



NAFTA NEGOTIATIONS

June 12, 2017

Docket No. USTR-2017-0006

Edward Gresser
Chief of the Trade Policy Staff Committee
Office of the United States Trade Representative
600 17th Street, NW
Washington, DC 20508

Dear Mr. Gresser:

BSA | The Software Alliance¹ provides the following information pursuant to the request of the Trade Policy Staff Committee for written submissions on modernization of the North American Free Trade Agreement (NAFTA). Our submission relates specifically to several topics on which the Committee invited comment: (h) relevant digital trade issues; (i) relevant trade-related intellectual property rights issues that should be addressed in the negotiations; (l) government procurement issues; and (q) state-owned enterprise issues.

United States Trade Representative Robert Lighthizer, in notifying Congress of the Administration's intent to initiate negotiations, said that important changes in the economy and business have occurred since NAFTA was concluded in 1992. He specifically recognized the emergence of digital trade as one of those changes.

Indeed, in the twenty-five years since NAFTA was concluded, the American software industry has transformed. It has evolved from floppy disks and desktop computing to cloud computing, smart devices, and data analytics. These changes continue at a rapid rate: artificial intelligence, autonomous vehicles, and "smart" contracts are each reshaping how software is used and U.S. businesses are creating jobs.

Trade in software developed from these technologies has expanded rapidly, and has become a significant contributor to U.S. bilateral services trade surpluses with Canada and Mexico. Domestically, the software industry alone supports nearly ten million American jobs, and adds more than a trillion dollars a year to the U.S. economy.

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 60 countries, BSA conducts 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, ANSYS, Apple, Autodesk, Bentley Systems, CA Technologies, CNC/Mastercam, DataStax, Docusign, IBM, Microsoft, Oracle, salesforce.com, SAS Institute, Siemens PLM Software, Splunk, Symantec, Trimble Solutions Corporation, The MathWorks, Trend Micro and Workday.

Congress, in recognition of the importance of digital trade, incorporated the subject into the principal negotiating objectives for U.S. trade agreements identified in the 2015 Trade Priorities and Accountability Act. Section 102(b)(6)(C) provides that agreements should “ensure that governments refrain from implementing trade-related measures that impede digital trade in goods and services, restrict cross-border data flows, or require local storage or processing of data.” Section 102(b)(6)(D) adds that it shall also be a negotiating objective “where legitimate policy objectives require domestic regulations that affect digital trade in goods and services or cross-border data flows, to obtain commitments that any such regulations are the least restrictive on trade, nondiscriminatory and transparent, and promote an open market environment.”

Every U.S. trade agreement concluded since the 2001 Free Trade Agreement with Chile contains a chapter on e-commerce. In most respects, these e-Commerce chapters have focused on a limited number of issues, even though much has changed on digital trade since 2001.

Given TPA guidance and marketplace developments, USTR accordingly has pursued updated digital trade provisions in several recent trade negotiations, including the Trans-Pacific Partnership (TPP), the Transatlantic Trade and Investment Partnership (TTIP), and the Trade in Services Agreement (TISA). These efforts provide a foundation for modernizing NAFTA to address digital trade.

BSA’s comments build on the Congressionally-established negotiating objectives and recent U.S. trade negotiations. They fall into four broad categories: provisions necessary to secure the new data economy; update intellectual property protection; advance the use of technology in government; and promoting trust and security. The driving principle behind all of them is that there should be no market access barriers and no discrimination against software.

Modernizing NAFTA in these ways would also serve as an important precedent for the United States to draw upon in future trade agreements with other countries. By incorporating these improvements into NAFTA and other U.S. trade agreements, the software industry can continue creating US jobs and improving the competitiveness of U.S. industries.

Data Economy

Privacy and security are bedrock principles for software services providers. BSA members are committed to protecting customers’ privacy and security. These companies regularly update their software products and services as well as their policies to ensure that customers are safe in using their services and other offerings and that they comply with the laws of each market where they operate.

Ensuring that users are safe and their privacy respected are goals governments pursue as well, including through laws and regulations. Unfortunately, governments sometimes invoke these policy goals to rationalize market barriers that are intended to impede US companies. NAFTA should be modernized to better address such barriers and ensure strong protections for digital trade.

Consequently, there are several crucial commitments that NAFTA should incorporate to allow the data economy to thrive across North America:

Free Movement of Data Across Borders: In view of the importance of cross-border data flows to the modern economy, governments should not use privacy or security policies as disguised market barriers.

NAFTA should obligate governments to refrain from imposing barriers to cross-border transfer of data, with sectoral carve outs. Recognizing that a government may determine it is necessary to adopt or maintain measures for legitimate domestic public policy purposes, including privacy or security, that are not consistent with this obligation, such measures must not discriminate against foreign service providers or constitute a disguised restriction on trade, and must be narrowly tailored to achieve the specific objective. A dispute settlement mechanism also must be available to allow close scrutiny and enforcement of measures that derogate from this obligation.

No Localization Requirements: NAFTA should preclude governments from using data localization requirements as a market access barrier in any sector of the economy. For example, a government should not require that a data center be built inside its borders as a condition for doing business in its territory.

NAFTA should prohibit a government from requiring, as a condition of doing business, that a service provider use or locate computing facilities in its territory. Recognizing that a government may determine it is necessary to adopt or maintain measures for legitimate domestic public policy purposes, including privacy or security, that are not consistent with this obligation, such measures must not discriminate against foreign service providers or constitute a disguised restriction on trade, and must be narrowly tailored to achieve the specific objective. A dispute settlement mechanism also must be available to allow close scrutiny and enforcement of measures that derogate from this obligation.

