

# Proactive Release

Date: 12 November 2019

The following Cabinet paper and related Cabinet minute have been proactively released by the Minister for Trade and Export Growth:

***Title of paper:*** WTO-Based Negotiations on the Trade-Related Aspects of E-commerce and the Digital Economy Partnership Agreement: Negotiating Mandate

***Title of minute:*** WTO-Based Negotiations on the Trade-Related Aspects of E-commerce and the Digital Economy Partnership Agreement: Negotiating Mandate

***(CAB-19-MIN-0491 refers)***

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 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.

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# 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.*

### WTO-Based Negotiations on the Trade-Related Aspects of E-commerce and the Digital Economy Partnership Agreement: Negotiating Mandate

**Portfolio**                      **Trade and Export Growth**

On 18 September 2019, the Cabinet Economic Development Committee:

- 1        **noted** that a single negotiating mandate is proposed for two separate but closely related negotiations:
  - 1.1     the negotiations based at the World Trade Organisation (WTO) on the trade-related aspects of e-commerce;
  - 1.2     the negotiation of a Digital Economy Partnership Agreement between Singapore, Chile and New Zealand (DEPA);
- 2        **agreed** to the mandate to guide New Zealand negotiators on the core issues expected to be covered in both sets of negotiations, as outlined in Annex One to the paper under DEV-19-SUB-0238;
- 3        **agreed** to the mandate to guide New Zealand negotiators in the DEPA negotiations, which will build on the WTO-based process, as outlined in Annex Two to the paper under DEV-19-SUB-0238;
- 4        **noted** that the costs of negotiating will be met from departmental baselines, and that Ministers will have the opportunity to consider at a later date any costs that may arise from the content of any outcome;
- 5        **authorised** the Ministers of Trade and Export Growth, Broadcasting, Communications and Digital Media, Commerce and Consumer Affairs, Economic Development, and Finance to approve other proposals that depart significantly from the parameters outlined in Annexes One and Two;
- 6        **noted** that before New Zealand confirms its intention to be bound by the outcome of negotiations, final agreed texts and accompanying National Interest Analyses will be submitted to Cabinet for approval;

- 7 **noted** that Cabinet approval will be sought for New Zealand to sign and ratify outcomes of both negotiations.

Janine Harvey  
Committee Secretary

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**Present:**

Rt Hon Winston Peters  
Hon Kelvin Davis  
Hon Phil Twyford  
Hon Dr Megan Woods (Chair)  
Hon Carmel Sepuloni  
Hon Iain Lees-Galloway  
Hon Damien O'Connor  
Hon Shane Jones  
Hon James Shaw  
Hon Eugenie Sage

**Officials present from:**

Office of the Prime Minister  
Officials Committee for DEV

**Hard-copy distribution:**

Minister for Trade and Export Growth

Proactively released by the Minister for Trade and Export Growth



# Cabinet Economic Development Committee

## Summary

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### WTO-Based Negotiations on the Trade-Related Aspects of E-commerce and the Digital Economy Partnership Agreement: Negotiating Mandate

**Portfolio** Trade and Export Growth

**Purpose** This paper seeks a negotiating mandate for two separate but closely related negotiations:

- the negotiations based at the World Trade Organisation (WTO) on the trade-related aspects of e-commerce;
- the negotiation of a Digital Economy Partnership Agreement between Singapore, Chile and New Zealand (DEPA).

**Previous Consideration** None.

**Summary** There has been a lag in the development of relevant international trade rules and norms to respond to the unprecedented growth of digital trade. It needs to be made easier for businesses and consumers to take advantage of these new opportunities.

While the WTO-based process is the best chance to set multilateral rules, only 80 WTO Members (out of 164) are currently participating in negotiations. The DEPA offers an opportunity to create a 'living agreement' that can evolve to accommodate developments in digital technology, and to create rules and best practice that reflect more directly the needs and concerns of New Zealanders.

Given the similarity in subject matter, a single mandate is sought to ensure that the overall outcomes in both sets of negotiations s9(2)(j) protect the government's right to regulate for legitimate public policy objectives.

The main areas for negotiation are listed in **paragraph 5** of the paper. New Zealand will not agree to include investor state dispute settlement (ISDS) or ISDS-like provisions enabling large technology firms to bring claims against the New Zealand Government.

