

Proactive Release

Date: 15 August 2023

The following Cabinet papers and related Cabinet minutes have been proactively released by the Minister for Trade & Export Growth

Title	Reference
Report of the Cabinet Economic Development Committee: Period Ended 30 June 2023	CAB-23-MIN-0280
Protocol to the Digital Economy Partnership Agreement: Approval of the Final Outcome and Authority to Sign	DEV-23-MIN-0117
Protocol to the Digital Economy Partnership Agreement: Approval of the Final Outcome and Authority to Sign	

Some parts of this information release would not be appropriate to release and, if requested, would be withheld under the Official Information Act 1982 (the Act). Where this is the case, the relevant sections of the Act that would apply have been identified. Where information has been withheld, no public interest has been identified that would outweigh the reasons for withholding it.

Key to redaction codes:

- 6(a): to avoid prejudicing the security or defence of New Zealand or the international relations of the New Zealand Government;
- 9(2)(g)(i): to protect the free and frank expression of opinions by departments; and
- 9(2)(j): to avoid prejudice to negotiations.



Cabinet

Minute of Decision

This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.

Report of the Cabinet Economic Development Committee: Period Ended 30 June 2023

On 3 July 2023, Cabinet made the following decisions on the work of the Cabinet Economic Development Committee for the period ended 30 June 2023:

Proactively Released by the Minister for Trade and Export Growth

DEV-23-MIN-0117

Protocol to the Digital Economy Partnership Agreement: Approval of Final Outcome and Authority to Sign
Portfolio: Trade and Export Growth

CONFIRMED

Diana Hawker
Acting Secretary of the Cabinet

Proactively Released by the Minister for Trade and Export Growth



Cabinet Economic Development Committee

Minute of Decision

This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.

Protocol to the Digital Economy Partnership Agreement: Approval of Final Outcome and Authority to Sign

Portfolio Trade and Export Growth

On 28 June 2023, the Cabinet Economic Development Committee (DEV):

Background

- 1 **noted** that on 3 June 2020, DEV authorised New Zealand's signature of the *Digital Economic Partnership Agreement* (DEPA) and the associated side instruments, and agreed that the National Interest Analysis be presented to the House of Representatives for Parliamentary treaty examination, in accordance with Standing Orders 397-400 [DEV-20-MIN-0093];
- 2 **noted** that the DEPA entered into force for New Zealand and Singapore on 7 January 2021, and for Chile on 23 November 2021;
- 3 **noted** that the DEPA is designed to be an open plurilateral agreement that facilitates digital trade flows and operates as a norm-setting forum for digital rules and cooperation;

DEPA Protocol

- 4 **noted** that a number of economies have expressed interest in joining the DEPA, including some that are not CPTPP members;
- 5 **noted** that due to the structure of the original DEPA, amendments were required in order to make four key provisions of the DEPA text (on Cross-Border Transfer of Information by Electronic Means, Location of Computing Facilities, Non-Discriminatory Treatment of Digital Products, and Information and Communication Technology Products that Use Cryptography) operational, transparent, legally certain and enforceable for non-CPTPP members;
- 6 **noted** that as part of these amendment negotiations, New Zealand also secured additional policy space to protect Māori rights, interests, duties, and responsibilities in respect of trade in the digital economy, in order to respond to Wai 2522 concerns;
- 7 **noted** that the outcomes contained within the *Protocol to the Digital Economy Partnership Agreement* (the DEPA Protocol) are consistent with the original negotiating mandate [DEV-19-MIN-0238 and DEV-20-MIN-0093];
- 8 **approved** the final text of the DEPA Protocol, attached as Annex B to the paper under DEV-23-SUB-0117;

- 9 **authorised** signature of the DEPA Protocol, subject to any minor or technical changes as required;
- 10 **approved** the content of the National Interest Analysis, attached as Annex A to the paper under DEV-23-SUB-0117, subject to any minor or technical changes that may be authorised by the Minister for Trade and Export Growth;
- 11 **agreed** that the National Interest Analysis be made public at the time of signature;
- 12 **agreed** that following signature, the text of the DEPA Protocol and the National Interest Analysis be presented to the House of Representatives for parliamentary treaty examination, in accordance with Standing Orders 405-408;
- 13 **noted** that no amendment to primary legislation or regulations will be required in order to implement the DEPA Protocol;
- 14 **authorised** officials to bring the DEPA Protocol into force by notifying the DEPA Depository (which is New Zealand) in accordance with Article 9 of the Protocol, subject to the satisfactory completion of the parliamentary treaty examination process;
- 15 **noted** that the ongoing costs associated with implementing the DEPA and the DEPA Protocol are low, and are expected to be met from within departmental baselines;
- 16 **noted** that it is likely the G20 member, the Republic of Korea, will formally accede to the DEPA shortly.

Janine Harvey
Committee Secretary

Present:

Hon Grant Robertson (Chair)
Hon Dr Megan Woods
Hon Willie Jackson
Hon David Parker
Hon Priyanca Radhakrishnan
Hon Kieran McAnulty
Hon Barbara Edmonds
Hon Dr Duncan Webb
Hon Rino Tirikatene
Hon Dr Deborah Russell
Hon Rachel Brooking
Hon Jo Luxton

Officials present from:

Office of the Prime Minister
Officials Committee for DEV

~~[Restricted]~~

Office of the Minister for Trade and Export Growth

Cabinet Economic Development Committee

Protocol to the Digital Economy Partnership Agreement: Approval of Final Outcome and Authority to Sign

Proposal

- 1 This paper seeks Cabinet's approval of the final text of the Protocol to the Digital Economy Partnership Agreement (DEPA) negotiated between New Zealand, Chile and Singapore (DEPA Protocol), and approval for signature and ratification of this Protocol, subject to the successful completion of the Parliamentary Treaty Examination process.
- 2 It also updates Cabinet on the status of negotiations for accessions to the DEPA, in particular for the Republic of Korea ("Korea"), which is expected to soon join the DEPA (as amended by the DEPA Protocol).

Executive summary

- 3 Since the DEPA entered into force for New Zealand, Chile and Singapore ("DEPA Parties") in 2021, a number of economies have signalled an interest in acceding to the Agreement. The DEPA was designed to be an 'open plurilateral' agreement and a pathfinder for international digital rules, so interest from accession candidates is welcome.
- 4 However before accessions can be formalised, the DEPA Parties have had to negotiate an amendment to make four DEPA provisions legally enforceable within the DEPA itself. This is because the original DEPA includes a somewhat unusual structure ^{s9(2)(i)} where these provisions referred back to and "affirmed" commitments in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). Technical amendments were therefore required to bring these four provisions into the DEPA itself in order to provide legal certainty and transparency of commitments for accession candidates that are not members of the CPTPP, and to make them legally enforceable in the same manner as other DEPA commitments. Negotiations between the DEPA Parties to amend the text have now concluded.
- 5 As part of this amendment process, New Zealand successfully secured new protections for Māori interests in response to the Waitangi Tribunal's third and final report in its Report on the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, issued in 2021 ("Wai 2522"). We have also secured language that protects commitments made under existing international agreements, and maintains our ability to provide more favourable treatment for digital products in the future with existing Free Trade Agreement partners, e.g. Australia and Pacific Island Countries, without needing to extend these to all DEPA Parties.

