-all category of "other digital products." These unprecedented customs requirements could have far-reaching impacts on US exports, especially if they are emulated by other countries. BSA members rely heavily on overseas markets for American software. Given that the US software sector supports 14.4 million jobs in all sectors of the US economy, the threat posed by Indonesia's Regulation 17 should not be underestimated, nor should Indonesia's efforts in the World Trade Organization, the World Customs Organization, and in other fora to undermine the global consensus in favor of duty free treatment of electronic transmissions.

The economic impacts on US exports and jobs are dwarfed by the negative impact to Indonesia itself from this self-defeating policy. Indonesia's customs requirements put at risk Indonesia's own international competitiveness, and its exports, jobs, and consumer welfare. By imposing such customs requirements, Indonesia increases its own industries' costs of accessing critical technologies and data, including productivity-enhancing software solutions; scientific, research, and other publications; and manufacturing data, blueprints, and other operational information. Indonesian industries need cross-border access to best-in-class software and data. Faced with higher software costs, its industries will become less competitive vis-à-vis their foreign competitors — threatening both domestic and export market sales. Furthermore, as these customs requirements would impose an unnecessary burden on local industries, they would also undermine those countries' attractiveness as a destination for investment and R&D. Estimated trade impacts are striking. According to a study recently published by the European Centre for International Political Economy (ECIPE), gross domestic product (GDP) losses would exceed the value of customs duties collected by 160 times for Indonesia when the risk of retaliatory or corresponding duties imposed by other countries is taken in to account.⁷

Finally, Indonesia's customs requirements on electronic transmissions also raise significant legal questions. For example, because Regulation 17 appears to tax services provided via the cloud or remote access, it raises questions regarding Indonesia's authority to impose tariffs on services. Similarly, because the incidence of Regulation 17 appears to fall exclusively on foreign (rather than Indonesian) services and service providers, it raises national treatment concerns. Additionally, Regulation 17 raises concerns regarding consistency with the WTO Agreement on Customs Valuation, as well as the reasonable basis for any "country of origin" determinations. The nature of electronic

⁶ Regulation No. 17/PMK.010/2018 (Regulation 17) (Indonesian) at: <https://jdih.kemenkeu.go.id/fullText/2018/17~PMK.010~2018Per.pdf>

⁷ Makiyama and Narayanan, The Economic Losses From Ending the WTO Moratorium on Electronic Transmissions (August 2019), available at: https://ecipe.org/wp-content/uploads/2019/08/ECI_19_PolicyBrief_3_2019_LY04.pdf

transmissions, which often consist of data packets transiting multiple servers in multiple jurisdictions, makes country of origin determinations difficult — if not impossible — in relation to electronic transmissions.

Regulation 17 is untimely and unnecessary, as discussions are underway among countries at the Organization for Economic Cooperation and Development (OECD) to reach a multilateral agreement to address the challenges to the international tax system posed by an increasingly digitized global economy. Any such internal taxes would need to be applied on a neutral and nondiscriminatory basis, consistent with WTO and other international obligations. Indonesia should not seek to impose customs duties, inconsistent with its existing international obligations, and at great risk for its own economic interests as well as the interests of US and other stakeholders, without first allowing for these broader international discussions in other fora to advance. Indonesia's actions not only undermine the OECD's work, but also the existing international consensus in favor of duty free treatment of electronic transmissions at the World Trade Organization and at the World Customs Organization, making it more difficult to sustain the existing international consensus on the importance of open digital markets and digital trade liberalization.

Indonesia is the only country in the world that has created customs classification subheadings in its Harmonized Tariff Schedule, imposed customs legal and reporting requirements, and threatened to impose customs duties on electronic transmissions such as software updates, manufacturing data, and the like. Its actions fall well outside the scope of any accepted international legal norms and are potentially much more disruptive than other digital revenue collection measures recently introduced or proposed by other countries. Its actions raise significant legal concerns under existing WTO obligations and do not provide "equitable and reasonable market access" to Indonesia's market for a wide array of digital products.

BSA urges USTR not to renew GSP status for Indonesia unless Indonesia repeals Regulation 17.

2. Cross-Border Data Flows and Data Localization Requirements (GR71)

The Government of Indonesia issued Government Regulation 82 of 2012 on the Operation of Electronic Systems and Transaction (GR82) in October 2012, and two implementing regulations under GR82 in subsequent years. These imposed data and IT infrastructure localization mandates.

In October 2019, the Government of Indonesia issued Government Regulation 71 of 2019 on the Operation of Electronic Systems and Transactions (GR71) to supersede and replace GR82. GR71 explicitly clarifies that public sector data must be managed, stored, and processed in Indonesia, but that there is no similar restriction on private sector data, which can be managed, stored, and processed anywhere, subject to requirements with respect to financial sector data that may be imposed by the financial sector regulator.