**Annex One** sets out the proposed negotiating parameters for the WTO-based e-commerce negotiations (and DEPA, where these overlap). **Annex Two** outlines the negotiating parameters for DEPA where issues are expected to build on the WTO-based negotiations.

Authority is sought for a group of Ministers to approve other proposals that depart significantly from the parameters outlined in Annexes One and Two. Cabinet approval will be sought before New Zealand confirms its intention to be bound by the outcome of the negotiations.

<b>Regulatory Impact Analysis</b>	An extended National Interest Analysis will be submitted to Cabinet for each set of negotiations when approval for signature is sought.
<b>Baseline Implications</b>	None.
<b>Legislative Implications</b>	None from this paper.
<b>Timing Issues</b>	None.
<b>Announcement</b>	Domestic public engagement on both negotiations is currently underway.
<b>Proactive Release</b>	This paper will be proactively released.
<b>Consultation</b>	<p>Paper prepared by MFAT. MCH, Customs, Reserve Bank, Treasury, Justice, TPk, DPMC, Inland Revenue, Statistics, NZTE, Agriculture, MBIE and DIA were consulted.</p> <p>The Minister for Trade and Export Growth indicates that the Prime Minister, Deputy Prime Minister, Minister of Commerce and Consumer Affairs, Minister of Broadcasting, Communications and Digital Media, Associate Minister of Housing (Māori Housing), and Minister for Government Digital Services were consulted, and that New Zealand First, the Green Party and the Labour Party were also consulted.</p>

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

- 1 note that a single negotiating mandate is proposed for two separate but closely related negotiations:
  - 1.1 the negotiations based at the World Trade Organisation (WTO) on the trade-related aspects of e-commerce;
  - 1.2 the negotiation of a Digital Economy Partnership Agreement between Singapore, Chile and New Zealand (DEPA);
- 2 agree to the mandate to guide New Zealand negotiators on the core issues expected to be covered in both sets of negotiations, as outlined in Annex One to the paper under DEV-19-SUB-0238;
- 3 agree to the mandate to guide New Zealand negotiators in the DEPA negotiations, which will build on the WTO-based process, as outlined in Annex Two to the paper under DEV-19-SUB-0238;

- 4 note that the costs of negotiating will be met from departmental baselines, and that Ministers will have the opportunity to consider at a later date any costs that may arise from the content of any outcome;
- 5 authorise the Ministers of Trade and Export Growth, Broadcasting, Communications and Digital Media, Commerce and Consumer Affairs, Economic Development, and Finance to approve other proposals that depart significantly from the parameters outlined in Annexes One and Two;
- 6 note that before New Zealand confirms its intention to be bound by the outcome of negotiations, final agreed texts and accompanying National Interest Analyses will be submitted to Cabinet for approval;
- 7 note that Cabinet approval will be sought for New Zealand to sign and ratify outcomes of both negotiations.

Janine Harvey  
Committee Secretary

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**Hard-copy distribution:**  
Cabinet Economic Development Committee  
Minister of Justice

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Chair,  
Cabinet Economic Development Committee (DEV)

**Digital Economy – Negotiating Mandate for WTO-based negotiations on the trade related aspects of e-commerce and Digital Economy Partnership Agreement**

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**Proposal**

1. That Cabinet approve one negotiating mandate for two separate but closely related negotiations; the negotiations based at the World Trade Organisation (**WTO**) on the trade related aspects of e-commerce and the negotiation of a Digital Economy Partnership Agreement between Singapore, Chile and New Zealand (**DEPA**).
2. Both processes respond to the unprecedented growth of digital trade and associated lag in the development of relevant international trade rules and norms to support this. The objective is to make it easier for businesses and consumers to take advantage of the opportunities presented by digital trade.
3. The WTO-based process is our best chance to set multilateral rules but it does not include all 164 Members. The 80 WTO Members participating so far are a mix of developed, developing and least developed country Members. s9(2)(j)  
The DEPA by contrast offers an opportunity to create a “living agreement” evolves to accommodate development in digital technology and creates rules and best practice that reflect more directly the needs and concerns of New Zealanders.
4. The proposed mandate sets out an approach that s9(2)(j)  
protects the government’s right to regulate for legitimate public policy objectives.

