



**SUBMISSION TO THE MINISTRY OF FOREIGN AFFAIRS AND TRADE
CONSULTATIONS ON E-COMMERCE
MARCH 2019**

This submission is made on behalf of the NZ International Business Forum (NZIBF), whose members are listed at Annex A.¹ NZIBF is a forum of senior business leaders working together to promote New Zealand’s engagement in the global economy. NZIBF appreciates the opportunity to be consulted on New Zealand’s participation in the WTO e-commerce plurilateral. As a leadership body, NZIBF leaves to individual members the task of identifying specific issues relating to e-commerce that impact their business. This submission focuses on cross-sectoral and general issues.

Summary

2 Digital trade is an increasingly significant driver of economic growth, enabling greater productivity and deeper global connections across all economic sectors. Even for traditional goods trade, the challenges of distance and cost that have long confronted this sector can be mitigated through digital technology. Digital trade also offers significant potential for enhanced participation by groups that have previously struggled to find success, including small and medium enterprises (SMEs), women entrepreneurs and Maori business.

3 New Zealand’s continued prosperity in the digital age depends largely on having the right enabling digital policies in place in the domestic economy. However our implementation of and advocacy for digital trade-friendly policies internationally will increasingly also be a factor in New Zealand’s success: despite the many well-documented benefits of digital trade for businesses, consumers and national economies alike, digital trade restrictions are increasing around the world. Some of these restrictions may be protectionist in intent; others may seek to address legitimate policy goals but may inadvertently or through poor design serve to restrict trade. Further, the sheer complexity and diversity of regulatory responses to the evolution of digital trade may in itself create a new ‘digital noodle bowl’. And the cross-cutting character of the issues, and indeed the “borderless” nature of cloud-based computing which underpins many modern business models, point strongly to the value in establishing global frameworks in this area.

4 NZIBF accordingly warmly welcomes New Zealand’s participation in the e-commerce plurilateral and urges MFAT to continue to champion the development of trade-enabling global rules in this area. NZIBF also underscores the importance of engaging closely with business and other stakeholders on an ongoing basis – both to raise awareness of the issues and risks, and more deeply to inform the negotiating position in relation to commercial as well as broader social concerns. This engagement should inform both New Zealand’s position in the WTO e-commerce plurilateral and also our existing and future FTA negotiations.

¹ The views in this submission are those of NZIBF as a whole. Individual members may have different views on specific issues covered in this submission.

IN CONFIDENCE

The benefits and challenges of digital trade

5 The digital revolution is transforming all aspects of modern life – international trade included. Digital technology is changing what is traded, how it is traded, when and where it is traded and who is trading. The digital economy is fast becoming ubiquitous. Indeed, the current distinctions between “digital trade” and “trade” will very likely become redundant in the near future. Even traditional goods sectors such as agriculture, food and beverage, which are central to New Zealand’s export economy, depend materially on the benefits of digitally-enabled trade such as lower trade costs, greater connectivity, supply-chain integrity, better market and customer information and accessibility and opportunities to innovate.

6 However it is clear that – while existing WTO Agreements and rules already apply to some extent to digital trade, and have served us relatively well to date – regulations and frameworks within and across many economies and in the WTO itself lag far behind both technological developments and commercial activity. With the advent of ‘frontier technologies’ including artificial intelligence, the Internet of Things, cloud computing, big data analytics and the exponential growth in cross-border data flows, the need for a global approach to policymaking becomes even more compelling.

The scope of the e-commerce plurilateral

7 “Digital trade” and “e-commerce” can be defined in many ways. We consider that the scope of the WTO plurilateral negotiations should go beyond platform-based internet-enabled goods and services trade and into broader areas including digitally-enabled value chains, direct trade in digital goods and services and the cross-border transmission of data and information. This will be important in order fully to leverage the opportunities of the digital age for New Zealand.

The benefits and opportunities of digital trade for New Zealand

8 Digital trade is a growing driver of global economic growth, helping to generate productivity gains and foster innovation, creating efficiencies in supply chains and in trade facilitation, enabling the development of global value chains and deepening global connections. The flow of data across borders now drives more economic growth than the flow of goods; over the last decade, even as traditional goods trade flows have struggled to regain pre-Global Financial Crisis levels, data flows have surged exponentially. The world is buying and selling online and across borders. It has been projected that business-to-consumer e-commerce will reach approximately US\$1 trillion by 2020 and business-to-business e-commerce sales could be five or six times as large.²

9 Digital trade may also have broader economic benefits. The Ministry for Business, Innovation and Employment has estimated that productivity improvements in the digital sector have a multiplier effect on New Zealand’s GDP.³

