

NAFTA NEGOTIATIONS HEARING

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INTRODUCTION

Thank you, Mr. Chairman and members of the committee, for the opportunity to testify on behalf of BSA | The Software Alliance, the leading advocate for the global software industry in the United States and abroad.

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 all reshaping how software is used in the economy.

Trade in software also has expanded rapidly. It contributes significantly 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. The industry’s success also fuels growth in numerous other sectors.

NAFTA, however, is silent on digital trade. BSA therefore is gratified that USTR and the Commerce Department have recognized the importance of addressing digital trade in a modernized NAFTA.

Last week Ambassador Lighthizer told the House Ways and Means Committee that “we expect to have a high-level agreement with a digital chapter”, and the Senate Finance Committee that NAFTA could be a “model agreement” for the digital economy. He added that he expected Canada and Mexico would be broadly supportive of this approach. Congress likewise is on record, in the 2015 Trade Promotion legislation, that advancing digital trade must be one of the principal negotiating objectives for U.S. trade agreements.

With this strong foundation for a NAFTA digital chapter already laid, I’d like to describe what BSA sees as its key elements.

SPECIFICS OF BUILDING DIGITAL TRADE INTO NAFTA

Data flows, domestic and international, are the lifeblood of the modern economy. It thus is crucially important that NAFTA governments not impede international data flows through market access barriers disguised as privacy or security policies. The Trans-Pacific Partnership (TPP) provides a template for addressing this issue.

Specifically, NAFTA should prohibit governments from interfering with cross-border transfer of data. It also should preclude governments from requiring service providers to build data centers inside their borders as a condition for doing business.

We recognize that a government may determine on occasion that it is necessary to adopt or maintain measures for legitimate domestic public policy purposes, including privacy or security, that are not consistent with these two obligations. But such measures must not discriminate against foreign service providers or constitute a disguised restriction on trade, and must be narrowly tailored to achieve specific objectives. A dispute settlement mechanism also must be available to allow close scrutiny of, and enforcement against, measures that derogate from these obligations.

In addition, we urge that NAFTA provide space for innovative new digital services. Market access commitments must cover not only existing services but also services that may emerge in the future. The United States must not accept broad exceptions by other governments for future services, and in general should be extremely careful in assessing proposed non-conforming measures in this area. This will ensure that new digital services cannot be discriminated against and that NAFTA itself stays up to date.

Good examples of emerging transformational digital services are “smart” contracts and other autonomous machine-to-machine means for conducting transactions, such as blockchain. TPP required governments to allow electronic authentications and signatures to be utilized in commercial transactions. This provision should be extended to digital contracts explicitly.

To promote growth of internet-based services, recent U.S. FTAs have prohibited customs duties on electronic transmissions. NAFTA should not only incorporate such a provision, but also clarify that customs duties also may not be imposed on the value of data being transmitted.

Additionally, we call for NAFTA governments to ensure that internet intermediaries are protected against liability for unlawful content posted or shared by third parties.

NAFTA governments further should ensure that their copyright rules permit commercial text and data mining, an important tool used in software-enabled data analytics, and in the development of artificial intelligence.

Finally, NAFTA must protect digital service companies from foreign government requirements to transfer their technology, such as demands to transfer source code or proprietary algorithms as a condition for importing, distributing or selling software in a foreign country.

CONCLUSION

The upcoming NAFTA negotiation is a unique opportunity to enable the growing and dynamic software services sector to expand in an integrated fashion across North America. Moreover, writing systematic digital trade rules into NAFTA would set a precedent that the United States can draw upon in future U.S. trade negotiations in other regions of the world.

Thank you for your attention, and I welcome your questions.