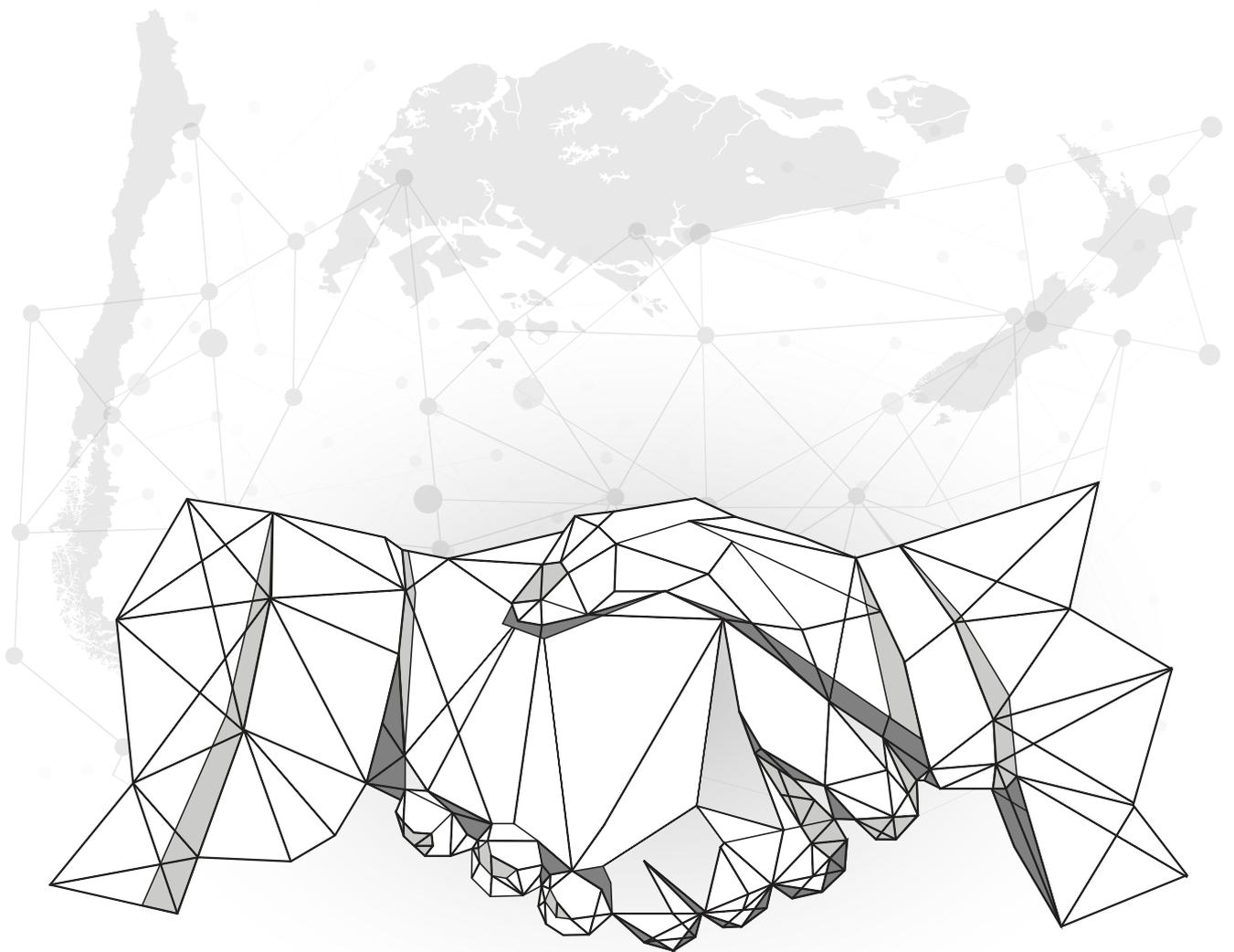


INTERNATIONAL  
AND COMPARATIVE  
LAW RESEARCH CENTER

# RULES FOR DIGITAL TRADE: THE DIGITAL ECONOMY PARTNERSHIP AGREEMENT (DEPA)

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Moscow 2020

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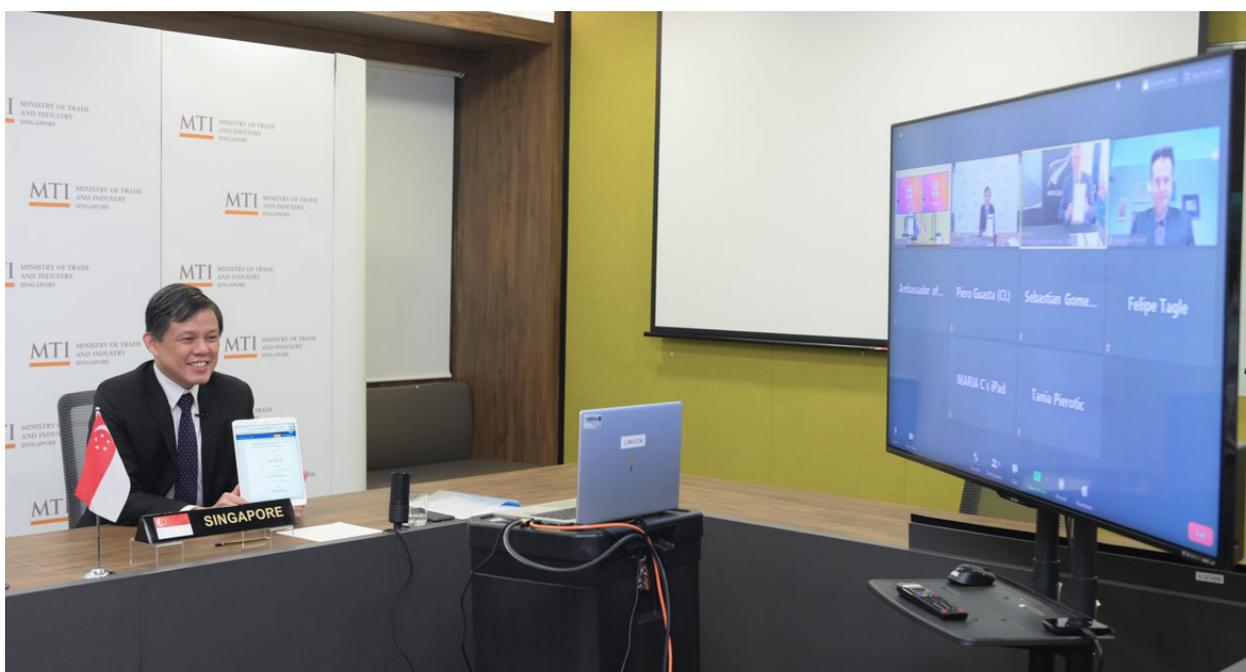
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# INTRODUCTION

Today, the world is going through unprecedented changes: as a result of the rapid development of digital technologies, various areas of life are currently undergoing a radical transformation. The methods of manufacturing, consumption and distribution of goods and services are being improved at an ever-increasing pace, curbing trade expenses and making economic relations more efficient.

However, the successful development of technology does not automatically herald an advancement of human well-being, a dynamic increase in trade and the achievement of the necessary level of economic growth. It is crucial to learn how to manage the structural changes fuelled by the development of technology. These changes are cross-border in nature and, therefore, demand a response on the inter-state level.

An efficient way for states to manage these structural changes is by entering into agreements with other countries envisaging new approaches to international trade in the setting of a digital economy. Until recently, such arrangements had largely contained fragmented rules of electronic commerce not capable of serving as a model of effective regulation. Yet, the situation has changed dramatically since the introduction of the **Digital Economy Partnership Agreement (DEPA)**, signed by the Republic of Chile, New Zealand and the Republic of Singapore on June 11, 2020.<sup>1</sup> The document encompasses pre-existing best practices and determines the thrust of development.



Singapore's Minister for Trade and Industry Chan Chun Sing, New Zealand's Minister for Trade and Export Growth David Parker and Chile's Minister of Foreign Affairs Teodoro Ribera Neumann signed the DEPA electronically via videoconference on June 11, 2020. *Photo Credit: Singapore's Ministry of Trade and Industry, Singapore's Ministry of Communications and Information and Singapore's Infocommunications Media Development Authority.\**

<sup>1</sup> For reference, according to data from the United Nations Conference on Trade and Development (UNCTAD), the parties of the DEPA have the following performance in 2019 in terms of exported goods: the Republic of Chile — US\$69.1 billion (0.38% of world exports); New Zealand — US\$38.1 billion (0.21% of world exports); the Republic of Singapore — US\$390 billion (2.1% of world exports).

