

The Treaty of Waitangi Exception in New Zealand's Free Trade Agreements*

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INTRODUCTION

This chapter discusses the approach that New Zealand has taken in seeking to protect the interests of Māori, the country's Indigenous people, when negotiating free trade agreements (FTAs) with other states. According to New Zealand constitutional law, the government has certain obligations to protect Māori interests in their lands and other resources, and Māori culture and political interests, under the Treaty of Waitangi.¹ One of the core legal principles of the Treaty of Waitangi is that the relationship it creates requires the New Zealand government to consult with Māori on important policy developments that affect Māori interests.² However, the nature and extent of these obligations and interests are contested. The efforts by the New Zealand government to protect Māori interests against the obligations it assumes to other states under FTAs have been informed by the government's view of its obligations to Māori under the Treaty of Waitangi, as well as its view of the nature of Māori interests that may be engaged by New Zealand's FTAs. Disputed expectations about what level of consultation and protection is desirable or required by the Treaty have become an issue of controversy.

New Zealand has sought to protect Māori interests, and fulfil its obligations to Māori under the Treaty of Waitangi, by negotiating the inclusion of a "Treaty of Waitangi" exception (Treaty Exception) in each of its FTAs. The adequacy of the Treaty Exception was questioned by Māori in respect of the recent Trans-Pacific Partnership (TPP) FTA (which has since become the Comprehensive and Progressive Agreement for Trans-Pacific Partnership

* I thank Isabel Ward for her research assistance.

¹ Matthew Palmer, *The Treaty of Waitangi in New Zealand's Law and Constitution* (Wellington: Victoria University Press, 2008); Carwyn Jones, *New Treaty, New Tradition: Reconciling New Zealand and Māori Law* (Vancouver: UBC Press, 2016). The Treaty of Waitangi (in the Māori language, te Tiriti o Waitangi) is a treaty between the British Crown and Māori leaders that was first signed on February 6, 1840.

² New Zealand, Waitangi Tribunal, *Report on the Trans-Pacific Partnership Agreement*, June 17, 2016 (WAI 2522), para. 5.2.2.

(CPTPP)).³ According to New Zealand's Ministry of Foreign Affairs and Trade,⁴ the Treaty Exception "recognises the importance of the Treaty of Waitangi to New Zealand" and will ensure that "nothing in TPP will prevent the Crown from taking measures that it deems necessary to meet its obligations to Māori."⁵ However, New Zealand has progressively expanded its commitments under FTAs, especially in respect of foreign investment, including by agreeing to the enforcement of investor protections through binding investor-state dispute settlement (ISDS). These developments have prompted widespread public and political debate in New Zealand, and raised concerns about their impact on New Zealand's regulatory capacity to protect public interests, especially given the possibility of investor claims against the government through ISDS.⁶ Concerns about the adequacy of the Treaty Exception to protect specific Māori interests resulted in several prominent Māori individuals, as well as a number of tribes and organizations from across New Zealand,⁷ seeking a determination by the Waitangi Tribunal of the Exception's effectiveness. The Tribunal is a standing commission of inquiry that was established in 1975 to make recommendations relating to the practical application of the Treaty, and to determine whether government actions or omissions are consistent with its principles.⁸

³ Comprehensive and Progressive Trans-Pacific Partnership, Austl.–Brunei–Can.–Chile–Japan–Malay.–Mex.–N.Z.–Peru–Sing.–Viet., March 8, 2018 [hereinafter CPTPP]. The CPTPP is effectively an umbrella agreement that incorporates the original TPP, with the exception of various provisions that are now "suspended" under Article 2.

⁴ New Zealand, Foreign Affairs and Trade, "Text of the Trans-Pacific Partnership," accessed September 6, 2018, www.mfat.govt.nz/en/about-us/who-we-are/treaties/trans-pacific-partnership-agreement-tpp/text-of-the-trans-pacific-partnership; Trans-Pacific Partnership, Austl.–Brunei–Can.–Chile–Japan–Malay.–Mex.–N.Z.–Peru–Sing.–U.S.–Viet., February 4, 2016 [hereinafter TPP], <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>.

⁵ New Zealand, Foreign Affairs and Trade, "Trans-Pacific Partnership: Legal and Institutional Fact Sheet."

⁶ Oliver Hailes and Andrew Geddis, "The Trans-Pacific Partnership in New Zealand's Constitution," *New Zealand Universities Law Rev* 27, no. 2 (December 2016): 226; Amokura Kawharu, "Process, Politics and the Politics of Process: The Trans-Pacific Partnership in New Zealand," *Melbourne Journal of International Law* 17, no. 2 (2016): 286.

⁷ New Zealand, *Waitangi Tribunal Report on the Trans-Pacific Partnership Agreement*, Appendix 1. The first claims were lodged in June 2015. Eventually, a total of nine claims were filed on behalf of individuals, tribes and organizations, including the New Zealand Maori Council (the statutory body created under the Maori Community Development Act 1962 to give a voice to Māori in national policy-making). More than thirty interested parties participated in the proceedings in support of them.

⁸ Treaty of Waitangi Act 1975, Preamble (N.Z.); Treaty of Waitangi Amendment Act 1985, s 3 (N.Z.). The Tribunal's jurisdiction was extended to include historical claims in 1985. Most claims heard by the Tribunal have related to historical events arising from New Zealand's colonization, and especially land loss suffered by Māori. However, the Tribunal has jurisdiction to inquire into any well-founded claims by Māori that the New Zealand government is not adhering to its obligations under the Treaty, and it has the competence to interpret the Treaty for this purpose. Recent contemporary claims have included, for instance, rights to protection of cultural IP, and the mistreatment of Māori children in state care. Its recommendations to the government are non-binding and the record for implementation is mixed. For general information, see further the Tribunal's website, www.waitangitribunal.govt.nz/.

In light of these issues, this chapter examines the inclusion of the Treaty Exception within New Zealand's evolving FTA programme as a means of protecting Māori interests arising under the Treaty of Waitangi. It analyses the terms of the Exception in the context of the recent debates about its adequacy and wider discussions now taking place in New Zealand about the risks and benefits of trade agreements. I argue that the government's processes for involving Māori in the development of New Zealand's FTA policy are flawed, and that the drafting of the Treaty Exception has not kept pace with changes in New Zealand's FTA practice. I conclude that possible solutions for remedying the problems in the text of the Treaty Exception need to be developed through dialogue with Māori.

1 DEVELOPMENT OF THE TREATY EXCEPTION

A New Zealand's FTA Programme

New Zealand has negotiated thirteen FTAs (eleven of which, at the time of writing, have been signed and entered into force).⁹ The Treaty Exception was developed for the 2000 FTA with Singapore, and it has been included in every FTA apart from the earlier Closer Economic Relations (CER) FTA with its closest trading partner, Australia, signed in 1983. Initially (and apart from CER), as a small,¹⁰ trade-dependent economy,¹¹ New Zealand focused its efforts on multilateral trade liberalisation initiatives through the World Trade Organization (WTO).¹² As progress on negotiations for further liberalisation through the WTO slowed around 2000, New Zealand's focus began to shift towards developing its programme of bilateral and regional FTAs. Thus, in addition to the CER, New Zealand entered into the FTA with Singapore, and then signed agreements with Thailand (2005), Singapore, Chile and Brunei (2005), China (2008), the ten ASEAN countries and Australia (AANZFTA, 2010), Malaysia (2010), Hong Kong (2010), Taiwan (2013) and Korea (2015).

