Business Council of Australia

SUBMISSION

Response to the future of digital trade rules discussion paper

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The Business Council of Australia draws on the expertise of Australia's leading companies to develop and promote solutions to the nation's most pressing economic and social policy challenges.

ABOUT THIS SUBMISSION

The Business Council of Australia welcomes the opportunity to respond to the Department of Foreign Affairs and Trade's (DFAT)'s discussion paper on *The Future of Digital Trade Rules*.

EXECUTIVE SUMMARY

Digital technologies are having a profound impact on our economy and society, including increased global links and transformation of cross-border commerce.

Consumers receive benefits from digital trade, such as greater competition which provides more choice and lower prices. Enabling data flows and digital commerce across borders is vital to unlocking the potential benefits of digital innovation for consumers.

Notwithstanding the benefits, governments around the world impose a range of barriers to digital trade. In some cases, barriers are imposed for legitimate public policy reasons, such as protecting privacy or national security. In other cases, barriers to digital trade may be inadvertent or erected for purely protectionist reasons.

The Business Council commends the Australian Government for taking an international leadership role in encouraging digital trade. We recommend DFAT focus on four priorities:

1. working through the World Trade Organization (WTO) towards the permanent prohibition of tariffs on electronic transmissions
2. working multilaterally and bilaterally to reduce behind-the-border barriers to trade, especially:
    - requirements to localise data (store data in a particular jurisdiction). Data localisation is a modern threat to trade, competition and digital innovation that can perversely undermine its purported objective of data security;
    - misalignment between regulatory regimes such as those protecting data;
    - ambiguous or excessive legal liability of intermediaries;
    - requirements to transfer technology or source code; and
    - restrictions on, or filtering of, content or expression.

    The Government should work with international counterparts to encourage regulation that is: the minimum necessary for achieving a legitimate policy objective; non-discriminatory; non-arbitrary; the least trade restrictive; and not disguised or inadvertent protectionism.
3. taking practical steps towards the digitisation of goods trade documentation in cooperation with partners in the Asia-Pacific region and elsewhere.
4. cooperating with other governments to improve international cyber security efforts.

KEY RECOMMENDATIONS

The Business Council recommends that the Australian Government should continue to play an international leadership role in digital trade, by:

1. working towards a permanent moratorium on import tariffs on electronic transmissions.
2. continuing to encourage regional partners to adhere to best practice regulatory processes when introducing laws that affect digital trade.
3. seeking to prohibit restrictions on data localisation requirements in future multilateral and bilateral trade agreements.
4. encouraging expanded participation in the APEC Cross-Border Privacy Rules in preference to extra-territoriality requirements in other jurisdiction's domestic legislation.
5. continuing to support work underway to encourage greater interoperability between the APEC Cross-Border Privacy Rules and data protection regulation in the European Union.
6. continuing to establish norms (in particular through the WTO digital trade working group) that discourage mandatory transfer of technology or source code, ambiguous or excessive legal liability of intermediaries, and restrictions or filtering of content or expression.
7. continuing to actively engage with the private sector in relation to digital trade, as technologies evolve.
8. continuing to encourage the digitisation of international trade documentation, including through:
    - the establishment under WTO auspices of a working group to advance ideas for the international electronic exchange of government trade documentation, and
    - bilateral and regional efforts to explore how single windows could be linked internationally.
9. enhancing international cooperation on cyber security matters using the full range of available diplomatic levers, including trade agreements, with a priority focus on the Asia-Pacific region.

INTRODUCTION

The Business Council welcomes the Australian Government's role in leading international discussion on digital trade and its willingness to consult with the Australian business community. We recognise that the Department of Foreign Affairs and Trade is already working on many of the recommendations discussed in this submission, and we commend the Department for taking a strategic approach to digital trade matters.

Defining digital trade

Defining "digital trade" is challenging, and a multitude of different definitions exist.[1] It is important to be precise in defining the exact aspects of commerce that are within scope.

