October 13, 2022

Comments to the Secretariat of Economy on
Cross-Border Data Provisions in the Mexico-United Kingdom FTA Negotiations

The Global Data Alliance[1] (GDA) congratulates Mexico on the start of FTA negotiations with the United Kingdom this year. We respectfully submit the following comments urging both countries to provide for strong cross-border data commitments built on the Treaty between Mexico, the United States, and Canada (T-MEC).

I. Introduction

The GDA is a cross-industry coalition of companies that are committed to high standards of data responsibility and that rely on the ability to transfer data around the world to innovate and create jobs.[2] GDA member companies employ tens of thousands of workers across Mexico in digitally-intensive industries. GDA member companies are active in a broad array of sectors, including aerospace, agriculture, automotive, energy, electronics, film, music, finance, health, logistics, retail and consumer goods, technology, and telecommunications, among others.

GDA members welcome Mexico's proactive approach in working to ensure that Mexico's FTA negotiations address the cross-border digital interests of all Mexican industries and their workers, including in the agriculture,[3] automotive,[4] clean energy,[5] finance,[6] healthcare and medical technology,[7] logistics,[8] media (including film, music and publishing),[9] pharmaceutical,[10] software, semiconductor, and telecommunications sectors.[11] Digital networks lie at the heart of today's interconnected global economy: They support jobs across Mexico in every sector, and at every stage of the value chain in millions of transactions every day.

II. Discussion

The GDA welcomes Mexico's proactive stance on digital trade in FTA negotiations, including through provisions on cross border data policy matters.

A. Proposed Cross-Border Data Commitments

Consistent with T-MEC, we encourage Mexico to negotiate the below provisions with the United Kingdom:

- Cross-Border Transfer of Information by Electronic Means: Across all sectors, Parties shall not prohibit or restrict the cross-border transfer of information, including personal information, by electronic means if this activity is for the conduct of a business.[12]
- Location of Computing Facilities: Across all sectors, Parties shall not impose requirements to use or locate computing facilities in their own territory as a condition for conducting business.[13]
- Custom Duties: Parties shall not impose customs duties on electronic transmissions.

To address the cross-border impacts of any data regulations that involve incidental restrictions on data transfers, we also urge Mexico to clarify – consistent with T-MEC – that such data regulations:

- Be necessary to achieve a legitimate public policy objective;[14]

- Not be applied in a manner that would result in arbitrary or unjustifiable discrimination or a disguised restriction on trade;[15]
- Not impose restrictions on transfers that are greater than necessary;[16]
- Not improperly discriminate among different economic sectors;[17]
- Not discriminate against other IPEF-based service providers by modifying conditions of competition by treating cross-border data transfers less favorably than domestic ones;[18]
- Be designed to be interoperable with other IPEF members' legal frameworks to the greatest extent possible;[19] and
- Be developed in a transparent and accountable manner.

The bulleted list above reflects longstanding tenets of international law and practice, namely: (1) the freedom to pursue necessary public policy objectives; (2) the renunciation of discrimination against non-national persons, products, services, or technologies; (3) the commitment to minimize trade-restrictive effects; and (4) due consideration to principles of compatibility and interoperability with trading partner laws.[20]

B.   Other Topics that Implicate Cross-Border Data Transfers

While this submission focuses on the commitments regarding data transfers, localization, and customs duties above, several other provisions also implicate data transfers and digital trust. Among others,[21] these provisions relate to personal data protection and cybersecurity, as explained below.

- <u>Data Transfers & Personal Data Protection</u>: Cross-border transfer mechanisms are a critical feature of privacy laws in countries that require that data continue to be protected even after it is transferred across borders. Where appropriate, Mexico's FTA negotiations could promote cross-border transfer mechanisms (such as standard contracts, binding corporate rules, certification mechanisms, etc.), that help ensure that data is protected even as it is transferred across borders. Mexican FTAs could also promote cross-border interoperability among different countries' personal data protection rules through mechanisms such as the Global Cross-Border Privacy Rules Forum.

- <u>Data Transfers & Cybersecurity</u>: Data transfers help improve cybersecurity because they allow for cybersecurity tools to monitor traffic patterns, identify anomalies, and divert potential threats in ways that depend on global access to real-time data. Given the role of data transfers in promoting timely visibility and response to emergent cyberthreats, Mexican FTAs could helpfully promote risk-based approaches that rely on consensus-based standards and risk management best practices to identify and protect against cybersecurity risks and to detect, respond to, and recover from cybersecurity events.

