

July 18, 2017

ITAC SUBMISSION TO GLOBAL AFFAIRS CANADA
CONSULTATIONS ON THE RENEGOTIATION AND MODERNIZATION OF THE
NORTH AMERICAN FREE TRADE AGREEMENT

Since its implementation in 1994, NAFTA has created a strong foundation for free trade across North America and has increased prosperity for all three parties. However, over the past 23 years the economy has undergone significant changes largely due to the mass deployment of new technologies. Many of the tools, business models and traded commodities driving today's digital economy are not reflected in the existing NAFTA framework. The 2017 NAFTA renegotiation is an important opportunity to expand market access, update the agreement to better reflect the current economy and establish principles that will keep the agreement relevant for the long term.

Key Priorities for Canada's ICT Industry

Canada's Information and Communications Technology (ICT) industry is made up of over 35,000 firms, that employ over 1.1 million directly and indirectly and contribute over \$71.3B to Canada's GDP. As the national voice of Canada's ICT industry, ITAC is a strong supporter of free trade agreements as they establish predictable frameworks for international commerce based on the rule of law, transparency and due process when disputes arrive. ITAC's membership includes a diverse community of over 300 ICT companies including Canadian-owned small and medium-sized enterprises (two-thirds of our membership), large Canadian firms as well as many of the leading global tech players.

As Canada, the U.S. and Mexico modernize NAFTA, ITAC recommends the provisions previously agreed to in the Trans Pacific Partnership be taken as a starting point, especially Chapter 14: Digital Economy and the Information and Communications Technology (ICT) Annex of Chapter 8: Technical Barriers to Trade. The TPP was the first transnational trade agreement to specifically incorporate protections for digital commerce and should serve as a base for building similar protections into NAFTA.

Priority 1 – Maintaining Free Trade on the Internet

Today, virtually all economic activities are facilitated at some level by the internet. This is especially true for the Canadian ICT industry where 88.6% of ICT companies provide software and computer services, usually delivered via the internet.

Since its inception the internet has supported free trade and driven innovation and economic growth because it can connect customers to the best products and services regardless of location. However, regulations that may be imposed on the internet or

businesses that leverage digital tools could serve to restrict market access and inhibit innovation.

For NAFTA to continue to support free and open trade, it is important that protections be adopted into NAFTA that guarantee market access for commercial activities over the internet and the free flow of data over borders. While parties should preserve their ability to adopt regulatory policies related to the internet appropriate to their economy—consistent with the principles of national treatment and market access—NAFTA partners should seek to coordinate regulatory approaches and standards to ensure interoperability.

Parties should adopt technology neutrality principles, so innovative technologies are not prevented from accessing the market simply because they are new or based on unnecessary technological requirements.

ITAC Recommendations:

Internet Openness

1. NAFTA should state that the parties intend to maintain free trade in goods and services delivered via the internet. Governments should be prohibited from restricting access to websites based on the website's country-of-origin.
2. NAFTA should prohibit parties from imposing duties on electronic transmissions. The value of the data transmitted should also not be dutiable.
3. Governments should be restricted from imposing data residency requirements.
4. NAFTA should prohibit governments from imposing regulatory and licensing requirements on providers of online services and applications that are discriminatory based on the country-of-origin of the online service provider or application.
5. NAFTA should support data analytics and prohibit location-based restrictions on services that lawfully collect and analyse data.

Coordinated Regulatory Approaches:

6. NAFTA should commit parties to pursue coordinated and interoperable approaches when considering regulating in areas that could impact digital business models, including privacy, data security, and unsolicited commercial messages. NAFTA approaches should seek to align with global best practices.
7. NAFTA should expressly support the APEC Cross-Border Privacy Rules framework as a good, principles-based interoperability mechanism that aligns with global best practices.
8. NAFTA should commit the parties to collaborate on the development of industry-led technology standards to insure interoperability across the NAFTA block.
9. NAFTA should reaffirm the commitment to regulatory alignment in regards to telecommunications, electromagnetic compatibility (EMC), and safety for technology products in ways which are interoperable across Mexico, the United

- States, and Canada. This should include the acceptance of international test reports to avoid unnecessary in-country testing and certification requirements.
10. NAFTA should require parties to accept the least trade restrictive conformity assessment process based on a risk proportionate approach to regulation.
 11. NAFTA should eliminate tariffs on ICT products. While Canada and the U.S. have both broadly done this under the WTO *Information Technology Agreement* (ITA), Mexico has not agreed to the ITA nor its 2015 expansion, and currently imposes duties on many products covered by the ITA. To avoid duplication, NAFTA should require Mexico to join the ITA.