\* Singapore, Chile and New Zealand are signing the Digital Economy Partnership Agreement electronically. URL: <https://www.imda.gov.sg/news-and-events/Media-Room/Media-Releases/2020/Singapore-Chile-and-New-Zealand-Sign-Digital-Economy-Partnership-Agreement-Electronically>.

The objective of this study is to examine the DEPA, seen as a cutting-edge agreement in the area of digital trade and economy, in order to give momentum to the subsequent evolution of corresponding regulations, including those involving Russia in the context of its membership in the EAEU. While working on this study, we aimed to determine the factors underlying the introduction of the agreement, one of a new generation in this sphere; analyze the modular approach of the DEPA as a special drafting technique fitting its aims; and provide an overview of the rules agreed upon by the Parties.

The International and Comparative Law Research Center expresses its gratitude to Maxim Vorobyev, Ilia Kabanov, Victoria Manko, Aleksey Petrenko, and Anna Sysoeva, who took part as experts in this study.

# ABBREVIATIONS

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<b>AI</b>	Artificial intelligence
<b>APEC</b>	Asia-Pacific Economic Cooperation
<b>CIS</b>	Commonwealth of Independent States
<b>CPTPP</b>	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
<b>DEPA, Agreement</b>	Digital Economy Partnership Agreement <sup>2</sup>
<b>EAEU</b>	Eurasian Economic Union
<b>GATT 1994</b>	General Agreement on Tariffs and Trade 1994
<b>MERCOSUR</b>	Southern Common Market
<b>OECD</b>	Organization for Economic Co-operation and Development
<b>Parties</b>	DEPA Parties
<b>SME</b>	Small and medium enterprises
<b>TPP</b>	Trans-Pacific Partnership
<b>TFA</b>	WTO Agreement on Trade Facilitation
<b>Treaty of Waitangi</b>	Agreement signed by British representatives and Maori chiefs, February 6, 1840
<b>UNCITRAL</b>	United Nations Commission on International Trade Law
<b>USMCA</b>	United States-Mexico-Canada Agreement
<b>WTO</b>	World Trade Organization

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<sup>2</sup> Digital Economy Partnership Agreement between the Republic of Chile, New Zealand and the Republic of Singapore, signed on June 11, 2020, URL: <https://www.mfat.govt.nz/assets/Uploads/DEPA-Signing-Text-11-June-2020-GMT.PDF>.

# EXECUTIVE SUMMARY

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1. The DEPA, signed on June 11, 2020, is an international agreement, the first of its kind, regulating trade relations geared *entirely* towards various aspects of digital trade and the digital economy as a whole. Its Parties (the Republic of Chile, New Zealand and the Republic of Singapore) are states who traditionally employ pioneering approaches to trade regulations, especially in international trade and economic relations. As of now, the DEPA is the first successful attempt to create regionally up-to-date rules for international e-commerce **(paras 13-15 of the Note)**.

2. The underlying premise for the creation of the DEPA has been inability at the international level, first and foremost that of the WTO, to generate efficient rules of e-commerce in the face of fast-developing modern digital technology. Attempts to satisfy businesses' demands in this regard have led to the adoption of fragmented rules of e-commerce in regional trade agreements. Thus, the DEPA was developed against a backdrop of isolated regional solutions to single issues **(paras 8-18 of the Note)**.

3. For these reasons, various regional arrangements have laid the foundation of the DEPA, some involving the Parties and some not. The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) has been the prevailing source of inspiration for the DEPA's content: The Agreement is, in fact, a more in-depth refinement of CPTPP provisions implemented earlier by the Parties, as well as similar rules of corresponding chapters of the Parties' other regional free trade agreements. Some provisions of the DEPA were also drawn from the USMCA and the US-Japan Digital Trade Agreement. Likewise, some DEPA provisions have elaborated on digital economy practices currently being shaped within the framework of APEC, the OECD and other international fora. As a result, the DEPA has accumulated the best practices for streamlining relationships in the digital environment **(paras 15-16, 35, 43, 45, 81, 93, 104, 120 of the Note)**.

4. These approaches include rule-making on topics such as business and trade facilitation; digital products; data issues; wider trust environment; business and consumer trust; digital identities; emerging trends and technologies; innovation and the digital economy; small and medium enterprises cooperation; and digital inclusion **(paras 28-79 of the Note)**.

5. The Parties have put their hopes in the DEPA's ability to shape new ideas and approaches that could become widely used. Adhering to this ambition is the innovative way of drafting chosen by the Parties, who decided to separate the structural elements of the DEPA into distinct modules — self-contained, independent blocks that can be further expanded. For instance, such an expansion would be possible not only within the Agreement itself via the amendments to the text in the future, but also both independently through the adoption of the blocks jointly by other countries in their agreements, or unilaterally on the national level, subject to modification. In addition, the ability of the Agreement to further evolve is embodied in its notion as a living instrument, broadly exhibiting commitments to the development of cooperation between the Parties and the subjects concerned, along with declaratory statements regarding adherence to the selected approaches to electronic commerce and the economy as a whole **(paras 23-25 of the Note)**.

6. Examination of the Agreement enables one to reasonably conclude that regard has to be paid to its approaches in the subsequent elaboration on and application of the rules of e-commerce. This capacity, built-in by the Parties, can further be realized in:

- multilateral negotiations on e-commerce at the WTO;
- negotiations between other countries on free trade agreements or other arrangements related to the development of rules of electronic trade and the economy as a whole;
- the shaping of trade policy by countries unilaterally; and
- the engaging of any other subjects relating to the international digital economy or digital trade.

7. Moreover, the DEPA experience can be useful in cooperation within the EAEU in terms of the development of e-commerce rules, as well as externally in the EAEU's international trade agreements, for example with Asian partners with whom there are already certain arrangements reached in this sphere.<sup>3</sup>

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<sup>3</sup> For instance, some provisions of the DEPA conceptually echo Articles 9.6 "Use of Electronic Documents in Electronic Commerce" and 9.9 "Consumer Protection" of the Free Trade Agreement between the Eurasian Economic Union and its Member States, of the one part, and the Republic of Singapore, of the other part, signed on October 1, 2019. Those provisions relate to the list of fraudulent practices in relation to consumers in e-commerce, mandatory requirements regarding the observance of consumer rights, and the use of electronic documents in e-commerce. URL: [http://www.eurasiancommission.org/ru/act/trade/dotp/sogl\\_torg/Documents/Сингапур/EAEU-Singapore%20FTA\\_Main%20Agreement.pdf](http://www.eurasiancommission.org/ru/act/trade/dotp/sogl_torg/Documents/Сингапур/EAEU-Singapore%20FTA_Main%20Agreement.pdf).

# I. BACKGROUND

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8. The creation of the DEPA is a timely solution in the context of the “decontainerization” process of international trade: whereas before goods used to cross borders predominantly in containers, now they do so more often in individual packages. This process underlines how e-commerce transformed from a particular case to a new full-scaled form of international economic activity, which is demonstrating high growth rates, especially in the face of new global challenges, such as, for example, the COVID-19 pandemic.<sup>4</sup>

9. The obvious urgency of completing such an international agreement on the regional level is also that the WTO e-commerce agenda is lagging behind business demands. Since the adoption of the Declaration on Global Electronic Commerce within the framework of the WTO in 1998, no significant decisions have been made.<sup>5</sup>

10. Meanwhile, enough issues that require an operative settlement at the international level have already been raised. For example, it is yet to be agreed whether customs duties on electronic transmissions are feasible at all and, if so, then in which manner such duties should be imposed. In the absence of an effective solution to this issue, there has been an operative moratorium on the imposition of customs duties on electronic transmissions under the Declaration. The terms of the moratorium do not contain clear and unambiguous legal definitions for a number of key activities in the framework of e-commerce. The moratorium is each time renewed at the WTO Ministerial Conferences.<sup>6</sup>

11. Yet another attempt to introduce multilateral rules on e-commerce on the sidelines of the WTO was the joint statement made by some Members in 2019. With this statement, negotiations commenced on trade-related aspects of electronic commerce.<sup>7</sup> At the time the launch of the negotiations was announced, 76 countries expressed their willingness to take part in them. All the DEPA Parties and several EAEU Member States, namely the Russian Federation and the Republic of Kazakhstan, are participating in these negotiations. Diametrically opposed positions on a number of key issues have so far prevented the negotiations from producing any meaningful results.<sup>8</sup>

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<sup>4</sup> For more information on how the COVID-19 pandemic has impacted e-commerce, see “E-Commerce, Trade and the COVID-19 Pandemic”, Information note by the WTO Secretariat, May 4, 2020.

<sup>5</sup> The Geneva Ministerial Declaration on Global Electronic Commerce, WT/MIN(98)/DEC/2, 1998, URL: [https://www.wto.org/ENGLISH/tratop\\_e/ecom\\_e/mindec1\\_e.htm](https://www.wto.org/ENGLISH/tratop_e/ecom_e/mindec1_e.htm).

