



Informal Aide de Memoire on the Treaty of Waitangi Exception in NZ's Free Trade Agreements (January 2025)

Paragraph 18 of the Mediation Agreement in the Wai 2522 claim on the Trans-Pacific Partnership Agreement signed on 2 October 2020 says:

Ngā Toki Whakarururanga, when established, shall, in conjunction with TEG (where required) ... Identify options, for dialogue with TEG, for a different Treaty of Waitangi Exception clause.

This aide de memoire sets out

1. the background to including reference to the Treaty of Waitangi in free trade agreements
2. the Treaty of Waitangi Exception in the Singapore NZ CEP 2001
3. the Waitangi Tribunal reports analysis and findings on the Treaty of Waitangi Exception
4. supplementary material: the Trade for All Report and Kawharu article.

It also identifies

5. agreements that currently have no Tiriti/Treaty/Māori protections
6. investment agreements and ISDS
7. agreements to which the 2001 Treaty of Waitangi Exception applies
8. variations on the 2001 Treaty Exception and Māori protections in agreements.

Details are in various Annexes.

1. Background

The adoption of the exception was the result of vigorous debate in the 1990s over two agreements.

The formation of the **World Trade Organization (WTO)** highlighted the lack of protections for Māori. The intellectual property rights agreement (TRIPS) became part of Wai 262. A supplementary order paper to The Uruguay Round adoption act drew on wording from the State-owned Enterprises Act 1986 that “nothing in New Zealand’s acceding to the General Agreement on Tariffs and Trade or New Zealand’s membership of the World Trade Organisation shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi”. That was lost by 40 votes to 42. Because there is no scope for reservations to the TRIPS, if this passed it would have been impossible for New Zealand to ratify the WTO agreements as a whole.

New Zealand’s trade in services schedule (GATS) included a horizontal limitation for national treatment (non-discrimination) that read:

Unbound for current and future measures at the central and sub-central level according more favourable treatment to any Maori person or organisation in relation to the acquisition, establishment or operation of any commercial or industrial undertaking.

That was drafted in secret without any known engagement with Māori. It became controversial once the text became public because there was no reference to Te Tiriti or the Treaty, it referred only to Māori persons or organisations, was limited to more favourable treatment and to activities of a commercial or industrial undertaking. A new round of negotiations was scheduled to begin in 2000. The Labour Government of Helen Clark came under public and media pressure to adopt a stronger Treaty-based protection in the GATS 2000. It is not known whether New Zealand made any such steps. Those negotiations were never concluded.

A proposed **Multilateral Agreement on Investment (MAI)** was negotiated in secret at the OECD from 1995. The text was leaked in 1996. Only the Nordic countries had argued for a general exception in the agreement for Indigenous Peoples, but this was narrowly framed to protect the Saami people's exclusive right to husband reindeer. Under pressure, MFAT disclosed that it would propose a Treaty of Waitangi reservation similar to the GATS. The proposed schedule also protected eligibility for assistance for domestic and Māori broadcast programming and New Zealand films.

The MAI provoked strong opposition from Māori, including a hikoi to Parliament. In 1997, Te Puni Kokiri, Māori MPs, the Māori Affairs Select Committee, amongst many others, criticised the inadequacy of the reservation and the failure to consult properly with Māori. A series of consultative hui were held around the country and a Treaty assessment was to be conducted. But the MAI negotiations were suspended sine die before that assessment was completed.

2. Treaty Exception in the Singapore NZ CEP 2001

The Crown's response to these challenges was to include a Treaty of Waitangi Exception in the Singapore New Zealand Closer Economic Partnership that was concluded in 2000 and entered into force in January 2001. These negotiations coincided with the debates over the GATS 2000. After intense pressure, the Crown engaged with Māori, including at five hui where concern was expressed that wording would not be strong enough and the Crown should not decide on that alone. The final text of the exception was decided by the Crown and not known until after the agreement was signed. It reads:

Treaty of Waitangi Exception

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 trade in goods, trade in services, or investment, nothing in this Agreement shall preclude the adoption by New Zealand of measures it deems necessary to accord more favourable treatment to Māori in respect of matters covered by this Agreement including in fulfilment of its obligations under the Treaty of Waitangi.
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 subject to the dispute settlement provisions of this Agreement. Chapter X (Dispute Settlement) shall otherwise apply to this Article. A panel established under Article X may be requested to determine only whether any measure referred to in paragraph 1 is inconsistent with its rights under this Agreement.

The wording has remained unchanged since 2001, with minor adaptations. That is despite the significant expansion of what free trade agreements cover, the much greater understanding of their implications for Te Tiriti o Waitangi and the increased commitment of the Crown, including the Ministry of Foreign Affairs and Trade, to meet its Tiriti obligations.

The concerns relating to the exception were summarised in the Position paper on [Indigenous Peoples' Rights and Protections](#) prepared for IPEF. Briefly, those issues are:

- An exception needs to be invoked as a defence in a dispute, rather than a carveout which should prevent a dispute and puts the onus on the objector.
- The chapeau “arbitrary or unjustifiable discrimination or a disguised restriction on trade in goods, services and investment”, as in the US Mexico Canada Agreement (article 32.5), may often arise, eg where Māori digital services providers benefit because data must be held in Aotearoa New Zealand.
- The chapeau also privileges commercial interests over Indigenous Peoples’ duties, responsibilities, rights and interests, subjects them to challenge by another State, and relies on interpretations by arbitral panels of trade law experts.
- The US Mexico Canada Agreement (USMCA) exception only applies to measures where there is a legal obligation to Indigenous Peoples, but not obligations that are sourced in constitutional instruments that have ambiguous legal status under colonial law, as with Te Tiriti o Waitangi, or some would argue obligations under the UNDRIP.
- An exception that applies only to measures that confer “more favourable treatment” on Indigenous Peoples (as per the Treaty of Waitangi Exception in many FTAs) does not provide effective protection for non-compliance with a provision or a measure that advances Indigenous Peoples’ protections as part of broader public policy measures. The phrase also opens reliance on the exception to challenge as not constituting “more favourable treatment”.
- These uncertainties can chill a Party’s willingness to implement measures sought by Indigenous Peoples to avoid the risk of dispute and potential sanctions. Rights of prior comment under “good regulatory practice” or “services domestic regulation” provide opportunities to threaten such action.

