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12-Nation Pacific Rim Deal Aims to Spur Commerce in Countries Accounting for 40% of World's Economy

Thursday, Nov. 5, 2015, witnessed the release of the long-awaited text of the Trans-Pacific Partnership (TPP) trade deal. This 12-nation¹ Pacific Rim deal aims to spur commerce in countries accounting for 40 percent of the world's economy.

While TPP deserves serious analysis in and of itself, and its path to ratification in the U.S. is expected to be a politically rocky one, its treatment of cross-border data traffic provides an interesting juxtaposition to the recent European Court of Justice decision invalidating the Safe Harbor Program between the U.S. and the European Union. In two recent hearings on the Safe Harbor decision in the House – in the Energy & Commerce and Judiciary Committees, respectively – experts noted that the cross-border data flow protections expected to be embodied in TPP could set an example for how the U.S. and the E.U. should address the cross-Atlantic data protection issues in in upcoming T-TIP trade negotiations.

Other experts disagreed with this approach and advocated for modernization of U.S. privacy and surveillance laws as the path forward. Given the president's comments today that TPP is good for the "digital economy...promoting a free and open Internet" and protecting free flow of data and information, we can expect a vibrant Congressional debate going forward on data protection.

So, how does TPP treat data flow issues?

The goal of TPP's drafters is to preserve the open Internet and prevent its geographic balkanization, while maintaining a

¹ United States, Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam.

balance with national public-interest rules that protect privacy and address cyber risk. The provisions are far less specific than a court decision such as the ECJ's, but the tenor of the provisions is clearly intended to foster continued data flow and prevent measures that would unnecessarily or in a discriminatory manner hinder online traffic.

TPP's Chapter 14 on Electronic Commerce includes commitments ensuring unfettered cross-border data traffic. Additionally, below are highlights from the Chapter that imply solutions for a Safe Harbor 2.0.

Article 14.3 on Customs Duties and Other Discriminatory Measures prohibits the imposition of customs duties on digital products, to ensure that electronic content is not disadvantaged.

Article 14.4 prevents TPP countries from favoring national producers or suppliers through discriminatory taxation, blocking, or other forms of content discrimination.

Article 14.5 on Domestic Electronic Transactions Framework favors use of a model framework on electronic commerce.

Article 14.11 on Cross-Border Transfer accommodates the need for national safeguards, such as for privacy, but provides that such measures may not be applied in an arbitrary or unnecessarily discriminate manner or be more onerous than necessary to achieve the objective. The clear intent is to help prevent unreasonable restrictions.

Article 14.13 on Location of Computing Facilities includes guarantees that companies will not have to build expensive and unnecessarily redundant data centers in every market they seek to serve.

Article 14.17 on Source Code prohibits requirements that force suppliers to share software source code with foreign governments or commercial rivals when entering a TPP market.

Consumer Protection and Privacy related provisions embodied in Articles 14.7, 14.8, and 14.14 include commitments by TPP Parties to adopt and maintain consumer protection laws related to fraudulent and deceptive online commercial activities. The Article calls on the TPP Parties to adopt personal information protections, but cautions that they not be discriminatory and that they provide for individual remedies. Similarly, with spam, the Parties must provide recourse to recipients of unsolicited commercial messages.

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