10 Digital trade also opens up new opportunities to overcome the challenges of scale, cost, connectivity and distance that have in the past limited the success in trade of groups

² Susan Lund and James Manyika, ‘Defending digital globalization’, *Foreign Affairs*, 20 April 2017; McKinsey Global Institute, ‘Digital Globalization: The new era of global flows’, <https://www.mckinsey.com/business-functions/digital-mckinsey/our-insights/digital-globalization-the-new-era-of-global-flows>

³ Ministry of Business, Innovation and Employment, ‘Building a Digital Nation’, <https://www.mbie.govt.nz/info-services/digital-economy/documents-and-images/building-a-digital-nation.pdf>

IN CONFIDENCE

including SMEs, women entrepreneurs and Maori business, as well as sectors such as the creative economy. Thanks to lower trade costs and more accessible trade opportunities, so-called “micro-multinationals” can immediately have global reach and take part in global value chains, even from a distant home base like New Zealand. This is particularly relevant given that 97% of New Zealand businesses are SMEs. While export participation rates for traditional ‘analogue’ SMEs range between 2 and 28 percent in most countries, for internet-enabled SMEs, the figure is 97 percent (as a relevant comparative data point, about 2 percent of Australia’s traditional SMEs export while around 90 percent of its internet-enabled SMEs do).⁴

11 In short, the potential for digital technology to enhance New Zealand business success, New Zealand’s ratio of trade to GDP – a metric where it has been difficult to shift the dial significantly in recent decades – and deliver greater social enablement through more inclusive participation in trade, should not be underestimated.

The challenges of, and potential barriers to, digital trade

12 A ‘Digital Trade Restrictiveness Index’ (DTRI) developed by the European Centre for International Political Economy (ECIPE) has sought to identify the level of restrictions in place around the world for digital trade. It finds that many of our trading partners significantly restrict the movement of data and regulate other aspects of digital trade. Of our top 20 trading partners, six are in the most-restrictive quartile of economies globally. The top ten most restrictive countries in respect of digital trade cover nearly half of the world’s population. The same ECIPE DTRI measure finds that New Zealand is the least-restrictive country in the world for digital trade.⁵

13 Restrictions on digital trade can be found at and behind the border, including:

- data flow restrictions, including forced data localisation and data retention requirements, which can impact on direct services exports as well as the ability of New Zealand goods exporters to access backbone services to support global value chains including cloud computing and storage, digital logistics, blockchain supply-chain management and so on;
- restrictions or prohibitions on the provision of digital services, including discriminatory rules for the provision of online retailing, local presence requirements (for example in order to provide digital services or sell on an online platform), limitations on foreign ownership and licensing and registration requirements, which in effect limit the opportunities for New Zealand services exporters;
- restrictions on e-payments which impact on e-commerce transactions;
- tariffs on electronic transmissions;
- restrictions on trade in digital goods;
- inadequate protections for intellectual property rights;
- performance requirements including forced transfer of source code or technology;
- personal privacy or cybersecurity requirements that are more burdensome than necessary to meet the stated goal;
- onerous Customs procedures or processes that are inadequately resourced for the parcel-based trade patterns of e-commerce;
- inadequate online dispute resolution;

⁴ World Trade Organisation, *World Trade Report 2016*,

⁵ Digital Trade Restrictiveness Index, ECIPE (2018), <https://ecipe.org/dte/>

IN CONFIDENCE

- challenges relating to the market power of large e-commerce platforms, especially for SMEs;
- misalignment of regulatory approaches and standards across markets, adding to business compliance costs.

14 The APEC Business Advisory Council commissioned a study in 2015 on the experiences of micro-, small and medium-sized enterprises (MSMEs) in e-commerce in the Asia-Pacific.⁶ The study found that MSMEs face a number of regulatory challenges when operating in other markets. In a survey of over 500 MSMEs about the problems they faced cross-border, 83 percent identified enforcement of intellectual property laws as either a “major” or “minor” problem; 83 percent identified differences in product certification requirements as a problem; 82 percent identified differences in product labelling requirements, and 75 percent identified coordination and enforcement of consumer protection as problematic. The same study found that Customs rules and procedures were a “major problem” for between 40 and 50 percent of MSMEs across, variously, Southeast Asia, North Asia and Latin America.

