DEEP DIVE ON DIGITAL TRADE RULES & TE TIRITI

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Whanaungatanga Ko wai koe? What does rangatiratanga mean to you in the digital space? What are Free Trade Agreements and why do powerful capitalist states and big corporations like them? As international treaties they can be:

- bilateral, plurilateral, regional, multilateral
- subject specific or multi-chapter
- closed or open to others acceding

Governed by Vienna Convention on Law of Treaties

Powerful states and corporations like them cos

- Cement in capitalist worldviews
- Privilege corporate over other factors
- Binding at international law
- Usually enforceable, with economic penalties
- Negotiated in secret
- Corporate lobbyists have influence, esp in US
- Executive treaty making for some
- Once a template created it is hard to shift

OVERVIEW OF US DIGITAL TRADE RULES EVOLUTION

US included light e-commerce rules in trade agreements from late 1990s TPPA was 1st major negotiation with e-commerce chapter, began 2010. Retained in CPTPP (TPPA minus US) Other agreements followed TPPA & expanded the template, eg Sing/AU, USMCA, EU FTAs, Digital Economic Partnership Agreement Dissension is growing: RCEP is not enforceable, US is backtracking in IPEF, WTO ecommerce is stuck over core rules

Mapping NZ's main digital FTAs & negotiations

Trans-Pacific Partnership Agreement (TPPA) 2016/ (Comprehensive & Progressive Agreement for Trans-Pacific Partnership (CPTPP) TPPA e-commerce chapter unchanged

Digital Economic Partnership Agreement with Chile, Singapore, 2021. Modules, incorporating CPTPP rules Regional Comprehensive Economic Partnership 2021, no data, source code, unenforceable.

WAI 2522 REPORT

UK NZ FTA 2022 Digital trade chapter similar to TPPA

WTO JSI on E-Commerce, part stalled, may have part 1 EU NZ FTA 2024, Digital Trade chapter based on EU model, similar, with EU emphasis on privacy

> Indo-Pacific Economic Framework, stalled

ASEAN Australia NZ FTA upgrade 2024 (before select committee

UAE FTA under rapid negotiation

TPPA set the
template,
templated by
Big Tech

US lead "e-commerce" negotiator was Robert Holleyman, President of Business Software Alliance (BSA) 1990-2013.

Described TPPA as: *"The most ambitious and visionary Internet trade agreement ever attempted".*

Based on "Digital 2 Dozen" principles that codified the Big Tech lobbies' wish-list.

US BIG TECH'S "DIGITAL 2 DOZEN" PRINCIPLES IN TPPA

<u>https://ustr.gov/sites/defaul</u> <u>t/files/Digital-2-Dozen-</u> <u>Final.pdf</u>

Small group discussion – what are the main issues these raises for Māori

"Free and open" Internet No digital customs duties Non-discrimination Unimpeded cross-border data flows No localisation barriers No forced technology transfers Protecting source code Using technology of choice Foster innovative encryption Market driven standardisation & interoperability Robust commitments on cross-border digital services *Participate in developing regulations & standards* Strong IP protection Enforceable consumer protections

What chapters of FAs are relevant to digital?

ELECTRONIC COMMERCE/DIGITAL TRADE (relatively new)

TRADE IN SERVICES chapters, including FINANCIAL and TELECOMMUNICATIONS services (since 1989)

INVESTMENT chapters (incl investor-state dispute settlement ISDS)

> INTELLECTUAL PROPERTY (marginal)

INITIAL PROVISIONS, EXCEPTIONS, TRANSPARENCY, DISPUTE SETTLEMENT

What most e-commerce/digital trade chapters look like

Digital trade chapters usually have these elements

general principles, scope, definitions trade facilitation (paperless trading, esignatures, e-authentication)

data location (not transfer offshore, must use local facilities)

digital regulation (source code/algorithms, privacy, consumers, spam, cryptography, regulatory framework, transparency)

security (national and cyber)

revenue (customs duty moratorium, tax of digital transactions)

institutional arrangements (committee, cooperation, future negotiations)

Core "digital trade" rules in the ecommerce/digital trade chapter NG<mark>a</mark> toki Whaka<u>ruru</u>ranga

Not restrict data transfer offshore Not require data is held in **source country** Not require **source code/algorithm** disclosure Not require use of **local content** Not **discriminate** between local and foreign firms Not hold online platforms liable for 3rd party content No tariffs on electronic transmissions **Prior consultation** before introducing measures [Not require employment if access **proprietary**] knowledge]

Core "digital trade" rules in other chapters [tomorrow]

Services chapter:

Not restrict **cross-border services** Not require offshore providers to have **local presence** (services chapter) Not require particular **legal form** of a local presence Not restrict financial and telecom **data**

Investment chapter: No technology transfer Not deprive of value of investment Investor-state dispute settlement

IP chapter:

Not cap **cross-border royalty** payments Trade secrets



The chapter applies to:

- measures (anything a govt does)
- adopted or maintained (exists or adopted later)
- by a Party
- that affect (has an affect on)
- trade by electronic means.

