GLOBAL DATA ALLIANCE
TRUST ACROSS BORDERS

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DEPA ACCESSION REVIEW TOOLKIT

COMMENTS ON PENDING ACCESSION REQUESTS TO THE DIGITAL ECONOMY PARTNERSHIP AGREEMENT

Introduction

The Global Data Alliance (GDA) welcomes the opportunity to offer the following legal toolkit for evaluating requests by candidate economies to accede to the Digital Economy Partnership Agreement (DEPA).

The GDA is a cross-industry coalition of nearly 100 companies from across Africa, Asia, Europe, Oceania, and the Western Hemisphere. GDA members are committed to high standards of data responsibility and rely on the ability to transfer data around the world to innovate and create jobs.[1] The GDA is a strong supporter of the DEPA, a digital economy agreement that spans the field of international data governance and that has grown in importance with recent updates to strengthen its cross-border data policy norms.

Importance of the DEPA

The DEPA is a groundbreaking digital economy agreement that entered into force in January 2021 among Chile, New Zealand, and Singapore as initial members. Following a multi-year accession review process, South Korea officially became the fourth member of the DEPA in May 2024.

In May 2023, DEPA members adopted an agreed Protocol that substantially strengthened the original agreement in several areas relevant to the cross-border data policy priorities of concern to GDA members. This Protocol produced clearer **prohibitions on**:

- Arbitrary, discriminatory, disguised, or unduly restrictive **data transfer restrictions** (Art. 5);
- Improper **mandates to localize** computing infrastructure (Art. 6); and
- **Discriminatory treatment** of another Party's digital products (Art. 3).

The DEPA also contains a permanent prohibition on the imposition of **customs duties on electronic transmissions**.[2]

Economies that have expressed an interest in acceding to the DEPA include Canada, the People's Republic of China (PRC), and a range of Latin American economies. Canada and the PRC have been engaged in formal accession talks since 2022 and 2021, respectively.

Overview of DEPA Accession Procedures

The DEPA's accession review processes are a keystone of the Agreement's future success. While the new member accession review process is important for any international agreement, this is particularly true for the DEPA because the DEPA lacks a binding dispute settlement framework. In other words, if current Parties do not take steps during the substantive and procedural reviews of prospective candidates to ensure that they meet "all of the existing standards in the DEPA", there will be little – or no – post-accession opportunity to do so. For this reason, the DEPA accession review process must be rigorous.

The DEPA Agreement Text and accompanying DEPA Accession Process guidance document make this clear. Together, these documents specify that all prospective candidates must demonstrate that they do, in fact and in law, meet the Agreement's high standards, along with any other terms stipulated by the Parties. Establishing full compliance prior to admitting any new member is critical to ensure that the DEPA:

- **Benefits its existing Parties:** Only if all Parties meet the Agreement's standards will it produce benefits for the citizens of the current Parties (Chile, New Zealand, Singapore, and South Korea) and future Parties (e.g., Canada and the PRC).
- **Can attract future Parties:** If the DEPA can help ensure predictable compliance by all Parties, prospective candidates will see value in joining the Agreement. Conversely, if there is a perception that the Agreement's terms are not strictly followed, the Agreement will be devalued. In such circumstances, the Agreement could be perceived as unable to deliver its promise, thus deterring future Parties from joining.
- **Is legally operative**: The accession review process is the primary – and perhaps the only – point of leverage to ensure that future Parties fully meet and implement the Agreement's obligations. As noted above, this is because the Agreement otherwise lacks a binding dispute settlement mechanism.