Technology Neutrality Protections:

12. NAFTA should establish an overarching principle of technology neutrality and equal market access for all technologies for lawful purposes.
13. NAFTA should prohibit governments from forcing technology transfers, including demanding access to source code as a condition of market access, subject to limited conditions, for example, sales to government national security organizations.
14. NAFTA should prohibit requiring access to cryptography keys as a condition of market access, subject to limited conditions -for example, sales to government national security organizations.
15. NAFTA should ensure that digital products are not provided less favourable treatment based on where they are created, produced or published.
16. NAFTA should recognize the legal validity of electronic signatures.

Priority 2: Access to Government ICT Procurement Opportunities

Governments are some of the largest purchasers of ICT products and services. In some cases—like sophisticated cyber security solutions—they can be the only customers. Since NAFTA was introduced, Canadian firms have been exempt from “Buy American” rules at the U.S. federal level. It is essential that Canada seek to maintain this access. In addition, ITAC recommends Canada press for expanded access to government procurement at the state and local levels, which in the U.S. are increasingly adopting “Buy American” policies. Reciprocally, to the extent Canadian firms remain exempt from “Buy American” policies Canada should commit to exempting American firms from any “Buy Canadian” policies on ICT procurements.

Regardless of jurisdiction, selling to governments is often unnecessarily costly and complex. This complexity acts as barrier to market access because significant investments are required by companies to pursue government contracts. NAFTA parties should collaborate to reduce the unnecessary burden when selling to government, and pledge to pursue modern procurement processes for ICT goods and services.

ITAC Recommendations

17. Prioritize maintenance of Canadian business access to U.S. Federal Government procurements.
18. Work with U.S. and Mexican officials to expand access to subnational procurement opportunities at the state and local levels, for instance by refreshing Article 1024 on “Further Negotiations with State and Local Governments.”
19. NAFTA should establish a process for regular dialogue with industry on modernizing government procurement processes for ICT products to reduce the complexity and cost of selling to government which acts as a market barrier.

Priority 3: Intellectual Property Protections

IP is an essential element of the innovation economy. While patenting an invention can provide a business with a competitive edge, defending patents in the courts can be a costly and time consuming exercise. Many Canadian ICT companies have found themselves victims of predatory or extortionist IP lawsuits by competitors or non-practicing entities (i.e. “Patent Trolls”), resulting in enormous court costs even if the company is victorious. While NAFTA provides for the recouping of attorney costs in IP suits,¹ these provisions are seldom applied by U.S. courts. ITAC would request these provisions be strengthened to make it easier for companies to seek compensation.

Over the past several decades “jurisdiction shopping” has been an endemic issue in the U.S. with some “plaintiff friendly” districts receiving a disproportionate number of IP suit filings.² A May 2017 U.S. Supreme Court decision made a dent in this practice by requiring companies be sued in the district where they reside.³ While this ruling may provide relief for U.S.-based firms, it is unclear how it will apply to international companies. There is a fear that it could make Canadian firms a bigger target for the established “patent troll” industry. NAFTA should clarify where a Canadian firm can be sued in the U.S., for instance, only in districts where they have significant business interests. Additionally, the threshold for U.S. courts to grant a change of venue request, presently only granted in the most extreme circumstances, should be lowered for non-domestic NAFTA companies in IP disputes.