- 6 Conclusion of the DEPA Protocol has allowed DEPA Parties to re-engage and progress accession processes. Formal accession negotiations with G20 member, the Republic of Korea (Korea) are close to concluding. Korea's accession to the DEPA will build momentum for others to join and ensure DEPA can play its intended pathfinder role. It will provide further opportunities for New Zealand businesses operating in the digital economy.
- 7 DEPA Parties are also progressing the accession of other economies which have formally sought to join the DEPA. Accession Working Groups were established for China and Canada in August 2022 and have started to examine whether those economies meet the DEPA standards, ^{s6(a), s9(2)(g)(i)}
Costa Rica has also formally applied to join the DEPA, and other economies have expressed informal interest ^{s6(a)}

Background

Amendment of the DEPA text

- 8 Since its entry into force for New Zealand in 2021, the DEPA has proven to be a successful example of New Zealand's strategy of "concerted open plurilateralism", with a range of economies applying to join. Formal requests to accede to the DEPA have been received from Korea, China, Canada, and Costa Rica. We have also received broader indications of informal interest, ^{s6(a)}
- 9 Efforts to progress accessions encountered a hurdle due to the original DEPA's somewhat unusual structure ^{s9(2)(i)}. In the DEPA, four key provisions, which cover important issues such as data flows, link back to and "affirm" commitments in the CPTPP rather than replicating these obligations in the DEPA itself. This was not a problem between the DEPA Parties (who are all members of CPTPP), and would not be an issue for DEPA aspirants who are members of CPTPP. It has, however, posed problems in efforts to expand the DEPA given that the majority of economies wishing to join DEPA are not CPTPP members.
- 10 An amendment to the "affirm" provisions in the DEPA text was therefore necessary in order to make these commitments legally certain, transparent and operational for all acceding economies – CPTPP members and non-CPTPP members alike. In addition, the amendments ensure that the four affirm provisions are subject to dispute settlement under the DEPA in the same manner as other existing provisions of the DEPA.
- 11 The four "affirm" provisions are: Non-Discriminatory Treatment of Digital Products (Article 3.3), ICT Products that Use Cryptography (Article 3.4), Cross-Border Transfer of Information by Electronic Means (Article 4.3), and Location of Computing Facilities (Article 4.4). These are important obligations and their inclusion ensures the DEPA is an ambitious agreement that sets a high standard for regulating the digital economy (while also including necessary protections). It is therefore particularly important – through the DEPA Protocol – that Parties are clear what obligations they need to meet and are required to extend to each other.
- 12 Throughout 2022, the DEPA Parties have been in negotiations to amend the DEPA to operationalise these four provisions. The negotiations operated within the mandate

approved by Cabinet for the original DEPA negotiations [CAB-19-MIN-0491 and CAB-20-MIN-0265 refer]¹. This was not a broad renegotiation of the agreement; it was narrowly focused on making the affirm provisions legally binding with limited scope to negotiate new provisions. Nevertheless, New Zealand was able to successfully secure targeted additional language to protect Māori interests in response to the Wai 2522 claim, where the Crown was found to be in breach of its obligations of active protection of mātauranga Māori in relation to certain digital commitments in the CPTPP (a number of which were affirmed in the DEPA). New Zealand took the opportunity to secure new language to provide additional and clear protections for Māori rights and interests (in addition to the existing Treaty of Waitangi exception that was included in the original DEPA text). The new DEPA language contains a similar carve-out for Māori rights and interests as that agreed in the New Zealand – European Union Free Trade Agreement, although makes this available to all DEPA economies with indigenous populations to protect.² New Zealand has also secured language that protects commitments made under existing international agreements, and maintains our ability to provide more favourable treatment for digital products to existing Free Trade Agreement partners, e.g. Australia and Pacific Island Countries without having to extend this to all DEPA Parties.

13 s6(a), s9(2)(j)

s6(a), s9(2)(g)(i), s9(2)(j)

14 In addition, a technical amendment has been made to replace the reference to “covered person” in the data flows and data localisation articles with “person of a Party”, which is already defined in the DEPA.

15 s6(a), s9(2)(g)(i)

¹s9(2)(g)(i), s9(2)(j)

“DEPA:

Conclusion of Amendment Protocol Negotiations and Korea’s Accession” dated 14 April 2023.

² The language in the DEPA Protocol states: “Article 3.3 (Non-Discriminatory Treatment of Digital Products), Article 3.4 (Information and Communication technology Products that Use Cryptography), Article 4.3 (Cross-Border Transfer of Information by Electronic Means), and Article 4.4 (Location of Computing Facilities) shall not apply to measures adopted or maintained by a Party that it deems necessary to protect or promote indigenous rights, interests, duties, and responsibilities^a in respect of trade in the digital economy,^b provided that such measures are not used as a means of arbitrary or unjustified discrimination against persons of another Party or a disguised restriction on trade in the digital economy.”

^a “For greater certainty, for New Zealand, indigenous rights, interests, duties and responsibilities include those relating to mātauranga Māori.”

^b “In the case of New Zealand, the measures referred to in this paragraph include the fulfilment of New Zealand’s obligations under Te Tiriti o Waitangi/the Treaty of Waitangi. The Parties agree that the interpretation of Te Tiriti o Waitangi/the Treaty of Waitangi, including as to the nature of the rights and obligations arising under it, shall not be subject to the dispute settlement provisions of this Agreement.”

s6(a), s9(2)(g)(i)

16

- 17 DEPA contains a range of carve outs, conditions and exceptions that allow for the protection of policy space, ^{s9(2)(g)(i)}
These include:

Carve outs from the scope of the DEPA, meaning its obligations do not apply to:

- government procurement;
- government information and measures relating to that information;
- financial services (where the DEPA contains a broader and more explicit carve out than usually exists in digital chapters);
- taxes and taxation measures;
- services supplied in the exercise of Government authority; and
- measures taken to protect indigenous rights, interests, duties, and responsibilities in respect of trade in the digital economy, in relation to the four key Protocol provisions.⁴

Specific exceptions contained within the “affirm provisions” include:

- the broad exception for measures necessary to achieve a “legitimate public policy objective” exception apply to both the data localisation and data transfer rules; and

s9(2)(g)(i), s9(2)(i)

⁴ Article 3.3: Non-Discriminatory Treatment of Digital Products, Article 3.4: Information and Communication technology Products that Use Cryptography, Article 4.3: Cross-Border Transfer of Information by Electronic Means of the Agreement, Article 4.4: Location of Computing Facilities.

- a carve out from the discipline for non-discriminatory treatment of digital products for measures related to “broadcasting”, as well as subsidies and grants, and obligations concerning intellectual property contained in another international agreement. Broadcasting is commonly a sensitive area for governments, and similar carve outs exist in New Zealand’s two most recent FTAs for audio-visual services (in the NZ-UK FTA and the NZ-EU FTA).

Agreement-wide exceptions, including:

- the Treaty of Waitangi exception;
- general exceptions that confirm the Government’s ability to take measures that are necessary to protect health, public order and morals as well as the environment;
- an exception to protect national treasures or specific sites of historical or archaeological value;
- a broad exception to support creative arts of national value;
- a broad security exception (expanded from the WTO exception);
- a Prudential exception and Monetary and Exchange Rate Policy exception; and
- an exception relating to Measures to Safeguard Balance of Payments.

Update on accession candidates to the DEPA

- 18 Negotiations with the DEPA’s first formal accession candidate, G20 member Korea, are close to conclusion. Korea’s accession to the DEPA will be a welcome step, and will strengthen New Zealand’s strategy of concerted open plurilateralism, build momentum for others to join the DEPA, and improve our ability to influence international rules and norms on digital trade.
- 19 DEPA Parties are also progressing the accession of other economies who have formally sought to join the DEPA. Accession Working Groups were established for China and Canada in August 2022 and have started to examine whether those economies meet the DEPA standards, ^{s6(a), s9(2)(g)(i)}

Costa Rica has also formally applied to join the DEPA, and other economies have expressed informal interest ^{s6(a)}

Comment

- 20 The DEPA Protocol is a treaty-status agreement and requires binding treaty action.
- 21 No amendment to primary legislation or regulations will be required in order to implement the DEPA Protocol.

- 22 In accordance with Standing Order 405, the DEPA Protocol and the accompanying National Interest Analysis will be presented to the House of Representatives for the purposes of the Parliamentary Treaty Examination Process.
- 23 The DEPA Protocol will enter into force 60 days after the date the last Party notifies the Depositary of the approval of the amendment in accordance with its legal procedures, subject to the satisfactory completion of the Parliamentary Treaty Examination Process.

Costs and Benefits

- 24 The key benefit of the DEPA Protocol is that in making the “affirm provisions” legally binding and enforceable in the DEPA itself, the obligations in the DEPA are now legally certain and transparent for all DEPA economies regardless of whether they are also a CPTPP member. Clarifying this makes it easier for economies to understand what is required to accede to the DEPA. This also means that the DEPA can function as intended, as an “open plurilateral” agreement, which new members can join and which serves as a pathfinder for the development of balanced digital trade rules internationally. ^{s9(2)(g)(i)}

Financial implications

- 25 The implementation of the DEPA Protocol will not have financial implications. It is similar to obligations made in other recent New Zealand trade agreements in the digital area, including the NZ-EU FTA, the NZ-UK FTA and the CPTPP. The ongoing costs associated with implementing the DEPA are low, and any future cooperative activities under the DEPA and accessions activity will continue to be met from within departmental baselines.
- 26 Promotion and outreach activities to explain the key outcomes of the DEPA Protocol have been and will be undertaken as part of the Ministry of Foreign Affairs and Trade’s ongoing wider trade policy outreach activities.