**Executive summary**

5. WTO-based e-commerce negotiations launched in January 2019 and initial discussions among 80 Members have taken place since then. DEPA launched in May 2019 to act as a pathfinder for the WTO and other international processes such as APEC. This paper proposes a mandate for both the WTO-based e-commerce and DEPA negotiations given much of the

subject matter is similar. The following topics, including the trade policy context and the approach to be taken in each negotiation, are covered:

- 5.1. Business and trade facilitation;
  - 5.2. Non-discrimination provisions;
  - 5.3. Data issues and privacy;
  - 5.4. Competition and consumer protection;
  - 5.5. Source code and algorithms;
  - 5.6. Digital identities;
  - 5.7. Artificial intelligence
  - 5.8. Cybersecurity and encryption;
  - 5.9. Open and non-discriminatory internet;
  - 5.10. Market access;
  - 5.11. Government procurement'
  - 5.12. Cooperation;
  - 5.13. Development;
  - 5.14. Dispute settlement;
  - 5.15. Legal framework;
  - 5.16. Treaty of Waitangi; and
  - 5.17. Other exceptions.
6. The proposed mandate will ensure that the overall outcomes in both negotiations s9(2)(j) protect the government's right to regulate for legitimate public policy objectives. s9(2)(j)
7. The proposed mandate reflects the fact that New Zealand will not agree to include investor state dispute settlement (**ISDS**) or ISDS-like provisions enabling large technology firms to bring claims against the New Zealand Government.

## **Background**

*WTO-based e-commerce negotiations*



8. A sub-set of 80 WTO Members agreed to launch negotiations on the trade-related aspects of e-commerce in January 2019. This is seen as an opportunity to demonstrate that the WTO can respond to current trading realities. Since January, Members have been invited to submit text proposals and have had initial discussions in three negotiating meetings (in May, June and July). New Zealand submitted proposals for discussion on four topics: consumer protection, customs duties on electronic transmissions, paperless trading and e-invoicing.
9. The text proposals and discussions this year have clarified the range of issues that we expect the negotiation to cover. A question remains as to what level of ambition is possible among this diverse group and whether a “critical mass” of Members agrees to the final outcome.
10. While further text proposals may be made, including by New Zealand, the core elements under discussion are familiar to us through our existing FTA practice. They include elements on which we have already made commitments through FTAs (including AANZFTA, CPTPP and the Singapore Upgrade), as well as others under negotiation currently (including with the EU, the Pacific Alliance, the RCEP, and the upgrade of our FTA with China). This mandate focuses on the outcomes and protections to be secured for New Zealand in the negotiations.

#### DEPA

11. The Trade Ministers of New Zealand, Singapore and Chile announced the launch of negotiations for a DEPA on 16 May 2019. Since then a formal preparatory process has commenced and negotiators have sought views from New Zealanders. This paper seeks a mandate for the negotiations through to substantial conclusion, intended to be announced by Leaders in November 2019. Following that, DEPA is intended to be a “living agreement” that can grow in substance and membership.
12. The three overarching objectives for the DEPA therefore are to:
  - 12.1. *Co-create and shape global norms for digital trade.* This is an area that is commercially critical to small economies (in particular SMEs) and is integral to the Government’s productive, sustainable and inclusive economic strategy as well as wider well-being objectives.
  - 12.2. *Create a model digital economy agreement* that can act as a pathfinder for others, raising ambition in other contexts and forums, and that can be integrated into and support processes in the WTO, OECD, APEC and elsewhere.

- 12.3. *Build confidence on new economy issues* to advance and sustain a rules-based order for trade and to demonstrate the benefits of working together with others on trade policy at a time when many economies are choosing to go it alone (or bilaterally).
13. The text under discussion in DEPA draws extensively from FTA practice but also seeks to establish cooperation in newer areas (such as for digital identities) so rules and norms for the wider digital economy can be developed over time, supporting multilateral engagement longer term. This negotiating mandate therefore draws on existing FTAs, particularly CPTPP and the Singapore FTA Upgrade, but also reflects New Zealand's forward looking interests.
14. While the Trade for All Advisory Board has not yet reported, I expect DEPA to take a more progressive and inclusive approach to trade negotiations. The three parties recognise the importance of bolstering SMEs (a key element of the Trade for All Agenda), and an agreement that works for these businesses will contribute to deepening and expanding New Zealand's exporting base, including in the regions. It is also intended that DEPA could include elements to cooperate with Chile and Singapore regarding the inclusion of Māori and women in the digital economy.

