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Mr. Douglas Bell
Chair, Trade Policy Staff Committee
Office of the United States Trade Representative
Washington, DC 20508

Re: Request for Comments on Transatlantic Trade and Investment Partnership
78 Fed. Reg. 19566 (April 1, 2013)
Docket: USTR-2013-0019

May 10, 2013

Dear Mr. Bell,

BSA | The Software Alliance¹ appreciates this opportunity to provide our views on priorities for the recently announced negotiations for the Transatlantic Trade and Investment Partnership (TTIP). BSA and its member companies welcome the launch of the TTIP and share the Administration's goal of concluding a high-standard agreement that can lead to a substantial increase in transatlantic trade and investment that benefits businesses, workers and consumers on both sides of the Atlantic.

The European Union (EU) is a high-priority market for BSA member companies. We believe the TTIP can break new ground and put in place trade rules and disciplines that will further liberalize trade between our two dynamic markets. Moreover, the TTIP can establish new trade rules that can serve as a precedent for future bilateral, plurilateral and multilateral trade

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, PTC, Rosetta Stone, Siemens PLM, Symantec, and The MathWorks.

agreements, and create mechanisms for the United States and EU to collaborate more closely on addressing mutual trade challenges in third markets.

BSA members are engaged in a wide spectrum of the IT landscape. This ranges from producers of software, to providers of digital services such as cloud computing, to manufactures (or partners of the manufacturers) of devices such as PCs, tablets and cell phones that run these innovative software products and services. In addition, BSA members provide products and services to a broad range of enterprises that do business in the EU, including retailers, financial institutions, manufactures and many more. Accordingly, we have a broad interest in many elements of the proposed TTIP agreement.

The United States and the EU took an important step toward developing a framework to support ICT trade in July 2011 with the issuance of a joint statement to the WTO on “Trade Principles for Information and Communication Technology Services.”² These Trade Principles encompass many significant issues for BSA members and lay an important foundation to build on for the TTIP. Notably, the United States and EU prefaced these Trade Principles by stating that “[t]he ICT services sector — a rapidly growing source of employment and exports in its own right — is an increasingly important part of the infrastructure for a host of other industries and sectors.” We are pleased that both parties recognized the multiplier effect of bolstering ICT industries and trade; it will enable other parts of the economy and broadly stimulate economic and job growth.

We are mindful that the negotiations for the TTIP will take place alongside other critical trade negotiations including the Trans-Pacific Partnership (TPP), the Trade in Services Agreement (TISA) and expansion of the Information Technology Agreement (ITA). Momentum on all of these efforts should continue as the United States advances its important agenda with the EU under the TTIP.

Set out below are the initial views of BSA and its member companies on key priorities for the TTIP. We look forward to working closely with US trade negotiators on these issues as the negotiations progress.

1. E-Commerce/Cross-Border Data Flows

The flow of digital information across borders is today the lifeblood for many industries, and it is increasingly essential to an ever-expanding share of the global economy. From small startups that rely on Internet-based technologies to deliver data and services around the world, to major financial services companies that rely on cross-border data flows to transfer transactional data and retailers that rely on such flows to inform shipping centers of new

² Communication from the European Union and the United States, Contribution to the Work Programme on Electronic Commerce, World Trade Organization, Council for Trade in Services, S/C/W/338, July 13, 2011.

orders, warehouse fulfillments, and notifications of customs declarations, almost every company today relies on the transfer and storage of data in some capacity as part of its overall business efficiency.

In this data-dependent global economy, eliminating existing barriers and ensuring the free flow of data across borders for the future would advance all forms of international trade and commerce. BSA member companies provide the essential tools to deliver these cross-border data flows. These tools include, among others, a full range of software solutions; functionality and data storage, processing, and management; and cloud computing services.

Cloud computing is a powerful example of effectively leveraging Internet-based technologies. 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.

To maximize the benefits of cloud technologies, providers must be able to operate effectively across borders. This means being able to locate servers where they make the most sense logistically and economically and offering services from these locations to any market where sufficient demand exists. To do so, cloud service 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 essential to providing cloud computing services and prevent the development of a cloud that is “chopped up” and remade specific to each country where the services are provided.

