

**PROTOCOL ON INVESTMENT  
TO THE NEW ZEALAND – AUSTRALIA  
CLOSER ECONOMIC RELATIONS TRADE AGREEMENT**

## Preamble

New Zealand and Australia (“the Parties”),

**Conscious** of their longstanding friendship and close historic, political, social, economic, and geographic ties and the special nature of the relationship that has developed on the basis of these ties;

**Building** on the deep and evolving closer economic relationship established under the *Australia New Zealand Closer Economic Relations Trade Agreement* done on 28 March 1983 (“Agreement”), and furthered by, *inter alia*, the *Protocol on Trade in Services* done on 18 August 1988 (“Services Protocol”);

**Recognising** the joint commitment of the two governments to work towards achieving a trans-Tasman Single Economic Market by progressively removing or minimising impediments to trans-Tasman business;

**Acknowledging** the extensive degree of trans-Tasman investment and desiring to promote further the flow of investment between the Parties, and contribute to the aim of a Single Economic Market by concluding a protocol on investment to the Agreement (“Protocol”);

**Conscious** of their rights and obligations under the WTO Agreement, and other multilateral and bilateral trade and economic agreements and arrangements;

**Recognising** that expanding the closer economic relationship between the Parties to include a protocol on investment can assist in promoting sustainable development, including social development, economic development, and environmental protection;

Have agreed as follows:

## **Article 1 Definitions**

For the purposes of this Protocol:

- (a) **covered investment** means, with respect to a Party, an investment in its territory of an investor of the other Party, in existence as of the date of entry into force of this Protocol or established, acquired, or expanded thereafter;
- (b) **enterprise** means any entity constituted or organised under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned including any corporation, trust, partnership, sole proprietorship, joint venture, association or similar organisation, and a branch of an enterprise;
- (c) **enterprise of a Party** means an enterprise constituted or organised under the law of a Party, and a branch located in the territory of a Party and carrying out business activities there;
- (d) **freely useable currency** means a freely useable currency as determined by the International Monetary Fund under the *Articles of Agreement of the International Monetary Fund* and amendments thereafter, or any currency that is used to make international payments and is widely traded in the international principal exchange markets;
- (e) **investment** means every kind of asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include the following:

- (i) an enterprise;
- (ii) shares, stocks, or other forms of equity participation in an enterprise, including rights derived therefrom;
- (iii) bonds, including government-issued bonds, debentures, loans and other forms of debt, including rights derived therefrom<sup>1</sup>;
- (iv) futures, options, and other derivatives;
- (v) rights under contracts, including turnkey, construction, management, production or revenue-sharing contracts;
- (vi) claims to money or to any contractual performance related to a business and having economic value<sup>2</sup>;
- (vii) intellectual property rights and goodwill;
- (viii) rights conferred pursuant to law or contract such as concessions, licences, authorisations, and permits<sup>3</sup>; and
- (ix) any other tangible and intangible, movable and immovable property, and any related property rights, such as leases, mortgages, liens, and pledges.

For the purposes of this definition, investment may include a return. A return that is invested shall also be

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<sup>1</sup> Some forms of debt, such as bonds, debentures, and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt, such as claims to payment that are immediately due and result from the sale of goods or services, are less likely to have such characteristics.

<sup>2</sup> For greater certainty, investment does not mean claims to money that arise solely from:  
(a) commercial contracts for sale of goods or services; or  
(b) the extension of credit in connection with such commercial contracts.

