

# **DEEP DIVE ON DIGITAL TRADE RULES & TE TIRITI Day 2**

**Supported by Te Pae Tawhiti funding**

**NGĀ TOKI  
WHAKARURURANGA**



## Day Two Agenda

1. Trade in services
2. Tiriti Exceptions and Reviews
3. Wai 2522 claim : TPPA/CPTPP E-commerce Report



# Trade in Services



## Essence of “Trade” in Services

Developed during 1986-1994 negotiations to expand GATT

US insisted expansion of global trade rules included services and IP, as areas of US dominance

Priority services for US were finance, airlines, telecom, legal and accounting, etc for their MNCs

“Trade” agreements were a convenient vehicle

Developing countries were resistant,

insisted on “positive list” that specifies which services are committed to each rule.

FTAs moved to “negative list” that say which measures are not subject to rules

## What the US wanted

Main focus was **foreign direct investment**  
No **limits on entry** to another country  
No **public monopolies** that keep MNCs out  
No limits on **numbers and size**  
No requirements for **joint-ventures**  
No **preferences** to local competitors  
No better treatment for competitors from  
**another country**  
Rights to bring their own **senior & specialist**  
**personnel**  
Rights to **move money** in and out  
**Data** important but not such an issue pre-  
Internet





## How are services “traded” internationally?

A commercial transaction between a **service supplier** from **one country** to a **consumer** of **another country**

This can occur in four ways (referred to as “**modes**” of supply)

**Mode 1:** service is supplied **across the border** (eg internet, call centres, was least significant back in 1994)

**Mode 2:** people **consume the service overseas** (students, tourists)

**Mode 3:** foreign companies set up a local **commercial presence** (direct investment - hotels, telecoms, Starbucks, most important)

**Mode 4:** people **go overseas to deliver** a service (consultants, skilled labour contractors)



## Services rules apply to

**all measures** (*law, regulation, rule, procedure, decision, administrative action, or any other form*)

**adopted or maintained** (*existing or new*)

**affecting** (*not just directed at*)

**trade** (*supply* - production, distribution, marketing, sale and delivery - in one of the **4 modes**) of

**services** (*W/120 – classifications – single cross border digital transaction may be a computer service, telecommunications, distribution, financial service, service related to manufacturing, transportation service*); and

**purchase, payment or use** of those services

at **all levels of government** (*steps reasonably available to comply*).

Excludes government procurement, but uses the same definition of a “process” of procurement

**“Scope” excludes**

**government procurement,**

but uses the same definition of a “process” of procurement

**Services supplied in the exercise of governmental authority,**

but has to be non-commercial and not have a competitor

(basically non-profit monopoly)





## Classification to define services dates back to 1991

1. **Business Services**: professional, computer, R&D, fisheries, etc
2. **Communications Services**: postal, courier, telecom, audio-visual
3. **Construction**
4. **Distribution**: wholesale, retail, franchise, commission agent
5. **Education**: primary, secondary, higher, adult, other
6. **Environmental**: sewage, refuse, sanitation
7. **Financial services**: Insurance, banking, other
8. **Health & related social**
9. **Tourism & travel related**
10. **Recreational, cultural & sporting**
11. **Transport**: maritime, internal waterways, air, rail, road, pipeline ...
12. **Other**



## SERVICES SECTORAL CLASSIFICATION LIST

<u>SECTORS AND SUB-SECTORS</u>		<u>CORRESPONDING CPC</u>
1.	<u>BUSINESS SERVICES</u>	<u>Section B</u>
A.	<u>Professional Services</u>	
a.	Legal Services	
b.	Accounting, auditing and <del>bookkeeping</del> services	862
c.	Taxation Services	863
d.	Architectural services	8671
e.	Engineering services	8672
f.	Integrated engineering services	8673
g.	Urban planning and landscape architectural services	8674
h.	Medical and dental services	9312
i.	Veterinary services	932
j.	Services provided by midwives, nurses, physiotherapists and para-medical personnel	93191
k.	Other	
B.	<u>Computer and Related Services</u>	
a.	Consultancy services related to the installation of computer hardware	841
b.	Software implementation services	842
c.	Data processing services	843
d.	Data base services	844
e.	Other	845+849
C.	<u>Research and Development Services</u>	
a.	R&D services on natural sciences	851
b.	R&D services on social sciences and humanities	852
c.	Interdisciplinary R&D services	853
D.	<u>Real Estate Services</u>	
a.	Involving own or leased property	821





## Uncertainty of classifications in the digital era

Accurately identifying what is committed to the rules is vital

**But do the digital giants supply computer services or is**

**Google** an advertising service

**Amazon** a distribution service

**Uber** a transportation service

**eBay** an auction service

**Netflix** an entertainment service

**PayPal** a financial service

or are they both, and more?



