



Hearing on

**“International Data Flows:
Promoting Digital Trade in the 21st Century”**

**House Committee on the Judiciary
Subcommittee on Courts, Intellectual Property, and the
Internet**

**November 3, 2015, at 1:00 p.m.
2141 Rayburn House Office Building
Washington, DC**

**Testimony of Victoria Espinel
President and CEO
BSA | The Software Alliance**

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Good morning Chairman Issa, Ranking Member Nadler, and members of the Subcommittee. My name is Victoria Espinel, and I am the President and CEO of BSA | The Software Alliance (“BSA”).

BSA is the leading advocate for the global software industry in the United States and around the world.¹ Promoting international trade by eliminating barriers to cross-border data flows is a top priority for BSA and its members. I commend this Subcommittee for holding a hearing on this important topic, and I welcome this opportunity to testify on BSA’s behalf.

I. Digital Trade and Data

For several BSA members, half or more of their revenues today come from overseas—a figure that will almost certainly grow as more developing markets move up the economic ladder. Removing barriers to trade is therefore essential to BSA members’ long-term success. As in many other sectors, international trade for our members increasingly involves data services and digital rather than physical transactions. Data services, including, storage, processing, analytics are the fastest growing elements of digital trade. And even how software is used and delivered is changing rapidly. Whereas BSA members once delivered their software to consumers on CD-ROMs or pre-installed on PCs, today software is more often downloaded online or provided remotely, such as through cloud computing services.

The transformation to data services and digital delivery model provides tremendous benefits to users. Data services and software delivered online tends to be extremely flexible, highly scalable, and allows customers to access massive computing power quickly and at a small fraction of what they would pay to store and process the data or run the software themselves. It also gives even small firms the ability to reach a global customer base and engage in cutting-edge innovation. As a result, we—and the billions of customers across the world who rely on our software to run their businesses—increasingly depend on digital trade in order to compete and succeed.

In fact, these software and data services already have become central to the lives of millions of people around the world. Farmers are reducing use of pesticides and water, while improving yields by five or 10 bushels an acre. Families are cutting down their drive times, and cities are designing transportation routes that save time and reduce emissions. Doctors are using data analysis to speed up diagnoses for their patients and make treatments more accurate. People rely on these services to improve their lives.

These myriad transformations also make the ability to move data freely from one place to another of critical importance. That’s because most software applications that people use today—whether mobile apps, online productivity tools, or enterprise cloud computing services—involve the user creating or receiving data on his or her device, but the actual processing and analysis of that data occurring elsewhere—somewhere that may be miles or even continents away. This can only happen, however, if data can move freely from one location to another.

¹ BSA’s members include Adobe, Altium, ANSYS, Apple, Autodesk, Bentley Systems, CA Technologies, CNC/Mastercam, DataStax, Dell, IBM, Intuit, Microsoft, Minitab, Oracle, salesforce.com, Siemens PLM Software, Symantec, Tekla, The MathWorks and Trend Micro. See www.bsa.org.

Likewise, as BSA explains in a recent paper,² as the cost of data collection and storage have plunged and innovations in data analytics software have accelerated—innovations that BSA members are actively driving—people and organizations across the economy are finding powerful new ways to use data to produce valuable insights that save time, money and even lives. This too requires data to move freely—whether across town or across the globe.

Indeed, when one looks at the sheer quantity of data that is produced, transferred, and processed today, the numbers are staggering. Already an estimated 2.5 quintillion bytes of data are generated every day.³ That's enough in a year to fill a stack of DVDs that would stretch from Earth to the moon and back.⁴ In fact, more than 90 percent of all the data in the world has been generated in just the last two years.⁵ We also are now doubling the rate at which data is produced every two years.⁶ By 2019, global IP traffic is projected to exceed 2.0 zettabytes per year—that's over two *trillion* gigabytes of data.⁷

Of course, all this data has little value if it doesn't lead to new knowledge. But by combining human ingenuity with innovative software, people increasingly are able to use these massive volumes of data to find new insights and discover new trends and relationships.

The implications of this software and data revolution are enormous. Economists predict that making better use of data could lead to a “data dividend” of \$1.6 trillion in the next four years, and that data-enabled efficiency gains could add almost \$15 trillion to global GDP by 2030.⁸ As noted in a recent report by the McKinsey Global Institute, “[t]he ability to monitor and manage objects in the physical world electronically makes it possible to bring data-driven decision making to new realms of human activity—to optimize the performance of systems and processes, save time for people and businesses, and improve quality of life.”⁹

In addition to driving economic growth and improving the quality of life, these developments will also create jobs. Already, 61 percent of senior executives in the United States say that data analytics is important to their companies' plans to hire more employees.¹⁰ And for every data-related IT job created, another three jobs are estimated to be created for people outside of IT—creating millions more jobs throughout the economy.¹¹

II. Barriers to Digital Trade

As excited as BSA members are about the potential for software and data-driven innovations to spur growth, we are deeply concerned about steps several U.S. trading partners have taken to erect barriers to digital trade and cross-border data flows. In countries from Australia, Brazil, Nigeria, and China to Russia, Switzerland, and Vietnam—along with many others—we are seeing a growing trend by governments to impose requirements that make it difficult or impossible to transfer data outside the country.