In this submission, references to "digital trade" refer to the following:

- the trade of digital goods and services (for example, the purchase of digital advertising in another jurisdiction), or
- the transmission of data or other digital communications related to the trade of goods and services (whether digital or physical) across borders[2] (for example, data associated with a financial transaction may cross borders to be stored in a different jurisdiction), or
- the use of digital platforms to purchase, produce or deliver goods and services across borders[3] (for example, the use of an online shopping platform to buy a product in one jurisdiction and have it shipped to another).

Digital technologies bring benefits

Digital trade has a transformational impact on cross-border commerce. Estimates suggest 48 per cent of all traded services are enabled by digital technologies.[4] An estimated 360 million individuals take part in cross-border digital trade annually.[5]

The economic benefits of digital innovation include:

- availability of a lever for promoting economic participation
- productivity improvements
- greater competition leading to lower prices and greater choice for consumers
- the emergence of new and more efficient business models
- knowledge spillovers, and
- increased global links and trade.

Digital innovation increases global links and trade, including by making it much easier to enter international markets.[6] As with cross-border trade more generally, by promoting exports and imports, digital trade brings national income benefits from greater specialisation.

Benefits are not limited to start-ups or the technology sector. Digital technologies facilitate trade across sectors.

Small and medium enterprises (SMEs) particularly benefit from digital trade. Digital tools have fundamentally transformed the cost structure of exporting for SMEs, by reducing export costs by up to 82 per cent.[7] SMEs are more likely to engage in cross-border commerce: any SME with a website has the opportunity to access foreign markets, export and be a “micro multinational”.[8] SMEs that are heavy online users are almost 50 per cent more likely to export goods and services.[9]

As an open, trade-based economy, Australia stands to benefit from greater global links and trade. Between 1986 and 2016, liberalisation of merchandise trade benefitted Australia through increasing real Gross Domestic Product 5.4 per cent, increasing real wages 7.4 per cent and decreasing prices of goods by 3.4 per cent.[10]

Disruption to digital trade (especially cross-border data flows) would be significant, especially for the Australian economy. For example, it is estimated that, if international data flows were seriously disrupted or stopped, EU GDP would fall by 0.8-1.3 per cent.[11]

Barriers to digital trade

Notwithstanding the benefits, governments around the world impose a range of barriers to digital trade. Common barriers include:

- restrictions or prohibitions on digital goods or services or technology requirements, including onerous or unreasonable security standards
- localisation requirements – such as through local content requirements, local registration requirements, or requirements for data (usually personal data) to be stored within specified national boundaries
- requirements to disclose confidential information relating to digital goods and services (forced technology transfers or sharing of source code)
- restrictions or filtering of content or expression
- ambiguous or excessively broad legal liability for intermediaries
- regulation that prohibits digitisation and requires physical copies of documentation
- unilateral tax changes outside the OECD’s work on Tax Challenges Arising From Digitalisation.[12]

In some instances, governments may institute barriers to digital trade for economic aims, like encouraging local industry and sheltering domestic companies from global competition. This may constitute protectionism and, if so, should be discouraged under global trading rules.

In some cases, governments institute barriers to digital trade for legitimate public policy objectives, such as law enforcement, national security or consumer protection, but do not apply the least trade restrictive approaches.[13] In some cases, restrictions on digital trade could perversely undermine the intended policy objective: for example, data localisation requirements may prevent data from being stored in more secure facilities in a different jurisdiction.[14]

To ensure public policy measures do not impose unnecessary barriers to trade, policies should be:

- the minimum necessary to accomplish a legitimate public policy objective,
- non-discriminatory,
- not arbitrary,
- least trade restrictive,
- not otherwise a disguised restriction on trade, and
- subject to best practice regulatory development processes.[15]

Barriers to digital trade risk forging the benefits of digital innovation and can lead to greater costs of goods and services (ultimately borne by consumers), barriers to competition, and a reduction in firms' capacity to participate in global value chains.[16]

The net economic impact can be significant. For example, the implementation of current and proposed data localisation measures (at the time of the study in 2013) in India, Indonesia and Vietnam was estimated to reduce GDP by 0.1 per cent, 0.5 per cent and 1.7 per cent, respectively.[17] The economic impact would be higher if sector-specific data localisation requirements were applied across the entire economy: leading to GDP losses of 0.8 per cent in India and 0.7 per cent in Indonesia.

