



Statement of BSA | The Software Alliance on Expansion of U.S. Trade in the Asia-Pacific Region

BSA | The Software Alliance (BSA),¹ the leading advocate for the global software industry, welcomes the opportunity to submit this statement on “Opportunities to Expand U.S. Trade Relationships in the Asia-Pacific Region”, in connection with the sub-committee’s October 11, 2017 hearing. BSA members engage in digital commerce of many types, including through the provision of cloud computing services, and through data analysis services that utilize the latest technological innovations such as artificial intelligence.

Digital trade plays an important and expanding role in US trade relationships with Asia-Pacific countries. It consistently generates trade surpluses for the United States. But digital trade is also susceptible to governmental interference with data flows, imposition of data localization requirements and technology transfer demands, among other challenges.

BSA recently put forth a modernized digital trade agenda.² We are pleased that the United States Trade Representative (USTR) has included many of these items in its negotiating objectives for the North America Free Trade Agreement (NAFTA). The same principles are important in expanding digital trade in the Asia-Pacific region.

The United States has additional tools at its disposal to ensure that digital trade can continue to grow. It participates in the Asia-Pacific Economic Cooperation (APEC) Cross-Border Privacy Rules (CBPR) program, a mechanism that is designed to allow companies to transfer personal data among the twenty-one member economies in the APEC region subject to stringent privacy protections. Congress should encourage the Administration to redouble its efforts to expand this valuable system more widely in the region. In addition, it should incorporate digital trade chapters in bilateral free trade agreements with Asia-Pacific countries.

¹ BSA | The Software Alliance (www.bsa.org) is the leading advocate for the global software industry before governments and in the international marketplace. Its members are among the world’s most innovative companies, creating software solutions that spark the economy and improve modern life.

BSA’s members include: Adobe, ANSYS, Apple, Autodesk, Bentley Systems, CA Technologies, CNC/Mastercam, DataStax, DocuSign, IBM, Intel, Intuit, Microsoft, Oracle, salesforce.com, SAS Institute, Siemens PLM Software, Splunk, Symantec, The MathWorks, Trend Micro, Trimble Solutions Corporation, and Workday.

² BSA’s digital trade agenda is available at <http://www.bsa.org/~media/Files/Policy/Trade/05222017BSANAFTAHandoutPress.PDF>

Scale of Asia-Pacific Digital Trade

U.S. trade in digital services is a significant and growing component of overall U.S. services trade, according to statistics from the U.S. Bureau of Economic Analysis. In 2015, the United States exported \$65.4 billion in digital services and imported \$40.8 billion, yielding a trade surplus of \$24.6 billion. Digitally-enabled services – a broader measurement that captures potentially ICT-enabled services across economic sectors – are even more substantial. Exports of such services totaled \$398.7 billion in 2015, while imports were \$237.1 billion, resulting in a surplus of \$161.6 billion. Digitally-enabled services constituted approximately half of total U.S. services trade that year.

The Asia-Pacific region is the second-largest market for U.S. digital services exports, and the largest market for U.S. imports of these services. Between 2006-2014, both U.S. exports and imports of digital services with this region expanded steadily. Exports have risen from over \$12 billion to more than \$18 billion during this period, while imports have increased from more than \$7 billion to \$15 billion.

Need for Digital Trade Legal Frameworks

BSA | The Software Alliance strongly supports the development of rule-based legal frameworks to enable this growth in digital trade. Such frameworks are essential to ensure the free movement of data across borders, and to discourage governments from imposing requirements that data be localized, such as by requiring that data centers be built within their territories as a condition for doing business there. Similarly, governments should not force companies to transfer their technology, or to disclose trade secrets, source code or algorithms in order to secure market access.

A sizeable number of governments in the Asia-Pacific region have imposed data transfer restrictions. Some of these sectoral restrictions bar data transfers entirely, while others allow transfers but only subject to onerous conditions. Localization requirements also are increasingly being imposed. “In almost all [APEC] economies, national security interests trump the necessity for cross-border data flows,” according to a 2017 study by the APEC Policy Support Unit. The study cites restrictions in Australia, Canada, China, Indonesia, Korea, Malaysia, Russia, Chinese Taipei, and Vietnam, among APEC members.

APEC Cross-Border Privacy Rules System

APEC has established an important system to facilitate cross-border data flows and enhance consumer privacy and interoperability across the region -- the Cross-Border Privacy Rules (CBPR). This system consists of a set of privacy principles and implementation guidelines. It was developed and is implemented through a process that brings together the governments and privacy enforcement authorities of participating economies with a range of other stakeholders, including businesses and civil society.

BSA has joined other industry associations across the Asia-Pacific region to urge member economies to join the CBPRs. The United States has been an early participant in the system, along with Canada, Mexico and, most recently, Japan and Korea. Singapore recently applied to join the program, and a number of other APEC economies – Chinese Taipei and the Philippines – have indicated that they are taking steps towards participation. Several others, including Hong Kong and Vietnam, are exploring joining as well.

The CBPR system requires participating companies to develop and implement data privacy policies consistent with the principles espoused in the APEC Privacy Framework.³ An accountability agent selected by a participating government in turn assesses whether a company is complying with the CBPR requirements. Any divergence that is found between a company's privacy commitments and its compliance with CPBR requirements is enforceable under the domestic privacy laws of participating economies.

An increasing number of companies participate in the CBPR program and intend to use the framework as a legal basis for transfer of personal data among participating economies. It thus can serve as one of the important cross-border data transfer mechanisms.⁴

Free Trade Agreements

Free trade agreements (FTAs) between the United States and Asia-Pacific countries also are an important tool in assuring that data, the lifeblood of the digital economy, may flow freely in the region. FTAs also can be critically important in protecting U.S. digital companies from requirements imposed by Asia-Pacific governments to transfer their technology, or to disclose trade secrets, source code or algorithms in order to secure market access.

The US-Korea FTA (KORUS) took a first step in this direction by calling for the parties to “endeavor to refrain from imposing or maintaining unnecessary barriers to electronic information flows across borders.” The Trans-Pacific Partnership (TPP) went further, imposing binding obligations with respect to data flows, localization and compelled source code disclosure, among other disciplines. If the eleven

³ The CBPR applies to companies that are controllers of personal data, i.e. that decide how such data is to be processed. APEC also has developed a parallel and similar regime for data processors, Privacy Recognition for Processors (PRP), designed to ensure that companies which process data effectively implement controllers' privacy requirements.

⁴ In the future, as the APEC CBPR framework expands geographically in the region and is utilized by additional companies, it holds promise as a unifying mechanism among the disparate national and regional mechanisms for data transfer. For example, the European Commission, responsible for administering the EU's comprehensive General Data Protection Regulation, and APEC have analyzed the similarities and differences between the two regimes. They are expected to begin further discussions on the possibility of a formal EU certification of the APEC CBPRs, which in turn could be a potentially significant step in eventual global inter-operability for data transfer.

governments other than the United States that signed TPP decide to proceed with its application, these important protections would protect and promote digital trade in the region.

The United States has drawn upon precedents including TPP in developing its proposed digital trade chapter in a modernized North American Free Trade Agreement (NAFTA). Agreement on a strong digital trade chapter among the United States, Canada and Mexico would send a clear message to other countries in the Asia-Pacific region of North America's commitment to digital trade. If the United States considers possible amendment of KORUS, a state-of-the-art digital trade chapter should be a priority. Similarly, the United States should pursue such chapters as it explores bilateral free trade agreements with other countries in the Asia-Pacific region.