## Comment

### *Approach to Mandate*

15. This paper provides background on the main areas for negotiation and seeks approval of a negotiating mandate for New Zealand negotiators. As a cross-cutting approach, I propose that the overall outcomes in each process should s9(2)(j) protect the government's right to regulate for legitimate public policy objectives.
16. I propose that any issues arising that are not explicitly addressed in the negotiation-specific annexes attached be dealt with in accordance with New Zealand's existing policy settings and in consultation with relevant agencies and Ministers where necessary.
- 16.1. **Annex one** contains negotiating parameters for the WTO-based e-commerce negotiations (and DEPA, where these overlap), based on provisions contained in AANZFTA, CPTPP and the Singapore FTA Upgrade and ongoing negotiations (including with the EU, the Pacific Alliance, the RCEP, and the upgrade of our FTA with China).

- 16.2. **Annex two** outlines negotiating parameters for DEPA where issues are expected to build on the WTO-based e-commerce negotiations. Additions or amendments to DEPA following the conclusion of the initial agreement will be subject to Cabinet consideration at the relevant time.

#### *Consultation with New Zealanders*

17. During the public submission processes there was strong support, particularly from businesses. Concerns were also raised about the following: data localisation, privacy/the protection of personal information, and competition policy related to large platforms. There will also be a general public interest in engagement and transparency. A programme of engagement with civil society and Māori in particular is underway.

#### *Business and Trade Facilitation*

18. Business and trade facilitation provisions promote the adoption and use of relevant technologies at the border to facilitate trade. As the digital environment opens new avenues for traders and consumers, Governments must ensure that border procedures support the seamless and secure movement of goods. We want to achieve paperless trading elements for all border related processes, such as (for example) sanitary and phytosanitary measures. As a broader objective, we intend to use DEPA to promote the interoperation of data systems for border processes and agencies.
19. In addition to elements that focus on trade facilitation at the border, these negotiations could cover the wider legislative and commercial environment. This includes the recognition of electronic contracts and signatures as equivalent to paper documents, the value of supporting electronic transactions frameworks, and electronic invoicing and payments.<sup>1</sup> In some areas, such as e-invoicing, where New Zealand's recent agreement to cooperate with Australia under the Single Economic Market agenda is more advanced than in many regions, systems and rules are still developing domestically.
20. Electronic payments (e-payments) is an issue of increasing focus, with multiple systems emerging. Examples include credit-card based systems such as s9(2)(g)(i) and banking-linked models such as s9(2)(g)(i). Each model presents regulatory and policy challenges.

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

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<sup>1</sup> While not covered at this stage of either WTO or DEPA negotiations, there are even further commercial transactions that could benefit from adopting or recognising common digital standards such as bills of lading, insurance and letters of credit. International rules may cover these areas in the future.

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

New Zealand has a growing financial technology (Fintech) industry interested in cross-border e-payments. A predictable, non-discriminatory and transparent international environment would support future commercial opportunities. It is not yet clear whether the WTO-based e-commerce negotiations will cover e-payments, but I expect DEPA to focus on creating a framework for future cooperation that supports NZ's Fintech sector. s9(2)(j)

### *Non-Discrimination Provisions*

21. The WTO has had a time-bound moratorium on the charging of customs duties on electronic transmissions since 1998, which is typically renewed every two years. We have secured a permanent moratorium in some of our FTAs, s6(a), s9(2)(j)

A moratorium ensures that businesses will not face customs duties on their electronic products (e.g. a tariff will not be applied to an e-book), but some developing countries are concerned about potential future revenue loss due to the digital delivery of products (e.g. e-books versus the import of a paperback book), and the expectation that 3D printing may impact the import of manufactured goods. s9(2)(j)

22. Linked to this, some Members are seeking a provision to prevent discriminatory treatment of digital products. s9(2)(j)

### *Data Issues and Privacy*

23. Data is at the heart of digital trade and the wider digital economy. We are only now starting to see the potential for data to support well-being in New Zealand and to drive innovation amongst businesses. In the international context, the ability to move and access data across borders and to choose where to store

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<sup>2</sup> The moratorium does not affect the ability to extend non-discriminatory taxation (such as New Zealand's GST) to imported services or digital products.

data is important for businesses, particularly SMEs. The role of open data for government, social and economic objectives is also important. Some countries have, however, introduced barriers to offshore storage and movement of data. s6(a)