DEPA Article 16.4.1 states that the "Agreement is open to accession on terms to be agreed among the Parties, and approved in accordance with the applicable legal procedures of each Party." To that end, the DEPA Accession Process guidance document states (in relevant part) as follows:

> 4.3 The aspirant economy will demonstrate to the Accession Working Group the efforts made to date, as well as identify any additional changes it will need to make to its domestic laws and regulations, in order to meet the Benchmarks as set out in Paragraph 7.
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> 4.4 After finalising negotiations, the Accession Working Group will submit a written report, in a timely manner, making a recommendation to the Joint Committee regarding the terms for the aspirant economy's accession to the DEPA. This written report will be approved by consensus within the Accession Working Group …
>
> 7. Benchmarks … Aspirant economies must:
>
> a. demonstrate the means by which they will comply with all of the existing provisions contained in the DEPA; and
>
> b. undertake to embark on meaningful collaborations and projects with some or all DEPA Parties. These collaborations and projects will deliver commercially-meaningful outcomes that facilitate business-to-business connectivity in the digital age or address new issues intrinsic to the digital realm. The collaborations and projects will be mutually decided with the aspirant economy, on a case by case basis.

Discussion of DEPA Accession Procedures

The foregoing provisions, and accession practice in international agreements more broadly, allow us to offer the following observations.

- **Burden of Proof:** Candidates bear the burden of demonstrating that all of their legal measures and practices comply with "all of the existing provisions contained in the DEPA."

- **General Standard of Review:** All candidates' accession requests should be evaluated according to the same standard of review. Reviews should be performed on a neutral, impartial, and equal basis. All candidates should be expected to meet the same standards as each other to ensure that the Agreement continues to function smoothly and effectively. This is also important to ensure that the benefits accruing to a Party are not improperly nullified or impaired due to improper differentiation in applicable legal standards.

- **Substantive Legal Standard of Review:** (We limit the following comments to DEPA Articles 5 and 6; we do not address other DEPA Articles). The accession review process should include a comprehensive analysis of all relevant measures, in all sectors and all legal disciplines, that impact cross-border data or the location of computing facilities. DEPA Articles 5 and 6 require an assessment as to whether *inter alia* any transfer restrictions or localization mandates: (1) are adopted or maintained to achieve a legitimate public policy objective; (2) are applied as a means of arbitrary or unjustifiable discrimination, or a disguised restriction on trade; and (3) impose transfer restrictions on localization requirements greater than required to achieve the objective.[3]

- **Duration of Review:** The DEPA Accession Process guidance document makes clear that accession reviews may require a significant time to reach completion. Article 4.3 (above) indicates that a favorable accession decision is predicated upon "changes … to domestic laws and regulations." This regulatory reform process may take years, if – for example – there is:

    - A substantial compliance gap between the DEPA obligations and the legal standards reflected in the candidate's domestic laws and regulations; and/or
    - A substantial number of domestic laws and regulations that would need to be amended to bring the candidate into compliance with DEPA obligations. In prior negotiations, candidates have needed to rescind or amend dozens (or more) laws, regulations, and other legal measures.

  For reference, in the context of WTO accession, the PRC's accession review process took over 15 years, while Russia's accession review process took almost 20 years.

- **Iterative Review Process:** Candidates and the Accession Working Group should engage in an iterative process to ensure that the candidate clearly identifies all measures relevant to the review. Understandably, this process may be more time-consuming in cases involving a lack of transparency or in cases in which not all relevant measures have been notified to the WTO. The Working Group should insist on sufficient information to allow it to identify, analyze, discuss, and assess which measures fall short of DEPA standards, and how those measures should be modified to ensure compliance. Given the complexity of such discussions, it is not uncommon for accession review processes to involve negotiating rounds spanning years.

- **Treatment of Legal Conflicts:** It is critical that – prior to any accession decision – any candidate resolve any *prima facie* inconsistency between its domestic legal framework and the agreement's obligations by effectuating changes to its domestic laws. For example, whereas DEPA Art. 6 allows Parties to restrict cross-border data transfers provided that (among other things) any restrictions are "no greater than required" to achieve a legitimate public policy purpose, one of the DEPA candidates has adopted dozens of restrictions on cross-border data transfers on many data types (including data that is often publicly available) across many economic sectors. That candidate economy's cross-border data rules appear to stand in direct legal conflict with DEPA norms, meaning that its domestic rules and the DEPA norms are mutually incompatible, such that it would be impossible to comply with one without breaching the other. For example, as stated by that candidate's cyberspace regulators on June 18, data transfers are only permitted if the regulator – in its discretion – considers the transfers to be "legitimate" and "necessary."[4] Under DEPA Art. 6, restrictions on data transfers are only permitted if those restrictions are "required" to achieve a "legitimate" objective. In this case, the candidate's law turns the DEPA obligations on their head – subverting their meaning and intent and giving rise to a legal conflict that can only be resolved through a change in that the candidate's law.