The most economically significant FTA initiative that New Zealand has been involved in is the twelve-country TPP, signed in Auckland on February 5, 2016. The

⁹ New Zealand, Foreign Affairs and Trade, "Free Trade Agreements," accessed December 17, 2018, www.mfat.govt.nz/en/trade/free-trade-agreements/. I include the agreement with Taiwan in the count of FTAs in force, although the Ministry does not.

¹⁰ New Zealand, Stats, "2013 Census Ethnic Group Profiles: Māori," accessed September 6, 2018, www.stats.govt.nz/tools/2013-census-ethnic-group-profiles. New Zealand has a relatively small economy and population (of approximately 4.8 million, of whom approximately 15 per cent are Māori).

¹¹ "Australia-Oceania: New Zealand," in *The World Factbook* (Washington, DC: Central Intelligence Agency, updated August 27, 2018), www.cia.gov/library/publications/resources/the-world-factbook/geos/nz.html.

¹² Richard Nottage, interview by Gabrielle Marceau, "WTO Creation," January 2009, www.wtcreation.org/en/videos?video=31933652. For instance, it was active in the "Cairns Group" of mainly developing country agricultural exporters during the Uruguay Round that preceded the creation of the WTO in 1994.

agreement was short-lived, however, because President Trump withdrew the United States' signature from the agreement soon after his election to office.¹³ Following the United States' departure, the remaining eleven countries entered into further negotiations to determine which parts of the TPP might be salvaged. It was on this basis that the re-named Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) emerged, and was signed by New Zealand and its ten counterparts on March 8, 2018.¹⁴

The extent of the obligations that New Zealand has assumed under these FTAs has increased over time, particularly regarding investment. As a net capital importer, New Zealand has only gradually accepted obligations to protect and promote foreign investment, partly to promote outbound investment, but mainly to secure concessions on trade. In the early FTA with Singapore, for example, the substantive obligations regarding investment are relatively modest and focused on non-discrimination,¹⁵ while the provisions on ISDS are limited and non-binding.¹⁶ The Ministry of Foreign Affairs and Trade describes the benefits of the Singapore agreement in terms of New Zealand's trade in goods and services.¹⁷ In contrast, the CPTPP is a far more wide-ranging agreement with chapters on investment, government procurement, competition, IP and a number of other related matters, in addition to provisions on trade in goods and services. The investment chapter imposes extensive obligations on the state parties to promote and protect foreign investment, and includes ISDS.¹⁸

That said, while the overall trajectory for New Zealand has been towards expanding trade and investment commitments, the CPTPP investment chapter also includes both standard and novel provisions intended to safeguard domestic regulatory space, while some of the more contentious original TPP provisions on ISDS have been suspended.¹⁹ New Zealand also exchanged side letters suspending the application of ISDS with Australia (consistent with their past practice, including the original TPP), and reflecting New Zealand's new policy to eschew ISDS²⁰ with

¹³ Memorandum Regarding Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement, 2017 Daily Comp. Pres. Doc. 64 (January 23, 2017); TPP, *supra* note 4, art. 30.5. This meant that the FTA was unable to enter into force, since, according to its terms, ratification by the United States is necessary in order for that to happen.

¹⁴ CPTPP, *supra* note 3, arts. 2 and 3.

¹⁵ Agreement between New Zealand and Singapore on a Closer Economic Partnership, N.Z.–Sing., November 14, 2000 [hereinafter CEP], arts. 28, 29 and 74.

¹⁶ CEP, *supra* note 15, art. 34.

¹⁷ New Zealand, Foreign Affairs and Trade, "Agreement Highlights," accessed September 6, 2018, www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/singapore/#high.

¹⁸ Amokura Kawharu and Luke Nottage, "Models for Investment Treaties in the Asia-Pacific Region: An Underreview," *Arizona Journal of International and Comparative Law* 34, no. 3 (2017): 503–509.

¹⁹ CPTPP, *supra* note 3, art. 2, Annexes 2 and 4(A). These include provisions for ISDS in respect of claims relating to the minimum standard of treatment for financial services, investment contracts and investment claims.

²⁰ Amokura Kawharu and Luke Nottage, "Has ISDS Gone Rogue for Australia and New Zealand? CPTPP (C-3PO), RCEP (R2-D2) and Beyond," *Yearbook on International Investment Law & Policy* (forthcoming). The policy shift followed the election of a Labour Party-led government in late 2017.

Peru, Brunei, Malaysia and Vietnam.²¹ In other words, while the general pattern has been one of FTA expansion, in recent times, there has been a degree of reflection on the scope of acceptable commitments, and the development of a range of measures to safeguard regulatory autonomy.

B *The Treaty Exception from GATS to the CPTPP*

Yet within this evolving FTA practice, the Treaty Exception has remained more or less static. Unlike the drafting of many other provisions typically included within New Zealand's FTAs, its text has not been adapted since its first use in the FTA with Singapore.²² Instead, substantially the same text has been included in each of New Zealand's FTAs from the Singapore agreement through to the CPTPP. In addition, and despite the Treaty of Waitangi obligation to consult with Māori,²³ there has been a lack of dialogue with Māori concerning the continued effectiveness of the Exception as part of the evolution of New Zealand's FTA programme. Instead, the government has regarded the Exception as sufficient, even in relation to the more recent and more expansive FTAs. Relatedly, the government has not viewed Māori as having any particular interests engaged by FTAs that need special protection. It maintained both these positions in the Waitangi Tribunal inquiry, discussed further in Section 2.

To some extent, this contrasts with the period in which the Treaty Exception was developed during the mid to late 1990s. At that time, the Ministry of Foreign Affairs and Trade and Te Puni Kōkiri (the Ministry of Māori Development) organized a series of meetings with Māori to discuss WTO negotiations, the proposed Multilateral Agreement on Investment (MAI) and the FTA with Singapore.²⁴ These efforts were largely in response to growing Māori demands for engagement on trade and investment agreements, and followed a strong public backlash on the controversial MAI.²⁵ As Carwyn Jones and others have observed, the Treaty

While in Opposition, Labour had signaled its intention to review New Zealand's stance on ISDS, following public opposition to ISDS especially in relation to the TPP. Labour was able to form a government only in coalition with the nationalist New Zealand First Party, which had unsuccessfully proposed legislation prohibiting ISDS in 2015 (the Fighting Corporate Control Bill 14–1).

²¹ ISDS is still available in respect of Brunei, Malaysia and Vietnam under AANZFTA.

²² CEP, *supra* note 15, art. 74.

²³ New Zealand, Waitangi Tribunal, Report on the Trans-Pacific Partnership Agreement, Chapter 5.

²⁴ Parekura Horomia and Jim Sutton, "Consultation Report to the Cabinet Policy Committee on the Singapore/New Zealand Closer Economic Partnership—Issues Raised in Consultation with Māori," 2000 (released under the Official Information Act 1982 (N.Z.), copy on file with the author). The consultation on the Singapore agreement is discussed by Hon. Parekura Horomia (Acting Minister of Māori Affairs) and Hon. Jim Sutton (Minister for Trade Negotiations).

