Tech Priorities for Advanced Trade Discussions between the United States and Brazil

ITI welcomes continued progress in bilateral trade discussions between the United States and Brazil taking place under the auspices of the Agreement on Trade and Economic Cooperation (ATEC). The current bilateral environment provides a unique opportunity to advance discussions on commercially meaningful outcomes and rules-based commitments. Given Brazil's active domestic digital policy agenda, its acceptance of modern digital trade commitments would be particularly consequential and would have a significant positive impact on the broader international acceptance of such commitments, including in the context of ongoing negotiations at the WTO. Similarly, Brazilian commitment to apply state-of-the-art Good Regulatory Practices (GRPs) in respect of emerging technology policy initiatives would be meaningful in facilitating acceptance of broad stakeholder input, promoting reliance on global, industry-driven, voluntary consensus standards, and ensuring that measures are targeted, proportionate, and developed in a fit-to-purpose manner.

We believe that in order to successfully seize the opportunity that the enhanced ATEC provides, as well as to resolve specific trade issues faced by tech companies, these advanced trade discussions must incorporate the essential foundational principles of digital trade, in particular those that:

- *Strengthen transatlantic data flows and prohibit data localization;*
- *Prohibit tariffs and customs formalities on electronic transmissions and enshrine non-discriminatory treatment of digital products;*
- *Ensure protection of personal data, taking into account best international practices for privacy and interoperability;*
- *Strengthen and expand good regulatory practices for digital trade, including as a means to promote emerging technologies like AI and machine learning, in accordance with the OECD principles;*
- *Promote governmental cooperation and risk-based approaches to cybersecurity;*
- *Prohibit requirements to disclose source code, algorithms, and proprietary information relating to cryptography;*
- *Establish limitations to intermediary liability for users and suppliers of interactive computer services to support and safeguard digital supply chains;*
- *Facilitate access to and use of open public data in minable, machine-readable formats to spur adoption of AI and other emerging technologies; and*
- *Enshrine acceptance of electronic contracts, signatures and authentication.*

In this document, we provide a list of the priority measures and policy initiatives affecting digital trade and trade in ICT goods in the Brazilian market. We offer this list as a means of informing ongoing discussions on rules-based commitments, and, where possible, to encourage the bilateral resolution of specific trade concerns.

Data Localization

In March 2018, Brazil's national security cabinet (GSI) issued an executive order mandating local data storage for public data stored in the cloud. The executive order lists three different definitions of public data: I. General Information: data, treated or not, that may be used for the production or transmission of knowledge, contained in any means, support or format; II. Classified information: proprietary information, to which a secrecy level is attributed, according to specific procedures of classification established in the existing law; and III. Proprietary information: information submitted to restriction of public access due to its indispensability to the safety of the society or State. There

appears to be a requirement for data localization that applies to those specific types of data, though its application is unclear. ITI remains concerned that this could both disadvantage firms that wish to provide services to the Brazilian public sector but do not have the capacity to store data in Brazil, or it could create a de facto data localization requirement for cloud services in Brazil, spreading outside of just public cloud. ITI encourages Brazil to avoid any data localization measure that is not for a specific, discrete, and appropriate purpose.

Cybersecurity

In February 2020, Brazil's GSI (security cabinet) issued a decree instituting E-CIBER, the national cybersecurity strategy, which focuses on cybersecurity, cyber defense, critical infrastructure, and information security. In March 2020, GSI issued Normative Instruction 4, which lays out cybersecurity requirements for 5G networks, including security audits, registration requirements, and inspection mandates. At the same time, ANATEL launched a public consultation about minimum cybersecurity requirements in the country, including appropriate encryption methods and usage. ITI's main concern is that Brazilian policymakers may seek to develop a unique security standard or localization requirement that isolates Brazil and makes it more difficult for companies to do business there. As detailed in our comments[12] to the Brazilian government, ITI encourages Brazil to look at global best practices, international standards, and voluntary industry-led partnerships and standards as models for the development of its national framework and minimum cybersecurity requirements for telecommunications networks and equipment, including the adoption of internationally developed security technics.

Privacy Law Implementation and DPA Creation

In 2018, Brazil adopted a General Personal Data Protection Law (LGPD), applicable both to the private and public sectors, that ITI believes strikes an appropriate balance between the protection of the data subject's rights on the one hand, and the enabling of innovation and access to information on the other. ITI supports a privacy framework and practices that protect personal information that are non-discriminatory, interoperable, and account for principles and guidelines of relevant international bodies. As Brazil will now create regulations to implement the LGPD, as well as establish its data protection authority (DPA), ITI encourages Brazil to leverage global best practices in setting up its DPA as an independent body and a resource to companies of all sizes that use data in Brazil. As Brazil considers the potential delay in implementation of the implementation date of its privacy law, we encourage clarity and predictability for companies that will need to comply with the new rules.

ITA Accession

Brazil's foreign trade secretary has made several comments indicating that Brazil intends to join the WTO Information Technology Agreement (ITA), joining the 82 signatory countries that have agreed to fully eliminate tariffs on hundreds of ICT products. By reducing their end costs, the ITA leads to increased production and use of ICT goods, which spurs productivity and economic growth in signatory nations. ITI encourages Brazil to join the ITA and its expansion, enabling Brazil to tap into

---

[1] https://www.itic.org/policy/2019.10.22ITI-CommentstoGSI-CPCyberStrategy%5BENG%5D%5B1%5D.docx

[2] https://www.itic.org/policy/2020.05.15ITICommentstoCP13Anatel-MinimimCyberRequirementsTelecomNetworkfinal.pdf

global ICT supply chains and position itself as a leader in the region on forward-looking tech policy. According to a study by the Information Technology and Innovation Foundation (ITIF), such a step would spur GDP growth by $19.5bn or an additional 0.82% over ten years.[3] ITI encourages accession to the ITA, or a significant reduction in ICT tariffs at a minimum, as part of these trade discussions.