<sup>3</sup> The term "investment" does not include an order or judgment entered in a judicial or administrative action.

treated as an investment and any alteration of the form in which an asset is invested or reinvested shall not affect its character as an investment. An investment may be owned or controlled by an investor of a Party, notwithstanding the fact that the investment was made through an enterprise duly incorporated, constituted, set up or otherwise duly organised under the law of a non-Party;

- (f) **investor of a Party** means a Party or a natural person of a Party or an enterprise of a Party that seeks to make, is making, or has made an investment in the territory of the other Party;
- (g) **measure** includes any measure by a Party, whether in the form of a law, regulation, rule, procedure, decision, administrative action, practice, or any other form;
- (h) **measure adopted or maintained by a Party** includes measures taken by:
  - (i) central, regional, or local governments or authorities; or
  - (ii) non-governmental bodies in the exercise of powers delegated by central, regional, or local governments or authorities;
- (i) **natural person of a Party** means any natural person possessing the nationality or citizenship of, or right of permanent residence in, that Party under its laws and regulations;
- (j) **person** means a natural person or enterprise;
- (k) **return** means an amount yielded by or derived from an investment, including profits, dividends, interest, capital gains, royalties, payments in connection with intellectual property rights, and all other lawful income;

- (l) **territory of a Party**, consistent with Paragraph 2 of Article 2 of the Agreement:
- (i) with respect to Australia, does not include any Australian territory other than internal territories; and
  - (ii) with respect to New Zealand, means the territory of New Zealand but does not include the Cook Islands, Niue, and Tokelau,
- unless the Parties have exchanged notes agreeing the terms on which this Protocol shall apply;
- (m) **TRIPS Agreement** means the *Agreement on Trade-Related Aspects of Intellectual Property Rights*, which is part of the WTO Agreement; and
- (n) **WTO Agreement** means the *Marrakesh Agreement Establishing the World Trade Organization*, done on 15 April 1994.

## **Article 2 Objectives**

The objectives of the Parties in concluding this Protocol are:

- (a) to strengthen further the economic relationship between the Parties and advance the ongoing evolution of the Agreement and work towards development of a trans-Tasman Single Economic Market;
- (b) to liberalise barriers to investment between the Parties;
- (c) to encourage and promote investment between the Parties; and

- (d) to establish a framework of transparent rules conducive to increased investment between the Parties and to ensure the protection and security of covered investments within each Party's territory.

### **Article 3** **Scope**

1. This Protocol applies to measures adopted or maintained by a Party relating to:

- (a) investors of the other Party;
- (b) covered investments; and
- (c) with respect to Article 7 (Performance Requirements), all investments in the territory of the Party.

2. A requirement by a Party that a service provider of the other Party post a bond or other form of financial security as a condition of providing a service into its territory does not of itself make this Protocol applicable to the provision of that cross-border service. This Protocol applies to that Party's treatment of the posted bond or financial security.

3. For greater certainty, the provisions of this Protocol do not bind either Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Protocol.

### **Article 4** **Relationship to Services Protocol**

In the event of any inconsistency between the rights and obligations in the Services Protocol and the rights and obligations in this Protocol, the rights and obligations in this Protocol shall prevail to

the extent that this provides more favourable treatment for investors of the other Party or covered investments.

## **Article 5 National Treatment**

Each Party shall accord to investors of the other Party and covered investments treatment no less favourable than that it accords, in like circumstances, to its own investors and their investments with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

## **Article 6 Most Favoured Nation Treatment**

1. Each Party shall accord to investors of the other Party and covered investments treatment no less favourable than that it accords, in like circumstances, to investors of any non-Party and their investments with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

2. For greater certainty, this Article does not apply to dispute settlement procedures.

## **Article 7 Performance Requirements**

1. Neither Party may, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory, impose or enforce any requirement, or enforce any commitment or undertaking:<sup>4</sup>

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<sup>4</sup> For greater certainty, a condition for the receipt or continued receipt of an advantage referred to in Paragraph 2 does not constitute a “commitment or undertaking” for the purposes of Paragraph 1.



- (a) to export a given level or percentage of goods or services;
- (b) to achieve a given level or percentage of domestic content;
- (c) to purchase, use, or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory;
- (d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;
- (e) to restrict sales of goods or services in its territory that such investment produces or supplies by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;
- (f) to transfer a particular technology, a production process, or other proprietary knowledge to a person in its territory;  
or
- (g) to supply exclusively from the territory of the Party the goods that it produces or the services that it supplies to a specific regional market or to the world market.

