Australia Parliamentary Joint Standing Committee On Trade And Investment Growth

INQUIRY INTO AUSTRALIA'S TRADE SYSTEM AND THE DIGITAL ECONOMY

Public Hearing Session
on
Friday, 17 August 2018, 1020–1100 hrs (AEST)

BSA Remarks

INTRODUCTION

BSA | The Software Alliance (**BSA**) appreciates the opportunity to speak with the Joint Standing Committee on Trade and Investment Growth (**Committee**) in connection with its inquiry into the trade system and the digital economy.

Here is an outline of the remarks that we intend to make during the teleconference:

- BSA's interest in the present inquiry;
- BSA's observations on Australia, as discussed in a recent BSA publication – our Global Cloud Computing Scorecard:
    - General observations on Australia's policy and regulatory regime;
    - Suggestions for areas for further improvement and where Australia can play a strong leadership role in the region, namely:
        - Digital Trade
        - Cybersecurity/Cybercrime
        - Intellectual Property Rights
- Conclusion

BSA'S INTEREST IN THE PRESENT INQUIRY

- BSA is the leading advocate for the global software industry before governments and in the international marketplace. We are headquartered in Washington, DC, and have operations around the world. Our member companies[1] are at the forefront of data-driven innovations, including cutting-edge advancements in artificial intelligence (**AI**), machine learning, cloud-based analytics, and the Internet of Things (**IoT**). These innovations are helping to make our devices smarter, our businesses more competitive, and the delivery of government services more efficient.[2]

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[1] BSA's members include: Adobe, Amazon Web Services, ANSYS, Apple, Autodesk, AVEVA, Baseplan, Bentley Systems, Box, CA Technologies, Cad Pacific/Power Space, Cadence, Cisco, CNC/Mastercam, DataStax, DocuSign, IBM, Informatica, Intel, MathWorks, Microsoft, Okta, Oracle, PTC, Salesforce, SAS Institute, Siemens PLM Software, Splunk, Symantec, Trend Micro, Trimble Solutions Corporation, and Workday.

[2] Software.org, a BSA foundation and an independent and nonpartisan international research organization, has released number of publications on AI, machine learning, cloud-based analytics, and IOT. See, for example,:

- *Sensor Sensibility – Making the Most of the Internet of Things* (July 2017, Software.org), available at https://software.org/reports/sensor-sensibility/;
- *Artificial Intelligence – Maximizing the Benefits* (March 2018), available at https://software.org/reports/artificial-intelligence/;
- *Encryption's Vital Role in Industrial Control Systems*, available at https://software.org/reports/icsencryption/; and,
- *Every Sector is a Software Sector: Manufacturing* (June 2018), available at https://software.org/reports/every-sector-is-a-software-sector/.

See also, BSA, *What is the Big Deal with Data* (2015), available at http://data.bsa.org/wp-content/uploads/2015/12/bsadatastudy_en.pdf.

- In close consultation with our members, BSA works with policymakers, stakeholders, and legislators globally to ensure our member companies can access global markets in a manner that fits their business models and strategies. Our policy agenda focuses on issues that have the greatest impact on members' ability to innovate and commercialize their software products and services globally.

- Our policy agenda includes 6 key priorities:

  (1) Promoting consumer trust through an approach to **privacy** and **security** that advocates:
    - Privacy policies and laws that respect and encourage informed consumer choices, while ensuring they receive the value of products and services tailored to their specific needs; and
    - Security policies that promote trust, rapid innovation, and adaptation in the face of a constantly evolving threat landscape. This includes a recognition of the importance of encryption to protecting data security.

  (2) Advancing **intellectual property** policies that encourage innovation and protect members' innovative products, services, and business models. BSA advocates for patent, copyright, and trade secret policies that are effective, enforceable, and technology-neutral.

  (3) Opening global markets to **digital trade** by working with policymakers to ensure trade agreements have strong and enforceable commitments on cross-border data transfers, prohibit data localization requirements, eliminate non-competitive market access barriers, and encourage effective IP protection and enforcement.[3]

  (4) Encouraging a level playing field for doing business with governments by promoting **procurement** policies that are fair and non-discriminatory, with decision making based on factors such as value, efficiency, and performance, rather than the nationality of the supplier or method of development.