De Minimis Threshold

Brazil's de minimis threshold (the level below which no tax or duty is charged on imported items) of USD $50 remains applicable only to consumer to consumer transactions and does not apply for business to business or business to consumer transactions. Brazil also limits the de minimis to postal shipments, not applying to express delivery. This differentiated treatment of the threshold by transaction type, in addition to the low de minimis threshold, creates unnecessary barriers to trade by increasing transactional costs for businesses and restricting consumer choice and competition in the market. ITI encourages the removal of this barrier to trade by extending the de minimis threshold to both business to business and business to consumer transactions and by increasing the threshold, and by allowing express delivery shipments. We believe these modifications are compatible with existing Brazilian legislation, including Decree 1804/1980, and could be implemented by the Executive branch without need for Congressional approval.

Value Added Services

Brazil has contemplated measures to apply ill-fitting or cumbersome regulations to value added services, such as video on demand streaming or other OTTs. Recent consultations by both ANATEL and ANCINE question how to regulate these services under existing frameworks, without due consideration of specific market and service characteristics, as well as the technical feasibility of the requirements on these services. We encourage Brazil to take an approach rooted in good regulatory practices that considers the innovative nature of internet-based business models and the overall consumer welfare, thus incentivizing less prescriptive regulations across all services.

Digital Services Tax

A Brazilian legislative proposal seeks to implement a new tax, "CIDE-Digital." This tax would reportedly apply at a progressive rate of one to five percent (on the basis of global revenue) on revenue generated in connection three narrowly defined sets of digital services. The draft legislation shares characteristics with the French Digital Services Tax enacted in July 2019, many of which contravene long-standing international taxation principles and create significant compliance challenges for companies in the tech sector and beyond. ITI urges the Brazilian government to refrain from introducing any tax measure that is discriminatory in nature, and to recommit to reaching a multilateral solution to the tax challenges arising from the digitalization of the global economy.

International Testing and Certification

Generally, product safety testing must be performed at in-country labs, unless the necessary capability does not exist in Brazil. Industry finds in-country testing problematic, both logistically and from a cost perspective. If testing has already been completed at an laboratory accredited to internationally accepted standards, the requirement to undertake similar testing at an additional in-country (local) lab duplicates the testing itself and increases the number of samples required and testing costs, all the while delaying the placement of products on the Brazilian market. INMETRO is

---

[3] https://itif.org/publications/2019/03/25/assessing-how-brazil-would-benefit-joining-ita

a signatory to the Mutual Recognition Arrangement (MRA) of the International Laboratory Accreditation Cooperation (ILAC), which can facilitate acceptance of test results from participating labs in signatory countries. We would encourage INMETRO to utilize this MRA to consistently accept international test reports. ITI encourages the Brazilian government to implement the Inter-American Telecommunication Commission (CITEL) mutual recognition agreement with respect to the United States. Doing so would allow for recognition of testing done in the U.S., easing the time and cost of exporting to the Brazilian market. ANATEL's Resolution 323 of 2002 is particularly onerous in that it requires producers of telecommunications equipment to test virtually all of their products in country before they can be placed on the market, increasing price and delaying the time it takes for the products to be available to Brazilian consumers. By allowing international mutual recognition agreements, Brazil can avoid having multiple, duplicative testing requirements that delay products to market and increase costs for Brazilian consumers.

Good Regulatory Practices

Brazil took a significant step towards Good Regulatory Practice when the Brazilian Foreign Trade Council (CAMEX)'s published Resolution 90 in 2018, thereby establishing good practices for the preparation and review of regulatory measures affecting foreign trade. The resolution encourages Brazilian regulatory bodies to develop regulatory agendas, conduct regulatory impact analysis, evaluate regulatory alternatives, use international standards, conduct transparent public consultations of a minimum of 60 days for all regulations with international trade effects, ensure all regulations comply with Brazil's international trade commitments, notify regulations to the WTO via the inquiry point, use evidence-based decision making, coordinate with other relevant regulators to ensure coherence and compatibility with other regulations, and review and manage regulatory stock. Despite this development, however, recent consultations notified by ANATEL through the WTO TBT inquiry point included very short timeframes for response. We appreciate ANATEL extending the deadlines for comments on a case-by-case basis, but we encourage all agencies in Brazil to notify consultations with a minimum 60-day comment period. Agencies are also encouraged to consider the regulatory impact imposed by requirements and whether the benefits are commensurate with the impacts. For example, the recent operational procedures published for Resolution No. 715 contain a number of submission procedures and additional bureaucratic steps that increase burden to industry without providing additional assurance of conformity. We encourage ANATEL to consider the impacts of regulations in comparison to the benefits provided and to provide an explanation of these benefits in any proposed regulation.

National AI Strategy

Brazil is currently reviewing and restructuring its national AI strategy at the federal level, and several bills of law governing AI have been introduced in the Congress. ITI is concerned that some policymakers have taken positions on these initiatives that could isolate Brazil with unique standards, onerous certification or localization requirements, or heavy-handed regulations. ITI advocates the adoption of a flexible and diversified regulatory approach that encourages strong public-private collaboration and responsible development of AI. Further, to promote innovation, ITI encourages the facilitation of data sharing, advancement of structured and standardized AI R&D, and support for STEM-informed workforce development.

ITI Promoting Innovation Worldwide   🌐 itic.org