As the Tribunal noted in the Wai 2522 urgency report (p.35), the Crown does not have to do anything in relation to the Exception until such time as a dispute is lodged under the FTA. At that time the Crown can decide to deploy the Exception as a shield. There has not been any dispute to date in which New Zealand has had to invoke the exception. The Crown does not need to incorporate the Treaty exception into New Zealand law, or formally state that it considers that a particular measure is covered by it. It is unknown how far the existence of the exception has influenced, positively or negatively, any policy thinking within Aotearoa, as such assessments are routinely redacted from documents released to the public.

3. The Waitangi Tribunal Wai 2522 reports

Key points from the three tribunal reports (urgency, UPOV 91, e-commerce) are summarised below drawing on the letters of transmission. A fuller account of references is in Annex 1. It is important to recall that the full hearing was limited to just four issues, two of which were process (secrecy and engagement) and two substantive (UPOV 91 and e-commerce) that the claimants had to select from a much longer list. The fact the e-commerce chapter is the only substantive matter on which the Tribunal found a breach does not mean there were no other similar breaches in the TPPA/CPTPP. It is also pertinent that the only tribunal panel that included a trade law expert was on e-commerce.

The Urgency report on the Treaty of Waitangi Exception

The initial **urgency report** was released in 2016 after the TPPA was made public. The letter of transmission says

“We conclude that the exception clause will be likely to operate in the TPPA substantially as intended and therefore can be said to offer a reasonable degree of protection to Māori interests. We have come to this view even though the clause as drafted only applies to measures that the Crown deems necessary to accord more favourable treatment to Māori. This raises a question about the scope of the clause. ...

The development of the Treaty exception clause, and its successful incorporation in the Singapore free trade agreement and every free trade agreement since (including the TPPA), demonstrates leadership and is to the credit of successive New Zealand Governments. We acknowledge that, in the context of the TPPA, it is an achievement to have maintained the clause given the number and diversity of participating states. We believe the Crown was right to argue for the inclusion of such a clause because of the significance of the Treaty of Waitangi in New Zealand’s constitutional arrangements.

We therefore do not find a breach of the principles of the Treaty of Waitangi arising from the inclusion of the Treaty exception clause in the TPPA in its current form. (x)

The Tribunal did, however, express concern about the investment chapter and investor-state dispute settlement (ISDS), and whether the Exception’s reference only to the state-state dispute provision meant that ISDS panels could interrogate the Crown’s Treaty obligations.

Despite this finding, we do have concerns. The protections and rights given to foreign investors under the TPPA are extensive. The rights foreign investors have to bring claims against the New Zealand Government in our view raise a serious question about the extent to which those claims, or the threat or apprehension of them, may have a chilling effect on the Crown’s willingness or ability to meet its Treaty obligations or to adopt otherwise Treaty-consistent measures. This issue and the appropriate text for a Treaty exception clause for future free trade agreements are matters about which there should, in our view, be further dialogue between Māori and the Crown. (x)

The Wai 2522 UPOV 1991 Report

The report on UPOV centred on the adequacy of Annex 18-A that supplemented the Treaty Exception. There was no consultation with Māori regarding the Annex. The Crown said it was aware

of the issues which had been subject to a long and inconclusive preview of the Plant Varieties Act. The claimants argued that the Crown's decision to include that Annex, prior to the urgency hearing, indicated the Crown itself was not confident about application of the Treaty Exception in relation to the obligation to adopt UPOV 1991. The report focused on the process for adopting the Annex and its adequacy. The Treaty Exception was barely mentioned, although the letter of transmittal did refer to the urgency report as follows:

We did not find a breach of the Tiriti / Treaty principles in that inquiry, but our report expressed some concerns and suggested further dialogue between Māori and the Crown over an appropriate exception clause for future trade agreements. (2)

Wai 2522 CPTPP Report (E-commerce)

The second substantive issue of the four nominated by claimant counsel was the electronic commerce chapter of the CPTPP (the other two issues being secrecy and engagement). It explicitly did not include provisions in other chapters that might also impact on Tiriti responsibilities and rights, notable the services chapter that applies to measures that affect trade in computer and related services and cross-border supply of services.

The Tribunal qualified its finding of Tiriti compliance and call for dialogue on a future Treaty exception:

The Tribunal's Stage One report in May 2016 considered that the Treaty of Waitangi exception clause in the TPPA would operate 'substantially as intended' and could 'be said to offer a reasonable degree of protection to Māori interests' affected by the TPP and, as such, made no findings of Tiriti / Treaty breach. The Tribunal did express concerns that the Crown may have misjudged and mischaracterised the nature, extent, and relative strength of Māori interests put at issue under the agreement. As such, the Tribunal suggested that there be further dialogue between Māori and the Crown as to an appropriate Treaty exception clause for future free trade agreements. (200-201)

The Tribunal differentiated between its general approach in the Urgency hearing, which at a high level considered the Treaty Exception to provide a reasonable degree of protection, and its specific examination of substantive provisions which, even when read in conjunction with other exceptions, it found did not provide effective protection.

