THE REPORT ON THE COMPREHENSIVE AND PROGRESSIVE AGREEMENT FOR TRANS-PACIFIC PARTNERSHIP

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WAI 2522

WAITANGI TRIBUNAL REPORT 2023

The cover image shows a detail of *Toi Tū Toi Ora: Contemporary Māori Art* exhibition identity.
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WELLINGTON

18 November 2021

E ngā Minita, tēnā koutou

Ka hua ake ngā whakamoemiti ki ngā mana katoa kua whetūrangitia. Kei roto tō rātou wairua i ngā kaupapa kua whārikitia ki te aroaro o tēnei Taraipiunara, hei Kaitiaki mō ngā tūmanako e puritia nei e te Tiriti o Waitangi.

We enclose our report on te Tiriti/the Treaty consistency of the electronic commerce (e-commerce) provisions in the Comprehensive and Progressive Trans-Pacific Partnership Agreement (CPTPP). This ends our inquiry into claims that began with the Trans-Pacific Partnership Agreement (TPPA). We reported in 2016 on the Treaty clause contained in the TPPA (and carried forward to the CPTPP). In May 2020, we reported on the Crown's review on the plant variety rights regime.

Originally, the issues for this final stage of our inquiry included the Crown's engagement with Māori over the TPPA and CPTPP, and the secrecy of those negotiations. However, in October 2020, the claimants and the Crown settled

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through mediation the issues of engagement and secrecy. The fact that the parties were able to settle these issues was a positive development and we see the outcome of the mediation as constructive and forward looking. As it has a bearing on our findings, we have attached the mediation agreement as appendix II to this report.

The final issue remaining was whether the e-commerce provisions in the CPTPP were consistent with the Crown's Tiriti/Treaty obligations.

We have found the task of assessing te Tiriti/the Treaty consistency of the e-commerce provisions in the CPTPP difficult. One reason arises from the relatively narrow ambit of Chapter 14 (e-commerce) set against the wider digital domain and the rapid technological and social change underway. This is a challenge to citizens and policy makers worldwide.

A particular challenge, in terms of our Tiriti/Treaty analysis, arises from the fact that the e-commerce issue has been separated from the broader issues of engagement and secrecy. It is difficult to assess compliance with one of the core Tiriti/Treaty principles at issue (active protection) in circumstances where significant aspects of that assessment (for example, the quality of the Crown's engagement with Māori) have been separately resolved by the parties and are outside of the scope of our inquiry.

A further challenge arises from the fact that the two international law experts who appeared before us have sharply diverging opinions on the extent to which the e-commerce provisions in the CPTPP present actual or potential risk to Māori Tiriti / Treaty rights and interests.

We have also had to address the difficult question of the extent to which these provisions constrict policy space or are likely to inhibit or weaken the Crown's political commitment to its domestic Tiriti/Treaty obligations by reason of the chilling effect. This is a difficult assessment based as it is on predicting future circumstances and conduct about which precision is not possible.

In light of these difficulties we begin our report with an outline of the relevant Tiriti/Treaty principles (chapter 2). We then turn to consider whether data generated by or about Māori can be considered a taonga. The issue is complex but in broad terms we conclude that Māori data may be a component of mātauranga Māori, and may in combination with related data be, or have the potential to be, taonga. While we cannot say that all data is a taonga, we recognise that from a te ao Māori perspective the way the digital domain is governed and regulated has important implications for the integrity of the Māori knowledge system, which is unquestionably a taonga. The vulnerability of taonga such as mātauranga Māori mean that the Crown's Tiriti/Treaty duty of active protection is heightened.

E-commerce is one of the many ways in which a citizen in modern society creates a data trail. Along with other citizens, Māori engage in e-commerce

and benefit from the convenience of doing so. Māori are also engaged in the digital domain as users and developers of digital products. However, Māori perspectives that have been presented to us about the protection of mātauranga captured or expressed in a digital format are different from Western conceptions of intellectual property and privacy, particularly in terms of how protection is achieved in law, including international law. The primary difference we see is that Māori concerns typically extend beyond commercial protection to matters fundamental to Māori identity such as whakapapa, mana, mauri, and mātauranga. We also heard claimant evidence highlighting the importance of collective rights to privacy, again something that goes beyond the emphasis on individual privacy, a feature of existing domestic and international law.

The core issue is governance and control over Māori data. While terms such as Māori Data Governance and Māori Data Sovereignty are of relatively recent origin, the underlying concerns have been a consistent theme in Crown-Māori interaction for several decades. We observe that it is now close to 30 years since the commencement of the inquiry that led to the *Ko Aotearoa Tēnei* (Wai 262) report. A major theme in the claims considered in that inquiry were Māori concerns about the appropriation of mātauranga and taonga, and its commercial exploitation or use by others in circumstances where Māori voice and control was lost. These same themes are prominent in the claims we have been examining. We therefore place particular weight on the findings and recommendations of the *Ko Aotearoa Tēnei* (Wai 262) report and the importance of the Crown understanding the nature of the interests claimed by kaitiaki or guardian communities. In chapters 4 and 5 we undertake a 'risk analysis'. In large part this reflects the way matters were argued before us.

The Crown did not engage with or challenge claimant evidence concerning mātauranga Māori, instead arguing that claimant concerns were essentially speculative and abstract unless the result of specific Crown acts or omissions. In addition, the Crown argued that matters raised by the claimants were generally outside the scope of the e-commerce chapter and that those provisions in no way restricted Māori rights or interests in the digital domain. If, and to the extent, there was any risks to Māori Tiriti/Treaty rights then the Crown argued that the exceptions and exclusions contained in the CPTPP offer sufficient and comprehensive protection.

In chapter 5, we consider the relevant exceptions and exclusions. While there is some merit in the Crown's argument that it can regulate to protect Māori interests, we nonetheless think there are material risks. We conclude that the policy space retained by the CPTPP exceptions and exclusions is not as extensive as the Crown maintains. We also conclude there is a material risk of regulatory chill and risk arising from the precedent or ratchet effect of the CPTPP e-commerce provisions.

Cumulatively, we conclude that the risks to Māori interests arising from the e-commerce provisions of the CPTPP are significant, and that reliance on the exceptions and exclusions to mitigate that risk falls short of the Crown's duty of active protection.

In chapter 6, we explain why we consider the Crown has failed to meet te Tiriti/the Treaty standard of active protection. We conclude that this failure constitutes a breach of te Tiriti/the Treaty principles of partnership and active protection.

This breach arose because when the Crown settled its e-commerce negotiation mandate for the TPPA/CPTPP it did so with a view to preserving consistency with existing domestic policy settings and its prior international agreements. We see this as a largely reactive or passive position that is insufficient because governance of the digital domain has important implications for the integrity of the taonga that is mātauranga Māori. 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 an issue that the Crown can or should decide unilaterally. At the same time, the question of data sovereignty and protection of mātauranga Māori in the digital domain is not a matter that Māori can resolve alone either. What has become clear in the course of this inquiry is that the question of the appropriate level of protection for mātauranga Māori in international trade agreements, and in the governance of the digital domain generally is first and foremost a matter for dialogue between te Tiriti/the Treaty partners. If compromise or adjustment is necessary considering what is achievable in international negotiations, then those are matters for good faith dialogue between the Crown and Māori.

We also draw conclusions in chapter 6 concerning the level of risk to Māori Tiriti/Treaty interests arising from the CPTPP e-commerce provisions particularly those concerning cross border data flows (Article 14.11), data localisation (Article 14.13), and source code (Article 14.17). On a number of these issues we prefer the evidence of the claimants over that of the Crown. We also see an evolution in Crown policy signalling developments towards greater regulatory flexibility apparent in the Crown's response to the report of the Trade for All Advisory Board (Trade for All Board) and in international instruments that postdate the CPTPP, such as the Digital Economic Partnership Agreement (DEPA) and the Regional Comprehensive Economic Partnership (RCEP). We also see the Agreement in Principle recently announced with respect to a free trade agreement (FTA) between Aotearoa New Zealand and the United Kingdom as important. At the same time, these developments also serve to highlight a relative lack of attention, or priority, accorded to Māori

interests at the time the e-commerce provisions in the TPPA and the CPTPP were agreed.

The principal prejudice we see arising lies in the constriction of domestic policy space and options by reason of the fact that Aotearoa New Zealand has committed to the e-commerce provisions in the CPTPP. Additional prejudice may also arise through the operation of the provisions for reasons we outline in chapter 5.

Having found Tiriti/Treaty breach and prejudice we must also consider what (if any) recommendations we may make in order to mitigate or remove the prejudice or to prevent others from being similarly affected in the future.

We have thought carefully about this. For reasons set out in chapter 6, we have come to the view that it would not be appropriate to make recommendations in the particular circumstances of this case.

We have observed over the five years since this inquiry began a significant shift in the Crown's position in response to the claims. This shift largely mirrors evolving government policy reflected in its work to develop a whole of government response (Te Pae Tawhiti) to the *Ko Aotearoa Tēnei* (Wai 262) report. It also reflects government policy development and response to the Trade for All Board's report. These developments are constructive and overdue.

We also have regard to the fact that the Crown and claimants were able, through mediation, to resolve concerns regarding engagement and secrecy. We see this as a significant reason to pause and think carefully about what (if any) recommendations we could make that would remove or mitigate prejudice in ways not already addressed as a result of commitments and processes already underway.

These processes include the establishment of Te Taumata following our Stage One *Report on the Trans-Pacific Partnership Agreement,* which is now being built upon with the establishment of Ngā Toki Whakarururanga as part of the mediation agreement.

We have also carefully considered the relief sought by the claimants. We decline to make a recommendation that further e-commerce negotiations be suspended until an effective or proper regime has been designed. On the basis of the relatively limited evidence before us concerning current and pending negotiations we do not believe we are in a position to make such a recommendation on an informed basis. We concur with the Trade for All Board about the need for a comprehensive review of Aotearoa New Zealand's policy and in the meantime avoiding locking Aotearoa New Zealand into fixed negotiation positions. As we understand it the Crown has accepted that recommendation and the review is underway with engagement from Te Taumata and Ngā Toki Whakarururanga.

We also see the constructive developments signalled as part of the recently announced NZ–UK FTA as indicative of what is possible without freezing or stopping international negotiations altogether. We do not regard ourselves as best placed to make such judgements and place weight on the fact that whilst still developing, the Crown-Māori dialogue on these issues has significantly advanced since the commencement of our inquiry in 2016.

Finally, while we acknowledge the challenges and difficulties ahead, we see these as matters best left for negotiation and dialogue between te Tiriti/the Treaty partners in good faith and within the fora and processes now in place. We wish the parties every success in that important work as it is abundantly clear to us that Aotearoa New Zealand will be stronger both domestically and in the international arena as it builds and strengthens the Crown-Māori relationship towards realising the enduring partnership promised by te Tiriti/the Treaty.

Nāku noa, nā

Judge Michael J Doogan
Presiding Officer

DEFINITIONS

Covered person Per Article 14.1 of the CPTPP, 'covered person' means: a covered investment as defined in Article 9.1 (Definitions); an investor of a Party as defined in Article 9.1 (Definitions), but does not include an investor in a financial institution; or a service supplier of a Party as defined in Article 10.1 (Definitions). It does not include a 'financial institution' or a 'cross-border financial service supplier of a Party' as defined in Article 11.1 (Definitions).

Data localization The act of storing data on any device that is physically present within the borders of a specific country where the data was generated.

Electronic commerce (e-commerce) The production, advertising, sale, and distribution of products via telecommunications networks ranging from ordinary telephones to the use of the internet or other large-scale electronic networks. Many definitions for this term exist, but none enjoy universal support.

General exception Provisions in trade agreements which list circumstances in which a government can adopt measures that would otherwise be prohibited by other terms of the agreement. They are based on the exceptions established in the General Agreement on Tariffs and Trade (GATT) 1947 and carried over into the World Trade Organization (WTO) Agreements.

Māori data Digital or digitisable information or knowledge that is about or from Māori people, language, culture, resources, or environments.

Māori Data Governance The principles, structures, accountability mechanisms, legal instruments, and policies through which Māori exercise control over Māori data.

Māori Data Sovereignty The inherent rights and interests that Māori have in relation to the collection, ownership, and application of Māori data.

Mass-market software Non-customised, commercial, off-the-shelf software made generally available to the public.

Measure Includes any law, regulation, procedure, requirement, or practice. Normally, any law, rule, regulation, policy, practice, or action carried out by government or on behalf of a government.

Source code The set of instructions and statements written by a programmer using a computer programming language. This code is later translated into machine language by a compiler. The translated code is referred to as object code.

State-to-State dispute When a member government believes another member government is violating an agreement or a commitment that it has made.

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Covered person Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Art 14.1

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State-to-State dispute World Trade Organisation, 'Dispute Settlement', https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm, accessed 14 July 2021

ABBREVIATIONS

AANZFTA	ASEAN–Australia–New Zealand Free Trade Agreement
ANZTEC	Agreement between New Zealand and the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu on Economic Cooperation
APEC	The Asia–Pacific Economic Cooperation
app	appendix
ASEAN	Association of Southeast Asian Nations
CA	Court of Appeal
CER	Closer Economic Relations
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
DEAG	Data Ethics Advisory Group
DEPA	Digital Economic Partnership Agreement
DIA	Department of Internal Affairs
doc	document
ed	edition, editor
FTA	free trade agreement
GATS	General Agreement on Trade in Services
GDP	gross domestic product
ICT	information and communication technologies
ISDS	investor–State dispute settlement
ISP	internet service provider
ITIF	Information Technology and Innovation Foundation
JIEL	*Journal of International Economic Law*
JP	justice of the peace
KC	King's Counsel
ltd	limited
MBIE	Ministry of Business, Innovation and Employment
MFAT	Ministry of Foreign Affairs and Trade
NIA	national interest analysis
NZLFRR	*New Zealand Law Foundation Research Reports*
NZLR	*New Zealand Law Reports*
OECD	Organisation for Economic Co-operation and Development
OIA	Official Information Act
ONZM	New Zealand Order of Merit
p, pp	page, pages
PC	Privy Council
PDF	portable document format
PVA	Plant Variety Rights Act 1987
PVR	plant variety right

RCEP	Regional Comprehensive Economic Partnership
s, ss	section, sections (of an Act of Parliament)
SADEA	Singapore Australia Digital Economy Agreement
SDG	Sustainable Development Goal
SPS	Agreement on Sanitary and Phytosanitary Measures
TBT	Technical Barriers to Trade
TEG	Trade and Economic Group
TFAAB	Trade for All Advisory Board
TMR	Te Mana Raraunga
TPK	Te Puni Kōkiri
TPPA	Trans-Pacific Partnership Agreement
TRIPS	Trade-Related Aspects of Intellectual Property
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UPOV	International Union for the Protection of New Varieties of Plants
UPOV 91	International Convention for the Protection of New Varieties of Plants
USMCA	United States–Mexico–Canada Agreement
USTR	United States Trade Representative
v	and (in a legal case name)
vol	volume
Wai	Waitangi Tribunal claim
WTO	World Trade Organisation

Unless otherwise stated, footnote references to briefs, claims, documents, memoranda, papers, submissions, and transcripts are to the index to the Wai 2522 record of inquiry, a select copy of the index to which is reproduced in appendix IV. A full copy of the index is available on request from the Waitangi Tribunal.

CHAPTER 1

INTRODUCTION

1.1 Introduction

This report is the outcome of the third and final part of our inquiry into claims related to the Trans-Pacific Partnership Agreement (TPPA). We have reported on two previous stages in *Report on the Trans-Pacific Partnership Agreement* and *The Report on the Crown's Review of the Plant Variety Rights Regime*, released (in pre-publication format) in June 2016 and May 2020, respectively. Here, we address the commitments relating to electronic commerce ('e-commerce') that the Crown has entered into under the TPPA, which is ratified in Aotearoa New Zealand but is not in force, and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), the TPPA's successor agreement.

The TPPA is a free trade agreement (FTA) negotiated by 12 countries which border the Pacific Ocean: Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, Peru, Singapore, the United States, Vietnam, and Aotearoa New Zealand. As we discussed at length in our first report, the TPPA reached beyond the commitments made in Aotearoa New Zealand's previous FTAs in both its subject matter and its scale.[1] The negotiations for the agreement were conducted under secrecy, with the Government of Aotearoa New Zealand electing not to share text or negotiating positions with anyone outside of Government as a matter of policy.[2] Thus, aside from what had been made available through leaked documents, the contents of the agreement were not publicly known until the negotiations were concluded and the text was released on 5 November 2015.[3] Among the chapters that were not leaked and were unavailable to the public until this time was Chapter 14, relating to e-commerce.[4]

The World Trade Organisation (WTO) defines e-commerce as '[t]he production, advertising, sale and distribution of products via telecommunications networks ranging from ordinary telephones to use of the internet or other large-scale electronic networks.' The WTO notes that, while many definitions for e-commerce exist, none of them enjoy universal support.[5] This lack of definitional clarity, coupled with the pace at which the digital world evolves, provides a glimpse of the

1. Waitangi Tribunal, *Report on the Trans-Pacific Partnership Agreement* (Lower Hutt: Legislation Direct, 2016), pp 11–12
2. Ibid, p 1
3. Document A1, p 7 at [20]–[22]
4. Document B25, p 3 at [6]–[7]
5. World Trade Organisation, *Dictionary of Trade Policy Terms*, ed Walter Goode, 5th ed (Cambridge: Cambridge University Press, 2007), p 149

complicated context in which we must consider the TPPA/CPTPP, e-commerce, and te Tiriti o Waitangi/the Treaty of Waitangi.

While Aotearoa New Zealand signed and ratified the TPPA, the agreement did not come into force as a result of the withdrawal of the United States in January 2017. In its place, New Zealand and the other 10 signatories renegotiated the TPPA as a new agreement without the United States: the CPTPP. The CPTPP was signed on 8 March 2018. The new agreement retained the text of the TPPA but suspended 22 provisions.[6] Chapter 14 was carried over in its entirety, unchanged.

Importantly, we discuss both the TPPA and CPTPP throughout this report. When we refer to the TPPA, we are discussing the agreement while it included the United States. When we are talking about the CPTPP, we are considering the agreement that came to fruition following the exit of the United States. While these agreements involve a differing number of Parties and have different names, their substantive content is identical – including Chapter 14 on e-commerce. We note that where the agreements are referred to together, as 'TPPA/CPTPP', there is no significant difference.

Chapter 14 is the first comprehensive chapter concerning e-commerce matters in a multi-party FTA to which Aotearoa New Zealand is a Party.[7] The chapter contains provisions concerning the establishment of domestic legal frameworks governing electronic transactions, electronic authentication and signatures, online consumer protection, the protection of personal information, unauthorised commercial electronic messages, and international cooperation on cybersecurity. Other provisions encourage the adoption of paperless trading, prohibit customs duties on electronic transmissions between the parties, require the non-discriminatory treatment of digital products, and minimise barriers relating to the cross-border transfer of information by electronic means, the location of computing facilities, and access to source code.[8] The potential effect of these rules on Māori interests in data and digital technologies, and their governance in Aotearoa New Zealand, is the catalyst for the claims considered in this report.

These claims are the Trans-Pacific Partnership Agreement (Reid and others) claim (Wai 2522), brought by Dr Papaarangi Reid, Dr Moana Jackson, Angeline Greensill, Hone Harawira, Rikirangi Gage, and Moana Maniapoto, and the Trans-Pacific Partnership Agreement (Baker and others) claim (Wai 2523) brought by

6. For a list of the suspended provisions, see 'CPTPP vs TPP', Ministry of Foreign Affairs and Trade, https://www.mfat.govt.nz/vn/trade/free-trade-agreements/free-trade-agreements-in-force/comprehensive-and-progressive-agreement-for-trans-pacific-partnership-cptpp/understanding-cptpp/cptpp-vs-tpp, accessed 24 September 2021.

7. Document B25, p 3 at [6]. New Zealand has previously negotiated e-commerce chapters in the following bilateral FTAs: ASEAN–Australia–New Zealand Free Trade Agreement (AANZFTA); the New Zealand–Thailand Closer Economic Partnership Agreement; the New Zealand–Hong Kong–China Closer Economic Partnership Agreement; and the Agreement between New Zealand and the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu on Economic Cooperation (ANZTEC): see doc C1, p 10.

8. Ministry of Foreign Affairs and Trade, *Trans-Pacific Partnership National Interest Analysis, 25 January 2016* (Wellington: Ministry of Foreign Affairs and Trade, 2016), pp 65–67

Natalie Kay Baker, Hone Tiatoa, and others on behalf of Hapū o Ngāpuhi.[9] They were among the 10 claimant groups whose broader allegations about the TPPA, and subsequently the CPTPP, have been addressed in the earlier stages of this inquiry.[10] In our previous reports, we said that certain issues of concern to the claimants would be set aside for later consideration. Of those, claimant concerns about inadequate engagement and secrecy in the negotiation process have since been resolved through mediation (see appendix I [procedural history] and appendix II [mediation agreement] for more detail). This report therefore focuses solely on one remaining issue, raised by two of the 10 claimant groups: the e-commerce provisions and the extent to which they are Tiriti/Treaty-compliant.

In essence, the two claimant groups alleged that the chapter contains binding e-commerce obligations that damage the ability of Māori to exercise mana motuhake over the digital domain.[11] They also alleged the e-commerce obligations restrict the Crown's ability to regulate Māori data in a Tiriti/Treaty-consistent way, including to prevent digital technologies from being used in ways that prejudice Māori.[12] In contrast, the Crown denied that the e-commerce provisions inhibit the development and implementation of regulatory measures that protect Māori interests.[13] Indeed, the Crown's view was that data governance concerns raised by the claimants 'can and should be addressed through domestic processes', and there is 'no reason to think that such measures would be prevented by the operation of the CPTPP'.[14] In short, the Crown maintained that the CPTPP preserves these policy options entirely.

In this report, we analyse the evidence and respective arguments about the e-commerce chapter, and the issues they give rise to, in order to determine whether the Crown complied with its Tiriti/Treaty obligations in consenting to be bound by these e-commerce provisions in its accession to the TPPA, and subsequently the CPTPP. We do so in light of those Treaty principles we consider relevant to international agreements and negotiations, as well as in respect of mātauranga Māori and the governance of digital technologies and data.

1.2 The Digital Domain and Digital Trade

The issues brought by the claimants arising from the e-commerce provisions in the TPPA and CPTPP concern the 'digital domain', or 'digital ecosystem'.[15] These terms are not defined with any certainty. However, we take them to refer to the entirety of the digital world.

9. Claim 1.1.1, p 3 [at 1]; claim 1.1.3, p 3 at [1]
10. See Waitangi Tribunal, *Report on the Trans-Pacific Partnership Agreement* (2016) and Waitangi Tribunal, *The Report on the Crown's Review of the Plant Variety Rights Regime* (2020).
11. Submission 3.3.60, p 13 at [2.2]
12. Ibid
13. Submission 3.3.61, p 74 at [224]
14. Submission 3.3.58, p 26 at [76]
15. Submission 3.2.7, pp 2–3 at [7]

We see the term 'digital domain' as encompassing digital technologies, concepts related to data and information, digital trade, and the digital economy. Notably, definitions relating to these concepts are in a state of flux, as the digital world changes at an unprecedented rate.

While there is no accepted definition of 'digital trade', the Organisation for Economic Co-operation and Development describes that there is a 'growing consensus that it [digital trade] encompasses digitally enabled transactions in trade in goods and services that can be digitally or physically delivered'.[16]

Undoubtedly, the global economy is experiencing the digitalisation of production, exchange, and consumption of goods and services. Shamel Azmeh, Christopher Foster, and Jaime Echavarri describe that, as a result, data is becoming fundamental to trade in 'traditional' goods. They note that this is a trend that can be expected to increase dramatically with the introduction of new technologies.[17]

1.3 The Key Issue for this Inquiry

The final stage of our inquiry is focused on the following overarching question we have set: What (if any) aspects of the e-commerce chapter in the CPTPP are inconsistent with the Crown's obligations under Te Tiriti/the Treaty?[18]

In order to properly answer this question, we consider it important to address the following subsidiary questions:

1. What is the nature of Māori interests in the digital domain?
2. What is the scope of the e-commerce provisions in the TPPA/CPTPP, and to what extent do they impact upon Māori interests in the digital domain? Which provisions do the claimants say cause prejudice to Māori interests, and why?
3. What (if any) domestic policy initiatives are currently underway to address those interests?
4. Do the CPTPP e-commerce provisions restrict the policy space for development of a Tiriti/Treaty-compliant domestic regime for data governance?
5. What additional steps may be required to create a framework to protect Māori interests in e-commerce when implementing the CPTPP?

The broad nature of issues engaged in these subsidiary questions raised issues as to the appropriate scope of this inquiry. Below, we set out how that scope has developed, including the impact of the outcome of mediation on what matters we can appropriately inquire into. We then set out our approach, and the structure of our report.

16. Organisation for Economic Co-operation and Development, 'Trade in the Digital Era', *OECD Going Digital Policy Note* (Paris, Organisation for Economic Co-operation and Development, 2019)

17. Shamel Azmeh, Christopher Foster, and Jaime Echavarri, 'The International Trade Regime and the Quest for Free Digital Trade', *International Studies Review*, vol 22, issue 3 (September 2020), doi.org/10.1093/isr/vix033, pp 671–692

18. Memorandum 2.6.7, p 6 at [25]

1.4 The Development of the E-Commerce Issue

1.4.1 The 'data sovereignty' issue

We set out the full procedural history of this inquiry as appendix I. For the third (current) stage of this inquiry, we released a revised statement of issues on 9 March 2020. That statement identified three remaining issues after our Stage One and Stage Two reports: engagement, secrecy, and what was titled 'data sovereignty'.[19] The first two issues – which relate to te Tiriti/the Treaty compliance of the Crown's actions during the negotiation process for the agreements – were successfully addressed through mediation in Auckland on 1 October 2020. This leaves only the 'data sovereignty' issue, which relates to the TPPA and CPTPP's e-commerce chapter (Chapter 14).

When we initially defined the data sovereignty issue in April 2019, we posed two questions:

- Is Māori personal data a taonga subject to the Crown's duty of active protection under article two of Te Tiriti/the Treaty? If not, why not?
- What (if any) aspects of the e-commerce chapter in the CPTPP are inconsistent with the Crown's obligations under Te Tiriti/the Treaty?[20]

In May 2019, the parties sought clarification of this aspect of the issue and argued that the questions should be reformulated. In the Crown's submission, the question was 'not located within the context of the CPTPP' and '[w]hether personal data is a taonga and what Treaty duties attach are matters that are context dependent.'[21] For the claimants, the use of the term 'personal data' was problematic, and they cautioned that the narrow interpretation of 'personal data' advocated by the Crown could exclude important data relating to

> whanau, hapū, iwi, a place (for instance a river, or a species), activities Māori engage in, cumulative data on health, meta data used for analytics that inform algorithms for example, for profiling, targeting, and forming predictions, and other kinds, forms and uses that are derived from personal and cultural data.[22]

In August 2019, we commissioned Associate Professor Amokura Kawharu to provide expert advice on the phrasing of the issue in light of the arguments raised by the parties.[23] Of the four possible adjustments to the phrasing she provided, all parties preferred the option to delete the first of the two questions, and leave it to the claimants 'to specify which provisions of Chapter 14 raise concerns and in relation to what types of information'.[24] We agreed, and subsequently removed the first question from our statement of issues.[25]

19. Memoranda 2.6.7, 2.6.7(a)
20. Memorandum 2.7.30; memorandum 2.7.30(a), p [1] at [6]–[7]
21. Submission 3.4.129 at [21]
22. Submission 3.4.136, p 4 at [15]
23. Memorandum 2.7.36
24. Memorandum 2.5.37(a); submissions 3.2.5, 3.2.7
25. Memorandum 2.6.7(a)

In closing submissions, the parties disputed the effect of deleting the question on the scope of our inquiry. The claimants' criticism of the wording was that, conceptually, it 'locates te ao Māori and the Crown's Tiriti obligations within the framework of the TPPA/CPTPP electronic commerce chapter'.[26] In their closing submissions, the claimants again stressed that 'Māori conceptions of the digital domain' are essential to our assessment of the 'risks that the TPPA and CPTPP pose to the Crown's ability to resolve these matters at the domestic level'.[27]

The Crown's response was to contend that 'a broader conceptual approach' would expand the issue to clauses outside Chapter 14, which would inappropriately expand the scope of the inquiry.[28]

To argue this point, the Crown placed weight on the phrasing of our statement of issues:

> Importantly, that process resulted in the removal of the stand-alone question about whether Māori personal data is [a] taonga subject to the Crown's duty of active protection – the claimants were instead to set out their concerns with the CPTPP e-commerce chapter. That is material to the scope of Issue Four and has guided the Crown's approach to the issue.[29]

As we noted in directions amending the wording of Issue Four, it was for the parties to specify the substantive issues with the e-commerce chapter when it came to the hearing.[30] The claimants' pleadings relating to Issue Four contained both conceptual and substantive elements, reinforced by a joint memorandum setting out the case theory of both the Reid and others (Wai 2522) and Baker and others (Wai 2523) claimants on 2 September 2020.[31] The rewording of our issue should not be read as restricting or limiting the scope of the claims.

In proposing to delete the first question, Associate Professor Kawharu's advice was that it would remove the reference to 'personal data' which 'may be confusing and does not seem necessary'.[32] The CPTPP e-commerce chapter covers a wider scope of information than 'personal data' alone. The Tribunal adopted the advice that deleting the first question would allow the claimants to

> raise a range of issues concerning possible restraints on the exercise of Māori authority over information, knowledge and related concepts arising under various provisions of Chapter 14 CPTPP. Again, it would be implicit that the status of the information under

26. Submission 3.2.54 at [4.1]
27. Submission 3.2.60, p 18 at [3.8]
28. Submission 3.3.61, p 6 at [12]
29. Ibid at [11]
30. Memorandum 2.6.7, p 7 at [35]
31. Memorandum 3.2.54, pp 2–3 at [2.3]
32. Memorandum 2.5.37(a), p [4]

te Tiriti/the Treaty would have to be established in setting out the various claims of inconsistency with the Crown's duties to protect it.[33]

An important question raised under the issue before us is the status under te Tiriti/the Treaty of the various forms of data the claimants alleged are affected by the CPTPP. The effect of deleting the first question was to open up the scope of the information that may be relevant to the inquiry, but also to locate the issue within the boundaries of the CPTPP. The broader conceptual framework, the status of data under te Tiriti/the Treaty, and what is at stake in the CPTPP e-commerce chapter are discussed in chapter 2.

1.4.2 Matters argued to be out of scope

The Crown argued that the following matters were outside the scope of Issue Four:

1. engagement and secrecy issues, as they have been settled through mediation;
2. how the Crown decided what to agree to, and whether the Crown met its obligation to make informed decisions, as process issues have been settled through mediation;
3. trade agreements concluded, planned, or currently being negotiated since the CPTPP came into force, or international trade issues generally, as this Tribunal has said its task is not one of maintaining oversight of current or pending international trade negotiations or practice;
4. the TPPA, as Issue Four only references the CPTPP;
5. digital issues generally, as Chapter 14 is concerned specifically with e-commerce;
6. Māori Data Sovereignty issues generally, though the Crown acknowledges 'the conceptual underpinnings of that term are relevant to the Māori interests involved';
7. the adequacy of the Treaty of Waitangi exception and other issues addressed in our Stage One report;
8. chapters of the CPTPP other than Chapter 14; and
9. developments since the TPPA and CPTPP were ratified.[34]

By contrast, the claimants have not identified any matters they consider out of scope. They saw Issue Four as having a relatively wide scope, which engaged their interests in both conceptual and practical ways, as well as touching on a range of Tiriti/Treaty principles and duties.[35]

1.4.2.1 *The TPPA and the CPTPP*

As noted, the TPPA never came into force as a result of the United States withdrawing. This withdrawal precipitated the agreement's renegotiation among the

33. Ibid
34. Submission 3.3.61, pp 6–7 at [13]
35. Submission 3.3.60, p 13 at [2.2]

11 remaining parties, resulting in the CPTPP. While the CPTPP suspends 22 provisions from the TPPA, it is otherwise substantially the same agreement. All of the provisions we discuss in this report exist in both agreements.

The Crown submitted that, as phrased, our issue for inquiry only references the CPTPP and as a result the TPPA is out of scope.[36] The claimants, by contrast, argued that both agreements are properly in scope for this inquiry:

> the TPPA continues to co-exist in parallel to the CPTPP as a treaty that New Zealand has ratified and which can enter into force if the requirements of Article 30.5.3 are satisfied. That would reinstate the original risks when the Crown ratified the TPPA that were associated with US participation: the potential for state–state and investor–state enforcement under the TPPA, challenges before the Commission of the Parties under Article 27.1, unilateral Section 301 investigations, a chilling effect by threatening to bring a dispute, or self-censorship by officials for fear of that occurring.[37]

Aotearoa New Zealand has ratified the TPPA. As the claimants noted, for the agreement to come into force the following condition must be met:

> it shall enter into force 60 days after the date on which at least six of the original signatories, which together account for at least 85 per cent of the combined gross domestic product of the original signatories in 2013, have notified the Depositary in writing of the completion of their applicable legal procedures.[38]

Completion of 'applicable legal procedures' refers to ratification.

Throughout this report, we refer to the 'CPTPP e-commerce provisions' in isolation. However, for the avoidance of doubt, the provisions themselves are identical in both agreements and our conclusions apply equally to each. The only additional point with respect to the TPPA/CPTPP is the possibility that the United States may seek to rejoin. This possibility has relevance when considering the concept of regulatory chill, which we discuss further in chapter 5. There may also be further issues given the possibility that other countries may signal a wish to join.

1.4.2.2 *Engagement, secrecy, and informed decision-making*

The claimants argued that the Crown omitted to conduct due diligence to inform itself of Māori rights and interests in relation to e-commerce at any stage of the negotiation and implementation of both the TPPA and the CPTPP.[39] They said this 'state of ignorance' led to further omissions, such as the lack of specific protections in the e-commerce chapter, as were deemed necessary for the UPOV 91 obligation (addressed in our Stage Two report). They said this avoidable ignorance causes ongoing prejudice, as the Ministry of Foreign Affairs and Trade (MFAT) continues

36. Submission 3.3.61, p 6 at [13], [13.3]
37. Submission 3.3.63, p 7 at [1.3]
38. Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Art 30.5.3
39. Submission 3.3.60, p 22 at [5.1]

to negotiate FTAs that include e-commerce obligations without specific protections for Māori rights and interests beyond the standard Treaty of Waitangi exception clause adopted, as well as the other exclusions and exceptions in the CPTPP.[40]

The Crown's position was that Issue Four is 'only about the negotiated outcomes' and that matters related to 'how the Crown decided what to agree' were part of Issues One and Two.[41] The Crown accepted there were 'relevant intersections and narrative relationships' between Issues One, Two, and Four, but it considered the process matters raised by the claimants to be outside the Tribunal's jurisdiction due to the mediation agreement and withdrawal of claims relating to Issues One and Two. However, Crown counsel also noted: 'The Crown does not seek to avoid responsibility for such matters – that responsibility has been assumed in full by the settlement on terms reached through mediation.'[42]

In our Stage One report, we expressed concerns about the Crown's engagement process for the TPPA, in particular relating to 'the status of Māori as Treaty partners as opposed to general stakeholders; the transparency of the Crown in its decision-making; and the process by which the Crown informs itself of Māori interests'.[43] Since our report was issued, MFAT has signed a Memorandum of Understanding with Te Taumata, 'a group of recognised leaders in Māori socio-economic and cultural development areas with significant networks across Māoridom . . . chosen by Māori to engage with MFAT on trade policy and related matters'.[44] In addition, through the mediation agreement reached towards the final stages of this inquiry, MFAT is also to establish a relationship with an additional body, Ngā Toki Whakarururanga, to engage on trade policy matters (see appendix I). These developments, and their forward-looking nature, are welcomed: they represent tangible commitments to engagement with Māori, which should assist the Crown in ensuring its future international trade policy is Tiriti/Treaty-consistent and advances the interests of Māori.

Our focus in this part of our inquiry is the substantive e-commerce provisions in the CPTPP, the effect of these provisions on data governance arrangements for Māori, and whether the Crown's decision to accede to them is inconsistent with te Tiriti/the Treaty and has caused prejudice to the claimants. In large part, we agree with the Crown that in light of the settlement reached in mediation, issues associated with the way the Crown came to agree to the e-commerce provisions in the CPTPP are outside the scope of this stage of our inquiry. At the same time, and as the Crown acknowledged, there are relevant intersections and narrative relationships between the issues of engagement, secrecy, and te Tiriti/the Treaty-consistency of the e-commerce provisions. At various points in this report we will

40. Ibid, pp 24–25
41. Submission 3.3.61, p 8 at [15]–[16]
42. Ibid, p 9 at [20]
43. Waitangi Tribunal, *Report on the Trans-Pacific Partnership Agreement*, p 39
44. Te Taumata and Ministry of Foreign Affairs and Trade, 'Memorandum of Understanding between Te Taumata and the Ministry of Foreign Affairs and Trade (MFAT)', memorandum of understanding, 24 September 2019

need to refer to some of this background, and indeed, to the mediation agreement, in order to provide context and clarity.

1.4.2.3 *The Treaty of Waitangi exception*

The Treaty of Waitangi exception appears as Article 29.6 in the CPTPP, and in brief, provides that nothing in the agreement shall 'preclude the adoption by New Zealand of measures it deems necessary to accord more favourable treatment to Maori' provided this is 'not used as a means of arbitrary or unjustified discrimination' or 'a disguised restriction on trade'. The adequacy of this exception was addressed in our Stage One report.

There has been some debate about the extent to which our conclusions on this exception are relevant to the scope of the current inquiry into e-commerce matters. Among the recommendations sought by the claimants in relation to the e-commerce issue was the convening of an Iwi–Crown dialogue to review and revise the Treaty exception.[45] In response to the claimants, the Crown has stated: 'The Crown's position is that this issue was dealt with exhaustively at Stage 1. There is no need to deal with it again in relation to Issue Four beyond its application as a specific exception to Chapter 14.'[46]

In Stage One, we reported on the adequacy of the Treaty of Waitangi exception in general terms. The question for our Stage Three inquiry is the level of risk to Māori interests posed by the e-commerce provisions in the CPTPP, and this requires us to consider the application of the Treaty exception to those matters specifically. We do not intend to revisit our Stage One findings. Any additional findings we may make relating to the Treaty exception apply within the context of the CPTPP e-commerce matters only.

1.4.2.4 *Chapter 10 (Cross-Border Trade in Services)*

In their amended statement of claim, the Reid and others (Wai 2522) claimants set out the pleadings relevant to Issue Four in detail under the subheading 'Failure to protect Māori rights to exercise tino rangatiratanga and kaitiaki responsibilities over taonga, including data'.[47] These included the following reference to Chapter 10 of the CPTPP:

> Related issues arise from the cross-border services chapter, which was also never leaked during the course of negotiations and was not therefore raised in the original statement of claim. Under the TPPA, providers of e-services from offshore cannot be required to have a local presence in New Zealand, unless the government has reserved the right to do so. New Zealand made very few restrictions on this local presence requirement. This prohibition makes it very difficult to monitor the use, and enforce the protection, of data by those offshore operators, to enforce New Zealand's privacy or anti-discrimination legislation, or to impose effective Tiriti-compliant protections

45. Submission 3.3.56, p 6
46. Submission 3.3.61, p 62 at [185]
47. Statement 1.1.1(b), pp 10–17

> for cultural content, such as on the sale of culturally offensive products or services. Such loss of control would make it impossible to enforce a Tiriti-compliant regime of Māori Data Sovereignty on offshore providers.[48]

This paragraph references Article 10.6 (Local Presence) of the TPPA, which carried over to the CPTPP. The claimants have been clear this specific provision has been within the scope of their e-commerce concerns for some time. The claimants included allegations concerning Article 10.6 throughout the inquiry, including in the 2 September 2020 joint memorandum setting out their case theory for Issue Four.[49] For the Issue Four hearings, they brought expert evidence on the effect of Article 10.6 from Professor Jane Kelsey.[50]

Crown counsel did not respond to the allegations. Their written opening submissions were silent on the issue and the Crown did not bring evidence in response.[51] In closing, the claimants submitted: 'The claimants assume the silence from the Crown regarding that provision means they accept the claimants' arguments.'[52]

In response, Crown counsel filed a schedule with their closing submissions setting out their position in relation to the formulation and scope of Issue Four.[53] They submitted: 'The Crown interpreted the issue to be about the e-commerce chapter and did not provide evidence on Chapter 10.'[54]

The Crown argued that, if we decided to consider the allegations regarding Article 10.6, it should be afforded the opportunity to bring evidence. Crown counsel submitted:

> If the Tribunal considers Chapter 10 to be rightly part of the issue, the Crown should not be denied the opportunity to provide evidence because of the ambulatory way the claim has been developed. The Crown is willing to provide evidence if the Tribunal considers Chapter 10 to be part of the claim, but submits that in the interests of finality, and having regard to how this issue has developed and the balance of evidence that is available to the Tribunal on Chapter 14 issues, the better approach is to treat Chapter 10 as out of scope.[55]

In Article 14.2.4 of the CPTPP e-commerce chapter, Chapter 10 is referenced directly:

> For greater certainty, measures affecting the supply of a service delivered or performed electronically are subject to the obligations contained in the relevant

48. Ibid, p 15 at [61]
49. Memorandum 3.2.54, pp 16 – 17 at [5.15]–[5.17]
50. Document B25, pp 17–19
51. Submission 3.3.58; submission 3.3.61, sch 2, pp 75–77 at [10]
52. Submission 3.3.60, p 49 at [9.7]
53. Submission 3.3.61, sch 2, pp 75–77
54. Ibid, sch 2, p 77 at [10]
55. Ibid at [12]

provisions of Chapter 9 (Investment), Chapter 10 (Cross-Border Trade in Services) and Chapter 11 (Financial Services), including any exceptions or non-conforming measures set out in this Agreement that are applicable to those obligations.

The provisions in Chapter 10, including Article 10.6, which aims to prevent requirements that overseas providers of a service maintain local presence in Aotearoa New Zealand, are clearly within the scope of the inquiry. Despite the absence of Crown arguments and evidence relating to Article 10.6, we treat the provision as important context for interpreting Chapter 14. We set out the claimants' concerns with the provision in chapter 4 (at section 4.2.3).

1.5 The Structure of this Report

In chapter 2, we situate the issues addressed in this report within the context of the relationship between international trade and te Tiriti o Waitangi/the Treaty of Waitangi. After considering previous jurisprudence, we set out the Tiriti/Treaty principles we consider relevant to the issue before us.

In chapter 3, we examine the connection between te ao Māori, the digital domain, and the Crown's role in addressing Tiriti/Treaty issues within the digital space. We first consider how Māori conceptualise the digital domain, and their interests within it. We then consider the Crown's approach to governing the digital domain, though we draw no conclusions about the efficacy of its approach. We note the policy work currently underway to address Tiriti/Treaty issues.

In chapter 4, we look at the specific e-commerce provisions at issue in the CPTPP, and the risk to Māori rights and interests that the claimants assert they give rise to.

In chapter 5, we examine the extent to which the exceptions and exclusions in the CPTPP afford the Crown policy space to regulate to protect Māori interests in the digital domain in a Tiriti/Treaty-consistent way. This examination of the Crown's regulatory flexibility necessitates a discussion of the regulatory chill concept. Notably, this chapter responds to the risks identified in chapter 4 and draws conclusions about whether risk, considered cumulatively, is unacceptable in Tiriti/Treaty terms.

Finally, in chapter 6, we outline our conclusions, discussing whether Māori interests have been prejudiced by the e-commerce chapter of the CPTPP and whether the actions of the Crown have been consistent with te Tiriti/the Treaty. We also present our recommendations for how any such prejudice may be compensated for or removed.

CHAPTER 2

TE TIRITI / THE TREATY CONTEXT

2.1 Introduction

This chapter is concerned with the intersection between the principles of te Tiriti o Waitangi/the Treaty of Waitangi, the duties they place upon the Crown, and this country's foreign policy and international trade relationships.

We begin by considering the wider trade context within which the CPTPP exists. We then survey te Tiriti/the Treaty principles previously identified by the Tribunal (and in Tiriti/Treaty jurisprudence more generally) as salient in the international treaty-making arena. In doing so, we address the claimants' arguments about the Crown's assumption and use of the sovereign power to conduct foreign relations and make international agreements on behalf of Māori; the relevance of findings related to these issues in the *Ko Aotearoa Tēnei* (Wai 262, 2011) report; and their consideration in the ongoing Te Paparahi o Te Raki district inquiry. We then explain the approach we have taken to these matters in this inquiry. Finally, we set out those Tiriti/Treaty principles and duties we consider relevant to the issue before us.

The e-commerce issues addressed in this part of our report are distinct from those covered in earlier stages of our inquiry reporting. In our Stage One report, we examined the adequacy of the Treaty of Waitangi exception as a broad protection of Māori interests across the entire TPPA agreement. In Stage Two, we examined te Tiriti/the Treaty-consistency of a Crown policy developed in response to an obligation in the CPTPP concerning Plant Variety Rights. This third and final stage of the report addresses claims regarding the effect of a series of provisions in the agreement, relating to e-commerce.

2.2 The International Trade Context

The subject of our inquiry, the CPTPP, is a large and complex international trade agreement. As we have already commented, in terms of scope and reach, the CPTPP goes beyond previous international trade agreements to which Aotearoa New Zealand has been a Party, with corresponding implications for the ambit of domestic policy.[1] To understand how Tiriti/Treaty principles may apply to an instrument of this kind, in both our Stage One and Stage Two reports, we considered the findings of the *Ko Aotearoa Tēnei* (Wai 262) report. In that report, the

1. Waitangi Tribunal, *Report on the Trans-Pacific Partnership Agreement* (Lower Hutt: Legislation Direct, 2016), p1

Tribunal undertook a comprehensive assessment of Crown policies and practices when negotiating and entering into international agreements.[2] As the Tribunal noted:

> International relations are no longer confined to formal political or even economic arrangements between nation states. As the MFAT evidence shows, its focus as a ministry is now inwards as much as outwards. This is because the many international instruments, and the long processes of negotiating and renegotiating their content and implementation, have the potential to affect New Zealanders in almost all aspects of their lives.[3]

The CPTPP—representing the fourth-largest trade bloc in the world by Gross Domestic Product (GDP)—came into force on 30 December 2018.[4] Aotearoa New Zealand has recently signed the Regional Comprehensive Economic Partnership (RCEP), an agreement between 15 states encompassing roughly 2.2 billion people and 30 per cent of global GDP. The member-States of RCEP constitute the largest trade bloc in the world.

Aotearoa New Zealand is currently in negotiations for Free Trade Agreements with the European Union, the United Kingdom, India, and the Pacific Alliance bloc of Chile, Colombia, Mexico, and Peru, as well as negotiating an upgrade to the ASEAN–Australia–New Zealand Free Trade Agreement (AANZFTA).[5] Intentions to negotiate for an e-commerce agreement at the World Trade Organisation (WTO) have also been confirmed.[6] With respect to the United Kingdom–New Zealand (UK–NZ) negotiations, an Agreement in Principle has recently been announced. This Agreement includes a commitment to advance indigenous trade to recognise

2. Waitangi Tribunal, *Report on the Trans-Pacific Partnership Agreement*, p 7

3. Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims concerning New Zealand Law and Policy Affecting Māori Culture and Identity*, *Te Taumata Tuarua*, 2 vols (Wellington: Legislation Direct, 2011), vol 2, p 680

4. David Parker, 'Trade Numbers Show Promising Start to CPTPP', New Zealand Government press release, 12 March 2019, https://www.beehive.govt.nz/release/trade-numbers-show-promising-start-cptpp; FTA Implementation Unit, 'Regional Comprehensive Economic Partnership', Ministry of Foreign Affairs and Trade, https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-in-force/regional-comprehensive-economic-partnership-rcep/rcep-overview, accessed 27 September 2021; Tobias Sytsma, 'RCEP Forms the World's Largest Trading Bloc: What does this Mean for Global Trade', 9 December 2020, RAND Corporation, https://www.rand.org/blog/2020/12/rcep-forms-the-worlds-largest-trading-bloc-what-does.html, accessed 27 September 2021; 'Comprehensive and Progressive Agreement for Trans-Pacific Partnership', Ministry of Foreign Affairs and Trade, https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/comprehensive-and-progressive-agreement-for-trans-pacific-partnership-cptpp/cptpp-overview, accessed 27 September 2021

5. 'Free Trade Agreements under Negotiation', Ministry of Foreign Affairs and Trade, https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-under-negotiation, accessed 11 June 2021

6. 'WTO E-commerce Negotiations', Ministry of Foreign Affairs and Trade, https://www.mfat.govt.nz/en/trade/our-work-with-the-wto/wto-e-commerce-negotiations, accessed 11 June 2021; doc B25, p 4 at [9]

te Tiriti/the Treaty. We see this as a significant development and refer to it in chapter 6 of this report.

At our hearings, we heard MFAT's Deputy Secretary of the Trade and Economic Group, Vangelis Vitalis, describe the challenges and opportunities of the international arena for New Zealand:

> We all need to be realistic about the asymmetry of power again, which I come back to, between a small economy and a large one, but there is no question that if you're not in the room there is no way that you'll have your view heard in a negotiation. The advantage, too, of CPTPP is that New Zealand is not alone. There are a number of other economies in that negotiation. It wasn't just the United States and it wasn't just Japan. There are a number of us small or medium-sized economies that work actively together.
>
> We had heft, a sort of a plurilateral heft that we could bring into the negotiations to protect our interests and that's what happened in the e-commerce negotiations. We worked actively with other colleagues who we knew had the same concerns as us. That gave us power, that meant that we were in the negotiations, we were shaping and informing the rules in a way that simply would not have been possible if we were outside of the negotiation.[7]

In the *Ko Aotearoa Tēnei* (Wai 262) report, the Tribunal observed that 'the Crown is not all-powerful (or even very powerful) in the international arena' and concluded that the standard of protection of Māori interests was limited, by necessity, to 'the extent that is reasonable and practicable in the international circumstances'.[8] Additionally, it commented that in the context of an international agreement, Māori interests may be affected 'not because of Crown action but because of Crown obligation'.[9] These obligations are arrived at and agreed to through a complex balancing of interests by trade negotiators, and it is within that context that the Tribunal in *Ko Aotearoa Tēnei* (Wai 262) assessed that te Tiriti/the Treaty requires the Crown to do what is 'reasonable and practicable in the international circumstances' to protect Māori interests.

The claimants in this inquiry take issue with a number of the Tribunal's findings in the *Ko Aotearoa Tēnei* (Wai 262) report. In the following section we address those arguments, before setting out te Tiriti/the Treaty principles we consider to be relevant to the issues before us in this final stage of our inquiry.

2.3 Tiriti / Treaty Principles and International Treaty-Making

In accordance with Aotearoa New Zealand's current constitutional arrangements, international treaty-making is an exercise of the prerogative power, held by the

7. Transcript 4.1.9, p 259
8. Waitangi Tribunal, *Ko Aotearoa Tēnei: Te Taumata Tuarua*, vol 2, p 681
9. Ibid, p 680

executive branch of government, to conduct foreign affairs with other states. In the context of the Tiriti/Treaty relationship, the orthodox Crown position has been that the prerogative power is part of the unitary and indivisible sovereignty held by the Crown and ceded by Māori under article 1. Throughout this inquiry, the claimants have argued that the Crown's assertion of exclusive authority to make international treaties is incompatible with te Tiriti/the Treaty.[10] In support of this position, they rely primarily upon the Stage One *He Whakaputanga me te Tiriti* report (2014) from the Te Paparahi o Te Raki (Wai 1040) inquiry.

We turn now to examine in more detail the claimants' arguments about the applicability of the Tribunal's findings in the *He Whakaputanga me te Tiriti* and *Ko Aotearoa Tēnei* (Wai 262) reports.

2.3.1 Sovereignty issues

Throughout all three stages of our inquiry, we have heard arguments from the claimants about the Te Raki Stage One report's conclusion that 'the rangatira who signed te Tiriti did not cede their sovereignty. That is, they did not cede their authority to make and enforce law over their people or their territories. Rather, they agreed to share power and authority with the Governor.'[11]

They argue that this conclusion means the Crown does not have authority to treat unilaterally with other states where the matters for negotiation and agreement concern Māori tino rangatiratanga, natural resources, and other taonga.[12]

We discussed the relevance of the Te Raki report's conclusions in our own Stage One report, noting:

> It is not our role to consider the consequences of the Te Raki Tribunal's conclusions in the stage 1 report for Treaty principles – that is a matter for that Tribunal in stage 2.
>
> We also consider that an urgent inquiry is not the appropriate forum to address broad constitutional questions, particularly concerning the Crown–Māori relationship in respect of international instruments.[13]

Our previous reports have, however, adopted *Ko Aotearoa Tēnei*'s (Wai 262) conclusion that:

> In Article 1 of the Treaty of Waitangi, the Crown acquired kāwanatanga (the right to govern), which involved, among other things, the power to make policies and laws for the government of this country. Included in this, we think, was the right to represent New Zealand abroad and to make foreign policy. But the right to govern was acquired in an exchange with Māori tribal leaders and their peoples, in which the

10. Submission 3.3.54, p 11 at [29]; submission 3.3.59, pp 3, 4 at [9], [17]
11. Waitangi Tribunal, *He Whakaputanga me te Tiriti: The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Lower Hutt: Legislation Direct, 2014), p xxii
12. Transcript 4.1.2, pp 33–37, 501–503
13. Waitangi Tribunal, *Report on the Trans-Pacific Partnership Agreement*, p 5

> Crown guaranteed to protect Māori interests, including their full authority over their own affairs, or tino rangatiratanga.[14]

We stated in our Stage One report that this was consistent with the conclusion in the Te Raki Stage One report that—through te Tiriti/the Treaty—the Crown acquired the right to protect Māori from 'foreign threats and represent them in international affairs, where that was necessary'.[15] We also acknowledged the qualification in the Te Raki Stage One report, which the claimants highlighted, that 'the chiefs' emphasis was on British protection of their independence, not a relinquishment of their sovereignty'.[16]

2.3.1.1 *The claimants' position*

The claimants invited us to reconsider the applicability of the approach taken in *Ko Aotearoa Tēnei* (Wai 262). They did so by adopting Professor Jane Kelsey's analysis of Tiriti/Treaty jurisprudence, which argues that the Court of Appeal's decision in *New Zealand Maori Council v Attorney-General* (the *Lands* case) interpreted the 'principles' of te Tiriti/the Treaty to mean that

> the Crown acquired sovereignty, with the right to govern and make law and policy, and in doing accepted a responsibility actively to protect Māori interests so far as reasonably practicable, make informed decisions about the implications for Māori and consult with Māori when it required further information, and to provide a process to remedy past breaches.[17]

Professor Kelsey argued that, following the *Lands* case, the Waitangi Tribunal 'accommodated itself' to this interpretation of the Tiriti/Treaty principles and, in so doing: 'reconstructed the constitutional relationship between the Crown and Iwi and Hapu under Te Tiriti through the construct of "principles" that overstate the authority conferred through kawanatanga and deny the essence of tino rangatiratanga'.[18]

For the claimants, the conclusion of the Stage One Te Raki report represents an important departure from this jurisprudence. They submitted that the Tribunal set out the 'challenge of re-conceptualising the Tiriti principles' in the following terms: 'Given we conclude that Māori did not cede their sovereignty through te Tiriti, what implications arise for the principles of the treaty identified over the years by both this Tribunal and the courts?'[19]

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14. Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims concerning New Zealand Law and Policy Affecting Māori Culture and Identity, Te Taumata Tuatahi* (Wellington: Legislation Direct, 2011), p 236
15. Waitangi Tribunal, *The Report on the Trans-Pacific Partnership Agreement*, p 7
16. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, p 524; submission 3.3.21, p 40; doc A26, p 10
17. Submission 3.3.60, pp 6–7; doc B31, pp 9, 23–24
18. Document B31, pp 9, 11
19. Submission 3.3.63, p 38 at [5.12]; Waitangi Tribunal, *He Whakaputanga me te Tiriti*, p 527

The Tribunal went on to state: 'It suffices to reiterate here that, in February 1840, an agreement was made between Māori and the Crown, and we have set out its meaning and effect. It is from that agreement that the treaty principles must inevitably flow'.[20]

The claimants argued that these conclusions require us to revisit the Treaty principles we have applied in this inquiry to date, and particularly those identified in *Ko Aotearoa Tēnei* (Wai 262), which predate the Te Raki findings.[21] They emphasised that, since that report was published a decade ago, 'the scope and consequences of international trade and investment agreements have expanded significantly'.[22]

2.3.1.2 *The Crown's position*

In response, the Crown has consistently highlighted the relatively limited scope of the Te Raki inquiry's findings on sovereignty.[23] In the letter of transmittal, the presiding officer of that inquiry said:

> I reiterate that our report concerns the meaning and effect of the treaty in February 1840. It does not contain findings in respect of claims, and nor does it make recommendations. It makes no conclusions about the sovereignty the Crown exercises today. Nor does it say anything about how the treaty relationship should operate in a modern context.[24]

The Crown argued the Te Raki Stage One report concluded that 'there was clarity and understanding between the parties to te Tiriti/the Treaty about relative roles for international affairs'.[25] At the same time, the Crown accepted that 'its exercise of this international affairs function is paired with responsibilities to understand and actively protect Te Tiriti/the Treaty interests of Māori as it does so – both procedurally and substantively'.[26]

In response to Professor Kelsey's argument that Tribunal jurisprudence falls into 'three phases', the Crown argues that Tribunal jurisprudence has been consistent across time, notwithstanding the influence of the *Lands* case, and more recently the Te Raki Stage One report.[27] Crown counsel point to relevant Tribunal findings that describe kāwanatanga as 'less than a cession of sovereignty' and of tino rangatiratanga as requiring the Crown 'to acknowledge Māori control (or unqualified chieftainship) over their tikanga, resources, and people to allow Māori to manage their own affairs in a way that aligns with their customs and values'.[28]

20. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, p 527
21. Submission 3.3.63, p 40 at [5.16]
22. Ibid
23. Submission 3.3.61, sch 3, p 78 at [1]; submission 3.3.27, pp 8–9 at [11.2]
24. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, pp xxii–xxiii
25. Submission 3.3.61, sch 3, p 78 at [4]
26. Ibid, p 79 at [5]
27. Ibid, pp 79–82; doc B31, p 6
28. Submission 3.3.61, sch 3, pp 80–81 at [11]

In particular, the Crown notes, citing several previous Tribunal reports:

> the idea that a successful partnership requires multiple interests to be held in balance – 'the national interest with Māori interests, the Crown's right to govern with its duty to protect, kāwanatanga with tino rangatiratanga' – has been repeatedly discussed by the Tribunal.[29]

On the matter of the weight to be given to the findings in *Ko Aotearoa Tēnei* (Wai 262), the Crown rejects the claimants' argument that the report represents 'institutionalised thinking', or a 'hiccup'. The Crown argues that the 'purposive and balancing approach' in the Tribunal's application of Tiriti/Treaty principles in *Ko Aotearoa Tēnei* (Wai 262) 'recognises the different but related spheres of influence and respective roles of both Crown and Māori under Te Tiriti/the Treaty'.[30]

The Crown, nonetheless, acknowledged that it may be appropriate to refine the *Ko Aotearoa Tēnei* (Wai 262) approach when we undertake our own Tiriti/Treaty analysis in relation to the e-commerce/data sovereignty issue. It remains the Crown's position, however, that the claimants' arguments relating to sovereignty 'should not displace the fundamentally purposive, relational, and evolutionary approach that has been articulated consistently by the Tribunal throughout its lifetime'.[31]

2.3.1.3 *The Treaty and its principles – our approach*

In our own Stage One report, we responded to arguments made by claimant counsel about the implications of Te Raki Stage One. We said that it was not our role to consider the consequences of that report for Treaty principles: that was a matter for the next stage of the Te Raki inquiry.

The hearings for Stage Two of the Te Raki inquiry have concluded and the report for that stage is in preparation. As the Stage One Te Raki report noted:

> We have reached the conclusion that Bay of Islands and Hokianga Māori did not cede sovereignty in February 1840. In drawing this conclusion, we say nothing about how and when the Crown acquired the sovereignty that it exercises today. Our point is simply that the Crown did not acquire that sovereignty through an informed cession by the rangatira who signed te Tiriti at Waitangi, Waimate, and Mangungu.
>
> What does this mean for treaty principles? Given we conclude that Māori did not cede their sovereignty through te Tiriti, what implications arise for the principles of the treaty identified over the years by both this Tribunal and the courts? That is a matter on which counsel will no doubt make submissions in stage 2 of our inquiry, where we will make findings and, if appropriate, recommendations about claims concerning alleged breaches of the treaty's principles.[32]

29. Ibid, p 82 at [14]
30. Ibid, pp 82–83 at [16]–[17]
31. Ibid, pp 83 at [18], 84 at [21]
32. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, p 527

Our concern remains that in this, our final report, we do not intrude into matters still under consideration in the Te Raki inquiry. We maintain the view that it is not appropriate in this final stage of inquiry to address broad constitutional questions concerning the Crown–Māori relationship in respect of international instruments, given the relatively limited evidence and range of parties before us. We also note that a kaupapa inquiry into the Constitution is pending.

With these considerations in mind, we acknowledge the careful submissions of the parties on these issues. Before turning to more detailed consideration of Tiriti/Treaty principles, we make the following observations:

- We accept that te Tiriti/the Treaty did not confer upon the Crown a supreme and unilateral right to make and enforce laws over Māori.
- We recognise the conclusion of the Te Paparahi o Te Raki Stage One Report that, in February 1840, rangatira did not cede their sovereignty (meaning their authority to make and enforce laws over their people and within their territories). Rather, te Tiriti/the Treaty signified Māori agreement to share power and authority with the Governor, although they had different roles and spheres of influence.[33]
- We also have regard to the findings of the Te Rohe Pōtae (Wai 898) inquiry, whose *Te Mana Whatu Ahuru* report characterised the kāwanatanga of the Crown in the following terms:

> Kāwanatanga, as they [Māori] saw it, was a power to govern and make laws, but it was a power that particularly applied to settlers, settlement, and international relations, and – to the extent that it might apply to Māori – was to be used for the protection of Māori interests and in a manner that was consistent with Māori views about what was beneficial to them. It was therefore not the supreme and unfettered power that the Crown believed it to be; rather, it was a power that was conditioned or qualified by the rights reserved to Māori.[34]

- In its Stage One Report, the Te Raki inquiry also concluded that: '[t]he rangatira appear to have agreed that the Crown would protect them from foreign threats and represent them in international affairs, where that was necessary'.[35]
- The particular question arising in the remaining part of our inquiry concerns the nature and extent of Māori interests potentially affected by the e-commerce provisions in the CPTPP. As the jurisprudence currently stands, we see no inherent conflict between the findings of the Tribunal in the Te Raki Stage One Report and the relevant findings of the Tribunal in the *Ko Aotearoa Tēnei* (Wai 262). In broad terms, both reports acknowledge that kāwanatanga includes a protective and representative capacity

33. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, pp 526–527
34. Waitangi Tribunal, *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims*, 6 vols (Lower Hutt: Legislation Direct, 2022), vol 1, p 196
35. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, p 529

in the conduct of international affairs. Again, following the logic of those two reports, the necessary inquiry becomes whether or not the Crown, in exercising this aspect of its kāwantanga, has properly informed itself of the nature and extent of the Māori interest, engaged with Māori in good faith, and acted appropriately to protect those interests.