²⁵ Robert Jones, "Maori March against MAI," *Green Leaf Weekly*, May 13, 1998, www.greenleft.org.au/content/maori-march-against-mai; Stephen Kobrin, "The MAI and the Clash of Globalizations," *Foreign Policy* 112 (Autumn 1998): 97–109; GATS: General Agreement on Trade in Services, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 8B (I), 1869 U.N.T.S.

Exception “arose out of this process,”²⁶ although Māori were not actually consulted on its final text.

A limited exception allowing discriminatory preferences for Māori commercial interests was included in New Zealand's schedule to the earlier 1994 WTO General Agreement on Trade in Services (GATS).²⁷ The GATS exception does not, however, mention the Treaty of Waitangi, and was criticized for its narrow scope.²⁸ At the time of the negotiations for the Singapore FTA, concerns were raised in parliamentary debates about whether the inclusion of a Treaty Exception was warranted. The then Trade Minister explained that the proposed Treaty Exception stemmed from the government's increasing recognition of the constitutional significance of the Treaty of Waitangi, and its commitment to addressing inequalities between Māori and non-Māori.²⁹ However, the Exception also faced serious criticism from Opposition parties, who claimed that the provision privileged Māori, and that any effects on Māori from the proposed FTA should instead be dealt with internally within New Zealand.³⁰

C Overview of the Treaty Exception Text

The text of the Treaty Exception in New Zealand's most recently concluded FTA, the CPTPP, is illustrative of its general form and language:³¹

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

183, 33 I.L.M. 1167 (1994) [hereinafter GATS]; New Zealand, Foreign Affairs and Trade, “Note on the wording of the Article on the Treaty of Waitangi (Article 74) in the CEP Agreement with Singapore,” September 2000 (released under the Official Information Act 1982 (N.Z.), copy on file with the author). Prompted by Māori concerns, the New Zealand government tabled an exception for Māori during the MAI negotiations, similar to the exception for Māori in GATS. For a more focused look on the MAI, read Kobrin article.

²⁶ Carwyn Jones, Claire Charters, Andrew Eruei and Jane Kelsey, “Māori Rights, Te Tiriti o Waitangi and the Trans-Pacific Partnership Agreement,” Expert Paper # 3, (2016): 8, <https://tpplegal.files.wordpress.com/2015/12/ep3-tiriti-paper.pdf>.

²⁷ GATS, *supra* note 25.

²⁸ Jane Kelsey, *Reclaiming the Future: New Zealand and the Global Economy* (Wellington, N.Z.: Bridget Williams Books, 1999), 262.

²⁹ Jim Sutton (16 August 2000) 586 NZPD 977.

³⁰ National Party, New Zealand First, and the Act Party (7 November 2000) 588 NZPD 428–440. See generally the contributions from these parties.

³¹ CPTPP, *supra* note 3, art. 29.6.

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.

The Treaty Exception is intended to operate as a general exception to the whole of the CPTPP, that is, to provide a basis on which New Zealand may defend a claim based on the breach of any other provision of the agreement. This is clear from the words “nothing in this Agreement” in paragraph 1, and the placement of the Exception in Chapter 29 alongside the other general exceptions. It has broader application, therefore, than some other similar exceptions for Indigenous interests. For example, Canada has included a reservation in its investment treaties against its obligations relating to national treatment, most-favoured nation (MFN), senior management and performance requirements, to preserve its ability to adopt measures that accord rights or preferences to its Indigenous peoples. The same reservation is included in Canada's schedule of non-conforming measures in the CPTPP, but, unlike New Zealand's Treaty of Waitangi exception, the Canadian reservation is not an exception of general application across the whole CPTPP.³²

The scope of the Treaty Exception is also indicated by the phrase “including in fulfilment of its obligations under the Treaty of Waitangi.” Given this phrase, and although the Treaty Exception is labeled “Treaty of Waitangi,” the Exception potentially applies to any measure giving more favourable treatment to Māori, whether required by the Treaty of Waitangi or not. Because of the proviso in paragraph 1, any discrimination in favour of Māori that the government seeks to bring within the Exception will nonetheless need to have a legitimate policy rationale. In most cases, that rationale will likely be connected to obligations under the Treaty because of its pervasive influence on government–Māori relations. On the other hand, the Exception applies only to preferences accorded to Māori. This is a potential shortcoming of the Exception, in that government actions that may be needed to protect Māori interests may not consist of measures that

³² CPTPP, *supra* note 3, Annex II on Cross Border Trade in Services and Investment Non-Conforming Measures, Schedule of Canada at 2. Agreement between the United States of America, the United Mexican States, and Canada, Can.–Mex.–U.S., November 30, 2018, art. 32.5. The reservation in the CPTPP provides that “Canada reserves the right to adopt or maintain a measure denying investors of and their investments, or service suppliers of a Party, any rights or preferences provided to aboriginal peoples.” There is a wider and general exception for measures necessary to fulfil legal obligations to Indigenous peoples in the proposed trade agreement between the United States, Mexico and Canada.

accord Māori “more favourable treatment.”³³ Whether this is an issue may depend on the interpretation of “more favourable treatment,” as discussed in Section 3.A.i. In addition, as also explained in Section 3.A.ii.c, the Exception applies only to “measures”; it does not exempt New Zealand from actions that do not involve the adoption of measures, including actions that are required to be taken under its FTAs.

2 TPP CONTROVERSIES AND THE WAITANGI TRIBUNAL INQUIRY

There are both principled and practical concerns arising from the New Zealand government's approach to safeguarding Māori interests in its FTAs through the Treaty Exception. The principled argument rests on the terms of the Treaty of Waitangi itself. There are two texts of the Treaty, one in English and one in Māori. Article 1 of the English text records that Māori cede sovereignty to the British Crown, while article 2 guarantees the protection of Māori lands and other resources. Article 2 in the Māori text guarantees that Māori retain their unqualified chieftainship; in other words, in the Māori text, which Māori signed, there is no cessation of sovereignty. Māori have argued that, fundamentally, the Treaty has been breached by the Crown assuming that Māori ceded sovereignty in the Crown's favour when this is not the case under the Māori text.³⁴ This fundamental breach extends to the government now negotiating trade agreements on behalf of Māori, and claiming the sovereign authority to do so, without Māori consent or sufficient involvement.

In terms of its practical effectiveness, as discussed in Section 3, the drafting of the Treaty Exception is problematic and raises complex interpretive questions. The ambiguities in the drafting have become more evident and relevant as New Zealand has become ever more deeply involved in FTAs. Māori concerns about the adequacy of the text of the Exception have gained attention in parallel with, and are supported by, the wider public concerns with the direction of New Zealand's FTA programme. As New Zealand's trade agreements broadened in scope to become general economic partnerships, and with growing public awareness of the possible regulatory risks of investment commitments, the traditional political bipartisan support for FTAs began to weaken.³⁵ This was evident during contentious parliamentary inquiries into ratification of New Zealand's FTA with Korea in 2015,³⁶ followed by the

³³ New Zealand, Waitangi Tribunal, *Report on the Trans-Pacific Partnership Agreement*, 5.1.6. This was noted by the Waitangi Tribunal, in a hypothetical sense.