2. Neither Party may condition the receipt or continued receipt of an advantage, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment in its territory of an investor of a Party or of a non-Party on compliance with any of the following requirements:

- (a) to achieve a given level or percentage of domestic content;
- (b) to purchase, use, or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory;

- (c) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment; or
- (d) to restrict sales of goods or services in its territory that such investment produces or supplies by relating such sales in any way to the volume or value of its exports or foreign exchange earnings.

3. Nothing in Paragraph 2 shall be construed to prevent either Party from conditioning the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Party or of a non-Party, on compliance with a requirement to locate production, supply a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory.

4. Paragraph 1(f) does not apply:

- (a) when a Party authorises use of an intellectual property right in accordance with Article 31<sup>5</sup> of the TRIPS Agreement, or to measures requiring the disclosure of proprietary information that fall within the scope of, and are consistent with, Article 39 of the TRIPS Agreement; or
- (b) when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal, or competition authority to remedy a practice determined after judicial or administrative process to be anticompetitive under the Party's competition laws.<sup>6</sup>

5. Paragraphs 1(a), (b), and (c), and 2(a) and (b), do not apply to qualification requirements for goods or services with respect to export promotion and foreign aid programmes.

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<sup>5</sup> The reference to "Article 31" includes footnote 7 to Article 31.

<sup>6</sup> The Parties recognise that a patent does not necessarily confer market power.

6. Paragraphs 1(b), (c), (f), and (g), and 2(a) and (b), do not apply to government procurement.

7. Paragraphs 2(a) and (b) do not apply to requirements imposed by an importing Party relating to the content of goods necessary to qualify for preferential tariffs or preferential quotas.

8. For greater certainty, Paragraphs 1 and 2 do not apply to any requirement other than the requirements set out in those Paragraphs.

9. This Article does not preclude enforcement of any commitment, undertaking, or requirement between private parties, where a Party did not impose or require the commitment, undertaking, or requirement.

## **Article 8**

### **Senior Management and Boards of Directors**

1. Neither Party may require that an enterprise of that Party that is a covered investment appoint to senior management positions natural persons of any particular nationality.

2. Neither Party may require that a majority of the board of directors, or any committee thereof, of an enterprise of that Party that is a covered investment, be of a particular nationality, or resident in the territory of the Party.

3. Neither Party may require that less than a majority of the board of directors, or any committee thereof, of an enterprise of that Party that is a covered investment, be of a particular nationality, or resident in the territory of the Party, where that requirement would materially impair the ability of the investor to exercise control over its investment.

## **Article 9**

### **Non-Conforming Measures**

1. Articles 5 (National Treatment), 6 (Most Favoured Nation Treatment), 7 (Performance Requirements), and 8 (Senior Management and Boards of Directors) shall not apply to:
  - (a) any existing non-conforming measure that is maintained by a Party at:
    - (i) the central or regional level of government, as set out by that Party in its Schedule to Annex I; or
    - (ii) the local level of government;
  - (b) the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a); or
  - (c) an amendment to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Articles 5 (National Treatment), 6 (Most Favoured Nation Treatment), 7 (Performance Requirements), and 8 (Senior Management and Boards of Directors).
  
2. Articles 5 (National Treatment), 6 (Most Favoured Nation Treatment), 7 (Performance Requirements), and 8 (Senior Management and Boards of Directors) do not apply to any measure that a Party adopts or maintains with respect to sectors, sub-sectors, or activities, as set out in its Schedule to Annex II.
  
3. Neither Party may, under any measure adopted after the date of entry into force of this Protocol and covered by its Schedule to Annex II, require an investor of the other Party, by reason of its nationality, to sell or otherwise dispose of an investment existing at the time the measure becomes effective.

4. Articles 5 (National Treatment), 6 (Most Favoured Nation Treatment), and 8 (Senior Management and Boards of Directors) do not apply to:

- (a) government procurement; or
- (b) subsidies or grants provided by a Party, including government supported loans, guarantees, and insurance.