  (5) Advocating for a streamlined regulatory approach that promotes the adoption of cutting-edge technologies and analytics tools associated with emerging technology such as **IoT**, **AI**, and **blockchain**.

  (6) Supporting investment in **computer science education** and **workforce development**.

- BSA's policy priorities are designed to facilitate the development, deployment, and trade of a range of software services in the digital economy, including cloud computing, data analytics, cybersecurity, IoT, AI, and blockchain solutions.

- BSA therefore greatly appreciates this opportunity to contribute to the conversations in Australia around trade and the digital economy.

[3] For a more detailed description of the BSA Global Trade Agenda, see BSA, *Modernizing Digital Trade – An Agenda for Software* (2017) available at http://www.bsa.org/~/media/Files/Policy/Trade/2017BSATradeAgendaGlobal.pdf

BSA'S OBSERVATIONS ON AUSTRALIA

- It is with the above policy priorities in mind that BSA has reviewed and compared the regimes of 24 different countries, including Australia's, in BSA's latest Global Cloud Computing Scorecard (**Scorecard**).[4] Australia ranks among the top 5 countries, along with Germany, Japan, United States and the UK.

- The Scorecard examines each country's existing laws and policies and grades them on their strengths and weaknesses across seven key areas to determine how prepared they are for cloud computing adoption:
  (1) Ensuring privacy;
  (2) Promoting security;
  (3) Battling cybercrime;
  (4) Protecting intellectual property;
  (5) Ensuring adherence to international standards;
  (6) Promoting free trade and data flows; and
  (7) Establishing the necessary IT infrastructure.

- While the Scorecard approaches the cross-country comparison from the standpoint of cloud computing, the seven policy areas just mentioned have equal relevance to trade and the digital economy. Considerations relating to privacy, security, cybercrime, intellectual property, international standards, free trade and data flows, and IT infrastructure, are just as fundamental and important to trade and the digital economy as they are to cloud computing.

General observations on Australia's policy and regulatory regime

- Australia has a mix of modern laws, regulations, and standards, all of which are conducive to trade and the digital economy. For example, Australia has a strong commitment to international cooperation, free trade, and interoperability. Key laws are based on international models, and Australia is an active participant in the development of international standards.

- Australia has an up-to-date cybercrime regime and has ratified the Convention on Cybercrime in 2012. Australia also has comprehensive electronic signature and electronic commerce laws. Australia's data protection legislation is current and is broadly compatible with global frameworks. Intellectual property laws in Australia provide good protection for cloud computing services and the digital economy. Australia's IT infrastructure is reasonably well developed.

- BSA also commends the Government of Australia for having embarked on several initiatives that are highly relevant to trade and the digital economy, such as:

  (1) Australia's Digital Economy Strategy[5] (to be launched in 2018);

[4] Available at http://cloudscorecard.bsa.org/2018/.

[5] Information on the review of Australia's Digital Economy Strategy, including the 2017 public consultation that was conducted to inform the strategy, is available at https://www.industry.gov.au/strategies-for-the-future/participating-in-the-digital-economy.

(2) Australia's Cyber Security Strategy[6] (launched in April 2016) and the related International Cyber Engagement Strategy[7] (launched in October 2017); and

(3) Australia's review and leadership role on digital trade rules in international forums, as outlined in the Department of Foreign Affairs and Trade's (**DFAT**) discussion paper "The Future of Digital Trade Rules"[8] issued in April 2018.

Suggestions for areas for further improvement and areas in which Australia can play a strong leadership role in the region

- As mentioned earlier, Australia fares well in its overall ranking in BSA's Cloud Computing Scorecard. There is nonetheless room for Australia to make further progress (and climb in the rankings) by making improvements in its policy and regulatory environment.

- We will be focusing on three key issues: (1) Promoting Digital Free Trade; (2) Cybersecurity and Cybercrime; and (3) Intellectual Property Rights.

(1) Promoting Digital Free Trade

- Moving data across borders is critical for services that sustain global digital commerce, improve health and safety, promote social good, and enable the technologies of the future.

