

# **DIGITAL TRADE RULES & TE TIRITI: Legal 101**

(Note some minor changes to recorded version)

**NGĀ TOKI  
WHAKARURURANGA**

# EVOLUTION OF E-COMMERCE/DIGITAL TRADE RULES

US included light e-commerce rules in trade agreements from late 1990s

TPPA was 1<sup>st</sup> 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 e-commerce is stuck over core rules



**Big Tech designed  
the TPPA template**

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

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

- *"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*



**Wai 2522**  
**TPPA was a Tiriti**  
**breach**

“The Crown must **actively protect Māori rights, interests & responsibilities**, not just be concerned with advancing Māori business and exporters’ interests.”

“ 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)

“We are **not convinced that reliance on exceptions and exclusions** [including the Treaty of Waitangi Exception] **is sufficient** to meet the active protection standard. ... (185)

**What most e-commerce/digital trade  
chapters look like**



**Scope:**  
**e-commerce/ digital**  
**trade chapter**

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**.

Not apply to:

- **government procurement** (kind of)
- info held or processed by or on behalf of **government**

Complicated **cross-over to cross-border services** chapter

## Digital trade chapters usually have these elements

- **general** principles, scope, definitions
- **trade facilitation** (paperless trading, e-signatures, e-authentication)
- **data location** (not transfer offshore, must use local facilities)
- **digital regulation** (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, but not all in the  
e-commerce/digital  
trade chapter

- Not restrict **data transfer** offshore
- Not require data is held in **source country**
- Not require offshore providers to have **local presence**
- Not require particular **legal form** of a local presence
- Not require **source code/algorithm** disclosure
- Not require use of **local content**
- Not **discriminate** between local and foreign firms
- Hold online platforms **liable for 3<sup>rd</sup> party content**
- Not require employment if access **proprietary knowledge**
- Not cap **cross-border royalty** payments in related parties’ contracts
- No **technology transfer**
- No **tariffs on electronic transmissions**
- **Prior consultation** before introducing measures

**What the most critical provisions look like, based on UK and EU NZ FTAs:**

- **Data transfer & local storage**
- **Source code**
- **Personal information**
- **Local presence**

## 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.

## NZ Proposal 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.

## NZ EU FTA

### Cross-border data flows

1. 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.
2. To that end, a Party shall not restrict cross-border data flows taking place between the Parties 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.

## 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:**

## 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.<sup>1</sup>

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;

## NZ UK FTA Cross-border services chapter

### **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.

## 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.

## Enforcement & penalties

- Alleged breach is subject to **consultation**
- If not resolved complainant state refer it to a **dispute panel**
- The “judges” are **trade experts**
- **Complainant** state must **show a breach** of FTA rules
- **Respondent** state must **show an exception** applies
- If a breach is found, respondent state must
- **end the breach**;
- Until it does so, it **may face sanctions** against exports to value of loss to the complainants’ firms

# 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.



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

INF/ECOM/62/Rev.4

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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.

## 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.

**Digital trade rules  
continue to be  
negotiated,  
including in**

- US-driven Indo-Pacific Economic Framework (IPEF)
- Review of CPTPP
- WTO E-commerce
- Digital Economic Partnership Agreement
- new agreements and review of existing FTAs

# NGĀ TOKI WHAKARURURANGA

## WHAT NEXT?

Ngā Toki Whakarururanga is:

- developing pānui that are educational resources on digital trade and FTAs;
- hosting online webinars;
- planning a on-line hui to develop a strategy on this;
- planning to co-host with Data Iwi Leaders Group a hui for Māori on data sovereignty and digital trade agreements early next year;
- aiming for a Crown/Māori hui to debate this Kaupapa.

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WHAKARURURANGA**

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