### **Article 10 Transfers**

1. Each Party shall permit all transfers into and out of its territory relating to a covered investment to be made freely and without delay in a freely usable currency at the market rate of exchange at the time of transfer. Such transfers include:

- (a) contributions to capital, including the initial contribution;
- (b) profits, dividends, interest, capital gains, royalty payments, management fees, and technical assistance and other fees;
- (c) proceeds from the sale of all or any part of the covered investment or from the partial or complete liquidation of the covered investment;
- (d) payments made under a contract, including payments made pursuant to a loan agreement;
- (e) payments made pursuant to Articles 13 (Compensation for Losses) or 14 (Expropriation);
- (f) payments arising out of the settlement of a dispute; and
- (g) earnings and other remuneration of personnel engaged from abroad in connection with that investment.

2. Notwithstanding Paragraph 1, a Party may prevent or delay a transfer through the equitable, non-discriminatory, and good faith application of its laws relating to:

- (a) bankruptcy, insolvency, or the protection of the rights of creditors;
- (b) issuing, trading, or dealing in securities, futures, or derivatives;
- (c) criminal or penal offences;
- (d) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities;
- (e) ensuring compliance with orders or judgments in judicial or administrative proceedings; or
- (f) social security, public retirement, or compulsory savings schemes.

## **Article 11**

### **Measures to Safeguard the Balance of Payments**

1. Notwithstanding Article 10 (Transfers), where a Party is in serious balance of payments and external financial difficulties or under threat thereof, it may adopt or maintain restrictions relating to transfers to which Article 10 (Transfers) applies.

2. Restrictions adopted or maintained under Paragraph 1 shall:

- (a) be consistent with the *Articles of Agreement of the International Monetary Fund*;
- (b) avoid unnecessary damage to the commercial, economic and financial interests of the other Party;

- (c) not exceed those necessary to deal with the circumstances described in Paragraph 1;
- (d) be temporary and be phased out progressively as the situation specified in Paragraph 1 improves; and
- (e) be applied on a national treatment basis and such that covered investments and investors of the other Party are treated no less favourably than investors and investments of any non-Party.

3. Any restrictions adopted or maintained by a Party under Paragraph 1, or any changes therein, shall be notified to the other Party within 14 days from the date such measures are taken.

4. The Party adopting or maintaining any restrictions under Paragraph 1 shall commence consultations with the other Party within 45 days from the date of notification in order to review the measures adopted or maintained by it.

## **Article 12**

### **Minimum Standard of Treatment**

1. Each Party shall accord to covered investments treatment in accordance with the customary international law minimum standard of treatment, including fair and equitable treatment and full protection and security.

2. The obligation in Paragraph 1 to provide:

- (a) “fair and equitable treatment” includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process;
- (b) “full protection and security” requires each Party to take such measures as may be reasonably necessary to ensure the physical protection and security of the covered investment.

3. For greater certainty, the concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by the customary international law minimum standard, and do not create additional substantive rights.

4. A determination that there has been a breach of another provision of this Protocol, or of a separate international agreement, does not establish that there has been a breach of this Article.

### **Article 13 Compensation for Losses**

1. Notwithstanding Paragraph 4(b) of Article 9 (Non-Conforming Measures), each Party shall accord to investors of the other Party and to covered investments, with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife, treatment no less favourable than that it accords, in like circumstances, to:

- (a) its own investors and their investments; and
- (b) investors of any non-Party and their investments.

2. Notwithstanding Paragraph 1, if an investor of a Party suffers a loss in the territory of the other Party resulting from:

- (a) requisitioning of its covered investment or part thereof by the other Party’s forces or authorities; or
- (b) destruction of its covered investment or part thereof by the other Party’s forces or authorities, which was not required by the necessity of the situation,

the other Party shall provide the investor with restitution, compensation, or both, as appropriate, for such loss. Any compensation shall be prompt, adequate, and effective in



accordance with Paragraphs 2 to 4 of Article 14 (Expropriation) *mutatis mutandis*.