Impact analysis

- 27 A National Interest Analysis (NIA) has been prepared by the Ministry of Foreign Affairs and Trade and is attached to this paper as Annex A. The NIA was circulated with this Cabinet Paper for departmental consultation with the Department of Internal Affairs, Department of Prime Minister and Cabinet; Ministry of Business, Innovation and Employment; Ministry of Culture and Heritage; Ministry for Primary Industries; Ministry of Justice; New Zealand Customs Service; New Zealand Trade and Enterprise; Reserve Bank of New Zealand; Statistics New Zealand; The Treasury; and Te Puni Kōkiri.

Publicity

- 28 Consistent with the approach taken for the signature of the original DEPA, officials propose a virtual event for Ministers from the DEPA Parties to sign the DEPA Protocol, accompanied by a post on social media. ^{s9(2)(g)(i)}

s9(2)(g)(i)

to Korea's accession in due course.

However we anticipate publicity related

Proactive Release

- 29 This paper will be proactively released following signature of the DEPA Protocol, with redactions where necessary, for example to protect New Zealand's leverage in other trade negotiations.

Consultation

- 30 The following departments and agencies have been consulted: Department of Internal Affairs, Department of Prime Minister and Cabinet; Ministry of Business, Innovation and Employment; Ministry of Culture and Heritage; Ministry for Primary Industries; Ministry of Justice; New Zealand Customs Service; New Zealand Trade and Enterprise; Reserve Bank of New Zealand; Statistics New Zealand; The Treasury; and Te Puni Kōiri.
- 31 The NIA outlines the wider consultation and engagement with Māori during the Protocol negotiating process. This included meetings with Treaty partner representative groups (Ngā Toki Whakarururanga and Te Taumata). s9(2)(g)(i), s9(2)(i)
- 32 With the DEPA Parties' agreement and under confidentiality agreements, the DEPA Protocol was shared with Ngā Toki Whakarururanga and Te Taumata. Ngā Toki Whakarururanga has continued to express some concern with the language secured, and in particular with the proviso "that [measures to protect Māori interests] are not used as a means of arbitrary or unjustified discrimination against persons of another Party or a disguised restriction on trade in the digital economy." This proviso is long-standing language in WTO exceptions, and is consistent with language New Zealand has secured to protect Māori interests elsewhere (e.g. in the Treaty of Waitangi exception that applies across our free trade agreements as well as in the NZ - EU FTA expanded protections for digital trade). s6(a), s9(2)(g)(i)

General feedback from Te Taumata noted their strong interest in the DEPA and the opportunities for Māori exporters in the digital economy.

Recommendations

The Minister for Trade and Export Growth recommends that the Committee:

- 1 **note** that in September 2020, Cabinet agreed to New Zealand signing the DEPA text, the associated side instruments, and for the National Interest Analysis to be presented to the House of Representatives for Parliamentary Treaty Examination, in accordance with Standing Orders 397-400 [CAB-20-MIN-0265];
- 2 **note** that the DEPA entered into force for New Zealand and Singapore on 7 January 2021, and for Chile on 23 November 2021;
- 3 **note** that the DEPA is designed to be an open plurilateral agreement that facilitates digital trade flows and operates as a norm setting forum for digital rules and cooperation;
- 4 **note** that a number of economies have expressed interest in joining the DEPA, including some that are not CPTPP members;
- 5 **note** that due to the structure of the original DEPA, amendments were required in order to make four key provisions of the DEPA text (on Cross-Border Transfer of Information by Electronic Means, Location of Computing Facilities, Non-Discriminatory Treatment of Digital Products, and Information and Communication Technology Products that Use Cryptography) operational, transparent, legally certain and enforceable for non-CPTPP members;
- 6 **note** that as part of these amendment negotiations New Zealand also secured additional policy space to protect Māori rights, interests, duties, and responsibilities in respect of trade in the digital economy, in order to respond to Wai 2522 concerns;
- 7 **note** that outcomes contained within the DEPA Protocol to the Digital Economy Partnership Agreement (DEPA) are consistent with the original negotiating mandate [CAB-19-MIN-0491 and CAB-20-MIN-0265];
- 8 **approve** the final text of the DEPA Protocol which is attached to this paper as Annex B;
- 9 **authorise** signature of the DEPA Protocol subject to any minor or technical changes as required;
- 10 **approve** the content of the National Interest Analysis ('NIA') attached to this paper as Annex A;
- 11 **agree** that the National Interest Analysis (subject to any minor or technical changes as required) and this Cabinet paper (subject to any necessary redactions) be made public at the time of signature;
- 12 **agree** that following signature, the text of the DEPA Protocol and the National Interest Analysis be presented to the House of Representatives for Parliamentary Treaty Examination, in accordance with Standing Orders 405-408;
- 13 **note** that no amendment to primary legislation or regulations will be required in order to implement the DEPA Protocol;
- 14 **authorise** officials to bring the DEPA Protocol into force by notifying the DEPA Depository (which is New Zealand) in accordance with Article 9 of the Protocol subject to satisfactory completion of the Parliamentary Treaty Examination process;

- 15 **note** that the ongoing costs associated with implementing the DEPA and this Protocol are low and are expected to be met from within departmental baselines; and
- 16 **note** that it is likely the G20 member, the Republic of Korea, will formally accede to the DEPA shortly.

Authorised for lodgement

Hon Damien O'Connor
Minister for Trade and Export Growth

Proactively Released by the Minister for Trade and Export Growth

Protocol to the Digital Economy Partnership Agreement (DEPA)

National Interest Analysis

Proactively Released by the Minister for Trade and Export Growth

Contents

Frequently used acronyms and terms	4
1 Executive summary	5
2 Nature and timing of the proposed treaty action.....	5
3 Reasons for New Zealand becoming Party to the treaty	5
4 Advantages and disadvantages to New Zealand of the treaty entering into force and not entering into force for New Zealand	8
4.1 Advantages.....	8
4.2 Disadvantages	9
5 Legal obligations which would be imposed on New Zealand by the treaty action, the position in respect of reservations to the treaty, and an outline of any dispute settlement mechanisms	9
Legal commitments in the four obligations	10
6 Measures which the Government could or should adopt to implement the treaty action, including specific reference to implementing legislation.....	11
7 Economic, social, cultural and environmental costs and effects of the treaty action.....	11
7.1 Economic effects	11
7.2 Social effects	11
7.3 Cultural effects	11
7.4 Environmental effects.....	12
8 The costs to New Zealand of compliance with the treaty	12
10 Subsequent protocols and/or amendments to the treaty and their likely effects	13
11 Withdrawal or denunciation provision in the treaty.....	13
Annex 1: Protocol to the Digital Economy Partnership Agreement	14

Frequently used acronyms and terms

CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
DEPA	Digital Economy Partnership Agreement
DEPA Parties	Chile, New Zealand, and Singapore
DEPA Protocol	Protocol to the Digital Economy Partnership Agreement
Four obligations	Non-Discriminatory Treatment of Digital Products (Article 3.3); Information and Communication Technology Products that Use Cryptography (Article 3.4); Cross-Border Transfer of Information by Electronic Means (Article 4.3); and Location of Computing Facilities (Article 4.4)
FTA	Free Trade Agreement
MFAT	New Zealand Ministry of Foreign Affairs and Trade

1 Executive summary

It is proposed that New Zealand ratify the *Protocol to the Digital Economy Partnership Agreement (DEPA Protocol)*.

DEPA Parties (Chile, New Zealand, and Singapore) have negotiated the DEPA Protocol to bring four obligations¹ directly into the DEPA that were not legally enforceable in the original DEPA. In the original DEPA, the four obligations were only 'affirmed' and linked back to the same obligations contained in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). The DEPA Protocol is required to ensure that the four obligations are clear, workable and legally enforceable for new accession candidates, and in particular economies which are not party to the CPTPP and therefore not subject to the obligations under the CPTPP. The DEPA Protocol also ensures that the four obligations will be subject to dispute settlement under the DEPA, in the same manner as other existing obligations in the DEPA.