³⁴ R.J. Walker, “The Treaty of Waitangi as the Focus of Māori Protest,” in *Waitangi: Maori and Pakeha Perspectives on the Treaty of Waitangi*, ed. I.H. Kawharu (Auckland: Oxford University Press, 1989), 263. The concept of sovereignty was foreign to the chiefs who signed the Treaty, who would have understood instead that the Treaty protected their status as chiefs as provided by the Māori text.

³⁵ (28 April 2009) 688 NZPD 2632. For instance, one Member of Parliament remarked that ratification of AANZFTA brought an “outbreak of peace” to the parliamentary debating chamber.

³⁶ Although not as far-reaching as the TPP, the Korea FTA marked a further evolutionary step in New Zealand's investment treaty practice, because it more closely follows US-style drafting compared to the then existing New Zealand agreements, in combination with binding ISDS.

TPP in 2016.³⁷ In response to these concerns, the then Labour Party Opposition announced in July 2015 that its support for the TPP was contingent on five “non-negotiable bottom lines.”³⁸ These included the requirements that foreign investors cannot successfully sue the government through ISDS for regulating in the public interest (second on its list) and that the Treaty of Waitangi should be upheld (fourth). As further evidence of the public contention, the signing of the TPP in Auckland in February 2016 was accompanied by mass protests in the city, led by prominent critics of the agreement and local Māori.³⁹

During the late stages of the negotiations and then conclusion of the TPP, at the request of several Māori claimants, the Waitangi Tribunal conducted an inquiry into the impact of the agreement on Māori interests, and, specifically, on the effectiveness of the Treaty Exception within it.⁴⁰ This arose from the claimants’ concerns that New Zealand’s obligations under the TPP would constrain the government’s ability, and potentially its willingness, to fulfil its Treaty of Waitangi obligations. The claimants argued that the TPP raised many issues that potentially affected Māori interests and the government–Māori relationship, such as access to affordable medicines, cultural knowledge and intellectual property (IP) rights, rights to water and environmental protection⁴¹ and, more generally, respect for Māori political rights and status.⁴² The enforceability of TPP rights by foreign investors through ISDS was of particular concern to the claimants, as was the lack of consultation on the TPP, apart from limited consultation with representatives of some Māori commercial interests.

For its part, the government maintained that any Māori interests affected by the TPP were general commercial interests or otherwise minimal; it claimed that “Māori interests are neither central to the TPP, nor significantly affected by it.”⁴³ To the extent that any Māori interests do exist, the government further claimed that they were appropriately protected, either by general policy safeguards embedded within the agreement or, as a very last resort, by the Treaty Exception.⁴⁴ The government’s narrow lens for viewing the nature of Māori interests was especially

³⁷ Kawharu, “Process, Politics and the Politics of Process.”

³⁸ “Labour Sets ‘Non-Negotiable’ Stance on TPP Free Trade,” *Stuff.co.nz*, last updated July 23, 2015, www.stuff.co.nz/business/industries/70496910/labour-sets-nonnegotiable-stance-on-tpp-free-trade-talks.

³⁹ Cherie Howie, “TPP Protesters Shut Down Central Auckland as Ministers Sign Controversial Deal,” *New Zealand Herald*, February 4, 2016, www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=11584458.

⁴⁰ Summarized in New Zealand, Waitangi Tribunal, *Report on the Trans-Pacific Partnership Agreement*, at Chapter 1.

⁴¹ New Zealand, Waitangi Tribunal, *Report on the National Freshwater and Geothermal Resources Claim*, 2012 (Wai 2358). Water rights issues are being considered in a separate inquiry by the Waitangi Tribunal. The Tribunal reported on the first phase of that inquiry in the above report.

⁴² New Zealand, Waitangi Tribunal, *Report on the Trans-Pacific Partnership Agreement*, at 2.2.1 and 5.2.2.

⁴³ New Zealand, Waitangi Tribunal, *Report on the Trans-Pacific Partnership Agreement*, at 2.2.2.

⁴⁴ New Zealand, Waitangi Tribunal, *Report on the Trans-Pacific Partnership Agreement*, at Appendix III.

unjustified given that it had already acknowledged the general public interests engaged by the TPP in terms of possible constraints on its regulatory capacity.⁴⁵

In its report, the Waitangi Tribunal disagreed with the government's description of Māori interests, which it described as "reductionist."⁴⁶ It nonetheless determined that the Treaty Exception in Article 29.6 TPP, now Article 29.6 CPTPP, would provide "reasonable" protection of Māori interests.⁴⁷ For the Labour Opposition, the Tribunal's conclusion was a satisfactory answer to its fourth bottom-line on the TPP. Once Labour was itself in government from late 2017, it continued to assert that its conditions had been met for the CPTPP, albeit only partially in relation to ISDS.⁴⁸ However, while the Tribunal endorsed the Exception's reasonableness, it also concluded that there are flaws with the drafting of the Exception, and that it did not endorse the government's generous interpretation of the text.⁴⁹ In addition, the claimants' concerns regarding the government's flawed strategy for involving Māori in FTA policy were largely vindicated by the Tribunal's report, in the Tribunal's criticism of the government's processes for engaging with Māori on both the Exception and the TPP more generally.⁵⁰ The Tribunal identified issues concerning the government's failure to regard Māori as Treaty partners (as opposed to ordinary stakeholders) with respect to the TPP,⁵¹ the government's lack of transparency in its decision-making on the TPP and the process by which the government informed itself of Māori interests.⁵² The Tribunal intimated its frustration that these issues had arisen in an earlier inquiry, Wai 262 (on rights to culture), but had still not been resolved.⁵³

⁴⁵ New Zealand, Foreign Affairs, Defence and Trade Select Committee, *Report on the International Treaty Examination of the Trans-Pacific Partnership Agreement* (May 4, 2016), www.parliament.nz/en/pb/sc/reports/document/51DBSCH_SCR68965_1/international-treaty-examination-of-the-trans-pacific-partnership#RelatedAnchor. At the time, the government was formed by the National Party (in coalition with others). It acknowledged public concerns regarding the possible regulatory impacts of the TPP's investment chapter (through protections for expropriation and the minimum standard of treatment in particular), but claimed that the policy safeguards contained within it would give "greater confidence that ISDS will not work against New Zealand interests."

⁴⁶ New Zealand, Waitangi Tribunal, *Report on the Trans-Pacific Partnership Agreement*, at 2.2.3.

⁴⁷ New Zealand, Waitangi Tribunal, *Report on the Trans-Pacific Partnership Agreement*, at 5.1.6. In this respect, the Tribunal's standard for assessing Treaty compliance, of reasonable protection, is lower than the issue the claimants presented for determination, which was whether the Treaty Exception would provide effective protection.

⁴⁸ David Parker, "Q+A," interview by Corin Dann, *Scoop Media*, November 12, 2017, www.scoop.co.nz/stories/PO1711/S00144/qa-david-parker-interviewed-by-corin-dann.htm.