3. Paragraph 1 does not apply to existing measures relating to subsidies or grants provided by a Party, including government-supported loans, guarantees, and insurance that would be inconsistent with Article 5 (National Treatment) except for Paragraph 4(b) of Article 9 (Non-Conforming Measures).

### **Article 14 Expropriation**

1. Neither Party may expropriate or nationalise a covered investment either directly or indirectly through measures equivalent to expropriation or nationalisation (“expropriation”)<sup>7</sup>, except:

- (a) for a public purpose;
- (b) in a non-discriminatory manner;
- (c) on payment of prompt, adequate, and effective compensation in accordance with Paragraphs 2 to 4; and
- (d) in accordance with due process of law.

2. Compensation shall:

- (a) be paid without delay;
- (b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place;
- (c) not reflect any change in value occurring because the intended expropriation had become known earlier; and

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<sup>7</sup> Except in rare circumstances, non-discriminatory regulatory actions by a Party to achieve legitimate public welfare objectives, such as protection of public health, safety, and the environment, do not constitute indirect expropriations.

(d) be fully realisable and freely transferable.

3. The compensation shall be payable either in the currency in which the investment was originally made or, if requested by the investor, in any other freely useable currency. The compensation shall include interest, at a commercially reasonable rate for that currency, from the date the measures in question were taken to the date of payment and shall be freely transferable between the territories of the Parties. If an investor requests payment in a freely usable currency, the compensation referred to in Paragraph 1(c), including any accrued interest, shall be converted into the currency of payment at the market rate of exchange prevailing on the date of payment.

4. This Article does not apply to the issuance of compulsory licences granted in relation to intellectual property rights in accordance with the TRIPS Agreement.

## **Article 15 Transparency**

1. Each Party shall ensure that its laws, regulations, procedures, and administrative rulings of general application with respect to any matter covered by this Protocol are published promptly or otherwise made available in such a manner as to enable interested persons of the other Party to become acquainted with them. Each Party shall also publish international agreements pertaining to investment to which it is a party.

2. To the maximum extent possible, each Party shall:

- (a) publish in advance any measure referred to in Paragraph 1 that it proposes to adopt; and
- (b) provide interested persons of the other Party with an opportunity to comment on such proposed measures.

3. With a view to administering its laws, regulations, procedures, and administrative rulings of general application with respect to any matter covered by this Protocol in a consistent, impartial, and reasonable manner, each Party shall ensure that its administrative agencies, in applying such measures to particular investors of the other Party or covered investments in specific cases through adjudication, rulemaking, licensing, determination, and approval processes:

- (a) provide, wherever possible, persons of the other Party that are directly affected by an agency's processes reasonable notice, in accordance with domestic procedures, when a process is initiated, including a description of the nature of the relevant process, a statement of the legal authority under which the process is initiated, and a general description of any issues in controversy;
- (b) afford such persons a reasonable opportunity to present facts and arguments in support of their positions prior to any final administrative action, when time, the nature of the process, and the public interest permit; and
- (c) follow procedures that are in accordance with its law.

4. Each Party shall maintain judicial, quasi-judicial, or administrative tribunals or procedures for the purpose of the prompt review and, where warranted, correction of final administrative actions regarding matters covered by this Protocol. Such tribunals shall be impartial and independent of the office or authority entrusted with administrative enforcement and shall not have any substantial interest in the outcome of the matter.

5. Each Party shall ensure that, in any such tribunals or procedures, the parties to the proceedings are provided with the right to:

- (a) a reasonable opportunity to support or defend their respective positions; and

- (b) a decision based on the evidence and submissions of record or, where required by domestic law, the record compiled by the administrative authority.

6. Each Party shall ensure, subject to appeal or further review as provided in its domestic law, that such decision shall be implemented by, and shall govern the practice of, the offices or authorities with respect to the administrative action at issue.