But the need to keep markets open to cross-border data flows is critical to businesses from all sectors, not just IT companies. While IT companies are developing the technologies to enable cross-border data flows, businesses of all sizes increasingly are selling products and services in digital form and conducting other forms of e-commerce, as well as relying on cross-border flows of intra-company data to manage their core operations. The centrality of cross-border data flows to companies’ offerings and operations will only grow over the next decade and trade rules must keep pace.

We commend the Administration for highlighting this issue in its March 20, 2013 letter notifying Congress of its intent to enter into negotiations for the TTIP. The Administration’s

objectives for the TTIP cited in the letter included “seek[ing] to include provisions that facilitate the movement of cross-border data flows.”³

The US and the EU already enjoy significant flows of data and other digital information across their borders. But for digital trade between these two markets to continue to flourish and expand, clear trade rules and disciplines should be established to ensure that these flows face minimal impediments going forward. This would include enforceable obligations to: 1) ensure the free flow of data across borders and 2) prohibit requirements to use local infrastructure, such as servers, as a condition for providing, or investing in the provision of, digital products and services or to conduct intra-company transfers of data in each other’s market.

We recognize that there are legitimate areas where exceptions to such enforceable obligations should be permitted, including national security, public safety concerns and privacy. But these exceptions should not be used to create unwarranted barriers to cross-border data flows as we are seeing in many countries around the world. As global leaders in the technology space, it is critical for the United States and EU to establish a precedent to ensure these legitimate trade exceptions are not abused.

Where such exceptions are deemed necessary, they should include specific criteria that provide a clear foundation for challenging a measure on the grounds that it is unnecessarily restrictive or constitutes a disguised restriction on trade. The party invoking the exception should have the burden of establishing that the measure is: 1) not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between trading partners where like conditions prevail; 2) is necessary to achieve a legitimate policy goal; 3) is implemented in the least trade-restrictive way possible (*i.e.*, by identifying the alternatives considered and why they were dismissed); and 4) does not constitute a disguised restriction on trade (*i.e.*, by clearly specifying the objective and rationale for the exception and how it will address the legitimate domestic interest).

In the context of the US and EU relationship, we recognize the need for the two parties to have effective mechanisms to address some of these concerns. One urgent matter is to preserve the current Safe Harbor with respect to privacy issues, or establish a similar mechanism, that enables our member companies to do business in the EU. Often times privacy policies can have the effect of unnecessarily restricting trade. The TTIP should develop a framework ensuring that both markets’ individual privacy regimes are respected without impeding flows of data and information.

³ Letter from Acting United States Trade Representative Demetrios Marantis to Hon. John Boehner, March 20, 2013.

The TTIP also presents an opportunity to deepen the transatlantic understanding of our differing — yet fundamentally equivalent — approaches to consumer privacy and the benefits that alignment of these two systems can deliver in increased digital trade. A great deal of recent debate has focused on the dissimilarities on paper between the proposed EU Data Protection Regulation and the broad-ranging US approach. But much less attention has been given to their commonalities. As Federal Trade Commissioner Julie Brill noted in a recent speech in Brussels on privacy:

A comparison of the US regime to protect consumer privacy with the draft EU privacy regulation highlights both our convergence on many of the goals around modernizing our privacy regimes, and our divergence on some of the mechanisms we choose to get there. The EU draft regulation reflects our common ground on many key issues — promoting privacy by design, protecting children’s privacy, enhancing data security, and providing consumers with appropriate access, correction and deletion rights.

In some instances, we differ on how to achieve these common goals. We both believe that consumer consent is important, but we have different approaches as to when and how that consent should be obtained. We both recognize the importance of encouraging notification of data breaches, but our views may differ with respect to the timing and scope of those notifications. In short, the particular solutions we develop may differ, but the challenges we face and our desire to solve them are the same.⁴

We also urge that there be continued collaborative and cooperative work to address security concerns in a manner that supports trade while recognizing that differing approaches to this issue can achieve compatible outcomes. In this regard, the United States and EU could commit themselves and advocate with other governments to avoid exercising any national security exemption to trade obligations, including forced localization measures, on widely available commercial IT products and services that are based solely on their geographical origin. In the limited circumstances where an exemption is invoked, the government should be required to demonstrate legitimate security concerns regarding the development, manufacture, use or maintenance of specific IT commercial products.

