

BSA's Digital Trade Agenda

Fostering growth in the digital economy requires investing in fundamentals such as education, skills training and broadband infrastructure at the national level. It also requires governments to commit themselves to a trade-modernization effort that recognizes the transformative impact of information technologies and services such as mobile and cloud computing, big data and analytics.

Negotiations underway for the Transatlantic Trade and Investment Partnership and the Trade in Services Agreement together represent a critical opportunity to advance such a modernization effort. It is in that context that BSA offers the following recommendations — a program for liberalizing trade that will bolster the global IT sector, give enterprises large and small the tools to innovate and grow, and improve consumer access to products and services that enhance quality of life.

1 MODERNIZING TRADE RULES TO ENABLE DIGITAL COMMERCE

Trade agreements should ensure data can flow across borders with few restrictions.

The ability to transfer data across borders is critical for companies that provide or use digital products and services like cloud computing or data

analytics. Yet current global trade rules provide few protections to limit countries from imposing restrictions on cross-border data flows. So it is vital that trade rules include clear and enforceable obligations to: (1) allow trading partners to transfer, access, process or store data across borders, and (2) prohibit countries from requiring the use of local servers or other IT infrastructure as a precondition for accessing their markets.

Governments have legitimate policy objectives that affect data flows, including privacy, public safety and consumer protection, and there may be times when they determine it is necessary to implement measures that affect data flows. In those circumstances, governments should select the least trade-restrictive measures available. To that end, it is imperative that trade agreements include specific criteria for challenging a policy that unjustifiably discriminates against trading partners, is unnecessarily restrictive, or acts as a disguised barrier to trade.

Finally, the flow of digital commerce should remain free of duties. Since 1998, WTO members have had short-term moratoriums on imposing customs duties on electronic transmissions. These moratoriums have been extended periodically through WTO ministerial declarations. To avoid the uncertainty that comes with short-term extensions and ensure duties do not become a barrier to digital trade, WTO members should make the moratorium permanent.

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Trade agreements should cover current and future innovative services.

The speed with which new technology service offerings are being developed and deployed is accelerating. Trade rules must be flexible and forward-looking to keep pace with these innovations. It is critical that services commitments in trade agreements be broad enough to cover both current and future technological advances. To achieve that goal, services commitments in trade agreements should be negotiated on a “negative list” basis that includes coverage of a particular service unless it has been specifically excluded by a party. This would allow trade agreements to keep pace with new technology service offerings without the need for frequent renegotiation.

Trade agreements utilizing a “positive list” for services should make clear that all new and future IT services fall within the broad GATS category of “Computer and Related Services” (which already includes, among other things, consulting services, software-related services, data-processing services, database services, Web and application-hosting services, and IT security services). Some work was done toward this end in 2007 when the United States, European Union, Japan and several other parties signed the Understanding on

Computer and Related Services, which called for an expansive approach to what was covered under this category. IT services also are encompassed in other parts of trade agreements, such as sections dealing with telecommunications and financial services. It is important that trade commitments to open markets in these areas are broad enough to cover IT services.

Further, trade agreements should include provisions ensuring non-discriminatory treatment for digital products and services. The method of delivery for a service should not affect whether it is afforded market access. For example, downloads of software and software updates have been common for some time and cloud computing is bringing software functionality to users over the Internet, while the actual copies of the software and data are stored on remote servers. From a trade standpoint, it should not matter whether consumers access software by purchasing a physical copy, downloading a copy over the Internet, or accessing a copy of software stored on a remote server.

2 PROMOTING TECHNOLOGY INNOVATION

Trade agreements should provide robust intellectual property protections.

Intellectual property theft undermines global trade in innovative products and services. Yet high rates of software license infringement remain all too common in many markets and theft of trade secrets is a growing problem.

Accordingly, trade agreements need to adopt best practices in intellectual property protection and enforcement. This includes providing strong civil and criminal enforcement mechanisms for both physical and online copyright infringement and effective measures for patent protection. Trade agreements also should include mechanisms to ensure governments lead by example and avoid using infringing products and services. For example, US trade agreements have long

included commitments requiring parties to ensure government entities use only legal software. New agreements should include similar provisions that build on these existing commitments. Finally, trade agreements should provide adequate civil and criminal remedies for trade secret theft that occurs through both traditional and digital means.

Trade agreements should promote market-led, globally adopted technology standards and minimally burdensome technical regulations.

Internationally recognized and adopted standards that are established through a voluntary, market-led process with industry participation and accepted across markets generate efficiencies and speed the development and distribution of new products and services, allowing consumers to get them faster and at lower cost. Government-mandated, country-specific standards, by contrast, tend to “freeze” innovation and force consumers and businesses into using products that might not best suit their needs. Trade agreements should include clear disciplines that require transparency and meaningful participation of industry in the standards-development process. They also should prevent trading partners from manipulating standards to block foreign competition or protect domestic industry sectors.

Technical regulations, especially specific technology mandates, can significantly impede innovation and create unnecessary barriers to trade, investment and economic efficiency. They also can promote the influence of vested interests seeking protection from competition, because they can affect both products and services themselves, and the way they are developed and manufactured. Moreover, technical regulations that are outdated or poorly designed can be inefficient to implement. Trade agreements should ensure that technical regulations for IT products and services are technology-neutral, reflect the lightest touch possible, and place the burden on governments to explain why other, less restrictive approaches could not be used.

3 CREATING LEVEL PLAYING FIELDS

Trade agreements should open up government procurement.

Governments around the world are among the largest purchasers of IT products and services. When they exclude foreign suppliers, it not only harms sales for those suppliers, but in many instances it denies government purchasers the ability to choose the best available products and services for their needs. So trade agreements should build on the WTO’s Government Procurement Agreement, which imposes important obligations on parties to open up their procurement markets.

Technology companies are especially concerned when government procurement policies restrict purchase options based on the underlying technology of products and services or whether they contain core intellectual property that is locally owned or developed. To combat this, trade agreements should expand on existing procurement trade rules and clearly prohibit measures that: (1) condition access to government procurement on the use of particular technologies or licensing models (for example, mandates for royalty-free use of open-source software over proprietary software), or (2) condition access to government procurement on a product or service having intellectual property that has been locally developed or registered.

In addition, as digital products and services become an increasingly important part of global trade, it is critical that procurement rules keep pace and clearly cover them. And finally, as noted above, governments have an opportunity to lead by example by implementing and enforcing policies to ensure they use only legal software and other non-infringing IT products and services in their operations.



Trade rules must be flexible and forward-looking to keep pace with innovation.

Trade agreements should keep state-owned enterprises on a level playing field.

In many countries, state-owned enterprises (SOEs) play an outsized role in the IT market, both as providers and consumers of IT products and services. It poses a significant challenge for foreign competitors when SOEs benefit from favorable treatment from the government, such as preferential financing, fewer regulatory burdens or preferred status as vendors to the government. In addition, there are instances where countries extend government procurement mandates and requirements to SOEs, limiting their purchasing decisions. Both scenarios can severely harm market opportunities for foreign software and other IT suppliers.

To address this, trade agreements should establish rules that put SOEs operating in the commercial sphere on the same level as private sector competitors. This includes ensuring SOEs operate in a transparent manner and conduct their activities consistent with the country's trade commitments for commercial entities.