7. Each Party shall designate a contact point or points to facilitate communications between the Parties on any matter covered by this Protocol.

## **Article 16**

### **Special Formalities and Disclosure of Information**

1. Nothing in Article 5 (National Treatment) shall be construed to prevent either Party from adopting or maintaining a measure that prescribes special formalities in connection with covered investments, such as residency requirements for registration or similar purposes or a requirement that covered investments be legally constituted under the laws or regulations of the Party, provided that such formalities do not materially impair the protections afforded by a Party to investors of the other Party and covered investments pursuant to this Protocol.

2. Notwithstanding Articles 5 (National Treatment) and 6 (Most Favoured Nation Treatment), a Party may require an investor of the other Party, or a covered investment, to provide information concerning that investment solely for informational or statistical purposes. The Party shall protect such information that is confidential from any disclosure that would prejudice the competitive position of the investor or the covered investment. Nothing in this Paragraph shall be construed to prevent either Party from otherwise obtaining or disclosing information in connection with the equitable and good faith application of its domestic law.

## **Article 17 Subrogation**

1. If a Party or an agency of a Party makes a payment to an investor of that Party under a guarantee, a contract of insurance, or other form of indemnity against non-commercial risks it has granted in respect of an investment of an investor of that Party, the other Party shall recognise the subrogation or transfer of any right or title in respect of such investment. The subrogated or transferred right or claim shall not be greater than the original right or claim of the investor.

2. Where a Party or an agency of a Party has made a payment to an investor of that Party and has taken over rights and claims of the investor, that investor shall not, unless authorised to act on behalf of the Party or the agency of the Party making the payment, pursue those rights and claims against the other Party.

## **Article 18 Denial of Benefits**

A Party may deny the benefits of this Protocol to an investor of the other Party that is an enterprise of such other Party and to investments of that investor if the enterprise has no substantive business operations in the territory of the other Party and persons of a non-Party or of the denying Party own or control the enterprise.

## **Article 19 Exceptions**

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between covered investments or investors of the other Party and other investments or investors, where like conditions prevail, or a disguised restriction on investment, nothing in Articles 5 (National Treatment), 6 (Most Favoured Nation Treatment), 7 (Performance Requirements), or 8 (Senior Management and Boards

of Directors) shall preclude the adoption or enforcement by either Party of measures:

- (a) necessary to protect public morals or to maintain public order;
- (b) necessary to protect human, animal or plant life or health<sup>8</sup>;
- (c) necessary to protect national works or specific sites of artistic, historic or archaeological value; or
- (d) relating to the conservation of living or non-living exhaustible natural resources.

## **Article 20 Security Exceptions**

Nothing in this Protocol shall be construed:

- (a) to require either Party to furnish or allow access to any information the disclosure of which it considers to be contrary to its essential security interests; or
- (b) to prevent either Party from taking any actions which it considers necessary for the protection of its essential security interests:
  - (i) relating to fissionable and fusionable materials or the materials from which they are derived;
  - (ii) taken in time of war or other emergency in international relations;
  - (iii) relating to the production or supply of arms and ammunition; or

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<sup>8</sup> The Parties understand that this includes environmental measures necessary to protect human, animal or plant life or health.

- (c) to prevent either Party from taking any action in pursuance of its obligations under the *United Nations Charter* for the maintenance of international peace and security.

