

**Testimony of Keith Gottfried
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**On behalf of the
Business Software Alliance**

**"Implementation of U.S. Bilateral Free Trade Agreements with Chile and
Singapore"**

**Before the
Subcommittee on Trade, Committee on Ways and Means
U.S. House of Representatives**

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Mr. Chairman, Mr. Levin and the Members of the Committee:

Thank you for the opportunity to appear before you today. My name is Keith Gottfried, Senior Vice President and General Counsel of the Borland Software Corporation. I am pleased to testify today on behalf of Borland and the Business Software Alliance¹ ("BSA"), an association of leading developers of software, hardware and e-commerce technologies worldwide.

Let me begin by thanking the members of this Subcommittee for holding this important hearing about the significance of fully implementing the Singapore and Chile Free Trade Agreements (FTA). Borland and BSA as well as each of its member companies commend you for recognizing the importance of promoting free trade among our trading partners.

As one of the leading contributors to the U.S. balance of trade, U.S. information technology (IT) and software makers have contributed a trade surplus of \$24.3 billion in 2002. As a leading engine of global economic growth, the industry contributed a trillion

¹ The Business Software Alliance (www.bsa.org) is the foremost organization dedicated to promoting a safe and legal digital world. The BSA is the voice of the world's software and Internet industry before governments and with consumers in the international marketplace. Its members represent the fastest growing industry in the world. BSA educates computer users on software copyrights and cyber security; advocates public policy that fosters innovation and expands trade opportunities; and fights software piracy. BSA members include Adobe, Apple, Autodesk, Avid, Bentley Systems, Borland, Cisco Systems, CNC Software/Mastercam, Entrust, HP, IBM, Intel, Intuit, Internet Security Systems, Macromedia, Microsoft, Network Associates, Novell, PeopleSoft, SeeBeyond Technology, Sybase, and Symantec.

dollars to the global economy in 2002. In the U.S. alone, the IT industry contributed \$400 billion to the U.S. economy, creating 2.6 million jobs and generating \$342 billion in tax revenues in 2002.

Exports account for over 50 percent of revenues for most of the leading commercial software makers in the U.S., including Borland and the majority of BSA members. If we are to continue the positive contributions of this industry to the U.S. economy, it is critical that free trade agreements (FTAs) establish the highest standards of intellectual property protection. It is also critical that FTAs provide an open trading environment that promotes barrier free e-commerce and growth of the information technology services sector.

As the landscape of trade policy continues to evolve, a relatively new issue has emerged on the international scene that could have an impact on American software exports. A number of countries, especially in Europe, are imposing levies (or surcharges) on hardware and software products, which by some industry estimates could cost up to one billion dollars per year, hurting both exports and the profitability of the American technology industry. This issue should also be part of our nation's trade agenda.

Mr. Chairman, I am pleased to express the unequivocal support of Borland and BSA and its member companies for the Singapore and Chile Free Trade Agreements.

BSA is also a member of the High Tech Trade Coalition, which also strongly support the adoption and implementation of the FTAs. The U.S. High-Tech Trade Coalition is a group of leading high-tech trade associations representing America's technology companies. The high-tech sector is the largest merchandise exporter in the United States and is the U.S. industry with the most cumulative investments abroad.²

² High Tech Trade Coalition Include: AeA- Association For Competitive Technology; Business Software Alliance; Computer & Communications Industry Association - Computer Systems Policy Project; Computing Technology Industry Association - Electronic Industries Alliance; Information Technology Association Of America - Information Technology Industry Council; National Electrical Manufacturers Association - Semiconductor Industry Association; Semiconductor Equipment & Materials International - Software & Information Industry Association; Telecommunications Industry Association.

The Singapore and Chile FTAs significantly advance the establishment of strong intellectual property protection and barrier free e-commerce in Singapore and Chile, and we commend the Administration and Congress for these achievements. Without the leadership provided by Ambassador Zoellick and his team and Congress's thoughtful guidance, these achievements would not have been possible.