Finally, we encourage the parties to develop a work plan on certification schemes as they relate to cross-border data flows and cloud computing. BSA believes it is unhelpful to mandate certification schemes in this area. We believe that voluntary, disclosure-based certifications are the most effective approach in such a dynamic, fast-changing field as technology. Overly prescriptive efforts will simply delay deployment of technology. To the

⁴ FTC Commissioner Julie Brill, Remarks to the Mentor Group Forum for EU-US Legal-Economic Affairs Brussels, April 16, 2013, available at <http://ftc.gov/speeches/brill/130416mentorgroup.pdf>

extent the United States and EU can align the certification criteria in their government procurement schemes and potentially provide recognition of each other's government certifications, it would lead to a tremendous boost in technology exchange across the Atlantic.

2. Services

BSA member companies develop cutting-edge products and services to help businesses and consumers become more productive and efficient and enjoy a higher quality of life. The speed with which new technology services offerings are being developed and deployed is accelerating. Trade rules must be flexible and forward-looking to keep pace with these innovations. Accordingly, it is critical that services commitments in the TTIP be broad enough to cover both current and later-developed technological advances.

We urge US trade negotiators to seek comprehensive market access and national treatment commitments with respect to all services covered by the TTIP using a "negative list" approach. 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.

A broad range of IT services are covered by existing General Agreement on Trade in Services (GATS) commitments for Computer and Related Services. A non-exhaustive list of IT 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. The TTIP should affirm that all new and future IT services fall within the broad category of Computer and Related Services. Some initial work toward this end was done by the Understanding on Computer and Related Services and the Plurilateral Request on Computer and Related Services, both of which were signed by the United States and the EU. The TTIP should build on this work to ensure that IT services commitments keep pace with technological advances.

Additionally, the United States and EU should affirm in the TTIP that they will not discriminate as between electronic and physical delivery of these services. The method of delivery for 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 above, 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.

Finally, the TTIP should ensure that commitments are technology-neutral. Markets should be open to services without limiting consumers' ability to choose the best technology option to meet their needs based on cost and functionality.

3. Forced Localization

In a growing number of markets around the world, BSA and its member companies are seeing the emergence of “forced localization” policies that favor domestic firms over foreign firms or compel foreign firms to, *inter alia*, establish local operations, conduct research and development locally, register and/or develop intellectual property in the country, or invest in a country in order to secure market access. Many of these policies, which apply largely to the IT and other strategic industries, were documented in a report BSA issued last year.⁵ This trend impedes the ability of US and EU software and other IT companies to access some of the world's fastest-growing markets.

We are pleased that the report of the joint High Level Working Group on Jobs and Growth (“High Level Working Group”) recommended that the United States and EU reach agreement on globally relevant rules, principles, or modes of cooperation to address “[l]ocalization barriers to trade” defined as “measures designed to protect, favor, or stimulate domestic industries, services providers, or intellectual property at the expense of imported goods, services, or foreign-owned or foreign-developed intellectual property.”⁶ The TTIP should develop a framework for the United States and EU to work together to limit the proliferation of these policies in key markets for both parties.

4. Intellectual Property

BSA members depend heavily on strong IP laws and enforcement to protect their innovative products and services and currently enjoy strong regimes for doing so in both the United States and EU. Both markets have relatively comparable IP regimes, so the focus on IP issues in the TTIP should be different than other US trade agreements where the aim was to bring the other party's regime up to US levels.

Given this context, the parties should strive to use the TTIP to address select issues to strengthen IP regimes in each market and to enhance bilateral cooperation aimed at bringing other markets up to similar levels of IP protection. This should be pursued in conjunction with other sections of the agreement — such as those dealing with e-

⁵ 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.