Furthermore, barriers to digital trade do not just harm the competitiveness of the country implementing the policies; they also harm other countries.[18]

A FRAMEWORK FOR DIGITAL TRADE

The Business Council recommends that the Australian Government's overall approach to digital trade should be guided by the following:

- The approach should be based on a recognition of the benefits to Australia from digital trade, open markets, competition and economic activity.
- Australia should lead by example. In the Cairns Group in the 1980s, Australia's trade negotiating position was strengthened by Australia already taking substantive steps to reduce barriers to agricultural trade domestically. A similar approach should be adopted in relation to digital trade.
- The Government should employ a broad range of levers to encourage digital trade, both within the trading rules system (like the World Trade Organization and bilateral or multilateral trade agreements), through other fora for cooperation (like APEC, ASEAN, the OECD, or bilateral cooperation), and through a conducive domestic macroenvironment (beyond the scope of DFAT's discussion paper).
- The Government should carefully consider the costs and benefits of all digital trade-related proposals that would necessitate changes to domestic regulation, to ensure they reflect the interests of Australian businesses, the Australian economy and consumers.[19]

RECOMMENDATIONS

We encourage the Australian Government to continue to play an international leadership role in relation to digital trade. This should involve building a core group of like-minded countries to advocate for the benefits of digital trade, advance digital trade norms and set high standards for digital trade around the world.

The Business Council makes the following recommendations as a suite of measures to play a leadership role in encouraging digital trade.

Tariffs and customs duties should be opposed

In 1998, the WTO adopted a declaration on e-commerce and a commitment that members would "continue their current practice of not imposing customs duties on electronic transmissions" (referred to as the "e-commerce moratorium"). The e-commerce moratorium has been extended at each conference of trade Ministers since 2001.[20]

However, from the extension granted at the 2017 meeting of the 11th Ministerial Conference of the WTO in Buenos Aires, it appears support for the moratorium may be eroding in some jurisdictions[21]; indeed, some may be readying themselves to levy duties in future.[22]

Through the digital trade group formed at the last WTO meeting, the Australian Government should pursue binding international agreement to a permanent moratorium on duties on electronic transmissions or, at least, a continuation of the temporary moratorium.

The adverse impacts of duties on electronic transmissions would potentially include:

- a diminution of the benefits consumers and importers receive from trade
- major disruption to the value chains of digital goods and services across borders
- disincentives for multinational firms to innovate and invest
- the implementation of duty collection regimes that would be difficult to design and near-impossible to administer.

Recommendation 1:

The Australian Government should work towards a permanent moratorium on import tariffs on electronic transmissions.

Behind-the-border barriers to digital trade should be addressed

Barriers to trade are broader than tariffs. Jurisdictions, including in the Asia-Pacific, are increasingly regulating digital activity in ways that are de facto barriers to digital trade.

A range of existing WTO agreements and bilateral or multilateral trade agreements contain provisions that address behind-the-border barriers to digital trade.[23] The WTO Work Programme on Electronic Commerce (if it is successfully reinvigorated) or upcoming bilateral agreements, like the Indonesia-Australia Comprehensive Economic Partnerships Agreement provide further opportunities.

The Australian Government should encourage international jurisdictions to adhere to good regulatory practices when introducing laws that impact digital trade. This includes consultation, opportunities for businesses to input to developing new legislation, and sufficient notice periods to ensure compliance. These requirements can be codified in bilateral or regional agreements.

Australia should lead by example in relation to our own regulations and regulatory processes, to avoid establishing new barriers to digital trade and by reducing existing barriers.

Recommendation 2:

The Australian Government should continue to encourage regional partners to adhere to best practice regulatory processes when introducing laws that affect digital trade.

Below is a non-exhaustive list of the current highest-priority behind-the-border barriers for Business Council members.

