



March 24 2022

## BSA SUBMISSION TO THE REPUBLIC OF KOREA ON ACCESSION TO THE CPTPP

### Overview

BSA | The Software Alliance (**BSA**)<sup>1</sup> seeks to provide comments to the Ministry of Trade, Industry and Energy (**MOTIE**) on Korea's potential accession to the Comprehensive and Progressive Agreement on Trans-Pacific Partnership (**CPTPP**). BSA understands that MOTIE is presently conducting consultations on this issue and would like to voice our support for Korea's accession. Our key messages for MOTIE's consideration are as follows:

Key Messages	
1.	Accepting the strong digital trade provisions in the CPTPP e-commerce chapter will generate opportunities and remove barriers for Korean businesses, thus facilitating economic activity and recovery.
2.	Joining the CPTPP is strongly aligned with Korea's ambition to take a leading role in establishing digital trade norms in the Asia-Pacific region.
3.	In negotiating accession to the CPTPP, Korea should consider various guiding objectives for 21 <sup>st</sup> century digital trade agreements, based on removing/minimizing trade barriers, supporting privacy and security, and fostering innovation.

### Introduction

BSA is the leading advocate for the global software industry before governments and in the international marketplace. BSA's members are at the forefront of the data-driven innovation that is fueling global economic growth and recovery, including through cutting-edge advancements in cloud computing, security solutions, artificial intelligence (**AI**) and machine learning, and the Internet of Things (**IoT**). BSA member companies provide software solutions to enterprise customers, and as

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<sup>1</sup> BSA's members include: Adobe, Alteryx, Altium, Amazon Web Services, Atlassian, Autodesk, Aveva, Bentley Systems, Box, Cisco, CNC/Mastercam, Dassault, DocuSign, Dropbox, IBM, Informatica, Intel, MathWorks, Microsoft, Nikon, Okta, Oracle, PTC, Rockwell, Salesforce, SAP, ServiceNow, Shopify Inc., Siemens Industry Software Inc., Splunk, Trend Micro, Trimble Solutions Corporation, Twilio, Unity Technologies, Inc., Workday, Zendesk, and Zoom Video Communications, Inc.

such they understand the critical importance of robust policies that facilitate digital trade and trusted data flows.

BSA applauds Korea's efforts as it works towards CPTPP accession. By joining the CPTPP and accepting the strong digital trade provisions in the e-commerce chapter, Korea will enhance its prospects of maintaining and sharpening its competitive edge in software development, cloud computing and AI. In this submission, BSA will lay out: 1) how the strong digital trade provisions in the CPTPP will benefit Korean businesses; 2) how joining the CPTPP is aligned with Korea's ambition to set digital trade norms in the Asia-Pacific region; and 3) guiding objectives that should be borne in mind when negotiating CPTPP accession.

## CPTPP digital trade provisions will benefit Korean businesses

Korea is one of the fastest digitalizing economies in the world.<sup>2</sup> For example, Korea's public cloud market is expected to double in size from USD1.5 billion in 2018 to USD3.1 billion in 2023, which will generate an estimated USD45 billion in national GDP and approximately 50,000 jobs.<sup>3</sup> While digital native businesses, such as e-commerce platforms and gaming companies, are drivers of digitalization, there is increasing traction from retail players and large conglomerates as they seek to support their digital arms and expand businesses internationally.<sup>4</sup> Indeed, from healthcare and manufacturing to agriculture and retail, digital technologies are becoming an integral part of how companies design, create, and export new products and services; enhance business processes and increase productivity; reach new customers; manage their supply-chain and engage in research and development.<sup>5</sup>

Unfortunately, trade barriers and digital protectionism are growing around the world at the very time that digital trade and connectivity are helping to sustain economic activity, employment, and social well-being. The World Trade Organization (**WTO**) has reported that some 80 countries have imposed export and other trade restrictions in reaction to the COVID-19 epidemic, in addition to a growing number of digital trade barriers that impact the movement of data and information across borders.

Of the various digital trade barriers, one of the most onerous is the requirement to store data within a country's borders, thus restricting the free movement of data. Data localization requirements create unnecessary costs, difficulties and uncertainties that hamper business and investments in the following ways, ultimately undermining Korea's economic competitiveness in the global digital economy. For instance, such restrictions:

- prevent local businesses from accessing new and innovative technologies, which may consequently preclude participation in global supply chains and access to customers in foreign markets;
- prevent local businesses from using data analytics to drive R&D in emerging technologies that are heavily reliant on large datasets, such as AI and machine learning;

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<sup>2</sup> Korea has topped the Bloomberg Innovation Index for seven of the last nine years. See: <https://www.bloomberg.com/news/articles/2021-02-03/south-korea-leads-world-in-innovation-u-s-drops-out-of-top-10?sref=d8oB8qmA>.