⁶ Final Report, High Level Working Group on Jobs and Growth, Feb. 11, 2013.

commerce and cross-border data flows discussed above — that are aimed at promoting the development of IP and the growth of innovative sectors within each market.

The High Level Working Group report stated that “[b]oth the EU and the United States are committed to maintaining and promoting a high level of intellectual property protection, including enforcement, and to cooperating extensively.”⁷ We are pleased that both parties are committed to finding ways to use the TTIP to address select IP issues and to finding more effective ways to collaborate in addressing IP protection and enforcement challenges in third markets.

To this end, we would recommend that the parties focus on the following:

- Government software legalization: Include language similar to provisions in other US trade agreements that impose obligations on governments to ensure legal software use. This would be an important statement that governments should lead by example in addressing IP infringement and implementing best practices in IT management.
- Cooperation in third markets: Build on the past efforts of the US-EU IPR Working Group and develop new mechanisms to ensure closer cooperation and collaboration between the United States and EU to address weak IP protection and enforcement practices in China, India, Ukraine and other high-piracy third markets. This could include regularly holding joint meetings in advance of each party’s bilateral IP discussions with priority third markets and holding trilateral discussions with certain markets.
- Notice & Action: Establish principles for more consistent and clear procedures in the EU market for taking action against infringing online material based on clear, complete and actionable information provided by the rights holder.
- Software patentability: Affirm eligibility of software patents is consistent with Article 27 of the WTO’s Trade-Related Aspects of International Property Rights (TRIPS) agreement. Refrain from unilaterally defining the term “technical contribution” of software, which would aim at preventing software patentability.
- Copyright levies: Address concerns with the divergent application of the levy system in the European market. In a number of European countries, collecting societies are empowered to impose levies on electronic devices such as PCs, smartphones, recording media and printing or imaging devices. The proliferation of levies across new digital technologies creates an environment of double taxation, with content holders, technology companies, and consumers paying for both levies and digital

⁷ Final Report, High Level Working Group on Jobs and Growth, Feb. 11, 2013.

rights management systems development. This raises the cost of technology overall for citizens. Moreover, arbitrary and nontransparent tariff-setting processes have led to significant litigation between levy payers and collecting societies throughout Europe, resulting in massive compliance costs that pose a significant market barrier for US companies.

- Trade secrets: Develop a comprehensive model trade secret protection system that can be promoted globally, which is important given that obligations in Article 39 of TRIPS to protect trade secrets ensure only minimum levels of protection. This system should enable greater public-private cooperation to minimize incidences of misappropriation and government requests for excessive trade secrets as a condition of market access. Both the US and EU governments are currently reviewing their respective trade secret laws to determine how they could be improved.

5. Government Procurement

Governmental bodies in the United States and EU are major purchasers of IT products and 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 products and services to meet their needs.

It is therefore important for the United States and EU to set a strong precedent for open and transparent procurement markets with restrictions allowed for only a limited number of particularly sensitive procurements that relate to national security, or public health and safety.

Technology companies are especially concerned when government procurement policies restrict purchase options based on the underlying technology of products and services or based on whether they contain core intellectual property that is locally owned or developed. Therefore, we urge that the TTIP include provisions to:

- Avoid tech mandates: Prohibit measures that would condition access to government procurement on the use of particular technologies or licensing models (*e.g.*, mandates for royalty-free use of open source software over proprietary software).
- Avoid domestic IP requirements: Prohibit measures that would condition access to government procurement on a product or service having intellectual property that has been locally developed or registered.

6. State-Owned Enterprises

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. This poses a significant

challenge for foreign competitors 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 software and other IT suppliers.

To address issues in the US and EU markets and to set a precedent for other trade agreements, we urge that the TTIP establish disciplines on SOEs to ensure transparency and to require they operate under the same obligations that the private sector does when they are engaged in commercial activity. It is critical that SOEs conduct their commercial activities as market actors and in a manner consistent with each party's market access and non-discrimination commitments. The United States and EU should commit to advancing these SOE disciplines in their own trade agreements and in multilateral and plurilateral forums.