1. Localisation requirements

Localisation requirements are behind-the-border barriers to trade that require minimum levels of locally-sourced goods or services to be incorporated into a larger intermediate good or service, before it can be traded in that jurisdictions. Localisation requirements increase cost, reduce competition and choice, and diminish a country's long-term competitiveness.[24]

For digital trade, the most pressing localisation requirements are those relating to data. Many require data (usually personal data) to be stored within the country of the data collection. In some cases, cross-border data flows are outright banned.[25]

Data localisation requirements have emerged in jurisdictions such as China, Vietnam and India.[26] Between 2006 and 2016, among the world's largest economies, the number of major data localisation measures nearly tripled from 31 to 84.[27]

As the International Chamber of Commerce explains, "creating artificial constraints to [companies' digital supply chain] planning through data or server localisation restrictions increases the costs of doing business and diminishes the attractiveness of the location for investment or inclusion in global value chains."[28] In particular, some of the business models around emerging technology (like distributed ledgers, data analytics or the Internet of Things) are built around distributed data flows and are not economically possible in jurisdictions with data localisation requirements.

Australia should pursue prohibitions on data localisation in every future multilateral and bilateral trade agreement. This could be a possible work stream under the WTO e-commerce work program.

Recommendation 3:

The Australian Government should seek to prohibit restrictions on data localisation requirements in future multilateral and bilateral trade agreements.

2. International alignment of regulation

International alignment of regulation reduces the burden on multinational firms that operate across multiple jurisdictions. Mutual recognition offers a good way to retain some flexibility in jurisdictions' regulatory discretion, while eliminating unnecessary jurisdiction-specific idiosyncrasies.[29]

One of the areas where international alignment can generate the greatest benefit is in relation to privacy and data protection. Alignment of privacy rules can reduce regulatory costs and ensure a common level of protection across jurisdiction, as long as regulation does not adopt the most prescriptive regime for all jurisdictions.

There has been valuable work already undertaken in relation to privacy through the APEC Cross-Border Privacy Rules. They strike the right balance between flexibility, alignment and giving consumers confidence, and should serve as a model for other examples of regulatory alignment across jurisdictions.[30]

This is preferable to alternate approaches, like the extra-territorial requirements in the EU's General Data Protection Regulation. Australia should not adopt the EU's regime – which contains many areas of regulatory overreach and ambiguity – in the interests of alignment.

We strongly encourage DFAT to work encourage other governments' participation in the Rules. This has also been recommended by the Productivity Commission.[31]

Work is reportedly underway between the APEC Data Protection Subgroup and the EU Article 29 Working Party to encourage greater interoperability between APEC's regime and the GDPR.[32] We encourage DFAT to build momentum behind this work.

Recommendation 4:

The Australian Government should encourage expanded participation in the APEC Cross-Border Privacy Rules in preference to extra-territoriality requirements in other jurisdiction's domestic legislation.

Recommendation 5:

The Australian Government should continue to support work underway to encourage greater interoperability between the APEC Cross-Border Privacy Rules and data protection regulation in the European Union.

3. Other behind-the-border areas

We recommend establishing norms through the WTO or multilateral agreements around the following areas:

- Legal liability. Uncertain or excessive legal liability rules can be a barrier to trade (for example: a lack of clarity over the liability of digital intermediaries can hinder investment[33]).
- Transfer of technology or source code. Some countries make market access contingent on the transfer of proprietary technology or source code.[34] While some multinational firms may see value in sharing technology with local partners, regulation that forces technology

transfer risks penalising innovators for the purpose of industry development, which ultimately stifles investment and innovation.

- Restrictions or filtering of content or expression. While some content restrictions or filtering requirements are legitimate (for example, to ensure child-friendly content or to discourage personal vilification), excessive restrictions or filters incur regulatory cost and, at their worst, represent political censorship.[35]

To assist in advocating for free trade, the Australian Government could commission analysis of behind-the-border restrictions and the economic impact (including the impact on Australian exporters and investors).

Recommendation 7:

The Australian Government should continue to establish norms (in particular through the WTO digital trade working group) that discourage mandatory transfer of technology or source code, ambiguous or excessive legal liability of intermediaries, and restrictions or filtering of content or expression.

Emerging technologies

A number of emerging technologies – including artificial intelligence and distributed ledger technologies (like blockchain) – could potentially generate large efficiencies in the global trading system, especially customs processes.