## The core GATS rules say:

Members can't adopt measures that:

- **give preference to local suppliers** over foreign ones (**national treatment**) or limiting foreign investment; and
- structure services markets in certain ways that **limit access for foreign services providers** (**market access**) by quotas, bans, requiring joint ventures, monopolies
- **give preference** to services or services suppliers from **one WTO country** over those from another Member (**MFN**)

in any of those 4 'modes' of supplying the service.

They continued to negotiate rules to require light regulation of licensing, qualification and technical standards (**domestic regulation**)



# A new rule in FTAs is important for digital

## **Article 9.7** **Local Presence**

Neither Party shall require a service supplier of the other Party to establish or maintain a representative office or any form of enterprise, or to be resident, in its territory as a condition for the cross-border supply of a service.



## 2 approaches to schedules

### Positive list (GATS, China)

government lists what sub-sector is covered by each rule, subject to limitations, which gives greatest control

### Negative list (recent FTAs)

government lists the measures or services that are not subject to specific rules in one of two annexes:

**Annex I: existing rules can be kept** but can't be made more restrictive in the future (standstill);

may also automatically lock in any future liberalisation.

**Annex II: policy space** to breach the rules.

If a measure or sector is not listed, **it is subject to the rules.**

These must be **negotiated & agreed** between the parties





## Member's Positive list schedule of commitments

Each country's schedule of commitments that says **which services sectors** are subject to the rules on

- **market access**
- **national treatment**
- **(additional commitments)**

in each of the **4 modes** of supplying the service.

**ONLY** services that are committed in the schedule are subject to those rules.

Commitments can be different for a service each mode, eg. commitments on foreign investment can differ from cross-border supply of the service.

# NZ positive list GATS schedule

Layout and terms “**none**” is confusing and counter-intuitive

Sector	Limitations on market access	Limitations on national treatment	Additional commitments
Computer & related services (CPC84) - Consultancy on hardware installation - Software implement - Data processing - Data base services	1) None 2) None 3) None 4) Unbound except as in horizontal	1) None 2) None 3) None 4) Unbound except as in horizontal	

## NZ horizontal reservation for Māori, only national treatment

### Limitations on national treatment

- 1)2) Unbound for current and
- 3)4) future measures at the central and sub-central levels according more favourable treatment to any Maori person or organisation in relation to the acquisition, establishment or operation of any commercial or industrial undertaking.



## NZ UK FTA Cross-border services limited policy space reservation

### Cross-Border Trade in Services and Investment

New Zealand reserves the right to adopt or maintain any measures in respect of:

- (a) cultural heritage of national value; including ethnological, archaeological, historical, literary, artistic, scientific, or technological heritage, as well as collections that are documented, preserved, and exhibited by museums, galleries, libraries, archives, and other heritage collecting institutions;
- (b) public archives;
- (c) library and museum services; and
- (d) services for the preservation of historical or sacred sites or historical buildings.

# **Tiriti exceptions and review**



## ARTICLE 25.6

### Tiriti o Waitangi/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 trade in goods, trade in 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.

2. The Parties agree that 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. Chapter 26 (Dispute settlement) shall otherwise apply to this Article. A panel established under Article 26.5 (Establishment of a panel) may be requested by the Union to determine only whether any measure referred to in paragraph 1 is inconsistent with its rights under this Agreement.



## EU NZ FTA Digital Trade Chapter broader carve-out

### Chapter does not apply to ...

- (c) measures adopted or maintained by New Zealand that it deems necessary to protect or promote Māori rights, interests, duties and responsibilities<sup>1</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, 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. Chapter 26 (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.

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<sup>1</sup> For greater certainty, Māori rights, interests, duties and responsibilities includes those relating to mātauranga Māori.

