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Digital Trade Policy: TPP as Minimum Standard or More?

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Outline



I. Introduction: Digital Globalization

II. TPP at a Glance

III. TPP Chapter 14: E-Commerce

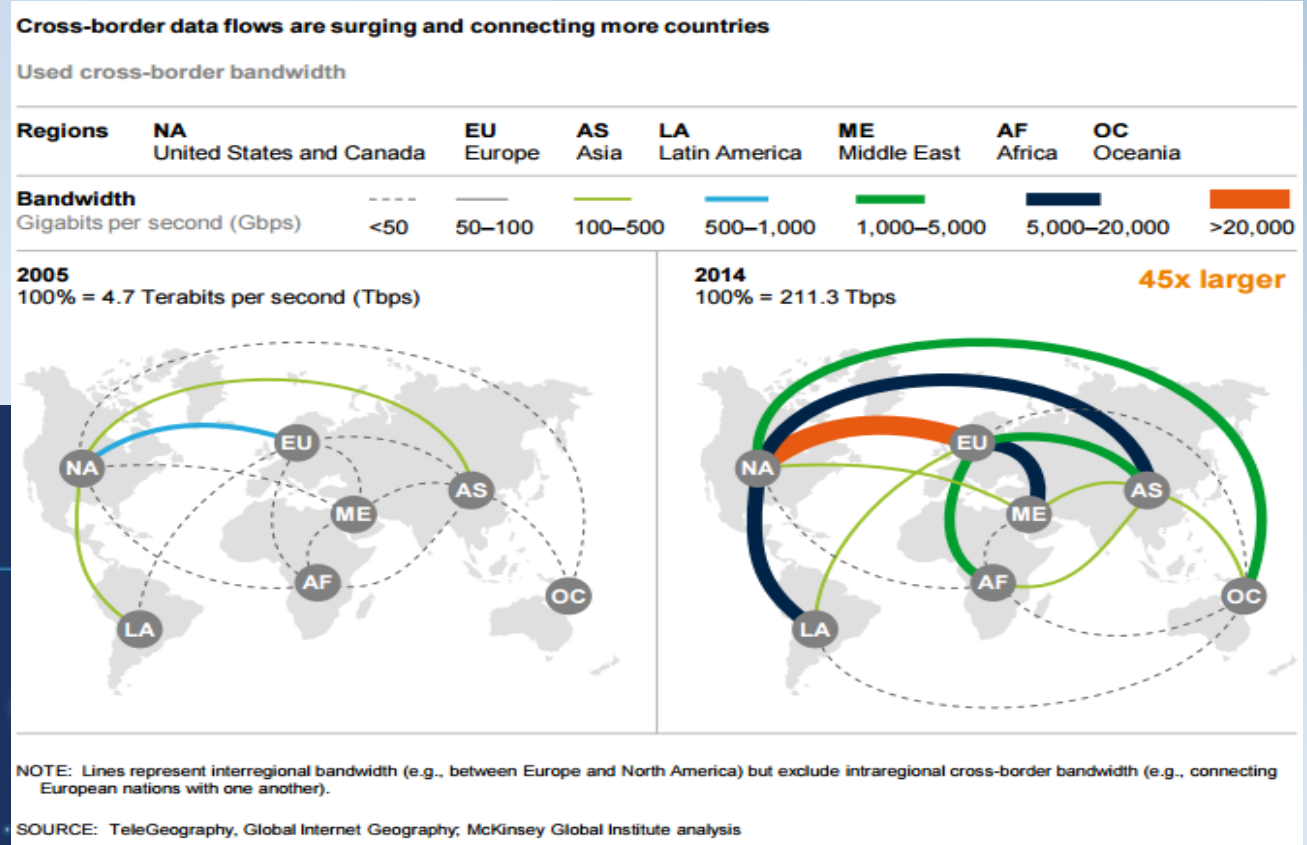
- Cross-border transfer of information by electronic means

- Prohibition of Data Localization

IV. Conclusion: 5 Messages

I. Introduction: Digital Globalization

Cross-border data flows have been drastically growing.