There is ample speculation on the implications of these technologies for digital trade but it is not yet clear how trading rules should be changed in response to these technologies. If rules for emerging technologies are set too early, they risk stifling potential innovation.

This should be regularly monitored to assist DFAT in identifying the right time, if any, to intervene. We recommend DFAT convene an advisory group of innovative companies that could assist in alerting areas that may require DFAT action in future.

Recommendation 8:

The Australian Government should continue to actively engage with the private sector in relation to digital trade, as technologies evolve.

Trade facilitation, government service delivery and digital authentication

Digitisation also has great potential to reduce costs associated with physical trade in goods across international borders. Among other things, digitisation could:

- speed up processing times associated with Customs processes;
- reduce back-office costs associated with processing trade documents; and
- encourage new businesses and start-ups to engage in international trade and exporting.

Substantial time and labour resources are devoted by banks and government authorities to processing traditional trade documentation, such as certification related to sanitary or phytosanitary requirements; technical specifications and standards requirements; and rules of origin.

Business Council member companies are already involved in initiatives to reform trade documentation processes, including consideration of how to use electronic means to authenticate trade financing and documentation between correspondent banks, and in cooperation with monetary authorities in the Asia-Pacific region.

Documentary processes for international trade have remained traditional, due to:

- still-emerging understanding and confidence among counter-parties of how to apply new technology to these processes; and
- a lack of clarity and cooperation on how technology could be applied to the submission and exchange of government trade documentation.

There is potential for governments to cooperate further to support the uptake of electronic means for delivering and authenticating such documentation. This cooperation could initially occur under WTO auspices, particularly through the digital trade group formed at the last WTO meeting and the WTO's trade facilitation agenda.

The WTO's Agreement on Trade Facilitation (ATF) already calls for the establishment of 'single windows', a central point for the submission of trade documents and data. This could go further by:

- anchoring work on single windows in a substantial program of international discussion and negotiation, including between border agencies;
- developing the potential of digital technology to facilitate the networking of single windows between countries. Such networks could become an integral to – or at least play an important role in – digital delivery and/or verification of government trade documentation across borders; and
- taking stock of developments in the electronic delivery and authentication of trade finance and letter of credit documentation between correspondent banks, and of the potential application of distributed ledger technology in government approval and certification processes for international trade.

The Business Council supports the work underway to advance a single window in Australia and recommends this work be prioritised with enhanced resources. This agenda should also embrace work with trade partner countries, as well as a more expansive WTO and regional agenda, to explore how such single windows could interlinked internationally.

Recommendation 9:

The Australian Government should encourage the digitisation of international trade documentation, including through:

- the establishment under WTO auspices of a working group to advance ideas for the international electronic exchange of government trade documentation, and
- bilateral and regional efforts to explore how single windows could be linked internationally.

Cyber security

Although companies are responsible for the cyber security of their systems and information, governments can take significant steps to encourage an environment conducive to cyber security. Governments can ensure their own security, collaborate with the private sector to improve readiness and share information, and establish norms with other governments.

Cyber security is an enabler for greater growth in digital innovation, digital commerce and digital trade by encouraging trust and security.

We commend the Government on its International Cyber Engagement Strategy and appointment of an Ambassador for Cyber Security.[36]

Trade agreements may be a suitable avenue to establish norms around how governments regulate businesses for cyber security. As with broader regulation, cyber security-related regulation should be: necessary for a legitimate public policy objective; non-discriminatory; not arbitrary; least trade restrictive; and not otherwise a disguised restriction on trade. If cyber security provisions are settled in NAFTA[37], there may be some value in using those provisions as a template for future Australian trade agreements.

Trade agreements should be part of a broader, holistic approach to cyber security. Other initiatives could include joint cyber security exercises with other governments, norm-setting around government behaviour, and threat sharing with governments and the private sector.

The Australian Government could consider working with like-minded countries to settle and promote cyber security norms. We recommend a priority focus on the Asia-Pacific region. To this end, the Government could build on the ASEAN-Australia Digital Trade Standards Initiative.

Recommendation 10:

The Australian Government should enhance international cooperation on cyber security matters using the full range of available diplomatic levers, including trade agreements, with a priority focus on the Asia-Pacific region.

Notes

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