We found in Stage One of our inquiry that the Treaty of Waitangi exception in the TPPA would function substantially as intended so as to provide a reasonable level of protection for Māori interests if the Crown needed to rely on it. We came to this view despite the clause, as it was drafted, applying only to measures that the Crown deemed necessary to accord more favourable treatment to Māori. This clause remained unchanged when the TPPA eventually became the CPTPP. Unlike in Stage One, here we discuss the Treaty exception in conjunction with exceptions and exclusions in the CPTPP, with the objective of making a cumulative assessment of risk. This section canvasses the arguments of the claimants and the Crown concerning whether the Treaty exception mitigates the potential risk that arises from Articles 14.11 and 14.13 of the CPTPP. (142)

On one hand, the Tribunal made it clear that it was only looking at the Treaty Exception in the context of Issue 4 that related to the E-commerce chapter. At the same time, the fact that it found a breach attaches a crucial caveat to the urgency report.

Among the recommendations sought by the claimants in relation to the e-commerce issue was the convening of an Iwi–Crown dialogue to review and revise the Treaty exception. The Crown’s position is that this issue was dealt with exhaustively at Stage 1. There is no need to deal with it again in relation to Issue Four beyond its application as a specific exception to Chapter 14.

In Stage One, we reported on the adequacy of the Treaty of Waitangi exception in general terms. The question for our Stage Three inquiry is the level of risk to Māori interests posed by the e-commerce provisions in the CPTPP, and this requires us to consider the application of the Treaty exception to those matters specifically. We do not intend to revisit our Stage One findings. Any additional findings we may make relating to the Treaty exception apply within the context of the CPTPP e-commerce matters only.(10)

The Tribunal concluded that

the policy space retained by the CPTPP exceptions and exclusions is not as extensive as the Crown maintains. We also conclude there is a material risk of regulatory chill and risk arising from the precedent or ratchet effect of the CPTPP e-commerce provisions. Cumulatively, we conclude that the risks to Māori interests arising from the e-commerce provisions of the CPTPP are significant, and that reliance on the exceptions and exclusions to mitigate that risk falls short of the Crown’s duty of active protection. (xiii-xiv, and 185)

We conclude that the presence of exceptions and exclusions in the CPTPP means that there is a possibility that the Crown can meet its Tiriti /Treaty obligations. However, we do not conclude that such a possibility is sufficient to mitigate existing risk. Cumulatively, we see the risk under the CPTPP as significant. (177)

The Tribunal also looked beyond the CPTPP to how the Crown had approached later digital trade agreements:

Stage One of our inquiry focused on the efficacy of the Treaty exception. As a result, we assume that it is well within the Crown’s contemplation that the exception is subject to contest and calls for change. In agreements such as DEPA and RCEP, which involve smaller nations, we see the sense of urgency and opportunity that characterised involvement in the TPPA /CPTPP as significantly diminished. As a result, we view objections to changes intended to better account for Māori interests as less persuasive. We ask why reliance on exceptions, where reliance constitutes a base level of risk, are still the starting point for protecting Māori interests? In our view, predominant reliance on exceptions falls short of the active protection standard. (177)

The Tribunal appeared to think that a process to review the Treaty exception was already underway when it reported in 2021: “With respect to a number of matters such as review of the Treaty of Waitangi exception clause and dialogue with tohunga and other experts regarding protection of

Māori interests, we had regard to the fact that commitments had been made and processes are underway to address these matters. In such circumstances we do not think it appropriate to further intervene.”(195)

It also noted that the Crown

saw the Stage One findings as comprehensively addressing the nature and scope of the Treaty exception. The Crown pointed to the mediation agreement [appendix II], which states that Ngā Toki Whakarururanga, in conjunction with the MFAT Trade and Economic Group, will identify opportunities for dialogue about a different Treaty of Waitangi exception clause.(144)

We have acknowledged that it would be difficult for Aotearoa New Zealand to seek changes to the CPTPP e-commerce provisions. Nonetheless, if the outcomes of this review, or dialogue with Te Taumata or Ngā Toki Whakarururanga suggests that change to these provisions is needed, then we would expect that the Crown would pursue, in good faith, any opportunity that may arise to amend the e-commerce provisions, or even the Treaty of Waitangi exception clause, either by direct change or by side letter. (195-6)

4. Supplementary material: Trade for All Report and Kawharu article

The Report of the Trade for All Advisory Board appointed by the Minister of Trade recommended in para 36 that:

Immediate measures should be taken to strengthen the international dimensions of the Crown-Māori partnership, including ...

Discussing the drafting of the Treaty of Waitangi exception’ used in New Zealand FTAs with Māori, as recommended by the Waitangi Tribunal in Wai 2522; decisions made on the future text of the exception should only be made following that dialogue.

Amokura Kawharu, the Tribunal’s expert in the Urgency hearing, a member of the Trade for All Advisory Board, and now Tumu Whakahaere/ President of Te Aka Matua o te Ture/ The New Zealand Law Commission, published a detailed analysis entitled “The Treaty of Waitangi Exception in New Zealand’s Free Trade Agreements” in an international book on Indigenous Peoples and Trade. This is attached separately to this aide memoire. She summarises her conclusion thus:

I argue that the government’s processes for involving Māori in the development of New Zealand’s FTA policy are flawed, and that the drafting of the Treaty Exception has not kept pace with changes in New Zealand’s FTA practice. I conclude that possible solutions for remedying the problems in the text of the Treaty Exception need to be developed through dialogue with Māori. (275) ...