Chapter 17 of NAFTA (Intellectual Property) was drafted before the creation of open platforms for trade and communication, like social media and video sharing sites. Third party content posted to these sites can breach copyright laws. Copyright should support the development of new technologies while continuing to protect rights holders. For instance, machine learning, computational analysis, text/data mining, and cloud-based technologies can all involve making copies of copyrighted material without the explicit consent of the copyright holder. NAFTA should be updated to require governments to

¹ See NAFTA Article 1715 (2e)

² For instance, 40% of all U.S. IP suits are filed in the East District of Texas. See: https://www.nytimes.com/2017/05/22/business/supreme-court-patent-lawsuit.html?_r=0

³ See *TC Heartland v. Kraft Foods Group Brands*: https://www.supremecourt.gov/opinions/16pdf/16-341_8n59.pdf

enable these kinds of innovative uses of copyrighted material for legitimate business purposes.

ITAC Recommendations

20. NAFTA's Intellectual Property chapter should strengthen provisions providing for the awarding of court costs in intellectual property litigation so they are more regularly applied.
21. NAFTA should stipulate that non-domestic companies can only be sued in locations where they have significant business activities, and that non-domestic companies have the right to request a change in venue to a location that more accurately reflects their business footprint in that jurisdiction.
22. NAFTA should require governments to adopt copyright regimes that support innovation through certain copyright limitations and exceptions to allow non-explicit uses of copyrighted material that support legitimate business purposes.
23. NAFTA should note that continued innovation in artificial intelligence and machine learning will require balanced approaches to copyright to enable non-expressive uses of data.

Priority 4: Intermediary Liability Protections

Given the speed and immense scale of the Internet, internet service providers, online platforms, cloud services and social media networks rely on robust intermediary liability protection, subject to appropriate qualifying conditions. NAFTA should require countries to implement intermediary liability protection, subject to appropriate conditions.

ITAC Recommendations

24. NAFTA should introduce intermediary liability protections to protect internet-based services from liability over third-party content, subject to appropriate legal and regulatory conditions.

Priority 5: Labour Mobility

The ICT industry is built on talent. Most ICT firms operate teams in multiple countries. It is important that businesses can temporarily access the skills of highly specialized individuals when and where it is required, without being unnecessarily delayed crossing the border.

ITAC Recommendation

25. Canada should seek to maintain and expand NAFTA allowances for the Temporary Entry of Business Persons (Chapter 16).

Priority 6: Support Canada-U.S. Innovation Corridors

Canada's federal government recognizes the importance of clusters in fueling innovation. While the focus of the government's Super Cluster strategy is domestic, NAFTA should recognize and support cross-border innovation corridors that have developed between NAFTA partners. In particular, the Cascadia Innovation Corridor including British Columbia and Washington State, and the Great Lakes Region are hotbeds for innovation in ICT, connected devices and autonomous vehicles. NAFTA should establish structures to accelerate the growth of these cross-border innovation corridors and reduce unnecessary barriers to regional collaboration.

ITAC Recommendation:

26. NAFTA should recognize the importance of regional innovation corridors between the three NAFTA partners. NAFTA should create a working table in partnership with sub-national governments to identify opportunities to accelerate growth and remove unnecessary impediments to continued regional collaboration.

Priority 7: Support Small Internet Enabled Entrepreneurs

It is important that trade agreements are inclusive and provide benefits to companies of all sizes. However, Canada's exorbitantly low *de minimis* threshold (DMT), \$20 CAD since the 1980s, can limit the benefits of NAFTA for small businesses. Moreover, it can discourage small Canadian businesses from using the internet to expand their business and export because it adds complexity and additional transaction costs, experienced when importing materials or fulfilling customer returns. Mexico has recently proposed changes to its customs procedures that will disadvantage Canadian low value shipments to Mexico. Establishing a minimum threshold for *de minimis* in NAFTA will reduce frictions on trading SMEs and make NAFTA more inclusive and impactful for small businesses.

ITAC Recommendation

27. NAFTA should establish a minimum *de minimis* threshold to ensure the benefits of cross-border trade are shared by small businesses.
28. NAFTA should include requirements to streamline and expedite customs procedures for low-value shipments.

For further details, please contact David Messer, Vice President Policy, ITAC at dmesser@itac.ca