<sup>6</sup> See the outcome of the XI Ministerial Conference of the WTO concerning e-commerce, WTO Website, 2017, URL: [https://www.wto.org/english/thewto\\_e/minist\\_e/mc11\\_e/briefing\\_notes\\_e/bfecom\\_e.htm](https://www.wto.org/english/thewto_e/minist_e/mc11_e/briefing_notes_e/bfecom_e.htm). At the same time, certain developing countries, most notably India, South Africa and Sri Lanka, have indicated their desire to cancel their support for the moratorium at the next WTO Ministerial Conference, which is scheduled to be held in Nur-Sultan (Republic of Kazakhstan) in 2021. The main reason is the budgetary loss by developing countries of customs revenues, especially the fact that such loss represents a disproportionately larger portion than that of developed countries (The E-Commerce Moratorium and Implications for Developing Countries, Communication from India and South Africa, WT/GC/W/774, June 4, 2019).

<sup>7</sup> Joint Statement on Electronic Commerce, WT/L/1056, January 25, 2019.

<sup>8</sup> Such issues include: the possibility of applying the requirement for localization of personal data as a condition for market access, determination of the country of origin of a digital product, and cancellation of the moratorium in favor of a permanent ban on the collection of customs payments from electronic transmissions.

12. Therefore, having been faced with the hurdles of how e-commerce rules are being shaped on the multilateral level, **in accord with the “spaghetti bowl” effect,<sup>9</sup> countries began actively developing this field through their own initiative via regional agreements.**

By May 2017, there had been 75 active regional trade agreements notified to the WTO that contained various provisions on e-commerce.<sup>10</sup> Yet, none of them became a model for the further development of rules in this sphere.

13. In an ambitious attempt to fill the gap, Chile, New Zealand, and Singapore declared on May 17, 2019, that they had launched negotiations to complete the DEPA, its scope reaching well beyond the aspects of trade alone (the Digital Economy Partnership Agreement).<sup>11</sup> It was signed in just a year,<sup>12</sup> meaning that the Agreement was developed in record time for an international trade agreement.<sup>13</sup>

In keeping with the spirit of the reached arrangement, the signing ceremony for the DEPA was held virtually, in an online format using digital signatures.<sup>14</sup> It was the first time such a method for concluding international agreements had been used.<sup>15</sup>

As of September 7, 2020, the DEPA had not yet entered into force.<sup>16</sup>

14. The Parties have a long-standing partnership. It was Chile, New Zealand, and Singapore who first put forward the idea of creating the TPP in 2003, which became in its final version the CPTPP<sup>17</sup> — the strategic, comprehensively integrated mega-regional agreement between a new

<sup>9</sup> “Spaghetti bowl” is a notion denoting the current state of international affairs in the field of trade law and policy, whereby in the last few decades there has been a dramatic rise in the number of regional trade agreements and integration processes despite the multilateral system of the WTO being operative, in light of the observed inability of the latter to become a forum for the efficient solution of emerging trade issues and challenges.

<sup>10</sup> Monteiro J-A, Teh R, “Provisions on Electronic Commerce in Regional Trade Agreements”, WTO Working Paper ERSD-2017-11, July 2017, p 4.

<sup>11</sup> See the website of the Ministry of Foreign Affairs and Trade of New Zealand, URL: <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-in-force/digital-economy-partnership-agreement/overview/>; Burri M. ToBurri M, “Towards a New Treaty on Digital Trade”, SSRN, p 14, 14. URL: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3623734](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3623734).

<sup>12</sup> Joint Ministerial Statement on the launch of Digital Economy Partnership Agreement negotiations, May 17, 2019, URL: <https://www.mfat.govt.nz/assets/Trade/Joint-Ministerial-Statement-on-the-launch-of-Digital-Economy-Partnership-Agreement-negotiations.pdf>.

<sup>13</sup> For instance, comparable periods from the start of negotiations until their conclusion or the signature of the document constituted **five years** for the EU-Canada Comprehensive Economic and Trade Agreement (2009-2014); **five years** for the Free Trade Agreement between the Eurasian Economic Union and Vietnam (2012-2015); and **two years** for the China-Switzerland Free Trade Agreement (2011-2013), URLs: <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/chronology-chronologie.aspx?lang=eng>; [http://www.eurasiancommission.org/ru/act/trade/dotp/sogl\\_torg/Documents/Вопросы%20и%20ответы%20по%20Соглашению%20о%20свободной%20торговле%20между%20странами%20ЕАЭС%20и%20Вьетнамом.pdf](http://www.eurasiancommission.org/ru/act/trade/dotp/sogl_torg/Documents/Вопросы%20и%20ответы%20по%20Соглашению%20о%20свободной%20торговле%20между%20странами%20ЕАЭС%20и%20Вьетнамом.pdf) (in Russian); <https://www.eda.admin.ch/countries/china/en/home/representations/embassy-in-beijing/embassy-tasks/economic-and-commercial-section/china-switzerland-free-trade-agreement.html>. To compare, it took a little more than **one year** for the development of the USMCA (August 2017 — November 2018), URL: <https://crsreports.congress.gov/product/pdf/R/R44981#:~:text=Negotiations%20officially%20began%20on%20August,a%20vote%20of%2089-10>.

<sup>14</sup> Article 16.9 of the DEPA allows the Agreement to be signed digitally. The signing ceremony was carried out in an online format and in different time zones. As a result, while the document reveals “June 11” as the date, some sources point out that New Zealand actually signed it on the next day, June 12. For convenience, in the present study, June 11, 2020 is indicated as the date when the DEPA was signed.

<sup>15</sup> A similar method of signing international agreements was later used in the case of the Australia-Singapore Digital Economy Agreement, signed on August 6, 2020 (Australian Government, Department of Foreign Affairs and Trade), URL: <https://www.dfat.gov.au/trade/services-and-digital-trade/Pages/australia-and-singapore-digital-economy-agreement>.

<sup>16</sup> The DEPA shall enter into force 90 days after the Depositary of the DEPA (New Zealand) has been notified by least two of the Parties that they have taken all of the necessary legal steps domestically (**paras 125-126 of the Note**).

<sup>17</sup> Signed on March 8, 2018.

formation of eleven countries from the Asia-Pacific region (Japan, Canada, Australia, New Zealand, Mexico, Peru, Chile, Malaysia, Brunei, Singapore, and Vietnam).

The CPTPP is deemed to have set the gold standard in regional trade agreements. It was designed to create a brand new trade environment in the Asia-Pacific region,<sup>18</sup> and allows for the generation of new issues for the trade negotiations agenda, including those concerning rules on e-commerce.<sup>19</sup>

15. These facts largely explain the speed of which the DEPA was completed. A significant part of its general provisions (Modules 1, 12-16), as well those more detailed, such as articles governing cross-border operations using digital technologies, repeat the provisions contained in the CPTPP (**paras 35, 43, 45, 81, 93, 104, 120 of the Note**). Such provisions are either identical to the same standards of the CPTPP, or include minimal changes, which in most cases regard terminology.

16. Besides drawing on some provisions of the CPTPP, the DEPA also includes various rules of other agreements the Parties do not participate in: the USMCA and the US-Japan Digital Trade Agreement.<sup>20</sup> Such borrowing has not become equivalent to a mere mechanical duplicating of the provisions: a number of them have been modified in the DEPA.<sup>21</sup>

17. Additionally, the DEPA has been developed in light of digital economy practices now being shaped within the framework of APEC, the OECD and other international fora.<sup>22</sup>

18. Based on the above, the following premises predominantly underlie the creation of the DEPA:

- the change of circumstances in which economies operate due to technological development, which calls for modern regulation;
- the lack of progress in WTO negotiations on the creation of such regulation, causing the multilateral e-commerce agenda to lag behind business demands; and
- the accumulation of regional experience in the field of e-commerce rule development, whereas this accumulation has reached a tipping point requiring processing and further adaptation and expansion in the context of how digital economy rules evolve.

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<sup>18</sup> "Australia, Canada, New Zealand Ratify CPTPP, Setting Stage for Trade Deal's Entry into Force", *Bridges*, Volume 22 — Number 36, November 1, 2018, URL: <https://ictsd.iisd.org/bridges-news/bridges/news/australia-canada-new-zealand-ratify-cptpp-setting-stage-for-trade-deals>.

<sup>19</sup> See "A Vision for Digital Trade Policy", *techUK* Report, 2020, p 11, URL: [https://www.techuk.org/images/assets/documents/A\\_Vision\\_for\\_UK\\_Digital\\_Trade\\_Policy\\_FINAL.pdf](https://www.techuk.org/images/assets/documents/A_Vision_for_UK_Digital_Trade_Policy_FINAL.pdf).