We turn now to a more detailed consideration of the applicable principles.

2.3.2 The principle of partnership

In our Stage One *Report on the Trans-Pacific Partnership Agreement* (2016), we noted that:

> For both claimants and the Crown, the starting point is the principle of reciprocity. This is the Treaty's 'essential compact' – the recognition of the Crown's right of kāwanatanga (the right to govern) in exchange for the guarantee of tino rangatiratanga (the right of full chieftainship, also known as autonomy, or self-government).[36]

The principle of partnership flows from this essential compact, requiring the partners to act reasonably and in good faith towards each other. In so doing, the Crown has a duty to engage with Māori on matters of importance to them. As the Central North Island Tribunal found, what is reasonable 'depends on the nature of the resource or taonga, and the likely effects of the policy, action, or legislation'.[37]

In our Stage Two *Report on the Crown's Review of the Plant Variety Rights Regime* (2020) we noted that, in addition to reciprocity, the principle of partnership contains 'the acknowledgement that neither kāwanatanga nor tino rangatiratanga was unqualified or absolute'. We went on to say:

> The premise that a successful partnership involves the need for compromise and requires multiple interests to be balanced – kāwanatanga with tino rangatiratanga, the national interest with Māori interests, the Crown's right to govern with its duty to protect – has been explored repeatedly in Tribunal reports.[38]

In *Ko Aotearoa Tēnei* (Wai 262), the Tribunal found partnership to be 'an overarching principle beneath which others, such as kāwanatanga and tino rangatiratanga, lie'.[39] Further, it found:

> This emphasis on partnership makes New Zealand unique among the post-colonial nations . . . other countries, by contrast, emphasise the power of the state and the relative powerlessness of their indigenous peoples by placing state fiduciary or trust obligations at the centre of domestic indigenous rights law. New Zealand, by contrast,

36. Waitangi Tribunal, *Report on the Trans-Pacific Partnership Agreement*, p 6
37. Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage One*, revised ed, 4 vols (Wellington: Legislation Direct, 2008), vol 4, p 1237
38. Waitangi Tribunal, *The Report on the Crown's Review of the Plant Variety Rights Regime* (Wellington: Legislation Direct, 2020), pp 11–12
39. Waitangi Tribunal, *Ko Aotearoa Tēnei, Te Taumata Tuarua*, vol 1, p 17

> emphasises through the partnership principle that our unique New Zealand arrangements are built on an original Treaty consensus between formal equals. We do of course have our own protective principle that acknowledges the Crown's Treaty duty actively to protect Māori rights and interests. But it is not the framework. Partnership is.[40]

This framework of partnership necessarily involves a careful balancing of interests.[41] Recalling again that New Zealand is a small actor on the international stage and does not have unilateral power to determine the content of large-scale international agreements, we adopt the conclusion of *Ko Aotearoa Tēnei* (Wai 262) – namely, that in balancing interests:

> The Crown must do what is reasonable in the circumstances. The reasonableness line is, in our view, to be drawn after careful consideration of the impact such rights might have on the rights and interests of others. That is, the answer will in each case depend on a balancing process.[42]

As noted in chapter 1, assessments of the Crown's engagement with respect to the TPPA and CPTPP negotiations are outside the scope of this report, as a result of the settlement reached by the parties through mediation. Accordingly, neither the Crown nor the claimants make specific submissions concerning the principle of partnership, whose central precept is good faith engagement. Similarly, we make no findings in this report regarding the adequacy, or otherwise, of the Crown's engagement with Māori in the context of the TPPA and CPTPP.

It is also appropriate that we emphasise the importance of partnership and joint decision-making between the Crown and Māori in the context of international relations. The Treaty requires that this extends beyond consultation. As the Tribunal found in the *Maniapoto Mandate Inquiry Report* (2019), '[t]he principles of partnership and reciprocity are inherently connected to article 2 of the Treaty and tino rangatiratanga.'[43] Furthermore, as the Tribunal held in *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (2019):

> Partnership is a much stronger concept than participation. Partnership under the Treaty, underpinned by recognition of tino rangatiratanga, means at least joint decision-making between Crown and Māori agencies and groups, not mere 'contributions to' or 'participation in' decision-making. This is a crucial distinction.[44]

40. Waitangi Tribunal, *Ko Aotearoa Tēnei, Te Taumata Tuarua*, vol 1, pp 17, 19
41. Waitangi Tribunal, *Report on the Trans-Pacific Partnership Agreement*, p 12
42. Waitangi Tribunal, *Ko Aotearoa Tēnei: Te Taumata Tuarua*, vol 1, p 86
43. Waitangi Tribunal, *The Maniapoto Mandate Inquiry Report* (Lower Hutt: Legislation Direct, 2020), pp 14–15
44. Waitangi Tribunal, *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wellington: Legislation Direct, 2019), p 78

Joint decision-making is described as the appropriate starting point in the *Hauora* report, with mere 'contributions' or 'participation' falling short of the partnership threshold. Professor Kelsey, quoting Moana Jackson (a claimant in the Health Services and Outcomes inquiry), drew attention to instances where no contribution or participation occurs at all:

> The Crown assumes its Treaty obligation is fulfilled when it engages with Maori in a time frame and terms that the Crown sets. After the fact. That is not a Treaty relationship. One doesn't unilaterally do something and say to the other, we have done it now is that OK? It puts Maori in an impossible position. The Crown denies the nature of the Treaty relationship, tino rangatiratanga of Maori, mana motuhake, [is] not a subsidiary right to be exercised when the process is beyond change.[45]

In the international trade arena, until recently, the opportunity for Māori to engage in joint decision-making with the Crown and its agents has been limited or non-existent. In this context, we see the recommendations by the Trade for All Advisory Board ('the Trade for All Board'), canvassed more fully in chapter 3, as constructive and consistent with what we see as the necessary application of the partnership principle. The Trade for All Board recommends, alongside several other suggestions, that:

- the manner in which the Crown engages with Māori on trade needs to evolve in line with growing expectations of power sharing and a more equal relationship;
- engagement begin early on, before key policies have even been determined, where co-creation of policy is still possible; and
- careful consideration is given toward which people or bodies need to be involved.[46]

The Trade for All Board's report, alongside the work of Te Taumata and the creation of Ngā Toki Whakarururanga, signals that steps are now being taken toward meeting the partnership threshold which is fundamental to te Tiriti/the Treaty relationship.

2.3.3 The principle of equity

Article 3 of te Tiriti/the Treaty guarantees Māori all the rights and privileges of British citizens. It is from this guarantee that the principles of equity and equal treatment flow. These principles oblige the Crown to 'meet a basic standard of good government'. This standard is met where government acts in accordance with its own law and ensures that the rights and privileges of Māori as citizens are protected by the law in practice.[47] As such, the principle of equity is closely linked to the principle of active protection, insofar as it necessitates positive action on behalf of the Crown, not only to ensure equality of rights and privileges

45. Document B8, p 33
46. Document B23, pp 81–82
47. Waitangi Tribunal, *Hauora*, pp 33–34; Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 428–429

between Māori and non-Māori, but to prevent and counter inequity. As noted in the *Hauora* report:

> Article 3 of the Treaty confirms that Māori have all the rights and privileges of British subjects. The Tribunal has found that this article not only guarantees Māori freedom from discrimination but also obliges the Crown to positively promote equity. It is through article 3 that Māori, along with all other citizens, are placed under the protection of the Crown and are therefore assured equitable treatment from the Crown to ensure fairness and justice with other citizens.[48]

The positive promotion of equity is further explored in *He Aha i Pērā Ai? The Māori Prisoners' Voting Report* (2019), where the Tribunal reiterated:

> the principle of equity is closely linked to the principle of active protection. Alongside the active protection of tino rangatiratanga, the duty of good government obliges the Crown, when exercising its kāwanatanga, to actively protect the rights and interests of Māori as citizens.[49]

As established by previous Tribunal reports, equitable treatment does not mean Māori and non-Māori should be treated the same, or that ensuring freedom from discrimination is the end of the Crown's responsibility. Rather, in order to satisfy its Tiriti/Treaty obligations, the Crown needs to not only ensure that Māori do not suffer direct or informal discrimination, but to actively inform itself about, and take steps to ameliorate inequity, where it arises.[50] Claimant closing submissions pointed to *Te Urewera* (2017), in which the Tribunal suggested how the Crown should approach remedying inequity:

> In attempting to reduce disparity, however caused, the Crown has an obligation to do so in good faith and partnership with the hapu and iwi of Te Urewera. It cannot simply present Maori with its own solutions, however well-intentioned they might be; at minimum, it must consult with Maori, and ideally it will either form a partnership with, or deliver funding and autonomy to, Maori organisations.[51]

In their closing submissions, the claimants went on to connect the principle of equity and the issue before the Tribunal in this inquiry:

> In the context of this claim, the principle of equity requires the Crown not to elevate other interests, and those of New Zealanders in general above the rights and interests of Māori. It also requires the Crown to co-design with Māori the protections and

48. Waitangi Tribunal, *Hauora*, p 33
49. Waitangi Tribunal, *He Aha i Pērā Ai? The Māori Prisoners' Voting Report* (Lower Hutt: Legislation Direct, 2020), p 13
50. Waitangi Tribunal, *Hauora*, p 34
51. Submission 3.3.60, p 11 at [1.32]; Waitangi Tribunal, *Te Urewera*, 8 vols (Lower Hutt: Legislation Direct, 2015), vol 8, p 3773

solutions that can achieve equitable outcomes, not simply to present them to Māori as a fait accompli.[52]

The Crown did not discuss the principle of equity in its closing submission beyond observing, in a footnote, that '[t]he principle of equity has been found to be closely related to active protection and is not developed here as a separate principle'.[53]

As noted, both the Crown and claimants recognise that the principles of equity and active protection are closely linked and relevant to this claim. The parties diverge, however, on the question of how much weight the principle of equity should be afforded. While the Crown does not address the principle separately, the claimants insist it is a standalone principle of particular significance to this inquiry.[54]

2.3.4 The right of development

The right of development arises from te Tiriti / the Treaty principles of partnership, reciprocity, mutual benefit, and equity.[55] The *Report on the Muriwhenua Fishing Claim* (1988) noted that a right to development was an emerging concept in international law following the Declaration on the Right to Development adopted on 4 December 1986.[56] This report, quoting Professor Danilo Türk, a leading drafter of the declaration, noted:

> states should adopt special measures in favour of groups in order to create conditions favourable for their development. If a group claims that the realisation of its right to development requires a certain type of autonomy, such a claim should be considered legitimate.[57]

The Tribunal in the *Radio Spectrum Management and Development Final Report* (1999) held, in relation to development rights arising from te Tiriti / the Treaty, that te Tiriti / the Treaty 'was not intended to fossilise the status quo'. Further, te Tiriti / the Treaty should be considered a 'living instrument' to be applied in light of developing circumstances.[58] Indeed, if 'Māori knowledge, technology, ideas, opportunities, and practice were to be frozen at their 1840 levels, then the corollary had to be that the same should apply to settlers – a notion that is plainly nonsense'.[59]

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52. Submission 3.3.60, p 12 at [1.34]
53. Submission 3.3.61, p 15 n
54. Submission 3.3.63, pp 44–45 at [6.8]
55. Waitangi Tribunal, *Te Kāhui Maunga: The National Park District Inquiry Report* (Wellington: Legislation Direct, 2013), p 17
56. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wellington: GP Publications, 1988), p 235
57. Ibid
58. Waitangi Tribunal, *The Radio Spectrum Management and Development Final Report* (Wellington: GP Publications, 1999), p 18
59. Waitangi Tribunal, *Te Kāhui Maunga*, vol 1, p 17

He Maunga Rongo: Report on Central North Island Claims notes that there has been a general acceptance by both the Tribunal and the courts, of a Treaty right of development. This acceptance is based on the wording of both Treaty texts, which emphasise guarantees to Māori concerning their properties and taonga.[60] The report states that Central North Island Māori have a Tiriti/Treaty right of development that includes:

- The right as property owners to develop their properties in accordance with new technology and uses, and to equal access to opportunities to develop them;
- The right to develop or profit from resources in which they have (and retain) a proprietary interest under Maori custom, even where the nature of that property right is not necessarily recognised, or has no equivalent, in British law;
- The right to positive assistance, where appropriate to the circumstances, including assistance to overcome unfair barriers to participation in development (especially barriers created by the Crown);
- The right of Maori to retain a sufficient land and resource base to develop in the new economy, and of their communities to decide how and when that base would be developed;
- The opportunity, after considering the relevant criteria, for Maori to participate in the development of Crown-owned or Crown-controlled property or resources or industries in their rohe, and to participate at all levels (such criteria include the existence of a customary right or an analogy to a customary right, the use of tribal taonga, and the need to redress past breaches or fulfil the promise of mutual benefit); and
- The right of Maori to develop as a people, in cultural, social, economic, and political senses.[61]

The report affirms the importance of te Tiriti/the Treaty principles of partnership and mutual benefit. However, it asserts that the overall 'intent of the Treaty was (and is) to enable both peoples to live together, to participate in creating a better life for themselves and their communities, and to share in the expected benefits from settlement'. This sentiment is affirmed in *Te Kāhui Maunga: The National Park District Inquiry Report* (2013), which acknowledges that a Tiriti/Treaty right to development, at its most basic, means giving Māori a 'fair go' alongside Pākehā.[62]

2.3.5 Mana motuhake

Tribunal jurisprudence equates mana motuhake and tino rangatiratanga, which is the term used in article 2 of te Tiriti. As *The Taranaki Report* (1996) sets out:

60. Waitangi Tribunal, *He Maunga Rongo*, vol 3, p 891
61. Ibid, p 914
62. Waitangi Tribunal, *Te Kāhui Maunga*, vol 1, p 18

> The international term of 'aboriginal autonomy' or 'aboriginal self-government' describes the right of indigenes to constitutional status as first peoples, and their rights to manage their own policy, resources, and affairs, within minimum parameters necessary for the proper operation of the State. Equivalent Maori words are 'tino rangatiratanga', as used in the Treaty, and 'mana motuhake', as used since the 1860s.[63]

As previous Tribunal inquiries have found, the Crown has a duty to actively protect Māori autonomy, or mana motuhake, to which they are entitled as a natural expression of their tino rangatiratanga. The *Tauranga Moana* report (2010), building on the *Turanga Tangata Turanga Whenua* report (2004), defined Māori autonomy as

> 'the ability of tribal communities to govern themselves as they had for centuries, to determine their own internal political, economic, and social rights and objectives, and to act collectively in accordance with those determinants'. In our view, the essence of autonomy is the capacity of Māori hapū and iwi to exercise authority over their own affairs.[64]

Importantly, the Crown is charged with recognising and protecting Māori autonomy and authority over their own affairs. However, this recognition and protection is necessarily limited in that it has to occur within parameters required for the proper operation of the State. The limits which te Tiriti/the Treaty imposes on the partners' respective spheres of authority are well recognised in jurisprudence surrounding the principles of reciprocity and partnership. Previous Tribunal reports have recognised that a practical balance needs to be struck between the authority of the Crown and iwi or Māori groups. Volume 1 of the *Te Urewera* report expands upon this idea in an extended discussion of te mana motuhake o Tūhoe. The report elaborates upon Māori and Crown spheres of authority and suggests that negotiation in the spirit of cooperation is required to strike a balance between them:

> In their respective languages, the concepts of 'sovereignty' on the one hand, and 'tino rangatiratanga' or 'mana motuhake' on the other, connote absolute authority, and so cannot co-exist in different people or institutions. Thus, striking a practical balance between the Crown's authority and the authority of a particular iwi or other Maori group must be a matter for negotiation, conducted in the spirit of cooperation and tailored to the circumstances.[65]

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63. Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi* (Wellington: GP Publications, 1996), p 5

64. Waitangi Tribunal, *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims*, 2 vols (Wellington: Legislation Direct, 2004), vol 1, p 113; Waitangi Tribunal, *Tauranga Moana, 1886–2006: Report on the Post-Raupatu Claims*, 2 vols (Wellington: Legislation Direct, 2010), vol 1, p 23

65. Waitangi Tribunal, *Te Urewera*, vol 1, p 134

Claimant counsel noted the Tribunal's finding in this instance:

> The Tuhoe [*Te Urewera*] report made it clear that any co-existence between tino rangatiratanga and kāwanatanga cannot be unilaterally determined by the Crown, but requires negotiation in good faith to reach a principled conclusion and may vary according to the matter at hand.[66]

As a result, claimants argue that Māori Data Sovereignty and Māori Data Governance are matters of mana motuhake which require the Crown to negotiate with Māori in a cooperative and context-responsive manner. They note that in the context of this inquiry:

> Tino rangatiratanga and mana motuhake in the contemporary digital domain means the mana to control and manage according to your own preferences, [and] requires the development of a tikanga-based regime for regulating the digital ecosystem that recognises Māori Data Sovereignty, Māori Data Governance, and collective concepts of privacy. How that is balanced with other national and international rules to govern the digital domain is a matter for negotiation between the Tiriti parties.[67]

The Crown affirms the claimants' central argument that issues of authority should be resolved in partnership with Māori, with a practical balance struck between the groups.[68] However, while the Crown recognises that mana motuhake is to be protected, within the reasonable parameters necessary for the functioning of the State, it notes that 'the broader aspects of these matters [Māori Data Sovereignty and Māori Data Governance] fall beyond the scope of the e-commerce chapter and, in any event, are being addressed through other processes'.[69]

Beyond this statement, the Crown does not define the broader aspects of Māori Data Governance and Māori Data Sovereignty that are said to be beyond the scope of the e-commerce chapter. In chapter 4, we will assess these matters in more detail.

2.3.6 The principle of active protection

Article 2 of te Tiriti included the guarantee to Māori of their tino rangatiratanga over all their treasures (taonga), by way of protection from the Crown.[70] Te Tiriti/the Treaty partnership requires the Crown to balance kāwanatanga under article 1 and tino rangatiratanga under article 2. In doing so, the Crown must actively pro-

66. Submission 3.3.60, p 9 at [1.23]
67. Ibid at [1.26]
68. Submission 3.3.61, p 17 at [46]
69. Ibid at [45]
70. 'Ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangatira ki nga hapu – ki nga tangata katoa o Nu Tirani te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa'. This was translated by Professor Sir Hugh Kawharu as 'The Queen of England agrees to protect the Chiefs, the subtribes and all the people of New Zealand in the unqualified exercise of their Chieftanship over their lands, villages and all their treasures'.

tect Māori rights and interests. In *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims* (2018), the Tribunal put it this way: 'The Crown is obliged to use its power of kāwanatanga to actively protect the Māori rights and interests guaranteed under articles 2 and 3 of the Treaty.'[71]

The Tribunal has held that the Crown's protective duty extends beyond land, waters, and property interests to encompass Māori 'interests in both the benefit and enjoyment of their taonga and the mana or authority to exercise control over them.'[72] This protection extends to 'tribal authority, Māori cultural practices, and Māori themselves.'[73] The *Report on the Te Reo Maori Claim* (1986) quoted from submissions on behalf of the New Zealand Section of the International Commission of Jurists, who emphasised that the word 'guarantee' in article 2 denotes an active executive sense rather than a passive permissive sense and as a result: 'The word guarantee imposes an obligation to take active steps within the power of the guarantor, if it appears that the Maori people do not have or are losing, the full, exclusive and undisturbed possession of the taonga.'[74]

They speculated that the protection standard would be different if article 2 merely required the Crown to 'permit' Māori to have full exclusive and undisturbed possession of taonga and that, '[h]aving so permitted, it could be argued that a policy of benign neglect amounted to compliance.'[75] However, this is not the protection standard required, instead:

> the word (guarantee) means more than merely leaving the Maori people unhindered in their enjoyment of the language and culture. It requires active steps to be taken to ensure that the Maori people have and retain the full exclusive and undisturbed possession of their language and culture.[76]

Recently, the Tribunal has found that the guarantee of tino rangatiratanga over kāinga in article 2 of the Māori text, te Tiriti, is nothing less than a guarantee of the right to continue to organise and live as Māori. Put another way, it is a guarantee to Māori of the right to cultural continuity. In *He Pāharakeke, he Rito Whakakīkīnga Whāruarua* (2021), the report on the urgent inquiry into Oranga Tamariki, the Tribunal found the effects of alienation and disconnection from culture to be a fundamental cause of the disparate rate that tamariki Māori are taken into State care. The Tribunal found:

71. Waitangi Tribunal, *Te Mana Whatu Ahuru*, p 189
72. Waitangi Tribunal, *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims* (Wellington: Brooker and Friend Ltd, 1993), p 33
73. Waitangi Tribunal, *The Offender Assessment Policies Report* (Wellington: Legislation Direct, 2005), p 12. This references the following two Tribunal reports: Waitangi Tribunal, *Te Whanganui-a-Orotu Report 1995* (Wellington: Brooker's Ltd, 1995) and Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim*, 2nd ed (Wellington: Brooker and Friend Ltd, 1991).
74. Wai 11 ROI, doc 43, p 3; Waitangi Tribunal, *Report of the Waitangi Tribunal on the Te Reo Maori Claim*, 3rd ed (Wellington: Brooker's, 1993), p 21
75. Wai 11 ROI, doc 43, p 3; Waitangi Tribunal, *Report on the Te Reo Maori Claim*, p 21
76. Wai 11 ROI, doc 43, p 3; Waitangi Tribunal, *Report on the Te Reo Maori Claim*, p 21

> The disparity has arisen and persists in part due to the effects of alienation and dispossession, but also because of a failure by the Crown to honour the guarantee to Māori of the right of cultural continuity embodied in the guarantee of tino rangatiratanga over their kāinga. It is more than just a failure to honour or uphold, it is also a breach born of hostility to the promise itself. Since the 1850s, Crown policy has been dominated by efforts to assimilate Māori to the Pākehā way. This is perhaps the most fundamental and pervasive breach of te Tiriti/the Treaty and its principles. It has also proved to be the most difficult to correct, in part due to assumptions by the Crown about its power and authority, and in part because the disparities and dependencies arising from the breach are rationalised as a basis for ongoing Crown control.[77]

Importantly, the Tribunal has found that 'taonga' encompasses both tangible and intangible things. In the *Report on Claims Concerning the Allocation of Radio Frequencies* (1990), the Tribunal found:

> 'Taonga' are things valued or treasured. They may include those things which give sustenance and those things which support taonga. Generally speaking the classification of taonga is determined by the use to which they are put and/or their significance as possessions. They are imbued with tapu (an aura of protection) to protect them from wrongful use, theft or desecration. Taonga may be the possession of he tangata (an individual), he whanau (a family), he hapu (a sub-tribe), or he iwi (a tribe). There are many kinds of taonga in various categories and in a wide range of classifications. They may be things which are not yet known.[78]

The question of whether something is a 'taonga' is indicative of the strength of the Māori interest and therefore the standard of active protection required of the Crown. This is a question we explore in relation to Māori data in chapter 3. However, as we have set out in our Stage One report, the duty of active protection must involve a careful balancing of interests as embodied by the principle of partnership. In relation to international agreements, we concluded in our Stage One report that 'the Crown must work out a level of protection for Māori interests, as identified and defined by Māori, that is reasonable when balanced where necessary against other valid interests, and in the sometimes constrained international circumstances in which it must act'.[79]

The argument at the centre of the claims before us is whether the standard of active protection has been met by the Crown in its accession to the CPTPP, in light of any potential risk posed to Māori interests by the Agreement's e-commerce provisions.

77. Waitangi Tribunal, *He Pāharakeke, He Rito Whakakīkīnga Whāruarua: Oranga Tamariki Urgent Inquiry* (Wellington: Legislation Direct, 2021), p 12
78. Waitangi Tribunal, *Report of the Waitangi Tribunal on Claims concerning the Allocation of Radio Frequencies* (Wellington: Brooker and Friend Ltd, 1990), p 40
79. Waitangi Tribunal, *Report on the Trans-Pacific Partnership Agreement*, p 8

The claimants argued that a number of Crown actions and omissions mean the active protection standard has not been met, reiterating that:

> The electronic commerce rules in the TPPA/CPTPP create a real and present danger of disabling Māori and the Crown from taking the action contemplated to remove or prevent forms, uses and impacts of the digital technologies that are detrimental to Māori, and foreclosing the adoption of such a Tiriti-consistent digital regime . . .[80]

The Crown referred to the *Ko Aotearoa Tēnei* (Wai 262) report and accepted that ensuring active protection is no small obligation. That Tribunal also pointed out that the level of control the Crown actually possesses in an international context is directly relevant to its ability to ensure adherence to the protection principle.[81] While the Crown does not deny an obligation to actively protect Māori interests, it asserts that a number of differing considerations need to be taken into account to determine whether, as a matter of fact, any aspects of the e-commerce chapter are inconsistent with the Crown's duty of active protection.[82]

The e-commerce provisions at issue are discussed in more detail in chapter 4, with relevant exceptions and exclusions discussed in chapter 5. In these chapters we more fully explore which, if any, aspects of the e-commerce provisions are inconsistent with the Crown's obligations under te Tiriti/the Treaty. However, we must first consider in more detail the nature of Māori interests in the digital domain and the Crown's governance responsibilities in this space.

80. Submission 3.3.60, p 79
81. Submission 3.3.61, pp 15–16; Waitangi Tribunal, *Ko Aotearoa Tēnei: Te Taumata Tuarua*, vol 2, p 681
82. Submission 3.3.61, p 38

CHAPTER 3

MĀORI INTERESTS IN THE DIGITAL DOMAIN

> 'Mātauranga' derives from 'mātau,' the verb 'to know'. 'Mātauranga' can be literally translated as 'knowing' or 'knowledge'. But 'mātauranga' encompasses not only *what* is known but also *how* it is known – that is, the way of perceiving and understanding the world, and the values or systems of thought that underpin those perceptions. 'Mātauranga Māori' therefore refers not only to Māori knowledge, but also to the Māori way of knowing. [Emphasis in original.]
>
> —Waitangi Tribunal[1]

3.1 Introduction

At present, Māori are making concerted efforts to reclaim elements of their cultural inheritance, including their knowledge system mātauranga, which colonisation has endangered and suppressed. In this context, sensitivity is understandably heightened that any part of mātauranga may be constrained or lost through the negotiation and implementation of trade agreements like the CPTPP. At the same time, increasing digital trade and e-commerce give rise to questions about how Māori may utilise new technologies to compete and thrive in an increasingly global, networked world.

This balance between opportunity and threat to Māori interests is at the heart of our focus in this report: the e-commerce chapter of the CPTPP. The chapter applies to measures adopted or maintained by a State party that affect trade by electronic means (Article 14.2(2)).

Article 14.2(1) signals the policy objective of the e-commerce chapter:

> The parties recognise the economic growth and opportunities provided by electronic commerce and the importance of frameworks that promote consumer confidence in electronic commerce and of avoiding unnecessary barriers to its use and development.

This apparently innocuous provision conceals a number of issues potentially significant to the protection and control of mātauranga. Some are wide in scope, while some are particular to the characteristics of digital commerce. Not all these

1. Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims concerning New Zealand Law and Policy Affecting Māori Culture and Identity, Te Taumata Tuarua*, 2 vols (Wellington: Legislation Direct, 2011), vol 1, p 16

issues are within the scope of this stage of our inquiry, but they are important context out of which the claims we examine arise.

In this chapter, we examine the relationship between te ao Māori and mātauranga Māori with the digital domain. We also consider the Crown's governance of this domain with respect to its Tiriti/Treaty obligations. We consider how Māori conceptualise the digital domain and their interests within it, addressing questions as to what constitutes 'Māori data', and whether data is a taonga. We then examine what policy work is underway to address Māori and Tiriti/Treaty issues in the digital domain and what effect (if any) these issues have had on the Crown's positions regarding the e-commerce provisions of the CPTPP. Finally, we set out our conclusions on Māori interests in the digital domain.

At the outset of the chapter, we provide, as necessary background to the discussion that follows, a brief account of evolving debate over the implications of e-commerce provisions to the ability of national governments to regulate to protect standards and rights, including those of indigenous people. We do so largely by reference to the 2019 report of the Trade for All Advisory Board (the 'Trade for All Board'), which we have found helpful and timely.

3.2 Background Summary of Issues relating to the Application of E-Commerce Provisions

The 2019 report of the Trade for All Board engaged extensively with a wide range of groups and opinions within Aotearoa New Zealand to identify the major issues of concern relating to e-commerce and international trade provisions. We have found the Trade for All Board report useful in summarising the issues and we set out a brief account here to provide the necessary context for our following discussion.

The Trade for All Board identifies the major areas of concern as largely arising from the expansion of international trade rules into the realm of domestic law. They also reflect rising concern amongst residents of Aotearoa New Zealand about the content of so-called trade agreements and the way they are negotiated. The Trade for All Board posed three questions that helped identify major issues of concern:

1. Has globalisation gone too far, so that the economic benefits are outweighed by social costs from deeper divisions in society, greater inequality, and the undermining of social contracts?
2. Are trade agreements unduly limiting the right of governments to regulate as they see fit on a range of issues like environmental protection, labour standards, and the rights of indigenous peoples?
3. Do the positions governments take in negotiating trade agreements reflect the influence of powerful individuals and corporations at the expense of other citizens and groups?[2]

2. Document B23, pp 39–40 at [49]

The Trade for All Board notes that there is currently no agreed definition of e-commerce or digital trade.[3] In most definitions, e-commerce covers the sale and purchase of goods and services through the use of internet platforms as well as the transmission of information and data across borders.[4]

Electronic commerce is one of the many ways in which a citizen in a modern society creates a data trail. Data is simply an abstraction (or measurement) from something in the real world (for example, a person, object, or event).[5]

Electronic commerce, and the data it generates, are a subset of the digital domain. The term 'digital footprint' is used to describe data points gathered relating to an individual. From an individual privacy perspective, issues can arise in relation to data collected about an individual without that person's knowledge or awareness. Issues can also arise when an individual chooses to share data but may have little or no knowledge or control of how that data is used, shared with, and repurposed by third parties.[6]

Data can be used to profile groups. This can perpetuate and reinforce prejudice. John Kelleher and Brendan Tierney, in their book *Data Science*, explain the link between prejudice and data:

> An argument is sometimes made that data science is objective: it is based on numbers, so it doesn't encode or have the prejudicial views that affect human decisions. The truth is that data science algorithms perform in an amoral manner more than in an objective manner. Data science extracts patterns in data; however, if the data encode a prejudicial relationship in society, then the algorithm is likely to identify this pattern and base its outputs on the pattern. Indeed, the more consistent a prejudice is in a society, the stronger that prejudicial pattern will appear in the data about that society, and the more likely a data science algorithm will extract and replicate that pattern of prejudice.[7]

Data has immense commercial value. The metaphor 'data is the new oil' is instantly recognisable and has become something of a cliché. However, as Matt Locke, deputy chair of the British Science Association, observes:

> Big platforms and governments are ramping up the battle over our personal data – who can collect it, what they can do with it, and where they can send it. But this is happening at a level far above our individual experience of data.

. . . . .

3. Ibid, p 49 at [108]
4. Organisation for Economic Co-operation and Development, *Unpacking E-commerce: Business Models, Trends and Policies* (Paris: OECD Publishing, 2019), doi.org/10.1787/23561431-en, pp 15–16, 28 n 3
5. John D Kelleher and Brendan Tierney, *Data Science* (Cambridge: MIT Press, 2018), p 240
6. Ibid, p 199
7. Ibid, p 191

> The discussions around data policy still feel like they are framing data as oil – as a vast, passive resource that either needs to be exploited or protected. But this data isn't dead fish from millions of years ago – it's the thoughts, emotions and behaviours of over a third of the world's population, the largest record of human thought and activity ever collected. It's not oil, it's history. It's people. It's *us*. [Emphasis in original.][8]

The Trade for All Board acknowledges the opportunities for Aotearoa New Zealand in the development of digital technology and its rapid spread to all aspects of life. But, as the Trade for All Board notes, these advances have come at a speed that governments and regulators have struggled to keep pace with and Aotearoa New Zealand cannot afford to stand and watch while the world develops rules on such an important sector without us. However, the Trade for All Board warns that 'the argument that New Zealand needs to be 'in the negotiating room' is largely undermined if our representatives are there without a clear idea of where our national interests lie'.[9]

The Trade for All Board further observes that a number of issues raised regarding e-commerce are important for reasons other than trade or commerce and Aotearoa New Zealand's interests in the negotiation of rules for the digital economy are not necessarily clearly aligned with those of any of the major players. It is therefore important that Aotearoa New Zealand finds its own path and identifies like-minded partners who share similar objectives:

> At present the country's position seems to reflect too much confidence that the type of thinking about the removal of trade barriers that might have applied to goods and more traditional services trade is transferable to a very different trading and regulatory environment in the digital world.[10]

From its inquiry, the Trade for All Board report identifies four critical areas where the Government's objective of maximising opportunities and minimising risks from trade agreements require particular care. The first concerns the Government's partnership with Māori and its obligations under te Tiriti/the Treaty. The second concerns environmental policy, particularly in the context of climate change and freshwater management, where novel and innovative regulatory measures may be required. A further consideration is the relationship between trade and investment policy so that foreign capital is attracted but in ways that preserve regulatory space. The final area requiring particular care is the digital economy. The Trade for All Board notes:

> The ongoing digitisation of New Zealand's economy presents great opportunities for New Zealand to overcome the disadvantages of scale and distance, and to leverage

8. Matt Locke, 'Data Isn't Oil, So What Is It?', 15 May 2021, https://howtomeasureghosts.substack.com/p/data-isnt-oil-so-what-is-it
9. Document B23, p 51 at [119]
10. Ibid, p 52 at [121]

its high levels of education. It also presents significant regulatory challenges that are not yet fully understood. The spread of digital technology into all aspects of life has advanced at a speed that governments and regulators have struggled to keep pace with. The speed and breadth of change, and the complexity of the issues, warrant further investigation and engagement.[11]

This led the Trade for All Board to recommend:

> A thorough review of New Zealand's interests in the digital trade negotiations should be carried out involving the Government Chief Digital Officer, Callaghan Innovation, Productivity Commission, the Privacy Commissioner, MBIE, MFAT, and the APEC Business Advisory Council, as well as representatives of Māori, business and civil society. In the interim, we recommend against locking New Zealand into any fixed negotiating positions.[12]

The CPTPP was signed by Aotearoa New Zealand on 8 March 2018. The e-commerce chapter (Chapter 14) was carried over without amendment from the TPPA. We discuss in more detail at chapter 5 the Crown's response to the recommendations made by the Trade for All Board. We note that these recommendations were released in November 2019, over a year after the CPTPP was signed.[13]

Having provided this context, in the remainder of this chapter we consider in more detail Māori rights and interests in the regulation and governance of the digital domain, as described to us by the claimants. As part of this, we consider it is also necessary to review the range of policy work and dialogue underway between Māori and the Crown in relation to these issues.

A review of Māori rights and interests in the governance of the digital domain is necessary in order to consider what (if any) aspects of the e-commerce chapter in the CPTPP may be prejudicial to those interests and therefore in breach of the Crown's Tiriti/Treaty obligations to Māori. This includes the question of whether data itself can be regarded as a taonga and therefore subject to the Crown's duty of active protection under article 2 of te Tiriti/the Treaty. We turn to those matters in this chapter and chapters 4 and 5.

The claimants' fundamental complaint is that the TPPA/CPTPP forecloses regulatory options, which they argue may be necessary for the Crown to develop a Tiriti/Treaty-compliant regime for governing data and digital technologies.[14] The claimants contend that any prospective Tiriti/Treaty-compliant data governance regime requires an understanding of the digital domain through a Māori lens, 'including the nature of data, the rights and responsibilities associated with tino rangatiratanga, kaitiakitanga, manaakitanga and mātauranga, and what tikanga

11. Ibid, p13 at [5]
12. Ibid, p18 at [2]
13. Ibid, p1
14. Submission 3.3.60, p79 at [15.4]

requires in that context'.[15] The TPPA/CPTPP rules, they argue, are incompatible with these concepts.

The claimants' more particular concerns with aspects of the CPTPP e-commerce chapter fall into four categories:

1. anti-localisation rules supporting the free flow and storage of data offshore;[16]
2. rules preventing governments from requiring that e-commerce firms maintain a local presence in countries in which they trade;[17]
3. non-discrimination rules preventing government procurement preferences for Māori digital products and services; and[18]
4. rules preventing government access to source code for digital products.[19]

A challenge we face is how to inquire into and define Māori interests in the governance of the digital domain when both claimants and the Crown acknowledge that they are also working to define those interests, and to develop Crown policy.[20] This challenge is compounded by the speed of change in digital technology, and the difficulty policymakers and regulators experience in trying to keep pace both domestically and internationally.

On this, the claimants have said:

> [I]n resolving this claim, the Tribunal is not asked to determine, beyond an understanding of the basic principles necessary to identify the nature of the Māori rights and interests that are affected, what it means to say 'data is a taonga', what a regime of Māori Data Sovereignty and Māori Data Governance will look like, or what constitutes a Tiriti- and tikanga-based approach to regulating the digital domain more generally.[21]

Broadly, the claimants seek findings that Māori data is (or has the potential to be) taonga, and that the Crown has a heightened duty of active protection in relation to Māori data under te Tiriti/the Treaty.[22] The Crown, in contrast, has argued that we should exercise caution in making 'abstracted findings on the nature of Māori data as taonga' beyond the scope of the issues before us, so as not to preempt the significant policy work and domestic dialogue underway on digital issues.[23] Though the Crown refers to significant policy work underway, we do not have evidence in any detail about such work.[24]

The claimants propose some regulatory concepts that they argue a Tiriti/Treaty-consistent data governance regime would require, and which they say are

15. Submission 3.3.60, p 18 at [3.6]
16. Submission 3.2.54, p 14 at [5.5]–[5.6]
17. Ibid, p 16 at [5.15]
18. Ibid, p 17 at [5.18]
19. Ibid, p 15 at [5.10]–[5.11]
20. Submission 3.3.61, p 11 at [26.2]; submission 3.3.63, p 47 at [7.2]–[7.3]
21. Submission 3.3.60, p 18 at [3.9]
22. Submission 3.2.54, p 3 at [2.4]; claim 1.1.1(b), pp 28–29 at [112]
23. Submission 3.3.61, p 23 at [61]
24. Transcript 4.1.9, p 248 at [25]

frustrated or have been precluded by the TPPA/CPTPP e-commerce rules. These include the concept of collective (rather than individual) privacy and local storage of Māori data in Aotearoa New Zealand (rather than storage overseas). The claimants use the term 'Māori Data Sovereignty' to cover both concepts.

We agree with the claimants that the Māori conceptual lens is crucial to understanding the Māori rights and interests at issue in the digital domain and the way it is governed, and more particularly any prejudice caused by a material gap or error in the TPPA/CPTPP e-commerce provisions. We also agree with the Crown that what appropriate regulation of the digital domain should look like overall is not a matter we can resolve in this inquiry.

In the remainder of this chapter, we consider two broad questions:

1. How do the claimants conceptualise the digital domain from a te ao Māori perspective?
2. What policy work and dialogue are underway to address Māori rights and interests, and Tiriti/Treaty issues, in the digital domain and what (if any) implications this might have for the policy positions taken in the e-commerce provisions of the CPTPP?

3.3 Te Ao Māori and the Digital Domain

3.3.1 How do Māori conceptualise the digital domain?

3.3.1.1 *The claimants' position*

The claimants say that the first step in addressing their concerns with the TPPA/CPTPP e-commerce provisions is 'to understand the conceptualisation of the digital ecosystem, including data, in te ao Māori according to tikanga Māori'.[25] They argue that within te ao Māori, data is a taonga and is therefore subject to active protection under article 2 of te Tiriti/the Treaty. The claimants also acknowledge that there are ongoing debates within te ao Māori, as well as discussions with various Crown agencies, about the boundaries of what counts as 'Māori data' and how it should be governed.[26]

The claimants brought evidence from four witnesses to demonstrate the Māori conceptualisation of data and the digital ecosystem:

- Hone Tiatoa, a named claimant and member of Te Taumata;[27]
- Karaitiana Taiuru, a doctoral student at Te Whare Wānanga o Awanuiārangi studying data and tikanga;[28]
- Potaua Biasiny-Tule, member of the Digital Economy and Digital Inclusion Ministerial Taskforce, co-founder of education initiatives Digital Natives Academy and Digital Basecamp, and chief executive of Māori news website TangataWhenua.com;[29] and

25. Submission 3.3.57, p 2 at [3]
26. Submission 3.3.61, p 11 at [26.2]; submission 3.3.60, p 26 at [6.6]; submission 3.3.63, pp 26–27 at [1.62]–[1.64]
27. Document B24
28. Document B26
29. Document B29

- Dr Donna Cormack, a senior lecturer from the University of Auckland specialising in ethnicity data as it relates to the health sector.[30]

Counsel stated that these witnesses broadly agreed on the following propositions:

1. that Māori data is a taonga;
2. that digital ecosystems have mauri, mana, and whakapapa; and
3. that anonymised data still carries whakapapa and remains Māori data.[31]

However, in highlighting these issues and bringing this evidence, the claimants

> are not seeking to address the broad question of how digital technologies, data sovereignty and digital commercial and other practices impact on Māori and their rights under te Tiriti. That involves a much bigger inquiry and requires much deeper and broad-ranging examination than is either possible or appropriate in this hearing.[32]

Below, we group the evidence we heard from the claimants under three topics: first, the cosmological and tikanga dimensions of the way Māori relate to the digital domain; secondly, the concept of 'collective privacy' which flows from these relationships; and finally, we discuss 'Māori Data Sovereignty' – a regulatory concept which aims to recognise Māori interests in digital technologies and data.

3.3.1.1.1 Cosmological and tikanga aspects

The claimants put forward that data 'must be contextualised within the life force and mauri of the cosmogony' and represents 'the passing of whakapapa from its beginning of Te Kore all the way through to Ranginui and Papatuanuku, continuing on through to their many children and descendants of those children'.[33] Potaua Biasiny-Tule described the connections that data has within te ao Māori in the following way:

> I do not see a difference between our whenua and our data. Our data has the same sort of connections as a whenua does, but it is just a different format. I think that we need to protect our data and recognize that it can be collectively owned by hāpu and iwi and whānau. Not one individual can own our data or should own our data. There are also the cultural considerations of the whakapapa of the data, the mauri of the data, what rights does the person who gave that data have, what rights do they actually give the person who is collecting it or the organization? . . .
>
> So there is a whakapapa and there is mana in the language and there's mauri in the system. Under tikanga whatever new data comes out of the original data it's still got whakapapa and is still whānau. The problem is not that the machines don't understand the tikanga. The people don't understand the tikanga.[34]

30. Document B32
31. Submission 3.3.60, pp 25–26 at [6.3]–[6.5]
32. Submission 3.2.54, p 2 at [2.2]
33. Ibid, p 8 at [4.2]
34. Document B29, pp 3–4 at [10]–[11]

Citing Mr Biasiny-Tule's evidence, claimant counsel submitted that protecting the whakapapa and mauri of Māori data must be sourced in tikanga.[35] This imperative is reflected in the workshop 'Te Iwi Matihiko' (The Digital Tribe), developed by Mr Biasiny-Tule and his wife Nikolasa Biasiny-Tule to teach tamariki and rangatahi about 'digital wellbeing' with reference to the te ao Māori spiritual, cosmological, and tikanga dimensions of interacting with the digital domain.[36] The workshops use Tā Mason Durie's 'Te Whare Tapa Whā' model to understand the possible impacts of using digital technologies on well-being, and provide a 'foundation' on which values of mana, manaaki, and kaitiakitanga 'can be explored and activated'.[37] When he discussed this initiative at our hearing, Mr Biasiny-Tule said 'we have created our own digital tikanga with our Koroheke just to keep our kids safe'.[38]

Mr Biasiny-Tule described his other initiatives – Digital Natives Academy and Digital Basecamp – as a means of exercising tino rangatiratanga and encouraging ideas 'to be locally developed, so we can establish a Māori tech sector with a Māori kaupapa, acting as kaitiaki for data, developing Māori software and operating the technology according to tikanga'.[39] We see these initiatives as real-world examples of the nexus between the digital domain and mātauranga Māori, and the use of tikanga to navigate digital technologies.

Mr Taiuru gave evidence on tikanga and cosmological elements of the Māori view of the digital domain. On 'anonymised' personal data, he expressed his view that, because data originates from a person, the data carries that person's mauri. For it to be 'anonymised' in a Māori sense, Mr Taiuru argues that a 'tapu removal ceremony' would be required.[40] He also believes that, because data has mauri and is tapu, its whakapapa should be recorded as metadata. In his view, the 'data collector' is responsible for recording 'where the data came from, what the data is about, Iwi and hapū connections, and kaupapa Māori categories for metadata' and for 'treat[ing] the data with respect'.[41]

Claimant counsel summarised his evidence as contrasting a 'pre-colonial' approach to 'colonised perspectives': 'What he calls a "pre-colonial" approach to tikanga recognises that the digital ecosystem resides in te ao Māori and sources data in the cosmology whose principles imbue it with Wairua, Mauri, Whakapapa, Hau and Ahua.'[42]

Mr Taiuru also noted that there are differences in approach among tohunga and Māori technology experts on philosophical aspects of the digital domain, as well as on appropriate tikanga.[43]

35. Ibid, p 27 at [6.12]
36. Document B29(a)
37. Ibid, p 7
38. Transcript 4.1.9, p 113 at [5]
39. Document B29, p 6 at [20]
40. Document B26(a), p 115
41. Ibid
42. Submission 3.3.60, p 26 at [6.7]; doc B26(b)
43. Submission 3.3.60, p 26 at [6.6]; doc B26 at [14]–[17], [35]

3.3.1.1.2 Collective privacy

The claimants contrasted 'Western liberal terms and concepts' that apply to data governance in the context of the TPPA/CPTPP – including 'personal information' and 'personal privacy' – with the concept of 'collective privacy'.[44] The claimants articulated:

> Data is taonga, imbued with mātauranga. One individual cannot own or only be affected by Māori data. Data is collective. When data is collective privacy cannot be an individual right. Privacy belongs to the collective and 'full and informed consent' needs to be collective.[45]

Dr Donna Cormack, in particular, stressed the collective nature of the Māori relationship to data.[46] She described the typical generation of data in a health setting through a person's consent to a test or procedure, which comes with consent for that data to be retained or used – including for unspecified future secondary use.[47] This is at odds with an indigenous view of data, which she contextualised in terms of a wider discourse led by the United Nations Special Rapporteur on the Protection and Use of Health-Related Data, whose definition of 'Indigenous Data' recognises both collective and individual elements.[48]

Dr Cormack considered that, while indigenous collective and individual rights are increasingly acknowledged, the frameworks relating to them are still being discussed and developed. She noted there is a risk that development may be impacted by CPTPP obligations, particularly those that relate to offshore data flows and the location of data storage.[49]

Mr Biasiny-Tule described the cultural dilemma of individual privacy rights for Māori in his evidence: 'I think that we need to protect our data and recognize that it can be collectively owned by hapū and iwi and whānau. No one individual can own our data or should own our data.'[50]

Similarly, Mr Taiuru explained Māori relationships to data through the notion of collective ownership:

> Māori data is not owned by any one individual, but is owned collectively by one or more family units, clan or tribes. Individual rights (including privacy rights), risks and benefits in relation to data need to be balanced with those of the groups of which they are a part. In some contexts, collective Māori rights will prevail over those of individuals.[51]

44. Submission 3.3.60, p 19 at [4.3]; submission 3.2.54, p 3 at [2.4]
45. Submission 3.2.54, p 9 at [4.4]
46. Submission 3.3.60, p 28 at [6.15]; doc B32, p 7 at [31]
47. Document B32, p 7 at [31]
48. Ibid, p 7 at [33]
49. Ibid, p 8 at [26]
50. Document B29, p 3 at [10]
51. Document B26, p 13 at [42]

The claimant witnesses all agreed that Māori data ownership and privacy had a collective dimension sourced in te ao Māori, arising from the view that data itself has whakapapa. Professor Kelsey noted documentation from Statistics New Zealand which recognises the centrality of whakapapa to Māori identity and to understanding the Māori worldview, and stresses 'that statistical information collected and reported about iwi and iwi-related groups is based on agreed definitions and principles'.[52]

In an ever-increasingly digitised world, the question of data ownership becomes even more prominent and important. Data 'ownership' in a Western sense, carries with it various property rights recognised in domestic and international law.

3.3.1.1.3 Māori Data Sovereignty

The claimants said that their witnesses conveyed 'a shared understanding that Māori Data Sovereignty reflects their inherent rights and interests in relation to the creation, collection, access, analysis, interpretation, management, dissemination, re-use and control of data'.[53] The concept of 'Māori Data Sovereignty' appeared frequently in their statements of claim, submissions, and evidence.

In their statement of claim, Reid and others (Wai 2522) extensively cited a paper by Te Mana Raraunga members Māui Hudson, Tiriana Anderson, Te Kuru Dewes, Tā Pou Temara, Hēmi Whaanga, and Tom Roa titled 'Conceptualising Big Data through a Māori Lens'.[54] Te Mana Raraunga (the Māori Data Sovereignty Network) is a network of Māori researchers and practitioners formed in October 2015 to progress Māori Data Sovereignty – the idea that Māori data should be subject to Māori governance.[55] In that paper, the authors posit that the concept of indigenous data sovereignty be put into practice as 'a means to exert control over [indigenous peoples'] data resources'. They said that 'Māori Data Sovereignty':

> Establishes a frame of reference that expects Indigenous involvement in the governance of data and raises questions regarding the proper locus of ownership and management of data that are about Indigenous peoples, their territories and ways of life . . . Indigenous Data Sovereignty reflects a desire for protecting collective interests in data which centre on access to data for governance (eg to realise Indigenous community aspirations), and governance of data (eg to control access to and use of Indigenous data).[56]

52. Document B25, pp 8–9 at [25]; doc B25(a), exh L, pp 112–114
53. Submission 3.3.60, p 25 at [6.4]; doc B26, p 4 at [8]; doc B29, p 3 at [8]; doc B32, pp 5–6 at [22]
54. Māui Hudson, Tiriana Anderson, Te Kuru Dewes, Pou Temara, Hēmi Whaanga, and Tom Roa, '"He Matapihi ki te Mana Rauranga" – Conceptualising Big Data through a Māori Lens', in *He Whare Hangarau Māori – Language, Culture & Technology*, ed Hēmi Whaanga, Te Taka Keegan, and Mark Apperley (Hamilton: Te Pua Wānanga ki te Ao/Faculty of Māori and Indigenous Studies, University of Waikato, 2017), pp 64–73
55. 'Our Data, Our Sovereignty, Our Future', Te Mana Raraunga, https://www.temanararaunga.maori.nz, accessed 26 August 2021
56. Hudson, Anderson, Dewes, Temara, Whaanga, and Roa, 'He Matapihi', pp 64–65

In a Māori context, the claimants sourced the exercise of these rights in tikanga, te Tiriti/the Treaty, and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Article 31 of UNDRIP states:

> Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.[57]

The claimants noted that the United Nations Special Rapporteur on the Right to Privacy has interpreted Article 31 as including the right to Indigenous Data Sovereignty. In the 2018 report on 'Open Data' and 'Big Data', the rapporteur notes:

- Data is 'a cultural, strategic and economic resource for indigenous peoples. Yet, indigenous peoples remain largely alienated from the collection, use and application of data about them, their lands and cultures.'
- Existing arrangements for data 'fail to recognise or privilege indigenous knowledge and worldviews and do not meet indigenous peoples' current and future data needs.'
- Indigenous data sovereignty 'is practised through indigenous data governance that comprises principles, structures, accountability mechanisms, policy relating to data governance, privacy and security, and legal instruments.'
- Indigenous networks 'in Australia and in Aotearoa New Zealand are developing protocols around indigenous data governance.'[58]

In sum, the claimants contended the proper locus of the ownership and management of Māori data is with Māori. Professor Kelsey contends that this is important regardless of whether the data is used or held by the Crown or a third party (for example, a tech company).[59] Central to the claimants' position is their argument that the Crown loses control of data when it is stored offshore: 'The closer [the] physical storage of data is, the better tino rangatiratanga can be exercised; the further it moves away, the more difficult control and protection can be for Māori data.'[60]

57. Document B26, p 3 at [6]; submission 3.2.54, pp 10–11 at [4.10]
58. Document B25, p 10 at [30]; Joseph A Cannataci, *Report of the Special Rapporteur on the Right to Privacy*, United Nations General Assembly, 73rd session, A/73/438, 17 October 2018, https://undocs.org/A/73/438, p 13 at [72], [74]
59. Document B25, pp 8–9 at [25]
60. Submission 3.3.60, p 59 at [12.3]

3.3.1.2 *The Crown's position*

The Crown did not comment on Māori perspectives on data, digital technologies, or their governance.[61] The Crown's approach has been to accept on its face the claimants' evidence about their concerns. At the same time, however, the Crown has pointed out that the concepts and examples supporting those concerns remain 'necessarily speculative and abstract' unless the claimants can cite specific Crown actions, decisions, or omissions – or alternatively, are matters outside the scope of the TPPA/CPTPP's e-commerce provisions.[62] We address these arguments in detail in chapters 4 and 5.

The Crown says it did not provide evidence on its activities, decisions, and initiatives relating to Māori digital issues for two reasons: because it believes the CPTPP e-commerce provisions do not apply to or restrict them, and because they (largely) post-date the TPPA and CPTPP.[63] As for the terms 'Māori Data Sovereignty' and 'Māori Data Governance', Vangelis Vitalis, a witness for MFAT, noted in his evidence:

> As the claimant evidence states, the concepts underpinning these terms are long-standing matters in te ao Māori and were central to the Tribunal previously (in the Wai 262 inquiry). However, their articulation as 'Māori data sovereignty' is relatively recent and has been developed largely after the TPP negotiations concluded.[64]

The Crown's evidence has largely served to defend its role in supporting Māori participation in the digital economy, including through international trade. It has also sought to highlight the broad flexibility allowed by the TPPA/CPTPP for it to regulate digital matters in a Tiriti/Treaty-consistent way (discussed in chapter 5).

Finally, the Crown has noted that the concerns raised by the claimants

> are still evolving and are also the subject of ongoing consideration and discussion (such as the nature of data as taonga and the relationship between individual and collective privacy, and the rights and obligations involved in both), by the claimants and Māori more widely, which makes reaching findings about them, in the Crown's submission, premature . . .[65]

As we have noted, the Crown has cautioned the Tribunal against making 'abstracted' findings on these matters, which it says 'turn on context' and should be addressed through policy processes and dialogue.[66] We discuss some of these policy processes below (at section 3.4.2).

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61. Submission 3.3.61, p 10 at [25.1]
62. Ibid, p 11 at [26.1]
63. Ibid, p 3 fn2
64. Document C1, p 9 at [25]
65. Submission 3.3.61, p 21 at [56.3]
66. Ibid, p 23 at [61]

3.3.2 What is Māori data?

As highlighted in a discussion with expert witness Dr Donna Cormack at hearing, identifying what 'Māori data' comprises is a necessary step for Māori to define their specific rights in this regulatory and policy space. Dr Cormack acknowledged that the debate as to what is and is not 'Māori data' was 'potentially somewhat unsettled' and ongoing.[67] Below, we set out the various definitions of the concept 'Māori data' as it was used by the claimants, as well as our response.

3.3.2.1 *Definitions proposed by the claimants' witnesses*

The paper by Te Mana Raraunga cited by the Reid and others (Wai 2522) claimants provides a useful (though non-exhaustive) definition of Māori data and proposes a series of considerations for determining whether a dataset is a taonga. It states:

> Māori data refers to data produced by Māori or that is about Māori and the environments we have relationships with. Māori data includes but is not limited to:
> - Data from organisations and businesses;
> - Data about Māori that is used to describe or compare Māori collectives; and
> - Data about te ao Māori that emerges from research.[68]

Dr Cormack, who is a member of Te Mana Raraunga,[69] did not offer a definition of 'Māori data' in her evidence and instead relied on a definition of 'indigenous data' provided by the United Nations Special Rapporteur on the Protection and Use of Health-Related Data:

> '*indigenous data*' refers to data information or knowledge, in any format or medium, which is about, from or may affect Indigenous Peoples or people of First Nations either collectively or individually and may include the language, culture, environments or resources of Indigenous Peoples. Indigenous data includes health-related data relating to Indigenous Peoples.[70]

This definition extends beyond the Te Mana Raraunga definition – which includes data that is *produced by* or is *about* Māori – to include data that *may affect* indigenous peoples.[71]

Mr Taiuru, arguing that other definitions of Māori data do not go far enough and mainly concern iwi data, proposed his own definition of the term at our hearings.[72] His definition appears to have developed the United Nations Special Rapporteur's indigenous data definition, again expanding it to include data which

67. Transcript 4.1.9, p 157 at [10]
68. Hudson, Anderson, Dewes, Temara, Whaanga, and Roa, 'He Matapihi', p 65
69. Document B32, p 2
70. Ibid, pp 7–8 at [33]; Joseph A Cannataci, *Report of the Special Rapporteur on the Right to Privacy*, United Nations General Assembly, 74th session, A/74/277, 5 August 2019, https://undocs.org/A/74/277, p 7
71. Hudson, Anderson, Dewes, Temara, Whaanga, and Roa, 'He Matapihi', p 65
72. Transcript 4.1.9, p 70

may affect Māori as well as that which is about, from, produced by, describes, or has relationships with Māori peoples:

> Datum, data, information or knowledge in any format or medium, which is about, from, is produced by Māori Peoples, whānau, hapū, iwi or Māori organisations either collectively or individually, describes Māori Peoples, whānau, hapū, iwi and Māori organisations and their environments, has relationships with, or is made by Māori Peoples, whānau, hapū, iwi and Māori organisations or contains any Māori Peoples, whānau, hapū, iwi and Māori organisations' content or association or may affect Māori, whānau, hapū, iwi and Māori organisations. Māori data are a living taonga and are of strategic value to Māori Peoples, whānau, hapū, iwi and Māori organisations.[73]

3.3.2.2 *Tribunal conclusions on the question of 'Māori' data*

Despite the importance of the question, we are unable to make definitive findings as to what 'Māori data' includes or does not include. This is in part because the scope of information that may be 'digitised' as data is potentially limitless.

We appreciate the expertise of the witnesses that appeared before us but, ultimately, we are also concerned that a question of this importance requires a fuller inquiry with a wider range of voices from te ao Māori. As all parties have acknowledged, defining Māori data and designing supporting Crown policy are part of the significant domestic dialogue underway both within te ao Māori and between Māori and the Crown. This is important work that needs to continue as a priority.

We accept that for Māori the digital domain is imbued with, contains, and is capable of capturing and using mātauranga Māori. They are not separable concepts. This has important implications for the Tiriti/Treaty relationship and for our inquiry, which we explore below.

3.3.3 The Tribunal's view: data and mātauranga Māori

In his whaikōrero which opened our hearings in November 2020, Tribunal kaumātua member Tā Hirini Moko Mead referred to the origins of mātauranga in the uppermost heaven, Te Toi-o-nga-rangi:

> Ko tēnei kaupapa e whāia nei e tātou, ki tāku nei titiro atu ki te kaupapa e pā ana ki te mātauranga Māori, e pā ana ki te tikanga Māori me te whakamōhio atu ki a tātou katoa i tīmata mai te mātauranga Māori i te toi o ngā rangi, ehara i te rohe o Ranginui. Nā Tāne i tiki atu, ka haria mai ki runga i a Papatūānuku hei titiro, he wherawhera mā tatou. Engari, i runga i tēnei o ngā kaupapa kua piki anō tātou ki runga i te rangi. Engari, kare i te mōhiotia ko tēhea o ngā rangi tūhāhā, ki ētahi iwi hoki, tekau ngā rangi, ki ētahi tekau mā rua, nā i reira kē te Toi-o-ngā-rangi, a, ināianei, i runga i te kaupapa tuawhā kua titiro, ko tēhea o ngā rangi tēnei e whakahaeretia nei. Kare pea i te Toi-o-ngā-rangi kei runga noa atu. Engari waiho tēnā hei wherawhera mā mātou, mā tātou katoa i tēnei ata.[74]

73. Document B26(b), p [3]; see also transcript 4.1.9, p 71; submission 3.3.60, p 26 at [6.6]
74. Transcript 4.1.9, p 2 at [5]

> My view of issues concerning knowledge and its guiding rules is that mātauranga had its beginnings in the uppermost heaven [Te Toi-o-nga-rangi] and it did not emerge from Ranginui, the Sky Father. It was Tane who fetched [the baskets of knowledge] and he brought them down to the Earth Mother, Papatūānuku, for us [the people] to consider and research. But in this kaupapa [TPPA issues about data] we are engaging again with the heavens of the Māori world: . . . [however] which of our 10 or 12 heavens is being used for communications? I don't think it is the uppermost heaven, it may be well beyond it. But let us look at those matters [further].

In the old world, Tāne had to go to great lengths to ascend the heavens and fetch the baskets of knowledge from Te Toi-o-nga-rangi (the uppermost heaven), for Māori to use, consider, and research. In the world in which we now live, knowledge can be retrieved with the push of a button on a computer. As Dr Cormack wrote in an article co-authored with Tahu Kukutai, the increasing digitalisation of our lives means that everything from our commercial decisions to our social interactions is 'being turned into data, driven by technologies that enable new methods of data accumulation, digitisation, integration and manipulation'.[75] This information can be extracted from almost any source, recorded and stored digitally, and thereby be endlessly used, reused, copied, moved, and processed at great speeds both within Aotearoa New Zealand and internationally. This rapid change affects us all.

Like knowledge in Western societies, mātauranga Māori is a living system that is always changing and expanding as it is added to over time. In the *Ko Aotearoa Tēnei* (Wai 262) report, this process is described in detail: from the Hawaikian culture, science, and systems of knowledge brought to Aotearoa by Kupe and his people, to the cultural evolution that occurred through contact with the environment of Aotearoa, to that which occurred through the arrival of Pākehā in Aotearoa and contact with new technology, science, culture and systems of knowledge.[76] Today, as digital technologies revolutionise our society, mātauranga Māori continues to expand and respond to the times in which we live.

The Māori knowledge system, mātauranga, has embraced digital technologies and includes information held and used as data. As mātauranga, data has whakapapa. In his evidence, claimant expert witness Potaua Biasiny-Tule described:

> data is the passing of that whakapapa from Te Kore to Te Pō, from Te Pō to Te Ao Mārama, from Te Ao Mārama to Ranginui, from Ranginui to Tāne Mahuta, Tūmatauenga, Rongo, Haumie to Papatūānuku and into our tūpuna and then us, and then the next generations and back again, sharing in whakapapa.[77]

75. Document C5, p 209
76. Waitangi Tribunal, *Ko Aotearoa Tēnei, Te Taumata Tuarua*, vol 1, pp 13–14
77. Transcript 4.1.9, p 103

In the *Ko Aotearoa Tēnei* (Wai 262) report, the Tribunal described the concept of whanaungatanga and the technique of whakapapa as being at the core of mātauranga Māori:

> whanaungatanga-based taxonomy reflects a detailed understanding of the natural world of Aotearoa. But the idea of whanaungatanga in mātauranga Māori goes even further than this. It categorises and it catalogues ideas themselves, showing relationships between and seniority among, different fields of knowledge. In this sense, whanaungatanga, through the technique of whakapapa, is not just a way of ordering humans and the world; it is an epistemology – a way of ordering knowledge itself.[78]

Whanaungatanga relationships to data were a consistent feature of the evidence brought by the claimants. As we have described above, the witnesses used the whakapapa of data to delineate rights and interests and describe problems of governance, including the notion of collective privacy.