- **No Strict Sequencing of Candidates:** Candidates are to be approved when they finally meet the "terms … agreed among the Parties" (DEPA Art. 16.4.1) and ultimately demonstrate their compliance "with all of the existing provisions contained in the DEPA." (DEPA Accession Process, Art. 7.1). Accession should be approved only when a candidate meets all relevant requirements of the Agreement. As such, later-in-time candidates may accede more rapidly than earlier-in-time candidates. Where – as noted above – a candidate may need to amend a large number of statutory measures as well as subsidiary regulations, the access process could take many years.

- **Implied Duty of Good Faith and Fair Dealing During Negotiations:** Candidates should meet standards of good faith, reflecting the *bona fides* of their intention to meet the terms of the treaty.
    - In the context of international treaty negotiations, the implied duty of good faith and fair dealing means that during the pendency of its accession review, a candidate should not undertake actions that would fundamentally frustrate or complicate compliance with, or fulfillment of, the terms of the international agreement.[5]
    - For example, during the period of accession review, candidates should not otherwise make binding legal commitments, or enact binding domestic rules, that would be incompatible with the obligations of the international agreement to which the candidate is seeking to accede. In the case of PRC and Canada, this period began in 2021 and 2022, respectively. In the 2021-2024 timeframe, one of these two candidate economies adopted numerous new cross-border data restrictions and data localization mandates that appear to be in conflict with DEPA Articles 5 and 6. This course of conduct raises questions and concerns.

- **Collateral Effects on Other International Agreements:** It is recommended that the DEPA Parties duly consider the potential impacts of an early DEPA accession decision on accession dynamics or legal interpretative issues in other agreements. First, given that the DEPA contains many provisions also found in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), a determination of a candidate's ability to comply with DEPA provisions will have implications on subsequent CPTPP accession processes as well. Second, and more generally, similar language is found in numerous other free trade agreements and digital economy agreements around the world (as well as the forthcoming WTO Joint Statement Initiative agreement on e-commerce), indicating that decisions made by the DEPA Parties may have even broader legal interpretative significance.

- **Sensitivity to Future Compliance and Implementation Challenges:** It is recommended that the DEPA Parties pay close attention to any evidence that an obligation may prove politically difficult for a candidate to implement - especially in instances where the candidate's domestic political system or circumstances would make it politically costly or sensitive to fully and faithfully implement the obligation.

- **Granting Transition Periods or Other Allowances May Have Unintended Consequences:** It is also recommended that the DEPA Parties approach with caution any suggestions to adopt transition periods for implementation of specific obligations. Vietnam's transition period under CPTPP Articles 14.13 (Location of Computing Facilities) and 14.11 (Cross-Border Data) offers a cautionary tale: Since the conclusion of the CPTPP negotiations, Vietnam has implemented numerous rules that appear to contradict these two obligations. This is an unfortunate development, given that the transition period was intended as a period during which Vietnam was to make efforts to bring itself into compliance. Using the compliance period to lock in domestic legal changes that are incompatible with the relevant treaty obligation may breach the spirit and the letter of the transition period. (Specifically, Vietnamese actions that raise compliance questions under the relevant CPTPP provisions occurred in May 2024, June 2023,[6] December 2022,[7] December 2021,[8] November 2021,[9] September 2021,[10] and April 2021.[11])

  While a CPTPP Party could initiate dispute settlement proceedings against Vietnam, a DEPA Party would not have that recourse in the absence of binding dispute settlement procedures. Accordingly, granting any transition period under DEPA could substantially weaken the prospects for long-term compliance if a candidate economy does not use the transition period to bring itself into compliance with the relevant treaty obligation.