² See BSA, *What's the Big Deal With Data?* (Oct. 2015), at http://data.bsa.org/wp-content/uploads/2015/10/bsadatastudy_en.pdf.

³ *Id.* at 7.

⁴ *Id.* at 8.

⁵ *Id.* at 6.

⁶ *Id.*

⁷ Cisco, *Cisco Visual Networking Index: Forecast and Methodology, 2014-2019 White Paper* (May 2015), at http://www.cisco.com/c/en/us/solutions/collateral/service-provider/ip-ngn-ip-next-generation-network/white_paper_c11-481360.html.

⁸ See BSA, *supra* n. 2, at 14.

⁹ McKinsey Global Institute, *The Internet of Things: Mapping the Value Beyond the Hype 1* (June 2015), at http://www.mckinsey.com/insights/business_technology/the_internet_of_things_the_value_of_digitizing_the_physical_world.

¹⁰ BSA, *supra* n. 2, at 14.

¹¹ *Id.* at 14.

These data market access barriers requirements take many forms. Sometimes they expressly require data to stay in-country or impose unreasonable conditions in order to send it abroad; in other cases, they require the use of domestic datacenters or other equipment. Sometimes they are justified as necessary to spur the local economy, or protect privacy, or to obtain jurisdiction over these services. But too often, there is also an element of protectionism, as the means chosen by these governments tend to be significantly more trade-restrictive than necessary to achieve any legitimate public policy goal.

Given our nation's competitive advantage in data services and software, there is no doubt that these data localization measures hurt U.S. businesses and workers. By prohibiting U.S. companies from transferring the data they collect in one country to a datacenter in another, or combining that data with other data, these measures undermine the enormous efficiencies of scale that online software and data analytics make possible. They also make it more difficult for U.S. companies to offer services that necessarily involve cross-border transfers of data. And because the analysis of large datasets often reveals insights that smaller datasets do not, these measures undermine data innovation and the many economic and social benefits that can flow from such innovation.

As harmful as data localization measures are for U.S. companies and workers, they are equally if not more harmful to the economies of the governments that impose them. By depriving local companies of unfettered access to the tremendous innovations that U.S. companies have to offer, and limiting these companies' ability to engage in data-driven innovation, these governments risk isolating their own businesses, consumers, and economies from the full benefits of the global economy.

III. Recent Developments: TPP and the EU-U.S. Safe Harbor

A. Trans-Pacific Partnership Agreement

In light of the troubling growth in data localization measures and other barriers to digital trade, BSA members welcome the recently concluded Trans-Pacific Partnership Agreement (TPP). Although we have not yet seen the final text, we understand that the Agreement includes several commitments that are vital to digital trade:

- Cross-border data flows. First, we understand the text includes robust commitments on cross-border data flows, including explicit prohibitions on data- and server-localization mandates. We also understand that these commitments are subject to narrow exceptions, so that measures impeding cross-border data flows can be justified only if required to achieve a legitimate public policy objective. These commitments would mark a significant milestone in international law and set a new global standard for promoting trade in digital and data-driven products and services.
- No digital customs duties or discrimination. We also understand that the final text prohibits TPP countries from imposing customs duties on digital products, and from imposing measures that discriminate against digital products as compared to physical products. Given the strength of the United States' digital economy and the competitive advantage we enjoy in many sectors that rely on digital commerce and data flows, this prohibition will be of tremendous benefit to U.S. companies, workers, and consumers.
- No forced source code disclosure. We understand that the final TPP text also prohibits TPP countries from requiring companies to disclose software source code as a condition of competing in the market. For many companies today—not just those in the software sector—the innovations they offer to customers and through which they gain a competitive edge are embodied in software. Protecting these innovations against misappropriation through forced source code disclosure will help ensure that U.S. companies can compete fairly and on a level playing field across all TPP markets.

- Promoting a free and open Internet. Finally, we understand that the final text enshrines the United States' strong commitment to a free and open Internet by affirming the principle that consumers should be able to access online content and applications of their choice for legitimate commercial purposes. Given the Internet's growing importance to economic growth across all sectors of the economy, preserving the free and open Internet is vital to both our values as a nation and to our economic future.