The DEPA is an "open plurilateral" agreement, which means that new economies can join if they meet the DEPA's high standards. The DEPA also seeks to be a pathfinder for the development of balanced digital trade rules internationally and a forum for cooperation. Accordingly, the DEPA Parties are pleased with the international interest that a range of economies have shown in the DEPA and the formal accession requests received to date. As a result of the DEPA Protocol, new members will be able to accede to the DEPA, as intended.

2 Nature and timing of the proposed treaty action

New Zealand will ratify the DEPA Protocol following successful conclusion of the Parliamentary Treaty Examination process. The DEPA Protocol will enter into force 60 days after the date on which the last Party has notified the Depository of the Agreement in writing of the completion of its applicable legal procedures.

3 Reasons for New Zealand becoming Party to the treaty

The DEPA is a pathfinder agreement which enables New Zealand and other DEPA Parties to shape global norms for digital trade. This is significant as the DEPA addresses the evolving nature of the digital economy through the development of rules in important areas such as e-invoicing and consumer protection, and formalises mechanisms for cooperation on emerging issues, such as digital identity and artificial intelligence. The DEPA also aims to enable small-and-medium sized businesses to compete by reducing the time and cost of doing business. This is especially important for New Zealand's small-and-medium-sized enterprises which comprise the majority of New Zealand's businesses.

¹ The four obligations are: Non-Discriminatory Treatment of Digital Products (Article 3.3), ICT Products that Use Cryptography (Article 3.4), Cross-Border Transfer of Information by Electronic Means (Article 4.3), and Location of Computing Facilities (Article 4.4).

Commitments on digital trade can facilitate opportunities to access new markets by bypassing the requirement for physical presence in a market and reducing requirements for hard-copy documentation.

Since the DEPA entered into force in 2021, a range of economies have shown interest and Korea, China, Canada, and Costa Rica have formally applied to join. The DEPA is an “open agreement” which furthers New Zealand’s strategic objective of promoting concerted open plurilateralism that builds towards multilateral outcomes. This means other economies may seek to join the DEPA, provided they can meet the high standards and obligations. The accession of additional members will greatly enhance the potential of the DEPA to advance the interests of New Zealand’s digital exporters, widen the opportunities for cooperation activities and provide greater momentum to influence global digital norms.

The DEPA Protocol will allow the DEPA to effectively fulfil its role as a pathfinder agreement on digital trade by ensuring that acceding economies fully understand the standard they must meet in order to join. The DEPA Protocol will provide legal certainty, transparency and enforceability of all of the DEPA’s obligations.

The four obligations which are becoming legally binding

The four obligations which were “affirmed” in the original DEPA text and will be made legally certain and enforceable in the DEPA through the DEPA Protocol are Non-Discriminatory Treatment of Digital Products (Article 3.3); Information and Communication Technology Products that Use Cryptography (Article 3.4); Cross-Border Transfer of Information by Electronic Means (Article 4.3); and Location of Computing Facilities (Article 4.4).

By clarifying the operation of the four obligations, the DEPA Protocol supports the interests of exporters by promoting certain and consistent rules across jurisdictions. The rules in relation to the cross-border transfer of information and location of computing facilities ensure that data can flow and help to avoid costly requirements for exporters to store their data locally in each new export market (subject to necessary public policy safeguards). The obligation of non-discriminatory treatment of digital products will help ensure that exporters of such products are not disadvantaged in relation to competitors. The cryptography obligation ensures that a foreign government or regulator cannot require access to an algorithm within a cryptographic product², or require a joint venture or use of particular algorithms as a condition of market entry. This helps protect the intellectual property of digital businesses operating in DEPA markets.

² A cryptographic product is a product that uses cryptography to secure the data sent between a sender and a recipient. Cryptography is a method of storing and transmitting data in a particular form so that only those for whom the data is intended can read and process it.

Maintaining the right to regulate

The direct incorporation of the four affirm provisions clarifies the obligations within the DEPA, and makes them enforceable between all DEPA Parties in international law. It should be noted, however, that the obligations are not absolute and are balanced with a number of protections in the DEPA text that provide Parties with policy space to maintain or introduce measures for a range of purposes. For example, the two data obligations (Cross-Border Transfer of Information by Electronic Means; and Location of Computing Facilities) include protections for privacy, which ensures the Government has the right to maintain robust privacy, personal information or personal data protection laws. The DEPA also contains an important set of exceptions that acknowledge the right of the Parties to adopt or enforce measures to deal with a crisis or to achieve certain priority policy outcomes, even if these measures may affect their DEPA obligations. These exceptions contain disciplines to ensure that they cannot be abused for trade protectionist purposes.

There are also a number of carve outs from the scope of the DEPA, meaning its obligations do not apply to government information and any measure relating to government procurement, financial services, and taxation measures. In addition, as with all of New Zealand's contemporary trade agreements, the DEPA includes a Te Tiriti o Waitangi/Treaty of Waitangi exception. The DEPA also contains a broad creative arts exception, and further exceptions for taxation, monetary, exchange rate, and prudential policy; measures to safeguard the balance of payments; and national security.

In addition to making the four obligations legally certain and enforceable, the DEPA Protocol includes new exceptions and clarifying language. Importantly for New Zealand, the Protocol includes new language that provides additional and clear protections for Māori rights and interests. This language excludes from scope of the four obligations addressed by the DEPA Protocol "measures adopted or maintained by a Party that it deems necessary to protect or promote indigenous rights, interests, duties and responsibilities in respect of trade in the digital economy", provided that such measures are not arbitrary or unjustifiable discrimination or are disguised restrictions on trade. This carve out from scope is available to all Parties with indigenous populations, and a footnote makes clear that for New Zealand this includes measures in fulfilment of New Zealand's obligations under Te Tiriti o Waitangi/the Treaty of Waitangi.³ This outcome was successfully secured in response to the Waitangi Tribunal's "Wai 2522" report, linked here: [The Report on the Trans-Pacific Partnership Agreement](#)

³ New Zealand has secured footnotes that make clear this carve out this applies to measures to protect mātauranga Māori, and includes measures in fulfilment of New Zealand's obligations under Te Tiriti o Waitangi/the Treaty of Waitangi and that the interpretation of Te Tiriti/the Treaty is not subject to dispute settlement, including as to the nature of the rights and obligations arising under it. There is also a requirement that such measures must not be used as a means of arbitrary or unjustified discrimination against persons of another Party or a disguised restriction on trade in the digital economy, which is a common formulation in trade exceptions, including in the World Trade Organization (WTO) Agreements.

The DEPA Protocol also introduces an exception to the rule on non-discriminatory treatment of "digital products"⁴, drawing on language New Zealand has used in previous free trade agreements. This exception allows New Zealand to provide more favourable treatment to digital products from other trade partners, without having to extend the same treatment to DEPA parties, if such treatment is provided pursuant to an existing international agreement already signed at the time the DEPA Protocol enters into force. More favourable treatment resulting from a future upgrade or future enhancement of an existing Free Trade Agreement (FTA) is also included in this exemption, allowing New Zealand to develop more advanced digital trade rules with our closest partners – for example Australia under the Australia–New Zealand Closer Economic Relations Trade Agreement (CER) – without having to extend that treatment to DEPA Parties. The DEPA Protocol also includes a definition of "broadcasting"⁵ (which is already excluded from the non-discriminatory treatment of digital products rule) in order to provide greater certainty regarding the policy space in relation to domestic broadcasting suppliers.

Lastly, for coherency of the DEPA Protocol with the original DEPA, the reference to "covered person" in Article 4.3 (Cross-Border Transfer of Information by Electronic Means) and Article 4.4 (Location of Computing Facilities) has been replaced with "person of a Party", which is already defined in the DEPA.

4 Advantages and disadvantages to New Zealand of the treaty entering into force and not entering into force for New Zealand

4.1 Advantages

The advantage of the DEPA Protocol coming into force is that the DEPA can function as it was intended to – as an example of innovative concerted open plurilateralism that operates as a pathfinder for the development of international norms in the digital economy. The DEPA is the first example of plurilateralised rule-making in the digital trade area. This is particularly significant because digital trade is an area that is rapidly evolving, and trade rules also need to evolve accordingly. The DEPA Protocol makes all of the DEPA obligations clear, workable and legally binding for new accession candidates, and accordingly is expected to facilitate the accession process.

