

**Before the
Office of the United States Trade Representative
Washington, D.C.**

Docket: USTR-2017-0006

Subject: Request for Comments on Negotiating Objectives Regarding Modernization of the North American Free Trade Agreement (NAFTA) with Canada and Mexico.

Date: June 12, 2017

**Comments of the
Internet Infrastructure Coalition - i2Coalition**

Pursuant to the request for comments issued by the U.S. Trade Representative (USTR) and published in the Federal Register at 82 Fed. Reg. 23699 (May 23, 2017), the Internet Infrastructure Coalition (i2Coalition)¹ respectfully submits the following comments for consideration as the USTR and Trade Policy Staff Committee (TPSC) develops the U.S. government's negotiating objectives and positions with regard to the modernization of NAFTA.

I. Introduction

The i2Coalition welcomes the opportunity to provide comments on the NAFTA negotiating objectives of the USTR and TPSC. The modernization of NAFTA provides the U.S. government with a unique opportunity to update a trade agreement to include one of the fastest, if not the fastest, growing segments of the economy, and one that provides a positive trade surplus to the United States.

Our comments focus on those areas of the Internet economy critical to our member's businesses, and the livelihoods and activities of our customers. We respectfully request that in formulating its negotiating objectives, USTR consider the fact that the business of Internet infrastructure providers lies overwhelmingly in facilitating the commerce and digital activities of others. Internet infrastructure providers are a key, but relatively fragile, component of the Internet. Recognizing the economic impacts of liability, regulation, and the preservation of well understood roles related to intellectual property, will be crucial to ensuring the continued vitality of this industry.

¹ Founded in 2012 by a diverse group of Internet infrastructure companies, the i2Coalition supports and represents the organizations that build and maintain the infrastructure of the global Internet. Today, the i2Coalition is the leading voice for hosting companies, data centers, registrars and registries, software services providers, and related technology firms.

II. General and Product Specific Negotiating Objectives - Paragraph 2(a)

A. Product Encryption and Cryptographic Products

Internet Infrastructure providers, and the Internet as a whole, must retain the ability to use, disseminate, and develop encryption and cryptographic products. Our comment related to upcoming NAFTA negotiations stems from the use of national security exceptions to restrict the use of encryption and cryptographic products and possible inclusion of certification requirements in trade agreements.

The infrastructure of the Internet, as well as the companies that build and support it, play an enormous role in the mechanics of how the Internet works, and the security of this infrastructure is vitally important to the websites and apps we all use every day. Encryption is enormously important to both network security and consumer choice. The billions of dollars of commerce and banking transactions that take place across the Internet depend on encryption to ensure confidence and security.

Internet infrastructure providers use encryption to secure their networks, technology, and code. Encryption helps to promote and protect cybersecurity, economic growth, and human rights, both domestically and abroad. Encryption secures communication on networks and forms a line of defense from a wide variety of security threats.

i. National Security Exceptions

The i2Coalition recognizes the need for national security exceptions in trade agreements. We also recognize the need for these exceptions to be narrowly construed. Simply put, the use of products containing encryption, or the facilitation of this use, does not fit within the traditional uses of national security exceptions in trade agreements.

There is a complex assortment of infrastructure that powers the Internet, and companies in our industry touch most of the data on the global Internet, either when in transit—while moving from one place to another—or at rest—when sitting in storage. This often places Internet infrastructure providers in a position in between service providers and users.

Some of this data is protected by the providers themselves through their own encryption key systems. Other data is protected independently by individual users, who choose products and services that protect their communications as they pass over Internet infrastructure resources.

Internet infrastructure providers distribute their products throughout the NAFTA region. This distribution requires the ability to include, or facilitate the use of, encryption products. Encryption and cryptographic products are woven throughout the Internet as a whole. Consumers throughout the NAFTA region depend on these products to securely do business online, and to engage in self-protection from malicious actors. The U.S. should narrowly define the national security exception so that these products, and facilitation of their use, are not within its scope.

ii. Certification Requirements

Currently no NAFTA signatories maintain material certification requirements for encryption and cryptographic products. In developing its negotiating objectives, the United States should take steps to ensure that this remains the case.² The NAFTA region should remain open to cryptographic and encryption innovation.

Proposals to favor certified encryption products weaken the ability of Internet infrastructure providers to develop robust corporate security policies. Country specific certification regimes lead to significant weakening of basic Internet security protocols.³ The U.S. government has consistently taken the position that the security of the Internet is maintained when consumers and businesses determine which types of security products best suit their needs, while at the same time facilitating standards making entities like the National Institutes of Standards and Technology. This position should be included in the U.S. government's negotiating objectives.

III. Digital Trade Issues - Paragraph 2(h)

Including digital trade in the modernization of NAFTA is core to the meaning of "modernization." The economic benefits to the U.S. delivered by the Internet economy are not materially different than those delivered by the automobile or agriculture industries. Including digital trade in NAFTA recognizes the fundamental role that the Internet plays in the economic vitality of the United States, and the day-to-day lives of its citizens.⁴

Internet infrastructure products can easily cross borders. The purchase of a domain name by a citizen of Mexico from a Canadian company depends on the facilitation of data flows through the entire NAFTA region. The same can be said for a niche producer of agricultural products in the United States selling their goods. Simply put, all companies are digital companies who use Internet infrastructure to enhance their lives.