The new era of digital globalization

Global flows of trade and finance are flattening, while data flows are soaring



Source: Mckinsey Global Institute, *Digital Globalization: The New Era of Global Flows* (March 2016)

I. Introduction: Digital Globalization

Merit

- In the era of IoT/big data, the free flow of information is a key enabler for innovation and economic growth all over the world. Accordingly, it is quite important to maintain the free flow of information on the basis of the fundamental value of the Internet.

Demerit

- On the other hand, it is undeniable that the free flow of information also causes the proliferation of privacy risks and cyber threats (in worst case scenario, these risks and threats cause physical impacts beyond cyberspace).

Solution

- In response to the situation, appropriate measures to protect privacy and personal information as well as for cybersecurity need to be taken, while maintaining the free flow of information and respecting a multi-stakeholder approach.

Global digital trade rules & policies for the solution are hoped for.

II. TPP at a Glance



➤ Signed by **12 countries** on February 2016
[Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States and Vietnam]

- **Not yet come into force** (in peril: the result of the U.S. Presidential Election...)
【Conditions for Entry into Force】 (Art.30.5 of Chapter 30)
1. All 12 countries have notified of the completion of their applicable legal procedures within 2 years from the signature date (i.e., February 2018)
 2. If not...
 - (a) At least 6 countries have notified of the completion of their applicable legal procedures; AND
 - (b) Account for at least 85% of the combined GDP of the 12 countries in 2013

☆ **Ratification by both the U.S. (GDP: 60%) and Japan (GDP: 18%) is prerequisite (and that's why...)**

II. TPP at a Glance



Chap. 1 Initial Provisions & General Definitions	Chap. 2 National treatment & Market Access for Goods
Chap. 3 Rules of Origin & Origin Procedures	Chap. 4 Textile & Apparel Goods
Chap. 5 Customs Administration & Trade Facilitation	Chap. 6 Trade Remedies
Chap. 7 Sanitary & Phytosanitary Measures	Chap. 8 Technical Barriers to Trade
Chap. 9 Investment	Chap. 10 Cross-Border Trade in Services
Chap. 11 Financial Services	Chap. 12 Temporary Entry for Business Persons
Chap. 13 Telecommunications	Chap. 14 Electronic Commerce
Chap. 15 Government Procurement	Chap. 16 Competition Policy
Chap. 17 State-Owned Enterprises & Designated Monopolies	Chap. 18 Intellectual Property
Chap. 19 Labour	Chap. 20 Environment
Chap. 21 Cooperation & Capacity Building	Chap. 22 Competitiveness & Business Facilitation
Chap. 23 Development	Chap. 24 Small & Medium-Sized Enterprises
Chap. 25 Regulatory Coherence	Chap. 26 Transparency & Anti-Corruption
Chap. 27 Administrative & Institutional Provisions	Chap. 28 Dispute Settlement
Chap. 29 Exceptions & General Provisions	Chap. 30 Final Provisions

III. TPP Chapter 14: E-Commerce



➤ Key Provisions:

Art. 14.3: Prohibition from imposing custom duties on electronic transmissions

Art. 14.4: Non-discriminatory treatment of digital products

Art. 14.6: Legal validity of electronic authentication and electronic signatures

Art. 14.7: Online consumer protection

Art. 14.8: Personal information protection*

Art. 14.11: Cross-border transfer of information by electronic means*

Art. 14.13: Prohibition of data localization*

Art. 14.14: Unsolicited commercial electronic messages

Art. 14.16: Cooperation on cybersecurity matters

Art. 14.17: Ban on source-code disclosure requirements

III. TPP Chapter 14: E-Commerce



➤ Art. 14.11: Cross-Border Transfer of Information by Electronic Means

2. Each Party shall 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.

3. Nothing in this Article shall prevent a Party from adopting or maintaining measures inconsistent with paragraph 2 to achieve a legitimate public policy objective, provided that the measure:
 - (a) is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade; and
 - (b) does not impose restrictions on transfers of information greater than are required to achieve the objective.

