

Between Innovation and Precedent

the Treaty of Waitangi exception clause in Aotearoa New Zealand's free trade agreements

Abstract

New Zealand includes a Treaty of Waitangi exception clause in all its free trade agreements. The clause aims to protect Māori interests arising from the government's Treaty of Waitangi obligations. But despite changes to New Zealand's trade agreements, an evolving relationship between the New Zealand government and Māori, and debate over the adequacy of the clause, the exception clause has remained unchanged for 20 years. We suggest that the reproduction the same text helps New Zealand

negotiators to credibly argue that inclusion of the clause is required for domestic political reasons. Yet this textual stability also hinders innovation. At the international level, FTA partners might balk at any widening of policy discretion afforded by a revised clause. At the domestic level, revising the clause would require difficult debate over the extent of appropriate protections for Māori in New Zealand's trade agreements. As calls to change the exception clause grow, New Zealand trade policymakers will need to carefully balance innovation and precedent.

Keywords trade policy, Treaty of Waitangi, path dependence, New Zealand, Crown–Māori relations

Since the 2001 agreement with Singapore, the Treaty of Waitangi exception clause has featured in all of Aotearoa New Zealand's free trade agreements (FTAs). The Treaty exception is designed to ensure that an FTA's terms do not prevent the New Zealand government from granting preferential

treatment to Māori in areas relating to the FTA, including as part of meeting its obligations to Māori under the Treaty of Waitangi (see Figure 1). The clause is a 'general exception' to FTA rules, as it provides an allowable escape from commitments in any of the issue-areas

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covered by the FTA. From the perspective of Aotearoa's Crown–Māori relations, such a clause would seem an important part of the Crown's protection of Māori interests in relation to international trade and a reinforcement of Crown commitments to Māori under the Treaty of Waitangi.

Yet, since its inception, the clause has attracted controversy. The (opposition) National Party opposed its first use in the Singapore FTA, with leader Jenny Shipley vowing to rescind the clause should National win the next election (Hoadley, 2002, p.50). In 2015, backlash from the New Zealand public and Māori against the Trans-Pacific Partnership (TPP) included concern about the adequacy of the government's ability to protect Māori rights and interests. Debate over the Trans-Pacific Partnership culminated in a Waitangi Tribunal inquiry (Waitangi Tribunal, 2016). Meanwhile, New Zealand has begun to include 'indigenous trade' clauses and chapters in its FTAs, indicating the growing importance of acknowledging, advancing and protecting Māori economic and trade interests. The 2022 New Zealand-United Kingdom and New Zealand-European Union FTAs go furthest in this regard.¹ Despite these shifts in the domestic social and political context and questions over the adequacy of the exception, the clause has remained almost identical since 2001.

There have been several legal analyses of the Treaty exception (Kawharu, 2016, 2020), as well as evaluation by the Waitangi Tribunal (2016, 2021). There has been less discussion of the clause from a politics perspective. Given debate over the adequacy of the clause and the growing incorporation of Māori economic and trade interests in FTA negotiations, we ask two questions: why was the Treaty exception developed; and why has it remained unchanged? We suggest that the reproduction of the same text helps New Zealand negotiators to credibly argue that inclusion of the exception is required for domestic political reasons. But textual stability also hinders innovation. At the international level, FTA partners might challenge a widening of the policy discretion afforded by a broader clause. At the domestic level, retention of the status quo sidesteps debate over the extent of

Figure 1: The Treaty of Waitangi exception clause, as proposed during negotiations for the Digital Economic Partnership Agreement (Ministry of Foreign Affairs and Trade, 2019)

Text for DEPA: Treaty of Waitangi

1. 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, trade in services and investment, nothing in this Agreement shall preclude the adoption by New Zealand of Maori 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. [Cross reference TBC] shall otherwise apply to this Article. A panel established under [Cross reference TBC] may be requested to determine only whether any measure referred to in paragraph 1 is inconsistent with a Party's rights under this Agreement.

appropriate protections for Māori in New Zealand's trade agreements. These competing incentives for change and stasis mean New Zealand trade policymakers are caught between innovation and precedent. We discuss New Zealand's FTA programme and the creation of the Treaty exception, before developing our argument.