The Treaty Exception has been a unique feature of New Zealand’s FTA landscape since 2000, and its inclusion in New Zealand’s FTAs demonstrates leadership by New Zealand in recognizing the interests of its Indigenous people in the field of trade law. At the same time, its adequacy is compromised because it does not fully reflect the comprehensive nature of New Zealand’s current FTAs, it has not evolved in light of New Zealand’s changing FTA practice, and its scope

does not account for the range of policy choices that may be needed to protect Māori interests. Instead, the protection it affords is limited to “more favourable treatment,” the meaning of which is uncertain and may be difficult to apply in practice. Māori have not been sufficiently consulted with respect to the drafting and use of the Treaty Exception, which both helps to explain these issues and undermines the effectiveness of New Zealand’s approach. The options for the future are threefold – adopting an exclusion, amending the current text, and keeping the status quo. The New Zealand government is right to raise the possible risks of any change in approach to the drafting of the Treaty Exception or to the protection of Māori interests in trade agreements. Nonetheless, and consistent with the partnership of the Treaty of Waitangi, it is essential for the decision on whether to take the risks to be made with, rather than imposed on, Māori. (294)

5. NZ’s trade and investment agreements with no Tiriti protections

Two of the most significant free trade agreements New Zealand is party to have no protections for Te Tiriti, and only two include the Treaty Exception. The recently signed Indo-Pacific Economic Framework on Clean Economy has no protections.

WTO

The World Trade Organization (WTO) multilateral agreements are the most comprehensive in terms of global coverage. There is no protection for Te Tiriti, or even the Treaty Exception, in the agreements that deal with goods, including standards for agricultural and other products (raising issues for organics, rongoā, tobacco control policies).

The Agreement on Trade-related Aspects of Intellectual Property (TRIPS) has significant impact on Māori but zero protections.

There is no protection in the Agreement on Trade-Related Investment Measures (TRIMS), which includes local content and processing.

The trade in services agreement has only the preferential treatment for a Māori “commercial and industrial undertaking”. That was retained, without improvement, in the Joints Statement Initiative (JSI) Reference Paper on Services Domestic Regulation adopted in 2023.

The Government Procurement Agreement to which New Zealand acceded in 2012 includes the 2001 Treaty of Waitangi Exception in New Zealand’s annex.

The Investment Facilitation Agreement, another plurilateral JSI that has not been adopted in the WTO, inserts a generic Indigenous Peoples version of the 2001 Treaty Exception as a footnote (see below).

Australia New Zealand Closer Economic Relations Trade Agreement (CER)

The Closer Economic Relations Trade Agreement with Australia 1983 on trade in goods has no reference to Te Tiriti, the Treaty or Māori.

The Services Protocol 1989 has rules relating to national treatment, market access, to commercial presence/foreign direct investment and cross-border. It operates on a negative list basis. There is no reference to anything Māori, even the GATS reservation.

The Trans-Tasman Mutual Recognition Agreement 1997 relating to goods and occupations provides for Australian standards to be accepted in NZ. This has been used to undertake nurse training in Australia so as to bypass the cultural safety requirements for the New Zealand nursing qualification.

The attempt to develop a joint authority for the approval of therapeutic products was challenged in Wai 262. That was defeated and there is still a broad exception that applies to therapeutic products (check). However, there is suspicion it played a role in the recent Therapeutic Products Act. There is no reference to anything Māori, Te Tiriti or The Treaty in this agreement.

The Government Procurement annex to CER adopted in 2013 has no Treaty Exception even though the Exception was included in the annex when NZ acceded to the WTO's GP Agreement in 2012. There is an exception for *relating to goods or services of persons with disabilities, of philanthropic institutions or not for profit institutions, or of prison labour.*'

The CER Investment Protocol 2011 has rules on national treatment, market access, MFN, performance requirements, minimum standards of treatment, expropriation, and is enforceable state to state but is not enforceable by ISDS. The text has the 2001 Treaty of Waitangi Exception. New Zealand's schedule is negative list and makes no reference to Māori.

IPEF Pillar 3 Clean Economy Agreement

Ngā Toki Whakarururanga prepared briefing papers for IPEF on [Indigenous Peoples Rights](#) and [Te Taiao and the Climate Crisis](#) that set out the protection that was required to meet the Crown's obligations under Te Tiriti and the UNDRIP. Despite that, and strong advocacy from Ngā Toki Whakarururanga, there is no Treaty or Indigenous exception in this Agreement (although there is in the Agreements on Supply Chains and Fair Economy). Instead, the Agreement contains this:

Article 3 Inclusive Transitions to Clean Economies

3. With respect to any matter covered by this Agreement, a Party may:⁴

- (a) in fulfillment of its obligations to its Indigenous Peoples under its law or a treaty, promote and protect the rights, interests, duties, and responsibilities of its Indigenous Peoples; or
- (b) in fulfillment of its obligations under its law, promote and protect the rights, interests, duties, and responsibilities of its local communities.

⁴ This paragraph shall be understood in accordance with each Party's domestic legal system. For greater certainty, this paragraph does not operate as a carve out from, or as an exception to, this Agreement.

The footnote makes it clear that this is the opposite of a carveout or exception and sets a problematic precedent. It was decided unilaterally by the Crown and was never discussed with Ngā Toki Whakarururanga. Other delegations in the room have expressed surprise that New Zealand did not argue even for the 2001 Treaty Exception in this Agreement.

6. Investment Agreements and ISDS

New Zealand has two historic bilateral investment agreements, which include ISDS. UNCTAD these bilateral investment treaties are still in force. It would be helpful for MFAT to clarify the status of both these agreements.

Hong Kong New Zealand Investment Promotion and Protection Agreement 1995

The Hong Kong New Zealand Investment Promotion and Protection Agreement 1995 continues in force until terminated by either contracting party. There is a survivor clause that allows existing investors to continue enjoying the benefits for 15 years beyond termination. It has no protections for Māori, Te Tiriti or The Treaty.

