



October 10, 2023

Hon Damien O'Connor  
Minister for Trade and Export Growth  
Ministry of Foreign Affairs and Trade  
195 Lambton Quay, Private Bag 18 901, Wellington 6160

Dear Minister:

BSA | The Software Alliance (**BSA**)<sup>1</sup> and the Global Data Alliance (**GDA**)<sup>2</sup> congratulate New Zealand on the substantial conclusion of discussions regarding Republic of Korea's accession to the Digital Economy Partnership Agreement (**DEPA**) and regarding the Protocol to the DEPA, which makes binding the DEPA provisions on cross-border data transfers and data/infrastructure localization.

We also congratulate you on the growing list of economies that have expressed interest in DEPA participation. This interest is testament to the Agreement's importance in countering a growing trend towards digital fragmentation – a trend that the OECD, United Nations, World Trade Organization, World Bank, and other development banks have warned threatens legal predictability and economic opportunity, particularly for developing economies.

As you assess future accessions, we urge you to maintain and safeguard the DEPA's high standards through a rigorous evaluation of candidate economies' legal regimes. We also urge you to admit only those economies whose legal regimes clearly meet all DEPA requirements. Allowing economies that fall short of DEPA obligations to accede to the Agreement could erode the legal meaning and enforceability of those obligations, as well as similar obligations in other agreements.

This accession review process should include a comprehensive analysis of all relevant measures, in all sectors and all legal disciplines, that impact cross-border data transfers. DEPA Articles 5 and 6 require an assessment as to whether any transfer restrictions or localization mandates: (1) are adopted or maintained to achieve a legitimate public policy objective (or not); (2) are applied as a means of arbitrary or unjustifiable discrimination, or a disguised restriction on trade; and (3) impose transfer restrictions or localization requirements greater than required to achieve the objective.

For example, if a country unreasonably delays or denies permission to hundreds or thousands of entities to transfer commercial data to another country, a "disguised restriction on trade" may exist. Likewise, the breadth and number of data transfer restrictions or localization requirements – or prohibitions on transfers of broad, undefined universes of data – may indicate that restrictions are "greater than required" to achieve a legitimate public policy objective. The unequal or disproportionate impact of such measures on non-national enterprises, products, or services may indicate the

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<sup>1</sup> BSA is the leading advocate for the global enterprise software industry, and our members develop cloud-enabled and data-driven services that help to create jobs and grow the digital economy. See [www.bsa.org](http://www.bsa.org)

<sup>2</sup> The GDA is a cross-industry coalition of companies, headquartered in different regions of the world, that are committed to high standards of data privacy and security. The GDA supports policies that help instill trust in the digital economy without imposing undue cross-border data restrictions or localization requirements that undermine data security, innovation, economic development, and international trade. See [www.globaldataalliance.org](http://www.globaldataalliance.org)

presence of “arbitrary or unjustifiable discrimination.” Finally, accepting such restrictions as a legitimate exercise of Article 15.2 (Security Exceptions) would raise broader concerns.

DEPA’s accession criteria require candidates to “demonstrate the means by which they will comply with all of the existing provisions contained in the DEPA.” Furthermore, given that the DEPA contains many provisions also found in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (**CPTPP**) and other international agreements, a determination of a candidate’s ability to comply with DEPA provisions may have implications on subsequent accession processes for the CPTPP and on international legal norms of digital governance.

For the foregoing reasons, we urge you to undertake a strict and rigorous analysis of the readiness of any candidate economies for DEPA accession. Candidates that are unable to comply with DEPA provisions should not be allowed to accede to the DEPA until they can clearly demonstrate otherwise.

BSA is grateful for New Zealand’s leadership in advancing regional and global frameworks for digital trade. We would also welcome the opportunity to share with your staff our own legal analysis under the DEPA of relevant measures from those countries that are currently undergoing formal accession review. Please do not hesitate to have your staff reach out to Jared Ragland, BSA’s Senior Director of Policy for APAC, and Joseph Whitlock, Executive Director at the Global Data Alliance, with any questions or comments.