Scope

TPPA

Article 14.2 This chapter shall apply to measures adopted or maintained by a Party that affect trade by electronic means.

Article 1.3 Definitions: Measure includes any law, regulation, procedure, requirement or practice.

Does not apply to government procurement, but limited coverage

- 3. This Chapter shall not apply to:
 - (a) government procurement; or
 - (b) information held or processed by or on behalf of a Party, or measures related to such information, including measures related to its collection.

government procurement means the process by which a government obtains the use of or acquires goods or services, or any combination thereof, for governmental purposes and not with a view to commercial sale or resale or use in the production or supply of goods or services for commercial sale or resale;

And does not apply to <u>some</u> government information

- 3. This Chapter shall not apply to:
 - (a) government procurement; or
 - (b) information held or processed by or on behalf of a Party, or measures related to such information, including measures related to its collection.

Data location and use is the most controversial issue with major implications for Māori data sovereignty and digital governance

TPPA AND NZ UK FTA

Cross-Border Transfer of Information by Electronic Means

- 1. The Parties recognise that each Party may have its own regulatory requirements concerning the transfer of information by electronic means.
- 2. Each Party shall allow the cross-border transfer of information by electronic means, including personal information, if this activity is for the conduct of the business of a covered person.

Article 15.15 Location of Computing Facilities

2. Neither Party shall require a covered person to use or locate computing facilities in that Party's territory as a condition for conducting business in that territory.

NZ UK FTA

- 3. Nothing in this Article shall prevent a Party from adopting or maintaining a measure inconsistent with paragraph 2 to achieve a legitimate public policy objective, provided that the measure:
 - (a) is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade; and
 - (b) does not impose restrictions on transfers of information greater than are required to achieve the objective.

Cross-border data flows

NZ EU FTA

 The Parties are committed to ensuring cross-border data flows to facilitate trade in the digital economy and recognise that each Party may have its own regulatory requirements in this regard.
In the context of activity that is within the scope of this Chapter, by:

- (a) requiring the use of computing facilities or network elements in its territory for data processing, including by requiring the use of computing facilities or network elements that are certified or approved in the territory of the Party;
- (b) requiring the localisation of data in its territory;
- (c) prohibiting storage or processing of data in the territory of the other Party; or
- (d) making the cross-border transfer of data contingent upon the use of computing facilities or network elements in its territory or upon localisation requirements in its territory.

Proposals in WTO JSI on E-commerce

6. [**Alt 1:**

Nothing in this Article shall prevent a [Party/Member] from adopting or maintaining [a measure/measures] inconsistent with paragraph 5 [that is necessary] to achieve a legitimate public policy objective, provided that the measure:

- (a) is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade [; and
- (b) does not impose restrictions on transfers of information greater than are [necessary/required] to achieve the objective.]]

[Alt 2:

[Parties/Members] may adopt and maintain the safeguards they deem appropriate to ensure the protection of personal data and privacy, including through the adoption and application of rules for the cross-border transfer of personal data. Nothing in the agreed disciplines and commitments shall affect the protection of personal data and privacy afforded by the [Parties'/Members'] respective safeguards.]

6*bis*. For greater certainty, legitimate public policy objectives include the protection or promotion of the rights, interests, duties and responsibilities of indigenous peoples.

Source code and algorithms are also critical and controversial, including now with Al

TPPA

Article 14.17: Source Code

1. No Party shall require the transfer of, or access to, source **code** of software owned by a person of another Party, as a condition for the import, distribution, sale or use of such software, or of products containing such software, in its territory.

2. For the purposes of this Article, software subject to paragraph 1 is limited to mass-market software or products containing such software and does not include software used for critical infrastructure.

- 3. Nothing in this Article shall preclude:
 - (b) a Party from requiring the modification of source code of software necessary for that software to comply with laws or regulations which are not inconsistent with this Agreement.

NZ EU FTA

Transfer of or access to source code

1. The Parties recognise the increasing social and economic importance of the use of digital technologies, and the importance of the safe and responsible development and use of such technologies, including in respect of source code of software to foster public trust.

2. A Party shall not require the transfer of, or access to, the source code of software owned by a person of the other Party as a condition for the import, export, distribution, sale or use of such software, or of products containing such software, in or from its territory.¹

4. Nothing in this Article shall:

- (a) affect the right of regulatory authorities, law enforcement, judicial or conformity assessment bodies of a Party to access source code of software, either prior to or following import, export, distribution, sale or use, for investigation, inspection or examination, enforcement action or judicial proceeding purposes, to determine compliance with its laws and regulations, including those relating to non-discrimination and the prevention of bias, subject to safeguards against unauthorised disclosure;
- (b) affect requirements by a competition authority or other relevant body of a Party to remedy a violation of competition law;

USMCA on source code & algorithms

Article 19.16. Source Code

1. No Party shall require the transfer of, or access to, source code of software owned by a person of another Party, or to an algorithm expressed in that source code, as a condition for the import, distribution, sale or use of that software, or of products containing that software, in its territory.