The Hong Kong New Zealand Closer Economic Partnership 2010 provided for negotiation of an investment protocol, but the IPPA would remain in force until that was concluded. The negotiations began and concluded in 2010. The [MFAT website](#) on this said: “**Impacts on Maori:** No specific impact on Māori stakeholders is anticipated”.

The select committee called for submissions on the negotiations in April 2010, but I have been unable to locate any text. It is unclear whether this was incorporated into the Hong Kong NZ FTA; if so, the 2001 Treaty Exception is likely to apply, which leaves the entire exception open to challenge under ISDS. It is possible there is no specific protection in the protocol.

China NZ Bilateral Investment Treaty

The China New Zealand Bilateral Investment Treaty dates from 1988. It has no Tiriti/Treaty protection. It was superseded by the FTA signed in 2008, which has the standard Treaty Exception and related problems for ISDS. The relationship of the FTA to the BIT is a matter for consultation.

Other FTAs to which NZ is a party that include ISDS raise similar issues. The problem has not been addressed in any agreements, despite the Wai 2358 and Wai 2522 inquiries raising issues around ISDS.

MFAT's Investment Protocol for use of the Treaty Exception

In 2022 MFAT determined the content of a [protocol](#) for how ISDS disputes would be handled if the 2001 Treaty Exception was in issue. The Protocol was less extensive than the Wai 2522 Tribunal proposed. Ngā Toki Whakarururanga engaged with MFAT on Tiriti-compatible drafting from 2018, but its views were largely ignored; it recorded its dissatisfaction with the process and outcome in a letter to Ministers. This remains a pressing problem, especially in light of resource, mining, climate and other potential issues under investment chapters and agreements.

7. Use of the 2001 Treaty Exception

The Treaty Exception was first used in 2001 in the text of New Zealand's agreements with Singapore (2001); China (2008); Thailand (2005); Chile, Singapore, NZ, Singapore/Chile/Brunei/NZ (the Trans-Pacific Strategic Economic Partnership - P4) (2005); ASEAN Australia NZ (2010); Taiwan (2013); South Korea (2015); TPPA/CPTPP (2016).

The Tribunal reported on the urgency claim in 2016 with the recommendation for dialogue over a new exception. The Crown has continued to use the 2001 Treaty Exception in PACER Plus (2020); UK (2022); RCEP (2022); EU (2023); DEPA (2023); IPEF pillars 2 and 4 (2023/4); and ACCTS (...).

8. Variations on the 2001 Treaty Exception

Since the Tribunal report the Crown has proposed and accepted a number of variations.

JSI on E-commerce

The original proposal sought to avoid both the chapeau and “more favourable treatment” and provided the best exception to date, although it is not a carveout:

1. Nothing in this Agreement shall preclude a [Party/Member] from adopting or maintaining measures it deems necessary to protect or promote rights, interests, duties, and responsibilities of indigenous peoples in its territory, including in fulfilment of its obligations under its legal, constitutional or Treaty arrangements with those Indigenous Peoples.
2. The [Parties/Members] agree that the interpretation of a [Party’s/Member’s] legal, constitutional or Treaty arrangements with Indigenous Peoples in its territory, including as to the nature of its rights and obligations under it, shall not be subject to the dispute settlement provisions in this Agreement.

However, the final version agreed to by New Zealand retains both the chapeau and “more favourable treatment”. The Agreement does not include data transfer and source code provisions, although there is provision for them to be included in the future. The ability to revisit exceptions is reserved if they are added, but that would require consensus.

Article 26. Indigenous Peoples

26.1 Provided that such measures are **not used as a means of arbitrary or unjustified discrimination against persons of another Party or as a disguised restriction on trade by electronic means**, nothing in this Agreement shall preclude a Party from adopting or maintaining measures it considers necessary to accord **more favourable treatment** to Indigenous Peoples in its territory in respect of matters covered by this Agreement, including in fulfilment of its obligations under its legal, constitutional, or treaty arrangements with those Indigenous Peoples.

26.2 The interpretation of a Party's legal, constitutional, or treaty arrangements with Indigenous Peoples in its territory, including as to the nature of the rights and obligations arising under such arrangements, shall not be subject to dispute settlement under Article 27. Article 27 shall otherwise apply to this Article.

JSI on Investment Facilitation

This agreement has a footnote to the final provisions that seeks to insert an exception as a clarification, after the other Parties rejected the inclusion of an exception. It remains to be seen how that would be treated in a dispute. The wording includes the chapeau and “more favourable treatment”:

⁴⁶ For greater certainty, and for the purposes of this Agreement, provided that such measures are not used as a means of arbitrary or unjustifiable discrimination against investors of another Party or as a disguised restriction on investment, nothing in this Agreement prevents the adoption by a Party of measures it considers necessary to accord more favourable treatment to Indigenous Peoples in its territory in respect of matters covered by this Agreement, including in fulfilment of its legal, constitutional or treaty obligations to those Indigenous Peoples. For greater certainty, and for these purposes, the interpretation of a Party's legal, constitutional or treaty obligations to Indigenous Peoples in its territory, including as to the nature of the rights and responsibilities arising thereunder, shall not be subject to the dispute settlement provisions in this Agreement. Article 44 shall otherwise apply.

EU FTA

The digital trade chapter includes the following carveout, rather than exception. It retains the chapeau:

3. This Chapter **shall not apply to measures adopted or maintained by New Zealand that it deems necessary to protect or promote Māori rights, interests, duties and responsibilities¹ in respect of matters covered by this Chapter**, including in fulfilment of New Zealand's obligations under Te Tiriti o Waitangi/the Treaty of Waitangi, provided that such measures are not used as a means of arbitrary or unjustified discrimination against persons of the other Party or a disguised restriction on trade enabled by electronic means. The Parties agree that the interpretation of the Te Tiriti o Waitangi/the Treaty of Waitangi, including as to the nature of the rights and obligations arising under it, shall not be subject to the dispute settlement provisions of this Agreement.