New Zealand's FTA programme

New Zealand's first contemporary FTA was the 1983 Australia–New Zealand Closer Economic Relations and Trade Agreement (ANZCERTA, commonly known as CER). CER marked a policy shift by the Ministry of Foreign Affairs and Trade towards unilateral, bilateral and regional liberalisation as complements to multilateralism, the latter having failed to produce meaningful agricultural market liberalisation (Castle, Le Quesne and Leslie, 2016, p.50; Ministry of Foreign Affairs and Trade, 1993; Leslie, 2015). New Zealand subsequently negotiated a comprehensive trade agreement with Singapore between 1999 and 2000, followed by agreements with Thailand (2005), Chile and Brunei (and Singapore again) in the P4 Agreement (2006), China (2008), Malaysia (2010),

Hong Kong (2011), ASEAN (jointly with Australia, 2012), Taiwan (2013), South Korea (2015), 11 other Asia-Pacific partners in the Trans-Pacific Partnership (signed in 2016; renamed and slightly revised as the 2018 Comprehensive and Progressive Agreement on Trans-Pacific Partnership (CPTPP) following the withdrawal of the United States),² members of the Regional Comprehensive Economic Partnership (RCEP, 2020),³ Pacific Island countries in the trade and development-focused Pacific Agreement on Closer Economic Relations Plus (PACER Plus),⁴ members of the Digital Economic Partnership Agreement (DEPA, 2021),⁵ the United Kingdom (2022) and the European Union (2022).

Several themes are evident in New Zealand's trade politics. First, trade negotiators have enjoyed broad public support for liberalisation. New Zealand is a small country whose economic prosperity has relied on market access for its exports, and trade negotiations have largely been a bipartisan affair between the major National and Labour parties, although smaller parties (notably the Green Party) have opposed trade agreements, and bipartisanship was eroded during the TPP

negotiations (Hoadley, 2017; Kawharu, 2016, p.295).

Second, in line with global trends (Dür, Baccini and Elsig, 2014; Milewicz et al., 2018), New Zealand's FTA commitments have become increasingly 'deep', addressing behind-the-border, or non-tariff, issues. The 1983 CER agreement was a comprehensive, but standard, agreement to liberalise trade in goods. Subsequent agreements have become increasingly ambitious in their effort to address non-tariff barriers to trade (in goods and services) and investment.

Third, domestic opposition to further liberalisation has largely focused on these new, behind-border issues, and negotiators have sought to balance liberalisation of trade and investment with safeguards to ensure domestic policy space (Kawharu and Nottage, 2017, pp.468–9). This increasing reach of FTAs behind borders has animated trade politics in New Zealand, as it has globally (Castle and Pelc, 2019). Illustratively, investor–state dispute settlement (ISDS) has become one of the most hotly contested issues in the contemporary trade regime (Pelc, 2017), and there was considerable domestic opposition to the inclusion of ISDS in the investment chapter of the 2015 Korea–New Zealand FTA. New Zealand negotiators reportedly opposed the clause, but Korean negotiators insisted on its inclusion, citing the need for consistency with their prior FTAs (Foreign Affairs, Defence and Trade Committee, 2015, p.5). ISDS, as well as other non-tariff issues, such as indigenous flora and fauna and digital trade, were also of central concern for opponents of the TPP, including claimants before the Waitangi Tribunal.

Development of the Treaty exception

The development of the Treaty of Waitangi exception clause can be seen in the context of the desire to balance liberalisation with safeguards for domestic policy space. As New Zealand's modern FTA negotiation programme was being launched in the late 1990s, another set of negotiations was gaining momentum: those to settle breaches of the Treaty of Waitangi. Following the 1985 decision to allow the Waitangi Tribunal to hear historic Treaty claims and the growing number of claims

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in the early 1990s, policymakers were increasingly aware of a shifting domestic political landscape in which the precise nature of the relationship between Crown and Māori was evolving, and in which the political import of the Treaty was still becoming apparent. For instance, a 1990 Waitangi Tribunal report (WAI 26, WAI 150) recommended the provision of FM radio frequencies for Māori broadcasting in Auckland and Wellington; parliamentary debate in 2000 pointed to preferential access for Māori to the radio spectrum as rationale for the 'more favourable treatment' wording of the exclusion clause (although, as noted below, this wording has an antecedent in the GATS).⁶

In this context, policymakers needed to ensure that they did not unintentionally limit the Crown's discretion, since '[t]he Treaty is ... useful as a political framework for self-determination *only to the extent that governments are effective agents of change*' (O'Sullivan, 2008, p.319, emphasis added). The desire to retain policymaking discretion was evident as early as the mid-

1990s. The contemporary clause dates to the late 1990s and the (re)launch of New Zealand's FTA programme with Singapore (Hoadley 2002, pp.48–50; Kawharu, 2020, p.278). But it was foreshadowed in New Zealand's schedule of commitments to the World Trade Organization General Agreement on Trade in Services (GATS), which carves out as a general exception to national treatment obligations 'current and 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' (World Trade Organization, 1994, p.6).

