

# Proactive Release

Date: 6 April 2020

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

***WTO-Based Plurilateral Negotiations on Investment Facilitation for Development: Negotiating Mandate***

***(CAB-20-MIN-0048 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

## Minute of Decision

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*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.*

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### **Report of the Cabinet Economic Development Committee: Period Ended 21 February 2020**

On 24 February 2020, Cabinet made the following decisions on the work of the Cabinet Economic Development Committee for the period ended 21 February 2020:

DEV-20-MIN-0014

**WTO-Based Plurilateral Negotiations on  
Investment Facilitation for Development:  
Negotiating Mandate**

Portfolio: Trade and Export Growth

CONFIRMED



# Cabinet Economic Development Committee

## Minute of Decision

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### WTO-Based Plurilateral Negotiations on Investment Facilitation for Development: Negotiating Mandate

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

On 19 February 2020, the Cabinet Economic Development Committee:

- 1        **noted** that on 27 November 2017, Cabinet:
  - 1.1      agreed that New Zealand should join the launch of World Trade Organization (WTO) based plurilateral negotiations on investment facilitation, subject to the Minister for Trade and Export Growth's assessment that this aligns with New Zealand's long-term goal of progressing investment multilaterally;
  - 1.2      noted that, should a multilateral or plurilateral negotiation be launched, officials will seek a further substantive mandate to negotiate;

[CAB-17-MIN-0513.01]
- 2        **approved** a negotiating mandate for the WTO-based plurilateral negotiations on Investment Facilitation for Development that would:
 

s9(2)(j)
- 3        **approved** the further detailed parameters to guide New Zealand negotiators on the individual proposals in the plurilateral negotiations, outlined in Annex One to the paper under DEV-20-SUB-0014;
- 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 Minister of Finance, the Minister for Trade and Export Growth, and any other relevant portfolio Ministers, to approve other proposals that depart significantly from the parameters outlined in Annex One to the paper under DEV-20-SUB-0014;

- 6 **noted** that before New Zealand confirms its intention to be bound by the outcome of the negotiations, final agreed texts and accompanying National Interest Analysis will be submitted to Cabinet for approval;
- 7 **noted** that Cabinet approval will be sought for New Zealand to sign and ratify outcomes of the negotiations.

Jack Petterson  
Committee Secretary

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**Present:**

Rt Hon Winston Peters  
Hon Kelvin Davis  
Hon Grant Robertson (Chair)  
Hon Phil Twyford  
Hon Dr Megan Woods  
Hon Dr David Clark  
Hon Nanaia Mahuta  
Hon Stuart Nash  
Hon Iain Lees-Galloway  
Hon Jenny Salesa  
Hon Damien O'Connor  
Hon Shane Jones  
Hon Kris Faafoi  
Hon Willie Jackson  
Hon Eugenie Sage

**Officials present from:**

Office of the Prime Minister  
Officials Committee for DEV

**Hard-copy distribution:**

Minister for Trade and Export Growth

Office of the Minister for Trade and Export Growth

Chair,  
Cabinet Economic Development Committee (DEV)

**Negotiating Mandate for WTO-based plurilateral negotiations on Investment Facilitation for Development**

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**Proposal**

1. That Cabinet approve a negotiating mandate for New Zealand participation in the World Trade Organisation (WTO) based plurilateral negotiations, amongst a subset of WTO Members, to develop a framework of rules on Investment Facilitation for Development.
2. This initiative aims to establish a framework of rules focused on the administrative procedures and requirements of participating WTO Members' investment authorisation processes. It also proposes transparency requirements to publish and notify changes to investment related laws and regulations, consistent with WTO practice in other areas.
3. The initiative does not cover matters related to investment market access. In this regard, it would not prevent participating WTO Members from implementing investment screening regimes like those established by the Overseas Investment Act 2005, nor would it require any participating Member to grant specific screening approvals to foreign investors. Investment protection measures (which provide protection for investors in certain circumstances, such as in the event of war or civil strife or expropriation) and investor state dispute settlement (ISDS, which allows companies to seek damages from governments) are also not covered by the negotiation.
4. s9(2)(j)