¹ For greater certainty, Māori rights, interests, duties and responsibilities includes those relating to mātauranga Māori

There is no equivalent carveout for the services chapter in the EU FTA, even though that applies to measures that affect trade in computer and related services. That has to rely on the Treaty Exception.

ASEAN Australia New Zealand FTA (AANZFTA)

The recently revised AANZFTA retains the 2001 Treaty Exception and, for the services and investment chapters, the following paragraph in the explanatory note to the Annex of reservations:

For greater certainty, New Zealand reaffirms its right to regulate within its territory to achieve legitimate policy objectives, such as the protection of human, animal or plant life or health, social services, public education, safety, the environment including climate change, public morals, social or consumer protection, animal welfare, privacy and data protection, or the promotion and protection of cultural diversity **and the promotion and protection of the rights, interests, duties and responsibilities of Māori related to Te Tiriti o Waitangi/the Treaty of Waitangi. The interpretation of Te Tiriti o Waitangi/the Treaty of Waitangi, including as to the nature of the rights and obligations arising under it**, shall not be subject to the dispute settlement provisions of this Agreement.

USMCA

For completeness it is useful to note the Indigenous Peoples exception in the US Mexico Canada Agreement. It omits more favourable treatment, although it retains the chapeau.

Article 32.5: Indigenous Peoples Rights

Provided that such measures are not used as a means of arbitrary or unjustified discrimination against persons of the other Parties or as a disguised restriction on trade in goods, services, and investment, nothing in this Agreement shall preclude a Party from adopting or maintaining a measure it deems necessary to fulfill its legal obligations to indigenous peoples.⁷

⁷ For greater certainty, for Canada the legal obligations include those recognized and affirmed by section 35 of the *Constitution Act 1982* or those set out in self-government agreements between a central or regional level of government and indigenous peoples.

As conveyed previously, this has been relied on by Mexico and some amicus curiae in the GM dispute between the US and Mexico under USMCA. I have attached those documents again FYI.

ANNEX 1 EXTRACTS FROM WAI 2522 REPORTS

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“We conclude that the exception clause will be likely to operate in the TPPA substantially as intended and therefore can be said to offer a reasonable degree of protection to Māori interests. We have come to this view even though the clause as drafted only applies to measures that the Crown deems necessary to accord more favourable treatment to Māori. This raises a question about the scope of the clause. ...

The development of the Treaty exception clause, and its successful incorporation in the Singapore free trade agreement and every free trade agreement since (including the TPPA), demonstrates leadership and is to the credit of successive New Zealand Governments. We acknowledge that, in the context of the TPPA, it is an achievement to have maintained the clause given the number and diversity of participating states. We believe the Crown was right to argue for the inclusion of such a clause because of the significance of the Treaty of Waitangi in New Zealand’s constitutional arrangements.

We therefore do not find a breach of the principles of the Treaty of Waitangi arising from the inclusion of the Treaty exception clause in the TPPA in its current form. (x)

The Tribunal did, however, express concern about the investment chapter and investor-state dispute settlement (ISDS), and whether the Exception’s reference only to the state-state dispute provision meant that ISDS panels could interrogate the Crown’s Treaty obligations.

Despite this finding, we do have concerns. The protections and rights given to foreign investors under the TPPA are extensive. The rights foreign investors have to bring claims against the New Zealand Government in our view raise a serious question about the extent to which those claims, or the threat or apprehension of them, may have a chilling effect on the Crown’s willingness or ability to meet its Treaty obligations or to adopt otherwise Treaty-consistent measures. This issue and the appropriate text for a Treaty exception clause for future free trade agreements are matters about which there should, in our view, be further dialogue between Māori and the Crown. (x)

The Tribunal was also concerned that the scope of the TPPA to which the exception needed to apply was much wider than the Singapore CEP:

“Having now heard evidence and argument, we stand by our provisional conclusion that the TPPA, in both subject matter and size, is substantially different from previous FTAs, and in particular the 2001 Singapore FTA for which the Treaty exception clause was designed.”(17)

These were the Tribunal’s conclusions:

There is a Treaty exception clause in the TPPA, but it has not changed since it was first developed for the New Zealand–Singapore free trade agreement in 2001. Neither the exception nor the Crown’s engagement strategy appear to have been revisited, despite the Wai 262 report and the changes in international and Treaty of Waitangi jurisprudence since 2001. Very little independent New Zealand expert analysis of the TPPA is yet available.

Concern by Māori about the Crown's willingness to honour its Treaty of Waitangi obligations is therefore both understandable and predictable. (44)

The expert witnesses hold a range of views on the adequacy of the Treaty exception, and consequently on whether it should be altered. Kelsey considers that the exception is fundamentally flawed, and proposes an entirely different exception, ideally for the TPPA but certainly for future FTAs. Kāwharu agrees that the exception is flawed, but not to the extent that Kelsey does. She also proposes a revised version of the current exception, which removes the last two sentences and the reference to 'more favourable treatment'. She considers that it is too late to change the exception in the TPPA, but feels that alterations are required for future FTAs. By contrast, Ridings considers the exception entirely fit for purpose and does not consider that any changes are required.(48)

In relation to future FTAs, Ridings argues that there is an inherent risk in changing the Treaty exception text. ... Crown counsel argue that changing the exception in future FTAs would be risky, because other states would view the changes as an attempt to change the scope of the exception, or as conceding a deficiency which could be exploited. They also say that, once a Treaty exception clause has been successfully concluded in an FTA, it is not a matter of rolling it over to the next FTA but rather 'using that previous acceptance by other states to encourage further states to accept it'. Given the Crown's position that there is nothing wrong with the current exception, they argue that it would be unwise to expend limited negotiating capital to seek changes. In their view, such changes would have no significant impact on the legal effect of the provision, and could even result in other countries imposing changes which might be harmful to Māori interests.