Without the DEPA Protocol coming into force, it would be unclear what standard would apply to economies acceding to the DEPA with whom we do not already have the four obligations in another treaty (such as the CPTPP). It would be unclear what standard could be expected by New Zealand exporters in relation to data, cryptography and non-discriminatory treatment of digital products.

⁴ Digital products are defined as meaning a "computer programme, text, video, image, sound recording or other product that is digitally encoded, produced for commercial sale or distribution, and that can be transmitted electronically. It also specifically states this does not include a digitalised representation of a financial instrument, including money. Products is used in this instance as some digital "products" can have elements of both a good and a service, and there is a lack of consensus internationally on this distinction.

⁵ The definition is "broadcasting means the transmission of signs or signals via any technology for the reception and / or display of aural and / or visual programme signals by all or part of the domestic public".

Furthermore, this could create unequal obligations across the DEPA members. For example, an acceding economy might have those obligations only in its bilateral FTAs with certain DEPA members, leading to a lack of symmetry where an acceding economy is able to meaningfully affirm those provisions with some DEPA partners but not others.

4.2 Disadvantages

A potential disadvantage is that broadcasting is carved out from the obligation to provide non-discriminatory treatment of digital products, meaning that New Zealand businesses in this sector would not gain any benefits from these rules (nor does New Zealand have any additional requirements imposed on us as a result of this agreement). However, this is commonly a sensitive area for governments, and similar carve outs exist in New Zealand's two most recent FTAs for audio-visual services (in the New Zealand – United Kingdom FTA and the New Zealand-European Union FTA). New Zealand also sought and secured a broad creative arts exception in the original DEPA to similarly protect domestic flexibility in this area.

5 Legal obligations which would be imposed on New Zealand by the treaty action, the position in respect of reservations to the treaty, and an outline of any dispute settlement mechanisms

The DEPA Protocol will make clear the legal obligations for New Zealand in the DEPA in relation to data flows, data localisation, cryptography and non-discriminatory treatment of digital products. Such obligations are consistent with what New Zealand has already agreed in the CPTPP⁶, and New Zealand's other recent trade agreements (for example, the New Zealand-United Kingdom FTA and the New Zealand-European Union FTA) and accordingly, the DEPA Protocol does not require any changes to New Zealand policy or legislation. With entry into force of the DEPA Protocol, and the likely future accessions to the DEPA, New Zealand will however extend these obligations to a wider group than the existing free trade agreement partners listed.

In addition, the DEPA Protocol ensures that the four affirm provisions are subject to binding dispute settlement under the DEPA in the same manner as other existing elements of the DEPA. However, in practice this will only affect New Zealand's legal exposure if economies accede to the DEPA in future to whom we do not already owe these obligations under existing agreements. New Zealand has already extended similar obligations in other agreements, such as the CPTPP, the New Zealand – United Kingdom FTA and the New Zealand-European Union FTA.

⁶ There are some changes to the original CPTPP text for clarification, e.g. to define "broadcasting", and replace the reference to "covered person" with "person of a Party" (which is already defined in the DEPA). The DEPA provisions have also required slight adjustment from the CPTPP to make the provisions operational in a digital-only agreement where there are no services or investment market access obligations and associated schedules of reservations.

Legal commitments in the four obligations

Non-Discriminatory Treatment of Digital Products (Article 3.3) requires that New Zealand (and other DEPA parties) provide digital products from another DEPA party with the best treatment it offers to its own "like" domestic digital products or those of any other country.⁷

The obligation in Article 3.3 does not apply to subsidies or grants provided by a Party, nor to broadcasting. It also does not apply to the extent of any inconsistency with a Party's international rights and obligations concerning intellectual property.

Information and Communication Technology Products that Use Cryptography (Article 3.4) addresses the issue that sometimes, importing countries ban encrypted products or put in place specific technical regulations that restrict the sale of encrypted products. Under Article 3.4 a DEPA Party may not require a manufacturer or supplier of a product that uses cryptography to do any of the following as a condition of the manufacture, sale, distribution, import or use of the product:

- transfer or provide access to a particular technology, production process or other proprietary information related to cryptography in the product (such as a private key), to the Government or a person in the Party's territory;
- partner with a person in its territory; or
- use or integrate a particular cryptographic algorithm or cipher.

This prohibition only applies with respect to products that are designed for commercial applications. It does not apply if the manufacture, sale, distribution, import or use of the product is by or for the Government of the Party imposing the condition. It also does not apply to a Party's requirements relating to access to networks that are owned or controlled by the Government (including those of central banks); or measures taken by a Party pursuant to supervisory, investigatory or examination authority relating to financial institutions or markets.

Cross-Border Transfer of Information by Electronic Means (Article 4.3) requires New Zealand (and each DEPA Party) to allow the cross-border transfer of information by electronic means for business activities. However, the provision also upholds the right of New Zealand (and other DEPA Parties) to take measures that prevent a transfer, if the measures are required to achieve legitimate policy objectives. Any such measures must not be applied in a manner that constitutes arbitrary or unjustifiable discrimination or a disguised restriction on trade, and must not impose restrictions on transfers of information greater than are required to achieve the objective.

⁷ This provision requires that a Party not give less favourable treatment to digital products that are created, produced, published, contracted for, commissioned or first made available on commercial terms in the territory of another DEPA Party. Nor may it give less favourable treatment to digital products if the author, performer, producer, developer, or owner is a person of another Party. In either case, the first Party's treatment must not be less favourable than that it accords to other "like" digital products (whether or not from a DEPA Party).

Article 4.4 (Location of Computing Facilities) prohibits New Zealand (and other DEPA Parties) from imposing a condition on the conduct of business in its territory that would require a person of another Party to use or locate computing facilities there. However, the provision allows a Party to take measures that do impose such conditions if those measures are to achieve legitimate policy objectives. Any such measures must not be applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade, and must not impose restrictions on the use or location of computing facilities greater than are required to achieve the objective.

6 Measures which the Government could or should adopt to implement the treaty action, including specific reference to implementing legislation

New Zealand's existing domestic legal and policy regime meet the obligations in the DEPA Protocol and no new legislation is required.

7 Economic, social, cultural and environmental costs and effects of the treaty action

7.1 Economic effects

The DEPA Protocol will enable other economies to join the DEPA. Businesses may benefit from more certainty and consistency around key provisions surrounding the treatment of digital products, data flows, data localisation, and cryptography. This can improve confidence in making trade and related investment decisions.

7.2 Social effects

The DEPA Protocol's impact on employment is expected to be negligible. The DEPA Protocol is not expected to have any negative impacts on other outcomes including health, social regulation, immigration and human rights.

7.3 Cultural effects

The DEPA Protocol can support new opportunities for digital companies to sell their products and services in Singapore, Chile, and economies that join the DEPA in the future by clarifying and making legally enforceable the protection afforded by the four key obligations addressed by the DEPA Protocol. Existing safeguards in the DEPA protect New Zealand's ability to pursue certain cultural policy objectives, such as supporting creative arts, and protecting national treasures and sites of historical/archaeological value and will apply to the new obligations incorporated through the DEPA Protocol. In addition to the Treaty of Waitangi exception contained in the original DEPA, the DEPA

Protocol provides new protection for Māori rights, interests, duties and responsibilities, including mātauranga Māori in relation to certain provisions.

7.4 Environmental effects

The impact of DEPA on the environment is expected to be negligible. There is no specific module on digital trade and environment. There may be benefits to the environment as a result of the broader transformation to digital trade as envisaged by DEPA's wider context.

8 The costs to New Zealand of compliance with the treaty

There will be no additional costs to New Zealand as a result of the DEPA Protocol. All costs associated with the implementation of the Protocol are expected to be met through existing resources and agency baseline funding.

9 Completed or proposed consultation with the community and parties interested in the treaty action

The negotiation of the DEPA Protocol was conducted by the Ministry of Foreign Affairs and Trade (MFAT). MFAT consulted The Treasury, the Ministry of Primary Industries, the Ministry of Business, Innovation and Employment, and the Ministry of Culture and Heritage at key points in the negotiations.

MFAT engaged with Treaty Partner representative groups, Ngā Toki Whakarururanga and Te Taumata, on the DEPA Protocol proposals, providing updates on the progress of negotiations and ongoing accession discussions.