- Digital trade is the enabler for the 21st century global economy. Internet-enabled technologies help companies of every size and across every industry to be more productive and reach new customers. 75**%** of the Internet's economic benefits accrue to manufacturers and other companies outside the Internet sector,[9] and research estimates that data flows contributed $2.8 trillion to global GDP in 2014 alone.[10]

- Strong trade agreements and trade policies are a complement to other economic policies needed to compete in the 21st century economy – policies such as building trust in technology with privacy and security policies and such as preparing the workforce of the future.

- In relation to this, BSA applauds Australia's leadership on digital trade and e-commerce issues in the Comprehensive and Progressive Agreement for the Trans-Pacific Partnership (**CPTPP**) and in the World Trade Organization (**WTO**) e-commerce workstream.

- We view the CPTPP's e-commerce chapter as a groundbreaking achievement, with its binding multilateral rules on cross-border data flows,

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[6] Information on Australia's Cyber Security Strategy is available at https://cybersecuritystrategy.pmc.gov.au/.

[7] Information on Australia's International Cyber Engagement Strategy is available at http://dfat.gov.au/international-relations/themes/cyber-affairs/aices/index.html.

[8] Available at http://dfat.gov.au/trade/services-and-digital-trade/Pages/the-future-of-digital-trade-rules-discussion-paper.aspx.

[9] McKinsey Global Institute, *Internet Matters: The Net's Sweeping Impact on Growth, Jobs, and Prosperity,* May 2011. Available at http://www.mckinsey.com/industries/high-tech/our-insights/internet-matters.

[10] McKinsey Global Institute, *Digital Globalization: The New Era of Global Flows,* March 2016. Available at http://www.mckinsey.com/business-functions/mckinsey-digital/our-insights/Digital-globalization-The-new-era-of-global-flows.

restrictions on data localization, and protecting source code disclosure, among other provisions.

- Additionally, we strongly support the leadership that Australia and other governments have shown at the WTO in exploring similar disciplines among an even larger group of WTO members.

- The CPTPP and new WTO disciplines could form the basis for a broad international consensus on digital trade rules that will continue the growth of the global economy and foster innovation.

- BSA notes that Australia has already incorporated the CPTPP's e-commerce provisions in its bilateral free trade agreement with Singapore. We encourage Australia to continue championing the incorporation of such provisions in other free trade agreements that it is pursuing with third countries, such as the European Union.

- As noted earlier, Australia already has a strong commitment to international cooperation, free trade, and interoperability. This is clearly demonstrated by Australia's international engagement strategy, as outlined in DFAT's "The Future of Digital Trade Rules" discussion paper. BSA commends Australia on this forward-looking strategy which advances various policies that are key to the growth of trade and the digital economy, not only within Australia but also internationally. We note Australia's advocacy for (among other things):

    - transparency by trading partners when considering the adoption of measures affecting e-commerce;
    - strong data transfer commitments among trading partners;
    - having trading partners reject arbitrary geographic restrictions and requirements for data storage facilities; and
    - the elimination of customs duties on digital products.

- BSA also notes the Turnbull administration's recent announcement on May 23, 2018 of the opening of negotiations with the European Union (**EU**), and sees an opportunity for Australia to lead the region in advancing rules and initiatives to support ongoing innovation. In view of present EU efforts to negotiate bilateral agreements with individual countries in the Asia-Pacific Region, and also with ASEAN as a bloc, an EU FTA with Australia containing strong digital economy-related provisions would serve as an invaluable precedent for cementing these rules throughout the region.

- To advance digital trade globally, BSA developed its Digital Trade Agenda, titled "Modernizing Digital Trade: An Agenda for Software".[11] We have also developed specific digital trade-related language built upon the CPTPP baseline and, working with the US Trade Representative, have sought to introduce this into the NAFTA 2.0 negotiations.

- Among other things, BSA advocates that – when negotiating new trade agreements or updating existing ones – governments should, among other

[11] Available at: http://www.bsa.org/~/media/Files/Policy/Trade/2017BSATradeAgendaGlobal.pdf

things, adopt commitments to enable the free flow of data across borders and prohibit local computing requirements. These commitments are vital to the digital economy, in which the ability to move data freely underpins many of the most innovative products and services.