The National Party opposition argued that Māori interests arising out of governmental Treaty obligations would be better managed within a domestic setting, rather than through international rules (Kawharu, 2020, p.279, note 1). Yet momentum had built up around the development of the exception clause, notably during a period of active consultation between the government and Māori, advocated by Māori. Consultation hui were held in relation to multilateral and bilateral trade agreements (including the Singapore FTA), and in 2000 Cabinet approved an engagement strategy with Māori on international treaties (jointly developed by Te Puni Kōkiri and the Ministry of Foreign Affairs and Trade) (Jones et al., 2015). The strategy acknowledged Māori rights and interests in areas such as foreign investment, genetic resources, intellectual property, flora and fauna, use of natural physical resources and indigenous rights. Subsequent to this engagement, the modern Treaty exception was developed and debuted in the New Zealand–Singapore FTA in 2001.

While the Treaty exception has been replicated in all New Zealand FTAs, it has also attracted criticism. Claims were lodged against the New Zealand government through the Waitangi Tribunal during the domestic backlash against the Trans-Pacific Partnership.⁷ The issues before the Tribunal were:

- whether or not the Treaty of Waitangi exception clause is indeed the effective protection of Māori interests it is said to be; and

- what Māori engagement and input is now required over steps needed to ratify the TPPA (including by way of legislation and/or changes to Government policies that may affect Māori). (Waitangi Tribunal, 2016, pp.2–3)

The government contended that the TPP had minimal effect on Māori interests as they were not central to the TPP, and that where Māori interests were impacted, it affected only interests held as investors, businesses and landowners. The Crown stated the TPP was ‘a natural progression from previous trade agreements, albeit on a larger scale’ (ibid., p.3), and Crown counsel maintained that the Treaty exception would provide a sufficient degree of protection for Māori interests if a legal challenge arose through ISDS. Meanwhile, the Māori claimants argued that the TPP differed significantly from other international treaties, which could be prejudicial to Māori. Claimants were also concerned that ‘entry into the TPPA will diminish the Crown’s capacity and willingness to fulfill its Treaty obligations to Māori’ and worried about ‘the potential chilling effect such actual or potential litigation may have on Government action’ (ibid, p.34).⁸

While the Crown maintains that the Treaty exception provides sufficient protection, legal experts have questioned this. Kawharu has argued that the Treaty exception is flawed because the meaning of ‘more favourable treatment to Māori’ is unclear, as there is no ‘relevant comparator’ available for proposed measures, and it is uncertain whether the Treaty exception would protect Māori interests if faced with ISDS proceedings. Moreover, the wording of the exception restricts its scope, and may not cover measures that are ‘distinct’ but do not equate to ‘more favourable treatment’ to Māori. Finally, the term ‘more favourable treatment’ fails to recognise the status of Māori as a Treaty partner (Kawharu, 2016, pp.304–6).

The Tribunal decided that, in its current form, the Treaty exception does provide ‘a reasonable degree of protection to Māori interests by the TPPA’. However, the Tribunal also expressed its concerns that the government ‘had misjudged the nature, extent and relative strength of Māori

The Waitangi Tribunal (and some legal experts) commended the New Zealand government on the Treaty exception in the first instance, and in particular on ensuring its acceptance during the TPP negotiations ...

interests put in issue under the TPPA’ (Waitangi Tribunal, 2016, pp.51–4). While it made no recommendations, the Tribunal encouraged dialogue between the New Zealand government and Māori to establish procedures if an ISDS dispute were to eventuate, which would require the Treaty exception (ibid., p.57). This position was largely reiterated in a subsequent (2021) Tribunal report.

Why no change to the Treaty exception?

Why has the Treaty exception remained virtually the same, despite contention over the adequacy of the clause and substantial innovation elsewhere in New Zealand’s free trade programme? We argue that while there are demands for change to the clause (as referenced above), there are also considerable costs associated with changing it. The concept of ‘path dependence’ provides a useful framework

for understanding the challenges of changing the Treaty exception, and insights from new research on international treaty drafting suggest how the power of established legal text supports countries’ bargaining positions.

Paul Pierson has described how (even imperfect) policy may be replicated when diverting from a chosen policy path is perceived as too costly (Pierson, 2000, p.252). Pierson emphasises the notion of increasing returns: that is, the longer a policy is in place, the more the beneficiaries of that policy stand to lose from change. This accords with recent research on trade negotiations. States replicate (often verbatim) prior text that aligns with domestic preferences (Allee and Elsig, 2019). Indeed, prior legal text can create a powerful ‘precedent’ that can shape negotiating outcomes (Castle, 2022; Crump and Moon, 2017), for instance by acting as a focal point and signalling to negotiation partners what will be agreeable to domestic audiences (Castle, 2022, pp.5–7).