15 Such restrictions add costs and difficulties to trade, undermine competition within and across economies, erode margins for business, limit companies’ ability to access the most efficient or innovative digital tools and services, and reduce benefits for consumers. The purpose of such restrictions may be outright protectionist, designed to favour domestic competitors or create local jobs. 97 percent of firms surveyed in the 2015 ABAC study identified “protectionism” (which they defined as specific rules and restrictions aimed at foreign companies) as a problem when trying to conduct cross-border e-commerce.⁷ By way of another example, a recent media article on a proposed Indian e-commerce policy noted that:

“...’In the future, economic activity is likely to follow data,’ the widely expected draft policy document said. ‘It is hence vital that we retain control of data to ensure job creation within India’. The new rules call for the housing of more data centers and server farms locally, amid a broader push for data localization by the South Asian nation, which is one of the world’s fastest-growing online markets...”⁸

16 It may also be the case that policy or regulation may be aimed at meeting a legitimate policy goal, such as consumer protection, personal privacy, law enforcement, national security or cybersecurity, but the design of the policy or regulation may unintentionally restrict trade more than necessary to meet the objective. This can curtail the ability of New Zealand firms to engage in e-commerce, or can significantly undermine the benefits or competitiveness in doing so, for example by restricting or even prohibiting cross-border flows of customer data when a consumer purchases an item via an online platform.

17 Such approaches may also, in fact, fail to deliver on the intended policy objective – for example, forced data localisation may mean that data is in fact less secure or private

⁶ Marshall School of Business at the University of Southern California, ‘Driving Economic Growth through Cross-Border E-Commerce in APEC: Empowering MSMEs and Eliminating Barriers’, <https://www2.abaonline.org/assets/2015/4%20Manila/MSMEEWG%2035-053%20USC%20Marshall%20SMMES%20in%20e-Commerce%20Research%20Project%20Full%20Report.pdf>

⁷ ABAC (2015)

⁸ ‘India proposes new e-commerce regulations with focus on data rules’, Reuters, 24 February 2019

IN CONFIDENCE

than if it were encrypted and stored in the cloud across multiple countries.⁹ It should also be recalled that business itself supports robust systems for consumer protection, personal privacy and cybersecurity in order to enhance trust and the social licence to operate – but such approaches must be developed using good regulatory practice and with the least-necessary restriction to trade and commercial activity.

18 Finally, the sheer diversity of regulatory approaches starting to emerge in relation to cross-border data flows, interoperability and standards, or approaches to personal data protection and privacy, may create a new digital “noodle bowl”. Just as is the case for non-digital ‘non-tariff barriers’, such measures add costs and erode margins for business. The ABAC study on MSMEs in e-commerce reported that 67 percent of businesses they surveyed identified “inconsistent standards and regulations” as a major barrier to cross-border e-commerce.¹⁰

New Zealand’s objectives for the e-commerce plurilateral

19 New Zealand’s objectives for the e-commerce plurilateral, and indeed also for future FTAs, should accordingly include the establishment of a rules-based, open global trading environment that supports cross-border data and digital trade flows, and builds trust and confidence while also minimising trade barriers. To put it another way, policy approaches should seek to create an enabling environment rather than simply to mitigate risk, and should embody core WTO principles such as non-discrimination and fair competition. This means that digital economy and trade regulation should be as light-handed as possible and should be aimed at achieving a legitimate objective; non-discriminatory; utilising the least trade-restrictive approach possible, and developed using good regulatory practices. Such measures should not act as a disguised restriction on trade.

20 New Zealand’s experience with FTAs, especially the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, and in WTO settings (for example, in the Doha negotiations on services and subsequently the Trade in Services Agreement negotiations) should inform these approaches. CPTPP outcomes in particular on e-commerce, trade in services, intellectual property, Customs procedures and trade facilitation are a good basis for future policy approaches.

21 New Zealand should also pursue an approach consistent with the APEC Business Advisory Council’s WTO-consistent Cross-Cutting Principles on Non-Tariff Measures/Non-Tariff Barriers¹¹ and the subsequent set of Principles on NTMs agreed by APEC Ministers¹² – in both cases including the concepts of non-discrimination, measures being no more trade-restrictive than necessary to meet a legitimate objective, avoiding unwarranted barriers to the development of new technologies that drive innovation, and transparent, timely and consultative development and implementation processes.

22 Specifically we would endorse approaches that include:

- a permanent moratorium on tariffs on electronic transmissions

⁹ Meltzer, J and Peter Lovelock, ‘Regulating for a Digital Economy’, Brookings Global Economy and Development Working Paper 113, March 2018

¹⁰ ABAC (2015)

¹¹ <http://www.tradeworks.org.nz/abac-cross-cutting-principles-to-ensure-ntms-do-not-become-ntbs/>

¹² http://apec.org/Meeting-Papers/Annual-Ministerial-Meetings/2018/2018_amm/Cross-cutting-principles-on-Non-Tariff-Measures