While the evidence on the conceptualisation of the digital domain and the cultural implications of data governance was not uniform in several respects, claimant counsel submitted this is 'hardly an uncommon feature of any philosophical debate'.[79] We agree. We also observe that – as the claimants and the Crown both note – these concepts and conversations have emerged relatively recently within te ao Māori (though the claimants say that their underlying features have 'been around nō mai rānō'[80]) and the kinds of digital regulation that are necessary to address them are uncertain and still developing.[81]

3.3.3.1 *Is data a taonga?*

The claimants have sought to establish that '[t]he entire digital ecosystem is imbued with mātauranga Māori and has mauri'.[82] In closing submissions, claimant counsel submitted that it was only necessary for us to find that data 'is or has the *potential* to be taonga' (emphasis added) to establish the Crown's Tiriti/Treaty duty of active protection in relation to it.[83]

We have based our understanding of the Māori relationship to data on the premise that 'data' (the gathering, communication, and analysis of information through digital technologies) is *part of* mātauranga – the Māori knowledge system.

In *The Wananga Capital Establishment Report* (1999), the Tribunal discussed the relationship between mātauranga Māori, as a taonga, and wānanga – a system of learning that gives expression to that taonga. By giving life to mātauranga Māori, the Tribunal found wānanga to be a taonga in its own right:

78. Waitangi Tribunal, *Ko Aotearoa Tēnei*, *Te Taumata Tuarua*, vol 1, p 37
79. Submission 3.3.60, p 31 at [6.21]
80. 'Since long ago'.
81. Submission 3.3.63, p 47 at [7.2]–[7.3]; submission 3.3.61, p 11 at [26.2]
82. Submission 3.3.60, p 13 at [2.3]
83. Ibid, p 78 at [15.1]

> It is clear that te reo Maori and matauranga Maori are taonga. Wananga is given life by these taonga, and in the reciprocal nature of the Maori world, wananga also serves to give life to te reo and matauranga. Each is dependent on the others to nurture, sustain and develop. Wananga as a system of learning, and a repository of matauranga Maori, is a taonga in its own right, but it does not exist in isolation from te reo and matauranga Maori.[84]

In our view, the relationships the claimant witnesses described having to data are also reflective of the reciprocal relationships within te ao Māori: digital technologies are imbued with mātauranga; whether they are being used by Māori themselves, or – in the course of their operation – record and communicate elements of mātauranga such as Māori knowledge, behaviours, expressions, whakapapa, demographics, genomic information, relationships, properties, and so on, as 'data'. Put simply, data can record mātauranga, and mātauranga also informs and generates data. In both senses, mātauranga Māori in the modern world includes digital data and technologies.

There is already significant Tribunal jurisprudence that establishes mātauranga Māori is a taonga.[85] In *The Wananga Capital Establishment Report*, the Tribunal found: 'There can be no doubt that te reo Maori and matauranga Maori are highly valued and irreplaceable taonga for New Zealand. These taonga exist nowhere else. The Crown has a duty actively to protect these taonga.'[86]

As such, for the purposes of this inquiry, we do not specify in detail what 'Māori data' comprises or discuss which kinds of data might, or might not be, taonga in their own right (including the issue of whether anonymised data is still 'Māori'). However defined, 'Māori data' may be a component of mātauranga Māori or may, in combination with related data, be (or have the potential to be) taonga. In short, we take 'mātauranga Māori' to include Māori rights and interests in the digital domain. This places a heightened duty on the Crown to actively protect those rights and interests, particularly in a field that is subject to rapid change and evolution.

We are not able to say whether *all* data is taonga. Rather, we recognise that, from a te ao Māori perspective, the way that the digital domain is governed and regulated has important potential implications for the integrity of the Māori knowledge system, which *is* a taonga. This is our starting point for considering the Māori rights and interests allegedly put at risk by the CPTPP e-commerce rules.

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84. Waitangi Tribunal, *The Wananga Capital Establishment Report* (Wellington: Legislation Direct, 1999), p 48

85. See, for example: Waitangi Tribunal, *The Wananga Capital Establishment Report*, p 50; Waitangi Tribunal, *Ko Aotearoa Tēnei*, *Te Taumata Tuarua*, vol 1, p 44; Waitangi Tribunal, *Report of the Waitangi Tribunal on Claims concerning the Allocation of Radio Frequencies* (Wellington: Brooker and Friend Ltd, 1990), p 40 at [8.3]; Waitangi Tribunal, *Report on the Te Reo Māori Claim* (Wellington: Legislation Direct, 1993), p 23.

86. Waitangi Tribunal, *Wananga Capital Establishment Report*, p 50

3.3.3.2 *What does te Tiriti/the Treaty partnership require in this context?*

In the *Ko Aotearoa Tēnei* (Wai 262) report, the Tribunal focused on 'the place of mātauranga Māori in New Zealand life' and examined the question of what the te Tiriti/the Treaty partnership requires in that context.[87] The Tribunal concluded:

> there are still many areas – intellectual property (IP) law, cultural harvest, traditional healing, to name just a few – where Māori cultural perspectives are on the outer. The key problem for kaitiaki is that they have little or no control over their relationships with taonga. Sometimes, the Crown exercises that control; sometimes it is others, such as commercial interests or property owners; only very rarely is it kaitiaki. In short, there is little room in current New Zealand law and policy for mātauranga Māori and for the relationships upon which it is founded.[88]

In relation to Māori interests in international instruments being negotiated by the Crown, the Tribunal also said:

> In sum, the Treaty requires the identification and active protection of Māori interests when they are likely to be affected by international instruments. Māori must have a say in identifying the interests and devising the protection. But the degree of protection to be accorded the Māori interest in any particular case cannot be prescribed in advance. It will depend on the nature and importance of the interest when balanced alongside the interests of other New Zealanders, and on the international circumstances which may constrain what the Crown can achieve. The Crown's duty of active protection becomes ever more urgent in light of the widening reach and rapid evolution of international instruments.[89]

The Wai 262 Tribunal set out a 'sliding scale' indicating the strength of the Crown's obligation to engage with Māori, relative to the strength of the interest.[90] In effect, this means:

> the more significant the Māori interest, or the more specific the Treaty interest, the likelier it is that the Crown should be engaged at the more active end of the spectrum, working together with Māori to ensure that Māori interests are accorded sufficient priority.[91]

We summarised the sliding scale of engagement in our Stage One report and also adopted relevant findings of the *Ko Aotearoa Tēnei* (Wai 262) report.[92] On the

87. Waitangi Tribunal, *Ko Aotearoa Tēnei*, *Te Taumata Tuarua*, vol 1, p 19
88. Ibid, vol 2, p 699
89. Ibid, p 681
90. Ibid, p 682
91. Ibid, p 682
92. Waitangi Tribunal, *Report on the Trans-Pacific Partnership Agreement*, p 8

evidence we have heard, and given our conclusion that data and digital technologies form part of (or have the potential to form part of) the taonga that is mātauranga Māori, it is clear to us that Māori interests in the governance of the digital domain are on the higher end of the scale: requiring, at minimum, engagement and discussion in the spirit of shared decision-making (as we set out in chapter 2). The strength of this interest is further reflected in and evidenced by the scope of the policy work underway to address Māori interests in the digital domain, which we discuss below in section 3.4.2. The challenge for us in this report is applying this to the negotiating context of the TPPA and the CPTPP, as well as to the effect of the negotiated outcomes of those agreements.

As we set out in chapter 1, issues concerning the engagement with Māori around the TPPA/CPTPP have been settled through mediation. The claimants have argued that 'engagement' does not fully encompass the concept of 'informed decision-making' – in the sense that the Crown should take steps to inform itself of the Māori interest *in addition to* engaging with Māori.[93] It is argued that the Crown's failure to inform itself is a distinct issue from how it conducted engagement as it did. Engagement is a matter of process, and as such is settled by the outcome of mediation. Informed decision-making, on the other hand, is said to be an issue of substance, not process. The claimants pointed to the opportunity for Government agencies to at least seek advice on possible Māori interests in trade matters under negotiation. They alleged that no such advice was sought by MFAT in relation to e-commerce, an omission that allegedly breaches te Tiriti/the Treaty.[94]

The Crown took the opposite view and said that 'inputs' are no longer in scope for this inquiry as a result of the mediation agreement. Instead, the Crown maintained the inquiry is 'only about the negotiated outcomes' and noted that the claimants 'seek to draw a distinction between that obligation [to make informed decisions] and those relating to engagement'.[95] Finally, the Crown noted that it has assumed responsibility on engagement and secrecy matters 'in full by the settlement on terms reached through mediation'.[96]

As a result of the outcome of mediation, we are in the unorthodox position of being asked to make findings about the Crown's duty to be properly informed, while being unable to make findings related to the process by which the Crown did (or did not) properly inform itself.

In our Stage One report, we expressed concern that

> institutional capacity and lines of advice to Government on Māori interests impacted by the TPPA appear to be relatively limited. . . . [W]e did not see any contemporary evidence of consultation between MFAT and TPK on the nature of the Māori interest in the TPPA or engagement with Māori on the TPPA.[97]

93. Submission 3.3.63, p 10 at [1.14]
94. Submission 3.3.60, pp 14–15 at [2.3]; doc C3, p 3 at [7]
95. Submission 3.3.61, p 8 at [15]–[16]
96. Ibid, p 9 at [20]
97. Waitangi Tribunal, *Report on the Trans-Pacific Partnership Agreement*, p 41

This observation, in general terms, applied holistically to the Crown's approach to informing itself of Māori interests in advance of the TPPA negotiations.

On the other hand, the Crown's duties in the protection and transmittal of mātauranga Māori were already well-established at the time the TPPA, and subsequently the CPTPP, were negotiated – including by the findings and recommendations of the *Ko Aotearoa Tēnei* (Wai 262) report. The response to that report came through the announcement of the Te Pae Tawhiti work programme in August 2019[98] (discussed below at section 3.4.2.2), which includes work relating to te ao Māori perspectives on digital issues. Put simply, this announcement came too late to have a meaningful effect on the TPPA negotiations – and many of the issues raised by the claimants in this inquiry could have been addressed had the Government's response been timelier.

As a result of the mediation agreement, the adequacy of the Crown's engagement processes for the TPPA and CPTPP are outside the scope of this report, and we can make no further findings on the matter. This is distinct, however, from the Crown's obligations to protect mātauranga Māori through its role in governing the digital domain generally, and into the future. The central issue for this inquiry is whether the negotiated outcomes of the TPPA and CPTPP will fetter the opportunity for Māori and the Crown to design and implement a digital governance regime consistent with te Tiriti/the Treaty. This includes affording Māori the opportunity to be engaged and to participate in decision-making. While the Crown's engagement on the TPPA/CPTPP is out of the scope of our report, the question is whether the outcomes of the agreements preclude meaningful future engagement with Māori on the governance of the digital domain.

The issue as we see it, is whether, now and into the future, the Crown has retained enough domestic regulatory flexibility in its international obligations to ensure that te Tiriti/the Treaty partnership can function meaningfully with respect to how the digital domain is governed.

3.4 Governing the Digital Domain

The term 'digital domain' encompasses digital technologies, concepts related to data and information, digital trade, and the digital economy. These concepts are far reaching and as a result, conversations relating to the governance of the digital eco-system are both complex and developing.

The ability to govern the digital domain, in the context of this inquiry, relates directly to the regulatory options available in Aotearoa New Zealand following accession to the CPTPP. The domestic policy context as it stands, and as it is developing, and the arguments both the claimants and the Crown present in relation to it, are covered below.

98. Jayden Houghton, 'Te Pae Tawhiti: Chance for Māori and the Crown to Reconcile after Wai 262', University of Auckland, 5 February 2020, https://www.auckland.ac.nz/en/news/2020/02/06/after-wai-262-time-to-address-crown-treaty-breaches.html, accessed 24 September 2021

While we do not assess the efficacy of policy work currently underway in relation to the governance of the digital sphere, it is relevant to outline what work has commenced, or is ongoing, to address Tiriti/Treaty compliance issues.

3.4.1 The relevance of the domestic policy context

The claimants said the 'digital domain is evolving rapidly and in unpredictable ways, as are the challenges and regulatory options that need to be considered'.[99] The Crown characterised the 'rapid and ongoing evolution of digital technology' as transforming our world, and highlighted the agreement with claimants that this 'presents both opportunity and risk for Māori interests'.[100] Indeed, the Crown agreed with the claimants that

> domestic regulation and policy measures that protect and promote Tiriti/Treaty rights and obligations are critical for Aotearoa New Zealand to successfully navigate this transformation. Significant and substantial work is underway domestically to this end. The Crown acknowledges the work of the Data Iwi Leaders Group, Te Mana Raraunga, Te Taumata, the Māori members of the Data Ethics Committee and the Trade for All Board, and the Māori experts who participated in this proceeding.[101]

We welcome this acknowledgement. The digital domain and its regulation are of central importance for the future integrity of mātauranga Māori.

Nonetheless, regulatory frameworks for the digital domain in Aotearoa New Zealand are not yet well-developed. This state of affairs reflects the challenges of regulating fast-moving and evolving technological developments, which have the potential to bring with them sweeping social and economic transformation. As Professor Kelsey observes: 'As with many countries, New Zealand's regulatory regime in relation to data and digital technologies, services and activities, is in a slow and perpetual state of catch-up with new developments'.[102]

In 2018, the chief data steward's Data Strategy and Roadmap for New Zealand identified the high-level policy challenges for the regulation and stewardship of data in this country in the following terms:

> As momentum and capability builds for the use of data, we need to keep pace with the ever-changing data landscape – and support others to do the same. This means striking a balance between enabling greater data use whilst ensuring the protection of privacy rights and ensuring that data is treated ethically, securely and safely.[103]

99. Submission 3.3.63, p 47 at [7.2]
100. Submission 3.3.61, p 3 at [1]
101. Ibid, p 3 at [2]
102. Document c3, p 16 at [46]
103. Government Chief Data Steward [Liz MacPherson], *Data Strategy and Roadmap for New Zealand* (Microsoft PowerPoint presentation, Wellington: Statistics New Zealand, 2018), https://www.data.govt.nz/assets/Uploads/data-strategy-and-roadmap-dec-18.pdf, p 4; see also transcript 4.1.9, p 71.

While there is agreement on the importance of these matters, we also recognise that the parties did not necessarily agree on the regulatory measures necessary to protect Māori interests. While the claimants argued for regulatory concepts such as Māori Data Sovereignty and collective privacy, the Crown did not take a position on whether it is necessary to implement these, pending the outcome of policy work and dialogue.[104] Instead, the Crown has argued that nothing in the TPPA/CPTPP would foreclose the adoption of these measures should they be found to be needed.[105] The Crown did not offer a view as to what it understands Māori interests in digital governance to be, saying only that these questions are the province of domestic policy, not international trade agreements, and therefore are outside the scope of this inquiry.[106]

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. As the Trade for All Board observed in its report, there is no perfect answer to the question of where the boundaries of trade policy end; Aotearoa New Zealand's 'trading prospects both depend on, and need to support, the success of domestic policies to improve productivity, sustainability and inclusiveness'.[107] The claimants identified 'a number of initiatives that are currently underway within Aotearoa New Zealand that specifically refer to Māori Data Sovereignty and Māori Data Governance among Māori and within government'. They believed these initiatives are in danger of being restrained by the CPTPP.[108] The Crown has not provided detailed evidence on these processes, as it argued 'they are outside the scope of the inquiry as they (largely) postdate both the TPP and CPTPP and, more importantly, they are not restricted by the CPTPP e-commerce provisions'.[109]

We agree that the question of what a Tiriti/Treaty-consistent digital governance regime should entail is outside the scope of our inquiry, and it is not our task to examine the adequacy of any policy processes currently underway. However, it has been necessary for us to understand the general policy context in which the claimants say the CPTPP intervenes. We see the following two areas as particularly relevant:

- the Minister for Trade and Export Growth's response to the e-commerce aspects of the *Trade for All* report; and
- the *Te Pae Tawhiti* all-of-government response to the *Ko Aotearoa Tēnei* report (Wai 262), in particular Kete 1, which includes 'Government data stewardship and Māori data governance' as an 'existing workstream' involving a variety of initiatives led by Statistics New Zealand.

Below, we summarise these policy initiatives and dialogues, and the issues they respond to which are relevant to our inquiry. This provides important context for

104. Submission 3.3.61, pp 10–11 at [26]
105. Ibid, pp 71–72 at [224]
106. Ibid, p 7 at [13.6]
107. Document B23, p 3
108. Submission 3.3.63, pp 32–33 at [4.2]
109. Submission 3.3.61, p 3 n

chapters 4 and 5, where we examine the extent to which the TPPA/CPTPP rules impinge upon the Crown's regulatory flexibility to address Māori interests in the digital domain.

3.4.2 What policy work is underway to address Tiriti/Treaty issues in the digital domain?

3.4.2.1 *Crown response to the Trade for All Advisory Board (the Trade for All Board) report*

3.4.2.1.1 Background

We have already noted some context we found useful from the Trade for All Advisory Board report published in November 2019. Cabinet established the Trade for All Board in November 2018 as part of an overall 'Trade for All' review of Aotearoa New Zealand's trade policy 'with a view to enhancing the benefits for all New Zealanders'. The Trade for All Board was required to deliver a written report and recommendations. The Trade for All Board, 'made up of representatives across the spectrum of views on trade issues', kept the names of participants confidential to encourage the free expression of opinion.[110] Mr Vitalis described the Trade for All Board's membership to us as reflecting 'the diversity of contemporary Aotearoa New Zealand'.[111] In carrying out its work, it engaged with a variety of stakeholders, including Māori organisations.[112] One of the themes arising from the work of the Trade for All Board, as we have already noted, was 'a strong emphasis on the Government's partnership with Māori under te Tiriti o Waitangi/the Treaty of Waitangi'.[113]

The Trade for All Board presented its report to the Honourable David Parker, then the Minister for Trade and Export Growth, on 28 November 2019. Mr Vitalis described it to us as having been 'widely welcomed'.[114] The report contains useful background on e-commerce issues of concern in Aotearoa New Zealand communities and organisations as we have already noted. In addition, the report makes 53 recommendations based on 11 key findings, many of which include consideration of Māori interests and te Tiriti/the Treaty partnership. Various recommendations also touched on this aspect, including four specific recommendations on 'Taking Te Ao Māori to the World'. A common theme in the recommendations was the need for more engagement and for Māori-led and -designed frameworks and principles to be recognised in trade policy, including on intellectual and cultural property rights-related issues.[115] Several of the report findings touch on the regulatory challenges of e-commerce and digital technology. One recommendation relates directly to digital trade.

110. Document C1(a), pp 42, 43
111. Document C1, p 20 at [56]
112. Document B23, p 3
113. Ibid, p 4
114. Document C1, p 20 at [57]
115. For example, recommendations 3, 9, 36; doc B23, pp 18–26

3.4.2.1.2 The Trade for All Board's relevant findings

In its report, the Trade for All Board found that:

> Because of the broad range of issues covered under trade agreements, and their implications for domestic policy, trade policy needs an anticipatory governance framework. Trade policy should always look to avoid putting future governments in a position where they would need to choose between implementing the policies they were elected on and remaining in international agreements to which the country has previously committed.[116]

It also set out four critical areas requiring 'particular care', two of which have direct relevance to this inquiry:

> The Government's partnership with Māori and its obligations under te Tiriti/the Treaty include considering how indigenous interests, perspectives and values can become part of the underpinnings of trade policy; reducing risks of policy conflicts; and exploring how indigenous frameworks can be utilised to determine the outcome of matters such as Wai 262 in trade negotiations.[117]

The Trade for All Board further found:

> The ongoing digitisation of New Zealand's economy presents great opportunities for New Zealand to overcome the disadvantages of scale and distance, and to leverage its high levels of education. It also presents significant regulatory challenges that are not yet fully understood. The spread of digital technology into all aspects of life has advanced at a speed that governments and regulators have struggled to keep pace with. The speed and breadth of change, and the complexity of the issues, warrant further investigation and engagement.[118]

Other Trade for All findings touched on digital trade issues, including the need for trade policy outcomes to be assessed against 'triple bottom line criteria that address social, environmental and economic outcomes', and recognising that the Crown's Tiriti/Treaty obligations 'are not negotiable in trade negotiations'.[119] Building on this, the Trade for All Board suggested a specific framework is needed for digital commerce.

These findings lead the Trade for All Board to recommend that:

> A thorough review of New Zealand's interests in the digital trade negotiations should be carried out involving the Government Chief Digital Officer, Callaghan

116. Document B23, p 13 at [5]
117. Ibid
118. Ibid
119. Ibid at [6]

> Innovation, Productivity Commission, the Privacy Commissioner, MBIE, MFAT, and the APEC Business Advisory Council, *as well as representatives of Māori*, business and civil society. In the interim, we recommend against locking New Zealand into any fixed negotiation positions. [Emphasis added.][120]

3.4.2.1.3 Government response: a review, but no pause on negotiations

As outlined in Mr Vitalis' evidence, Cabinet has agreed to conduct the review recommended by the Trade for All Board; he anticipated 'work on this review, which will involve a significant phase of engagement with Māori and wider public consultation, will begin as soon as possible'.[121] The Minister's response to the recommendation is appended to Mr Vitalis's brief of evidence, and reads:

> I agree in principle with the recommendation to review New Zealand's wider policy settings that affect digital trade and support the digital economy. This will need to be assessed against ongoing negotiations and ongoing domestic development in this area.[122]

The response is categorised as agreeing 'in principle', with work on the recommendation 'already under way or will be commenced immediately'.[123] However, the second part of the Trade for All Board's recommendation – to avoid Aotearoa New Zealand being locked into 'fixed negotiating positions' – has been interpreted by the claimants as recommending a pause on negotiations.[124] The Crown stated this is incorrect, and highlighted that the recommendation's opposition to 'fixed negotiating positions' implies 'acceptance by the Trade for All Board of negotiations continuing in parallel with the review'.[125] Nonetheless, the Minister's response gave some insight into the prospect of pausing negotiations on e-commerce: 'It is not in New Zealand's interests to pause all negotiations on digital trade issues. I would expect, however, that the positions taken in ongoing negotiations would be informed by the review.'[126]

This aligns with the view advanced by Mr Vitalis in his evidence. Mr Vitalis argued that pausing negotiations would result in opportunity costs. First, he said, stepping away from important e-commerce negotiations with the European Union and United Kingdom while a review was undertaken would mean that there would be no guarantees Aotearoa New Zealand could 'restart' those negotiations; it would also suffer competitive disadvantages as other countries (for example, Australia) would have secured preferences into those markets.[127] Mr Vitalis also

120. Document B23, p 18 at [2]
121. Document C1, p 21 at [59]–[60]
122. Document C1(a), p 54
123. Ibid
124. Submission 3.3.63, pp 57–58 at [9.1], [9.5], [9.6]
125. Submission 3.3.61, pp 32–33 at [82]
126. Document C1(a), p 54
127. Transcript 4.1.9, p 285

referred to a reputational cost, which he described as a 'very, very serious problem' as New Zealand would no longer be considered a 'serious player' in trade negotiations.[128] Thus, he summarised the Crown's position in the following terms: 'New Zealand negotiators will continue to work to achieve the kinds of flexible outcomes in current negotiations on electronic commerce that retain sufficient space and relevant safeguards to incorporate the outcomes of this review, in due course.'[129]

This is consistent with the Crown's position that it retains sufficient regulatory flexibility to address Māori interests in the digital domain matters at the domestic level. The review recommended by the Trade for All Board and agreed to by Cabinet, however, could play an important role in allowing Māori to further articulate those interests, and could assist the Crown in its understanding of them.

3.4.2.2 *Te Pae Tawhiti – the whole-of-government response to the* Ko Aotearoa Tēnei *(Wai 262) report*

3.4.2.2.1 Background

In our Stage Two report, we set out the background and nature of the whole-of-government Te Pae Tawhiti initiative as follows:

> In September 2019, almost 30 years after what was then known as the 'flora and fauna' claim (Wai 262) was received by the Tribunal and a decade after *Ko Aotearoa Tēnei* was issued, the Crown announced that it would address the recommendations made in the report in a comprehensive and holistic way under a work programme known as Te Pae Tawhiti. This approach involves creating a process to enable the Crown and Māori to discuss how to move forward on the issues identified in the report in a 'spirit of partnership.' The Government also intends to create a ministerial group to oversee the work programme as a whole and to consider cross-cutting issues. Sitting under the oversight group will be three ministerial groups consisting of Ministers with portfolio links to the following three broad kete of issues:
>
> - kete 1: taonga works me te mātauranga Māori;
> - kete 2: taonga species me te mātauranga Māori;
> - kete 3: Kawenata Aorere/Kaupapa Aorere (with an international focus).[130]

Arranging the work programme through reference to three 'kete' (baskets) recalls the story of Tāne's ascent to Te Toi-o-nga-rangi. We believe this reinforces our kōrero that, for Māori, data and digital technologies belong inside a mātauranga framework. Below, we discuss points of relevance to digital issues across the three 'kete' described above.

128. Ibid, pp 276–277, 286–287
129. Document C1, p 21 at [60]
130. Waitangi Tribunal, *The Report on the Crown's Review of the Plant Variety Rights Regime: Stage 2 of the Trans-Pacific Partnership Agreement* (Lower Hutt: Legislation Direct, 2020), p 36

3.4.2.2.2 Relevant workstreams in kete 1: taonga works me te mātauranga Māori

Matters concerning governance of the digital domain fall within kete 1, under the questions: 'How should the Crown approach Māori data stewardship and governance issues. How can the Crown better manage its metadata to enable access to the mātauranga Māori it holds?'[131] Several existing and upcoming kete 1 workstreams are relevant to the governance of the digital domain, including:

- *Government data stewardship and Māori data governance (Statistics New Zealand):* As of November 2019, several initiatives related to data governance were being considered or underway. Within this workstream is the appointment of 'an independent Advisory Group on Trusted Data Use' including 'membership with expertise and knowledge in te ao Māori' – this became the Data Ethics Advisory Group (DEAG), with a member representing te ao Māori.[132] In addition, the Government chief data steward is working with the Data Iwi Leaders Group, Te Puni Kōkiri, and Te Arawhiti to address Māori Data Governance issues, including by developing a 'system-wide co-design approach . . . bringing together government officials and Māori to ensure that te ao Māori views are incorporated'.[133]
- *Review of the Statistics Act 1975 (Statistics New Zealand):* Aotearoa New Zealand's statistics and data legislation has been under review by Statistics New Zealand, with a view to repealing and replacing the Statistics Act 1975. Any changes 'would be expected to support data system governance initiatives, among other things'.[134]
- *Government Digital Strategy (Department of Internal Affairs):* This initiative is described in the November 2019 Te Puni Kōkiri description of Te Pae Tawhiti as:

> This mahi has the vision of all New Zealanders thriving in the digital age, and working on the government's rapid response to societal and economic changes in the digital age. The Department of Internal Affairs has expressed a commitment to digital inclusion, especially for Māori, and to honouring Te Tiriti, as well as ensuring that tangata whenua have input into decisions at all levels.[135]

As noted above, the Crown has not provided detailed evidence on these workstreams. The evidence before us was provided by Professor Kelsey, who obtained it through requests under the Official Information Act (OIA). Statistics New Zealand noted they had been asked by Te Puni Kōkiri to 'identify any current initiatives it

131. Document B25(a), p 72
132. 'Data Ethics Advisory Group', Government Information Services, https://www.data.govt.nz/leadership/advisory-governance/data-ethics-advisory-group, accessed 24 September 2021
133. Document B25(a), p 72
134. Ibid, p 73
135. Ibid

was undertaking that might bear on a government Wai 262 response'[136] and communicated the following to Professor Kelsey:

> At this time, Stats NZ was working through some specific Māori data governance issues, was initiating discussions with the Data Iwi Leaders Group on Māori data governance in general, and was aware of thinking by Te Mana Raraunga and others on Māori data sovereignty and the possible taonga status of contemporary government data referring to Māori. Stats NZ raised these initiatives and Te Puni Kōkiri incorporated [them] into relevant workstreams for Wai 262.[137]

Of the documents provided with this OIA response, Professor Kelsey noted:

> The attached 'Note on the Data Implications of the Wai 262 Report', dated 18 September 2019 was headed 'Not Government Policy'. The note indicated that Stats NZ was planning to convene two groups, 'an officials one and a Māori one, to pursue a Treaty-based approach to data governance, employing a co-design process.' It was seeking advice from the Data Iwi Leaders Group on the Māori group. It was also engaging with Te Mana Raraunga (TMR) 'to develop protocols to address Māori interests in the [Integrated Data Infrastructure] and in offshore storage of data (ie Remote Data Labs). TMR has presented in recent literature a position that all Māori data should be treated as a taonga. Should this be accepted, Māori data might come within the scope of the taonga works area of the Wai 262 report.'[138]

Three further Statistics New Zealand workstreams mentioned in the documentation provided by Professor Kelsey are relevant to Māori interests in data and digital technologies:

- The Mana Ōrite Relationship Agreement, signed on 30 October 2019 between Statistics New Zealand and the Data Iwi Leaders Group with the purpose of helping to 'create a future that benefits te oranga whanui o Aotearoa by realising the potential of data to make a sustainable positive difference to outcomes for iwi, hapū and whanau.'[139] As Professor Kelsey noted, the work programme for this relationship includes the development by the Data Iwi Leaders Group of a Māori data governance proposal.[140] Under the heading 'Wai 262 issues arising in this kaupapa' is 'Māori decision-making and rights over taonga' with the description: 'Co-design of an approach to Māori data governance by a te ao Māori group and government officials

136. Document B25, p 7 at [22]
137. Document B25(a), p 94
138. Document B25, p 8 at [23]; doc B25(a), p 94
139. Liz MacPherson and Karen Vercoe, 'Mana Ōrite Relationship Agreement', relationship agreement between Data Iwi Leaders Group and Statistics New Zealand, 30 October 2019, p 1, https://www.stats.govt.nz/assets/Uploads/mana-orite-relationship-agreement-with-cover-note-12-february-2021.pdf, p 2
140. Document B25, p 8 at [24]

group would help to ensure that proposed models reflect Treaty principles and te ao Māori perspectives.'[141]

- The Algorithm Charter for Aotearoa New Zealand, released in July 2020 and signed by all major Government departments. The charter is 'a commitment by government agencies to carefully manage how algorithms will be used to strike the right balance between privacy and transparency, prevent unintended bias and reflect the principles of the Treaty of Waitangi.'[142] It contains an explicit commitment to te Tiriti o Waitangi/the Treaty of Waitangi, to deliver 'clear public benefit' by: '[e]mbedding a Te Ao Māori perspective in the development and use of algorithms.'[143] The charter is subject to review every 12 months, with the next taking place in or after July 2021.
- The Ngā Tikanga Paihere guidelines, released in March 2020 and developed by Statistics New Zealand and Associate Professor Maui Hudson, a founding member of Te Mana Raraunga.[144] The framework draws on 10 tikanga to 'guide researchers wishing to access integrated data for new projects in the Integrated Data Infrastructure and Longitudinal Business Database' and ensure that 'data will be used in an appropriate and collaborative way and that research does not disadvantage any specific population.'[145]

3.4.2.2.3 Relevant workstreams in kete 2: taonga species me te mātauranga Māori

Kete 2 was of immediate relevance in Stage Two of this inquiry and was covered in the *Report on the Crown's Review of the Plant Variety Rights Regime* (2020).[146] As such, we do not deal with it in any depth.

3.4.2.2.4 Relevant workstreams in kete 3: Kawenata Aorere/Kaupapa Aorere

Kete 3 is also relevant. In his evidence, Mr Vitalis noted that 'MFAT are actively engaged working with Te Puni Kōkiri and other relevant parties with Kete 3 – some of which will inform future approaches on digital economy policy'.[147]

The Trade for All agenda and the work of the Trade for All Board sit within Kete 3 of Te Pae Tawhiti.[148] It lists several international negotiations and kaupapa where e-commerce issues are in play, identifying them as areas where the Crown is 'currently engaging with Māori and will need to be mindful of the issues raised in the Wai 262 claim and *Ko Aotearoa Tēnei*':[149]

141. Document B25(a), p 107
142. Statistics New Zealand, *Algorithm Charter for Aotearoa New Zealand* (fact sheet, Wellington: Statistics New Zealand, 2020), p 1
143. Ibid, p 3
144. 'Ngā Tikanga Paihere', Statistics New Zealand, https://www.data.govt.nz/toolkit/data-ethics/nga-tikanga-paihere, accessed 24 September 2021
145. Document B25(a), exh K, p 108
146. Waitangi Tribunal, *Report on the Crown's Review of the Plant Variety Rights Regime*, p 36
147. Document C1, p 23 at [66]
148. Document B25(a), p 64
149. Ibid

- E-commerce negotiations at the World Trade Organization (WTO), the launch of which was confirmed in January 2019. They involve approximately 80 other WTO member-States working towards the following aim:

> We want to ensure our trade policy settings facilitate growth in this area, and will contribute towards achieving the government's economic diversification goals, as well as the transition to a low-carbon economy and protection of areas of specific interest.[150]

- Digital Economic Partnership Agreement (DEPA) negotiations with Chile and Singapore, launched in May 2019 and concluded on 12 June 2020. Aotearoa New Zealand's goal for this negotiation was

> to help co-create and shape global norms for digital trade and to lead on important issues in the wider digital economy. The envisaged scope is wider than e-commerce chapters in free trade agreements and the WTO e-commerce negotiations, and at the same time will safeguard our ability to regulate to address legitimate public policy interests.[151]

- Various free trade agreements and related work, including new bilateral agreements with the European Union and United Kingdom, which will include e-commerce provisions and issues.

3.5 Tribunal Conclusions on Māori Interests in the Digital Domain

We refrain from making detailed findings on the matters discussed in this chapter for two reasons. Firstly, the evidence we have is valuable, but its scope is limited. Secondly, all parties agree that understanding of the Māori interests in the digital domain and the regulatory response are currently evolving, both within te ao Māori and between Māori and the Crown.

Various Government work programmes are underway to address Māori interests in the digital domain. This is important context for our inquiry. The initiatives now progressing clearly contemplate how Māori cultural perspectives on digital technologies and data might be recognised, and, through Te Pae Tawhiti, this work has both domestic and international dimensions. The Crown disputes their relevance, however, as both the policy initiatives and the concept of 'Māori Data sovereignty' post-date the CPTPP.

For the claimants, the emergence of policy initiatives to address Māori concepts of data sovereignty and governance after the CPTPP e-commerce rules were decided upon, and came into effect, is part of the problem. At our hearings,

150. Ibid, p 85
151. Ibid, p 86

claimant expert witness Professor Kelsey described the initiatives as 'catch-up work'.[152] The claimants argued there is a risk that any options for developing a Tiriti/Treaty-consistent digital domain in New Zealand that might emerge from these initiatives and processes are (or will be) impeded by the CPTPP rules, which are already in force.[153]

Despite the evolving and uncertain nature of the policy context, from the claimants' evidence we have found that protecting mātauranga Māori encompasses digital governance issues. This has important implications for the Crown's duties under te Tiriti/the Treaty. The full extent of the implications of governance for digital technologies, Māori data, and mātauranga Māori is still unclear. Nonetheless, the potential measures the Crown may be required to put in place to honour its obligations under te Tiriti/the Treaty to protect those interests are likely to be significant, even if the detail is uncertain.

Added to this uncertainty is the reality that, in the years to come, digital technologies will continue to profoundly change our society – probably in unforeseen ways. Thus, we agree with the Trade for All Board that an anticipatory governance framework is critical. It is crucial that the Crown completes its policy engagement processes as a matter of priority. The Crown needs to develop a good understanding of what is at stake for Māori in digital governance matters – at the same time making use of the frameworks for ongoing engagement on evolving issues it has put in place as our inquiry has unfolded, Te Taumata and Ngā Toki Whakarururanga. The Trade for All Board has recommended a wide-ranging and thorough review of Aotearoa New Zealand's interests in digital trade. The Crown has agreed that this review should take place as soon as possible. We support this and emphasise the importance of a prominent Māori dimension within any such review.

We agree with all parties that it is imperative Aotearoa New Zealand retains the regulatory flexibility to address digital governance issues, as they arise, in a Tiriti/Treaty-consistent way. The claimants and the Crown disagreed over whether the Crown has retained sufficient flexibility given the e-commerce commitments it has signed up to in the case of the TPPA/CPTPP – an issue we turn to in the chapters that follow.

152. Transcript 4.1.9, pp 40–41
153. Submission 3.3.63, p 26 at [1.62]

CHAPTER 4

THE E-COMMERCE PROVISIONS AT ISSUE

As we discussed in chapter 3, the Crown is currently developing its policy settings with respect to Māori interests in the digital domain, including through dialogue with Māori. At this point, however, the Crown's understanding of the nature of its Tiriti/Treaty obligations remains largely undefined. Understandings of the relationships Māori have to data and digital technologies continue to evolve. As we have observed, good governance of the digital domain involves, at least, protecting mātauranga Māori – the Māori knowledge system. Because international trade agreements may affect mātauranga Māori, Māori have significant interests in the matters before us, and under article 2 of te Tiriti/the Treaty, the Crown has an obligation to actively protect these interests.

But even as the Crown works to develop its policy and regulatory settings for understandings of its interests in the digital domain, it has already entered into binding e-commerce commitments under the CPTPP. In this chapter, we assess the scope and operation of these e-commerce provisions. We do this first by way of an overview (section 4.1.1), which addresses the parties' differing positions on the scope and purpose of the CPTPP agreement.

We then examine more closely the CPTPP e-commerce provisions the claimants have identified as prejudicing Māori rights and interests in the digital domain. We introduce each provision in turn and explain why the claimants say they are at issue. We then consider what Tiriti/Treaty interests are engaged and assess the extent to which they are affected by the operation of these provisions.

4.1 The CPTPP E-Commerce Provisions in Overview

4.1.1 Overview

The e-commerce aspects of the CPTPP are largely found in Chapter 14 (Electronic Commerce), with cross-reference to several other chapters. Chapter 14 contains 18 articles, listed below.[1] The articles in italics are those which, due to their relevance to the issue raised by the claims, we see as necessary to examine in more detail:

Chapter 14: Electronic Commerce
Art 14.1 Definitions
Art 14.2 Scope and General Provisions

1. TPPA/CPTPP Chapter 14 is appended to this report as appendix III.

Art 14.3 Customs Duties
*Art 14.4 *Non-Discriminatory Treatment of Digital Products*
Art 14.5 Domestic Electronic Transactions Framework
Art 14.6 Electronic Authentication and Electronic Signatures
Art 14.7 Online Consumer Protection
Art 14.8 Personal Information Protection
Art 14.9 Paperless Trading
Art 14.10 Principles on Access to and Use of the Internet for Electronic Commerce
*Art 14.11 *Cross-Border Transfer of Information by Electronic Means*
Art 14.12 Internet Interconnection Charge Sharing
*Art 14.13 *Location of Computing Facilities*
Art 14.14 Unsolicited Commercial Electronic Messages
Art 14.15 Cooperation
Art 14.16 Cooperation on Cybersecurity Measures
*Art 14.17 *Source Code*
Art 14.18 Dispute Settlement

All parties agreed that the provisions in Chapter 14 must be read in the context of the whole CPTPP agreement. As the Crown noted in its opening submissions, 'the principle of "holistic" interpretation is key to international trade law interpretation'.[2] As part of this holistic approach, the provisions need to be viewed in respect of the broader agreement, including any *exceptions* and *exclusions* in the agreement that apply to them. Importantly, the extent to which the Crown can enact regulatory measures that are inconsistent with the CPTPP obligations is framed by the relevant exceptions and exclusions, which create what is sometimes called 'policy space' or 'regulatory flexibility'. We consider the issue of 'regulatory flexibility' in more detail in chapter 5 of this report.

4.1.2 What is the background to Chapter 14 on electronic commerce?

Chapter 14 is the first comprehensive chapter concerning e-commerce matters in a multi-party free trade agreement (FTA) to which Aotearoa New Zealand is a Party.[3] While Aotearoa New Zealand had agreed e-commerce provisions in previous bilateral trade agreements,[4] their inclusion in the 12-party TPPA, and subsequently in the 11-party CPTPP, is a commitment of a different scale. The substantive content of the provisions also differs. This is evident in a comparison of the ASEAN–Australia–New Zealand Free Trade Agreement (AANZFTA) and the CPTPP. The e-commerce chapter in the AANZFTA covers electronic authentication, online consumer and data protection, and paperless trading. The CPTPP also

2. Submission 3.3.58, p 14 at [43]
3. Document B25, p 3 at [6]
4. Document C1, p 10; New Zealand has previously negotiated e-commerce chapters in the following bilateral FTAs: ASEAN–Australia–New Zealand Free Trade Agreement (AANZFTA); the New Zealand–Thailand Closer Economic Partnership Agreement; the New Zealand–Hong Kong, China Closer Economic Partnership Agreement; and the Agreement between New Zealand and the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu on Economic Cooperation (ANZTEC).

covers these topics, however it introduces – for the first time – articles concerning the non-discriminatory treatment of digital products, the cross-border transfer of information by electronic means, location of computing facilities, and source code.

While the CPTPP was unique in terms of the content and extent of its provisions, the policy of secrecy under which negotiations were conducted was not new. Professor Jane Kelsey, in her paper analysing the TPPA from an Aotearoa New Zealand perspective, noted that the Trade Minister at the time, the Honourable Tim Groser, said as much.[5] We noted in our Stage One report that it was the continued practice of the Aotearoa New Zealand Government not to disclose their negotiating position to anyone outside of Government:

> Although the TPPA is described as a free trade agreement, it contains provisions that reach beyond traditional trade agreements. The negotiations were confidential. The TPPA countries agreed that governments could provide draft text and other materials to 'persons outside government who participate in [the] domestic consultation process'. However, it was the New Zealand Government's practice not to share text or negotiating positions with anyone outside of government. The agreed text of the concluded agreement was not released until 5 November 2015, a month after negotiations concluded.[6]

Before the text was released in November 2015, those outside the Ministry of Foreign Affairs and Trade (MFAT) relied on leaks of the chapters and targeted engagement from officials to access the content of the agreement. Unlike some other chapters, the text of Chapter 14 was not leaked during the original TPPA negotiations. As Professor Kelsey said in her evidence: 'The first time I and other[s] outside the negotiations saw the text was when it was released in November 2015, followed by the legally scrubbed text in January 2016, almost six years after the TPPA negotiations began.'[7] When the TPPA was renegotiated as the CPTPP after the withdrawal of the United States, 22 provisions were suspended but Chapter 14 was retained in its entirety.

In the claimants' view, the text of Chapter 14 'largely codifies the US technology industry's demands set out in the US Trade Representative's Digital-2-Dozen principles'.[8]

The Digital-2-Dozen was published in 2016 by the Office of the United States Trade Representative (USTR) and is a statement of 24 objectives it claims to have secured in the text of the original TPPA agreement. It describes the agreement as containing 'cutting-edge obligations designed to promote the digital economy

5. Professor Jane Kelsey, 'The TPPA: Treaty Making, Parliamentary Democracy, Regulatory Sovereignty & the Rule of Law' (2017) NZLFRR 2, http://www.nzlii.org/nz/journals/NZLFRRp/2017/2.html

6. Waitangi Tribunal, *Report on the Trans-Pacific Partnership Agreement* (Lower Hutt: Legislation Direct, 2016), p 1

7. Document B25, p 3 at [7]

8. Submission 3.2.54, p 6 at [3.1]

through a free and open Internet and commerce without borders'.[9] Referring to its e-commerce content, the US Trade Representative described the TPPA as 'the most ambitious and visionary Internet trade agreement ever attempted'.[10]

At our hearing, we discussed the possible influence of the United States technology industry on the original TPPA negotiations with Crown witness Vangelis Vitalis, MFAT Deputy Secretary Trade and Economic Group (TEG), who was Aotearoa New Zealand's chief negotiator for the CPTPP:

> Q. . . . Professor Kelsey had also made the general point that in part or in large part the e-commerce chapter codifies the demands of the US technology industry, particularly the [US Trade Representative's Digital-2-Dozen] principles, and I just wanted your view on that proposition?
> A. Yes, look I think it is true that certainly [the US Trade Representative] like any big country that comes into a negotiation expects to get its own way and puts on the table what they wanted, and my understanding is that during those negotiations indeed that was the perspective that they took. I think the important question though is what does the text look like at the end of the negotiations and I don't think that any fair view of that text would conclude that yes the US technology [industry] has got everything that they wanted. They got some of the things where we saw an advantage to us and our technology firms while also protecting the policy space that we believe we needed in this kind of fast evolving and rapidly developing [space for] technologies.[11]

Mr Vitalis said that the United States tech industry 'had influence' on the negotiations through the United States Trade Representative, but no direct role in the negotiating room.[12] He rejected the assertion that the final text of Chapter 14 represented 'the unvarnished proposals of any individual party', saying it was instead the result of multiple years of negotiations with inputs by all participants.[13] Further, in response to questioning from claimant counsel, Mr Vitalis suggested that the United States technology industry's objectives were not in fact fully realised due to the public policy exceptions and exclusions in the agreement:

> I think the really important question is what does the text look like and to what extent does it reflect the US objectives? . . . You'd be pretty disappointed because apart from anything else the public policy safeguards essentially protect precisely the kinds of things that they didn't want to happen. . . . anyone in the [Digital-2-Dozen] who looks through what they had initially proposed and what they finally got, they would've been pretty disappointed.[14]

9. Document B25(a), exh B, p 4
10. Ibid, exh A, p 2
11. Transcript 4.1.9, pp 291–292
12. Ibid, pp 292, 314–315
13. Document C1, p 15 at [39.1]
14. Transcript 4.1.9, p 315

This position is difficult to test. But we recognise the claimants' contention that the United States Trade Representative's strong advocacy for the agreement (not accounting for the decision of the United States to withdraw) and conclusions about its 'visionary' nature as an 'internet trade agreement' at least call into question the claim that the agreement would have disappointed the US tech industry interests that lobbied for the provisions in Chapter 14. Professor Kelsey asserted that, rather than disappointing the United States tech industry, the e-commerce rules were designed to protect their first mover status and market power.[15]

The claimants suggested that outside of the United States Trade Representative's strong advocacy for the agreement and the interests of the United States tech industry, an understanding of the broad context of the e-commerce rules necessarily involves:

- An assessment of the power asymmetries in negotiations for both the TPPA and the CPTPP and how this would seemingly contradict Mr Vitalis' argument that non-US parties were able to insist on the insertion of effective policy space and safeguards in the e-commerce text;
- A look into the evolution of the text and the intention of those who drafted it, which the claimants assert would be recorded in the negotiating history, which is unavailable;
- A look into digital corporations and governments which 'champion' digital trade rules and pressure other governments seeking to regulate digital technologies, services, and data more actively.[16]
- An assessment of subsequent negotiations concerning e-commerce rules. These rules are based on the TPPA/CPTPP and involve the same parties (whether this be in bilateral or regional negotiations).[17] We discuss subsequent negotiations and agreements, such as the Digital Economy Partnership Agreement (DEPA) and the Regional Comprehensive Economic Partnership (RCEP), in chapter 5 as these are relevant to the overall question of how much regulatory flexibility exists within Chapter 14 of the CPTPP. Of interest is Article 4.4 of the DEPA, which concerns the location of computing facilities. While containing similar language to Article 14.13 of the CPTPP, which covers the same subject matter, there are material differences. This is relevant to our discussion of legitimate public policy objectives, which proceeds at section 5.3.3.

The claimants asserted that the broad context of the TPPA/CPTPP negotiations is relevant because it is directly related to assessing the nature and range of risks that arise at any stage of the policy process.[18] While the by-products of e-commerce can appear relatively innocuous, the use and control of data related to millions of transactions inevitably raises broader issues. A look into the background of the

15. Document c5, p 3
16. Submission 3.3.60, pp 34–35 at [7.5]
17. Ibid, p 35 at [7.5]
18. Ibid

e-commerce chapter provides some insight into the nature and extent of issues potentially engaged. The claimants saw the United States Trade Representative's Digital-2-Dozen principles as contributing to the background of the e-commerce chapter. As such, we refer to that document when discussing the specific provisions at issue, below (p 95, section 4.2).

In addition to the four Chapter 14 provisions highlighted at the outset of this chapter, the claimants also took issue with a provision in Chapter 10 (Cross-Border Trade in Services), which they said had implications for their interests in the digital domain: Article 10.6 (Local Presence). As we describe below in section 4.2.3, Article 10.6 prevents States from requiring overseas providers of a service (including an e-commerce or digital service) to have a 'local presence' inside the countries where they operate. The claimants argued this provision would complicate the ability of Aotearoa New Zealand to exercise jurisdiction over digital service providers trading within its territory. As the Crown understood the scope of our inquiry to be limited to the provisions in Chapter 14 (and the relevant exceptions in Chapter 29), it did not address the claimants' arguments concerning Article 10.6.[19] As we stated in chapter 1, while Article 10.6 is not exclusively about 'e-commerce', it has clear relevance in terms of the issues brought by the claimants and has consistently featured in their arguments. We therefore consider this provision to be properly within the scope of this inquiry and we discuss it under its relevant subheading alongside the Chapter 14 provisions.

4.1.3 What is the scope of the e-commerce provisions in the CPTPP?

4.1.3.1 *The parties' positions*

The claimants said that the aim of the CPTPP's e-commerce provisions (collectively) is 'to protect and entrench current technological giants, shutting out those who, like Māori, continue to build capacity in this area'.[20] They saw the scope of the CPTPP e-commerce rules as extending 'beyond trade to cover key areas of Internet governance'.[21]

By contrast, the Crown's position was that '[t]he e-commerce elements of the CPTPP are a small and peripheral part of the way government actions and decisions interact, or could interact, with Māori data.'[22]

4.1.3.1.1 The claimants

The claimants argued that the treatment of digital concepts and rules imposed by the TPPA and CPTPP agreements is fundamentally inconsistent with te Tiriti/the Treaty, because those concepts and rules have 'no place for Te Ao Māori'.[23] While Māori have relationships to digital technologies and data of the kind we outlined in chapter 3, the claimants said that the broad CPTPP e-commerce rules affect

19. Submission 3.3.61, p 77 at [10]
20. Submission 3.3.59, p 3 at [13]
21. Submission 3.2.54, p 6 at [3.1]
22. Submission 3.3.58, p 11 at [30]
23. Submission 3.2.54, p 12 at [4.14]

digital governance and 'segment, privatise, commodify and commercialise the integrated whole of the digital ecosystem and destroy its mauri'.[24]

In a published article placed on our Record of Inquiry, Professor Kelsey contextualised the CPTPP rules as part of a wider trade rules-based response to a '4th industrial revolution' being driven by digital technologies. She wrote:

> Trade rules on 'electronic commerce', more recently termed 'digital trade', are at the forefront of the new issues being promoted in the international trade arena. The first comprehensive legal text, concluded in 2015, was chapter 14 of the Trans-Pacific Partnership Agreement (TPPA). . . . The scope of the rules extends beyond any traditional conception of trade or commerce to the regulation of digital technologies and data, as well as internet governance.[25]

By way of example, the paper goes on to cite the rules which prevent a Party to the CPTPP from requiring data to be localised within their territorial jurisdiction, and those that prevent requirements on overseas providers of digital services to disclose the source codes and algorithms of their software.[26] Professor Kelsey described the difficulty created by these particular categories of rules for regulators:

> the three most likely points of conflict between . . . innovative regulation and the digital trade rules being negotiated in bilateral, regional and potentially multilateral arenas: the right of transnational digital firms not to have any local presence in a country where they operate and to choose their preferred legal form if they do; corporate control over data, especially the jurisdiction where it is held; and right to keep the source codes and algorithms that drive the software apps and platforms secret.[27]

Throughout their evidence, the claimants expressed similar concerns about the breadth of the TPPA/CPTPP e-commerce rules, and their extension beyond trade matters. Claimant Hone Tiatoa pointed to the definitions of digital products and personal information in Chapter 14 as 'broad'; to him, this meant that 'Aotearoa, and all of its citizens, lose some control over our personal information'.[28] He cited the view of Dr Burcu Kilic and Tamir Israel, who said in 2015 that Chapter 14 sets 'rules that, if ratified, will shape the development of the digital economy for years to come'.[29]

Finally, to highlight what she characterised as the overly prescriptive and broad nature of the CPTPP e-commerce provisions, Professor Kelsey noted that they have been departed from in several respects by other countries in subsequent negotiations:

24. Ibid, p 13 at [4.14]
25. Document C5, pp 90, 91
26. Ibid, p 91
27. Ibid, pp 90–91
28. Document B24, p 3 at [14]
29. Document B24(a), p 1

> As further evidence that the TPPA rules are contested, I note that the digital trade chapter in the RCEP is unenforceable, excludes the source code provision, and has a sweeping national security exception for data transfers. This negotiation included TPPA/CPTPP parties New Zealand, Japan, Australia and Singapore, who are strong advocates for TPPA-style electronic commerce rules. The EU Mercosur Agreement concluded in 2019 has a slimmed down and genuinely-trade related section on electronic commerce.[30]

In sum, the claimants said that the scope of the TPPA/CPTPP e-commerce provisions extends beyond traditional trade matters, intruding into the realm of governing the digital domain.[31] They argued that such a broad scope creates uncertainty,[32] and that there is a real and present danger that the Crown is not adhering to its Tiriti/Treaty obligations.[33]

Professor Kelsey asserted that the intrusive scope of the rules has arisen as a result of the influence of powerful multinational technology industry interests in the original TPPA negotiations, whose demands were represented in the position of the United States Trade Representative – and ultimately secured in the text of the TPPA/CPTPP e-commerce rules.[34]

4.1.3.1.2 The Crown

The Crown has acknowledged 'the breadth and depth of claimants' concerns and interests as expressed through their evidence'. However, it has argued that the claimants have largely overstated the issues with the CPTPP e-commerce rules. In the Crown's view, the claimants' concerns speak to broader digital governance and constitutional issues – particularly the examples and concerns raised in the evidence of the Māori expert witnesses.[35]

Contrary to the claimants' arguments about the scope of the rules and the risks they are said to give rise to, the Crown submitted that the provisions in Chapter 14:

1. are of narrow effect and do not apply to many of the scenarios the claimants focused on in evidence . . .;
2. primarily provide practical and necessary measures to enable efficient international electronic commerce (such as restricting customs duties on electronic transactions, recognition of electronic authorisation and signatures, online consumer protection, paperless trading, and minimising spam);
3. do not prevent Aotearoa New Zealand from developing and implementing regulatory measures for the protection of Tiriti/Treaty interests and for other legitimate public policy reasons;

30. Document C3, p 15 at [42]; see also submission 3.3.60, pp 86–87 at [16.18]
31. Submission 3.3.60, pp 48–50 at [9]
32. Ibid, p 38 at [8.8]
33. Ibid; submission 3.3.60, p 79 at [15.4]
34. Document B25, p 3 at [6]
35. Submission 3.3.58, p 17 at [51]; submission 3.3.61, pp 20–21 at [56]

4. were intentionally crafted at a high level of generality and with sufficient flexibility for the Parties to be able to develop domestic regulation in response to the fast-evolving nature of e-commerce;
5. are subject to (amongst other measures) the Treaty exception, which the Tribunal has already found is likely to provide reasonable protection for Tiriti/Treaty rights; and
6. are contingent, and do not present risks of the nature or scale alleged by the claimants.[36]

In sum, the Crown's position was that the e-commerce rules are a peripheral part of the way government action and decisions interact, or have the potential to interact, with Māori data.[37] Much of this argument depends on the extent of the policy space and related regulatory flexibility afforded by the agreement's exceptions and exclusions (points 3, 4, and 5, above), which we examine further in chapter 5.

The Crown has argued that the concerns brought by the claimants (and embodied in the various hypothetical scenarios used by the claimants' witnesses) largely concern matters outside the scope of the TPPA/CPTPP and often relate to digital issues generally.[38] These issues, the Crown has argued, are thus out of scope as 'Chapter 14 is concerned specifically with e-commerce'.[39] When questioning claimant witness Karaitiana Taiuru, Crown counsel attempted to clarify that data relating to 'e-commerce' was a smaller subset of the larger concept of 'Māori data' – a characterisation Mr Taiuru accepted.[40]

In his analysis of CPTPP Article 14.2 (Scope and General Provisions), the Crown's expert witness Professor Andrew Mitchell, described the aim of Chapter 14 as follows:

> With the rapid digitalisation of the global economy, electronic commerce plays a critical role in facilitating trade across countries and is thus an important precursor for economic growth and development. Against this background, Chapter 14 of the CPTPP is aimed at fostering a favourable environment for electronic commerce in the CPTPP region to maximise the opportunities for economic growth.[41]

4.1.3.2 *The scope of Chapter 14 as defined in the CPTPP (Article 14.2)*

The scope of Chapter 14 is defined in Article 14.2 (Scope and General Provisions). Article 14.2 specifies how, and to what, the other provisions in Chapter 14 apply, as well as what is excluded from their scope. The two international trade law experts who gave evidence in this stage of the inquiry, Professor Kelsey for the claimants, and Professor Mitchell for the Crown, were largely in agreement that Chapter 14

36. Submission 3.3.61, p 4 at [4.1]–[4.6]
37. Submission 3.3.58, p 11 at [30]
38. Ibid
39. Submission 3.3.61, p 6 at [13.4]
40. Transcript 4.1.9, pp 90–91
41. Document C2, pp 15–16 at [44]

is 'wide in scope', though there was some disagreement on the operation of the obligation and the two 'exclusions' defined within Article 14.2.[42] We discuss their evidence and conclusions below.

4.1.3.2.1 Chapter 14 applies to 'measures adopted or maintained by a Party that affect trade by electronic means'

Pointing to Article 14.2.2, Professor Mitchell concluded that Chapter 14 covers 'any act by a Party that has an impact on trade by electronic means'.[43] On this conclusion, Professor Kelsey said in her reply evidence:

> I fully concur with Professor Mitchell that Chapter 14 has a wide scope, covering 'measures', broadly defined, that 'affect trade by electronic means'. Further, the rules include non-trade matters such as network management (Article 14.10), spam (Article 14.14) and rights over source code (Article 14.17), as well as cross-border data flows (Article 14.11 and 14.13). A similarly broad scope applies to Chapter 10 Cross-Border Trade in Services that hosts the Local Presence rule (Article 10.6) and other obligations relating to cross-border supply of services, and computer and related services.[44]

Article 1.3 of the CPTPP defines a measure as including 'any law, regulation, procedure, requirement or practice'.[45] The World Trade Organization (WTO) defines a measure as 'normally any law, rule, regulation, policy, practice or action carried out by government or on behalf of a government'.[46]

The CPTPP also defines 'Party' as 'any State or separate customs territory for which this Agreement is in force'.[47] While there are exceptions from this scope, these will be discussed in more detail at sections 4.1.3(2)(b)–(c). These exceptions concern government procurement and information held or processed by or on behalf of a Party.

Professor Mitchell was questioned by claimant counsel on whether the reference to measures that have 'an impact on trade by electronic means' created any ambiguity or uncertainty. Professor Mitchell responded:

> No, I would suggest the opposite. . . . Because it's quite clear that it casts a very wide scope, so if it . . . is an act by a particular party that has an impact on trade by electronic means and none of those terms are ambiguous, then it will fall within the scope of the CPTPP if it doesn't go within one of the exclusions then from the scope, say government procurement, [or] information [that] is held or processed by or on behalf of the party.[48]

42. Document C3, pp 26–27, 43; doc C2, pp 16–17 at [47]–[48]
43. Document C2, p 16 at [47]
44. Document C3, p 26 at [79]
45. Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Art 1.3
46. Walter Goode, ed, *Dictionary of Trade Policy Terms*, 5th ed (Cambridge: Cambridge University Press, 2007), p 276
47. Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Art 1.3
48. Transcript 4.1.9, pp 384–385

Article 14.2: Scope and General Provisions

1. The Parties recognise the economic growth and opportunities provided by electronic commerce and the importance of frameworks that promote consumer confidence in electronic commerce and of avoiding unnecessary barriers to its use and development.
2. This Chapter shall apply to measures adopted or maintained by a Party that affect trade by electronic means.
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.

. . . . .

However, we do consider that there is some uncertainty in the phrase 'trade by electronic means' and its impact on the scope of Chapter 14. In his evidence, claimant Hone Tiatoa referenced a 2015 article by Dr Kilic and Mr Israel, who noted the uncertainty over the scope of application for the then-TPPA Chapter 14:

> The chapter does not clearly define its scope of application, but rather states broadly that '[T]his Chapter shall apply to measures adopted or maintained by a Party that affect trade by electronic means.'
>
> Although it does include certain definitions, no definition is provided for key scoping terms 'e-commerce' or 'trade by electronic means'.[49]

In the Crown's view, the ambit of the term 'e-commerce' is, however, narrower and more definite:

> 'E-commerce' is generally considered to cover digitally-enabled transactions of trade in goods and services that can either be digitally or physically delivered, and that involve consumers, firms, and governments. Familiar examples include the purchase and delivery of a book (digital or hard copy) through an online marketplace such as Amazon, or the purchase of apps like Zoom for a smartphone. These days more and more transactions have a digital component, and more and more commerce is moving online, including at the international level.[50]

Corresponding with the Crown's argument that 'e-commerce' is a narrow category of digital activities is the argument that data associated with e-commerce is

49. Document B24(a), p 1
50. Submission 3.3.58, p 14 at [41]

similarly narrow. In conversation with claimant witness Karaitiana Taiuru at our hearings, Crown counsel sought to clarify what he understood the scope of this data to be, which we noted previously. Mr Taiuru did not see a distinction between e-commerce data and data more generally. He said: 'in my opinion you can't have e-commerce without creating data and that data . . . will more than likely be used by A I to create better financial returns in a commercial model'.[51]

He did, however, accept that there was data additional and separate to that related to e-commerce.[52] When the same question was posed to Dr Donna Cormack, expert witness and member of Te Mana Raraunga (the Māori Data Sovereignty Network), she also accepted that 'e-commerce data' might be a subset of Māori data generally, though added that she did not 'necessarily think that the beliefs, that the rights and interests are any different'.[53]

We do not see a distinction between 'e-commerce data' from data more generally to be of particular significance. The range of data that may be captured by 'commercial' activity seems to us to be wide, though the potential ambit was not explored in detail by either the claimants or the Crown. To the extent that the claimants' concerns relate to digital issues generally, nothing suggests that data related to or arising from 'e-commerce' (and which may be captured by the CPTPP provisions) is distinct from or outside the ambit of their general concerns about the governance of the digital domain, which we explored in chapter 3.

Chapter 14's broad scope is confirmed by the interpretations of Professor Mitchell and Professor Kelsey. The terms 'e-commerce' and 'trade by electronic means' are not defined in the CPTPP, but we see them as covering similar matters. 'E-commerce' clearly does not capture the entire digital domain, but captures a very broad category of digital activities, technologies, and products. We also observe that there is scope for the term 'measures . . . that may affect' to encompass measures that do not have a commercial objective, but nevertheless 'affect trade by electronic means'. Nonetheless, two 'exclusions' constrain Chapter 14's wide scope. They relate to government procurement and information held or processed by or on behalf of a Party.

4.1.3.2.2 Excluding 'government procurement'

While Chapter 14 applies to 'measures adopted or maintained by a Party that affect trade by electronic means', it also contains exclusions specifying that the chapter will not apply to 'government procurement' (Article 14.2.3(a)) and 'information held or processed by or on behalf of a Party, or measures related to such information, including measures related to its collection' (Article 2.3.(b)).