7. Standards and Technical Regulations

Technology standards play a vital role in facilitating global trade in IT products and services. Internationally recognized and adopted standards that are established through a 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.

IT companies invest substantial resources to develop and support technology standards that can be used globally and to make them available for licensing on fair, reasonable, and nondiscriminatory (FRAND) terms to companies large and small, regardless of nationality. This process has generated enormous benefits for consumers. Not only has it spurred technology innovation, but experience has shown that standards are most successful when developed in market-led, voluntary, and consensus-based processes. Discriminatory government-mandated, country-specific standards, by contrast, tend to "freeze" innovation and force consumers and businesses into using products that might not suit their needs.

Both the APEC Code of Good Practices and the OECD have noted that technical regulations, especially if they are prescriptive in nature (*i.e.*, specific technology mandates), can significantly impede innovation and create unnecessary barriers to trade, investment and economic efficiency. Technical regulations may also promote the influence of vested interests seeking protection from competition because they can directly affect products and services or their development and manufacturing processes. Similarly, technical regulations that are outdated or poorly designed to achieve their intended policy objectives contribute to inefficient regulatory arrangements.

We are pleased that the High Level Working Group recommended that the parties seek to "yield greater openness, transparency, and convergence in regulatory approaches and

requirements and related standards-development processes, as well as, *inter alia*, to reduce redundant and burdensome testing and certification requirements, promote confidence in our respective conformity assessment bodies, and enhance cooperation on conformity assessment and standardization issues globally.”⁸ We agree that these should be important areas of focus for the agreement.

The parties should use the TTIP to ensure greater compatibility between the US and EU markets on standards and standard-setting processes and to create a mechanism to work together to promote adoption of market-led, globally recognized standards in third markets.

Moreover, the United States and EU should maximize market access opportunities for IT products and services by creating a new public-private collaborative mechanism within the TTIP to ensure that development of new IT regulations is done in a way that does not undermine innovation or impose added costs. In establishing this new regulatory collaboration mechanism, the United States and EU should affirm their belief that the use of technical regulations for IT products and services should be technology-neutral and reflect the lightest touch possible. The TTIP also should place the burden on governments to explain why other, less restrictive approaches could not be used. The parties should commit to promote these good regulatory practices for the IT industry to other governments, where prescriptive technical regulations are on the rise.

8. Mobility of Skilled Labor

BSA members operate in a global market offering products and services and meeting customer needs on a global basis. Their ability to deploy talent within their corporations on a global basis is essential for efficient operations and for fulfillment of customer contracts.

Development projects frequently span borders. Collaboration is necessary among researchers who may be based in R&D centers around the globe. Consultants, project managers and technical experts must often be assigned on a short term and temporary basis outside of their home countries to meet the needs of customers seeking to deploy sophisticated enterprise software applications. These are just a few examples of the importance of trans-border mobility of highly-skilled and medium-skilled labor for the software sector.

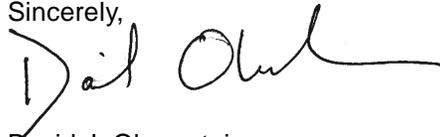
However, BSA member companies encounter numerous barriers which either prevent or hinder the transfer of employees between the EU and the United States. These barriers include restrictive criteria for determination of "highly-skilled" workers, difficulties in achieving recognition of diplomas or certifications issued by the other trading partner, cumbersome labor-market tests, visa category quotas and lengthy application approval procedures. Additionally, there is a need to put in place policies and procedures to better

⁸ Final Report, High Level Working Group on Jobs and Growth, Feb. 11, 2013.

facilitate intra-corporate transferees. These are but some of the issues which could be addressed in the TTIP to facilitate the mobility of skilled labor in the transatlantic marketplace.

Thank you again for this opportunity to highlight our initial views on key priorities for the TTIP.

Sincerely,

A handwritten signature in black ink, appearing to read "David Ohrenstein". The signature is fluid and cursive, with a long horizontal stroke at the end.

David J. Ohrenstein
Director, Global Trade Policy

Cc: David Weiner, Deputy Assistant United States Trade Representative for Europe