## EU NZ negative list schedule ...

Sector	All sectors
Obligations concerned	<p>National treatment (Article 10.16 and Article 10.6)</p> <p>Local presence (Article 10.15)</p> <p>Performance requirements (Article 10.9)</p> <p>Senior management and boards of directors (Article 10.8)</p> <p>Market access (Article 10.14 and Article 10.5)</p>
Description	<p>Cross-border trade in services and investment</p> <p>New Zealand reserves the right to adopt or maintain measures it deems necessary to protect or promote Māori rights, interests, duties and responsibilities in respect of trade enabled by electronic means, including in fulfilment of its 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 as a disguised restriction on trade in services and investment.</p> <p>The Parties agree that 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.</p>

## EU NZ negative list schedule ...

Sector	All sectors
Obligations concerned	National treatment (Article 10.16 and Article 10.6) Most-favoured-nation treatment (Article 10.17 and Article 10.7) Senior management and boards of directors (Article 10.8) Performance requirements (Article 10.9)
Description	Cross-border trade in services and investment New Zealand reserves the right to adopt or maintain any measure necessary to protect national treasures or specific sites of historical or archaeological value, or measures necessary to support creative arts of national value. <sup>73</sup>

<sup>73</sup> "Creative arts" include ngā toi Māori (Māori arts), the performing arts – including theatre, dance, and music, haka (traditional Māori posture dance), waiata (song or chant) – visual arts and craft – such as painting, sculpture, whakairo (carving), raranga (weaving), and tā moko (traditional Māori tattoo) – literature, language arts, creative online content, indigenous traditional practice and contemporary cultural expression, and digital interactive media and hybrid art work, including those that use new technologies to transcend discrete art form divisions. The term encompasses those activities involved in the presentation, execution and interpretation of the arts; and the study and technical development of these art forms and activities.



## Proposed WTO JSI e-commerce exception

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### (8) Indigenous peoples

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.

#### *Paragraphs 1-2:*

- Based on text proposal by NZ.

## Current WTO JSI e-commerce exception ...

### Article 8: Indigenous Peoples

- 8.1 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.
- 8.2 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 legal, constitutional or treaty arrangements, shall not be subject to the dispute settlement provisions of this Agreement. Article 27 (Dispute Settlement) shall otherwise apply.

## IPEF Pillar 3: “clean economy” (climate change)

### Article 3: Inclusive Transitions to Clean Economies

1. The Parties acknowledge each Party’s diverse social and cultural contexts and geography. The Parties recognize that Indigenous Peoples, and local communities, as understood in each Party’s domestic framework, have an important role in the transitions to clean economies.
2. In implementing this Agreement, in accordance with domestic law and policies, each Party intends to partner with its Indigenous Peoples, and local communities, including through enabling participation and, as appropriate, drawing on their traditional knowledge and practices to enhance efforts to transition to clean economies, including the sustainable management and governance of ecosystems, forests, oceans, and waterways and the move towards sustainable agricultural practices.
3. With respect to any matter covered by this Agreement, a Party may:<sup>4</sup>
  - (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

<sup>4</sup> 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.



## USMCA ...

### **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.<sup>7</sup>

## UK NZ FTA Review Provision

### Article 15.22 Review

1. To take into account developments in digital trade, the Parties shall review the operation and implementation of this Chapter and Article 11.7 (Financial Data and Information – Financial Services) within two years of the date of entry into force of this Agreement unless the Parties agree otherwise.
2. In the context of that review, and following the release of the Waitangi Tribunal's Report Wai 2522 dated 19 November 2021, New Zealand:
  - (a) reaffirms its continued ability to support and promote Māori interests under this Agreement; and
  - (b) affirms its intention to engage Māori to ensure the review outlined in paragraph 1 takes account of the continued need for New Zealand 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.

## EU NZ FTA Review Provision

4. The Parties shall keep the implementation of this Article under review and assess its functioning within three years after the date of entry into force of this Agreement unless the Parties agree otherwise. A Party may also at any time propose to the other Party to review this Article. Such request shall be accorded sympathetic consideration.
5. In the context of the review referred to in paragraph 4, and following the release of the Waitangi Tribunal's Report Wai 2522 dated 19 November 2021, New Zealand:
- (a) reaffirms its continued ability to support and promote Māori interests under this Agreement; and
  - (b) affirms its intention to engage Māori to ensure the review referred to in paragraph 4 takes account of the continued need for New Zealand 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.