<sup>20</sup> Burri M, "Towards a New Treaty on Digital Trade", *SSRN*, p 15, URL: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3623734](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3623734).

<sup>21</sup> See Mitchell AD, Mishra N, "Digital Trade Integration in Preferential Trade Agreements", *ARTNeT Working Paper Series*, No 191, May 2020, p 28.

<sup>22</sup> In particular, with the adoption of the Ministerial Meeting Declaration on Digital Economy on June 23, 2016, noting the digital transformation of economies as one of the priorities of government policies, the OECD began to develop the relevant standards through the OECD Digital Economy Policy Committee. URL: <http://www.oecd.org/sti/ieconomy/Digital-Economy-Ministerial-Declaration-2016.pdf>.

## II. DEPA OBJECTIVES AND THE MODULAR STRUCTURE OF THE AGREEMENT

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19. In accordance with the preamble of the Agreement, the objective of the DEPA is to make use of the widespread opportunities provided by innovations and the global internet to contribute to economic growth, sustainable development, increasing the productivity of existing industries, and stimulating the emergence of new markets and businesses.

20. The DEPA promotes the transition to paperless trading, in which electronic versions of trade administration documents, in particular invoices, will be recognized as equivalent to paper documents in most situations.

The Agreement recognizes the rapid development of technology, and that in the future, electronic data exchange systems will completely replace paper documents, which will require the development of relevant standards at the international level.<sup>23</sup>

21. Additionally, the DEPA lays down the mechanisms for implementing customs procedures for express shipments. The Parties again confirmed their position that customs duties should not apply to goods delivered via electronic transmission.<sup>24</sup> This decision corresponds to the temporary moratorium currently in place at the WTO **(para 10 of the Note)**.

22. The Parties will strive to increase the number of electronic payments, creating clear and safe conditions for the functioning of payment systems, which will affect the balance of payments.<sup>25</sup>

23. Having designed the DEPA, the Parties came forward with a global initiative to alter the direction of negotiations on digital trade, including those that do not involve them. In this vein,

“The Parties hope that this new agreement will generate new ideas and approaches that can be used by members in the WTO negotiations, and by other countries negotiating free trade agreements or engaging in international digital economy or digital trade work.”<sup>26</sup>

In this regard, the Agreement is believed to be a living instrument that, the Parties' cooperation aside, should evolve along with the digital economy, due to, among other things, its membership's expansion.<sup>27</sup> Echoing the concept of a living instrument, many provisions of the DEPA do not contain enforceable legal obligations of substantive law. Rather, they constitute either undertakings to cooperate or declaratory statements about being committed to the selected approaches to regulation.

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<sup>23</sup> Recitals 3, 8 of the preamble, Art 2.2 of the DEPA.

<sup>24</sup> This is an established practice for the DEPA Parties: such an approach is nested in many bilateral FTAs (Korea-Singapore 2006, Australia-Chile 2009, USA-Singapore 2004).

<sup>25</sup> Art 2.7 of the DEPA.

<sup>26</sup> See the website of the Ministry of Foreign Affairs and Trade of New Zealand, URL: <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-in-force/digital-economy-partnership-agreement/overview/>.

<sup>27</sup> Recital 8 of the preamble of the DEPA.

24. For that reason, the drafters of the Agreement preferred the modular approach to the composition of the DEPA text, enabling them to achieve a more flexible result and encompass a wider range of issues.<sup>28</sup>

Each module represents an independent set of provisions on one topic, which could be addressed in isolation to the rest of the Agreement. This structure facilitates other countries to comprehend and utilize individual DEPA provisions more smoothly, compared to the more standard formulation of regional trade agreements via chapters or sections.

Unlike modules, chapters or sections are assumed to have a closer connection with each other; hence, the text of an agreement is required to be considered holistically as one unit.<sup>29</sup>

25. The modular approach is conveniently illustrated in the text of the Agreement, among others, by the fact that each module contains a glossary. At the same time, the DEPA also has provisions common for the entire Agreement.

26. Therefore, both the objectives of the Agreement and its structure are aimed at enabling the dynamic development of rules for electronic trade and the digital economy, in order to contribute to economic growth, sustainable development, increasing the productivity of existing industries, and the stimulation of emerging markets and businesses. In the meantime, the drafters of the DEPA intend to look beyond the relationships between the Parties: it is expected that other countries will also be able to use results achieved by the Agreement in the framework of the WTO and at the regional level.

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<sup>28</sup> Burri M, "Towards a New Treaty on Digital Trade", *SSRN*, p 14, URL: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3623734](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3623734).

<sup>29</sup> Ramasubramanian G, "Building on the Modular Design of DEPA", *EastAsiaForum*, July 10, 2020, URL: <https://www.eastasiaforum.org/2020/07/10/building-on-the-modular-design-of-depa/>.

# III. BUSINESS AND TRADE FACILITATION (MODULE 2 OF THE DEPA)

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## 1. Paperless Trading (Article 2.2 of the DEPA)

27. The Parties shall publish in the public domain online samples of documents necessary for the implementation of cross-border trade in English or other official languages of the WTO (French or Spanish) and, if possible, in machine-readable form.

These standards should simplify and automate the process of filling out such documents for participants in foreign economic activity.

28. Such electronic documents are recognized as equivalent to paper documents: the relevant authorities of the Parties are obliged to accept them in any case, with the exception of situations where the requirement to provide a paper document signed by hand is expressly stipulated in national legislation. For example, as may be the case with the transportation of donor organs.

## 2. Consolidation of Single Windows and Data Exchange Systems (Articles 2.2(4)-(5), 3 of the DEPA)

29. The Parties are required to have a Single Window system to simplify the interaction of companies with government agencies in the field of foreign economic activity: at the least, documents in electronic form or data related to the import or export of goods are to be loaded onto the system. On the one hand, these provisions of the Agreement are built on the obligation already provided for at the level of the WTO to create such a system. On the other hand, they expand the corresponding provisions of the TFA entered into force in 2017, which only states the ambitions of the TFA parties to create Single Window systems, and to deny additional submission of documents in paper form if such documents were submitted electronically.<sup>30</sup>

30. As part of the data exchange, the Parties should strive to ensure the information exchange of sanitary and phytosanitary certificates, statistics on imported and exported goods, and other documents and information (including various entries in the registers), on which relevant agreements will be reached.

31. The transition of the Parties to a qualitatively new level of trade relations is ensured by the obligations of the Parties to implement measures aimed at the compatibility of national data exchange systems, both operational and functional — so that the data exchange would be carried out swiftly and with no loss in quality. In this context, the Parties will exchange information, experience and best practices, as well as launch a number of pilot projects.

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<sup>30</sup> Art 4.1, 4.2 of the TFA, URL: [https://www.wto.org/english/docs\\_e/legal\\_e/tfa-nov14\\_e.htm](https://www.wto.org/english/docs_e/legal_e/tfa-nov14_e.htm).

32. The Parties will jointly present a position on international fora regarding the issue of ensuring the recognition of documents in the field of foreign economic activity in electronic form.

33. The Parties, in the development of national legislation on this issue, are guided by the principles of the UNCITRAL Model Law on Electronic Commerce (1996)<sup>31</sup> and the United Nations Convention on the Use of Electronic Communications in International Contracts (2005).<sup>32</sup>

34. The Parties will also endeavour to implement the UNCITRAL Model Law on Electronic Transferable Records in their national legislation.<sup>33</sup>

### 3. Logistics, Electronic Invoicing and Electronic Payments (Articles 2.4-2.6 and 2.7 of the DEPA)

35. The DEPA develops a series of new framework obligations in the field of transport, logistics, and payments for the Parties, which are expanding the provisions of the CPTPP on this issue.

36. In terms of logistics, the Parties will exchange best practices in the field of “last mile” delivery services,<sup>34</sup> including on-demand delivery and a dynamic flow routing system, the use of unmanned vehicles, and the simplification of cross-border delivery of goods to automated parcel lockers.

37. As regards the use of electronic shipping documents, it was agreed that such documents would be developed taking into account the principles of interoperability. For these purposes, international standards, guidelines, and recommendations will be used as far as possible.

38. A number of measures are envisaged to develop the cross-border express transport market in terms of simplifying customs procedures for this type of service. These procedures should provide for the following:

- the possibility of prior informing;
- the submission of information within the framework of a single register for all goods arriving within the framework of one express transportation;
- a minimal number of documents for customs administration;
- the release of goods for free circulation within 6 hours; and
- a system for the automatic recognition of the weight or price of goods used to determine customs value for the purpose of further payment of customs duties.

39. The Parties should develop specialized acts to regulate the activities of express carriers and the goods transported by them, in the absence of these provisions in national legislation.

