

# **Tiriti-based approaches to trade negotiations in Aotearoa New Zealand**

**NGĀ TOKI  
WHAKARURURANGA**

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**Ngā Toki Whakarururanga  
was established in 2021  
under a Mediation Agreement  
with the Crown in the  
Waitangi Tribunal Inquiry on  
the Trans-Pacific Partnership  
Agreement (TPPA) (Wai 2522)**

**The claim was lodged in 2015.  
The final report 2021 found the  
TPPA e-commerce chapter  
breached Crown's Tiriti  
obligations.**

**The Mediation Agreement  
between claimants and the  
Crown in October 2020 says  
the Crown will ensure  
Ngā Toki Whakarururanga  
has "genuine" and  
"meaningful" influence  
on future trade policy and  
negotiations  
at all stages of decisions.**

**Ngā Toki  
Whakarururanga's  
Statement of Position:**

**Rangatira never ceded  
their mana to the Crown  
in the international  
domain, just as they  
never ceded their mana  
within Aotearoa**



Robyn Kahukiwa, *Māori Never Ceded Sovereignty to the Crown*, 2023. *Sovereign* series.  
Collection of Christchurch Art Gallery Te Puna o Waiwhetū. Photograph by Samuel Hartnett

**As a by-Māori-of Māori-with Māori-for Māori body,  
Ngā Toki Whakarururanga will set the bar for  
Te Tiriti o Waitangi-consistent trade policy and agreements,  
that reflects its moemoea/vision:**

*He Whenua Rangatira*

*We are an independent and sovereign nation*

**and its kaupapa:**

*Our duty and responsibility is to protect and advance Māori rights  
according to Te Tiriti o Waitangi (1840)*

*me He Whakaputanga o te Rangatiratanga o Nu Tireni (1835)*

# **This was not a new kaupapa**

**For over 40 years Māori have resisted international agreements the Crown has negotiated, often in secret, that are called “trade “and “investment” treaties but violate Māori duties, responsibilities, rights and interests under Te Tiriti o Waitangi**

A key issue in the TPPA Tribunal inquiry was the lack of effective protection for Māori duties, responsibilities, rights and interests that are affected by the agreements.

**The Crown had simply rolled over a Treaty of Waitangi Exception it developed in 2001.**

## Treaty of Waitangi Exception (2001)

**Provided** that such measures are **not** used as a means of **arbitrary or unjustified discrimination**

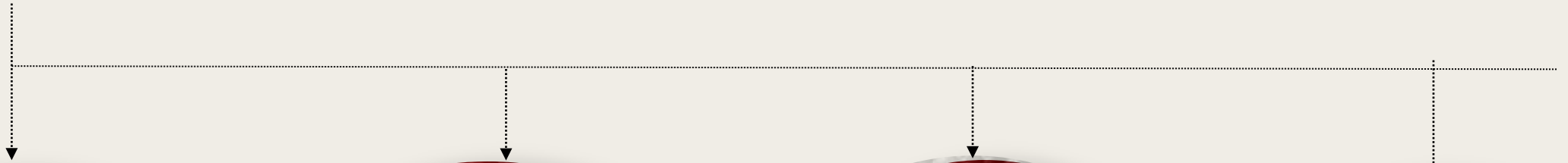
... or **a disguised restriction** on trade in goods, services, and investment

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 **te Tiriti o Waitangi/** the Treaty of Waitangi, **interpretation not subject to dispute settlement.**

# ISSUES WITH THE 2001 EXCEPTION



**The Crown  
decides if there  
are Tiriti  
obligations & if  
measures are  
necessary**

**The exception only  
applies to  
measures for “more  
favourable  
treatment”**

**The measure must  
not be unjustified  
discrimination or  
a disguised trade  
restriction**

**Everything  
except  
interpretation of  
Te Tiriti is  
subject to dispute  
before a trade  
panel, ISDS  
unclear**

The Treaty Exception was challenged in the Waitangi Tribunal,  
which initially said ...