Professor Mitchell explained the operation of the government procurement exclusion (in summary) as follows: 'Thus, when a government entity of a CPTPP party acquires digital products and services such as cloud computing services, AI

51. Transcript 4.1.9, p 90
52. Ibid, p 91
53. Ibid, p 166

technologies, etc. for use in the discharge of its governmental or public functions, it falls outside the scope of Chapter 14.'[54]

'Government procurement' is defined in Chapter 1 of the CPTPP at Article 1.3 (General Definitions) as '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'.

The definition of government procurement (in Article 1.3), he argued, 'is drafted broadly to capture a government's consumption of goods and services regardless of the form of consumption'. He and Professor Kelsey disagreed over the breadth of the definition's scope, as embodied in the terms 'the process by' and 'for commercial sale or resale'.[55]

The government procurement exclusion is particularly relevant to the provision on the non-discriminatory treatment of digital products (Article 14.4) and the provision on source code (Article 14.17). We explore the experts' debate over the definition further when we discuss those provisions below (at sections 4.2.4 and 4.2.5).

4.1.3.2.3 Excluding 'information held or processed by or on behalf of a Party'

The two experts also disagreed over how to interpret the exclusion of 'information held or processed by or on behalf of a Party [etc]' scope under Article 14.2.3(b). However, both Professor Mitchell and Professor Kelsey agreed that the 'intended scope of this exclusion is unclear'.[56]

Professor Mitchell noted that the term 'information' is undefined in the CPTPP and in his view would therefore 'be construed broadly to capture any form of knowledge including – but not limited to – data, personal information, commercial information, and non-commercial information'.[57] As in the rest of the agreement, a 'Party' refers to a government that is a CPTPP member, including its 'local government, judicial organs, and any other governmental bodies or agencies'.[58] Ambiguity arises, he said, in the term 'on behalf of a Party', where a second type of entity becomes involved, 'such as a company, an individual, or some other type of private organization'.[59] Both experts agreed that this creates a degree of uncertainty concerning the intended scope of the exclusion.[60]

The key point of disagreement between the experts was how this exclusion might apply to particular scenarios put forward by Professor Kelsey. These described different combinations of public-private joint ventures and the distribution of responsibilities over data between the organisations involved. She said:

54. Document C2, p 18 at [53.1]
55. Ibid, p 19 at [54]
56. Ibid, pp 23–24 at [63]
57. Ibid, p 21 at [60]
58. Ibid, p 21 at [61.1]
59. Ibid, p 21 at [61.2]
60. Ibid, p 21 at [62]; doc B25, pp 20–21 at [67]

> I expect the exclusion would extend to a joint venture arrangement between the government and a private entity (although that would permit rather than require the government not to apply the disciplines in the chapter).
>
> I do not consider it would exclude data in a product developed by a commercial subsidiary of a government agency, such as statistics or a health joint venture, that uses information that is collected for a public purpose.
>
> Nor do I consider the exclusion would extend to information that a government requires to be collected by non-government entities, pursuant to regulation or a contract, but does not itself hold or process, such as certain health data.
>
> The carve-out would not cover other relevant information or data that the government may wish to access that is held by the private individual or firm or by third party intermediaries, or requirements that businesses retain within the country the kind of information that is needed for compliance with domestic laws or regulations.
>
> This exclusion focuses on primary information. I would not interpret it as applying to re-purposed information that uses primary data, for example a private firm that uses data collected from a joint venture with a government agency, such as a regional health authority, for research and development of AI.[61]

However, Professor Mitchell contended that '[w]hether such instances would be captured . . . would depend on the facts of a given case'[62] and he considered Professor Kelsey's understanding as expressed in the examples to be 'unduly narrow'.[63] After setting out both broad and narrow interpretations of the exclusion, Professor Mitchell concluded that:

> In my view, therefore, the correct interpretation would fall somewhere in-between these extremes, but it is difficult to pinpoint a precise definition in the abstract. Rather, an understanding of the term 'on behalf of' would likely hinge on the fact-pattern of a given case and be guided by indicia such as:
>
> - whether the Party would ordinarily have access to the information being processed or held by a private entity;
> - whether the processing or holding of the information is in pursuit of a public purpose; and
> - whether the nature of the information is such that it would ordinarily be processed and held by the private entity.[64]

Professor Kelsey agreed that the application of the exclusion depended on the relevant facts to which it might apply.[65] She concluded her reply to Professor

61. Document B25, pp 20–21 at [66]–[72]
62. Document C2, p 24 at [63.2]
63. Ibid, p 24 at [63]
64. Ibid, p 22 at [62.3]
65. Document C3, pp 43–44 at [140]

Mitchell's evidence by noting that 'the application of this exclusion is very contestable and could only be relied on decisively in limited circumstances'.[66]

4.1.3.3 *Tribunal analysis and conclusions*

In Stage One of this inquiry, we expressed our view that the then-TPPA represented a significant departure from previous trade agreements 'in both substance and reach'.[67] This was also the view advanced by claimants, who characterised the TPPA as a 'quantum shift in the nature and extent of [Aotearoa] New Zealand's international commitments'.[68] The Crown's response was to assert that the obligations in the TPPA were not substantially different from those previously entered into under other trade agreements.[69]

We disagreed with the Crown, ultimately finding that 'the TPPA's exceptional reach and significance [is] difficult to dispute'.[70] This was due to both its consolidation of trade and investment provisions, as well as its inclusion of 'five of New Zealand's top 10 trading partners'.[71] While subsequent developments led to the withdrawal of the United States and the partial renegotiation of the TPPA as the CPTPP (with no changes to the e-commerce provisions), we see no reason to revise our Stage One finding.

While Aotearoa New Zealand had agreed e-commerce provisions before in bilateral trade agreements, their inclusion in the 12-party TPPA, and subsequently the 11-party CPTPP, was a commitment of an entirely different scale, and the nature and content of the obligations assumed are more comprehensive than those contained in previous agreements.[72] In their 2015 article, Dr Kilic and Mr Israel described Chapter 14 as follows:

> The chapter sets rules and procedures for trade in goods and services conveyed by the Internet and other electronic means, and addresses a range of issues including duties on digital products, paperless trade administration, and rules on electronic signatures, [internet] neutrality and data protection.[73]

In our view, the potential for electronic commerce to extend further into the governance of the digital domain in Aotearoa New Zealand is now also supported

66. Ibid, p 44 at [141]
67. Waitangi Tribunal, *Report on the Trans-Pacific Partnership Agreement*, p 11
68. Ibid, p 5
69. Ibid, p 11
70. Ibid
71. Ibid, p 12
72. Document C1, p 10; New Zealand has previously negotiated e-commerce chapters in the following bilateral FTAs: ASEAN–Australia–New Zealand Free Trade Agreement (AANZFTA); the New Zealand–Thailand Closer Economic Partnership Agreement; the New Zealand–Hong Kong, China Closer Economic Partnership Agreement; and the Agreement between New Zealand and the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu on Economic Cooperation (ANZTEC).
73. Document B24(a), p 1

by the findings of the Trade For All Advisory Board (the 'Trade for All Board'). The Trade for All Board's focus was not specifically on the CPTPP. Nevertheless, the Trade for All Board found that the digital economy has raised 'a range of both established trade policy issues and new issues and concerns that traditional trade negotiations have not previously needed to focus on to a great degree'.[74] These include:

(a) consumer and privacy rights
(b) the implications for competition policy of the large first mover advantages that the digital sector can produce
(c) impacts on employment and criminal law
(d) net neutrality and competition
(e) taxation equity issues
(f) censorship and digital content
(g) social impacts such as bullying, abuse of privacy
(h) the digital divide and inequitable access
(i) pornography
(j) the facilitation of crime through the 'dark web'
(k) technical requirements (eg local storage and processing of information, ISP liability, access to source codes).[75]

The Trade for All Board concluded that this proliferation of governance issues associated with digital trade means that '[t]rade agreements may not [be] the best way to deal with some of the issues related to digital technology', due to the fact that they often 'are important for other than for trade and commercial reasons'.[76] As a result, the Trade for All Board suggested that: 'Ideally, there should be a framework that allows all of these issues to be addressed in an international body that had broader aims than the WTO.'[77]

Overall, the Trade for All Board urged an anticipatory governance approach to trade policy. According to this approach, trade policy should 'always look to avoid putting future governments in a position where they would need to choose between implementing the policies they were elected on and remaining in international agreements to which the country has previously committed'.[78]

The Trade for All Board noted that a number of officials felt that some departments had only considered trade agreement commitments against current law and practice, without sufficient focus on the future.[79] The Trade for All Board urged against short-sighted decision-making, observing that agreements must leave

74. Document B23, p 51 at [116]
75. Ibid, p 51 at [116]
76. Ibid, p 51 at [117]
77. Ibid
78. Ibid, p 41 at [58]
79. Ibid, p 42 at [66]

appropriate space for future governments to make decisions in the national interest.[80] This cautionary approach was bolstered by the Trade for All Board's recommendation that until a thorough review of Aotearoa New Zealand's interests in digital trade negotiations can be carried out, the country should not be locked into any fixed negotiating position. We note that there was some disagreement between parties concerning the Trade for All Board's recommendation against being 'locked in'.[81] The Crown asserted that this recommendation is not one to suspend negotiations, implement a moratorium, or insert a rendezvous clause.[82]

Having considered the evidence before us, we agree with the Trade for All Board that the potential implications of digital trade policy are far-reaching, despite the purportedly limited focus on 'electronic commerce' in agreements like the CPTPP.

The CPTPP provisions are engaged wherever a measure put in place by Aotearoa New Zealand might impact another CPTPP Party's interests in digital trade. The scope of what this may capture is very broad. We believe the emphasis on electronic commerce – the commercialisation of data, other digital products, and digital methods of transacting across borders – in Chapter 14 and elsewhere, indicates the rules have the potential to reach a long way into the future governance of the digital domain in Aotearoa New Zealand. As a result, we do not accept the Crown's argument that the e-commerce aspects of the CPTPP are 'of narrow effect'.[83] The claimants' concern about the potential reach of Chapter 14 (and Article 10.6 from Chapter 10) into domestic governance arrangements for the digital domain in Aotearoa New Zealand is justified (even allowing for the application of the exceptions we discuss in chapter 5).

We agree with the Trade For All Board that the nature of the digital economy, even outside of those concerns specific to Māori, raises a number of issues, both traditional and entirely new.[84] The claimants argued that the potential reach of the e-commerce chapter infringes on Tiriti/Treaty principles, namely: the principle of active protection, the principle of equity, and the guarantee of tino rangatiratanga in article 2.[85] As this chapter continues, we more fully explore whether the e-commerce provisions apply to the specific interests and scenarios outlined by the claimants and the Crown in their evidence, as well as the Tiriti/Treaty principles they engage.

4.1.4 How do the CPTPP e-commerce provisions benefit Aotearoa New Zealand?

4.1.4.1 *The parties' positions*

As set out in chapter 2, the relevant Tiriti/Treaty standard in the context of international relations and treaty-making was set out in *Ko Aotearoa Tēnei* (Wai 262):

80. Ibid, p 53 at [132]
81. Ibid, p 18 at [2]
82. Submission 3.3.61, pp 32–33 at [82]
83. Ibid, p 4 at [4.1]
84. Document B23, p 51 at [116]
85. Submission 3.3.60, p 22 at [4.10]

> [t]he degree of priority to be accorded the Māori interest depends on the scale of its importance to Māori and the nature and extent of likely impacts on it. Ultimately, this has to be ascertained by a properly informed Crown and then balanced against any valid interests of other New Zealanders and of the nation as a whole, if those interests are in tension.[86]

The Crown, relying on this finding, noted that the balancing exercise also involves assessing the potential risks against the purported benefits of the CPTPP e-commerce rules, for both Māori specifically and Aotearoa New Zealand more widely.[87] The claimants argued that any benefits the Crown says arise from the agreement are unsubstantiated or overstated.[88] We canvass these arguments in the following section.

4.1.4.1.1 The Crown

A large part of the Crown's case in this inquiry centred upon the benefits of the CPTPP e-commerce rules to Aotearoa New Zealand, including for Māori. These, the Crown argued, must be balanced against any potential risks arising from the agreement.[89] Vangelis Vitalis provided key evidence on the potential benefits of the agreement.[90]

Mr Vitalis highlighted the importance of the digital economy to Māori and Aotearoa New Zealand in general terms, describing electronic commerce as 'vital for New Zealand', given the 'digital economy is part of [our] everyday lives'.[91] On the benefits of e-commerce rules for Aotearoa New Zealand, Mr Vitalis posited that cross-border e-commerce and digital technologies:

- Support increased participation in the global economy by New Zealand businesses, including small and medium-sized businesses (which make up 97 per cent of New Zealand businesses), women, Māori, and rural communities, and help to overcome the challenges of scale and distance (both domestically and globally) and reduce the transaction costs of trading.
- Support the creation of new products, services and business models, and are transforming the way that whole industries do business.
- Open up new opportunities for New Zealand consumers and respond to new and varied consumer demands, including those of Māori consumers. These changes provide both challenges and opportunities for the global trading environment,

86. Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims concerning New Zealand Law and Policy Affecting Māori Culture and Identity*, *Te Taumata Tuarua*, 2 vols (Wellington: Legislation Direct, 2011), vol 2, p 681
87. Submission 3.3.61, p 13 at [33.2]
88. Submission 3.3.63, p 34 at [4.8]
89. Submission 3.3.61, p 13 at [33.2]
90. Document C1
91. Ibid, p 11 at [30]

> traditional trade rules and architecture, as well as specific New Zealand trade interests.[92]

In a general sense, the Crown said that the CPTPP has brought broad economic benefits for Aotearoa New Zealand, including for the digital economy. Mr Vitalis told us that, even taking into account Statistics New Zealand's 'relatively narrow interpretation' of digital trade, its latest figures showed 'we have had a 47 per cent increase in digital exports of ICT between 2017 and 2019, $2 billion worth of trade and a 47 per cent increase just in that time period. Software development alone is worth about $800 million.'[93]

However, in his written evidence Mr Vitalis conceded that it is 'difficult to extrapolate numerically what this means for the extent of digitally enabled trade in New Zealand at this stage'.[94] Instead, he cited more generalised research by the Organisaton for Economic Co-operation and Development (OECD) which found, in his words:

> a 10 per cent increase in bilateral digital connectivity (which is supported by e-commerce rules) raises goods trade by nearly 2 per cent, and trade in services by 3 per cent, in particular for sophisticated manufacturers and digitally deliverable services. This grows by a further 2.3 per cent when supported by a Free Trade Agreement.[95]

He also noted that Māori initiatives or business interests see 'e-commerce and digital technology as important to their future success'.[96] He gave the following examples:

> Government initiatives such as Ka Hao (the Māori Digital Technology Development Fund) have recognised the value in increasing Māori participation in the digital sector and work to support this as a way to boost employment opportunities as well as harness the benefits of digital tools, for example to improve access to te reo Māori language resources.
>
> Māori businesses such as Metia Interactive are developing digital products such as educational games that weave in traditional Māori stories – such products can be used to educate and support learning and e-therapy. Members of my staff spoke with Metia Interactive staff last year in the context of an MFAT-run creative sector conference.
>
> I note also media reporting on Māori businesses investing in the development of e-commerce platforms (for example Hokohoko and Te Whare Hukahuka). Others are already exporting successfully via e-commerce platforms, a move that supports Māori

92. Ibid, p 11 at [31]
93. Transcript 4.1.9, p 255
94. Document C1, p 12 at [33]
95. Ibid, p 13 fn 25
96. Ibid, p 11 at [32]

> businesses to have more direct interest in export revenues. The Hui Collective which launched on Alibaba's T-Mall in 2018 is one such example.[97]

Mr Vitalis aligned the Government's pursuit of e-commerce outcomes in trade agreements with its commitment 'to supporting the transformation of the New Zealand economy . . . including a shift from volume to value in our export profile'.[98] In addition, he asserted that the Government's support for the e-commerce rules in trade agreements aligns with its general, long-standing support of the 'rules based international trading system'.[99] In the words of Crown counsel, Mr Vitalis's 'touchstone' was

> the necessity of an international rules-based order to advance the interests of small nations, and small and medium enterprises (virtually all New Zealand enterprises are classed as small to medium in the international context). His evidence traversed the national benefits (consistency, predictability, enforceability); the benefits to Māori trading internationally (eg cost reductions, connectivity, and not being required to establish physical premises in each market they access); and benefits within the domestic economy (including on Māori employment – substantial proportions of jobs in regions with high Māori populations depend on the export sector).[100]

To this end, Mr Vitalis explained at our hearings that the CPTPP e-commerce rules support exporters of digital products in Aotearoa New Zealand – including Māori – on the world stage. He considered that this was important due to the 'competitive advantage' that emerging technologies give to 'the existing large tech firms' who 'benefit from scale, composition, and network effects'.[101] In this environment, he explained, the 'classical benefits of common rules' are certainty, transparency, non-discrimination, and securing preferences for Aotearoa New Zealand.[102] Finally, he said that common e-commerce rules 'constrain the ability of a host country to try to tilt the playing field in favour of its own national champions' and allow businesses from Aotearoa New Zealand to compete 'on as level a playing field as possible' – something Mr Vitalis described as 'desperately [needed]' given 'the size, the scale, the distance of our firms'.[103]

In sum, the Crown has argued that the CPTPP e-commerce rules provide a varied range of benefits to Aotearoa New Zealand – benefits that Māori experience. It provided examples of Māori businesses and initiatives that participate in or benefit from digital trade generally, although the Crown also acknowledged that the economic benefits are difficult to quantify from the data available. At the level of the international trade system as a whole, the Crown also aligned its support for the

97. Ibid, p 12 at [32.1]–[32.3]
98. Ibid, pp 12–13 at [33]
99. Document C1, p 13 at [34]
100. Submission 3.3.61, p 28 at [69]
101. Transcript 4.1.9, p 255
102. Ibid, p 257
103. Ibid

TPPA/CPTPP e-commerce rules with its support for a rules-based trading system – and highlighted that common rules benefit Aotearoa New Zealand by levelling the playing field and giving transparency to the governance of e-commerce internationally.[104]

4.1.4.1.2 The claimants

The claimants argued in their reply to Crown closing submissions that the 'putative benefits' of the TPPA/CPTPP, which the Crown maintained must be taken into account in balancing the interests at stake, are 'anecdotal and unsubstantiated'.[105] Claimant counsel submitted:

> The Crown continues to conflate the benefits of digital technologies with purported benefits from the e-commerce rules in the CPTPP/TPPA. None of the claims from Mr Vitalis regarding benefits from the e-commerce rules to New Zealand, including Māori, is supported by any evidence. He agreed in cross-examination that there have been no such studies in New Zealand. The absence of such an evidence base led the Trade for All Advisory Board to recommend a thorough review that would provide evidence to inform New Zealand's negotiating position, and suggested that a trade agreement might not be the best place to deal with issues that are important for reasons aside from trade and commercial reasons.[106]

4.1.4.2 *Tribunal analysis*

Having considered the parties' positions on the possible benefits of the e-commerce provisions of the CPTPP, we reiterate the conclusions relevant to the Tiriti/Treaty standard for active protection that this Tribunal has repeatedly expressed: the level of active protection provided by the Crown must be 'reasonable in the circumstances' and considered against the interests of Aotearoa New Zealand more broadly.[107] In assessing these wider interests, it is relevant to weigh arguments that have been made about two related objectives. First, the realisation of benefits for the digital economy more widely and secondly, the realisation of benefits arising from the setting of standard international trade rules.

4.1.4.2.1 Economic benefits

It has been difficult to quantify the benefit of the CPTPP e-commerce provisions specifically.

Notably, Mr Vitalis affirmed that there was no 'good data' to prove how the free flow of digital trade promised by the e-commerce provisions would benefit the economy or Māori. What data exists, he said, is not broken down in a way that would enable one to discern the benefit for Māori e-commerce specifically, or to

104. Ibid, p 260
105. Submission 3.3.63, p 34 at [4.8]
106. Ibid, pp 54–55 at [8.1]
107. Waitangi Tribunal, *Ko Aotearoa Tēnei: Te Taumata Tuarua*, vol 2, p 681

assess the economic benefit arising from any particular provision of the CPTPP.[108] He referred to an MFAT working paper, released in June 2020, which reiterated that the 'benefits and costs of trade have been unevenly spread across New Zealand. However, there is insufficient data in a New Zealand context to estimate these disparities. Nor is there a set of indicators to assess how the distribution of costs and benefits is changing over time.'[109]

That report asserts that further research will help to understand the drivers of specific trends, including both the negative and positive effects that trade and domestic policy settings have on certain groups. Mr Vitalis was of a similar opinion, confirming that more time and research were needed to understand the effect of the CPTPP, though he submitted that remedying the lack of data was the subject of an ongoing project between MFAT and Statistics New Zealand. Notably, the data put forward in MFAT's working paper concerning Māori centered almost singularly on export and tradables employment, followed by the observation that

> Māori and Pacific Peoples are reasonably well engaged with trade. Māori and Pacific Peoples are more likely to be employed in export industries than other groups, although their share of employment in tradables sectors is broadly in line with other groups. Māori businesses account for significant shares of the forestry, fishing and sheep and beef sectors. However, Māori and Pacific Peoples have tended to earn less in tradables sectors than other New Zealanders.[110]

This 'inclusivity' section in the report does little to provide any indication of the benefit of the CPTPP to Māori e-commerce. Additionally, when considering that MFAT and Statistics New Zealand are to be involved in the aggregation of data which may, or may not, improve the understanding of the benefits to Māori e-commerce of the CPTPP, it would seem appropriate that Māori were involved in this data aggregation process to ensure the capture of data relevant to Māori e-commerce interests and that the data capture is in accordance with Māori interests. Further, it would be necessary to ensure data was used to assess the economic benefits which arise for Māori from the CPTPP, if any.

Notably, the examples given by Mr Vitalis of Māori businesses and other initiatives that take advantage of digital trade opportunities were anecdotal and we do not see them as having a clear connection to opportunities said to have been created by the CPTPP. The Alibaba T-Mall platform that is being utilised by the Hui Collective, which Mr Vitalis spoke of, originates in China – which is not currently a party to the CPTPP.[111]

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108. Transcript 4.1.9, pp 272–273
109. Sarah Drought and Phil Mellor, *MFAT Working Paper: Understanding the Linkages between Trade and Productivity, Sustainability and Inclusiveness* (Wellington: Ministry of Foreign Affairs and Trade, 2020), p 10
110. Ibid, p 53
111. Document C1, p 12 at [32.3]

It is possible that e-commerce provisions like those contained in the CPTPP might have a positive economic effect. But the evidence before us on this point is thin – especially with regards to Māori. The economic benefits of the CPTPP e-commerce provisions are too difficult to distinguish from the general benefits of increasing digitalisation for the economy.

This leads us to a similar conclusion to that reached by the Trade For All Board: that Aotearoa New Zealand's interests in digital trade 'warrant further investigation and engagement.'[112] As we discussed in chapter 3, the Trade for All Board's findings that the breadth and impact of issues arising in e-commerce negotiations were not well understood led it to recommend a thorough review of Aotearoa New Zealand's interests in the digital trade negotiations.[113]

4.1.4.2.2 Transparent and consistent international trade rules on e-commerce

Much of Mr Vitalis' evidence underlined the importance of Aotearoa New Zealand maintaining its seat at the negotiating table on international trade matters, and the necessity of supporting 'an international rules-based order to advance the interests of small nations'.[114]

We acknowledge what Mr Vitalis called the 'classical benefits of common rules' in international trade.[115] We also recall Mr Vitalis' evidence, given in Stage Two of our inquiry, about the importance of the CPTPP generally, for strategic, economic, and other reasons, including as a '[b]ulwark against rising protectionism' and a '[s]afety-net for the rules-based system at risk.'[116] In Mr Vitalis' view, the advantages of the CPTPP include the agreement's approach to e-commerce issues, though as noted previously, he was unable to provide data which shows specific benefits arising from the CPTPP.

The *National Interest Analysis* (NIA), published by MFAT in March 2018, described the advantages of entering the CPTPP, with specific regard to e-commerce as being:

- The provision of certainty for New Zealand users of e-commerce, including New Zealand exporters who conduct their business online, that CPTPP Parties would not move to impose customs duties on electronic transactions;
- the building of public confidence in the use of e-commerce by providing consumer protection, such as the protection of personal information of users of e-commerce; and
- the recognition of principles which affirm the value of information flows and the development of new technologies and services, such as cloud computing, for the

112. Document B23, p 13
113. Ibid, p 18
114. Submission 3.3.61, p 28 at [69]
115. Transcript 4.1.9, p 257
116. Document A65, pp 4–14

> growth of innovative and cost-effective approaches to the delivery of business services.[117]

The analysis also confronts the disadvantages of entrance into the CPTPP, with specific regard to the e-commerce provisions, which largely centre on the fact that a number of the provisions are new to Aotearoa New Zealand and have not been extensively tested in other agreements.[118] The NIA also considers the consequences of Aotearoa New Zealand not becoming a party to the agreement at all, noting that non-participation would mean:

> New Zealand would miss the opportunity to inform and shape the rules that may come to underpin future regional trade and economic integration. New Zealand would instead have to accept rules developed by other countries if we were to decide to accede to these agreements in the future.[119]

A number of other consequences were described. Namely, the disadvantage to Aotearoa New Zealand companies if the agreement were to proceed without Aotearoa New Zealand. At hearing, Mr Vitalis described the consequences of standing aside as 'catastrophic'. The NIA took a milder position, expressing that it would cause a substantial level of disadvantage to exporters.[120] Crown counsel summarised Mr Vitalis' position on 'standing aside' in the following terms:

> Mr Vitalis spoke to the implications, opportunities, and risks that result from the power asymmetry New Zealand faces when negotiating trade agreements. He spoke to the [important role] digital technology plays for New Zealand, as a small nation distant from its markets (exacerbated recently by the supply chain disruption caused by Covid-19, which has further propelled New Zealand into the digital space). The international norms and rules applying to the use of digital technology for e-commerce are evolving rapidly. He stressed that it is not within New Zealand's power to stop that evolution until such time as New Zealand's domestic positions are fully developed. The choices New Zealand has are limited. It can be at the table and have an opportunity to shape those developments, or 'step aside', and accept what others decide. Mr Vitalis described the option of standing aside as being 'catastrophic' for New Zealand.[121]

While the Crown insisted that the rapid evolution of digital technologies and 'international norms and rules' mean that it cannot afford to be absent from the

117. Ministry of Foreign Affairs and Trade, *Comprehensive and Progressive Agreement for Trans-Pacific Partnership: National Interest Analysis, March 2018* (Wellington: Ministry of Foreign Affairs and Trade, 2018), pp 51–52
118. Ibid, p 52
119. Ibid, p 20
120. Transcript 4.1.9, p 260 at [15]; Ministry of Foreign Affairs and Trade, *Comprehensive and Progressive Agreement for Trans-Pacific Partnership: National Interest Analysis*, p 19
121. Submission 3.3.61, p 28 at [70]

table, the claimants and the Trade For All Board are urging caution. Indeed, the Trade for All Board characterised the Crown's current position on digital trade negotiations as reflecting

> too much confidence that the type of thinking about the removal of trade barriers that might have applied to goods and more traditional services trade is transferable to a very different trading and regulatory environment in the digital world. This is a long way from the type of anticipatory governance thinking that TFAAB endorses.[122]

The report goes on to recommend a 'thorough review of New Zealand's interests' in digital trade negotiations because, it notes, 'the argument that New Zealand needs to be "in the negotiating room" is largely undermined if our representatives are there without a clear idea of where our national interests lie'.[123] The Crown has consistently highlighted the importance of reputation to Aotearoa New Zealand's influence in trade negotiations. We agree with the Trade for All Board that achieving this strength of voice on the world stage is only advantageous if it is a way to assert our national interests, including honouring te Tiriti/the Treaty partnership.

The Trade For All report was sceptical of the value of the NIA. The report found that the NIA was not only 'inadequate', but that '[t]he focus of NIA is too narrow, it comes too late in the process, and it is delivered under political and time pressures that are not conducive to the quality of analysis the subject matter deserves'.[124]

The report asserted that, if Aotearoa New Zealand is to improve Government policy and foresight, the NIAs for Free Trade Agreements (FTAs) should be conducted by an independent body, as opposed to MFAT – who are assessing themselves – under better-defined criteria. This body would take into consideration that:

a. Trade policy outcomes should be assessed against a triple bottom line framework – they need to meet social, environmental and economic objectives, and be consistent with the Crown's partnership objectives and obligations to Māori under te Tiriti/the Treaty.
b. The SDGs, the Treasury Living Standards Framework – which would be enhanced by the inclusion of a Te Ao Māori perspective – and other government wellbeing indicators should be used as a way to help assess trade policy outcomes.
c. There should be guidelines for minimum and maximum periods of consultation so that the public has ample opportunity to provide views.[125]

We find the Trade for All Board's report persuasive and agree that MFAT, as the agency negotiating agreements, cannot reasonably be expected to provide a truly objective view of the strengths and weaknesses of the agreements they have

122. Document B23, p 50 at [121]
123. Ibid, p 51 at [119]
124. Ibid, p 14 at [6]
125. Ibid, p 19 at [9]

negotiated.[126] There seems to be clear merit in their recommendation that an independent body be established, with the requisite resources and expertise.[127]

Overall, the Crown maintained that Aotearoa New Zealand's voice is clearly present in the 'generality and flexibility' built into the e-commerce provisions – which the Crown describes as intentional.[128] However, there is no way we can meaningfully test this proposition as we, along with the claimants and the public generally, are not privy to information about the relevant negotiating positions and history of the CPTPP and the extent to which Aotearoa New Zealand attained particular outcomes against bigger and more powerful states. In the remainder of this chapter, we explore the generality and flexibility the Crown asserted it has achieved with reference to the specific provisions identified by the claimants as potentially harmful to their interests in the digital domain.

4.2 Specific Provisions at Issue

4.2.1 Overview

The claimants took particular issue with three e-commerce provisions:

1. *Preventing data localisation* – (Articles 14.11 and 14.13). Claimants alleged that these provisions prevent the Crown from requiring that Māori data be stored exclusively within Aotearoa New Zealand.
2. *Non-disclosure of source code* – (Article 14.17). The claimants alleged that this provision prevents the Crown from requiring companies to disclose the source code of software as a condition for its importing, distribution, sale, or use in Aotearoa New Zealand. They said access to source code is essential to see how software uses Māori data, and whether it discriminates against or otherwise harms Māori.
3. *Non-discrimination for local content* – (Article 14.4). The claimants alleged that this provision prevents Aotearoa New Zealand from giving preference to local (including Māori) digital products, aside from subsidies, grants, and broadcasting.[129]

In addition to the e-commerce provisions, the claimants took issue with one other closely related provision:

4. *Local presence* – (Article 10.6). The claimants allege that this provision prevents the Crown from requiring that providers of electronic services (for example, via the internet) maintain a local presence in Aotearoa New Zealand (for example, a locally based subsidiary) as a condition for supplying that service.[130] We see Article 10.6 as being complementary to Article 14.13 concerning the location of computing facilities, in that it also aims to

126. Document B23, p 65 at [216]
127. Ibid, p 72 at [245]
128. Submission 3.3.61, p 66 at [200]
129. Submission 3.2.54, pp 13–17 at [5.1]–[5.22]
130. Ibid, pp 16–17 at [5.15]–[5.17]

Article 14.11: 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, when this activity is for the conduct of the business of a covered person.
3. Nothing in this Article shall prevent a Party from adopting or maintaining measures 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.

facilitate cross-border trade in digital services by reducing the operating costs of overseas suppliers of a service.

We deal with each of these provisions in turn. We explain how the provisions operate, what their intended purposes are, and what is in dispute between the parties to this inquiry. In chapter 5 we look at exceptions and exclusions that are relevant to the effects of these provisions.

4.2.2 Preventing data localisation requirements (Articles 14.11 and 14.13)

In both Articles 14.11 and 14.13, the substance of the obligations placed on Parties is contained in paragraph 2, which respectively:

1. require a Party to allow a covered person[131] to transfer, process, and store data, including personal information, offshore when this is for the purpose of conducting the business of a covered person (Article 14.11.2); and
2. provide that a covered person does not need to use or locate computing facilities in a Party's territory as a condition for doing business in that territory (Article 14.13.2).[132]

The Crown and the claimants (and both experts) agreed that, on their face, these provisions prevent the Government from requiring that Māori data is, first, not

131. The term 'covered person' is defined in Article 14.1 (Definitions) as an investment, investor, or service supplier of a State Party to the TPPA/CPTPP. The terms 'investment' and 'investor' are further defined in Article 9.1 (Definitions) in Chapter 9: Investment of TPPA/CPTPP. The term 'service supplier' is further defined in Article 10.1 (Definitions) of TPPA/CPTPP.

132. Submission 3.3.61, p 42 at [110]

Article 14.13 Location of Computing Facilities

1. The Parties recognise that each Party may have its own regulatory requirements regarding the use of computing facilities, including requirements that seek to ensure the security and confidentiality of communications.
2. No 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.
3. Nothing in this Article shall prevent a Party from adopting or maintaining measures 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 the use or location of computing facilities greater than are required to achieve the objective.

transferred offshore and, secondly, held only in Aotearoa New Zealand (although they also acknowledged the provisions must be read alongside the exclusions and exceptions that apply – see chapter 5).[133]

4.2.2.1 *Purpose of the provisions*

The United States Trade Representative's Digital-2-Dozen document described the objectives of these provisions as follows:

> [4] **Enabling cross-border data flows**
> Companies and consumers must be able to move data as they see fit. Many countries have enacted rules that put a chokehold on the free flow of information, which stifles competition and disadvantages American entrepreneurs. TPP combats these discriminatory and protectionist barriers with specific provisions designed to protect the movement of data, subject to reasonable safeguards like the protection of consumer data when exported.
>
> [5] **Preventing localization barriers**
> Companies and digital entrepreneurs relying on cloud computing and delivering Internet-based products and services should not need to build physical infrastructure and expensive data centers in every country they seek to serve. However, many countries have tried to enforce such requirements which add unnecessary costs and burdens on providers and customers alike. TPP squarely confronts these localization

133. Submission 3.2.54, p 14 at [5.5]–[5.6]; submission 3.3.60, pp 60–61 at [12.6]–[12.8]; submission 3.3.61, p 43 at [113]; doc B25, p 13 at [38]; doc C2, p 43 at [107]

barriers through specific provisions designed to promote access to networks and efficient data processing.[134]

According to Mr Vitalis, enabling of cross-border data flows and preventing local storage requirements represents an e-commerce objective for Aotearoa New Zealand in trade negotiations. This recognises 'the importance of data for the digital economy', while simultaneously 'maintaining the right of the government to regulate in a contrary fashion for legitimate public policy objectives'.[135] These objectives, he said, were achieved in the text of Chapter 14.

The Crown described the purpose of the two provisions as:

1. Permitting 'the offshore flow of information to allow trade to occur electronically, eg on the internet. This has benefits for a number of New Zealand exporters and users or clients of electronic commerce.'[136]
2. Removing 'a significant financial barrier to a foreign person operating a business in a Party's territory ie an exporter. There is no need to have local computing facilities. This logically benefits smaller business and smaller countries such as New Zealand.'[137]

In sum, the Crown's argument is that the CPTPP provisions preventing data localisation are important for trade and businesses in Aotearoa New Zealand, including for Māori. However, it also considered there is sufficient flexibility to allow for domestic regulations that would be inconsistent with the provisions but favour Māori interests. There is little indication as to what domestic regulations could be implemented and whether these policies would, in fact, favour Māori.

The claimants not only disagreed with the Crown's assessment of the level of regulatory flexibility maintained in the provisions as drafted, but saw the disadvantages as significantly impacting Aotearoa New Zealand's ability to adopt Māori-specific measures. In addition, they argued that the rules serve powerful external business interests.

4.2.2.2 *Why the provisions are at issue*

The claimants contended that, through these provisions, the CPTPP prevents any requirement for Māori data to be held exclusively within Aotearoa New Zealand.[138] They said the implication of the e-commerce provisions (including the alleged inadequacy of the protections and exceptions) is that Aotearoa New Zealand and Māori lose control over where Māori data is transferred, processed, and stored. As a result, Māori data can readily pass into the hands of other interests:

> That might apply to a range of businesses from CPTPP countries, from Internet Service Providers and social media platforms, to gene banks, to companies that mine

134. Document B25(a), exh B, p 4
135. Document C1, p 14 at [36.1.5]
136. Submission 3.3.61, p 42 at [111]
137. Ibid
138. Document B25, p 13 at [38]

and process health data or plant variety data, to multinational artificial intelligence (AI) businesses that operate security and facial recognition cameras in public/private places.[139]

The effect of this diffusion of data, the claimants said, is that Māori are alienated from their whakapapa. They are also denied their tino rangatiratanga and ability to exercise kaitiaki responsibilities over data, which cannot be prevented from being transferred across borders and stored in foreign lands by overseas businesses and/or governments.[140]

The claimants' Māori expert witnesses expressed wide-ranging concerns with Aotearoa New Zealand's alleged inability, due to the CPTPP, to require that Māori data be stored locally. In closing submissions, claimant counsel noted that these witnesses agreed that Māori rights and interests in data meant the Māori needed 'an ability to control data and develop appropriate protocols, even if some Māori data is subsequently allowed to be transferred out of New Zealand.'[141] In his oral evidence, Potaua Biasiny-Tule said:

> We cannot act as kaitiaki and protect our whakapapa if the data is held offshore. I have got data and I have it saved on my computer, which gets saved in Google Auckland, which gets saved in Google Australia, which gets saved in Google Ireland. That one piece of data is in 5 different places. It is difficult to control in all those jurisdictions. If it's stored in Australia, then because of their legislation which means they can access anything without a warrant, then they control access to it.[142]

Dr Donna Cormack said that the 'offshoring' of data was of concern because it involved the transfer of data 'outside of a jurisdiction.'[143] Data stored in a 'cloud', she said, creates jurisdictional issues 'that relate to both where those server warehouses are located but also the company that runs [them].'[144] In other words, cloud data storage raises concerns about both the person or entity controlling the data (for example, a company like Google) and the location where that data is stored (for example, a data facility in Australia). Technology giants like Facebook and Google locate most of their servers within the United States, a place which 'historically takes a light-handed approach to regulating the information industry.'[145] Dr Kilic and Mr Israel noted that localisation requirements would undermine the advantage currently enjoyed by United States-based cloud services, which benefit from the fact that most, if not all, corporations that offer cloud-based services are

139. Submission 3.2.54, p 14 at [5.5]
140. Ibid, p 14 at [5.7]
141. Submission 3.3.60, p 59 at [12.2]
142. Transcript 4.1.9, p 105
143. Ibid, p 154
144. Ibid
145. Document C5, p 109

currently located in the United States.[146] Dr Cormack described why the location of these cloud services is an issue for Māori, noting:

> From an indigenous data sovereignty point of view . . . the closer the physical and local storage of data is, the more able communities, and nations are able to . . . exercise rangatiratanga or control over that data. So, the further away it moves, the more other jurisdictional considerations come into play.[147]

Dr Cormack asserted that, as Aotearoa New Zealand has not yet resolved how to give effect to Māori Data Sovereignty, any move to offshoring not only would be premature but would affect the ability of Māori to retain tino rangatiratanga over their data.[148] This speaks directly to the issue that Article 14.11 and 14.13 raises: the potential loss of control over Māori data, stemming from the inability of the Crown to require localisation within Aotearoa New Zealand.

4.2.2.3 *Tribunal analysis and conclusions*

The claimants' arguments about data localisation under the TPPA/CPTPP focus on Aotearoa New Zealand's alleged inability to require Māori data to be localised in its territory and jurisdiction and therefore within its control. We acknowledge, as the Crown appeared to, that the offshoring of data could compromise the ability of Māori to exercise control over their data.[149] We also recognise, given our conclusions in chapter 3, that this exercise of control undeniably has wider implications for the ability of Māori to exercise tino rangatiratanga and kaitiakitanga in respect of mātauranga Māori, given the ubiquitous place of digital data in the world we now live in.

However, we also acknowledge that the CPTPP's data localisation provisions may provide some economic benefit to Māori who are active in digital commerce. As the provisions apply to all CPTPP parties, it also prevents other countries from requiring that Māori data storage facilities be localised within their jurisdictions as a condition for Māori doing business in those countries. We discussed this point with witnesses Dr Cormack and Professor Kelsey during our hearings.[150] This potential effect of the provision aligns with the Crown's evidence that the CPTPP e-commerce provisions would support increased participation in the global economy for Māori.[151]

Nonetheless, this must be weighed against the claimants' central concern: the risk to Māori interests caused by the Crown's loss of domestic policy flexibility to require Māori data to remain in Aotearoa New Zealand as a result of the agreement. We agree that Articles 14.11 and 14.13 clearly prevent the forced localisation

146. Document B24(a), p 5
147. Transcript 4.1.9, p 155
148. Ibid
149. Submission 3.3.61, p 43 at [113]
150. Transcript 4.1.9, pp 154–155, 183–187
151. Document C1, p 11 at [31]

of Māori data by foreign operators in Aotearoa New Zealand, subject to the applicable exceptions we discuss in chapter 5. As a result, we recognise that a Tiriti/Treaty-compliant domestic regime will be difficult to achieve under international obligations.

We acknowledged in chapter 2 that data can record or capture mātauranga, while mātauranga also informs and may generate data. Tribunal jurisprudence has established that mātauranga Māori is a taonga. We acknowledge that data therefore has the potential to be a taonga. As a result, the Crown is obliged to actively protect Māori data that falls into this class. Determination as to which data is a taonga is a decision for Māori to make and is not for the Crown to unilaterally decide.

We recognise that the active protection threshold is high and that the level of control the Crown possesses in an international context is directly relevant to its ability to discharge its protective duty.[152] If the localisation of Māori data in Aotearoa New Zealand is a necessary and appropriate protection for Māori data, then the inability to do that under Articles 14.11 and 14.13 would constitute a *prima facie* breach of the duty of active protection.[153] We consider in chapter 5 whether the relevant exceptions contained in the CPTPP mean that a Tiriti/Treaty-compliant domestic regime is possible, despite the inability of the Crown to require the localisation of Māori data in Aotearoa New Zealand because of Articles 14.11 and 14.13.

4.2.3 Preventing local presence requirements (Article 10.6)

The 'local presence' provision in CPTPP Chapter 10 (Cross-Border Trade in Services) is related to the provisions aiming to prevent parties from adopting 'data localisation' measures (subject to the exceptions discussed in chapter 5). The local presence provision prevents CPTPP Parties from requiring that 'service suppliers' from other Parties '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' – including digital services.

The claimants led evidence and made extensive submissions in relation to Article 10.6. The Crown did not respond or provide any evidence of its own, arguing that CPTPP Chapter 10 was outside the scope of our inquiry.

4.2.3.1 *Why the provision is at issue*

We see the provision as relevant to Article 14.13 on the location of computing facilities, in that it also aims to facilitate cross-border trade in digital services by reducing the operating costs of overseas suppliers of a service (who thus do not have to maintain local servers *or*, due to Article 10.6, local offices). This means the provision would protect the ability of a company (for example, Google) located in an offshore CPTPP member-State to provide its services (for example, a search engine) in another member-State without needing to maintain a presence inside that member-State.

152. Submission 3.3.61, pp 15–16
153. *Prima facie* translates to 'at first sight'.

Article 10.6: Local Presence

No Party shall require a service supplier of another 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.

As with the provisions preventing data localisation, the claimants' opposition to the 'local presence' provision related to Aotearoa New Zealand's ability to maintain jurisdiction over digital technologies and data that may impact Māori:

> This [provision] would prevent the government from ensuring that it can exercise jurisdiction over firms supplying services, ranging from social media platforms that publish racist or appropriated material and digital retailers, such as those selling taonga without consent, to corporations that mine, store and process health data or images captured on closed circuit cameras.[154]

Professor Kelsey saw the provision as directly antithetical to Tiriti/Treaty-compliant regulation of the digital domain:

> It is already very difficult to monitor the use, and enforce the protection, of Māori data by offshore operators, to enforce New Zealand's privacy or anti-discrimination legislation, or to impose effective Tiriti-compliant protections for cultural content, such as on the sale offshore of culturally offensive products or services. This rule prevents the government from trying to ensure that it can exercise jurisdiction. Such loss of control would make it impossible to enforce a Tiriti-compliant regime of Māori Data Sovereignty on offshore suppliers.[155]

In closing submissions, the claimants highlighted a passage from Professor Mitchell's academic writings which addresses this in relation to the dilemma of accessing data held extraterritorially:

> the legal position on access to extraterritorial digital data is unsettled. . . . The dispute involving Microsoft and the US government is an example of the difficulties associated with accessing data located outside one's borders. In this dispute, the US government issued a warrant for data located in servers in Ireland for domestic law enforcement activities, which Microsoft refused to comply [with] because the warrant related to data located outside the US.[156]

154. Submission 3.2.54, p 16 at [5.15]
155. Document B25, p [18]
156. Document C5, pp 339–340

4.2.3.2 *Tribunal analysis and conclusions*

We agree with the claimants that Article 10.6, preventing local presence requirements, is important and relevant. We also agree that, if a Tiriti/Treaty-compliant digital governance regime would require overseas providers of digital services to submit to Aotearoa New Zealand's jurisdiction, this provision (on its face, before considering any applicable exceptions) would work to frustrate this domestic regulation.

However, as with the other provisions we discuss in this chapter, Article 10.6 must be read within the context of the agreement as a whole. This means it cannot be read independently of important exception clauses, including two located in Annex II (New Zealand) which apply directly to Article 10.6. We discuss these in detail when we address the regulatory flexibility in the CPTPP in chapter 5.

Moreover, like Articles 14.11 and 14.13, we consider this provision could also benefit suppliers of services based in Aotearoa New Zealand from being required to maintain local presence in overseas jurisdictions in which they trade. As these suppliers could be Māori entities, or entities holding Māori data to some extent, the provision could also function to protect Māori data. While we recognise the possibility of these benefits to Māori entities operating internationally, we have to consider the relevance of this hypothetical against our primary concern: the integrity of Māori data created and used in Aotearoa New Zealand.

The Crown relied upon these possible benefits to Māori of the e-commerce provisions. However, such 'possible' benefits are not in themselves a sufficient answer to the duty of active protection the Crown must fulfil to comply with te Tiriti/the Treaty, as outlined in chapter 2. While the Tribunal in *Ko Aotearoa Tēnei* (Wai 262) qualified active protection as having to be 'reasonable and practicable in the international circumstances', it also stressed that it was for Māori to articulate how their interests might best be protected.[157] We agree that Māori should have the opportunity to articulate what sufficient protection necessitates. Importantly, while we acknowledge the recent establishment of Te Taumata and related ongoing developments, it is clear that Māori did not have the opportunity to articulate how their interests might best be protected before the e-commerce provisions were negotiated and incorporated into the TPPA/CPTPP.

We note that the protection of Māori data offshore is not certain and as a result, the integrity of Māori data overseas cannot be assured.

Arguably, this was already the position for Māori data prior to entry into the CPTPP. Our immediate focus is on whether aspects of the e-commerce chapter (Articles 14.11 and 14.13) and Article 10.6 are inconsistent with the Crown's obligations under te Tiriti/the Treaty. We accept, in principle, that Articles 10.6, 14.11 and 14.13 may operate to preclude or limit the Crown in its ability to actively protect Māori data. However, we still have to assess whether this barrier to te Tiriti/

157. Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims concerning New Zealand Law and Policy Affecting Māori Culture and Identity, Te Taumata Tuatahi* (Wellington: Legislation Direct, 2011), p 236

the Treaty-required protection can be sufficiently remedied by the exceptions described in chapter 5.

Notably, significant evidence presented to us stressed collective rights. Such an emphasis on collective rights and reciprocal obligations transcends what Dr Donna Cormack and Professor Tahu Kukutai described as 'the narrow focus on personal data protection and control' that currently characterises existing policy and regulatory approaches in Aotearoa New Zealand.[158] Counsel for the claimants submitted: 'One individual cannot own or only be affected by Māori data. Data is collective. When data is collective, privacy cannot be an individual right. Privacy belongs to the collective and "full and informed consent" needs to be collective.'[159]

Counsel for the claimants observed that the TPPA/CPTPP rules treat data as an abstraction that can be moved, stored, used, and remixed without origin, without consequence, and without collective consent.[160] We recognise their concern that companies like Google, Apple, and Amazon, located outside of Aotearoa New Zealand, control the search engines, digital platforms, marketplaces, databases, and server farms, and mine meta-data for artificial intelligence.[161] In essence, these technological giants exercise a level of control over Māori data that Māori themselves may be precluded from exercising as a result of Articles 14.11, 14.13, and 10.6.

4.2.4 Preventing requirements to disclose source code (Article 14.17)

Article 14.17 prevents parties from requiring the transfer of, or access to 'source code' as a condition for the import, distribution, sale, or use of software and associated products. The substance of the obligation is located at Article 14.17.1, while paragraphs 2 and 4 contain limitations on its scope. Paragraph 3 sets out two exceptions to the obligation.

Article 14.17 only applies to 'mass-market software or products containing such software and does not include software used for critical infrastructure'. Professor Kelsey explained the distinction, saying 'mass-market' software refers to

> software that is generally available for retail sale and would include products that facilitate the mining of data, such as fit bits, smart appliances and drones. It might also extend to surveillance cameras used, for example, by supermarkets or employers. It does not include software used for 'critical infrastructure', which is not defined but could be said to include the telecommunications and digital infrastructure itself.[162]

Professor Kelsey noted that the source code provision in the TPPA (and later incorporated into the CPTPP) 'was . . . the first of its kind'.[163] 'Source code' is not defined in the CPTPP. Professor Mitchell defined it as 'instructions written in any

158. Document C5, p 195
159. Submission 3.2.54, p 9 at [4.4]
160. Ibid, p 9 at [4.7]
161. Ibid, pp 9–10 at [4.7]
162. Document B25, pp 16–17 at [51]
163. Ibid, p 15 at [46]

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:
   (a) the inclusion or implementation of terms and conditions related to the provision of source code in commercially negotiated contracts; or
   (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.
4. This Article shall not be construed to affect requirements that relate to patent applications or granted patents, including any orders made by a judicial authority in relation to patent disputes, subject to safeguards against unauthorised disclosure under the law or practice of a Party.

computer programming language for the computer to execute.'[164] He defined the term 'algorithm' as 'the mathematical formula (or series of logical steps) used to solve a problem.'[165] Professor Kelsey explained in her evidence that algorithms are 'embedded in those [source] codes.'[166]

Professor Mitchell and Professor Kelsey each explored the question of whether Article 14.17 applied to 'algorithms' as well as 'source code'. Professor Kelsey described the question as 'extremely important, as the evidence highlights algorithms as the conduits for biased assumptions and bad data inputs that impact negatively on Māori.'[167] Professor Mitchell considered that drawing a distinction between 'algorithms' and 'source code' could mitigate the claimants' concerns about discrimination being embedded in the way software works; in his view, 'algorithms are more useful than source code to understand discrimination, eg in job search applications.'[168] The implication of Professor Mitchell's view is that, because algorithms are subject to disclosure requirements, the Government could address discrimination in software even if source code is protected.

164. Document C2, p 67
165. Ibid, p 65
166. Document B25, p 16 at [48]
167. Ibid
168. Document C2, p 58 at [134.1]

While describing the distinction between algorithms and source code as 'illogical', in their closing submissions, the claimants accepted that 'for the purpose of this hearing, . . . the source code provision does not include algorithms.'[169]

4.2.4.1 *Purpose of the provision*

This provision aims to allow trade in, and use of, software across borders while protecting suppliers from requirements that they disclose the 'source code' of that software. The United States Trade Representative's Digital-2-Dozen document describes the objective of the source code provision as follows:

> [7] **Protecting critical source code**
> US innovators should not have to hand over their source code or proprietary algorithms to their competitors or a regulator that will then pass them along to a State-owned enterprise. TPP ensures that companies do not have to share source code, trade secrets, or substitute local technology into their products and services in order to access new markets, while preserving the Parties' ability to obtain access to source code in order to protect health, safety, or other legitimate regulatory goals.[170]

The Crown argued that the provision 'benefits New Zealand software exporters.'[171] It described the purpose of the provision as to

- protect the rights of a person who has developed software to earn revenue from that software; and so
- prevent a Party from compelling the transfer of or access to the source code to a Party as a condition of doing business in that Party's territory.[172]

Professor Mitchell explained this purpose further in his evidence:

> Firms that sell software or operate on digital platforms generally will often have invested significant resources in developing the 'source code' underpinning their products. In light of this investment, the 'source code' will often represent a major part of the value of such products, and any requirement to disclose it will either deter those firms from entering a market or erode their competition advantage significantly by exposing them to the potential that other firms may gain access to their 'source code.'[173]

4.2.4.2 *Why the provision is at issue*

For the claimants, '[s]ource code forms part of the holistic digital ecosystem that integrates data as taonga and whakapapa, source codes, algorithms and technology,

169. Submission 3.3.60, p 68 at [12.37]
170. Document B25(a), exh B, p 5
171. Submission 3.3.61, p 49 at [137]
172. Ibid, p 49 at [136.1]–[136.2]
173. Document C2, p 57 at [132]

into an ecosystem [that] has mauri.'[174] At hearing, claimant witness Potaua Biasiny-Tule described how source code, algorithms, and Māori data intersect:

> data is just an abstraction made visible [through software] and that abstraction, now that it's visible, with the algorithm[,] can actually do something for you – a search, or turn on a light [for example]. . . . I'll just say data creates context. . . . But analysis provides the activity, so you've got the data, but without that activity, without the algorithm making it do something, it's just numbers.[175]

As set out above, the CPTPP works to protect the source code of mass-market software 'owned by a person of another Party' that is imported, distributed, sold, or used in Aotearoa New Zealand. The claimants argue that

> Many programmes today are built on and adapt existing codes. Those codes have built-in biases that reflect the data inputs and assumptions of their creators, who are predominantly white male computer technicians, and of those who adapt the codes and develop the algorithms. If the programmers' assumptions and the data they select are racist, the programmes and applications will be too. It makes no difference if the data are 'anonymised'. Access to source code is essential to identify those biases.[176]

The essential concern of the claimants is that, without access to source code, it would be impossible to understand how Māori data is being used in foreign software that operates in Aotearoa New Zealand. As a result, they said that '[t]he ability to access code for the detection and correction of bias and to ensure the security of information and prevent its abuse is integral to an effective Māori Data Sovereignty and Māori Data Governance regime.'[177]

4.2.4.2.1 Specific claimant concerns about inquiries, investigations, or juridical proceedings

Professor Kelsey identified specific difficulties that could arise from non-disclosure requirements for source code in the context of 'inquiries, investigations or juridical proceedings', given that the TPPA has no exception allowing the Government to require disclosure in such proceedings:

> New Zealand authorities would be unable to access source codes to investigate, for example, how Māori data is used in software or the link between facial recognition software in surveillance cameras to racial profiling. This provision would preclude any jurisdiction under Māori Data Governance that included source code.[178]

174. Submission 3.2.54, p 15 at [5.11]
175. Transcript 4.1.9, p 112
176. Submission 3.3.60, pp 66–67 at [12.31]
177. Ibid, p 67 at [12.33]
178. Document B25, p 17 at [52]

The Crown's expert witness, Professor Mitchell, agreed that the example given by Professor Kelsey raised significant areas of concern:

> . . . I agree with the importance placed on the ability to address 'algorithms as the conduits for biased assumptions and bad data inputs that impact negatively on Māori' and 'how Māori data is used in software' in relation to 'the link between facial recognition software in surveillance cameras to racial profiling.'[179]

However, he disputed whether the CPTPP actually inhibited the Government's ability to do this, saying instead that 'Article 14.17.1 does not, on its face, restrain Parties from requiring access to the source code of software for other purposes, such as criminal investigations or judicial proceedings, so long as those other proceedings do not preclude market access.'[180] In response, Professor Kelsey disagreed as '[c]onditions on importing, selling and using certain software may be imposed for a variety of policy objectives and rationale[s], and the conditions may be generic or individualised to a product or supplier.'[181] The essence of the dispute is whether 'condition for the import, distribution, sale or use of such software, or of products containing such software, in its territory' extends to judicial or regulatory investigations.

The Crown disputed Professor Kelsey's interpretation of the 'as a condition for' phrase. Crown counsel addressed this when cross-examining Professor Kelsey at our hearings, and summarised her response in the Crown's closing submissions:

> Professor Kelsey suggested in cross-examination that the words 'as a condition for . . .' in Article 14.17.1 should be interpreted to mean that the software owner had to comply with the domestic laws of the country in which it was operating. That is, if it was a condition of operating in New Zealand that you had to comply with the laws of New Zealand (including with Police warrants or Commerce Commission notices), then that was in breach of Article 14.17.1.[182]

In the Crown's submission, this interpretation is 'difficult to accept', as it 'seems obvious that a party operating in another jurisdiction must comply with the laws of that jurisdiction.'[183] The Crown elaborated:

> Professor Kelsey's position logically means that in her view the New Zealand High Court would set aside notices issued by the Commerce Commission, or a warrant obtained by the Police, on the basis that Article 14.17.1 of the CPTPP should be interpreted so that the words 'as a condition for the import' mean abiding by local laws

179. Document C2, p 59 at [136]
180. Ibid, p 57 at [133]
181. Document C3, p 34 at [105]
182. Submission 3.3.61, p 51 at [149]
183. Ibid, pp 51–52 at [150]

and that, further, as there is no express carve-out for regulatory or criminal investigations then a person can rely on Article 14.17.1 to set aside such a warrant or notice. This seems exceptionally unlikely. While New Zealand has passed legislation implementing the CPTPP it has, not surprisingly, made no amendments to any domestic legislation such as the Crimes Act to achieve the outcome that Professor Kelsey says arises.[184]

Professor Mitchell's evidence, by contrast, accepted the importance of the claimants' concerns but argued that they are able to be addressed through measures covered by both the exception under Article 14.17.3(b) for compliance 'with laws or regulations which are not inconsistent with this Agreement' as well as the General Exception under Article 29.1.3. The protection afforded by these exceptions is disputed by the claimants, as we discuss in chapter 5 of this report.

4.2.4.3 *Tribunal analysis and conclusions*

To the claimants, source codes (and algorithms) are an integral part of the digital domain. These technologies interface with and operationalise Māori data. Whether algorithms are excluded or not, significant Tiriti/Treaty issues are triggered by the Government's potential inability to investigate how foreign software imported, distributed, sold, or used within Aotearoa New Zealand might be using Māori data (as expressed in its source code) – including, in the example of facial recognition software, to potentially prejudicial ends. The claimants' concerns with Article 14.17 of the CPTPP go to the heart of the ability of Māori to exercise tino rangatiratanga over taonga in the digital domain, as well as to the Crown's duty of active protection. They are right to emphasise the importance of these issues.

As with the other provisions examined in this chapter of our report, we note that Article 14.17 on 'source code' could serve to protect Māori software traded overseas.

In our assessment of the evidence before us concerning Article 14.17, clear interpretive issues arise. We address the following questions and cover them under their relevant sub-headings:

1. Does Article 14.17 apply to 'algorithms' as well as source code?
2. What is the scope of 'mass-market software', and does this mitigate the risk to Māori interests?
3. Does the provision prevent the disclosure of source code for the purposes of investigating how software uses Māori data – including, for example, requiring source code to be disclosed for inquiries, investigations, or juridical proceedings?

4.2.4.3.1 Does the provision apply to both source code and algorithms?

The claimants accepted, for the purposes of this inquiry, that Article 14.17 does not apply to 'algorithms'. But it is clear from the evidence that the operation of 'algorithms' in software has implications for Māori, including how the software uses

184. Submission 3.3.61, p 52 at [151]

Māori data. The distinction between 'source code' and 'algorithms' is important, and the expert witnesses took differing positions on the question of whether the CPTPP covers both.

For Professor Mitchell, the exclusion of 'algorithms' from the scope of Article 14.17 mitigates the risk for Māori, as he saw algorithms as 'more useful' than source code to understand how software may discriminate against Māori.[185] He explained that the United States–Mexico–Canada Agreement (USMCA) and Singapore Australia Digital Economy Agreement (SADEA) each 'make a clear distinction between source code and algorithms – suggesting that in trade negotiations that they are different things'.[186] This supports the interpretation that CPTPP Article 14.17 does not apply to algorithms, as they are not mentioned.

Professor Kelsey's initial brief of evidence also referred to the distinctions made between algorithms and source codes in the USMCA and SADEA. She took the view that algorithms were likely to be excluded from Article 14.17, despite some uncertainty about the exclusion.[187] But in her second brief of evidence, responding to Professor Mitchell, Professor Kelsey said:

> on reflection I am less sure algorithms are excluded. If algorithms are not protected from disclosure under Article 14.17 in the same way as source code, that would mean that governments could require the disclosure of algorithms that are embedded within source code. It seems counter-intuitive that source codes would be protected from mandatory disclosure and algorithms would not.[188]

We agree that the CPTPP itself is unclear on this question, given the relationship between 'source codes' and 'algorithms' and the more careful delineation of those two terms in other trade agreements. We note this issue is likely to arise in future trade negotiations. Professor Kelsey has highlighted that the stocktake text[189] for the WTO plurilateral negotiations on e-commerce 'has square bracketed options on this question'.[190] However, as the claimants have provisionally accepted that CPTPP Article 14.17 does not apply to algorithms, we also consider this to be the case for the purposes of this report.

4.2.4.3.2 Does the provision's application to only 'mass-market software' meaningfully mitigate risk to Māori interests?

The claimants submitted that an effective Māori Data Sovereignty and Māori Data Governance regime would necessitate access to source code 'for the detection and correction of bias and to ensure the security of information and prevent its abuse'.[191] However, the Crown argued that the limitation of this provision to

185. Document C2, p 58 at [134.1]
186. Ibid, p 58 at [134.1]
187. Document B25, p 16 at [48]–[49]
188. Document C3, pp 35–36 at [110]
189. Document C3(a), exh O, pp 96–186
190. Document C3, p 35 at [109]; doc C3(a), pp 143–144
191. Submission 3.3.60, p 67 at [12.33]

'mass-market' software made it 'difficult to understand why any of the Treaty duties set out [earlier] would be engaged on this basis.'[192] This misses the point, in our view. We consider the Crown, in its regulatory capacity, has a responsibility under te Tiriti/the Treaty to ensure that software imported, distributed, sold, or used in Aotearoa New Zealand does not harm, discriminate against, or cause prejudice to Māori. As the claimants submitted, Article 14.17 appears to inhibit the ability of the Crown to discharge its Tiriti/Treaty responsibility in respect of 'mass-market software'. Regardless of whether the software is mass-market, or not, the Crown's Tiriti/Treaty responsibilities remain.

As noted in chapter 2, article 3 of te Tiriti/the Treaty guarantees Māori all the rights and privileges of British citizens. It is from this guarantee that the principles of equity and equal treatment flow. As such, the principle of equity is closely linked to the principle of active protection. This means the Crown is obligated to take positive action to not only ensure equality between Māori and non-Māori, but to prevent and counter inequity.[193] This principle means the Crown has a responsibility to Māori to prevent the distribution of imported software that harms, discriminates against, or has the potential to cause prejudice to Māori. Limiting the application of the provision to only 'mass-market' software does not mitigate the risk to Māori interests, nor absolve the Crown of its responsibilities, even where these responsibilities are to be considered against other valid interests.[194]

As noted previously, Article 14.17 only applies to 'mass-market' software and excludes 'software used for critical infrastructure'. Professor Kelsey, in her evidence, described the term 'mass-market software' as referring to 'software that is generally available for retail sale'. This includes a wide-range of products, some of which 'facilitate the mining of data, such as fit bits, smart appliances and drones' as well as 'surveillance cameras used, for example, by supermarkets or employers'.[195] She advised that the limitation to mass-market software is not present in a number of more recent agreements, providing the EU proposal to Aotearoa New Zealand on digital trade as an example, as it applies to all source code of software.[196] Notably, the DEPA, an agreement following the CPTPP, omits the source code provision entirely.