Conclusion

We thank the DEPA Parties for your consideration and review of this DEPA Accession Review Toolkit and look forward to any questions that you may have. Please direct any questions to gdainfo@bsa.org.

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[1] For more information, please see the GDA website at www.globaldataalliance.org. GDA member companies are active in the accounting, agriculture, automotive, aerospace and aviation, biopharmaceutical, consumer goods, energy, film and television, finance, healthcare, hospitality, insurance, manufacturing, medical device, natural resources, publishing, semiconductor, software, supply chain, telecommunications, and transportation sectors. GDA member companies have operations and support tens of millions of jobs across the globe.

[2] In addition to these four cross-border data disciplines, the DEPA includes provisions relating to: (1) artificial intelligence; (2) cooperation on competition policy; (3) consumer protection; (4) cryptography; (5) cybersecurity; (6) data innovation; (7) digital identities; (8) digital inclusion; (9) e-invoicing, e-authentication, and e-payments; (10) financial technology cooperation; (11) information sharing; (12) non-discriminatory treatment of digital products; (13) open government data; (14) online consumer protection; (15) online safety and security; (16) open Internet access; (17) paperless trading; (18) personal information protection; (19) small- and medium-sized enterprises; and (20) unsolicited commercial electronic messages (spam).

[3] For example, a "disguised restriction on trade" may exist if there is evidence that hundreds of traders have been unable to secure required security assessment approvals to transfer out of a jurisdiction commercial data needed for the conduct of their business. Likewise, the breadth and number of data transfer restrictions or localization requirements – or the existence of prohibitions on transferring broad, undefined types of data (e.g., an indeterminate and vague class of "important data") – may raise concerns as to whether the restrictions are "greater than required" to achieve a legitimate public policy objective. A similar observation exists in a situation in which an authority indicates that tacit approval for cross-border data transfers can

be revoked without notice or due process based on a unilateral future determination that the data at issues are "important." The unequal or disproportionate impact of such measures on non-national enterprises may indicate the presence of "arbitrary or unjustifiable discrimination."

[4] *See* MLEX, *Chinese official outlines criteria to determine 'legitimacy and necessity' of outbound data transfers* (June 18, 2024) (describing Policy Briefing on the Management of Cross-Border Data Transfers, hosted by CNCERT/CC and China Electronics Standardization Institute, Beijing, June 18 2024)).

[5] *See e.g.,* Hans Wehberg, *Pacta Sunt Servanda,* 53 American J. Int'l L. 775-786 (1959), https://www.cambridge.org/core/journals/american-journal-of-international-law/article/abs/pacta-sunt-servanda/E8967A236B1141934DD8D1495FEA2BFA; Josef L. Kunz, *The Meaning and the Range of the Norm Pacta Sunt Servanda* (1945), 39 American J. Int'l La. 180-197 (1945), https://www.cambridge.org/core/journals/american-journal-of-international-law/article/abs/meaning-and-the-range-of-the-norm-pacta-sunt-servanda/87674E485CBE023C0A16B6B429FA2361; Ejan MacKaay, Good Faith in Civil Law Systems – A Legal-Economic Analysis, published in: Vrank en vrij - Liber amicorum Boudewijn Bouckaert, Jef De Mot (ed.), (2011), https://ssrn.com/abstract=1998924 or http://dx.doi.org/10.2139/ssrn.1998924

[6] GDA Comments on the Cross-Border Data Transfer Elements of the Personal Data Protection Decree

[7] GDA Comments on Draft Law on Telecommunications (globaldataalliance.org)

[8] GDA Comments on Proposed Amendments to Draft Decree 72 (globaldataalliance.org)

[9] GDA Comments On Proposed Amendments To Draft Decree On Sanctions Against Administrative Violations In the Field of Cybersecurity (globaldataalliance.org)

[10] GDA Comments on Proposed Amendments to Draft Decree 72 (globaldataalliance.org)

[11] GDA Comments on Draft Viet Nam Personal Data Protection Decree (globaldataalliance.org)