## Executive summary

5. The Investment Facilitation for Development negotiation is one of several plurilateral initiatives currently being pursued by a subset of the WTO membership, including New Zealand. The objective is to establish a framework of rules that provide for transparent and efficient administrative procedures and requirements related to the investment authorisation process. It is envisaged this would “facilitate” investment by providing investors with predictability on basic investment approval processes. In New Zealand, the Overseas Investment Office (OIO) is primarily responsible for the administration of these processes.
6. The proposed framework includes a range of proposals that collectively seek to:
  - 6.1. improve transparency and predictability by putting in place requirements to publish laws and regulations and investment authorisation procedures;
  - 6.2. introduce some commonality in administrative procedures and requirements; and
  - 6.3. enhance international cooperation, information sharing, and exchange of best practices.
7. The initiative does not cover screening regimes, like New Zealand’s Overseas Investment Act 2005 (which is known as investment market access). Investment protection measures (which provide protection for investors in certain circumstances, such as in the event of war or civil strife or expropriation) and investor state dispute settlement (ISDS, which allows companies to seek damages from governments) are also not covered by the negotiation.
8. Since the launch of the initiative in December 2017, the process has attracted considerable momentum and support. There are now ninety-eight participating WTO members and this number is expected to grow. The negotiation is open to any WTO member to join, and therefore aligns with New Zealand’s strategy for concerted open plurilaterals that support the rules-based system. The initiative is championed by developing country Members, s6(a)
9. New Zealand’s reasons for participating are both strategic and economic. A successful outcome would lend further credibility to the WTO system; be a

useful complement to other developed country-led plurilateral initiatives already underway (e.g. e-commerce); and align with New Zealand's trade diversification strategy. New Zealand's engagement also serves to further burnish our credentials as welcoming of high quality, productive investment. Participation would also complement recent reforms of the Overseas Investment Act to reduce unnecessary red tape, s9(2)(g)(i)

I judge that it is important for New Zealand to be engaged in the process in order to have a voice in how the eventual rules are shaped.

10. Participating Members have agreed to move the process into a formal negotiating phase starting in March 2020, working off a text developed by the Chair of the negotiation, Chilean Ambassador Eduardo Gálvez Carvallo, but with opportunities for any participating Member to submit additional proposals in the future.
11. New Zealand's current mandate extends only to supporting the launch of plurilateral discussions (CAB-17-MIN-0513.01). This paper seeks a mandate to enable New Zealand officials to participate in the formal negotiation process once this commences.
12. s9(2)(j)
13. New Zealand's participation would be on the basis of a two-step process. This paper seeks approval for New Zealand to participate in the first step, i.e. formal negotiations to shape and influence the outcomes. Once the negotiations are complete, and if New Zealand confirms its intention to be bound by the outcome of negotiations, the final agreed texts and a National Interest Analysis would be submitted to Cabinet for approval.

## Background

14. WTO-based structured discussions on Investment Facilitation for Development were launched in December 2017. This is one of several plurilateral initiatives currently being pursued by a subset of the WTO membership, including New Zealand.

15. The plurilateral initiatives aim to address issues not covered by existing WTO agreements and where consensus currently does not exist to negotiate amongst the entire WTO Membership. New Zealand's approach to participation in the plurilateral initiatives is based on our WTO reform proposal on Flexible and Open Negotiating Approaches. Under this approach, New Zealand continues to seek multilateral outcomes, but also champions flexible plurilateral approaches to launching and participating in negotiations to better harvest outcomes at the WTO in the current environment. This approach allows agreements to be reached amongst a subset of WTO Members in a way that supports multilateralism over time.
16. The objective of the Investment Facilitation for Development process is to eventually establish a multilateral framework of rules on foreign direct investments which parallels the separate services domestic regulation process expected to conclude at MC12. This investment facilitation initiative aims to:
  - improve transparency and predictability by putting in place requirements to publish laws and regulations and investment screening procedures;
  - introduce some commonality in administrative procedures and requirements; and
  - enhance international cooperation, information sharing, and exchange of best practices.
17. New Zealand's right to regulate for legitimate public policy purposes would not be affected. Investment market access, investment protection measures and investor state dispute settlement (ISDS) will not be covered by the negotiations.
18. The 'end goal' is to agree a framework of rules that facilitates a more transparent, efficient business climate, by establishing certain baseline 'process steps' and requirements related to participant Members' investment authorisation processes. Facilitating greater flows of investment to developing and least-developed Members, as a means of promoting their economic development, is also a core objective of the initiative. This is reflected in the large number of developing Member participants, s6(a)
19. There are both economic and strategic considerations underpinning New Zealand's participation in this process:
  - Being part of this initiative will help to signal that New Zealand welcomes high quality, productive investment, and complement some of the Phase