In cross-examination, Crown counsel asked Professor Kelsey for clarification that Article 14.17 does not apply to software that is 'bespoke, [or] critical infrastructure, just mass-market', which she agreed with.[197] The Crown did not dispute her definition of 'mass-market software' and Professor Mitchell provided no definition of the term of his own as a point of comparison. We accept Professor Kelsey's definition, which has a wide ambit and engages Māori interests. In

192. Submission 3.3.61, p 49 at [139]
193. Waitangi Tribunal, *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wellington: Legislation Direct, 2019), pp 33–34
194. Waitangi Tribunal, *Report on the Trans-Pacific Partnership Agreement*, p 8
195. Document B25, pp 16–17 at [51]
196. Ibid, p 17 at [51]
197. Transcript 4.1.9, p 224

accepting this definition, we recognise the somewhat artificial nature of the distinction between 'mass-market' software and software used for critical infrastructure, at least in respect of obligations under te Tiriti/the Treaty. We reiterate that whether software is 'mass-market' or not has no effect on the applicable te Tiriti/the Treaty standard.

4.2.4.3.3 Can the Crown require disclosure of source code for inquiries, investigations, or juridical proceedings?

A critical issue relating to Article 14.17 is whether it prevents the Crown from requiring disclosure of the 'source code of software owned by a person of another Party' which may harm, discriminate against, or otherwise cause prejudice to Māori. Professor Kelsey provided the example of facial recognition software in surveillance cameras: should, for example, the Crown be able to access the software's source code to investigate any link between the composition of the software and racial profiling?[198] (This presumes that such software is sourced from overseas, and from a business belonging to a country that is a Party to the CPTPP.)

The Crown made two responses to this issue:

- First, it said that compliance with 'New Zealand['s entire] regulatory framework' is implied, and therefore, Article 14.17.1 would not operate to prevent domestic judicial regulatory enforcement bodies from requiring access to source code.[199]
- Secondly, the Crown maintained that even if this were not the case, the General Exception (Article XIV of GATS incorporated into the CPTPP through Article 29.1.3) justifies deviations from Article 14.17.1 – in particular in reference to 'public morals' (Article XIV(a)) and to 'secure compliance with laws or regulations' (Article XIV(c)).[200]

On the first argument, the Crown relied upon Professor Mitchell's evidence[201] to argue that Article 14.17 'is not likely to present a restraint on Parties from requiring access to the source code of software for purposes, such as criminal investigations or judicial proceedings, so long as those other purposes *do not preclude market access*' (emphasis added).[202] The Crown said this interpretation is supported by the exception at Article 14.17.3(b); it allows parties to require 'the modification of source code' in ways that are 'necessary for that software to comply with laws or regulations which are not inconsistent with this Agreement', giving as examples compliance with any regulations 'designed to protect privacy or prohibit racial discrimination'.[203] This, the Crown argued, makes it clear that the 'covered person'

198. Document B25, p 17 at [52]
199. Transcript 4.1.9, pp 225–226; submission 3.3.61, p 50 at [142]–[145]
200. Submission 3.3.61, pp 50–51, 57–58 at [146], [171]; transcript 4.1.9, pp 225–226
201. Professor Mitchell's version of this argument is less forceful: he says that it '*may not*' (as opposed to *would not*) be inconsistent with Article 14.17.1 to require access to source code in this way; see also doc C2, pp 58–59 at [134.2].
202. Submission 3.3.61, p 50 at [142]; see also doc C2, p 57 at [133].
203. Submission 3.3.61, p 50 at [144]

of another CPTPP Party whose software is imported, distributed, sold, or used in Aotearoa New Zealand is subject to the law here because, '[i]f a person was not subject to the laws of the Party . . . including the laws of search and seizure by regulatory authorities, then there would be no need for Article 14.17.3(b)'.[204]

Professor Kelsey, in her brief of evidence, observed that the TPPA provided 'no exception for a regulatory or judicial body to require disclosure of source code for the purposes of inquiries, investigations or juridical proceedings'.[205] She did not say that the domestic law in Aotearoa New Zealand would cease to apply, which the Crown implied when they recharacterised her position. It asserted that Professor Kelsey's argument was that, if it was a condition to submit to domestic law in order to operate, this would constitute a breach of Article 14.17.[206]

On balance, we think there is some ambiguity around this provision and how it would be interpreted and operate in practice. While it is true that Article 14.17.3(b) allows Aotearoa New Zealand to require the modification of source code and software in order to comply with our domestic laws, reliance on this proviso presupposes knowledge that there is in fact a breach of our domestic law embedded in, for example, the source code of facial recognition software. There seems to be a very real question as to how Aotearoa New Zealand's judicial and regulatory bodies would be able to access (in the face of resistance) source code in order to monitor and enforce compliance.

4.2.5 Non-discriminatory treatment of digital products (Article 14.4)

Article 14.4 of the CPTPP prevents Aotearoa New Zealand 'from giving preference to digital products made locally or by local persons' aside from subsidies, grants, and broadcasting.[207] The operative term in the obligation is that the Government cannot 'accord less favourable treatment to' the digital products of another CPTPP Party. As we set out above, this provision does not apply to 'government procurement' due to the exclusion in Article 14.2.3(a).

Related to this provision is Article 9.10.1(h)(i) from CPTPP Chapter 9 (Investment), which reads:

> **Article 9.10: Performance Requirements**
>
> 1. No Party shall, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory, impose or enforce any requirement, or enforce any commitment or undertaking:
>
> . . . . . .
>
> (h) (i) to purchase, use or accord a preference to, in its territory, technology of the Party or of a person of the Party . . .

204. Submission 3.3.61, p 50 at [145]
205. Document B25, p 17 at [52]
206. Submission 3.3.61, p 51 at [149]
207. Submission 3.2.54, p 17 at [5.18]

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.
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.

4.2.5.1 *Purpose of the provision*

Non-discrimination rules are a common feature of trade agreements. They aim to ensure that participating countries cannot enact measures that privilege local producers over overseas producers of the same product or service. This helps ensure that local and overseas producers compete on a level playing field. The purpose of Article 14.4 is to extend this protection to digital products. The United States Trade Representative's Digital-2-Dozen document describes the objective as follows:

> [3] **Securing basic non-discrimination principles**
> TPP provides that digital products originating from TPP countries cannot be put at a competitive disadvantage in any Party's market. Fundamental non-discrimination principles are at the core of the global trading system for goods and services, and TPP ensures that this principle applies to digital products as well.[208]

4.2.5.2 *Why the provision is at issue*

Claimants questioned whether Article 14.4 allows the Government to give preference to procuring digital products from Māori – which would be seen as according overseas producers of digital products 'less favourable treatment'. While Article 14.2.3(a) makes clear that Chapter 14 does not apply to government procurement, the claimants argue that the 'very limited definition' of government procurement identified by Professor Kelsey, would restrict 'public procurement . . . from Māori to a sub-category of digital products for the internal use of the government or for incorporation into goods or services that the government does not charge for'.[209] The claimants saw this as too restrictive in light of the status of Māori as a Tiriti/Treaty partner.

208. Document B25(a), exh B, p 4
209. Submission 3.2.54, p 17 at [5.20]

The parties disputed the proper interpretation of the 'government procurement' exclusion in this context. Professor Mitchell described it as 'drafted broadly to capture a government's consumption of goods and services regardless of the form of consumption.'[210] He argued that the position put forward by Professor Kelsey and the claimants adopted 'an excessively narrow understanding of Article 14.2.3(a), in which the concept of "commercial" is equated with the government not charging for the sale or resale of the procured goods and services (or the use thereof as inputs in a downstream product).'[211]

In closing submissions, the claimants conceded that they believed 'a procurement process for digital services or products that gives preference to Māori is likely to fall within the Treaty Exception'. This refers to CPTPP Article 29.6, which was the subject of our Stage One report.[212] Professor Kelsey qualified this point:

> However, a social procurement strategy that combines Māori with other marginalised groups would face more difficulties. An example is the Southern Initiative, which has been channelling procurement through council and council-controlled organisations to create employment and enterprise opportunities in South and West Auckland. In my opinion, the Treaty Exception would protect preferences explicitly for Māori where contracts fell within the scope of procurement chapters, except for the CER Agreement that has no Treaty Exception. But that would not protect other social categories, and the broader nature of the procurement strategy would deny Māori the ability to rely on benefits of the Treaty exception.[213]

4.2.5.3 *Tribunal analysis and conclusions*

We do not see Article 14.4 as raising significant Tiriti/Treaty issues. As we have noted, in closing submissions the claimants conceded that procurement preferences for Māori are likely covered by the Treaty of Waitangi exception.[214] In our Stage One report we examined the adequacy of the Treaty of Waitangi exception and found it offered 'a reasonable degree of protection' and would operate 'substantially as intended'.[215] As we see it, the qualifying point raised by Professor Kelsey relating to procurement strategies of a 'broader nature' that encompass non-Māori would not preclude the Crown from addressing the interests of Māori in a targeted way, and this must remain our focus.

4.3 Tribunal Conclusions on the E-Commerce Provisions at Issue

In this chapter, we set out the various arguments brought by the parties on how the e-commerce provisions operate, whether they engage Māori interests, and how they may affect domestic policy and decision-making.

210. Document C2, p 19 at [54]
211. Ibid, pp 19–20 at [57]
212. Submission 3.3.60, p 57 at [11.8]
213. Document C3, p 41 at [130]
214. Submission 3.3.60, p 57 at [11.8]
215. Waitangi Tribunal, *Report on the Trans-Pacific Partnership Agreement*, p 38

The Crown has argued that the e-commerce provisions benefit Aotearoa New Zealand overall, both through the protections they afford and their economic benefit in facilitating digital trade. It submitted that we should weigh these benefits against the risks arising from the agreement in order to determine what level of active protection for Māori under te Tiriti/the Treaty is 'reasonable in the prevailing circumstances'.[216] We acknowledge it is not our role to decide the merits of entering into international agreements generally, and also that the CPTPP may provide some benefits for Aotearoa New Zealand. However, we do not believe there is sufficient evidence to place any significant weight upon the Crown's argument that there is economic benefit for Māori arising from the e-commerce rules.

The claimants identified four categories of provisions which they say are detrimental to Māori interests, and which prevent the Crown from governing the digital domain in a Tiriti/Treaty-consistent way. Of these four categories, we have found that significant Tiriti/Treaty issues are raised by the rules preventing data localisation (Article 14.11 and 14.13), local presence requirements (Article 10.6), and the Government from requiring access to the source code of software owned by overseas providers (Article 14.17). We do not believe that the provision relating to non-discrimination measures for locally produced digital content (Article 14.4) raises significant Tiriti/Treaty issues.

The provisions that make up the three 'categories' of rules we see as problematic have two major implications:

1. They potentially place Māori interests at risk by eroding government control over how foreign entities obtain and operate with Māori data in Aotearoa New Zealand; and
2. They could function to protect Māori interests by protecting Māori control of data when it is traded overseas by Māori – something that will undeniably happen more and more as the digital economy grows in Aotearoa New Zealand. This possibility is relevant to our assessment of the Crown's duty of active protection in agreeing to the CPTPP e-commerce provisions.

The key issue is the extent to which the protections function to mitigate the risks arising from the provisions and whether the balance, or imbalance, between the two is appropriate in Tiriti/Treaty terms. This inevitably falls to the 'regulatory flexibility' the Crown has retained under the CPTPP to put measures in place which otherwise violate these rules. In the following chapter we consider and test the degree of policy space the Crown has retained to enable regulatory flexibility, especially by way of the exceptions and exclusions available under the CPTPP.

216. *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC) at 517 (submission 3.3.61, p 18 at [50])

CHAPTER 5

EXCEPTIONS, POLICY SPACE, AND REGULATORY FLEXIBILITY

5.1 Introduction

In chapter 4, we considered the claimants' allegations that the e-commerce provisions of the CPTPP agreement potentially prejudice Māori. In this chapter, we consider the Crown's ability to use exceptions and exclusions to avoid or mitigate any prejudice that may arise from the e-commerce provisions. We define these terms at section 5.1.1.

The question of how much regulatory flexibility the exceptions and exclusions afford is central to this inquiry, as we assess whether by joining the CPTPP the Crown has retained enough policy space to properly protect Māori interests in the digital domain. The claimants are concerned that the Crown's regulatory flexibility is constrained by not only the use of exceptions, but also various forms of pressure on its ability to regulate to protect Māori interests. They said that these pressures create regulatory chill. In order to address this issue, we consider the claimants' and the Crown's arguments relating to this concept in some detail.

As set out in chapter 4, the claimants argued that a range of measures inconsistent with the e-commerce provisions in the TPPA/CPTPP would be required to protect Māori interests in relation to the management and use of data. The claimants alleged that the available exceptions and exclusions are inadequate to protect their interests.

Before we discuss issues relating to policy space and regulatory flexibility, it is necessary to first introduce our definition of the terms 'exception' and 'exclusion', and to set out what exceptions and exclusions are available in the CPTPP. We then consider, in Tiriti/Treaty terms, the following questions:

- What approaches do the parties take to assessing the risk the CPTPP may pose to Māori interests and interpreting international trade agreements more generally? What is our approach to these issues?
- Do Articles 14.11 and 14.13 inhibit the Crown from preventing the transfer and storage of Māori data overseas, except with Māori consent?
- In light of Article 14.17, can the Crown require access to the source code of software imported into Aotearoa New Zealand in order to investigate how it collects and uses Māori data?
- What is the relevance of regulatory chill to the operation of the CPTPP provisions? Does it operate to the extent that it interferes with the adoption of a Tiriti/Treaty-compliant domestic regime?

5.1.1 About exclusions and exceptions in the CPTPP

5.1.1.1 *What are exclusions and exceptions?*

Exceptions are provisions in trade agreements listing circumstances in which a government may adopt measures that would otherwise be prohibited by the agreement.[1] The CPTPP contains both general and specific exceptions. General exceptions apply across one or more of the chapters, such as the general exceptions contained in Chapter 29, which apply to the e-commerce chapter. Specific exceptions apply to a particular Article or Articles, such as the legitimate public policy exceptions found in Articles 14.11.3 and 14.13.3.

Exclusions are provisions limiting the scope of other provisions in the CPTPP. For instance, Article 14.4.4 of the e-commerce chapter excludes 'broadcasting' from the non-discrimination obligation in Article 14.4.1.[2] Based on the evidence before us, whether a provision is an exception or an exclusion is not distinct or material. Throughout this inquiry, both the claimants and the Crown have used the terms interchangeably.

Parties to the agreement negotiate exceptions and exclusions to give governments policy space and therefore regulatory flexibility to undertake measures ostensibly inconsistent with obligations of the agreement. These exception and exclusion provisions are often complex to implement. The use of exclusions and exceptions is often at the heart of disputes over whether a party to a trade agreement is in compliance with the agreement or not.

5.1.1.2 *What exceptions and exclusions are available to parties?*

The exceptions and exclusions available to parties are as follows:

- *Legitimate public policy objectives:* These are located at Articles 14.11.3 and 14.13.3 and apply only to provisions preventing data localisation. These Articles read:

> Nothing in this Article shall prevent a Party from adopting or maintaining measures 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.

- *Government procurement and government information:* Located at Article 14.2.3(a) and (b), these specify that Chapter 14 does not apply to government procurement, or to information held or processed by or on behalf of a Party. The Article reads:

1. 'Preserving our Right to Regulate', Ministry of Foreign Affairs and Trade, https://www.mfat.govt.nz/en/trade/nz-trade-policy/preserving-our-right-to-regulate, accessed 15 June 2021
2. Document C2, p 10 at [30.4.2]

> 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.[3]

- *The General Exception:* Imported into Article 29.1.3 from the WTO's General Agreement on Trade in Services (GATS, Article XIV), this exception allows parties to adopt or enforce measures that are necessary to protect public morals, public order, human life, or health, and which prevent deceptive or fraudulent practices. Article XIV of GATS reads:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:
> (a) necessary to protect public morals or maintain public order;
> (b) necessary to protect human, animal or plant life or health;
> (c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to . . .

- *The Treaty of Waitangi exception:* Located at Article 29.6.1. This exception allows New Zealand to adopt necessary measures 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.[4] The Article reads:

> 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.

- *The Traditional Knowledge clause:* Listed as a 'General Provision' at Article 29.8. This clause stipulates that measures can be established to respect, preserve, and protect culture. The Article reads: 'Subject to each Party's

3. Submission 3.2.54, p 13 at [5.23]–[5.40]
4. This exception was examined extensively in our Stage One report, *The Report on the Trans-Pacific Partnership Agreement* (Lower Hutt: Legislation Direct, 2016).

international obligations, each Party may establish appropriate measures to respect, preserve and promote traditional knowledge and traditional cultural expressions.'

5.2 What Approach Do the Parties Take to Assessing Risk and What Is Our Approach to these Issues?

5.2.1 Assessing the risk the TPPA/CPTPP presents to Māori interests: different approaches

The claimants and the Crown framed this inquiry as an exercise in 'risk assessment', but they had differing views on what 'risk' is to be assessed and what methodology we should follow.

5.2.1.1 *The claimants' position*

The claimants asserted that the e-commerce provisions in the TPPA/CPTPP (and the relevant exceptions and exclusions) are uncertain and opaque in meaning, and that this lack of clarity will prevent or discourage policymakers from designing regulatory measures for Māori that go against the e-commerce rules, even though there are exceptions to those rules. They said the risk derives from two sources:

1. the conceptual incompatibility between the Māori worldview and the TPPA/CPTPP; and
2. the policy outcomes of applying the rules as they are drafted, including by subjecting regulatory measures for Māori to State-to-State and investor–State dispute resolution mechanisms.[5]

To assess the constraints allegedly caused by these provisions, the claimants directed us to Associate Professor Amokura Kawharu's 'three-tiered typology' of the regulatory impact of trade agreements:

1. *regulatory restraint* imposed by the rules of the agreement;
2. *regulatory chill*, which occurs not only through direct threats to litigate but also includes shifts in emphasis within policymaking as agreements cover a wide range of topics; and
3. the *psychological effect* of officials and junior officers not wanting to be reviewed by an international tribunal.[6]

Professor Jane Kelsey (as the claimants' key expert witness) distinguished two categories within Associate Professor Kawharu's 'regulatory chill tier' (tier 2):

1. direct threats or warnings that going forward with a proposal would result in litigation or cause economic or reputational harm; and
2. a systemic form of chill that occurs when those considerations are internalised through the Government's policy criteria, procedures such as regulatory impact assessments, and the growing influence of trade bureaucracy on domestic policy decisions.[7]

5. Submission 3.3.60, p 13 at [2.2]
6. Ibid, p 13 at [2.2], pp 80–81 at [15.8]–[15.10]
7. Ibid, pp 38–39 at [8.3]

The claimants emphasised that these forms of chill occur at various stages of the policy and legislative process. They urged us to approach 'risk' to Māori interests as deriving from both the substantive effect of the provisions (regulatory restraint) and the wider effect of their existence (regulatory chill and psychological effect). The claimants asserted that, taken together, these factors work to restrict the operation of regulatory flexibility necessary for Aotearoa New Zealand to enact Tiriti/Treaty-consistent measures relating to data and digital technologies.

5.2.1.2 *The Crown's position*

The Crown submitted that the Tribunal is required to determine whether aspects of the TPPA/CPTPP e-commerce rules restrict the Crown's right to regulate, or oblige it to act in a manner that 'would adversely affect its ability to meet its obligations to Māori under te Tiriti/the Treaty'.[8] If so, the Crown said any risk we find to Māori interests must be

1. quantified – the nature and size of any risks considering the degree of speculation and contingency involved – ie not only the severity of risk but also the likelihood of it coming to pass;
2. contextualised against:
    a. the relative benefits that sit alongside those risks;
    b. the matters that are or are not within the control of the Crown (or even of Aotearoa New Zealand);
    c. the range of alternatives and their relative pros and cons (for example the realism of decoupling Aotearoa New Zealand from the global digital ecosystem); and
    d. the consideration required under te Tiriti/the Treaty of other legitimate interests (whilst there is no duty on the claimants to balance their views and interests within the whole, there is a duty on both the Crown and the Tribunal to do so).[9]

The Crown's case relied on:

1. An expert legal opinion from Professor Andrew Mitchell that it asserts provides 'a correct or most likely reading' of the meaning and effect of the e-commerce provisions in the CPTPP; and
2. Evidence from Vangelis Vitalis, Deputy Secretary of the Trade and Economic Group at the Ministry of Foreign Affairs and Trade ('MFAT'), on the 'benefits for New Zealand, including Māori, of the e-commerce provisions, and their policy rationale' as well as the broader 'international circumstances which may constrain what the Crown can achieve' through a trade agreement.[10]

8. Submission 3.3.61, p 12 at [32.1]
9. Ibid, pp 13–14 at [33.1]–[33.2]
10. Document C1; submission 3.3.61, pp 27, 38 at [68]–[69], [98]

Relying on the evidence of Professor Mitchell and Mr Vitalis, the Crown developed a two-step approach to risk, asking:

1. What the *most likely* interpretation of the provisions would be? To this question, the Crown answered that the most likely interpretation would be that it maintains enough flexibility to address Māori interests despite the disciplines and obligations in the TPPA/CPTPP – that is, the prejudice the claimants allege is unlikely to materialise; and
2. If the Crown's *most likely* interpretation was incorrect, would the extent of any risk to Māori interests arising from restrictions on flexibility be unreasonable in the circumstances? To this question, it maintained that Aotearoa New Zealand does have the flexibility under the TPPA/CPTPP to adequately address Māori interests.[11]

In summary, the Crown urged us to determine the 'likelihood' that the TPPA/CPTPP would 'impair, to a material extent, the Crown's ability to take the reasonable action which it is under an obligation to undertake in order to comply with the principles of the Treaty'.[12] It defined 'likelihood' as 'a real or significant possibility that the outcomes proposed by the claimants are in real contemplation of materialising'.[13] The Crown asserted that the onus is on the claimants to show that the outcomes they alleged will arise are 'likely'.

Given the content of the issues before us, the Crown also highlighted the importance of the expert evidence we have received on international trade law to our assessment.[14]

5.2.1.3 *Comparing the parties' approaches to risk*

The key difference in the parties' approaches to risk is the methodologies they use for interpreting the meaning and effect of provisions. These methodologies are derived from the experts' evidence.

When the claimants talked about 'risk', they were referring to Māori interests being jeopardised by limited policy space that constrained regulatory flexibility under the TPPA/CPTPP. Effectively, they argued that the e-commerce rules 'foreclose' the possibility of a Tiriti/Treaty-consistent domestic regime for digital governance. They considered 'risk' to Māori interests as encompassing both immediate regulatory restraint and wider effects, such as psychological and systemic chill. In addition, they saw risk as arising from the base incompatibility between the e-commerce provisions and te ao Māori.[15] These risks, in the claimants' estimation, occur at various levels of the policymaking process and cumulatively contribute to the overall level of risk the e-commerce provisions pose to Māori interests.[16] Such

11. Submission 3.3.61, pp 13–14 at [32.2]–[33.2.4], 35 at [87.2.2]; doc C1, p 9 at [24.3]
12. *New Zealand Māori Council v Attorney-General* [2013] 3 NZLR 31, [2013] NZSC 6 at [88] (submission 3.3.61, p 18 at [51])
13. Submission 3.3.61, p 12 at [31]
14. Ibid, p 37 at [96]
15. Submission 3.3.60, p 81 at [15.10]
16. Ibid, p 81 at [15.9]

a degree of risk, the claimants asserted, is inconsistent with the Crown's obligations under te Tiriti/the Treaty.

The Crown considered the likelihood that the TPPA/CPTPP would put Māori interests at risk could be quantified by reference to a 'most likely' legal interpretation of the provisions. The 'most likely' interpretation, the Crown argued, is that the TPPA/CPTPP exception and exclusion provisions have broad scope to address Māori interests, including to put in place the measures in relation to data and digital technologies the claimants have highlighted as necessary. Therefore, the Crown argued that it can fulfil its obligations under te Tiriti/the Treaty in the domestic sphere and can do so in a way that is consistent with international obligations.

Both the Crown and the claimants acknowledged that it is not our role to determine the 'legally correct interpretation' of the TPPA/CPTPP provisions, and that it is unnecessary for us to do so.[17] We have observed throughout this inquiry that it is not our function to perform as an international trade panel. In our Stage One report, we commented:

> Our core expertise as a tribunal is not in the interpretation, negotiation, or implementation of international instruments. In the face of differing expert opinions we reach conclusions in such matters with some diffidence and only where we feel we must in order to properly address the issues for inquiry.[18]

We have maintained this as a broad position in respect of our approach to the e-commerce issues now before us.

5.2.2 Interpreting international trade agreements: the parties' approaches

The two legal experts commissioned by the parties (Professor Kelsey and Professor Mitchell) took different positions on the interpretation of international trade agreements. Both agreed that the agreement should be interpreted by applying Articles 31 and 32 of the Vienna Convention on the Law of Treaties.

The experts' views on how these interpretation rules should be applied are at odds. As the differences are significant and the appropriate method of interpretation is critical to the issues in this chapter, we set out the approaches below in some detail.

5.2.2.1 *The claimants' position*

Professor Kelsey characterised her approach to the interpretation of trade agreements under the Vienna Convention as 'necessarily contextual', because any 'correct' meaning of a provision 'is always itself contextual'.[19] This view, in Professor Kelsey's words, is consistent with

17. Submission 3.3.61, p 12 at [31]; submission 3.3.60, p 19 at [3.11]
18. Waitangi Tribunal, *Report on the Trans-Pacific Partnership Agreement*, p 3
19. Document C3, p 19 at [59]

Articles 31 and 32 of the Vienna Convention on the Law of Treaties

The analytical framework for interpreting treaties is contained at Articles 31 and 32 of the Vienna Convention on the Law of Treaties.

Article 31(1) stipulates that a treaty should be interpreted 'in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.

Article 32 sets out the 'supplementary means of interpretation' where the interpretation according to Article 31 'leaves the meaning ambiguous or obscure' or 'leads to a result which is manifestly absurd or unreasonable'. This includes reference to the travaux preparatoire, or negotiating history.

> a school that has great difficulty in conceiving of there being a single correct legal interpretation of anything but the most explicit and directive text and that the notion of legal certainty is especially untenable when we are dealing with novel rules, and the TPPA/CPTPP was novel.[20]

In addition to the novelty of the TPPA/CPTPP's digital trade rules, Professor Kelsey highlighted that the 'generalised terms' and lack of clarity 'on their face' heightened the need for context to be considered.[21] This context, she argued, must be informed by a variety of sources:

> The Vienna Convention provides a methodology to interpret international treaties that have been constructed through negotiations between state parties that often have different and sometimes divergent interests. The resulting text involves compromise wording that is often opaque and defers contestation over its meaning to a later stage, for example to subsequent agreements and practice – an interpretive source that the Convention implicitly recognises. Where the objects and purposes of a text are formally stated, they will often be highly generalised and there may be many competing and potentially conflicting objects and purposes. Resolving their interpretation is not a purely semantic exercise.[22]

In summary, Professor Kelsey's approach perceives risk because of the imprecise wording and novelty of provisions in the TPPA/CPTPP and, therefore, what she framed as their potentially ambiguous or uncertain interpretation. She saw this uncertainty as almost impossible to resolve in the abstract and only likely to be resolved through access to the negotiating text as an interpretive source for

20. Transcript 4.1.9, p 42
21. Ibid, p 42; doc B25(b), p 7 at [19]
22. Document C3, p 20 at [61]

context. The negotiating histories for the TPPA and CPTPP are not publicly available and have not been disclosed to Professor Kelsey, or to the claimants, or to Professor Mitchell.

Both the Reid and others (Wai 2522) and Baker and others (Wai 2523) claimants relied on Professor Kelsey's evidence as to the interpretation of the TPPA/CPTPP. They said:

> Interpretation and application of the Electronic Commerce rules is necessarily speculative, because the rules themselves and many of their key legal terms are broadly worded and novel and there is no relevant jurisprudence available. The negotiating history, which could provide context for interpretation, is not available, and material secured by Professor Kelsey under the Official Information Act is so heavily redacted that it provides no assistance. The absence of any legal certainty heightens the risks for Māori arising from the adoption of these rules.[23]

Quoting Isabelle van Damme, who wrote a book on the WTO Appellate Body approach to treaty interpretation, Professor Kelsey saw the Vienna Convention as reflecting 'principles, not rules, and they essentially need to be applied, interpreted and evaluated together with non-codified principles of treaty interpretation. . . . They are principles of logic and order that both constrain and empower the interpreter.'[24]

5.2.2.2 *The Crown's position*

The Crown described the view of its commissioned expert, Professor Mitchell, as 'that it is possible to give an opinion on a correct or most likely reading' of the e-commerce provisions in the CPTPP.[25] To summarise Professor Mitchell's approach to interpretation:

- if there is ambiguity in the text, that leads to a robust exercise of the rules of treaty interpretation as they are applied in the international trade law regime (that is applying articles 31 and 32 of the Vienna Convention and drawing on traditional legal sources of case law and treaties);
- through this analytic process, one can consider multiple approaches/perspectives and then arrive at a reasonably confident position as to how a tribunal would resolve the issue.[26]

Professor Mitchell took a two-step approach to applying Article 31.1 of the Vienna Convention – to interpret the ordinary meaning of the terms of the treaty in their context and in light of the treaty's object and purpose. First, he began with

23. Submission 3.2.54, p 13 at [5.3]
24. Isabelle van Damme, *Treaty Interpretation by the WTO Appellate Body* (Oxford: Oxford University Press, 2009), p 381 (doc C3, p 20 at [60])
25. Submission 3.3.61, p 38 at [98]
26. Ibid, p 38 at [98.1]–[98.2]

the meaning of the words on the basis that they have been deliberately chosen and are the 'most reliable indication of the parties' common intention'.[27] Secondly, if the words were unclear, he resorted to referring to the treaty's object and purpose. Professor Mitchell also noted that, given the terms are deliberately chosen, '[i]t would not make sense for drafters to include provisions that contradict one another, or to include some provisions that are effectively redundant due to the practical application of other provisions.' Therefore, in Professor Mitchell's assessment, there is a 'presumption that the provisions of a treaty are cumulative and complementary'.[28]

Professor Mitchell noted that, pursuant to Article 32 of the Vienna Convention, the negotiating history of a provision may affect its proper interpretation. However, he articulated that his analysis is based on publicly available materials and not on any negotiating history in the exclusive possession of any of the Parties to the CPTPP.[29]

The final point in Professor Mitchell's methodology is specific to the TPPA/CPTPP. He stated there should be reliance on WTO jurisprudence as 'persuasive guidance' on the meaning of the provisions or their terms.[30] While the TPPA/CPTPP texts only direct any adjudicative panel to apply WTO jurisprudence '[w]ith respect to any provision of the WTO Agreement that has been incorporated into this Agreement', Professor Mitchell described its inclusion as 'indicative of the broader relevance ascribed by the negotiators and lawyers of the CPTPP Parties to WTO jurisprudence'.[31] In essence, Professor Mitchell said that WTO jurisprudence provided persuasive context for interpreting the provisions.

The Crown relied on Professor Mitchell's opinion of the e-commerce provisions under this interpretive framework to demonstrate the 'likelihood' of the forms of prejudice the claimants are concerned about. In essence, the Crown asserted that Professor Mitchell provided a convincing legal opinion on the meaning and operation of the provisions, which obviates the concerns brought by the claimants – to the extent that the risk to Māori interests (if there is any) is 'reasonable' in the circumstances.

5.2.2.3 *Comparing approaches to interpretation of international trade agreements*

In short, Professor Mitchell's approach endeavoured to establish (to the extent possible) *certainty* on the interpretation of the e-commerce provisions. By contrast, Professor Kelsey's approach highlighted the level of *uncertainty* in their interpretation.

Both experts agreed that the TPPA/CPTPP should be interpreted through Articles 31 and 32 of the Vienna Convention. But they used this methodology differently. The chief differences lay in:

27. Document C2(c), p 7; doc C2, pp 5–7 at [18]–[23]
28. Document C2, p 6 at [20]
29. Ibid, p 6 at [21]
30. Document C2(b), p 4
31. Document C2, p 7 at [23]

1. how the interpretive rules/interpretive principles ought to be applied;
2. which sources can assist in that process; and
3. how to assess whether the rules might impede the adoption of certain policies.

5.2.3 Tribunal analysis: our approach

In our view, the issue we need to consider is the extent of the Crown's ability to regulate to address Māori interests in light of the obligations and disciplines in the TPPA and CPTPP agreements.

When the claimants talk about 'risk', they are referring to Māori interests being put at risk by the lack of policy space that arises from the TPPA/CPTPP. When the Crown talks about risk, it talks about the risk of another State successfully challenging a measure Aotearoa New Zealand has imposed to recognise or protect Māori Tiriti/Treaty interests at a dispute resolution tribunal. The claimants saw risk as engaging a number of possibilities, much wider than challenge by another State. These include what we have called 'the chilling effect', as well as the psychological and systemic effects of the provisions on policymakers. The claimants asserted that the mere requirement that a Māori Data Governance regime be made to fit within the exceptions in the CPTPP is, in itself, inconsistent with te Tiriti/the Treaty.[32]

We noted in section 5.2.1, that the claimants and the Crown had framed this inquiry as a 'risk assessment'. When we consider what 'risk' we are assessing, we are referring to the risk to the ability of the Crown to protect Māori interests and the risk to Māori concerning their ability to exercise rangatiratanga in respect of their taonga. We are not referring to the risk that the Crown will be successfully challenged at a dispute resolution tribunal. While we recognise that State-to-State disputes are possible under the e-commerce chapter, we do not see our task as assessing the outcome of any potential claim. Instead, we focus on another question: whether aspects of the e-commerce chapter, which impose international obligations on Aotearoa New Zealand, pose a material risk to Māori Tiriti/Treaty interests.

To put it another way: does the e-commerce chapter pose a risk of the Crown being prevented from fulfilling its obligations to Māori under te Tiriti/the Treaty, including Māori being able to exercise rangatiratanga in respect of their taonga? We answer these questions later in this chapter, where we address whether, in becoming a Party to the TPPA/CPTPP, the Crown has, in fact, maintained sufficient policy space to provide it with necessary regulatory flexibility.

Professor Kelsey and Professor Mitchell are both international trade law experts of international standing. Each has advised governments on the operation of e-commerce provisions and have reputations for research excellence on the very matters before us. However, the fact that their interpretive approaches and subsequent conclusions are so different, highlights the degree to which the operation of the e-commerce rules is contestable and subject to some uncertainty. This

32. Submission 3.3.60, p19 at [4.2]

uncertainty constitutes a base level of risk – particularly to Māori interests captured by the TPPA/CPTPP. An anticipatory framework can reduce risk.

The recommendations of the Trade For All Advisory Board (the Trade for All Board) emphasised the importance of trade policy having an 'anticipatory governance framework', as noted at section 3.4.2.1.2 of this report. We note that the Trade for All Board urged against locking Aotearoa New Zealand into any fixed negotiating positions until a thorough review of national interests in digital trade negotiations can be carried out.[33] We see this as a responsible approach and endorse it.

A State-to-State or investor–State dispute resolution tribunal will evaluate both the Treaty articles and whether any measure is compliant with the article or fits within an exception or exclusion. Assessing the possible outcomes of a dispute invoking such provisions is an inherently speculative exercise. Where it is necessary for us to interpret the provisions we do so holistically. A holistic interpretation aligns with the jurisprudence of the WTO Appellate Body, which has found that the interpretation of customary rules codified in Article 31 of the Vienna Convention, is ultimately a 'holistic exercise that should not be mechanically subdivided into rigid components'.[34]

As previously explained, our role is to assess the extent to which we believe the operation of the provisions makes regulatory measures for data and digital technologies which may protect Māori Tiriti/Treaty interests vulnerable to challenge, or may hinder the ability of Māori to exercise tino rangatiratanga over data significant to them. In doing so, we must consider and apply the relevant Tiriti/Treaty standard: whether the risk (if any) to Māori interests is reasonable in the circumstances (as we discussed in chapter 2).

As indicated at section 5.1.1, in order to determine whether the Crown has retained sufficient policy space, so it has regulatory flexibility to protect Māori interests in e-commerce, we focus on two questions:

1. Can the Crown prevent transfer and storage of Māori data overseas, unless with Māori consent? (Articles 14.11 and 14.13.)
2. Can the Crown require that overseas providers of digital services and products disclose the source code of any software used in Aotearoa New Zealand, for the purposes of understanding how that software uses Māori data, including for inquiries, investigations, and juridical proceedings? (Article 14.17.)

In answering these questions, we consider the Crown's assertion that it can use exceptions and exclusions under the CPTPP to create relevant measures that will enable compliance in meeting obligations to Māori under te Tiriti/the Treaty. We recognise that no such domestic measures currently exist in relation to Māori e-commerce. In the absence of a domestic framework, we consider the risk to Māori interests that arises from potential application of the CPTPP exceptions and

33. Document B23, p18 at [2]
34. World Trade Organization Appellate Body, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, report of the Appellate Body, AB-2005-5, WT/DS269/AB/R, WT/DS286/AB/R, 12 September 2005, at [176]

Rule at issue	Exceptions and exclusions that may apply
Data localisation provisions	• Legitimate public policy objective (Articles 14.11.3 and 14.13.3) • Privacy protections (Article 14.8) • The General Exception (Article 29.1) • Treaty of Waitangi exception (Article 29.6) • The Traditional Knowledge clause (Article 29.8)
Source code provision	• The General Exception (Article 29.1) • Treaty of Waitangi exception (Article 29.6) • The Traditional Knowledge clause (Article 29.8)

Table 1: Exceptions and exclusions to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership

exclusions and whether this degree of risk is inconsistent with the active protection standard under te Tiriti/the Treaty. The provisions at issue and the exceptions and exclusions which apply to them are set out in table 1.

5.3 Can the Crown Prevent Transfer and Storage of Māori Data Overseas, Except with Māori Consent? (Articles 14.11 and 14.13)

The Crown and the claimants (and both experts) agreed, that, on their face, Articles 14.11 and 14.13 prevent the Government from prohibiting the transfer of Māori data offshore or requiring that it be held exclusively in Aotearoa New Zealand. As we recognised in chapter 4, a Tiriti/Treaty-compliant domestic regime, which may call for the localisation of Māori data by foreigners operating in New Zealand, might not be possible under the existing international obligations imposed by the TPPA/CPTPP.

This section will consider whether the relevant exceptions and exclusions to Articles 14.11 and 14.13 allow sufficient policy space so that the Crown may sufficiently discharge its Tiriti/Treaty obligations.

5.3.1 The parties' positions

5.3.1.1 *The claimants' position*

The claimants argued that Articles 14.11 and 14.13 remove control of Māori data from Māori. They noted that, as a result of this loss of control, Māori have been estranged from their whakapapa and denied the ability to exercise tino rangatiratanga and kaitiaki responsibilities over data. This inability to do so, the claimants said, inhibits them from achieving effective Māori Data Sovereignty and Māori Data Governance.[35]

The claimants disagreed with the Crown's assessment of the level of flexibility maintained in Articles 14.11 and 14.13, and argued that the rules act to serve

35. Document B25, p14 at [40]

Article 14.11: 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, when this activity is for the conduct of the business of a covered person.
3. Nothing in this Article shall prevent a Party from adopting or maintaining measures 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.

powerful external business interests and do not allow for the adoption of Māori-specific measures.[36] They argued that cumulatively, the rules increase the likelihood of regulatory restraint and regulatory chill, including the psychological and systemic effects of such chill.

5.3.1.2 *The Crown's position*

The Crown argued that Articles 14.11 and 14.13 strongly affirm the agreement's intentions that all Parties regulate with regard to their own needs and interests.[37] As such, the Crown maintained that these Articles leave sufficient regulatory flexibility via the legitimate public policy exception, the GATS General Exception, and the Treaty of Waitangi exception so as to appropriately protect Māori interests.[38]

5.3.2 'Each Party may have its own regulatory requirements' (Articles 14.11.1 and 14.13.1)

The first paragraphs of both Articles 14.11 and 14.13 contain similar wording which states that parties may have their own regulatory requirements covering the electronic transfer of information (Article 14.11.1) and 'the use of computing facilities, including requirements that seek to ensure the security and confidentiality of communications' (Article 14.13.1).

The claimants did not refer to Articles 14.11.1 and 14.13.1 in their opening submissions, and the initial evidence of their witnesses did not refer to them.

However, Professor Mitchell, for the Crown, placed interpretive weight on these

36. Submission 3.3.60, p 19 at [4.2]
37. Submission 3.3.61, p 43 at [114]
38. Ibid, p 43 at [113]

Article 14.13 Location of Computing Facilities

1. The Parties recognise that each Party may have its own regulatory requirements regarding the use of computing facilities, including requirements that seek to ensure the security and confidentiality of communications.
2. No 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.
3. Nothing in this Article shall prevent a Party from adopting or maintaining measures 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 the use or location of computing facilities greater than are required to achieve the objective.

provisions. Regarding the cross-border data flows provision (Article 14.11), he argued that from paragraph 1, when read along with the substantive obligation in paragraph 2:

> it is apparent that the existence of a regulatory framework that must be complied with when information is transferred by electronic means across borders is not inherently inconsistent with the requirement to 'allow' such transfers. Accordingly, CPTPP Parties have a margin of discretion to establish a regulatory framework that governs how – and under what circumstances – they 'allow' the cross-border transfer of information by electronic means.[39]

Similarly, he saw paragraph 1 of the location of computing facilities provision (Article 14.13.1) as allowing paragraph 2 to be interpreted as:

> affording space to Parties to set conditions for *other* purposes under its regulatory framework on the use or location of computing facilities, including in relation to security or confidentiality. For instance, a Party's regulatory framework may set minimum protections for security and confidentiality that a given jurisdiction or business must satisfy because computing facilities can be permissibly used and located in that other jurisdiction. [Emphasis in original.][40]

While pointing out that these paragraphs signal flexibility, Professor Mitchell acknowledged that both provisions *prima facie* prevent Aotearoa New Zealand

39. Document C2, p 42 at [105]
40. Ibid, p 43 at [106]

from enacting regulatory requirements that Māori data (1) not be transferred offshore and (2) be held only in Aotearoa New Zealand.[41] Despite such prevention, Crown counsel summarised in closing submissions that Articles 14.11.1 and 14.13.1 amount to 'strong affirmations of the intent for all parties to regulate for their own needs and interests'.[42]

In her reply evidence, Professor Kelsey, for the claimants, briefly addressed Professor Mitchell's interpretation of Articles 14.11.1 and 14.13.1, which she described as overstated. In her view, paragraph 1 simply 'recognises the Party may choose how to implement the obligation in paragraph 2'.[43] She gave Professor Mitchell's interpretation no further weight and her evidence primarily addressed the legitimate public policy objective exception in Articles 14.11.3 and 14.13.3.

5.3.3 'Legitimate public policy objectives' under Articles 14.11 and 14.13

As we noted in chapter 4, all parties agreed that, on their face, the measures in question prevent Aotearoa New Zealand from prohibiting the offshore transfer of Māori data and requiring that it be held exclusively in Aotearoa New Zealand. The dispute over the effect of the provisions arises from the extent to which the protections, exclusions, and exceptions in the agreement allow Aotearoa New Zealand sufficient regulatory flexibility to address Māori interests, even when such regulations would be inconsistent with the obligations under Articles 14.11 and 14.13.

The key question is the effect of paragraph 3, which is almost identical in each provision and provides that parties may adopt measures inconsistent with the rules when the measures achieve 'a legitimate public policy objective'.

Both the claimants and the Crown recognised that applying this provision means any proposed regulatory measure inconsistent with the obligations must satisfy a three-step test:

1. first, the public policy objective must be 'legitimate' (paragraph 3);
2. secondly, it must not constitute 'arbitrary or unjustifiable discrimination or a disguised restriction on trade' (paragraph 3(a)); and
3. thirdly, any restrictions imposed on 'transfers of information' or on 'the use or location of computing facilities' must not be 'greater than are required to achieve the objective' (paragraph 3(b)).[44]

In the following sections, we discuss the parties' approaches to how each of these steps might be applied to a measure requiring that Māori data be localised in Aotearoa New Zealand.

5.3.3.1 *'Legitimate public policy objective'*

The claimants described the term 'legitimate public policy objective' as 'a novel phrase in international trade law on which there is no jurisprudence'.[45] They said

41. *Prima facie* translates to 'at first sight'.
42. Submission 3.3.61, p 43 at [114]
43. Document c3, p 36 at [113]
44. Submission 3.3.60, pp 62, 63, 64 at [12.13], [12.17], [12.24]; submission 3.3.61, pp 44, 46 at [116], [125]; doc c3, p 37 at [116]
45. Submission 3.2.54, p 14 at [5.8]

that, in the absence of an international consensus on indigenous data sovereignty matters, the legitimacy of objectives which protect Māori control over data is 'likely to be contested'.[46] Professor Kelsey noted, in addition to the lack of jurisprudence on the term, that what counts as 'legitimate' is not self-judging. That is, that what constitutes a 'legitimate' objective will not be for the State or Party involved to interpret. Instead, in the event of a dispute, the legitimacy of the measure would, in her view, be subject to interpretation by a dispute resolution panel which would not have the expertise in tikanga or mātauranga Māori required to understand the importance of the measure.[47]

In the oral presentation of her evidence, Professor Kelsey gave the example of the European Union's (EU) attempt to clarify the term 'legitimate public policy objective' as including 'the protection of privacy' in the 'stocktake text' for the ongoing WTO plurilateral negotiations on e-commerce.[48] This, she said, shows the EU was not 'convinced that privacy protection would be accepted as a legitimate public policy objective and so again we've got this problem about uncertainty'.[49]

During questioning, Professor Kelsey also referred to the modification of the provisions in the recently concluded Regional Comprehensive Economic Partnership (RCEP) agreement (Articles 12.14 and 12.15) to explicitly make the 'legitimate public policy objective' self-judging.[50] Both of these developments, in her view, suggest that there is concern about 'the lack of clarity and the potential risks that exist in the language that may not have been foreseen' at the time the TPPA and CPTPP were being negotiated.[51] Of relevance here, again, is the observation that Chapter 14 was a novel chapter in a Free Trade Agreement (FTA) at the time it was negotiated.

We note at this point that Professor Kelsey's interpretation of the 'object and purpose' of the Chapter 14 provisions is informed by Article 14.2 on Scope, which she argued favours 'a very narrow interpretation of the right to regulate under Chapter 14'.[52] The provision reads:

> The Parties recognise the economic growth and opportunities provided by electronic commerce and the importance of frameworks that promote consumer confidence in electronic commerce and of avoiding unnecessary barriers to its use and development.

The objectives referenced here, Professor Kelsey noted, are economic growth and opportunities, consumer confidence, and avoiding barriers to the use and development of e-commerce. This Article does not reference cultural identity, diversity, or indigenous rights.

46. Ibid
47. Document B25, p 14 at [41]
48. Transcript 4.1.9, p 55; doc B25(b), p 14 at [45]
49. Transcript 4.1.9, p 55
50. Ibid, pp 182–183
51. Ibid, p 183
52. Document C3, p 21 at [66]

Also relying on context, object, and purpose, the Crown considered that Māori-specific measures would be 'highly likely' to qualify as 'legitimate' if they were 'explained and substantiated in terms of protecting "cultural identity", preserving "traditional knowledge and traditional cultural expressions", and promoting "indigenous rights"'.[53]

The Crown relied on Professor Mitchell's interpretation of the term 'legitimate' in relation to 'objective', which he interpreted, according to WTO jurisprudence, as referring to 'an aim or target that is lawful, justifiable, or proper' – including, he said 'by reference to objectives protected elsewhere in the treaty in question'.[54] He explained his analysis as based on the interpretation 'of the term "legitimate objective" by the WTO Appellate Body in the analogous context of Article 2.2 of the TBT Agreement, as adapted to the context of the CPTPP'.[55]

Professor Mitchell listed the following as relevant sources of context for interpreting what constitutes a 'legitimate public policy objective':

- The recognition of 'appropriate measures to respect, preserve and promote traditional knowledge and traditional cultural expressions' from Article 29.8 (Traditional Knowledge and Traditional Cultural Expressions) in Chapter 29 (Exceptions and General Provisions).
- The ability for Aotearoa New Zealand to adopt '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 the Treaty of Waitangi' under the Treaty of Waitangi exception (Article 29.6).
- The statement from the preamble of the original TPPA (and incorporated into the CPTPP) recognising: 'the importance of cultural identity and diversity among and within the Parties, and that trade and investment can expand opportunities to enrich cultural identity and diversity at home and abroad'.
- The statement from the preamble to the CPTPP, reaffirming 'the importance of promoting . . . cultural identity and diversity . . . indigenous rights . . . and traditional knowledge'.[56]

In her reply evidence, Professor Kelsey responded to Professor Mitchell's analysis by making the following points:

- As the 'legitimate public policy objective' provision is not incorporated from the WTO, there is no direct requirement to consider WTO jurisprudence.[57] Further, the WTO Appellate Body decision which Professor Mitchell cites, *US – COOL*, is a Technical Barriers to Trade (TBT) dispute and '[t]he subject matter and objectives of the TBT and Electronic Commerce chapters and provisions are different and interpretations need to reflect that.'[58]

53. Submission 3.3.61, p 45 at [120]
54. Document C2, p 45 at [110]
55. Ibid, p 46 at [112]
56. Ibid, pp 45–46 at [110], [112]
57. Document C3, pp 23, 37 at [75], [116]
58. Ibid, p 37 at [116]; doc C2, pp 60, 60 n

- The preambular statements relied upon by Professor Mitchell are context for interpretation, but are 'very weak context'.[59] She noted that the 19 objectives in the CPTPP preamble are 'diverse and often competing' and Professor Mitchell had chosen just one.[60]

The claimants also challenged Professor Mitchell's conclusion that Māori data localisation requirements would be 'highly likely' to satisfy the test of being 'legitimate' through reference to his scholarly writings which are on our Record of Inquiry.[61] In a 2019 article published in the *Journal of International Economic Law* (JIEL), Professor Mitchell and co-author Dr Neha Mishra recommended that the WTO incorporate obligations enabling cross-border data flows and prohibiting data localisation measures along the lines of the CPTPP Articles 14.11 and 14.13.[62] In making this recommendation, Professor Mitchell and Dr Mishra noted the CPTPP does not 'define the scope of "legitimate public policy objective"' and that, if the WTO adopts similar wording to the CPTPP 'the term "legitimate public policy objective" should be clarified with an illustrative list'.[63]

In questioning, we asked Professor Mitchell to explain the apparent discrepancy between the views expressed in his evidence and the JIEL article. He explained that it was 'particularly important in the context of the WTO agreement' for 'legitimate public policy objective' to be clarified because the WTO 'contains far fewer explicit endorsements of values and objectives . . . compared to the CPTPP'.[64] The term 'endorsements of values and objectives' refers to statements in the preamble to the agreement, Treaty of Waitangi exception (Article 29.6), and Traditional Knowledge clause (Article 29.8).

When we asked Professor Mitchell why he places such weight on preambular statements to understand the term 'legitimate objective', he clarified that he takes them as 'confirmation of the ordinary meaning in which [he has] ascribed to particular words'.[65] In contrast, he described Professor Kelsey's approach as conflating 'ambiguity with abstract'. In his view, the abstract nature of the language does not make it ambiguous; rather the term 'fin[d]s application in particular fact patterns and [in] the abstract, it would be difficult to delineate every single objective that could conceivably qualify as legitimate'. This difficulty, Professor Mitchell stated, does not necessarily make the language 'ambiguous'.[66]

5.3.3.2 *'A means of arbitrary or unjustifiable discrimination or a disguised restriction on trade'*

If a measure is found to satisfy the test of serving a 'legitimate public policy objective', the right of a government to achieve that objective has been established.

59. Document C3, p 37 at [117]
60. Ibid, p 21 at [67]
61. Submission 3.3.60, p 62 at [12.14]; submission 3.3.63, p 30 at [2.2]
62. Document C5, exh 23, p 350 (406)
63. Ibid, p 351 (407)
64. Transcript 4.1.9, p 363
65. Ibid, pp 360–361
66. Ibid, p 361

However, the measure must still satisfy two further requirements which relate to the *way* the measure achieves the objective. The first of these two requirements (Articles 14.11.3(a) and 14.13.3(a)) is that the measure must not be 'arbitrary', 'unjustifiable', or 'a disguised restriction on trade'. The GATS General Exception (discussed below at section 5.3.6) contains similar wording.

The claimants, relying on Professor Kelsey, considered that applying this requirement to Māori data concepts created risk, because any test would depend on how the measure was understood from a non-Māori perspective.[67] Professor Kelsey elaborated that any measure to recognise Māori interests in data would need to treat different kinds of data in different ways, and she noted (as we have) that there is no internationally accepted definition of 'indigenous data' or 'Māori data' on which the Government could rely as justification.[68] On the definition offered by the United Nations Special Rapporteur (referred to by claimant expert witness Dr Donna Cormack[69]), Professor Kelsey noted that the definition is 'contextual and provides little guidance to distinguishing it from other data'.[70]

The Crown's position is that it is difficult to apply these tests in the abstract because they depend on the detail of the measure.[71] Professor Mitchell's view is the test works so that a measure would be considered 'arbitrary', 'unjustifiable', or 'disguised' if it bears no 'rational connection' to the legitimate objective.[72] He noted:

> Contextual elements of the CPTPP could shed light on what comprises 'arbitrary' or 'unjustifiable' discrimination in a given instance. One such contextual element is Article 29.6.1, which foreshadows that New Zealand may adopt 'measures it deems necessary to accord more favourable treatment to Māori in respect of matters covered by this Agreement' in certain circumstances. In light of relevant contextual elements, discrimination in the form of a competitive advantage to Māori that directly results from the application of the measure in pursuit of the 'legitimate objective' would appear unlikely to be 'arbitrary', 'unjustifiable' or 'disguised', particularly if there is no less trade-restrictive alternative.[73]

In reply to Professor Mitchell on this aspect of the provision, Professor Kelsey highlighted the difference between the phrasing in Articles 14.11.3(a)/14.13.3(a) and the GATS General Exception which refers to 'arbitrary or unjustifiable discrimination *between countries where like conditions prevail*' (emphasis added).[74] Professor Kelsey referred to this as a 'comparator'. Articles 14.11.3(a) and 14.13.3(a) do not have a comparator, and thus she says that their meaning 'will therefore

67. Submission 3.3.60, pp 63–64 at [12.21]–[12.23]; also relevant is the discussion of this problem in our Stage One report: Waitangi Tribunal, *Report on the Trans-Pacific Partnership Agreement*, p 38.
68. Document B25, p 14 at [42]
69. Document B32, pp 7–8 at [33]
70. Document B25, p 14 at [42]
71. Submission 3.3.61, pp 45–46 at [124]
72. Document C2, p 47 at [113]
73. Ibid, p 61 at [140.2]
74. GATS, Article XX

depend on what comparators are chosen. Is the comparison between indigenous and non-indigenous, different kinds of data, or different services or firms?'[75]

The claimants considered the uncertainty created by this 'open-ended wording' allowed scope for other Parties to the TPPA/CPTPP 'to object to a measure that restricts the offshoring of data, because they can complain about any form of discrimination'.[76]

In sum, the claimants saw risk in the open-ended nature of the wording of this part of the provision. The Crown referred to the available sources of context for justifying the measure, as was the argument with the 'legitimate public policy objective' test. Professor Mitchell's more detailed arguments about the similar wording in the GATS General Exception are discussed below.

5.3.3.3 *'[R]estrictions . . . greater than are required to achieve the objective'*

Professor Mitchell and Professor Kelsey agreed that the third requirement of Articles 14.11 and 14.13 is whether the measure in question imposes restrictions greater than required to achieve a 'legitimate public policy objective'.[77] However, their assessment of what was, in fact, 'required', differed.

Professor Mitchell drew attention to the use of the word 'required', as opposed to 'necessary', noting that the decision of CPTPP Parties not to replicate the 'language of necessity' was significant.[78] He argued that the intent behind the difference in language was to afford a higher degree of deference to regulators.[79]

Professor Mitchell contended that the use of 'required' in Articles 14.11 and 14.13 is the same as contained in Article 5.6 of the Agreement on Sanitary and Phytosanitary Measures (SPS).[80] He noted that in the SPS, a measure is only more trade restrictive than 'required' if there is evidence that a 'significantly' less trade-restrictive alternative exists. As such, a less restrictive trade option must not only provide the same level of protection as the original option but must also be 'significantly' less restrictive to trade.[81]

Professor Kelsey disagreed with Professor Mitchell's use of the SPS provision and other case law to argue that the word 'required', in relation to Articles 14.11 and 14.13, is intended to provide a greater degree of deference to regulators. She contended that Professor Mitchell had not addressed the numerous restrictions on regulatory autonomy also contained in Article 5.6 of the SPS. Furthermore, Professor Kelsey noted that, while the SPS includes a footnote that clearly indicates the intention is to provide regulators with a greater degree of deference and to impose limitations on proposed alternatives, the CPTPP does not indicate such an intention. Professor Kelsey argued that, if that had been the intention behind the

75. Document c3, p 38 at [120]
76. Submission 3.3.60, p 63 at [12.21]
77. Document c2, p 48 at [115]; doc c3, p 39 at [124]
78. Document c2, pp 48–49 at [116]
79. Ibid, pp 49–50 at [116]
80. Ibid, p 49 at [116]
81. Ibid, pp 49–50 at [116]

use of the term 'required', then she would have expected a similar footnote would have been included in both Articles 14.11.3(b) and 14.13.3(b).[82]

Professor Mitchell concluded Articles 14.11.3(b) and 14.13.3(b) would likely be interpreted to afford greater deference to regulators in the context of State-to-State disputes. He argued that any Party contending a measure was inconsistent under Articles 14.11.3(b) and 14.13.3(b) would have to prove, as a matter of evidence, that a reasonable alternative measure exists. If the Party could not prove the existence and effectiveness of such an alternative measure, then it is likely to meet the 'required' test.[83]

Professor Kelsey was perplexed by the idea that a foreign Party would have to prove that a reasonable alternative measure exists. She noted that such a measure, in the context of Articles 14.11.3(b) and 14.13.3(b), would have to protect the collective privacy of Māori data, in an equivalent or superior way, to a restriction requiring the localisation of data in Aotearoa New Zealand. She struggled to see how the evidentiary burden to prove an alternative measure, in fact, existed would be placed on a complainant Party in a State-to-State dispute.[84]

Overall, Professor Mitchell believed determining the threshold for an alternative measure included considering whether it meets the following criteria:

- it must provide the same level of protection, or greater, than the original measure proposed;
- it must be significantly less restrictive to trade; and
- the onus is on the complainant Party to prove that the alternative measure is sufficient.[85]

Professor Kelsey rebutted these suggestions. However, she did not provide an explanation as to what a threshold for an alternative measure should consist of or consider. That is, she did not establish what is actually 'required' to prove that a proposed measure is more restrictive than necessary.[86]

Counsel for the claimants considered that the weighing exercise at this final stage of the legitimate public policy 'test' reinforces several issues raised previously. One such issue is that the tests applied are constantly shifting and are not easily transposed from one agreement to another. The claimants also argued that the criteria to be weighed, and the methodology for doing so, is not only subjective, but ultimately informed by the ideological framework of those in power. The claimants noted that overall, the CPTPP does not empower Māori to make decisions or to exercise mana motuhake. The claimants argued that under the agreement, Māori are unable to exercise a degree of control over data originating from or belonging to them, and that this situation reflects the Crown's failure to discharge its duty of active protection.[87]

82. Document c3, p 39 at [125]
83. Document c2, pp 50–51 at [118]
84. Document c3, p 40 at [126]
85. Document c2, p 52 at [120]
86. Document c3, pp 36–40 at [112]–[126]
87. Submission 3.3.60, p 65 at [12.26]

The Crown maintained that a measure will only be found to be 'greater than required to achieve the objective' where a reasonably available and less trade-restrictive alternative that achieves equivalent protection exists. Once a measure is found to have a legitimate public policy objective, which is stage one of the test, the Crown argued that a government's right to achieve that objective is established. As noted previously, the two steps that follow the establishment of a legitimate public policy objective simply concern the *way* in which the measure achieves that objective. The Crown recognised that the application of these latter two steps is difficult in the abstract – that is, without a specific measure to assess. However, Crown counsel noted that this is not because there is reason to believe that a measure would not satisfy these final two steps, but because the successful application of a measure will depend on its context.[88]

5.3.4 Tribunal analysis: the 'legitimate public policy' objective in Articles 14.11 and 14.13

In this section, we consider the 'legitimate public policy' objective contained in Articles 14.11 and 14.13 in view of the evidence presented by both the claimants and the Crown in relation to the three-tier test. We draw conclusions about the adequacy of the 'in-built' exceptions, prior to discussing other applicable exceptions and exclusions. A cumulative assessment of the policy space that would allow for regulatory flexibility, accounting for all relevant exceptions and exclusions, follows at the close of the chapter (section 5.6).

The legitimate public policy test first requires that a public policy objective be 'legitimate'. In interpreting legitimacy, the evidence of the experts concerning Articles 14.11 and 14.13 highlights the importance of the approach taken – in particular, which interpretive sources are relied upon. The Treaty of Waitangi exception and the Traditional Knowledge clause support an interpretation that public policy measures to protect Māori interests in data could qualify as 'legitimate'. In addition, we find the statements within the CPTPP preamble that Professor Mitchell referred to reinforce such an interpretation. These statements are that the CPTPP '[r]eaffirm[s] the importance of promoting . . . cultural identity and diversity . . . [and] indigenous rights'.[89] We also note, as Professor Kelsey said, that there are other preambular statements that are not supportive.[90] Article 14.2 also lends weight to economic objectives.

We do not share Professor Mitchell's confidence that his approach is the 'highly' or 'most' likely interpretation of the term 'legitimate'. We have some doubt as to whether there can be certainty that his interpretation is the most probable one an international trade dispute panel or other Parties to the CPTPP would reach.

In addition, we take Professor Kelsey's evidence on the evolution of Articles 14.11 and 14.13 in the WTO stocktake text on e-commerce and in the RCEP as

88. Submission 3.3.61, pp 45–46 at [122]–[124]
89. Document C2, pp 35–36 at [91.2]
90. Document C3, p 21 at [67]: Professor Kelsey noted that Professor Mitchell referred to a minimal number of the preambular statements.

indicative of ongoing uncertainty over the application of the language in the TPPA/CPTPP. Professor Mitchell himself made a similar observation about countries' possible uncertainty over the application of the provisions in the JIEL article he co-authored.[91] In our assessment, uncertainty surrounding the language and application of the provisions contributes to risk. As noted earlier, when we speak of risk, we are referring to the risk to Māori, not the risk that the Crown will be successfully challenged in a State-to-State dispute.

The final stage of the legitimate public policy test enhances the uncertainty inherent in the previous two stages. Indeed, data transfer restrictions are allowed insofar as they are not 'greater than are required to achieve the objective'.

At various points throughout this report, we comment on the relative novelty of the CPTPP provisions. Since the release of the CPTPP text, it has become a template for other agreements, with provisions relating to digital trade appearing in multilateral, regional, and bilateral agreements. These agreements include the Regional Comprehensive Partnership Agreement (RCEP), the Digital Economy Partnership Agreement (DEPA), the United States–Mexico–Canada Agreement (USMCA), the Australia–Singapore Digital Economy Agreement, among many others.[92] Some of these agreements reflect the language and structure of the CPTPP and even include provisions going beyond the commitments contained within it. The number of digital trade agreements following the CPTPP indicate the importance of e-commerce as well as the need to respond to an increasingly digitised and ever-changing modern world.

