Cross-Border Trade

Tech, Internet Groups Keep Up Fight
For Trade Pact as Election Casts Shadow

BY ALEXIS KRAMER

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mid political debate over the Trans-Pacific Partnership trade pact is an underlying dispute over whether the accord is essential for digital trade growth.

There is also continuing uncertainty over the fate of the deal itself. It has been approved by trade ministers from each of the 12 Pacific Rim countries, which represent 40 percent of the world GDP, but it hasn’t yet been ratified.

The technology sector, including companies such as IBM Corp. and eBay Inc., believes the TPP’s electronic commerce chapter in particular will have a beneficial impact on companies and consumers by removing barriers to the free flow of information.

Meanwhile, some nonprofit groups have expressed concern that the intellectual property chapter’s section on internet service providers isn’t sufficiently flexible and that certain digital rights provisions may pose technological barriers to people with disabilities.

A U.S. vote on the deal could likely depend on how the presidential election plays out in November.

Software and mobile application industry sources, including BSA | The Software Alliance and ACT | The App Association, told Bloomberg BNA that the agreement’s data provisions are vital for digital trade and economic growth. The free flow of data across borders would facilitate the exchange of new ideas, scientific discoveries and technological innovation, and a ban on localization rules—which require locally created data to be stored on servers within the same country—would encourage business growth and competition, they said.

But critics argue the accord doesn’t give countries enough flexibility in determining what framework to implement for limiting the liability of ISPs that have infringing content on their networks. Under the TPP parties would be required to implement a “notice and take-down” system similar to that of the U.S., public interest groups say. They also say the TPP’s digital rights protection provisions could hinder the ability to make copyrighted works accessible to the blind, deaf and hard of hearing.

The fate of the trade deal is uncertain. According to international trade experts, the lame-duck session may be the best chance for Congress to ratify the agreement. After that, passage may depend on the composition of Congress, they said. Democratic presidential nominee Hillary Clinton and her GOP rival, Donald Trump, both oppose the pact.

“If it doesn’t happen this year, it’s questionable about whether it’ll pass at all,” said David Glynn, an international trade lawyer and of counsel at Holland & Hart LLP in Denver, Colo.

The tech sector has been actively pushing to move the agreement forward. The Trade Benefits America Coalition—which includes BSA | The Software Alliance, Microsoft Corp., and IBM Corp.—has been “educating Members of Congress on the local benefits of trade and the TPP through personal meetings, local opinion pieces, site visits and data releases,” a spokeswoman for the coalition said.

BSA | The Software Alliance has participated in an open letter to the presidential candidates in support of the TPP. The company has also met with members of Congress all year to discuss the significance of the agreement, according to a BSA spokeswoman.

IBM’s Government and Regulatory Affairs Executive Debra Marks said IBM will meet with legislators this month to present its case on the TPP, focusing on the pact’s electronic commerce chapter. The agreement is an “incredibly forward-looking agreement that ensures the openness of the internet and puts small businesses on a level playing field,” Marks said.

The e-commerce chapter of the TPP provides that signatory countries “shall allow the cross-border transfer of information by electronic means, including personal information” when such transfer is for the conduct of business.

The chapter would ban countries from requiring the use or location of computer servers within national borders as a condition for conducting business there, referred to as data localization.

The TPP’s intellectual property chapter provides a “safe harbor” provision that protects ISPs from liability for the infringing content posted by users, as long as they promptly take the content down upon receiving notice. The IP chapter also prohibits the circumvention of technological measures that control access to a protected work.

World Without TPP? The development, implementation and innovation of artificial intelligence, the internet of things and cloud computing all require the free flow of data, Carl Schonander, senior director for international public policy at the Software & Information Industry Association, said. “It would be more difficult to reap the full benefit of these technologies if you deny cross-border data flows,” he said.
"If we don’t have an agreement to secure the free movement of trade, we really will miss out on a growth of opportunities."

**Stephen Ezell, Information Technology and Innovation Foundation**

The data flow and localization provisions within the TPP aren’t found in any other trade agreement, said Victoria Espinel, president and chief executive officer of BSA. The TPP is the first international agreement to have strong, enforceable rules on data, she said.