III. TPP Chapter 14: E-Commerce



➤ Art. 14.11: Cross-Border Transfer of Information by Electronic Means 【Analysis】

[Point 1] Cross-border transfer of information: Personal information included

● TPP Art. 14.8 : Personal information protection, but just an endeavour clause

5. Recognising that the Parties may take different legal approaches to protecting personal information, each Party should encourage the development of mechanisms to promote compatibility between these different regimes. . . . To this end, the Parties shall endeavour to exchange information on any such mechanisms applied in their jurisdictions and explore ways to extend these or other suitable arrangements to promote compatibility between them.

⇒ In principle, each Party shall allow the cross-border transfer of personal information by electronic means although each party may take different legal approaches to protecting personal information. If a Party wants to deny the cross-border transfer of personal information (e.g., on the basis of an “adequacy decision” scheme adopted by the EU, Japan, and others), then the Party must satisfy requirements for public policy objective exception under Art.14.11 (3).

III. TPP Chapter 14: E-Commerce



➤ Art. 14.11: Cross-Border Transfer of Information by Electronic Means

【Analysis】

[Point 2] Exception Clause: What is “a legitimate public policy objective”?

⇒ Neither such wording in WTO Agreements nor WTO jurisprudence on the wording; leaves broad room for different interpretation on what kind of public policy objective is legitimate.

[Point 3] Exception Clause: Similar to WTO’s Agreement on Technical Barriers to Trade (TBT Agreement)

● TBT Art. 2.2

••• For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. •••

⇒ The relevant jurisprudence of WTO Dispute Settlement: **Relational & Comparative analysis (in order)**

(1st Step) Relational analysis: a panel should begin by considering factors that include: (i) the degree of contribution made by the measure to the legitimate objective at issue; (ii) the trade-restrictiveness of the measure; and (iii) the nature of the risks at issue and the gravity of consequences that would arise from non-fulfilment of the objective (s) pursued by the Member through the measure.

III. TPP Chapter 14: E-Commerce



➤ Art. 14.11: Cross-Border Transfer of Information by Electronic Means

【Analysis】

[Point 3] Exception Clause: Similar to WTO Agreement on Technical Barriers to Trade (TBT Agreement)

(2nd Step) Comparative analysis: In addition to the relational analysis, **in *most cases***, it may be relevant to consider (i) whether the proposed alternative measure is less trade-restrictive; (ii) whether it would make an equivalent contribution to the relevant legitimate objective, (taking account of the risks non-fulfilment would create); and (iii) whether it is reasonably available.

[Point 4] Exception Clause: The so-called “chapeau” is also provided

[GATS Art. 14]

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures • • •

III. TPP Chapter 14: E-Commerce



➤ Art. 14.11: Cross-Border Transfer of Information by Electronic Means

【Analysis】

[Point 4] Exception Clause: The so-called “chapeau” is also provided

⇒ In a dispute *Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (DS285), the panel said that interpretative principles accumulated under the chapeau of Art. 20 of General Agreement on Tariffs and Trade (GATT) would also be applicable in relation to GATS Art. 14. In addition, the panel stated “the absence of consistency in this regard may lead to a conclusion that the measures in question are applied in a manner that constitutes ‘arbitrary and unjustifiable discrimination between countries where like conditions prevail’ and/or ‘disguised restriction on trade’”.

☆”“The absence of consistency” could also be a key factor in determining whether a certain measure is applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade under TPP Art.14.11(3)(a) .