DEPA, in particular, builds on existing commitments in the CPTPP, such as the cross-border transfer of information by electronic means (Article 14.11 in the CPTPP and Article 4.3 in the DEPA) and the location of computing facilities (Articles 14.13 in the CPTPP and Article 4.4 in the DEPA). DEPA contains provisions addressing digital identities, artificial intelligence, and data innovation, which do not have equivalent provisions in the CPTPP.[93]

The National Interest Analysis (NIA) for DEPA describes this expansion of commitment as an intentional step to 'attain a new level of ambition' in regard to digital trade agreements.[94] The NIA also states that DEPA contains exceptions which make clear that the agreement does not prevent Parties from taking certain measures in certain circumstances:

91. For example, Professor Mitchell and Dr Mishra wrote, 'Clarifying the scope of the above exceptions [Articles 14.11.3 and 14.13.3] is important to ensure that Members do not feel threatened that a horizontal obligation on data flows or a prohibition on data localisation would restrain their ability to regulate the internet for legitimate reasons.' (Document C5, exh 23, p 351 (407).)

92. The Chile–Brazil FTA; the Chile–Uruguay FTA; the US–Japan Trade Agreement; and the Japan–UK Trade Agreement: Burcu Kilic, 'Digital Trade Rules: Big Tech's End Run around Domestic Regulations', Heinrich Böll Stiftung, https://eu.boell.org/en/2021/05/19/digital-trade-rules-big-techs-end-run-around-domestic-regulations, accessed 11 August 2021.

93. Asia Business Trade Association, *'Digital' Free Trade Agreements: Comparing DEA, DEPA and CPTPP*, issue paper, August 2020, p 6

94. Ministry of Foreign Affairs and Trade, *Digital Economy Partnership Agreement: National Interest Analysis* (Wellington: Ministry of Foreign Affairs and Trade, 2020), p 9 at [3.2]

> These exceptions acknowledge the regulatory right of the Parties to adopt or enforce measures to deal with a crisis or to achieve certain priority policy outcomes, even if these measures may affect their DEPA obligations. The exceptions contain disciplines to ensure that they cannot be abused for trade protectionist purposes.[95]

Article 4.3 of DEPA is similar to Article 14.11 of the CPTPP, which concerns the cross-border transfer of information. Similarly, Article 4.4 of DEPA is largely the same as Article 14.13 of the CPTPP, which relates to the location of computing facilities. Both of these articles specify that nothing should prevent a Party from adopting or maintaining inconsistent measures in order to achieve a legitimate public policy objective. The primary difference between the Articles 4.3 and 4.4 in DEPA and Articles 14.11 and 14.13 in the CPTPP is that the DEPA Articles include a prelude that states: 'The parties affirm their level of commitment relating to location of [computing facilities/cross-border transfer of information by electronic means], in particular, but not exclusively'.[96]

This appears to indicate that following the CPTPP, negotiating parties recognised some uncertainty surrounding the term 'legitimate public policy objective' and softened the wording. This change supports the argument by the claimants that a degree of uncertainty exists in how the 'legitimate public policy' exception will be interpreted and that this uncertainty increases the potential risk to Māori interests.

Overall, the expansion of commitments contained in DEPA appears to reflect an attempt at improving clarity following the uncertainty arising from the CPTPP. We see such steps toward clarity as generally positive. As noted in the NIA for DEPA, DEPA was one of the first agreements where MFAT worked in collaboration with Te Taumata. The NIA states: 'Engagement with te Taumata was critical to ensuring the DEPA included provisions on digital inclusion and inclusive trade. This engagement identified a range of known Māori interests and considered the DEPA's potential impact on such interests.'[97]

At the time DEPA was announced, Te Taumata chair Chris Karamea Insley noted that it would 'enable traceability and product tracking, connecting global consumers back to [Māori] commerce directly and in real-time promote our unique korero o te ao Māori ki te Ao'.[98] He also stated that Te Taumata was actively working alongside the Government, with a number of Māori businesses, to practically advance the development of a digital trade framework through DEPA.[99] We see the engagement between MFAT and Te Taumata as positive.

95. Ibid, p 21 at [4.11]
96. Digital Economy Partnership Agreement, https://www.mfat.govt.nz/assets/Trade-agreements/DEPA/DEPA-Signing-Text-11-June-2020-GMT-v3.pdf, Arts 4.3, 4.4
97. Ministry of Foreign Affairs and Trade, *Digital Economy Partnership Agreement*, p 40 at [9.3]
98. Megan Lacey, 'E-Maori Enabling Whanau Trade in the World', 21 January 2020, Te Taumata, https://www.tetaumata.com/news/2020/01/21/e-maori-enabling-whanau-trade-to-the-world
99. Ibid

A number of commentators, in addition to Professor Kelsey, have raised concerns about the supposed 'self-judging' nature of the 'legitimate public policy' exception.[100] We note that the word 'legitimate' acts to mitigate against the use of the exception for any public policy at any time. The use of 'legitimate' is important because this opens the way for a test (which even if it has a considerable degree of deference) raises questions as to whether it is wholly self-judging.

We see the ability to rely on this exception as beneficial to Māori. In the event that the Crown decides to rely upon the exception, we have no reason to doubt that it would do so in good faith and see that it was used appropriately. We note, however, that there are practical concerns about how the Crown would conduct itself if its use of the exception was contested by another Party. In this situation, the Crown should ensure that it has appropriate Māori expertise and voice in the process, as we commented on in our Stage One report.[101] We reassess the possibility that a measure could be challenged in more detail at section 5.5.

The nature of the legitimate public policy exception is that it is open to challenge. This is a kind of risk. We cannot say with certainty that any measures taken to protect interests in Māori Data Governance will be challenged, but we can conclude that there are several factors pointing to the risk of challenge in a State-to-State dispute. As we have discussed, this risk arises from the competing views of experts about the interpretation of the provisions, and the subsequent approaches in trade agreements reinforce that there is some disagreement requiring clarification about how the 'legitimate public policy' exception will be interpreted.

5.3.5 Treaty of Waitangi exception and Articles 14.11 and 14.13

We found in Stage One of our inquiry that the Treaty of Waitangi exception in the TPPA would function substantially as intended so as to provide a reasonable level of protection for Māori interests if the Crown needed to rely on it. We came to this view despite the clause, as it was drafted, applying only to measures that the Crown deemed necessary to accord more favourable treatment to Māori. This clause remained unchanged when the TPPA eventually became the CPTPP. Unlike in Stage One, here we discuss the Treaty exception in conjunction with exceptions and exclusions in the CPTPP, with the objective of making a cumulative assessment of risk. This section canvasses the arguments of the claimants and the Crown concerning whether the Treaty exception mitigates the potential risk that arises from Articles 14.11 and 14.13 of the CPTPP.

Under Articles 14.11 and 14.13 the Crown is unable to require that Māori data be held in Aotearoa New Zealand and not transferred offshore. Such data localisation would be contrary to the obligations imposed under Articles 14.11.2 and 14.13.2.

100. Information Technology and Innovation Foundation, submission to Trade Negotiations Division of Ministry of Foreign Affairs and Trade, 2 July 2019, https://www2.itif.org/2019-new-zealand-trade.pdf, pp 7–8; The Information Technology and Innovation Foundation (ITIF) made a submission to MFAT concerning DEPA, which stressed that general exceptions could be 'misused' to enact forced data localisation: doc B25, p 14 at [41].

101. Waitangi Tribunal, *Report on the Trans-Pacific Partnership Agreement*, p 57

Professor Mitchell noted that the adoption of a contrary measure can occur so long as the Crown can prove that it has been implemented in order 'to accord more favourable treatment to Māori'.[102] A measure affording such treatment would likely not contravene the agreement unless it failed the test in the chapeau, that is, the introductory clause.

The chapeau states that a measure must not be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination, or a disguised restriction on trade.[103] Professor Mitchell took the view that a measure will be considered arbitrary or unjustifiable where the pursuit of the objective and the restriction or discrimination lack a rational connection.[104] The experts differed in their perspectives on how exceptions should be interpreted and how they may function in the future.

Professor Kelsey argued that the Crown did not consider whether the Treaty of Waitangi exception will protect Māori interests in relation to the digital domain.[105] She considered that, while the exception will protect local content requirements and Government procurement outside of the exclusion in Chapter 14, the applicability in relation to the collection, storage, and application of personal information about Māori individuals is much less clear. She noted that, even outside of the practical issues in attempting to isolate and treat particular information differently, she doubted whether this would, in fact, constitute 'more favourable treatment'.[106]

Professor Kelsey's main concern was with the broader regulatory regime. She noted that, if data were to be recognised as taonga, systemic change of the regulatory regime would be needed. This would affect the entire digital framework in Aotearoa New Zealand. In her view, non-compliance with the e-commerce rules on that basis would clearly not constitute 'more favourable treatment' for Māori as intended by the Treaty exception because it would apply to all subject to the laws of Aotearoa New Zealand.[107]

Overall, Professor Kelsey argued that the e-commerce rules are an example of how the measures needed to meet the Crown's obligations under te Tiriti/the Treaty fall outside of the Treaty exception. She noted that the threshold test for the application of the exception, 'more favourable treatment to Māori', would not be met. Consequently, neither would the chapeau concerning 'arbitrary and unjustifiable' treatment or a 'disguised barrier to trade'.[108]

Professor Mitchell asserted that contextual elements of the CPTPP may shed light on what comprises 'arbitrary' or 'unjustifiable' discrimination.[109] He noted that the Treaty exception 'foreshadows' the ability of Aotearoa New Zealand to adopt beneficial measures:

102. Document C2, pp 54–55 at [125]
103. Document C2(c), p 29
104. Transcript 4.1.9, p 353 at [15]; doc C2(c), p 29
105. Document B25, p 23 at [81]
106. Ibid, p 23 at [83]
107. Ibid, pp 23–24 at [84]
108. Ibid, p 24 at [87]
109. Document C2, pp 39–40 at [100]

> discrimination in the form of a competitive advantage to certain Māori that directly results from a measure to enforce laws protecting privacy (including Māori privacy), and for which no less trade-restrictive alternative is available, would appear unlikely to be 'arbitrary' or 'unjustifiable.'[110]

The Crown addressed the Treaty exception as part of the matrix of flexibility and protective measures raised by the claimants.[111] Beyond this, it saw the Stage One findings as comprehensively addressing the nature and scope of the Treaty exception.[112] The Crown pointed to the mediation agreement [appendix II], which states that Ngā Toki Whakarururanga, in conjunction with the MFAT Trade and Economic Group, will identify opportunities for dialogue about a different Treaty of Waitangi exception clause.[113]

5.3.6 The General Exception and Articles 14.11 and 14.13

The General Agreement on Trade in Services (GATS) Exception at Article XIV is imported *mutatis mutandis* (with things changed that should be changed) into the TPPA and CPTPP.

The claimants and the Crown provided evidence concerning the applicability of the General Exception to regulatory measures, the purpose of which is to protect Māori interests in relation to e-commerce. The Crown said that Professor Mitchell and Professor Kelsey agreed on several points:

- Article XIV is an exception. Consequently, it is only relevant if a Party adopts a measure that is inconsistent with Chapter 14.
- Articles XIV(a) and (c), which concern the protection of public morals and compliance with laws and regulations, are potentially applicable exceptions to measures aimed at protecting Māori interests in relation to e-commerce.
- Article XIV(a) could also apply to measures to protect Māori control over the digital ecosystem.
- Article XIV(c) could also apply to a measure to protect collective privacy.
- The necessity test includes the Government being able to choose a level of protection that meets its objective and that any proposed less-restrictive alternative must be equivalent to that level of protection, or offer more protection.[114]

In light of these points, both experts envisaged, at least, that the localisation of Māori data in Aotearoa New Zealand is possible under the General Exception. However, their interpretations as to the extent of that possibility differ.

Professor Kelsey stressed that only two respondents have ever successfully invoked the General Exception before the Appellate Body.[115] She noted that very few WTO disputes have considered the GATS General Exception and those that

110. Document C2, pp 39–40 at [100]
111. Submission 3.3.61, p 61 at [182]
112. Ibid, p 62 at [185]
113. Ibid, p 62 at [184]
114. Ibid, pp 58–59 at [173]
115. Document C3, pp 46–47 at [154]

Article XIV of the General Agreement on Trade in Services

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:

(a) necessary to protect public morals or maintain public order;
(b) necessary to protect human, animal or plant life or health;
(c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to . . .

have considered it concern the provisions of particular interest in this inquiry: primarily Article XIV(a), which concerns public morals. Professor Kelsey noted that measures that are necessary to protect public morals have been considered in previous cases and that a broad test has been applied. However, she was sceptical as to whether novel measures concerning tikanga would satisfy that test.[116]

Professor Kelsey noted that of the three GATS disputes which have assessed the 'necessity' of measures under Article XIV, they have all undertaken a 'weighing and balancing exercise'.[117] She described the Appellate Body in *China – Publications and Audiovisual Products*, summarising the approach in *US – Gambling*, noted that the necessity test

> begins with an assessment of the relative importance of the interests or values furthered by the challenged measure. A panel should then turn to the other factors that are to be weighed and balanced, which in most cases will include: (i) the contribution of the measure to the realization of the ends pursued by it; and (ii) the restrictive effect of the measure on international commerce.[118]

Privacy measures are a part of the General Exception provision and are imported via Article 29.1.3 of the CPTPP from Article XIV(c) of GATS. Article XIV(c) permits exceptions 'necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement'. Both experts agreed that it could potentially apply to collective privacy.[119] Professor Kelsey noted that Article XIV(c) is more prescriptive than other grounds in the General Exception and that,

116. Ibid, p 48 at [156]
117. Ibid, p 50 at [164]
118. *China Publications and Audiovisual Products*, WT/DS363/AB/R at [240] (doc C3, p 50 at [164])
119. Document C2, p 46 at [112]; doc C3, p 48 at [158]

while collective privacy is hypothetically available, it would have to satisfy both the necessity test and the chapeau.[120] Professor Kelsey explained that Article XIV(c) is limited in a number of ways outside of simply satisfying these tests, including that:

- it only applies to the privacy of individuals, which assumes a Western individualised concept of privacy; and
- it is a defence that would apply to measures that do not comply with the e-commerce rules.[121]

In regard to necessity, Professor Kelsey used privacy law as an example. She stated that, if data were required to be held in Aotearoa New Zealand, the country would have to prove that the adoption of this measure was necessary to secure compliance with the Privacy Act 2020.[122] She cited Professor Tania Voon, a trade law expert at Melbourne Law School, who described the necessity test as stringent, and noted that it has only been invoked successfully twice.[123] Overall, Professor Kelsey was concerned about the power conferred on trade law panels and the Appellate Body, as well as their ability to assess tikanga Māori and its associated concepts. She stressed that reliance on such bodies to settle disputes concerning issues unique to Aotearoa New Zealand is not the action of a responsible Tiriti/Treaty partner.[124]

The Crown, in considering the General Exception, raised two concerns. First, Crown counsel noted that the claimants had shifted their focus in their closing submissions to what a trade panel is capable of understanding. Secondly, the Crown disagreed that an experienced panel of trade experts would be unable to understand evidence put before them which considered tikanga and Māori values.[125]

5.3.7 The Traditional Knowledge clause and Articles 14.11 and 14.13

The Traditional Knowledge clause (Article 29.8) of the CPTPP can be found under the General Provisions section of Chapter 29.

Professor Mitchell and Professor Kelsey took different approaches to the clause. Professor Mitchell saw it as forming part of the relevant context and as a result of this, having some interpretive value when assessing a legitimate public policy exception. Professor Kelsey noted that, at best, it may be considered broader interpretive context.[126] Their positions are canvassed in more detail below.

Professor Kelsey characterised the position of Article 29.8 in the chapter as indicating that it is not an exception.[127] When questioned, Professor Kelsey was

120. Document C3, p 48 at [158]
121. Document B25, p 22 at [78]
122. Document C3, p 49 at [160]
123. Ibid, p 50 at [163]
124. Document C3, p 51 at [168]
125. Submission 3.3.61, pp 59, 61 at [174], [180]
126. Transcript 4.1.9, p 68 at [20]; submission 3.3.61, p 40 at [105.1]
127. Transcript 4.1.9, p 175 at [20]

Article 29.8

Subject to each Party's international obligations, each Party may establish appropriate measures to respect, preserve and promote traditional knowledge and traditional cultural expressions.

asked whether the position of the Traditional Knowledge clause in the Exceptions and General Provisions chapter made it, at least, wider in purpose than its counterpart in RCEP.[128] In answering, she was hesitant to take a position in the absence of the negotiation history. She noted that, as a result of negotiation occurring in 'silos', there was no indication as to how and when the Traditional Knowledge clause appeared in Chapter 29.[129] Professor Kelsey asserted that the Traditional Knowledge clause provided weak interpretative context for the following reasons:

- it lacks a substantive effect;
- the term 'may' is permissive and means that a Party may choose to respect, preserve, and promote traditional knowledge and traditional cultural expressions, but is not required to do so;
- it is located in the General Provisions section of Chapter 29, as opposed to the Exceptions section;
- the term 'appropriate' with regard to what measures might be implemented adds further conditions on policy choices; and
- the provision overall is subject to each Party's international obligations.[130]

The Crown agreed that the Traditional Knowledge clause applies to the entirety of the CPTPP as a general provision and recognised that it is not situated in the exception section of Chapter 29.[131] The Crown noted that this wide application contrasts with other FTAs, where the clause sits in the Intellectual Property chapter.[132] Mr Vitalis felt comfortable that when considered together, the Treaty of Waitangi exception and the traditional knowledge provision provide more than sufficient regulatory space.[133] As a result, Mr Vitalis viewed an equivalent clause with more detail, such as that seen in Annex 18-A of UPOV 91,[134] as both unnecessary and

128. Ibid, p180 at [15]
129. Ibid, p180 at [20]
130. Submission 3.3.60, p55 at [10.19]
131. Submission 3.3.61, p40 at [105.1]
132. Ibid
133. Ibid, p34 at [86]
134. UPOV is the French acronym for the International Union for the Protection of New Varieties of Plants. The convention was first drafted in 1961 and has been revised three times (in 1972, 1978, and 1991).

incompatible.[135] While Annex 18-A was negotiated with the purpose of ensuring flexibility, the Crown argued that Chapter 14 as a whole is crafted with such a flexibility purpose in mind.

Overall, the Crown asserted that measures which protect or promote cultural identity, traditional knowledge, and traditional cultural expressions will be highly likely to qualify as measures used to achieve a legitimate public policy objective. It relied on the fact that Article 29.8 expressly recognises the legitimacy and importance of such interests and it saw Articles 14.11.3 and 14.13.3 as bolstered by this general provision.[136]

5.3.8 Tribunal analysis: Do the exceptions and exclusions to Articles 14.11 and 14.13 allow the Crown to adopt measures that fulfil their Tiriti o Waitangi / Treaty of Waitangi obligations?

We conclude that the cumulative nature of these exceptions, in addition to the legitimate public policy exception, gives some support to the argument that the Crown can regulate to protect Māori interests. We note that, while the enactment of any domestic measures to create a local regime that supports Māori Data Sovereignty and Māori Data Governance is possible, it could still be challenged. We also note that the Crown's faith in the exceptions suggests that, if a challenge arose in a State-to-State dispute, it would steadfastly defend such a challenge. We certainly expect that would be the case, and see that doing so would be consistent with what te Tiriti/the Treaty requires.

If the Crown were challenged there is certainly a risk that Aotearoa New Zealand would be unsuccessful. This is the nature of disputes where experts differ. If Aotearoa New Zealand did lose a dispute, it would have to bring its law into compliance with the CPTPP and effectively overturn the measure in question. Reliance on possible success in litigation to vindicate policy choices made to protect Māori interests is a risk in and of itself.

This risk is compounded by the fact that the measures envisaged by the claimants do not yet exist and are, in part, still being discussed and developed. The problem as the claimants see it, arises from the need to react to the framework established under the CPTPP, a framework they see as primarily designed by and for the benefit of larger nations and multinational corporate interests. We are persuaded there is force in this claimant concern.

The number of exceptions and their differing purposes provide some assurance that any challenge to a measure protecting Māori Tiriti/Treaty interests can be vigorously defended. However, it is precisely the fact that such interests might need to be defended that make Māori interests vulnerable and puts the Crown

135. Submission 3.3.61, pp 33–35 at [86]–[87]; Annex 18-A was negotiated to ensure that New Zealand had the flexibility to meet its Tiriti/Treaty obligations. The result is a plant variety rights regime that is consistent with UPOV 91, except for the measure or measures deemed necessary to meet Tiriti/Treaty obligations.

136. Ibid, p 45 at [120]

in a position which affects its performance and commitment to its Tiriti/Treaty obligations.

The Crown's response that it needs to be 'at the table' in these agreements does not remove this risk.[137] Rather, it highlights that before entering into such agreements the necessary domestic measures should first be developed with Māori involvement.

5.4 Can the Crown Require Access to the Source Code of Software Imported into Aotearoa New Zealand to Investigate How it Collects and Uses Māori Data? (Article 14.17)

Article 14.17 of the CPTPP protects the owner of the source code of mass-market software from being required to transfer or provide access to the code as a condition for its import to, or distribution, sale, or use within a territory.

As a result of this article, the Crown is in theory *prima facie* prohibited from requiring access to the source code of imported software in order to investigate how Māori data is collected and used.[138] The Crown argued, however, that relevant exceptions and exclusions allow it to access source code for the purposes of inquiries, investigations, and juridical proceedings.[139] These exceptions and exclusions include:

- Articles 14.2.3(a) and 14.2.3(b) (relating to government procurement and information);
- Articles 14.17.3(a) and 14.17.3(b) (relating to commercially negotiated contracts and modification for legal compliance);
- the General Exception;
- the Treaty of Waitangi exception; and
- the Traditional Knowledge clause.

These exclusions and exceptions will be discussed in more detail shortly. For the purpose of this assessment, both the Crown and claimants accepted that algorithms are not included in the source code provision, as outlined in chapter 4 at section 4.2.4.[140]

Importantly, several provisions in the CPTPP also apply to source code. These include Article 9.10.1(f), which prohibits requirements on foreign investors to transfer technology to a host country as a condition for investment, and Article 18.78, which provides for the protection of trade secrets. Article 18.78 is in the Intellectual Property Chapter of the CPTPP and specifies that trade secrets include, at the minimum, undisclosed information, as provided for in Article 39.2 of the Trade-Related Aspects of Intellectual Property (TRIPS Agreement). The unauthorised acquisition, use, or disclosure of such secret information in a manner contrary to honest commercial practices is a violation of the protection of trade

137. Document C1, pp 8–9 at [24.2]
138. *Prima facie* translates to 'at first sight'.
139. Submission 3.3.61, pp 50–51 at [142]–[146.2]
140. Submission 3.3.60, p 68 at [12.37]

Article 14.17

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:
   (a) the inclusion or implementation of terms and conditions related to the provision of source code in commercially negotiated contracts; or
   (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.
4. This Article shall not be construed to affect requirements that relate to patent applications or granted patents, including any orders made by a judicial authority in relation to patent disputes, subject to safeguards against unauthorised disclosure under the law or practice of a Party.

secrets.[141] As such, the Government cannot compel any person or entity to reveal trade secrets.

Articles 9.10.1(f) and 18.78 are part of the context to Chapter 14, with a degree of overlap between them. We will consider the relevance of such content and overlap as part of the source code assessment, insofar as they are relevant to the Crown's ability to require the disclosure of source code to investigate how Māori data is used.

5.4.1 The parties' positions

5.4.1.1 *The claimants' position*

The claimants argued that Article 14.17 obstructed the access Māori need to protect their rights and interests. They noted that in order to achieve the access integral to an effective Māori digital regime, they would likely have to depend on a comprehensive exclusion which applies across the entirety of Chapter 14.[142] They submitted that, at present, no such exclusion exists.[143]

The reasons for accessing source code could include seeing how Māori data is used and whether it is used in discriminatory ways. This raises practical issues

141. 'Trade Secret Basics', World Intellectual Property Organization, https://www.wipo.int/tradesecrets/en/tradesecrets_faqs.html, accessed 10 September 2021
142. Submission 3.3.60, p 69 at [12.40]
143. Ibid

concerning how you would determine source code was non-compliant, that is, functioning 'badly', without being able to access that source code in the first place. It follows that, if Aotearoa New Zealand were unable to access source code to identify issues, then those issues would likely not be capable of correction.

5.4.1.2 *The Crown's position*

The Crown submitted that the evidence of Professor Mitchell should be preferred. He took the view that source code is accessible for certain regulatory and judicial purposes. Crown counsel argued the claimants had not provided sufficient evidence to prove that Article 14.17.1 would be interpreted to prevent authorities from requiring source code disclosure. Overall, the Crown maintained that it is possible to require the disclosure of source code for the purpose of inquiries, investigations, or juridical proceedings.[144]

5.4.2 Exceptions contained in Article 14.17

Article 14.17 contains two exceptions. These are found at clauses (3)(a)–(b) and concern commercially negotiated contracts and the modification of source code necessary to comply with laws or regulations that are not inconsistent with the CPTPP:

> 3. Nothing in this Article shall preclude:
>
> (a) the inclusion or implementation of terms and conditions related to the provision of source code in commercially negotiated contracts; or
>
> (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.

Professor Mitchell and Professor Kelsey agreed that Article 14.17.3(b) permits Parties to require the modification of the source code of software in order for that software to comply with laws and regulations which are not inconsistent with the CPTPP. This includes laws or regulations designed to protect privacy or prohibit racial discrimination. However, Professor Kelsey noted that Article 14.17.3(b) only applies to modification after non-compliance has been identified. She asserted that this does little to address the issue of identifying non-compliance in the first place.[145]

Article 14.17.3(b) states that modification of source code is possible in order to comply with law that is consistent with the CPTPP. The claimants noted that a determination regarding what is consistent with the CPTPP and compliant with domestic law will necessarily involve a complex assessment.[146] This assessment creates a barrier to modification. The claimants asserted that even though modification for the purpose of legal compliance is allowed, this does not automatically

144. Submission 3.3.61, p 52 at [152]–[153]
145. Document C3, p 35 at [108]
146. Submission 3.3.60, pp 68–69 at [12.39]

translate to the Crown having the ability to require disclosure for purposes outside of strict legal compliance. The claimants drew attention to Professor Mitchell's JIEL article, where he suggested the following:

> certain countries fear that algorithms and technical codes underlying digital services may be discriminatory, insecure, or allow unauthorized access to certain countries or groups, and therefore should be scrutinized further. To address the above concerns, WTO law should prohibit forced disclosure of source code(s) and algorithm(s) but *subject to an exception allowing governments to access this information for regulatory purposes such as checking for discriminatory algorithms, auditing security of digital services, and for judicial proceedings or government investigations*. [Emphasis in original.][147]

Professor Mitchell noted Article 19.16.2 of USMCA is a good example of an exception expressly stating that the disclosure of source code for the purpose of investigation is possible:

> 1. This Article does not 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 proceeding, subject to safeguards against unauthorized disclosure.[148]

This Article also includes, in a footnote, a statement that 'disclosure shall not be construed to negatively affect the software source code's status as a trade secret, if such status is claimed by the trade secret owner'. Unlike USMCA, the CPTPP does not contain a clear statement that inquiries, investigations or juridical proceedings may require the disclosure of source code. As a result, Professor Kelsey asserted that

> if we cannot require the disclosure of the source code to investigate the problems that might be intrinsic to the source code, we have a difficulty being able to show breaches of what might be relevant laws that arise from the way that source code is structured.[149]

Indeed, while Article 14.17.3(b) provides for the modification of source code, it does not expressly allow the Government to require source code for the specific purpose of investigating compliance. The claimants stated that to date, there is no provision that enables non-government parties, such as Māori, access to source

147. Submission 3.3.60, p 68 at [12.38]
148. Document C2, p 58 n; 'Agreement between the United States of America, the United Mexican States, and Canada 7/1/20 Text', https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between, accessed 10 September 2021
149. Trancript 4.1.9, p 191 at [5]

code and that, even if the Government were to attempt to ensure access, this would be difficult to achieve within the exceptions and exclusions offered.[150]

Professor Mitchell asserted that outside of the exception contained in Article 14.17.3(a), Article XIV(c) of GATS (imported via Article 29.1.3 of the CPTPP), concerning public morals, would still permit Parties to take necessary measures to ensure compliance with laws and regulations that were otherwise consistent with the CPTPP.[151] Presumably, this includes the modification of source code.

5.4.3 Government procurement and government information (Article 14.2.3)

Articles 14.2.3(a) and (b) exclude government procurement and government information from Chapter 14. This means that when a government entity of a CPTPP Party acquires digital products and services for the discharge of government responsibility or public functions, it falls outside of obligations contained in the e-commerce chapter. Additionally, the chapter does not apply where a government itself processes information or engages with a commercial entity to hold or process information on its behalf.

The Crown argued that Articles 14.2.3(a) and (b) mean Māori will not lose the ability to control the collection, use, and distribution of important information relating to health, personal privacy, or enforcement data.

In relation to these exclusions, the experts agreed that:

- Article 14.2.3(a) would still apply even where the Government made some charge, short of a commercial charge, for the onsale or resale of goods or services it had procured;
- an understanding of the term 'on behalf of' contained in Article 14.2.3(b) would be context specific; and
- the Treaty exception would protect preferential procurement when that procurement relates specifically to Māori.[152]

In light of this consensus, the Crown considered that the primary concerns of the claimants regarding Articles 14.2.3(a) and (b) relate specifically to:

- whether Article 14.2.3(a) extends to the use of a procured product or service; and
- whether anonymised data or health data held by joint ventures between public agencies and private enterprise fall within the scope of Article 14.2.3(b).[153]

We explore these issues further in order to decide whether the Government could require source code as part of the procurement process.

5.4.3.1 *Government procurement*

Article 1.3 defines government procurement as: '[t]he process by which a government obtains the use of or acquires goods or services . . . for governmental

150. Submission 3.3.60, p 69 at [12.40]
151. Document C2, p 59 at [137]
152. Submission 3.3.61, p 53 at [157]
153. Ibid, pp 53–54 at [158]

purposes and not with a view to commercial sale or resale or use in the production or supply of services for sale or resale.'[154]

Professor Kelsey noted that this definition makes clear that government procurement refers to the process of procuring, as opposed to the product eventually procured.[155] She considered that Article 14.2.3(a) does not 'override' the rule preventing the disclosure of source code. She noted that this raised issues as to how the Crown would identify biases or other 'problematic' elements which it may want disclosed 'for the purposes of investigation.'[156]

Professor Kelsey's interpretation contrasts with Professor Mitchell's, which considered that the activities of the Government following procurement, specifically, the use of a good or service post-acquisition, are also excluded from Chapter 14.[157] The Crown was of the opinion that no practical or identifiable concerns arose from this difference in interpretation.[158]

Professor Kelsey explained that the procurement process is limited by other aspects of the definition, such as the fact that procurement is for government purposes and not for commercial sale or resale.[159] In their evidence, the experts considered what the term 'commercial' connotes, as well as what 'with a view to commercial sale' includes. Professor Mitchell said: '[t]he term "commercial" connotes an arms-length transaction between a willing seller and a willing buyer, and may also be demonstrated by the use of market prices or a profit orientation on the part of the seller'.[160]

Professor Mitchell gave an example of conduct that would not be considered 'commercial' in the sense of Article 14.2.3(a). He explained that a government which obtained medical devices may on-sell these to patients with the goal of discharging a public function as opposed to making a profit.[161] In such a situation, procurement would occur for governmental purposes with the view to sell, but this sale would not be 'commercial'. In contrast, if those medical devices were obtained with the view to sell and maximise profit, or compete with private sellers, then this would likely be considered 'commercial'.[162]

In Professor Kelsey's view, an exploration of the term 'commercial' was not a critical issue. She instead drew attention to the term 'with a view to commercial sale', asserting that this reference reinforces that the definition of government procurement only covers the process of procurement and not the acquisition and subsequent use of goods and services. She said, once a product was procured, the Crown could not require the disclosure of source code. As a result, the claimants

154. Comprehensive and Progressive Trans-Pacific Partnership Agreement, Art 1.3
155. Transcript 4.1.9, p 51 at [10]
156. Ibid, pp 51–52 at [30]–[35]
157. Submission 3.3.61, p 54 at [159.1]
158. Ibid, p 54 at [161]
159. Transcript 4.1.9, p 51 at [10]
160. Document C2, p 19 at [55]
161. Ibid, p 19 at [56]
162. Ibid

asserted that Article 14.2(a) would not exclude source code for goods and services procured by governments from obligations under Article 14.17.[163]

5.4.3.2 *Government information*

Information processed 'by or on behalf of' the Government is not within the scope of the e-commerce chapter. The experts agreed that the interpretation of Article 14.2.3(b) is largely dependent on the facts of a given case. The claimants proposed a number of hypothetical situations in which the Article 14.2(b) exclusion would or would not apply.

The claimants described a project run by Data Ventures, the commercial arm of Statistics New Zealand, as an example of a situation that might fall outside of the exclusion. This project, which uses the Spark and Vodafone national networks, accesses 'anonymised' cell-phone tower data in order to measure population density. This population density information is then sold back to the Government. The claimants asserted that this data and its potential uses could be highly sensitive to Māori. However, it would still fall outside of the government information exception.[164]

Dr Donna Cormack raised further concerns about the scope of the exception, which related to issues of data transfer, data storage, and local presence. Using the example of private firms in the health sector working alongside public research organisations that store and utilise data offshore for commercial reasons, she noted:

> When a private company analyses data, the control over and movement of that data is beyond the control of those Māori to whom it relates. A Māori collective to whom that health data relates will want that information held within the country under control of Māori, or at least subject to Māori governance protocols. That raises potential breaches of the data transfer, data storage and local presence provisions of the TPPA/CPTPP.[165]

In addition to situations outside of the exception, the claimants also described a situation in which they consider the exception would apply. They considered that where the Government is an active player in a joint venture with a private firm collecting and processing Māori data, this will fall squarely within the exception. As an 'active player', the Government would have to be involved in all activities, including determining the mode of collection and the use of the data concerned.[166]

Responding to these examples, the Crown submitted that it is not inhibited from requiring source code in any instance. In respect of the joint venture concerning anonymised cell phone data, the Crown asserted that this is a 'domestic issue

163. Submission 3.3.60, pp 56–57 at [11.5]–[11.7]
164. Ibid, p 58 at [11.13]
165. Ibid, p 58 at [11.14]
166. Ibid, pp 58–59 at [11.15]

Article 14.2: Scope and General Provisions

. . . . .

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.

between domestic entities'.[167] As such, there is nothing to prevent it from requiring any transfer of data. Further, the Crown contended that it maintains the ability to require the use of data is undertaken in a way consistent with Māori interests. In a situation where data usage is inconsistent with Māori interests, the Crown argued that it can simply exercise its refusal to purchase such data.[168] In terms of the other situations proposed, the Crown asserted that interests can be managed as a matter of contract, noting that the CPTPP does not prohibit the disclosure of source code as a contract condition.[169] In addition, the Crown observed that hypothetical situations considering when and how government information might be subject to disclosure are insufficient proof that prejudice to Māori is 'likely'.[170]

5.4.4 The General Exception and Article 14.17

As outlined at section 5.3.6, the General Exception is imported *mutatis mutandis* (with things changed that should be changed) into the CPTPP. The Crown asserted that CPTPP Parties can use Article XIV(c), the public morals exception, to justify a measure which requires the transfer of or access to source code owned by another person or Party.[171]

The Crown relied on Professor Mitchell's evidence, which spoke to the effectiveness of the GATS General Exceptions. As noted previously, only two claims concerning the GATS General Exceptions have ever been successfully brought before the WTO. This is why, in part, the claimants doubted the efficacy of relying on the GATS exception to justify a measure which requires the disclosure of source code.

5.4.5 The Treaty of Waitangi exception and Article 14.17

The claimants accepted that a procurement process for digital services or products that gives preference to Māori was likely to fall within the Treaty exception. However, they saw potential risk in the fact that preference given to Māori during

167. Submission 3.3.61, p 55 at [165.1]
168. Ibid
169. Ibid, pp 55–56, 57 at [165.2], [170.2]
170. Ibid, p 57 at [170]
171. Transcript 4.1.9, p 357 at [15]

Article XIV of the General Agreement on Trade in Services

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:

(a) necessary to protect public morals or maintain public order;
(b) necessary to protect human, animal or plant life or health;
(c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to . . .

the procurement process could still be challenged as arbitrary or unjustifiable discrimination between suppliers of other Parties.[172] They argued that, while such a finding would be contrary to the purpose of the exception itself, it is still a likely possibility. As an example, they described a problematic situation that 'could arise if procurement from Australia was excluded from [the] preferential arrangement for Māori' and other TPPA/CPTPP Parties objected on this basis. For the claimants, this is more than a simple hypothetical, but a 'real possibility' as a procurement protocol between Australia and New Zealand already exists. This partnership is enshrined in the Closer Economic Relations agreement (CER), which runs alongside the CPTPP. Notably, this agreement lacks a Treaty exception.[173] The claimants theorised that the unwillingness of central and local government to procure digital products and services from Māori could be symptomatic of the obligations agreed to in the CER agreement.[174]

The claimants conceded that the Treaty exception is likely to provide protection for measures which give preference to Māori content and producers. They were concerned that the exception would not protect a regime of Māori Data Sovereignty, Māori Data Governance, or collective privacy that overtly breaches rules, including those relating to source code.[175]

5.4.6 The Traditional Knowledge clause

The Traditional Knowledge clause applies across the CPTPP as a general provision. While the Crown argued that this clause could form the basis of a legitimate public policy exception in relation to Articles 14.11 and 14.13, its application to the

172. Submission 3.3.60, p 57 at [11.8]
173. Ibid, p 57 at [11.9]
174. Ibid
175. Submission 3.3.63, p 15 at [1.32]

Article 29.6: 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. Chapter 28 (Dispute Settlement) shall otherwise apply to this Article. A panel established under Article 28.7 (Establishment of a Panel) may be requested to determine only whether any measure referred to in paragraph 1 is inconsistent with a Party's rights under this Agreement.

Article 29.8 Traditional Knowledge and Traditional Cultural Expressions

Subject to each Party's international obligations, each Party may establish appropriate measures to respect, preserve and promote traditional knowledge and traditional cultural expressions.

interpretation of Article 14.17 would be different, as that Article does not have an express legitimate public policy exception.

Professor Kelsey contended that, because the clause is 'subject to each party's international obligations', the clause is of no practical effect.[176] Professor Mitchell, in contrast, generally relied on the Traditional Knowledge clause as contributing to the Crown's overall approach that there are enough exceptions to enable it to regulate in relation to Māori interests.[177]

5.4.7 Tribunal analysis: Can the Crown require the disclosure of source code utilising exceptions and exclusions?

We agree with the Crown that the purpose of Article 14.17 is to:

(a) protect the rights of a person who has developed software to earn revenue from that software, and to;

176. Transcript 4.1.9, p 68 at [15]
177. Ibid, pp 361–362 at [30]

(b) prevent a Party from compelling the transfer of or access to source code of another Party as a condition for doing business in that Party's territory.[178]

We understand that a developer of code in Aotearoa New Zealand, or elsewhere, could want to protect the code they had developed from being taken and used. However, we also see a risk that this protection may foreclose the ability to require the disclosure of source code for a range of regulatory purposes outside of maintaining the value of the code.

The Crown argued that source code can be accessed by regulatory or judicial bodies for the purposes of inquiries, investigations, or juridical proceedings. If so, the threshold for access to source code could be relatively high. The Crown argued that being discoverable to official inquiry in this way constitutes access. We are not so sure.

The claimants contended the Crown's ability to require the disclosure of source code, even at the more serious end of the spectrum, is significantly inhibited by Chapter 14 and therefore insufficient to comply with its Tiriti/Treaty obligations. They noted that this is why agreements like USMCA now make explicit that source code can be disclosed for specific investigation, inspection, examination, enforcement action, or judicial proceedings.[179] In turning our attention to USMCA, which clarifies the circumstances under which source code can be disclosed, we are also cognisant of Aotearoa New Zealand's RCEP and DEPA agreements, which omit source code protection provisions entirely. The effect of these omissions might be that member-states are, subject to contractual arrangements and trade secrets, able to require such transfer or access to source code, which Article 14.17 of the CPTPP precludes.

Dr Kilic noted that the CPTPP limitations relating to the disclosure of source code 'restrict public oversight and accountability and create a barrier to due process'. She argued that:

> Trade-secrets protections for source code may reinforce existing prejudices and inequalities through a 'techno-social divide' and act as a barrier to information, which fundamentally affects human rights and social justice issues including bias, discrimination, and equity.[180]

This commentary echoes the concerns of the claimants. The situations they envisaged in which source code disclosure would be necessary, relate to issues of bias, discrimination, and equity. We are unsure that source code can be required in situations that involve law-breaking and are even less clear as to whether the Crown can, in fact, require access to source code for situations beneath this threshold.

178. Submission 3.3.61, pp 48–49 at [136]

179. USMCA, Article 19.16(2), https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/19-Digital-Trade.pdf

180. Kilic, 'Digital Trade Rules'

In terms of bias or racial profiling in software, we are not confident that source code would be available to our domestic judicial and regulatory authorities so as to detect the bias or issue in the first instance. Under te Tiriti/the Treaty, the Crown has a responsibility to ensure software imported, distributed, sold, or used in Aotearoa New Zealand does not harm, discriminate against, or cause prejudice to Māori.

As outlined in chapter 2, article 2 of te Tiriti guarantees that the Crown will take active steps, within its power, to protect Māori rights and interests. We are concerned that the Crown is precluded from requiring the disclosure of source code and, as a result, is inhibited from taking appropriate steps to protect Māori rights and interests. This is because the policy space, supposedly retained by the CPTPP exceptions and exclusions, appears relatively limited in relation to source code. That is to say, we are not confident that source code could be required in situations related to law-breaking, let alone the detection or correction of bias or prejudice.

Even if source code could be required as a condition for government procurement, the problem of the Government's limited ability to provide oversight of mass-market software sold in New Zealand would still remain an issue.

5.5 Is Regulatory Chill Operating and, If So, Does it Interfere with the Adoption of a Tiriti/Treaty-Consistent Domestic Regime?

The most recognised form of regulatory chill arises from direct threats to litigate. However, regulatory chill encompasses more than just this threat, including what Professor Kelsey described as a 'systemic form.'[181] She said this systemic chill occurs when considerations are internalised through the Government's policy criteria and procedures.

In our Stage One report, the focus was on the chilling effect created by investor–State dispute settlement (ISDS); that is, the effect that either actual or potential litigation has on government action. In this stage of our inquiry, regulatory chill has a broader application.

Previously, we cited 'Expert Paper #5: The Economics of the TPPA', which noted that the true essence of the chill process is threat, not necessarily the actualisation of repercussions. The threat is compounded by uncertainty over:

- how serious the threat is;
- the outcome of legal proceedings in which novel decisions are made – especially when those decisions do not have to follow precedent, lie outside of a country's jurisdiction, and may be following unfamiliar legal rules; and
- whether the policymaker's democratic mandate might suffer at the hands of the electorate if a dispute with a foreign corporation turns ugly.[182]

The Stage One report also registered concerns about the breadth of rights conferred upon foreign investors by the TPPA and the potential chilling effect that this may have on Tiriti/Treaty-compliant Crown conduct. While we did not make

181. Submission 3.3.60, pp 38–39 at [8.3]
182. Waitangi Tribunal, *Report on the Trans-Pacific Partnership Agreement*, p 44

findings about the extent to which an ISDS under the TPPA may cause prejudice to Māori Tiriti/Treaty rights and interests, we defined the chilling effect as meaning governments would be deterred from passing laws or making policy by the threat or the apprehension of an ISDS claim.[183] The claimants in this inquiry argued that the chilling effect extends beyond the risk of an ISDS claim, to include the risk of multiple interventions during both the policy and legislative process. As they noted:

> The risk is not just that the Crown would lose a dispute if another TPPA/CPTPP Party challenged it before a trade tribunal. There is a significant likelihood of interventions at various stages of the policy and legislative process by foreign corporations and their governments, which is supported by recent evidence of foreign corporate and state pressure on governments in the adoption of digital policies. That pressure is designed to chill the decision making process. The risks of threatened or actual state-state and investor–state disputes, would intensify should the US re-engage with the TPPA. The examples cited by the Crown to negate the risk of chill are either wrong or not substantiated by evidence.[184]

The Trade For All Board also took the position that regulatory chill as a concept transcends ISDS, acknowledging that 'in theory, regulatory chill extends beyond regulation and includes suppression of other forms of government action'. The Trade for All Board listed a series of reasons for regulatory chill, beyond ISDS, including:

- the fear of capital flight;
- the influence of lobbying, in particular, action taken by large multinationals concerned at the precedent effect of new regulation in a market;
- a 'race to the bottom' on, for example, environmental regulation to maintain trade competitiveness; and
- uncertainty by officials and government about the extent to which trade agreements allow regulation.[185]

The Trade for All Board acknowledged that, while studies into the extent of regulatory chill have been conducted, findings are inconsistent. In the Aotearoa New Zealand context, they noted that proponents of the chill theory express two sets of concerns. First, Aotearoa New Zealand may want to pursue policies inconsistent with its commitments in trade agreements. Examples provided by the Trade for All Board included:

- government funding schemes to firms – including Māori firms or sectors with a large Māori commercial presence;
- local content requirements in broadcasting; and
- the introduction of a royalty on exports of bottled water.[186]

183. Ibid, p 41
184. Submission 3.3.60, p 81 at [15.9]
185. Document B23, p 43 at [70]
186. Ibid, p 43 at [71]

Secondly, the Trade for All Board noted that a combination of factors can lead to a degree of regulatory chill in certain sectors. The Trade for All Board provided a list of areas where concerns have been raised in relation to regulation and government protection. The Treaty of Waitangi exception provision appeared on this list. The Trade for All Board explained:

> While the exceptions are broad and have consequently been hard to negotiate, their exact parameters are at least open to contest by other countries. In some circumstances an unwillingness to have them tested could lead to some policy options not being available.[187]

The Crown, in contrast to the claimants and the Trade for All Board, took a limited view of regulatory chill, saying that it only applies to ISDS. Crown counsel noted that Chapter 14 obligations are subject only to State-to-State disputes, and that it would be surprising for other CPTPP parties to act in an adversarial manner where Aotearoa New Zealand was only seeking to adopt measures that protect and advance Māori interests.[188] As such, the Crown suggested the prospect of chill in relation to regulatory actions carried out by Aotearoa New Zealand was merely speculative.[189]

The Crown has also drawn attention to the fact that MFAT, as the expert trade agency that negotiated the CPTPP accords, considers domestic regulatory space has been maintained. Crown counsel pointed to the evidence of Mr Vitalis, who affirmed that any necessary measures to protect Māori Tiriti/Treaty interests in relation to e-commerce could be introduced.[190] Such measures could be justified through the range of exceptions negotiated as part of the CPTPP.[191] The Crown asserted that it would be 'surprising' if MFAT was not consulted as to whether proposed measures would have an adverse impact on Māori interests, prior to the introduction of any such measures. Ultimately, the Crown and MFAT maintained that domestic policy measures can be introduced and doing so would not breach commitments under the CPTPP.[192] The Crown took the position that the exception provisions are effective in Tiriti/Treaty terms by actively protecting space for necessary domestic policy and constitutional dialogue.[193]

The Trade For All Board noted that, in defining Aotearoa New Zealand's trade objectives, MFAT should develop mechanisms that provide foresight that enables it to take an 'anticipatory governance' approach.[194] In this way, the Government will be able to ensure FTA's support policy objectives without foreclosing regulatory space.

187. Document B23, p 43 at [72]
188. Submission 3.3.61, p 63 at [190]
189. Ibid, p 63 at [191]
190. Ibid, p 65 at [197]
191. Document C1, p 2 at [6]
192. Submission 3.3.61, p 65 at [197]
193. Ibid, p 67 at [206]
194. Document B23, p 18

What are State-to-State disputes?

A State-to-State dispute arises when a government believes another member government is violating an agreement or commitment that it has made.

Disputes about the CPTPP, other than disputes arising from the investment chapter, can only be subject to State-to-State dispute settlement.

5.5.1 Dispute resolution mechanisms

5.5.1.1 *State-to-State disputes*

Professor Mitchell argued minimal regulatory chill would arise from the e-commerce provisions. He noted that the 'chill phenomenon' generally arises in the context of an investor–State dispute settlement in which

> discussions of 'regulatory chill' often pertain to investment treaties whose obligations may be drafted in somewhat imprecise and capacious terms, which in turn give rise to the possibility of a broad range of interpretations, thereby creating uncertainty on whether a given regulatory action could be found impermissible within that range of interpretations.[195]

In contrast, Professor Mitchell asserted regulatory chill is less likely to arise from State-to-State dispute settlement as it would be 'surprising' for any Party to react in an adversarial manner to measures adopted by Aotearoa New Zealand to advance Māori interests. Instead, it could be expected that dialogue between Parties would occur before State-to-State litigation was pursued.[196]

Professor Kelsey agreed with Professor Mitchell that states are less likely to bring disputes than investors. However, she noted that this likelihood is shifting, with some states having 'become more belligerent, especially in the context of an evolving digital trade war'.[197] She recognised that the number of CPTPP states which could threaten action against Aotearoa New Zealand was limited. However, she maintained that such action remained a possibility.[198]

There are two dispute settlement bodies that are of relevance to State-to-State disputes. The first is the World Trade Organization (WTO), whose interpretation approach Professor Mitchell discusses. Secondly, the dispute resolution process outlined in Chapter 28 of the CPTPP. We provide information on the dispute settlement mechanics of both bodies.

195. Document C2, p 13 at [38]
196. Ibid, p 14 at [41]
197. Document C3, p 29 at [89]
198. Ibid, p 30 at [91]

Stage of process	Explanation of process
First stage *(Up to 60 days)*	The first stage of the dispute process is consultation. Before taking any further action, the disputing parties must talk to each other and see whether their differences can be settled. If consultation in the first instance fails, either party can ask the WTO director-general to mediate or offer assistance in another form.
Second stage *(Up to 45 days)*	If consultations fail, the complaining country can ask for a panel to be appointed. The country 'in the dock' can block the creation of a panel once, but when the dispute settlement body meets for a second time, the appointment can no longer be blocked, unless a consensus against appointment has been reached. The panel helps the dispute settlement body make rulings and recommendations. Because the panel's report can be rejected only by consensus in the dispute settlement body, its conclusions are difficult to overturn. The panel's findings have to be based on the agreements cited. The panel's final report should be given to parties within six months. In cases of urgency, the deadline is shortened to three months. The agreement describes in some detail how the panels should work. The main stages are: ***Before the first hearing:*** Each side in the dispute presents its case in writing to the panel. ***First hearing – the case for the complaining country and defence:*** The complaining country (or countries), the responding country, and those that have announced an interest in the dispute, make their case at the panel's first hearing. ***Rebuttals:*** The countries involved submit written rebuttals and present oral arguments at the panel's second meeting. ***Experts:*** If one side raises scientific or other technical matters, the panel may consult experts or appoint an expert review group to prepare an advisory report. ***First draft:*** The panel submits the descriptive (factual and argument) sections of its report to the two sides, giving them two weeks to comment. This report does not include findings and conclusions. ***Interim report:*** The panel then submits an interim report, including its findings and conclusions, to the two sides, giving them one week to ask for a review. ***Review:*** The period of review must not exceed two weeks. During that time the panel may hold additional meetings with the two sides. ***Final report:*** A final report is submitted to the two sides and three weeks later, it is circulated to all WTO members. If the panel decides that the disputed trade measure does break a WTO agreement or an obligation, it recommends that the measure be made to conform with WTO rules. The panel may suggest how this could be done. ***The report becomes a ruling:*** The report becomes the Dispute Settlement Body's ruling or recommendation within 60 days unless a consensus rejects it. Both sides can appeal the report.

Table 2: The World Trade Organization's dispute settlement process

Source: 'Understanding the WTO: Settling Disputes', World Trade Organization, https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm, accessed 17 September 2021

Stage of process	Explanation of process
First stage	An appeal is commenced upon written notification to the Dispute Settlement Body and the simultaneous filing of a notice of appeal with the Appellate Body Secretariat. On the same day this notice of appeal is filed, the appellant must also file a written submission. A party to the dispute that wishes to respond to the allegations raised by the appellant may file its own written submission, within 18 days of the filing of the notice of appeal and the appellant's submission.
Oral hearing	An oral hearing is held. Appellants, other appellants, appellees, and third participants are given an opportunity to present oral arguments and to respond to questions put to them by the Appellate Body Division hearing the appeal. The hearing generally takes place within 30 to 45 days of the filing of the notice of appeal.
After hearing	Before finalising the Appellate Body report, the Appellate Body Division hearing the appeal exchanges views with the other four Appellate Body members.
Report release	The Appellate Body report is circulated to WTO members within 90 days of the date when the notice of appeal was filed. In its report, the Appellate Body may uphold, modify, or reverse the legal findings and conclusions of the panel.
Adoption	Within 30 days of the circulation of an Appellate Body report, the report, together with the panel report, as upheld, modified, or reversed, will be put on the agenda of a Dispute Settlement Body meeting for adoption. The Dispute Settlement Body will adopt the reports, unless it decides by consensus not to adopt them. An adopted Appellate Body report, together with the adopted panel report, must be unconditionally accepted by the parties to the dispute.

Table 3: The World Trade Organization's appellate procedure
Source: 'Dispute Settlement: Procedures', World Trade Organization, https://www.wto.org/english/tratop_e/dispu_e/ab_procedures_e.htm, accessed 13 October 2021.

5.5.1.2 *The relevance of investor–State dispute settlement (ISDS)*

While all parties agreed that the provisions in Chapter 14 (Electronic Commerce) are subject to State-to-State dispute resolution, the claimants also perceived a risk of investor–State disputes. They based this on Professor Kelsey's evidence that

> measures adopted by the Crown to comply with its Tiriti obligations that, for example, restrict data and digital operations and operators could be challenged under the TPPA investment chapter, *where the company or its intellectual property qualifies as an investor or investment*. [Emphasis added.][199]

199. Document B25, p 19 at [62].

Stage of process	Explanation of process
Consultation (*Article 28.5*)	Any Party can request consultation with another Party, so long as it relates to a matter within scope. Scope is set out at Article 28.3. The Party receiving the request, shall reply no later than seven days after receipt. Unless otherwise agreed, both Parties should enter consultation within 30 days. Both Parties shall make every attempt to reconcile.
Establishing a panel (*Article 28.7*)	If the consulting Parties fail to resolve a matter, the complaining Party can request to establish a panel. Upon delivery of this request, a panel shall be established. A panel shall not be established to review a proposed measure.
Initial report (*Article 28.17*)	The panel shall present an initial report to the disputing parties no later than 150 days after the date of the date of the appointment of the final panelist. The initial report should contain: (a) findings of fact; (b) the determination of the panel as to whether: (i) the measure at issue is inconsistent with obligations in the agreement; (ii) a Party has otherwise failed to carry out its obligations in this agreement; or (iii) the measure at issue is causing nullification or impairment. (c) any other determination requested in the terms of reference; (d) recommendations, if the disputing Parties have jointly requested them, for the resolution of the dispute; and (e) the reasons for the findings and determinations.
Final report (*Article 28.18*)	The final report should be presented no later than 30 days after presentation of the initial report.
Implementation of the final report (*Article 28.19*)	The responding Party shall, whenever possible, eliminate non-comformity, nullification, or impairment of the measure. Unless otherwise agreed, the responding Party shall be given reasonable time to do so if doing so is not immediately practicable.

Table 4: Chapter 28 of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership

Professor Kelsey added that, despite the side letters Aotearoa New Zealand has secured with some other CPTPP countries exempting it from the ISDS provisions, 'an investor from Canada, Chile, Japan, Mexico or Singapore' could still bring such a dispute.[200] The Crown rejected this argument.[201]

Professor Kelsey explained that ISDS applies due to the nexus between Chapter 14 and Chapter 9 (Investment) where a minimum standard of treatment complaint could include a breach of a Chapter 14 obligation under Article 9.6.3, just not as

200. Document B25, pp 19–20 at [63]
201. Document C1, p 16 at [42]

What is investor–State dispute settlement (ISDS)?

Investor–State dispute settlement (ISDS) is a system by which investors can sue the country hosting their investment, if they feel that the investment has been damaged by the State.

This system exists by virtue of international agreements (such as the CPTPP) and Parties cannot be brought before the system unless they agreed to be subject to it.

its sole basis.[202] She noted agreement on this point between herself and Professor Mitchell, who stated in his brief of evidence:

> An investor cannot have recourse to investor–State dispute settlement (ISDS) under the CPTPP for a Party's breach of an obligation in Chapter 14. Only the breaches of the obligations in Chapter 9 (Investment) can be challenged through ISDS, as well as any obligations in non-treaty, investor-specific 'investment authorisations' and 'investment agreements' (see CPTPP, art 9.19(a)(i)). However, as discussed . . . below, a breach of an obligation in Chapter 14 can also imply a breach of an obligation in Chapter 9 due to a degree of overlap between the two.[203]

The claimants filed a question in writing for Professor Mitchell, given his overall argument that ISDS claims cannot be brought for breaches of Chapter 14.[204] In response, Professor Mitchell reaffirmed his conclusion that an investor 'cannot have recourse to [ISDS] under the CPTPP for a Party's breach of an obligation in Chapter 14'.[205] He states that Professor Kelsey 'draws incorrect inferences from Article 9.6.3, which relates to the CPTPP's fair and equitable treatment standard'.[206] Of his earlier evidence, he clarified that it is important to contextualise his statement with his use of the phrase 'due to a degree of overlap between the two'.[207] He explained that 'certain fact patterns' may result in a breach of both Chapter 9 and Chapter 14 obligations due to 'a coincidence of partially-overlapping scopes'. However, in his view, a breach of Chapter 14 'cannot give rise to a breach of an obligation of Chapter 9' and therefore cannot form the basis of an ISDS claim.[208]

Claimant counsel characterised Professor Mitchell's explanation as unconvincing, for several reasons. First, they pointed out that the footnote in his brief of

202. Document B25(b), p 8 at [23]
203. Document C2, pp 6–7 fn 7
204. Submission 3.2.86
205. Document C2(d), p 2 at [3]
206. Ibid, p 2 at [4]
207. Ibid, p 3 at [6]
208. Ibid, pp 3–4 at [7]–[8]

evidence observed that 'the breach of an obligation in the e-commerce Chapter can also imply a breach of an obligation in the Investment Chapter'. This interpretation, counsel noted, differs from Professor Mitchell's later assertion that the footnote refers to an overlap in fact patterns that can result in a breach of both chapters.[209]

Secondly, in attempting to illustrate how the same 'fact pattern' might involve a breach of provisions in both the Investment and Electronic Commerce Chapters, Professor Mitchell referred to Article 9.10.1(f) and Article 14.17.1. Both these Articles involve moves by one Party to access technology owned by a person of another Party, which makes them conceptually similar. However, they are not the same 'fact pattern' and would not lead to a breach of both the investment and e-commerce rules. Claimant counsel noted that Article 9.10 deals exclusively with requirements imposed as a condition of investment, while Article 14.17 deals exclusively with conditions imposed for trading in software. Claimant counsel argued that these are not only factually, but also legally, distinct.[210]

Finally, claimant counsel drew attention to the fact that Professor Mitchell had earlier rejected Professor Kelsey's interpretation of Article 9.6.3: Minimum Standard of Treatment. However, the paper he cited in support of his argument affirmed Professor Kelsey's interpretation.[211]

Claimant counsel stressed that it is critical to the issue before the Tribunal that there is potential for an ISDS dispute that includes a breach of Chapter 14 obligations as part of an allegation which concerns fair and equitable treatment. They added that a dispute could potentially break out over allegations of expropriation or a breach of national treatment on similar grounds. They noted that 'critical' importance is not simply because Aotearoa New Zealand could still be subject to an ISDS dispute by countries like Japan or Singapore, but also because of 'the potential chilling effect of such risks on the adoption of contentious measures'.[212] Counsel noted that domestic policy measures adopted in relation to Māori Data Sovereignty, Māori Digital Governance, and collective privacy are likely to fall in the 'contentious' category.[213] Consequently, they are at higher risk of chill.

5.5.2 Crown and claimant examples assessing the risk of chill arising from Chapter 14

The Crown argued that no regulatory chill arises from Chapter 14. It referred to the Privacy Act 2020 and the localisation laws imposed by Brunei Darussalam and Vietnam as evidence that Aotearoa New Zealand maintains the ability to adopt new requirements despite obligations under the CPTPP. The claimants contested this assessment, arguing that the potential for regulatory chill is a real and

209. Submission 3.3.63, p 23 at [1.58]
210. Ibid, p 24 at [1.58]
211. Ibid
212. Ibid, p 25 at [1.59]
213. Ibid

practical risk. This risk, they noted, is heightened by the possibility that the United States may seek to rejoin the CPTPP in the future.