The importance of the Congressional approval of the Trade Promotion Authority (TPA) to the American high tech industry cannot be underestimated. The TPA legislation set the standard of strong IP protection and trade liberalization among our trading partners in all trade contexts including FTAs and the World Trade Organization (WTO).

With the successful conclusion of these FTAs, and continued progress within the WTO Doha Round of negotiations, including important talks on e-commerce and trade in services, we feel confident that the U.S. will achieve its objectives in promoting barrier free e-commerce and trade liberalization among our trading partners.

Intellectual Property (IP) Provisions in Singapore and Chile FTA:

For the software industry, strong intellectual property protection is essential in fostering continued innovation and investment as copyright infringements and software piracy cost the industry \$13 billion in lost revenues in 2002. In Singapore and Chile, the IT industry has contributed significantly to their economic growth -- \$1.2 billion in Singapore and \$340 million in Chile in 2002. However, both countries continue to have high piracy rates - 48% in Singapore and 51 percent in Chile, costing the industry \$31.9 million in Singapore and \$44.9 million in Chile in lost revenues in 2002.

To promote strong IP protection in a digital world, it is essential that our trading partners establish the level of copyright protection that complies with WTO Agreement on the Trade Related Aspects of Intellectual Property Rights (TRIPS) and the World Intellectual

Property Organization (WIPO) Copyright Treaty (WCT). It is also essential that our trading partners fully comply with and enforce these obligations.

The mutual obligations under the U.S. – Singapore FTA mark some of the highest standards of intellectual property rights protection and enforcement yet achieved in a bilateral or multilateral agreement. The U.S.-Chile FTA also makes significant progress in achieving improved intellectual property protection and enforcement.

Both agreements recognize the importance of strong intellectual property rights protections in a digital trade environment by building on the obligations in the TRIPS Agreement, and ensuring that works made available in digital form receive commensurate protection by incorporating the obligations set out in the WIPO Copyright Treaty.

Some of the highlights in both agreements include:

- The clear application of the reproduction right of a copyright owner to permanent as well as temporary copies, including temporary storage in electronic form. This treatment is critical in a networked world where copyrighted materials can be fully exploited without a user ever making a permanent copy. The Chile and the Singapore Agreements contain slightly different obligations. While the Singapore Agreement establishes the much better unqualified protection for temporary copies, the Chile Agreement contains certain limitations. In the future, the United States should in all cases follow the Singapore model.
- Provisions to promote strong intellectual property rights protection and foster electronic commerce by maintaining the balance reflected in the U.S. Digital Millennium Copyright Act. Copyright law is clarified to permit the exploitation of works and effective enforcement of rights in the online environment, while

remedies against Internet service providers are limited for infringements they do not control, initiate or direct.

- Requirements to establish prohibitions against the circumvention of effective technological protection measures employed by copyright owners to protect their works against unauthorized access or use, coupled with the ability to fashion appropriate limitations on such prohibitions, again consistent with those set out in the Digital Millennium Copyright Act.
- Recognition that robust substantive standards for the protection of intellectual property, to be meaningful, must be coupled with obligations providing for the effective enforcement of rights, in both civil and criminal contexts. In this regard, key provisions of the agreements provide for the establishment of statutory damages at levels appropriate to deter further infringement, civil ex-parte measures to preserve evidence of infringement, strong criminal penalties against the most pervasive form of software piracy – corporate and enterprise end user piracy; and strong border measures to combat cross-border trade in infringing goods.
- Obligating governments to lead by example by using only legitimate and licensed software.

Trade in Information Technology (IT) Services

During the past decade, a vast array of new e-commerce and information technology services have been developed including data storage and management, web hosting, and software implementation services. Given the increasing trend for technology users to purchase information technology solutions as a combination of goods and services, full liberalization in this area is more important than ever.

