



Testimony of
BSA | The Software Alliance
Before the
Trade Policy Staff Committee (TPSC)
on
Negotiations for an International Services Agreement
March 12, 2013

BSA | The Software Alliance (BSA)¹ appreciates this opportunity to provide our comments on priorities for the recently announced negotiations for an International Services Agreement (ISA).

At the outset, BSA would like to convey our strong support for the negotiation of a robust, comprehensive, high-standard ISA. BSA members are increasingly providing services offerings and increasingly looking to overseas markets as key opportunities for growth. Notably, overseas markets now represent more than half of our members' overall business. Yet many challenges exist to the growth of these services in foreign markets. Key markets in all regions of the world are erecting, or considering erecting, barriers to BSA member service offerings. The international trade regime must keep pace with the growth of services trade and establish clear and comprehensive trade rules to ensure this growth. The ISA offers an important opportunity to do that.

This statement highlights initial views of BSA and its member companies on the ISA negotiations. We look forward to working closely with US trade negotiators to develop specific proposals that can bolster global trade in services for the software industry and promote economic and job growth here at home.

¹ BSA | The Software Alliance (www.bsa.org) is the leading global advocate for the software industry. It is an association of world-class companies that invest billions of dollars annually to create software solutions that spark the economy and improve modern life. Through international government relations, intellectual property enforcement and educational activities, BSA expands the horizons of the digital world and builds trust and confidence in the new technologies driving it forward.

BSA's members include: Adobe, Apple, Autodesk, Bentley Systems, CA Technologies, CNC/Mastercam, Dell, IBM, Intel, Intuit, McAfee, Microsoft, Minitab, Oracle, Progress Software, PTC, Rosetta Stone, Siemens PLM, Symantec, TechSmith, and The MathWorks.

The ISA Should Seek Comprehensive Coverage for both Current and Later-Developed Technological Advances

BSA member companies develop cutting-edge products and services to assist businesses and consumers become more productive and efficient and enjoy a higher quality of life. The speed with which new technology offerings – especially services – are being developed and deployed is accelerating. Trade rules must be flexible and forward looking to keep pace with these innovations. They must be aimed at breaking down existing market barriers, anticipating new barriers, and creating disciplines to address barriers before they become widely used and entrenched.

Accordingly, we urge USTR to seek comprehensive market access and national treatment commitments with respect to all services covered by the ISA. The services covered by the agreement should be understood to encompass services offered today and those yet to be developed. This would give the agreement the flexibility to adapt to new services offerings without the need for renegotiation. The original Information Technology Agreement (ITA) negotiations included some mechanisms to address this issue and negotiators should be encouraged to look at possible ways to ensure that this idea is enshrined in the ISA.

Additionally, care will need to be taken to ensure that market openings are reciprocated. For example, market access offers submitted on behalf of the United States must be reciprocated by other partners, with an appropriate balancing mechanism before the end of the negotiations.

The ISA Should Build Upon and Enhance Existing Services Commitments

A truly ambitious ISA should seek to do three things: (i) affirm existing market access and national treatment commitments under the General Agreement on Trade in Services (GATS), ensure that they apply to ISA parties comprehensively and, where necessary, expand on those commitments to cover services that have evolved since GATS came into effect; (ii) incorporate and improve upon the services commitments the United States has negotiated in Free Trade Agreements (FTAs); and (iii) address new challenges to services trade, such as policies that restrict cross-border data flows.

A broad range of information technology services are covered by existing GATS commitments for Computer and Related Services. A non-exhaustive list of information technology services covered by the Computer and Related Services category include consulting services, software-related services, data processing services, database services, web and application hosting services, and information technology security services, among others. ISA parties should affirm that all new and future information technology services fall within the broad category of Computer and Related Services. It will be important to ensure that the ISA strengthens and does not erode these commitments. Moreover, these services are not highly regulated and should continue to be treated accordingly.

Additionally, ISA parties should affirm that they will not discriminate as between electronic and physical delivery of these services. The method of delivery of a service should not affect the nature of the market access commitment for that particular service.

For example, software and software functionality are increasingly reaching consumers, not on physical disks, but over the Internet. Downloads of software and software updates have been common for some time and, as discussed below, 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 functionality by purchasing a physical copy, downloading a copy over the Internet, or accessing a copy of software stored on a remote server. The current duty-free, national treatment and MFN rules that apply today to software that is delivered on physical media (for example, under the Information Technology Agreement) should apply as well to online delivery of software and software functionality.

Finally, the ISA should ensure that commitments are technology-neutral. Markets should be open to services without limiting services consumers from choosing the best technology option to meet their needs on cost and functionality.

The ISA Should Foster the Growth of Global Cloud Computing Services by Limiting Barriers to Cross-Border Data Flows and Avoiding Forced Localization of Data Servers

BSA members are rapidly improving services delivered through cloud computing. This includes, among others, a full range of software programs and functionality and data storage, processing, and management.