<sup>3</sup> BCG, "Ascent to the Cloud: How Six Key APAC Economies can Lift-Off", October 2019, [https://web-assets.bcg.com/img-src/Ascent\\_to\\_the\\_Cloud\\_Report\\_21Oct\\_tcm9-231826.pdf](https://web-assets.bcg.com/img-src/Ascent_to_the_Cloud_Report_21Oct_tcm9-231826.pdf) (BCG Report).

<sup>4</sup> BCG Report (2019).

<sup>5</sup> Global Data Alliance, "Jobs in every sector depends upon data flows", March 2020, <https://globaldataalliance.org/wp-content/uploads/2021/07/infographicda.pdf>.

- reduce Korea’s attractiveness as a destination for investment and R&D, as foreign investors will need to incur significant costs duplicating their processing and storage facilities locally; and
- result in potential conflict of laws as other countries may impose contradictory requirements regarding the movement of data across borders.

The CPTPP e-commerce chapter addresses these concerns by imposing binding rules among parties on movement of data:

- Article 14.11 (Cross-Border Transfer of Information by Electronic Means) requires all parties to the CPTPP to “allow the cross-border transfer of information by electronic means, including personal information, when this activity is for the conduct of the business of a covered person”.
- Article 14.13 (Location of Computing Facilities) prohibits parties to the CPTPP from imposing requirements “to use or locate computing facilities in that Party’s territory as a condition for conducting business in that territory”.

**BSA strongly recommends the Government of Korea to fully accede to the robust digital trade disciplines in the CPTPP. In so doing, the Government will preserve the ability for Korean businesses to seamlessly transfer data across borders, thus avoiding the problems enumerated above. This is critical for facilitating the success of Korean businesses in the rapidly expanding global digital economy.**

### Alignment with Korea’s digital trade ambitions

BSA notes from MOTIE’s 2022 Workplan that one of its key priorities is to position Korea as a leading voice in the global digital trade landscape and to establish digital trade norms in the Asia-Pacific region.<sup>6</sup> In this regard, we also note that Korea has been active in negotiating Digital Economy Agreements (DEAs) with like-minded partners, having substantially concluded the Korea-Singapore Digital Partnership Agreement (KSDPA) negotiations and making a formal request to accede to the Digital Economy Partnership Agreement (DEPA) in late 2021.

BSA applauds Korea’s efforts to engage in discussions on digital trade rules. Forward-looking digital trade rules are critical to job creation, economic competitiveness, and software-enabled innovations such as cloud computing, AI, smart devices, and other emerging technologies. They also reflect the transformative role of technology and data in growing economies and raising competitiveness across a wide range of industries.

While the CPTPP e-commerce chapter, unlike the DEPA and KSDPA, does not contain articles on emerging digital trade issues (e.g., e-payments, AI, and digital identities), its provisions have served as the foundation for these DEAs. Many articles in the CPTPP, including critical ones on cross-border transfer of data and location of computing facilities, have been replicated in the DEPA, as well as other agreements (e.g., the Singapore-Australia Digital Economy Agreement and the Digital Trade Chapter of the US-Mexico-Canada Agreement). As such, the CPTPP continues to represent the “gold standard” of digital trade rulemaking.

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<sup>6</sup> 2022 MOTIE Work Plan, December 2021, [https://www.motie.go.kr/common/download.do?fid=bbs&bbs\\_cd\\_n=81&bbs\\_seq\\_n=165095&file\\_seq\\_n=3](https://www.motie.go.kr/common/download.do?fid=bbs&bbs_cd_n=81&bbs_seq_n=165095&file_seq_n=3).