Two Overseas Investment Act reforms that will reduce unnecessary red tape.

- Participating early and actively in the process will enable New Zealand to help shape the outcomes and ensure the agreement reached fits well within our broader investment policy frameworks, including the OIA Phase Two reforms. s6(a), s9(2)(j)
  
  - Such a framework would support New Zealand investors by providing greater certainty and transparency as to the processes for when they are investing offshore, albeit at a limited “baseline” level.
  - s9(2)(g)(i)
  
  - A successful outcome, if achieved, would contribute to our core trade policy objective of revitalising the WTO system; and underscore the continued relevance of the WTO’s negotiating and institutional functions.
  - s9(2)(j)
20. Over the past two years, participating WTO Members have submitted a range of textual ‘example measures’ for discussion. These were collated into a Working Document and used as the basis for holding a series of ‘structured discussions’ (as distinct from formal negotiations) throughout 2019 on possible elements of the framework. The structured discussions have helped to clarify some of the issues the negotiations are expected to cover, and have signalled the positions of key participants on these issues.
21. In December 2019, participating Members agreed to move the process into a formal negotiating phase starting in early 2020. The first formal meeting will take place in March 2020. A ‘streamlined text’ has been produced by the Chair, Chilean Ambassador Eduardo Gálvez Carvallo. This provides a broad overview of what are likely to comprise the core elements of an eventual

framework, and is intended to provide a starting point for negotiations. It nonetheless remains open to participating Members to make new proposals, and we expect further substantial contributions during the early phases of the negotiation.

22. Many of the elements covered by the Chair's text are common features of our domestic investment screening framework and existing FTA practice. We anticipate the draft text will continue to evolve as participating Members submit their own proposals and begin to set down positions in the formal negotiation process. s9(2)(j)

## **Comment**

### *Approach to Mandate*

23. This mandate paper outlines the key areas expected to be the focus of discussion and the outcomes and protections to be secured for New Zealand in the negotiations. s9(2)(j)

24.

25.

### Elements for discussion

26. The Chair's text is organised into the following seven sections plus a preamble:
- Scope and general principles;
  - Transparency;
  - Administrative procedures and requirements;

- Contact points for investors, domestic coordination and cooperation;
- Special and differential treatment for developing and Least-Developed Members;
- Cross-cutting issues; and
- Institutional arrangements and final provisions.

*Scope and general principles*

27. At the launch of the structured discussions at MC11, participants agreed that issues related to market access, investment protection and investor state dispute settlement (ISDS) will not be covered by this process. This understanding is reflected in the Joint Ministerial Statements<sup>1</sup> and within the draft text itself. s9(2)(j)
28. In line with New Zealand's WTO reform proposal on Flexible and Open Negotiating Approaches, we are supporting and participating in this plurilateral process (negotiating between a subset of Members) but the process must be transparent and open to all Members that wish to participate. s9(2)(j)

*Transparency and Investment Measures:*

29. The transparency provisions seek to ensure that information about participating Members' investment laws and regulations are published, including in advance of taking effect (but after they have been decided by our Government) and that opportunities exist for interested persons and other Members to comment on draft laws. These provisions also aim to ensure that information about participating Members' investment authorisation processes

<sup>1</sup> The December 2017 Joint Ministerial Statement agreed at MC11 in Buenos Aires, and the November 2019 Joint Ministerial Statement agreed in the margins of the WTO min-Ministerial in Shanghai both carve these issues out of scope.

s9(2)(j)

is published (including, for example, information about procedures, forms and documents, fees and charges and contact information).