⁴⁹ New Zealand, Waitangi Tribunal, *Report on the Trans-Pacific Partnership Agreement*, at 5.1.6.

⁵⁰ New Zealand, Waitangi Tribunal, *Report on the Trans-Pacific Partnership Agreement*, at 4.4.5, 5.1.4–5.1.6.

⁵¹ *New Zealand Maori Council v. Attorney General* [1987] 1 NZLR 641 (NZCA). The principle of partnership is one of the cornerstone principles under the Treaty of Waitangi. It was articulated by the Court of Appeal in 1987 and is now widely acknowledged in New Zealand law.

⁵² New Zealand, Waitangi Tribunal, *Report on the Trans-Pacific Partnership Agreement*, at 5.2.2.

⁵³ New Zealand, Waitangi Tribunal, *Report on the Trans-Pacific Partnership Agreement*, at 5.2.2.

Some findings from the Wai 262 report can be repeated almost verbatim from the complaints about engagement we have heard in relation to the [TPP]:

[W]e have concerns about how the strategy is carried out in practice, in terms of providing consistent and full information to the right people at the right time, so as to consult effectively with Māori when their interests are (sometimes vitally) affected. . . . We heard examples of engagement that was too general in nature, and of meetings that were targeted at limited numbers or ranges of participants, or were not adequately advertised. We also heard of engagement processes that occurred over too short a timeframe for Māori to consider and respond to the Crown's proposition. . . . [W]e even heard examples of a basic dearth of consultation.

In its Wai 262 report, the Tribunal observed that, with each new international treaty, the government “has less freedom in how it can provide for and protect Māori, their tino rangatiratanga [authority], and their interests in such diverse areas as culture, economic development, and the environment.”⁵⁴ In relation to the TPP, the Tribunal continued that its concerns about the government's poor engagement with Māori related not only to substantive outcomes but also to the partnership under the Treaty of Waitangi:⁵⁵

This is not simply an issue of poor process. It harms the relationship and increases the probability of a low-trust and adversarial relationship going forward.

3 DRAFTING AMBIGUITIES AND LIMITATIONS IN THE TREATY EXCEPTION TEXT

A Drafting Ambiguities

The Treaty Exception raises complex interpretive issues, some of which could have been avoided fairly easily with careful attention to drafting. These issues increase the risk that the Exception will not provide the intended coverage and raise questions about whether and how they should be resolved for the future. The interpretive issues include the extent to which the interpretation of the proviso (“provided that such measures”) should be guided by WTO jurisprudence⁵⁶ and the extent to which the exception is self-judging. In relation to the former issue, the general exceptions provisions in the WTO General Agreement on Tariffs and Trade (GATT) (Article XX) and GATS (Article XIV) have a similar proviso or “chapeau,” and it is clear from these similarities that the Treaty Exception was modelled on the GATT and GATS exceptions. There are, however, differences in language between the Treaty

⁵⁴ New Zealand, Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity – Te Taumata Tuarua*, 2011 (Wai 262), at 8.7.

⁵⁵ New Zealand, Waitangi Tribunal, *Report on the Trans-Pacific Partnership Agreement*, at 5.2.2.

⁵⁶ General Agreement on Tariffs and Trade, October 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

Exception and the WTO equivalents, which caution against relying on WTO interpretations. In addition, GATT Article XX lists various policy issues that attract the application of the exception, such as public health. A further difficulty in applying the WTO jurisprudence directly to the proviso in the Treaty Exception is that the Treaty Exception does not reveal a true policy objective. That is, according more favourable treatment to Māori is not, in and of itself, a policy objective.

Relatedly, as to the question regarding the extent to which the Treaty Exception is self-judging, it is unclear whether the self-judging element “it deems” applies to the necessity of a measure to achieve an objective, or to the necessity to accord more favourable treatment. The New Zealand government argued during the Waitangi Tribunal hearing that it would be the latter, which provides New Zealand with more scope to determine what amounts to more favourable treatment. However, an alternative interpretation is that the exception is self-judging only in relation to New Zealand’s need to fulfil its obligations to Māori, rather than its need to discriminate, and that more favourable treatment would be objectively assessed.

Both these interpretive issues could be avoided if the Treaty Exception instead provided that New Zealand may adopt measures to fulfil its obligations to Māori, rather than “more favourable treatment.” The meaning of “more favourable treatment” is also unclear, as discussed further in Section 3.A.i. In addition, it is unclear whether the second paragraph of the Treaty Exception applies to ISDS. This is also analysed in more detail in Section 3.A.ii.⁵⁷

i The Relevant Comparator for “More Favourable Treatment to Maori”

The Treaty Exception applies to measures that accord “more favourable treatment to Māori”. A first issue with the use of the phrase is that it suggests that measures adopted by the government pursuant to the Treaty of Waitangi may be remedial in nature, rather than reflective of the constitutional position that Māori have as a Treaty partner. In terms of interpretation, the phrase “more favourable” is a comparative expression, so the ordinary meaning of “more favourable treatment” is that it involves Māori being advantaged by a measure in some way as compared to someone else. It is unclear, however, who or what the appropriate comparator should be. There is a question whether the phrase means more favourable treatment of Māori as compared to the putative claimant where both are in like circumstances, or more favourable treatment of Māori generally. Both of these interpretations are arguable and I consider them in turn.

A likely explanation for the “more favourable treatment” wording relates to the nature of the obligations typically imposed by FTAs. The phrase “more favourable

⁵⁷ New Zealand, Waitangi Tribunal, *Brief of Evidence of Amokura Kawharu*, February 24, 2016 (Wai 2522). For disclosure, I was commissioned by the Waitangi Tribunal to provide an independent expert opinion on the interpretation of the Treaty Exception. This part of the chapter is mainly based on that opinion.

treatment” is the reverse of the phrase “less favourable treatment” which is commonly found in non-discrimination provisions. Non-discrimination is one of the central organizing tenets of international trade law. It is intended to promote access to, and ensure a level playing field for participants in, a given market. In relation to the WTO, for example, “[t]he elimination of discriminatory treatment in international trade relations is one of the core values of the multilateral trading system.”⁵⁸ In the WTO, the principle is expressed in two ways, through the obligations of national treatment and MFN. National treatment requires persons from other state parties to be treated no less favourably than nationals. MFN requires persons from other state parties to be treated no less favourably than persons from third countries. FTAs expand on the commitments in the WTO agreements and are based on the same general principles.

Measures that discriminate in favour of Māori could potentially breach the national treatment obligation unless covered by an exception. The national treatment obligation is usually expressed to require no less favourable treatment of foreigners, or their goods or services, who are in “like” circumstances to nationals or their goods or services. In the CPTPP, for example, with respect to trade in goods, the national treatment language of the WTO GATT is incorporated into chapter 2 by cross-reference.⁵⁹ Article III.4 GATT relevantly provides:

The *products* of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to *like products* of national origin. (emphasis added)

In the CPTPP’s chapter on investment, the national treatment obligation relevantly provides:⁶⁰

Each Party shall accord to *investors* of another Party treatment no less favourable than that it accords, in *like circumstances*, to its own *investors*. (emphasis added)

As explained earlier, the Treaty Exception was first used in New Zealand’s FTA with Singapore. That FTA is mainly about trade, and its minimal obligations on investment are focused on non-discrimination.⁶¹ Given this initial use, and the style of the language, it could be argued that the Treaty Exception is a response to non-discrimination obligations. On this view, the Exception deals with discrimination between Māori and CPTPP claimants who are in like circumstances, i.e. economic competitors. If so, the scope of the Exception is limited to laws and regulations concerning Māori in a narrow, commercial context. On the other hand, terms used in affirmative obligations do not necessarily have the same meaning as they have

⁵⁸ Mitsuo Matsushita, Thomas J. Schoenbaum, Petros C. Mavroidis and Michael Hahn, *The World Trade Organization: Law, Practice, and Policy* (Oxford: Oxford University Press, 2016), 155.