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<sup>31</sup> UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996, with additional article 5 bis as adopted in 1998, URL: [https://www.uncitral.org/pdf/russian/texts/electcom/05-89452\\_Ebook.pdf](https://www.uncitral.org/pdf/russian/texts/electcom/05-89452_Ebook.pdf).

<sup>32</sup> United Nations Convention on the Use of Electronic Communications in International Contracts, URL: [https://www.un.org/ru/documents/decl\\_conv/conventions/elect\\_com.shtml](https://www.un.org/ru/documents/decl_conv/conventions/elect_com.shtml).

<sup>33</sup> UNCITRAL Model Law on Electronic Transferable Records, URL: [https://www.uncitral.org/pdf/russian/texts/electcom/MLETR\\_ebook\\_R.pdf](https://www.uncitral.org/pdf/russian/texts/electcom/MLETR_ebook_R.pdf).

<sup>34</sup> The last stage of product delivery to the end user.

40. Each Party undertakes to periodically review the thresholds for duty-free entry of goods.

41. The Parties acknowledge the importance of e-invoicing, which can increase the efficiency, accuracy, and credibility of commercial transactions. To this end, they have agreed to develop the corresponding regulation and, to the extent practicable, base it on the relevant international standards.

The DEPA also sets out the necessity of the Parties to facilitate the usage of e-invoicing by business.

42. The Parties agreed on principles for regulating cross-border electronic payments, including the use of international standards and rules, the development of open APIs (application programming interfaces) for national payment companies/systems, and the use of cross-border authentication systems for users (individuals and legal entities). These steps will greatly simplify trade transactions between business actors.

# IV. DIGITAL PRODUCTS

## (MODULE 3 OF THE DEPA)

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43. The definition of digital goods in the DEPA is completely identical to the same term contained in the CPTPP, and includes computer programs, text, video, images, sound recordings, or other goods that are digitally encrypted, produced for commercial sale or distribution, or which can be transmitted in electronic form. It does not include financial instruments.

44. The Parties stipulated an important condition that some countries are trying to challenge at the level of the WTO (**para 10 of the Note**): a ban on the imposition of customs duties on electronic transmissions, including the transfer of digital goods and content. In addition, such “digital goods” are provided with preferential treatment.

At the same time, the provisions of the Agreement do not preclude the collection of the corresponding internal taxes or fees.

45. The provisions on the non-discriminatory treatment of digital goods (including in the part that concerns the legal regime of intellectual property objects) do not create new obligations for the Parties, since they copy similar provisions from the CPTPP (Article 14.4 “Non-Discriminatory Treatment of Digital Products”). However, as highlighted by the drafters of the Agreement, such obligations set a high standard for new partners who might wish to join the DEPA in the future.<sup>35</sup> It is also noted that the non-discriminatory regime does not apply to the provision of government subsidies or grants, government loans, guarantees, or insurance.

46. For goods containing cryptography, the Parties agreed not to apply technical regulations or conformity assessment procedures that require the manufacturer or supplier, as a condition of market access, to provide access to their technologies, create a joint venture, or use a specific cryptographic algorithm.

47. A similar principle of “technical neutrality” in regulating the issues of goods containing cryptography is, in principle, characteristic of most countries. In turn, in the EAEU, it is required to obtain permission from the competent authorities responsible for the regulation of cryptography.<sup>36</sup> In particular, in the Russian Federation, such a body is the **Federal Security Service**.

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<sup>35</sup> Digital Economy Partnership Agreement: National Interest Analysis, June 2020, p 14, URL: <https://www.mfat.govt.nz/assets/Trade/FTAs-concluded-but-not-in-force/DEPA-NIA-June-2020-for-MFAT-website.pdf>.

<sup>36</sup> Decision of the Board of the Eurasian Economic Commission dated April 21, 2015 No 30 “On measures of non-tariff regulation”, URL: <https://docs.eaeunion.org/Pages/DisplayDocument.aspx?s=e1f13d1d-5914-465c-835f-2aa3762eddda&w=9260b414-defe-45cc-88a3-eb5c73238076&l=8a412e96-924f-4b3c-8321-0d5e767e5f91&EntityID=7584> (in Russian); Annex No 9 “Regulations on the import into the customs territory of the Eurasian Economic Union and export from the customs territory of the Eurasian Economic Union encryption (cryptographic) devices”, URL: [http://www.eurasiancommission.org/ru/act/trade/catr/nontariff/Documents/Особенности%20для%20физических%20лиц/2.19%20шифровалка/Приложение%209\\_ред%20131%20%286%29.pdf](http://www.eurasiancommission.org/ru/act/trade/catr/nontariff/Documents/Особенности%20для%20физических%20лиц/2.19%20шифровалка/Приложение%209_ред%20131%20%286%29.pdf) (in Russian).

## V. DATA ISSUES (MODULE 4 OF THE DEPA)

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48. The Parties are to create an additional tool for the protection of personal data of natural persons of the Parties, developing a clear legal framework for the functioning of the digital economy as an economy based on data flows.

In this regard, the Parties undertake to develop measures to protect the personal data of users, taking into account existing and emerging international principles and recommendations.

In such work, they should also take into account the need for standards to limit the collection of personal data, ensure the quality of data, identify the purpose of data collection, restrict data use, and ensure compliance with security conditions; the needs for transparency and accountability; and the possibility of use by all types of business entities.

49. Such measures should be applied on a non-discriminatory basis to all individuals of the Parties.

50. To simplify the conduct of business, the Parties undertake to publish open access manuals for entrepreneurs in order to ensure that their activities comply with the requirements of the legislation in the field of personal data protection. In order to support fair business, it is proposed to introduce a special category of “trusted companies” that comply with personal data protection standards.

51. Cross-border data transfer, including personal data, is possible in cases where it relates to the business of a person that could be identified using such data.

52. The Parties have agreed not to require business entities to store personal data of individuals of the Parties in *localized* data centers.

# VI. WIDER TRUST ENVIRONMENT (MODULE 5 OF THE DEPA)

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53. In order for producers and consumers to build up sufficient trust in the internet to enable the efficient development of trade relationships between countries, cybersecurity appears to be essential. Cooperation in this sphere can become critical in the promotion of digital economy and trade.<sup>37</sup>

54. The Parties recognize that cybersecurity is an integral part of the digital economy, and in this regard will collectively continue to consider cybersecurity as one of the new global challenges. To this end, the Parties will pool their resources to ensure the standard of cybersecurity not only in their region, but also beyond.

55. Meanwhile, the DEPA does not contain in this part specific rules regarding the trust space in the context of validation of electronic signatures of individuals and legal entities. It should be noted that in the Eurasian area, for example, this issue is considered a relevant factor in the formation of the cross-border trust space and regulated in sufficient detail.<sup>38</sup>

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<sup>37</sup> Meltzer JP, "Cybersecurity and Digital Trade: What Role for International Trade Rules?", Working Paper #132, Global Economy and Development - Brookings Institution, 2019, p 1, 3, URL: [https://www.brookings.edu/wp-content/uploads/2019/11/Cybersecurity-and-digital-trade\\_final-11.20.pdf](https://www.brookings.edu/wp-content/uploads/2019/11/Cybersecurity-and-digital-trade_final-11.20.pdf).

<sup>38</sup> Decision of the Council of the Eurasian Economic Council No 96 "On the requirements for the establishment, development and functioning of a cross-border trust space", URL: <https://docs.eaeunion.org/Pages/DisplayDocument.aspx?s=%7be1f13d1d-5914-465c-835f-2aa3762eddda%7d&w=9260b414-defe-45cc-88a3-eb5c73238076&l=%7b8a412e96-924f-4b3c-8321-0d5e767e5f91%7d&EntityID=20224>.

# VII. BUSINESS AND CONSUMER TRUST

## (MODULE 6 OF THE DEPA)

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56. One of the main challenges in electronic commerce is the necessity for cross-border measures aimed at protecting consumer rights. Often, a buyer who purchases goods in a foreign online store/site is not able to obtain effective protection of their legitimate interests and rights in the occasion of a dispute. The reason for this is the legal uncertainty regarding the establishment of the applicable jurisdiction or its geographical remoteness, which makes it difficult to file a complaint with the relevant authorities. The DEPA provisions on the legitimate interests of consumers seek to increase their level of confidence in this relatively new type of economic activity, which will increase the growth of transactions through electronic channels.

57. One of the factors in the violation of consumer rights in electronic commerce is spam, which often contains deliberately false information and leads to the abuse of buyers' trust. The Parties of the DEPA have agreed to create norms within the framework of their national legislation to limit unsolicited electronic messages (spam mail), including requirements to simplify the mechanism for declining to receive them further; maintaining the requirement of the sender to obtain consent from the recipient to be sent spam mail; a reduction in the amount of spam mail in general; and the creation of legal methods of protection against spam mail.