Accession to the CPTPP will therefore send a strong signal to the international community that Korea is both able and willing to meet the high standards in the CPTPP e-commerce chapter. This will lend momentum to Korea's efforts to negotiate DEAs with bigger economic zones, such as the European Union (EU), Association of Southeast Asian Nations (ASEAN), and the Indo-Pacific region.<sup>7</sup>

## Guiding objectives for accession negotiations

When negotiating digital and data-related provisions during its accession to the CPTPP, BSA recommends that Korea consider the following guiding objectives for 21<sup>st</sup> century digital trade agreements:

### *Removing/Minimizing Trade Barriers*

- *No Data Localization Requirements and Cross-Border Data Transfer Restrictions.* Governments should not impose data localization requirements or restrict cross-border data transfers that result in a market access barrier and should promote interoperable frameworks to facilitate data transfers.
  - There is a rising concern from the industry that Korea's Cloud Security Assurance Program (**CSAP**), which imposes certification requirements on cloud services providers (**CSPs**) that provide cloud services to public institutions, including the requirement to localize data and servers in Korea, may be expanded to cover some private sector industries as well.<sup>8</sup>
  - While CPTPP e-commerce chapter does not cover government procurement, such data localization measures, even if limited to the public sector, runs counter to the spirit of the CPTPP e-commerce chapter and the DEAs it inspired. It is also important to note that further expansion of the CSAP to the private sector may conflict with CPTPP Articles 14.11 and 14.13 on data transfers and data localization respectively.
- *No Customs Requirements on Electronic Transmissions.* Governments should not impose customs requirements on software or data transmitted electronically.
- *International Standards:* Governments should support voluntary, internationally recognized standards, and should refrain from imposing conflicting national standards on market participants.
- *No Forced Technology Transfer.* Governments should not require or pressure companies to transfer or disclose their technology — such as source code or trade secrets, including algorithms — as a condition for market access.
- *State-Owned Enterprises.* Governments should not favor state-owned enterprises through discriminatory regulation or subsidies.

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<sup>7</sup> In this regard, BSA understands from the 2022 Workplan that there are ongoing discussions with the EU on the Korea-EU Digital Partnership Agreement, ASEAN on a Korea-ASEAN Digital Agreement, and the US on a digital trade framework for the Indo-Pacific region.

<sup>8</sup> For example, in July 2020, the Ministry of Health and Welfare and the Health and Medical Information announced that they will require CSAP-certified CSPs in their new Electronic Medical Record (**EMR**) certification criteria for the healthcare industry.

- *Investment and Export Restrictions.* Restrictions on the investment in, and exports of, digital technologies should be focused on safeguarding core national security objectives without undermining commercially oriented R&D or international trade.
- *Procurement.* Procurement rules should reflect the 21st century needs of governments, allowing them to use state-of-the-art technologies, including through access to domestic and foreign cloud computing services, and government agencies should use only legally acquired software.
- *Choice.* Organizations should be free to use the technology of their choice and not be required to use local technology.

### Supporting Privacy and Security

- *Support for Privacy.* Governments should adopt legal frameworks that protect personal information without allowing for unnecessary or disguised restrictions on trade.
- *Protecting Security Through Encryption.* Governments should not undermine encryption in commercial products, and should not impose restrictions on security technologies used to safeguard against intrusions.
- *Protecting the Information Technology Supply Chain.* Governments and industry should increase their readiness to mitigate cyber and supply chain security threats, including through cyber and supply chain risk management and vulnerability disclosure processes that are based on internationally recognized standards.
- *Fair and Transparent Requests for Access to Data.* Governments should ensure that law enforcement requests to access information are procedurally fair and transparent with appropriate avenues for appeal, and include mechanisms for resolving differing legal requirements between jurisdictions.

### Fostering Innovation

- *Machine Learning and Data Analytics.* Governments should ensure that commercial data analytics in the machine learning context is permitted.
- *Open Government Data.* Governments should commit to making non-sensitive government-generated data freely available to the public, on a non-discriminatory basis, and in machine-readable formats.
- *Limitations on Liability.* National laws should include appropriate limitations on liability for technology providers for legal claims arising from conduct by third parties.
- *Copyrights.* Governments should ensure that copyright rules are aligned with international standards, including appropriate exceptions and limitations, such as safe harbors for online service providers, that expeditiously remove infringing content upon receiving notification from a rightsholder.
- *Patents and Trade Secrets.* Governments should provide for nondiscriminatory software patent protection, and should protect trade secrets under civil and criminal law.

- Research and Development. Government should support R&D in emerging technologies such as AI on a transparent and non-discriminatory basis, including through funding for basic research and support for public-private partnerships.
- Technology in Government. Governments should promote the use of innovative technology in public sector operations.
- Electronic Signatures. National laws should recognize electronic signatures in commercial transactions, including “smart” contracts.

## Conclusion

We hope that our comments will assist in Korea’s deliberations on CPTPP accession. Please do not hesitate to contact me if you have any questions regarding this submission or if I can be of further assistance.

Sincerely,



Tham Shen Hong

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