We understand the points the Crown makes, and we accord them some weight. We are nonetheless troubled by the fact that ambiguity in the second paragraph seems to have arisen because template text from previous agreements has not been adjusted to ensure coherent links to the various dispute resolution processes within the TPPA. If so, this in turn raises a question about the extent to which the Crown truly turned its mind to the operation of the Treaty exception clause in the TPPA. (49)

The first issue we identified for inquiry responded to the proposition that the Treaty exception clause is a valuable and effective protection of Māori interests affected by the TPPA. The Crown however goes further and says that nothing in the TPPA will prevent the Crown from meeting its Treaty obligations to Māori. We have some reservations about this. The first is a concern that the Treaty exception clause as presently structured may not encompass the full extent of the Treaty relationship. We agree with Kāwharu that not all Crown actions or policies that may be necessary to protect Māori Treaty interests consist of measures that accord more favourable treatment to Māori. Our second reservation arises from uncertainty about the extent to which ISDS may have a chilling effect on the Crown's willingness or ability to meet particular Treaty obligations in the future or to adopt or pursue otherwise Treaty-consistent measures.(49-50)

We are not in a position to reach firm conclusions on the extent to which ISDS under the TPPA may prejudice Māori Treaty rights and interests, but we do consider it a serious question worthy of further scrutiny and debate and dialogue between the Treaty partners. We do not accept the Crown's argument that claimant fears in this regard are overstated.

Ultimately only time will tell, but whether the ISDS system is suffering from ‘a crisis of legitimacy’ (Kelsey) or ‘in need of reform’ (Kāwharu), we think its application under the TPPA is uncertain. (50)

The applicable Treaty standard is a reasonable degree of protection, not perfection. Overall, we conclude that the exception would be likely to operate in the TPPA substantially as intended. The exception, in our view, could be said to offer a reasonable degree of protection to Māori interests affected by the TPPA. In coming to this view, we have had particular regard to the points of agreement and disagreement between the experts and the nature and extent of any changes to the exception they proposed.

We agree that in structure and reach the Treaty exception needs to be self judging, have broad application, be subject to a good faith requirement, and ensure that the Treaty of Waitangi is not a matter to be interpreted by an arbitration panel. We believe that, in conjunction with other protections in the TPPA, the Treaty exception achieves, or substantially achieves, these objectives. We come to this view even though the exception applies only to measures the Crown deems necessary to accord more favourable treatment to Māori. Any such measure must be ‘in respect of matters covered by the Agreement’. Whilst more favourable treatment does not encompass the entire Treaty relationship, neither does the TPPA.

We have also accorded some weight to the practical matters raised by the Crown about difficulties and risks associated with any attempt to renegotiate or change the exception.

Finally, we have considered the exception alongside other provisions in the TPPA that have some potential to mitigate risk to Māori, particularly the ability of states to rule out ISDS in respect of tobacco control measures, and the non-conforming measures in relation to matters including the foreshore and seabed, cultural heritage, water, and social services. We again note that Australia and New Zealand have opted not to allow ISDS claims against each other. It follows that we do not find a breach of the principles of the Treaty of Waitangi arising from the inclusion of the Treaty exception clause in its current form in the TPPA.

It is unquestionably a good thing that the New Zealand Government has successfully negotiated the inclusion of the Treaty exception in the TPPA. We simply do not know whether the exception will ultimately prove to be the effective protection of Māori interests the Crown says it is, but we are satisfied that in terms of the applicable Treaty standard it does provide a reasonable degree of protection. (51-52)

We have not made a finding of Treaty breach, therefore we are not in a position to make formal recommendations. However, we make the suggestions that follow to assist the Crown and claimants going forward.

We suggest that the Crown include dialogue about the Treaty exception in its review of engagement with Māori. The dialogue between the three expert witnesses has, we believe, highlighted a number of matters that are worthy of attention. The Treaty exception may be necessary and we suggest that this could include space for dialogue between the Crown and Māori on this important provision. Adjustment of the Treaty exception may be necessary (in the EU FTA) and we suggest that this could include space for dialogue between the Crown and

Māori on this important provision. There may be practical and logistical questions, but these ought not to be insurmountable, given lines of communication established during this inquiry and proposals made by the Wai 262 Tribunal such as the use of an expert panel.

Claimants must recognise that additional dialogue does not imply or guarantee particular outcomes. A judgement call will have to be made as to whether some changes to improve the exception might put the entire exception at too great a risk of rejection by other states, or cause too much uncertainty as to the application of the Treaty exceptions in existing FTAs. However, this is not a sufficient reason to deny domestic dialogue.

We also suggest to the Crown the adoption of a protocol that would govern New Zealand procedure in the event it becomes a party to an ISDS under the TPPA (or any other FTA) in which the Treaty exception clause is, or is likely to be relied upon. (55-56)

All experts who appeared before us agreed that such a protocol could include the following:

- a commitment to invoke the Treaty exception if there is an ISDS case concerning Māori;
- a policy to lead expert Māori evidence where the Treaty exception may be invoked ;
- amicus curiae briefs for Māori to be encouraged;⁵³
- a policy commitment to regular dialogue and consultation over the course of an ISDS case if it raises issues of concern to Māori;
- in a case where the Treaty exception clause may be raised, Māori representation could be included as part of the New Zealand team;
- a commitment to select an arbitrator with knowledge of Treaty principles and tikanga (and investment arbitration); and
- if necessary, cooperate with the State of the investor to make a joint submission on interpretation of the Treaty exception (in the event it was considered that the arbitration tribunal was at risk of coming to an erroneous view).