MFAT particularly engaged with Ngā Toki Whakarururanga and Te Taumata in relation to the new language New Zealand secured in the DEPA Protocol to exclude Māori rights and interests from the four key obligations being made legally enforceable in the DEPA, and this engagement informed MFAT's approach. As mentioned earlier, New Zealand took the limited opportunity the DEPA Protocol provided to add to the original DEPA text and we sought to secure this language in response to the Waitangi Tribunal "Wai 2522" Report that found the CPTPP breached the Crown's obligation under Te Tiriti o Waitangi.

We understand that Ngā Toki Whakarururanga would have preferred language without the 'trade test'⁸, because Ngā Toki Whakarururanga questioned its effectiveness in protecting Māori rights, interests, duties, and responsibilities in the digital space. The inclusion of this text is however common FTA practice (including for New Zealand's Treaty of Waitangi exception and the Legitimate Public Policy Objective exception). Including the 'trade test' language was required in order for other DEPA Parties (Chile and Singapore) to agree to the language which excludes Māori rights and interests from the four key obligations.

⁸ 'Trade test' language states: "... provided that such measures are not used as a means of arbitrary or unjustified discrimination against persons of another Party or a disguised restriction on trade in the digital economy."

There was also extensive engagement with Treaty Partners in the formation of the module on Digital Inclusion in the original DEPA. This text is the first of its kind and seeks to expand and facilitate digital economy opportunities to the benefit of all people, including indigenous peoples, while strengthening protections. By facilitating accessions through the DEPA Protocol, more economies will be able to participate in cooperative activities under these provisions.

10 Subsequent protocols and/or amendments to the treaty and their likely effects

Given the DEPA is intended to be a living agreement, it is possible that the amendment procedure will be used in future to ensure that the DEPA remains up to date and reflects emerging technologies. There are no further proposals to amend the DEPA in the short to medium term.

As the Protocol will become an integral part of the DEPA, the amendment procedures in the original DEPA will also apply to the new provisions incorporated through the DEPA Protocol. DEPA Parties may agree, in writing, to amend the DEPA (including the DEPA Protocol provisions). Amendments enter into force 60 days after the date on which the last DEPA Party has notified the Depositary (New Zealand) in writing of the approval of the amendment, in accordance with their respective legal procedures, or on such other date as the Parties may agree.

11 Withdrawal or denunciation provision in the treaty

The Protocol will become an integral part of the DEPA, and existing withdrawal provisions will continue to apply. Any Party may withdraw from the DEPA by providing written notice of withdrawal to the Depositary (Article 16.5). The withdrawal would take effect six months after notice is provided. If a Party withdraws, the Agreement would remain in force for the remaining Parties.

Annex 1: Protocol to the Digital Economy Partnership Agreement

PROTOCOL TO THE DIGITAL ECONOMY PARTNERSHIP AGREEMENT

The Government of the Republic of Chile, the Government of New Zealand, and the Government of the Republic of Singapore (hereinafter referred to collectively as the “Parties” and singularly as a “Party”),

RECALLING the Digital Economy Partnership Agreement (hereinafter referred to as the “Agreement”) signed between the Republic of Chile, New Zealand, and the Republic of Singapore on 6 November 2020;

SEEKING to enhance certainty of the Agreement;

RECALLING that Article 12.2 (Functions of the Joint Committee) of the Agreement provides for the Joint Committee established by the Parties to consider any matter relating to the implementation or operation of the Agreement, and consider any proposal to amend or modify the Agreement, among other functions; and

SEEKING to reflect the decision adopted by the Joint Committee on this Protocol on [date],

HAVE AGREED AS FOLLOWS:

ARTICLE 1 – Article 1.1 (Scope) of the Agreement

Article 1.1 (Scope) of the Agreement shall be superseded by the following:

“Article 1.1: Scope and General Provisions

1. This Agreement shall apply to measures adopted or maintained by a Party that affect trade in the digital economy.
2. This Agreement shall not apply:
 - (a) to a service supplied in the exercise of governmental authority;
 - (b) except for Article 2.7 (Electronic Payments), to financial services;
 - (c) except for Article 8.3 (Government Procurement), to government procurement; or
 - (d) except for Article 9.5 (Open Government Data), to information held or processed by or on behalf of a Party, or measures related to that information, including measures related to its collection.

3. Article 3.3 (Non-Discriminatory Treatment of Digital Products), Article 3.4 (Information and Communication Technology Products that Use Cryptography), Article 4.3 (Cross-Border Transfer of Information by Electronic Means), and Article 4.4 (Location of Computing Facilities) shall not apply to measures adopted or maintained by a Party that it deems necessary to protect or promote indigenous rights, interests, duties, and responsibilities^a in respect of trade in the digital economy,^b provided that such measures are not used as a means of arbitrary or unjustified discrimination against persons of another Party or a disguised restriction on trade in the digital economy.”

“^a For greater certainty, for New Zealand, indigenous rights, interests, duties and responsibilities include those relating to mātauranga Māori.”

“^b In the case of New Zealand, the measures referred to in this paragraph include the fulfilment of New Zealand’s obligations under Te Tiriti o Waitangi/the Treaty of Waitangi. The Parties agree that the interpretation of Te Tiriti o Waitangi/the Treaty of Waitangi, including as to the nature of the rights and obligations arising under it, shall not be subject to the dispute settlement provisions of this Agreement.”

ARTICLE 2 – Article 3.1 (Definitions) of the Agreement

Article 3.1 (Definitions) of the Agreement shall be superseded by the following:

“Article 3.1: Definitions

For the purposes of this Module:

broadcasting means the transmission of signs or signals via any technology for the reception and / or display of aural and / or visual programme signals by all or part of the domestic public;

digital product means a computer programme, text, video, image, sound recording or other product that is digitally encoded, produced for commercial sale or distribution, and that can be transmitted electronically;^{9, 10} and

electronic transmission or **transmitted electronically** means a transmission made using any electromagnetic means, including by photonic means.”

“⁹ For greater certainty, digital product does not include a digitised representation of a financial instrument, including money.”

“¹⁰ The definition of digital product should not be understood to reflect a Party’s view on whether trade in digital products through electronic transmission should be categorised as trade in services or trade in goods.”

ARTICLE 3 – Article 3.3 (Non-Discriminatory Treatment of Digital Products) of the Agreement

Article 3.3 (Non-Discriminatory Treatment of Digital Products) of the Agreement shall be superseded by the following:

“Article 3.3: Non-Discriminatory Treatment of Digital Products

1. No Party shall accord less favourable treatment to digital products created, produced, published, contracted for, commissioned or first made available on commercial terms in the territory of another Party, or to digital products of which the author, performer, producer, developer or owner is a person of another Party, than it accords to other like digital products.^{10bis}
2. Paragraph 1 shall not apply to the extent of any inconsistency with a Party's rights and obligations concerning intellectual property contained in another international agreement a Party is party to.
3. The Parties understand that this Article does not apply to subsidies or grants provided by a Party, including government-supported loans, guarantees and insurance.
4. This Article shall not apply to broadcasting.
5. Notwithstanding paragraph 1, a Party may adopt or maintain any measure that accords differential treatment to digital products of another Party or a non-Party:
 - (a) under any bilateral or multilateral international agreement in force or signed prior to the date of entry into force of the Protocol to the Digital Economy Partnership Agreement signed between the Republic of Chile, New Zealand, and the Republic of Singapore on [date] day of [month] 2023 for the Party adopting or maintaining the measure; or
 - (b) as part of a wider process of economic integration or trade liberalisation under any agreement referred to in subparagraph (a).”

^{“10bis} For greater certainty, to the extent that a digital product of a non-Party is a “like digital product”, it will qualify as an “other like digital product” for the purposes of this paragraph.”