IN CONFIDENCE

- a prohibition on data localisation requirements and other restrictions on cross border data flows, with a high threshold for any exceptions (including the concept of measures being 'no more trade-restrictive than necessary to meet a legitimate objective')
- electronic authentication and recognition of e-signatures
- adequately resourced and streamlined Customs procedures to smooth trade flows and reduce compliance costs, including e-border processes and paperless trading, consistent with the obligations in the WTO Trade Facilitation Agreement
- a high e-commerce *de minimis* threshold
- cooperation to work towards global approaches to cybersecurity, privacy protection, access to data for law enforcement and consumer protection – seeking to align approaches where possible or use other tools such as a recognition of adequacy or equivalence
- further liberalisation of trade in digital services, including through removal of market access and national treatment restrictions on digitally-provided services
- removal of tariffs on ICT products
- a prohibition on requirements to provide source code and forced technology transfer
- consultative processes for the development of harmonised regulations and technical standards, and mutual recognition of conformity assessment
- given the crucial role played by e-payments/fintech in e-commerce, trade-enabling approaches to innovative cross-border financial services
- robust competition policy approaches in relation to e-commerce platforms
- accessible online dispute resolution
- transparency (for exporters) around laws and regulations relating to data regulation

23 New rules should also be designed to taken into account the rapid evolution of technology, including potentially a greater uptake of 'frontier technologies' such as artificial intelligence, cloud computing, blockchain, the Internet of Things and search engines. For example, blockchain, which is already in use by some of New Zealand's largest exporters such as Fonterra to improve supply chain traceability and transparency, depends on free flows of data across multiple geographies; ensuring that New Zealand exporters can continue to make use of innovative value-adding technology is central to our ongoing competitive position and success in global markets.

24 NZIBF also underscores the importance of engaging closely with business and other stakeholders on an ongoing basis – both to raise awareness of the issues and risks in the business community, and to inform New Zealand negotiating positions more deeply. This engagement should serve to shape both New Zealand's position in the WTO e-commerce plurilateral and also our existing and future FTA negotiations.

Recommendations to the Ministry of Foreign Affairs and Trade

- 25 NZIBF recommends that the Ministry:
- a. **note** the NZIBF's support for the negotiation of an ambitious and trade-friendly global rules framework for digital trade, based on the approach taken in CPTPP, and drawing on APEC and ABAC Principles for Non-Tariff Barriers;
 - b. continue to **consult widely** with sectors likely to be impacted directly by the negotiations, and with other stakeholders;
 - c. **develop** an active communications and outreach programme aimed at deepening New Zealand business' understanding of the issues covered in the negotiation; and

IN CONFIDENCE

- d. **agree** to seek to conclude these negotiations as soon as a substantive and mutually advantageous outcome is to hand.

For further information

Stephanie Honey
Associate Director
New Zealand International Business Forum
Phone: +64 21 352 633; email stephanie@honeyconsulting.co.nz

New Zealand International Business Forum
29 March 2019

IN CONFIDENCE

Annex A

Board members of the NZ International Business Forum

Executive Committee

Malcolm Bailey (Chair), Chair, Dairy Companies' Association of New Zealand
Michael Barnett, Chief Executive, Auckland Regional Chamber of Commerce and Industry
(*representing the New Zealand Chambers of Commerce*)
Philip Gregan, Chief Executive, NZ Winegrowers
Kirk Hope, Chief Executive, Business NZ
John Loughlin, Chairman, Meat Industry Association
Bruce Cameron, Chairman, Zespri International Ltd
Andrew Morrison, Chairman, Beef + Lamb New Zealand
Alan Pollard, Chief Executive, NZ Apples and Pears
Hon Simon Power, General Manager, Consumer Banking and Wealth, Westpac
Katherine Rich, Chief Executive, New Zealand Food and Grocery Council
Sarah Salmond, Special Counsel/Head of International Trade, Russell McVeagh
Simon Tucker, Director, Global Stakeholder Affairs, Fonterra
Steve Yung, Chief Executive, Sealord Group Ltd

Alternate Directors

Catherine Beard, Executive Director, Export NZ/Manufacturing NZ
Jeffrey Clarke, General Manager, Advocacy, NZ Winegrowers
David Courtney, General Manager, Zespri International
Jenny Mcgregor, General Manager, Trade Strategy, Fonterra
Sam Mclvor, Chief Executive, Beef + Lamb New Zealand
John Milford, Chief Executive, Wellington Chamber of Commerce
Tim Ritchie, Chief Executive, Meat Industry Association

Executive team

Stephen Jacobi, Jacobi Consulting Ltd (*Executive Director*)
Fiona Cooper, Cooper Consulting (*Associate Director*)
Stephanie Honey, Honey Consulting (*Associate Director, Staffer ABAC*)

Associate members

NZIBF's membership comprises a range of associate members who are listed on our website,
www.tradeworks.org.nz.