Cloud computing offers enormous benefits for enterprises of all sizes, for governments and for consumers. It levels the playing field for access to technology by allowing individuals and small- and medium-sized businesses to enjoy computing power that has long been available only to major users. It opens the door to tremendous gains in efficiency, productivity and competitiveness for governments and businesses in the global marketplace.

Cloud computing can contribute significantly to the US economy and global growth. One recent study found that public and private IT cloud services will produce nearly 14 million jobs worldwide by 2015 – and more than half of those will come from small and medium-sized businesses.² It goes on to predict that in that time cloud computing will generate as much as \$1.1 trillion in annual revenue.

To maximize the benefits of cloud computing, cloud providers need to be able to operate effectively across borders. This means being able to locate cloud servers where it makes the most sense logistically and economically and offering cloud services from these locations to which ever markets have sufficient demand. To do this, cloud providers must have the freedom to transfer data across borders and to store and process data in multiple jurisdictions. Trade rules need to facilitate the cross-border data flows that are the lifeblood of the cloud and prevent the development of a cloud that is “chopped up” and remade specific to each country where the services are provided.

Unfortunately, we are now seeing many countries implementing (or considering) policies that threaten to impede the ability to offer cloud computing services across borders, including: (i) restrictions on cross-border data flows and (ii) “forced localization” policies that require data servers to be located in-country in order to serve the local market.

² IDC, *White Paper: Cloud Computing's Role in Job Creation* (March 2012).

BSA details these types of policies and provides case studies on them in a recent report on IT trade barriers.³

Accordingly, the ISA should include specific trade disciplines to promote and facilitate cross-border data flows. This would include enforceable obligations to: (i) ensure the free flow of data across borders, and (ii) prohibit requiring the use of local computing infrastructure, such as servers, as a condition for providing, or investing in the provision of, cloud services in the country.

These obligations should be subject only to established WTO criteria for exceptions, such as national security and public safety. Where exceptions are deemed necessary, they should include specific criteria that provide a clear foundation for challenging a practice because it is unnecessarily restrictive or constitutes a disguised restriction on trade. Moreover, the party invoking the exception should have the burden of establishing that the regulation is necessary to achieve the specified policy goal, that it is implemented in the least trade-restrictive way possible and that the measure does not constitute a disguised restriction on trade.

The ISA Should Establish Disciplines on State-Owned Enterprises

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

While commercial activity by SOEs is already covered by existing GATS commitments and therefore also should be covered by the ISA, the ISA should include explicit commitments on SOEs. The ISA should establish disciplines on SOEs to ensure that when they are engaged in commercial activity, they are required to operate under the same obligations that the private sector does. It is important that they conduct their services activities as market actors and in a manner consistent with each country's market access and non-discrimination commitments.

The ISA Should Explore Ways to Foster Transparent, Non-Discriminatory and Technology-Neutral Government Procurement

Governments are among the biggest (and sometimes the biggest) consumer of IT goods and services. Yet in many countries, governments have imposed significant restrictions on foreign supplier participation in their procurement markets for services.

When governments 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 services to meet their needs. There is broad international consensus that governments benefit by keeping their procurement markets as open as possible. For example, under the

³ BSA, *Lockout: How a New Wave of Trade Protectionism Is Spreading through the World's Fastest-Growing IT Markets – and What to Do about It* (June 2012), available at www.bsa.org/tradelockout.

umbrella of APEC negotiations, leaders of Asia-Pacific economies agreed to “[p]romote government procurement policies that are transparent, nondiscriminatory, openly pro-competitive, and performance-based, consistent with the APEC Non-Binding Principles on Government Procurement.”⁴

The GATS does not directly cover government procurement of services in any meaningful way. Many of the participants in the ISA have commitments on procurement through their FTAs, while others are part of the World Trade Organization’s (WTO’s) Government Procurement Agreement (GPA) which requires that member economies provide non-discriminatory access to large portions of their procurement markets, including many services, subject to thresholds and other requirements. The GPA is reciprocal, so care would have to be taken to determining whether and to what extent procurement should be a part of the ISA. This is an area that merits further attention to determine how the ISA might include effective provisions fostering transparent, non-discriminatory and technology-neutral government procurement.

Software Enables the Growth of the Services Economy

Finally, it is important to highlight that software is integrally connected to the wider services economy. It enables the provision of IT, health, financial and many other services in the global economy. Ensuring foreign markets are open to the cross-border provision of cloud computing and other software-related services will benefit these other sectors, and liberalizing services trade in these other sectors will benefit software companies by expanding their commercial opportunities.

With the right trade policies in place – including a robust, high-standard ISA – BSA members can help drive the growth of the services economy and with that contribute to economic and job growth in the US and global economy.

Thank you again for this opportunity to highlight our initial views on priorities for the ISA. We look forward to continuing opportunities to assist US trade negotiators in this important effort.

⁴APEC, 2011 Leaders’ Declaration, Annex A: Promoting Effective, Non-Discriminatory, and Market-Driven Innovation Policy (Nov. 13, 2011).