ARTICLE 4 – Article 3.4 (Information and Communication Technology Products that Use Cryptography) of the Agreement

Article 3.4 (Information and Communication Technology Products that Use Cryptography) of the Agreement shall be superseded by the following:

“Article 3.4: Information and Communication Technology Products that Use Cryptography

1. This Article shall apply to information and communication technology (ICT) products that use cryptography.^{10ter}
2. For the purposes of this Article:

cryptography means the principles, means or methods for the transformation of data in order to hide its information content, prevent its undetected modification or prevent its unauthorised use; and is limited to the transformation of information using one or more secret parameters, for example, crypto variables, or associated key management;

encryption means the conversion of data (plaintext) into a form that cannot be easily understood without subsequent re-conversion (ciphertext) through the use of a cryptographic algorithm;

cryptographic algorithm or **cipher** means a mathematical procedure or formula for combining a key with plaintext to create a ciphertext; and

key means a parameter used in conjunction with a cryptographic algorithm that determines its operation in such a way that an entity with knowledge of the key can reproduce or reverse the operation while an entity without knowledge of the key cannot.

3. With respect to a product that uses cryptography and is designed for commercial applications, no Party shall impose or maintain a technical regulation or conformity assessment procedure that requires a manufacturer or supplier of the product, as a condition of the manufacture, sale, distribution, import or use of the product, to:

- (a) transfer or provide access to a particular technology, production process or other information, for example, a private key or other secret parameter, algorithm specification or other design detail, that is proprietary to the manufacturer or supplier and relates to the cryptography in the product, to the Party or a person in the Party's territory;
- (b) partner with a person in its territory; or
- (c) use or integrate a particular cryptographic algorithm or cipher,

other than where the manufacture, sale, distribution, import or use of the product is by or for the government of the Party.

4. Paragraph 3 shall not apply to:

- (a) requirements that a Party adopts or maintains relating to access to networks that are owned or controlled by the government of that Party, including those of central banks; or
- (b) measures taken by a Party pursuant to supervisory, investigatory or examination authority relating to financial institutions or markets.

5. For greater certainty, this Article shall not be construed to prevent a Party's law enforcement authorities from requiring service suppliers using encryption they control to provide, pursuant to that Party's legal procedures, unencrypted communications."

"^{10ter} For greater certainty, for the purposes of this Article, a "product" is a good and does not include a financial instrument."

ARTICLE 5 – Article 4.3 (Cross-Border Transfer of Information by Electronic Means) of the Agreement

Article 4.3 (Cross-Border Transfer of Information by Electronic Means) of the Agreement shall be superseded by the following:

"Article 4.3: Cross-Border Transfer of Information by Electronic Means

1. The Parties recognise that each Party may have its own regulatory requirements concerning the transfer of information by electronic means.
2. Each Party shall allow the cross-border transfer of information by electronic means, including personal information, when this activity is for the conduct of the business of a person of a Party.
3. Nothing in this Article shall prevent a Party from adopting or maintaining measures inconsistent with paragraph 2 to achieve a legitimate public policy objective, provided that the measure:
 - (a) is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade; and
 - (b) does not impose restrictions on transfers of information greater than are required to achieve the objective."

ARTICLE 6 – Article 4.4 (Location of Computing Facilities) of the Agreement

Article 4.4 (Location of Computing Facilities) of the Agreement shall be superseded by the following:

“Article 4.4: Location of Computing Facilities

1. The Parties recognise that each Party may have its own regulatory requirements regarding the use of computing facilities, including requirements that seek to ensure the security and confidentiality of communications.

2. No Party shall require a person of a Party to use or locate computing facilities in that Party’s territory as a condition for conducting business in that territory.

3. Nothing in this Article shall prevent a Party from adopting or maintaining measures inconsistent with paragraph 2 to achieve a legitimate public policy objective, provided that the measure:

- (a) is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade; and
- (b) does not impose restrictions on the use or location of computing facilities greater than are required to achieve the objective.”

ARTICLE 7 –Article 14.3 (Scope) of the Agreement

Article 14.3 (Scope) of the Agreement shall be superseded by the following:

“Article 14.3: Scope

This Module and its Annexes shall apply:

- (a) with respect to the avoidance or settlement of disputes between the Parties regarding the interpretation or application of this Agreement; or
- (b) when a Party considers that an actual or proposed measure of another Party is or would be inconsistent with an obligation of this Agreement, or that another Party has otherwise failed to carry out an obligation under this Agreement.”

ARTICLE 8 – Annexes to the Agreement

The following Annexes to the Agreement shall cease to be in operation:

- (a) Annex 14-A (Scope of Module 14 (Dispute Settlement)); and

(b) Annex I (Understanding on this Agreement).⁹

ARTICLE 9 – General Provisions

1. This Protocol shall enter into force 60 days after the date on which the last Party has notified the Depositary of the Agreement in writing of the completion of its applicable legal procedures.
2. This Protocol may be signed electronically by the Parties. For greater certainty, the Parties understand that the electronic signing of this Protocol shall carry the same weight and legal effect as affixing hand-signed wet-ink signatures on treaties under international law.
3. This Protocol shall constitute an integral part of the Agreement.

⁹ For greater certainty, Module 14 (Dispute Settlement) of the Agreement applies to Article 3.3 (Non-Discriminatory Treatment of Digital Products), Article 3.4 (Information and Communication Technology Products that Use Cryptography), Article 4.3 (Cross-Border Transfer of Information by Electronic Means), and Article 4.4 (Location of Computing Facilities) of the Agreement, as set out in Articles 3, 4, 5, and 6 of this Protocol.

IN WITNESS WHEREOF, the undersigned, being duly authorised by their respective Governments, have signed this Protocol.

Done this [date] day of [month] 2023 (GMT), in the English language.

For the Republic of Chile

[Name]
[Designation]

For New Zealand

[Name]
[Designation]

For the Republic of Singapore

[Name]
[Designation]

Proactively Released by the Minister for Trade and Export Growth

Proactively Released by the Minister for Trade and Export Growth

MFAT

MINISTRY OF FOREIGN AFFAIRS AND TRADE
MANATŪ AORERE

PROTOCOL TO THE DIGITAL ECONOMY PARTNERSHIP AGREEMENT

The Government of the Republic of Chile, the Government of New Zealand, and the Government of the Republic of Singapore (hereinafter referred to collectively as the “Parties” and singularly as a “Party”),

RECALLING the Digital Economy Partnership Agreement (hereinafter referred to as the “Agreement”) signed between the Republic of Chile, New Zealand, and the Republic of Singapore on 6 November 2020;

SEEKING to enhance certainty of the Agreement;

RECALLING that Article 12.2 (Functions of the Joint Committee) of the Agreement provides for the Joint Committee established by the Parties to consider any matter relating to the implementation or operation of the Agreement, and consider any proposal to amend or modify the Agreement, among other functions; and

SEEKING to reflect the decision adopted by the Joint Committee on this Protocol on [date],

HAVE AGREED AS FOLLOWS:

ARTICLE 1 – Article 1.1 (Scope) of the Agreement

Article 1.1 (Scope) of the Agreement shall be superseded by the following:

“Article 1.1: Scope and General Provisions

1. This Agreement shall apply to measures adopted or maintained by a Party that affect trade in the digital economy.
2. This Agreement shall not apply:
 - (a) to a service supplied in the exercise of governmental authority;
 - (b) except for Article 2.7 (Electronic Payments), to financial services;
 - (c) except for Article 8.3 (Government Procurement), to government procurement; or
 - (d) except for Article 9.5 (Open Government Data), to information held or processed by or on behalf of a Party, or measures related to that information, including measures related to its collection.
3. Article 3.3 (Non-Discriminatory Treatment of Digital Products), Article 3.4 (Information and Communication Technology Products that Use Cryptography), Article 4.3 (Cross-Border Transfer of Information by Electronic Means), and Article 4.4 (Location of Computing Facilities) shall not apply to measures adopted or maintained by a Party that it deems necessary to protect or

promote indigenous rights, interests, duties, and responsibilities^a in respect of trade in the digital economy,^b provided that such measures are not used as a means of arbitrary or unjustified discrimination against persons of another Party or a disguised restriction on trade in the digital economy.”

“^a For greater certainty, for New Zealand, indigenous rights, interests, duties and responsibilities include those relating to mātauranga Māori.”

“^b In the case of New Zealand, the measures referred to in this paragraph include the fulfilment of New Zealand’s obligations under Te Tiriti o Waitangi/the Treaty of Waitangi. The Parties agree that the interpretation of Te Tiriti o Waitangi/the Treaty of Waitangi, including as to the nature of the rights and obligations arising under it, shall not be subject to the dispute settlement provisions of this Agreement.”

