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TPP: Digital Trade Provisions

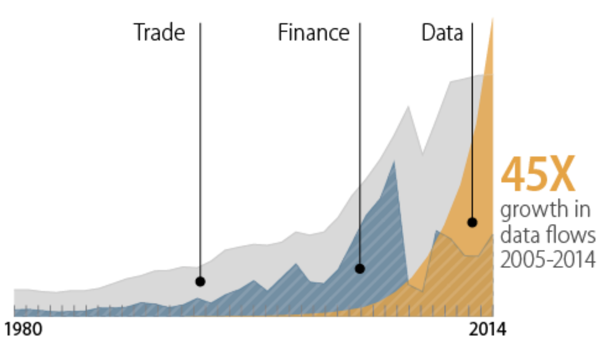
Background

On January 24, 2017, President Trump withdrew the United States from the Trans-Pacific Partnership (TPP). The TPP was a proposed free trade agreement (FTA) among 12 countries in the Asia-Pacific region, including the United States. The Obama Administration cast TPP as a comprehensive and high standard agreement with economic and strategic significance for the United States. Some U.S. stakeholders argue the TPP withdrawal coupled with ongoing FTA negotiations that do not involve the United States may negatively affect U.S. export competitiveness and leadership in establishing new trade disciplines. The remaining 11 parties may move forward to ratify the TPP without U.S. participation (TPP-11). The proposed TPP, as negotiated by the United States, includes new commitments to address barriers to digital trade (see text box).

Digital trade, a growing part of the U.S. and global economy, includes not only end-products such as movies or video games, but also is a means to facilitate economic activity, potentially enhancing productivity and overall competitiveness. Examples of digital trade include online shopping; transmission of information needed by manufacturers to manage global value chains; communication channels from email to voice over internet protocol (VoIP); and financial services used in e-commerce or electronic trading.

A U.S. International Trade Commission study estimated the U.S. digital economy was $711 billion of U.S. GDP in 2011. In 2014, the United States exported $400 billion in digitally-deliverable services and imported $241 billion, creating a surplus of $159 billion, and comprising over half of all U.S. services trade. Global cross-border data flows grew 45 times from 2005-2014, according to the McKinsey Global Institute.

Figure 1. Growth in Global Data Flows



Source: McKinsey Global Institute, *Digital Globalization: The New Era of Global Flows*, March 2016.

Congress noted the importance of digital trade and the Internet as a trading platform in setting U.S. trade negotiating objectives in the June 2015 Trade Promotion Authority (TPA) legislation (P.L. 114-26). TPP includes provisions addressing principal U.S. trade negotiating objectives to prohibit data localization requirements and protect cross-border data flows. Despite the U.S. withdrawal, TPP's digital trade provisions may continue to influence U.S. trade policy. Members of Congress and Trump Administration officials have expressed interest in drawing from the TPP commitments, particularly on digital trade, in future U.S. negotiations, including the NAFTA renegotiation.

Key Provisions

Overall, the agreement aims to promote digital trade, the free flow of information, and ensure an open internet. Provisions related to digital trade are found in chapters on electronic commerce, financial services, investment, telecommunications, intellectual property rights (IPR), and technical barriers to trade (TBT).

In general, technology companies, telecommunications firms, and industry groups continue to support the TPP digital trade provisions. Several stakeholders raise concerns over exceptions to the cross-border data-flows and localization provisions. Other stakeholders believe that the current provisions go too far and may limit a government's flexibility to adopt strict e-commerce privacy laws.

E-Commerce

Cross-border data flows. TPP would guarantee the cross-border transfer of information and would prohibit computing facility localization requirements for all sectors, except financial services and government procurement (see below). These provisions would protect a firm's ability to provide and use cloud services and function more efficiently, and would block localization requirements that could require firms to have in-country servers and data centers to store data. Specific exceptions are included for achieving legitimate public policy objectives to allow governments to regulate the transfer and storage of certain data, such as health records, provided such measures are not arbitrary or a disguised restriction on trade.

Regulators may view local data storage as a potentially necessary defense to maintain safety, security, or privacy. The tension between industry and cautious regulators represents differing priorities between companies seeking growth in new markets and innovation, as opposed to those responsible for establishing regulations and oversight.

While data localization requirements are not currently in place in TPP countries, observers note that Malaysia and Vietnam are considering imposing them, which TPP would prohibit, apart from the exceptions noted above. In addition, some stakeholders note concern about potential future TPP parties including Indonesia and South Korea, which have or are considering data localization requirements.