5.5.2.1 *The Privacy Act 2020*

Professor Mitchell used the replacement of the Privacy Act 1993 with the Privacy Act 2020 as an example of Aotearoa New Zealand's ability to adopt new requirements despite international obligations. He asserted that this showed that regulatory chill concerns, in the case of the CPTPP, are overstated.[214] He described the purpose of the new Act as protecting and promoting individual privacy by providing a framework for the protection of personal information, noting that changes introduced included:

- strengthening the powers of the Privacy Commissioner with regard to information gathering.
- deciding complaints on individual access to personal information; and
- providing a robust mechanism for overseas data transfers.[215]

Addressing the overseas transfer of data, Professor Mitchell raised the point that the Privacy Commission can prohibit the transfer of data overseas where it has 'reasonable grounds' to believe that personal data will not be protected outside of the country's borders. Additional benefits of the Act include that:

- it applies to all entities carrying out business in New Zealand, even where they do not have a physical presence in the country; and
- there is a mandatory privacy breach notification regime for breaches that may cause serious harm.[216]

Professor Mitchell asserted that these changes to the Act showed that, despite its obligations in CPTPP and other international trade agreements, Aotearoa New Zealand has the ability to adopt new requirements that enhance the power of its domestic privacy regulator. Furthermore, he noted that Aotearoa New Zealand maintained the ability to strengthen compliance requirements for businesses, including with respect to cross-border data transfers. Professor Mitchell speculated that it would be unlikely for other CPTPP Parties to act in an adversarial manner, such as State-to-State litigation, as a result of Aotearoa New Zealand adopting measures that advance Māori interests – especially where these measures were designed to minimise any negative trade effects to other Parties. He noted that, if other Parties were concerned about the trade effects of any measures Aotearoa New Zealand was considering implementing, they would likely enter into good faith consultation in the first instance. Even if the situation escalated to State-to-State litigation, the risks would differ from those of investor–State dispute settlement. The key difference in such a situation would be that investor–State dispute settlement typically involves monetary compensation for harm caused by the

214. Document C2, p 13 at [40]
215. Ibid, pp 13–14 at [40]
216. Ibid, p 14 at [40]

Treaty violation, while State-to-State dispute settlement under the CPTPP would be prospective and not require a back-payment.[217] The Crown argued that in light of these factors, it was 'not immediately apparent that the reasons for which some have speculated the existence of "regulatory chill" in relation to investment treaties would be valid with respect to regulatory actions by New Zealand to advance Māori interests'.[218]

Overall, Professor Kelsey found Professor Mitchell's argument problematic. She noted that, as she understood it, his argument was 'that the new Privacy Act 2020 shows that the TPPA/CPTPP did not chill the adoption of a new privacy law'. While she agreed with Mitchell that the new Privacy Act 2020 anticipates the possibility of imposing Aotearoa New Zealand's privacy law on an offshore digital supplier, she stated that a number of problems remain.[219]

The first issue Professor Kelsey raised related to enforcement. She conceded that Professor Mitchell was correct in asserting that there is a provision in the Act for offshore enforcement by an overseas privacy authority and that this authority would have the power to conduct investigations and pursue enforcement proceedings. However, complaints to the Privacy Commissioner would be determined within the jurisdiction of that authority. This means that Aotearoa New Zealand would not require the extraterritorial application of our privacy law, but would rely on the strength of the privacy law in that particular jurisdiction. Professor Kelsey noted that, while Article 14.8 (the personal information protection provision) requires that TPPA/CPTPP Parties have such privacy laws, there has not been a minimum standard set.[220] Consequently, it seems uncertain what privacy law would be applied by another jurisdiction and what effects, if any, this application would have in practice. In addition to this, Kelsey questioned whether a privacy authority in another jurisdiction would be open to, and capable of, comprehending Māori arguments concerning privacy.[221]

Professor Kelsey continued that even where a matter remained within Aotearoa New Zealand's jurisdiction, it would raise practical matters of service and legal problems related to securing submission of an overseas entity with no local presence in Aotearoa New Zealand to Aotearoa New Zealand's jurisdiction and enforcement of penalties. She provided examples of overseas enforcement issues, referring to national alcohol regulations regarding Facebook in France and the New Zealand Commerce Commission's pursuit of legal action against online ticket reseller Viagogo.[222] Professor Kelsey noted that the TPPA/CPTPP did not create these problems. However, she explained that further research would be required in order to assess whether the TPPA/CPTPP influenced the shape of the privacy provisions contained in the Act.[223]

217. Document C2, pp 14–15 at [41]–[42]
218. Ibid, p 15 at [42]
219. Document C3, pp 31–32 at [96]–[98]
220. Ibid, pp 31–32 at [98]
221. Ibid, pp 31–32 at [98]
222. Ibid, p 32 at [99]
223. Ibid, p 32 at [100]

Ultimately, Professor Kelsey drew attention to the fact that the claimants' argument is about securing a Tiriti/Treaty-compliant privacy law recognising Māori Data Sovereignty, Māori Data Governance, and collective privacy in a tikanga sense.[224] She asserted that such compliance does not exist under the Privacy Act 2020.[225] Instead, the uncertainty surrounding the provisions as they stand means that the TPPA/CPTPP could prove an obstacle for the adoption of a Tiriti/Treaty-compliant privacy law, while also creating real risks of regulatory chill.[226]

Furthermore, Professor Kelsey noted Professor Mitchell's suggestion that the outcome of an unsuccessful State-to-State dispute would not involve monetary compensation for harm caused by Tiriti/Treaty violation. She described being uncertain whether Professor Mitchell was suggesting that, because the outcome would not involve monetary compensation but would instead bring laws back into compliance, there would be less regulatory chill, despite the potential outcome being overturning of the measure itself.[227]

5.5.2.2 *Brunei Darussalam and Vietnam*

Professor Mitchell asserted that, if Professor Kelsey's argument concerning regulatory chill and the limitations on the right to regulate was completely accurate, then a global decline in data localisation provisions would have occurred. He noted that, instead, we have seen an increase. Professor Mitchell provided the examples of CPTPP member states and developing countries Vietnam and Brunei Darussalam imposing data localisation provisions as indicating such an increase, 'at least as per reports'.[228]

The claimants asserted that Professor Mitchell was wrong in using Brunei Darussalam and Vietnam as evidence that the TPPA/CPTPP had not constrained those countries' adoption of data localisation laws because:

- Brunei Darussalam is a signatory to both the TPPA and CPTPP. However, it has not yet ratified the agreement and it possibly may never do so. As a result, Brunei Darussalam is not constrained by TPPA/CPTPP obligations and can adopt data localisation laws without fearing action against it under the agreements. That is to say, Brunei is not chilled.
- Vietnam, which has ratified the CPTPP, has until 30 December 2023 to comply with its obligations under the agreement. Notably, the Vietnamese Law on Cybersecurity, which requires that certain data must be stored in Vietnam, was passed prior to the ratification of the CPTPP.[229]

The claimants put forward that Brunei Darussalam and Vietnam's adoption of data localisation law is not evidence of the absence of regulatory chill. Instead, claimant counsel put to Professor Mitchell that the Asia Internet Coalition strongly challenged Vietnam's data localisation and local presence rules, which included

224. Ibid
225. Ibid
226. Ibid
227. Ibid, p 32 at [101]
228. Document C2(b), p 5
229. Submission 3.3.60, pp 44–45 at [8.25]–[8.27]

big-tech global players such as Google, Twitter, Apple, Facebook, and Amazon.[230] Because these companies are non-State actors which emerged as major global economic players from the United States, the claimants said this is evidence that Vietnam has come under pressure from the United States technology industry, despite the United States not being a signatory to the CPTPP.[231]

Claimant closing submissions noted that these companies assert that they have secured changes in relation to data localisation laws in Vietnam and have done so alongside coalition partners such as Japan.[232] The claimants expect that these countries and companies can be expected to 'weaponise' the CPTPP to pressure Vietnam further, once application of the agreement is imminent.[233] They argued if such corporate and political pressure can come to bear on Vietnam, then it could also happen to Aotearoa New Zealand in response to attempts to implement law relating to Māori digital governance. Consequently, the claimants concluded that regulatory chill arising from the opposition, or potential for opposition, of such actors is not negligible, but a 'real and practical' risk.[234]

5.5.2.3 *The United States rejoining the CPTPP*

The Crown asserted that it is entirely speculative to suggest that regulatory chill may increase in the future just because the United States may seek to rejoin the renegotiated CPTPP.[235] It noted that in making this risk assessment, Professor Kelsey relied on the assumption that the United States would rejoin if changes were made. The Crown noted that these proposed changes would require Aotearoa New Zealand, and all other CPTPP parties, to agree with them. The Crown refused to accept an argument which was not only hypothetical, but contingent on other hypotheticals.[236]

According to Professor Kelsey, the possibility of the United States re-engaging with the CPTPP gives rise to additional risk. She noted that readoption of the TPPA/CPTPP has advocates within the Biden administration. Referring to a report from *Inside US Trade*, she theorised that President Biden would not allow the United States to join the agreement without ensuring changes intended to hold China 'accountable'.[237] Professor Kelsey believed this alluded to the strengthening of digital trade rules. She provided the example that the United States has launched 11 investigations into digital services taxes that it says are unfair under the Trade Act 1974. She took this willingness to raise opposition concerning digital trade to indicate that Tiriti/Treaty-based digital policy would draw threats or actual litigation from the United States and its technology corporations.[238]

230. Transcript 4.1.9, p 392 at [5]; submission 3.3.60, p 45 at [8.28]
231. Submission 3.3.60, p 45 at [8.28]
232. Ibid
233. Ibid
234. Transcript 4.1.9, p 392
235. Submission 3.3.61, p 64 at [195]
236. Ibid, pp 64–65 at [195]
237. Document B25(b), p 9 at [25]
238. Ibid

5.5.3 The Crown's negotiation mandate for the TPPA/CPTPP e-commerce provisions

Mr Vitalis told us that no single Government agency has the policy lead for issues relating to e-commerce and the digital economy, although MFAT leads the negotiation of e-commerce provisions in trade agreements.[239]

In the case of Chapter 14 of the CPTPP, Mr Vitalis told us that MFAT engaged with a variety of agencies with domestic responsibility for matters associated with and impacted by cross-border e-commerce.[240] The MFAT lead was accompanied throughout the TPPA/CPTPP negotiations by an expert policy advisor from the Ministry of Business, Innovation, and Employment (Communications and Information Policy Branch)(MBIE), and from time to time, by a policy expert from the Department of Internal Affairs (DIA). Active coordination was maintained during negotiations with a range of agencies with regulatory responsibility for issues under discussion in relation to Chapter 14.

In all, Mr Vitalis listed eight Government departments and agencies, including MBIE and the DIA, as having regulatory responsibilities relevant to e-commerce. Te Puni Kokiri was not among those listed, although it was noted as one of the agencies with a wider policy interest across the negotiations as a whole.[241]

Professor Kelsey noted in response that, while Mr Vitalis referred to mandated objectives, the mandate itself has not been provided. Professor Kelsey saw the mandate as part of the problem. It was her understanding that the Crown's negotiating mandate on e-commerce was to ensure that it was consistent with Aotearoa New Zealand's policy settings at the time. She noted:

> As with many countries, New Zealand's regulatory regime in relation to data and digital technologies, services and activities, is in a slow and perpetual state of catch-up with new developments, and discussions with Māori in relation to Te Tiriti and the digital domain also post-date that mandate.[242]

5.5.4 Tribunal analysis: the Crown's negotiation mandate for the TPPA/CPTPP e-commerce provisions

From the totality of evidence before us, we conclude that Māori rights and interests were not given much (or any) particular consideration in setting the negotiating mandate under which Aotearoa New Zealand's representatives negotiated and agreed to the e-commerce provisions in the TPPA and CPTPP.

We think Professor Kelsey was right to characterise this as part of the problem. We also think Professor Kelsey correctly infers, or understands, that the mandated objective appears to have been to ensure consistency with Aotearoa New Zealand's policy settings at the time. We see nothing to displace that inference, and developments that post-date the CPTPP, such as the Privacy Act 2020, DEPA, RCEP, and the

239. Document C1, p 19 at [53]
240. Ibid, pp 19–20 at [54]
241. Ibid
242. Document C3, p 16 at [46]

recently announced NZ–UK Agreement in Principle, all lend support to the view that Aotearoa New Zealand's policy in this important area is still evolving.

We have described throughout this report the considerable policy work that is underway across various Government agencies. This includes the work of Te Pae Tawhiti, which is designed to advance adoption by the Government of relevant recommendations from *Ko Aotearoa Tēnei* (Wai 262). We also note the constructive developments that have followed the establishment of Te Taumata, and those now underway as a result of the mediation agreement. These developments all post-date the negotiation and entry into the CPTPP by Aotearoa New Zealand.

The Crown has presented a vigorous case that the e-commerce provisions will not, of themselves, present significant risk to Māori. We are not convinced that reliance on exceptions and exclusions is sufficient to meet the active protection standard. We say this noting that the e-commerce provisions set a framework that advantages incumbent businesses, particularly multinational corporations, whose business model is based upon, or benefits from, unrestricted cross-border data-flows and the right to capture, store, and use such data.

It is clear that Aotearoa New Zealand, along with many other countries, is working hard to catch up with the speed and scale of technological innovation and change. While we understand and respect the logical force of Professor Mitchell's evidence concerning the probable interpretation of the e-commerce provisions in the CPTPP, it is simply not a sufficient answer to the problem arising from the fact that these provisions were adopted by Aotearoa New Zealand with minimal or no consideration of the Māori rights and interests guaranteed pursuant to te Tiriti/the Treaty. We see as particularly problematic the failure to appreciate or understand the link between data and mātauranga Māori, a taonga also guaranteed to Māori pursuant to te Tiriti/the Treaty and, in respect of which, the Crown has a duty of active protection.

If there had been a specific consideration of Māori Tiriti/Treaty rights in the formulation of Aotearoa New Zealand's negotiating mandate, with respect to the e-commerce provisions in the TPPA/CPTPP, we expect that it would have been brought to our attention.

We see this as important context for our consideration of the issue concerning the actual and potential operation of regulatory chill. Whilst we acknowledge that there have been very constructive developments since entry by Aotearoa New Zealand into the CPTPP, this policy work and the developing process of engagement with Māori on digital trade issues must necessarily be reactive to some degree to the framework already set in the CPTPP. This is not optimum and, in our view, increases the potential for prejudice arising from the operation of regulatory chill.

5.5.5 Tribunal analysis: does regulatory chill interfere with the adoption of a Tiriti/Treaty-compliant domestic regime?

Having considered the arguments before us, we agree with Professor Kelsey that the concept of regulatory chill extends beyond ISDS, encompassing the risk of potential impact on aspects of both the policy and legislative process. We

acknowledge that in relying on exceptions and exclusions to ensure adequate domestic policy space, some form of regulatory restraint and related regulatory chill is inevitably operating. The question then becomes whether these regulatory chilling factors operate to the extent that they interfere with the Crown adopting a Tiriti/Treaty-compliant domestic regime. As far as we are aware, Aotearoa New Zealand has not yet tested the boundaries of the e-commerce provisions despite the fact that it could pursue policies within the framework of its commitments under the CPTPP.

We recognise that Chapter 14 cannot directly form the basis of an ISDS claim. However, it is less clear whether a breach of a Chapter 14 obligation could constitute part of a minimum standard of treatment complaint under Article 9.6.3. Even if it should not, it does not seem that investors who can bring claims would necessarily feel this restraint. This, even if tangentially, contributes to the regulatory chilling effect and related risk to the Crown's ability to meet its Tiriti/Treaty obligations.

The Crown relies on the 2020 reforms to privacy law in Aotearoa New Zealand as illustrative of the absence of regulatory chill. The Privacy Act 2020 does not directly address Māori concerns. The chilling effect does not mean that there will not be legislation. So, while we accept the new Privacy Act 2020 anticipates the possibility of imposing Aotearoa New Zealand's privacy law on offshore digital suppliers, we also recognise the level of uncertainty surrounding application of these provisions. We note that this uncertainty inevitably contributes to the risk that a Tiriti/Treaty-compliant privacy law which recognises Māori Data Sovereignty, Māori Data Governance, and collective privacy could be inhibited by the CPTPP.

We find it difficult to accept the Crown's argument that examples of legislation enacted in Brunei Darussalam and Vietnam refute any possibility of regulatory chill. The claimants have argued consistently throughout the course of this inquiry that the interests of powerful multinational businesses, such as those represented in the Digital-2-Dozen, are advanced by the e-commerce provisions in the CPTPP at the expense of the rights of indigenous peoples to control their data and mātauranga. Defence of these business interests contributes to regulatory chill. 'Big-Tech's' willingness to challenge measures implemented by States has a chilling effect which, by its nature, is difficult to quantify.

We agree with the Crown that the United States rejoining the CPTPP is speculative. It, nevertheless, is a possibility and is another aspect of potential regulatory chill that is impossible to quantify. We consider that these sorts of risks are cumulative and thus whilst difficult to quantify are most likely to contribute to the psychological and systemic regulatory chill effects that the claimants have raised. Even though the United States rejoining the CPTPP is far from certain, its rejoining makes it possible for it to bring State-to-State disputes which, given its industry interests in e-commerce, it could well do.

Stage One of this inquiry recognised that we did not have the time, expertise, or evidence to make findings as to whether the investment regime in the TPPA/CPTPP was likely to impede the capacity, or willingness, of the Aotearoa New

Zealand Government to honour Tiriti/Treaty obligations.[243] This stage of our inquiry recognises that risk extends beyond the risk of an ISDS claim and includes the broader scope of regulatory chill across the policy and legislative process. We recognise the cumulative effect of these risks and the potential that they have to circumscribe the ability of the Crown to legislate in ways that would address Tiriti/Treaty interests in Māori Data Sovereignty, Māori Data Governance, and collective privacy.

The claimants and the Crown agreed that it is impossible to measure regulatory chill. The Crown therefore considered it is not a significant problem and that any risk is, at best, negligible. The claimants, in effect, saw that the difficulty of measuring the risk points to heightened risk. As Professor Kelsey noted 'By its very nature[,] it is impossible to know the extent of the chilling effect.'[244] Consequently, whether or not any regulatory chill impacts the Crown in such a way that it is inhibited from discharging its Tiriti/Treaty obligations is not straightforward, but it is also not the central question.

The argument at the centre of the claims before us is whether the standard of active protection has been met by the Crown in light of the potential risk posed to Māori by the e-commerce provisions. We see regulatory chill as potentially contributing to that risk.

5.6 Tribunal Conclusions on the Exceptions and Exclusions, Regulatory Chill, and Regulatory Flexibility

The Crown relied on the presence of several exceptions and exclusions to argue that there was appropriate policy space for Aotearoa New Zealand to regulate to address Māori interests – interests which we concluded Articles 14.11, 14.13, and 14.17 in the e-commerce chapter posed a *prima facie* risk to in chapter 4.[245]

We conclude that the presence of exceptions and exclusions in the CPTPP means that there is a possibility that the Crown can meet its Tiriti/Treaty obligations. However, we do not conclude that such a possibility is sufficient to mitigate existing risk. Cumulatively, we see the risk under the CPTPP as significant. This significance is underscored when considering that subsequent agreements both clarified and sometimes expanded on Aotearoa New Zealand's (and the other CPTPP Parties') e-commerce obligations following the uncertainty that the CPTPP made evident.

However, despite such developments, the Treaty exception remained identical in both DEPA and RCEP. Previously, we had questioned why Māori interests were not covered more extensively during TPPA/CPTPP negotiations. The response we received from the Crown was that Aotearoa New Zealand is a small country needing to take the opportunity to be involved in such an important trade agreement with some urgency. This inevitably involved acceding to some obligations that did

243. Waitangi Tribunal, *Report on the Trans-Pacific Partnership Agreement*, p 34
244. Document A1(a), p 811 at [4.25]
245. *Prima facie* translates to 'at first sight'.

not necessarily reflect our national interests, but which ran alongside a number of other obligations which did.

Stage One of our inquiry focused on the efficacy of the Treaty exception. As a result, we assume that it is well within the Crown's contemplation that the exception is subject to contest and calls for change. In agreements such as DEPA and RCEP, which involve smaller nations, we see the sense of urgency and opportunity that characterised involvement in the TPPA/CPTPP as significantly diminished. As a result, we view objections to changes intended to better account for Māori interests as less persuasive. We ask why reliance on exceptions, where reliance constitutes a base level of risk, are still the starting point for protecting Māori interests?

In our view, predominant reliance on exceptions falls short of the active protection standard. We noted earlier that *Ko Aotearoa Tēnei* (Wai 2562) describes how the duty of active protection becomes even more urgent considering the widening reach and rapid evolution of international instruments.[246] We see this urgency as further compounded by the speed of change in the digital sphere. This makes the active protection task something the Crown must be proactively and consistently engaged with. The Tiriti/Treaty standard remains that Māori interests must be protected to the extent that is reasonable and practicable in international circumstances. We are not convinced that with the CPTPP this standard has been met.

We recognise efforts have been made following the conclusion of the CPTPP to better account for Māori rights and interests. Notably:

- Te Taumata's role in the DEPA module on digital inclusion;[247]
- RCEP's recognition of the importance of prior and informed consent, access, and benefit sharing for attaining and using genetic resources, traditional knowledge, and folklore;[248] and
- the creation of Ngā Toki Whakarururanga following mediation, whose purpose is to enable effective Māori influence on trade negotiations.[249]

These efforts are positive ones. We note, as the Trade for All Board did, that trade agreements may not be the best way to deal with issues that arise in relation to digital trade – especially where they concern Māori rights and interests.[250]

With these developments in mind, coupled with the conclusions we have drawn about the policy space and consequent regulatory flexibility available in light of the exceptions and exclusions in the CPTPP, we now turn to our findings and conclusions.

246. Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims concerning New Zealand Law and Policy Affecting Māori Culture and Identity*, *Te Taumata Tuarua*, 2 vols (Wellington: Legislation Direct, 2011), vol 2, p 681

247. Ministry of Foreign Affairs and Trade, *Digital Economy Partnership Agreement: National Interest Analysis*, p 20 at [4.10]

248. Regional Comprehensive Economic Partnership Agreement, Chapter 11: Intellectual Property, Section G: Genetic Resources, Traditional Knowledge, and Folklore

249. Memorandum 2.6.24(b), p 7 at [11]

250. Document B23, p 51 at [117]

CHAPTER 6

CONCLUSIONS

6.1 Introduction

In this chapter, we set out our Tiriti/Treaty analysis and conclusions. We have found the task of assessing te Tiriti/the Treaty consistency of the e-commerce chapter of the CPTPP difficult. The reasons for this include the relatively narrow ambit of the chapter (e-commerce), set against the wider digital domain and the rapid technological and social change underway.

We have had to address the difficult question of the extent to which the CPTPP e-commerce provisions constrict policy space, or are likely to inhibit or weaken the Crown's political commitment to its domestic Tiriti/Treaty obligations, by reason of the 'chilling effect'. This task has required us to assess, not only argument around interpretation of the e-commerce provisions, but also the extent to which the provisions may foreclose, or render more difficult, the adoption of more Tiriti/Treaty consistent e-commerce provisions in future international agreements. By its very nature, this assessment is to an extent speculative, based as it is around future contingencies and scenarios about which precision is not possible. With these difficulties in mind, we have tried to be as clear as possible about the reasons for the conclusions we reached.

Another difficulty, in terms of our Tiriti/Treaty analysis, arises from the way in which the e-commerce issue was separated from the broader contextual issues concerning engagement and secrecy, that were originally part of this stage of our inquiry. Whilst we welcome the fact that the parties were able to settle in mediation issues concerning engagement and secrecy, the removal of these issues from this stage of our inquiry does present both practical and conceptual challenges.

Practically, it is difficult to draw a precise line between Crown engagement with Māori and the outcome at issue (in this case, the CPTPP e-commerce provisions). Conceptually, it is difficult to assess compliance with one of the core Tiriti/Treaty principles at issue (active protection) in circumstances where significant aspects of that assessment (for example, the quality of the Crown's engagement with Māori) have been separately agreed between the parties.

Turning to the evidence, a further challenge arises from the fact that the two international law experts who appeared before us have sharply diverging opinions on the extent to which the e-commerce provisions in the CPTPP present actual, or potential, risk to Māori Tiriti/Treaty rights and interests. With these considerations in mind, we begin with some matters of context, before turning to outline the approach we have taken to the assessment of risk, and finally, our assessment of the Tiriti/Treaty consistency of the CPTPP e-commerce provisions.

6.2 Te Tiriti / the Treaty Principles and Mātauranga Māori

In chapter 2, we consider the relevant Tiriti/Treaty principles. We place particular emphasis on the principle of active protection and the obligation it places on the Crown to take active steps to protect Māori in the control and retention of their taonga.

Whether or not data could be considered a taonga is discussed in chapter 3. We conclude there that *Māori* data may be a component of mātauranga Māori, or may in combination with related data be, or have the potential to be, a taonga. At the beginning of chapter 3 we set out the definition of mātauranga from the *Ko Aotearoa Tēnei* (Wai 262) report. What that definition highlights is that mātauranga is not just 'knowing' or 'knowledge' but encompasses both what is known and *how* it is known. Mātauranga Māori encompasses the Māori way of perceiving and understanding the world, and the values and systems of thought that underpin those perceptions. While we cannot say that *all* data is a taonga, we recognise that from a te ao Māori perspective, the way the digital domain is governed and regulated has important implications for the integrity of the Māori knowledge system, which *is* a taonga.

Perhaps the most fundamental of te Tiriti/the Treaty guarantees is the guarantee to Māori of the right to cultural continuity, embodied in the article 2 Tiriti guarantee to Māori of tino rangatiratanga in respect of whenua, kāinga, and all taonga. This is nothing less than the right to continue to organise and live in Aotearoa New Zealand as Māori in accordance with tikanga Māori. A necessary corollary of this is the right to retain, promote, and develop mātauranga Māori, within and through the medium in which it is nurtured and expressed —te reo Māori— and within the customary framework known as tikanga Māori.

For most of the period since 1840, the Crown has not honoured this fundamental aspect of te Tiriti/the Treaty as coercively assimilationist policy and practice has dominated the relationship between the Crown and Māori. Considerable prejudice has been caused to Māori and to their freedom to live as Māori. The nature of this prejudice has been well traversed in previous Tribunal reports, such as the *Te Reo Maori* report (1986), *Ko Aotearoa Tēnei* (Wai 262, 2011), the *Hauora* report (2019) and more recently in *He Pāharakeke, he Rito Whakakīkīnga Whāruarua* (2021), the Tribunal's report on the Oranga Tamariki Urgent Inquiry.[1] As well established by these and other reports, when taonga such as te reo Māori and mātauranga Māori are in a vulnerable state, the Crown's duty of active protection is heightened.

Te Tiriti/the Treaty principle of options allows for the possibility that Māori may benefit from te Tiriti/the Treaty exchange by adopting, incorporating, or using ideas, technology, and cultural practices from the various people and cultures who come to live here after 1840. As noted in the *Hauora* report:

1. Waitangi Tribunal, *He Pāharakeke, he Rito Whakakīkīnga Whāruarua: Oranga Tamariki Urgent Inquiry* (Lower Hutt: Legislation Direct, 2021)

> The Tribunal has also identified the principle of options, which broadly determines that, as Treaty partners, Māori have the 'right to choose their social and cultural path'. This right derives from the Treaty's guarantee to Māori of both tino rangatiratanga and the rights and privileges of British citizenship. The principle of options, therefore, follows on from the principles of partnership, active protection, and equity and protects Māori in their right to continue their way of life according to their indigenous traditions and worldview while participating in British society and culture, as they wish.[2]

An important point stressed in other Tribunal reports is that such choices must be free and unconstrained, rather than the outcome of coercive policy or systemic bias.[3]

In recent decades, Māori have made concerted efforts to reclaim and revitalise mātauranga Māori and te reo Māori. There is a particular sensitivity toward any developments that threaten, or have the potential to threaten, this progress. In our view, this circumstance also heightens the Crown's duty of active protection.

The ongoing digital revolution presents particular challenges, not only for Māori, but for citizens generally, as well as governments. Indeed, it is difficult for governments to keep pace with the speed of technological innovation and the commercial exploitation of those innovations that follows.

E-commerce is one of the many ways in which a citizen in modern society creates a data trail. Along with other citizens, Māori engage in electronic commerce and benefit from the convenience of doing so. Māori are also engaged in the digital domain as users and developers of digital products. Māori ideas about the protection of mātauranga captured or expressed in a digital format that have been presented to us are different from Western conceptions of intellectual property and its protection, at least in terms of how such conceptions are captured or represented in law, including international law. The primary difference we see is that Māori concerns typically extend beyond commercial protection to matters fundamental to Māori identity such as whakapapa, mana, mauri, and mātauranga.

At the heart of the e-commerce issue explored in this report is the question of governance and control of Māori data. The terms 'Māori Data Governance' and 'Māori Data Sovereignty' refer to the idea that Māori data should be subject to Māori governance. The claimants referred us to a description of 'Indigenous Data Sovereignty' prepared by a network of Māori researchers and practitioners known as Te Mana Raraunga:

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2. Waitangi Tribunal, *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Lower Hutt: Legislation Direct, 2019), p 35; see also Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, 2nd ed (Wellington: Waitangi Tribunal, 1989), p 195; Waitangi Tribunal, *The Ngai Tahu Sea Fisheries Report 1992* (Wellington: Brooker and Friend Ltd, 1992), p 274; Waitangi Tribunal, *The Napier Hospital and Health Services Report* (Wellington: Legislation Direct, 2001), p 65; Waitangi Tribunal, *The Tarawera Forest Report* (Wellington: Legislation Direct, 2003), p 28.

3. Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui: Report on Northern South Island Claims*, 3 vols (Wellington: Legislation Direct, 2008), vol 1, pp 4–5

> [Indigenous Data Sovereignty e]stablishes a frame of reference that expects Indigenous involvement in the governance of data and raises questions regarding the proper locus of ownership and management of data that are about Indigenous peoples, their territories and ways of life.
>
> . . . . .
>
> Indigenous Data Sovereignty reflects a desire for protecting collective interests in data which centre on access to data for governance (e.g., to control access to and use of Indigenous data).[4]

Te Mana Raraunga also asserts that Māori Data Sovereignty not only recognises that Māori data should be subject to Māori governance, but that Māori organisations should be able to access Māori data so as to support their development aspirations.[5]

As part of the right of development, discussed in chapter 2, Māori have the right to develop as people culturally, socially, politically, and economically. This includes the right to develop their properties in accordance with new technologies and uses, to equal access opportunities to develop properties or resources which they have proprietary interests in, and to retain a sufficient base of land and resources. In addition, they have the right to decide how and when development occurs.

Claimants also draw our attention to the United Nations Declaration on the Rights of Indigenous Peoples.[6] Article 31 provides:

> 1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.
> 2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.[7]

The United Nations Special Rapporteur on the Right to Privacy notes that Indigenous Data Sovereignty is a global movement and that data is a cultural, strategic, and economic resource for indigenous peoples.[8] Despite this, the report states that 'indigenous peoples remain largely alienated from the collection, use

4. Claim 1.1.1(b), p 14 at [55]
5. Ibid, p 14 at [56]
6. Document B25, p 9 at [28]
7. United Nations, *United Nations Declaration on the Rights of Indigenous Peoples*, resolution adopted by the General Assembly on 13 September 2007, Art 31
8. Joseph A Cannataci, *Report of the Special Rapporteur on the Right to Privacy*, United Nations General Assembly, 73rd session, A/73/438, 17 October 2018, https://undocs.org/A/73/438, p 13 at [72]–[74]

and application of data about them, their lands and cultures'.[9] It concludes that 'existing data and data infrastructure fails to recognize or privilege indigenous knowledge and world views' and that it does 'not meet indigenous peoples' current and future data needs'.[10]

We see this point as particularly relevant. The disjunction between the Māori worldview and the dominant Western paradigm was evident in the way arguments about data governance came before us.

In broad terms the claimants see data that is generated by, or about, Māori as inextricably linked to mātauranga Māori, and imbued with mauri and whakapapa. That characteristic remains when data by or about Māori, or aggregations of data that capture mātauranga Māori, enter the digital domain. Accordingly, the claimants consider that Māori have an inherent right to control how and where that data is held, used, or accessed by third parties.

The Crown did not engage with concepts relating to mātauranga Māori. It accepted claimant evidence about such matters on its face for the purposes of this inquiry, subject to the proviso that the concerns raised by the claimants remain speculative and abstract, unless they could point to specific Crown actions or omissions. In addition, Crown counsel argued that matters raised by the claimants were outside of the scope of the e-commerce chapter and that its provisions in no way restricted Māori rights or interests in the digital domain.[11]

Mr Vitalis in his evidence described what he saw as an evolution in the articulation of Māori interests, in particular, relating to the concept of Māori Data Sovereignty. Mr Vitalis notes claimant evidence to the effect that concepts underpinning such terms are longstanding matters in te ao Māori and were central to *Ko Aotearoa Tēnei* (Wai 262). He went on to say, however, that "their articulation as 'Māori [D]ata [S]overeignty' is relatively recent and has been developed largely after the TPP negotiations concluded".[12]

While we accept that terms like 'Māori Data Sovereignty' and 'Māori Data Governance' are relatively new, the ideas that underpin them have been consistent themes in Crown–Māori interaction for decades, a point fairly acknowledged by Mr Vitalis and also by Crown counsel in their closing submissions.

Dr Moana Jackson clearly made the underlying point in his brief of evidence:

> During the negotiation of the Agreement on Trade-Related Intellectual Property Rights (TRIPS), during the Uruguay Round of the GATT, and in the Wai 262 claim, I have consistently pointed out to the Crown that the commodification of knowledge and conferring rights on commercial interests to exploit and profit from monopolies on knowledge is a violation of He Whakaputanga, te Tiriti and the UNDRIP, and with the limited and conditional kawana role it holds, the Crown has no authority to unilaterally enter into international agreements that commit to the adoption of such

9. Ibid, p 13 at [72]
10. Ibid
11. Submission 3.3.61, pp 9–11 at [21]–[26]
12. Document C1, p 9 at [25]

rules. This was made clear in the findings of the Waitangi Tribunal in the Wai 262 Report.[13]

Notwithstanding the Crown's acknowledgements, we are troubled by what this stark divergence in viewpoint between the claimants and the Crown may signify. Of particular concern is the possibility that the Crown has misunderstood, mischaracterised, or simply not made itself aware of the nature and extent of the Māori interests at issue. In 2016, in our *Report on the Trans-Pacific Partnership Agreement*, we registered the same concern:

> We find ourselves unable to accept the Crown's characterisation of Māori interests put at issue by the TPPA as primarily those they may hold as investors, businesses, or landowners. This seems to us to be an overly reductionist approach to Māori interests, and to the reach of the TPPA. It also misses in fundamental ways the findings and recommendations of the Wai 262 Tribunal.[14]

It is now close to 30 years since the commencement of the inquiry that culminated in the *Ko Aotearoa Tēnei* report (Wai 262). A major theme in the claims considered in that inquiry was Māori concerns about appropriation of mātauranga and taonga, and its commercial exploitation or use by others, in circumstances where Māori voice and control was lost. These same themes are prominent in the claims we have been examining during this inquiry. We therefore place particular weight on the findings and recommendations of the *Ko Aotearoa Tēnei* (Wai 262) report, and the importance of the Crown understanding the nature of interests claimed by kaitiaki, or guardian communities. We note the emphasis placed by the presiding officer in that inquiry on 'the absolute necessity of valuing, rather than ignoring or avoiding, the Māori interest'.[15]

Throughout this report we refer to our evaluation of the e-commerce rules as a 'risk assessment'. In large part this reflects the approach of the parties before us. We have also found such a 'risk assessment' necessary given the diverging views of the experts. As noted previously, we are not assessing the risk that the Crown will be successfully challenged in a dispute, but the risk to Māori interests that arises from aspects of the e-commerce chapter.

The claimants have raised a number of issues relating to the operation of the e-commerce provisions, which they say give rise to risks including:

- regulatory measures enacted for the benefit of Māori being subject to State-to-State and investor–State dispute resolution mechanisms;
- the conceptual incompatibility between the Māori worldview and the views and interests which underpin the CPTPP;

13. Document B9(a), p 4 at [14]

14. Waitangi Tribunal, *Report on the Trans-Pacific Partnership Agreement* (Lower Hutt: Legislation Direct, 2016), p 14

15. Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims concerning New Zealand Law and Policy Affecting Māori Culture and Identity, Te Taumata Tuatahi* (Wellington: Legislation Direct, 2011), p xix

- the ongoing development of frameworks which relate to individual and collective rights;
- the possibility of regulatory chill occurring at various stages of the policy and legislative process;
- the lack of an internationally accepted definition of 'indigenous data' and 'Māori data'; and
- external pressure from States and multinational corporations seeking to protect their interests.

In chapter 5, we considered the exceptions and exclusions relevant to the provisions which were identified as being at issue: Articles 14.11 (cross-border data flows), 14.13 (location of computing facilities) and 14.17 (source code). While we observe that arguments relating to Articles 14.11 and 14.13 give some support to the assertion that the Crown can regulate to protect Māori interests, we still consider there is material risk in operation. Regarding Article 14.17, we have concerns about the availability of source code to Aotearoa New Zealand's domestic judicial and regulatory authorities and consider that the policy space retained by the CPTPP exceptions and exclusions, is not as extensive as the Crown maintains. We also see a material risk of regulatory chill, and risk arising from the precedent or ratchet effect of the CPTPP e-commerce provisions.

Cumulatively, we conclude that the risk to Māori interests arising from the e-commerce chapter of the CPTPP is significant and that reliance on the agreement's exceptions and exclusions to mitigate that risk falls short of the Crown's duty of active protection.

In chapters 4 and 5, we considered the Crown's arguments that a number of issues fall outside of the scope of the CPTPP and that the e-commerce provisions do not restrict Māori rights or interests in the digital domain. For the reasons that follow, we are not persuaded by a number of these arguments and do not share the Crown's confidence that Māori rights and interests in the digital domain are unaffected by the e-commerce provisions in the CPTPP.

6.3 Application of te Tiriti / the Treaty Principles

In our reports from Stages One and Two, as well as in chapter 2 of this report, we traversed the findings of *Ko Aotearoa Tēnei* (Wai 262).[16] The Tribunal found that, through article 1, the Crown acquired the right to govern, which included the right to represent Aotearoa New Zealand abroad and to make foreign policy.[17] Pursuant to article 2, this right was conditional upon, and qualified by, the guarantee that the Crown would protect Māori interests, including their right to have full authority over their affairs.

We see the duty to protect Māori interests as of particular importance. In chapter 2, we review the arguments between claimant and Crown counsel as to the

16. See Waitangi Tribunal, *Report on the Trans-Pacific Partnership Agreement* (2016) and Waitangi Tribunal, *Report on the Crown's Review of the Plant Variety Rights Regime* (2020).
17. Waitangi Tribunal, *Report on the Trans-Pacific Partnership Agreement*, p 7

correct understanding of the Crown's duty of active protection in light of the Stage One report in the Te Raki inquiry, which found that the rangatira who signed te Tiriti/the Treaty in the Bay of Islands and the Hokianga in 1840 did not cede their sovereignty to the Crown. Claimant counsel argue that the jurisprudence around Tiriti/Treaty principles established since the 1987 *Lands* case effectively reconstructed the constitutional relationship between the Crown, iwi, and hapū under te Tiriti. This was done, it was argued, by the use of 'principles' that overstate the authority conferred through kāwanatanga and thereby deny the essence of tino rangatiratanga. Claimant counsel argue that the conclusions from the Stage One Te Raki report represent an important departure from te Tiriti/the Treaty 'principles' and therefore invite this Tribunal to revisit the findings in *Ko Aotearoa Tēnei*, which predate the Te Raki findings (see section 2.3.1.1).

Crown counsel accepted that in the exercise of its international affairs function the Crown's powers are paired with responsibility to understand and actively protect te Tiriti/the Treaty interests of Māori, both procedurally and substantively. In terms of what weight ought to be given to the findings in *Ko Aotearoa Tēnei*, Crown counsel acknowledges that, while it may be appropriate to refine the *Ko Aotearoa Tēnei* approach in our analysis of the e-commerce and data sovereignty issues, it remains the Crown's position that claimant arguments relating to sovereignty should not displace the purposive relational, and evolutionary approach articulated consistently by the Tribunal throughout its lifetime (see section 2.3.1.2).

We concluded in chapter 2 that there was no inherent conflict between the findings of the Tribunal in the Te Raki Stage One report and relevant findings of the Tribunal in *Ko Aotearoa Tēnei.* We saw both reports as acknowledging the fact that kāwanatanga includes a protective and representative capacity in the conduct of international affairs. Following the logic of those two reports, the necessary inquiry becomes whether or not the Crown, in exercising this aspect of its kāwanatanga, has properly informed itself of the nature and extent of the Māori interests, engaged with Māori in good faith, and acted appropriately to protect those interests (see section 2.3.1.3).

The 'sliding scale' devised in the *Ko Aotearoa Tēnei* (Wai 262) report is based on the acceptance that it is for Māori to say what their interests are and how those interests might best be protected. The priority accorded to Māori interests depends on the scale of its importance to Māori and the nature and extent of the likely impacts upon it. Ultimately, this has to be taken into account by a properly informed Crown and considered against any valid interests of other New Zealanders and the nation as a whole. If those interests are in tension, the *Ko Aotearoa Tēnei* (Wai 262) report suggests that the Crown must work out a level of protection for Māori interests that is reasonable in the context of other valid interests, as well as in the sometimes constrained international circumstances in which the Crown must act.

On this basis, the critical prerequisite is that the Crown properly informs itself of the relevant Māori interests so as to be in a position to assess those interests against other valid interests as necessary. In this case we are not assessing the

quality of the Crown's engagement because that issue has been settled in mediation. Instead, our focus has been upon the actual terms of the CPTPP and coming to a view on the level of risk to Māori interests the e-commerce provisions may present.

We consider that, because the governance of the digital domain has important implications for the integrity of the taonga that is mātauranga Māori, the Māori interests at issue are at the higher end of the scale. 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. Neither is the question of data sovereignty and the protection of mātauranga Māori in the digital domain a matter that Māori can resolve alone. However hard it may be, the question of the appropriate level of protection for mātauranga Māori in international trade agreements, and in the governance of the digital domain, is first and foremost a matter for dialogue between te Tiriti/the Treaty partners. If compromise or adjustment is necessary in light of what is achievable in international negotiations, then those are also matters for good faith dialogue between the Crown and Māori. We see the framework and processes agreed to by the Crown and the claimants pursuant to the mediation agreement as an example of a practical and constructive way in which the inevitable difficulties and tensions arising can be worked through in a Tiriti/Treaty-consistent way.

With regard to the e-commerce provisions in the CPTPP, we conclude that the Crown has not met the required protective standard. We come to this view for a number of reasons.

First, 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 domestic policy settings. In other words, the Crown took a largely reactive or passive position. We may be wrong about that, but in the absence of evidence from the Crown demonstrating a different negotiation mandate or demonstrating that particular consideration was given to Māori Tiriti/Treaty interests that may be in issue, we conclude that it is a reasonable inference to draw. It also appears consistent with developments that postdate the CPTPP, which signal evolution of a more sophisticated policy framework in this area. We believe the Crown's duty of active protection in this instance warranted a more proactive and forward-looking stance.

We also draw conclusions from the evidence of the expert witnesses and the considerable difference between them concerning the interpretation and application of critical e-commerce provisions. On some of these issues, for reasons we have set out previously, we find the evidence of the claimants more persuasive than the evidence of the Crown. That leads us to conclude that, on balance, the Crown tends to overstate the benefits and downplay the risks to Māori interests arising from the e-commerce provisions, particularly those concerning cross-border data flows, data localisation, and source code (Articles 14.11, 14.13, and 14.17).

We also take into account the evidence and public sources concerning events following accession to the CPTPP, particularly, the work of the Trade for All Advisory Board (Trade for All Board) and the Government's response to its findings and recommendations. We have considered agreements entered into following the CPTPP which also include provisions relating to e-commerce, specifically, the Digital Economy Partnership Agreement (DEPA) and the Regional Comprehensive Economic Partnership (RCEP). We consider that the e-commerce provisions in these agreements signal important developments which incorporate greater regulatory flexibility.

DEPA contains provisions addressing digital identities, artificial intelligence, and data innovation. These provisions have no equivalent in the CPTPP. Even where equivalent provisions exist, such as Article 4.3 (Article 14.11 of the CPTPP, concerning the cross-border transfer of information) and Article 4.4 (Article 14.13 of the CPTPP, concerning the location of computing facilities), these are preceded by clearer explantory language.

Neither DEPA nor RCEP contain provisions relating to source code. RCEP, which followed DEPA, was signed in November 2020. Notably, RCEP's only mention of source code comes in Article 12.16 of the agreement, where Parties, in conducting dialogue, should consider current and emerging issues, such as source code.[18] While we cannot conclusively say why the source code provision was omitted in DEPA and RCEP, its omission in subsequent agreements raises a question as to what it was intended to achieve in the CPTPP, and whose interests were being served by its inclusion.

The Australian Government indicated that the non-disclosure of source code, when seeking to import or distribute software in a CPTPP country, promoted confidence for software developers – particularly tech start-ups, whose proprietary source code is often the foundation of their business.[19] Similarly, the United States, in the Digital-2-Dozen document referred to by the claimants, stated that its innovators 'should not have to hand over their source code or proprietary algorithms to their competitors or a regulator that will then pass them along to a State-owned enterprise'.[20] In the view of these parties, it's clear that the non-disclosure requirement exists to protect the proprietary interests of creators and innovators.

We see the changes in DEPA and RCEP as part of ongoing policy work within government to reorientate Aotearoa New Zealand's general trade policy following accession to the CPTPP. We note that policy work has been undertaken to support such a reorientation, including Te Taumata's involvement in the DEPA module on digital inclusion, RCEP's provisions concerning prior and informed consent, access and benefit sharing for attaining and using general resources, traditional knowledge and folklore, and the creation of Ngā Toki Whakarururanga. We turn now

18. Regional Comprehensive Economic Partnership Agreement, https://www.mfat.govt.nz/assets/Trade-agreements/RCEP/RECP-Agreement-112020/Chapter-12.pdf, Art 12.16(b)

19. Department of Foreign Affairs and Trade, *CPTPP Outcomes: Trade in the Digital Age* (factsheet, Canberra: Department of Foreign Affairs and Trade, 2019), p 1

20. Document B25(a), exh B, p 5

to outline in a little more detail what we see as important developments underway. We do so because these developments, together with the establishment and operation of Te Taumata and Ngā Toki Whakarururanga, have an important bearing on the conclusions that follow.

The Crown's response to the Trade for All Advisory Board's (the 'Trade for All Board') recommendations makes clear its acceptance that reorientation was necessary. The Trade for All Board found that:

- Aotearoa New Zealand needs to be involved in the international development of e-commerce rules, but it should do so with a clear idea about where national interests lie.[21]
- The current negotiating position taken by Aotearoa New Zealand reflects too much confidence that traditional trade thinking is easily transferable and applicable to the digital world. Such a position is not consistent with an anticipatory governance approach.[22]
- A thorough review of Aotearoa New Zealand's interests in digital trade negotiations should be carried out involving the Government's Chief Digital Officer, Callaghan Innovation, Productivity Commission, the Privacy Commissioner, MBIE, MFAT, and the APEC Business Advisory Council, as well as representatives of Māori, business, and civil society. In the meantime, New Zealand should not be locked into any fixed negotiating positions.[23]

The Trade for All Board identified the Government's partnership with Māori and its obligations under te Tiriti/the Treaty as one of the critical areas where the Government's objective of maximising opportunity and minimising risk arising from trade agreements would require particular attention.[24]

On 18 March 2020, Cabinet's Economic Development Committee considered and approved a response to the report of Trade for All Board.[25] In his paper to Cabinet, the Minister for Trade and Export agreed in principle with the recommendation to review New Zealand's wider policy settings affecting digital trade. The work was categorised as 'priority A', which means that it was considered as work already underway and within short-term deliverables. The Minister also noted that it was his view that it was not in Aotearoa New Zealand's interest to pause all negotiations on digital trade issues. He would expect, however, that positions taken in ongoing negotiations would be informed by the review.[26]

In July 2021, we sought an update from the Crown on its response to the recommendation of the Trade for All Board with respect to digital trade. By affidavit dated 23 July 2021 Mr Vitalis informed us:

21. Document B23, p 51 at [119]
22. Ibid, p 52 at [121]
23. Ibid, p 18 at [2]
24. Ibid, p 13 at [5]
25. Document C1(a), exh EVV-7, pp 30–85
26. Ibid, p 54

> I would like to record more generally that fruitful and substantive discussions on digital issues with Te Taumata in 2019 helped shape and inform our negotiating approach to the DEPA, including in particular (but not only) DEPA's Module 11 on Digital Inclusion. The module reflects input from Te Taumata and we expect this will form one of several important areas of further work during the ongoing implementation process. We have also regularly consulted and engaged in depth and on substance with Te Taumata on the United Kingdom and European Union Free Trade Agreements, and the World Trade Organisation Agreement Joint Statement Initiatives currently under negotiation, including in relation to potential digital commitments contained within these.[27]

Mr Vitalis also informed us that on 29 March 2021 Cabinet approved a progress report on work underway to implement the Trade for All Board's recommendations. He noted, at that time, that an all-of-government review of Aotearoa New Zealand's digital policies led by the Ministry of Business, Innovation and Employment was underway. Mr Vitalis said that this review would include a public discussion document. This discussion document, *Towards a Digital Strategy for Aotearoa*, was released on 6 October 2021.[28] This discussion only recently concluded on 10 November 2021.[29] Mr Vitalis says that it is MFAT's understanding that the review will develop a strategy to make the most of Aotearoa New Zealand's opportunities in the digital domain as well as managing associated risks. There will be a review of existing digital policy settings across government to identify strengths and weaknesses and to assess where a greater focus may be required. It is MFAT's intention that this cross-cutting review provide the framework for a subsequent, specific review of digital trade policy.[30]

The Cabinet documents attached to Mr Vitalis' affidavit include an annex describing engagement with Māori, which includes a description of the role of Te Taumata and the establishment of Ngā Toki Whakarururanga. The Cabinet paper also records that MFAT is leading an interagency trade policy development workstream to contribute to the identification of Māori interests in the NZ–UK Free Trade Agreement (FTA). These processes are designed to ensure that negotiated outcomes create material benefits for Māori. Te Taumata receive regular briefings and Ngā Toki Whakarururanga received its first confidential briefing in December 2020. The paper records: 'These activities represent a significant increase in

27. Document C9, p 4 at [12]
28. New Zealand Government, *Te Koke ki Tētahi Rautaki Matihiko mō Aotearoa/Towards a Digital Strategy for Aotearoa* (discussion document, Wellington: New Zealand Government, 2021); Ministry of Business, Innovation and Employment, 'Government Seeking Public Feedback on Digital Strategy', media release, 6 October 2021, https://www.mbie.govt.nz/about/news/government-seeking-public-feedback-on-digital-strategy
29. Digital.govt.nz, 'Developing a Digital Strategy for Aotearoa', https://www.digital.govt.nz/digital-government/strategy/towards-a-digital-strategy-for-aotearoa/developing-a-digital-strategy-for-aotearoa, accessed 11 November 2021
30. Document C9, p 6 at [19]

engagement with Treaty partners on key trade initiatives and together create a useful model for future trade engagement.'[31]

With respect to the recommendation for a review of Aotearoa New Zealand's wider policy settings that affect digital trade and support the digital economy it is noted that COVID-19 has increased reliance on, and prominence of, digital tools for facilitating trade. This is to be part of the review. The paper goes on to record:

> This framework should also link into and be coherent with other domestic policy work that relates to the digital economy, including the digital strategy Aotearoa, the digital technologies ITP, digital inclusion and governance questions, and development of a National AI Strategy.[32]

Cabinet had also agreed in principle with the recommendation that Aotearoa New Zealand should lead development of international efforts to protect and promote indigenous intellectual and cultural property.[33] The Cabinet paper notes that there was some delay on progress due to the COVID-19 response but the work of Te Pae Tawhiti is ongoing. It is noted that it is part of that work Te Puni Kōkiri advocates for protection and promotion of mātauranga Māori within specific international agreements (for example, the UK and EU FTAs).[34]

In that regard, we note the recent announcement and publication of an Agreement in Principle (AIP) reached between Aotearoa New Zealand and the United Kingdom. The AIP records commitments to negotiate a NZ–UK FTA which will include the development of an indigenous trade chapter. This commitment is based on an acknowledgement that te Tiriti o Waitangi/the Treaty of Waitangi is a foundational document of constitutional importance to Aotearoa New Zealand. Amongst the matters to be included in the chapter are recognition of the value of Māori leadership and economy, mātauranga Māori, and te ao Māori. There is also a commitment to provide for cooperation between Aotearoa New Zealand, including Māori and the United Kingdom, in a way that promotes Māori participation in the agreement as well as in trade and investment opportunities. The proposed environment chapter would acknowledge Māori perspectives on sustainability and the importance of the environment to Māori, and the parties acknowledge the special relationship of Māori with the environment and include concepts such as kaitiakitanga, mauri, and whakapapa.[35]

31. Document C9(a), p 22
32. Ibid, p 25
33. Ibid
34. Ibid, pp 25–26
35. '*Kaitiakitanga* (noun) guardianship, stewardship. *Mauri* (noun) life principle, vital essence, special nature, a material symbol of a life principle, source of emotions – the essential quality and vitality of a being or entity. Also used for a physical object, individual, ecosystem or social group in which this essence is located. *Whakapapa* (noun) genealogy, genealogical table, lineage, descent.' All definitions taken from the Māori Dictionary, https://maoridictionary.co.nz, accessed 10 November 2021.

Finally, we also note that the table annexed to the Cabinet papers released in July 2021 record that MFAT's Māori policy unit has been shifted to a central policy coordinating position to ensure that it can have impact across the organisation, not just the trade and economic group.[36] We see these developments, particularly those foreshadowed in the NZ–UK AIP, as significant. At the same time, they also serve to highlight the relative lack of attention, or priority, accorded to Māori interests at the time the e-commerce provisions were agreed to in the TPPA, which then carried forward to the CPTPP.

6.4 Conclusion

In our Stage One report, we concluded that the Treaty of Waitangi exception would function substantially as intended to protect Māori interests.

At this stage of our inquiry, we are not looking at a single exception, but the cumulative effect of a variety of exceptions and exclusions. This stage also differs from Stage Two, which addressed whether the Crown's process for engagement and its policy on whether or not Aotearoa New Zealand should accede to UPOV 91 was consistent with its Tiriti/Treaty obligations to Māori. We found that claims of Tiriti/Treaty breach were not made out. We noted the long-standing frustration that understandably arises when the Crown negotiates international treaties and leaves Māori perspectives in the margin.[37]

In this report, we conclude that the Crown has not met its Tiriti/Treaty obligation to actively protect the taonga that is mātauranga Māori. Whilst the e-commerce provisions in the CPTPP only operate with respect to a part of what is known as the digital domain or digital ecosystem, we are satisfied that there is significant potential impact upon access to, and control over, data generated by or about Māori engaged in e-commerce, including with respect to the development of software that may capture or hold mātauranga Māori.

A key question has been how much regulatory flexibility the exceptions and exclusions relied upon by the Crown preserve, and whether there is sufficient policy space to properly protect Māori interests in the digital domain. We have considered in some detail the differing viewpoints of Professor Kelsey and Professor Mitchell concerning the interpretation and expected operation of these exceptions and exclusions. On balance, we conclude that there is a material risk. This is covered in chapter 5.

While difficult to quantify, we also accept that the phenomenon known as regulatory chill presents a material risk that the Crown may not act to protect Māori interests by reason of the commitments it has entered into via the e-commerce provisions of the CPTPP. We set out our conclusions with respect to the concept of regulatory chill in chapter 5 also.

36. Document c9(a), p 30
37. Waitangi Tribunal, *The Report on the Crown's Review of the Plant Variety Rights Regime* (Lower Hutt: Legislation Direct, 2020), p x

Our overall conclusion is that, in committing Aotearoa New Zealand to the CPTPP e-commerce provisions, there has been a failure by the Crown to meet the standards required by te Tiriti/the Treaty principles of partnership and active protection. In order to go further and reach a finding that the claims are well founded, we must also consider whether there is prejudice to Māori arising from this breach of te Tiriti/the Treaty principles.

The issue of prejudice arising from the breach is more difficult to assess as a number of the risks we identified and discussed are based on predicting future contingencies and circumstances about which precision is not possible.

The main prejudice lies in the constriction of domestic policy space and options by reason of the fact that Aotearoa New Zealand has committed to e-commerce provisions in the CPTPP. Further prejudice may also arise through the operation of the provisions for reasons outlined in chapter 5. Whilst, theoretically, it is possible to change or resile from these commitments, there are substantial risks to the outcomes achieved, by reopening negotiation. This is because trade and investment agreements such as the CPTPP are concluded on the basis that nothing is agreed until everything is agreed. The corollary being that any attempt to promote a change risks countervailing requests for other changes that may be detrimental to Aotearoa New Zealand interests. In addition, there are reputational and transaction costs that mean there is a low probability that Aotearoa New Zealand would adopt such a course.

Having found a breach of Tiriti/Treaty principles and prejudice we must also consider what (if any) recommendations we may make in order to mitigate or remove the prejudice or prevent others from being similarly affected in the future. In this case, this is not a straight forward question. In part, this is because the e-commerce issue has been separated from fundamental aspects of the claims relating to engagement and secrecy which have been settled by mediation. Because issues associated with the quality of the Crown's engagement with Māori and issues concerning the secrecy accompanying the conduct of the negotiations have been resolved in mediation and formally withdrawn, it is not appropriate for us to make findings or recommendations with respect to those matters.

We acknowledge, nonetheless, that to an extent we have reached conclusions and made findings that touch upon the extent to which the Crown turned its mind to Tiriti/Treaty issues when settling its mandate for the e-commerce component of the negotiations. We have done so primarily in order to assess the efficacy and robustness of the Crown's reliance on the exclusions and exceptions in the CPTPP.

To the extent we retain a discretion to make recommendations, having found Tiriti/Treaty breach and prejudice, we have come to the (perhaps novel) conclusion that it is not appropriate to do so in the particular circumstances of this case. It is now over five years since we began a process of inquiry into aspects of the TPPA, and consequently the CPTPP. Over the course of this time we have observed a significant shift in the Crown's position in response to the claims.

In broad terms, this shift mirrors evolving government policy, as reflected in its work to develop a whole-of-government response (Te Pae Tawhiti) to the *Ko*

Aotearoa Tēnei (Wai 262) report. It also reflects government policy developed in response to the Trade for All Board's report. We see these developments as constructive and overdue. But perhaps, most fundamentally, we regard the fact that the Crown and claimants were able to settle through mediation the issues concerning engagement and secrecy as a significant reason to pause and think carefully about what (if any) recommendations we could make that would remove or mitigate prejudice in ways not already addressed as a result of commitments and processes already underway. We see the mediation agreement as a very positive development and wish to record our appreciation to the role of the mediators, Judge Damian Stone and Ms Prue Kapua. A copy of the mediation agreement is annexed to this report as appendix II.

To its credit, the Crown has responded constructively as our inquiry has progressed. The establishment of Te Taumata following our Stage One *Report on the Trans-Pacific Partnership Agreement* has now been built upon with the establishment of Ngā Toki Whakarururanga as a result of the mediation agreement.

Appropriately, the establishment and operation of Te Taumata and Ngā Toki Whakarururanga have not been the subject of detailed evidence before us. What evidence we do have points to genuine progress as a result of these initiatives. We have no reason to doubt the mutual commitment of the Crown and the claimants to the long-term success of these important initiatives. The recent announcement of the NZ–UK FTA AIP and the prominence there given to consideration of Tiriti/Treaty issues we see as confirmation of this.

We have considered the claims for relief made by the claimants. The Baker and others (Wai 2523) claimants in their amended statement of claim sought a recommendation that the Crown work with Māori to develop effective and Tiriti-compliant protections for Māori Data Sovereignty informed by Māori decision-making.[38] In closing submissions, counsel for these claimants also sought:

- a pause on e-commerce negotiations until a proper regime had been designed;
- iwi–Crown dialogue to review the Treaty of Waitangi exception; and
- dialogue with tohunga and other Māori experts regarding the digital domain, to discuss developing ways to protect Māori interests.[39]

Counsel for the Reid and others (Wai 2522) claimants, in an amended statement of claim, sought recommendations that the Crown suspends any existing negotiations and refrains from negotiating or adopting any agreement on e-commerce, particularly relating to data or source codes, until effective protections for Māori Data Sovereignty and other Māori rights had been identified and agreed as part of the negotiating mandate.[40] In closing submissions, counsel for these claimants also sought:

- recommendations concerning the adoption of a rendezvous clause;

38. Claim 1.1.3(a), p 34 at [127]
39. Submission 3.3.59, p 16 at [75]
40. Claim 1.1.1(b), p 30 at [113]

- dialogue with tohunga and other experts regarding effective protection for Māori interests; and
- dialogue to review and revise the Treaty of Waitangi exception clause.[41]

We have carefully considered these and other claims to relief. With respect to a number of matters such as review of the Treaty of Waitangi exception clause and dialogue with tohunga and other experts regarding protection of Māori interests, we had regard to the fact that commitments had been made and processes are underway to address these matters. In such circumstances we do not think it appropriate to further intervene. With respect to the proposed suspension of further e-commerce negotiations until an effective or proper regime has been designed, we decline to make such a recommendation. On the basis of the relatively limited evidence before us concerning current and pending negotiations, we do not believe we are in a position to make such a recommendation on an informed basis.

We agree with the conclusions reached by the Trade for All Board with respect to the need for a comprehensive review of Aotearoa New Zealand's policy settings and we also accept the need to avoid locking Aotearoa New Zealand into fixed negotiating positions pending completion of that review. We understand that the Crown has accepted that recommendation, the review is underway, and both Te Taumata and Ngā Toki Whakarururunga are engaged in that review. We also regard the constructive developments signalled as part of the recently announced NZ–UK FTA as indicative of what is possible without freezing or stopping international negotiations altogether. We do not regard ourselves as best placed to make such judgments and place weight on the fact that, whilst still developing, the Crown–Māori dialogue on these issues has significantly advanced since the commencement of our inquiry in 2016.

We have acknowledged that it would be difficult for Aotearoa New Zealand to seek changes to the CPTPP e-commerce provisions. Nonetheless, if the outcomes of this review, or dialogue with Te Taumata or Ngā Toki Whakarururanga suggests that change to these provisions is needed, then we would expect that the Crown would pursue, in good faith, any opportunity that may arise to amend the e-commerce provisions, or even the Treaty of Waitangi exception clause, either by direct change or by side letter.

This ends our inquiry into the claims concerning the TPPA and the CPTPP. Over the course of this inquiry it has been our privilege to hear evidence from claimants, experts in international law, and senior diplomats. It has been remarkable to observe a shift from adversarial positions towards constructive engagement and dialogue.

We do not underestimate the difficulties faced by both the Crown and the claimants as a more substantive relationship is established and worked out. Nor do we underestimate the complexity of the issues that Māori and the Crown must together confront in the international arena. These are matters that are best left

41. Submission 3.3.60, pp 82–83 at [16.2]

for negotiation and dialogue between te Tiriti/the Treaty partners in good faith and within the fora and processes now in place. It is abundantly clear to us that Aotearoa New Zealand will be much the stronger, both domestically and in the international arena, as it builds and strengthens the Crown–Māori relationship towards realisation of the genuine and enduring partnership promised by te Tiriti/the Treaty.

Dated at Wellington this 18th day of November 2021

Judge Michael Doogan, presiding officer

David Cochrane, member

Professor Susy Frankel FRSNZ, member

Professor Sir Hirini Mead DCNZM, member

Kim Ngarimu, member

Tania Te Rangingangana Simpson, member

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APPENDIX I

THE PROCEDURAL HISTORY OF WAI 2522: THE TRANS-PACIFIC PARTNERSHIP AGREEMENT INQUIRY

The release of this report, the *Report on the Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, concludes the inquiry into the Trans-Pacific Partnership Agreement (Wai 2522), which has advanced over three stages. The following is a brief procedural history of these stages, outlining key developments and events. Each stage is discussed in a separate section, with the contents of each summarised at the outset.

1.1 Stage One

Stage One of the inquiry culminated in the *Report on the Trans-Pacific Partnership Agreement*.[1] The procedural history of Stage One is outlined briefly below, as follows: inception; hearing; and findings.

1.1.1 Inception

The Tribunal received five applications seeking an urgent hearing of claims relating to the Trans-Pacific Partnership Agreement (TPPA). These applications are listed below:

- *23 June 2015:* The Wai 2523 claim was filed by Natalie Kay Baker, Hone Tiatoa, Maia Pitman, Ani Taniwha, Pouri Harris, Owen Kingi, Justyne Te Tana, and Lorraine Norris.[2]
- *23 June 2015:* The Wai 2522 claim was filed by Papaarangi Reid, Moana Jackson, Angeline Greensill, Hone Harawira, Rikirangi Gage, and Moana Maniapoto.[3]
- *3 July 2015:* The Wai 2530 claim was filed by Rihari Dargaville on behalf of the Te Tai Tokerau District Māori Council (TTDMC).[4]
- *3 July 2015:* The Wai 2531 claim was filed by Waimarie Bruce-Kingi, Kingi Taurua, Paora Whaanga, Huia Brown, Jack Te Reti, Richard Tiki o Te Rangi Thompson, John Wī, Tracey Waitokia, Karina Williams, and Michael Leulua'i on behalf of their whānau and hapū.[5]

1. Waitangi Tribunal, *Report on the Trans-Pacific Partnership Agreement* (Lower Hutt: Legislation Direct, 2016)
2. Claim 1.1.3, p 3
3. Claim 1.1.1, pp 3, [25]
4. Claim 1.1.4, p 2
5. Claim 1.1.5, pp 2–3

- *10 July 2015:* The Wai 2532 claim was filed by Cletus Maanu Paul and Sir Edward Taihākurei Durie on behalf of the New Zealand Māori Council, a number of District Māori Councils, and Māori more generally.[6]

At the time these claims were lodged, negotiations for the TPPA were still in progress. As such, the Tribunal declined urgency on the grounds brought by the claimants but considered that there were grounds for an urgent hearing as and when the final text of the TPPA became available. The negotiations for the TPPA concluded on 5 October 2015 and on 6 November 2015, the Crown informed us that the full text of the agreement was released.[7] The Tribunal proceeded with its urgent inquiry.