⁵⁹ CPTPP, *supra* note 3, art. 2.3.

⁶⁰ CPTPP, *supra* note 3, art. 9.4.

⁶¹ CEP, *supra* note 15.

when used in exceptions, even if they are expressed in the same or similar language. This principle was re-affirmed in the WTO setting by the Appellate Body in the *US–Tuna* case, in which the Appellate Body said that due account has to be taken of the immediate context and purpose of each provision.⁶²

The alternative view is that there is no express limitation to Māori and claimants in like circumstances in the text of the Treaty Exception, and that the context of the Exception within New Zealand's FTAs does not indicate that any such limitation should be implied. In other words, on this view, the phrase "more favourable treatment" should be interpreted broadly to encompass any more favourable treatment accorded to Māori as compared to any non-Māori – the comparator would not have to be an economic competitor from a CPTPP country. The New Zealand government pressed for this liberal interpretation, which would give the Treaty Exception wide application, during the Waitangi Tribunal proceedings.⁶³ However, the lack of a direct comparator for assessing preferential treatment may prove challenging, because comparing like with unlike to determine whether a measure accords more favourable treatment may not be straightforward. This difficulty could lead a tribunal to prefer the first interpretation, in order to make the Exception more workable and less abstract.

In my view, the intent of the Treaty Exception is to provide a basis on which New Zealand can lawfully act other than in full compliance with its FTA obligations, hence the references to discrimination against "persons of the other Parties" and "more favourable treatment . . . in respect of matters covered by this Agreement" in its text. The non-compliance is to the disadvantage of an FTA counterparty or person from that state, and it is that disadvantage that would give rise to a claim and the possible need for reliance on an exception. In addition, if the purpose of the Treaty Exception were to cover all measures that provide Māori better treatment than Māori had received previously, then the way to achieve this would be to draft it to cover measures which are necessary to promote Māori interests. In other words, a restrictive interpretation is more consistent with the current text of the Exception.

In its report, the Waitangi Tribunal acknowledged the difficulties regarding the relevant comparator, but did not express a preference for one view over another.⁶⁴ It did, however, accept that if a measure has many objectives, only one of which is to protect Māori interests, then the measure would likely not fall within the scope of the Exception because the Māori interest is subsumed into a general one.⁶⁵ This, too, may raise difficult interpretive issues in the sense that it may sometimes be hard

⁶² Appellate Body Report, *United States – Measures Affecting the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc. WT/DS381/AB/RW (adopted November 20, 2015) at 7.88–7.89.

⁶³ New Zealand, Waitangi Tribunal, *Brief of Evidence of Dr Penelope Ridings*, January 19, 2016 (Wai 2522), at 24.2–24.3, 35.

⁶⁴ New Zealand, Waitangi Tribunal, *Report on the Trans-Pacific Partnership Agreement*, at 5.1.2, 5.1.6.

⁶⁵ New Zealand, Waitangi Tribunal, *Report on the Trans-Pacific Partnership Agreement*, at 4.4.4.

to draw the line in relation to a measure that has various public interest objectives, in addition to protecting Māori interests.

ii Interpretation of Paragraph 2

Paragraph 2 of the Treaty Exception concerns the interpretation of the Treaty of Waitangi by FTA tribunals. During the Waitangi Tribunal inquiry, an issue arose regarding the particular wording used for paragraph 2 in the TPP (now CPTPP):

The Parties agree that the interpretation of the Treaty of Waitangi . . . 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.

The text suggests that the interpretation of the Treaty of Waitangi is not subject to dispute settlement proceedings, but its exact application is ambiguous. It is unclear whether ISDS tribunals are bound by the first sentence, and whether the second and third sentences operate to preclude an ISDS tribunal from determining whether a measure referred to in paragraph 1 of the Exception is inconsistent with an investor's rights under the FTA.

A WHETHER INVESTOR–STATE TRIBUNALS ARE BOUND BY THE FIRST SENTENCE. The apparent purpose of the first sentence is to confine the subject-matter jurisdiction of dispute settlement tribunals. Their role with respect to the Treaty Exception would be limited to determining that a measure falls within its general scope of application, and that the measure has been adopted in good faith, in accordance with the requirements of the proviso. In the ordinary sense, the “dispute settlement provisions” of the TPP/CPTPP include the ISDS provisions in section B of Chapter 9. However, the ambiguity about the application of the first sentence to ISDS arises because “dispute settlement” is referred to generally in that sentence, but only state–state dispute settlement is referred to in the second and third sentences. So what is clear is that, at least in relation to state–state dispute settlement, a panel would have no mandate to second guess (for example) whether the government's assessment of its obligations to Māori in terms of the Treaty of Waitangi was legally correct. If paragraph 2 is read disjunctively, so that the first sentence is disconnected from the rest of paragraph 2, the same limitation would apply to ISDS. The constitutional importance of the Treaty of Waitangi supports this meaning. Yet it remains an open question, because the word “otherwise” also suggests that the first and second sentences should be read together, and that the latter applies only to state–state tribunals.

B WHETHER THE SECOND AND THIRD SENTENCES HAVE A PRECLUSIVE EFFECT. It is possible to read paragraph 2 in a way that would preclude an ISDS tribunal from considering the application of the Treaty Exception. This is because the second and third sentences confirm that a state–state tribunal may do so, subject to the qualification in the first sentence. A reasonable interpretation of paragraph 2 does not lead to this outcome, given the reference to “investment” in paragraph 1. Perhaps the important point is that, with careful drafting, the ambiguity could easily have been avoided. The second and third sentences simply needed to refer to the ISDS provisions in section B of Chapter 9. For example, in Annex 9-H to the investment chapter of the TPP/CPTPP, recourse to dispute settlement for claims relating to New Zealand’s foreign investment screening regime is precluded in the following terms:

4. A decision under New Zealand’s Overseas Investment Act 2005 to grant consent, or to decline to grant consent, to an overseas investment transaction that requires prior consent under that Act *shall not be subject to the dispute settlement provisions under Section B (Investor-State Dispute Settlement) or Chapter 28 (Dispute Settlement)*. (emphasis added)

The original use of the Treaty Exception in the New Zealand–Singapore FTA probably explains the anomalies in paragraph 2 of the Exception in the TPP/CPTPP. As noted earlier,⁶⁶ there is no binding ISDS in the Singapore agreement, so language on ISDS was not needed for that FTA. Yet the same template for the Treaty Exception has been used again, despite the changing scope and nature of New Zealand’s subsequent trade and investment agreements. Given the obviousness of the mistakes, the Waitangi Tribunal censured the government for making them.⁶⁷

C LIMITATIONS IN THE TREATY EXCEPTION: UPOV 91. Despite the government’s position that the Treaty Exception is effective to protect Māori interests, the Exception’s inability to operate as an all-encompassing general exception has effectively been conceded, albeit only in relation to an IP issue. Before conclusion of the TPP, Māori anticipated⁶⁸ that the agreement might require accession to the 1991 International Convention for the Protection of New Varieties of Plants (known as UPOV 91).⁶⁹ New Zealand has not acceded to UPOV 91, and it would be difficult for it to do so because obligations the convention imposes are inconsistent with Māori IP interests in native flora.⁷⁰ The Treaty Exception would not be sufficient to protect these interests from any UPOV 91 accession obligations under the TPP because the

⁶⁶ CEP, *supra* note 15, art. 34.