Customs Duties and Non-Discrimination. Similar to recent U.S. FTAs, TPP would prohibit customs duties on or discrimination against digital products.

E-signatures. TPP would require parties to identify electronic signatures as valid, facilitating trade.

Source Code. For the first time, TPP would prohibit requiring a provider to disclose source code for mass-market software or products, but specifically excludes critical infrastructure and patent filing applications.

Digital Innovations in TPP

- Prohibits cross-border data flows restrictions and data localization requirements, except for financial services and government procurement.
- Prohibits requirements for source code disclosure or transfer as a condition for market access, with exceptions.
- Requires parties to have online consumer protection and anti-spam laws, and a legal framework on privacy.
- Prohibits requiring technology transfer or access to proprietary information for products using cryptography.
- Clarifies IPR enforcement rules to provide criminal penalties for trade secret cybertheft.
- Encourages cooperation between parties on e-commerce to assist small and medium sized enterprises (SMEs), and on privacy and consumer protection.
- Promotes cooperation on cybersecurity.
- Safeguards cross-border electronic card payment services.
- Covers mobile service providers and promotes cooperation for international roaming charges.

Consumer Protection. For the first time, TPP would require governments to adopt or maintain online consumer protection laws against fraudulent and deceptive commercial activities and take anti-spam measures.

Privacy. For the first time, TPP would require parties to have a legal framework to protect personal information. TPP critics view the provisions as vague, without an explicit minimum standard for privacy protection. TPP supporters note that TPP includes a reference to take into account "guidelines of relevant international bodies" that would include the Asia-Pacific Economic Cooperation (APEC) Privacy Framework.

SME. TPP encourages, but would not require, cooperation to assist SMEs with e-commerce.

Cybersecurity. For the first time, the agreement would promote inter-governmental cooperation on cybersecurity, such as capacity building and information sharing.

Other Provisions

IPR. For the first time, TPP IPR enforcement obligations, including for copyright, explicitly cover infringement in the digital environment and would commit parties to establish criminal procedures and penalties for trade secret theft, including cyber theft.

Cryptography. TPP would prohibit requiring technology transfer or access to proprietary information for commercial products that use cryptography, but excludes products for government use or access to government-controlled network, such as financial networks and instruments.

Mobile. For the first time, the TPP would cover mobile service providers. TPP would also promote cooperation on charges for international roaming services.

Telecommunications. E-commerce and digital trade rely on transmission via telecommunications services. The TPP would only apply to public telecommunications services, with obligations to provide suppliers non-discriminatory access to public telecommunications services, networks, infrastructure, and government-controlled resources like spectrum. TPP would allow suppliers to choose their technology as long as it meets legitimate public policy requirements. TPP also would obligate parties to prevent anti-competitive behavior, establish independence of regulators from the regulated, and require regulatory transparency.

Financial Services Data Flows

The e-commerce provisions for this sector are addressed in the separate financial services chapter. Similar to the U.S.-South Korea FTA, the TPP would allow for cross-border data flows, but would not prohibit localization requirements. Financial services firms are concerned about the distinct treatment of their sector with respect to e-commerce because, like many other industries, they rely on cross-border data flows to ensure data security, create efficiencies and cost savings through economies of scale, and use cloud computing. The localization exclusion could affect companies in other industries that depend on transmitting financial data across borders, such as companies that offer customer financing. Localization regulations could increase costs, open additional cybersecurity risks, and may serve as a deterrent for firms seeking to enter new markets. Defenders of these practices claim they increase local control and data privacy.

Critics of the exclusion of financial services from the e-commerce chapter argue that the prudential exception in the financial services chapter provides regulators with sufficient safeguards and flexibility. On May 25, 2016, the U.S. Treasury Secretary announced a proposal to resolve the issue in future trade agreements, including the potential plurilateral Trade in Services Agreement (TiSA).

Issues for Congress

As Congress considers addressing digital trade provisions for free trade agreements, it may wish to consider a number of issues including:

- How would TPP have advanced U.S. digital trade negotiating objectives?
- Should the North America Free Trade Agreement (NAFTA) renegotiations reflect the digital trade provisions from the proposed TPP?
- Does the proposal from the U.S. Treasury sufficiently address congressional and industry concerns on financial services data localization for the ongoing NAFTA renegotiations and any future negotiations?

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