58. The Parties have agreed to ensure that their national legislation contains standards to combat fraudulent and deceptive practices. These practices include:

- knowingly providing false information about a product or service;
- advertizing goods or services without the intention of selling them;
- non-delivery of goods or denial of service after payment;
- writing-off funds without authorization from the consumer.

59. Additionally, national legislation should include requirements for the supply of goods or the provision of services of appropriate quality, consistent with the needs of the consumer, as well as providing compensation to the consumer for losses incurred.

60. The Parties undertake to develop alternative dispute resolution mechanisms for electronic commerce transactions, as indicated in the module on dispute resolution (**paras 109-116 of the Note**).

61. The Parties advocate free access to the internet, providing freedom for consumers to connect to the internet from any device, use services and applications, and access information, if it is not contrary to national law.

# VIII. DIGITAL IDENTITIES

## (MODULE 7 OF THE DEPA)

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62. As part of the development of digital identification systems (unique numbers for legal entities or individuals), the Parties have agreed to strive to ensure the compatibility of such systems, in order to simplify the conduct of activities in electronic form, ensure the transparency of relevant information, and reduce the number of unscrupulous business entities.

63. Such cooperation will consist of the exchange of knowledge, experience, and best practices, as well as the joint use of technology, data protection systems, and the involvement of other states in the international arena.

# IX. EMERGING TRENDS AND TECHNOLOGIES (MODULE 8 OF THE DEPA)

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64. Under the module “Emerging Trends and Technologies”, the Parties identify four main elements: financial technology, AI, digital public procurement, and competition in the digital sphere.

65. The Parties will facilitate the exchange of experience and contacts from financial technology companies, the launch and implementation of joint developments, and collaboration on start-ups.

66. In terms of AI, the Parties will endeavour to adopt legal standards in the field of ethics and governance that would ensure the reliable and safe use of AI technologies. In adopting such legal rules, the Parties will have to take into account internationally recognized principles and guidelines in this area, including transparency, fairness and human-centred values.

67. The Parties also agreed to conduct a joint study to evaluate the effects of digitalization of public procurement, taking into account existing international obligations under free trade agreements or the WTO Agreement on Government Procurement.

68. The Parties have also committed to organizing an exchange of expertise in the field of competition in relation to companies operating in the digital sphere.

69. The changes that will follow the implementation of these provisions should intensify cooperation between the Parties on new technologies, and limit risks to business from the introduction of new regulations in the field of competition and financial technologies.

# X. INNOVATION AND THE DIGITAL ECONOMY (MODULE 9 OF THE DEPA)

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70. In order to ensure the openness of economies and the development of entrepreneurial activity, the Parties undertake to strive to ensure the openness of the registers of rights to intellectual property.

71. Noting that data is becoming a key element in generating additional profit in the digital economy, the Parties will facilitate its widespread exchange and the use of open licenses.

72. The Parties will also endeavour to ensure that data published by government bodies will be made publicly available in a “public data” format, i.e., at least be published in a machine-readable format. These provisions are directly related to the fairly-standard transparency provisions included in international agreements.

73. The Parties will also seek ways to expand the publication of “open data”, including identifying sectors of the economy in which the publication of such data is most effective, and promoting the development of new products based on “open data”.

74. The Parties will also support the projects where the principle of open licenses is applied, allowing free access to “open data”.

Cooperation in the field of innovation will help to create conditions that will enable the Parties’ economies to recover from the consequences of the COVID-19 pandemic, and potentially restore previous rates of economic growth.

# XI. SMALL AND MEDIUM ENTERPRISES COOPERATION (MODULE 10 OF THE DEPA)

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75. The Parties acknowledge the fundamental role that small and medium enterprises play in maintaining dynamism and enhancing competitiveness in the digital economy. For this reason, the DEPA contains rules to stimulate the conditions for cooperation between small and medium enterprises, both among themselves and with the state.

76. In order to improve the business conditions for such enterprises, the Parties will endeavour to continue their cooperation on the exchange of information and best practices regarding digital instruments and technologies. Furthermore, the Parties have undertaken an obligation to disseminate the relevant information by uploading and displaying it on a website set up specifically for this purpose. The site shall contain information regarding the Agreement itself, focusing on the interests of small and medium enterprises, as well as a broader range of material regarding the digital economy.

77. The DEPA prescribes the creation of an additional format of cooperation, a so-called Digital SME Dialogue. Private sector aside, the representatives of non-commercial organizations, scholars and other interested persons are expected to participate in the Dialogue. This format is envisaged to lead to the expansion of the benefits arising from the DEPA for the Parties' small and medium enterprises.

# XII.DIGITAL INCLUSION

## (MODULE 11 OF THE DEPA)

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78. The DEPA addresses one of the most trending global topics: inclusion, bringing it into the context of the digital economy.

The DEPA contains several provisions on providing access to the digital economy for all categories of people, singling out women, rural populations, indigenous peoples, and low socio-economic groups in particular.

79. The Parties will conduct joint analysis to remove barriers to participating in the digital economy, and develop programs to increase the level of involvement of the above groups in the digital economy, as well as exchanging approaches to collecting non-aggregated data and analyzing relevant statistics. As expected by the drafters, major beneficiaries of the provisions on digital inclusion will be small and medium enterprises, which will receive the opportunity to reduce time and labour costs.

# XIII. INSTITUTIONAL PROVISIONS

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## 1. Joint Committee and Contact Points (Module 12 of the DEPA)

80. A joint committee and contact points are the traditional mechanisms established for the administration of international agreements and operational communication on issues arising from them. Both are also features of the DEPA.

81. The DEPA utilizes the standard approaches used in most modern international trade agreements. Some of the provisions related to the functioning of the Joint Committee and contact points of the DEPA are taken from the CPTPP, particularly from the part regarding the CPTPP Commission, the quasi-administrative body established to administer that agreement, and contact points.

### a. Joint Committee (Articles 12.1-4 of the DEPA)

82. The Joint Committee consists of representatives of state bodies of each of the Parties. Each DEPA member forms their own delegation independently at their own discretion.

83. The list of tasks of the Joint Committee is open. At the least, it will handle issues associated with the implementation of the DEPA, including the establishment of subsidiary bodies; consideration of proposals on amendments or additions to the DEPA; consideration of further partnership development between the Parties in the field of the digital economy; the development of mechanisms for implementing the DEPA; the establishment of dispute resolution procedures (if it is expressly provided for in the relevant provisions of the DEPA); and other matters as agreed by the Parties.

84. As a general rule, decisions of the Joint Committee are taken based on consensus, which is recognized as having been reached if no objection to the proposed decision has been received from any of the Parties. Exceptions to this rule are provisions of the DEPA that explicitly specify a different decision-making procedure.

85. The procedure for the functioning of the Joint Committee is also presented in the standard form for such a quasi-body in an international agreement; the first meeting and subsequent meetings are defined:

- the first meeting of the Joint Committee should take place within one year of the entry into force of the DEPA. Its next convocation is determined at the discretion of the Parties;
- chairmanship, meaning administration of the work of the Joint Committee session, including its financing and technical support (sending notifications, organizing video conferences), is carried out by each Party in turn;
- the DEPA does not establish a procedure for the activities of the Joint Committee or any subsidiary body. This can be set by the specified institutions at their own discretion;

- all Parties should submit a report on the implementation of the DEPA and plans to improve its implementation at each meeting of the Joint Committee.

86. Other special working bodies of the DEPA are not established. However, possible forms of cooperation on the subject of the Agreement are indicated, such as information exchange; dialogues; meetings of officials; and official contact on mutual recognition, equivalence, and harmonization – that is, through the unification of norms and procedures in the field of cooperation in the digital economy.

87. Separate formats for cooperation on certain issues can be established in memoranda.

## **b. Contact Points (Article 12.6 of the DEPA)**

88. For quick communication between the Parties on any issue related to the DEPA, contact points will be established: each Party is to provide lists of specific officials responsible for any particular issue, including contact details such as a phone number, e-mail address, or other means of contact.

89. The lists must be exchanged between the Parties via official communication channels no later than 60 days after the DEPA enters into force.

90. All Parties should be informed of changes in the lists in a timely manner. The terms and frequency of such notifications are not set, but, as a rule, officials who are in constant contact on authorized issues independently notify their counterparts of changes at their own initiative. Another option may be to periodically send a list to one another detailing all recent changes. As usual, the procedure is formed through practice, based on the principle need to communicate changes as quickly as possible.

## **2. Transparency (Module 13 of the DEPA)**

91. The DEPA notes that access to information is particularly important in digital commerce, where an increasing number of small businesses are involved in multi-country trade chains.