30. The proposed framework would also introduce requirements for participating WTO Members to notify domestic investment laws and regulations to the WTO; and to specify enquiry points for exchange of information amongst WTO members.
31. s9(2)(j)

#### *Authorisation procedures and requirements*

32. A number of elements of the proposed framework deal with investment authorisation procedures and requirements. The Chair's text includes requirements to:
  - Permit the submission of applications throughout the year;
  - Provide indicative timeframes for the processing of applications;
  - Ascertain the completeness of an application without undue delay;
  - Process complete applications within a reasonable time period; and
  - Ensure any authorisations granted enter into effect without undue delay.
33. The draft framework also sets out a number of process steps for the treatment of incomplete or rejected applications, and encourages the use of ICT in the investment authorisation process.
34. In New Zealand, current OIO practices conform to the proposed requirements. For example, the OIO already allows applications to be submitted throughout the year. The OIO already provides indicative timeframes both during the initial quality assurance process and for processing of applications; and provides for applicants to submit applications via email.
35. s9(2)(j)

s9(2)(j)

### *Criteria for investment authorisations*

36. The proposed framework includes provisions to ensure that criteria used in the investment authorisation process are clear, transparent, objective and published in advance of application. s9(2)(j)

### *Fees and charges*

37. The proposed framework aims to ensure that any fees from the investment authorisation process are reasonable, transparent, based in law, commensurate with the costs incurred to process the application and do not in themselves restrict trade. This will benefit New Zealand investors offshore. In New Zealand, fees charged for applications for consent under the Overseas Investment Act 2005 are usually small in relation to the size of the investment; however there can be investments which require consent where the application fee is significant in the context of the investment. s9(2)(j)

### *Single window mechanism*

38. One area s9(2)(j) relates to proposals to establish a single-window<sup>3</sup> type mechanism that would act as a “one stop shop” for investors in the investment authorisation process. New Zealand’s Overseas Investment Office currently does not have this type of functionality. s9(2)(g)(i)

s9(2)(j)

<sup>3</sup> New Zealand’s Joint Border Management System is an example of a single window used for border agencies such as Customs and the Ministry of Primary Industries.

s9(2)(j)

*Review of administrative decisions*

39. These provisions aim to ensure that participating Members maintain tribunals or judicial or administrative procedures that provide for the review of and, where justified, appropriate remedies for, administrative decisions affecting an investment. Any such procedures should adhere to principles of due process, impartiality and non-discrimination.
40. Under New Zealand's system, applicants can seek a review of administrative decisions through a judicial review through the courts. s9(2)(j)

*Contact points for investors*

41. The proposed framework envisages that participating Members would have contact points in place to assist investors on a range of matters. The contact point's responsibilities are still to be determined. Initial proposals range from responding to enquiries about domestic investment measures and the investment authorisation process; to more far-reaching and potentially problematic proposals around assisting investors to resolve investment related difficulties, and recommending changes to investment settings to relevant government agencies.
42. The OIO publishes contact details which investors can use for general enquiries about how the Overseas Investment Act 2005 operates or to understand the processes for making and assessing an application. The OIO does not provide assistance with resolving difficulties or settling grievances; nor does its contact point mechanism make recommendations to Government

about improvements that could be made to New Zealand's investment environment. New Zealand Trade and Enterprise (NZTE) engages selectively to provide some additional services to a cohort of investors based on target criteria, however this is not a service that is offered to all investors. NZTE also do not have a role as an advocate for investors to other New Zealand authorities. s9(2)(j)

#### *Domestic Regulatory Coherence*

43. High quality regulatory management systems can play an important role in reducing barriers to trade and investment. The proposed regulatory coherence provisions aim to encourage participating Members to establish regulatory quality management systems, including in the process of planning designing, issuing, implementing and reviewing regulatory measures. s9(2)(j)

#### *Cooperation*

44. Given the objective of simplifying and coordinating investment processes, provisions on cooperation will be an important element of the proposed framework. Cooperation provides a way for Members to share experiences and learn from best practice; as well as to collaborate on areas of mutual interest. Such processes have the potential to involve resource implications for relevant agencies. s9(2)(j)