- We would be happy to share this work with the Government of Australia, and to have opportunities to collaborate with the Government to advance its digital trade strategy.

(2) Cybersecurity/Cybercrime

- User confidence and trust in transacting online are critical to the digital economy. Users must be assured that their digital service providers understand and properly manage the risks inherent in storing and running applications in the cloud.

- Creating an environment that is secure and respects personal privacy is essential to facilitating such user confidence and trust. Among other things, this entails digital service providers being able to implement cutting-edge and appropriate cybersecurity solutions without being tied to using specific technologies.

- Australia already ranks highly in areas of cybersecurity (2/24) and cybercrime policy (5/24). Australia's strong performance in this area is due to Australia's adoption of the national Cyber Security Strategy in 2016 and the Cybercrime Act 2001, which covers a comprehensive range of cybercrimes.

- Australia's Cyber Security Strategy is also evolving in response to the ever-changing threat landscape, and Australia has also launched its International Cyber Engagement Strategy, outlining Australia's direction and regional approach to cybersecurity through 2020. This International Strategy contains a strong Indo-Pacific focus and outlines seven key themes for Australia's regional approach to championing an open, free, and secure cyberspace: (1) digital trade, (2) cyber security, (3) cybercrime, (4) international security, (5) internet governance and cooperation, (6) human rights and democracy, and (7) development. It also outlines the importance of public and private sector partnerships in promoting digital trade and cybersecurity and in encouraging human rights and sustainable development.

- In the face of a challenging policy environment in the Asia-Pacific region – especially in ASEAN, where countries are looking to emulate cybersecurity models such as China's – those models could, on the one hand, result in the balkanization of the Internet, and, on the other hand, lead to fragmented cybersecurity regimes that are not "harmonized" or interoperable. In this context, Australia can play a strong leadership in the region that could avoid such outcomes.

- BSA thus strongly supports Australia's efforts in promoting regional alignment on cybersecurity, and ultimately the reduction of the risk of cybercrime, and the promotion of peace and stability in cyberspace. This in turn maximizes opportunities for economic growth and prosperity through digital trade.

Australia's initiatives in this area stand Australia in very good stead to lead the region in cybersecurity policy.

- The disciplines that Australia is promoting in its International Cyber Engagement Strategy also resonate well with BSA's International Cybersecurity Policy Framework.[12] BSA developed this Framework to provide a recommended model for a comprehensive national cybersecurity policy, and to serve as a tool, both for policymakers considering foundational cybersecurity legislation and for those examining gaps and shortfalls in existing policies.

- Encryption plays an important role in helping to ensure cybersecurity. This is because the widespread use of encryption not only enables consumer benefits and helps drive economic growth, but it also helps safeguard our countries' critical infrastructure and security.

- BSA would be happy to share our insights and experience in developing our International Cybersecurity Policy Framework with the Government of Australia, and to collaborate on initiatives to promote strong alignment within the region on cybersecurity policies.

(3) Intellectual Property Rights

Generally

- To promote continued innovation and technological advancement, intellectual property laws should provide for clear protection and enforcement against misappropriation and infringement of the developments that underlie the digital economy.

    - First, this includes ensuring that copyright laws and regulations are in place, and are effectively enforced, to protect digital service providers. We consider it important that copyright standards also be in line with international standards. This means not only "standards of protection" but also "exceptions and limitations".

    - Second, it includes having both clear legal protections and enforcement against the circumvention of technological protection measures.

    - Third, it includes having clear legal protection and enforcement against misappropriation of trade secrets.

    - Finally, it includes having clear standards of protection for software-implemented inventions.

[12] Available at: http://bsacybersecurity.bsa.org/report-item/bsa-international-cybersecurity-policy-framework/

ISP Safe Harbors

- While Australia has a Copyright Act based on international norms, as well as a strong culture of intellectual property enforcement, Australia ranked 8th due to the limited safe harbors available for digital service providers.