For the reasons explained above, we strongly support Mexico's ongoing negotiations with the United Kingdom. We look forward to continuing to work with Mexico in connection with these negotiations.

Sincerely yours,

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[1] For more information on the Global Data Alliance, please see: https://www.globaldataalliance.org/

[2] While Alliance member companies have a range of interests in Mexico's FTA negotiations, this submission focuses exclusively on the cross-border data aspects of the Mexico-UK FTA negotiations.

[3] Global Data Alliance, *GDA Website – Agriculture* (2022), at: https://globaldataalliance.org/sectors/agriculture/

[4] Global Data Alliance, *GDA Website – Automotive* (2022), at: https://globaldataalliance.org/sectors/automotive/

[5] Global Data Alliance, *GDA Website – Energy* (2022), at: https://globaldataalliance.org/sectors/energy/

[6] Global Data Alliance, *GDA Website – Finance* (2022), https://globaldataalliance.org/sectors/finance/

[7] Global Data Alliance, *GDA Website – Healthcare* (2022), https://globaldataalliance.org/sectors/healthcare/

[8] Global Data Alliance, *GDA Website – Supply Chain Logistics* (2022), https://globaldataalliance.org/sectors/supply-chain-logistics/

[9] Global Data Alliance, GDA Website – Media and Publishing (2022), https://globaldataalliance.org/sectors/media-publishing/

[10] Global Data Alliance, *GDA Website – Biopharmaceutical R&D* (2022), https://globaldataalliance.org/sectors/biopharmaceutical-rd/

[11] Global Data Alliance, *GDA Website – Telecommunications* (2022), https://globaldataalliance.org/sectors/telecommunications/

[12] *See e.g.,* T-MEC Art. 19.11.

[13] *See e.g.,* T-MEC Art. 19.12.

[14] *See e.g.,* T-MEC Art. 19.11.2.

[15] *See e.g.,* T-MEC Art. 19.11.2(a).

[16] *See e.g.,* T-MEC Art. 19.11.2(b).

[17] *See e.g.,* T-MEC Chapter 17.

[18] *See e.g.,* T-MEC Art. 19.11, footnote 5.

[19] *See e.g.,* T-MEC Art. 19.8.4, 19.8.6.

[20] In the WTO context, these tenets – which trace back to the 1947 General Agreement on Tariffs and Trade – now apply to all multilateral trade rules, including those relating to goods, services, investment, technical regulations, and customs procedures. We support the efforts of Mexican digital trade negotiators to explicitly clarify that these same core tenets apply to trade rules relating to the cross-border movement of data.

[21] Other topics that implicate data transfers and digital trust include:

- <u>Data Transfers & Mandates to Force Technology Transfer or Source Code Disclosure</u>: Data transfers enabled by software are critical to economic development. Unfortunately, some countries mandate involuntary access, transfer, or disclosure of proprietary source code as a condition of market access or for other improper purposes. While a regulatory body should be free to require an entity to make available source code for a specific investigation, enforcement action, or judicial proceeding, governments should not force technology transfer or source code disclosure for industrial policy, industrial espionage, cyber-exfiltration, or other improper purposes. Such measures not only increase the risk of malicious cyberactivity, but also discourage companies from providing cross-border access to their technologies or engaging in beneficial data transfers. By prohibiting such mandates, Mexico can continue to encourage cross-border access to technology.

- <u>Data Transfers & Data Analytics</u>: Recognizing that data transfers and the consolidation of data sets across borders are critical to data analytics and AI tools, Mexican trade negotiations could helpfully promote AI risk management best practices, which are more compatible with the responsible application of these tools to data sets consolidated across borders than top-down restrictions that fail to acknowledge the rapidly evolving nature of digital technology. Data transfers are integral to every stage of the AI life cycle, from the development of predictive models to the deployment and use of AI systems. The data used in AI systems often originates from many geographically dispersed sources, making it imperative that data can move freely and securely across borders. To secure for themselves the insights and other benefits that AI systems can provide, Mexico and its trading partners should agree to the responsible and secure cross-border movement of data for analytics and AI purposes.

- <u>Data Transfers & Technical Barriers to Digital Trade</u>: International standards development organizations (SDOs) convene companies from across the region to voluntarily contribute their innovations to the development of new international technology standards. Cross-border data transfers and technology access lie at the heart of this beneficial process. Unfortunately, technical regulations and mandatory national standards are sometimes misused (often in conjunction with data restrictions) to discriminate against non-

national persons and technologies. By supporting the development and adoption of voluntary, internationally recognized standards, Mexican trade negotiators can help avoid the creation of new cross-border digital barriers.