#### *Special and differential treatment for developing and least-developed countries:*

45. Development is an important focus of this initiative. Many developing and least developed Members are in the process of adopting pro-investment frameworks to create a domestic environment that is hospitable to foreign direct investment. However, reflecting the varying levels of development, many participants will require additional time and/or assistance to comply with the framework's commitments. s9(2)(j)

s9(2)(j)

### *Cross-Cutting Issues*

46. The proposed framework also includes provisions on cross-cutting issues, such as the role that investment measures can play in combatting corruption and promoting corporate social responsibility. We understand that some Members may also table further proposals in areas such as women's economic empowerment and micro, small and medium sized enterprises (MSMEs). Many of these issues are features of New Zealand's existing FTAs, and/or issues that we actively support in other fora, such as the OECD.

s9(2)(j)

### *General and Security Exceptions*

47. The proposed framework currently includes a placeholder for the inclusion of general and security exceptions. s9(2)(j)

48. New Zealand maintains a Treaty of Waitangi provision in its WTO GATS schedule. This enables the New Zealand government to adopt domestic policies according more favourable treatment to Maori, including in fulfilment of obligations under the Treaty of Waitangi. I propose to ensure that the eventual outcome does not affect the Government's ability to adopt domestic policies according more favourable treatment to Māori, including in fulfilment of obligations under the Treaty of Waitangi.

### *Dispute Settlement*

49. The proposed framework currently includes a placeholder for dispute settlement. While the final legal form is not yet clear, s9(2)(j)

The agreement will not include any ISDS provisions.



### **Consultation**

50. The following departments have been consulted in the preparation of this paper and concur with its recommendations: Department of Prime Minister and Cabinet, Ministry of Business, Innovation and Employment, Reserve Bank of New Zealand, Land Information New Zealand, New Zealand Trade and Enterprise and the Treasury.

### **Financial implications**

51. Funding for participation in the negotiations will be met within MFAT's baseline funding. Any cooperation initiatives will be funded from baseline or subject to budget processes.

### **Human rights**

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

### **Legislative implications**

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

### **Regulatory impact analysis**

54. Not required at this stage. If the outcome of the negotiation 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.

### **Gender implications**

55. No gender implications statement is required.

### **Disability perspective**

56. No disability perspective statement is required.

### **Publicity**

57. MFAT is commencing domestic public engagement on these negotiations to ensure that New Zealanders have the opportunity to engage on issues of interest. As part of this, officials will call for public submissions which will remain open through the negotiation process, and prepare updated website materials and FAQs. Key objectives of the engagement will continue to be i) ensure that New Zealanders have ready access to information regarding the issues under negotiation and ii) the views of interested New Zealanders are understood and considered in developing New Zealand's negotiating position.

### **Proactive Release**

58. This paper will be proactively released, subject to any necessary redactions to protect New Zealand's negotiating position.

### **Recommendations**

59. The Minister for Trade and Export Growth recommends that the Committee:
- 59.1. Approve a negotiating mandate for the WTO-based plurilateral negotiations on Investment Facilitation for Development that will s9(2)(j)
  - 59.2. Approve the further detailed parameters to guide New Zealand negotiators on the individual proposals in the plurilateral negotiations outlined in Annex one.
  - 59.3. 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.
  - 59.4. Agree that the Minister for Trade and Export Growth, Minister of Finance and any other relevant portfolio Minister have delegated authority to approve other proposals that depart significantly from the parameters outlined in Annex one;
  - 59.5. Note that before New Zealand confirms its intention to be bound by the outcome of negotiations, final agreed texts and accompanying National Interest Analysis will be submitted to Cabinet for approval.
  - 59.6. Note that Cabinet approval will be sought for New Zealand to sign and ratify outcomes of the negotiations.

Hon David Parker  
Minister for Trade and Export Growth

**Annex one: Mandate recommendations for WTO Plurilateral negotiations on  
Investment Facilitation for Development  
General**

s9(2)(j)

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s9(2)(j)

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s9(2)(j)

- Ensure that nothing in the outcome affects the New Zealand Government's ability to adopt domestic policies according more favourable treatment to Māori, including in fulfilment of obligations under the Treaty of Waitangi.

Proactively released by the  
Minister for Trade and Export Growth