## **Article 21**

### **Taxation Measures**

1. Except as provided in this Article, nothing in this Protocol shall apply to taxation measures.
2. This Protocol shall only grant rights or impose obligations with respect to taxation measures:
  - (a) where corresponding rights or obligations are also granted or imposed under the WTO Agreement;
  - (b) under Article 7 (Performance Requirements); or
  - (c) under Article 14 (Expropriation).
3. Nothing in this Protocol shall affect the rights and obligations of the Parties under any tax convention relating to the avoidance of double taxation in force between the Parties.
4. In the event of any inconsistency relating to a taxation measure between this Protocol and a tax convention relating to the avoidance of double taxation in force between the Parties, the latter shall prevail to the extent of the inconsistency. Any consultations between the Parties pursuant to Article 25 (Consultations) about whether an inconsistency relates to a taxation measure, or whether any other matter arising under this Protocol relates to a taxation measure, shall include representatives of the tax administration of each Party.
5. Nothing in this Protocol shall be regarded as obliging either Party to extend to the other Party the benefit of any treatment, preference or privilege arising from any existing or future agreement

on the avoidance of double taxation or from the provisions on the avoidance of double taxation in any other international agreement or arrangement by which the Party is bound.

## **Article 22 Prudential Measures<sup>9</sup>**

Notwithstanding any other provisions of this Protocol, a Party shall not be prevented from taking measures affecting the supply of financial services for prudential reasons, including for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system. Where such measures do not conform with the provisions of this Protocol, they shall not be used as a means of avoiding the Party's commitments or obligations under this Protocol.

## **Article 23 Treaty of Waitangi**

1. Provided that such measures are not used as a means of arbitrary or unjustified discrimination against persons of the other Party or as a disguised restriction on investment, nothing in this Protocol shall preclude the adoption by New Zealand of measures it deems necessary to accord more favourable treatment to Maori in respect of matters covered by this Protocol including in fulfilment of its obligations under the Treaty of Waitangi.

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<sup>9</sup> For greater certainty the measures which a Party may take, provided they meet the requirements of this Article, include those governing:

- (a) juridical form, registration as a financial service supplier, and corresponding requirements, obligations, and operational restrictions;
- (b) ownership;
- (c) directors and management, including qualifications, residency and nationality requirements;
- (d) location of offices, systems, information infrastructure, and staff;
- (e) payment, clearance, and security settlement systems;
- (f) governance arrangements, including reporting lines;
- (g) capital and liquidity requirements and arrangements;
- (h) risk management processes;
- (i) anti-money laundering and countering terrorism financing; and
- (j) the response to the distress or failure of a financial service supplier.



2. The Parties agree that the interpretation of the Treaty of Waitangi, including as to the nature of the rights and obligations arising under it, shall not be the subject of consultations pursuant to Article 25 (Consultations).

#### **Article 24 Investment and Environment**

Nothing in this Protocol shall be construed to prevent either Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Protocol that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.

#### **Article 25 Consultations**

If a Party considers that:

- (a) an obligation under this Protocol has not been, is not being, or may not be fulfilled; or
- (b) the achievement of any objective of this Protocol is being or may be frustrated,

it may request consultations with the other Party. Following such a request the Parties shall promptly enter into consultations with a view to seeking an early, equitable, and mutually satisfactory solution.

#### **Article 26 Review**

The Parties agree to meet in or shortly after the first year of entry into force of this Protocol, and regularly thereafter, to review the operation of this Protocol.

**Article 27**  
**Status of Annexes and Letters**

The Annexes to this Protocol, the *Exchange of Letters Concerning Clarification of Australian Non-Conforming Measures at Regional Level of Government*, the *Exchange of Letters Concerning the New Zealand MFN Reservation*, and the *Exchange of Letters Concerning New Zealand's Reservation with respect to Water* are an integral part of this Protocol.

**Article 28**  
**Association with Protocol**

1. The Parties may agree to the association of any other State with this Protocol.
2. The terms of any such association shall be negotiated jointly between the Parties and the other State.

**Article 29**  
**Entry into Force**

This Protocol shall enter into force 30 days, or such other period as the Parties may agree, after the Parties exchange written notification that necessary domestic procedures have been completed.

**Signed** at Wellington, in duplicate, this \_\_\_\_\_ day of February two thousand and eleven.

**For New Zealand:**

**For Australia:**

\_\_\_\_\_  
**Rt Hon John Key**  
**Prime Minister**

\_\_\_\_\_  
**The Hon Julia Gillard**  
**Prime Minister**