(known as forced data localisation). This adds costs for New Zealand businesses which might otherwise use cloud services. There are also some controls on movement of data. Some are legitimate, such as the requirements of New Zealand's Privacy Bill. Others, however, are driven by more mercantilist and protectionist objectives. s6(a)

24. I do not expect that wider questions relating to data governance, for example questions of data 'ownership', will be broached in the context of either negotiation. In this regard, nothing is expected that will affect the government's ability to shape policy regarding the protection of data including as part of the whole-of-government approach to address issues raised in the context of Wai 262.
25. Securing robust global disciplines on the protection of **personal information/privacy** is a priority in both negotiations. Helping to build a global consensus around robust privacy protections is the best way to protect New Zealanders from unauthorised access to their personal data. s9(2)(j)

26. Provisions on **cross-border transfer of information and to prevent forced location of computing facilities** recognise the value of information flows and the development of new technologies and services. At the same time, these provisions should preserve the Government's ability to take measures affecting cross-border transfers of information by electronic means (such as in the Privacy Bill), or the location of computing facilities in the event that

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legitimate public policy issues arise. Many countries (including New Zealand) already require local storage of financial information for tax purposes, but access to data is increasingly relevant for activities such as competition investigations. s9(2)(j)

27. s9(2)(j), s6(a)

28. The concept of **open government data** has not previously been addressed in New Zealand's trade agreements. Any provisions will be designed consistent the International Open Data Charter. s9(2)(j)

#### *Competition and Consumer Protection*

29. New Zealand will seek robust consumer protection provisions to ensure consumers and businesses have the information to trade with confidence and have access to appropriate redress if things go wrong. s9(2)(j)

New Zealand will also seek provisions to minimise sending of unsolicited commercial messages (known as SPAM), consistent with the Unsolicited Electronic Messages Act 2007.

30. There is an active international debate regarding competition implications of the digital economy. For example, online platform businesses s9(2)(g)(i) may offer both infrastructure to connect buyers and sellers, as well as acting as a seller. The WTO, however, has not yet addressed competition issues and is unlikely to do so. DEPA may be able to provide a forum for future

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<sup>3</sup>

New Zealand's privacy regime is assessed to have an adequate level of data protection compared to the EU's legal requirements. The adequacy status will be reviewed in 2020.

discussions on whether generic competition laws and existing enforcement tools are sufficient to protect competition.

*Source code and algorithms*

31. Software companies report difficulties protecting source code<sup>4</sup>, especially in jurisdictions where providing access to code is a condition of doing business. Source code provisions in FTAs, such as CPTPP, introduce a prohibition on governments requiring access to source code as a condition of market entry. Provisions are limited to “mass market” software (as compared to bespoke software which is a primary market for New Zealand firms) and exclude software used for critical infrastructure.
30. s9(2)(j)

*Digital Identities*

31. Digital identity (e.g. national business numbers) is a new issue for trade agreements. s9(2)(j)

*Artificial Intelligence (AI)*

32. Provisions on AI are also new to trade agreements. As government and other organisations are relying more on AI to make significant decisions, creating and maintaining trust in AI systems becomes crucial for institutions to maintain the trust of their communities. Inclusion of AI will therefore acknowledge the importance of frameworks under discussion in other international fora. s9(2)(j)

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<sup>4</sup>

Source code is the human-readable version of the core code in software and is key proprietary information for businesses.

s9(2)(j)

This will support other ongoing work.<sup>5</sup>

*Cyber Security and encryption*

33. Strong encryption is a fundamental element of good cyber security. This is increasingly critical to New Zealand's national security and economic prosperity. New Zealand's established position includes a duty for network providers and services providers to assist in decrypting communications where the network operator or service provider has provided the encryption. The changing technology environment and the increasing use of encryption, however, create challenges for law enforcement. s9(2)(j)

34. New Zealand's existing FTAs recognise the importance of cooperation on cyber security matters. While New Zealand has other avenues for cooperation on cybersecurity, s9(2)(j)

*Open and Non-Discriminatory Internet: Net Neutrality*

35. Net neutrality is the principle that internet service providers treat all data equally (e.g. in relation to speed or charge) and should not discriminate in favour of or against particular users, content, websites or platforms. Despite broad alignment to concepts of free and open internet, net neutrality as a concept is not used in New Zealand law. s9(2)(j)