⁶⁷ New Zealand, Waitangi Tribunal, *Report on the Trans-Pacific Partnership Agreement*, at 5.1.5.

⁶⁸ New Zealand, Waitangi Tribunal, Reid and others, *The Trans-Pacific Partnership Agreement Statement of Claim*, June 23, 2015 (Wai 2522), at 15 and 22.

⁶⁹ International Convention for the Protection of New Varieties of Plants, November 8, 1981, 1861 U.N. T.S 281.

⁷⁰ New Zealand, Waitangi Tribunal, *Ko Aotearoa Tēnei*, at 2.7.3.

Exception addresses only “measures” adopted by New Zealand to recognize Māori interests.⁷¹ The Exception does not cover an obligation on New Zealand to accede to an international treaty.

The final TPP/CPTPP text includes a further and more specific Treaty of Waitangi exception relating to UPOV 91 in Annex 18-A. According to paragraph 1 of Annex 18-A, New Zealand is obliged to either (a) accede to UPOV 1991, or (b) adopt a *sui generis* plant variety rights system that gives effect to UPOV 1991, in either case within three years of the CPTPP’s entry into force for New Zealand. Paragraph 2 then states that nothing in paragraph 1 precludes “the adoption by New Zealand of measures it deems necessary to protect indigenous plant species in fulfilment of its obligations under the Treaty of Waitangi.” Reportedly, Annex 18-A was a last-minute addition to the TPP text.⁷² Given the secrecy maintained around the TPP negotiations, it remains unclear whether the addition of Annex 18-A was prompted by concerns voiced prior to the conclusion of the TPP about inadequate protection of Māori IP interests (which is possible, given the apparent timing of its inclusion), or whether the government had realized the shortcomings of the general Treaty Exception of its own accord. The Waitangi Tribunal reserved its jurisdiction in respect of the UPOV 91 issue, in order to be able to assess whether the government’s plans for complying with Annex 18-A are consistent with its Treaty of Waitangi obligations.⁷³ As at the time of writing, its inquiry in respect of UPOV 91 is ongoing.

4 OPTIONS FOR THE FUTURE

A key issue for Māori now is whether the Treaty Exception should be amended, in light of the drafting issues and the risks that the scope of the Exception will be interpreted more narrowly than is needed to adequately safeguard Māori interests. There are difficult interests and risks for Māori to balance in determining the way forward. Yet re-thinking the text of the Exception and the way that Māori interests are protected in New Zealand FTAs is a pressing issue, because New Zealand remains very committed to expanding its FTA network. Current FTA negotiations involving New Zealand include the negotiations for the Regional Comprehensive Economic Partnership (RCEP) with ASEAN and several other states from the Asia Pacific region, including India, with whom New Zealand does not yet have a trade agreement.⁷⁴ New Zealand has also entered into negotiations for an FTA with the

⁷¹ CPTPP, *supra* note 3, art. 1.3. A “measure” is defined as including “any law, regulation, procedure, requirement, or practice.”

⁷² Jane Kelsey, “Te Tiriti o Waitangi, Tino Rangatiratanga and the TPPA,” *It’s Our Future New Zealand*, February 2, 2018, <https://itsourfuture.org.nz/te-tiriti-o-waitangi-tino-rangatiratanga-tppa-jane-kelsey>.

⁷³ New Zealand, Waitangi Tribunal, *Report on the Trans-Pacific Partnership Agreement*, at 5.2.3.

⁷⁴ New Zealand, Foreign Affairs and Trade, “Regional Comprehensive Economic Partnership (RCEP),” accessed September 7, 2018, www.mfat.govt.nz/en/trade/free-trade-agreements/agreements-under-negotiation/rcep/. For further discussion, see Jeffrey D. Wilson, “Mega-Regional

European Union (EU). The EU's negotiating mandate for the proposed agreement has been disclosed (unlike New Zealand's) and foresees that a Treaty Exception will be part of the FTA.⁷⁵ In addition, New Zealand has ambitions for an FTA with the United Kingdom once it leaves the EU, and has been participating in talks on a multilateral trade in services agreement and with several Pacific Rim countries on a Pacific Alliance FTA.⁷⁶

The options include: replacing the Treaty Exception with an exclusion; making amendments to the Treaty Exception; and keeping the status quo. During the Waitangi Tribunal inquiry, the claimants proposed replacing the Exception with an exclusion (to provide that the FTA does not cover anything done by New Zealand in pursuance of the Treaty of Waitangi), as an exception has a more limited operation as a defence. Two versions were submitted to the Tribunal for consideration. The first, and more ambitious, read:⁷⁷

Nothing in this Agreement shall apply to any measure [adopted by New Zealand] [New Zealand deems necessary] to fulfil the obligations of the Crown to Maori, whether pursuant to te Tiriti o Waitangi or otherwise under international or domestic law,¹ or to address the particular, but not necessarily exclusive, concerns of Maori in relation to social, cultural, spiritual, environmental or other matters of importance to them.

¹ For greater certainty, these obligations arise from He Wakaputanga o te Rangatiratanga o Nu Tirenī/ the Declaration of Independent of New Zealand, first signed on 28 October 1835; te Tiriti o Waitangi/the Treaty of Waitangi, first signed on 4 February 1840; the United Nations Declaration on the Rights of Indigenous Peoples, adopted by New Zealand in 2010; and other existing and future international instruments, and related obligations under New Zealand's domestic law.

The second version was less ambitious, and presented as an alternative in case the first was regarded as too open-ended:⁷⁸

Trade Deals in the Asia-Pacific: Choosing between the TPP and RCEP?" *Journal of Contemporary Asia* 45, no. 2 (2015): 345.

⁷⁵ Council of the European Union, *Negotiating Directives for a Free Trade Agreement with New Zealand*, Doc. 7661/18 ADD 1 (May 8, 2018), 22.