92. The principle of transparency is one of the main principles of the WTO, the components of which are spelled out in detail by its members in regional trade agreements.

93. The DEPA transparency module sets out principles and procedures for implementing actions to ensure prompt access to regulations related to e-commerce. The structure and content of the corresponding module are almost completely identical to similar provisions in the CPTPP, but are presented in shortened form.

94. In order to ensure transparency standards, the DEPA sets out obligations stating that all laws and other regulations, including rules, procedures, and administrative rulings of general application relating to the subject matter of the DEPA, must be accessible to any interested person: that is, at least published and presented in such a way that the texts of the relevant documents can be read.

95. Exceptions to granting access to administrative rulings of general application are made in regards to personalized acts issued in respect of a specific individual or legal entity, goods or services of another Party; or when such an administrative decision is adopted while establishing the decision in a specific case.

96. It is also stipulated that the Parties shall publish the drafts of the above-mentioned acts in cases where the situation allows, as well as providing an opportunity for them to be discussed.

97. When applying administrative measures related to the implementation of the DEPA, each Party must ensure that any persons of another Party who are involved in an administrative proceeding are notified of it being initiated, and are provided with all relevant information regarding the proceeding. Such notification is to be carried out in accordance with the domestic procedure of the Party in whose territory the administrative measures have been initiated.

98. Until the final decision is made on the initiated administrative proceeding, the person in respect of whom it is launched must be provided with the opportunity, in accordance with the national law of the relevant Party, to provide any information that justifies and defends their position.

### **3. Review and Appeal (Article 13.4 of the DEPA)**

99. For the quick review and appeal of administrative decisions, except for those related to prudential regulations, the Parties will establish or maintain judicial, quasi-judicial, or administrative tribunals for proceedings, or introduce special procedures for this purpose.

100. The persons involved must be provided with the opportunity to provide arguments, positions, and objections on which the objective of the administrative decision will be based.

### **4. Notification and Provision of Information (Article 13.5 of the DEPA)**

101. If a Party considers that measures or actions they are taking, or plan to take, will have a significant effect on the operation of the DEPA, they must notify the other Parties.

102. At the request of any Party, information about any current or possible measure will be provided through the established contact points, regardless of whether or not the Party taking or contemplating that measure has given notice about it to the other Parties.

# XIV. DISPUTE SETTLEMENT

## (MODULE 14 OF THE DEPA)

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103. The DEPA contains a separate module dedicated to dispute settlement by such means as good offices and conciliation, mediation, or arbitration.

104. The procedural component is spelled out in great detail. Meanwhile, there are no fundamental innovations: standard provisions are included, as are used in modern international regional trade agreements, which in most cases use their own procedure for resolving interstate trade disputes, rather than directly referring disputes to the mechanisms of the Dispute Settlement Body within the WTO. The structure and content of the corresponding module of the DEPA almost completely copy the part of the CPTPP related to dispute settlement mechanisms. The only exception is the format of consultations: these can be in person, or use any technical means available to the consulting Parties.

105. The following provisions are excluded from the scope of dispute settlement under the DEPA:

- non-discriminatory treatment of digital products (article 3.3 of the DEPA);
- information and communication technology products that use cryptography (article 3.4 of the DEPA);
- cross-border transfer of information by electronic means (article 4.3 of the DEPA); and
- location of computing facilities (article 4.4 of the DEPA).<sup>39</sup>

106. As to products that use cryptography, the exclusion from the dispute settlement procedures under the Agreement is mostly due to the specifics of these products, which do not have a clear definition at the moment. Moreover, no general procedure for regulating disputes involving such products, especially in terms of judicial procedures, has so far been developed at the national level, let alone at the international level. Although discussions on “e-disputes in e-commerce” (electronic disputes in e-commerce) are regularly held on international platforms and in scientific circles,<sup>40</sup> common approaches have not yet been defined. For example, the export of goods containing encryption (cryptographic) tools in most countries comes under a number of restrictions. The export of such products is regulated by special authorities, due to containing technologies designed to protect information from unauthorized access during its transmission through communication channels and (or) during its processing and storage. Often, disputes regarding goods containing a cryptographic component are considered by criminal courts, which additionally explains the exclusion of such cases from the general dispute settlement methods specified in the DEPA. In this regard, disputes on such goods require consideration by specialized judicial or quasi-judicial bodies.

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<sup>39</sup> Article 14A.1 of the DEPA.

<sup>40</sup> For more information, see Heuvel E vd, “Online dispute resolution as a solution to cross-border e-disputes: An introduction to ODR”, URL: <https://www.oecd.org/internet/consumer/1878940.pdf>.

107. In respect of other DEPA provisions, the dispute settlement procedures defined therein apply to the interpretation and application of the Agreement, as well as to cases where a party considers that a measure of another Party is or would be inconsistent with the objectives of the DEPA, or that another Party has otherwise failed to carry out an obligation under the Agreement.

108. The DEPA envisages a so-called **“fork-in-the-road” provision**, according to which the choosing of a forum of dispute settlement results in the relinquishing of the right to refer the dispute to other such fora.<sup>41</sup>

The mechanism of this clause is used quite often in regional trade agreements. For example, it is included in the North American Free Trade Agreement,<sup>42</sup> and within the framework of MERCOSUR.<sup>43</sup> Singapore and Chile’s bilateral agreements with the USA also contain a similar clause.<sup>44</sup> In accordance with Article 14.7 of the DEPA, the complaining Party may choose either to use the mechanism of the Agreement, or that of other international fora, including the WTO, in which all Parties participate.

109. With regards to specific means of dispute settlement, the Parties may use alternative dispute settlement methods, such as good offices and conciliation, at any time. Such proceedings shall be confidential and shall not prejudice the rights of any of the Parties to dispute in any further proceedings. The parties to the dispute may suspend or terminate the settlement proceedings at any time. Good offices, conciliation, and mediation may continue after the composition of arbitral tribunals.

110. The DEPA contains a detailed dispute resolution procedure using mediation. This includes the procedure for notifying the Parties about the choice of this method of dispute settlement; the terms and procedure for provision of the requested information and the positions of the parties to the dispute; the choice of mediator, its validity, and principles of officiating; the mechanism of settlement of the dispute; request for the establishment of a factual report in the matter of providing options for the application of conciliatory measures; the procedure of paying expenses; and completion of the mediation procedure and execution of a conciliation decision mutually agreed by the Parties.

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<sup>41</sup> Art 14.7 of the DEPA. For more information about different types of jurisdictional clauses in regional trade agreements, including “fork-in-the-road” provisions, see Furculiță C, “Fork-in-the-Road Clauses in the New EU FTAs: Addressing Conflicts of Jurisdictions with the WTO Dispute Settlement Mechanism”, *CLEER Papers* 2019/1, pp 11-12, URL: [https://www.asser.nl/media/5268/cleer19-01\\_web.pdf](https://www.asser.nl/media/5268/cleer19-01_web.pdf); see also Marceau G, Kwak K, “Overlaps and Conflicts of Jurisdiction between the WTO and RTAs”, Conference on Regional Trade Agreements, April 26, 2002, URL: [https://www.wto.org/english/tratop\\_e/region\\_e/sem\\_april02\\_e/marceau.pdf](https://www.wto.org/english/tratop_e/region_e/sem_april02_e/marceau.pdf).

<sup>42</sup> Art 2005(6) of the North American Free Trade Agreement, 1992, URL: <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/fta-ale/20.aspx?lang=eng>.

<sup>43</sup> Art 1(2) of the Protocol of Olivos for Dispute Settlement in MERCOSUR, 2002, URL: <https://opil.ouplaw.com/view/10.1093/law-oxio/e148.013.1/law-oxio-e148-regGroup-1-law-oxio-e148-source.pdf>.

<sup>44</sup> Art 20.4(3)(c) of the Singapore-USA Free Trade Agreement, 2003, URL: [https://ustr.gov/sites/default/files/uploads/agreements/fta/singapore/asset\\_upload\\_file708\\_4036.pdf](https://ustr.gov/sites/default/files/uploads/agreements/fta/singapore/asset_upload_file708_4036.pdf); Art 22.3(2) of the United States-Chile Free Trade Agreement, 2003, URL: [https://ustr.gov/sites/default/files/uploads/agreements/fta/chile/asset\\_upload\\_file683\\_4016.pdf](https://ustr.gov/sites/default/files/uploads/agreements/fta/chile/asset_upload_file683_4016.pdf).

# XV. ARBITRATION MECHANISM (ANNEX 14-C TO MODULE 14 OF THE DEPA)

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111. Any Party may request consultations on any matter arising under the DEPA, subject to the established exemptions from the scope of dispute settlement procedures (**para 105 of the Note**).

