

Digital Economy Partnership Agreement (DEPA)

Non-Paper from New Zealand: *The Treaty of Waitangi*

August 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 measures it deems necessary to accord more favourable treatment to 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.

Note that the text used for DEPA is the same as text in the P4, CPTPP and Singapore-New Zealand FTA but would be updated if no dispute settlement provisions.

Summary

The Treaty of Waitangi (the Treaty) is a founding document of New Zealand of the greatest constitutional importance. The Treaty provides a framework for the ongoing relationship of partnership between the Crown (represented by the Government of New Zealand) and Māori, the indigenous people of New Zealand. As part of the principle of partnership between the two signatories of the Treaty, it is important that recognition be given to the special place of the Treaty in New Zealand.

In light of the significance of the Treaty in New Zealand's constitutional arrangements, New Zealand must 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. All of New Zealand's free trade agreements (FTAs) since 2000 include a provision (referred to as the "Treaty of Waitangi exception") that addresses this need.

1. The Treaty of Waitangi is a founding document of New Zealand

- The Treaty was signed in 1840 between representatives of the British Crown and representatives of Māori tribes and sub-tribes.

2. The Treaty of Waitangi is legally effective to the extent that it is recognised in Acts of Parliament and through administrative law

- The Treaty is not incorporated into the general law of New Zealand nor entrenched as supreme law, so does not prevail over other laws; however,

broad administrative law requirements founded in the Treaty apply to the exercise of most public powers.

- The Treaty is recognised as a founding document of the greatest constitutional importance and as such it has great political and moral force.¹
- Principles stemming from the Treaty are referred to in many New Zealand statutes. These require the Crown to take into account or give effect to the principles that underlie the Treaty.
- New Zealand courts will prefer an interpretation of statutes that is consistent with Treaty principles where the subject matter before them has relevance to the Treaty interests of Māori.
- New Zealand courts will also review public decision-making processes for compliance with the principles of the Treaty. Treaty compliance can be considered an implied mandatory relevant consideration and relevant to the principle of legality.
- Government policy can also be assessed by the Waitangi Tribunal, which is a statutory commission of inquiry. While the Waitangi Tribunal can make recommendations to government and generally cannot make binding decisions, the government must consider any recommendation in good faith.

3. Most references to the Treaty of Waitangi in legislation are to the “principles of the Treaty” rather than the precise wording of the Treaty itself

- The Treaty is in two languages: English and Māori.² Neither version is a direct translation of the other. There are significant differences between the two texts and those differences have led to different understandings of what the Treaty means.
- The differences between the two texts and the need to apply the Treaty to present-day circumstances and issues have led to New Zealand courts considering the underlying spirit and intention of the Treaty, and to identify the “principles of the Treaty”. Those principles are not confined to the express terms of the Treaty and focus on the underlying mutual obligations and responsibilities of the Treaty partners.
- In short, the Treaty states the conditions under which Māori and the Crown agreed to co-operate as a unified nation. A number of enduring principles have emerged over the years that express those conditions.

4. General principles of the Treaty of Waitangi

- The main purpose of the Treaty was to ensure that both parties to it would live together peacefully and develop New Zealand together in partnership. The Treaty does this by assuring Māori that their interests will be protected and confirming citizen equality.

¹ The New Zealand constitution is found in formal legal documents, in decisions of the courts, and in practices (some of which are described as conventions). The Treaty of Waitangi is one of the major sources of the New Zealand constitution.

² The Māori and English texts of the Treaty can be viewed at www.treatyofwaitangi.govt.nz/treaty/.

- The Treaty signifies a partnership between Māori and the Crown, and requires the partners to act reasonably and with the utmost good faith. Partnership requires that each party have a voice in how the relationship is managed. This requires good faith, and consultation with Māori groups on decisions affecting them.
- The Crown has a duty to actively protect Māori in the use of their lands, fisheries, forests, and other treasured possessions, both tangible and intangible, such as language, culture and sacred places.
- The Crown has a duty to remedy past breaches of the Treaty.
- The Crown also has a right to govern. The principles of the Treaty do not authorise unreasonable restrictions on the right of a duly elected government to follow its chosen policy, subject to it meeting its Treaty duties.

More information can be found at: <https://nzhistory.govt.nz/politics/treaty-of-waitangi>