"It’s an unprecedented and historical opportunity," Espinel said.

Industry groups said if the TPP is not ratified, other countries may take the lead in defining global standards for cross-border trade. Those standards may not include the unique data rules that would benefit the digital economy, they said.

"Failure to secure the TPP would be disastrous for the digital economy," Stephen Ezell, director of global innovation policy at the Information Technology and Innovation Foundation in Washington, said. "If we don’t have an agreement to secure the free movement of trade, we really will miss out on a growth of opportunities."

Ezell said that as the global digital economy continues to rise, ensuring the free flow of cross-border data is as significant as ever. Half of all value in the global economy will be created digitally by 2025, according to a report by TEKES, Finland’s Technology and Innovation Agency.

Schonander said that if the TPP doesn’t pass, other countries, including China, will likely become more influential in developing trade agreements that may not have the same digital trade provisions. They may impose data localization rules or increase requirements to see source code, he said.

Morgan Reed, executive director of ACT | The App Association in Washington said the greatest concern would be who picks up the lead in setting standards for digital trade. The fear is that it might put a country like China “in the driver seat for defining what’s appropriate in the digital economy,” he said.

“It behooves the U.S. to write the rules on how digital trade moves forward,” Reed said.

But not everyone thinks the TPP is a make-or-break deal for the tech sector. Jeremy Malcolm, senior global policy analyst at the Electronic Frontier Foundation in Washington, said there would be very little impact on the tech sector if TPP doesn’t pass. “It would be more
symbolic than anything that local hosting mandates are not acceptable," he said. "All tech companies lose is that they wouldn't have this statement of principle."

**Free Flowing Data.** Internet industry groups have a different view. Digital trade and the free flow of data is a critical component of insuring the internet industry is able to reach over 3 billion users, said Ari Giovenco, director of trade and international policy at the Internet Association—whose members include Facebook Inc., Google Inc. and Amazon.com Inc. "The TPP would be a win for the internet community as a whole," he said.

The TPP's provision on cross-border data flows is also "absolutely critical" to the mobile application industry, according to Reed. "Everything we do on our smartphones is a cloud based service," he said.

**The TPP would “entrench existing U.S. law so that we can’t improve it in the future.”**

**JEREMY MALCOLM, ELECTRONIC FRONTIER FOUNDATION**

Cross-border data flow affects more than the just the tech industry, though.

According to Espinel, predictive analytics software—which mines data to extract information and predict trends for businesses and organizations—is more accurate with information from more than one region. In addition, the location where data is collected and where it needs to be analyzed isn’t always the same, she said.

An analysis of data on indicators of an increased risk of a form of cancer, for example, would be more accurate if more than one subset of data is available, Espinel said. In the healthcare industry, it would be much more effective for doctors and scientists if they could analyze data from across the globe, she said.

Cross-border data flow is essential for using analytics software to detect fraud, Espinel said. A credit card owner may be located in one country, a purchase associated with the card may take place in another, and the company that can analyze the data may be located in a third country.

"If the data can’t flow among those countries instantaneously, it is not useful," she said.

**TPP Equals More Competition, Supporters Say.** The ban on data localization rules would better enable mobile app companies to do business and be more competitive in foreign markets, according to Reed.

Data localization laws would force U.S. companies wishing to do business globally to build computer servers in each country or buy the services of existing servers there. According to Giovenco, setting up servers in every market a company wishes to enter can be costly.

Reed said localization laws would make it difficult for businesses to operate internationally and therefore prevent global consumers from purchasing products that could benefit their own business.

For example, he said a U.S. developer of an agricultural app designed to help grow crops couldn’t offer the app to farmers in countries with a localization law in place without setting up a server there.

The localization ban would benefit any mobile app company, regardless of size, whose apps are globally applicable, Reed said. He said that companies offering apps designed for just one locality would also benefit because they still store data on the cloud and higher competition would lower the cost of cloud computing services.