Indonesia's reflection of the broad principle in GR71 that "private electronic systems operators" may place their systems and data outside of Indonesia is a positive development. This principle is important because the procedures and protections applied to ensure privacy, security, and investigatory access are more important to achieve these three objectives than the location at which the data is stored. However, there are reports that the financial sector regulator has indicated its intention to continue with the previous localization policy.

BSA welcomes GR71's recognition of the principle that private systems operators should be permitted to make their own determinations on optimal data storage locations. BSA urges Indonesia to ensure continued adherence to this important principle. As such, BSA is concerned about open-ended language in GR71 that appears to imply that specific Indonesian ministries may in the future choose to derogate from this principle in (as yet) undefined circumstances. In short, addressing "how" data is stored will prove to be more effective at achieving specific regulatory objectives than unnecessarily limiting "where" data can be stored. Furthermore, given ambiguities in the data transfer restrictions applying to public sector data, the implications of these restrictions on private sector business

operations are still to be determined. Additionally, Regulation 71 provisions that appear to mandate source code disclosure for companies doing business with public sector entities also raise serious concerns.

BSA urges Indonesia to ensure, under GR71 and related measures, that its overall framework for information security and personal data protection will facilitate, rather than impede, the cross-border data transfers that are critical to growth and innovation in the global digital economy. We also encourage the financial sector in Indonesia to similarly adopt a more open and flexible approach to data management that does not require localization.

3. E-Commerce Regulation (GR80)

In June 2016, the Government of Indonesia published a draft regulation on Electronic System Based Trade Transactions. This draft regulation threatens to impose unreasonable requirements on e-commerce providers relating to physical presence and registration, security clearance, infrastructure localization, and product liability, among other concerns. It also contains provisions on personal data protection that need to be aligned with the Draft Privacy Law and Electronic Data Protection Regulation discussed above.

In November 2019, the Government of Indonesia issued GR80, a new e-commerce regulation. This regulation contains a number of concerning provisions relating to physical presence and registration. GR80 also imposes liability on foreign business actors and Internet intermediaries for content over which they lack direct knowledge or control. GR80 does helpfully clarify that this liability does not apply to intermediary service operators that (i) are mere conduits of information; (ii) only store data/information, either temporarily (caching) or for hosting purposes; and (iii) only act as search engine operators. It appears that cloud computing service providers, including enterprises offering SaaS, PaaS, and IaaS solutions, would fall within the scope of this exemption from liability. BSA urges the Government of Indonesia to provide more clarity with respect to the scope and obligations of GR80 to provide helpful guidance and avoid chilling investment and innovation in Indonesia.

Of particular concern are provisions in GR 80 that stipulate that personal data cannot be transferred offshore unless the receiving nation is deemed by the Ministry of Trade as having the same level of personal data standards and protection as Indonesia. Such a restriction on data transfers is overly restrictive as it does not appear to account for other internationally recognized transfer mechanisms including transfer pursuant to APEC Cross-Border Privacy Rules, standard contractual clauses, binding corporate rules, certifications, marks, or other approaches recognized in (for example) Article 46 of the GDPR. Further, GR 80 contains requirements for businesses to participate in government programs that prioritize trade in domestic goods and services. Such domestic preference policies raise significant concerns from a national treatment perspective.

BSA urges Indonesia to explore additional modifications to GR80, as indicated in BSA's comments.

4. Over-the-Top Regulation

In mid-2016, Kominfo published a draft regulation (which was later updated in mid-2017) on the Provision of Application and/or Content Services Through the Internet.⁸ This draft regulation threatens to impose unreasonable requirements on virtually all Internet-enabled services and service providers,

⁸ *Draft Regulation on the Provision of Application and/or Content Services Through the Internet (Draft OTT Regulations)* (2016) (Indonesian)

<https://web.kominfo.go.id/sites/default/files/users/4761/Draft%20Uji%20Publik%20Rancangan%20Permen%20Kominfo%20tentang%20Penyediaan%20Layanan%20Aplikasi.pdf>

including local physical presence and registration mandates, content filtering and censorship requirements, and mandatory use of local payment gateways, among others.

BSA urges Indonesia to ensure that any future iteration of its Over-the-Top Regulation addresses the concerns outlined above.

5. Local Content Regulation

In 2015, Kominfo published a regulation (number 27 of 2015) that introduced local content requirements on 4G products that would require such products imported into Indonesia to meet 20-40 percent local content (in terms of components, value-add, etc.). The Ministry of Industry published a corresponding regulation that stipulated how local content is to be computed and certified to the required percentage levels, including requirements for establishing local manufacturing facilities.

In 2019, Kominfo published a new regulation that extended this policy to cover all wavelength division multiplexing telecommunication tools and devices (number 9 of 2019) and all Internet protocol network telecommunication tools and devices (number 10 of 2019). With the updated 2019 regulation, the Ministry of Industry is now looking into developing new regulations that would stipulate how local content would be computed for the broader scope of products covered.

BSA urges Indonesia to remove its local content policies and provide a level playing field for all ICT players in the market.