1.1.2 Hearing

Two issues were set for the inquiry:

> [W]hether or not the Treaty of Waitangi exception clause is indeed the effective protection of Māori interests it is said to be; and
>
> [W]hat Māori engagement 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).[8]

Hearings focused on these two issues were conducted on the following dates, with closing submissions received soon after:

- *14–18 March 2016:* Five days of hearing took place in Wellington.
- *29–30 March 2016:* The Tribunal received the claimants' written closing submissions.[9]
- *8 April 2016:* The Tribunal received the Crown's written closing submissions.[10]

Following the receipt of closing submissions, the report was written.

1.1.3 Findings

The Tribunal released its Stage One report on 5 May 2016. It considered that the Treaty of Waitangi exception clause in the TPPA would operate 'substantially as intended' and could 'be said to offer a reasonable degree of protection to Māori interests' affected by the TPPA[11] and, as such, made no findings of Tiriti/Treaty breach.[12] The Tribunal did express concerns that the Crown may have misjudged and mischaracterised the nature, extent, and relative strength of Māori interests put at issue under the agreement.[13] As such, the Tribunal suggested that there

6. Claim 1.1.6, p 1
7. Submission 3.1.76, p 1
8. Waitangi Tribunal, *Report on the Trans-Pacific Partnership Agreement*, p 3
9. Submissions 3.3.17, 3.3.20, 3.3.22, 3.3.23, 3.3.24
10. Submission 3.3.27
11. Waitangi Tribunal, *Report on the Trans-Pacific Partnership Agreement*, p x
12. Ibid, p 38
13. Ibid, p 54

be further dialogue between Māori and the Crown as to an appropriate Treaty exception clause for future free trade agreements.[14]

In addition, it was suggested that the Crown adopt a protocol that would govern Aotearoa New Zealand's procedure in the event it became party to an investor–State dispute settlement (ISDS) proceeding under the TPPA, in which the Treaty clause is, or was likely, to be relied upon.[15]

The Tribunal adjourned its inquiry with respect to one further issue: the changes to be made to the plant variety rights regime and whether or not Aotearoa New Zealand should accede to the International Union for the Protection of New Varieties of Plants (UPOV 91), as a result of TPPA obligations. Crown policy on this matter was under development, and the Tribunal adjourned with a view to assessing what (if any) further steps would be necessary once further information was available.[16]

1.2 Stage Two

Stage Two of the inquiry culminated in the *Report on the Crown's Review of the Plant Variety Rights Regime*.[17]

Initially, Stage Two was supposed to consider four issues. However, because the Plant Variety Act Review Options Paper made clear that the Government intended to introduce the Bill to Parliament, inquiry into Issue Three was expedited. The choice to expedite was made on the grounds that once the Bill was introduced, the Tribunal would lose the jurisdiction to hear the issue. As a result, Stage Two focused solely on Issue Three, which considered whether the Crown's process for engagement with Māori over the plant variety rights regime and its policy on whether or not New Zealand should accede to the Act of 1991 International Union for the Protection of New Varieties of Plants was consistent with its Tiriti/Treaty obligations to Māori.[18]

The procedural history of this stage of the inquiry will be outlined in more detail below, as follows: inception; pre-hearing; hearing; and findings.

1.2.1 Inception

In Stage One, the Tribunal adjourned issues concerning the plant variety rights regime as it was still the subject of ongoing policy development. As a result, the Tribunal recognised it was possible that another inquiry stage might be needed once policy development was complete. The inquiry re-commenced in mid-2016:

- *13 June 2016:* The Crown filed a memorandum with the Tribunal which outlined the Ministry of Business, Innovation and Employment's (MBIE)

14. Ibid, pp 56–57
15. Ibid, p 57
16. Ibid, pp xi, 43
17. Waitangi Tribunal, *Report on the Crown's Review of the Plant Variety Rights Regime* (Lower Hutt: Legislation Direct, 2020)
18. Ibid, **pp ix–x**

intention to develop a process for engagement with Māori on the Plant Variety Rights Act 1987 (PVR).[19]

- *26 August 2016:* The Crown filed a further update and timeline regarding the Plant Variety Rights Act.[20]
- *30 August 2016:* The presiding officer directed the parties that if they wished to respond to the Crown memorandum of 26 August 2016 then they would have to do so by 23 September 2016. They were advised to indicate whether the inquiry should be concluded or continued.[21]
- *23 September 2016:* Counsel for the Reid and others (Wai 2522) claimants filed a memorandum confirming that they wished the inquiry to continue.[22]

1.2.2 Pre-hearing

Prior to Stage Two hearings, a number of important events occurred both internationally and internally. These are outlined below:

- *30 January 2017:* The United States withdrew as one of the 12 parties to the TPPA. As a result, 11 signatories remained. These were: Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam.
- *1 March 2017:* The Crown advised the Tribunal via memorandum that the TPPA could not enter into force without the United States as a Party.[23] This message was also repeated in a later memorandum from the Crown on 28 April 2017.[24]
- *30 June 2017:* The Tribunal further adjourned the inquiry and asked that Crown counsel file an update before 21 July 2017 confirming:
    (a) Whether the government is considering changes to the terms upon which the TPPA may come into force which would have the effect of removing the requirement that the United States be a party;
    (b) If so, clarification as to when the government expects that it will become clear one way or another whether such changes will be agreed and take effect;
    (c) Whether a TPP without the United States as a participating party constitutes a new treaty that would be required to pass through the legal processes required for New Zealand to enter into an international treaty (including consultation with Māori). If not, why not?
    (d) The implications going forward of any changes to the accession requirements in terms of the current review of the plant variety rights regime.

19. Submission 3.4.17
20. Submission 3.4.18
21. Memorandum 2.7.7, p 2
22. Submission 3.4.21, p 3
23. Submission 3.4.23, p 3 at [12]–[14]; submission 3.4.25, pp 6–7
24. Submission 3.4.25, p 6

(e) Any update on or any proposed changes to the plan and timeline for engagement with Māori over the plant variety rights regime and whether or not New Zealand should accede to UPOV 91.[25]

- *24 July 2017:* The Crown informed the Tribunal that discussions concerning bringing the TPPA into force were still occurring between the remaining signatory Parties.[26] It submitted that should the Tribunal need further oversight, an update could be provided in the first quarter of 2018 concerning the Crown's Māori engagement strategy for the Plant Variety Act review.[27]
- *14 November 2017:* The Crown filed a memorandum updating the Tribunal that:
  (a) The TPP parties had agreed to name the new agreement the Comprehensive and Progressive Agreement for the Trans-Pacific Partnership ('CPTPP').
  (b) The CPTPP will bring most of the TPPA agreement signed in February 2016 into effect by incorporation into a new treaty, but will suspend 20 items from the agreement (eventually 22) and that;
  (c) The Treaty of Waitangi exception clause would be retained.[28]
- *21 and 29 November 2017:* Counsel for the claimants expressed their concern over what they perceived as the Crown's failure to consult.[29]
- *8 December 2017:* The Tribunal received another update from the Crown, informing that negotiating parties were looking to meet mid-late January, and that should agreement be reached on the four issues, a date for signature would be agreed by the Ministers.[30]
- *23 January 2018:* Negotiations for the CPTPP were officially concluded.[31]
- *14 February 2018:* The Crown filed a memorandum updating the Tribunal that:
  (a) Signing the CPTPP would not cause any material changes to the high-level plan for the review of the Plant Variety Rights Act 1987 and that;
  (b) New Zealand will still have three years from the date of entry into force of the CPTPP to decide whether to accede to UPOV 91 or develop a *sui generis* regime.[32]
- *8 March 2018:* The signing ceremony for the CPTPP occurred in Santiago, Chile.[33]

25. Memorandum 2.7.10, p 4
26. **Submission 3.4.31, pp 1–2**
27. **Ibid, p 5**
28. **Submission 3.4.33, pp 1–2**
29. Submissions 3.4.34, 3.4.35
30. **Submission 3.4.36, pp 1–2**
31. **Submission 3.4.42, p 1**
32. Ibid, p 5
33. The Treasury, 'Signing ceremony of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)', https://www.treasury.govt.nz/news-and-events/news/signing-ceremony-comprehensive-and-progressive-agreement-trans-pacific-partnership-cptpp, last updated 9 March 2018

- *30 April 2018:* A judicial conference was convened where the Tribunal asked for clarification on the inquiry issues remaining, possible next steps, and relative priority of those issues identified.[34]
- *25 October 2018:* The CPTPP received royal assent and as a result, was ratified.[35]
- *19 February 2019:* The presiding officer issued a Statement of Issues for Stage Two of the inquiry. The remaining issues for inquiry were:
  (a) Issue One: Crown engagement with Māori;
  (b) Issue Two: the secrecy surrounding Crown negotiations;
  (c) Issue Three: UPOV 91 and the plant variety rights regime; and
  (d) Issue Four: described as 'data sovereignty'.[36]
- *2 April 2019:* The four issues outlined above were supposed to be heard together, with provisional hearing dates set for the week beginning 2 December 2019.[37]
- *29 July 2019:* The Tribunal raised the possibility of using the hearing dates reserved in December 2019 to conduct an expedited hearing into Issue Three concerning the plant variety rights regime. This was because the PVR Act review Options Paper made clear that the Government intended to introduce the Bill to Parliament in April or May of 2020. At this point, the Tribunal would lose jurisdiction over the issue. Ultimately, the parties agreed to this approach and the three remaining issues were deferred to be heard at a later stage, in 2020.[38]
- *20 November 2019:* The Crown filed a memorandum informing the Tribunal that Cabinet had confirmed that it had chosen to adopt a sui generis regime – a plant variety rights regime unique to New Zealand – to give effect to UPOV 91, as opposed to acceding to UPOV 91 itself.[39]

1.2.3 Hearing

The expedited hearings for Stage Two of this inquiry considered Issue Three, which was:

> Is the Crown's process for engagement with Māori over the plant variety rights regime and its policy on whether or not New Zealand should accede to the Act of 1991 International Union for the Protection of New Varieties of Plants consistent with its Tiriti/Treaty obligations to Māori?[40]

34. **Memorandum 2.7.18, p 2**
35. New Zealand Parliament, 'Trans-Pacific Partnership Agreement (CPTPP) Amendment Bill', https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/BILL_78569/trans-pacific-partnership-agreement-cptpp-amendment-bill
36. **Memorandum 2.7.29, pp 9–11; Waitangi Tribunal,** *Report on the Crown's Review of the Plant Variety Regime*, p 4
37. **Memorandum 2.7.30, p 11**
38. Memorandum 2.7.36, p [3]
39. **Submission 3.1.196, p 1**
40. **Memorandum 2.7.30(a), para 5**

The hearings took place at the Waitangi Tribunal's hearing room in Wellington from 4 to 6 December 2019.

1.2.4 Findings

The Tribunal found that the Crown's process for engagement over the plant variety rights regime and its policy on whether or not New Zealand should accede to UPOV 91 was consistent with Tiriti/Treaty obligations to Māori.[41] Indeed, the Tribunal supported aspects of the Crown's policy, particularly Cabinet's decision to not only implement the findings of the Tribunal's 2011 *Ko Aotearoa Tēnei* (Wai 262) report, but to go further in providing 'additional measures to recognise and protect the interests of kaitiaki in taonga species and in non-indigenous species of significance.'[42]

The report was released on 15 May 2020.

1.3 Stage Three

Stage Three of the Wai 2522 inquiry culminates in this report, the *Report on the Comprehensive and Progressive Agreement for Trans-Pacific Partnership*. Initially, three issues remained for inquiry in this stage: engagement, secrecy, and data sovereignty. Mediation saw the settlement of Issue One (engagement) and Issue Two (secrecy). As a result, majority of the claims in this inquiry were settled, with the exception of two:

- The Trans-Pacific Partnership Agreement (Reid and others) claim (Wai 2522), represented by Annette Sykes; and
- The Trans-Pacific Partnership agreement (Baker and others) claim (Wai 2523), represented by Bryce Lyall.

Of all claims received, these were the two that contained pleadings relevant to the last remaining issue, Issue Four (data sovereignty). The procedural history of this report concerning Issue Four is outlined as follows: mediation; pre-hearing; and hearing.

1.3.1 Mediation

In the *Report on the Crown's Review of the Plant Variety Rights Regime* (the Stage Two report), the Tribunal noted that important issues concerning engagement and secrecy would be returned to in the next stage of the inquiry. However, claim allegations relating to these issues were subsequently settled through mediation. The agreement reached by the claimants and the Crown on these issues is appended to this report as appendix II.

A brief timeline of the process of referral to mediation is set out below:

- *31 July 2020:* Several claimant parties and the Crown made clear in a joint memorandum that they were agreeable to mediation concerning Issue One

41. Waitangi Tribunal, *Report on the Crown's Review of the Plant Variety Rights Regime*, pp 41–42
42. Ibid, p x

(engagement) and Issue Two (secrecy). They proposed that mediation occur on 1–2 October 2020.[43]

- *24 August 2020:* In a joint memorandum of counsel, the claimants and the Crown agreed that the only issues for mediation would be Issue One (engagement) and Issue Two (secrecy). They also agreed that a representative from the Ministry of Foreign Affairs and Trade (MFAT) should attend, and that best endeavours were also being made for a representative from Te Puni Kōkiri (TPK) to attend.[44]
- *4 September 2020:* The presiding officer referred the following claims to mediation:
    (a) Wai 2522, the Trans-Pacific Partnership (Reid and others) claim;
    (b) Wai 2523, the Trans-Pacific Partnership (Baker and others) claim;
    (c) Wai 682, the Ngati Hine Lands, Forests and Resources claim;
    (d) Wai 2533, Te Runanga a Iwi o Ngati Kahu Trans-Pacific Partnership claim;
    (e) Wai 2531, the Trans-Pacific Partnership (Bruce-Kingi and others) claim;
    (f) Wai 2530, the Te Tai Tokerau District Maori Council Trans-Pacific Partnership Agreement claim;
    (g) Wai 2535, the Trans-Pacific Partnership Agreement (Paul) claim;
    (h) Wai 1427, the Ngāpuhi Kuia and Kaumatua claim; and
    (i) Wai 2889, the Trans-Pacific Partnership Agreement (Paul) claim.

  The mediation was to take place on Thursday 1 October 2020 and Friday 2 October 2020, with mediators to provide a report to the Tribunal on the outcomes of the mediation prior to 22 October 2020.[45] The mediators appointed were Judge Damian Stone and Waitangi Tribunal member Prue Kapua.[46]
- *2 October 2020:* The mediation agreement was signed. This agreement provided that:
    (a) MFAT will engage with authenticity and integrity in order to build a genuine and respectful, mutually beneficial relationship between the claimants and Aotearoa New Zealand's international trade policy and processes undertaken by MFAT. This includes MFAT being open and honest, purposeful, inclusive, responsive, and relevant.[47]
    (b) The parties will jointly develop open and accountable processes to facilitate the establishment of Ngā Toki Whakarururanga (a by-Māori for-Māori body) to the extent that it involves the Crown's functions. This development will include a process to define:

43. Submission 3.2.40, p 1
44. Submission 3.2.45, pp 1–2
45. Memorandum 2.6.20, pp 3–4
46. Ibid, p 3
47. Memorandum 2.6.24(b), p 6 at [6]

1. processes to review arrangements and to manage any concerns or disputes that arise between the parties having regard to tikanga; and
2. the nature of the ongoing role between Ngā Toki Whakarururanga and MFAT, to be reflected in an MOU or similar, which shall include any legal obligations required to provide sufficient security for both parties.[48]

(c) MFAT commits to ensure Ngā Toki Whakarururanga is fully engaged with, and has meaningful influence over, trade policy as it falls within the remit of MFAT. Trade policy includes international multilateral (for example, WTO), regional (for example, APEC), plurilateral (for example, DEPA, CPTPP, and so on) and bilateral processes.[49]

(d) Ngā Toki Whakarururanga shall, in conjunction with the MFAT Trade and Economic Group (TEG), where required:

1. develop specific relationships;
2. promote mutual education;
3. discuss and develop processes of engagement;
4. commission independent Tiriti impact assessments of proposed trade and investment agreements at various stages;
5. ensure transparency of process;
6. identify Māori interests and the means for their effective protection and promotion;
7. identify options for a different Treaty of Waitangi exception clause;
8. share information;
9. identify Māori matters that potentially affect relationships with taonga and Tiriti/Treaty rights;
10. fund work; and
11. build the capacity of rangatahi in international trade.[50]

(e) Where information cannot be shared with Ngā Toki Whakarururanga, MFAT will discuss its view of the reasons why that information cannot be shared.[51]

(f) While Ngā Toki Whakarururanga is being established, MFAT is committed to engaging with the claimants in the interim on ongoing processes, such as the EU and UK free trade agreement negotiations.

(g) MFAT will establish a process where MFAT will commission the advice of portfolio agencies on the Māori interests impacted upon in their portfolio areas.[52]

48. Ibid, pp 6–7 at [8]
49. Ibid, p 7 at [11]
50. Ibid, pp 8–9 at [13]
51. Ibid, p 10 at [16]
52. Ibid, p 11 at [19]

Both Issue One (engagement) and Issue Two (secrecy) were settled on the basis that Ngā Toki Whakarururanga be established, as outlined above. Notably, the approach to confidentiality by MFAT with Ngā Toki Whakarururanga was espoused as being specific to the issue at hand. This means, with regard to Issue Two (secrecy), MFAT would provide a 'view' of its reasons for withholding any information.[53] The claimants agreed that this was sufficient to settle Issue Two (secrecy).

As a result of settlement, claims relating to Issues One (engagement) and Two (secrecy) were to be withdrawn. Issue Four (data sovereignty) remained for inquiry.[54]

- *9 October 2020:* The mediators Judge Stone and Ms Kapua filed their report, notifying the Tribunal of the success of mediation and the settlement of Issues One and Two.[55]

1.3.2 Pre-hearing

Prior to hearings for Issue Four, debate arose concerning the scope of evidence before the Tribunal considering the settlement of engagement and secrecy-related matters.

Overall, despite disagreement between the Crown and claimants concerning the scope of evidence and the issues to be covered in the final stage of the inquiry, both indicated that the ultimate assessment of the relevance of evidence would be for the Tribunal.

1.3.3 Hearing

The hearing for Stage Three of this inquiry considered Issue Four, which was:

> What (if any) aspects of the e-commerce chapter in the CPTPP are inconsistent with the Crown's obligations under Te Tiriti/the Treaty?[56]

The hearing took place at the Tribunal's hearing room in Wellington from 17 to 19 November 2020. Closing submissions for Baker and others (Wai 2523), represented by Bryce Lyall, were received on 4 December 2020.[57] Closing submissions for Reid and others (Wai 2522), represented by Annette Sykes, were received on 7 December 2020.[58] The Tribunal received the Crown's closing submissions on 18 December 2020.[59]

53. Memorandum 2.6.24(b), p 10 at [16]
54. Ibid, p 11 at [22]
55. Memorandum 2.6.24(a), p [3] at [9]
56. Tribunal statement of issues 2.6.7(a), p 1
57. Submission 3.3.59
58. Submission 3.3.60
59. Submission 3.3.61

APPENDIX II

MEDIATION AGREEMENT

Parties

1. The parties to this agreement are:
   1.1 'The claimants' being:
      a. Wai 2522: a claim by Moana Jackson, Director of Nga Kaiwhakamarama I Nga Ture, lecturer Māori Law and Philosophy degree programme at Te Wananga o Raukawa; Angeline Greensill, Environmental and Land Rights Advocate, former Waikato University Lecturer; Robert Pouwhare, Executive Producer and Director at Tangata Whenua Television; Hone Pani Tamati Waka Nene Harawira, Leader of the Mana Movement and former Member of Parliament for Te Tai Tokerau; Rikirangi Gage, Chief Executive of Te Rūnanga o te Whānau tribal authority, current director of the Māori fisheries commission, Te Ohu Kaimoana;
      b. Wai 2523: A claim by Natalie Kay Baker on behalf of herself and the Waimate Taiamai Alliance; Hone Tiatoa on behalf of himself and Te Waimate Taiamai; Maia (Connie) Pitman on behalf of herself and her whānau; Ani Taniwha, on behalf of herself and Te Uri o Te Pona, Ngati Haiti, Ngati Kawau, Ngati Kawhiti, Ngati Kahu o Roto Whangaroa, Ngāitupango, Te Uri o Tutehe, Te Uri Mahoe and Te Uri Tai and Te Uri o Te Aho; Pouri Harris on behalf of himself and Ngāti Toro; Owen Kingi on behalf of himself and Ngāti Uru and other Whangaroa hapū; Justyne Te Tana on behalf of herself and Ngāi Te Whiu and Ngāti Tautahi, and Ngai Te Wake o Waoku, Ngāi Te Wake Tua Whenua, and Ngāi Te Wake o Takutai Moana; Lorraine Norris on behalf of herself and Te Uriroroi, Te Parawhau and Te Mahurehure ki Poroti.
      c. Wai 682: A claim by Rewiti Paraone, Kevin Prime, Erima Henare, Pita Tipene and Waihoroi Shortland on behalf of Te Runanga o Ngati Hine for and on behalf of descendants of Torongare and Hauhaua;
      d. Wai 2533: a claim by Professor Margaret Mutu for and on behalf of Te Rūnanga-ā-Iwi o Ngāti Kahu and the whānau, hapū and iwi of Ngāti Kahu;
      e. Wai 2531: a claim by Waimarie Bruce-Kingi for and on behalf of the whānau and hapū of Ngāti Kahu o Torongare me Te

Parawhau; Kingi Taurua for and on behalf of the whānau and hapū of Ngāti Rahiri and Ngāti Kawa; Paora Whaanga for and on behalf of the whānau and hapū of Rakaipaaka; Huia Brown for and on behalf of the whānau and hapū of Rongomaiwahine; Jack Te Reti for and on behalf of the whānau and hapū of Ngāti Te Ihingārangi; Richard Tiki o Te Rangi Thompson for and on behalf of the whānau and hapū of Ngāti Tahinga; John Wī for and on behalf of the whānau and hapū of Ngāti Tūtakamoana and Ngāti Hōpu; Tracey Waitokia for and on behalf of the whānau and hapū of Ngāti Hineoneone; Karina Williams for and on behalf of the whānau and hapū of Ngāti Whākiterangi; and Michael Leulua'i of Ngatiwai for and on behalf of his whānau;

f. 2530: Chairman of Te Tai Tokerau District Māori Council, Mr Rihari Dargaville on behalf of the Te Tai Tokerau District Māori Council;

g. 2535: Cletus Maanu Paul for and on behalf of the Nga Kaiawhina a Wai 262, and the Mataatua District Māori Council;

h. 1427: Ms Titewhai Hara Wira of Auckland; on behalf of kuia and kaumatua of Ngapuhi nui tonu living within Tamaki and throughout Ngapuhinuitonu;

i. 2889: This Statement of Claim ('SOC') is filed on behalf of the following members of the New Zealand Māori Council ('the NZMC'):

   a. Cletus Maanu Paul, Chairperson of the Mataatua District Māori Council ('DMC'), for and on behalf of himself, and the Mataatua DMC;

   b. Raymond Hall, Chairperson of the Tamaki Makaurau DMC, Titewhai Harawira and John Tamihere, for and on behalf of themselves, and the Tamaki Makaurau DMC;

   c. Desma Kemp Ratima, ONZM, JP, Chairperson of the Takitimu DMC, for and on behalf of himself, and the Takitimu DMC;

   d. Rihari Richard Takuira Dargaville, Chairperson of Te Tai Tokerau DMC, for and on behalf of himself, and Te Tai Tokerau DMC; and

   e. Diane Black, Chairperson of the Tamaki ki Te Tonga DMC, and Tunuiarangi McLean, JP, for and on behalf of themselves, and the Tamaki ki Te Tonga DMC.

And

1.12 MFAT Trade and Economic Group (represented by the Deputy Secretary Trade and Economic).

Principles/kaupapa

2. The claimants enter this Agreement recognising:

   2.1 That shared authority in the international domain is informed by the domestic relationship between Māori Peoples Whānau, Hapū and Iwi

and the Crown and the tino rangatiratanga and kāwanatanga that has endured since the 1835 He Whakaputanga o Nga Rangatira o Nga Hapu o Niu Tireni and 1840 Te Tiriti o Waitangi.

2.2 The need to preserve mana tukuiho (mana inherited) and mana whakahaere (exercise of that inherited power to preserve and maintain hapū mana and rangatiratanga).

2.3 The responsibilities of rangatira as leaders to preserve and uphold the mana and rangatiratanga of their hapū and the responsibilities of the Crown to represent Tauiwi.

2.4 The importance of tikanga-based trading relationships to Māori Peoples, Whānau, Hapū, and Iwi and the significance of trade to the economy of Aotearoa New Zealand and the livelihoods and wellbeing of its people.

2.5 Information is essential to the exercise of mana and tino rangatiratanga through effective participation in decision-making by collective, participatory, and accountable processes.

2.6 The need to develop a new approach to trade policy and the negotiation of international trade agreements that gives effect to the Tiriti relationship and establishes mutual respect and collaboration between the parties.

2.7 Reflects that Te Tiriti/the Treaty is a relationship of equals. Legally it is an international treaty whereby at least 2 sovereign nations entered into an agreement to set out how they were to structure their relationship with each other.

3. The Crown enters into this Agreement recognising:

3.1 Te Tiriti o Waitangi/the Treaty of Waitangi is New Zealand's founding constitutional document. It affirms te tino rangatiratanga o ngā iwi me ngā hapū, and the kāwanatanga of the Crown. It established a continuing partnership between Māori and the Crown.

3.2 Ka Hikitia te whanaungatanga a te Manatu Aorere me te Iwi Māori: the overarching aspiration for this Tiriti/Treaty partnership is that Māori have confidence in their partnerships with the Ministry of Foreign Affairs and Trade (MFAT) for international trade. Through this agreement both parties wish to develop a mana-enhancing relationship that reflects Te Tiriti/Treaty principles of partnership, participation, protection and prosperity and acknowledges:

3.2.1 claimants' rangatiratanga and status as Tiriti/Treaty partners;

3.2.2 mātauranga Māori makes an important contribution to solving policy and practical problems;

3.2.3 the claimants have important resources and capability to contribute to achieving beneficial outcomes internationally for Māori and for Aotearoa New Zealand; and

3.2.4 international trade issues affect the claimants and they must have a key role in determining how their interests are affected and how to approach those matters internationally.

Scope

4. The scope of this Agreement is international trade policy. This includes international multilateral (eg WTO), regional (eg APEC), plurilateral (eg DEPA, CPTPP etc) and bilateral processes and other trade-related kaupapa.

Objectives

5. For the claimants, active protection of rights under te Tiriti and tikanga Māori means the ability of Māori to protect their identity and taonga by the ability to protect their rights and interests in relation to trade policy, including:
   - 5.1 review of overall trade policy;
   - 5.2 development of new policy on old areas;
   - 5.3 new policy on new sectors and technologies;
   - 5.4 learning lessons from failed policies;
   - 5.5 including proposals for new negotiations, negotiating during;
   - 5.6 expansion of existing agreements, amending or remaining agreements;

   which can only be given effect to by the exercise of tino rangatiratanga and mana tukuiho, mana whakahaere, mana motuhake in accordance with the values of manaakitanga, whanaungatanga, kotahitanga, kaitaikitanga, mutual respect.
6. For MFAT Trade and Economic Group ('TEG'), it is committed to strengthening the international trade dimension of the Crown–Māori partnership. To achieve this, MFAT will:
   - 6.1 engage with authenticity and integrity to continue to build a genuine and respectful mutually beneficial relationship between the claimants and Aotearoa New Zealand's international trade policy and practices undertaken by MFAT;
   - 6.2 open and honest/tika;
   - 6.3 purposeful/koi;
   - 6.4 inclusive/manaakitanga;
   - 6.5 responsive/whakautu;
   - 6.6 relevant/whaitake.

Ngā Toki Whakarururanga

7. MFAT supports a body being established that adds to its existing partnership bodies (to be named through the agreed establishment process, working title Ngā Toki Whakarururanga).
8. The parties agree to jointly develop open and accountable processes to facilitate the establishment of Ngā Toki Whakarururanga to the extent that it involves the Crown's functions. This will include a process to define:
   - 8.1 processes to review arrangements and to manage any concerns or disputes that arise between the parties having tegard to tikanga;
   - 8.2 the nature of the ongoing role between Te Toki Whakarururanga and MFAT, to be reflected in an MOU or similar, which shall include any legal obligations required to provide sufficient security for both parties.

9. Ngā Toki Whakarururanga will be a by Māori, for Māori body. MFAT will not appoint membership. MFAT will not prescribe the terms of reference for the Ngā Toki Whakarururanga. For the avoidance of doubt, claimants have stated the following matters will guide them in this process (the Crown acknowledges these are matters for Māori):
    9.1 Ngā Toki Whakarururanga has obligations to Māori Peoples, Whānau, Hapū and Iwi and will fulfil those obligations in accordance with tikanga Māori, so as to ensure they maintain the mana and mandate of Te Ao Māori necessary to perform their role.
    9.2 A working party will be established to engage with Māori Peoples, Whānau, Hapū and Iwi recognising the need for participation to reflect diversity in all its forms, and to put together an advisory paper setting out the various options for Ngā Toki Whakarururanga, and after that has been done to embark on a process of obtaining widespread consensus amongst key Māori for the establishment of Ngā Toki Whakarururanga.
10. If Ngā Toki Whakarururanga is formed, it should complement the work or roles of existing organisations and may of course collaborate or partner with those organisations.
11. The parties agree that sharing information is essential to achieving the objectives of this Agreement. MFAT commits to ensure Ngā Toki Whakarururanga is fully engaged with, and has meaningful influence over, trade policy as it falls within the remit of MFAT. Trade policy includes international multilateral (eg WTO), regional (eg APEC), plurilateral (eg DEPA, CPTPP etc) and bilateral processes.
12. MFAT will support Ngā Toki Whakarururanga, including through funding, to establish this new body through a process established by Māori. The process to establish will cover:
    12.1 Regularity and structure of meetings;
    12.2 A clear point of contact within MFAT;
    12.3 A secretariat independent from the Crown to provide technical, administration and logistical support;
    12.4 Confidentiality arrangements and other measures to build trust and relationships as partners.
13. Following its establishment, Ngā Toki Whakarururanga shall, in conjunction with TEG (where required):
    13.1 Develop a relationship with Deputy Secretary Trade and Economic [Vangelis Vitalis].
    13.2 Develop a relationship with the relevant Trade Ministers.
    13.3 Promote mutual education on mātauranga Māori and international trade policy through an ongoing, iterative process that builds understanding between Māori and the Crown and benefits each other and Aotearoa New Zealand.
    13.4 Discuss and develop processes of engagement that enable Māori as the

Tiriti/Treaty partner to exercise genuine influence over trade policy, broadly defined, including at various stages of decisions making in negotiations for international trade and investment agreements.

13.5 Conduct or commission independent Tiriti impact assessments of proposed trade and investment agreements at various stages.

13.6 Ensure transparency of process ie what are the steps in a negotiation process, what international engagements occur at particular times, what international engagements are occurring in the future (and when). This includes both parties proactively identifying matters (noting there may be confidentiality parameters) that potentially affect relationships with taonga and Tiriti/Treaty rights to enable their active and effective protection, such as, their identify:

13.6.1 the need for, and opportunities for, input into, and the method of engagement appropriate for, each stage/matter:

(a) trade policy engagement plans
(b) formation of negotiation mandates
(c) during negotiations, including facilitating targeted opportunities to present to negotiating partners) and reporting on negotiations;
(d) prior to ratification;
(e) during implementation;
(f) during the review of international trade instruments.

13.7 Identify Māori interests and means for their effective protection and promotion. The parties acknowledge there may be mutually beneficial opportunities.

13.8 Identify options, for dialogue with TEG, for a different Treaty of Waitangi exception clause.

13.9 Information sharing (including text proposals if reasonably possible).

13.10 Proactive identification by Māori of matters that potentially affect relationships with taonga and Tiriti/Treaty rights to enable their active and effective protection.

13.11 Funding for ongoing role/work.

13.12 Building up rangatahi capacity in international trade (for example, internships).

14. The following may form elements of an engagement agreement between Ngā Toki Whakarururanga and MFAT:

14.1 Sharing of negotiation timelines and identification of issues and opportunity to work together.

14.2 Regularity and sttucture of meetings.

14.3 Kanohi ki te kanohi/face to face (agree on regional hui programme including funding of same).

14.4 Early and continuing bi-directional information sharing.

14.5 Confidentiality as required to the extent possible.

14.6 General transparency practices.

Confidentiality/Secrecy

15. MFAT is committed to enhanced transparency on trade policy, including through the measures agreed to in this agreement.
16. The approach to confidentiality with Ngā Toki Whakarururanga will depend on the specific issue at hand. The approach will be informed by the need to protect and enhance national interests. Where information cannot be shared MFAT will discuss its view of the reasons why that information cannot be shared with the Ngā Toki Whakarururanga. The parties recognise that there may be tension between issues of confidentiality and Ngā Toki Whakarururanga's obligations to Māori Peoples, Whānau, Iwi and Hapu.

Funding assistance

17. Funding assistance will be provided for Ngā Toki Whakarururanga as above. Other funding assistance for processes outside Ngā Toki Whakarururanga is to be discussed through ongoing dialogue between the parties.

Other Matters

Current negotiations

18. There are ongoing processes that will not stop for parties to develop a protocol and/or Ngā Toki Whakarururanga. MFAT is committed to engagement with the claimants in the interim on ongoing processes, such as the EU and UK free trade agreement negotiations.

Other government agencies

19. To ensure negotiations are fully appraised of, to the maxunum extent possible, how Māori interests are engaged, MFAT will, in addition to the steps outlined above, establish a process where MFAT will commission the advice of portfolio agencies on the Māori interests impacted upon in their portfolio areas.
20. TEG will provide letters of introduction for Ngā Toki Whakarururanga with other Government departments and agencies.

ISDS

21. The development of the ISDS protocol is being progressed by the MFAT Trade Law Unit. TEG will facilitate dialogue between Ngā Toki Whakarururanga and the MFAT Trade Law Unit in relation to the ISDS protocol.

Settlement of Issues 1 and 2

22. The parties agree that Issues 1 and 2 are settled on the basis of the agreements reached above, claims will be withdrawn (other than Issue 4) within five working days of the date of the mediators report.
23. Any claimants participating in the Wai 2522 inquiry with pleadings as part of

their generic claims withdraw only that part of their claim that relates to the Wai 2522 inquiry (other than Issue 4).

24. Claimants have advised TEG that failure to honour this agreement would result in a new claim being lodged with the Waitangi Tribunal based on this agreement.

2 October 2020

Signed for Wai 2522 by:

[Annette Sykes as counsel for the claimants for Wai 2522 together with mandated representatives for the claimants Karaitiana Taiara, Moana Maniapoto, Matthew Takaki]

Signed for Wai 2523 by:

[John Tiatoa]

Signed for Wai 682 by:

[Josey Lang as counsel for Wai 682]

Signed for Wai 2533 by:

[Te Kani Williams, counsel for Wai 2533]

Signed for Wai 2531 by:

[Bryce Lyall for Tavake Afeaki, counsel for Wai 2531]

Signed for Wai 2530 by:

[Rihari Dargaville and Louisa Collier]

Signed for Wai 2535 by:

[Cletus Maanu Paul]

Signed for Wai 1427 by:

[Titewhai Harawira]

Signed for Wai 2889 by:

[Cletus Maanu Paul and Desma Kemp Ratima]

Signed for MFAT Trade and Economic Group (represented by the Deputy Secretary Trade and Economic) by:

[Vangelis Vitalis]

APPENDIX III

CHAPTER 14 (ELECTRONIC COMMERCE)

Article 14.1: Definitions

For the purposes of this Chapter:

computing facilities means computer servers and storage devices for processing or storing information for commercial use;

covered person[1] means:

(a) a covered investment as defined in Article 9.1 (Definitions);

(b) an investor of a Party as defined in Article 9.1 (Definitions), but does not include an investor in a financial institution; or

(c) a service supplier of a Party as defined in Article 10.1 (Definitions),

but does not include a 'financial institution' or a 'cross-border financial service supplier of a Party' as defined in Article 11.1 (Definitions);

digital product means a computer programme, text, video, image, sound recording or other product that is digitally encoded, produced for commercial sale or distribution, and that can be transmitted electronically;[2][3]

electronic authentication means the process or act of verifying the identity of a party to an electronic communication or transaction and ensuring the integrity of an electronic communication;

electronic transmission or **transmitted electronically** means a transmission made using any electromagnetic means, including by photonic means;

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

trade administration documents means forms issued or controlled by a Party that must be completed by or for an importer or exporter in connection with the import or export of goods; and

unsolicited commercial electronic message means an electronic message which is sent for commercial or marketing purposes to an electronic address, without the consent of the recipient or despite the explicit rejection of the recipient, through an Internet access service supplier or, to the extent provided for under the laws and regulations of each Party, other telecommunications service.

1. For Australia, a covered person does not include a credit reporting body.

2. For greater certainty, digital product does not include a digitised representation of a financial instrument, including money.

3. The definition of digital product should not be understood to reflect a Party's view on whether trade in digital products through electronic transmission should be categorised as trade in services or trade in goods.

Article 14.2: Scope and General Provisions

1. The Parties recognise the economic growth and opportunities provided by electronic commerce and the importance of frameworks that promote consumer confidence in electronic commerce and of avoiding unnecessary barriers to its use and development.
2. This Chapter shall apply to measures adopted or maintained by a Party that affect trade by electronic means.
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.
4. For greater certainty, measures affecting the supply of a service delivered or performed electronically are subject to the obligations contained in the relevant provisions of Chapter 9 (Investment), Chapter 10 (Cross-Border Trade in Services) and Chapter 11 (Financial Services), including any exceptions or non-conforming measures set out in this Agreement that are applicable to those obligations.
5. For greater certainty, the obligations contained in Article 14.4 (Non-Discriminatory Treatment of Digital Products), Article 14.11 (Cross-Border Transfer of Information by Electronic Means), Article 14.13 (Location of Computing Facilities) and Article 14.17 (Source Code) are:
   (a) subject to the relevant provisions, exceptions and non-conforming measures of Chapter 9 (Investment), Chapter 10 (Cross-Border Trade in Services) and Chapter 11 (Financial Services); and
   (b) to be read in conjunction with any other relevant provisions in this Agreement.
6. The obligations contained in Article 14.4 (Non-Discriminatory Treatment of Digital Products), Article 14.11 (Cross-Border Transfer of Information by Electronic Means) and Article 14.13 (Location of Computing Facilities) shall not apply to the non-conforming aspects of measures adopted or maintained in accordance with Article 9.12 (Non-Conforming Measures), Article 10.7 (Non-Conforming Measures) or Article 11.10 (Non-Conforming Measures).

Article 14.3: Customs Duties

1. No Party shall impose customs duties on electronic transmissions, including content transmitted electronically, between a person of one Party and a person of another Party.
2. For greater certainty, paragraph 1 shall not preclude a Party from imposing internal taxes, fees or other charges on content transmitted electronically, provided that such taxes, fees or charges are imposed in a manner consistent with this Agreement.

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.

Article 14.5: Domestic Electronic Transactions Framework

1. Each Party shall maintain a legal framework governing electronic transactions consistent with the principles of the UNCITRAL *Model Law on Electronic Commerce 1996* or the *United Nations Convention on the Use of Electronic Communications in International Contracts*, done at New York, November 23, 2005.

2. Each Party shall endeavour to:
   (a) avoid any unnecessary regulatory burden on electronic transactions; and
   (b) facilitate input by interested persons in the development of its legal framework for electronic transactions.

Article 14.6: Electronic Authentication and Electronic Signatures

1. Except in circumstances otherwise provided for under its law, a Party shall not deny the legal validity of a signature solely on the basis that the signature is in electronic form.

2. No Party shall adopt or maintain measures for electronic authentication that would:
   (a) prohibit parties to an electronic transaction from mutually determining the appropriate authentication methods for that transaction; or
   (b) prevent parties to an electronic transaction from having the opportunity to establish before judicial or administrative authorities that their transaction complies with any legal requirements with respect to authentication.

3. Notwithstanding paragraph 2, a Party may require that, for a particular category of transactions, the method of authentication meets certain performance standards or is certified by an authority accredited in accordance with its law.

4. The Parties shall encourage the use of interoperable electronic authentication.

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 16.6.2 (Consumer Protection) when they engage in electronic commerce.

4. For greater certainty, to the extent that a digital product of a non-Party is a 'like digital product', it will qualify as an 'other like digital product' for the purposes of this paragraph.

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 16.6.5 and Article 16.6.6 (Consumer Protection) includes cooperation with respect to online commercial activities.

Article 14.8: Personal Information Protection[5]

1. The Parties recognise the economic and social benefits of protecting the personal information of users of electronic commerce and the contribution that this makes to enhancing consumer confidence in electronic commerce.
2. To this end, each Party shall adopt or maintain a legal framework that provides for the protection of the personal information of the users of electronic commerce. In the development of its legal framework for the protection of personal information, each Party should take into account principles and guidelines of relevant international bodies.[6]
3. Each Party shall endeavour to adopt non-discriminatory practices in protecting users of electronic commerce from personal information protection violations occurring within its jurisdiction.
4. Each Party should publish information on the personal information protections it provides to users of electronic commerce, including how:
   (a) individuals can pursue remedies; and
   (b) business can comply with any legal requirements.
5. Recognising that the Parties may take different legal approaches to protecting personal information, each Party should encourage the development of mechanisms to promote compatibility between these different regimes. These mechanisms may include the recognition of regulatory outcomes, whether accorded autonomously or by mutual arrangement, or broader international frameworks. To this end, the Parties shall endeavour to exchange information on any such mechanisms applied in their jurisdictions and explore ways to extend these or other suitable arrangements to promote compatibility between them.

Article 14.9: Paperless Trading

Each Party shall endeavour to:

5. Brunei Darussalam and Viet Nam are not required to apply this Article before the date on which that Party implements its legal framework that provides for the protection of personal data of the users of electronic commerce.

6. For greater certainty, a Party may comply with the obligation in this paragraph by adopting or maintaining measures such as a comprehensive privacy, personal information or personal data protection laws, sector-specific laws covering privacy, or laws that provide for the enforcement of voluntary undertakings by enterprises relating to privacy.

(a) make trade administration documents available to the public in electronic form; and
(b) accept trade administration documents submitted electronically as the legal equivalent of the paper version of those documents.

Article 14.10: Principles on Access to and Use of the Internet for Electronic Commerce

Subject to applicable policies, laws and regulations, the Parties recognise the benefits of consumers in their territories having the ability to:

(a) access and use services and applications of a consumer's choice available on the Internet, subject to reasonable network management;[7]
(b) connect the end-user devices of a consumer's choice to the Internet, provided that such devices do not harm the network; and
(c) access information on the network management practices of a consumer's Internet access service supplier.

Article 14.11: 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, when this activity is for the conduct of the business of a covered person.
3. Nothing in this Article shall prevent a Party from adopting or maintaining measures 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.

Article 14.12: Internet Interconnection Charge Sharing

The Parties recognise that a supplier seeking international Internet connection should be able to negotiate with suppliers of another Party on a commercial basis. These negotiations may include negotiations regarding compensation for the establishment, operation and maintenance of facilities of the respective suppliers.

Article 14.13: Location of Computing Facilities

1. The Parties recognise that each Party may have its own regulatory requirements regarding the use of computing facilities, including requirements that seek to ensure the security and confidentiality of communications.
2. No 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.

7. The Parties recognise that an Internet access service supplier that offers its subscribers certain content on an exclusive basis would not be acting contrary to this principle.

3. Nothing in this Article shall prevent a Party from adopting or maintaining measures 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 the use or location of computing facilities greater than are required to achieve the objective.

Article 14.14: Unsolicited Commercial Electronic Messages[8]

1. Each Party shall adopt or maintain measures regarding unsolicited commercial electronic messages that:

(a) require suppliers of unsolicited commercial electronic messages to facilitate the ability of recipients to prevent ongoing reception of those messages;
(b) require the consent, as specified according to the laws and regulations of each Party, of recipients to receive commercial electronic messages; or
(c) otherwise provide for the minimisation of unsolicited commercial electronic messages.

2. Each Party shall provide recourse against suppliers of unsolicited commercial electronic messages that do not comply with the measures adopted or maintained pursuant to paragraph 1.

3. The Parties shall endeavour to cooperate in appropriate cases of mutual concern regarding the regulation of unsolicited commercial electronic messages.

Article 14.15: Cooperation

Recognising the global nature of electronic commerce, the Parties shall endeavour to:

(a) work together to assist SMEs to overcome obstacles to its use;
(b) exchange information and share experiences on regulations, policies, enforcement and compliance regarding electronic commerce, including:
    (i) personal information protection;
    (ii) online consumer protection, including means for consumer redress and building consumer confidence;
    (iii) unsolicited commercial electronic messages;
    (iv) security in electronic communications;
    (v) authentication; and
    (vi) e-government;
(c) exchange information and share views on consumer access to products and services offered online among the Parties;
(d) participate actively in regional and multilateral fora to promote the development of electronic commerce; and

8. Brunei Darussalam is not required to apply this Article before the date on which it implements its legal framework regarding unsolicited commercial electronic messages.

(e) encourage development by the private sector of methods of self-regulation that foster electronic commerce, including codes of conduct, model contracts, guidelines and enforcement mechanisms.

Article 14.16: Cooperation on Cybersecurity Matters

The Parties recognise the importance of:

(a) building the capabilities of their national entities responsible for computer security incident response; and

(b) using existing collaboration mechanisms to cooperate to identify and mitigate malicious intrusions or dissemination of malicious code that affect the electronic networks of the Parties.

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:

(a) the inclusion or implementation of terms and conditions related to the provision of source code in commercially negotiated contracts; or

(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.

4. This Article shall not be construed to affect requirements that relate to patent applications or granted patents, including any orders made by a judicial authority in relation to patent disputes, subject to safeguards against unauthorised disclosure under the law or practice of a Party.

Article 14.18: Dispute Settlement

1. With respect to existing measures, Malaysia shall not be subject to dispute settlement under Chapter 28 (Dispute Settlement) regarding its obligations under Article 14.4 (Non-Discriminatory Treatment of Digital Products) and Article 14.11 (Cross-Border Transfer of Information by Electronic Means) for a period of two years after the date of entry into force of this Agreement for Malaysia.

2. With respect to existing measures, Viet Nam shall not be subject to dispute settlement under Chapter 28 (Dispute Settlement) regarding its obligations under Article 14.4 (Non-Discriminatory Treatment of Digital Products), Article 14.11 (Cross-Border Transfer of Information by Electronic Means) and Article 14.13 (Location of Computing Facilities) for a period of two years after the date of entry into force of this Agreement for Viet Nam.

APPENDIX IV

SELECT INDEX TO THE WAI 2522 RECORD OF INQUIRY

SELECT RECORD OF PROCEEDINGS

1 Statements

1.1 Statements of claim

1.1.1 Kathy Ertel, Annette Sykes, and Robyn Zwaan, statement of claim on behalf of Associate Professor Dr Papaarangi Reid, Moana Jackson, Angeline Greensill, Hone Harawira, and Rikirangi Gage alleging prejudice resulting from the Crown's policies, practices, acts, and omissions in respect of the Trans-Pacific Partnership Agreement, 24 June 2015

(a) Vacated

(b) Kathy Ertel, Annette Sykes, and Robyn Zwaan, statement of claim on behalf of Moana Jackson, Angeline Greensill, Hone Harawira, Rikirangi Gage, and Moana Maniapoto alleging prejudice resulting from the Crown's policies, practices, acts, and omissions in respect of the Trans-Pacific Partnership Agreement, 21 September 2018

1.1.3 Linda Thornton and Bryce Lyall, statement of claim on behalf of Natalie Baker, Hone Tiatoa, Maia Pitman, Ani Taniwha, Pouri Harris, Owen Kingi, Justyne Te Tana, and Lorraine Norris alleging significant and irreversible prejudice resulting from the Crown entering into the Trans-Pacific Partnership Agreement, 23 June 2015

(a) Bryce Lyall and Linda Thornton, amended statement of claim on behalf of Natalie Martin (née Baker), Hone Tiatoa, Maia Pitman, Ani Taniwha, Pouri Harris, Owen Kingi, Justyne Te Tana, and Lorraine Norris, 21 September 2018

1.1.4 Gerald Sharrock, statement of claim on behalf of Rihari Dargaville alleging irreversible prejudice to be caused to the Te Tai Tokerau District Māori Council by the Crown's adoption and ratification of the Trans-Pacific Partnership Agreement, 3 July 2015

1.1.5 Tavake Afeaki, Winston McCarthy, and Rebekah Jordan, statement of claim on behalf of Waimarie Bruce-Kingi, Kingi Taurua, Paora Whaanga, Huia Brown, Jack Te Reti, Richard Thompson, John Wī, Tracey Waitokia, Karina Williams, and Michael Leulua'i, concerning the Crown's policies, practices, acts, and omissions in respect of the Trans-Pacific Partnership Agreement, 3 July 2015

1.1.6 Donna Hall, statement of claim on behalf of Cletus Maanu Paul, Sir Edward Durie, Kereama Pene, Tamati Cairns, Titewhai Harawira, Desma Ratima, Rihari Dargaville, and Anthony Bidois alleging prejudice caused by the Crown's ongoing negotiation of the Trans-Pacific Partnership Agreement, 10 July 2015

2 Tribunal Memoranda, Directions, and Decisions

2.5 Pre-hearing stage

2.5.37 Judge Michael Doogan, memorandum proposing revisions to issue 4 of Tribunal statement of issues, setting date for feedback, and responding to memoranda on disclosure issues, 22 November 2019
(a) Associate Professor Amokura Kawharu to Waitangi Tribunal, letter concerning phrasing of issue 4 of Tribunal statement of issues, 14 November 2019

2.6 Hearing stage

2.6.7 Judge Michael Doogan, memorandum addressing matters arising from judicial teleconference, considering submissions on phrasing of issue 4 of Tribunal statement of issues, and setting filing dates, 9 March 2020
(a) 'Tribunal Statement of Issues – Remaining Issues for Stage Two of the Trans-Pacific Partnership Agreement Inquiry', Microsoft Word document, 9 March 2020

2.6.24 Judge Michael Doogan, memorandum placing documents on record, responding to extension requests, and convening teleconference, 9 October 2020
(a) Judge Damian Stone and Prue Kapua, 'Mediators' Report', Microsoft Word document, 9 October 2020
(b) Annette Sykes (Wai 2522), John Tiatoa (Wai 2523), Josey Lang (Wai 682), Te Kani Williams (Wai 2533), Bryce Lyall (Wai 2531), Rihari Dargaville and Louisa Collier (Wai 2530), Cletus Maanu Paul (Wai 2535), Titewhai Harewira (Wai 1427), Cletus Maanu Paul and Desma Kemp Ratima (Wai 2889), Vangelis Vitalis (MFAT), 'Mediation Agreement', 9 October 2020

2.7 Post-hearing stage

2.7.7 Judge Michael Doogan, memorandum directing parties to indicate whether the inquiry can or should be concluded, 30 August 2016

2.7.10 Judge Michael Doogan, memorandum concerning the ratification of the TPPA and the adjourning of the inquiry, 30 June 2017

2.7.18 Judge Michael Doogan, memorandum both concerning additions to the record and the introduction to Parliament of a Bill to implement aspects of the CPTPP and directing the filing of further submissions, 1 May 2018

2.7.29 Judge Michael Doogan, memorandum concerning submissions received on jurisdictional issues and remaining issues for inquiry, 19 February 2019

2.7.30 Judge Michael Doogan, memorandum responding to oral submissions, confirming remaining issues for inquiry, and setting out provisional timetable, 2 April 2019
(a) Waitangi Tribunal, 'The Tribunal's Statement of Issues for Stage Two of the Trans-Pacific partnership Agreement Inquiry', no date

2.7.36 Judge Michael Doogan, memorandum responding to submissions and Crown memorandum and setting out process to address remaining disclosure issues, 2 August 2019

3 Submissions and Memoranda of Parties

3.1 Pre-hearing stage represented

3.1.76 Virginia Hardy, memorandum concerning the public release of the text of the Trans-Pacific Partnership Agreement, 6 November 2015

3.1.196 Daniel Hunt, memorandum concerning Cabinet consideration of policy options and recommendations from review of Plant Variety Rights Act 1987, filing further material, and updating filing of timetable, 20 November 2019

3.2 Pre-hearing stage unrepresented

3.2.5 Rachel Ennor, memorandum on behalf of the Crown concerning the phrasing of issue 4 of the Tribunal statement of issues, 13 December 2019

3.2.7 Annette Sykes, Jordan Bartlett, and Kalei Delamere-Ririnui, memorandum on behalf of the Wai 2522 claimants concerning the phrasing of issue 4 of the Tribunal statement of issues, 13 December 2019

3.2.40 Bryce Lyall, joint memorandum on behalf of the Wai 682, Wai 2522, Wai 2523, and Wai 2533 claimants concerning mediation, 31 July 2020

3.2.45 Bryce Lyall and Mike Colson, joint memorandum on behalf of the Wai 682, Wai 1427, Wai 2522, Wai 2523, Wai 2530, Wai 2531, Wai 2533, Wai 2535, Wai 2888, and Wai 2889 claimants and the Crown concerning mediation, 24 August 2020

3.2.54 Annette Sykes, Jordan Chaney, and Camille Ware, joint memorandum on behalf of the Wai 2522 and Wai 2523 claimants concerning the Treaty consistency of Chapter 14, 2 September 2020

3.2.60 Annette Sykes, Camille Ware, and Tumanako Silveira, memorandum on behalf of the Wai 2522 claimants concerning issues 1 and 2, 7 September 2020

3.2.86 Annette Sykes, Kalei Delamere-Ririnui, and Aphiphany Forward-Taua, memorandum on behalf of the Wai 2522 claimants listing questions for Professor Andrew Mitchell, 19 November 2020

3.3 Opening, closing, and in reply

3.3.17 Gerald Sharrock, closing submissions on behalf of Taitokerau District Council, 29 March 2016

3.3.20 Bryce Lyall and Linda Thornton, closing submissions on behalf of Wai 2523 claimants, 29 March 2016

3.3.21 Season-Mary Downes and Heather Jamieson, closing submissions on behalf of Wai 49, Wai 682, Wai 1464, and Wai 1546 claimants, 29 March 2016

3.3.22 P J Andrew, closing submissions on behalf of Wai 2532 claimants, 29 March 2016

3.3.23 Tavake Afeaki and Winston McCarthy, closing submissions on behalf of Wai 2531 claimants, 30 March 2016

3.3.24 Janet Mason, closing submissions on behalf of Wai 2535 claimants, 29 March 2016

3.3.27 Michael Heron KC and Gillian Gillies, closing submissions on behalf of the Crown, 7 April 2016

3.3.54 Annette Sykes, Jordan Bartlett, and Kalei Delamere-Ririnui, submissions on behalf of Wai 2522 claimants responding to Crown closing submissions (submission 3.3.61), 23 December 2019

3.3.56 Bryce Lyall and Linda Thornton, opening submissions on behalf of Wai 2523 claimants, 2 November 2020

3.3.57 Annette Sykes, Kalei Delamere-Ririnui, and Camille Ware, supplementary opening submissions on behalf of Wai 2522 claimants, 3 November 2020

3.3.58 Rachael Ennor, opening submissions on behalf of the Crown, 6 November 2020

3.3.59 Bryce Lyall and Linda Thornton, closing submissions on behalf of Wai 2523 claimants, 4 December 2020

3.3.60 Annette Sykes, Kalei Delamere-Ririnui, and Camille Ware, closing submissions on behalf of Wai 2522 claimants, 4 December 2020

3.3.61 Mike Colson and Rachael Ennor, closing submissions on behalf of the Crown, 18 December 2020

3.3.63 Annette Sykes and Kalei Delamere-Ririnui, memorandum on behalf of the Wai 2522 claimants responding to the Crown's closing submissions, 20 January 2021

3.4 Post-hearing matters

3.4.17 Rachael Ennor, memorandum on behalf of the Crown seeking an extension for the filing of an update on the UPOV 91 negotiations, 13 June 2016

3.4.18 Rachael Ennor, memorandum on behalf of the Crown updating the Tribunal on the UPOV 91 negotiations, 20 August 2016

3.4.21 Annette Sykes and Jordan Bartlett, memorandum on behalf of the Wai 2522 claimants concerning the continuation of the inquiry, 23 September 2016

3.4.23 Rachael Ennor, memorandum on behalf of the Crown concerning the Crown's negotiations with Māori over UPOV 91 and seeking an extension for the filing of an update on those negotiations, 1 March 2017

3.4.25 Gillian Gillies, memorandum on behalf of the Crown updating the Tribunal on the Crown's engagement with Māori over UPOV 91, 28 April 2017

3.4.31 Gillian Gillies, memorandum on behalf of the Crown updating the Tribunal on possible changes to the TPPA, 24 July 2017

3.4.33 Rachael Ennor, memorandum on behalf of the Crown updating the Tribunal on the CPTPP negotiations, 14 November 2017

3.4.34 Annette Sykes, Jordan Bartlett, and Rebekah Jordan, memorandum on behalf of the Wai 2522 claimants concerning the Crown's lack of consultation over the CPTPP negotiations, 21 November 2017

3.4.35 Bryce Lyall and Linda Thornton, memorandum on behalf of the Wai 2523 claimants asking the Tribunal to reconvene to consider outstanding issues, the current status of the negotiations, and the Crown's Treaty compliance, 29 November 2017

3.4.36 Rachael Ennor, memorandum on behalf of the Crown updating the Tribunal on the UPOV 91 review process and the CPTPPA and expressing a view on the Tribunal's jurisdiction, 8 December 2017

3.4.42 Gillian Gillies, memorandum on behalf of the Crown concerning the effect of the CPTPP on the Crown's plan of engagement, the application of *res judicata*, and an appropriate time for the inquiry, 14 February 2018

3.4.129 Rachael Ennor, memorandum on behalf of the Crown concerning the Tribunal's jurisdiction, the hearing timetable, the Plant Variety Rights Act 1987 review, the scope of the inquiry, and disclosure, 17 May 2019

3.4.136 Bryce Lyall, joint memorandum on behalf of the Wai 682, Wai 2522, Wai 2523, Wai 2533, Wai 2551, and Wai 2888 claimants detailing the high-level position they plan to take at the 29 July 2019 judicial conference, 18 July 2019

4 Transcripts and Translations

4.1 Transcripts

4.1.2 [National Transcription Service], transcript of Stage One hearing week 1 (14–18 March 2016), [2016]

4.1.9 [National Transcription Service], transcript of Stage Three hearing (17–19 November 2020), [2020]

SELECT RECORD OF DOCUMENTS

A Series Documents

A1 Professor Elizabeth Jane Kelsey, affidavit, 19 June 2015
(a) Professor Elizabeth Jane Kelsey, comp, supporting documents to document A1, 19 June 2015

A26 Willow-Jean Prime, brief of evidence, 12 February 2016

A65 Evangelos (Vangelis) Vitalis, affidavit, 18 May 2018

B Series Documents

B8 Professor Elizabeth Jane Kelsey, affidavit, 17 October 2019

B9 Moana Jackson, second brief of evidence, 17 October 2019
(a) Moana Jackson, comp, supporting papers to document B9, [17 October 2019]
pp 1–21 Moana Jackson, brief of evidence, [17 October 2019]

B23 Trade for All Advisory Board, *Report of the Trade for All Advisory Board* ([Wellington]: Trade for All Advisory Board, 2019)

B24 Hone Tiatoa, brief of evidence, 1 September 2020
(a) Burcu Kilic and Tamir Israel, 'The Highlights of the Trans-Pacific partnership E-Commerce Chapter', Canadian Internet Policy and Public Interest Clinic, 5 November 2015

B25 Professor Elizabeth Jane Kelsey, affidavit, 8 September 2020
(a) Professor Elizabeth Jane Kelsey, comp, supporting documents to document B25, 8 September 2020
pp 1–3 Office of the United States Trade Representative, 'Ensuring a Free and Open Internet', fact sheet, [2015]
pp 4–7 Office of the United States Trade Representative, 'The Digital 2 Dozen', fact sheet, April 2016
pp 40–91 Te Puni Kōkiri, *Wai 262 – Te Pae Tawhiti: The Role of the Crown and Māori in Making Decisions about Taonga and Mātauranga Māori – Preliminary Proposals for Crown Organisation* ([Wellington]: Te Puni Kōkiri, [2019])
pp 94–106 Statistics NZ, 'A Note on Data Implications of the Wai 262 Report: Draft', 18 September 2019
pp 107–108 Statistics NZ, 'Appendix One', table listing milestones for Mana Ōrite Relationship Agreement between Statistics NZ and the Data Iwi leaders Group, no date
pp 109–125 Stats NZ Tatauranga Aotearoa, *Iwi Statistical Standard: September 2017* (Wellington: Stats NZ Tatauranga Aotearoa, 2017)
(b) Professor Elizabeth Jane Kelsey, presentation of evidence on issue 4, 16 November 2020

B26 Karaitiana Taiuru, affidavit, 1 September 2020
(a) Karaitiana Taiuru, comp, supporting documents to document B26, 1 September 2020
pp 109–121 Karaitiana Taiuru, 'Why Data is a Taonga: A Customary Māori Perspective', PDF file, 19 December 2018, www.turu.maori.nz/data-is-a-taonga
(b) Karaitiana Taiuru, 'Wai 2522 E-Commerce', Powerpoint presentation, [2020]

B29 Potaua Biasiny-Tule, affidavit, 7 September 2020
(a) Te Iwi Matihiko: A Values-Based Approach to Digital Wellbeing Curriculum Guide

B31 Professor Elizabeth Jane Kelsey, affidavit, 8 September 2020

B32 Donna Cormack, affidavit, 4 September 2020

C Series Documents

C1 Evangelos (Vangelis) Vitalis, brief of evidence, 14 October 2020
(a) Evangelos (Vangelis) Vitalis, comp, supporting documents to document C1, 14 October 2020

C2 Professor Andrew Mitchell, brief of evidence, 14 October 2020
(a) Professor Andrew Mitchell, comp, supporting documents to document C2, 14 October 2020
(b) Professor Andrew Mitchell, 'Summary of Positions on Key Issues', table, no date
(c) Professor Andrew Mitchell, 'Wai 2522 Inquiry: Issue Four Expert Evidence', Powerpoint presentation, no date
(d) Professor Andrew Mitchell, written responses to Wai 2522 claimant counsel questions, 25 November 2020

C3 Professor Elizabeth Jane Kelsey, affidavit in reply, 29 October 2020
(a) Professor Elizabeth Jane Kelsey, comp, supporting documents to document C3, 29 October 2020

C5 Professor Elizabeth Jane Kelsey, comp, supporting documents, 29 October 2020

C9 Evangelos (Vangelis) Vitalis, affidavit, 23 July 2021
(a) Proactive Release: Trade for All Advisory Board Recommendations: Report on Progress, 22 July 2021