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<sup>5</sup> New Zealand recently adopted the OECD Principles on AI and has joined France, Canada and several other countries to form the International Panel on Artificial Intelligence

<sup>6</sup> s9(2)(j)



### *Market Access*

36. Some WTO Members have proposed that the WTO-based negotiations should improve market access commitments made in the WTO General Agreement on Tariffs and Trade (GATT) and General Agreement on Trade in Services (GATS)<sup>7</sup>. On goods, the sole proposal tabled thus far asks participating Members to join the WTO Information Technology Agreement (ITA) and its 2015 expansion (ITA II).<sup>8</sup> New Zealand is a participant to both the ITA I and ITA II and has implemented relevant tariff elimination commitments.

37. s9(2)(j)

38. I do not expect DEPA to include a market access negotiation.

### *Government Procurement*

39. Government Procurement (GP) commitments enable export opportunities for New Zealand businesses through guaranteed access to government markets

<sup>7</sup>

Services market access commitments relate to the ability of services providers to supply services in a foreign market. Commitments ensure Members will not impose measures that restrict access to their market on the basis on quotas, value of services transactions, types of legal entity or joint venture used to supply the service, and foreign capital. In the WTO context these are set out in our GATS schedule agreed in 1995. Most of New Zealand's FTAs also include services market access schedules. Unlike tariff negotiations, they do not typically result in changes to the actual access conditions for services exporters. Instead, commitments provide predictability by locking in minimum conditions – in practice countries are often far more open for services trade than their commitments would suggest.

<sup>8</sup>

The WTO Information Technology Agreement (ITA I) is an understanding reached in 1996 among a sub-set of WTO Members under which they eliminated tariffs on a range of IT products. In 2012, 53 out the 82 ITA (I) participants agreed to commence negotiations to expand the range of IT products covered and the expanded WTO Information Technology Agreement (ITA II) negotiation was launched. Via a non-binding Declaration, ITA (II) participants agreed during the 10th WTO Ministerial Conference (MC10) in December 2015 on the timeframe for reducing tariffs on an agreed list products. Participants agreed tariff elimination will be phased through equal stages over a 4 year period from 1 July 2016.

on a non-discriminatory basis. DEPA provides an opportunity to evaluate with like-minded partners whether the digital economy impacts GP commitments and whether additional provisions are necessary. This is particularly important for SMEs that rely on accessible and transparent digital platforms to gain access to procurement opportunities. I expect the WTO-based negotiation to exclude government procurement from scope, given the existence of the WTO's stand-alone rules on GP.

#### *Cooperation*

40. Given the evolving nature of the digital economy, provisions on cooperation will be a valuable element of both processes. Cooperation ensure the outcomes remain relevant in future, as well as providing a hook for discussions on issues too difficult to secure now. Such processes often involve resource implications for relevant agencies. Officials will therefore seek to frame cooperation in a way that New Zealand can scale its engagement to fit with relative priorities or available resources.

#### *Development*

41. Development is not relevant for DEPA but will be a complex issue for the WTO-based negotiation. s6(a), s9(2)(j)

#### *Dispute Settlement*

42. As a model digital economy agreement that acts as a pathfinder for others, I expect that DEPA to be legally enforceable through state to state dispute settlement. Any provisions on dispute settlement will be based on the WTO Dispute Settlement Understanding and reflect international best practice. DEPA will not include any ISDS or ISDS-style provisions. Companies or individuals will not be able to claim against the New Zealand Government relating to DEPA commitments.

*Legal Framework for WTO-based negotiations and DEPA*

43. New Zealand's approach to the WTO-based negotiation on e-commerce is based on our WTO reform proposal on Flexible and Open Negotiating Approaches. This means we are supporting and participating in the plurilateral process (negotiating between a subset of members) but the process must be transparent and open to all Members. We will also propose that any results must apply on a Most Favoured Nation (MFN) basis.<sup>9</sup>
44. s6(a), s9(2)(j)

*Treaty of Waitangi*

45. New Zealand maintains a Treaty of Waitangi provision in its WTO GATS schedule and our FTAs contain a similar provision. This enables the New Zealand government to adopt domestic policies according more favourable treatment to Māori, including in fulfilment of obligations under the Treaty of Waitangi. s9(2)(j)

*Other Exceptions*

46. General and security exceptions are important tools for protecting space to regulate for legitimate public policy concerns. s9(2)(j)

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<sup>9</sup> MFN basis means that commitments will be extended to benefit all WTO Members.