We see the power of precedent at play with the Treaty exception. First, there is ongoing support (albeit qualified in some quarters and tacit in others) for the New Zealand government’s approach. The Waitangi Tribunal did not call on the New Zealand government to revise the clause, which has allowed the retention of the Treaty exception in its current form. There have been no further Tribunal claims lodged involving the Treaty exception; thus there is no imminent threat of domestic litigation to compel the New Zealand government to review the clause. Indeed, it is noteworthy that the New Zealand government has been successful in establishing the clause and in ensuring its replication (presumably against at least some degree of reluctance from trading partners). The Waitangi Tribunal (and some legal experts) commended the New Zealand government on the Treaty exception in the first instance, and in particular on ensuring its acceptance during the TPP negotiations, ‘given the number and diversity of the participating states’ (Waitangi Tribunal, 2016, p.43).

Precedent, and the re-use of established text, helps to explain New Zealand negotiators’ success in retaining the Treaty exception. In ‘non-papers’ prepared for

FTA partners, Ministry of Foreign Affairs and Trade negotiators emphasise how the Treaty exception is a non-negotiable aspect of New Zealand's FTA practice, and stress that the clause has remained the same in all New Zealand FTAs. The relevant paper for the DEPA negotiations, for instance, notes that 'the text used for DEPA is the same as text in the P4, CPTPP and Singapore–New Zealand FTA', and that all 'of New Zealand's free trade agreements (FTAs) since 2000 include a provision (referred to as the "Treaty of Waitangi exception")' that addresses the need for New Zealand to 'retain flexibility for successive governments to implement domestic policies of their choice in relation to Māori, including in fulfilment of the Crown's obligations under the Treaty, without being obliged to offer equivalent treatment to persons of other countries' (Ministry of Foreign Affairs and Trade, 2019). Such appeals to precedent and to genuine domestic preferences strengthen New Zealand negotiators' hand when pushing for inclusion of a clause that provides an unparalleled degree of policy discretion for New Zealand: no other country has a comparably broad general exception to their trade commitments.

Were New Zealand negotiators to negotiate a new (even broader) clause, they would not be able to rely on the power of precedent; opening up the exception's wording to negotiation might enable other countries to 'impos[e] changes which might be harmful to Māori interests' (Waitangi Tribunal, 2016, p.37). As Crown counsel explains, precedent is central to acceptance of the clause during negotiations: New Zealand negotiators '[use] that previous acceptance by other states to encourage further states to accept [the clause]' (ibid.). There may additionally be some risk that amending the clause would cast uncertainty about the nature of the protections afforded by the previous wording.

There are costs to change associated with domestic politics as well. The 2011 WAI 262 Tribunal report *Ko Aotearoa Tēnei* established that the New Zealand government should achieve 'a reasonable degree of protection [for Māori interests] when those interests are affected by international instruments entered into by

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the New Zealand Government' (Waitangi Tribunal, 2011, 2016, p.8). Yet there is lively debate over the exact mechanisms by which such protection should be achieved. Indeed, proposed changes to the Treaty exception range from relatively small amendments aimed at reducing ambiguity and clarifying scope (suggested by Amokura Kawharu) to a complete rejection of the current clause and replacement with a new clause that even omits the exception's 'chapeau', which establishes a good faith obligation on the use of the clause (suggested by Jane Kelsey: see Waitangi Tribunal, 2016, pp.35–7). Given the uncertainty of any process to revise the clause, governments may wish to avoid re-politicising trade negotiations

and the protection of Māori interests in New Zealand's trade agreements.

A changing Crown–Māori relationship in trade?

Thus far we have discussed how precedent both supports the continued inclusion of a Treaty exception, yet also limits change to the clause. We now offer two considerations regarding changes to the Crown–Māori relationship in trade, one positive and one cautionary. First, New Zealand's approach to including Māori economic and trade interests does appear to be changing in ways that may (provided this continues) allow for a more meaningful incorporation of Māori interests beyond the general carve-out of the Treaty exception. There has been an increase in consultation with Māori to identify Māori economic and trade interests, notably in the context of FTA negotiations with the EU and with the UK. This aligns with recommendations from the Waitangi Tribunal (2016), which called for more meaningful Crown–Māori engagement, in the spirit of the Treaty of Waitangi principle of partnership. There has also been a more substantive incorporation of Māori economic and trade interests in the FTAs with the UK and the EU.