- The present safe harbor scheme, which covers only "carriage service providers" or telcos, limits the remedies available against such service providers for copyright infringements in the course of carrying out certain online activities – essentially covering situations where the service provider has no direct control over the content, e.g., where the service provider acts as a mere conduit for a transmission of copyright material initiated by one of its users.

- BSA notes that Australia had, in 2015, considered an expansion of the safe harbors to online service providers more generally, but has not yet taken the bold step to legislate for this. BSA urges Australia to re-consider this expansion.

- BSA has been a strong supporter of efforts to promote innovation in Internet-enabled services such as cloud computing, data processing and data analytics. Our members provide a wide range of software solutions and online services to users across the globe. These users rely on BSA members' solutions to collect, transfer, store and process data to enhance commercial efficiencies and solve pressing social issues in sectors as varied as healthcare, transportation, environmental solutions, and many others. Ensuring that online service providers, who fulfil relevant conditions, are granted a safe harbour from liability for alleged copyright infringement by their users is critical to promoting these important new services.

Text and Data Mining

- Australia has the opportunity to be one of the leaders in the region in adopting balanced provisions on copyright that facilitate the use of data for innovative applications such as data analytics and AI while respecting IP owners' legitimate commercial interests. In this respect, BSA agrees strongly with Australia's Department of Communications and the Arts (**DCA**), in its recent Copyright Modernisation Consultation Paper[13] that the measure of a well-functioning copyright system is one that is effective, efficient, adaptable, and accountable. We strongly support the DCA's proposed updates to the Copyright Act to provide a much-needed framework of flexible exceptions for the development and deployment of innovative technologies, including an exception for text and data mining.

- To elaborate, text and data mining is a form of data analytics that enables the extraction of factual information from "unstructured data," such as written text, images, and audio-visual material. The ability to carry out non-infringing text and data mining is critical to the development of data-driven innovations,

[13] Available at https://www.communications.gov.au/have-your-say/copyright-modernisation-consultation.

including cutting-edge advancements in AI, machine learning, and cloud-based analytics. These innovations are helping to make our devices smarter, our businesses more competitive, and the delivery of government services more efficient.

- If Australia sets in place a policy framework, including the adoption of a flexible exception for text and data mining that allows for the full potential of these technologies, economists estimate they will grow Australia's GDP by an incredible 1.2% per year, adding $250 billion to the economy by 2025.[14] BSA understands that it was precisely to ensure Australia is able to maximise these benefits, that the Turnbull Government recently announced that its forthcoming Digital Economy Strategy will recognise the importance of AI and machine learning to Australia's long-term strategic interests.[15] The importance of these emerging technologies is further underscored by the Government's recent positive initiatives around public data and the new data sharing and release legislation.[16]

CONCLUSION

- In conclusion, BSA would like to reiterate that Australia is already in a strong position with respect to its policy and regulatory regime for trade and the digital economy, which encompasses progressive domestic and international strategies. BSA particularly commends Australia on its strong potential to lead the region in – (1) promoting digital free trade; (2) having Cybersecurity/Cybercrime regimes that are both robust and yet provide digital service providers the flexibility to adopt the most cutting-edge technologies to protect their service offerings; and (3) promoting Intellectual Property Rights frameworks that are both flexible and yet protect innovation.

- BSA and our members thank the Committee for giving us this opportunity to speak, and we would welcome further opportunities to engage with the Government of Australia on its various initiatives, particularly those on regional cybersecurity policy and digital trade.

[14] Simon Blackburn, Michaela Freeland, and Dorian Gärtner, *Digital Australia: Seizing Opportunities From the Fourth Industrial Revolution*, McKinsey & Company (May 2017), available at https://www.mckinsey.com/featured-insights/asia-pacific/digital-australia-seizing-opportunity-from-the-fourth-industrial-revolution.

[15] *Australian Government Response to Innovation and Science Australia 2030 Plan* (May 2018), available at https://www.industry.gov.au/innovation/InnovationPolicy/Documents/Government-Response-ISA-2030-Plan.pdf

[16] *New Australian Government Data Sharing and Release Legislation: Issues Paper for Consultation* (July 2018), available at https://www.pmc.gov.au/resource-centre/public-data/issues-paper-data-sharing-release-legislation