**Digital Downside?** Despite the benefits, some critics have expressed concerns that the TPP could hinder the use of technology to turn copyrighted works into more accessible formats for blind, deaf or hard of hearing people who may need descriptive audio or closed-captioning to enjoy them.

The intellectual property chapter of the TPP prohibits people from bypassing technological security measures that restrict unauthorized access to copyrighted digital media and other products. The chapter allows countries to include exceptions to the anti-circumvention ban to enable non-infringing uses, but those exceptions aren’t mandatory, according to Malcolm.

"This makes it more difficult to make even non-profit adaptations of copyrighted works in accessible formats, or to make tools available to those making such adaptations," Malcolm said. Passage of the TPP wouldn’t affect the current state of accessibility but it would "entrench existing U.S. law so that we can’t improve it in the future," he said.

**“It behooves the U.S. to write the rules on how digital trade moves forward.”**

**MORGAN REED, ACT | THE APP ASSOCIATION**

Krista Cox, director of public policy initiatives at the Association of Research Libraries in Washington, said the exceptions language in the anti-circumvention provision was a "welcome development," but that it could be stronger.

"It’s a shame that language around rights for rights holders is much stronger than rights for users, but having this language on limitations and exceptions in the TPP is a step forward," she said.

Carolina Rossini, vice president of international policy and strategy at Public Knowledge in Washington, disagreed that the TPP would present barriers to web accessibility. The agreement provides flexibility in determining the appropriate scope of anti-circumvention prohibitions as well as exceptions to those prohibitions, she said.

This flexibility gives "a good amount of space for countries to design good law and policy that would deal with accessibility issues for the blind," Rossini said.

Cox said the TPP doesn’t present flexibility, however, within its internet service provider “safe harbor” provision. The IP chapter contains a safe harbor similar to the U.S.’s notice and takedown system under the Digital Millennium Copyright Act, which protects ISPs from liability for the infringing acts of their users as long as they remove the content upon receiving notice.

Annex 18-E to the chapter provides that the notice and takedown framework doesn’t apply to a party that, as of the date of agreement of the TPP, has instead implemented a system for forwarding notices to the alleged infringer. Canada is exempt from the notice and takedown framework under this annex because it has a
“notice and notice” system, in which the recipient of the notice is responsible for determining whether the content is infringing.

Cox said that the Canadian system may be better than the notice and takedown system, and that signatories should be allowed to choose which one to implement. Notice and notice is “a newer system, so time will tell on its effectiveness, but the point is that the TPP should preserve these flexibilities rather than prohibiting them,” Cox said.

Uncertainty Lies Ahead. As the presidential election nears, U.S. ratification of the TPP is far from certain. International trade experts have considered the possible scenarios.

Ezell said that chances in the near term for the TPP are much better in the lame duck than after the next president takes office. “Near-term prospects for passage of the TPP are far greater under President Obama than they are under a President Clinton or President Trump,” he said.

Clinton campaign chairman John Podesta said July 27 at the Democratic National Convention that Clinton is opposed to the TPP and isn’t interested in renegotiating it. “She is against it before the election and after the election,” Podesta said.

Trump expressly said he would withdraw the U.S. from the TPP in an economic policy speech delivered in June.

Meanwhile, Obama has reaffirmed his commitment to the TPP. “This is an opportunity to grow our economies and write the rules for trade in the 21st century in a way that’s equitable,” Obama said in an Aug. 2 press conference.

David Olave, director of international trade and government relations at Sandler Travis & Rosenberg PA, said that passage during lame duck is unlikely, but that the likelihood is greater if Clinton wins.

“Trump is running on such a strong anti-trade platform that if he wins there will be no way that Congress votes on this before he is president,” Olave said. But if Clinton wins, and depending on the outcome of the Congressional elections, Republicans in the current Congress may decide it is better to sign the deal before Clinton makes changes to it, he said.

Glynn said that after the election there is a good chance Obama will introduce the TPP during the lame duck Congress. Once the new president takes office, passage appears unlikely, he said. Both candidates are against the TPP, and even if Republicans, who generally support free trade, take over Congress, the president could still veto the agreement, he said.

The 12 signatories to the TPP are Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the U.S. and Vietnam.

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