2. Nothing in this Article shall preclude a regulatory body or judicial authority of a Party from requiring a person of another Party to preserve and make available the source code of software, or an algorithm expressed in that source code, to the regulatory body for a specific investigation, inspection, examination enforcement action or judicial proceeding⁷, subject to safeguards against unauthorized disclosure.

Individual privacy and consumer protection are identified as special concerns, but are individualised and don't address Indigenous Peoples' concerns

NZ UK FTA: Personal Information Protection

"personal information" means information, including data, about an identified or identifiable natural person;

- 2. Each Party shall adopt or maintain a legal framework that provides for the protection of the personal information of the users of digital trade. In the development of its legal framework for the protection of personal information, each Party shall take into account principles and guidelines of relevant international bodies.
- 3. The Parties recognise that the principles underpinning a robust personal information protection framework include:

Online consumer protection, **TPPA**

Article 14.7: Online Consumer Protection

1. The Parties recognise the importance of adopting and maintaining transparent and effective measures to protect consumers from fraudulent and deceptive commercial activities as referred to in Article 16.7.2 (Consumer Protection) when they engage in electronic commerce.

2. Each Party shall adopt or maintain consumer protection laws to proscribe fraudulent and deceptive commercial activities that cause harm or potential harm to consumers engaged in online commercial activities.

3. The Parties recognise the importance of cooperation between their respective national consumer protection agencies or other relevant bodies on activities related to cross-border electronic commerce in order to enhance consumer welfare. To this end, the Parties affirm that the cooperation sought under Article 16.7.5 and Article 16.7.6 (Consumer Protection) includes cooperation with respect to online commercial activities.

Non-discrimination in favour of local products or producer, eg support for start ups or kaitiaki roles, eg te reo

Article 14.4: Non-Discriminatory Treatment of Digital Products

1. No Party shall accord less favourable treatment to digital products created, produced, published, contracted for, commissioned or first made available on commercial terms in the territory of another Party, or to digital products of which the author, performer, producer, developer or owner is a person of another Party, than it accords to other like digital products.⁴

2. Paragraph 1 shall not apply to the extent of any inconsistency with the rights and obligations in Chapter 18 (Intellectual Property).

3. The Parties understand that this Article does not apply to subsidies or grants provided by a Party including government-supported loans, guarantees and insurance.

4. This Article shall not apply to broadcasting.

US seeks to shield platforms from 3rd party liability; controversial US law now and give access to government information

Article 19.17: Interactive Computer Services

1. The Parties recognize the importance of the promotion of interactive computer services,

including for small and medium-sized enterprises, as vital to the growth of digital trade.

2. To that end, other than as provided in paragraph 4 below, no Party shall adopt or maintain measures that treat a supplier or user of an interactive computer service as an information content provider in determining liability for harms related to information stored, processed, transmitted, distributed, or made available by the service, except to the extent the supplier or user has, in whole or in part, created, or developed the information.⁸

3. No Party shall impose liability on a supplier or user of an interactive computer service on account of:

- (a) any action voluntarily taken in good faith by the supplier or user to restrict access to or availability of material that is accessible or available through its supply or use of the interactive computer services and that the supplier or user considers to be harmful or objectionable; or
- (b) any action taken to enable or make available the technical means that enable an information content provider or other persons to restrict access to material that it considers to be harmful or objectionable.
- 4. Nothing in this Article shall:
 - (a) apply to any measure of a Party pertaining to intellectual property, including measures addressing liability for intellectual property infringement; or

WTO JSI includes this on "open government data"

(2) Open government data

- 1. For the purposes of this Article, "metadata" means structural or descriptive information about data, such as content, format, source, rights, accuracy, provenance, frequency, periodicity, granularity, publisher or responsible party, contact information, method of collection and context.
- 2. This Article applies to measures by a Party with respect to data held by the central government, disclosure of which is not restricted under domestic law, and which a Party makes digitally available for public access and use (hereafter referred to as "government data")³.
- 3. Parties recognize the benefit of making data held by a regional or local government digitally available for public access and use in a manner consistent with paragraphs 3 to 5.
- 4. Parties recognise that facilitating public access to and use of government data fosters economic and social development, competitiveness, and innovation. To this end, Parties are encouraged to expand the coverage of such data, such as through engagement and consultation with interested stakeholders.
- 5. To the extent that a Party chooses to make government data digitally available for public access and use, a Party shall endeavour, to the extent practicable, to ensure that such data is:
 - (a) made available in a machine-readable and open format;
 - (b) searchable and retrievable;
 - (c) updated, as applicable, in a timely manner; and
 - (d) accompanied by metadata that is, to the extent possible, based on commonly used formats that allow the user to understand and utilise the data.
- 6. A Party shall further endeavour to make this data generally available at no or reasonable cost to the user.

DAY TWO

- **1. Trade in Services**
- 2. Exceptions and Reviews
- 3. Ngā Toki Whakarururanga and Wai 2522 Inquiry
 - on TPPA/CPTPP and e-commerce rules



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