⁷⁶ New Zealand, Foreign Affairs and Trade, "Brexit: The UK and the European Union," accessed September 7, 2018, www.mfat.govt.nz/en/countries-and-regions/europe/united-kingdom/brexit-the-uk-and-europe; New Zealand, Foreign Affairs and Trade, "Trade in Services Agreement (TiSA)," accessed September 7, 2018, www.mfat.govt.nz/assets/FTAs-in-negotiations/TiSA-Public-Sessions-Presentation-June-2016.pdf; New Zealand, Foreign Affairs and Trade, "Pacific Alliance," accessed September 7, 2018, www.mfat.govt.nz/en/countries-and-regions/latin-america/pacific-alliance. TiSA is a proposed multilateral agreement for trade in services to extend GATS but is being negotiated outside of the WTO framework. It will be necessary for New Zealand to argue that the Treaty Exception is required for TiSA, even though it accepted a more limited reservation in GATS.

⁷⁷ New Zealand, Waitangi Tribunal, Professor Jane Kelsey, "Best 'Fit for Purpose' Tiriti Provision," March 21, 2016 (Wai 2522).

⁷⁸ New Zealand, Waitangi Tribunal, Professor Jane Kelsey, "Best 'Fit for Purpose' Tiriti Provision."

Nothing in this Agreement shall apply to any measure [adopted by New Zealand] [New Zealand deems necessary] to fulfil the obligations of the Crown to Maori, including under te Tiriti o Waitangi.¹

¹ For greater certainty, these obligations may arise from He Wakaputanga o te Rangatiratanga o Nu Tirenī/ the Declaration of Independent of New Zealand, first signed on 28 October 1835; te Tiriti o Waitangi/the Treaty of Waitangi, first signed on 4 February 1840; the United Nations Declaration on the Rights of Indigenous Peoples, adopted by New Zealand in 2010; and other existing and future international instruments, and related obligations under New Zealand's domestic law.

An exclusion would provide Māori with the highest level of protection. It would mean that the FTA does not apply to the measures covered by the exclusion. It would limit any dispute resolution proceedings by placing the onus on the claimant investor or state to establish that the exclusion does not apply, whereas New Zealand has the burden of establishing the application of the Treaty Exception. However, exclusions are uncommon in FTAs,⁷⁹ and it may be hard for New Zealand to convince its trade partners to accept an exclusion for the Treaty of Waitangi (at least without significant concessions in return).

The second option would be to amend the text of the existing Treaty Exception. This would be less robust, but practically it may be easier to convince the New Zealand government to pursue this option. Amendments would be relatively easier for New Zealand's counterparts to accept, as it is a less significant departure from current New Zealand FTA practice. The text could be amended to remove the phrase "more favourable treatment" from paragraph 1, so that the exception relates to measures New Zealand deems necessary to fulfil its obligations to Māori under the Treaty of Waitangi. Removing the "more favourable treatment" language would recognize that the scope of New Zealand's FTA commitments now extends far beyond non-discrimination, would better reflect the constitutional status of Māori as Treaty partner, and would remove the drafting ambiguities discussed earlier.⁸⁰ The Exception at the very least needs to be amended to remove the confusing second and third sentences from paragraph 2. An amended Treaty Exception along these lines would read:

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 fulfil its obligations to Maori, including under the Treaty of Waitangi.

⁷⁹ Robert Stumberg, "Safeguards for Tobacco Control: Options for the TPPA," *American Journal of Law and Medicine* 39, nos. 2 & 3 (2013): 382.

⁸⁰ New Zealand, Foreign Affairs and Trade, "Note on the wording." An early version of the then draft Treaty Exception omitted the "more favourable treatment."

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.

The third option would be to maintain the status quo. In its report, the Waitangi Tribunal encouraged the claimants and the government to enter into constructive dialogue on the future of the Treaty Exception text.⁸¹ In spite of this encouragement, the government has continued to maintain that the current Exception is adequate. The government has also argued, in favour of the status quo, that the risks of reopening settled text in future negotiations are significant.⁸² The possible risks of amending the Treaty Exception for future FTAs would include the Exception in existing FTAs being read as a narrower version. This is a concern in relation to the CPTPP especially, as the most economically significant and legally expansive FTA that New Zealand has entered into.

There is also the risk that current and future negotiating counterparties will seek to weaken the protection for Māori interests. However, this risk is tempered by two factors. The first is that FTA commitments, especially on investment, are undergoing a period of reflection and reform. Any clarifications to the Exception would fit within a general pattern of FTA redrafting by New Zealand and its trade partners to preserve legitimate policy space. The second factor is that the new exception for UPOV 91 in Annex 18-A of the TPP/CPTPP demonstrates how New Zealand can achieve further protection of Māori interests beyond the current text of the Treaty Exception.

The government's risk assessment will be difficult for Māori to accept for two reasons. First, the problems with the text of the Treaty Exception have arisen following years of inadequate government attention to the issue of Māori interests in FTAs, and repeated use of problematic language. There were no changes to the text of the Treaty Exception when the CPTPP emerged from the TPP, and there were no other substantive protections added to the CPTPP to make up for the deficiencies. New Zealand joined with Canada and Chile in issuing a "Joint Declaration on Fostering Progressive and Inclusive Trade," which declared these countries' shared commitment to achieving development outcomes for Indigenous peoples.⁸³ However, the Declaration is non-binding, and its hortatory effect is anyway limited to the three countries. Second, the government continues to consult with Māori regarding international treaties according to a flawed strategy. That said, in mid-2018, the government announced a consultation process for its "Trade for All" review to modernize New Zealand's trade policy. It is expected that the Trade

⁸¹ New Zealand, Waitangi Tribunal, *Report on the Trans-Pacific Partnership Agreement*, at 5.2.3.

⁸² (28 February 2018) 727 NZPD.

⁸³ New Zealand, Foreign Affairs and Trade, "Comprehensive and Progressive Agreement for Trans-Pacific Partnership – Joint Statements," March 8, 2018, www.mfat.govt.nz/assets/CPTPP/CPTPP-Joint-Declaration-Progressive-and-Inclusive-Trade-Final.pdf.

for All Board established as part of this process will make recommendations to government for improving its engagement with Māori on trade agreements.⁸⁴

CONCLUSION

The Treaty Exception has been a unique feature of New Zealand's FTA landscape since 2000, and its inclusion in New Zealand's FTAs demonstrates leadership by New Zealand in recognizing the interests of its Indigenous people in the field of trade law. At the same time, its adequacy is compromised because it does not fully reflect the comprehensive nature of New Zealand's current FTAs, it has not evolved in light of New Zealand's changing FTA practice, and its scope does not account for the range of policy choices that may be needed to protect Māori interests. Instead, the protection it affords is limited to "more favourable treatment," the meaning of which is uncertain and may be difficult to apply in practice. Māori have not been sufficiently consulted with respect to the drafting and use of the Treaty Exception, which both helps to explain these issues and undermines the effectiveness of New Zealand's approach. The options for the future are threefold – adopting an exclusion, amending the current text, and keeping the status quo. The New Zealand government is right to raise the possible risks of any change in approach to the drafting of the Treaty Exception or to the protection of Māori interests in trade agreements. Nonetheless, and consistent with the partnership of the Treaty of Waitangi, it is essential for the decision on whether to take the risks to be made with, rather than imposed on, Māori.

⁸⁴ David Parker, Minister for Trade and Export Growth, "Trade for All: Update" (Cabinet paper, 2018) (released under the Official Information Act 1982 (N.Z.), copy on file with the author). For disclosure, I have been appointed to the Trade for All Board that will oversee the trade policy review consultation.