It is critical that our trading partners provide full market access and national treatment in information technology services including those that are delivered electronically. It is also important that no barriers are created for the new and evolving information technology services.

In both the Singapore and Chile agreements, parties agreed to provide full market access and national treatment on services. Both agreements adopted a negative list approach, which means that new services will be covered under the agreement unless specific reservations were made in the agreement.

We commend this approach and the achievement in both agreements where liberalization of information technology services was achieved without any commercially significant reservations, leading to the promotion of barrier free trade in services with our trading partners.

E-Commerce in Singapore and Chile FTA

With over 500 million people using the Internet worldwide, the promotion of barrier free cross border e-commerce is critical in encouraging continued e-commerce growth and development. In fact, the trade treatment of software delivered electronically is one of the most important issues facing the software industry and it is essential that software delivered electronically receive the same treatment under the trade laws as software traded on a physical medium. The e-commerce provisions in the Singapore and Chile FTAs should be the model for what the United States pursues in all future trade agreements.

We are quickly moving to a world where online distribution is the predominant way software is acquired and used. According to our CEOs, by 2005, 66 percent of all software is expected to be distributed online. This will have enormous efficiencies as the

newest, most up-to-date software is delivered across borders at a lower cost and more quickly than when delivered in a physical form, to the benefit of both customers and software developers.

The E-commerce chapters in both the Singapore and Chile FTAs recognize, for the first time, the concept of "digital products" in terms of trade. The chapters also establish requirements that further promote barrier free e-commerce, essential in promoting growth and development of the IT industry.

- In both agreements, the trading partners agreed not to impose customs duties on digital products. This provision is consistent with the WTO Moratorium on Customs Duties on Electronic Transmissions. The inclusion of this provision is critical in further promoting the growth of cross border e-commerce.
- Both agreements also introduce the concept of "digital products" as the means to ensure broad national treatment and MFN nondiscriminatory treatment for products acquired on-line. This is critical as it recognizes, for the first time, the evolution and development of digital products during the last twenty years and addresses the need for predictability in how digital products are treated by trade law.
- With respect to the physical delivery of digital products, in both agreements, the parties agreed to apply customs duties on the basis of the value of the carrier medium. This provision is essential as valuation on content results in highly subjective assessments of projected revenues.
- The parties also agreed to cooperate in numerous policy areas related to e-commerce, further advancing the work on e-commerce with our trading partners.

Information Technology: Tariff Measures

The Uruguay Round agreements on tariff reduction, and the subsequent Information Technology Agreement within the WTO, have made significant contributions by addressing the issue of barriers to trade created by high tariffs. Tariffs on information technology products are still very high in many countries, creating a substantial impediment to trade.

In order to foster a barrier free trade environment, it is critical that our trading partners sign and implement the Information Technology Agreement (ITA) or its equivalent. It is essential that our trading partners eliminate or phase out existing tariffs applied to information technology products since tariff acts as a counterproductive burden that raises the cost of the very technology needed to be competitive in the digital economy.

In both FTAs, Singapore and Chile have agreed to liberalize tariff barriers. Singapore is already a signatory to ITA. Chile, who is not a signatory to the ITA, has agreed to eliminate tariffs on high-technology products within the next 4 years. The tariff reduction measure in the Chile agreement also sets an important precedent for the Free Trade Area of the Americas (FTAA), significantly increasing the high tech industry's ability to export its products to Brazil, one of the largest markets for technology products in Latin America.

In conclusion, the U.S. free trade agreements with Singapore and Chile sets new benchmarks in progress toward the promotion of strong intellectual property rights protection, full liberalization of trade in information technology services and barrier free e-commerce as well as tariff elimination among our trading partners. In these agreements, new baseline have been set that should lead to significant market opportunities for the US IT and software industries in the years ahead. We commend the achievements made in both agreements and we strongly support their passage in Congress. On behalf of Borland and the members of BSA, I would like to thank the Committee for the opportunity to testify here today.