## Current status of Tiriti exceptions

**GATS** – “commercial undertakings”  
limitation

**Most FTAs + JSI e-commerce:** 2001  
Treaty Exception

**EU FTA** special carveout for digital chapter  
and services negative list

**IPEF Pillar 2** (supply chains) and 4 (tax,  
corruption) 2001 Treaty Exception

**IPEF Pillar 3** (“clean economy” no Treaty  
exception, meaningless provision





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Waitangi Tribunal Claim on TPPA  
(Wai-2522) e-commerce chapter:  
Implications for Digital Policy,  
Trade Policy & Negotiations



the Crown must actively protect Māori **rights, interests & responsibilities**, not just be concerned with advancing Māori business and exporters' interests.

*“We are assessing the risk to **Māori interests** that arises from aspects of the e-commerce chapter.” (185)*

*“The **balance between opportunity and threat** to Māori interests is at the heart of our focus in this report. (35)*

*“The crux of the issue for this inquiry is the **nexus between** the e-commerce provisions of the **TPPA/CPTPP** and Aotearoa New Zealand's **domestic policy context**. ...” (65)*



## E-commerce chapter impacts on fundamental Tiriti rights

*“at the heart of the e-commerce issue explored in this report is the question of governance and control of Māori data”*

*which involves “matters fundamental to Māori identity, such as whakapapa, mana, mauri and mātauranga. ...*

*Perhaps the most fundamental of te Tiriti/the Treaty guarantees to Māori is of the right to cultural continuity.*

*This is nothing less than the right to continue to organise and live in Aotearoa New Zealand as Māori in accordance with tikanga Māori.”(180-2)*



# Crown/MFAT did not think e-commerce was a Tiriti issue

*“We see as particularly problematic the [Crown’s] failure to appreciate or understand **the link between data and mātauranga Māori** .. in respect of which the Crown has a duty of active protection.” (p.174)*

*“We conclude that Maori rights and interests **were not given much (or any) particular consideration** in setting the **negotiating mandate**.” ...*

*“ These provisions [eg localisation of data] were adopted with **minimal or no consideration of Māori rights** and interests guaranteed in Te Tiriti/the Treaty.” (174)*





# Crown is obliged to protect domestic policy space to meet its Tiriti obligations into the future

*“It appears to us that when the Crown settled its **e-commerce negotiation mandate** in the TPPA/CPTPP it did so on the basis of endeavouring to preserve consistency with **existing policy settings**. ...*

*We believe the Crown’s duty of active protection in this instance warranted **a more proactive and forward-looking stance**.” (188)*

*“It is precisely the fact that [Māori] interests might need be defended that make Māori interests vulnerable [in the CPTPP] ... and highlights that **before entering such agreements the necessary domestic measures should be developed** with Māori involvement” (149)*



# Existing CPTPP “protections” are inadequate and prejudice Māori rights

*“We are **not convinced that reliance on exceptions and exclusions** [which includes the Treaty of Waitangi Exception] **is sufficient to meet the active protection standard.***

...

*“We conclude that there is a **material risk of regulatory chill and risk arising from the precedent and ratchet effect of the CPTPP e-commerce provisions.**” (185)*



*“Because mātauranga Māori is at the heart of Māori identity it is **not an interest or consideration that is readily amenable to some form of balancing exercise** when set **against other trade objectives, or the interests of other citizens or sectors.**”*

*“It is certainly **not a matter the Crown can or should decide unilaterally.***

*...*

*However hard it may be, the question of the **appropriate level of protection for mātauranga Māori in international trade agreements, and the governance of the digital domain, is first and foremost a matter for dialogue between te Tiriti/the Treaty partners.**” (174)*



Ngā Toki Whakarururanga was created through a Wai 2522 Mediation Agreement

The Crown promised it will have “**genuine influence** on trade policy” at all stages of negotiations

But MFAT **continues to negotiate** multiple new free trade agreements with “digital trade” rules along the lines of those challenged in Wai 2522.

The **outcomes vary depending** on the Crown’s priorities:

In practice, the **bad agreements close off the spaces** kept open by the good ones.

**Very few Māori know** how these “trade” agreements handcuff Tiriti-based digital policies.

**Crown officials don’t understand** it either.

Despite that, the **Crown said no to a Kaupapa Māori process** to address these questions.

Instead, it **hid behind a general “digital trade policy”** review that ignores these issues.

**So we need to build awareness to put pressure on the Crown to “stop” and “undo”.**



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