<sup>10</sup> s6(a), s9(2)(j)

s9(2)(j)

47. s9(2)(j)

### **Consultation**

48. The following departments have been consulted in the preparation of this paper and concur with its recommendations: Department of Internal Affairs, Department of Prime Minister and Cabinet (NCPO), the Commerce Commission, Inland Revenue Department, Ministry of Business, Innovation and Employment, Ministry of Culture and Heritage, Ministry of Justice, Ministry of Primary Industries, New Zealand Customs Service, New Zealand Trade and Enterprise, Reserve Bank of New Zealand, Statistics New Zealand, Te Puni Kōkiri and the Treasury.

### **Financial implications**

49. The WTO-based e-commerce negotiations and DEPA negotiations will be met within MFAT's baseline funding. Any cooperation initiatives will be funded from baseline or subject to budget processes.

50. There should be no fiscal implications from either outcome resulting from a loss of tariff revenue.

### **Human rights**

51. There are no inconsistencies with the Human Rights Act 1993 and New Zealand Bill of Rights Act 1990.

## **Legislative implications**

52. There are no legislative implications directly resulting from this paper, however, Ministers will be updated if these become apparent.

## **Regulatory impact analysis**

53. Not required at this stage. If the outcome of the WTO-based e-commerce process is such that a text is submitted for signature, an extended National Interest Analysis (incorporating a Regulatory Impact Analysis) will be presented to Cabinet. An extended National Interest Analysis (incorporating a Regulatory Impact Analysis) will be presented to Cabinet when negotiations have concluded and the final agreed text of the DEPA is submitted for approval for signature.

## **Gender implications**

54. No gender implications statement is required.

## **Disability perspective**

55. No disability perspective statement is required.

## **Publicity**

56. MFAT is currently undertaking domestic public engagement on both negotiations to ensure that New Zealanders have the opportunity to engage on issues of interest. Engagement activities to date have included a public submissions process and meetings targeted at Māori, industry, and the general public. Key objectives of the engagement will continue to be i) ensure that New Zealanders have a fuller understanding of the important issues under negotiation and ii) the views of New Zealanders are understood and incorporated into New Zealand's negotiating position.

## **Proactive Release**

57. The Ministry of Foreign Affairs and Trade will proactively publish a copy of this paper on its website.

## **Recommendations**

59. The Minister for Trade and Export Growth recommends that the Committee:
- 59.1. Approve the recommendations outlined in Annex one to guide New Zealand negotiators in the WTO-based e-commerce and DEPA negotiations.

- 59.2. Approve the recommendations outlined in Annex two to guide New Zealand negotiators in the DEPA negotiations, which will build on the WTO-based process;
- 59.3. Note that Annex one includes recommendations for the core issues expected to be covered in the WTO-based e-commerce negotiations and the DEPA;
- 59.4. Note that Annex two includes recommendations to build on or expand upon WTO-based e-commerce negotiation outcomes in DEPA;
- 59.5. Note that the costs of negotiating will be met from departmental baselines, and that Ministers will have the opportunity to consider at a later date any costs that may arise from the content of any outcome.
- 59.6. Agree that the Ministers of Trade and Export Growth, Broadcasting Communication and Digital Media, Commerce and Consumer Affairs, Economic Development and Finance have delegated authority to approve other proposals that depart significantly from the parameters outlined in Annex one and two;
- 59.7. Note that before New Zealand confirms its intention to be bound by the outcome of negotiations, final agreed texts and accompanying National Interest Analyses will be submitted to Cabinet for approval.
- 59.8. Note that Cabinet approval will be sought for New Zealand to sign and ratify outcomes of both negotiations.
- 59.9. Note that this paper will be proactively released.

Approved for lodgement

Hon David Parker  
Minister for Trade and Export Growth

**Annex one: Mandate recommendations for WTO E-commerce and DEPA**

Annex withheld in full under s9(2)(j)

Proactively released by the Minister for Trade and Export Growth

**Annex Two: Mandate recommendations applying only to DEPA**

This Annex applies only to DEPA and contains recommendations to build on what could be agreed in the WTO-based e-commerce negotiations.

Remainder of Annex withheld under s9(2)(j)

Proactively released by the Minister for Trade and Export Growth