*The exception is not perfect, but it is likely to operate substantially  
as intended and offer a reasonable degree of protection to Māori  
interests affected by the TPPA.*

**But its later report on the TPPA/CPTPP e-commerce chapter found  
the Treaty Exception plus other exceptions  
did not provide sufficient active protection for  
mātauranga Māori & Māori data sovereignty.**

The Crown has responded in several ways,  
initially limited to digital chapters

## The UK FTA Art 15.22: Review

1. To take into account developments in digital trade, **the Parties shall review the implementation and operation of this Chapter** and Article 11.7 (Financial Data and Information - Financial Services) **within 2 years** of entry into force ...
2. In the context of that review, and **following the release of the Waitangi Tribunal's Wai 2522 report**, New Zealand
  - (i) Reaffirms its continued ability to support and promote Māori interests under this Agreement; and
  - (ii) Affirms its intention to engage Māori to ensure the review takes account of the continued need of NZ to** support Māori to exercise their rights and interests, and **meet its responsibilities under Te Tiriti** o Waitangi/The Treaty of Waitangi and its principles.

But UK has to agree and that review is **moving very slowly** ...

**EU carveout in digital trade chapter, with standard chapeau.  
Then this UAE NZ FTA carveout **with no chapeau**, applied to**

(e) to measures adopted or maintained by New Zealand that it deems necessary to protect or promote Māori rights, interests, duties and responsibilities<sup>3</sup> 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. Chapter 20 (Dispute Settlement) does not apply to the interpretation of te Tiriti o Waitangi / the Treaty of Waitangi, including as to the nature of the rights and obligations arising under it.

<sup>3</sup>For greater certainty, Māori rights, interests, duties and responsibilities include those relating to mātauranga Māori.

**Meanwhile ...  
the Crown had  
reluctantly committed  
in the Mediation  
Agreement in 2020 to**

**“identify options,  
for dialogue with the  
Trade and Economic  
Group of MFAT,  
for a different Treaty of  
Waitangi exception  
clause.”**

## **We pointed to CUSMA Art 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.<sup>7</sup>*

<sup>7</sup> *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 .*

## **A better version of the Treaty Exception because:**

- **it dropped reference to  
“more favourable treatment”,**

**and**

- **referred to a party’s  
constitutional & treaty  
obligations.**

## **But:**

- **it still had the proviso/  
chapeau;**

- **raised issues about “legal”  
status of te Tiriti o Waitangi**

- **the colonial state still  
controlled the legal decisions  
and**

- **Indigenous Peoples had no  
power except as “amicus”.**

## US-Mexico dispute on GM corn under CUSMA 2024-5

The first test of an Indigenous exception was US-Mexico dispute over GM corn.

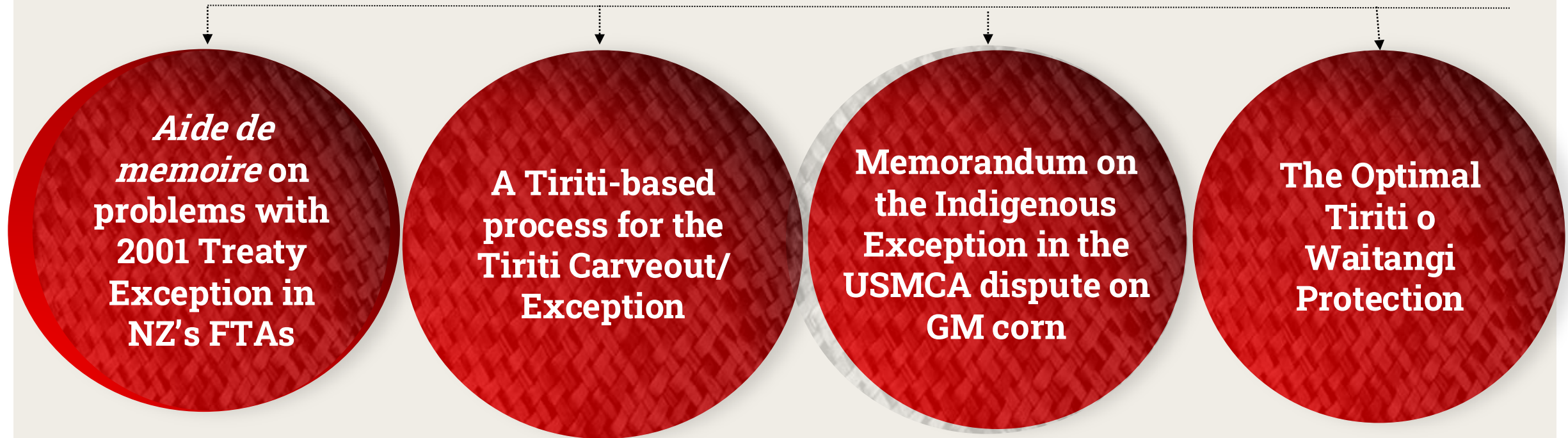
Concern over “chapeau” and panel of trade/investment judges were confirmed:

***Mexico is obligated to** ensure that any measures adopted to fulfill these objectives [on protection of native corn] **comply with specific limitations to which it agreed** ... in trade agreements that Mexico has ratified.*

*These limitations **include the proviso** in [the Indigenous Peoples' exception]. ...*

*The **Panel finds that the Measures ... are not justified under the exception** ... for measures that otherwise are inconsistent with the requirements of the USMCA.*

# So we prepared four papers



available at <https://ngatoki.nz/kaupapa/rangatiratanga-and-constitutional>

## And co-designed with MFAT a gold standard carveout to replace 2001 Exception

- 1. This Agreement shall not apply to measures adopted or maintained by New Zealand that **it deems necessary** to protect or promote **rights, interests, duties, and responsibilities** of Māori, including in fulfilment of its obligations under Te Tiriti o Waitangi / the Treaty of Waitangi.*
- 2. The Parties agree that the **interpretation** of Te Tiriti o Waitangi / the Treaty of Waitangi, including as to the nature of obligations arising under it, shall **not be subject to** the **dispute** settlement provisions of this Agreement.*

## Essential process elements

- 1) *Agreement on the **revised wording** and scope of a protection*
- 2) ***Understanding** and explaining **the rationale** for the provision*
- 3) *Developing **negotiation strategies***
- 4) *Interpretation of and **advocacy** for the provision **during negotiations***
- 5) *Explanation and **application** of the provision **following negotiations***
- 6) *Understanding and advocacy during **reviews***
- 7) *Awareness and accurate application of the provision in **policy advice and domestic policy decisions***
- 8) ***Application** of the provision in the international trade and investment context*
- 9) *Understanding and application during a **consultation phase of a dispute***
- 10) *Handling a **dispute***


**A gold standard protection  
is no good if  
it is not included in new FTAs  
and  
not able to replace the existing  
failed exception.**

**That requires**  
**(i) commitment from the Crown**  
**and**  
**(ii) agreement from the other  
party/ies.**

**The first attempt to include the  
new text in a bilateral FTA was  
the India NZ FTA.  
The text was rejected by India.**

**Plurilateral or multilateral  
negotiations are even harder.**

**And the Crown will still not  
concede publicly that the 2001  
Exception is flawed  
and continues to claim it  
provides effective protection.**



So collective action is needed by  
Indigenous Peoples in  
demanding a gold standard  
protection in all agreements.

**What are the best organising  
vehicles to achieve that in the  
trad and investment negotiation  
space?**

## **IPETCA is currently not a vehicle to achieve that**

**IPETCA had promise** when we drafted it in 2021:

- Indigenous-centred holistic and relational approaches to trade and investment,
- effective protections consistent with UNDRIP,
- co-governance through participatory and accountable processes.

**IPETCA has not delivered** on that, at least in Aotearoa.

- “Representatives” are individuals, not accountable.
- No information on work plans & meetings on MFAT website.

Review was due within 3 years.

**What can be done positively to make IPETCA work as intended?**

—  
**NGĀ TOKI  
WHAKARURURANGA**  
—

WHAKAWHETAI KOE