While a full evaluation of those FTAs is beyond the scope of this article, there is explicit emphasis on the importance of the Treaty of Waitangi as a founding document for New Zealand in the agreement preambles, recognition of the importance of Māori leadership and the Māori economy, and acknowledgment of the (disproportionate) challenges faced by Māori in accessing international trade and economic opportunities. The agreements have chapters devoted to Māori trade and economic cooperation, which call for various cooperation activities aimed at improving the ability of Māori-owned enterprises to make use of the FTAs. Chapter 15 of the UK FTA (on digital trade) notes the 19 November 2021 release of the Waitangi Tribunal's WAI 2522 report and affirms that the New Zealand government will engage with Māori to ensure Treaty of Waitangi obligations are met and that Māori can 'exercise their rights and interests' in the context of any review of chapter 15. The digital trade

chapter of the EU FTA retains this commitment, but also notes an exception for digital trade measures relating to New Zealand's protection or promotion of 'Māori rights, interests, duties and responsibilities' (including pertaining to mātauranga Māori).⁹ We view this sort of additional, targeted protection as a welcome complement to the general Treaty exception.

Second, and as a counterpoint, we discourage complacency about the fact that New Zealand has not yet had to rely on the Treaty exception in a trade dispute. As the Waitangi Tribunal has cautioned, 'given the long-term nature of trade and investment treaties, foresight is needed to ensure that the Treaty exception clause properly responds to the changing international context and the particular agreement under negotiation' (2016, p.37). Indeed, the WAI 262 report was issued by the Tribunal in response to claims made by Māori around indigenous flora and fauna, mātauranga Māori (Māori traditional knowledge) and intellectual property issues. The Tribunal made recommendations across many different areas where Māori interests are affected by Crown policy. But implementation of the WAI 262 recommendations across government has been slow and uneven. If the implementation of WAI 262 progresses further in changing Crown policy, and if

the implementation is considered discriminatory against foreign parties, this could set in motion potential legal challenges against New Zealand. A test of the Treaty exception may be yet to come. Such considerations may warrant pre-emptive revision of the Treaty exception to ensure that it covers actions in line with the changing Crown–Māori relationship, including in previous FTAs.

Conclusion

New Zealand's free trade agreements have evolved over the last 20 years. In contrast, the Treaty of Waitangi exception clause, which purports to protect Māori rights and interests in trade agreements, has remained unchanged. We argue that the New Zealand government simultaneously benefits from and is hindered by the precedent that the unchanged clause constitutes. There has been considerable 'positive feedback' to support continued use of the clause. There is no impending threat of further litigation from Māori interest groups against the government for the Treaty of Waitangi exception clause; the Waitangi Tribunal has offered (qualified) support for the clause; there have been no international legal challenges that require reliance on the Treaty exception; and the re-use of prior language helps New Zealand negotiators to include what remains an unrivalled general exception.

Continued reliance on established text stands negotiators in good stead. Yet government policy as it relates to Māori rights and interests is still developing. As the response to WAI 262 (in particular) further emerges, New Zealand negotiators may need to overcome the barriers to changing the established Treaty exception text to ensure the guarantee of those rights and interests. In doing so, the New Zealand government will need to carefully navigate the space between precedent and innovation.

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- 1 The NZ-UK FTA, signed on 28 February 2022, included a dedicated Māori trade and economic cooperation chapter, and New Zealand's Ministry of Foreign Affairs and Trade notes that Māori 'economic and trade interests were prioritised in negotiations and are reflected across the Agreement' (Ministry of Foreign Affairs and Trade, 2022).
- 2 The original TPP members comprised Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States and Vietnam. The UK is negotiating to accede to the CPTPP, and China and Taiwan have both applied to initiate negotiations.
- 3 RCEP comprises ASEAN plus five of its prior FTA partners, Australia, China, Japan, New Zealand and the Republic of Korea, following the withdrawal of India from negotiations in 2019.
- 4 Parties to PACER Plus include Australia, the Cook Islands, Kiribati, Niue, Samoa, Solomon Islands, Tonga and New Zealand.
- 5 DEPA includes Chile, New Zealand and Singapore.
- 6 *Parliamentary Debates (Hansard)*, vol. 588, 7 November 2000, <https://www.parliament.nz/en/pb/hansard-debates/historical-hansard/#2000-2009>.
- 7 For critical analysis of TPP see, inter alia, the expert paper series at TPP Legal: <https://tpplegal.wordpress.com/>.
- 8 'Frivolous' claims by foreign investors have risen markedly; such claims may be lodged precisely with the aim of inducing a chilling effect on legislation (Pelc, 2017).
- 9 At the time of writing, the texts of the EU FTA await legal revision.

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