III. TPP Chapter 14: E-Commerce



➤ Art. 14.13: Prohibition of Data Localization

2. No Party shall require a covered person to use or locate computing facilities in that Party's territory as a condition for conducting business in that territory.
3. Nothing in this Article shall prevent a Party from adopting or maintaining measures inconsistent with paragraph 2 to achieve a legitimate public policy objective, provided that the measure:
 - (a) is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade; and
 - (b) does not impose restrictions on the use or location of computing facilities greater than are required to achieve the objective.

【Analysis】

1. Same structure as Art. 14.11 regarding Cross-Border Transfer of Information by Electronic Means;
Same analyses could be applied?

FYI: ITI's Data Localization Snapshot (Current as of September 15th, 2016) :

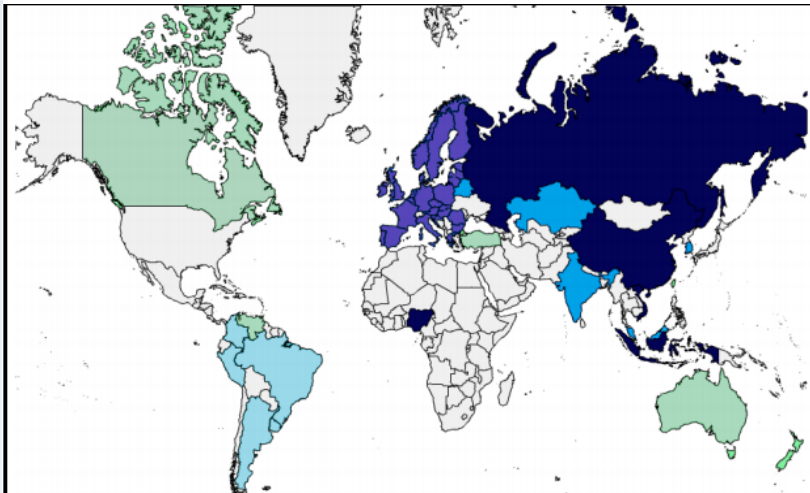
<https://www.itic.org/public-policy/SnapshotofDataLocalizationMeasures9-15-2016.pdf>

III. TPP Chapter 14: E-Commerce

➤ Art. 14.13: Prohibition of Data Localization 【Analysis】

※Source: Albright Stonebridge Group, *Data Localization: A Challenge to Global Commerce and the Free Flow Of Information* (September 2015)

2. Data localization as a tool to protect personal data: Again, could an “adequacy decision” scheme be justified by the public policy objective exception under Art. 14.13(3)?



COLOR	STRENGTH OF MEASURES	COUNTRIES
Dark Blue	Strong: Explicit requirements that data must be stored on servers within the country.	Brunei, China, Indonesia, Nigeria, Russia, Vietnam
Purple	De Facto: Laws that create such large barriers to the transfer of data across borders that they effectively act as data localization requirements.	European Union
Light Blue	Partial: Wide range of measures, including regulations applying only to certain domain names and regulations requiring the consent of an individual before data about them is transferred internationally.	Belarus, India, Kazakhstan, Malaysia, South Korea
Light Green	Mild: Restrictions on international data transfers under certain conditions.	Argentina, Brazil, Colombia, Peru, Uruguay
Light Green	Sector-specific: Tailored to specific sectors, including healthcare, telecom, finance, and national security.	Australia, Canada, New Zealand, Taiwan, Turkey, Venezuela
White	None: No known data localization laws.	Remaining Countries

IV. Conclusion: 5 Messages



- Although the future of the TPP is in peril, TPP Chapter 14 **should be a minimum standard for future EPAs/FTAs** all over the world.
- The fundamental value of the Internet: maintaining the free flow of information globally is indispensable and it **should be explicitly provided in international trade agreements**.
- Public policy objective exception, still needs to be scrutinized: the **“public policy objective”** should be discussed in the field of Internet governance.
- **Unjustifiable data localization should be prohibited**, while respecting the appropriate, non-excessive protection of privacy and personal information.
- **Harmonization** between traditional international trade negotiation among governments and Internet governance discussion among multi-stakeholders is necessary.

References



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Thank You.

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