A. Data Flows

Preserving the free flow of data across borders is critical to the continued ability of U.S. companies to use the Internet to drive economic growth and create jobs. For this reason, it is essential that a modernized NAFTA include binding disciplines that will protect the movement of data across borders.

² Examples of certification regimes include those in Russia, China and frequent proposals in Vietnam and India.

³ Some Chinese certification standards have resulted in limitation on the ability to use transport-layer security. *See, e.g.* <http://icmconference.org/wp-content/uploads/C23Introduction-on-the-Commercial-Cryptography-Scheme-in-China-20151105.pdf>

⁴ The Internet economy represented \$222.9 billion in U.S. exports in 2012. <https://www.usitc.gov/publications/332/pub4485.pdf>

These binding commitments must ensure that access to the underlying data transmission layer is provided to foreign companies at the same rates it is provided to domestic companies. In some cases, U.S. companies receive less favorable terms than Mexican companies for access to data transmission.

B. Localization

One of the most significant long-term trends within the Internet infrastructure industry has been the move to—and the increased demand for—a distributed Internet infrastructure. This positive development has spurred exponential growth of U.S. Internet infrastructure companies. The U.S. should continue to strongly advocate for trade provisions that permit a distributed, innovative, Internet infrastructure that allows individuals and companies to locate facilities based on their needs, not the location of the provider.

Leveraging network effects creates a robust environment for business and dialogue. Small businesses, who make up the vast majority of Internet infrastructure providers, can base their businesses in any location. Creating an environment where they may do so is a valid, and appropriate, trade issue.

Localization measures limit competition and growth. Localization policies, whether those that require certain facilities to be located in a jurisdiction, or those that seek to require particular types of data to be kept in a country, threaten to slow or restrict the growth of the Internet as a whole, and the Internet infrastructure industry in particular. Localization policies also undermine the security of the Internet by hamstringing the ability of Internet infrastructure providers to deploy network based security products. This may lead to conflicting security policies and protocols, as well as inconsistent security across the entire Internet.

C. Regulatory Transparency

Any NAFTA modernization should include commitments to ensuring that businesses throughout the NAFTA region have access to regulations impacting them, and the ability to provide input on those regulations. Relevant regulations must be published in a manner that is readily available and comprehensible to all businesses. It is vital that businesses be able to easily understand and interpret new laws or changes to current regulations in order to properly conform to such regulations, provide meaningful responses, and effectively protest, if necessary.

The ability to understand, and have input on, regulations throughout the NAFTA region is primarily critical for small to medium sized businesses. We recognize the need for governments to enact discrete laws and regulations that reflect their interests, and that these laws and regulations may not be consistent throughout the NAFTA region. However, this need should not advantage citizens of a particular NAFTA country over another. Individuals who seek to sell their products using an Internet infrastructure provider should have the opportunity to research and understand their legal obligations. But this opportunity should not be limited simply to researching and understanding. All economies and countries benefit from diverse points of view and input.

We also believe that smart collaboration with industry trade groups such as the i2Coalition is essential to ensure workable outcomes to trade issues. We encourage you to maintain as much transparency in trade regulations and negotiations as is reasonably possible to enable robust discussion of the impact of negotiations. More open negotiation and regulatory processes will contribute to increased support for the current trade agenda.

D. Intermediary Liability

The Internet has thrived in places where those responsible for creating and using content have borne responsibility for their actions. Internet infrastructure providers are mere conduits for transmission of information. Trade agreements should reflect that status, and include provisions that prohibit governments from making online services liable for third-party content, consistent with Section 230 of the Communications Decency Act of 1996.

IV. Intellectual Property – Paragraph 2(i)

Internet infrastructure providers are thriving users, developers, and owners of intellectual property. Many of our businesses depend on intellectual property laws to protect software and products. Enforcement of these laws is important to us.

Mechanisms for enforcing intellectual property rights in a modernized NAFTA should be based on current U.S. law. Concepts of proportionality must form the basis of any enforcement mechanism. Any agreement should recognize the right of fair use and ensure, to the greatest extent possible, that enforcement mechanisms are narrowly tailored to avoid impacting fundamental rights like free speech. Internet infrastructure providers should be given the opportunity to communicate allegations of infringement to users. Users should have the right to due process prior to sustaining damage to their data and businesses.

Conclusion

The Internet infrastructure industry generates more than \$100 billion in annual revenue and is growing at a rate of nearly 20% per year.⁵ The USTR has the opportunity to facilitate and enhance U.S. economic growth and job creation through a modernized NAFTA that will include disciplines that will support a strong and growing Internet infrastructure.

Respectfully submitted,

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⁵ See <http://www.gartner.com/newsroom/id/2352816>