These are ideas to be developed and not all will necessarily be applicable in the context of a specific dispute. However, given the increased exposure to ISDS under the TPPA, we believe it would be both prudent and Treaty-consistent for the Crown to engage in a dialogue with Māori, with a view to reaching agreement over measures such as these. (71)

Wai 2522 CPTPP Report (e-commerce)

The Tribunal addressed the Treaty of Waitangi Exception in particular in section 1.4.1.3 and chapter 5.

Among the recommendations sought by the claimants in relation to the e-commerce issue was the convening of an Iwi–Crown dialogue to review and revise the Treaty exception. The Crown’s position is that this issue was dealt with exhaustively at Stage 1. There is no need to deal with it again in relation to Issue Four beyond its application as a specific exception to Chapter 14.

In Stage One, we reported on the adequacy of the Treaty of Waitangi exception in general terms. The question for our Stage Three inquiry is the level of risk to Māori interests posed by the e-commerce provisions in the CPTPP, and this requires us to consider the application of the Treaty exception to those matters specifically. We do not intend to revisit our Stage

One findings. Any additional findings we may make relating to the Treaty exception apply within the context of the CPTPP e-commerce matters only.(10)

The Crown argued that the e-commerce chapter provisions “are subject to (amongst other measures) the Treaty exception, which the Tribunal has already found is likely to provide reasonable protection for Tiriti / Treaty rights”. (77)

We found in Stage One of our inquiry that the Treaty of Waitangi exception in the TPPA would function substantially as intended so as to provide a reasonable level of protection for Māori interests if the Crown needed to rely on it. We came to this view despite the clause, as it was drafted, applying only to measures that the Crown deemed necessary to accord more favourable treatment to Māori. This clause remained unchanged when the TPPA eventually became the CPTPP. Unlike in Stage One, here we discuss the Treaty exception in conjunction with exceptions and exclusions in the CPTPP, with the objective of making a cumulative assessment of risk. This section canvasses the arguments of the claimants and the Crown concerning whether the Treaty exception mitigates the potential risk that arises from Articles 14.11 and 14.13 of the CPTPP. (142)

The Crown “saw the Stage One findings as comprehensively addressing the nature and scope of the Treaty exception. The Crown pointed to the mediation agreement [appendix II], which states that Ngā Toki Whakarururanga, in conjunction with the MFAT Trade and Economic Group, will identify opportunities for dialogue about a different Treaty of Waitangi exception clause.(144)

While there is some merit in the Crown’s argument that it can regulate to protect Māori interests, we nonetheless think there are material risks. We conclude that the policy space retained by the CPTPP exceptions and exclusions is not as extensive as the Crown maintains. We also conclude there is a material risk of regulatory chill and risk arising from the precedent or ratchet effect of the CPTPP e-commerce provisions. Cumulatively, we conclude that the risks to Māori interests arising from the e-commerce provisions of the CPTPP are significant, and that reliance on the exceptions and exclusions to mitigate that risk falls short of the Crown’s duty of active protection. (xiii-xiv, and 185)

The Crown has presented a vigorous case that the e-commerce provisions will not, of themselves, present significant risk to Māori. We are not convinced that reliance on exceptions and exclusions is sufficient to meet the active protection standard. (174)

We conclude that the presence of exceptions and exclusions in the CPTPP means that there is a possibility that the Crown can meet its Tiriti/Treaty obligations. However, we do not conclude that such a possibility is sufficient to mitigate existing risk. Cumulatively, we see the risk under the CPTPP as significant. (177)

We noted earlier that Ko Aotearoa Tēnei (Wai 2562) describes how the duty of active protection becomes even more urgent considering the widening reach and rapid evolution of international instruments. We see this urgency further compounded by the speed of change in the digital sphere. This makes the active protection task something the Crown must be proactively and consistently engaged with. The Tiriti / Treaty standard remains that

Māori interests must be protected to the extent that is reasonable and practicable in international circumstances. We are not convinced that with the CPTPP this standard has been met.(177)

Stage One of our inquiry focused on the efficacy of the Treaty exception. As a result, we assume that it is well within the Crown's contemplation that the exception is subject to contest and calls for change. In agreements such as DEPA and RCEP, which involve smaller nations, we see the sense of urgency and opportunity that characterised involvement in the TPPA /CPTPP as significantly diminished. As a result, we view objections to changes intended to better account for Māori interests as less persuasive. We ask why reliance on exceptions, where reliance constitutes a base level of risk, are still the starting point for protecting Māori interests? In our view, predominant reliance on exceptions falls short of the active protection standard. (177)

With respect to a number of matters such as review of the Treaty of Waitangi exception clause and dialogue with tohunga and other experts regarding protection of Māori interests, we had regard to the fact that commitments had been made and processes are underway to address these matters. In such circumstances we do not think it appropriate to further intervene.(195)

The Tribunal's Stage One report in May 2016 considered that the Treaty of Waitangi exception clause in the TPPA would operate 'substantially as intended' and could 'be said to offer a reasonable degree of protection to Māori interests' affected by the TPP and, as such, made no findings of Tiriti/Treaty breach. The Tribunal did express concerns that the Crown may have misjudged and mischaracterised the nature, extent, and relative strength of Māori interests put at issue under the agreement. As such, the Tribunal suggested that there be further dialogue between Māori and the Crown as to an appropriate Treaty exception clause for future free trade agreements. (200-201)