ARTICLE 2 – Article 3.1 (Definitions) of the Agreement

Article 3.1 (Definitions) of the Agreement shall be superseded by the following:

“Article 3.1: Definitions

For the purposes of this Module:

broadcasting means the transmission of signs or signals via any technology for the reception and / or display of aural and / or visual programme signals by all or part of the domestic public;

digital product means a computer programme, text, video, image, sound recording or other product that is digitally encoded, produced for commercial sale or distribution, and that can be transmitted electronically;^{9, 10} and

electronic transmission or transmitted electronically means a transmission made using any electromagnetic means, including by photonic means.”

“⁹ For greater certainty, digital product does not include a digitised representation of a financial instrument, including money.”

“¹⁰ The definition of digital product should not be understood to reflect a Party’s view on whether trade in digital products through electronic transmission should be categorised as trade in services or trade in goods.”

ARTICLE 3 – Article 3.3 (Non-Discriminatory Treatment of Digital Products) of the Agreement

Article 3.3 (Non-Discriminatory Treatment of Digital Products) of the Agreement shall be superseded by the following:

“Article 3.3: Non-Discriminatory Treatment of Digital Products

1. No Party shall accord less favourable treatment to digital products created, produced, published, contracted for, commissioned or first made available on commercial terms in the territory of another Party, or to digital products of which the author, performer, producer, developer or owner is a person of another Party, than it accords to other like digital products.^{10bis}
2. Paragraph 1 shall not apply to the extent of any inconsistency with a Party's rights and obligations concerning intellectual property contained in another international agreement a Party is party to.
3. The Parties understand that this Article does not apply to subsidies or grants provided by a Party, including government-supported loans, guarantees and insurance.
4. This Article shall not apply to broadcasting.
5. Notwithstanding paragraph 1, a Party may adopt or maintain any measure that accords differential treatment to digital products of another Party or a non-Party:
 - (a) under any bilateral or multilateral international agreement in force or signed prior to the date of entry into force of the Protocol to the Digital Economy Partnership Agreement signed between the Republic of Chile, New Zealand, and the Republic of Singapore on [date] day of [month] 2023 for the Party adopting or maintaining the measure; or
 - (b) as part of a wider process of economic integration or trade liberalisation under any agreement referred to in subparagraph (a).”

“^{10bis} For greater certainty, to the extent that a digital product of a non-Party is a “like digital product”, it will qualify as an “other like digital product” for the purposes of this paragraph.”

ARTICLE 4 – Article 3.4 (Information and Communication Technology Products that Use Cryptography) of the Agreement

Article 3.4 (Information and Communication Technology Products that Use Cryptography) of the Agreement shall be superseded by the following:

“Article 3.4: Information and Communication Technology Products that Use Cryptography

1. This Article shall apply to information and communication technology (ICT) products that use cryptography.^{10ter}
2. For the purposes of this Article:

cryptography means the principles, means or methods for the transformation of data in order to hide its information content, prevent its undetected modification or prevent its unauthorised use; and is limited to the transformation of information using one or more secret parameters, for example, crypto variables, or associated key management;

encryption means the conversion of data (plaintext) into a form that cannot be easily understood without subsequent re-conversion (ciphertext) through the use of a cryptographic algorithm;

cryptographic algorithm or **cipher** means a mathematical procedure or formula for combining a key with plaintext to create a ciphertext; and

key means a parameter used in conjunction with a cryptographic algorithm that determines its operation in such a way that an entity with knowledge of the key can reproduce or reverse the operation, while an entity without knowledge of the key cannot.

3. With respect to a product that uses cryptography and is designed for commercial applications, no Party shall impose or maintain a technical regulation or conformity assessment procedure that requires a manufacturer or supplier of the product, as a condition of the manufacture, sale, distribution, import or use of the product, to:

- (a) transfer or provide access to a particular technology, production process or other information, for example, a private key or other secret parameter, algorithm specification or other design detail, that is proprietary to the manufacturer or supplier and relates to the cryptography in the product, to the Party or a person in the Party's territory;
- (b) partner with a person in its territory; or
- (c) use or integrate a particular cryptographic algorithm or cipher,

other than where the manufacture, sale, distribution, import or use of the product is by or for the government of the Party.

4. Paragraph 3 shall not apply to:

- (a) requirements that a Party adopts or maintains relating to access to networks that are owned or controlled by the government of that Party, including those of central banks; or
- (b) measures taken by a Party pursuant to supervisory, investigatory or examination authority relating to financial institutions or markets.

5. For greater certainty, this Article shall not be construed to prevent a Party's law enforcement authorities from requiring service suppliers using

encryption they control to provide, pursuant to that Party's legal procedures, unencrypted communications."

"^{10ter} For greater certainty, for the purposes of this Article, a "product" is a good and does not include a financial instrument."

ARTICLE 5 – Article 4.3 (Cross-Border Transfer of Information by Electronic Means) of the Agreement

Article 4.3 (Cross-Border Transfer of Information by Electronic Means) of the Agreement shall be superseded by the following:

"Article 4.3: Cross-Border Transfer of Information by Electronic Means

1. The Parties recognise that each Party may have its own regulatory requirements concerning the transfer of information by electronic means.
2. Each Party shall allow the cross-border transfer of information by electronic means, including personal information, when this activity is for the conduct of the business of a person of a Party.
3. Nothing in this Article shall prevent a Party from adopting or maintaining measures inconsistent with paragraph 2 to achieve a legitimate public policy objective, provided that the measure:
 - (a) is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade; and
 - (b) does not impose restrictions on transfers of information greater than are required to achieve the objective."

ARTICLE 6 – Article 4.4 (Location of Computing Facilities) of the Agreement

Article 4.4 (Location of Computing Facilities) of the Agreement shall be superseded by the following:

"Article 4.4: Location of Computing Facilities

1. The Parties recognise that each Party may have its own regulatory requirements regarding the use of computing facilities, including requirements that seek to ensure the security and confidentiality of communications.
2. No Party shall require a person of a Party to use or locate computing facilities in that Party's territory as a condition for conducting business in that territory.

3. Nothing in this Article shall prevent a Party from adopting or maintaining measures inconsistent with paragraph 2 to achieve a legitimate public policy objective, provided that the measure:

- (a) is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade; and
- (b) does not impose restrictions on the use or location of computing facilities greater than are required to achieve the objective.”

ARTICLE 7 –Article 14.3 (Scope) of the Agreement

Article 14.3 (Scope) of the Agreement shall be superseded by the following:

“Article 14.3: Scope

This Module and its Annexes shall apply:

- (a) with respect to the avoidance or settlement of disputes between the Parties regarding the interpretation or application of this Agreement; or
- (b) when a Party considers that an actual or proposed measure of another Party is or would be inconsistent with an obligation of this Agreement, or that another Party has otherwise failed to carry out an obligation under this Agreement.”

ARTICLE 8 – Annexes to the Agreement

The following Annexes to the Agreement shall cease to be in operation:

- (a) Annex 14-A (Scope of Module 14 (Dispute Settlement)); and
- (b) Annex I (Understanding on this Agreement).¹

ARTICLE 9 – General Provisions

1. This Protocol shall enter into force 60 days after the date on which the last Party has notified the Depositary of the Agreement in writing of the completion of its applicable legal procedures.

¹ For greater certainty, Module 14 (Dispute Settlement) of the Agreement applies to Article 3.3 (Non-Discriminatory Treatment of Digital Products), Article 3.4 (Information and Communication Technology Products that Use Cryptography), Article 4.3 (Cross-Border Transfer of Information by Electronic Means), and Article 4.4 (Location of Computing Facilities) of the Agreement, as set out in Articles 3, 4, 5, and 6 of this Protocol.

2. This Protocol may be signed electronically by the Parties. For greater certainty, the Parties understand that the electronic signing of this Protocol shall carry the same weight and legal effect as affixing hand-signed wet-ink signatures on treaties under international law.

3. This Protocol shall constitute an integral part of the Agreement.

Proactively Released by the Minister for Trade and Export Growth

IN WITNESS WHEREOF, the undersigned, being duly authorised by their respective Governments, have signed this Protocol.

Done this [date] day of [month] 2023 (GMT), in the English language.

For the Republic of Chile

[Name]
[Designation]

For New Zealand

[Name]
[Designation]

For the Republic of Singapore

[Name]
[Designation]

Proactively Released by the Minister for Trade and Export Growth