Financial Services: Rules specific to any specific sector, such as financial services, which are typically addressed in separate chapters of free trade agreements, must be substantially the same as the rules of general applicability on cross border data flows and localization, and must not contain any special rules that could be interpreted to deviate from the general ones.

New Services: NAFTA should ensure that robust market access commitments cover both existing services and new services that may emerge in the future. Innovative new digital services should be protected against future discrimination, and trade agreements should not become obsolete as markets evolve and technology advances. The United States must not accept broad carve-outs for future “new” services.

On-line services: To promote growth of internet-based services, NAFTA governments should ensure that internet intermediaries are protected against liability for unlawful content posted or shared by third parties, consistent with US law.

Electronic Authentication and Smart Contracts: To facilitate trade, NAFTA should require that the laws of each government allow electronic authentications and signatures to be utilized in commercial transactions. In addition, NAFTA should require governments to recognize the use of “smart” contracts and other autonomous machine-to-machine means for conducting transactions, such as blockchain, which are growing in economic significance in North America and generally.

Intellectual Property

Copyright Rules: Consistent with US law and US free trade agreements negotiated since NAFTA, NAFTA should ensure that governments have copyright laws that provide meaningful protections for rights holders as well as safeguards to foster the Internet's continued growth as a platform for free expression, innovation and digital commerce. The intellectual property chapter should provide online service providers with safe harbors from liability for infringing, or otherwise unlawful, content posted by third parties. Such safe harbors require internet service providers (ISPs) to remove infringing content upon notification by a rights holder, but should not be conditioned on any obligation by an ISP to monitor or filter infringing activity, as such obligations would weaken incentives for innovation and threaten the dynamism and values that have made the Internet so valuable.

In addition, NAFTA should preserve the ability for U.S. companies to develop world-class software-enabled data analytics solutions that are powering innovations in artificial intelligence. To that end, NAFTA should ensure that copyright laws are sufficiently flexible to permit commercial text and data mining of all lawfully accessible content.

Trade Secrets: NAFTA should require governments to adopt civil and criminal causes of action and penalties for theft of trade secrets.

Government Use of Legal Software: NAFTA should require governments to adopt laws and other measures obliging central government agencies to use only non-infringing software, and to use such software only as authorized by the relevant license for both the acquisition and management of the software for government use.

Technology in Government

Technology Promotion in Government: NAFTA should promote the use of innovative technology in government operations involving the provision of services to citizens.

Procurement: Procurement rules should be changed to reflect the 21st century needs of governments.

Choice: NAFTA should ensure that companies and government agencies are free to use the technology of their choice, and not be required to purchase and use local technology.

Trust and Security

Encryption: NAFTA should prohibit governments from undermining the use of encryption in commercial products by imposing restrictions on security technologies used to protect data in-transit or at-rest. Such a provision should preclude governments from mandating how encryption and other security technologies are designed or implemented, including imposing requirements to build in vulnerabilities or 'back doors' or otherwise requiring the disclosure of encryption keys.

International Standards: NAFTA should follow the rules agreed under the WTO Technical Barriers to Trade provisions, as updated and revised in further agreements. This is a key area for technology companies which have participated in the voluntary standards-setting processes that underpin the U.S. system.

Cybersecurity: NAFTA should seek to strengthen the foundations of digital trade and innovation by advancing mutually beneficial approaches to cybersecurity. First, the agreement should build upon previous negotiating experience, such as the principles proposed by the United Nations Group of Government Experts and endorsed by the G-7.

Second, NAFTA should encourage the mutual adoption of a voluntary, standards-based, outcome-focused cyber risk management framework to drive the adoption of stronger cybersecurity measures by both government and industry stakeholders. Such an approach should focus on the National Institute for Standards and Technology's Cybersecurity Framework for Critical Infrastructure, which has been strongly supported by U.S. industry and is currently in wide use across around the world. The Administration's continued commitment to the NIST Framework's approach to cybersecurity is reflected in the recent executive order on Strengthening the Cybersecurity of Federal Networks and Critical Infrastructure.

State-owned enterprises: NAFTA should include rules precluding governments from favoring their state-owned enterprises over foreign service providers through discriminatory regulation or subsidies. NAFTA should build upon previous negotiating experience, and make these provisions enforceable through dispute settlement procedures.

No Forced Technology Transfer: NAFTA should prohibit governments from conditioning market access on the forced transfer of technology to persons in their territories. Likewise, it should preclude disclosure of trade secrets or source code as a condition of market access. These prohibitions should not, however, operate to impede legitimate security testing and research. Such provisions should be based on previous negotiating experience, and should clarify the legitimacy of security testing and research.

No Customs Duties on Electronic Transmissions: NAFTA should prohibit governments from imposing customs duties on either the telecommunications value of electronic transmissions or the value of the information being transmitted. Such a provision should be based on previous negotiating experience.

Conclusion

BSA welcomes the opportunity to provide this submission to inform the Administration's development of specific negotiating objectives for a modernized NAFTA. We look forward to working with USTR and the other agencies represented on the Trade Policy Staff Committee to make digital trade a central element of the proposed modernization. Removing market access barriers for software, and incorporating the other regulatory protections described above, will enable this growing and dynamic sector of the US economy to expand its reach across Canada and Mexico, contribute to favorable US service trade surpluses with these countries, and continue to generate new jobs in the United States.