

TPP's Electronic Commerce Chapter

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*This post is the first in a series of posts on the final text of the **Trans-Pacific Partnership ("TPP")**. The final TPP text, which was released on November 5, 2015, is available [here](#).*

Notwithstanding its title, the TPP's chapter on [Electronic Commerce](#) (Chapter 14) includes commitments that apply well beyond traditional e-commerce to a wide range of digital communications and trade affecting nearly every sector of the economy. Although variations on some of these commitments can be found in prior U.S. free trade agreements or other international instruments, the chapter includes several novel commitments, including on cross-border data transfers, forced localization of computing facilities, and compelled disclosure of software source code. While the commitments are subject to important carve-outs, exceptions, and limitations, violations of these commitments may be challenged by TPP governments pursuant to the dispute settlement mechanism set out in Chapter 28.

Key Commitments

For U.S. companies, some of the key commitments in Chapter 14 are as follows:

- **Cross-Border Electronic Data Transfers.** Article 14.11 requires each TPP government ("Party") to allow the cross-border transfer of information, including personal information, by electronic means, "when this activity is for the conduct of the business of a covered person." "Covered person" is defined broadly to mean an investor of a Party (but excluding an investor in a financial institution—see below) or an "investment," as defined in Chapter 9, and any service supplier of a Party as defined in Chapter 10. Article 14.11 allows a Party to adopt or maintain a measure inconsistent with this obligation only "to achieve a legitimate public policy objective," provided that such a measure is not applied in a manner that constitutes "arbitrary or unjustifiable discrimination or a disguised restriction on trade" and "does not impose restrictions on transfers of information greater than are required" to achieve the legitimate objective.
- **Forced Localization of Computing Facilities.** Under Article 14.13, no Party may require a "covered person" to use or locate computing facilities (e., "servers and storage devices for processing or storing information for commercial use") in that Party's territory as a condition for conducting business in the territory. This commitment is subject to the same exception language as described in the preceding bullet. According to USTR, this is the first U.S. free trade agreement ever to include an explicit commitment against forced localization of computing facilities.
- **Transfers of Source Code.** Article 14.17 prohibits any Party from requiring the transfer of, or access to, software source code as a condition for the import, distribution, sale or use of such software, or products containing such software, in the Party's territory. However, this commitment applies only to "mass market" software (a term that is not defined), and does not apply to software used for "critical infrastructure" (also not defined). This commitment does not preclude (i) requirements to provide source code pursuant to a "commercially negotiated contract[.];" or (ii) a Party from requiring the modification of source code "necessary for that software to comply with laws or regulations which are not inconsistent with" the TPP. According to USTR, this too is the first such commitment ever to appear in a U.S. free trade agreement.
- **Customs Duties on Electronic Transmissions.** Article 14.3 prohibits Parties from imposing customs

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duties on cross-border electronic transmissions, including content, between persons of the various TPP countries. This commitment largely follows the moratorium on e-commerce customs duties agreed among WTO members in 1998. Article 14.3, however, does not preclude Parties from imposing internal taxes, fees, or other charges on “content transmitted electronically,” provided such measures are imposed in a manner consistent with the TPP.

- **Non-Discriminatory Treatment of Digital Products.** Article 14.4. prohibits a Party from providing less favorable treatment to digital products, and the creators and owners of those digital products, of other Parties than it accords to “other like digital products.” (The determination of whether two products are “like products” has a long history in WTO jurisprudence.) Subsidies, grants, and broadcasting are all excluded from this commitment.
- **Access to and Use of the Internet for Electronic Commerce.** Article 14.10 includes a general recognition by the Parties of the benefits of consumers being able to access and use online services and applications of their choice, and to connect the devices of their choice to the Internet. This text largely reflects the “open Internet” principles enshrined in U.S. law and practice. Notably, however, this article does not include enforceable commitments, and even the agreed principles are “[s]ubject to applicable policies, laws and regulations.”

Beyond these provisions, the e-commerce chapter addresses several other issues, including methods of electronic authentication and the validity of e-signatures; maintenance of laws on online privacy, consumer protection, and spam (“unsolicited commercial electronic messages”); the benefits of “paperless trading,” and other matters. Certain of these provisions impose obligations on the Parties, while others merely require Parties to “endeavor” to adopt or implement them.

The entire chapter falls within the scope of the dispute settlement provisions of Chapter 28. Although the e-commerce commitments are not covered by the investor-state dispute settlement (“ISDS”) provisions of Chapter 9, a government measure that violates a commitment in the e-commerce chapter might also violate an investment commitment in Chapter 9, and to that extent be subject to ISDS.

Additional Limitations

In addition to the commitment-specific limitations and exceptions already discussed, the e-commerce provisions are subject to additional limitations that apply to the entire chapter. These include:

- **Exclusion of Government Procurement and Government Data Processing.** Article 14.2.3 excludes from the scope of Chapter 14: (a) government procurement, and (b) information “held or processed by or on behalf of a Party, or measures related to such information, including measures related to its collection.” These could be significant exclusions and might, for instance, allow TPP governments to require that processing or storage of government data occur on domestic computing facilities.
- **Exclusion of Financial Institutions/Financial Services.** Under Article 14.1, the term “covered person” excludes “financial institution[s]” and any “cross-border financial service supplier of a Party” as defined in Chapter 11 (Financial Services). These and related provisions are broadly seen as excluding financial institutions from the scope of Chapter 14. Instead, financial institutions will be forced to rely on the commitments specifically applicable to financial service suppliers set forth in Chapter 11 and other chapters of the TPP.
- **Incorporation of GATS Exceptions.** Chapter 14 commitments also must be read in conjunction with the General Exceptions in Chapter 29. For example, under Article 29.1.3, paragraphs (a), (b), and (c) of Article XIV (General Exceptions) of the WTO’s General Agreement on Trade in Services (GATS) are incorporated by reference into the TPP. These GATS paragraphs permit measures necessary to protect public morals or maintain public order; protect human, animal, or plant life or health; or to secure compliance with laws or regulations that are not inconsistent with the GATS.
- **National Security Exception.** Under Article 29.2(a), nothing in the TPP, including Chapter 14, precludes a Party from applying measures that “it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.” Historically, security exceptions based on similar text often have been considered to be largely self-justifying, under the view that they can be invoked by a Party whenever “it considers” the exception to apply. This could make it difficult for Parties to challenge measures that facially violate one or more Chapter 14 commitments, but which a Party justifies as necessary to protect national security.

Finally, the commitments set forth in Chapter 14 do not apply to any non-conforming measures (*i.e.*, measures that do not conform to commitments set forth in the TPP) identified by a Party. Article 14.18 also provides that

Malaysia is exempt from the commitments in Article 14.4 (non-discriminatory treatment of digital products) and 14.11 (cross-border data transfers) for two years, while Viet Nam is exempt from both of these commitments, and from Article 14.13 (forced localization of computing facilities), for two years.

Conclusion

If adopted as drafted, the TPP's e-commerce chapter includes several noteworthy commitments that provide a basis to challenge non-tariff barriers to digital trade and commerce confronting companies in TPP countries. However, when evaluating the benefits and enforceability of these commitments, it is important also to consider the carve-outs, exceptions and limitations to these commitments, including any applicable non-conforming measures.

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