In an innovation-driven economy such as ours, these protections are vital. We look forward to studying carefully the final text of the Agreement once it is released, and to working with Members of Congress and the Administration as the Agreement moves forward.

B. EU-U.S. Safe Harbor

While we are pleased by the important protections that the TPP will provide with regard to trade with many of our trans-Pacific trading partners, we are concerned by potential new barriers that recently have arisen with our biggest trans-Atlantic trading partner, the European Union.

As this Subcommittee is aware, the EU's Court of Justice recently handed down a decision that invalidates the EU-U.S. Safe Harbor, a mechanism that thousands of U.S. companies have relied on for more than a decade to facilitate digital commerce with customers, suppliers, and partners in Europe. Under longstanding EU law, personal information—which includes a wide range of data—generally can be moved to third countries only if the data is subject to “adequate” protections in those countries, and the EU does not consider the U.S. to be “adequate.” The U.S.-EU Safe Harbor Framework, which was adopted in 2000, was designed to allow companies to self-certify that they would provide these “adequate” protections to EU-originating data stored in the United States.

In striking down the Safe Harbor, the Court of Justice focused on issues around national security and law enforcement access to data. Troubled by the Snowden leaks, the Court concluded that countries that permit “indiscriminate surveillance and interception” and “mass and undifferentiated accessing” of personal data could not be deemed “adequate” under EU law.

The invalidation of the Safe Harbor has broad ramifications for trans-Atlantic trade, not only for the technology sector, but for many other sectors of our economy as well. For 15 years, thousands of American and European companies relied on the Safe Harbor mechanism to do business with each other and to set up operations and serve customers in each market. This included companies from a wide range of industries, among them pharmaceutical, aviation, retail, consumer goods, automotive and even agri-business firms. These companies utilized the Safe Harbor to serve European customers and do business with European partners, as well as to make use of our world-class datacenter capabilities and innovative data analytics services. Many routine commercial dealings between the U.S. and European companies have now been disrupted, and customers in Europe are asking hard questions about their ongoing ability to do business with the United States.

Significantly, the European Court's judgment relates only to the Safe Harbor. There are a number of other mechanisms available under EU law that enable the lawful transfer of data from Europe to the United States that our companies are relying on today. Worryingly, however, the long-term stability of these alternative mechanisms is unclear. European data protection authorities have indicated that they are scrutinizing these mechanisms for compliance with EU law following the Court's judgment. German data protection authorities recently announced that they will no longer authorize certain transfers to the United States that they were previously willing to authorize. Countries outside the EU are watching closely; Swiss authorities, for example, have now said that the U.S.-Swiss Safe Harbor, which mirrors the U.S.-EU Safe Harbor, no longer constitutes a sufficient legal basis for data transfers under Swiss law.

The current situation has led to uncertainty for European and American businesses. If the United States and European Union do not act quickly to address this uncertainty, the impact on trans-Atlantic trade could be significant. One study predicts that if data flows from Europe were brought to a near-halt, imports of services into the European Union from the United States could decrease by between 16.6 and 24 percent.¹²

We encourage Congress, and the U.S. Government broadly, to respond with urgency and focus. European data protection authorities are reviewing the overall framework for EU-U.S. data transfers now and will issue their findings shortly; they have announced a grace period on enforcement until January 31, 2016. Many companies today are working hard to put in place alternatives to transfer data lawfully without certainty that these alternatives will not later be challenged.

U.S. policymakers need to engage immediately with their European counterparts to restore trust and efficiency to trans-Atlantic data flows. Specifically, we need three things: rapid consensus on a new agreement to replace the Safe Harbor, ideally delivered within 90 days; sufficient time to come into compliance with new rules; and a framework in which the European Union and United States can develop and agree a sustainable, long-term solution that reflects and advances the interests of all stakeholders. This will require active engagement, trans-Atlantic dialogue, creative thinking, and a willingness on both sides to listen and meaningfully respond to each other's concerns.

BSA's members are totally committed to protecting data in their care, regardless of where that data originates, and to providing solutions that give individuals robust control over their information. Our members work hard to build privacy and security into their products and services from day one. We are ready to work with Congress and the U.S. Government, and with the governments of Europe, to ensure that data continues to flow across our borders to the benefit of both Americans and Europeans.

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Thank you again Chairman Issa, Ranking Member Nadler, and members of the Subcommittee for providing this opportunity to share BSA's views on this important matter. I look forward to answering any questions you might have.

¹² ECIPE, "The Economic Importance of Getting Data Protection Right: Protecting Privacy, Transmitting Data, Moving Commerce" (March 2013); available at https://www.uschamber.com/sites/default/files/documents/files/020508_EconomicImportance_Final_Revised_Ir.pdf