112. The request for consultations shall be made in writing to the respondent Party using contact points established by the DEPA. A Party to a dispute may request the other Party to the dispute to involve experts for consultation from their state bodies or other authorities with experience in the matter under discussion. The grounds for the Parties to use arbitral tribunals are standard for international agreements: the Parties to the dispute were not able to resolve it through consultations within the prescribed period.

113. The request to establish an arbitral tribunal is sent by the complaining Party simultaneously to all Parties through the established contact points. The DEPA has defined a list of information to include in the request.

114. An arbitral tribunal shall be composed on the basis of the provisions of the DEPA, unless the Parties have decided otherwise. The functions of the arbitral tribunal are defined in a standard format: unless the Parties of the dispute agree otherwise, the arbitral tribunal shall examine, in the light of the relevant provisions of the DEPA, the matter referred to the tribunal in accordance with the Agreement, and draw conclusions by presenting recommendations, along with establishing the reasons for the dispute. The composition of the arbitration tribunal is standard: there are three members. Each Party of the dispute appoints one arbitrator. After the appointment of the second arbitrator, a third arbitrator shall be appointed by mutual agreement as the chairman of the arbitral tribunal.

115. If the necessary appointments are not made, any Party of the dispute may invite the Director-General of the WTO to make the necessary appointments.

116. The DEPA also establishes procedures and provides detail regarding the replacement of arbitrators; their required qualifications; the tribunal's function; termination or suspension of the tribunal's work; preparation of its reports (initial and final); implementation of the tribunal's recommendations; and the procedure for payment of compensation and suspension of benefits in case of failure by the respondent to comply with the established requirements.

# XVI. EXCEPTIONS (MODULE 15 OF THE DEPA)

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117. The DEPA contains a chapter standard for international trade agreements that specifies exceptions to the general provisions. These norms allow the Parties to take any action they deem necessary, which would otherwise be inconsistent with the DEPA, to protect their main public interests. The Agreement contains several groups of exceptions:

- general exceptions (Article 15.1 of the DEPA);
- security exceptions (Article 15.2 of the DEPA);
- a prudential exception<sup>45</sup> (Article 15.4 of the DEPA);
- measures to safeguard balance of payment (Article 15.6 of the DEPA);
- a taxation exception (Article 15.5 of the DEPA);
- a monetary and exchange rate policy exception (Article 15.4 of the DEPA); and
- special provisions related to the Treaty of Waitangi (Article 15.3 of the DEPA).

118. The general exceptions allow the Parties to take actions contrary to their obligations under the Agreement when certain conditions are met. Otherwise, they would be interpreted as violating the obligations arising from the DEPA. The analogous provisions from the WTO agreements are incorporated into and made part of the DEPA, *mutatis mutandis* (Article XX of the GATT and Article XIV of the General Agreement on Trade in Services).

119. The general exceptions also contain provisions regarding the protection of cultural property. The term “creative arts of national value” is clarified in the context of the digital economy as also including digital interactive media and hybrid art work, including those forms that use new technologies.<sup>46</sup>

120. The security exceptions are identical to those contained in article 15.2 of the CPTPP. At the same time, the said provision under the DEPA uses wording different from that in Article XXI of the GATT 1994.<sup>47</sup>

121. The Understanding on the Balance-of-Payments Provisions of the GATT 1994, regarding the limitation of the quantity or value of imported goods, including if it is necessary to ensure the balance of payments, is incorporated into the DEPA to address balance of payment

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<sup>45</sup> Prudential measures are means to protect investors and depositories and ensure the integrity and stability of the national financial system through the application of licenses, minimum capital requirements, and accounting statements.

<sup>46</sup> Art 15.1(4) of the DEPA.

<sup>47</sup> Other differences aside, article 15.2 of the DEPA does not refer to the conditions under article XXI(b) of the GATT 1994, such as the adoption of measures (i) relating to fissionable materials; (ii) relating to the traffic in arms, ammunition, and implements of war; or (iii) taken in time of war or other emergency in international relations.

issues. The DEPA also contains similar rules on trade relating to services and investments.

122. The DEPA states that nothing in the Agreement applies to tax measures. This area is the traditional prerogative of national regulation.

123. The prudential exception and monetary and exchange rate policy exception set out in article 15.4 of the DEPA are intended to protect financial services consumers and preserve the integrity and stability of the financial system.

124. The DEPA contains specific provisions that are unique only to the practice of New Zealand's international agreements. These provisions are sourced from those of the Treaty of Waitangi,<sup>48</sup> a necessary component in New Zealand's international trade agreements since 2001 that sets out the pre-emption of the Treaty of Waitangi in New Zealand. The provisions are intended to protect the rights and legitimate interests of the indigenous Maori population in New Zealand.<sup>49</sup> However, there is no obligation for other DEPA Member countries to implement measures equivalent to the actions of the New Zealand Government.<sup>50</sup> The standard provisions of the Treaty of Waitangi are also contained in the CPTPP and the Regional Comprehensive Economic Partnership, to which New Zealand is a party, as well as in its bilateral free trade agreements, for example with the Kingdom of Thailand.

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<sup>48</sup> The Treaty of Waitangi was signed on February 6, 1840, in Waitangi in the Bay of Islands, between representatives of Great Britain and 40 Maori chiefs. According to the Treaty of Waitangi, New Zealand came under British administration, receiving the status of a British colony and the protection of the British crown. The Maori transferred the rights to buy their land to Great Britain. The Treaty of Waitangi is one of the fundamental constitutional acts of New Zealand.

<sup>49</sup> New Zealand has a special policy aimed at protecting the interests of New Zealand's indigenous population, including through export programs, since Maori own 50% of New Zealand's fishing quota and approximately 30% of its forest plantations, and control about 30% of lamb production, 10% of milk production, and 30% of sheep and beef production.

<sup>50</sup> "Non-Paper from New Zealand: The Treaty of Waitangi", August 2019 – Non-paper by New Zealand on the inclusion of a special clause on the issue of Maori rights in the DEPA negotiation process, URL: <https://www.mfat.govt.nz/assets/Uploads/DEPA-Treaty-of-Waitangi-New-Zealand-August-2019.pdf>.

# XVII. FINAL PROVISIONS

## (MODULE 16 OF THE DEPA)

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125. New Zealand has been designated as the Depository of the DEPA, performing all procedural functions under the Agreement.

126. The DEPA shall enter into force 90 days after the Depository of the DEPA has been notified by at least two of the Parties that they have taken all of the necessary legal steps domestically.

127. The terms for new parties to join the DEPA are to be agreed upon by the founding Parties, and then adopted by the Joint Committee. The DEPA does not contain restrictions as to who can join.

128. The conditions for DEPA accession are contained in article 16.4: Accession, and generally repeat the procedure established in Article XII of the Marrakesh Agreement Establishing the World Trade Organization:<sup>51</sup> any state or separate customs territory that has full autonomy in the conduct of its external trade relations may join on terms agreed between such state or territory and the WTO.

This “individual” approach makes it possible to ensure compatibility of regional economic integration, taking into account the principle of so-called “multi-level and multi-speed integration”, applied, for instance, in the EU, the EAEU, and the CIS.

So, for example, in Article 5 of the Agreement on the Establishment of the Common Economic Zone,<sup>52</sup> it is directly stated that each party independently determines in which areas of integration development or individual integration activities it takes part, and to what extent. The Treaty on a Free-Trade Area of the CIS countries, by the way, uses a similar approach for determining the terms of accession to the agreement: “For a state, which is not a CIS member, this Treaty shall enter into force upon the expiry of 30 days from the date of receipt by the depository of the accession document as well as terms, agreed by the parties, for accession to this Treaty.”<sup>53</sup>

129. Any Party may withdraw from the DEPA six months after receipt by the Depository of a written notice of withdrawal.

130. The DEPA defines the conditions for the disclosure of information and the regime of its confidentiality.

131. The Parties may, by mutual written consent, make changes in accordance with the

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<sup>51</sup> Marrakesh Agreement Establishing the World Trade Organization, 1994.

<sup>52</sup> Agreement on the Establishment of the Common Economic Zone, 2003.

<sup>53</sup> Article 24 of Treaty on a Free-Trade Area between members of the CIS, 2011, URL: [http://www.eurasiancommission.org/ru/act/trade/dotp/sogl\\_torg/Documents/FTA%20CIS\\_Text\\_with\\_protocols\\_ENG.pdf](http://www.eurasiancommission.org/ru/act/trade/dotp/sogl_torg/Documents/FTA%20CIS_Text_with_protocols_ENG.pdf).

procedure established by the DEPA, with these changes then becoming an integral part of the Agreement.

132. The DEPA was signed electronically on June 11, 2020. The electronic signature will be equivalent to a hand-signed wet-ink signature, according to international law.

